State of Iowa

1942

TWENTY-FOURTH BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1942

JOHN M. RANKIN
Attorney General

Published by
THE STATE OF IOWA
Des Moines

ATTORNEY GENERAL'S DEPARTMENT

JOHN M. RANKIN, Keokuk.....Attorney General
FLOYD PHILBRICK, Cedar Rapids.....
.....First Assistant Attorney General
JENS GROTHE, Charles City.....Assistant Attorney General
WILLIAM F. MCFARLIN, Montezuma....Assistant Attorney General
EDWARD S. WHITE, JR., Carroll.....Assistant Attorney General
JOHN E. MULRONEY, Fort Dodge.....
.....Special Assistant Attorney General
—State Tax Commission
G. H. CLARK, JR., Ida Grove....Special Assistant Attorney General
—State Highway Commission
DON HISE, Des Moines.....Special Assistant Attorney General
—State Board of Social Welfare
KENNETH F. NEU, Mason City.....
.....Special Assistant Attorney General
—Claims
IRA A. BUCKLES, Lake City.....Secretary to Attorney General
WINIFRED FOLEY, Anamosa.....Secretary
MARY GREEN, Des Moines.....Secretary
MARY PRATT, Clarinda.....Secretary
MARJORIE SHOESMITH, Guthrie Center.....Secretary

ATTORNEYS GENERAL OF IOWA

1853-1943

NAME	HOME COUNTY	YEARS SERVED
David C. Cloud	Muscatine	1853-1856
Samuel A. Rice	Mahaska	1856-1861
Charles C. Nourse	Polk	1861-1865
Isaac L. Allen	Tama	1865-1866
Frederick E. Bissell	Dubuque	1866-1867
Henry O'Connor	Muscatine	1867-1872
Marsena E. Cutts	Mahaska	1872-1877
John F. McJunkin	Washington	1877-1881
Smith McPherson	Montgomery	1881-1885
A. J. Baker	Appanoose	1885-1889
John Y. Stone	Mills	1889-1895
Milton Remley	Johnson	1895-1901
Charles W. Mullan	Black Hawk	1901-1907
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George Cosson	Audubon	1911-1916
Horace M. Havner	Iowa	1917-1921
Ben J. Gibson	Adams	1921-1926
John Fletcher	Polk	1927-1933
Edward L. O'Connor	Johnson	1933-1937
John H. Mitchell	Webster	1937-1939
Fred D. Everett	Monroe	1939-1940
John M. Rankin	Lee	1940-

REPORT OF THE ATTORNEY GENERAL

December 31, 1942

HONORABLE GEORGE A. WILSON,
Governor of Iowa.
My Dear Governor Wilson:

Agreeably with Section 249 of the 1939 Code of Iowa, I have the honor to submit herewith the biennial report of the Attorney General, covering the period of his regular term beginning January 1, 1941, and ending January 1, 1943.

Chapter 12 of the 1939 Code of Iowa provides:

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

1. Prosecute and defend all causes in the supreme court in which the state is a party or interested.
2. Prosecute and defend in any other court or tribunal, all actions and proceedings, civil or criminal, in which the state may be a party or interested, when, in his judgment, the interest of the state requires such action, or when requested to do so by the governor, executive council, or general assembly.
3. Prosecute and defend all actions and proceedings brought by or against any state officer in his official capacity.
4. Give his opinion in writing, when requested, upon all questions of law submitted to him by the general assembly or by either house thereof, or by any state officer, elective or appointive. Questions submitted by state officers must be of a public nature and relate to the duties of such officer.
5. Prepare drafts for contracts, forms, and other writings which may be required for the use of the state.
6. Report to the governor, at the time provided by law, the condition of his office, opinions rendered, and business transacted of public interest.
7. Supervise county attorneys in all matters pertaining to the duties of their offices, and from time to time to require of them reports as to the condition of public business intrusted to their charge.
8. Promptly account, to the treasurer of state, for all state funds received by him.
9. Keep in proper books a record of all official opinions, and a register of all actions prosecuted and defended by him, and of all proceedings had in relation thereto, which books shall be delivered to his successor.

10. Perform all other duties required by law."

It being the duty of the Attorney General to prosecute and defend all causes in the Supreme Court, in which the state is a party or interested, and prosecute and defend in any other court or tribunal all actions civil or criminal in which the state may be a party or interested, it is appropriate to review the activity of the Department relative to criminal matters.

During the biennium, the department has handled one hundred thirty-four criminal cases where the defendant was appellant and nine criminal cases where the state was appellant, with the following results: Defendant's appeal—91 affirmed, 12 reversed; State's appeal—2 affirmed, 7 reversed; Dismissals—defendant 7; Petition for rehearing pending—1; Cases pending—23; Briefs now due—1.

During the two years covered by this report, the department has handled several cases where the legal questions involved were novel and the opinions therefore are of far-reaching importance in the administration of criminal law in this state. We call attention to the most important decisions.

In the case of State v. Benson, the question involved was whether it was proper to admit evidence that the defendant had refused to submit to a blood test. This case arose in Dallas County and the defendant was represented by able and resourceful counsel. The claim was made that the admission of such testimony violated the defendant's privilege against self-incrimination. The claim was further made that such testimony constituted a deprivation of defendant's rights without due process of law. The contentions of defendant were held untenable and the cause was accordingly affirmed. Thus, it has been established for the first time in this state that when a defendant refuses to submit to a blood test to determine the alcoholic content of his blood, evidence of such refusal is competent. We found only one other case in the United States in which this question had been raised before. That was in the case of State v. Gatton, which was decided by an intermediate appellate court in the State of Ohio.

Other cases of importance to the administration of criminal law in this state were the Epstein-Wiley cases wherein the lower court held that the general misdemeanor sections, to-wit, 12893-12894 did not apply to defendants charged with illegal possession of gambling devices enumerated in Section 13210 and said court also held that a pin ball machine, equipped with a free play device, was not gambling equipment and, therefore, could not be seized or destroyed under the provisions of Section 13210. The state appealed both of these decisions with the result that both were reversed. The court specifically found and determined that a person having possession of any of the devices enumerated in Section 13210 could be successfuly prosecuted under the general misdemeanor statute. It was contended that Section 12893 applied only when no penalty was provided and the claim was made that the seizure

and destruction of the gambling devices constituted a penalty and that, therefore, defendant could not be further punished. This was held to be without merit. The court specifically held that seizure and destruction of all articles enumerated in Section 13210 did not constitute a penalty as that term is used in Section 12893 and that, therefore, said latter section applied. The possession of gambling devices being prohibited, the court found the defendant did not have such property rights therein that seizure and destruction of said devices could be logically claimed to constitute a penalty. Therefore, the general misdemeanor section referred to applied. With reference to the pin ball machines giving free games, the court held that the giving of such free games constituted a consideration and that, therefore, the device had the three essential elements of gambling, to-wit: 1. Prize; 2. Consideration; 3. Chance. We might here add that in other states the same conclusion has been reached by appellate courts with reference to machines of this type.

We call attention, also, to the case of State v. Nelson, which was an appeal by defendant from a judgment of conviction in Franklin County. The defendant was charged with maintaining a liquor nuisance. Reversal was based on the theory that the sheriff in searching defendant's premises was armed with an illegal search warrant and that, therefore, the liquor seized and all testimony with reference to the seizure was incompetent. Defendant's counsel admitted that under the holding of the Supreme Court in State v. Tonn the conviction was proper, but seriously contended that the rule in the Tonn case was unsound and should be overruled. The case was affirmed with the result that the principles of law laid down in State v. Tonn are now definitely established and will no doubt continue to be the law of this state. By way of explanation, we might add that the court held in these cases that notwithstanding that evidence is obtained by virtue of an illegal search warrant, the same is nevertheless competent and admissible. This is in accord with the weight of authority of the appellate state courts. It is contrary, however, to the rule in the Federal courts.

Many of the pending cases will, no doubt, as usual, be disposed of upon Clerk's Transcript and it will not, therefore, be necessary to file brief and argument. It is, of course, at this time impossible to state the exact number of cases wherein briefs will have to be filed. In only one case is there a brief due at this time, it having been the policy of this department to file briefs and arguments as the same come due and thus keep the work up to date.

The criminal department has also had charge of disbarments. One contested case has been tried, which was won in the lower court. This was carried to the Supreme Court and the same was affirmed, the judgment of disbarment entered by the court below being made final.

During the past two years a considerable amount of land has been acquired by the Conservation Commission in various parts of

this state by condemnation proceedings. All of these proceedings have been conducted by this Department, and in Hancock, Worth and Clay Counties appeals have been taken by some of the owners of the land condemned in an effort to secure higher payments for the land than were awarded the owners by Sheriff's Juries. One of these appeals was tried at Spencer with a resulting verdict satisfactory to the Conservation Commission. It appears probable that several of the other appeals will be disposed of by settlement, and the trials of those which are not will be handled by this department.

One action is now pending at Spirit Lake in which the plaintiff seeks to recover by reversion, land previously deeded to the State, bordering upon Lake Okoboji, and of very considerable value. This suit is being defended by this department, and will be submitted to the Court sometime during the next year.

Some loss has been sustained in the past by the Conservation Commission through the unlawful cutting and stealing of timber in State Parks along the Mississippi River. This department acting in conjunction with the State Bureau of Criminal Investigation, and the County Attorney of Clayton County, secured a plea of guilty from one such offender, and is now preparing to take action to recover for the Conservation Commission the value of that lumber which was taken in this case.

This department has adopted the policy of strict enforcement of the practice acts affecting the various professions. In actions conducted by this Department one Civil Engineer's license to practice in this state has been revoked, and one Public Accountant's license was suspended. Unauthorized practice of medicine has in several instances been discontinued as a result of action by this department, and several cases of similar violations are now in the process of being disposed of.

The Iowa State Fair Board in its negotiations with the United States Department of War, in connection with the leasing of state property by the Federal War Department, has been represented by this department.

We have passed upon all claims against the State for Workmen's Compensation, have allowed the payment of those claims about which there could be no question as to liability, and have represented the State in hearings held upon such claims as seemed questionable.

One action has been filed by this office seeking to close by injunction the operation of a mine, the owner of which refused to comply with the law requiring him to furnish Workmen's Compensation insurance.

This office has handled a number of cases for the State Tax Commission. These cases involved appeals from income tax, sales and use tax and inheritance tax in district courts of Iowa and some of these cases were appealed to the Supreme Court of Iowa. Among the more important cases handled by this department are the following:

Montgomery Ward and Sears, Roebuck v. the State Tax Commission. These cases were pending in the United States Supreme Court at the time of the last report. That Court rendered a decision reversing the Iowa Supreme Court and holding that the State could lawfully collect use tax on mail order sales to Iowa residents. After the decision in the Supreme Court of the United States the mail order houses attempted to secure a decision on State constitutional grounds in the Supreme Court of Iowa. After the submission of this issue in the Supreme Court of Iowa and the decision in favor of the State Tax Commission, the mail order houses paid all back tax with interest amounting to approximately $800,000.00 and they are now paying the tax regularly.

Standard Oil Company (Phillips Petroleum Company, intervener) v. State Tax Commission. At the time of the last report this case was pending in the Circuit Court of Appeals for the Eighth Circuit. The attorneys representing the litigants were asked to resubmit this case and the case was resubmitted and orally argued in St. Paul and the Circuit Court of Appeals reversed the Federal District Court for the Southern District of Iowa but remanded the case for the bringing of an action in the District Court of Polk County, Iowa to secure an interpretation of the statute. This action was brought in the District Court of Polk County and resulted in a judgment to the effect that the Iowa Chain Store Tax Act did not apply to bulk plant operation where no sales were made upon the premises. The Supreme Court of Iowa affirmed the Polk County District Court.

Grace S. Wooster v. State Tax Commission. This case involved the right to collect inheritance tax upon the inheritance received by one who was not legally adopted by the testatrix. The lower court denied the right of the Tax Commission to lay the tax, but this was reversed upon appeal to the Supreme Court.

City of Muscatine, et al v. E. R. Swickard, et al. This case involved the right of the State Tax Commission to tax rural transmission lines owned by a municipal light company and located outside of the borders of the municipality. The lower court enjoined the assessment, but this was reversed upon appeal to the Supreme Court. This case is pending on the plaintiffs' petition for rehearing in the Supreme Court.

The State Tax Commission v. General Trading Company. This was a law action brought by the State Tax Commission involving an assessment of use tax against a corporation not qualified to do business, but making sales by means of traveling salesmen. The case was brought in Polk County District Court and the demurrer to the defendant's answer has been sustained. This case will be appealed to the Supreme Court and it involves an issue vital to the State Tax Commission's position in assessing the use tax against corporations even though the corporation is not qualified to do business in Iowa. It is possible that this case might even go to

the Supreme Court of the United States for it is an extension of the doctrine of the Montgomery Ward and Sears, Roebuck cases.

During the biennium this department has aided the county attorneys in several counties, including Clinton and Hamilton Counties, in the matter of appeals from assessments. A good deal of work was done in the matter of the negotiations with the Federal Government as to the application of the Iowa sales and use tax laws upon the purchases and use of tangible personal property by contractors holding cost-plus-a-fixed-fee and lump sum contracts with the Federal Government. In brief it might be said that these negotiations resulted in the assessment of tax on all lump sum contracts and a directive dated October 13, 1942 recognizing application of the Iowa sales and use tax laws on purchases and use of property by cost-plus-a-fixed-fee contractors from and after December 2, 1941.

During the biennium we have had three cases for the Board of Education, one of which was the case of Agnes Johansen, et al v. Davenport Bank and Trust Company, et al. The will of J. H. Bendixen provided that after the death of his wife the balance of his estate was to go to the Board of Education to be used for medical research in connection with the State Medical School at Iowa City. The above case was an action to set aside the will. The case was settled without going to trial and it appears that the Board of Education will receive a substantial amount under the terms of this will.

A case of state-wide interest in which our office has aided the County Attorney of Scott County is Lamb v. Kroeger, et al. This was an action by the plaintiff asking that he be declared an honorably discharged soldier of the War with Germany and entitled to the benefits of our military service tax exemption law. The plaintiff has a discharge from the draft and the trial court held he was an honorably discharged soldier. The case is now in the Supreme Court and is of interest to the whole state as there are hundreds of persons in the same position as the plaintiff in this case.

In the year 1941, the Attorney General appeared for the State of Iowa in 223 foreclosure and partition actions, and in the year 1942, appeared for the State of Iowa in 180 foreclosure and partition actions. In these actions, the state was made a party defendant by reason of old age assistance liens or old age taxes. In each instance, the petition was checked to make certain the state's interest was protected and an appearance or answer was filed and if submitted, decree was approved.

During each year of the biennium, several hundred old age assistance recipients have died leaving estates which were probated. The Attorney General, in each one of these estates, protected the interest of the state's claim for reimbursement of old age assistance advanced. In every instance where real estate was sold in an estate, an answer was filed setting up the state's claim and lien. Due

to the fact that the old age assistance program has been growing, the number of estates to be probated has been steadily increasing. Approximately 250 estates each year of this bienniúm have been checked and appearances and answers filed therein. Hearings in the district have been attended in approximately 50 estates each year.

In 1941, two appeals from the decisions of the State Board of Social Welfare were taken by the applicants for or recipients of old age assistance, to the District Court and during the year 1942, three of such appeals were taken. Two appeals are pending at the present time.

Of the three foreclosure actions started by the State Department of Social Welfare in 1940, two have been closed and one was dismissed. In the year 1941, two have been closed and one was dismissed. In the year 1941, two more foreclosures were commenced and both closed. In the year 1942, four more foreclosure actions have been started. These foreclosure actions are for the foreclosure of liens against the real estate formerly belonging to old age assistance recipients.

At the beginning of the biennium, two actions were pending against beneficiaries of insurance benefit policies which had been assigned to the State Department of Social Welfare. Both of these actions were settled and another action started against another beneficiary. This acion also was settled.

Approximately 50 cases for the year 1941 and 50 cases for the year 1942 were referred to the Attorney General for action against responsible relatives of old age recipients to cover excess old age assistance granted and paid. Out of this number, 20 actions were commenced in the District Court and 10 have been settled at the present time. The majority of such cases referred to the Attorney General have been settled out of court.

During the year 1942, three actions have been started against makers of notes which have been assigned to the State Department of Social Welfare by recipients of old age assistance.

The 49th General Assembly created the office of Special Assistant Attorney General for Claims and on July 5, 1941, I appointed Mr. Kenneth F. Neu of Mason City, Iowa, to that position.

The Bill creating this new addition to the staff provides that the Special Assistant Attorney General for Claims shall, with the view of determining the merits and legality thereof, fully investigate all claims filed against the State of Iowa and report his findings and conclusions of law to the State Appeal Board, who review the same and make a recommendation to the Claims Committee of the Legislature. It is not possible at this time to make a definite statement as to the number of claims filed, the total amount, etc., in view of the fact that the biennium is not completed and the claims investigated during this time have not, as yet, been presented to the Legislature. However, the State Appeal Board has reviewed, thus far, approximately one hundred fifty claims.

Chapter 61, Acts of the 49th General Assembly, also provides that the State Appeal Board shall have power and authority to investigate and collect claims which the State of Iowa may have against municipal or political corporations in the State of Iowa, including counties, cities, towns, townships and school districts. The Act further provides that the Appeal Board shall have power to compromise said claims after a report to it by the Special Assistant Attorney General for Claims.

On July 1, 1941, there was turned over to the Special Assistant Attorney General for Claims approximately $27,000.00 of unpaid audit claims against various cities in the State, approximately $27,000.00 of unpaid claims against various school districts and approximately $4,000.00 against counties in the State. These accounts were not paid for the reason that the various school districts and towns thought the same were excessive. There has been collected, thus far, the sum of approximately $30,000.00.

The Special Assistant Attorney General for Claims has also assisted the State Social Welfare Department in the collection of claims against responsible relatives.

While a considerable amount of civil business, including litigation, has been handled by the department, detailed mention will be made of only litigation which has gone through the appellate courts, and one or two other matters of outstanding importance.

The case of Independent School District of Cedar Rapids v. State Appeal Board was a proceeding in which the School District attempted to nullify the action of the State Appeal Board with reference to the budget of the District. A writ of certiorari was obtained from the District Court of Iowa in and for Linn County, and the District Court annulled the action of the Appeal Board. Appeal was taken to the Supreme Court and the same was submitted early in 1941, and on August 4, 1941 the Supreme Court reversed the action of the District upholding the action of the State Appeal Board.

In September of 1941 there was instituted an action entitled Woods Brothers Construction Company v. W. G. C. Bagley, Treasurer of State, to mandamus the Treasurer of State to pay gasoline tax refunds amounting to something over $10,000.00. The District Court of Polk County held for the defendant and on appeal this was affirmed by the Supreme Court.

The case of Lineberger v. W. G. C. Bagley had its inception during the preceding biennium by reason of the assessment under the motor vehicle fuel tax law of a gasoline tax against Lineberger of nearly $2,400.00 and 100% penalty. A writ of certiorari was obtained in the District Court of Polk County directed to the Treasurer of State and the District Court annulled and set aside the action of the State Treasurer. This was appealed to the Supreme Court of Iowa and submitted in October, 1941 and thereafter the Supreme Court reversed the action of the District Court and sustained the action of the Treasurer of State assessing the tax.

The cases of Klatt v. C. B. Akers, Auditor of State, Warner v. C. B. Akers, Auditor of State, and Neargard v. Akers, Auditor of State, were three cases instituted by three former examiners in the office of the Auditor of State claiming preference under the Soldiers' Preference Law. These cases were tried in the District Court of Iowa in and for Polk County in 1940, the District Court holding for the plaintiffs and against the defendant, C. B. Akers. Appeals were taken to the Supreme Court and the cases submitted during the period for which this report is rendered, and the Supreme Court reversed the action of the District Court upholding the position taken by the Auditor of State.

One matter which we believe deserves mention was a proceeding before the Federal Power Commission. For a number of years a group in Muscatine County have been fathering the idea of a hydro electric project on the Cedar River which would involve the construction of a large diversion dam about 25 miles above the point where the Cedar River flows into the Iowa River, and the construction of a diversion canal just above the diversion dam for the purpose of carrying the water in the lake formed by the dam down to the Mississippi River where a power dam would be constructed. This project, if carried out, would result in practically drying up the Cedar River from the point of the dam down to the point where it flows into the Iowa River. The Iowa statutes prohibit the diversion of the water of streams in connection with the construction of dams and in years past there have been efforts made on the part of the people interested to have the statutes with respect to this changed, but without avail. Along in the summer of 1941 the First Iowa Hydro-Electric Cooperative which is organized under the Iowa Cooperative law and composed, so far as we have been able to find out, of about 90 individuals, filed an application with the Federal Power Commission for a license to construct a hydro-electric project, as indicated above. Hearing on this was finally set at Davenport, Iowa, for the 12th day of January, 1942, before the Trial Examiner of the Federal Power Commission. Notice had been served upon the Executive Council and the State of Iowa appeared in resistance to the granting of the license. The State of Iowa at the hearing was represented by this department and nearly three weeks were occupied in the hearing before the Trial Examiner. Thereafter written briefs were filed and up to the time of the preparation of this report there has been no decision by the Federal Power Commission.

The foregoing is only a small part of the civil litigation which has occupied this department. One further matter should be mentioned: During the session of the 49th General Assembly the services of this department were made available to the legislature and its members for counsel in connection with the legislative session.

Immediately following this report is a summary of the work handled by the special assistant to the State Highway Commission.

In submitting this report, I want to express my appreciation to all public officials of the State and to the County Attorneys and Sheriffs for their splendid cooperation with this Department.

I appreciate the loyalty always shown by all members of this Department.

Respectfully submitted,

JOHN M. RANKIN,
Attorney General of Iowa.

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

January 1, 1941 to December 31, 1942, inclusive

Appeals from Condemnation

Appeals pending January 1, 1941	15
Appeals instituted during above period	31
Old appeals tried or settled during above period	23
New appeals tried or settled during above period	13
Condemnation appeals pending December 31, 1942	10

Foreclosure Proceedings

Foreclosures pending January 1, 1941	3
Foreclosures instituted during above period	6
Old foreclosures disposed of during above period	1
New foreclosures disposed of during above period	1
Foreclosures pending December 31, 1942	7

Miscellaneous Cases

(Injunctions, Mandamus, Damage, Workmen's Compensation, Partition Actions)

Miscellaneous cases pending January 1, 1941	10
Instituted during above period	18
Old misc. cases disposed of during above period	9
New misc. cases disposed of during above period	12
Miscellaneous cases pending December 31, 1942	7

Retained Percentage Cases

(On contractor's contracts)

Percentage cases pending January 1, 1941	9
New cases instituted during above period	20
Old cases disposed of during above period	8
New cases disposed of during above period	14
Percentage cases pending December 31, 1942	7

Total number of all cases pending December 31, 1942	31

Condemnation proceedings instituted during above period	113
Condemnations held—number of parcels	92
Number purchased, pending or dismissed	21
Number of acres condemned	149.34
City lots and parts of lots condemned, including 2 bldgs	24

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SOME OF THE

IMPORTANT OPINIONS

OF THE

ATTORNEY GENERAL

FOR

Biennial Period
1941-1942

OPINIONS OF THE ATTORNEY GENERAL

COUNTY ATTORNEY: QUIET TITLE ACTIONS: COMPENSATION: It is the duty of the county attorney to prosecute quiet title actions for the county without any additional compensation even though there are several actions to be commenced to quiet title to land acquired by the county by tax titles, because of errors and irregularities in tax proceedings.

January 3, 1941. *Mr. C. Morse Hoorneman, County Attorney, Le Mars, Iowa:* This is in answer to your letter of the 18th ult., wherein you ask the opinion of this department on the following legal question:

The board of supervisors have instructed me to start proceedings to quiet title to several parcels of land which the county owns on which the title is defective. This is land that the county has tax title to and because of errors and irregularities in tax proceedings which occurred prior to the time I was elected county attorney, it is necessary in order for the county to dispose of this land to have the title cleared up; and the surest and best way to do this is by a quiet title action.

The question is: May the county pay the county attorney reasonable compensation for his services in connection with such quiet title actions?

We are of the opinion that it is the duty of the county attorney to prosecute these quiet title actions without additional compensation.

We call your attention to sub-section 6 of Section 5180, which provides:

"It shall be the duty of the county attorney to:

"6. Commence, prosecute, and defend all actions and proceedings in which any county officer, in his official capacity, or the county is interested, or a party."

It is our opinion that, under the sub-section above quoted, it is the duty of the county attorney to bring the quiet title actions above referred to. If it is his duty then it goes without saying that he may not legally be paid for such services.

COUNTIES: EXPENSE OF SPECIAL HOSPITAL ELECTION AND OF ADVERTISEMENT, ISSUANCE, AND SALE OF BONDS: PAYMENT FROM GENERAL FUND: Section 5348.1, C., '39, providing for an election on the proposition of issuing county public hospital bonds, and Section 5353, C., '39, providing for a county public hospital fund, are both specific as to the purposes for which funds derived under the sections are to be used, and inasmuch as such sections do not provide for the expense of the election and the expense of advertisement, issuance, and sale of the bonds, such expenses cannot be paid from the proceeds of the bond sale or from the hospital fund but must be paid from the county general fund.

January 6, 1941. *Mr. James P. Irish, Assistant County Attorney, Des Moines, Iowa:* This is in answer to your letter of the 26th ult., wherein you ask the opinion of this department in reference to the following legal question. We quote from your letter:

" * * * not long ago the hospital issued a number of bonds. This was after a special election and there is, of course, the expense of that election and the expense of the advertisement, issuance and sale of the bonds. The question now is out of what funds should these expenses be paid? Is this a general obligation of the county to be paid out of the county fund; should it be paid from the regular hospital maintenance fund or may it be paid from the

proceeds of the bond sale? In connection with the sale of the bonds a premium was paid by the purchasers which premium, I believe, would be almost enough to pay these expenses.

It is our opinion that the expenses of the election and the expense of advertisement, issuance and sale of bonds should be paid from the general fund.

Section 5348, Code of Iowa, 1939, provides:

"When it is proposed to establish in any county a county public hospital, a petition shall be presented to the board of supervisors, * * * requesting said board to submit to the electors the proposition to issue bonds *for the purpose of procuring a site, and erecting, equipping, and maintaining such hospital,* and specifying the amount of bonds proposed to be issued for such purpose, * * * ."

Section 5348.1, Code of Iowa, 1939, provides:

"The board of supervisors of any county having a population of 135,000 inhabitants or more in which there is already an established county public hospital, when requested by a petition * * * shall submit to the voters * * * the proposition of issuing county public hospital bonds *for the purpose of erecting and equipping hospital buildings and additions thereto, which proposition shall state the maximum amount of bonds to be issued and the annual rate of tax to be levied for the payment of said bonds.* * * * and upon the issue of such bonds the board of supervisors shall make provision for the payment of the principal and interest of the bonds out of the county public hospital fund by the levy of a tax within the limitations provided for in section 5353."

Section 5348.1 is the section that applies to counties having the population of Polk County, and Section 5348 governs the establishment in counties under 135,000. In Section 5348 it is provided "to issue bonds for the purpose of procuring a site, and erecting, equipping and maintaining such hospital". Section 5348.1 provides, "the proposition of issuing county public hospital bonds for the purpose of erecting and equipping hospital buildings and additions thereto". It is clear, therefore, that the statute points out specifically as to what the proceeds from the sale of such bonds may be used for.

It is our conclusion that the use of the proceeds of the sale of said bonds for any purpose other than that specifically authorized by the voters would constitute an illegal expenditure. Consequently it is our opinion that the expenses of the election and the expenses incident to the advertisement, issue and sale of the bonds may not be paid from the proceeds of the sale of the bonds, and we think it quite clear that these expenses may not be paid from the hospital maintenance fund. This fund has been created for a specific purpose and may not, as we view it, be used for other than the specific purposes enumerated in the statute.

The maintenance fund is created by Section 5353, Code of Iowa, 1939. This section specifically provides that the board of supervisors may levy 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 135,000 inhabitants or over, the levy for improvements and maintenance of the hospital shall not exceed two mills in any one year. The proceeds of such taxes shall constitute the county public hospital fund".

It is our conclusion that the expenses referred to in your letter should be paid from the general fund.

HIGHWAYS: FARM-TO-MARKET ROAD FUND NOT REQUIRED TO MATCH FEDERAL AID ALLOCATED TO SECONDARY ROAD CONSTRUCTION FUND: Any funds in the farm-to-market fund which are not needed to match federal aid shall be allocated to the secondary road construction fund of each county for construction purposes only.

January 8, 1941. *Iowa State Highway Commission, Ames, Iowa. Attn. of Fred R. White, Chief Engineer:* This will acknowledge receipt of your request for opinion relative to the interpretation to be given Section 4686.33 of the Code of 1939.

Your question briefly restated is as follows:

Section 4686.31 provides that the highway commission shall transfer from the primary road fund to the farm-to-market road fund on or before June 30, 1941, and on or before June 30 of each year thereafter, all moneys in excess of the sum of $16,000,000.00 received in the primary road fund from state sources exclusive of primary road bond funds. Section 4686.33 provides that that portion of the primary road fund going to the farm-to-market road fund not required to match federal aid shall be allocated to the secondary road construction fund of each county for construction purposes only, in the same ratio as provided by Section 4686.05.

Your inquiry is whether or not the excess not required to match federal aid, as allocated to the various counties, shall be transferred outright to the secondary road construction funds of such counties and expended for the purposes for which said fund is used, or whether such funds so allocated remain earmarked for expenditure on the farm to market road system only.

Section 4686.05, referred to in Section 4686.33, simply provides, for the purpose of this question, that the allotment of funds to the counties of the State is in the ratio that the area of the county bears to the total area of the State.

Chapter 117, Section 31, Acts of the 48th General Assembly, only a part of which appears in Section 4686.31, provides as follows:

"The highway commission shall transfer from the primary road fund to the farm-to-market road fund the sum of six hundred fifty-eight thousand two hundred sixty-four dollars ($658,264), said sum to be used to match the federal allotment for farm-to-market roads for the fiscal year ending June 30, 1938.

"They shall also transfer from the primary road fund to the farm-to-market road fund on or before September 15, 1939, an additional sum of five hundred ninety-one thousand seven hundred thirty-six dollars ($591,736.00) and on or before the 15th day of May, 1940, they shall transfer from the primary road fund to the farm-to-market road fund the additional sum of one million two hundred fifty thousand dollars ($1,250,000.00), and all funds transferred from the primary road fund as herein provided shall be used to match the federal allotment for farm-to-market roads.

"The state highway commission also shall transfer from the primary road fund to the farm-to-market road fund, on or before June 30, 1941, and on or before June 30 of each year thereafter, all moneys in excess of the sum of sixteen million dollars ($16,000,000.00) received in the primary road fund from state sources, exclusive, however, of funds received from the sale of primary road bonds."

It will be noted from the section last above quoted that for the fiscal years ending June 30, 1938 to June 30, 1941, inclusive, funds in specific amounts were appropriated from the primary road fund to match federal allotments to farm-to-market roads. Such amounts were only sufficient to

substantially accomplish the requirements of matching federal aid for secondary roads. However, beginning July 1, 1941, and for each fiscal year thereafter, the legislature has seen fit to require a transfer from the primary road fund to the farm-to-market road fund of all moneys in excess of $16,000,000.00 received in the primary road fund from State sources, exclusive of bond funds. The federal aid allotment to Iowa for secondary road purposes available for the fiscal year beginning June 1, 1941, amounts to something less than $500,000.00, whereas, the amount of the excess of the $16,000,000.00 in the primary road fund to be transferred to the farm-to-market road fund on or before June 30, 1941, is estimated to be in the neighborhood of $4,000,000.00. It will be seen that this is greatly in excess of what is necessary to match federal aid for secondary road purposes for that year.

While there is language in other provisions of the farm-to-market road act from which it seems to have been contemplated that funds allotted or transferred to the farm-to-market road fund must be used in the improvement of farm-to-market roads only, in applying the well recognized rules of construction of statutes we are compelled to give effect to the plain provisions of Section 4686.33. Its "allocation" to the secondary road construction fund of each county of the excess necessary to match federal aid to secondary roads is without qualification to the purpose for which it shall be expended, other than that it shall be used for construction purposes only. Sec. 4644.08, which defines what the secondary road construction fund shall consist of, includes therein, "all other funds which may be dedicated by law to said fund, and shall be used and employed as herein provided". Sections 4644.09 and 4644.10 pledge the expenditure of this fund to certain purposes and in the absence of words of qualification or reservation in Sec. 4686.33, we can reach but one conclusion, namely, that said Section 4686.33 is a "dedication by law" to the secondary road construction fund of the excess in the farm-to-market road fund necessary to match federal aid to secondary roads, and that such excess must be "allocated" or transferred to the secondary road construction funds of the several counties in the ratio that the area of each county bears to the total area of the State. It necessarily follows that it may then be programmed by the board of supervisors, subject to the approval of the highway commission, and expended for general secondary road purposes to which said fund is pledged by Sections 4644.09 and 4644.10.

JUSTICES OF THE PEACE: RECORD OF MOTOR VEHICLE CONVICTIONS SENT TO PUBLIC SAFETY DEPARTMENT: FEE FOR MAKING TRANSCRIPT NOT ALLOWABLE: A justice of the peace is not permitted to charge a 50-cent fee for making a record of motor vehicle convictions and forwarding it to the department of public safety as required under §5014.07, C., '39, as such record is not a "transcript" for which a justice of the peace is permitted to charge 50 cents under §10636, subsection 20, C., '39.

January 9, 1941. *The Honorable Chet B. Akers, Auditor of State:* This is in answer to your letter of the 7th inst. wherein you ask the opinion of this department relative to the following legal question:

Is a justice of the peace permitted to charge a 50¢ fee for making a record of the conviction of a person as provided for in Section 5014.07 of the 1939 Code?

There is a feeling among some of the justices of the peace that they should

receive the fee provided for in paragraph 20 of Section 10636 for making out this abstract of record.

We are of the opinion that a justice of the peace is not entitled to a 50¢ fee for making the record required under the provisions of Section 5014.07, which provides:

"Every court having jurisdiction over offenses committed under this chapter, or any other law of this state regulating the operation of motor vehicles on highways, shall forward to the department a record of the conviction of any person in said court for a violation of any said laws, * * *."

Section 10636, Code of Iowa, 1939, provides:

"Justices of the peace shall be entitled to charge and receive the following fees:

"20. For making and certifying transcript, fifty cents."

It is our view that the record required under the provisions of Section 5014.07 is not a "transcript" as that term is used in Section 10636, sub-section 20. It is true that Section 5014.07 imposes upon the justices of the peace of this state a duty, the performance of which is equally as onerous, perhaps, as the preparation of the transcript referred to in Section 10636. This, however, furnishes no reason for construing the statute in such a way as to make the collection of the 50¢ fee justifiable. Statutes frequently impose additional duties on public officers without any commensurate increase in compensation.

We reach the conclusion, therefore, that the "record" provided for in Section 5014.07, is not a "transcript" for which the justice is entitled to charge fifty cents.

PHYSICIANS AND SURGEONS: FEES FOR EXAMINATION OF PATIENT AND AS WITNESS BEFORE COUNTY COMMISSION OF INSANITY: A physician appointed by a county commission of insanity to examine a patient and certify whether the patient is sane or insane is entitled to compensation for his services and to a witness fee to compensate him for time spent in testifying before the commission, even though the physician has signed the information against the patient.

January 10, 1941. *Mr. E. B. Shaw, County Attorney, West Union, Iowa:* Received your letter of the 7th inst., wherein you ask the opinion of this department relative to the following legal question. We quote from your letter:

"Our clerk of courts has asked me for an opinion as to the amount of fees to which an examining physician appointed in an insanity case, under the provisions of Code Section 3549 is entitled to. In the case in question the information in the insanity proceedings was signed by one of the local doctors. He was a witness before the Commissioners of Insanity and he was also appointed as the examining physician."

The questions is: May the physician receive a fee as examining physician and as a witness?

We are of the opinion that he is entitled to both fees.

Section 3549, Code of Iowa, 1939, provides:

"The commission shall, in all cases, appoint, either from, or outside, its own membership, some regular practicing physician of the county to make a personal examination of the person in question for the purpose of determining his mental and physical condition. Said physician shall certify to the commission whether said person is sane or insane."

We see no reason why a physician appointed to determine the mental and physical condition of a person suspected of being insane should perform this

service without reasonable compensation. It is clear, so it seems to us, that when this physician is called upon to render this service an obligation arises to pay him reasonable compensation for his services.

The question then arises as to whether the physician who is so appointed to examine the person against whom the information in insanity has been filed may receive a witness fee for testifying before the commission. We know of no statute that could be logically construed as denying him such witness fee. He employs a certain portion of his valuable time in making the examination and this is true as to the time spent in testifying before the commission. How could it be logically argued that he must gratuitously render his services as a witness merely because he happens to be the physician who made the examination. We do not think that such a view would be logical and we reach the conclusion that the physician in question is entitled to both fees.

You say in your letter that this physician happened to be the person who signed the information against the person investigated. This, we think, is immaterial for it is presumed that the physician acted in the utmost good faith in signing this information and that the same was filed for the protection of the person suspected of being insane and the general public. It is also quite clear from your letter that at the time that the physician signed the information he had no knowledge that he would be appointed to examine the patient, nor did he then know that he would be called as a witness. However, even assuming that he anticipated being appointed the examining physician and being called as a witness at the hearing on the information, we think this would have no bearing on the conclusion herein reached.

COUNTIES: AUDITOR'S FAILURE TO FURNISH COPY OF BOARD PROCEEDINGS FOR PUBLICATION: PUBLICATION IN OFFICIAL NEWSPAPERS SELECTED FOR FOLLOWING YEAR: The board of supervisors may urge the county auditor to perform his duty to furnish a copy of the proceedings of the board for publication and may see that publication is made within the time required by law, working out the matter in an amicable manner. It is the mandatory duty of the county auditor to furnish to official newspapers a copy of the board proceedings within a week after adjournment. The proceedings shall be published in the official county newspapers selected for the following year when publication has not been made during the year in which the proceedings are held.

January 11, 1941. *Mr. Wm. W. Crissman, County Attorney, Cedar Rapids, Iowa:* This is in answer to your letter of the 7th inst., wherein you ask the opinion of this department on various matters. We quote from your letter:

"Due to the failure of the county auditor to furnish a copy of the proceedings of the meetings of the board of supervisors as required by Section 5412.1 of the Code, publications of the proceedings of the board are behind and at present the proceedings of the board held last August are just being published.

"The propositions upon which your opinion is requested are: (1) What is the nature and extent of the duties and responsibilities of the board of supervisors in this situation, and what steps, if any, should they take to correct the situation in the proper exercise of their duties?

"(2) Should the proceedings for the remainder of the year 1940 be published in the official newspapers selected for the year 1940, or in the official newspapers selected for the year 1941?

"Section 5411 does not specify as to which county officer should cause the proceedings to be published in the official newspapers. Section 5412.1, however, specifically places upon the county auditor the duty to furnish a copy of the

proceedings to be published within one week following adjournment of the board."

Answering your first question, we are of the opinion that under Section 5412.1, Code of Iowa, 1939, it is the mandatory duty of the county auditor to furnish a copy of the board proceedings to the official newspapers within one week following adjournment of the board. The board has no specific duty with reference to these proceedings. We call your attention, however, to Section 5130, Code of Iowa, 1939, which provides:

"The board of supervisors at any regular meeting shall have power:
"* * *.
"6. To represent its county and have the care and management of the property and business thereof in all cases where no other provision is made."

Under this provision we believe that the board may properly urge the county auditor to perform his duty under Section 5412.1 and if he does not we incline to the view that the board may see to it that these proceedings are published within the time required by law and to that end may employ necessary clerical assistance. We do, however, believe that it is a matter that should be worked out in an amicable manner by the board and the auditor.

Answering your second question, we are of the opinion that the proceedings for the year 1940 which have not as yet been published should be published in the official newspapers selected for the year 1941. If these are the same as those for 1940 then no question arises. The papers selected for the year 1941 are the official papers for all proceedings of the board whether for the year 1941 or 1940. The publication of the 1940 proceedings in newspapers which have ceased to be the official newspapers of the county would, as we view it, not be a legal publication.

We reach the conclusion, therefore, that the board proceedings for 1940, which have not been published as by law required in that year, should be published in the official newspapers selected for 1941.

DRAINS: ELECTION OF DRAINAGE DISTRICT TRUSTEES: VOTING BY JOINT LANDOWNERS: ABSENT VOTERS LAW: VOTING BY AGENT OR PERSON ABSENT OR DISABLED: Joint landowners are each entitled to vote in a drainage district election to elect trustees, under statute permitting each landowner over 21 to vote. Residents eligible to vote at such elections, but unable to go to the polls because of absence or physical disability, cannot vote by absent voters' ballots, as the absent voters law applies only to elections held under the general election laws, nor can they vote by agent, as they do not come within the statute permitting voting by agents of nonresidents or corporations owning land or right of way in the district and assessed for benefits.

January 15, 1941. *Mr. John S. Redd, County Attorney, Sidney, Iowa:* This acknowledges your request by telephone in which the following situation and questions were presented by you to this department.

A drainage district election is being held in your county under the provisions of chapter 358, Code, 1939, this election being for the purpose of selecting one or more trustees of the drainage district. Your questions are as follows:

1. If two or more persons owned an undivided interest in a tract of land assessed for benefits in the district, is each person entitled to vote under section 7684, Code, 1939?
2. Can residents of a district who are eligible to vote in a drainage district

election but who, because of physical disability or temporary absence on election day, are unable to go to the polls, vote by absent voters' ballot?

3. Can a resident of a district eligible to vote in such an election but who, because of physical disability or temporary absence, is unable to go to the polls, vote by agent?

Directing attention to your first inquiry, section 7684 provides:

"*Qualifications of voters.* Each landowner over twenty-one years of age without regard to sex and any railway or other corporation owning land in said district assessed for benefits shall be entitled to one vote only, except as provided in section 7685."

When two or more persons are tenants in common, that is, each owning an undivided interest or a part of real estate, each of them is a land-owner in our view of the matter, and each would be entitled to vote. That this is the construction which should be placed on this section is indicated by the provisions of section 7685 which provide a method whereby the voting may be in proportion to the assessment of benefits to land-owners. If this method of voting were adopted in the district, it may be done, then if there were two people, for instance, each owning an undivided one-half of a particular piece of real estate assessed by the district, each of these undivided owners would be entitled to one-half the number of votes that one individual owning the entire tract would be entitled to. Furthermore, there is no sound distinction between two persons each owning eighty acres, and two persons each owning an undivided one-half interest in 160 acres, so far as this statute is concerned.

Directing attention to your second inquiry, it is our view that the absent voters law does not apply to elections in drainage districts. A considerably different method of voting is provided for in elections in drainage districts. The absent voters law provides in section 927 that "any qualified voter of this state may, as provided in this chapter, vote at any general, municipal, special or primary election, or at any election held in any individual town, city or consolidated school district: * * *"

It is apparent that the absent voters law is directed to take care of elections held under the general election laws. The words in section 927 "any qualified voter of this state" have reference to the general constitutional qualifications of the voter. The qualifications for voting in an election in a drainage district are entirely different, in some respects being narrower than the general qualifications for a voter, and in some respects broader when it permits corporations, minors and incompetents to vote.

Generally speaking, the basic qualification for voting in a drainage district election is ownership of land in the district. Furthermore, said section 927 as quoted above sets out the elections which "any qualified voter" may vote by absent voters ballot, and it is our view that drainage district elections do not fall within the elections set out in section 927.

The conclusion is that the absent voters law does not apply to drainage district elections.

Directing attention to your third inquiry. The only provision made for voting by agent is found in section 7686, Code, 1939, and the individual person who is a resident of the district, but sick or temporarily absent does not come within the description of a person who may vote by agent as set out in section 7686 of the code. This section permits voting by agents of a non-resident of the county or any corporation owning land or right of way lying wholly or in part within the district and assessed for benefits.

SOLDIERS: SOLDIERS' RELIEF: SUBSCRIPTIONS TO NEWSPAPERS NOT "RELIEF": PAYMENT FOR SUBSCRIPTIONS TO NEWSPAPERS FROM SOLDIERS' RELIEF FUND PROHIBITED: Subscriptions to newspapers do not fall within the meaning of the word "relief" as used in §3828.051, C., '39, and the relief commission is without authority to pay for such subscriptions from the soldiers relief fund.

January 20, 1941. *Mr. Wm. C. Hanson, County Attorney, Jefferson, Iowa:* This will acknowledge receipt of your letter of January 18, wherein you ask our opinion on the following:

"A matter has been called to my attention by the Soldiers' Relief Commissioner here in Greene County, Matt May.

"He has asked me whether or not it would be legal for him to pay for subscriptions to the daily paper for soldiers who are now confined in the Soldiers' Home at Marshalltown. These soldiers are requesting that subscriptions to the daily paper be given them, and Mr. May does not want to make this expenditure unless it is legal.

"So far as I am able to discern, I can find no place where the attorney general's office has ruled on it, or whether it is a legal expenditure for the soldiers' relief commissioner to make.

"Would you kindly advise me as to your opinion in the matter."

For the purpose of this opinion, we quote Section 3828.051:

"*Tax.* A tax not exceeding one-fourth mill on the dollar may be levied by the board of supervisors upon all taxable property within the county, to be collected at the same time and in the same manner as other taxes, to create a fund for the relief of, and to pay the funeral expenses of honorably discharged, indigent United States soldiers, sailors, marines, and nurses who served in the military or naval forces of the United States in any war and their indigent wives, widows, and minor children, not over fourteen years of age if boys, nor sixteen if girls, having a legal residence in the county."

It is our opinion that subscriptions to newspapers do not fall within the meaning of the term "relief" as used in the above quoted section, and that therefore, the Soldiers' Relief Commission has no authority under the law to pay for such subscriptions out of the Soldiers' Relief Fund.

WIDOW'S PENSION: REMARRIAGE OF WIDOW: RIGHT TO PENSION AFTER DIVORCE FROM SECOND HUSBAND: When the right to a widow's pension, under §3641, C., '39, is extinguished by the widow's remarriage, and such marriage and the stepfather's responsibility to support her children terminate in divorce proceedings, she again becomes entitled to such pension since the mother is the only person legally obligated for their support.

January 21, 1941. *Mr. Philip C. Lovrien, County Attorney, Humboldt, Iowa:* This will acknowledge receipt of your recent letter requesting an opinion on the following proposition:

"A widow with several children under sixteen years of age applied for a widow's pension and received the same. Later she remarried and, of course, during that time her pension was cut off. Still later, she obtained a divorce from her second husband. There were no children by this second marriage. She has now again applied for a widow's pension."

The Code section which is applicable to this situation is:

"3641 *Aid to widow in care of child.* If the juvenile court finds of record that the mother of a neglected or dependent child is and has been a resident of the county for one year preceding the filing of the application, and is a widow and a proper guardian, but, by reason of indigency, is unable to

properly care for such child, and that the welfare of said child will be promoted by remaining in its own home, it may, on ten days written notice to the chairman of the board of supervisors, of said application, by proper order determine the amount of money, not exceeding two dollars and fifty cents per week, necessary to enable said mother to properly care for said child. The board of supervisors shall cause said amount to be paid from the county treasury as provided in said order. Such order may, at any time, be modified or vacated by the court. No payment shall be made after said child reaches the age of sixteen years, or after the mother has remarried, or after she has acquired a legal residence in another county, or after she has become a nonresident of the state.

No person on whom the notice to depart provided for in chapter 189.4 shall have been served within one year prior to the time of making the application, shall be considered a resident so as to be allowed the aid provided for in this section."

This section is in the chapter of the Iowa Code on "Care of Neglected, Dependent and Delinquent Children", and undoubtedly was enacted for the benefit of the children rather than the widow.

The case of *Debrot vs Marion County*, 164 Iowa 208, is somewhat similar to the above statement of facts, although we think distinguishable. In that case the record showed that there was one child by the first marriage, nothing appearing as to whether the first husband was dead or alive. There were two children by the second marriage and then a divorce, the second husband being alive at the time of the trial. The court denied the mother a widow's pension because they felt that she did not come within the definition of a widow, but the decision was based primarily on the reason that the divorced husband was liable for the support of the children; that there was a legal obligation on his part to provide proper care for them.

In the instant case the mother was clearly a widow prior to her second marriage and she did receive a widow's pension. Naturally she would not have been entitled to a widow's pension during the time the second marriage was in effect. At that time the stepfather was liable for the support of his stepchildren, having accepted them into his family. He stood in loco parentis to them.

Upon the termination of the second marriage, the stepfather ceased to be legally responsible for the support of the stepchildren and the mother was solely responsible for the welfare of her children. Here we have a situation where the father of the children is dead and there is no one legally obligated to provide for them other than their mother. Surely this is a situation intended to be within the provisions of Section 3641.

It is our conclusion that the mother is entitled to receive a widow's pension in accordance with Section 3641.

TAXATION: SCHOOL TAX OFFSET: POSTGRADUATE TUITION: No school tax offset may be allowed a parent against the payment of postgraduate high school tuition, regardless of whether the high school attended is located within or without the school district of the parent's residence.

January 24, 1941. *Department of Public Instruction:* Your letter of January 15th, 1941, asking our opinion upon the following matter, is herewith acknowledged:

"A student under twenty-one years of age has graduated from a four-year course in an approved high school. He wishes to return for postgraduate work. (This school is in the district of the parent's residence.)

"The question is whether the parent who is responsible for the payment of this tuition can be legally allowed an offset on said tuition in the amount of the school taxes he pays to the high school district, whether he lives within or without the district maintaining the high school."

For the purpose of this opinion, we quote the following sections from the 1939 Code of Iowa:

"4269 *Offsetting tax.* The parent or guardian whose child or ward attends school in any independent district of which he is not a resident shall be allowed to deduct the amount of school tax paid by him in said district from the amount of the tuition required to be paid.

"4273 *Tuition.* Every school shall be free of tuition to all actual residents between the ages of five and twenty-one years, and to resident honorably discharged soldiers, sailors, and marines, as many months after becoming twenty-one years of age as they have spent in the military or naval service of the United States before they became twenty-one. Every person, however, who shall attend any school after graduation from a four-year course in an approved high school or its equivalent shall be charged a sufficient tuition fee to cover the cost of the instruction received by such person."

It appears that the parent of the student in question is a resident of the school district in which the student seeks postgraduate high school work. Section 4269 allows a tax offset only when the student is attending school in a district other than the residence of the parent or guardian. The school attendance here being within the school district of the parent's residence, the parent is, therefore, not entitled to the benefit of a tax offset from the tuition he may be obliged to pay.

Should the student in question seek postgraduate high school work in a school district other than that of the residence of the parent, the parent is still not entitled to a tax offset as against the tuition he must pay.

The tax offset privilege was obviously not intended to apply to tuition charged a parent for postgraduate high school work. Section 4273 requires a tuition fee of all students seeking postgraduate high school work and this is true whether the attendance is within or without the school district of the parent's or guardian's residence. The legislature could not reasonably have contemplated an offset to tuition paid to a high school located outside of the district of the parent's residence and none against the tuition paid to the high school within the district of the parent's residence.

It is, therefore, our opinion that no tax offset may be allowed a parent against a postgraduate high school tuition regardless of whether the high school attended is located within or without the school district of the parent's or guardian's residence.

MOTOR VEHICLES: REGISTRATION: COUNTY TREASURER'S FEE WHEN PAYABLE IN INSTALLMENTS: A county treasurer may deduct only one fifty cent fee for the annual registration of trucks, truck tractors, and semitrailers even though such annual registration is payable in two semiannual installments.

January 25, 1941. *Department of Public Safety:* We have your letter of recent date, asking our opinion upon the following matter:

"We have a controversial issue between Mr. H. E. Sullivan, Wright County Treasurer, Clarion, Iowa, and this office in regard to fifty cent ($0.50) fee allowed to the county fund for Motor Vehicle registrations.

"The Wright County Treasurer is deducting a fifty cent ($0.50) fee for all trucks, truck-tractors, and semitrailers when the second payment is paid. Inasmuch as there is only one registration, the fifty cents ($0.50) is deducted when

the first payment is paid; therefore, a fee should not be deducted for second payment.

May we have your opinion as to whether two fifty cent ($0.50) registration fees should be deducted?"

For the purpose of this opinion, we quote the following sections and portions of sections of the 1939 Code of Iowa:

"5008.15 *Trucks with pneumatic tires.* For motor trucks equipped with all pneumatic tires, the annual registration fee shall be: * * *

"5008.16 *Trucks with solid rubber tires.* For motor trucks equipped with two or more solid rubber tires, the annual registration fee shall be * * *

"5008.18 *Truck tractors, road tractors, and semitrailers.*

"1. For a truck tractor or for a road tractor the annual registration fee shall be: * * *

"5009.02 *Monthly penalty.* * * * Provided, however, that the annual registration fee for trucks, truck tractors, road tractors, trailers and semitrailers, as provided in sections 5008.15 to 5008.19, inclusive, may be payable in two equal semiannual installments. * * *

"5010.01 *Disposition.* The money, except fines and forfeitures, and except operator's and chauffeur's license fees, collected pursuant to the provisions of this chapter shall be credited by the treasurer of state to the following funds:

"1. * * *

"2. The balance of said money, less the collection fee of fifty cents retained by the county treasurer on each registration, and less the one percent received by the department as a reimbursement fund from which to pay refunds, to the primary road fund.

"5010.08 *Fee for county.* Each county treasurer shall be allowed to retain, for the use and benefit of the county general fund, fifty cents for each motor vehicle registration issued by him out of money collected in each year for the registration of such motor vehicles, * * *"

From a review of the above statutes relating to the registration of trucks, truck tractors and semitrailers, it appears that each of such vehicles is subject to one annual registration but that this registration, for the convenience of the owner, may be paid in two semiannual installments. The fact that the annual registration may be made in two installments, makes it no less an annual registration fee.

The statutes further provide that for each registration, the county treasurer may retain a fee of fifty cents (50c). Inasmuch as the only registration for which the law provides is an annual registration, the legislature could not reasonably have contemplated any other type of registration. This being true, then the county treasurer is entitled to a fifty cent (50c) fee for each annual registration. He is not entitled to deduct two fifty cent (50c) fees for one annual registration, whether such registration is payable in two semiannual installments or otherwise.

It is, therefore, our opinion that the county treasurer may deduct but one fifty cent (50c) fee for the annual registration of trucks, truck tractors and semitrailers even though such annual registration is payable in two semiannual installments.

LICENSES: DRUGGISTS: DEALERS IN BIOLOGICAL PRODUCTS: SERUM SOLD IN TWO STORES WITH SAME OWNER: A druggist who owns two stores in separate towns and sells serum in each store must secure for each location a permit and bond for dealing in biological products.

January 27, 1941. *Hon. Mark G. Thornburg, Secretary of Agriculture:* Your

letter of recent date, asking our opinion on the following matter, is herewith acknowledged.

"The Enlowe Havner Serum Company, of Fremont, Nebraska, has as a dealer a druggist who owns two stores in separate towns and the question has been raised as to whether or not it is necessary for this serum company to secure a permit or bond for each location."

For the purpose of this opinion, we quote the following sections of the 1939 Code of Iowa:

"2705 *Definitions.* When used in this chapter:
"1. * * *
"2. * * *
"3. 'Dealer' includes every person who, for profit, sells, dispenses, or distributes, or offers to do so, either as principal or agent, biological products, except: * * *
"2707 *Permit to manufacture or sell.* 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.
"2710 *Dealer's permit.* An application for a permit to deal in biological products shall be accompanied by a bond, with sureties to be approved by the department, in the sum of five thousand dollars, * * *"

It will be observed that an agent is defined as a dealer by virtue of section 2705, paragraph 3. It appears that the druggist in question dispenses serum through two drug stores in different towns. It is evident that the druggist is a dealer in serum. He is at the same time a principal as one of his stores must be, and perhaps both are operated by agents.

It follows, therefore, that each drug store, even though owned by one individual, must because of the principal and agency involved, secure a permit and bond for each location.

LICENSES: GASOLINE PUMPS: MEASURING CAN NOT SUBJECT TO LICENSE: A gasoline measuring can from which gasoline is sold is not a "gasoline pump" within the statute which defines gasoline pump as "any pump, meter, or similar measuring device used for measuring gasoline" and need not be licensed as a gasoline pump.

January 27, 1941. *Hon. Mark G. Thornburg, Secretary of Agriculture:* Your letter of January 8, 1941, asking our opinion on the following matter, is herewith acknowledged.

"We find that, in some localities, it has become the practice of truck operators to solicit and deliver gasoline to owners of cars parked on the streets or around creameries and certain other buildings.
"Gasoline, we believe, should be measured through some measuring device; therefore, the point in question is: Would the measuring can used by the operators of the trucks that follow this practice be considered a 'similar measuring device used for measuring gasoline' and, if so, will it be necessary to have each can licensed as a gasoline pump is licensed under Section 3262?"

For the purpose of this opinion, we quote from Chapter 164 of the 1939 Code of Iowa, as follows:

"3258 *Definitions.* For the purpose of this chapter:
"1. * * *
"2. 'Gasoline pump' shall mean any pump, meter, or similar measuring device used for measuring gasoline.
"3259 *License.* Every person who shall use or display for use any public scale or gasoline pump shall secure a license for said scale or pump from the department.

"3262 *License to be displayed.* The license plate shall be displayed prominently on the front of the scale or pump, and the defacing or wrongful removal of such plate shall be punished as provided in chapter 147. Absence of license plate shall be prima facie evidence that the weighing or measuring device is being operated contrary to law."

From a review of Chapter 164 and particularly the quoted sections, it appears that the legislature sought to license gasoline pumps and to require the display of the license on the front of the pump. In order to come within the definition of a gasoline pump, the means by virtue of which the gasoline is measured and sold must be a pump, meter or similar measuring device. It is evident that a measuring can is not a pump and it is equally evident that it is not a meter. Funk and Wagnalls Standard Dictionary defines a meter to be:

"An instrument, apparatus or machine for measuring fluids, gases, electric currents, grain, etc. and recording the results obtained."

Nor can it be said that a measuring can is similar to a pump or meter. It lacks several of the characteristics of either and it may not as a consequence be said to be a similar measuring device.

It is, therefore, our opinion that a gasoline measuring can is not a gasoline pump and need not be licensed as such.

TAXATION: FOREIGN INSURANCE COMPANIES: TAX ON GROSS PREMIUMS: DIVIDENDS LEFT TO PURCHASE PAID-UP ADDITIONS TO POLICY: The tax on gross premiums of foreign insurance companies must be based on the premiums received, which must include dividends left by an insured with a company to purchase paid-up additions to his policy.

January 27, 1941. *State Tax Commission:* We are in receipt of your request for an opinion with respect to whether or not the gross premium tax on foreign insurance companies, provided for in Section 7022 of the 1939 Code of Iowa should include a computation on the dividends applied by the insured to obtain paid-up additions to the insured's policy.

Section 7022 of the 1939 Code of Iowa provides that a foreign life insurance company shall pay a tax of 2½ percent of the gross amount of premiums received by it for business done in the State of Iowa. We understand that the insurance companies issue policies of life insurance which permit the payment of dividends in cash, or permit the dividends to remain with the company and be applied by the company to paid-up additions to the policy.

A somewhat similar question was before the Iowa Supreme Court in the case of New York Life Insurance Company v. Burbank, 209 Iowa 199. In that case the question before the Court involved another policy that provided that dividends could be left with the company and applied as part payment of the contract premium. It was the company's intention that it should pay a gross premium tax based upon the difference received in cash from the policyholder after the application of the dividend payable to the insured. In a rather exhaustive opinion, with a special concurring opinion by Justice DeGraff, the Court analyzed the words used in the taxing statute and came to the conclusion that a "premium received" by the company included the dividend payable to the insured, but left by the insured with the company, and the company was compelled to pay the gross premium tax on the full amount of premium received, including the dividend left with it.

We feel the reasoning of this case is applicable to the policy now under consideration. Under this policy the insurance company is receiving premiums for this additional insurance in the form of what amounts to an assignment of dividend. Since the company is receiving premiums, the tax must be based upon the premiums received, and upon the authority of the Burbank case, we are of the opinion that the premiums received must include the dividends left with the company to purchase paid-up additions to the policy.

TAXATION: TAX SALE: LIEN OF SUSPENDED TAX: A tax sale for delinquent general taxes may be had when there is also a tax lien against the property for suspended general tax for prior years, but such tax sale will not serve to cut out the lien of the suspended general tax.

January 28, 1941. *Mr. Frank Drake, County Attorney, Muscatine, Iowa:* We have received your request for an opinion upon the following situation:

If property is sold at tax sale on which there is prior tax suspended by the Board of Supervisors, would a tax deed issued on such a sale cancel the lien of the suspended tax?

In an opinion dated October 10, 1939, this office ruled that in the publication for the tax sale the notice should include the general taxes for which the property was to be sold and a notation with respect to suspended taxes. This was in the case where the tax had been suspended by reason of the operation of the statute providing for the suspension of such tax when an old age pension is granted. In that opinion we specifically reserved the question of whether or not the lien for such suspended taxes would be lost in the event the sale was made for delinquent and unsuspended tax.

In an earlier opinion this office also ruled that there could be no sale for suspended tax when none of the contingencies mentioned in Section 6952 had occurred. See opinion dated May 14, 1937-1938 Attorney General's Report, page 227.

In a still earlier opinion the Attorney General's office ruled very flatly that the suspended tax for prior years would not remain a lien after a tax sale in a later year when the tax had not been suspended. See opinion dated November 1, 1933, at page 398 of the 1934 Attorney General's Report. With this last mentioned opinion we do not agree. Suspended general taxes are somewhat in the class of future unmatured installments of special assessments. In that connection there is quite a discussion of the effect of a tax sale for general taxes on future unmatured special assessments in the case of *Ferguson v Aitken*, 22 Iowa 1154. This case involved the delinquent tax. However, the opinion stressed the matter that a sale for general taxes would cut out any inferior lien to general taxes which existed at the time of the sale. A sale for special assessments of course would not cut out future unmatured installments of special assessments. Suspending general taxes should not reduce the superiority of the general tax lien, but only postpone its payment. We do not believe that the county treasurer would have any authority to sell real estate for suspended general taxes, assuming of course that the title has not changed or that none of the events that terminate the suspension have occurred. In other words, the county treasurer could not, merely because he is selling property for delinquent taxes, include the suspended tax for prior years. We therefore agree with the conclusion reached in the opinion of the Attorney General's office of May 14, 1937, heretofore cited, but we do not believe that the lien for this suspended

tax is lost by the subsequent sale. The rule of *caveat emptor* applies in the case of a tax sale and the purchaser at such a sale is upon notice to ascertain existing liens which will not be cut off by the sale. As pointed out above, a sale for one installment of a special tax would not give the purchaser a title that would be free and clear of the lien of subsequent installments of the special tax. Throughout all of our taxing statutes there is a clear legislative intent that the lien for general tax, unless cancelled by statutory authority, shall remain a senior and paramount lien until paid.

We are therefore of the opinion that a tax sale for delinquent general taxes may be had when there is also a tax lien against the property for suspended general tax for prior years, but that such tax sale would not serve to cut out the lien of such suspended general tax.

COUNTIES: SOLDIERS RELIEF COMMISSION: AUTHORITY TO HIRE SOCIAL WORKER: A county soldiers relief commission has no authority to hire a social worker or other person to investigate applicants for relief even though the expenditure of a salary to the social worker works a saving, as the expenditure of such salary is not authorized by law.

January 29, 1941. *Mr. Alden D. Avery, County Attorney, Spencer, Iowa:* This will acknowledge receipt of your letter of January 21 wherein you ask our opinion on the following:

"Clay County has a relief commission set up under Chapter 189.2 of the 1939 Code of Iowa. For several years they have employed the County Social Worker to make their investigations for them, and before making any disbursement the commission has passed on the recommendations of the County Social Worker. For this service they have paid the County Worker the sum of $10.00 per month. Objection has recently been raised that this disbursement is unauthorized by law.

"It is apparent that by paying the Social Worker the sum of $10.00 per month these investigations can be made with less expense than if the investigation were made by individual members of the commission, and the investigations are made by a trained worker who has files on many of the people who have to be investigated. The commission is of the opinion that the results are more economically obtained and that the relief recipient is more thoroughly investigated under this procedure than if the members of the commission themselves conducted the actual investigation. Inasmuch as the commission passes on the relief before it is granted after a full disclosure of the investigation is made by the Social Worker they feel that they are acting within the law.

"I would appreciate it if you would give me your opinion so that I may have it not later than Feb. 4th as to the legality of this procedure."

Section 3828.051 provides for the levy of a tax to create a fund for the relief of and pay the funeral expenses of honorably discharged, indigent United States soldiers, sailors, marines, nurses and their children.

Section 3828.053 provides that "said fund shall be disbursed by the Soldiers Relief Commission."

Section 3828.057 provides as follows:

"*Meetings—report—levy.* The commission shall meet annually at the county auditor's office on the second Monday in June, and at such other times as may be necessary. At the annual meeting it shall determine who are entitled to relief and the probable amount required to be expended therefor, which sum it shall certify to the board, together with a list of those found to be entitled to relief, and the sum to be paid in each case. The board at its regular June meeting shall levy a sufficient tax to raise such amount."

Section 3828.058 provides as follows:

"Names certified—relief changed—report. Upon the filing of the list with the board of supervisors, the county auditor shall, within twenty days thereafter, transmit to the township clerks in the county the names of those, if any, to whom relief has been awarded, and the amount. The amount awarded to any person may be increased, decreased, or discontinued by the commission at any regular meeting. New names may be added and certified thereat, and it shall, at the close of each year, make annual detailed reports to the board of its work, which shall be accompanied with the proper vouchers for all moneys disbursed by it."

We are unable to find any section of the code which provides that the Commission may hire a county social worker or any other person to do the work of the Commission in investigating applicants for soldiers' relief. The only section dealing with compensation for work performed is Section 3828.055 which reads as follows:

"Compensation. The members of said commission shall be paid for their services the sum of two dollars per day for each day actually employed in the work of said commission, and also the same mileage that is paid to the members of the board of supervisors. Said per diem and mileage shall be paid out of the taxes raised under the provisions of section 3828.051."

The mere fact that in your particular instance the hiring of a county social worker at the rate of $10.00 per month works a saving should not be controlling. If the Commission could hire an investigator or worker for $10.00, they could hire him for $100.00.

It is, therefore, our opinion that the expenditure of $10.00 per month for the salary of a social worker to make investigations for the Soldiers Relief Commission of your county is an expenditure of Soldiers Relief funds not authorized by law.

LICENSES: PUBLIC SCALES: PENNY AND SLOT MACHINE SCALES: Penny and slot machine scales are public scales within the statute defining "public scales" and must be licensed and license fees must be paid for their operation.

January 29, 1941. *Hon. Mark G. Thornburg, Secretary of Agriculture:* Your letter of January 22nd, 1941, asking our opinion upon the following matter, is herewith acknowledged.

"The Department has been testing penny and slot machine scales and charging the owner $3.00, license fee. A few days ago a group of men who own most of these machines came to my office and stated they felt they should not come under the term 'public scales'. It seems to us these machines should be considered as public scales as they charge a fee and we think it our duty to inspect these scales for correct weighing and charge a fee."

For the purpose of this opinion, we quote the following sections of the 1939 Code of Iowa:

"3258 *Definitions.* For the purpose of this chapter:
"1. 'Public scale' shall mean any scale or weighing device for the use of which a charge is made or compensation is derived.
"2. * * *
"3259 *License.* Every person who shall use or display for use any public scale or gasoline pump shall secure a license for said scale or pump from the department.
"3260 *Fee.* The license fee shall be three dollars per annum and each license for a public scale shall expire on December 31 and for a gasoline pump on June 30 of each year."

It will be observed that the penny and slot machine scales in question fall clearly within the definition of the statute defining the words "public scale".

It is, therefore, our opinion that penny and slot machine scales are public scales within the definition of the statute and that such scales must be licensed and a license fee must be paid for their operation as required by statute.

TAXATION: MONEYS AND CREDITS: DEDUCTION FOR DEBTS: JOINT SIGNERS OF NOTE AND MORTGAGE: Two persons who have signed a note and mortgage may not each take a deduction for money and credit tax in the amount of the face value of the obligation, but the deductions should be either in the amount that each received by way of consideration from the payee of the note, or the probable liability in the amount that the taxpayer believes he will be compelled to pay if a principal and surety relation exists.

January 29, 1941. *Mr. D. W. Dickinson, County Attorney, Eldora, Iowa:* You have requested an opinion upon the following situation:

Section 6988 of the 1939 Code of Iowa allows a deduction for money and credit tax of "the gross amount of all debts in good faith owing" by the taxpayer. "A" and "B" signed a note and mortgage in the sum of $20,000. You do not state whether "B" is a surety for "A" but you merely ask whether "A" and "B" could each take a deduction of $20,000 on the theory that under the provisions of Section 9477, paragraph 7, such an instrument would be deemed to be joint and several and each signer could be held liable for the full amount of the note.

It will be noted that Section 6989 provides that the indebtedness must be founded upon actual consideration and if it is a surety transaction, it is covered by Section 6990.

Section 9477, paragraph 7, of the Negotiable Instruments Law, providing as it does the primary liability for the signer of a note, does not destroy the suretyship transaction which might still exist between co-signers. If it is a joint note and "A" and "B" each received part of the consideration, then their deductions should be to the extent of the consideration received. If it is a suretyship transaction, then under the provisions of Section 6990 the deductions should be in the amount that the taxpayer believes he will be compelled to pay. This would be based upon the ability of the principal debtor to pay the obligation for which he is surety.

We are therefore of the opinion that both "A" and "B" could not take a deduction for money and credit tax in the amount of the face value of the obligation, but that the deduction should be either in the amount that each received by way of consideration from the payee of the note, or the probable liability as above outlined if a principal and surety situation exists.

MUNICIPAL CORPORATIONS: CITY COUNCIL: SALARIES OF OFFICIALS RAISED AFTER REELECTION: The act of a city council in passing an ordinance raising salaries of the mayor and other officials, after reelection of the officials and before they took office, is contrary to §5672, C., '39, and not in accord with the public policy of the state.

February 3, 1941. *Hon. Chet B. Akers, Auditor of State:* This will acknowledge receipt of your recent letter in which you ask for an opinion on the following set of facts:

We have a record of where a city council passed an ordinance raising salaries

of the mayor and certain other officials between the time that they were elected to office, the latter part of March, and the time that they took office early in April.

The mayor and the whole council which passed the ordinance were reelected and knew that they were reelected at the time the ordinance was passed.

For the purpose of this opinion, we quote the following section of the 1939 Code of Iowa:

"5672 *Ineligibility—change of compensation.* No member of any city or town council shall, during the time for which he has been elected, be appointed to any municipal office which has been created or the emoluments of which have been increased during the term for which he was elected, nor shall the emoluments of any city or town officer be changed during the term for which he has been elected or appointed, unless the office be abolished. No person who shall resign or vacate any office shall be eligible to the same during the time for which he was elected or appointed, when, during the time, the emoluments of the office have been increased."

In an early Iowa case, *Cox v. The City of Burlington,* 43 Iowa 612, the court made the following statement in considering an earlier Iowa statute similar to the present provisions of Section 5672:

"To determine what the words mean in the place in which they are used, we must consider the objects of the provision and give them the meaning which will accomplish that object, if the words are as susceptible of that meaning as any other. The object of the provision undoubtedly was to require the council to fix each salary with reference to the office and not the officer; in other words, to exclude favoritism on the one hand and on the other hand to take from the council the power to thwart the wishes of the people by compelling an officer to resign by diminishing his salary. Now, if we so construe the provisions as to hold that the officer's term of office does not commence with his election, but with his qualification, we leave the door open for all the mischief which the provision was evidently intended to prevent."

And from *McQuillan on Municipal Corporations,* we find the following statement:

"On the other hand laws providing that the change of salary shall not take effect during the term for which the officer was elected or appointed are often construed to prohibit any change of salary after election or appointment to take effect during the term for which the officer was elected or appointed."

It is our opinion that we should construe Section 5672 in accordance with the above statements, and that the aforementioned acts of the city council were contrary to a fair interpretation of Section 5672 and definitely not in accord with the public policy of this State.

DRAINAGE DISTRICTS: REDEMPTION FROM SALE FOR SPECIAL ASSESSMENTS: BONDS AS PAYMENT: Section 7495.1, C., '39, permitting drainage bonds to be applied upon the payment of delinquent assessments, is a special statute granting unusual rights and should be strictly construed, and since it does not mention that the bonds may be used to redeem the property from tax sale, such redemption cannot be effected by offering the drainage bonds as payment.

February 4, 1941. *Mr. Robert N. Johnson, Jr., County Attorney, Fort Madison, Iowa:* This will acknowledge receipt of your recent letter, in which you ask for an opinion on the following matter:

"At the last December tax sale some property lying in the Green Bay Drainage District was sold for special assessments (i.e. drainage taxes). There were no general taxes due against the property. The sale was a scavenger sale the property having been previously offered three times at which times it was

not sold. The purchaser at the last December sale bid $200.00 and received a tax sale certificate. The owner of the land has come to the Auditor offering drainage bonds and coupons in redemption of the land from said tax sale. The land owner offers no cash except for the interest and penalty. The question that presents itself to the Auditor and Treasurer is whether they have a right to accept the drainage bonds and coupons in redemption . . ."

For the purpose of this opinion, we quote the following sections of the 1939 Code of Iowa:

"7272 *Redemption—terms.* Real estate sold under the provisions of this chapter and chapter 347 may be redeemed at any time before the right of redemption is cut off, by the payment to the auditor, to be held by him subject to the order of the purchaser, of the amount for which the same was sold and four percent of such amount added as a penalty, with six percent interest per annum on the whole amount thus made from the day of sale, and the amount of all taxes, interest, and costs paid by the purchaser of his assignee for any subsequent year or years, with a similar penalty added as before on the amount of the payment for each subsequent year, and six percent per annum on the whole of such amount or amounts from the day or days of payment.

"7495.1 *Bonds received for assessment.* Bonds issued for the cost of construction, maintenance or repair of any drainage or levee district, or for the refunding of any obligation of such district, may be acquired by any taxpayer or group of taxpayers of such district, and applied at their face value in the order of their priority, if any priority exists between bonds of the same issue, upon the payment of the delinquent and/or future assessments levied against the property of such taxpayers to pay off the bonds so acquired; the interest coupons attached to such bonds, may likewise be applied at their face value to the payment of assessments for interest accounts, delinquent or future."

In the last section there is no mention that the bonds may be used to redeem the property from tax sale. The only language in this section that would in any way indicate that the bonds could be used to redeem the property from tax sale would be "upon the payment of the *delinquent* and/or future assessments levied against the property of such taxpayers to pay off the bonds so acquired; . . ." When property is sold at tax sale, the taxes are deemed in theory at least, to be paid. Following this idea it would be hard to say that redeeming after tax sale would be the same as paying delinquent taxes.

In view of the fact that this is a special statute granting unusual rights, it should be strictly construed and inasmuch as there is no mention in Section 7495.1 that the bonds may be used to redeem the property from tax sale, it is our conclusion that a redemption cannot be effected by offering the drainage bonds as payment.

TAXATION: REDEMPTION FROM TAX SALE: NOTICE OF EXPIRATION OF RIGHT: AFFIDAVIT: PERSON DECEASED IN WHOSE NAME PROPERTY IS TAXED: The statute providing for serving notice of expiration of the right of redemption from tax sale does not provide for service upon any other persons if, when an attempt is made to serve notice, the person in whose name the property is taxed is deceased. When there is no one upon whom notice can be served, an affidavit of service setting forth the facts and filed with the county treasurer eliminates the necessity of notice.

TAXATION: SALE OF PROPERTY ACQUIRED BY COUNTY UNDER PUBLIC BIDDER STATUTE: DISCRETION OF BOARD OF SUPERVISORS: The board of supervisors of a county which has acquired property under the public bidder statute may use discretion in selling the property so long as it acts in conformity with §10260.4, C., '39.

February 5, 1941. *Mr. Eugene J. Kean, County Attorney, Dubuque, Iowa:* This will acknowledge receipt of your recent letter in which you ask for an opinion on the following questions:

1. Where notice of expiration of right of redemption under Section 7279 of the 1939 Code of Iowa, is served on the tenant in possession and where the person in whose name the real estate is taxed dies almost ninety (90) days after the service of said notice upon the tenant in possession, where no notice has been served upon said person in whose name the tax has been assessed before her death, is such service sufficient to cut off the right of redemption and place the title to the property in the hands of the purchaser, namely, Dubuque County. The affidavits and return of service filed five (5) days after the death of the person in whose name the property was taxed shows the service on the tenant in possession and the affidavit shows that the person in whose name the property was taxed died five (5) days prior to the date of filing the affidavit and return of service.

2. After the county has served the notice under Section 7279 and after the ninety (90) day period of redemption has passed before the county has taken a tax deed, may they in their discretion sell the property involved in such a notice to the true owner for the total amount of taxes, interest, penalties and costs charged against said real estate regardless of the fact that a prior bid in an equal amount has already been entered by an independent bidder and that said independent bidder is prepared to raise his bid.

As to your first question, we set out Section 7279 of the 1939 Code of Iowa:

"*Notice of expiration of right of redemption.* After two years and nine months from the date of sale, or after nine months from the date of a sale made under the provisions of section 7255, the holder of the certificate of purchase may cause to be served upon the person in possession of such real estate, and also upon the person in whose name the same is taxed, if such person resides in the county where the land is situated, in the manner provided for the service of original notices, a notice signed by him, his agent, or attorney, stating the date of sale, the description of the property sold, the name of the purchaser, and that the right of redemption will expire and a deed for the land be made unless redemption is made within ninety days from the completed service thereof. When said notice is given by a county as a holder of a certificate of purchase the notice shall be signed by the county auditor. Service of such notice shall also be made by registered mail on any mortgagee, or his assignee, of record, whether resident or nonresident of the county, if his address is disclosed by the recorded instrument or by a certificate showing the address of the mortgagee or assignee duly filed with the recorder, or the state of Iowa in case of an old-age assistance lien by service upon the superintendent of the division of old-age assistance."

No statutory provision is made for service upon any other person or persons if when an attempt is made to serve notice, the person in whose name the property is taxed is deceased. The statutory requirement for notice thereon ceases to be effective. See *Gray vs. Morin*, 218 Iowa 540, and other cases cited therein. There being no one upon whom notice could be served, an affidavit of service setting forth such facts and filed with the county treasurer would eliminate the necessity of notice.

As to your second question, it should be noted that the real purpose of a tax sale is to coerce the payment of the taxes. The public bidder statute was enacted to further this purpose. In this connection, Section 10260.4 provides as follows:

"*Title under tax deed—sale—apportionment of proceeds.* When the county acquires title to real estate by virtue of a tax deed such real estate shall be controlled, managed and sold by the board of supervisors as provided in this chapter, except that any sale thereof shall be for cash and for a sum not less than the total amount stated in the tax sale certificate including all indorse-

ments of subsequent general taxes, interests and costs, without the written approval of a majoriy of all the tax levying and tax certifying bodies having any interest in said general taxes. All money received from said real estate either as rent or as proceeds from the sale thereof shall, after payment of any general taxes which have accrued against said real estate since said tax sale and after payment of insurance premiums on any buildings located on said real estate and after expenditures made for the actual and necessary repairs and upkeep of said real estate, be apportioned to the tax levying and certifying bodies in proportion to their interests in the taxes for which said real estate was sold." All of which further indicates that the real purpose of these various statutes is to enable the county to collect the total amount of the taxes due.

Section 10260.1 provides for the management of properties acquired by a county and other governmental bodies in the following manner:

"*Management.* When the title to real estate becomes vested in the state, or in a county or municipality under this chapter, or by conveyance under the statutes relating to taxation, the executive council, board of supervisors or other governing body, as the case may be, shall manage, control, protect by insurance, lease or sell said real estate on such terms, conditions, or security as said governing body may deem best."

It is to be noted that there is no requirement in this statute that the property be sold to the highest bidder. The wording of the statute indicates that the board of supervisors has broad powers in disposing of the property, provided, however, it meets the requirements of Section 10260.4 in connection with property acquired under the public bidder act.

In the instant case, the county will be made whole by accepting the bid of either of the two bidders. It is our opinion that so long as the board of supervisors acts in conformity to the requirements of Section 10260.4, it may use its discretion in selling property acquired under the public bidder statute.

SCALES: RAILROAD SCALES: NO AUTHORITY FOR AGRICULTURE DEPARTMENT TO INSPECT: SERVICE RENDERED NOT "COMMODITY": The department of agriculture has no authority to inspect and charge a fee for the inspection of railroad scales used exclusively for determining the amount of freight to be charged, as the service provided by the scales is not a "commodity" within the meaning of §3266, C., '39.

February 11, 1941. *Department of Agriculture:* Your letter of January 22, 1941, in which you ask our opinion on the following matter, is herewith acknowledged:

"Section 3266, 1939 Code of Iowa, authorizes the Department of Agriculture to make an inspection of all weights and measures wherever the same are kept for use in connection with the sale of any commodity sold by weight or measurement thereof.

"It has always been the contention of the Department that the heavy scales owned by the railroads must, according to law, be inspected by this department and the legal fees collected therefor as set out in Section 3267 but the railroads claim that these scales are used only for the purpose of determining the amount of freight to be charged the shipper.

"We would therefore like an opinion regarding the legality of a claim for the exemption of the inspection fee for these railroad companies."

For the purpose of this opinion, we quote Section 3266 of the 1939 Code of Iowa, as follows:

"*Duty to inspect.* The department shall make an inspection of all weights and measures wherever the same are kept for use in connection with the sale of any commodity sold by weight or measurement, or where the price to be paid for producing any commodity is based upon the weight or measurement

thereof; and when complaint is made to the department that any false or incorrect weights or measures are being made under said conditions, said department shall have the same inspected."

It will be observed that the only part of the quoted section which might be applicable is the requirement that "The department shall make an inspection of all weights and measures wherever the same are kept for use in connection with the sale of any commodity sold by weight or measurement, * * *". It appears that if anything is sold over the scales in question it is a service provided to a shipper and it follows that if the statute is to apply to such scales, this "service" must be construed to be a "commodity". Funk & Wagnalls Standard Dictionary defines a commodity to be:

"A moveable article of value: something bought and sold."

It has also been held:

"In the popular and received import of the word, a 'commodity' is a tangible article, and the service or labor of transmitting a telegram is not a 'commodity' within the meaning of Laws 1899, p. 1514, c. 690, providing for the prevention of monopolies in the manufacture, production, and sale of commodities, etc." *In re Jackson*, 107 N. Y. Supp. 799.

It appears, therefore, that the service provided is not a commodity in the usual sense of the word, and it is probable that the legislature did not intend this statute to apply to a service of this kind. With this in mind, it follows that the statutory inspection requirement does not apply to the railroad scales in question.

It is our opinion that the Department of Agriculture has no authority to inspect and charge an inspection fee for the inspection of railroad scales used exclusively for the purpose of determining the amount of freight to be charged and the claim for exemption from such inspection fee is entirely proper.

TAXATION: TAXES SUSPENDED TO OLD-AGE ASSISTANCE RECIPIENT: PAYMENT BY SUBSEQUENT OWNER: One who owns property upon which the taxes have previously been suspended and who is not a recipient of old-age assistance must pay the full amount of the taxes suspended, without penalty, plus six percent interest per annum from the date of suspension.

February 12, 1941. *Mr. E. W. Ruppelt, County Attorney, Grundy Center, Iowa:* This will acknowledge receipt of your recent letter in which you ask for an opinion on the following state of facts:

"A party, not a recipient of Old Age Assistance, owns property upon which the Board of Supervisors suspended the taxes some years ago. The owner now desires to pay the taxes for the years during which they were suspended. I should like your opinion as to whether the owner should pay the tax (1) without penalty or interest, (2) with penalty and interest, or (3) with accrued interest."

Section 6950.1 provides for suspension of taxes as mentioned in the above statement of facts. Section 6952 is as follows:

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

suspension, except that no interest on taxes shall be charged against the property or estate of a person receiving or having received monthly or quarterly payments of old-age assistance, and shall be enforceable against the property or part thereof which does not pass to such spouse or minor child."

There is no other provision dealing with the payment of the taxes suspended by the board of supervisors under authority given them by Section 6950.1.

To hold that the owner must pay the tax, plus penalty and interest, would be to put the owner of the property in a worse position than his grantee or devisee. His grantee or devisee is required only to pay the tax, plus six per cent (6%) interest per annum on the taxes from the date of such suspension. To hold the owner liable for the penalty would undoubtedly lead to the practice of making sales to avoid the penalty and then a resale to the owner. To hold the owner liable only for the taxes and not for the interest would permit an owner contemplating the sale to pay the taxes himself and to complete the sale later, and thereby defeat the provisions of Section 6952 pertaining to a sale.

It is our opinion that the owner should be required to pay the full amount of the taxes suspended, plus six per cent (6%) interest per annum from the date of suspension.

COUNTIES: PUBLIC HOSPITAL CONSTRUCTION: CONTRACTS MADE IN THE NAME OF HOSPITAL TRUSTEES: Contracts made in connection with the construction of the new Polk county hospital building should be made in the name of the trustees of Broadlawns Polk County Public Hospital and not in the name of Polk county.

February 17, 1941. *Mr. Francis J. Kuble, County Attorney, Des Moines, Iowa:* This will acknowledge receipt of your letter of February 10th, 1941, in which you ask for an opinion on the following matter:

Should the name of Polk County or the name of the Trustees of Broadlawns Polk County Public Hospital be carried on the contracts to be made in connection with the construction of the new hospital building.

Section 5359 provides in part 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.

"2. Cause plans and specifications to be made and adopted for all hospital buildings and equipment, and advertise for bids, as required by law for other county buildings, before making any contract for the construction of any such building or the purchase of such equipment.

"* * *"

Subsection 1 of Section 5359 gives the board of hospital trustees the power to purchase, condemn or lease a site for a public hospital and provide and equip suitable hospital buildings. It would seem to necessarily follow that the board of hospital trustees would have the power and the duty to make the contracts in connection with the above mentioned powers. Subsection 2 provides that the hospital trustees shall follow a certain procedure "before making any contract for the construction of any such building or the purchase of such equipment" and it is the fair and reasonable interpretation of said section that the board of hospital trustees would sign the contracts mentioned in subsections 1 and 2.

It is our opinion that the contracts to be made in connection with the construction of the new hospital building should be made in the name of the Trustees of Broadlawns Polk County Public Hospital and not in the name of Polk County.

LIENS: CARE OF PERSONS IN COUNTY AND STATE INSTITUTIONS: Section 3604.1, C., '39, creates a lien in favor of the county and against the real estate of a person or the spouse of a person for assistance furnished under chapter 178. It does create a lien for treatment of an insane or idiotic person in a county home or asylum or in a private hospital or sanatorium, but does not create a lien for the treatment of inebriates at state hospitals or elsewhere, or for assistance to tubercular patients at Oakdale Sanatorium, students at the Vinton School for the Blind, the Council Bluffs School for the Deaf and Dumb, or inmates of the Toledo Juvenile Home.

February 17, 1941. *The Honorable Chet B. Akers, Auditor of State:* This is in answer to your letter of the 13th inst., wherein you ask the opinion of this department relative to the following legal question:

Section 3604.1, Code of Iowa, 1939 provides:

"Any assistance furnished under this chapter shall be and constitute a lien on any real estate owned by the person committed to such institution or owned by either the husband or the wife of such person."

This section is found in Chapter 178, Code of Iowa, 1939. It was enacted by the 48th General Assembly, House File 540, and is designated in the Acts of the 48th General Assembly as Chapter 98.

Your question is as to whether or not the above quoted section creates a lien on the real estate owned by the person committed or owned by either the husband or wife of such person, for the expense incident to care and treatment in the following enumerated institutions:

Hospitals for the Insane.
Insane kept in county homes or county asylums.
Idiotic and Inebriates.
Epileptics at Woodward.
Epileptics at any institution.
Feeble-minded at Woodward.
Feeble-minded at Glenwood.
Oakdale Sanatorium.
School for the Blind, Vinton.
School for the Deaf and Dumb, Council Bluffs.
Inmates in the Juvenile Home, Toledo.

On November 13, 1940, this office rendered an opinion to the county attorney of Delaware County, wherein we held that the above quoted section created a lien in favor of the county for the expense incident to the care and treatment of persons in the State Hospitals for the Insane, Feeble-minded at Glenwood and Feeble-minded at Woodward. This opinion, therefore, disposes of three classes of patients referred to in your letter.

This leaves unanswered your question as to insane at county homes or county asylums, idiotic and inebriates, epileptics at Woodward, epileptics at any institution, patients at Oakdale Sanatorium, students at the School for the Blind, students at the School for the Deaf and Dumb, and inmates of the Juvenile Home at Toledo.

We take up first a discussion of whether or not this section applies to insane in county homes or county asylums, wherein are treated or confined insane or idiotic persons. We are of the opinion that as to this class of patients the above section creates a lien in favor of the county and against the owner of real estate therein enumerated. We reach this conclusion in view of Section 3598, which provides:

"The estates of insane or idiotic persons who may be treated or confined in any county asylum or home, or in any private hospital or sanatorium, and the estates of persons legally bound for their support, shall be liable to the county for the reasonable cost of such support."

This section is now and has been for a number of years a part of Chapter 178. Therefore, we hold that when an insane or idiotic person is treated or confined in any county asylum or home, or in a private hospital or sanatorium, assistance is furnished such persons under Chapter 178. It follows, therefore, that a lien is created against the real estate of the person confined or against his or her spouse, under the express provisions of Section 3604.1.

We next consider as to whether such lien is created against the real estate of an idiotic person and an inebriate. As to an idiotic person we believe this is covered by our opinion of November 13, above referred to, and we need, in our opinion, give this matter no further consideration. We call your attention again, however, to section 3595, Code of Iowa, 1935, which is a part of Chapter 178. Therein it is provided:

"Insane persons and persons legally liable for their support shall remain liable for the support of such insane. Persons legally liable for the support of an insane or idiotic person shall include the spouse, father, mother, and adult children of such insane or idiotic person, * * *."

It is quite clear, therefore, that Section 3604.1, creates a lien against the real estate of an idiotic person and his or her spouse, as provided in said Section 3604.1.

Under the laws of our state, inebriates are treated in the state hospitals for the insane, under the provisions of Chapter 173. The following two pertinent sections are found in this chapter. Section 3478 provides:

"Persons addicted to the excessive use of intoxicating liquor, * * * may be committed by the commissioners of insanity of each county to such institutions as the board of control may designate."

Section 3479 provides:

"All statutes governing the commitment, custody, treatment, and *maintenance* of the insane shall, so far as applicable, govern the commitment, custody, treatment, and maintenance of those addicted to the excessive use of such drugs and intoxicating liquors." (Italics ours.)

It is our opinion that notwithstanding the two sections last above set out, Section 3604.1 does not create a lien for assistance furnished inebriates. Such assistance is furnished under and by virtue of Chapter 173. Section 3604.1 specifically provides: "Any assistance furnished under this chapter (Chapter 178) * * *". It, therefore, becomes pertinent to inquire as to whether assistance furnished inebriates is assistance furnished under Chapter 178. We think not. Such assistance, we hold, is furnished under Chapter 173 and therefore, manifestly, Section 3604.1 is not applicable.

We must bear in mind that statutes creating liens must be strictly construed. Liberal construction is not permitted. The following cases support this contention:

Lyster v. Munck's Estate, 54 Mich. 325; 20 N. W. 83.

This decision is to the effect that courts cannot create liens, but can only declare and enforce them.

In Frost v. Atwood, 73 Mich. 67, 41 N. W. 96, it was held, in effect, that liens can only be created by agreement, or by some fixed rule of law, and it is not one of the functions of courts to create them.

In Howard v. Burke, 176 Iowa 123; 157 N. W. 744, it was held, in effect, that where the legislature intends to create a lien subject to prior liens of record, the statement is explicit to that effect, and when the lien is not to be subject to prior liens of record there is no provision made therefor.

We think it is fundamental that liens cannot be created by implication. Section 3604.1, Code of Iowa, 1939, was passed by the 48th General Assembly and was known as House File 540. The title thereto reads in part as follows:

"An Act to amend Chapter 178, code of Iowa, 1935, and to amend section 3595 * * * relating to persons legally liable for the support of insane or idiotic persons; providing for the collection of sums advanced by the county for their support, and the power of the board of supervisors to compromise said liability; and creating a lien on real estate owned by any person receiving assistance under said chapter * * *."

We, therefore, think it is clear that Section 3604.1 applies only to assistance specifically furnished under the provisions of Chapter 178.

We reach the conclusion, therefore, that said Section 3604.1 does not create a lien against the real estate of inebriates treated at the state hospitals for the insane or elsewhere at public expense.

We next consider the question of whether the lien under Section 3604.1 applies for assistance furnished tubercular patients at Oakdale Sanatorium, students at the School for the Blind, Vinton, students at the School for the Deaf and Dumb, Council Bluffs, and inmates of the juvenile home, Toledo.

It follows, from what we have hereinabove said, that this statute does not apply to such assistance, as it is furnished under other chapters than Chapter 178. If such assistance is authorized by other chapters, it logically follows that it is not furnished under Chapter 178. The fact that such other chapters may refer to Chapter 178, insofar as procedure and collection of the amounts due for assistance, etc., does not, in our opinion, justify us in coming to the conclusion that the assistance is furnished under Chapter 178. These sections have reference to various provisions of Chapter 178 for convenience only and do not have the effect of creating a lien for assistance furnished under chapters other than 178.

We have set out above the title to House File 540, creating the lien set out in Section 3604.1. A reading of this title will, we think, make it clear indeed that the legislature never intended to create a lien for assistance furnished under other chapters of the code.

COUNTIES: SUPERVISORS' RESOLUTION DISMISSING MARRIED WOMEN EMPLOYEES: INAPPLICABLE TO CERTAIN OFFICES: When a board of supervisors has passed a resolution terminating the employment of all women employees of the county whose husbands have steady employment, it cannot make the resolution effective as to employees in the offices of county auditor, treasurer, recorder, sheriff, county attorney, clerk of the district court, coroner, and county superintendent of schools, as only the appointing officer has the power to revoke the appointment of any such employee.

February 24, 1941. *Mr. John D. Moon, County Attorney, Ottumwa, Iowa:* This will acknowledge receipt of your recent letter in which you ask for an opinion in connection with the following statement of facts:

The Board of Supervisors some time ago passed a resolution, the pertinent part of which is as follows:

"BE IT FURTHER RESOLVED by the Board of Supervisors of Wapello County, Iowa, that the services of all married women employed by Wapello County, Iowa, whose husbands have steady employment shall be terminated as of April 15, 1939."

The Board has resolved to make said resolution effective as of March 1, 1941.

Does the Board of Supervisors have the power and authority to make this resolution effective as to the employees working in the offices of County Auditor, Treasurer, Recorder, Sheriff, County Attorney, Clerk of the District Court, Coroner and County Superintendent of Schools.

For the purpose of this opinion, we quote the following Code sections:

"5238 *Appointment.* Each county auditor, treasurer, recorder, sheriff, county attorney, clerk of the district court, coroner, and county superintendent of schools, may, with the approval of the board of supervisors, appoint one or more deputies or assistants, respectively, not holding a county office, for whose acts he shall be responsible. The number of deputies, assistants, and clerks for each office shall be determined by the board of supervisors, and such number together with the approval of each appointment shall be by resolution made of record in the proceedings of such board.

"5239 *Certificate of appointment.* When any such appointment has been approved by the board of supervisors, the officer making such appointment shall issue in writing a certificate of such appointment, and file the same in the office of the auditor where it shall be kept.

"5240 *Revocation of appointment.* Any certificate of appointment may be revoked in writing at any time by the officer making the appointment, which revocation shall be filed and kept in the office of the auditor."

In reading the above Code sections, it appears that the various elected county officers may appoint their deputies, assistants and clerks with the approval of the Board of Supervisors. The Board of Supervisors determines the number of deputies, assistants and clerks and approves the various appointments as made by the county officers mentioned in Section 5238. Section 5239 provides for the issuance of a certificate of appointment by the officer making the appointment after the Board of Supervisors has approved the appointment. Section 5240 provides for the revocation of the appointment "* * * *by the officer making the appointment* * * *". From the above it is clear that the power to appoint the deputies, assistants and clerks in the offices mentioned rests in the hands of the elective officer in each particular office, subject to the approval of the Board of Supervisors. It is equally clear that the appointing officer is the only person with power to revoke any appointment made in his office.

To hold that this resolution is effective as to the above named employees would be to say that the Board of Supervisors has the power to revoke the appointments of the employees in the various county offices mentioned in Section 5238. Such a conclusion is contrary to the provisions of Section 5240 and it is our opinion that only the appointing officer has the power to revoke the appointment of any employee in his office.

COUNTIES: TAX LEVIES FOR HOSPITAL WARD IN COUNTY HOME: LEGALITY: The board of supervisors of a county has the power to establish wards in any public or private hospital, but not to establish a hospital ward in the county home, and therefore tax levies for such ward in the county home are not legal.

February 25, 1941. *Mr. John R. Cronin, County Attorney, New Hampton, Iowa:* This will acknowledge receipt of your recent letter, in which you ask for an opinion on the following question:

For the past three years the Board of Supervisors in each year made a levy of one-eighth mill for the purpose of maintaining a hospital ward at the county home. The levy was made under section 5367 of the Code providing for county

wards in public or private hospitals. The question now arises as to whether or not the levies were legal.

For the purpose of this opinion, we quote section 5367 of the Code:

"County wards in public or private hospitals—levy. The board of supervisors of any county in which no county hospital has been established may, in its discretion, establish one or more wards in any public or private hospital situated in the county for the use of the county under such regulations as may be agreed upon with the board having such hospital in charge. For such purpose the board of supervisors may levy a tax not to exceed one-eighth mill."

We must keep in mind in determining the powers of the Board of Supervisors the general rule that the Board of Supervisors has only such powers as are expressly given by statute or those which may reasonably be inferred from the express statutory grant.

Turning again to the above quoted section of the Code, we find that the Board of Supervisors of any county in which no county hospital has been established may, in its discretion establish one or more wards in any *public or private hospital* * * *. It is clear that this statute does not expressly give the Board of Supervisors the power to establish such a ward in the county home and it is our opinion that such power may not reasonably be inferred from the express grant made in Section 5367. It necessarily follows that the tax levies made under Section 5367 as above outlined are not legal.

BEER AND MALT LIQUORS: REVOCATION OF PERMIT: VIOLATION OF BEER STATUTE: If a class "B" beer permittee is found guilty of a violation of section 1921.126, C., '39, a revocation of his permit is optional rather than mandatory.

February 26, 1941. *Mr. Warren J. Rees, County Attorney, Anamosa, Iowa:* This is in answer to your letter of the 12th inst., wherein you ask the opinion of this department relative to the following legal question. You state:

"Section 1921.126 provides that a violation of a provision of the section shall be grounds for revocation of the permit. Section 1921.125 provides that Class B permittees who shall be guilty of the violation of Chapter 93.2, as amended, shall be subject to the mandatory revocation of the permit. Is the revocation of the permit mandatory upon conviction of a Class B permittee for the violation of Section 1921.126?"

Section 1921.125, Code of Iowa, 1939, provides:

"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, and he shall not again be allowed to secure a permit for the distribution or sale of beer nor shall he be an employee of any person engaged in the manufacture, distribution or sale of beer."

Section 1921.126, Code of Iowa, 1939, provides:

"No liquor for beverage purposes having an alcoholic content greater than four per cent by weight, shall be used, or kept for any purpose in the place of business of class 'B' permittees, or on the premises of such class 'B' permittees, at any time. A violation of any provision of this section shall be grounds for revocation of the permit. This section shall not apply in any manner or in any way, to drug stores regularly and continuously employing a

registered pharmacist, from having alcohol in stock for medicinal and compounding purposes."

You will note that Section 1921.125 provides: "If a permit holder under the provisions of this chapter, is convicted of a felony * * * or who shall be guilty of the violation of this chapter, as amended, * * * his permit shall be revoked by the authorities issuing same, * * *". Section 1921.126 provides: "* * * A violation of any provision of this section shall be grounds for revocation of the permit. * * * "

The question then is as to whether a violation of Section 1921.126 makes the revocation of a Class "B" permit mandatory or optional.

We are of the opinion that in order to give any effect to the provision with reference to revocation in Section 1921.126, we are compelled to hold that this provision is not mandatory. It is true that Section 1921.125 provides that the permit shall be revoked when the Class "B" permittee shall be found guilty of violation of Chapter 93.2. And, of course, it is also true that Section 1921.-126 is a part of Chapter 93.2. However, we must assume that the Legislature had some purpose in providing in Section 1921.126 that in the event of a violation of said section, the permit could be revoked. It is significant that the provision with reference to revocation in Section 1921.126 is couched in such terms that it would be illogical to hold that the revocation was mandatory. Therefore, we incline to the view that Section 1921.126 is an exception to the mandatory provisions as to revocation contained in Section 1921.125. Were we to hold that the revocation for a violation of the provisions of Section 1921.-126 was mandatory, the following provision in said section would become utterly meaningless: "A violation of any provision of this section shall be grounds for revocation of the permit."

We reach the conclusion, therefore, that if a Class "B" permittee is found guilty under Section 1921.126, a revocation of his permit is optional.

POOR FUND: MEDICAL SERVICES TO RELIEF CLIENTS: PAYMENT OF OPTOMETRIST FROM POOR FUND: The authority of a county to expend relief funds for medical services applies only to services rendered by a doctor of medicine. Because an optometrist is not a medical doctor, he cannot be paid from the county poor fund for services to relief clients.

February 27, 1941. *Mr. John E. Miller, County Attorney, Albia, Iowa:* This will acknowledge receipt of your letter of February 13, wherein you ask our opinion on the following question:

"The question has arisen in this county as to whether or not the Board of Social Welfare and County are authorized to expend relief funds in securing eye examinations and glasses for persons otherwise entitled to relief, and in particular, whether or not an optometrist could be employed for this purpose. In other words, the authority of the County to send relief clients to a regularly licensed optometrist has been questioned."

For the purpose of this opinion, we quote in part from the following sections:

"3828.099 *Form of relief—condition.* The relief may be either in the form of food, rent or clothing, fuel and lights, *medical attendance,* or in money, and shall not exceed two dollars per week for each person for whom relief is thus furnished, exclusive of medical attendance. * * * "

"3828.100 *Medical services.* When medical services are rendered by order of the trustees * * *."

"3828.106 *Allowance by board.* The board of supervisors may examine

into all claims, including claims for medical attendance, allowed by the township trustees for the support of the poor, * * *."

From the wording of the above quoted sections of the code, it is apparent that one form of relief can be for medical services. It is our opinion that medical services mean services rendered by a doctor of medicine. Obviously, an optometrist is not a medical doctor. We have previously held that because a chiropractor is not a medical doctor, he cannot be paid from the poor fund. The same reasoning applies in the instant case and consequently, it is our opinion that an optometrist cannot be paid from the poor fund.

BURIAL EXPENSES: OLD-AGE ASSISTANCE RECIPIENT ADMITTED TO COUNTY FARM: NO NOTICE TO SOCIAL WELFARE BOARD: COUNTY RESPONSIBILITY FOR BURIAL: Where the county board of social welfare was not notified of the admission of an old-age assistance recipient to the county farm and as a result the inmate continued to receive old-age assistance until his death, the county must assume financial responsibility for the burial of the inmate.

March 6, 1941. *Mr. Carl V. Burbridge, County Attorney, Logan, Iowa:* This will acknowledge receipt of your letter of February 27 wherein you ask our opinion on the following question:

"A long time recipient of old age assistance in Iowa was admitted to the Harrison County Farm on July 5, 1940. The County Board of Social Welfare was not notified of this admission to the County Farm and as a result, this individual continued to receive old age assistance while an inmate of this institution, receiving warrants on Aug. 1 and Sept. 1 of 1940. This recipient of old age assistance died on September 14, 1940, while an inmate of the County Home, and with her certificate of assistance in good standing at the time of her death.

"The question is, with whom does financial responsibility of burial rest, Harrison County, through the Harrison County Poor Fund or the State Department of Social Welfare through funds made available to them by the Social Security legislation?"

For the purpose of this opinion, we quote from Section 3828.021:

"*Funeral expenses.* On the death of any person to whom a certificate of old-age assistance has been issued and has not been canceled, such reasonable funeral expenses shall be paid from the old-age assistance fund to such person as the county board directs, in an amount of not to exceed one hundred dollars; provided: * * *"

We also quote from Section 3828.008:

"*To whom granted.* Old-age assistance may be granted and paid only to a person who at the time of application and during the continuance of a certificate of assistance:

"* * *

"9. Is not, because of physical or mental condition, in need of continued institutional care, and such care is reasonably available to him in one of the institutions provided by the United States, the state of Iowa, or one of its political subdivisions."

From the facts as stated in your letter, it is apparent that the certificate of assistance issued to the recipient had not been cancelled at the time of his death. However, under subsection 9 of section 3828.008, it is equally apparent that the recipient was ineligible to receive old age assistance by reason of his being an inmate of the county home.

It is our opinion that eligibility section 3828.008 is controlling and that as

a result, Harrison County should assume financial responsibility for the burial. The mere fact that a bookkeeping transaction of cancellation from the old age assistance rolls had not been completed, is not, in our opinion, controlling. It is the duty of the county to notify the State Board of Social Welfare at the time such recipient was placed in the county home and it is our opinion that the county cannot shift financial responsibility for the burial by failing to notify the State Department of Social Welfare.

TAXATION: EXEMPTION FROM TAXES FOR CURRENT YEAR: Under §6950, C., '39, which provides for the suspension, cancellation, and remission of taxes for the current year, it would not be proper for a board of supervisors to order in 1940 the remission of 1938 taxes payable in 1939.

March 11, 1941. *Mr. Francis J. Kuble, County Attorney, Des Moines, Iowa:* We wish to acknowledge receipt of your recent letter in which you ask for an opinion on the following matter:

It appears that a certain party here in Des Moines, who has been exempted under Section 6950 for many years, in the fall of 1939 requested from the County Auditor's Office a statement of her taxes for the year 1938, for the purpose of proceeding to the City Council so that she could get her yearly approval for the remission. At that time she was told that the books were not in such shape that they could give her this statement. (The difficulty arose from litigation involving the 1937 assessment. A decision of the Supreme Court of Iowa made it necessary for the City Council to reconvene as a Board of Review to consider various matters arising from the 1937 assessment.)

She then went to the City Solicitor and went over the matter with him, and she claims that she was given an indication that it would not be possible for her to get the statement and that he knew that because of the assessment condition, but the matter could be taken care of for her.

With all this condition existing, it wasn't until the year 1940 that the City Council approved her application for remission for the taxes for the year 1938, payable in 1939.

The question in this matter is whether or not the Board of Supervisors has the right now or whether it had the right in 1940 to order the remission of the 1938 taxes, payable in 1939, in view of the provision of the statute wherein it states that it is to be done for the current year.

As a matter of convenience, we set out the pertinent part of Section 6950, as follows:

"* * * The board of supervisors may thereupon order the county treasurer to suspend the collection of the taxes assessed against such petitioner, his polls or estate, or both, for the current year, or such board may cancel and remit said taxes * * *"

It is clear from the above language that the taxes may be suspended only for the current year and it is a reasonable interpretation that the provision in the same Code section relating to the power to cancel and remit applies to the same period in the absence of any language to the contrary.

We should note the following language in Section 6950:

"* * * or such board may cancel and remit *said taxes* * * *"

The words "said taxes" undoubtedly refer to the taxes mentioned previously in the section and the previous reference is as follows:

"* * * The board of supervisors may thereupon order the county treasurer to suspend the collection of the taxes assessed against such petitioner, his polls or estate, or both, *for the current year.* * * *"

It is our opinion that the reasonable interpretation of Section 6950 is that it

provides for the suspension of taxes for the current year and for the cancellation and remission of taxes for the current year. It necessarily follows that it would not be proper for the Board of Supervisors to order in 1940, the remission of the 1938 taxes, payable in 1939.

WEAPONS: PERMIT TO SELL CONCEALED WEAPONS: SALE BY INDIVIDUAL: Section 12951, C., '39, was not intended to be limited to dealers engaged in the business of selling weapons. Therefore, an individual who owns a revolver and sells it must obtain a permit to sell weapons which may be concealed on the person and must report the sale.

March 18, 1941. *Mr. E. B. Shaw, County Attorney, West Union, Iowa:* We wish to acknowledge receipt of your recent letter in which you ask for an opinion on the following statement of facts:

Do Code Sections 12951 to 12954 apply to a situation where an individual owning a revolver sells it to another individual, the vendor not being engaged in the business of selling, keeping for sale or exchange of revolvers, pistols and similar weapons.

For the purpose of this opinion, we quote the following Code sections:

"12951 *Dealer's permit to sell.* It shall be unlawful for any person, firm, association, or corporation to engage in the business of selling, keeping for sale, exchange, or to give away to any person within the state, any revolver, pistol, pocket billy, or other weapons of a like character which can be concealed on the person, without first securing a permit from the proper officials having authority to issue such permit.

"12952 *Record of permits to sell.* The chief of police, sheriff, or mayor shall have authority to issue permits to sell and shall keep a correct list of all persons to whom permits to sell are issued, together with the number of such permit and the date each is revoked, and furnish the county recorder a copy of all such permits issued and revocations made.

"12953 *Report and record of sales.* Every person selling revolvers, pistols, pocket billies, and other weapons of a like character which can be concealed on the person, whether such person is a retail dealer, pawnbroker, or otherwise, shall report within twenty-four hours to the county recorder the sale of any revolver, pistol, or pocket billy and in such report shall set forth the time of selling, age, occupation, place of employment or business, name and residence of such purchaser of said weapon or weapons, together with the number, make, and other marks of identification of such weapon or weapons, and the recorder on receipt of such information shall make a permanent record of the same in a book specially kept for that purpose."

In determining the legislative intent in connection with the above sections, we turn to the title of the Act as it appears in the Session Laws of the 35th General Assembly:

"An Act to prohibit the sale, keeping for sale, loaning, giving away, or carrying of certain dangerous weapons, to prevent the carrying of concealed weapons, except in specified cases when a permit is issued therefor;* * *"

From this language it would seem that the legislature intended to provide strict control of the sale, loaning or giving away of concealed weapons and the above mentioned statutes should be so interpreted to give effect to the legislative intent if reasonably possible to do so. With this thought in mind it would seem that the legislature intended that it would be unlawful for any person, firm, association or corporation to sell, to keep for sale, exchange or to give away any concealed weapon without first securing a permit.

It is our opinion that the legislature intended by the enactment of Section 12951 to cover every transfer of a concealed weapon and that said section was

not intended to be limited to dealers engaged in the business of selling concealed weapons. Therefore, it is our conclusion that an individual owning but one revolver selling it to another must obtain the permit provided for in Section 12951 and it necessarily follows that he must make the report mentioned in Section 12953.

COUNTIES: DISCOVERY AND REGISTRY OF SOLDIERS' GRAVES: USE OF COUNTY FUNDS NOT AUTHORIZED: A county project to discover and register graves of deceased persons who have served in the military and naval forces may not be financed from the soldiers and sailors relief fund, nor can the cost be appropriated from the general fund as "care and maintenance" of graves, nor can it be financed from any other fund.

March 19, 1941. *Mr. John S. Redd, County Attorney, Sidney, Iowa:* I wish to acknowledge receipt of your recent letter in which you ask for an opinion on the following questions:

"1. Can the soldiers and sailors relief fund collected under Section 3828.051, Code 1939, be expended by the Soldiers Relief Commission with approval of the Board of Supervisors to finance a project to discover and register graves of deceased persons who have served in the military and naval forces, said registry being conducted by a member of the Soldiers Relief Commission, the principal expense being payment for services in discovering and registering the graves in the various cemeteries.

"2. Can such a project be financed under the provisions of Section 3828.065, Code 1939?

"3. Can such a project be financed by the County from any other fund?"

From reading Chapter 189.2 entitled "Relief for Soldiers, Sailors, and Marines" it is clear that the primary object of the legislature enacting said chapter was to provide relief and to meet burial expenses of indigent soldiers, sailors, marines and nurses and members of their families as set out in Section 3828.051. Section 3828.064 provides that the funds raised under this chapter may be used, with a certain limitation, to purchase metal markers for the grave of each honorably discharged soldier, sailor, marine or nurse of the United States who served in the military or naval forces of the United States during any war, who is buried within the limits of said township or municipality. There is no other mention in the chapter that the funds raised by the tax provided for in Section 3828.051 may be used for any other purpose than relief or burial expenses.

It is our opinion that it was not the intention of the legislature that the funds raised under the provision of Section 3828.051 should be used for any other purpose than those specifically mentioned in said chapter. It necessarily follows that it would not be proper to use these funds in connection with the project mentioned in your first question.

In connection with your second question, Code Section 3828.065 provides that the Board of Supervisors may appropriate out of the general fund a sum sufficient to pay for the care and maintenance of the lots on which any deceased soldier or sailor of the United States is buried in any and all cases in which provision for such care is not otherwise made.

It is our opinion that the cost of financing a project to discover and register graves cannot fairly be said to come under the provisions for "care and maintenance".

As to your third question as to whether this project could be financed by the county from any other fund, it is our opinion that inasmuch as there is no

Code section which specifically provides for the financing of such a project by the county and that there is no Code section from which it may be fairly implied that the county can finance such a project, it would be improper for the county to expend any of its funds in financing the project you have mentioned.

LEGAL SETTLEMENT: RELIEF GIVEN AFTER ENTERING COUNTY: NOTICE TO DEPART UNNECESSARY: A person who is furnished county relief at any period during the year after entering the county cannot obtain a legal settlement in the county even though no notice to depart is served on him.

March 24, 1941. *Mr. John C. Owen, County Attorney, Washington, Iowa:* This will acknowledge receipt of your letter of March 4 wherein you ask an opinion on the following questions:

"I would like the opinion of the department on the following facts. X comes from Nebraska and settles in Washington County and stays here one year without notice to depart. But during that one year he receives, off and on, some relief from the county in the form of rent and some groceries. Would this relief which is furnished by Washington County constitute "public funds" under section 3828.088 (3), so that a notice to depart would be unnecessary and a legal settlement be prevented because of such relief?

"Now, suppose X comes from another Iowa county which we will call "A County" — and "A County" refuses to pay for X's support. Washington County instead of taking it to court and deciding where the settlement is, merely goes ahead and furnishes relief to X for a year without notice to depart. Now again at first glance this relief would seem to be "public funds" so that X should not in this year acquire legal settlement. It is also obvious that where Washington County does not decide the question in court upon notice of "A County's" refusal to pay for relief that Washington County has no right of action against "A County" for the relief furnished. Does X acquire legal settlement in Washington County under such circumstances, where Washington County could have had the matter decided in Court but did not?"

We quote in part from Section 3828.088:

"Settlement—how acquired. A legal settlement in this state may be acquired as follows:

"* * *

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

"* * *"

The Supreme Court of Iowa has passed upon your question in the recent case of *Audubon County vs. Vogessor*, 291 N. W. 135. After citing the above quoted section 3828.088, the court stated:

"The finding of the trial court that, though no notice to depart was served on defendants, they did not acquire a settlement in Audubon County because they were being supported by public funds is quite apparently based on the provisions of section 5311, paragraph 3, 1935 Code (Section 3828.088, paragraph 3, 1939 Code).

"Statutes preventing the acquisition of a legal settlement by a poor person who is receiving relief are not uncommon in the several states. See 48 C.J. pages 476 and 478. At the time defendants were transported to Audubon County, they were supported by the public funds of Cass County. From January 2, 1935 to the time of the trial, they were receiving work relief and supplemental relief orders from Audubon County, and during this period defendants were sup-

ported by public funds and therefore, could not acquire a settlement in Audubon County and under such circumstances, a warning to depart under sections 5311, 5315, or other sections of chapter 267, 1935 code, was not necessary to prevent the acquisition of a legal settlement in Audubon County."

While the Vogessor case above quoted contained another point of law which might also have determined its outcome, it is our opinion that the Supreme Court would follow the language as set out above. It is our opinion that refusal of another county to accept responsibility for the relief client upon notice is immaterial and that if Washington County in the instant case furnishes relief to the client at any period during the year, he cannot obtain a legal settlement in Washington County. It follows that it is our opinion that in both your questions, the relief client does not have a legal settlement in Washington County and that notice to depart is unnecessary.

POOR FUND: MEDICAL ATTENDANCE: GLASSES, FALSE TEETH, BRACES, ETC. FOR RELIEF CLIENTS: Expenditures for glasses, false teeth, trusses, braces, artificial limbs, and the like can be interpreted as "medical attendance" for relief clients and may be paid from the poor fund.

March 26, 1941. *Mr. Francis J. Kuble, County Attorney, Des Moines, Iowa:* This will acknowledge receipt of your letter of March 20 wherein you refer to our opinion of February 27 directed to Mr. John E. Miller, County Attorney of Monroe County, and wherein we held that the county poor fund could not be used for the payment of an optometrist. You then asked this question:

"In Polk County, and I assume in most of the other counties of the state, we have a good many calls from our poor relief clients asking that we make expenditures for glasses, false teeth, trusses, braces, artificial limbs, and the like. We should like very much to have this matter clarified and secure your opinion as to whether or not our Board of Social Welfare and our Board of Supervisors can purchase such items."

Section 3828.099, 1939 Code of Iowa, reads in part as follows:

"*Form of relief—condition.* The relief may be either in the form of food, rent or clothing, fuel and lights, medical attendance or in money, and shall not exceed two dollars per week for each person for whom relief is thus furnished, exclusive of *medical attendance.* * * *"

It is our opinion that expenditures for glasses, false teeth, trusses, braces, artificial limbs and the like can properly be interpreted as part of "medical attendance" for relief clients, and therefore, expenditures for same may be properly paid from the poor fund.

The opinion to Mr. Miller under date of February 27, 1941 should not be construed to mean that the purchase of glasses is prohibited by law. Rather, it holds that the Board of Supervisors may not legally pay an optometrist for his services as they are not medical services.

SOLDIERS RELIEF: BURIAL EXPENSES OF VETERAN'S WIFE: COUNTY OF HUSBAND'S RESIDENCE LIABLE: The soldiers relief commission of the county in which a world war veteran was living when his wife died while a patient at Oakdale sanatorium is liable for the wife's burial expense.

April 2, 1941. *Mr. Robert N. Johnson, Jr., County Attorney, Fort Madison, Iowa:* We wish to acknowledge receipt of your recent letter in which you ask for an opinion on the following question:

A woman, the wife of a World War veteran, entitled to the relief provisions of Chapter 189.2, entered Oakdale Sanitarium in June of 1936. She remained there until her death on April 12, 1940. This confinement was at the expense of Washington County. The decedent's husband was a resident of Washington County from March 1, 1934 to January 13, 1937, at which time he moved to Lee County and resided there until May 1, 1940. At the time of his wife's death, he was a resident of Lee County. Upon the decedent's death her husband made arrangements with a funeral home at Keota, Keokuk County, Iowa, for her burial. Prior to that time her husband had received soldiers relief in Keokuk County and Washington County.

The question now arises as to whether the Soldiers Relief Commission of Keokuk County, Washington County or Lee County is responsible for the burial expense.

For the purpose of this opinion, we quote the following sections of the 1939 Code:

"3828.061 *Burial—expenses.* The board shall designate some suitable person in each township to cause to be decently interred in a suitable cemetery and not in any cemetery or part thereof used exclusively for the burial of the pauper dead, the body of any honorably discharged soldier, sailor, marine, or nurse of the United States, who served in the military or naval forces of the United States during any war, or his wife, widow, or child, if any such person has died without leaving sufficient means to defray the funeral expenses. The commission shall pay such expenses in a sum not exceeding one hundred dollars in any case.

"3828.063 *Expenses and audit thereof.* The expenses of such burial and headstone shall be paid by the county in which such person died. If such person is a resident of a different county at the time of death, the latter county shall reimburse the county wherein he died for the cost of such burial and headstone. In either case, the board of supervisors of such respective counties shall audit the account and pay the same from the funds provided for in this chapter in such manner as other claims are audited and paid."

The purpose of the legislature in placing the burial expense on the county where the deceased was a resident is undoubtedly to avoid any controversy that might arise as to the legal settlement of the deceased in determining which Soldiers Relief Commission would be liable for the burial expense. Controversy as to which Soldiers Relief Commission should bear the burial expense would be unusual where the matter is to be determined on a basis of residence rather than legal settlement.

The general rule is that the residence of the wife is that of her husband while the usual family relationship is in existence. For the purpose of determining which county's Soldiers Relief Commission is responsible for the burial expense, we see no reason to deviate from the above mentioned rule and it is our opinion that in the case set out in your question, the Soldiers Relief Commission of Lee County is liable for the burial expense.

POOR FUND: SUPPORT OF INSANE PERSONS AT COUNTY FARM: TAX FOR INSANE SUPPORT NOT LEVIED: The county poor fund can be used only for the relief of poor persons and should not be used to pay the expense of keeping insane persons at the county farm. If no tax has been levied for the support of the insane, such support must be charged to the general fund.

April 3, 1941. *Mr. Don Savery, County Attorney, Atlantic, Iowa:* We wish to acknowledge receipt of your letter of March 17th, 1941, in which you ask for an opinion on the following question:

Is it legal to pay out of the county poor fund any money for insane patients kept at the county farm.

It has developed that no levy has been made as under Section 3604, 1939 Code of Iowa, for a county fund for the insane, but this expense has been borne by the county poor fund.

It is the opinion of this office that the poor fund of a county can be used only for the relief of poor persons. Section 3604 provides for a fund for the support of persons adjudged insane as are cared for and supported by the county in the insane ward of the county home or elsewhere outside of any state hospital for the insane.

It is, therefore, our opinion that it is not proper to charge the expense of keeping persons adjudged insane at the county farm to the county poor fund. If there has been no tax levied as provided for in Section 3604, such expenditures must necessarily be charged to the general fund of the county.

LEGAL SETTLEMENT: DELAY OF ABANDONED WIFE IN CHOOSING FORMER SETTLEMENT: TEMPORARY RELIEF NOT CONTROLLING: A woman who married a resident of another county took his legal settlement and when abandoned by him had the right to continue that settlement or reestablish her former settlement, but a delay of a year before making an affidavit choosing legal residence in the former county is more than a reasonable time, and by her delay she indicated an intent to retain her husband's legal settlement. The granting of temporary relief by one county does not control and the act of applying for such relief is not an election to take legal settlement in that county.

April 8, 1941. *Mr. Robert N. Johnson, Jr., County Attorney, Fort Madison, Iowa:* This will acknowledge receipt of your letter of March 21 and the enclosed statement of facts relative to the legal settlement of Zelma Shirts. We are also in receipt of a letter from Raymond H. Wright, County Attorney of Des Moines County, dealing with the same person and in which he encloses another affidavit made by her. The facts involved are as follows:

Mrs. Shirts had legal settlement in Des Moines County prior to her marriage on September 1, 1939. She married one, Charles Shirts, who had a legal settlement in Lee County, and lived with him in Lee County until February, 1940, at which time she was abandoned by him.

After their marriage, Mr. and Mrs. Shirts moved to Des Moines County and were served notice to depart some time early in 1940. They moved to Lee County and applied for relief January 9, 1940. Temporary relief was granted them. Mrs. Shirts continued to reside in Lee County until October, 1940, at which time she moved to Des Moines County. On January 25, 1941, Des Moines County, in response to her application for relief, referred her to Lee County. On February 21, 1941, Mrs. Shirts signed an affidavit, part of which is as follows: "At the time of my marriage, I was a resident of Burlington, Des Moines County, Iowa. Upon my abandonment and desertion by my husband, I then chose and have since chosen Burlington, Des Moines County, Iowa, as my residence."

On March 14, 1941, Mrs. Shirts executed another affidavit, part of which is as follows: "Upon my abandonment and desertion by my husband, I applied for and received public assistance from Lee County, as a person legally settled there, thus, in fact, exercising my right to select my county of legal settlement between Lee and Des Moines counties. Having thus once made my selec-

tion, I fully understand that I am bound by it and that it is not my privilege to transfer my legal settlement back and forth between the two counties. Having thus originally elected Lee County, which county conceded my legal settlement by granting relief, I, at this time, reaffirm my selection of Lee County."

The question is in which county does Mrs. Shirts have a legal settlement.

Section 3828.088, 1939 Code, reads in part as follows:

"*Settlement—how acquired.* A legal settlement in this state may be acquired 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 resumd upon the death of her husband, or if she be divorced or abandoned by him, if both settlements were in this state."

It is our opinion that the legal settlement of Mrs. Shirts is in Lee County. Mrs. Shirts had legal settlement in Des Moines County, but upon her marriage to Mr. Shirts, she took his legal settlement which was in Lee County. Upon her abandonment, she had the right to choose either to continue her legal settlement in Lee County or reestablish her legal settlement in Des Moines County.

It is our opinion further that any election to return to the county of settlement before marriage must be made within a reasonable time; otherwise, an abandoned wife should indicate that she intended to retain the legal settlement of her husband.

It is our further opinion that the mere granting of temporary relief by one county or the other is not controlling and the act of applying for such temporary relief does not constitute an election to take legal settlement in that county.

It is our opinion also that Mrs. Shirts waited more than a reasonable time before making the election contained in her affidavit of February 21, 1941, part of which is above quoted and that consequently, she retained the legal settlement of her husband in Lee County.

MILITARY SERVICE: LEAVE OF ABSENCE TO INDUCTEES: ELECTIVE OFFICERS: It is not necessary that persons inducted into military service ask for or obtain a leave of absence under §467.25, C., '39, as amended by Senate File 16, 49 G. A., which applies to elective officers of the state, its subdivisions, and municipalities.

April 8, 1941. *Mr. Francis J. Kuble, County Attorney, Des Moines, Iowa:* We wish to acknowledge receipt of your letter of March 27, 1941, in which you ask for an opinion on the following questions:

"The bill known as Senate File 16 was, as you know, passed by the legislature and I take it to be an amendment to section 467.25 of the 1939 Code. By the new Senate File 16, it is worded in part as follows:

'Entitled to leave of absence from such civil employment for the period of such active service without loss of status or efficiency rating.'

Under the above as it applies to an elective public official my question is does the elective official, first, have to ask for the leave of absence to create the vacancy or is the vacancy there even though no request for leave is asked or obtained?

My other inquiry is relative to the use of the word "employment". Does the

word employment in connection with the leave of absence apply to an elective officer?"

Section 467.25 as amended by an Act known as Senate File 16 of the Forty-ninth General Assembly of Iowa, reads as follows:

"STATE AND MUNICIPAL OFFICERS AND EMPLOYEES NOT TO LOSE PAY WHILE ON DUTY. All officers and employees of the state, or a subdivision thereof, or a municipality therein, who are members of the national guard, organized reserves or any component part of the military, naval, or air forces or nurse corps of this state or nation, or who are or may be otherwise inducted into the military service of this state or of the United States shall, when ordered by proper authority to active service, be entitled to a leave of absence from such civil employment for the period of such active service, without loss of status or efficiency rating, and without loss of pay during the first thirty days of such leave of absence. The proper appointing authority may make a temporary appointment to fill any vacancy created by such leave of absence."

It is our opinion that under the provisions of Section 467.25 as amended, it is not necessary for a person coming within the terms of said section to ask for a leave of absence, and it is not necessary that a leave of absence be obtained to make the provisions of the section effective.

We believe that the leave of absence is based on the order of the proper authority ordering said person to active service, and when that person responds to the order there is a temporary vacancy in the office or position held by him and he shall be considered as having left his office or position on a leave of absence.

It is our further opinion that the provisions of section 467.25 as amended by Senate File 16, an Act of the Forty-ninth General Assembly of the State of Iowa, do apply to elective officers of the State, subdivisions thereof and the municipalities therein.

JUSTICE OF PEACE: FEES RETAINED: SUCCESSOR IN OFFICE: A justice of the peace who is authorized by the board of supervisors to retain a certain amount of civil fees may retain such fees as come into his possession by virtue of his office, even though such fees arose from cases tried by his predecessor, but he has no claim on civil fees assessed in cases heard by him but paid to his successor in office.

April 14, 1941. *Mr. Forest L. Bedell, County Attorney, Newton, Iowa:* We wish to acknowledge receipt of your recent letter in which you ask for an opinion on the following question:

Under the provisions of section 10639 of the 1939 Code, the Board of Supervisors passed a resolution allowing the Justices of the Peace in Newton Township to retain civil fees not exceeding $125 per year for expenses of their offices.

X was Justice of the Peace in Newton Township in 1939 and 1940. Neither in 1939 nor 1940 were sufficient civil fees paid to X to amount to $125 per year. Is X, the former Justice of the Peace, entitled to receive civil fees paid to his successor in cases tried and in which such fees were taxed during X's term of office.

For the purpose of this opinion, we set out the following pertinent paragraph of section 10639 of the 1939 Code of Iowa:

"*Accounting for fees—compensation.*

* * *

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."

It is our opinion that a Justice of the Peace who has completed his term of office has no claim on civil fees which were assessed in cases which he heard that are paid to his successor in office.

Paragraph 4 of section 10639 of the 1939 Code contemplates a Justice of the Peace retaining fees that he has received. We cannot say that he can retain fees that never come into his possession. A Justice of the Peace is responsible for fees that come into his possession and a Justice of the Peace who is authorized to retain a certain amount of civil fees by the Board of Supervisors in accordance with the provisions of section 10639 may retain such fees as come into his possession by virtue of his office, even though such fees arose from cases which were tried by his predecessor.

WITNESS FEES: PUBLIC OFFICERS: COUNTY HOME STEWARD: The steward of a county home who receives a salary from the county is a public official within the meaning of section 11328, C., '39, and is not entitled to a witness fee for testifying at a county insane commission hearing on the insanity of a former county home inmate.

April 23, 1941. *Mr. Walter J. Willett, County Attorney, Tama, Iowa:* We wish to acknowledge receipt of your recent letter in which you ask for an opinion upon the following question:

May the steward of the county home receive a witness fee for testifying at a county insane commission hearing in a case where the party being tried for insanity has been a patient at the county home. The county steward receives a monthly salary for his services from the county.

Section 3541 states in part as follows:

"*Compensation and expenses.* Compensation and expenses shall be allowed as follows:

* * *

4. To witnesses, the same fees as witnesses in the district court."

Section 11328 provides as follows:

"*Peace officer.* No peace officer who receives a regular salary, or any other public official shall, in any case, receive fees as a witness for testifying in regard to any matter coming to his knowledge in the discharge of his official duties in such case in a court in the county of his residence, except police officers who are called as witnesses when not on duty."

Section 3828.118 provides for the appointment of a steward of the county home.

From the above question, it appears that the steward received his knowledge of the matters to which he testified because of his position as steward of the county home. The question then arises as to whether the county steward is to be considered as a public official as that term is used in section 11328.

It is our opinion that the county steward is to be considered a public official in interpreting section 11328. In the instant case he is paid a monthly salary from the county and he obtained the information which he related to the commission of insanity because of his position as steward of the county home. We believe that this is a situation which the legislature intended to cover in enacting section 11328.

TAXATION: SOLDIERS EXEMPTION: CONSTRUCTION OF STATUTE: Senate File 333, 49 G. A., should be construed to allow a soldiers tax exemption to the holder of the legal *or* equitable title to property. Applicants for soldiers exemption for the 1941 tax payable in 1942 must file an application for such exemption before July 4, 1941, and a claim filed before June 1, 1942, will secure an exemption on the 1942 tax payable in 1943.

April 24, 1941. *State Tax Commission, Des Moines, Iowa:* Receipt is acknowledged of your request for an opinion with respect to the interpretation to be placed on certain provisions of Senate File 333, Acts of the 49th General Assembly. The specific questions are as follows:

1. In Sections 2 and 3 of the Act the tax exemption appears to be given to the "equitable and legal" owner of the property designated. The question is whether or not the applicant for the exemption must be both the legal and equitable owner.
2. Senate File 333 goes into effect on July 4, 1941. Since it provides for an exemption to persons who file on or before June 1st, would it be effective to secure an exemption on the 1941 tax, or is its first application on the 1942 tax payable in 1943?

In answer to the first question, we cannot believe that the legislature intended to limit the exemption to veterans who hold both the legal and equitable title to the real estate designated in the application for the exemption. To so hold would mean that the contract purchasers with, in nearly all instances the obligation to pay the tax, would receive no credit, for such a contract purchaser would be the holder of the equitable title, but not the holder of the legal title. The tax exemption shall inure to the benefit of the person who sustains the obligation to pay the tax, and in this instance to carry out the Legislative intent, we feel that this statute must be construed as if the word "and" were used in a disjunctive sense, and it should be given the meaning of the word "or". There is ample authority for such a construction in the decisions of the Supreme Court of Iowa and we need only cite the cases of *State v Myers*, 10 Iowa 448; *State v Brandt*, 41 Iowa 593; *Oltrogge v Schutte*, 51 Iowa 279; and the case of *C. R. I. & P. Ry. Co. v Rosenbaum*, 212 Iowa 227.

In answer to question 2 we call attention to Section 3 of the Act:

"Sec. 3. Section six thousand nine hundred forty-eight (6948), Code, 1939, is amended, revised and codified to read as follows:
'Said claim for exemption, if filed on or before June 1 of any year and allowed by the board of supervisors, shall be effective to secure an exemption for the year in which such exemption is filed, and when a claim has once been made and allowed, it shall be effective thereafter during the period of ownership of the property designated or of the homestead, as the case may be, or until the death of all persons named in section 6946 who remain equitable and legal owners of said property.'"

Since the date June 1st is mentioned in the foregoing quoted portion of the Act, the legislature must have meant that the first application of the act was June 1st following the passage of the act. The act was not passed until April and it contained no publication clause, so the first June 1st after the act becomes a law will be June 1, 1942. It will be noted that the act provides that the claim if filed before June 1st shall be effective to secure an exemption for the year in which such exemption is filed. It is our interpretation that if filed in 1942 and before June 1st of that year, the claim will be effective to secure an exemption on the 1942 tax payable in 1943. We do not believe that it was the legislative intent that the claim for exemption when filed on or before June 1st of any year would be effective to secure an exemption on the tax payable for that

year. We are supported in our view by the history of the passage of this bill. The original bill provided that a claim for exemption would be effective to secure an exemption from the tax for the *preceding* year. Before the passage of the bill the word "preceding" was stricken out by an amendment which clearly indicates a legislative intent that the claim for exemption was to be effective to secure an exemption on the tax for the year during which the claim is filed payable the year following.

We do call your attention, however, to the other provisions of the act. By Section 4 of the act, section 6949 of the Code of 1939 is in effect repealed. This section provided for the filing of exemption claims up to September 1st of the year following the year for which the exemption is claimed. This would mean that such claims could be filed in 1941 for the tax payable in 1941 up to September 1st of this year. When Senate File 333 goes into effect on July 4th of 1941, we feel it will have the immediate effect of cutting off the filing of such exemption claims after the act goes into effect. This means merely that after July 4, 1941, no claim for exemption can be filed for the 1940 tax payable in 1941.

It will also be noted that Section 6948 of the 1939 Code is in effect repealed, so all applicants for soldier's exemption for the 1941 tax payable in 1942 must file an application for such exemption before July 4, 1941.

TAXATION: HOMESTEAD TAX CREDIT: PERSON IN MILITARY SERVICE: Senate File 248, 49 G. A., removes the homestead tax exemption residence requirement for a person in military service. The renting of a homestead by a person in service will not defeat the homestead credit.

April 25, 1941. *State Tax Commission, Des Moines, Iowa:* We are in receipt of your request for an opinion with respect to the application of Senate File 248, Acts of the 49th General Assembly, and the specific question is as follows:

This statute provides that any person who is inducted into the active service or voluntarily enters such active service of the military forces of the United States shall be considered as occupying or living on the homestead during such service for the purpose of receiving homestead credit. The question is whether or not such a homestead credit should be granted if the person in service is renting his homestead.

In Section 2 of Senate File 248 it is specifically provided that a person in the military service "shall be considered as occupying or living on the homestead during such service provided he was entitled to a homestead tax credit for a year immediately preceding such service."

In view of the broad language of this amendment, we are of the opinion that the legislature removed the residence requirement for such a person in service. After this amendment the homestead credit will be granted upon proof of ownership and proof that the party was entitled to a homestead tax credit for the year immediately preceding service in the military forces, with additional proof that the person is in the military service of the United States as outlined in the statute. The disposition of his homestead during the period of his service is immaterial and the renting of such a homestead by the person in service would not defeat the homestead credit.

LEGAL SETTLEMENT: PERSON RECEIVING SURPLUS COMMODITIES: NOT SUPPORTED BY PUBLIC FUNDS: A person receiving surplus commodities is not being supported by public funds within the meaning of §3828.088, C., '39, and may acquire legal settlement if not served with notice to depart.

April 29, 1941. *Mr. Shirley Webster, County Attorney, Winterset, Iowa:* We wish to acknowledge receipt of your letter in which you ask for an opinion on the following question:

Is a person who receives surplus commodities "being supported by public funds" within the meaning of those words as used in paragraph 3 of section 3828.088 of the 1939 Code of Iowa.

The pertinent part of paragraph 3 of section 3828.088, is as follows:

". . . or any person who is being supported by public funds shall not acquire a settlement in said county unless such person before becoming an inmate thereof or being supported thereby has a settlement in said county."

The Federal Government established the surplus commodities program primarily to relieve the producers of surplus products. The main purpose of the program is to aid the producers as distinguished from a method of providing relief for the unfortunate.

The Federal Government purchases the surplus commodities from the producers and distributes them through the regular relief channels. To be entitled to receive surplus commodities, a person does not need to be receiving direct relief. It is only necessary that he be certified as being eligible to receive surplus commodities. Thus a person along the border line of relief is entitled to receive surplus commodities. It should be noted that the surplus commodity orders are of a relatively small value and the recipient usually receives about two orders a month.

As was stated above, the primary purpose of the surplus commodities program is to aid the producers of surplus commodities and the relief of the underprivileged is secondary. We do not believe that a person receiving surplus commodities may be considered as "being supported by public funds" as that phrase was used by the Iowa Legislature in paragraph 3 of section 3828.088 of the Code of Iowa.

It is our opinion that a person receiving surplus commodities is not being supported by public funds within the meaning of section 3828.088 and that such person may acquire legal settlement if not served with notice to depart as provided by the Iowa Code.

FRUIT-TREE AND FOREST RESERVATIONS: FENCES: TAX EXEMPTION: Where a fruit-tree or forest reservation is fenced so as to restrain livestock from entering from adjoining land, it is not necessary to fence the reservation along the public highway in order to qualify for a tax exemption.

April 29th, 1941. *Mr. Walter J. Willett, County Attorney, Tama, Iowa:* We wish to acknowledge receipt of your letter of April 24th, 1941, in which you ask for an opinion on the following question:

Is the owner of a timber reservation abutting on the public highway required to build a fence between the timber tract and the public highway, in order to have such timber reservation established as such, by the assessor?

The tax exemption on fruit tree and forest reservations is provided in Chapter 126 of the 1939 Code of Iowa. The legislature has made it necessary to meet

several requirements before a person is entitled to the tax exemption as provided in section 7110. Among them is the following:

"2614 *Restraint of livestock.* Cattle, horses, mules, sheep, goats, and hogs shall not be permitted upon a fruit-tree or forest reservation."

Compliance with this provision avoids the damage that livestock would do to such a fruit tree or forest reservation, and insures that the person asking for the tax exemption will not use the area for pasture purposes.

While it is true that exemption statutes must be strictly construed, we do not believe that it is necessary or proper to construe section 2614 to mean that there is a duty on the part of the person asking for the tax exemption to fence said reservation along the public highway to keep out an occasional stray animal. There is a duty on all persons to restrain their livestock and the case would be rare where such a reservation would be damaged by livestock running at large on the highway.

It is our opinion where the taxpayer fences his fruit tree or forest reservation so as to restrain livestock from entering said land from the adjoining land, it is not necessary to fence the reservation along the public highway.

INDIANS: TAMA COUNTY: COMMISSION OF INSANITY JURISDICTION: The Tama county commission of insanity has no jurisdiction over insane Indians residing on the Sac and Fox Indian reservation in Tama county.

April 29, 1941. *Mr. Walter J. Willett, County Attorney, Tama, Iowa:* We wish to acknowledge receipt of your letter of April 24th, 1941, in which you ask for an opinion on the following question:

Has the Tama County, Iowa, Insane Commission jurisdiction over insane Indians residing on the Sac and Fox Indian Reservation in Tama County, Iowa, and if so, do they have the right to commit them to a State Insane Institution?

By an Act of the Twenty-sixth General Assembly (Chapter 110) the State of Iowa tendered jurisdiction of this land and of the Indians to the Federal Government, reserving the right to levy taxes on said lands for "state, county, bridge, county road, and district road purposes, and such other purposes as the general assembly may from time to time by special statute provide." At the present time the Indian lands in Tama County are subject only to the following levies: State, General County, Funding Bond 1930, County Road Bond, Secondary Road Construction, and Secondary Road Maintenance.

The Federal Government by an Act of Congress, approved June 10, 1896, accepted and assumed jurisdiction over those Indians in Tama County and over their lands as tendered to the Federal Government by the above mentioned Act of the General Assembly of the State of Iowa.

From the Act of the General Assembly of the State of Iowa and the Act of Congress, it appears that the above mentioned Indians are wards of the Federal Government, and it is our opinion that the Tama County, Iowa, Commission of Insanity has no jurisdiction over insane Indians residing on the Sac and Fox Indian Reservation in Tama County, Iowa.

BONDS: FOOD STAMP OFFICER: PAYMENT BY COUNTY: The bond premium of a food stamp issuing officer cannot legally be charged to and paid by the county.

April 29, 1941. *Mr. Walter J. Willett, County Attorney, Tama, Iowa:* This will acknowledge receipt of your letter of April 25 wherein you ask the following question:

Tama County, Iowa, is going into the Food Stamp Plan and it is necessary that the issuing officer in charge of the $7,000.00 revolving fund put up a bond of 110%.

The question which has been raised is as follows: "Can this bond, required by the Food Stamp Plan, of the issuing officer, be legally charged to and paid by the County?"

We have examined the Code and find no authority permitting the county to pay a bond premium for such an officer.

It is, therefore, our opinion that a bond premium cannot legally be charged to and paid by the County.

OLD-AGE ASSISTANCE: BURIAL EXPENSE: COUNTY HOME RESIDENTS: The provisions of House File 400, 49 G. A., which provides that an old-age assistance recipient who has been committed to a tax-supported institution and is not receiving old-age assistance at the time of his death may receive burial expense, do not apply to ordinary residents in county homes, but do apply to persons committed to a county home or any other tax-supported institution.

April 30, 1941. *Mr. King R. Palmer, Chairman, State Board of Social Welfare, Des Moines, Iowa:* This will acknowledge receipt of your letter of April 14 wherein you ask our opinion on the following question:

We would like to have your opinion as to how a portion of House File 400 recently passed by the legislature should be interpreted. That portion of said House File to which we refer is as follows:

"Where a person has been receiving old age assistance under the provisions of this act and while receiving such assistance is committed to any tax supported institution for any cause and is not receiving old age assistance at the time of his death, he shall, notwithstanding such facts, be qualified to receive his burial expense as provided in this section."

Our specific question is whether this section should be applied to residents in county homes.

It will be noted under the provisions of the above quoted portion of House File 400 that said section only applies to old age recipients who are *committed* to a tax supported institution.

Under the provision of Section 3828.120, 1939 Code, admission to a county home is based upon an order of a township trustee or a member of the county board of supervisors. Such order is in no sense a *commitment* to the home. The resident of a county home who has been admitted as a poor person is not required by law to remain in said home unless he so chooses. However, in the instance of a person found to be insane, such person may be committed to a county home in lieu of a state institution for the insane.

It is our opinion that under the wording of the new section of the old age assistance law which you have quoted in your letter, said section does not apply to the ordinary residents in county homes. It is our opinion that it does apply to those persons who are committed to a county home as insane or who are committed to any other tax supported institution such as the state hospital for the insane.

JUSTICE OF THE PEACE: EXPERT WITNESS FEES: A justice of the peace court may allow expert witness fees.

May 6, 1941. *Mr. M. L. Mason, County Attorney, Mason City, Iowa:* We wish to acknowledge receipt of your letter of April 28th, 1941, in which you ask for an opinion on the following question:

"May a justice of the peace in a criminal action, regardless of whether the crime charged is a misdemeanor triable before the justice of the peace or an indictable offense, allow expert witness fees?"

For the purpose of this opinion, we quote the following sections of the 1939 Code of Iowa:

"11326 *Witness fees.* Witnesses in any court of record, except in the police courts, shall receive for each day's attendance two dollars, and in the police courts the same fees and mileage as are allowed before justices of the peace; before a justice of the peace, fifty cents for each day; and in all cases five cents per mile for each mile actually traveled.

"11329 *Expert witness fees—fee.* Witnesses called to testify only to an opinion founded on special study or experience in any branch of science, or to make scientific or professional examinations and state the result thereof, shall receive additional compensation, to be fixed by the court, with reference to the value of the time employed and the degree of learning or skill required; but such additional compensation shall not exceed four dollars per day while so employed."

It is our opinion that the words "to be fixed by the court" used in Section 11329 are broad enough to include a justice of the peace court and that it would be proper for the justice of the peace court to allow expert witness fees in accordance with the provisions of Section 11329.

MARRIAGE: HEALTH EXAMINATIONS: AFFIDAVIT OF PREGNANCY: Senate File 2, §4, 49 G. A., permits parties to a proposed marriage to file an affidavit of pregnancy when the woman is pregnant and receive a marriage license without a health certificate from either of the parties.

May 6, 1941. *Hon. Chet B. Akers, Auditor of State:* We wish to acknowledge receipt of your letter of April 30th, 1941, in which you ask for an interpretation of Section 4 of Senate File 2, enacted by the 49th General Assembly. Said section reads as follows:

"Irrespective of the laboratory test results and clinical examination findings, the clerk of the district court shall issue a marriage license to parties to a proposed marriage when the woman is pregnant at the time of application, and in lieu of the health certificate required under this chapter such clerk of the district court is hereby authorized to accept an affidavit on a form prescribed by the state department of health, signed by an Iowa licensed physician, stating that the woman is pregnant, which affidavit shall be sealed and available only to the contracting parties or to any interested party securing an order of court."

The legislators, when considering Senate File 2 and particularly Section 4, had in mind the social problem that arises from children being born outside of wedlock. By the terms of this section the legislature made inoperative the provisions of the act relating to presentation of health certificates where the woman in a proposed marriage is pregnant.

It is our opinion that the intent of the legislature in making Section 4 a part of Senate File 2 was to permit parties to a proposed marriage, when the woman is pregnant at the time of application, to receive a marriage license

regardless of the fact that either one or both parties might have syphilis in a communicable stage at the time of application for a license. In the case where an affidavit of pregnancy is filed, the issuing officer should not require a health certificate from either of the parties to the proposed marriage. Thus interpreted, Senate File 2 of the Acts of the 49th General Assembly is not in conflict with the social desire that all children be born in wedlock.

It should be noted that it is only necessary to file the affidavit of pregnancy when either one of the parties is unable to furnish the health certificate required by Section 1 of Senate File 2 of the Acts of the 49th General Assembly.

TAXATION: PERSONAL PROPERTY TAX EXEMPTION: MOTOR VEHICLES IN HANDS OF DEALERS: A dealer's registration of private passenger motor vehicles is sufficient to give rise to a personal property tax exemption on the vehicles and the exemption extends to all automobiles owned by the dealer, irrespective of whether they bear dealers license plates.

May 7, 1941. *State Tax Commission, Des Moines, Iowa:* You have presented certain inquiries with respect to the assessment of private passenger automobiles in the hands of dealers.

Since our opinion of May 23, 1940, appearing in the 1940 Report of the Attorney General at page 524, the question has been presented as to whether or not the exemption of private passenger automobiles in the hands of dealers should extend to those automobiles which do not bear dealer's license plates obtained under the provisions of Section 5004.04 of the 1939 Code of Iowa, or to those cars stored by the dealer either at his place of business or at some storage point or public warehouse. It is the usual practice of dealers having perhaps thirty cars for sale to obtain but fifteen or twenty dealer's license plates, and the specific question is as to whether or not the cars that do not bear dealer's license plates should be taxed as personal property.

By reference to our opinion heretofore cited, it will be seen that we arrived at the conclusion that the registration of private passenger motor vehicles by manufacturers and dealers was a registration that would be received in lieu of personal taxes within the provisions of Section 5008.26 of the 1939 Code. We arrived at this conclusion by a review of the legislative history of this exemption statute. Our conclusion in that opinion that the registration of a manufacturer did give rise to the exemption is our present opinion, but your question raises the point as to what will be considered a registration by a dealer. We presume that in every instance the dealer has been issued his certificate under the provisions of Section 5004.03 of the 1939 Code. We also presume that he has obtained one or more sets of plates under the provisions of Section 5004.04 and there would be nothing in the statute to prevent the dealer from placing these plates on any car he has for sale. It would seem also that the dealer when he sold an automobile which bore dealer's plates that he could remove the dealer's plates and put them on another automobile which he had for sale. This does not indicate that the dealer's registration is of any specific automobile. Once we conclude that the dealer's registration is sufficient to give rise to the personal property tax exemption, we feel we must necessarily extend the exemption to all private passenger automobiles owned by the dealer even though for all or a part of the year they bear no dealer's license plates. There is no duty upon the part of the dealer to put the dealer's license plates on any specific car, or in fact on any car. Consequently the exemption

cannot be made to depend upon whether or not the dealer installs dealer's plates on automobiles he has for sale.

We have felt that our opinion of May 23, 1940 was very close. It will be recalled that this opinion reversed a former opinion dated January 17, 1940 where we had arrived at an opposite conclusion. At the time of the opinion of May 23, 1940 we felt we were compelled to reach the conclusion there stated because we could not otherwise give expression to the amendment passed by the 48th General Assembly appearing as Chapter 124 where the exception to the exemption statute was stricken. The 49th General Assembly presumably had knowledge of our ruling with respect to this exemption and no legislation rendering such automobiles in the hands of dealers taxable was enacted.

We feel, therefore, that the registration of a dealer is sufficient to give rise to the exemption and that being true, then the conclusion that the exemption shall extend to all automobiles owned by the dealer, irrespective of whether they bear dealer's license plates, necessarily follows.

TAXATION: BANK STOCK OWNED BY IOWA RESIDENTS IN OUT OF STATE BANKS: Bank stock in out of state banks owned by residents of Iowa is not subject to taxation in Iowa.

May 8, 1941. *Mr. E. B. Shaw, County Attorney, Oelwein, Iowa:* We have your recent request for an opinion as to whether or not shares of stock in a foreign banking corporation owned by a citizen and resident of Iowa are taxable to the owner thereof in the county of his residence.

In reply to your inquiry we will state at the outset that we do not believe such shares of stock in out-of-state banks are subject to tax when owned by a citizen of Iowa.

Section 6985 of the 1939 Code expressly exempts the shares of stock of National, State and Savings Banks from the five mill money and credit tax. We have examined the other taxing statutes of the State of Iowa and we find that there is no provision for the taxing of such shares in out-of-state banks. Chapter 333 of the 1939 Code expressly provides for the taxation of shares of stock of National, State and Savings Banks located in the State of Iowa. See Section 6998 of the 1939 Code.

Thus the situation with respect to the Iowa statutes is that such bank stock is expressly exempted from the provisions of the money and credit tax law and not included in the bank stock law, so we are therefore of the opinion that such stock in an out-of-state bank would not be taxable when owned by a citizen and resident of Iowa.

Perhaps the reason for the exemption of such bank stock lies in the provisions of the Federal Statute where, in Title 12, Section 548 Masons' U. S. Code (Fed. Stats. 5219) provision is made that with respect to National Banks the State may provide the manner and place "of taxing all the shares of National Banking Associations located within its limits." If the shares of National Banks located outside the State were subjected to a tax when owned by a resident of this State, then quite likely the result would be double taxation, for in each State tax laws similar to the Iowa tax laws are in force providing for the taxing of such bank stock where the bank is located without regard to the place of residence of the owners of the stock. The taxation of such bank stock in out-of-state banks would savor of double taxation. Double

taxation is never favored. See Section 7398 and Section 7408 of the 1939 Code of Iowa where provision is made for credit for double taxation. See, also Security Savings Bank v. Board of Review, 189 Iowa 463. In this last cited case the Court had under consideration the method of assessing shares of stock of National Banks, but with respect to double taxation used the following pertinent language:

"It is in the power of the legislature to make double taxation, but the courts are slow to construe a statute to that end. Furthermore, there can be no double taxation upon the shares of national bank stock, because of the limitations provided in the Federal statute, Section 5219."

In this case the Court also quoted from the case of Bank of California v. Richardson, 248 U. S. 476 where the Supreme Court of the United States held that a California tax law constituted double taxation where the tax was placed upon the bank and upon stockholders. In this same Iowa case the Supreme Court of Iowa holds that bank taxation must be construed precisely the same with reference to State banks as though they were National banks.

In view of the foregoing, we are of the opinion that bank stock in out-of-state banks owned by residents of Iowa is not subject to taxation in Iowa.

LEGAL SETTLEMENT: WIFE WHOSE HUSBAND IS IN CUSTODY OF CONTROL BOARD: A wife may not resume the settlement she had prior to her marriage during such period of time as her husband is under the custody of the state board of control.

May 12, 1941. *Mr. Carl V. Burbridge, County Attorney, Logan, Iowa:* We wish to acknowledge receipt of your letter of May 7th, 1941, in which you ask for an opinion on the following question:

May a wife, whose husband is serving a sentence in the State Reformatory, elect her settlement as that prior to her marriage during such period of time as her husband is under the custody of the State Board of Control under the abandonment statute.

For the purpose of this opinion, we quote the following pertinent part of section 3828.088 of the 1939 Code of Iowa:

"* * * 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. * * *"

The ordinary meaning of abandonment is to give up entirely; to desert; to forsake. For the purpose of determining the legislative intent, we must give the words used their usual and ordinary meaning unless it is shown that the legislature intended otherwise.

The usual case when a wife is abandoned by her husband is where the husband, by his own free will, deserts or leaves his wife without regard to her well being. In a case where the husband is confined in prison, the "abandonment," if any, is not voluntary. He may not have any desire to desert or forsake his wife. We do not believe the legislature intended to cover the situation outlined in your question in using the word "abandoned" in the above mentioned Code section.

It is therefore our opinion that a wife may not resume the settlement she had prior to her marriage during such period of time as her husband is under the custody of the State Board of Control.

MARRIAGE: PHYSICAL EXAMINATION: RESIDENT PHYSICIAN MAY EXAMINE NONRESIDENT APPLICANTS: NONRESIDENT PHYSICIAN MAY EXAMINE RESIDENT APPLICANTS TEMPORARILY ABSENT FROM STATE: Under chapter 292 (S. F. 2), 49 G. A., requiring a physical examination of all applicants for a marriage license in Iowa showing freedom from syphilis in a communicable stage, a resident physician in Iowa may examine a nonresident applicant and a nonresident physician may examine a resident of Iowa having a temporary residence outside the state of Iowa.

May 20, 1941. *Dr. Walter L. Bierring, Commissioner of Public Health:* We wish to acknowledge receipt of your recent request for an opinion on the following questions:

1. May doctors licensed in Iowa examine nonresident applicants for license to wed in the State of Iowa.
2. May Iowa residents who are temporarily living outside the State of Iowa be examined by a doctor licensed to practice in the State of the applicant's temporary residence.

For the purpose of answering your first question, we wish to quote the following sections of Senate File 2, Acts of the Forty-ninth General Assembly:

"Section 1. In addition to the requirements for a marriage license as set out in chapter four hundred sixty-nine (469), Code, 1939, all persons making application for license to marry shall, at any time within twenty (20) days prior to such application, be examined by a duly licensed physician in this state as to the existence of or freedom from syphilis, and it shall be unlawful for the clerk of the district court of any county in this state to issue a license to marry, except as otherwise provided in this chapter, to any person who fails to present for filing with such clerk a certificate signed by such physician setting forth that said person to the proposed marriage is either free from syphilis or not in a stage whereby it may become communicable as nearly as can be determined by a thorough physical examination and such standard microscopic and serological tests as are necessary for the discovery of syphilis.

"Sec. 8. Where a party making application for the issuance of a marriage license is a non-resident of the state of Iowa and the state of which he is a resident has a law in effect requiring a test to show freedom from syphilis, as provided in this act, the said applicant shall be entitled to the issuance of a license provided he furnishes a certificate conforming to the requirements of the state of which he is a resident, signed by a duly licensed physician of said state, showing freedom from disease as provided in this act.

"Where a person resides in a state which requires no physical examination as a prerequisite to the issuance of a marriage license and desires to make application for a marriage license in this state the said person, as a condition to the issuance of said license, shall be required to file a certificate signed by a duly licensed physician of the state in which the applicant resides, certifying that the said applicant has been examined by said physician and that he is free from syphilis or not in a stage whereby it may become communicable and the certificate shall be signed by the said physician and sworn to by him and his signature acknowledged by an officer authorized to administer oaths."

The purpose and intent of the legislature in enacting Senate File 2 was to prevent as nearly as possible, the marriage in this State of persons having syphilis in a communicable stage. We feel that this law should be liberally construed to carry out the intent of the legislature in enacting this law.

It is our opinion that Section 8 of Senate File 2 presents an alternative method of securing the health certificate required by this law, and that Section 8 was never intended to be the exclusive method by which nonresidents of the State of Iowa could secure the health certificate required by Senate File 2.

It is our conclusion that nonresidents of the State of Iowa may be examined by an Iowa physician or they may be examined by a physician licensed in the State of the applicant's residence as provided in Section 8 of said bill.

As to your second question, we would like to repeat that the purpose of Senate File 2 was to prevent marriages in the State of Iowa where either of the parties has syphilis in a communicable stage. The purpose of the law will be carried out if the person who makes application for a marriage license is able to present a certificate of a physician stating that said person is free from syphilis in a communicable form.

With the above thought in mind, it is our opinion that an Iowa resident temporarily residing in another State may properly be considered to be governed by Section 8 of Senate File 2. We do not believe that the legislature in using the words "resident" and "nonresident" intended to use those words in the same strict legal sense as those words would be interpreted in construing a voting statute.

It is our conclusion that an Iowa resident who is temporarily living outside the State may be examined and procure his health certificate as contemplated by the provisions of Senate File 2 from a physician licensed to practice in the State where he is temporarily residing.

DOMICILE AND RESIDENCE: MINOR CHILDREN IN CUSTODY OF DIVORCED MOTHER: LEGAL SETTLEMENT IS THAT OF MOTHER AND NOT OF THEIR NATURAL FATHER: While the general rule is that the legal settlement of a minor child follows that of his father, such settlement may be changed by order of court in divorce proceedings wherein the mother is granted the custody of the minor children, so that the legal settlement of the children is that of their mother and not of their natural father.

May 21, 1941. *Mr. Glen L. Eichhorn, County Attorney, Montezuma, Iowa; Mr. John C. Moon, County Attorney, Ottumwa, Iowa:* This will acknowledge receipt of your joint letter of May 6, wherein you ask our opinion on the following question:

"Prior to 1935, Mr. and Mrs. Lauren Maston and their two minor children were residents of and had settlement in Wapello County, Iowa. In that year (1935) Mrs. Maston divorced her husband and obtained custody of the two minor children in the decree entered in said divorce action. No support money was granted. In October, 1935, Mrs. Maston left Wapello County with the children and went to Poweshiek County, Iowa, where she was married to Glen Winchell in March, 1936. Mr. Maston's settlement continues in Wapello County. She and her second husband lived together as man and wife until about the first of April, 1941, and during that period Mrs. (Maston) Winchell retained the custody of the two minor children by her first marriage. No divorce has been granted, but the separation still continues.

"We are aware, of course, of the general rule that minor children take the settlement of their father. However, since this rule is modified in some cases we would like the opinion of your office on whether in the present case the general rule above stated will prevail or whether the minor children will take the settlement of their mother who has had the legal custody since 1935."

As stated in your letter above quoted, the general rule is that the legal settlement of a minor child follows that of his father. However, we wish to call your attention to our opinion under date of April 25, 1939, directed to Mr. Archie R. Nelson, County Attorney of Cherokee, Iowa, and found on page 195 of 1940 Report of Attorney General. In that opinion, we held that the legal settlement of a minor child is in the county of its maternal grandparents to whom the custody of the child had been given by order of court. We also wish to call your attention to the case of Vanderwarker's Estate, Hicks vs. Fox, 83 N. W. 538, which is set out at some length in said opinion. The same reasoning ap-

plies in the instant case, that is, that the legal settlement of a child may be changed by an order of court. In the instant case, the custody of the minor children was given to their mother in a divorce action.

It follows that it is our opinion that the legal settlement of the children is that of their mother and not that of their natural father. The mother of the children obtained legal settlement in Poweshiek County by marrying Glen Winchell. From the facts as stated in your letter, it is our opinion that the legal settlement of the minor children is in Poweshiek County.

TAX SALES: ANNUAL TAX SALE STATUTE AS AMENDED: NON-EFFECT ON STATUTE PROVIDING FOR SUSPENSION OF TAXES OF OLD-AGE ASSISTANCE RECIPIENTS: Section 7244, C., '39, as amended by S. F. 310, 49 G. A., does not affect or repeal §6950.1, C., '39, providing for suspension of taxes to persons issued a certificate of old-age assistance until after the death of the old-age assistance recipient or after such recipient goes off the old-age assistance rolls.

May 22, 1941. *Mr. M. D. Hall, County Attorney, Indianola, Iowa:* This will acknowledge receipt of your letter of May 20, wherein you ask whether or not Section 7244, 1939 Code of Iowa, as amended by Senate File 310 of the 49th General Assembly applies to taxes which have been suspended under the authority of Section 6950.1.

Section 7244, as amended, reads as follows:

"Annually, on the first Monday in December, the Treasurer shall offer at his office at public sale all lands, town lots, or other real property on which taxes of any description for the preceding year or years are delinquent, which sale shall be made for the total amount of taxes, interest and costs due and unpaid thereon, *including all prior suspended taxes.* PROVIDED, however, that no property against which the county holds a tax sale certificate shall be offered or sold. *No interest or penalty on suspended taxes shall be included in the sale price except that six per cent interest per annum from the date of suspension shall be included as to taxes suspended under provisions of 6950.*"

(That part of the above quoted section which is italicized is contained in Senate File 310.)

Section 6950.1, 1939 Code of Iowa, reads as follows:

"*Suspension of taxes.* Whenever a person has been issued a certificate of old-age assistance and is receiving monthly or quarterly payments of assistance from the old-age assistance fund, such person shall be deemed to be unable to contribute to the public revenue. The State Board of Social Welfare shall thereupon notify the board of supervisors, of the county in which such assisted person owns property, of the aforesaid fact giving a statement of property, real and personal, owned, possessed, or upon which said person is paying taxes as a purchaser under contract. It shall then be the duty of the board of supervisors so notified, without the filing of a petition and statement as specified in section 6950, to order the county treasurer to suspend the collection of all the taxes assessed against said property and remaining unpaid by such person or contractually payable by him, for such time as such person shall remain the owner or contractually prospective owner of such property, and during the period such person receives monthly or quarterly payments of assistance from the old-age assistance fund."

It will be noted that Senate File 310, 49th G. A., did not specifically repeal the provision of Section 6950.1.

It is, therefore, our opinion that the provision of Section 6950.1 should still be given effect and that as long as a recipient of old age assistance continues to receive old age assistance, that the taxes on his property should be suspended each year.

It is, therefore, our further opinion that the legislative intent behind the enactment of Senate File 310 was to permit the county treasurer to sell property at tax sale for all taxes due on said property including those suspended by reason of the owner of the property receiving old age assistance, but only after the death of such property owner or after the time when he stopped receiving old age assistance.

Under the provisions of section 7244 before its amendment by Senate File 310, there was no provision for the sale of property for suspended taxes unless said taxes were due and delinquent. Said taxes could only become due and delinquent if the property owner sold said real estate or in case the property upon which the taxes had been suspended passed by devise, bequest or inheritance to any person other than the surviving spouse or minor child of said property owner. To hold that the county treasurer should sell property for taxes which had been suspended under the provision of section 6950.1 would render said section 6950.1 meaningless.

It is, therefore, our opinion that the county treasurer should not sell at tax sale, any property belonging to an old age assistance recipient, and upon which taxes have been suspended, until after the death of said old age assistance recipient, or after such recipient goes off the old age assistance rolls.

STATE OFFICERS AND DEPARTMENTS: PRINTING BOARD TO LET CONTRACTS, PRESCRIBE STANDARDS OF PRINTING, STOCK, AND MATERIALS: DEPARTMENTS MAY DESIGNATE FORMS AND CONTENTS: Section 183, C., '39, provides that the printing board shall let contracts for all printing for all state offices, departments, boards, and commissions when the cost of such printing is to be payable out of any taxes, etc., collected for state purposes; and §1921.017, C., '39, gives the Iowa Liquor Control Commission authority to make rules and regulations prescribing what official seals should be attached to packages of liquor, but such authority is limited to prescribing the design and contents of such seals and does not include or abrogate the power of the printing board to let the contracts for the printing of such seals or to prescribe the standards of printing, stock, or materials.

May 22, 1941. *Hon. George A. Wilson, Governor of Iowa, Des Moines, Iowa:* We have your letter of May 16, wherein you quote from a recent communication to you from the Iowa Liquor Control Commission, wherein you request the opinion of this office as to whether the Iowa Liquor Control Commission should determine the kind and price of seals to be purchased, and as to the authority of the Commission to provide a certification label without reference to the State Printing Board.

The State Printing Board was created by the 39th General Assembly in the enactment of what is known as Chapter 286, Acts of the 39th General Assembly. An examination of the original act clearly discloses that it was the intention of the legislature to place all printing of the state under the jurisdiction of the State Printing Board, except printing for any institution which is able to do its own printing in its own plant. The statutes governing the State Printing Board and its jurisdiction are found in Chapter 14, Code of 1939, and in section 183 we find the following:

"The printing board shall:

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

"2. Direct the manner, form, style, and quantity of all public printing when such matters are not otherwise expressly prescribed by law.
"3. * * *"

The exception noted in paragraph 1 of the above provision covers institutions or departments located outside the city of Des Moines, and in those instances, as it clearly appears from section 205, the institution must take bids and is only authorized to enter into a contract after the State Printing Board has approved the same.

This all clearly indicates that it was the intention of the legislature that all of the printing of the state should be contracted for by the State Printing Board, except such as might be clearly and specifically excepted therefrom.

In paragraph 4 of section 187 of the Code the State Printing Board is empowered to fix the standards for printing and for stock and material.

It is not difficult to understand the reasons for these various provisions. It is a recognition by the legislature that the State Printing Board, organized and set up for the purpose of handling state printing, would be in a better position to contract for printing and to determine the nature of the printing and stock and material best adapted for particular purposes.

Any authority that may be lodged in the Iowa Liquor Control Commission with reference to the purchase or contracting for certification labels or seals must be found in the Iowa Liquor Control Act, which appears in the Code as Chapter 93.1. In section 1921.017 we find the following:

"1. The commission may make such rules and regulations not inconsistent with this chapter, which to the commission may seem expedient or necessary for carrying out the provisions of this chapter and for the efficient administration thereof.
"2. Without attempting or intending to limit the power of the commission as to the provisions contained in subsection 1 hereof, it is declared that the commission may and it does have the power to make regulations in the manner set forth in the foregoing subsection and that said powers shall extend to and include the following: * * *
"g. Prescribing what official seals or labels should be attached to the packages of liquor sold under this chapter including the various kinds of official seals or labels for the different classes or varieties or brands of liquors. * * *
"q. The Liquor Control Commission shall prepare, print and furnish all forms required under this chapter."

From the foregoing it appears that the Liquor Control Commission has power to make regulations "prescribing what official seals or labels should be attached to the packages of liquor sold", and has power to make regulations for the preparation, printing and furnishing of forms, but nowhere in the last above quoted section is there anything indicating a clear and distinct intention on the part of the legislature that the contracting for these seals should be taken from the State Printing Board.

When in section 1921.017 in paragraph g of subsection 2, the legislature said that the commission should have power to make rules and regulations, including the prescribing of official seals and labels, they were authorizing and empowering the Commission to designate the form of the seal and the printed content of the seal, but they were not attempting to invade the power and duty imposed upon the State Printing Board to contract for the seals and to prescribe the standards of the printing and stock and material involved in their manufacture.

When under paragraph q of section 1921.017 the commission is directed to prepare, print and furnish all forms the legislature was doing nothing more than directing the Commission to prepare and cause to be printed in the usual

manner and pay for the forms necessarily required for the conduct of the business of the Commission. Nowhere in the Iowa Liquor Control act is there any indication of an intention to except the printing required by the Liquor Control Commission from the general provisions of the law relating to state printing.

In addition to the foregoing, it is significant that on August 1, 1934, an opinion was rendered from this department on the question as to the authority of the Liquor Control Commission to contract for their own printing, and in which opinion it was held that the Liquor Control Commission had no authority to contract for their own printing, but that the printing of the Liquor Control Commission should be contracted for by the State Printing Board. Since that time the Liquor Control Commission has submitted all of its needs for printing to the State Printing Board, and the State Printing Board has contracted for same. The opinion has been the basis for action by both the Liquor Control Commission and the Printing Board ever since its rendition and without exception. Four regular sessions of the General Assembly have been held since that time, and no action has ever been taken or even suggested by way of empowering the Liquor Control Commission to purchase or contract for, or to change its authority with reference to printing or certification. The courts will invariably give great weight to the construction placed upon the statutes by administrative bodies, particularly when successive sessions of the legislative branch have been cognizant of such construction and have made no effort to amend the law to effect a different result.

It is our considered opinion that the authority of the Liquor Control Commission with reference to the purchase of seals is confined to determining the design and content of the seal and that the determination of printing, stock and materials and the letting of the contracts is the power and duty of the State Printing Board.

POOR SUPPORT: EXPENSE OF TRANSPORTING PAUPER TO COUNTY OF LEGAL SETTLEMENT: COUNTY RESPONSIBILITY: If a poor person removes from the county of his legal settlement with the acquiescence of the county authorities, the county may not thereafter refuse to transport such person back to his home.

May 27, 1941. *Mr. H. Wayne Black, County Attorney, Audubon, Iowa:* This will acknowledge receipt of your letter of May 23 wherein you ask our opinion on the following question:

"The question I wish you to give me an opinion on is whether or not Audubon County should pay the costs of transporting this family back to Dickinson County or whether the expense should be borne by Dickinson County itself.

"Prior to the year, 1938, G. N. Jones and family moved into Dickinson County and had lived there continuously for some three years. They had legal settlement in Audubon County prior to moving to Dickinson County but lived in Dickinson County, according to the admission of the Relief Director of Dickinson County, Iowa, for two years before they asked for any help from Dickinson County. They then became recipients of relief from Dickinson County and was so receiving relief in June, 1938. Under arrangements with the relief director of Dickinson County they then moved to the town of Brayton in Audubon County, Iowa, to be there for a short time or until a child was born to his wife. They have remained in Brayton since that time and have received relief from Dickinson County ever since moving to Brayton, Iowa.

"Just recently Dickinson County officials made a change in their relief policy and have refused to extend relief to any person living outside their county limits and so notified the Jones family to that effect. That left the Jones family

stranded in this county with no way of getting back to Dickinson County unless someone transports them there. Dickinson County under the provisions of Section 3828.090 of the Code of Iowa, 1939, is of the opinion that Audubon County should bear the costs of transporting them back, and Audubon County under the provisions of Section 3828.096 claims that Dickinson County should bear the costs of transporting them."

For the purposes of this opinion, we quote in part from Section 3828.090, which reads as follows:

"*Foreign paupers.* 1. Any person who is a county charge or likely to become such, coming from another state and not having acquired a settlement in any county of this state or any person having acquired a settlement in any county of this state who removes to another county, may be removed from this state or from the county into which such person has moved, as the case may be, at the expense of the county wherein said person is found, upon the petition of said county to the district or superior court of that county. * * *"

We also quote in part from Section 3828.096 which reads as follows:

"*County of settlement liable.* The county where the settlement is shall be liable to the county rendering relief for all reasonable charges and expenses incurred in the relief and care of a poor person, and for the charges of removal and expenses of support incurred. * * *"

It is our opinion that Section 3828.090 above quoted applies only in those instances wherein the legal settlement of the poor person has not been determined and it is necessary for the court to decide in which county or state the settlement of such poor person should be. From the facts as stated in your letter, there appears to be no dispute as to the legal settlement of the poor person in the instant case. Consequently, it is our opinion that Section 3828.096 applies.

It is our further opinion that if the poor person removes from the county of his accepted legal settlement with the acquiescence or approval of the county authorities of such county, which situation exists in the instant case, then the county of his legal settlement may not thereafter refuse to transport such poor person back to his home. Consequently, it is our opinion that the expense of the removal of such poor person back to Dickinson County should be borne by Dickinson County and not by Audubon County.

SOCIAL WELFARE: COUNTY EMPLOYEES UNDER CONTROL OF STATE BOARD: MERIT EXAMINATIONS: Where §§3661.013 and 3828.003, C., '39, conflict, §3828.003 should be given precedence and all county employees coming under the supervision and control of the state board of social welfare must pass a merit examination.

May 27, 1941. *Mr. Eugene J. Kean, County Attorney, 507 Bank & Ins. Bldg., Dubuque, Iowa:* This will acknowledge receipt of your letter of May 21, wherein you ask our opinion on the following question:

"One of the clerical workers under the county board of social welfare failed to pass the merit system examination for the position he was holding at the time of said examination. The county board of supervisors is not willing to dismiss him upon their own motion, nor upon the demand of the state board of social welfare. This county has now integrated the various social agencies into one office. The question now raised under the above facts is as follows: does the state board of social welfare have the power to pass upon the competency of clerical and stenographic help, or to set up standards for qualification on clerical help by the imposition of merit system examinations, in view of the second paragraph of section 3661.013 of the 1939 Code of Iowa."

Section 3661.013, 1939 Code of Iowa, reads as follows:

"*County board employees.* The county board shall employ a county director and such other personnel as is necessary for the performance of its duties. The number of employees shall be subject to the approval of the state board. The county director and all employees shall be selected solely on the basis of the fitness for the work to be performed, with due regard to experience and training, but graduation from college shall not be made a prerequisite of any such appointment. It shall be a prerequisite to obtaining an appointment that the applicant shall have been a legal resident of Iowa for at least two years prior to the time of making said application.

"Any appointment made by the county board other than clerical or stenographic help, shall be subject to review by the state board in this respect, that if any appointee is not properly carrying out the duties for which he is appointed, or if any appointee is not qualified or capable of handling the duties for which he is appointed, and the state board so finds, it shall certify a copy of such finding to the county board and the county board shall then discharge the said employee and shall fill the vacancy."

Also, for the purpose of this opinion, we quote in part from Section 3828.003, 1939 Code of Iowa:

"*Powers and duties of the state board.* The state board shall be the responsible authority for the efficient and impartial administration of this chapter. To this end the state board shall formulate and make such rules and regulations, outline such policies, dictate such procedures and delegate such powers as may be necessary to carry out the provisions and purposes of this chapter.

"The state board shall:

"* * *

"2. Cooperate with the federal social security board, created by title VII of the social security act, Public No. 271, enacted by the 74th congress of the United States and approved August 14, 1935, in such reasonable manner as may be necessary to qualify for federal aid for old-age assistance, including the making of such reports in such form and containing such information as the federal social security board, from time to time, may require, and to comply with such regulations as said federal social security board, from time to time, may find necessary to assure the correctness and verification of such reports. * * *"

The 76th Congress amended the Federal Social Security Act requiring that after January 1, 1940, all states wishing to participate in federal funds must establish and maintain personnel standards on a merit basis. In other words, before the state of Iowa can continue to receive federal funds from the Federal Social Security Board, it was necessary that a merit system be instituted in the state of Iowa. Such merit system necessarily extended to all employees under the control of the State Board of Social Welfare. The authority for the State Board of Social Welfare to so act is found in the provisions of Section 3828.003 above quoted.

In your letter you state that Dubuque County is an integrated county. As such, all of the employees of the Dubuque County Social Welfare office are paid by the state and are subject to control by the State Board of Social Welfare. Section 3661.013 above quoted apparently gives the County Board the right to employ any clerical or stenographic help which it chooses. However, under the provisions of Section 3828.003 above quoted, the State Board of Social Welfare must cooperate with the Federal Social Security Board in all respects so as not to lose federal funds.

Under the amendment to the Federal Social Security Act, it has become necessary for the State Board of Social Welfare to require all employees, including clerical and stenographic help in the county offices, to come under the

merit system and to pass a merit examination. It thus appears that in actual operation, section 3661.013 and section 3828.003 are in conflict with each other. It is our opinion that in such a case, section 3828.003 should be given precedence and that all employees coming under the supervision and control of the State Board of Social Welfare must be required to join in the operation of the merit system and pass a merit examination.

GRAND ARMY OF THE REPUBLIC: PROPERTY OF DISBANDED POST: RIGHTS OF STATE DEPARTMENT: The state department of the Grand Army of the Republic is entitled to the property of any disbanded post unless it is shown that the post has voted to dispose of its property in the manner provided by the rules and regulations of the G. A. R.

May 28, 1941. *Amy Noll, Secretary, Grand Army of the Republic:* We wish to acknowledge receipt of your letter of May 26th, 1941, in which you present a question as to the right of the Department of Iowa Grand Army of the Republic to require that the property of the various disbanded Iowa Posts of the Grand Army of the Republic be delivered to the Department Headquarters.

It should be noted that the Grand Army of the Republic is incorporated and that the Department of Iowa Grand Army of the Republic also has corporate existence.

We quote Article 1, Section 1 of Chapter II of the Rules and Regulations of the Grand Army of the Republic:

"A Post may be formed by the authority of a Department Commander, or of the Commander-in-Chief (where no Department organization exists), on the application of not less than ten persons eligible to membership in the Grand Army of the Republic; and no Post shall be recognized by the members of the Grand Army of the Republic unless acting under a legal and unforfeited charter."

We must recognize that the various Posts of the Grand Army of the Republic came into existence by virtue of the Articles of the National organization and with the approval of the State Department of the Grand Army of the Republic. It is also clear that the various Posts are subject to the Rules and Regulations of the Grand Army of the Republic.

We quote Article 1, Section 3 of Chapter V of the Rules and Regulations of the Grand Army of the Republic:

"Post charters shall not be surrendered while one member desires continuance of the Post. In case of surrender or forfeiture of a charter, the property of the Department, including books of record and Post papers shall be immediately turned over to the Assistant Adjutant-General of the Department Encampment, and shall be subject to the disposition of the Department Encampment. If any Post has any property, moneys or effects of any kind unexpended when the Post has disbanded, then such property, money or effects shall become the property of the Department. Any Post surrendering its charter may, if it shall so vote, deposit all books of record and Post papers with the nearest historical society, public library or managers of a Grand Army memorial building, within such Department, to be kept and preserved by such society, library or managers of such memorial building. The receipt of such historical society, public library or managers of a Grand Army memorial building deposited with the Assistant Adjutant-General, shall be evidence that the Rules and Regulations have been complied with. It shall be the duty of the Commander of the Post making such deposit to procure such receipt and forward the same to the assistant Adjutant-General."

From the above there seems to be no question but what the State Department

is entitled to the property of any Post upon surrender or forfeiture of the Post's charter unless the Post has voted to deposit all books of record and Post papers with some organization mentioned in the above Article.

In order that any organization mentioned in Article 1, Section 3 of Chapter V may retain any books or records of any Post of the Grand Army of the Republic, it is necessary to show that the Post and such organization receiving the books and records have complied with the above mentioned requirements.

The necessity of the aforementioned Article in respect to the property of disbanded Posts is obvious. The property of the Post may best be preserved by the State Department and any retention of Post property by any organization mentioned in Article 1, Section 3 of Chapter V should be in strict compliance with said Article of the Grand Army of the Republic.

The State Department is entitled to the property of any disbanded Post unless it is shown that the Post voted to dispose of its property in the manner provided in the above Article.

GASOLINE TAX: OATHS WITH REFUND CLAIMS: COUNTY AUDITOR OR TREASURER NOT TO ADMINISTER: A county auditor or county treasurer is not authorized to administer oaths in connection with claims for gasoline tax refunds.

May 28, 1941. *Hon. W. G. C. Bagley, State Treasurer:* We have your request for an opinion as to whether the county auditor or county treasurer is authorized to administer oaths in connection with claims for refund of the gasoline tax.

Section 1216, Code, 1939, provides as follows:

"The following officers and persons are empowered to administer oaths and to take affirmations in any matter pertaining to the business of their respective office, position, or appointment.

"1. * * *

"2. * * *

"3. All county officers other than those named in section 1215."

Under this section county auditors and county treasurers are authorized to administer oaths in any matter "pertaining to the business of their respective office." The gasoline tax refund in no manner pertains to the business of the office of either the auditor or the treasurer, and therefore there would be no authority in the auditor or the treasurer to administer oaths in connection with the claim for gasoline tax refund.

This opinion is in accordance with the opinion rendered by this office on March 25, 1940, in connection with the authority of the county auditor to administer oaths *outside his office* in connection with the absent voters' ballots.

MILITARY SERVICE: PUBLIC OFFICERS AND EMPLOYEES INDUCTED: THIRTY DAYS PAY: State and municipal officers and employees inducted into military service other than the national guard prior to March 18, 1941, are not entitled to thirty days pay under §467.25, C., '39, as amended by Senate File 16, 49 G. A.

May 28, 1941. *Hon. C. Fred Porter, State Comptroller:* We have your request of May 26 as to whether officers or employees inducted into military service prior to March 18, the effective date of Senate File 16, are entitled to thirty days' pay.

Section 467.25, as amended by Senate File 16, Acts of the 49th General As-

sembly (which became effective by publication on March 18, 1941), has, beginning with March 18, 1941, read as follows:

"*State and municipal officers and employees not to lose pay while on duty.* All officers and employees of the state, or a subdivision thereof, or a municipality therein, who are members of the national guard, *organized reserves or any component part of the military, naval, or air forces or nurse corps of this state or nation, or who are or may be otherwise inducted into the military service of this state or of the United States,* shall, when ordered by proper authority to active service, be entitled to a leave of absence from such civil employment for the period of such active service, without loss of status or efficiency rating, and without loss of pay during the first thirty days of such leave of absence. *The proper appointing authority may make a temporary appointment to fill any vacancy created by such leave of absence.*"

The italicized portion of the foregoing quoted section is the part which went into the section by reason of Senate File 16.

Prior to the amendment of this section by Senate File 16, the provisions of this section applied only to members of the national guard. The amendment only adds further classes in addition to the national guard and attempts to make the addition all-inclusive. This is done by adding "organized reserves", also by adding disjunctively "any component part of the military, naval, or air forces or nurse corps of this state or nation", and further adding disjunctively "who are or may be otherwise inducted into the military service of this state or of the United States."

Nowhere are there any words indicating that the act is to have any retroactive effect. Nowhere are there any words used indicating a past induction. If it should be contended that the words "who are" were intended to have the same effect as the words "who have been" it is a sufficient answer to point out that the language would apply only to those "otherwise inducted" and would not apply to the "organized reserves", and it cannot be logically contended that the legislature would intend to make one class retroactive and another class not retroactive. For an act to be retroactive in its effect it must be clearly manifest by the language of the act that the legislature intended it to be retroactive. There is nothing in Senate File 16 to so indicate.

It is, therefore, our holding that there is no basis for the payment of thirty days' pay under section 467.25 as amended by Senate File 16 to those who are inducted into the service prior to March 18, the effective date of the act.

The foregoing, of course, does not apply to members of the national guard.

INSURANCE: FOREIGN ASSESSMENT LIFE INSURANCE COMPANIES: BUSINESS TAX: CERTIFICATES: Senate File 100, 49 G. A., does not impose a tax on business done during the year 1940 by foreign assessment life insurance companies which operated under Chapter 400, C., '39, and the certificates of such companies for 1941 should be issued without the payment of such tax.

May 29, 1941. *State Insurance Department, Des Moines, Iowa:* Receipt is acknowledged of your letter of May 9th requesting an opinion with respect to the application of Senate File 100. We understand your question to be as follows:

"Section 7022 of the 1939 Code of Iowa provides for a gross premium tax to be paid by foreign insurance companies. Senate File 100 of the Acts of the 49th General Assembly removed the exclusion formerly in Section 7022 applying to associations doing business under Chapter 400, and the result is that

such foreign corporations doing business under Chapter 400 are now required to pay the gross premium tax. The question is whether or not such a foreign assessment association doing business under Chapter 400 is liable for taxes on premiums during the year 1940 for business done in this State, and if the certificates authorizing such associations to engage in business during 1941 should be withheld as provided in Section 7023 of the 1939 Code until payment of said tax."

In reply to your question we call attention to the fact that the corporations doing business under the provisions of Chapter 400 receive their certificates as of date April 1st of each year authorizing such companies to do business for a period of one year. See Section 8702 of the 1939 Code. We next call your attention to the effective date of Senate File 100. This amendment was published on May 1, 1941 and became a law May 2, 1941. It thus becomes apparent that under the law as it existed at the time the foreign companies were to receive permits to do business for a twelve-month period, there was no statute providing that such companies should pay gross premium tax upon the past year's business in Iowa as a prerequisite for the granting of the permit.

An examination of Section 7022 shows that the statement filed by the insurance companies is the first step toward the assessment of the tax. This statement must be filed within ninety days after the close of the year, and the tax is due when computed by the Tax Commission. After the passage of Senate File 100, the next date for the filing of a statement by the insurance companies will be in 1942. The next due date for the payment of the tax after the passage of Senate File 100 will also be in 1942. All laws should be given a prospective interpretation unless a legislative intention for a retrospective interpretation can be found in the Act. We do not believe a retrospective interpretation can be found here. At the time this Senate File 100 was passed, the Legislature knew, or should have known, that all corporations doing business under Chapter 400 had already reported and presumably should have received their certificates to do business for a twelve-month period from April 1st.

In view of the above, we are of the opinion that no tax based on business done during the year 1940 should be collected from companies which operated during that year under Chapter 400, and that the certificates should issue without the payment of such tax.

We wish it understood that we at this time do not pass upon the question of whether or not such companies will have to pay a tax in the year 1942 upon the premiums received during the year 1941 and prior to the effective date of Senate File 100. Research has shown that it would be entirely within the power of the Legislature to have placed the tax on the receipts of premiums during the previous year. Our opinion is confined solely to the legislative intent as shown by the dates of the reports, the certificates, and the amendment. We are not at all impressed with the argument that the Legislature could not have laid this tax on premiums received before the effective date of the Act. We feel there is ample authority for the legislative power to so tax found in *Ex rel. Connecticut Mutual Life Ins. Co. v. Kelsey*, 101 N. Y. Supp. 902; *Sovereign Camp, W. O. W. v. Casodos*, 21 Fed. Supp. 989, and *State v. National Life Ins. Co.*, 275 N. W. 26. We feel these cases will be of interest if a subsequent question is submitted involving the right to lay the gross premium tax against a company operating prior to the amendment under Chapter 400 for the period from January 1st to May 2nd, 1941.

COOPERATIVE ASSOCIATIONS: FILING OF AMENDMENT TO ARTICLES: TIME OF MEETINGS SPECIFIED IN ARTICLES: REASONABLENESS: Section 8491, C., '39, is not mandatory but is directory, and if an amendment to corporation articles is not filed until after thirty days, it does not become effective until the date of filing.

Articles of a cooperative association under chapter 390, C., '39, which provide for an annual meeting, the date to be determined by the board of directors or executive committee, are reasonable and not illegal.

May 29, 1941. *Hon. Earl G. Miller, Secretary of State:* We have your inquiry as to whether the provisions of section 8491 of Chapter 390 of the Code of 1939 with reference to the filing of amendments to articles of corporations incorporated under Chapter 390 are mandatory or directory.

Said section 8491 provides as follows:

"Within thirty days after the adoption of any amendment to its articles of incorporation, the association shall cause a copy of such amendment to be recorded in the office of the Secretary of State".

It is our view that this provision of the statute is not mandatory, but directory, the effect being that if an amendment is adopted, and if within thirty days it becomes effective as of the date of its adoption, but that if not filed until after thirty days it does not become effective until the date of filing.

You also inquire as to the legality of the provisions of articles of incorporation under Chapter 390 which provide that the annual meeting of the corporation shall be held at the office of the association during the month of February or March of each year, at such time and date during either of said months as the executive committee shall determine, ten days notice of said time, place and date being given by publication of same in a publication of general circulation among the members of the corporation. Your question is particularly directed to the time of the holding of the meeting as designated in the proposed articles.

It is our view that such a provision providing for the annual meeting to be held within a certain designated period, the exact date to be determined upon by the board of directors or executive committee of the corporation, is a reasonable provision and is not illegal.

COOPERATIVE ASSOCIATIONS: "ORGANIZATION STOCK" WHICH IS NOT IN FACT STOCK: VOID PROVISION IN ARTICLES: ORGANIZATION OF COOPERATIVES: Where cooperative association articles provide for "organization stock" which is not stock in a legal sense, a provision is illegal and void which provides that a stockholder must have a property interest in the corporation and without such interest there would be no right to vote.

Corporations which are in fact cooperatives must be organized under chapter 390.1, C., '39, and not under chapter 384.

May 29, 1941. *Hon. Earl G. Miller, Secretary of State:* We have your request for an opinion on the form of Articles of Incorporation proposed to be used by the Iowa Farm Service Company in incorporating local county farm service companies, and in which you state the following question:

"May the form of articles of incorporation submitted legally be used to incorporate a corporation under Chapter 384 of the Code of Iowa, 1939."

We understand your position to be that under the form of articles submitted a corporation could not be incorporated under Chapter 384 of the Code, but could only be incorporated under the provisions of Chapter 390.1 entitled "Co-

operative Associations (Newly Organized)", after eliminating what you suggest as certain objectionable features.

What is now Chapter 390.1 of the Code, 1939, was enacted as Chapter 94 Acts of the 46th General Assembly. It relates to cooperative corporations. The title to that act was in the following language:

"An Act to revise and modernize the laws relating to cooperative corporations with and without capital stock; to define such corporations, and other terms; to provide for the incorporation, regulation, renewal, dissolution and internal affairs of such corporations; to define their necessary and permissible powers and activities; to provide for classes of stockholders and the rights, privileges, duties and obligations of stockholders and members; to exempt certain cooperative securities from the Iowa securities act; to permit marketing contracts and provide remedies thereon; to require certain fees, reports and penalties; to regulate the use of the word 'cooperative'; to extend the act to certain existing cooperatives; to permit the admission of foreign cooperatives; to limit the application of chapters three hundred eighty-nine (389) and three hundred ninety (390) of the 1931 code of Iowa, and for other related purposes."

At the time of the enactment of Chapter 390.1, Code 1939, there was in existence as cooperative laws chapters 389 and 390 of the Code, and when Chapter 94, Acts of the 46th General Assembly was enacted, section 61 thereof (section 8512.60, Code 1939) provided specifically that the provisions of chapters 389 and 390 should be inoperative as to corporations chartered from and after July 4, 1934, (the effective date of the act). In other words that no corporations should be chartered under the provisions of Chapters 389 and 390 from and after Chapter 94, Acts of the 46th General Assembly became effective.

In section 8512.02 under Chapter 390.1 a cooperative is defined in the following language:

"A 'cooperative association' is one which, in serving some purpose enumerated in section 8512.06, deals with or functions for its members at least to the extent required by section 8512.03, 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.

" 'Association' means a corporation formed under this chapter."

Section 8512.03 of the Code provides that such an association shall not deal or function with or for nonmembers to an extent exceeding one-half of the value of business done by it.

Section 8512.04 provides that no person, firm or corporation *hereafter* organized, which is not an association defined in the chapter shall use the word "cooperative" or any abbreviation thereof in its name or its advertising or in any connection with its business.

The form of the articles of incorporation submitted clearly indicates that it is to function on a cooperative basis. The articles provide in Article III, Section 1, that the object of the corporation is to function "cooperatively and upon a non-profit basis to and for its stockholders." And again, in Article IV to the same effect. It provides for distribution of its net earnings among the "membership stockholders" on a patronage basis. (Article VII.) The articles provide that business done with non-stockholders shall not exceed that done with stockholders, (Article III, section 2), and the articles provide that each membership stockholder shall be entitled to one vote, and one vote only. (Article X.) However, two classes of voting stock are set up, one known as "membership stock" (Article VI, section 1) and the other known as "organiza-

tion stock" (Article VI, section 2). The articles limit the holdings of membership stock to one share per stockholder, but provide that the organization stock may be issued only to the Iowa Farm Service Company, the Iowa Farm Bureau Federation or a state-wide corporation organized under the laws of Iowa on a cooperative basis sponsored by and cooperating with the Iowa Farm Bureau Federation. The holders of the organization stock are entitled to one vote for each and every share held and owned by them but under the articles are entitled to draw no dividends, either stock or patronage, and are entitled to no distribution of assets in any liquidation.

If the provision for organization stock was absent from the proposed articles it would be clear that the corporation would come under the provisions of chapter 390.1 and not under chapter 384.

However, it is contended that the "organization stock" is not stock in that the holders of this stock are not voting members of the corporation by reason of the fact that it receives no dividends, does not participate in earnings, nor share to any extent in the corporate assets upon liquidation or otherwise. That its only feature or attribute is to give outsiders holding it a vote in accordance with the number of shares held.

The mere fact that this is called stock, does not necessarily mean that it is stock.

In the case of *Bridgman v. City of Keokuk*, 72 Iowa 42, the court had occasion to discuss the nature of stock in a corporation and in this connection said:

"Stock in a corporation * * * is not a credit, not an indebtedness to its owner, but, on the contrary, is an interest in the property of the corporation. Its owner has an equitable interest in the property of the corporation which is represented by the term 'stock', and the extent of his interest is described by the term 'shares'. The expression 'shares of stock' * * * expresses the extent of the owner's interest in the corporate property."

In *Fletcher "Corporations"* 88, Section 5100, appears the following:

"A share of stock represents the proportionate and aliquot interest in the property of the corporation * * * It follows as a necessary conclusion from the nature of a share of stock that it represents a proportional interest in the aliquot part of the property and assets of the corporation."

Also the following from 11 *Fletcher "Corporations"* 44, Sec. 5086:

"An essential element of common stock is that the holders have an opportunity to make a profit if there is any, and to participate in the assets after claims are paid."

In other words, the ownership of stock in a corporation contemplates the ownership of an aliquot part of the corporate property or the right to share in the proceeds when distributed.

The courts have frequently held that where a corporation owns its own shares it cannot vote them on the theory that the corporation has no financial interest as the result of such ownership, and to permit it to vote its own shares would be to allow voting by those not actually holding an estate in corporate property, and have even held that this principle cannot be avoided by the device of registering the corporation's own stock in the name of some individual.

American R. Co. v. Haven, 101 Mass. 398, 3 Am. Rep. 377
Thomas v. International Silver Co., 59 Atl. 321
O'Connor v. International Silver Co., 62 Atl. 408
See *Farrington v. Tennessee*, 95 U. S. 687, 24 L. Ed. 558.

In the case of *Lloyd v. Ramsey*, 192 Iowa 103, articles were presented which gave voting rights exclusively to common stockholders who were the real stockholders with a property interest in the company but the amount of common stock was very small in proportion to the amount of preferred stock, and the Secretary of State refused to approve the articles, and he was sustained in this by the Executive Council, and the Court held that the Secretary of State and the Executive Council were within their rights in disapproving the articles because of the disproportionate interest between the preferred stockholders and the common stockholders.

It is therefore our conclusion that the "organization stock" is not in fact stock in the corporation in the legal sense of the word, and the provision therefor in the articles is illegal and void, that a stockholder must have a property interest in the corporation and its assets, and that in the absence of a property interest in the assets there would be no right to vote.

It is further our opinion that any cooperative association formed under the laws of the state of Iowa must be formed under and in compliance with the provisions of Chapter 390.1 of the Code. We have heretofore set out the provisions of the title of the act. An examination of these provisions we believe clearly discloses that it was the intention of the legislature to require all cooperative corporations organized after the effective date of that act to be incorporated under the provisions of that act. The declared object and purpose of the legislature as stated in the title is "An act to revise and modernize the laws relating to cooperative corporations * * * to define their necessary and permissible powers and duties * * *".

It is the general rule that where a special statute is enacted to govern corporations of a peculiar nature that the general law does not apply to them.

1 *Fletcher "Corporations"* 268, Sec. 68
1 *Fletcher "Corporations"* 399, Sec. 109
In re Application of Pennsylvania State Camp, etc., 194 Atl. 590
State v. Nichols, 82 Pac. 741
Ex Parte Baldwin Producers Association, 83 So. 69.

In the case last cited above there was a general corporation law and a special statute as to cooperatives. Articles for a cooperative were presented with larger powers and a different organization than the cooperative law provided, and it was claimed that these were justified by the general law and that the corporation could be formed under the general corporation law. The court pointed out that the articles claimed substantially every right given by the special law, and said:

"While it is true that the charter provisions * * * may be in some particulars more general in scope than that authorized in the act, yet we are of the opinion that where it so clearly appears * * * that the company is in fact organized under the (special) act of August 25, 1909, such other powers which may be considered beyond the corporate authority (under the special act) will not change the company from what its declarations of incorporation show it to be, viz., a corporation organized under the special act of August 25, 1909."

The court held that a claim for other powers would not change the nature of the cooperative, but simply render those claims void.

It is, therefore, our conclusion that corporations which are in fact cooperatives must be organized under the provisions of Chapter 390.1 of the Code, and not under Chapter 384.

BEER AND MALT LIQUORS: CLASS C PERMITS: RENEWAL: Class C permits expiring before July 4, 1941, should be renewed for one year.

June 4, 1941. *Mr. Roy W. Smith, County Attorney, Council Bluffs, Iowa:* This will acknowledge receipt of your letter of the 27th ult. wherein you request the opinion of this department on the following legal question:

If a class C beer permit expires prior to July 4, 1941, for what period should it be renewed?

It is our opinion that such permit should be renewed for one year. In other words, the new law does not in any manner affect any permit expiring prior to the effective date of the act.

SCHOOLS: JUNIOR COLLEGE ESTABLISHED: ELECTION: The proposition of establishing a junior college by a school district may be submitted to the voters not at a special election but only at a general election.

June 5, 1941. *Miss Jessie M. Parker, Superintendent of Public Instruction, Des Moines:* We have your letter of June 4, asking an opinion of this office as to whether the proposition for the establishment of a junior college by the school district may be submitted at a special election of the voters of the district called for that purpose.

Section 4267.1 of the Code, 1939, provides:

"The board, upon approval of the state superintendent of public instruction, and when *duly authorized by the voters* shall have power to establish and maintain * * * public junior colleges."

Section 4217, Code 1939, provides:

"The voters at the regular election shall have power to:
"* * *

"8. Authorize the establishment and maintenance in each district of one or more schools of a higher order than an approved four-year high school course."

Section 4216.02 makes provision for special elections in school corporations in the following language:

"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."

From the foregoing it will be seen that the voters are empowered to authorize the establishment of a junior college at a regular election, and in section 4216.02 no provision is made for voting on a proposition for maintaining a junior college, at a special election, the statute with reference to special elections of such corporations being silent on the subject.

We must conclude that the legislature did not intend that the proposition for establishing a junior college should be voted at any election other than a regular election.

The amendment to section 4267.1 made by House File 138, Acts of the 49th General Assembly, in no way affects this question. All that the amendment to House File 138 did was to change the size of the districts within which junior colleges may be established, and to provide that a proposition authorizing the establishment of a junior college must be carried by a sixty per cent of the total vote cast for and against the proposition.

ADOPTION: RECORDS NOT ACCESSIBLE TO PUBLIC: MANNER OF KEEPING: The legislative intent that adoption records should be sealed or locked up will be carried out if such papers are kept inaccessible to the public except on court order. A separate journal should be kept for adoption matters, such journal to be locked or kept in a vault or locked cabinet. If the docket shows the person seeking to adopt a child, such docket should be kept from public access.

June 25, 1941. *Mr. Clarence A. Kading, County Attorney, Knoxville, Iowa:* We wish to acknowledge receipt of your recent letter in which you ask for our opinion as to how the Clerk of the Court should proceed to carry out the intent of House File 169 recently enacted by the Forty-ninth General Assembly. Said section reads as follows:

"The complete record in adoption proceedings, after filing with the Clerk of Court, shall be sealed by said Clerk, and the record shall not thereafter be opened except on order of the court."

It is our opinion that the legislature intended that the original papers filed in an adoption case should be sealed and placed in a vault or safe, or the papers should be kept in a locked filing cabinet, etc. We believe that the intent of the law will be carried out if such papers are kept in such a way that they are not accessible to the public unless permission is obtained from the court to inspect the records.

It is our belief that in order to carry out the intent of the above law, it will probably be necessary for the Clerk of the Court to maintain a separate journal for the recording of matters pertaining to adoption cases. Such journal should be of such type as may be locked or the journal should be kept in a vault or locked filing cabinet in order to avoid public inspection of the records. If it is the practice of the Clerk in docketing adoption cases to show in the docket the name of the person seeking to adopt the child, it will be necessary to keep said docket from public access as well as the original papers and the journal containing the adoption proceedings.

RECORDS: CONDITIONAL SALE CONTRACT: INDEXING BOTH CONTRACT AND ASSIGNMENT: When a conditional sale contract has a duly executed assignment in the body of the contract or on the back, it should be indexed as two instruments. The recorder may charge twenty-five cents for filing the contract and for each assignment, and he is required to index both the contract and the assignment.

June 25, 1941. *Mr. Steven V. Carter, County Attorney, Leon, Iowa.* We wish to acknowledge receipt of your recent letter in which you ask for an opinion on the following question:

In filing conditional sale contracts we have been asked to file them without showing the assignment, and simply write on the margin "Assignment not desired". Is it all right to file them without showing the assignment?

It is our opinion that when a conditional sale contract which has a duly executed assignment either in the body of said contract or on the back thereof, the same should be considered as two instruments and should be indexed accordingly. The Recorder would be entitled to charge twenty-five cents (25c) for filing the contract, and twenty-five cents (25c) for each assignment thereon.

We are of the opinion that when there is a duly executed assignment as mentioned above, the Recorder is required to index the contract and assignment, and that there is no authority for the Recorder to index only the contract at the request of the party presenting the document for filing.

TAXATION: ASSESSMENT OF PINBALL OR MUSIC MACHINES: Pinball machines, music machines, and other such property may be assessed for taxation purposes to the party who has the property in his control or in his place of business.

June 25, 1941. *State Tax Commission, Des Moines, Iowa:* We are in receipt of your request for an opinion which is as follows:

"We are confronted with the question many times as to whom property such as pinball machines, music machines and property in the hands of a person on consignment should be assessed, and so far we have never been able to give a definite answer.

"I would like to inquire whether or not the provisions of section 6958 are sufficient to advise in such cases that this class of property can be assessed to the party who has it in his control, or in his place of business."

Section 6958 of the 1939 Code provides as follows:

"*Agent personally liable.* Any person acting as the agent of another, and having in his possession or under his control or management any money, notes, and credits, or personal property belonging to such other person, with a view to investing or loaning or in any other manner using or holding the same for pecuniary profit, for himself or the owner, shall be required to list the same at the real value, and such agent shall be personally liable for the tax on the same; and if he refuse to render the list or to swear to the same, the amount of such money, property, notes, or credits may be listed and valued according to the best knowledge and judgment of the assessor."

It is true that the provisions of this section have generally been invoked to reach intangible property in the hands of an agent, and one Iowa Supreme Court case, Crane Company v. Des Moines, 208 Iowa 164, 76 A. L. R. 801, deals with the question of the taxation of intangible property which has acquired a business situs in a place other than the owner's domicile. An examination of the above statute and the two preceding sections of the Iowa Code shows that tangible personal property should be listed for assessment by the person having the control over the property or using the property for pecuniary profit for himself or the owner.

Section 6956 provides in effect that every inhabitant of this State shall list for taxation all property subject to taxation "of which he is the owner or has the control or management", and Section 6957 in outlining the duty of any person who must list property belonging to another states that it shall be listed "in the same county in which he would be required to list it if it were his own * * *".

The property described in the question is property that is subject to taxation in this State. It is property over which the consignee exercises control and management. It is property in the consignee's possession or control "with a view to * * * using * * * the same for pecuniary profit for himself or the owner * * *" within the meaning of Section 6958 heretofore quoted.

In view of the above we are of the opinion that the class of property stated in the question may be assessed to the party who has the property in his control or in his place of business.

GAMBLING: POSSESSION OF PUNCHBOARDS: PENALTY: For a punchboard prosecution under §13198, C., '39, for keeping gambling houses, there must be evidence that gambling has actually taken place, but for a prosecution under §13210, C., '39, for possession of gambling devices, possession of punchboards is sufficient. The penalty for possession of punchboards is provided by §§12893 and 12894, C., '39.

June 25, 1941. *Mr. Francis J. Kuble, County Attorney, Des Moines, Iowa:* This is in answer to your letter of the 11th inst., wherein you ask the opinion of this department relative to the following legal question, involving the interpretation of Sections 13198 and 13210, Code of Iowa, 1939.

Section 13198, Code of Iowa, 1939, provides:

"If any person keep a house, shop, or place resorted to for the purpose of gambling, or permit or suffer any person in any house, shop, or other place under his control or care to play at cards, dice, faro, roulette, equality, punch boards, slot machine or other game for money or other thing, such offender shall be fined in a sum not less than fifty nor more than three hundred dollars, or be imprisoned in the county jail not exceeding one year, or both."

Section 13210, Code of Iowa, 1939, provides:

"No one shall, in any manner or for any purpose whatever, except under proceeding to destroy the same, have, keep, or hold in possession or control any roulette wheel, klondyke table, poker table, punch board, faro, or keno layouts or any slot machine or device with an element of chance attending such operation."

The question is: May a person, whom the evidence shows has the mere possession of punch boards, be prosecuted under Section 13198, i. e., punch boards are found, let us say, laying on the counter of a store but there is no proof that any person has been "punching out" any of the slips contained in the sealed holes of said board.

It is our opinion that in order for the prosecution to be successful under Section 13198, the state must be able to prove that the person having possession of the punch boards permitted or suffered persons in said store to "play at" said punch boards. In other words, it is our opinion that under Section 13198 the mere possession of gambling devices does not make the possessor of such devices subject to prosecution. It is clear, so it seems to us, that a person can not be convicted of "keeping a gambling house" unless there is evidence that gambling actually took place therein.

Now the question arises as to whether or not such person so having possession of said punch boards may be successfully prosecuted under Section 13210.

We think it very clear that he may. Said section specifically provides: "No one shall * * * keep, or hold in possession or control any * * * punch board * * *".

The question arises as to what penalty is provided for having possession of such punch boards.

We believe, and so hold, that Sections 12893 and 12894, Code of Iowa, 1939, cover the situation.

Section 12893, provides:

"When the performance of any act is prohibited by any statute, and no penalty for the violation of such statute is imposed, the doing of such act is a misdemeanor."

There is no specific penalty under Section 13210 and, therefore, Section 12893, just quoted, applies, as we view it.

Section 12894, provides:

"Every person who is convicted of a misdemeanor, the punishment of which is not otherwise prescribed by any statute of this state, shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment."

DOMICILE AND RESIDENCE: WAR VETERAN OR WIDOW OF VETERAN: RESIDING OUTSIDE OF STATE: NO RIGHT TO SOLDIERS TAX EXEMPTION: A World War veteran or a widow of a Civil War veteran who has an actual residence outside the state of Iowa, but who maintains a voting residence in Iowa, is not entitled to a soldiers tax exemption under the statute providing "he is a resident of and domiciled in the state of Iowa."

July 3, 1941. *State Tax Commission, Des Moines Building, Des Moines, Iowa:*

We are in receipt of your request for an opinion with respect to the following questions concerning the application of Senate File 333, Acts of the 49th General Assembly, to-wit:

1. Mr. A is a world war veteran and in the employ of the postal department of the United States and located at New Orleans. He maintains his voting residence in Iowa and has made application for soldier's exemption. Is Mr. A. under the provisions of Senate File 333, eligible for this exemption?
2. Mrs. B is a widow of a civil war veteran and lives outside of Iowa, but maintains her voting residence in Iowa. Is she eligible for the soldier's exemption?

Section 2 of Senate File 333 provides that any person who is an honorably discharged soldier within the provisions of Section 6946 of the 1939 Code of Iowa, can receive a soldier's exemption if "he is a resident of and domiciled in the State of Iowa."

To answer the above questions it is necessary to interpret the phrase "domiciled in and resident of" as used in this statute.

In the situations outlined in the two questions we assume that A does not live in the State of Iowa, and in fact maintains a residence in which he dwells in the city of New Orleans, so that in neither case do the applicants for the soldier's exemption actually reside in the State of Iowa.

Residence and domicile are not necessarily the same. Residence is actually used to indicate a place or dwelling either of a permanent or temporary nature, while domicile denotes a fixed, permanent residence, to which, when absent one has the intention of returning. Thus the court in the case of Salem Independent School District v. Kiel, 206 Iowa 967, defined the two terms as follows:

"The terms 'residence' and 'domicile' are not necessarily identical in meaning. The first is used to indicate the place or dwelling, which may be either permanent or temporary; the second, to denote a fixed, permanent residence, to which, when absent, one has the intention of returning. Fitzgerald v. Arel, 63 Iowa 104; In re Estate of Titterington, 130 Iowa 356; In re Estate of Colburn, 186 Iowa 590."

In construing this statute, it is therefore apparent that the use of the word "residence" restricted the class of applicants for soldier's credit to those who actually live in the State of Iowa. Each of the above applicants might be said to have an Iowa domicile, but it cannot be said that they have an Iowa residence within the meaning of this statute.

We are, therefore, of the opinion that the above applicants are not entitled to soldier's credit within the meaning of Senate File 333, Acts of the 49th General Assembly.

OSTEOPATHIC PHYSICIAN MAY REFRACT EYES WITHOUT OPTOMETRY LICENSE: An osteopathic physician is not required to obtain an optometry license to refract eyes, since they have been held to come within the phrase "licensed physicians and surgeons" who, under the statutes, are not to be included as persons engaged in the practice of optometry.

July 3, 1941. *D. E. Hannan, D. O., Secretary, State Board of Osteopathic Examiners, Perry, Iowa:* We wish to acknowledge receipt of your letter of recent date in which you ask for an opinion as to whether an osteopathic physician may refract eyes without procuring an optometry license as required by Chapter 122 of the 1939 Code of Iowa.

This question was ruled on by the Attorney General on August 31, 1922. The opinion held that osteopaths could practice optometry without having an optometry license. The opinion was based on the fact that osteopaths were required to study the treatment and disease of the eyes and on an interpretation of the following language which appeared in the optometry law at that time:

"Any person practicing optometry shall be prohibited from using the prefix doctor to his name, unless he is a duly registered and licensed physician and surgeon and his rights to such being allowed by the state board of medical examiners."

The Attorney General reached the conclusion that an osteopath was included in the words "physician and surgeon", and could practice optometry without an optometry license.

The 40th Extra General Assembly shortly thereafter amended the optometry law, the pertinent part of which is as follows:

"2575. *Persons not engaged in the practice of optometry.* This chapter shall not be construed to include the following classes:
1. * * *
2. Licensed practitioners of medicine."

After this change, the Attorney General ruled that an osteopath could not practice optometry without securing an optometry license. Said section was not amended or changed until the 45th General Assembly amended the law when it convened in 1933, the section being changed to read as follows:

"2575. *Persons not engaged in.* This chapter shall not be construed to include the following classes:
1. * * *
2. Licensed physicians and surgeons."

The exception statute has not been changed since 1933 and it uses the words "physicians and surgeons", the same words on which the opinion of 1922 was based.

Section 2554.06 provides that an approved osteopathic college must offer a course in the study of:

"Practice of osteopathy as applied to the diagnosis and treatment of human diseases, including clinical practice; neurology and psychiatry; obstetrics; pediatrics; *eye, ear, nose and throat;* * * *"

It should be noted that the State Department of Social Welfare has, in connection with its rules governing aid to the blind, included osteopaths in its definition of ophthalmologists.

The 49th General Assembly amended the optometry law by enacting Senate File 211 as amended. Senate File 211 as introduced in the Senate contained the following section:

"Sec. 5. Chapter one hundred twenty-two (122), code, 1939, is amended by adding thereto the following:
'It shall be unlawful for any person to dispense an ophthalmic lens or lenses, without first having obtained a written prescription or order therefor from a duly licensed practicing optometrist, *or licensed practitioner of medicine and*

surgery as defined in Chapter 116 of the Code. Each such practitioner shall furnish, without charge, a copy of his patient's prescription.' "

Said section 5 as passed, reads as follows:

"Sec. 5. Chapter one hundred twenty-two (122) of the Code is amended by adding thereto the following:

'It shall be unlawful for any person to dispense an ophthalmic lens or lenses, without first having obtained a written prescription or order therefor from a duly licensed practitioner referred to in this chapter, *or other practitioner authorized to write said prescriptions or orders.* Each such practitioner shall furnish his patient without charge a copy of his patient's prescription.' "

The above shows an attempt to definitely limit the practice of optometry to licensed optometrists and licensed practitioners of medicine and surgery as defined in Chapter 116 of the Code. If Senate File 211 as originally introduced had passed, the osteopath would clearly have been excluded from the right to dispense ophthalmic lens or lenses; however, the legislature did not pass Senate File 211 as it was introduced containing the above mentioned limited language, not seeing fit to so limit the practice. The legislative history and Attorney General's opinions of the optometry law indicate that the words "physician and surgeon" do include a licensed osteopathic physician. The legislature in amending Section 2575, paragraph 2 from "licensed practitioners of medicine" to read "licensed physicians and surgeons" must have intended to have broadened the language.

It is our opinion that osteopaths may refract eyes without procuring an optometry license as required by Chapter 122 of the 1939 Code of Iowa.

INTOXICATING LIQUORS: CLASS "B" BEER PERMITTEE: CONVICTED OF SELLING BEER TO MINORS PRIOR TO ISSUANCE OF LICENSE: REVOCATION OF LICENSE NOT MANDATORY: Where a class "B" permittee has been issued a license to sell beer and it is ascertained thereafter that the permittee had been convicted of the offense of selling beer to a minor prior to the issuance of the present license, the revocation of such license is not mandatory, the statute referring to such violation after the permit is issued.

July 8, 1941. *Mr. F. L. Bedell, County Attorney, Newton, Iowa:* This is in answer to your letter of the 23rd ult., wherein you ask the opinion of this department relative to the following legal question. As to the facts we quote from your letter:

"On October 9, 1940, the town council of the town of Valeria in Jasper County granted a Class "B" permit to one Russell Snow for a period of one year from the date of issuance of said permit. At the time the permit was granted, the council did not know the applicant had been indicted in Dallas County, Iowa on January 11, 1936 for the crime of furnishing beer to a minor under twenty-one years of age and had been convicted and sentenced on such charge.

"I should like your opinion on the question as to whether the council is required under Section 1921.125 to revoke this beer permit on the ground of the permittee's 1936 conviction."

It is the opinion of this department that Section 1921.125 refers to convictions after the issuance of permit and that, therefore, the revocation of Mr. Snow's permit is not mandatory under said section.

Section 1921.125, Code of Iowa, 1939, provides:

"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 * * * his permit shall be revoked * * *."

As I have above indicated, a reading of this statute, we believe, has reference to violations after the permit is issued.

We want it understood, of course, that we are passing only on the question of whether or not the revocation is mandatory under the section above referred to. We do not pass upon the question of whether or not the council would have the right to revoke the permit because of the fact that the permittee was not possessed of good moral character at the time the application for a class "B" permit was filed. It is clear that he was not possessed of such good moral character as the statute requires, for under its provisions it is specifically stated that a person who has been found guilty of selling beer to minors is not a person of "good moral character" as that term is used in the statute. (See Sec. 1921.096, Par. 6, 1939 Code of Iowa.)

PEACE OFFICER: OFFICER IN ATTENDANCE WHILE DANCING PERMITTED WHERE BEER IS SOLD: OATH OF OFFICE REQUIRED: BOND AND UNIFORM TO BE FURNISHED WITHOUT EXPENSE TO OPERATOR: COMPENSATION DETERMINED BY LOCAL AUTHORITIES: Under the statute requiring a policeman to be in attendance at all times while dancing is permitted in a place of business where beer is sold, such officer is required to take the regular oath of office and furnish a bond and uniform both without expense to the operator, and such officer's compensation is to be determined by the local governing bodies.

July 9, 1941. *Mr. Charles L. Johnston, County Attorney, Centerville, Iowa:* This is in answer to your letter of the 5th inst., wherein you ask the opinion of this department relative to the following legal questions:

1. Under House File 415, Laws of the 49th General Assembly, may the Class "B" permittee be required to provide the uniform worn by the policeman to be in attendance during the hours when dancing is permitted?
2. Is such policeman required to be under bond and if so may the Class "B" permittee be required to pay the bond premium?
3. As to your third inquiry, we quote from your letter:

"Also I would like to know whether or not your department has made any ruling or has any suggestions relative to the charge that the special deputy sheriff should make for policing taverns where dancing is permitted."

As to your question number one, have to say that it is our opinion that the Class "B" permittee may not be legally required to pay the cost of the policeman's uniform. We do not believe that the language employed in the act justifies any other construction.

As to your second question, it is our opinion that this policeman must be bonded; that he must take the regular oath of office of a police officer, deputy sheriff or special officer, as the case may be. The appointment should be approved by the council or board of supervisors, as the case may be, whenever such approval is required under the general statutes pertaining to appointment of peace officers. It is our opinion that the Class "B" permittee may not be required to pay the bond premium. In our opinion a fair interpretation of the statute is that the permittee must pay reasonable compensation for the services rendered by such police officer in policing the dance hall. That is all that he may be required to pay.

As to your third inquiry, have to say that we do not deem it practical for our department to make suggestions relative to compensation to be paid these

policemen. This, of course, will depend upon several factors concerning which we have no information. We are satisfied that this is a matter that can be determined by the local governing bodies.

SCHOOLS AND SCHOOL DISTRICTS: REFUNDING SCHOOL BONDS BEFORE MATURITY WITH INTEREST TO MATURITY: REFUNDING BONDS BEARING INTEREST FOR THE SAME PERIOD: PROHIBITED BY STATUTE LIMITING INTEREST RATE TO FIVE PERCENT: A school district is prohibited from refunding outstanding bonds which are due July 1, 1942, with interest to maturity at five percent when the refunding bonds are to be issued July 1, 1941, with interest at two and one-half percent, since the statute limits the rate of interest on school bonds to five percent per annum.

July 14, 1941. *Hon. Chet B. Akers, Auditor of State:* We wish to acknowledge receipt of your letter of July 11, 1941, in which you ask for an opinion on the following situation:

A school district wishes to refund $20,000 in outstanding bonds which are due July 1, 1942. They carry an interest rate of five percent. The bonds are to be refunded as of July 1, 1941, with the interest paid to date of maturity, or July 1, 1942. The new bonds are to be issued as of July 1, 1941, and carry an interest rate of two and one-half percent from date of issue.

Does such procedure violate the provisions of Section 4407 limiting the rate of interest on school bonds to five percent?

For the purpose of this opinion, we quote the pertinent part of Section 4407 of the 1939 Code of Iowa:

"*Form—rate of interest—where registered.* All of said bonds shall be substantially in the form provided for county bonds, but subject to changes that will conform them to the action of the board providing therefor; shall run not more than twenty years, * * *; bear a rate of interest not exceeding five percent per annum, payable semiannually; * * *"

The legislature saw fit to limit the rate of interest which school bonds could bear to five percent per annum, which is the equivalent of saying that the debts of the school district represented by school bonds shall bear not more than five percent per annum.

In the above mentioned situation, for a period of one year the school district would have outstanding two different bond issues representing the same indebtedness, the one issue of bonds bearing five percent interest and the other two and one-half percent interest, which requires the taxpayers of the school district to pay interest at the rate of seven and one-half percent per annum on this particular indebtedness instead of the contemplated maximum of five percent.

It is our opinion that such a practice clearly violates the intent and purpose of the above mentioned Code section, and that the same is illegal.

INTOXICATING LIQUORS: WHOLESALE LIQUOR DEALER WITH FEDERAL PERMIT: LOANING MONEY TO INDIVIDUAL TO ESTABLISH BEER BUSINESS: VIOLATION OF IOWA STATUTE: The loaning of money by a wholesale liquor dealer, operating under a Federal permit, to an individual to establish a beer business within this state is in violation of the statute prohibiting wholesalers of beer from having any interest in a place of business where beer is sold at retail.

July 15, 1941. *State Permit Board, Des Moines, Iowa:* We have examined the correspondence from the Alcohol Tax Unit of the Federal Internal Revenue

Service with respect to the interpretation of Section 1921.117 of the 1939 Code of Iowa. In this correspondence it is stated that wholesale malt liquor dealers are holders of basic permits from the Federal Government, and one of the conditions of the issuance of such basic permits is that the wholesaler shall comply with the State laws relating to the conduct of his business. Inquiry is made by the District Supervisor of the Alcohol Tax Unit as follows:

"In checking the operations of such a permittee this office might find that the wholesaler permittee had, for instance, loaned a substantial sum of money, say $700.00, to an individual to enable him to go into the business of selling beer at retail.

"In passing on any case involving such facts and the interpretation of the Iowa law, this office must be guided by the interpretation of such law by the Iowa authorities. In the event it should be found that the above-referred-to state of facts existed, would your Board, in applying the law to the facts, construe the act of the wholesaler in thus lending money as a violation of the Iowa law, justifying action thereunder?

"This office would very greatly appreciate your consideration of the matter and advice as to what your interpretation would be."

Section 1921.117 of the 1939 Code of Iowa provides as follows:

"*Brewers, etc.—prohibited interest.* No person engaged in the business of manufacturing, bottling or wholesaling beer nor any jobber nor any agent of such person shall directly or indirectly supply, furnish, give or pay for any furnishings, fixtures or equipment used in the storage, handling, serving or dispensing of beer or food within the place of business of another permittee authorized under the provisions of this chapter to sell beer at retail; nor shall he directly or indirectly pay for any such permit, nor directly or indirectly be interested in the ownership, conduct or operation of the business of another permittee authorized under the provisions of this chapter to sell beer at retail. Any permittee who shall permit or assent or be a party in any way to any such violation or infringement of the provisions of this chapter shall be deemed guilty of a violation of the provisions of this chapter."

The loaning of money by a wholesaler to an individual to enable him to enter the retail beer business would be a violation of the foregoing quoted section. Such a wholesaler would be, at least indirectly furnishing or paying for the supplies and equipment, and it would seem that he would be directly interested in the ownership of the retailer's place of business within the prohibition of this statute.

If the investigation of the wholesale permittee disclosed that in the conduct of his business a loan was made to a retailer to enable the latter to enter the retail beer business, it would be the opinion of this office that such wholesale permittee had violated the quoted section of the Iowa Code.

COUNTIES: BOARD OF SUPERVISORS WITHOUT AUTHORITY TO EXPEND COUNTY FUNDS FOR WPA PROJECT TO MAKE SCIENTIFIC VALUATION OF REALTY FOR PURPOSE OF TAXATION: The board of supervisors of a county has only such powers as are expressly, or by necessary implication, delegated to it by the legislature and the statute conferring general powers to the supervisors will not permit such board to expend county funds for a WPA project to make a scientific valuation of realty in the county for the purpose of taxation, and especially so where the project is not a part of the regular assessment but an independent project.

July 16, 1941. *Mr. Philip C. Lovrien, County Attorney, Dakota City, Iowa:* We wish to acknowledge receipt of your letter in which you ask for an opinion on the following matter:

"The Board of Supervisors of this county are considering a WPA project whereby all of the real estate in the county will be scientifically valued for the purpose of taxation and the values equalized, etc., with complete detailed data on each property in the county. Under this project, the county will have to furnish about $1200, the balance to be furnished from WPA funds."

We are of the opinion that it would not be proper for the county to make an expenditure as above outlined. We must keep in mind that the Board of Supervisors of a county has only such powers as are expressly or by necessary implication delegated to it by the legislature.

In addition to the above quoted portion of your letter, you further indicated that the project is not a part of the regular assessment but that it is an independent project. For this reason it is not necessary to further consider whether the expenditure is proper as a part of the express powers in regard to the regular property assessments.

Section 5130 of the 1939 Code of Iowa sets out the powers and duties of the Board of Supervisors, and the broadest paragraph of said section is as follows:

"*General powers.* The board of supervisors at any regular meeting shall have power:

"* * *

"6. To represent its county and have the care and management of the property and business thereof in all cases where no other provision is made.

"* * *"

It is our opinion that the above cited paragraph, broad as it is, does not give authority to the Board of Supervisors to make this expenditure, nor do we believe that there is any necessary implication from the above paragraph to authorize the contemplated expenditure of county funds. In order that a power may be implied, it is essential that its exercise will tend directly and not remotely to accomplish the purpose of the express power from which it is sought to be implied. 20 C. J. S. 803.

It is our conclusion that the Board of Supervisors would not have authority to expend funds of the county in the manner above outlined.

TAXATION EXEMPTION: MILITARY SERVICE IN ARMY OF UNITED STATES ALLIES: HONORABLE DISCHARGE REQUIRED TO BE FROM UNITED STATES ARMY: "DISCHARGE FROM DRAFT": NO EXEMPTION BASIS: Persons, whether citizens of the United States or of foreign countries now residing in the United States, who received honorable discharges from the Canadian army for service during the World War, and a person who received a discharge from the draft in the United States are not entitled to taxation exemptions, because the exemption law contemplates an honorable discharge from the military forces of the United States.

July 19, 1941. *Mr. Archie R. Nelson, County Attorney, Cherokee, Iowa:* We wish to acknowledge receipt of your letter of July 16th, 1941, in which you ask for an opinion on the following questions:

(1) A, a citizen of Canada, enlisted in the armed forces of Canada and served throughout the years 1917 and 1918 with the Canadian forces and following his honorable discharge from the army, came to the United States and became a naturalized citizen shortly thereafter. Is he entitled to the $500.00 tax exemption provided for in Section 6946 of the 1939 Code of Iowa?

(2) B, a citizen of the United States, went to Canada and enlisted in the Canadian forces and served with them throughout 1917 and 1918, received an honorable discharge, and returned to his residence in the State of Iowa where he has continued to reside since that time. Is B entitled to the exemption?

(3) C, a citizen of the United States, was called to report on November 10, 1918, and went from the city of Cherokee to Sioux City and then was returned

to his residence after a lapse of two or three days and later received a discharge from draft. Is C now entitled to such exemption and if he is not entitled to it now, was he entitled to such exemption until the bills passed at the 49th General Assembly?

For the purpose of this opinion, we quote the following part of Code Section 6946 as amended by the 49th General Assembly:

"*Military service—exemptions.* The following exemptions from taxation shall be allowed:
"* * *
"3. The property, not to exceed five hundred dollars in taxable value of any honorably discharged soldier, sailor, marine, or nurse of the war with Germany.
"* * *"

It is our opinion that the exemption provided for in paragraph 3 of Section 6946 contemplates an honorable discharge from the military forces of the United States.

It necessarily follows that a person who has an honorable discharge from the armed forces of one of our allies in the war with Germany, would not be entitled to the exemption above mentioned. The further fact that said person was a citizen of the United States at the time of said service would not alter the situation.

As to your third question, we believe that a person who has a "discharge from the draft" is not entitled to the exemption as such discharge is not included in the provisions of Section 6946. We must remember that exemption statutes must be strictly construed and any doubt upon the question must be against exemption and in favor of taxation.

It is our opinion that the above interpretation has always applied to the exemption law which we are considering, and that the same has not been altered in any way by any act of the 49th General Assembly.

In conclusion, we reiterate that the exemption is contingent upon an honorable discharge showing service in the military forces of the United States during the period from the declaration of war April 5th, 1917, to November 11th, 1918.

BEER: DANCING REGULATIONS: EXEMPTION: HOTELS WITH FIFTY OR MORE GUEST ROOMS: Section 5, ch. 114, 49 G. A., which regulates dancing in connection with the operation of a beer business under a Class "B" License, expressly exempts from such regulations hotels with fifty or more guest rooms.

August 5, 1941. *Mr. M. E. Rawlings, County Attorney, Sioux City, Iowa:* This will acknowledge receipt of your letter of July 11, 1941, wherein you ask the opinion of this department relative to House File 415, and more particularly that part of Section 5, subsection b, which states as follows:

"the provisions of subsections (a) and (b) of this section shall not apply to any club holding a class 'B' permit under this chapter or to hotels with fifty or more guest rooms when the operator thereof holds the class 'B' license in connection with which dancing is permitted."

The question upon which you want an opinion is succinctly stated in the last paragraph of your letter, which reads as follows:

"There are those who contend that the exemption here made, applies or has to do only with a regularly operated ballroom in a hotel, and that if dancing is permitted in the place where the 'B' permit is held, or in other words, in the

place where beer is regularly dispensed under the 'B' permit, that a hotel is then bound by the same regulations as apply to other Class 'B' holders."

We are of the opinion that subsection (b) of Section 5 expressly exempts hotels with fifty or more guest rooms from the provisions of Chapter 114, Laws of the 49th General Assembly (House File 415). It is our view that the above quoted provision can not be logically construed to under any circumstances apply to hotels with fifty or more guest rooms. Nothing is said in the act with reference to a "regularly operated ballroom", as mentioned in your letter. If the exemption applies only to hotels with regularly operated ballrooms, it would necessitate, so we view it, reading a provision into the statute which is not contained therein. This would be contrary to well-known canons of construction. In construing a statute it is fundamental that words should be given their common and ordinarily accepted meaning. We think that the legislature has said in clear and unequivocal language that the provisions of subsections (a) and (b) of Section 5, House File 415 shall not apply to hotels with fifty or more guest rooms.

BEER AND MALT LIQUOR: CLASS "B" BEER PERMIT HOLDER PRIOR TO JULY 4, 1941: ENTITLED TO REFUND ON SURRENDER OF PERMIT: A class "B" beer permit holder whose permit was issued prior to July 4, 1941, is entitled to a refund upon the surrender of such certificate as provided by §8, ch. 114, 49 G. A., since such law refers to any permit issued under chapter 93.2, C., '39.

August 6, 1941. *Mr. Paul F. Ahlers, County Attorney, Maquoketa, Iowa:* This will acknowledge receipt of your letter of the 29th ult., wherein you ask the opinion of this department on the following legal question. We quote from your letter:

"Is a class 'B' permittee, whose license was issued prior to July 4, 1941, entitled to a refund under Section 8, Chapter 114, Laws of the 49th General Assembly, in a case of voluntary surrender of the license by the permittee as therein provided for?"

We are of the opinion that such permittee is entitled to a refund of the license fee.

Section 8 of said Chapter 114, provides:

"Section one thousand nine hundred twenty-one and one hundred thousandths (1921.100) of the Code of 1939 is amended by adding thereto the following:

"Any Class 'B' permittee or his executor, administrator or any person duly appointed by the Court to take charge of and administer the property or assets of such permittee for the benefit of his creditors, *may voluntarily* surrender *any permit*, ISSUED UNDER THIS CHAPTER, * * *" (Italics and capitals supplied.)

You will note that the permit the law authorizes the permittee to surrender is "any permit, issued under this chapter". The phrase "under this chapter" we construe to mean to have reference to Chapter 93.2, Code of Iowa, 1939 (chapter relating to beer and malt liquors). A reading of the original section, 1921.100, will reveal that it starts out as follows: "All permits provided for *in this chapter* * * *" Therefore, we feel that, inasmuch as Section 8, Chapter 114, Laws of the 49th General Assembly is an amendment by addition to Section 1921.100, Code of Iowa, 1939, the phrase, "under this chapter" as found in said section 8, refers to Chapter 93.2, Code of Iowa, 1939 and that, therefore, any permittee may surrender his permit and obtain the benefits provided for in Section 8 of Chapter 114, Laws of the 49th General Assembly.

TAXATIOIN: USE TAX: PURCHASES BY POLITICAL SUBDIVISIONS: Purchases from out-of-state sellers by political subdivisions within the state are subject to the Iowa use tax.

August 6, 1941. *State Tax Commission, Des Moines, Iowa:* We have received your request for an opinion with respect to whether or not purchases made by municipalities and school districts should be subject to the Iowa Use Tax.

The Iowa Use Tax is complementary to the Iowa Sales Tax and provides for a tax of 2% upon the purchase price of tangible personal property purchased from out-of-state sellers. Since the act was passed the State Tax Commission has collected this tax either from the purchaser or the seller when purchases were made by political subdivisions within the State. We understand that certain towns and a few school districts have protested the payment of this tax upon the ground that the State should not tax the political subdivisions within the State.

There is no exemption in the Iowa Use Tax Act exempting the purchases made by the political subdivisions in the State of Iowa. Quite clearly the Iowa Sales Tax Act would apply to such purchases if they were made from Iowa sellers. The Iowa Use Tax Act was designed to prevent the making of purchases outside the State of Iowa for the purpose of avoiding the sales tax act, and this is probably the reason why there was no exemption placed in the Use Tax Act exempting puchases by political subdivisions. If such purchases were exempted there would be a substantial buying power which could evade the Iowa Sales Tax Act by making purchases outside the State. This would defeat the very purpose of the Use Tax Act.

All of this is probably a reason why there is no exemption in the Use Tax Act exempting purchases made by political subdivisions, but the legal authority for the taxation of such purchases under the Use Tax Act lies in two Iowa cases, namely, "*The State of Iowa v The City of Des Moines*, 221 Iowa 642 and *State v Woodbury County*, 222 Iowa 488. These cases construe the Iowa gasoline tax law, which by the way is a plain use tax, and construed that law as applicable to cities and counties.

Upon the authority of these cases, we are of the opinion that purchases made by political subdivisions within the State of Iowa are subject to the Iowa Use Tax.

TAXATION: SALES TAX ACCRUED WHEN ASSIGNMENT FOR BENEFIT OF CREDITORS MADE: PRIORITY OF CLAIM: RIGHT OF ACTION: Where a merchant makes an assignment for the benefit of creditors and is indebted to the state for accrued sales tax, the tax commission may file a claim with the trustee which will be entitled to priority over general creditors by virtue of statute, even though the tax commission may have the right to institute direct suit against the merchant.

August 6, 1941. *Mr. Milo M. Jensen, County Attorney, Denison, Iowa:* We are in receipt of your letter of July 30th requesting an opinion on the following facts:

"A merchant, hereinafter referred to as A, decided to go out of business. A had a sale which lasted about three months during which time she collected sales tax and social security tax from her employees. Thereafter she assigned her remaining assets to a trustee for the benefit of creditors. The State Tax Commission had filed a preferred claim for the sales tax with the trustee.

"The questions are: (1) Should the State Tax Commission collect the sales

tax from A or should they collect the same from the trustee for the benefit of the creditors? (2) If the Commission can collect the tax from the trustee is it a preferred claim to the rest of the creditors?"

In reply to your first question we first call attention to Section 6943.087 of the 1939 Code of Iowa which by reference makes Section 6943.058 of the 1939 Code applicable. An examination of these statutes will show that a lien exists for sales tax against all personal property without the necessity of recording the lien. It is possibly true that the State Tax Commission could collect the sales tax in a direct suit against A, providing A were solvent, for the State Tax Commission has the power to institute original suit for taxes due the State under the three-point tax law, but this does not mean that the trustee should not pay the tax lien from the funds in his hands. It is the duty of the trustee for the benefit of creditors to pay the creditors in the order of priority, and the tax claim enjoys a priority status over general creditors by the virtue of the above statutes.

We are not sure about the meaning of your second question wherein you ask if the Commission can collect the tax from the trustee is it a preferred claim to the rest of the creditors. We have already answered that the tax claim is preferred over the rest of the general creditors. If you have further inquiry, we suggest you communicate with us.

CIGARETTES: MEN'S REFORMATORY AND STATE PENITENTIARY: SALES ONLY TO INMATES: PERMIT NOT REQUIRED: A retail permit is not required for the sale of cigarettes at the canteens in the men's reformatory and state penitentiary, where cigarettes are sold only to inmates and all profits are used for the entertainment and benefit of the inmates.

August 9, 1941. *Board of Control of State Institutions:* This will acknowledge receipt of your letter of the 6th inst., wherein you ask the opinion of this department with reference to the following legal question. As to the facts we quote from your letter:

"Recently we discussed with you whether or not the canteens being operated in the several state institutions are required by law to obtain retail permits for the sale of cigarettes.

"Upon your suggestion, we secured a report from each institution, and find therefrom that in every instance all the profits from the canteens are used for the entertainment and benefit of the patients; that cigarettes are sold only to the inmates of the Men's Reformatory and State Penitentiary and at all of the other institutions where cigarettes are sold to the employees and/or public, such retail permit has been obtained."

The legal question is as to whether or not a retail permit is required for the sale of cigarettes at the Men's Reformatory and State Penitentiary, where it appears from your letter that cigarettes are sold only to the inmates and that all profits derived are used for the entertainment and benefit of the inmates.

It should be further stated that the penitentiary purchases the cigarettes and that the inmate who operates the canteen works under the direction of the warden. In other words, the canteen is operated strictly by the penitentiary or reformatory, as the case may be. The inmate or inmates who operate the canteen have no financial interest whatever in the canteen.

Section 1552, subsection 4, Code of Iowa, 1939, provides:

"'Place of business' is construed to mean and include any place where cigarettes are sold or where cigarettes are stored or kept for the purpose of sale or consumption; * * *"

Subsection 14 of this section provides:

" 'Retailer' shall mean and include every person in this state who shall sell, distribute, or offer for sale for consumption or possess for the purpose of sale for consumption, cigarettes irrespective of quantity or amount or the number of sales."

Section 1556.08, subsection 1, Code of Iowa, 1939, provides:

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

Subsection 6 of said Section 1556.08, provides:

"No distributor, wholesaler or retailer shall sell any cigarettes until such application has been filed and the fee prescribed paid for a permit and until such permit is obtained and only while such permit is unrevoked and unexpired."

Section 1556.09, subsection 1, Code of Iowa, 1939, provides:

"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 of Iowa * * *".

We are of the opinion that the above statutes do not apply to the sale of cigarettes in a penitentiary or reformatory canteen. We do not believe that the penitentiary or reformatory operating the canteen may be construed to be a "retailer" as the term is defined in subsection 14 of Section 1552. We must bear in mind that these cigarettes are kept solely for the convenience of the inmates. Any profits derived are used for the entertainment and benefit of the inmates. It also should be borne in mind that there are two forms of permit, to-wit: a state permit and a permit issued by cities and towns. We are of the opinion that the city of Anamosa and the city of Fort Madison, being the cities in which the reformatory and penitentiary are located, respectively, would have no jurisdiction to issue permits to sell cigarettes within the penitentiary walls, and so far as the state permit is concerned, it would amount to the state issuing a permit to itself.

These and other reasons which could be mentioned, lead us to the conclusion that Chapter 78, relating to the sale of cigarettes and tobacco, does not apply to sales of cigarettes to inmates of the penal institutions of this state, under the facts outlined in your letter.

TAXATION: DELINQUENT PERSONAL TAXES: INTEREST AND PENALTY NOT TO BE COLLECTED AFTER FOUR YEARS: INAPPLICABILITY TO REALTY TAXES: Section 7194, C., '39, which provides that no penalty or interest, except for the first four years, shall be collected on taxes remaining unpaid four years or more, applies only to personal taxes. If real estate taxes remain unpaid for more than four years, full penalty and interest should be collected, and the property should be sold for the delinquent tax.

August 11, 1941. *Mr. Chet B. Akers, Auditor of State:* We wish to acknowledge receipt of your request for an opinion upon the following question:

Section 7194 of the 1939 Code of Iowa provides in effect that no penalty or interest except for the first four years shall be collected upon taxes remaining unpaid four years or more, and the question is whether or not penalty and interest on real estate taxes should be governed by this section in those in-

stances where the County Treasurer has not sold the real estate for delinquent real estate taxes, and the tax is delinquent for more than four years.

Code section 7194 provides as follows:

"No penalty or interest, except for the first four years, shall be collected upon taxes remaining unpaid four years or more from the thirty-first day of December of the year in which the tax books containing the same were first placed in the hands of the county treasurer, and the board of supervisors at the January meeting may declare such tax unavailable, and when so declared by the board, the amount shall be credited to the treasurer by the auditor as unavailable and he shall apportion such tax among the funds to which it belongs."

At the outset we are at a loss to understand how there could be delinquent real estate tax for a four year period. Sections 7252, 7255 and 7255.1 of the 1939 Code provide that real estate shall be sold for delinquent real estate tax, and if the property is not sold to an individual party, then the county shall bid it in at scavenger sale. It would seem from this that there should be no four year delinquencies in real estate taxes, but we assume that there must be some situation in Iowa where the treasurer has failed in his duty and real estate taxes have been allowed to remain delinquent for more than a four year period.

Although Section 7194 does not in express terms limit the application of the statute to personal taxes, we believe that this must necessarily be the construction, for as pointed out above, it certainly was not contemplated that there would ever be a four year delinquency in real estate taxes. Section 7194 further provides that the County Board of Supervisors shall declare such tax that has been delinquent for a four year period "unavailable". Clearly this would have no application to real estate taxes. It would not be within the province of the Board of Supervisors to ever declare a real estate tax unavailable. The whole theory of our law is that real estate taxes, together with all penalty and interest shall be paid and if not paid the real estate sold for the tax obligation.

It is somewhat significant that about the only two cases that have reached the Iowa Supreme Court involving the construction of this statute and antecedent statutes were instances where only personal tax was involved. See *Beecher vs. The Board of Supervisors of Webster County*, 50 Iowa 538, and *Collins Oil Company vs. Perrine*, 188 Iowa 295. At the time of the decisions in these cases, the statute forbade the collection of all penalty and interest after four years. These antecedent statutes did not specifically state that the tax involved was personal tax, and yet the Court, particularly in the Collins Oil Company case interpreted the statute as having application only to personal taxes, for Justice Evans in his opinion stated:

"This statute has in it a quality of salvage and a touch of mercy. If, after four years of official effort with the whip and prod of penalties and the duress of distraint, collection yet fails, then the statute reverses its method by reducing the load, instead of increasing it; somewhat as sailors jettison cargo to save the remnant and the ship, or as the ox driver drops his long-used goad and salves its perforations in the rump of the sick ox."

Note in the foregoing quotation the Court speaks of the "duress of distraint." This indicates that the Iowa Supreme Court felt that the application must necessarily be confined to personal taxes.

It is, therefore, our opinion that Section 7194 has no application to real estate taxes, and if delinquent real estate taxes for more than a four year

period remain on the treasurer's books, full penalty and interest should be collected, and the treasurer should immediately sell the property for the delinquent tax as provided by law.

BOARD OF SUPERVISORS: ACTING AS GOVERNING BOARD OF DRAINAGE AND LEVEE DISTRICT: NOT REQUIRED TO PUBLISH PROCEEDINGS: A county board of supervisors acting as the governing board of a drainage and levee district need not publish its proceedings. Failure to publish such proceedings will not affect the validity of proceedings whereby new bonds are ordered and new assessments spread to pay the bonds.

August 14, 1941. *Hon. C. B. Akers, Auditor of State:* We have your letter of August 13, in which you inquire whether or not a County Board of Supervisors acting as the Governing Board of a Drainage and Levee District must publish the proceedings of said Governing Board.

Section 5411 of the 1939 Code of Iowa provides:

"There shall be published in each of said official newspapers at the expense of the county during the ensuing year:

1. The proceedings of the board of supervisors, excluding from the publication of said proceedings, its canvass of the various elections, as provided by law; witness fees of witnesses before the grand jury and in the district court in criminal cases; the transcripts of justices of the peace, including their proceedings and cost; the county superintendent's report.
2. The schedule of bills allowed by said board.
3. The reports of the county treasurer, including a schedule of the receipts and expenditures of the county.
4. A synopsis of the expenditures of township trustees for road purposes as provided by law."

You will observe that the foregoing section applies to the proceedings of the Board of Supervisors, and that the publication is made at the expense of the county.

It is our view that when the Board of Supervisors is acting as the Governing Board of a Drainage and Levee District, the members are not acting in the capacity of Supervisors of the County, but are acting as Trustees of the Drainage and Levee District.

To compel the publication of the proceedings of such Board acting for a part of the County at the expense of the County would place a burden upon taxpayers who do not receive a benefit therefrom.

You advise us that this question arises out of the case of *Reconstruction Finance Corporation vs. Diehl,* in which a decree was entered in the District Court of Louisa County, which was affirmed by the Iowa Supreme Court, which is reported in the 296 Northwestern at Page 450.

A perusal of this case discloses that proper notices were served, the Court had jurisdiction, and the acts of the Governing Board of the Drainage and Levee District were approved.

It is our opinion that the Governing Board of the Drainage and Levee District need not publish its proceedings, and that the failure to publish same will not affect the validity of proceedings whereby new bonds were ordered, and new assessments spread to pay said bonds.

CONSTABLE: FEES: PRISONER CONVEYED TO COUNTY JAIL: A constable who lives in a town outside the county seat is entitled to a constable's fees, but not the same fees as a sheriff, when he conveys prisoners to the county jail on commitment.

August 16, 1941. *Mr. John S. Redd, County Attorney, Sidney, Iowa:* We wish to acknowledge receipt of your recent letter in which you ask for an opinion upon the following question:

"A constable lives in a town outside of the county seat, and he is required from time to time to convey prisoners to the county jail on commitment. Is he entitled to the fees as set out in Section 13479 (Sheriff's fees), or is he confined to the fees as set out in Section 10637?"

Code Section 13479, provides as follows:

"13479 *Conveying prisoner to jail—fees and expenses.* Every officer or person who shall arrest anyone with a warrant or order issued by any court or officer, or who shall be required to convey a prisoner from a place distant from the county jail to such jail on an order of commitment, shall be allowed the same fees and expenses as provided for in case of such service by the sheriff."

Code Section 10637 provides:

"10637 *Fees of constable.* Constables shall be entitled to charge and receive the following fees:

* * *

4. For traveling fees, going and returning by the nearest traveled route, per mile, five cents.

* * *

13. For serving each warrant of any kind, seventy-five cents.

* * *

15. For serving each mittimus or order of release, besides mileage, thirty cents."

The above-mentioned Code sections seem to be in conflict, but it is our opinion that in the instant case the constable is entitled to receive the fees as provided in Section 10637.

Section 13479 provides for fees in two separate instances, which if separated would read as follows:

"(1) Each officer or person who shall arrest anyone with a warrant or order issued by any Court or officer shall be allowed the same fees and expenses as provided for in case of such service by the Sheriff.

"(2) Each officer or person who shall be required to convey a prisoner from a place distant from the county jail to such jail on an order of commitment shall be allowed the same fees and expenses as provided for in case of such service by the Sheriff."

Clearly the constable is not entitled to the same fees as the Sheriff when he arrests someone with a warrant, because Code Section 10637 specifically provides for the constable fees when serving any warrant. If we reach the conclusion that the first part of Section 13479 does not apply to a constable, can we reasonably say that the second part was intended to be applicable to constables? We are of the opinion that it does not apply. Code Section 10637 does not specifically mention conveying a prisoner to the county jail on an order of commitment, but it does provide in Paragraph 15 for the constable fees in serving a mittimus which would seem to cover the same situation.

It is our opinion that the fees for the constable in the instant case are to be determined in accordance with the provisions of Section 10637.

COUNTY OFFICERS: EMPLOYEES OF COUNTY ENGINEER'S OFFICE: SALARY INCREASE DURING YEAR: POWER OF BOARD OF SUPERVISORS: A board of supervisors may increase the salaries of employees of the county engineer's office during the year where the increase can be made within the appropriation for the office.

August 16, 1941. *Mr. Wm. W. Crissman, County Attorney, Cedar Rapids, Iowa:* We wish to acknowledge receipt of your letter of August 12, in which you ask for an opinion on the following question:

"Can the Board of Supervisors, after having appropriated funds for the year for the County Engineer's Office, increase the pay of certain employees and assistant engineers in that office during the course of the year? The salaries in question could be increased without exceeding the entire appropriation of the County Engineer's Office."

The following Code Sections are pertinent to the above inquiry:

"5260.02 *Appropriation.* On or before the thirty-first of January of every year, the board of supervisors shall appropriate, by resolution, such amounts as are deemed necessary for each of the different county officers and departments during the ensuing year, and shall specify from which of the different county funds created by law the appropriated sums shall be derived. The appropriations to each separate county office or department shall be itemized in the same manner that the accounts are itemized on the records of the county auditor."

"5260.08 *Transfer of funds.* In the event that any office has exceeded, or may find it necessary to exceed, the amount of its appropriation in any particular account, the board of supervisors, by resolution, may authorize a transfer from one or more of the other appropriation accounts of said office, any portion of such unexpended appropriation balance, to any other appropriation account of said office."

"5130 *General powers.* The board of supervisors at any regular meeting shall have power:

* * *

10. To fix the compensation for all services of county and township officers not otherwise provided by law, and to provide for the payment of same.

* * *."

It is our opinion that the Board of Supervisors may increase the salaries of the employees above mentioned at the present time.

We wish to call your attention to our opinion of February 2, 1940, reported in the 1940 report of the Attorney General at Page 475, which fully discusses the question of increasing or decreasing salaries of deputy officers and clerks for the second year of a two year term.

It is our conclusion that in the immediate case it is proper to increase the salary of the employees mentioned, where the same may be done within the appropriation of the County Engineer's office.

COUNTY: FAIRGROUNDS BUILDINGS: WPA PROJECT: RESOLUTION BY BOARD OF SUPERVISORS UNAUTHORIZED: A board of supervisors has no authority to pass a resolution to continue a WPA project of improving and rebuilding certain buildings on the fairgrounds, the resolution making the county liable if certain provisions are violated.

August 18, 1941. *Mr. John Mowry, County Attorney, Marshalltown, Iowa:* We wish to acknowledge receipt of your recent letter in which you present a question concerning the adoption of several resolutions by the Board of Supervisors, said resolutions dealing with the management and control of the Fair and Fairgrounds in Marshall County, the WPA requesting that said resolutions

be adopted by the Board of Supervisors in order to continue the WPA Project of improving and rebuilding certain buildings located on the fairgrounds.

The proposed resolutions are as follows:

"1. All rules and regulations governing the operation of the facilities shall be approved by the Board of Supervisors, as well as the dates on which fairs are to be held and the character and scope of the exhibits.

2. All fees shall be approved by the Board of Supervisors.

3. The facilities shall be available to the general public without discrimination.

4. An accounting shall be rendered periodically to the Board of Supervisors and the books of the association shall be open to inspection by the Board of Supervisors.

5. Upon dissolution of the association all assets shall revert to Marshall County.

6. All revenues shall be subject to control of the Board of Supervisors, salaries paid by the operating organization shall be subject to similar control, and all net profits shall be turned over to the County.

7. The sponsor (namely Marshall County) shall give assurance that, if at any time during the normal expected life of the improvements, the above conditions governing retention of public control are violated, the County of Marshall will refund to the United States a sum equivalent to the funds expended by this Administration upon the project."

The question is: "If the Board of Supervisors should adopt said resolutions, what, if any effect that would have upon their position as Board of Supervisors, or would it be in contravention of their duties as such Board? The Board of Supervisors seem willing to adopt these resolutions, but do not wish to do anything that would be a violation of their duties individually or as a Board."

Code Section 2907 provides as follows:

"If a majority of the votes are cast 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 a county or district fairground 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."

From the above Code Section it seems clear that the Board of Supervisors has no authority to adopt the resolutions in question. Code Section 2907 not only provides that the control and management of said real estate shall be in the fair society, but it further provides that 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.

It is our opinion that the Board of Supervisors has no authority to pass the resolutions in question, because they clearly violate the provisions of Section 2907, and it naturally follows that the resolutions should not be adopted.

BOILERS: INSPECTION: INAPPLICABILITY TO AIR COMPRESSORS: The boiler inspection law, Ch. 97, 49 G. A., has no application to air compressors such as are found in garages and oil stations.

August 18, 1941. *Mr. Charles W. Harness, Labor Commissioner:* We wish to acknowledge your oral request for an opinion on Chapter 97 of the Acts of the 49th General Assembly, known as the Boiler Inspection Law, your specific question being:

"Does the act require the inspection of air compressors, such as are commonly found in garages and oil stations?"

You state that Section (e) of Section 7, would seem to include such compressors.

It is our opinion that the Boiler Inspection Law, Chapter 97 of the Acts of the 49th General Assembly, has no application to the air compressors that you mention. We would like to call to your attention the following language in the title of the above Act:

"An act creating a boiler inspection department within the Department of Labor, providing for notice of intention to install and *inspection of steam boilers, generators, superheaters,* and creating the office of state boiler inspector, defining his duties and providing for the enforcement of boiler inspection provisions of the act and providing penalties for the violation thereof."

Section 2 of the above-mentioned act enumerates the articles to be inspected by the boiler inspector, and if there is any conflict between the provisions of said section and the provisions of Section 7, as far as the immediate question is concerned, we believe that Section 2 is controlling. The pertinent part of Section 2 reads as follows:

"(a) It shall be the duty of the state boiler inspector, to inspect or cause to be inspected internally and externally, at least once every twelve (12) months, in order to determine whether all such equipment is in a safe and satisfactory condition, and properly constructed and maintained for the purpose for which the same is used, all steam boilers, tanks, jacket kettles, generators and other appurtenances used in this state for generating or transmitting steam for power, or for using steam under pressure for heating or steaming purposes, in order to determine whether said equipment is in a safe and satisfactory condition, and properly constructed and maintained for the purpose for which the same is used."

It is our opinion that the above language does not include air compressors, and that there is no duty on the part of the boiler inspector to inspect such compressors.

MOTOR VEHICLES: MAXIMUM WHEEL LOAD: PENAL PROVISION: Chapter 178, 49 G. A., which amends §5035.12, C., '39, increases to 8,500 pounds the maximum load permitted on any one wheel of a vehicle. Any distribution of load in excess of this amount is a violation of statute.

August 20, 1941. *Iowa State Highway Commission, Ames, Iowa:* This will acknowledge receipt of your communication of July 21, 1941, relative to the interpretation to be given Section 5035.12, Code of 1939, as amended by Chapter 178, Acts of the 49th General Assembly.

Section 5035.12 provides as follows:

"*Maximum load.* The total maximum load on any one wheel of any vehicle, including the weight of the vehicle and the load it carries, shall be four tons for vehicles equipped with pneumatic tires or three and one-half tons for vehicles equipped with solid rubber tires, provided the total maximum weight of any vehicle or combination of vehicles and load shall not in any event exceed twelve tons plus four hundred fifty pounds for each foot, or fraction thereof, of distance between the front and rear axles of the vehicle or first and last axles of a combination of vehicles. Two or more wheels on the same end of a given axle shall be considered as one wheel."

Chapter 178, Acts of the 49th General Assembly, recites:

"Section 1. Section five thousand thirty-five and twelve hundredths (5035.12), Code, 1939, is amended by adding thereto the following: 'Provided however,

trucks registered under the laws of the State of Iowa and displaying Iowa license plates shall be entitled to a total maximum load on any one axle of any vehicle, including the weight of the vehicle and the load it carries, of seventeen thousand (17,000) pounds for vehicles equipped with pneumatic tires or fourteen thousand (14,000) pounds for vehicles equipped with solid rubber tires, provided the total maximum weight of any vehicle or combination of vehicles and load shall not in any event exceed fourteen (14) tons plus five hundred (500) pounds for each foot or fraction thereof, of distance between the front and rear axles of the vehicle or first and last axle of a combination of vehicles. An axle may be divided into two (2) or more parts, provided, however, that all parts in the same vertical transverse plane shall be considered as one axle.'"

Your question is how you shall interpret the "axle load" in terms of "wheel load" for the purposes of enforcement in view of the fact that Sec. 5035.12 contemplates a maximum wheel load of four tons, or 8,000 pounds, for vehicles equipped with pneumatic tires, and the amendment contemplates a total maximum load "on any one axle" of 17,000 pounds. Doubling the maximum wheel load necessarily limited the total axle load to a maximum of 16,000 pounds prior to the amendment.

The question now arises as to what effect the amendment has on the maximum load permissible on one wheel. Is four tons or 8,000 pounds still a maximum load, or is one-half of 17,000 pounds, or 8,500 pounds the maximum wheel load? May a truck carry a load of 7,000 pounds on one wheel of an axle and 10,000 pounds on the other within the 17,000 pound axle limitations prescribed by the amendment?

Section 5036.01 makes it a misdemeanor to do any act forbidden or for failure to perform any act required by any of the provisions of the chapter of which the above quoted sections are a part. This necessitates the application of rules of construction of penal statutes to Sec. 5035.12 as amended.

It is a fundamental rule in the construction of statutes that penal statutes must be construed strictly. However, under such strict construction such statutes will not be enlarged by implication or intendment beyond the fair meaning of the language used. Such statutes should not be unreasonably interpreted, or construed so as to render them ineffective, or to defeat the obvious intention of the legislature, as found in the language actually used according to its true and obvious meaning, unless it is forced by the express language of the statute; nor should they be subjected to any strained or unnatural construction in order to work exemption from their penalties. 59 C. J. 1113-1117, and cases cited. Penal statutes must receive a rational, sensible construction in preference to one that is unreasonable and probably not intended by the legislature. Anderson vs. Williams, 279 Fed. 822; 42 S. Ct. 590; 259 U. S. 597, (Reversed on other grounds, 44 S. Ct. 43, 263 U. S. 193.)

It is plainly evident that the purpose of the statute fixing the maximum wheel load at four tons for vehicles equipped with pneumatic tires was for the protection of the highways which are designed by the Highway Commission to support a maximum load of four tons to each forty inch square of pavement or bridge structure. That the legislature was cognizant of such design and specifications is further evident by some other provisions of the size, weight and load sections of the chapter, particularly Sec. 5035.08, which limits the distance between axles to not less than forty inches. It is also important to note that the amendment to Sec. 5035.12 as quoted, was added thereto without an express repeal of existing wheel load provisions. This

leaves no doubt but that by the retention of the wheel load provision that the legislature intended to retain such limitations in so far at least as the same contemplated an equal distribution of the load, notwithstanding, the increase of 1,000 pounds in the total axle load serves to increase the wheel load to 8,500 pounds.

Specifically answering your question, therefore, we are of the opinion that the amendment will prevail over the maximum wheel load provisions of the amended section to the extent that it increases the load on any one wheel to 8,500 pounds and any distribution of load in excess of this amount is a violation of the provisions of the statute as amended. To hold otherwise would be to render ineffectual the provisions of the statute enacted for the prevention of injury or damage to pavement and bridge structures by permitting a load of 12,000 pounds on one wheel so long as the total axle load did not exceed 17,000 pounds. No such absurd intention may be attributed to the legislature within the contemplation of the rules for construction of a statute of this character.

We trust this answers your inquiry.

TAXATION: CAPITAL STOCK: EXEMPTION: FOREIGN MERCHANDISING CORPORATION DOING BUSINESS ENTIRELY WITHIN IOWA: The capital stock of a foreign merchandising corporation which does business entirely within the state is exempt from taxation in Iowa.

September 3, 1941. *Mr. Francis J. Kuble, County Attorney, Des Moines, Iowa:* We wish to acknowledge receipt of your recent inquiry in which you ask for our opinion on the following question:

"There is now ready for closing in the District Court of Polk County, Iowa, a rather sizable Estate in which a large portion of the assets is capital stock in a sizable retail establishment located in the City of Des Moines. This corporation is organized under the laws of the State of Delaware but to our knowledge its sole outlet is the store here in Des Moines. In other words it is a foreign corporation but does business entirely within the confines of the State of Iowa. Being a foreign corporation engaged in merchandising is this stock exempt from taxation, or does subdivision 20 of Section 6944 exempt only domestic corporations engaged in merchandising?"

Code Section 6944, provides as follows:

"6944 *Exemptions.* The following classes of property shall not be taxed: * * *

20. *Capital stock of utility companies.* The shares of capital stock of telegraph and telephone companies, freight line and equipment companies, transmission line companies as defined in section 7089, express companies, corporations engaged in merchandising as defined in section 6971, domestic corporations engaged in manufacturing as defined in section 6975, and corporations not organized for pecuniary profit. * * *"

Section 6971 provides as follows:

"6971 *'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 by him within or without this state, except a warehouseman as defined in section 9718, shall be held to be a merchant for the purposes of this title."

It is our opinion that the shares of stock of the foreign merchandising corporation described in your letter are exempt from taxation as provided in Paragraph 6944.

It should be noted that insofar as Paragraph 20 of the above-mentioned Code Section relates to merchandising corporations, there is no qualification of the word "corporation," but immediately following the reference to merchandising corporations, we find this language.

"*Domestic* corporations engaged in manufacturing as defined in section 6975."

The fact that the word "corporation" is used in the first instances without qualification, and immediately thereafter when dealing with manufacturing, we find the words "domestic corporations" indicates that the use of the word "corporation" without modification was intended to include both domestic and foreign corporations.

In Section 6971, we note this language:

"*Any* person, firm or *corporation* * * *"

Certainly these words do not convey the thought that the section is applicable only to domestic corporations. So we find that in these two sections dealing with merchandising corporations there is no reference whatsoever to *domestic corporations*, as there is in Section 6944, as it refers to manufacturing corporations.

The opinion of the Attorney General which you mentioned in your letter, reported at Page 439 of the 1936 Attorney General's reports, was based on the following language in the case of *Judy vs. Beckwith*, 137 Iowa, 24:

"Without taking time for further reference to the statute we feel entirely safe in the assertion that there is no existing legislation in this State which expressly or by implication excepts from the category of taxable property the shares of capital stock owned or held by residents of the State in a foreign corporation."

It should be noted that the Judy case was one involving taxation of shares of stock of an Illinois Corporation, whose principal place of business was in Illinois. The case did not involve the interpretation of Section 1318 of the Code of 1897, said section being the original Code provision exempting the capital stock of a merchandising corporation from taxation, and it is our opinion that the Judy case is not authority for the proposition that the capital stock of a foreign merchandising corporation such as is described in your letter is subject to taxation.

It should be noted that in the immediate case the stock of merchandise of the foreign corporation is subject to taxation, and it is our conclusion that the capital stock of a foreign corporation which does business entirely within the confines of the State of Iowa is exempt from taxation.

Any opinions of the Attorney General to the contrary are hereby overruled.

TAXATION: COMPROMISE TAX SALE: AMOUNT REQUIRED FOR REDEMPTION: The owner cannot redeem from tax sale by tendering the amount paid by an assignee under a compromise agreement, but must pay the amount for which the property was sold plus penalty and interest and the amount of all taxes, interest and costs paid by the purchaser or his assignee for any subsequent years.

September 3, 1941. *Mr. C. A. Bowers, County Auditor, Council Bluffs, Iowa:* I wish to acknowledge receipt of your recent letter which you have written in the absence of your County Attorney asking for our opinion on the following matter:

"'A' made a compromise offer of $100.00 for a tax certificate held by Pottawattamie County, on which the total taxes amounted to $150.00. The taxing bodies accepted this offer and 'A' proceeded to serve notice upon the owner of record. The owner of record came in to redeem the property, which we let him do for the sum of $100.00, being the same amount which 'A' had paid for the certificate. May the owner redeem said property by the payment of $100.00?"

Code Section 7265 of the 1939 Code provides as follows:

"7265 *Assignment—presumption from deed recitals.* The certificate of purchase shall be assignable by indorsement and entry in the register of tax sales in the office of county treasurer of the county from which said certificate issued, and when such assignment is so entered, it shall vest in the assignee or his legal representatives all the right and title of the assignor. The statement in the treasurer's deed of the fact of the assignment shall be presumptive evidence thereof. When the county acquires a certificate of purchase and has the same in its possession for one year, or more, the board of supervisors may compromise and assign the said certificate of purchase, with the written approval of all tax-levying and tax-certifying bodies having any interest in said general taxes. All money received from assignment of said certificates shall be apportioned to the tax-levying and certifying bodies in proportion to their interests in the taxes for which said real estate was sold."

Code Section 7272 provides:

"7272 *Redemption—terms.* Real estate sold under the provisions of this chapter and chapter 347 may be redeemed at any time before the right of redemption is cut off, by the payment to the auditor, to be held by him subject to the order of the purchaser of the amount for which the same was sold and four percent of such amount added as a penalty, with six percent interest per annum on the whole amount thus made from the day of sale, and the amount of all taxes, interest, and costs paid by the purchaser or his assignee for any subsequent year or years, with a similar penalty added as before on the amount of the payment for each subsequent year, and six percent per annum on the whole of such amount or amounts from the day or days of payment."

Section 7265 of the 1939 Code provides that the assignment shall vest in the assignee or his legal representatives all the right and title of the assignor so clearly in the instant case, the county with the approval of the other tax-levying bodies gave up all the interest of the county in this particular property.

Section 7272 provides that the amount necessary to redeem from tax sale is:

"* * * the amount for which the same was sold and four percent of such amount added as a penalty, with six percent interest per annum on the whole amount thus made from the day of sale, and the amount of all taxes, interest, and costs paid by the purchaser or his assignee for any subsequent year or years, with a similar penalty added as before on the amount of the payment for each subsequent year, and six percent per annum on the whole of such amount or amounts from the day or days of payment."

It is our opinion that in order to redeem, the owner must pay the amount contemplated by Section 7272, and that he cannot redeem by tendering the amount paid by the assignee for the certificate, when the assignee purchases the same under a compromise agreement as provided in Section 7265. It was not stated in your letter, but we assume that the county had the certificate of purchase in its possession for one year or more, as such possession is a prerequisite to the compromise provided for in Section 7265.

TAXATION: EXEMPTION: SOLDIERS: CHANGE OF DESIGNATION OF PROPERTY: After filing a claim for tax exemption for military service, the claimant may change his designation of property after June 1st, but not

after the tax for a succeeding year has become a lien against the property designated.

September 5, 1941. *State Tax Commission, Des Moines, Iowa:* You have requested an opinion upon the following question:

"A soldier, who is entitled to tax exemption for military service, filed his claim for such exemption before June 1st, but having sold his property since June 1st, he now desires to designate other property for the exemption for the tax for the year 1941, payable in 1942."

The question is whether this designation can be changed in view of the amendment to the exemption statute contained in Chapter 242, Acts of the 49th General Assembly.

Section 2 of Chapter 242, Acts of the 49th General Assembly provides for the claim that is to be made by the soldier for exemption or reduction in taxes. It is there provided in part as follows:

"Said person shall file with the county auditor 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 six thousand nine hundred forty-six (6946), and give the volume and page on which the 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. No person may claim a reduction or exemption in more than one county of the state of Iowa, and if no designation is made the exemption shall apply to the homestead, if any."

It will be noted that in the above portion of Section 2, provision is made that the claim shall be filed and there are certain mandatory provisions as to the contents of the claim, but in order to obtain the exemption it is not necessary that there be any designation of property, for, it will be noted, the statute says that the claim *may* contain a designation of property which is to be the subject of the exemption, and again in the last two lines of the section provision is made for the application of the exemption in the event that there is no designation and the claimant is the owner of a homestead.

It would seem, from the wording of the above statute, that the information with respect to the honorable discharge is the important and necessary part of the claim that is filed with the auditor. When this information has been given to the auditor through the medium of the claim then the tax exemption automatically applies when the Board of Supervisors makes the proper allowance. This being true, the designation of property could, we feel, be changed by the exemption claimant after June 1st.

Nothing in this opinion is to be construed as holding that the designation could be changed after the tax for a succeeding year had become a lien against the property formerly designated.

SCHOOLS: CHILDREN IN CHARITABLE INSTITUTIONS OR CHILDREN'S BOARDING HOMES: RESPONSIBILITY FOR PAYMENT OF TUITION: DOMICILE: Tuition of a grade school child committed to a charitable institution in another school district must be paid by the county of domicile, but if the child's domicile is outside the state there should be no tuition charge. Tuition of a grade school child in a children's boarding home should be paid by the state, but if the home is in the child's school district, there should be no tuition charge, nor should tuition be charged for a child in a free home. If a charitable institution voluntarily assumes care of a

grade school child, the county of the child's domicile should pay the tuition, but there should be no tuition charge if domicile cannot be determined, or if domicile is outside the state and free tuition is refused and no arrangement can be made with the state of domicile, the institution must pay the tuition. Tuition of a high school pupil in a charitable institution must be paid by the state unless the institution is in the same district as the child's domicile.

September 8, 1941. *Department of Public Instruction, State House:* In answer to your oral request of recent date concerning the payment of tuition by the state for school children, we beg to advise as follows, taking up your several questions individually:

1. A child of grade school age having domicile in the state of Iowa, is committed by juvenile court to a charitable institution in another school district.

It is our opinion that Section 4283 of the 1939 Code applies and that said section reads as follows, which, we believe, is self-explanatory:

"*Tuition in charitable institutions.* When any child is cared for in any charitable institution in this state which does not maintain a school providing secular instruction, and which institution is organized and operating under the laws of Iowa, and the domicile of the child is in another school district than that wherein the institution is situated, then such child shall be entitled to attend school in the district where such institution is located. In such cases, the district which provides schooling for such child shall be entitled to receive tuition not exceeding the average cost thereof in the department of the school in which schooling is given, and not exceeding eight dollars per month for tuition in schools below the high school grade, and not exceeding twelve dollars per month for tuition in high school grades. Such tuition shall be paid by the county of the domicile of such child. Any county so paying tuition shall be entitled to recover the amount paid therefor from the parent of such child. This section shall not apply to charitable institutions which are maintained at state expense."

In such cases, it is our opinion that the county of the domicile of such child must pay his tuition.

2. Same as No. 1 except that the said child has a domicile outside the state of Iowa.

We are unable to find any statute which covers this particular situation. Clearly, Section 4283 does not cover it as the child's domicile is not in the state of Iowa. Consequently, no county in this state should be liable for the payment of tuition. Also, we find nothing in the code which would make the state liable. Practically speaking, the only home the child has is in the institution to which he has been committed. Consequently, it is our opinion that such child should attend school in the school district wherein the charitable institution is located, free of charge.

3. A child of grade school age is committed by juvenile court to a licensed child welfare agency and is placed by such agency in a licensed children's boarding home.

Section 4283.01 of the 1939 Code reads as follows:

"*Tuition when in boarding home.* When any child of school age has become a public charge and is being cared for in a children's boarding home licensed by the state, and the domicile of such child at the time it became a public charge was in another school district than the one wherein such boarding home is located, then such child shall be entitled to attend public school in the school district in which such boarding home is located, or if such district does not maintain a school offering instruction in the grade in which such child is properly classified, then such child may attend upon such instruction in any approved public school in the state that will receive it. The tuition of such a

child, at the rates established by law, shall be paid by the treasurer of state from any funds in the state treasury not otherwise appropriated, and upon warrants drawn by the state comptroller upon the requisition of the superintendent of public instruction. If such child was in the district at the time the regular biennial school census was taken, the semi-annual apportionments shall be deducted from the tuition due the district under the provisions of this section. The superintendent of public instruction is hereby empowered to require such reports as are necessary properly to carry out the provisions of this section."

Also Section 3661.057 reads as follows:

" '*Children's boarding home' defined.* Any person who receives for care and treatment or has in his custody at any one time more than two children under the age of fourteen years unattended by parent or guardian for the purpose of providing them with food, care and lodging, except children related to him by blood or marriage, and except children received by him with the intent of adopting them into his own family, shall be deemed to maintain a children's boarding home. This definition shall not include any person who, without compensation, is caring for children for a temporary period."

It has been and it is still our opinion that any boarding home which has facilities to take care of three children and indicates a willingness to do so even though such home actually has only one or two children living there, it is a proper home to be licensed as a children's boarding home. Consequently, it is our opinion that if a home is licensed as a children's boarding home, tuition for any child placed in said home should be paid by the state under the provisions of Section 4283.01 above quoted.

It is our further opinion that children placed by such agency in a free home to which no board is paid for the support of the children, are entitled to attend school free of tuition in the school district in which such home is located. Children thus placed are placed for the purpose of obtaining a home and not for the purpose of obtaining merely a free education.

Under the plain provisions of Section 4283.01, said section does not apply in cases where the child resides in a children's boarding home located in the child's own school district. In such cases, there should be no charge for tuition.

Also, a question has been raised concerning the meaning of the words "public charge" contained in Section 4283.01. It is our opinion that any child whose board is being paid by a county, is unquestionably a public charge. It is our further opinion that any child who is being cared for by a charitable institution or a child welfare agency and supported directly or indirectly by public funds raised by subscription or otherwise, should be considered a public charge. In other words, if the charitable institution or child welfare agency were not taking care of such child, then such child would necessarily be a neglected, dependent or abandoned child and subject to the provisions of Chapter 180, 1939 Code.

4. The custody of a child of grade school age is assumed voluntarily by a charitable institution.

If such child is being cared for in a charitable institution and the domicile of such child can be determined, it is our opinion that Section 4283 above quoted applies. In the event that the domicile of such child cannot be determined, then it is our opinion that the reasoning stated above in No. 3 applies and the child should attend school free of tuition charges.

In the event the domicile of such child is in another state, we find no statute covering this particular situation. It is our opinion that in the event the

school district in which such institution is located, refuses to furnish free schooling for such child, then an arrangement must necessarily be made with the state of the domicile of such child, or in the alternative, the charitable institution in which the child is located, must pay the tuition.

5. A child of high school age who is committed or who merely resides in a charitable institution located in a school district other than his own school district.

At first glance, it appears that Section 4283 above quoted might apply. However, said section first appeared in the 1924 Code. The 48th General Assembly, in Chapter 104, Acts of the 48th General Assembly, passed a bill amending Section 4275. Said bill now appears in the 1939 Code as Section 4275.1 and reads as follows:

"Children from charitable institution. Children who are residents of a charitable institution organized under the laws of this state and who have completed a course of study for the eighth grade as required by Section 4276 shall be permitted to enter any approved public high school in Iowa that will receive them and the tuition 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."

Section 2 of said Act, which does not appear in the Code at the present, reads as follows:

"Section 2. All acts or parts of acts in conflict herewith are hereby repealed."

Consequently, it is our opinion that Section 4275.1 applies to the above-mentioned situation, that is, that if a child of high school age is residing in a charitable institution, the tuition for such child shall be paid by the state. It should be noted that said section applies, whether or not the child is originally from the state of Iowa or some other state.

It is our further opinion, however, that if the original domicile of such child is in the same school district as that in which such charitable institution is located, then such child should attend school, tuition free.

BEER: FORFEITURE OF PERMITTEE'S BOND: COUNTY ATTORNEY'S DUTY: CANCELLATION OF PERMIT AS CONDITION PRECEDENT: STATE OR COUNTY AS PLAINTIFF: The county attorney has the duty to commence forfeiture proceedings upon bonds furnished by Class B or C beer permittees where the permit is issued by the board of supervisors. A citizen or taxpayer may not bring such action. Forfeiture proceedings may and should be commenced when a permit is cancelled, the cancellation being a condition precedent to the forfeiture proceedings. The action may be brought in the name of the state or county.

September 9, 1941. *Mr. Maurice E. Rawlings, County Attorney, Sioux City, Iowa:* This is in answer to your letter of the 25th ult., wherein you ask the opinion of this department relative to the following legal questions. We quote from your letter as follows:

"A question or several questions have just been presented to this office upon which it would appear advisable that we secure an opinion from your department in connection with or relating to the commencement of forfeiture proceedings of any Class B or Class C beer permit bonds.

"In this respect it would seem that the first question which presents itself is in substance as follows: In the event a person holding a Class B or Class C beer permit is convicted or pleads guilty to a violation of any provision of Chapter 93.2 of the Code, is it then the duty of the county attorney to commence forfeiture proceedings upon or as against the bond posted by such person at the time of making application for such permit, or is it the duty of some other officer or official to do so?

"Along the same line but in connection with the same matter, another inquiry presents itself as follows: Can a citizen or taxpayer or some other person or persons representing such citizen or taxpayer bring the action of forfeiture upon or against the bond posted in connection with the above matter?

"It would then seem that a third question presents itself substantially as follows: If a Class B or Class C beer permit is held by some designated person or persons, and a party separate and distinct from the permit holder is convicted or enters a plea of guilty to a violation of any provision of Chapter 93.2 of the Code, and such violation has been upon the premises of a Class B or a Class C permit but there is no evidence available or to show that such permit holder was aware of any such violation, is a forfeiture proceeding upon or as against the bond of the permit holder proper or legally justifiable?"

Answering your first inquiry, it is our opinion that it is the duty of the county attorney to commence forfeiture proceedings upon all bonds furnished by Class B or Class C permittees where the permit is issued by the board of supervisors. We do not believe that the county attorney has any duty with reference to bonds filed in the office of the town or city clerks.

Answering your second inquiry, we are of the opinion that there is no provision in the statute which authorizes a citizen or taxpayer to bring action of forfeiture upon the bonds furnished by Class B or Class C permittees. We have read Section 10982, Code of Iowa, 1939 and are of the opinion that the same is not applicable to the facts stated in your letter. The following clause, we think, makes this quite clear, "who has sustained an injury in consequence of a breach thereof * * *". This injury, in our opinion refers to an injury or damage which he suffers separate and distinct from the public generally.

Your third inquiry pertains to violations taking place upon premises of Class B or Class C permittees, but there is no evidence available to show that such permit holder was aware of such violation, the specific question being if under such a state of facts a forfeiture proceeding against the bondholder would be justifiable. We believe that the amendment to the statute, to-wit: Section 2, Chapter 114, Laws of the 49th General Assembly, answers this question. Said amendment provides:

"Said bond shall be further conditioned to the effect that the permittee and his surety, as a part of the permit granted hereunder, shall consent to forfeiture of the principal sum of said bond *in event of cancellation* of the permit as a result of charges filed and hearing had thereon as provided in this chapter." (Italics ours.)

It will be noted that the permittee and his surety consent to forfeiture of the bond in event of cancellation of the permit. Only when there is a cancellation may forfeiture proceedings be legally instituted.

Therefore, it is our opinion that if the permit is for any reason legally cancelled under the provisions of Chapter 93.2, Code of Iowa, 1939, as amended, then forfeiture proceedings may and should be commenced. It is quite clear, so it seems to us, that a condition precedent to the commencement of forfeiture proceedings upon the bond furnished by a Class B or Class C permittee is the cancellation of the permit. When, as a result of charges filed and hearing had thereon, the permit is cancelled, we believe the legality of the cancellation has

been adjudicated and in the forfeiture proceedings that matter can not be further inquired into. In the event of appeal from an order cancelling the permit, the forfeiture proceedings would be automatically suspended until the determination of the appeal.

I think that your suggestion as to commencing the action under the heading, "State of Iowa, ex rel, County Treasurer, Woodbury County, Iowa" is all right. I believe, however, that "State of Iowa" or "Woodbury County, Iowa" would also be proper. In other words, I do not believe it is very material as to just how the plaintiff is designated.

LIENS: OLD-AGE ASSISTANCE: SUPPORT OF INSANE: EQUAL WEIGHT AND EFFECT: Liens for old-age assistance and for support of insane are of equal weight and effect, but, where a lien existed on a husband's homestead for old-age assistance to his wife, such lien was prior to a subsequent lien to a county for the support of the husband after his insanity, where the old-age assistance lien was filed prior to the enactment of statute providing the lien for support of insane.

September 17, 1941. *Mr. Woodford R. Byington, Attorney at Law, Malvern, Iowa:* This will acknowledge receipt of your letter of September 12, wherein you ask our opinion on the following question:

" 'A', wife of 'B', was the recipient of old-age assistance from June 1st, 1935, until her death sometime in 1940, in the amount of $1255.00. 'A' owned no real estate in her name, the title to the real estate which was the homestead of 'A' and 'B', being in 'B'. In August, 1935 and in May, 1938, the Department of Social Welfare filed liens in the Recorder's office for old-age assistance furnished to 'A'. In October, 1934, 'B' was adjudged insane and committed to the Clarinda State Hospital where he remained until his death in January, 1941. The amount paid by the County for 'B's' care and support at Clarinda for the period commencing October 5th, 1934 and ending with the first quarter of 1941, amounts to $1202.00. There are no minor heirs and no one living in this homestead property which stands in the name of 'B'.

"My question is who has the prior lien on this property, the Department of Social Welfare or the County and if the Department of Social Welfare has prior lien, is that lien for the full amount as above stated?"

Sections 3604.1 to 3604.6 inclusive provide that any support given an insane person shall create a lien on any real estate owned by the person committed to the insane institution or owned by either the husband or wife of such person.

Said above named sections were passed by the 48th General Assembly and appear as Chapter 98, Acts of the 48th General Assembly. The wording used follows almost exactly the wording of the old-age assistance law. It is our opinion that the legislature intended that the lien for the support of the insane should attach to the homestead.

Sections 3828.022 and 3828.023 of the old-age assistance chapter provide that old-age assistance furnished shall constitute a lien on the property of the person receiving old-age assistance or upon the property of the spouse. The lien provisions of the insane law went into effect on July 4, 1939, while the provisions for the old-age assistance lien went into effect prior to that time. We find nothing in the code which indicates which lien should have priority over the other and it is our conclusion that both liens are of equal weight and effect. The lien for old-age assistance accumulates month by month as does the lien for the support of the insane.

Consequently, under the facts as stated in your letter, it is our opinion that the lien for old-age assistance to "A" is a prior lien up to and including

July 4, 1939. From that date on, both liens, being of equal weight, the lien for old-age assistance given to "A" and the lien for insane care given to "B", should attach each month to the property in their respective amounts.

It is our further opinion that funds expended for the care of "B" prior to July 4, 1939 are not a lien on the property.

TAXATION: SALES TAX: COOPERATIVE CREAMERIES AND CREAMERY ASSOCIATIONS: BUTTER AND DAIRY PRODUCTS EXCHANGED FOR CREAM SUPPLIED BY MEMBERS OR STOCKHOLDERS: The sales tax should be collected upon the gross receipts of cooperative creameries and creamery associations resulting from the exchange of butter or other dairy products for cream supplied by members or stockholders.

September 24, 1941. *State Tax Commission, Des Moines, Iowa:* We are in receipt of your request for an opinion with respect to the application of the Iowa Sales Tax Law to the gross receipts of cooperative creameries. In order to state the question we quote the following from your letter:

"Cooperative creameries and creamery associations primarily operate for the benefit of their members and stockholders in the processing of cream into dairy products the major part of which is made into butter and the marketing of such butter and other dairy products. To accomplish this end, producers of cream, who are members or stockholders of such creameries, either take their cream to the creamery or station of the creamery or arrange to have it picked up by a route truck, a route vehicle of the creamery. The creamery then submits this cream to certain tests with relation to butter fat content, etc., in order to determine the amount or amounts of members' or stockholders' cream checks which are normally drawn or caused to be drawn by the secretary of the creameries or creamery association subsequent to which the cream checks are given to members or stockholders generally at the end of about two week periods.

"In some instances, cooperative creameries or creamery associations test the cream and make immediate determination of the amount due and immediate payment to the member or stockholder for the cream at the time of delivery of the cream to the creamery or vehicle.

"In the normal operation of these creameries, the cream secured from various members and stockholders after testing, is poured into a general mass of cream for processing of butter and other dairy products or by-products. That is to say, at this point the identity of individual members' and stockholders' cream is lost, being mixed with the cream received from other members and stockholders.

"Members and stockholders of cooperative creameries and creamery associations are privileged to secure from time to time as needed, butter or other processed dairy products for their own and family consumption at prices which are determined by the secretary or officers of such creameries. Consequently, it is the general practice for such members or stockholders to pick up butter or other dairy products which they will require from the creamery, or to secure same from a stock which is often carried on the route vehicle of the creamery. Where settlement is made on a periodic basis such as semi-monthly or monthly, for example, it is normal practice for the creamery to compute the amounts which are due members or stockholders for cream and then deduct from such amounts charges for their butter or other dairy products which have been supplied to the members or stockholders in the interim."

The question is would the gross receipts of the creamery resulting from the exchange of butter or other dairy products for cream supplied by members or stockholders be subject to the Iowa sales tax.

The Iowa sales tax is placed on the retail sale transaction (see Section

6943.075 of the 1939 Code of Iowa) but the statute undertakes to define the term "sale".

Paragraph 2 of Section 6943.074 of the 1939 Code provides as follows:

" 'Sales' means any transfer, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever, for a consideration."

An analysis of the method of doing business as disclosed by your letter would seem to indicate that the transactions involved would be a sale within the meaning of the above definition, which by its terms includes barter. In the operation of these creameries the cream turned over by the stockholders or members becomes the property of the creamery and the fact that butter or some processed dairy product is received as part consideration for the transfer of the cream merely means that the transferor is receiving a consideration which is in the nature of a barter transaction. It is still a sale within the meaning of the statute for it cannot be said that custom churning results as would be the case where a producer brought his own cream to the creamery and had it churned into butter retaining, however, the title at all times to the butterfat and merely paying a service charge for the churning operation. Such a situation does exist in some industries involving custom hatching of eggs and custom grinding of grain. The difference of course exists in that there is no transfer but merely a service charge for custom work while here, in each instance, there is a complete transfer of the cream to the creamery association and a right to demand processed products as a part of the purchase price or consideration for the transfer.

Under the facts as outlined in your letter we are of the opinion that the Iowa Retail Sales Tax Law does apply and should be collected upon the gross receipts of creameries doing business as outlined in your letter.

COUNTY OFFICERS: CLERKS: MEETING CALLED BY STATE AUDITOR: EXPENSES ALLOWABLE BY BOARD OF SUPERVISORS: The state auditor may, when necessary, call a meeting to instruct county officers as to any particular duties, and it is proper for boards of supervisors to allow claims of officers for expenses at such meetings.

October 6, 1941. *Mr. Chet B. Akers, Auditor of State:* We wish to acknowledge receipt of your recent letter in which you ask our opinion on the following matters:

(1) Is it proper for the Auditor of State to call the Clerks of the District Court of Iowa to Des Moines for a school of instruction?

(2) If it is proper for the State Auditor to issue such a call, do the Boards of Supervisors of the several counties of the State have the right to pay the expense of said Clerks which is incurred while attending this school of instruction?

The State Auditor's Office is charged with the duty of auditing the financial condition and transactions of all counties, and in making such an examination the examiners may examine all papers, records, books and documents of all of the various county officials, and it is important that these officers have the information necessary to conduct their offices in compliance with the laws of the State of Iowa.

It is our opinion that when the State Auditor finds it necessary to instruct any of the county officers it is proper for him to call a meeting for that purpose.

When the State Auditor has called a meeting of this kind to advise the county

officers as to their duties in connection with any particular question, we are of the opinion that it is proper for the Boards of Supervisors to allow the claims of such officers for expenses arising out of their attendance at such a meeting.

FEES: COUNTY RECORDER: FILING ONE INSTRUMENT RELEASING SEVERAL CHATTEL MORTGAGES: A county recorder is entitled to charge only twenty-five cents for filing one instrument releasing five different chattel mortgages.

October 6, 1941. *Mr. Donald P. Chehock, County Attorney, Osage, Iowa:* I wish to acknowledge receipt of your recent inquiry in which you ask for our opinion on the following question:

"Please be advised that one instrument releasing five different chattel mortgages by the same parties has been tendered to the County Recorder together with a fee of twenty-five cents for the filing of such instrument. The County Recorder feels that he is entitled to twenty-five cents for each of the five releases, although it is contained in one instrument, and we would appreciate your opinion in this regard."

Code Section 10031 of the 1939 Code of Iowa provides as follows:

"10031 *Fees.* The fees to be collected by the county recorder under this chapter shall be as follows:

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

It is our opinion that the Recorder is entitled to charge only twenty-five cents for filing an instrument that releases several chattel mortgages as above-mentioned.

The following language of Section 10031 should be noted:

"1. *For filing any instrument* * * *."

While it is true that the instrument offered releases several chattel mortgages, we are of the opinion that it would be improper to say that each release was in and of itself a separate instrument. The statute provides for a charge for filing *any instrument* and does not provide for a charge for filing each release. It should be noted that the County Recorder is only entitled to charge such fees as are authorized by statute.

It is therefore our conclusion that the Recorder is entitled to charge only twenty-five cents for filing the instrument above-mentioned.

TAXATION: TAX LIST: COST OF PUBLICATION: CHARGE MADE ONLY FOR EACH DESCRIPTION: The cost of publication of the tax list should be chargeable against the properties listed, and only thirty cents may be charged for each description. The county may not make an additional payment for the general statement and the subheads in the tax list.

October 8, 1941. *Mr. Chet B. Akers, Auditor of State:* We wish to acknowledge receipt of your letter of October 6, 1941, in which you present a question concerning the interpretation of Code Section 7247 of the 1939 Code of Iowa. This section deals with the cost of publishing the tax list, and you state that in some instances it is found that a charge has been made and paid by the County to the publisher in addition to the thirty cents (30c) per description, for the

heading of the notice, and also for the subheads of the notice, your question being as to whether it is legal for the County to pay this additional charge for the headings and subheadings that appear in the tax list.

Code Section 7246 provides that notice of a tax sale shall be given, and sets forth what the notice should contain. It is clear that it is necessary to have a general statement as to the time and place of said sale, and any other explanation that is necessary to make the tax list understandable.

In the tax list that you have submitted with your request, the treasurer has seen fit to have a general statement as to the time and place of said tax sale, and an explanation of the use of asterisks in the tax list. In the tax list itself there are various subheads showing in which township and subdivision the various properties are located. It appears to us that these subheads are part of the individual descriptions that immediately follow, and that they are used to avoid repetition in describing the properties.

Code Section 7247 provides as follows:

"7247 *Costs.* The compensation for such publication shall not exceed thirty cents for each description, and shall be paid by the county. The amount paid therefor shall be collected as a part of the costs of sale and paid into the county treasury."

It is our opinion that this section contemplates that the total cost of printing the tax list shall not exceed thirty cents (30c) for each description contained, and that the county may not legally pay thirty cents (30c) for each description and in addition thereto make a payment for the general statement preceding the actual list, and for the subheads that appear in the tax list. We believe the Legislature intended that the cost of publication of the tax list should be chargeable against the properties listed, and it is clear that only thirty cents (30c) may be charged for each description.

COUNTIES: EXPENSES FOR CHILD SUPPORT: LIMITATION: PRIVATE INSTITUTIONS FOR NEGLECTED, DEPENDENT, AND DELINQUENT CHILDREN: A county may not legally expend more than eighteen dollars per month for the support of any child committed by a juvenile court to a private institution for neglected, dependent, and delinquent children.

October 10, 1941. *Mr. George F. Allen, County Attorney, Creston, Iowa:* We wish to acknowledge receipt of your letter of September 26, 1941, in which you ask our interpretation of Code Section 3676, your particular inquiry being as to whether the County may pay for medical aid and clothing in addition to the allowance provided for in Code Section 3676.

Code Section 3676 as amended by the 49th General Assembly reads as follows:

"3676 *Monthly allowance.* The institution receiving and caring for a child under eighteen years of age and under commitment from the juvenile court, shall receive, from the county of the legal settlement of such child, a monthly allowance of not to exceed eighteen dollars."

It is our opinion that Code Section 3676 establishes a limit on the amount that the County may expend for the support of a neglected, dependent and delinquent child committed to a private institution when the above-mentioned Code Section is applicable. We believe that the Legislature intended that the institution accepting any child should assume the financial burden of caring

for the child if the expense exceeded the amount provided for in Section 3676.

Code Section 3661.103 reads as follows:

"3661.103 *Authority to agencies.* Any institution incorporated under the laws of this state or maintained for the purpose of caring for, placing out for adoption, or otherwise improving the condition of unfortunate children may, under the conditions specified in this chapter and when licensed in accordance with the provisions of this chapter:

1. * * *
2. * * *
3. * * * ."

From this language it is clear that the institution referred to in Section 3676 is one that has as one of its principal objects the care of unfortunate children, and that the children are not accepted with the idea that some outside person or organization will pay for all of the expenses of caring for the said children.

It is our conclusion that the County may not legally expend more than the amount mentioned in Section 3676 as amended, for the support of any neglected, dependent and delinquent child, placed in a private institution under circumstances making Section 3676 applicable.

In connection with your inquiry we would like to call to your attention Code Section 3666 which was amended by the 49th General Assembly. You will note that the amendment makes the section applicable only to children over the age of eighteen years.

WIDOW'S PENSION: HUSBAND NOT "CONFINED" WHEN PAROLED FROM STATE INSTITUTION: WIDOW NOT ENTITLED TO PENSION: A man who is released on parole from a state institution is not "confined" in the institution within the intent and meaning of §3643, C., '39, and his wife is not entitled to a widow's pension.

October 14, 1941. *Mr. William C. Hanson, County Attorney, Jefferson, Iowa:* I wish to acknowledge receipt of your letter of October 8, in which you request our opinion on the following question:

"A is the mother of several children; B is her husband and the father of the children. B was declared insane by the Insane Commission of Greene County, Iowa, and committed to the Clarinda State Hospital. During the time of B's commitment A secured a divorce. B after being in the institution for some time was paroled and is now out of the institution but under parole and has not as yet been discharged. A has made application for widow's pension."

Code Section 3643 of the 1939 Code of Iowa provides as follows:

"3643 *Who considered widow.* Any mother whose husband is an inmate of any institution under the care of the board of control, shall, for the purposes of section 3641, be considered a widow, but only while such husband is so confined."

It is our opinion that a person who is paroled from a state institution is not "confined" within the meaning of that word as used in Section 3643 of the 1939 Code of Iowa.

The purpose of Section 3643 was to define "widow" as including "any mother whose husband is an inmate of any institution under the care of the board of control * * *" because the husband was not in a position to support his children. When an inmate is released on parole from a state institution as mentioned in Section 3643, he is no longer necessarily in a position whereby he cannot support his children. He is not confined in an institution where it is impossible for him to enter gainful employment, but rather he is free to work

and provide for his family to the best of his ability. The rules of parole would not hamper him in this regard.

It is our conclusion that a person who is released on parole from a state institution is not "confined in said institution" within the intent and meaning of Code Section 3643.

COUNTY OFFICERS: DEPUTY SHERIFF: MAXIMUM SALARY: DUBUQUE COUNTY: The maximum salary that can be paid to deputy sheriffs, other than the chief deputy, in Dubuque county, is $1,500 per year.

October 22, 1941. *Mr. E. J. Kean, County Attorney, Dubuque, Iowa:* We wish to acknowledge receipt of your letter of October 21, in which you ask for our opinion on the following question:

"What is the legal maximum salary that can be paid by the Board of Supervisors to Deputy Sheriffs other than the Chief Deputy in a county with a population of between 57,000 and 65,000?"

Section 5227 of the 1939 Code of Iowa provides as follows:

"5227 *Deputy sheriff.* Each deputy sheriff shall receive as his annual salary in counties having a population of:

1. Less than fifty thousand, and in any county where district court is held in but one place, not to exceed fifteen hundred dollars, fixed by the board of supervisors.
2. Fifty thousand or over, sixty-five percent of the amount of salary of the sheriff to be paid to the one designated by the sheriff as chief deputy, but in the event such amount exceeds eighteen hundred dollars, then to be reduced to said sum.
3. * * *."

We believe that paragraph one (1) of the above Code Section was not intended to apply solely to counties having a population under 50,000, but that it is also applicable to "any county where district court is held in but one place" with the exception provided for in paragraph (2) of Section 5227. To hold otherwise would be the equivalent of saying that there is no statutory provision covering the situation mentioned in your letter, and there can be no doubt but what the Legislature intended to regulate the salary of every Deputy Sheriff by enacting the above-mentioned law.

It is therefore our opinion that the maximum salary that can be paid by the Board of Supervisors to Deputy Sheriffs, other than the Chief Deputy, in your county is $1,500 per year.

TAXATION: COMPROMISE OF DELINQUENT CITY POLL TAX: The board of supervisors has the same authority to compromise the delinquent city poll tax as it has in the case of the usual personal property tax where the tax is not a lien on the real estate.

October 22, 1941. *Mr. Chet B. Akers, Auditor of State, Attention: L. I. Truax:* I wish to acknowledge receipt of your recent letter in which you present the following inquiry:

"Section 6236 of the 1939 Code provides that delinquent city poll tax may be turned into the county auditor's office and by him placed on the tax list for collection by the county treasurer.

"The question upon which we desire your opinion is whether or not after this delinquent city poll tax has been placed upon the tax list by the county auditor and turned over to the county treasurer for collection, the Board of

Supervisors have authority to compromise said poll tax as they do other personal taxes, in accordance with Section 7193.09 of the Code of Iowa."

Section 6236 of the 1939 Code of Iowa, provides as follows:

"6236 *Certification of unpaid tax.* All of said tax remaining unpaid on the fifteenth day of November in each year shall be certified to the county auditor at any time before the following first day of December and shall be entered by him upon the tax list of said county and treated and collected as ordinary county taxes, and shall be a lien upon all the real property of the delinquent."

We wish to call to your attention the following language of the above-mentioned Code Section:

"and shall be entered by him upon the tax list of said county and *treated* and *collected* as ordinary county taxes * * *."

It is our opinion that the above language clearly indicates that the Legislature intended to give the Board of Supervisors the same authority to compromise this tax as it has in the case of the usual personal property tax where the tax is not a lien on the real estate.

CITIES AND TOWNS: BUDGETS: REVOLVING FUNDS NOT INCLUDED IN ESTIMATES: Municipal revolving funds, which cities use to advance money to meet current obligations, with such funds later being reimbursed, need not be included in city budget estimates.

November 5, 1941. *Mr. Chet B. Akers, Auditor of State:* We wish to acknowledge receipt of your recent letter in which you ask for our opinion on the following matter:

In several of the budget appeal hearings, which have been held recently and also in prior times, the question has come up as to whether or not "Revolving Funds" should be included in the budget estimate, as provided by Chapter 24, Code of 1939.

These so-called revolving funds are funds in which no receipts from taxes are involved and are made up essentially of refunds for certain work done by cities and towns. For example, a number of cities have what is called a Street Excavation Fund which functions in the following manner: Some of the utilities of the city will want to open the pavement for various reasons and this is done, then the city replaces the pavement and bills the utility for the work. This money, when received, is then deposited in the Street Excavation Fund. Another example would be in the case of road oiling, where the charges which are made against the property, go back into this fund to reimburse it for the work done.

Code Section 370 provides as follows:

"370 *Requirements of local budget.* No municipality shall certify or levy in any year any tax on property subject to taxation unless and until the following estimates have been made, filed, and considered, as hereinafter provided:

1. The amount of income thereof for the several funds from sources other than taxation. * * *
2. The amount proposed to be raised by taxation. * * *
3. The amount proposed to be expended in each and every fund and for each and every general purpose during the fiscal year next ensuing.
4. A comparison of such amounts so proposed to be expended with the amounts expended for like purposes for the two preceding years."

It is our opinion that it is not necessary to include in the budget estimate the Revolving Fund such as mentioned in your letter.

From the facts set out in your letter we do not believe that the expenditures made from the Revolving Fund should be considered as expenditures as contemplated by the local budget law. It appears that the particular fund makes it

possible for the city to advance some money to meet a current obligation and that fund is reimbursed as set out in your letter. The Revolving Fund over a period of time, under such a plan, would maintain a constant balance and there would be no permanent withdrawals made. It is equally clear that the reimbursement to the fund should not be considered income to the fund from a source other than taxation.

It is possible to conceive of a situation where the money in a revolving fund would be expended twenty or thirty times during a year and yet at the end of that period the revolving fund would have the same balance as at the beginning of the period.

The real purpose of the budget law is to provide a check on the tax levying bodies so that excessive levies will not be made. The exclusion of such funds, as mentioned in your letter, from the budget does not hamper the effectiveness of our budget law.

It is, therefore, our conclusion that the Legislature never intended that such funds should be included in the budget estimate.

INSANITY COMMISSION: CONVENING TO CONSIDER PAROLES FOR INSANE COMMITTED FROM COUNTY: COMPENSATION: Commissioners of insanity may convene for the purpose of considering whether they shall consent to the parole of patients in the hospitals for the insane and they are entitled to three dollars per day for such services.

November 10, 1941. *Board of Control of State Institutions, Building:* This is in answer to your letter of the 7th inst., wherein you ask the opinion of this department relative to the following legal question:

May the commissioners of insanity legally convene for the purpose of determining whether or not to consent to the parole of patients in the hospitals for the insane committed from their county and are they legally entitled to a per diem of $3.00 for attending such meeting?

In answering this question it will be necessary to consider certain sections of the 1939 Code and Chapter 136, Laws of the 49th General Assembly.

Section 3540 provides:

"Said commission (of insanity) shall, except as otherwise provided, have jurisdiction of all applications for the commitment to the state hospitals for the insane, or for the otherwise safekeeping, of insane persons within its county, unless the application is filed with the commission at a time when the alleged insane person is being held in custody under an indictment returned by the grand jury or under a trial information filed by the county attorney."

Section 3541 provides:

"Compensation and expenses shall be allowed as follows:
1. To each member of the commission three dollars for each day actually employed in the duties of his office as such member and necessary and actual expenses, not including charges for board.
* * *"

Section 3564 provides:

"If any person found to be insane cannot at once be admitted to the hospital, or, in case of appeal from the finding of the commission, if such person cannot be allowed to go at liberty, the commission of insanity shall require that such person shall be suitably provided for otherwise until such admission can be had, or until the occasion therefor no longer exists."

Section 3565 provides:

"* * * patients may be cared for as private patients when relatives or friends

will obligate themselves to provide such care without public charge. In such case the commission shall in writing appoint some suitable person special custodian who shall have authority and shall in all suitable ways restrain, protect, and care for such patient, * * *."

Section 3505, Code of Iowa, 1939, which was repealed by Chapter 136, Laws of the 49th General Assembly, provided as follows:

"The relatives of any patient not susceptible of cure by remedial treatment in the hospital and not dangerous to be at large, shall have the right to take charge of and remove him with the consent of the board of control."

This section was, by Chapter 136, Laws of the 49th General Assembly, repealed and the following enacted in lieu thereof:

"Upon the recommendation of the superintendent and the written consent of the commissioners of insanity of the county which is the legal settlement of a patient, the board of control may parole said patient for a period not to exceed one year, under such conditions as are prescribed by said board."

It will thus be observed that under the law as it now exists no person confined in the hospital for the insane may be paroled without the written consent of the commissioners of insanity of the county which is the legal settlement of the patient. As we have indicated, the question is whether said board may meet for the purpose of considering whether such consent shall be given or withheld and if they meet for this purpose may they lawfully charge $3.00 per day for their services.

We are of the opinion that the law contemplates that said board may lawfully meet for the purpose of determining whether or not to give or withhold its consent to the parole of a patient confined in the hospital for the insane. It follows that for their services in attending said meeting they are each entitled to the compensation provided by law, to-wit: $3.00 for each day actually employed. The phrase, "three dollars for each day actually employed", we construe to mean $3.00 for each day or fraction thereof. It will be noted that Section 3541 provides, "three dollars for each day actually employed in the duties of his office". We believe that if the board meets for the purpose of determining whether or not it shall give or withhold consent of parole of a patient in the state hospital, this is a part of the duties of the commission of insanity and, consequently, they are entitled to be paid for their services in performing these duties.

We reach the conclusion, therefore, that the commissioners of insanity may convene for the purpose of considering whether it shall consent to the parole of patients in the hospitals for the insane and that they are entitled to $3.00 per day for such services.

HOSPITALIZATION INSURANCE: MUTUAL HOSPITAL SERVICE: COUNTIES: AUDITOR TO DEDUCT AMOUNT FROM WARRANTS ISSUED TO EMPLOYEES: In the application of Chapter 274, 49th G. A., county officials should follow the usual practice of drawing and paying warrants and when an employee authorizes a deduction from his salary for mutual hospital service, the auditor should deduct the amount from the warrant issued to the employee.

November 12, 1941. *Mr. Wm. W. Crissman, County Attorney, Cedar Rapids, Iowa:* We wish to acknowledge receipt of your letter of November 7th in which you ask for our opinion on the following matter:

The Chapter pertaining to mutual hospital service provides, in part, that em-

ployees of any county may authorize the deduction from their salary or wages, the amount of their subscription payments under the hospital service plan. It further provides, in part, that the governing body of the county may authorize deductions from salaries or wages of said employees subscribing to the hospital service plan. It further provides that the authorization of the employees for a deduction from their salary or wages shall be evidenced by written request directed to and filed with the Treasurer of the county which said Treasurer is authorized to draw and deliver checks in favor of the hospital service corporation in the amount authorized.

Under Chapter 255 of the 1939 Code of Iowa, it is the duty of the County Auditor to sign all orders issued by the Board of Supervisors and consequently all claims, salaries, etc., are paid by the issuance of warrants by the County Auditor which are accepted for payment by the County Treasurer. It would appear that the County Treasurer has no authority whatsoever to make payment on any claims or salaries or otherwise, except on the warranty from the Auditor.

Question No. 1: Under Chapter 274 of the 49th G. A., is it proper for the Board of Supervisors by resolution to authorize and direct the County Auditor to make the deductions as therein provided to carry out the purpose and evident intent of the Act.

Question No. 2: If the answer to Question No. 1 is in the affirmative, then would it be proper for the County Auditor to issue warrants in payment of the deductions made from salaries and wages to the hospital service corporation regardless of the fact that the Act itself provides that the Treasurer is authorized to draw and deliver checks in favor of the hospital service corporation.

Question No. 3: Does the Act itself, that is Chapter 274 of the 49th G. A., specifically authorize the Treasurer in this instance to draw and deliver checks in favor of the hospital service corporation, and if so, in what manner could the plan be worked out between the Auditor's office and the Treasurer's office wherein it would appear that the County Auditor would have no choice except to issue a warrant for salaries and wages in the full amount without deductions.

Chapter 274 of the Acts of the 49th General Assembly provides as follows:

SECTION 1. That Chapter four hundred three and one-tenth (403.1), Code 1939, be amended by adding thereto the following: "An employe or employes of the State of Iowa, or of any county, city or town, or of any institution supported in whole or in part by public funds, or any subdivisions thereof, may authorize the deduction from his or their salary or wages of the amount of his or their subscription payments to any corporation operating a non-profit hospital service plan as provided in this chapter. The governing body, of the State of Iowa, or of the county, city or town, or of any institution supported in whole or in part by public funds, or any subdivisions thereof, may authorize deductions from the salaries or wages of employees subscribing to such non-profit hospital service plan. The authorization by an employe or employes for deductions from his or their salaries or wages shall be evidenced by a written request signed by the employe directed to and filed with the treasurer of the State of Iowa, county, city or town, or of any institution supported in whole or in part by public funds, or any subdivisions thereof, and said treasurer is authorized to draw and deliver checks in favor of the hospital service corporation stipulated in such authorization for the amount covering the sum total of the deductions authorized. The foregoing provisions are not to be deemed an assignment of salaries or wages."

It is clear that the Legislature intended in enacting Chapter 274 to authorize the County officials to make deductions from salaries of employes when so requested and to pay said money to the proper hospital service corporation.

It is true the county warrants are drawn and signed by the County Auditor and not by the County Treasurer. The Treasurer, however, makes the actual disbursements when the warrants are presented to him for payment.

Our opinion is that the Legislature never intended to set out the strict mechanics as to how payments should be made and that the Legislature did not wish to change the usual procedure of issuing warrants and disbursing county

funds. To hold otherwise would be contrary to provisions of Code Section 5156, which provides as follows:

"5156 Duties. The treasurer shall receive all money payable to the county, and disburse the same on warrants drawn and signed by the county auditor and sealed with the county seal, and not otherwise, and shall keep a true account of all receipts and disbursements, and hold the same at all times ready for the inspection of the board of supervisors."

It is our further opinion that the Legislature did not repeal Section 5156 by enacting Chapter 274 of the Acts of the 49th General Assembly.

Our conclusion is, that in the application of said Chapter, the County officials should follow the usual practice of drawing and paying warrants and when an employe authorizes a deduction from his salary the Auditor should deduct said amount from the warrant he issues to the employe.

In view of our conclusion we did not feel it necessary to consider Question No. 4 presented in your letter.

INSURANCE: UNEARNED PREMIUM OR ASSESSMENT RESERVE: COMPUTED ON ENTIRE PREMIUM OR ASSESSMENT STATED IN POLICY: The unearned premium reserve to be held by an insurance company under §8939, C., '39, should be computed on a percentage of the premium stated in the policy, and the reserve for unearned premiums or assessments under §9042.1, C., '39, should be computed on the entire premium or total amount of assessment, even though payable in installments.

November 12, 1941. *Mr. Charles R. Fischer, Commissioner of Insurance, Des Moines, Iowa:* We have your letter of November 6 requesting our opinion and interpretation of the provisions of sections 8939 and 9042.1, Code 1939, and particularly as to whether the percentage provided for in these sections for unearned premium reserve should be on the basis of the total stated premiums in policies in force, or on the amount of the premiums actually received by the company or association when the stated premium is payable in installments during the term of the policy rather than being paid in one sum at the time the policy becomes effective.

Section 8939 is of considerable length and sets out six different situations in connection with the computation of unearned premium reserves which are required to be maintained. However, the language of these paragraphs is practically identical, so far as the purposes of your question are concerned. This language is that the unearned premium reserve is an amount equal to a stated percent of the "aggregate gross premiums written in all policies". It is our opinion that this can refer to but one thing, and that is the premium stated in the policy, irrespective of the fact that it may be received in installments, and that therefore the reserve should be computed on the basis of the premium stated in the policies. It is to be noted that the words "aggregate gross" are used which is indicative of the intent of the legislature that the total premium should be the basis of computation.

Referring to the provisions of section 9042.1 providing for the establishment of a reserve for unearned premiums or assessments of companies organized under chapter 406, the basis is a percent "of the aggregate gross premiums or assessments in force". It is our opinion that this provision requires the computation to be on the same basis, to-wit, the entire premium, rather than on the installments paid, or in the event of assessment, upon the total amount of the assessment, even though it might be payable in installments.

VITAL STATISTICS: COUNTY REGISTRAR MAY NOT APPOINT SELF AS LOCAL REGISTRAR: NOT ENTITLED TO LOCAL REGISTRAR'S FEES: The clerk of the district court, as county registrar of vital statistics, may not appoint himself local registrar, and as county registrar he is not entitled to receive the fees payable to the local registrar for services as contemplated by Chapter 114, C., '39, as amended by Chapter 117, 49th G. A.

November 26, 1941. *Mr. Alden D. Avery, County Attorney, Spencer, Iowa:* We wish to acknowledge receipt of your recent letter in which you ask for our opinion on the following matter:

Section 2417 of the 1939 Code of Iowa provides that "each *local* registrar shall be paid 25 cents for each birth or death certificate properly executed * * *". Chapter 117 of the Acts of the 49th G. A. amends Chapter 114 of the 1939 Code of Iowa so that the Clerk of the District Court is the County registrar and further provides that the County registrar shall, with the approval of the Board of Supervisors, appoint as many local registrars as are in his opinion necessary to carry out the provisions of the chapter. The state registrar has certified to Clay County, Iowa, fees for one local registrar and also fees for the Clerk of the District Court for this County.

The question has been raised as to whether the Clerk of the District Court is entitled to fees for the certificates executed by him or whether as County registrar there is no provision in the statute authorizing payment of fees to him, in as much as the statute explicitly provides for payments to local registrars.

Section 5 of Chapter 117, Acts of 49th General Assembly, is as follows:

"Sec. 5. Chapter one hundred fourteen (114), Code, 1939, is hereby amended by adding thereto the following section:

'The clerk of the district court of each county shall be the county registrar.' "

Section 9 of Chapter 117, Acts of 49th General Assembly provides:

"Sec. 9. Chapter one hundred fourteen (114), Code, 1939, is hereby amended by adding thereto the following section:

'The county registrar shall with the approval of the board of supervisors, appoint as many local registrars as are, in his opinion, necessary to carry out the provisions of this chapter and shall assign to each local registrar a definite district, except that local registrars in cities having a population of thirty-five thousand (35,000) or more, shall be appointed by the local board of health. A copy of such appointment and assignments shall be kept as a permanent record in the office of the county registrar and a copy thereof shall be forwarded to the state registrar.' "

We assume that the certification of fees to the Clerk of District Court as County registrar arises because the County registrar has appointed himself as a local registrar. The directory of Iowa Registration Officials prepared by the Iowa State Department of Health shows that the County registrar has appointed himself local registrar for the entire County with the exception of one township.

It is our opinion that such an appointment is improper as being contrary to public policy. Corpus Juris expresses the law as follows:

"It is contrary to the policy of the law for an officer to use his official appointing power to place himself in office, so that, even in the absence of a statutory inhibition, all officers who have the appointing power are disqualified for appointment to the offices to which they may appoint; * * *" 46 Corpus Juris 940.

It is our conclusion that it is improper for the County registrar to appoint himself local registrar and it is clear that the County registrar is not entitled to receive the fees payable to the local registrar for the services as contemplated by Chapter 114 of the 1939 Code of Iowa as amended by Chapter 117, Acts of 49th General Assembly.

TAXATION: SALES OF PROPERTY ACQUIRED BY TAXING BODIES: ADVANCE APPROVAL OF SALES OF A LARGE NUMBER OF TRACTS NOT THE EXERCISE OF PROPER DISCRETION: Sections 7265 and 10260.4, C., '39, contemplate that taxing bodies shall exercise discretion in the sale of tracts of real estate for a sum less than the amount of taxes, subsequent interest and penalty, and for a taxing body to give advance approval covering a large number of tracts would not be the exercise of proper discretion.

November 28, 1941. *Executive Council:* We have before us a letter of November 14th, addressed to your Council from Mr. E. B. Shaw, County Attorney of Fayette County, which we are returning herewith. He has requested blanket authority from the Executive Council for the sale of tracts of real estate acquired by the county by tax deed, for a sum less than the amount of taxes, subsequent interest and penalty.

Two sections of the Code are involved, depending upon the status of the transaction, to-wit, section 7265, where it is a case of assignment of certificate of purchase, and section 10260.4, where the same has gone to tax deed. The intent of both of these sections is the same, that an assignment of public bidder's certificate in the one instance, or sale of the property acquired by tax deed in the other instance, shall not be for less than the amount of taxes, subsequents, interest and penalty, unless all taxing bodies having an interest in the general taxes approve.

On the questiton of authority to make a blanket approval, the following part of section 7265 is pertinent:

"When the county acquires a certificate of purchase and has the same in its possession for one year, or more, the board of supervisors may compromise and assign the said certificate of purchase, with the written approval of all tax-levying and tax-certifying bodies having any interest in said general taxes."

Where it has gone to deed, the following provisions of section 10260.4 are pertinent:

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

In the first cited section it speaks of when the county acquired "a certificate of purchase" that the board may compromise and assign "the said certificate of purchase."

In the second-mentioned section it is "any sale" which shall be for a sum of not less than the total amount stated without the written approval of the majority of all taxing bodies. These words would indicate that it was contemplated that the board of supervisors and the various taxing bodies would exercise a discretion as to each sale or assignment involved, that each would have to stand on its own feet.

While we recognize that where there are a very large number of tracts involved, it may result in some inconvenience both to the county and to each individual taxing body to have to approve each sale individually, yet we believe that it is the intent of the above-quoted sections to require the exercise of judgment and discretion in each instance. Certainly, if a taxing body were to give advance approval covering a large number of tracts, it could not be said that they had exercised any legal discretion, and we believe the statutes contemplate that

the taxing bodies shall exercise a discretion. Otherwise the provisions for approval by the taxing bodies would mean nothing.

AUDITORS: COMPENSATION: AMOUNT OF PER DIEM AND EXPENSES: County, municipal, and school examiners and their assistants are to be paid a per diem of not to exceed $7.00 each for each day they work and their actual and necessary expenses, in accordance with Chapter 65, 49th G. A.

December 3, 1941. *Mr. Chet B. Akers, Auditor of State:* We wish to acknowledge receipt of your request for our interpretation of Chapter 65, Acts of 49th General Assembly, as to whether the same, in effect, nullifies the provisions of Section 125 of the 1939 Code of Iowa, as they relate to the expenses payable to county, municipal and school examiners.

Pertinent part of Section 125 of the 1939 Code of Iowa, reads as follows:

"125 *Bills—audit and payment.* Where the examination is made by the state auditor under the provisions of this chapter, each examiner shall file with the local governing body and also with the auditor of state a detailed, itemized and sworn voucher of his per diem and expense, which expense shall not exceed the sum of three dollars per day for the time such examiner is actually engaged in such examination. * * *"

Chapter 65, Acts of 49th General Assembly, reads as follows:

"AN ACT to amend chapter ten (10), Code, 1939, relating to compensation of county, municipal, and school examiners and their assistants.

Be It Enacted by the General Assembly of the State of Iowa:

Section 1. Chapter ten (10), Code, 1939, is amended by inserting after section one hundred fifteen (115) as a separate section the following: 'County, municipal, and school examiners, and their assistants, shall be paid a per diem of not to exceed seven dollars ($7.00) each for each day they actually work, and their actual and necessary expenses. Said payment shall be made from the general fund on the certification of the Auditor of State, and the general fund shall be reimbursed as provided in sections one hundred twenty-five (125) and one hundred twenty-six (126).'"

We wish to call special attention to the title of the above-mentioned Act of the 49th General Assembly. The title clearly shows that the Legislature intended to definitely establish the compensation of the examiners and their assistants. The language "county, municipal and school examiners, and their assistants, shall be paid a per diem of not to exceed seven dollars ($7.00) each for each day they actually work, and their actual and necessary expenses. * * *" would seem to negative any contrary expression that might appear in our law.

Chapter 65, Acts of the 49th General Assembly, states that it is an amendment to Chapter 10, Code of 1939, and if said Act is contrary to the provisions of any prior statute we are bound to give effect to the last expression of the Legislature.

It is clear that Chapter 65, Acts of the 49th General Assembly, is in direct conflict with Code Section 125 and we are of the opinion that the Legislature intended to amend or repeal the provisions of Code Section 125 in so far as the same are in conflict with the provisions of Chapter 65, Acts of the 49th General Assembly.

It is, therefore, our conclusion that the county, municipal and school examiners and their assistants are to be paid a per diem of not to exceed seven dollars ($7.00) each for each day they actually work, and their actual and necessary expenses.

COUNTIES: PATIENTS AT OAKDALE SANATORIUM: COSTS PAID FROM GENERAL FUND OR POOR FUND: The cost for the care of patients at Oakdale Sanatorium may be paid from either the county general fund or the county poor fund.

December 3, 1941. *Mr. Chet B. Akers, Auditor of State:* In answer to your inquiry as to whether the cost for care of patients at Oakdale Sanatorium should be paid from the county fund or from the poor fund, we beg to advise as follows:

Chapter 169 deals with the State Sanatorium at Oakdale, and section 3399 therein provides that each county shall be liable to the State for the support of patients from that county in the State Sanatorium, and further provides that the amounts due shall be certified by the superintendent of the Sanatorium to the State Comptroller, who shall collect the same from the county auditor "at the times and in the manner required for the certification and collection of money from counties for the support of insane patients."

Chapter 178 deals with the support of the insane, and sections 3600 and 3601 provide the machinery or method by which this is collected. Section 3600 requires the superintendent of the State Insane Hospital to certify to the Comptroller the amount due the state in the several counties, and that a duplicate certificate shall be mailed to each county auditor. Section 3601 provides that the auditor, upon receipt of the duplicate certificate, shall enter same to the credit of the state in his accounts, and issue notice to the county treasurer authorizing him to transfer the amount from the insane or county fund, to the general state revenue.

We do not believe that this provision in section 3601 which denominates the fund from which the transfer is made can be construed as a part of the "manner" required for certification and collection of the money referred to in section 3399. If it were it would be necessary to hold that payment of the cost of support of patients in the State Sanatorium at Oakdale was payable either from the insane fund or the county fund, and we do not believe that the legislature intended such interpretation, but by their reference to section 3399 for collection of cost of patients at the State Sanatorium "at the times and in the manner required for certification and collection of moneys from counties for the support of insane patients" had reference only to the mechanics of collection. Nowhere in Chapter 169 dealing with the State Sanatorium is anything provided as to which fund the county shall pay the cost of caring for their patients in the State Sanatorium. However, Chapter 189.6, Code 1935, deals with the care and treatment of indigent tubercular patients. This chapter provides that the board may contract for such care and treatment with the board of trustees of any hospital not maintained for pecuniary profit, may erect and equip buildings in connection with any hospital in the county for the segregation, care and treatment of tubercular patients, and provides in section 3828.128 that the board may allow from the proper fund of the county not to exceed $20.00 per week for the care and support of each tubercular patient. In Chapter 189.7 dealing with medical and surgical treatment of indigent persons, including treatment at the University Hospital, section 3828.157 makes provision as to reimbursement to the State by the county, and provides for this reimbursement to be made from the poor fund or county fund.

In view of these various provisions with reference to the fund from which payment of the cost of treatment of indigent persons is to be paid, and particu-

larly the provisions of Chapter 189.6, it is our opinion that the cost for the care of patients at Oakdale Sanatorium may be paid from either the county general fund or the county poor fund.

MUNICIPAL COURT: UNPAID COSTS IN CLASS "C" CASES: COUNTY LIABLE ONLY FOR WITNESS FEES AND MILEAGE: A county is not liable to the city for unpaid costs in class "C" cases in municipal court other than for witness fees and mileage.

December 15, 1941. *Mr. C. B. Akers, Auditor of State:* We wish to acknowledge receipt of your letter of December 10th in which you ask for our opinion on the following matter:

It has come to the attention of our examiners that the Clerk of the Municipal Court of Sioux City has filed bills with the Woodbury County Auditor for the unpaid costs in Class "C" cases. The bills filed do not include witness fees in these cases, the County has, each month, reimbursed the City for the witness fees.

The following items of costs make up the bills:

Information-Warrant-Docketing-Hearing-Judgment-Bond-Transcript-Continuance-Service of Warrants.

The Board of Supervisors contend that the costs are not chargeable to the County. They have taken the matter up with our examiners and in connection with the same have asked that question be presented to the office of Attorney General for an opinion.

The answer to your question must be found in the Code provisions of the State of Iowa in as much as there is no common law liability on the part of the County for costs. 15 C. J. 324. Code Section 10666 provides as follows:

"10666 *Causes of action divided.* Causes of action within its jurisdiction shall be divided into the following classes:

"* * *

"Class 'C' shall include the trial of all public offenses of which this court has jurisdiction, other than for the violation of the city ordinances.

"* * *"

Code Section 10670.1 reads as follows:

"10670.1 *Payment of witness fees.* The city treasury shall be reimbursed from the county treasury for witness fees and mileage paid in class 'C' cases. Once each month the city treasurer shall certify to the county auditor an itemized statement of such fees, showing in each case the names of the defendants, date of judgment, book and page of the court record, names of witnesses and amount paid to each, whereupon, the county auditor shall issue a warrant therefor payable to the city treasurer without audit, as provided in section 5143."

It should be noted that the salaries of the various officers of the Municipal Court are paid jointly by the City and the County. See Code Section 10688. The bailiff is entitled to retain the amounts allowed to him by law for mileage and necessary and actual expenses in addition to his salary. See Code Section 10671. The present controversy does not involve any question as to an officer's right to receive fees but is solely a question as to whether the County is chargeable with the above-mentioned items of cost.

It should be noted that most of the items of cost set out are for mere clerical entries made by the Clerk whose salary is paid equally by the City and the County. The item, service of warrants, is not payable to the bailiff and the charge, when paid, would go directly to the City Treasury.

Code Section 10670.1 specifically mentions that the City Treasury shall be

reimbursed from the County Treasury for witness fees and mileage paid in Class "C" cases. This specific reference to the witness fees and mileage would seem to negative any thought that the County was to pay any fees not expressly mentioned in this Chapter.

As previously noted the aforementioned costs do not involve any expenditures on the part of the City, the items being charges for clerical entries made by the Clerk of the Municipal Court whose salary is paid in part by the County. The only expense to the City in the situation under consideration is the cost of the supplies used in the Clerk's office. Such expense is to be paid by the City. Note Code Section 10689, which reads as follows:

"10689 *City to provide rooms.* The city council shall provide suitable place for holding said court, and such other rooms and offices as may be necessary for the transaction of the business of said court. All of the other expenses of maintaining said court not otherwise provided for in this chapter shall be paid from the city treasury."

It is our conclusion that the County is only liable to the City for witness fees and mileage, as mentioned in Code Section 10670.1, and that the express statement in said Section negatives any contention that the County is responsible to the City for the costs set out in your letter.

CHILDREN'S BOARDING HOMES: LICENSE WHEN NO CHILDREN UNDER 14: NO COLLATERAL ATTACK ON LICENSE BY ANOTHER STATE DEPARTMENT: TUITION PAYABLE BY STATE: A children's boarding home license issued to a home which has only three children who are between the ages of 14 to 21 should not be subject to collateral attack by another state department, and the state should pay the school tuition of such children when the boarding home is not in the school district of their legal residence.

December 17, 1941. *Miss Jessie M. Parker, Superintendent of Public Instruction:* This will acknowledge your oral request for an opinion on the following question:

"A home was duly licensed by the State Board of Social Welfare as a children's boarding home on July 1, 1939 for the following year. During that year, there were three children in the home, one of whom was under, and two of whom were over, 14 years of age. The youngest child reached the age of 14 years in March of 1940. The home is located in a school district other than the legal residence of all three children. Tuition for all three children was paid by the state for the school year, 1939-1940. The license of the home was renewed by the State Board of Social Welfare in July 1940, even though there was no child in the home at that time under the age of 14 years. The same three children all live in the home at the present time and all are under the age of 21 years. The school district wherein the home is located has now billed the state for tuition for all three children for the school year, 1940-1941. Our question is,—should the state pay said bill?"

Section 3661.057 of the 1939 Code of Iowa reads as follows:

"*'Children's boarding home' defined.* Any person who receives for care and treatment or has in his custody at any one time more than two children under the age of fourteen years unattended by parent or guardian, for the purpose of providing them with food, care and lodging, except children related to him by blood or marriage and except children received by him with the intent of adopting them into his own family, shall be deemed to maintain a children's boarding home. This definition shall not include any person who, without compensation, is caring for children for a temporary period."

Section 4283.01, 1939 Code of Iowa, reads in part as follows:

"*Tuition when in boarding home.* When any child of school age has become a public charge and is being cared for in a children's boarding home licensed by the state, and the domicile of such child at the time it became a public charge was in another school district than the one wherein such boarding home is located, then, such child shall be entitled to attend public school in the school district in which such boarding home is located, or if such district does not maintain a school offering instruction in the grade in which such child is properly classified, then such child may attend upon such instruction in any approved public school in the state that will receive it. The tuition of such child, at the rates established by law, shall be paid by the treasurer of state from any funds in the state treasury not otherwise appropriated, and upon warrants drawn by the state comptroller upon the requisition of the superintendent of public instruction * * *"

The question presented concerns whether or not the renewal license issued to the home in July, 1940, was a proper license, and if not, whether such license can be questioned by another department of the state.

It might be argued that the home in question might not technically come under the provisions of Section 3661.057 above quoted, in July, of 1940, inasmuch as there was no child living in said home at that time who was under fourteen years of age. On the other hand, can it not be said that the State Board of Social Welfare may issue a children's boarding home license to any home in anticipation that children will be therein placed, even though such home may have no children residing there at the time such license is issued. We believe that the latter is the better interpretation, especially when it is a known fact that the number of children residing in any given home may vary in any one year from none to many.

It will be further noted from the facts as stated that all three children are of school age as defined by Section 4268, 1939 Code of Iowa, that is, between the ages of 5 and 21. Consequently, said children clearly fall within the provisions of Section 4283.01 above quoted. They are all of school age and they live in a children's boarding home licensed by the state.

It is our opinion that a license issued by one department of the state should not be the subject of a collateral attack concerning its validity, by another department of the state.

It follows that it is our opinion that the bill presented for payment by the school district should be paid by the state under the provisions of Section 4283.01 above quoted.

ASSESSORS: TIME FOR OPERATION OF CITY ASSESSORS LAW: ASSESSOR NOT YET IN OFFICE: CITY ASSESSMENT EXPENSE FUND: COUNTY WARRANTS UNDER CITY REQUISITION: DOG LISTING FEES PART OF FUND: Chapter 203, 49th G. A., does not make the city assessors law, Chapter 202, 49th G. A., inoperative until the assessor has qualified. Funds for operation of the city assessor's office after Jan. 1, 1942, should be provided by the county, city, and school district under Chapter 202, even though the assessor has not yet taken office. The city assessment expense fund should be set up as of Jan. 1, 1942, with the dog listing fee going into such fund, and the county auditor may issue warrants on the fund under requisition of the city assessor.

December 22, 1941. *Mr. Francis J. Kuble, County Attorney, Des Moines, Iowa:* We wish to acknowledge receipt of your recent letter in which you ask for our opinion on the following matter:

Under the terms of Chapter 202, Acts of 49th General Assembly, which law is applicable to the City of Des Moines, the Assessor is appointed ultimately

by the three taxing bodies. The law also provides that from and after January 1, 1942, the office of the Assessor shall be financed by joint contributions made by the three taxing bodies, to-wit: County, City and School District, after a budget has been submitted and approved. That law further specifically provides that the fee for listing dogs shall not be paid to the City Assessor but shall become part of what is known as the City Assessment Expense Fund.

You are also aware of the fact that the appointing body consists of the three taxing bodies and sometime ago appointed Bert L. Zuver as the City Assessor. Thereafter an action was brought by Byron Tusant claiming that the taxing body acted illegally in appointing Zuver in that they failed to recognize the Soldier's Preference Law. The lower court sustained Tusant's contention. An appeal was taken and the Supreme Court of Iowa on November 18, 1941, filed an opinion, found in 231 Iowa 116, reversing the action of the trial court, and finding, in effect, that Zuver was entitled to the office. A petition for rehearing has been filed, which I understand will not be heard until the latter part of January. In the meantime Mr. Tusant is still acting as City Assessor.

It will, of course, be necessary to provide funds for the operation of the Assessor's office from January 1st, particularly in view of the fact that under the law the City Assessor must commence on the second Monday in January to assess personal property.

The question then is, by whom shall these funds be provided? Should they be provided by setting up a City Assessment Expense Fund as provided in Senate File No. 3, or must the County Board of Supervisors pay the expense, as the law contemplated prior to the enactment of Senate File No. 3?

As stated in your letter this question arises because of the dispute and resultant Court action over the appointment of the City Assessor.

It is clear from a reading of Chapter 202, Acts of the 49th General Assembly, that the Legislature intended that from and after January 1, 1942, the expenses of the City Assessor's office and the Examining Board created by Chapter 202, were to be paid by the three taxing bodies, as set forth in Section 19 of said Chapter.

"SEC. 19. From the date of the taking effect of this act and until January 1, 1942, the expenses of the examining board, the city assessor's office and the local board of review shall be paid by the county upon approval of the board of supervisors, and the court costs and related expenses incident to any assessment appeal shall be paid as now provided by law. Until January 1, 1942, the salaries of the city assessor, deputy assessors and other office personnel and the compensation of members of the board of review, shall be authorized by the board of supervisors.

"After January 1, 1942, all expenditures under this act shall be paid as hereinafter provided. * * *

"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 act shall be paid. * * *"

Is this altered by the fact that the Assessor selected under the provisions of this Act has not qualified because of the pending litigation and the position of City Assessor is being occupied by the Assessor, who took office under the former law? It is our opinion that the provisions of Chapter 202, insofar as they relate to the financing of the City Assessor's office after January 1, 1942, should be put into effect.

In this connection it is necessary to quote the following portion of Chapter 203, Acts of the 49th General Assembly:

"SECTION 1. Senate file three (3), Acts of the Forty-ninth General Assembly of Iowa, is amended by repealing section thirty-two (32) and enacting in lieu thereof the following:

" 'This act shall not terminate the existing procedure for the making of assessments, including the acting in their respective capacities of the present assessors, their deputies and personnel, until such time as the assessors, their deputies and personnel have been selected and qualified pursuant to the provisions of this act, at which time the procedure provided for by this act shall be in full force and effect.

" 'If any of the provisions of this act shall be in conflict with any of the laws of this state, then the provisions of this act shall prevail.' "

The primary purpose of Chapter 203 was to make sure that Chapter 202 did not interrupt the assessment that was being made in Des Moines at the time Senate File No. 3 became the law. However, it should be noted that Chapter 203 provides that Senate File No. 3 (Chapter 202) shall not terminate "the acting in their respective capacities of the present assessors, their deputies and personnel, until such time as the assessors, their deputies and personnel, have been selected and qualified pursuant to the provisions of this act, at which time the procedure provided for by this act shall be in full force and effect."

We are of the opinion that Chapter 203 was not intended to make all of the provisions of Chapter 202 non-operative until "such time as the assessors, their deputies and personnel, have been selected and qualified pursuant to the provisions of this act." It is clear that it was necessary for the Examining Board to function prior to the time of the qualification of the Assessor and other personnel. We can see no reason why the provisions of Chapter 202, mentioned in your letter, should not become operative as of January 1, 1942, even though the Assessor, selected under the provisions of Chapter 202, has not yet taken office, that office being occupied by the Assessor holding office under the prior law.

It is, therefore, our conclusion that the funds necessary to operate the City Assessor's office from and after January 1, 1942, should be provided by the three taxing bodies as set forth in Chapter 202, Acts of the 49th General Assembly, and not by the County. It is our further opinion that the County Auditor would be justified in issuing warrants on the City Assessment Expense Fund under requisition of the City Assessor. In as much as we are of the opinion that the City Assessment Expense Fund should be set up as of January 1, 1942, it follows that the dog listing fee should not be retained by the City Assessor but shall be a part of the City Assessment Expense Fund.

HOSPITALS: COUNTY PUBLIC HOSPITAL: ADDITION: APPLICATION BY TRUSTEES FOR FEDERAL GRANT: GRANT NOT GIFT FOR ESTABLISHING HOSPITAL: NO ELECTION FOR MAINTENANCE TAX: The board of trustees of a county public hospital is the proper body to apply for a federal grant for an addition to the hospital. Such grant would not be a gift for establishing a hospital as contemplated by §10190, C., '39, and the question of a tax for maintenance of such institution may not be submitted to the people at an election.

January 6, 1942. *Mr. Harold F. McLeran, County Attorney, Mt. Pleasant, Iowa:* We wish to acknowledge receipt of your recent letter in which you ask for our opinion on the following matter:

A number of years ago the voters of this county authorized the erection of a County Hospital and pursuant to that authorization, a hospital has been maintained since that time. Recently due to the Ordnance Plant located at Burlington, Iowa, the facilities of our hospital have become inadequate and because of the proximity of our hospital to the Ordnance Plant there is a possibility that our hospital can secure sufficient funds from the Federal Govern-

ment with which to build an addition to the hospital. Since the hospital is already a going institution, the question has arisen as to whether the application for such a grant should be made by the Trustees of the hospital, or by the Board of Supervisors of Henry County, Iowa.

If such a grant should be secured from the Federal Government, the next question is whether such a grant could be considered as a gift within the meaning of Section No. 10190 and thus authorize the Trustees to submit the question of levying a ¾ mill tax to the people, in order to provide for the maintenance of the grant. I might say that a tax is already being levied for the purpose of maintaining the present hospital as provided by law, but it is the thought that if the addition to the hospital should be made, that the present rate of tax might not be sufficient to provide the necessary maintenance, and if so the Trustees might need to raise an additional tax if that would be possible under Section No. 10190.

The pertinent part of Code Section 5359 provides as follows:

"5359 *Powers and duties.* Said board of hospital trustees shall:
"* * *

"11. 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 the purposes enumerated in subsection 12 hereof or for equipment.
"* * *"

From this section it would seem that the Board of Trustees would have the power and authority to make application for a grant from the Federal Government. In this connection we should also like to call your attention to our opinion of February 17, 1941, to Francis Kuble, County Attorney of Polk County, Iowa, dealing with the powers and duties of the Board of Trustees of County Hospitals. The request will undoubtedly have to meet the requirements of the Federal Government and it may be that the Federal authorities will require that the Board of Supervisors join in the application. Otherwise it is our opinion that it is not necessary for the Board of Supervisors to make an application in connection with the proposed Federal grant.

As to your second question, we wish to quote Code Section 10190 as follows:

"10190 *Tax voted to maintain.* When any county, city, or town shall receive by gift or devise, property, real or personal, for the purpose of establishing any institution of benevolence including hospitals, and no sufficient fund or endowment is provided for its maintenance, or is received upon condition that the donee or devisee provide for aiding the maintenance of such institution by a tax levy upon the assessed property of such municipality, it shall be the duty of the governing board of such municipality to submit by resolution to the qualified electors thereof at a regular or special election the question whether there shall be levied upon the assessed property of such municipality an annual tax not exceeding three-fourths mill on the dollar for the purpose of aiding the maintenance of such institution. The said proposition shall be submitted in the manner provided for similar propositions in the title on elections."

In particular we call your attention to the following language of said section: "* * * for the purpose of *establishing* any institution of benevolence including hospitals, * * *".

It is clear that the grant under consideration would not be one given for the purpose of establishing a hospital. It is our opinion that Code Section 10190 was not intended to cover a gift such as the one under consideration, and it is our conclusion that the question whether there shall be levied upon the assessed

property an annual tax of not to exceed three-fourths mill on the dollar for the purpose of aiding the maintenance of such institution could not be legally submitted in the instant case.

DOCKS: EXPENDITURE FOR CHECKING FREIGHT RATES: REASONABLE EXPENDITURE BY DOCK BOARD: DOCKS LEASED ON TONNAGE BASIS: Where dock facilities are leased on a tonnage basis, an expenditure for services rendered in checking freight rates is a reasonable legal expenditure by the dock board.

January 6, 1942. *Mr. Chet B. Akers, Auditor of State:* We wish to acknowledge receipt of your letter in which you ask for our opinion on the following matter:

"On a recent audit made by our examiners of the city of Dubuque, there was some discussion as to the payment of an item to the Dubuque Traffic Association which is an organization which figures freight rates.

"This item was classified as dues by the Dock Commission, and as such was set up by our examiners as an illegal expenditure. We find now that what this is in reality is for services rendered by the Traffic Association in checking freight rates, etc., and as such might be a legal expenditure.

"However, there is another question that enters into it and that is the fact that the Dock facilities are leased to the Inland Waterways Corporation or the Federal Barge Lines.

"I am enclosing two letters from Mr. J. A. Kerper, President of the Dock Commission, which I believe will explain this item in detail, and I would like to have an opinion as to whether or not an expenditure of this kind is legal. The Dock Commission operates under Chapter 303, of the Code, and if we can furnish you any further information please advise us."

Chapter 303 of the 1939 Code of Iowa provides for the establishment of public docks and the administration of the Department of Public Docks by a Dock Board of three members to be known as the Commissioners of Public Docks.

Without setting forth in detail the powers and duties of the Board we call your attention to the fact that the Board is given full authority to exclusively govern and control the public docks and the expenses thereof. Among the powers and duties of the Board we call your attention to the following matters:

"* * * The board shall have exclusive charge and control of the wharf property belonging to the municipality including belt railway located in whole or in part therein, all the wharves, piers, quay walls, bulkheads, and structures thereon and waters adjacent thereto, and all the slips, basins, docks, water fronts, the structures thereon, and the appurtenances, easements, uses, reversions, and rights belonging thereto, which are now owned or possessed by the municipality or to which the municipality is or may become entitled, or which the municipality may acquire under the provisions hereof or otherwise. The board shall have the exclusive charge and control of the building, rebuilding, alteration, repairing, operation, and leasing of said property and every part thereof, and of the cleaning, grading, paving, sewering, dredging, and deepening necessary in and about the same.

"* * *

"* * * The board is also vested with exclusive government and control of the harbor and water front consistent with the laws of the United States governing navigation, and of all wharf property, belt railway, wharves, piers, quay walls, bulkheads, docks, structures, and equipment thereon, and all the slips, basins, waters adjacent thereto, and submerged lands and appurtenances belonging to the municipality, and may make reasonable rules and regulations governing the traffic thereon and the use thereof, with the right to collect reasonable dockage, wharfage, sheddage, storage, cranage fees, and tolls thereon, as hereinafter provided.

"* * *

"* * * The board shall have power to employ such assistants, employees, clerks, workmen, and laborers as may be necessary in the efficient and economical performance of the work authorized by this chapter. All officers, places, and employments in the permanent service of the board shall be provided for by ordinance duly passed by the board and the same shall be transmitted to the clerk of the municipality as provided for other ordinances of the board."

In your letter to our office you enclosed two letters which you had received from the President of the Board of Dock Commissioners, which stated that the dock facilities are leased to the Inland Waterways Corporation on a tonnage basis. The revenue of the city being so many cents per ton according to the type of goods handled.

The letters also disclosed that the expenditure in question is for services rendered by the Traffic Association in checking freight rates, etc., as the same relate to the use of waterways and railways serving Dubuque.

We believe that it is not unreasonable that the Dock Board should have available to it authentic information and advice with reference to freight rates and tariffs in connection with the proper and efficient conduct of the business intrusted to it and that it is within its discretion to secure same in the manner which it believes will best serve its purpose. Again we reiterate that the Board is given rather full and complete authority in the operation of the public dock.

It is, therefore, our conclusion that a reasonable expenditure, for the purpose above mentioned, is proper under the facts disclosed in your correspondence.

FEEBLE-MINDED PERSONS: RETURN FROM INSTITUTION TO PARENTS OR GUARDIAN WITHOUT COURT ORDER: BOARD OF CONTROL POWERS: NO RETURN TO PERSONS OTHER THAN PARENTS OR GUARDIAN: The board of control may return any inmate of the schools for the feeble-minded at Woodward and Glenwood to his parents or guardian, but in no case may an inmate be returned under §3405, C., '39, to any person except his parents or guardian.

January 7, 1942. *Board of Control of State Institutions. Attention: Mr. D. R. McCreery:* This is in answer to your letter of recent date wherein you ask the opinion of this department relative to the following legal question. You state in your letter:

"Inquiry has been made to this office in regard to removing patients from these two institutions by the Counties to their local County Home, as has been done under the new law in regard to insane patients. Of course, this inquiry comes because of the fact that after January 1, 1942, the Counties will be billed for the entire maintenance of these patients (Glenwood and Woodward) as they now are for insane patients."

Several sections of the Code have a bearing on this subject and we quote them in full.

Section 3405, which is a part of Chapter 170 pertaining to the Glenwood State School, provides:

"Admission to said institution may be either voluntary, by parents, guardian, or county attorney, under such rules as the Board may prescribe, or by commitments under chapter 171 of this title. The board may at any time return any inmate to its parent or guardian, even though committed by a court."

In the Code of 1927, said Section 3405 did not contain the last six words, to-wit:

"* * * even though committed by a court."

These were added by the Forty-fourth General Assembly, being House File 69, Chapter 71, Laws of the Forty-fourth General Assembly. (1931)

Section 3439 provides:

"A petition for the discharge of a person who has been committed to an institution under this chapter, or to vary such order of commitment, may at any time after six months from the date of such commitment be filed by the person committed or by any reputable person. If the commitment be to a private institution, the petition shall be filed with the court or judge ordering such commitment. If the commitment be to a state institution, the petition shall be filed in the proper court of the county where the institution is situated."

Section 3440 provides:

"Discharges and modifications of orders may be made on any of the following grounds:

"1. That the person adjudged to be feeble-minded is not feeble-minded.

"2. That said person has so far improved as to be capable of caring for himself.

"3. That the relatives or friends of the feeble-minded person are able and willing to support and care for him and request his discharge, and in the judgment of the superintendent of the institution having the person in charge, no evil consequences are likely to follow such discharge.

"4. That, for any other cause, said discharge should be made or such modification should be entered."

According to your letter, you desire our opinion on the two following questions:

1. May the Board of Control legally discharge an inmate of either of the two schools for the feeble-minded except under the provisions of Sections 3439-3440? (by court order)

2. If the Board has the authority to discharge such inmate without an order of court, must said inmate in all cases be returned to his parents or guardian?

We are of the opinion that the Board of Control has the authority to return any inmate of either of said schools for the feeble-minded to his parents or guardian without an order of court and we will hereinafter give our reasons for so holding. Section 3405 was amended by the Forty-fourth General Assembly by adding to the last sentence the following words, to-wit:

"* * * even though committed by court."

This amendment was approved April 27, 1931, and went into effect on the 4th day of July, 1931. On the 5th day of December, 1930, an opinion was rendered to the Board of Control by the Attorney General, said opinion involving the identical questions contained in your request. In the request for the opinion of December 5, 1930, the Board of Control called the attention of the Attorney General to the apparent conflict between Sections 3405 and 3440. The Attorney General held as follows:

"It is, therefore, the opinion of this department that the Board of Control may return an inmate to its parent or guardian if said inmate were committed without a court order in the manner prescribed by statute and that said Board has no jurisdiction to discharge a person committed, or to modify the order of court committing any person to the institution for the feeble-minded, except on order of court."

It will be noted that this opinion was written prior to the amendment contained in Chapter 71, Laws of the Forty-fourth General Assembly. In other words, the statute then did not contain these words:

"* * * even though committed by a court."

We think that in construing the present statute the interpretation of Section 3405 by the Attorney General, prior to the amendment, may be taken into consideration. We think it may be assumed that the Legislature took judicial notice of the holding of the Attorney General and that the statute was amended to obviate the interpretation placed by the Attorney General. In any event, it is now very clear, so it seems to us, that the Board of Control has the authority to return to its parent or guardian any inmate of either of the two institutions for the feeble-minded without order of court. We believe that it was undoubtedly the intention of the Legislature to provide an expeditious method of returning these unfortunate persons to their parents or guardian without subjecting their parents or guardian to the expense of court proceedings.

Under our interpretation of the statute, there is no conflict between Section 3405 and Sections 3439 and 3440. The two latter sections simply provide an additional remedy whereby interested persons may petition the court for a discharge of any feeble-minded person when in a proper case the Board fails, refuses or neglects to act.

Answering your second inquiry, we are of the opinion that in no case under Section 3405 may the inmate be returned to any other person except his parent or guardian.

TAXATION: DELINQUENT PERSONAL TAX COLLECTOR: APPOINTMENT: COMPENSATION: DESIGNATION OF TAXES TO BE COLLECTED: COLLECTION OF DELINQUENT TAX FOR CURRENT YEAR: A board of supervisors may authorize the appointment of a delinquent personal tax collector and may designate the delinquent tax to be collected, which may include the delinquent tax for the current year, and must fix the compensation of the collector within the maximum allowed by §7225, C., '39.

January 7, 1942. *Mr. Wm. W. Crissman, County Attorney, Cedar Rapids, Iowa:* We have your letter of December 20, 1941, requesting an opinion upon the following question:

On January 3, 1939 the Board of Supervisors of Linn County by resolution approved the appointment of a delinquent tax collector; the record showing that the compensation was to be 10% of the total amount of the delinquent personal taxes collected during the year 1939. On January 2, 1940 a similar resolution was adopted by the Board pertaining to the delinquent personal taxes collected during the year 1940, and again on September 24, 1940 a resolution was adopted by the Board of Supervisors authorizing the delinquent tax collector to collect delinquent personal taxes for the year 1939 remaining unpaid on or after October 1, 1940 "as provided in Section 7226 of the 1939 Code of Iowa". On September 30, 1941 the following resolution was adopted by the Board, to-wit:

"On motion by Supervisor Seevell, seconded by Supervisor Beeson, the delinquent tax collector is authorized to collect the delinquent personal taxes for the year 1940 remaining unpaid on or after October 1, 1941, as provided by Section 7226 of the 1939 Code of Iowa. All members voting aye thereon."

We understand your question to be whether or not under the above record the Board of Supervisors had the right to authorize the delinquent tax collector to collect taxes currently delinquent between October 1st and December 31st of 1941, and if so, whether or not he should be paid as compensation 10% of the amount of delinquent personal taxes so collected.

We assume that the delinquent tax collector was appointed by the treasurer and that the action of the Board of Supervisors is in the nature of an authorization of such appointment and the designation of the delinquent tax to be

collected. Under the provisions of Section 7225 the Board of Supervisors may authorize the appointment by the treasurer of a delinquent tax collector and this collector can collect the delinquent personal tax that the Board may designate and the Board also fixes the compensation for services rendered and expenses incurred, but this is not to be a sum which will exceed 10% of the amount collected.

The Board in this case did specifically designate the delinquent personal tax to be collected, namely, the delinquent personal tax which remained unpaid on or after October 1, 1941. It does not appear that there has been any designation of the amount of compensation to be paid to the delinquent tax collector. We feel the Board of Supervisors did have the right to authorize the appointment of the delinquent personal tax collector and this Board did have the right to designate the delinquent personal tax to be collected by the collector, and this could include the tax that was delinquent for the current year. We assume Linn County has a population of eighty thousand or more and therefore it is not within the prohibition of Section 7226 of the 1939 Code.

As we have pointed out herein, the Board of Supervisors has failed to perform one of the essential duties with respect to the appointment of such a delinquent personal tax collector in that it does not appear that the Board fixed the compensation to be paid to such collector. Section 7225 does not provide that such collector shall receive as compensation the sum of 10% of the delinquent personal tax collected. This is only a maximum compensation and it is still incumbent upon the Board of Supervisors to fix the compensation within the maximum allowed by law. It is true the record indicates that there probably was a thought on the part of the collector and the members of the Board that the compensation would be 10% of the amount of delinquent personal taxes collected. It is not enough that the parties have some general understanding to that effect. Boards of Supervisors can only take official action in the manner prescribed by law and the fixation of the collector's compensation should be the subject of the Board's official action.

In this situation we can only suggest that it is probably still within the province of the Board to fix the compensation to be paid the delinquent personal tax collector within the maximum allowed by Section 7225 of the 1939 Code of Iowa.

FEES: CLERK OF COURT: PROPERTY OF AN ESTATE: VALUE OF REALTY USED BY ADMINISTRATOR TO PAY DEBTS: FUNDS RECEIVED FROM HEIRS NOT CONSIDERED: In determining property of an estate for the purpose of ascertaining the clerk of court's fee, the value of real estate taken charge of by the administrator to pay debts should be considered, but not funds received by the administrator from the proceeds of real property sold by heirs independent of court action, nor money put into an estate by heirs for the purpose of paying debts.

January 12, 1942. *Mr. John C. Owen, County Attorney Washington, Iowa:* We wish to acknowledge receipt of your recent letter in which you ask for our opinion on the following matters:

1. Are proceeds of real estate sold on Order of Court to pay debts in an estate included in the "value of the property of the estate", within the meaning of the language in section 10837 (29)?

2. Now does the "value of the property of the estate" also include the proceeds of the sale of real estate by heirs without Court Order and absolutely independent of the Court or estate proceedings, these proceeds being turned into

the estate and accounted for by the administrator in his reports showing said proceeds as having been paid by him in satisfaction of claims against the estate? If the clerk can claim a fee on such an item then can be also claim a fee in any case where an heir, for example, puts money into the estate to help pay debts, regardless of where the money comes from—said money being from then on counted as assets in the estate and accounted for in the report of the administrator?

The pertinent part of Code Section 10837 provides as follows:

10837 *Fees.* The clerk of the district court shall charge and collect the following fees, all of which shall be paid into the county treasury:

* * *

29. For all services performed in the settlement of the estate of any decedent, minor, insane person, or other persons laboring under any legal disability, except where actions are brought by the administrator, guardian, trustee, or person acting in a representative capacity or against him, or as may be otherwise provided herein, where the value of the property of the estate does not exceed three thousand dollars, three dollars; where such value is between three thousand dollars and five thousand dollars, five dollars; where such value is between five thousand dollars and seven thousand dollars, eight dollars; etc. * * *

* * *

The case of Estate of Pitt, 153 Iowa 269, as mentioned in your letter, indicates that when it is necessary for the administrator to take charge of real estate in order to pay debts of the estate that the value of said real estate should be considered in determining the clerk's fee. In as much as it is necessary for the administrator to take charge of said property it becomes "property of the estate", and it is our opinion that the value of said property should be considered in determining the clerk's fee.

It is our opinion that where the heirs sell real estate independent of any court action and the proceeds are turned over to the administrator said proceeds do not thereby become "property of the estate". The decedent was not possessed of such funds and he did not have any claim to such funds at the time of his death and we do not believe that the same may be properly considered as property of the estate.

We are of the same opinion when an heir puts money into an estate for the purpose of paying debts. The money was not possessed by the decedent at time of his death and it is, therefore, our opinion that the money could not be considered as property of the estate for the purpose of ascertaining the clerk's fee.

LEGAL SETTLEMENT: NOTICE TO DEPART SERVED ON FAMILY IN COUNTY OF WIFE'S SETTLEMENT PRIOR TO MARRIAGE: ELECTION OF SETTLEMENT IN COUNTY AFTER DIVORCE: SETTLEMENT OF CHILDREN: A notice to depart served on a family after it moves into the county which was the legal settlement of the wife prior to her marriage does not prevent the wife, after getting a divorce, from electing to resume the legal settlement which she had prior to her marriage. The legal settlement of the minor children is governed by the settlement of the mother who was awarded custody of the children.

January 12, 1942. *Mr. E. B. Shaw, County Attorney, West Union, Iowa:* We wish to acknowledge receipt of your recent letter in which you ask for our opinion on the following matter:

More than a year ago X of A County and his wife and several children moved into B County. The proper notice to depart was served upon Mr. and Mrs. X within a year and A County continued to furnish the family with some direct re-

lief. In November, 1941, X's wife secured a divorce from him while the family was still residing in B County and shortly thereafter X plead guilty to the crime of forgery and was sentenced to the penitentiary at Fort Madison.

B County was Mrs. X's legal settlement at time of her marriage but she has not been divorced or abandoned by him, instead she divorced him, and I am wondering whether this fact plus the fact that previous to time she divorced him she attempted to choose this County as her legal settlement a notice to depart had been served upon Mr. and Mrs. X would not prevent her from choosing this County as her legal settlement.

The custody of all the minor children was awarded to Mrs. X and I, therefore, assume her legal settlement would govern theirs.

The question presented calls for our interpretation of the following portion of Code Section 3828.088:

3828.088 *Settlement—how acquired.* A legal settlement in this state may be acquired 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.

It is our opinion that under the facts before us it is immaterial whether the divorce be secured by the husband or by the wife. In connection with your question we feel that the last sentence of paragraph four of the above mentioned Code Section should be read as follows: *"Any settlement which the wife had at the time of her marriage may at her election be resumed if she be divorced, if both settlements were in this state."* To hold otherwise would be to say that the wife who respected her matrimonial vows would be denied the right to resume the legal settlement she had prior to marriage but the wife who was guilty of wrongdoing would have the privilege of making a choice as to her legal settlement. Surely no such interpretation was intended by the Legislature.

It is, therefore, our conclusion that the wife, in the instant case, may elect to resume the legal settlement she had at the time of her marriage. It is also our opinion that the fact the husband and wife had been served with a notice to depart in the county which was the legal settlement of the wife prior to her marriage does not deprive the wife of her right to elect to resume the legal settlement that she had prior to her marriage. The purpose of paragraph four of Code Section 3828.088, as the same relates to the question under consideration, was to wipe out all matters pertaining to legal settlement between the time of marriage and the divorce.

We agree with the statement in your letter that in as much as the custody of the minor children was awarded to the mother that the legal settlement of said children is governed by the settlement of the mother.

SOLDIERS RELIEF COMMISSION: VETERANS OF PHILIPPINE INSURRECTION NOT ELIGIBLE FOR MEMBERSHIP: An honorably discharged soldier of the Philippine Insurrection is not eligible to membership on a soldiers relief commission.

January 12, 1942. *Mr. L. L. Corcoran, County Attorney, Sibley, Iowa:* We wish to acknowledge receipt of your recent letter in which you ask for our opinion on the following question:

The question has arisen whether an honorably discharged soldier of the Philippine Insurrection is eligible to membership on the Soldier's Relief Commission in view of the last sentence of Section 3828.053 of the 1939 Code of Iowa, said membership being limited to the soldiers, sailors, marines and nurses of the Civil War, Spanish-American War and World War.

Code Section 3828.053 provides as follows:

3828.053 *Relief Commission.* Said fund shall be disbursed by the soldiers relief commission, which shall consist of three persons, all of whom shall be honorably discharged soldiers, sailors, marines, or nurses of the United States who served in the military or naval forces of the United States in any war. Said membership shall at all times, as near as possible, be equally divided between the soldiers, sailors, marines, and nurses of the Civil War, Spanish-American War, and World War.

It is our opinion that an honorably discharged soldier who served in the Philippine Insurrection is not eligible to membership on the Soldier's Relief Commission. It should be noted that only persons who were honorably discharged soldiers, sailors, marines, or nurses of the United States who served in the military or naval forces of the United States in any *war* are eligible to serve on the Soldier's Relief Commission. There is some question as to whether the Philippine Insurrection should be classified as a war. At any event we feel that the last sentence of Section 3828.053 clearly shows that the Legislature intended that only honorably discharged soldiers, sailors, marines, and nurses of the Civil War, Spanish-American War, and World War should be eligible to serve on said Commission. It is our belief that had the Legislature intended that an honorably discharged soldier of the Philippine Insurrection be eligible for membership on said Soldier's Relief Commission that the Legislature would not have provided that membership on the three membered Commission at all times, as near as possible, be equally divided between the soldiers, sailors, marines, and nurses of the Civil War, Spanish-American War and World War.

JUSTICE OF PEACE: JURORS FEES: PERSONS CALLED WHO DO NOT SERVE: Jurors called in justice court, but who do not serve, are not entitled to jurors fees.

January 12, 1942. *Mr. John C. Owen, County Attorney, Washington, Iowa:* We wish to acknowledge receipt of your recent letter in which you ask for our opinion on the following matter:

In paying fees to jurors in the Justice Court, do the talesman who are not selected as jurors but who are called into the Justice Court and are present until told that their services are not required, receive any fee under paragraph 2 of section 10846?

Code Section 10846 provides as follows:

10846 *Fees of jurors.* Jurors shall receive the following fees:

1. For each day's service or attendance in courts of record, including jurors summoned on special venire, three dollars, and for each mile traveled from his residence to the place of trial, ten cents.
2. For each day's service before a justice of the peace, one dollar.
3. No mileage shall be allowed talesmen or jurors before justices.

We agree with your analysis of Code Section 10846 and it is our opinion that the use of the words "service or attendance" in paragraph one of said section dealing with the fee of jurors in courts of record and the use of only the word "service" in paragraph two which provides for the fee for jurors in justice court indicates that the Legislature did not intend that jurors called in justice court, but who do not serve, are entitled to any fee.

MILITARY SERVICE: STATE OFFICERS AND EMPLOYEES: VOLUNTEERS OR APPLICANTS FOR SERVICE: LEAVE OF ABSENCE AND 30 DAYS PAY WHEN ENTERING INTO ACTIVE SERVICE: Officers and employees of the state who enlist in the armed forces of the United States, or reserve officers who apply for active service before they are ordered to report, are entitled to military leave with pay for thirty days, the actual call into service being the controlling factor.

January 13, 1942. *Mrs. Mary Huncke, Chairman, State Board of Social Welfare:* This will acknowledge your oral request for an opinion relative to the following section:

Section 467.25, as amended, reads in part as follows:

"All officers and employees of the state * * * who are members of the National Guard, organized Reserves or any component part of any military, naval or air forces or nurses corps of this state or nation or who are or may be otherwise inducted into the military service of this state or of the United States, shall, when ordered by proper authority to active service, be entitled to a leave of absence * * * without loss of pay during the first thirty days of such leave of absence."

Your specific question concerns an employee who enlists.

It is our opinion that a person who enlists in the armed forces of the United States, or a reserve officer who applies for active service before he is ordered to report, is nevertheless "ordered by proper authority to active service". When a person applies or volunteers for service, he has no assurance that he will be accepted for such service and it is our opinion that the actual call into service should be the controlling factor rather than the fact that such person volunteered. To hold otherwise would mean that a person who waited until he was drafted would be entitled to thirty days pay and a person who enlisted or volunteered would not be entitled to thirty days pay. We do not believe that the legislature intended to discriminate against volunteers.

It is our conclusion that the above-quoted statute should be given a liberal construction and that military leave with pay for thirty days should be given to all persons entering active service in the armed forces.

EMPLOYMENT SECURITY: BENEFITS CHARGEABLE AGAINST EMPLOYER'S CONTRIBUTIONS: AVERAGE PAY ROLL: LAST QUARTER OF CALENDAR YEAR USED IN COMPUTATIONS: The employment security commission, in determining benefits chargeable against an employer's contributions for any given calendar period, should take into consideration the contribution made for the last quarter of such period, even though the contribution is actually paid after the close of the calendar period, and in computing the average pay roll of an employer for the last three or five years, the pay roll for the last quarter of the calendar year should be considered.

January 20, 1942. *Hon. George A. Wilson, Governor of Iowa:* We wish to acknowledge receipt of your recent letter in which you ask for our opinion on the following matter:

A question has arisen as to the proper construction to be placed upon Section 1551.13, Code of 1939, in so far as this Section and other provisions of Chapter 77.2, Code of 1939, relate to the power created to the Iowa Employment Security Commission for fixed rates of contributions for all employers for the year 1942 and each year thereafter.

The Commission desires instructions as to the following questions:

1. Shall the Commission in determining the rate for each employer take into

consideration only the contributions that have been actually paid to the Commission on wages earned in 1941 when such contributions are received by the Commission prior to midnight December 31, 1941, or shall the Commission in determining the employer's rate take into consideration the amount of contributions on wages earned during the last quarter of 1941 which are paid in due course on or before the 31st day of January, 1942?

2. In computing the average pay roll of the employer for the last three or five years shall the Commission take into consideration the pay roll for the last quarter of the calendar year 1941, or shall the Commission use only the pay roll reports for the first three calendar quarters in the year 1941?

The material portions of the above-mentioned Act are as follows:

"1551.13 Payment—rates.

"* * *

"C. Future rates based on benefit experience.

"* * *

"3. Each employer's rate shall be two and seven-tenths per centum, except as otherwise provided in the preceding or following provisions of this section. No employer's rate shall be less than two and seven-tenths per centum after December 31, 1937, unless and until there shall have been three calendar years after he becomes liable for contributions under this chapter throughout which any individual in his employ could have received benefits if eligible.

"4. Each employer's rate for the twelve months commencing January 1 of any calendar year, after December 31, 1941, shall be determined on the basis of his record up to the beginning of such calendar year. If, at the beginning of such calendar year, the total of all his contributions, paid on his own behalf, for all past years exceeds the total benefits charged to his accounts for all such years, his contribution rate shall be:

"(a) One and eight-tenths per centum, if such excess equals or exceeds seven and one-half but is less than ten per centum of his average annual pay roll [as defined in section 1551.25 subsection 'A' paragraph 2];

"(b) Nine-tenths of one per centum, if such excess equals or exceeds ten per centum of his average annual pay roll. If the total of his contributions, paid on his own behalf for all past periods or for the past sixty consecutive calendar months, whichever period is more advantageous to such employer for the purposes of this paragraph, is less than the total benefits charged against his account during the same period, his rate shall be three and six-tenths per centum."

"1551.25 Scope. As used in this chapter, unless the context clearly requires otherwise:

"A. 1. 'Annual pay roll' means the total amount of wages payable by an employer (regardless of the time of payment) for employment during a calendar year.

"2. 'Average annual pay roll' means the average of the annual pay rolls of any employer for the last three or five years, whichever average is higher"; provided that on and after January 1, 1941, the term "annual pay roll" shall mean the total amount of wages paid by an employer during a calendar year for insured work, and provided further that any wages paid after December 31, 1940, for insured work performed on and prior to December 31, 1940, shall be credited to the annual pay roll of the year in which such work was performed.

As stated in your letter, under the procedure adopted by the Commission contributions are payable on the basis of wages paid during each calendar quarter. The contributions are due and must be paid on or before the last day of the month following the close of the quarter for which they are due. The contribution report and check for contribution must be accompanied by a pay roll report showing the name of each employee during such calendar quarter and amount of wages that were paid to such individual. This report is due with the contribution report on or before the last day of the month following the quarter for which such wages were paid. Payment of benefits are charged to the account of such employee as of date of issuance of check to pay benefit.

The purpose of Section 1551.13, C-4, was to provide a method of determining the future contribution rate of any given employer by a study of the past record of contributions and benefits paid. If the employer has contributed an amount sufficient to build up a balance in his account, over and above the benefits paid, his future contributions will be determined in accordance to the yardstick set out in Section 1551.13, C-4. The same is true if the employer's record shows that his contributions have not been sufficient to meet the benefits paid.

The most accurate method in determining the future rate of contributions, based on past experience, would be to consider the contributions which are paid to cover the given period, and the benefits that arise during said period.

You state in your letter that the benefits paid are chargeable against the employer's account as of the date of payment. Under this rule of the Commission all but the very last few of the claims for benefits for any given quarter would be chargeable against the quarter in which said claims arose. We also note that the Commission has, by rule, declared that the contributions are payable on or before the last day of the month following the close of the quarter for which they are due.

In determining the benefits chargeable against the contributions for any given calendar period it is our opinion that the Commission should take into consideration the contribution made for the last quarter of such period, even though the contribution is actually paid after the close of the calendar period.

To proceed otherwise would be to consider the benefits paid during the last quarter, most of which would arise in said quarter, and not to consider contributions which are made to cover said quarter but which are not required to be paid until the last day of the month following the end of the quarterly period. The result would be that a comparison of benefits paid during said period and contributions made to cover the same period would not show the true ratio. A more accurate picture of the employer's account must take into consideration the contribution for the last quarter of 1941. A study of the past record of the employer, for the purpose of determining the future rate, cannot fairly include the benefits paid during the last quarterly period without also including the employer's contribution for said period.

In as much as it is our opinion that the contributions made for the last quarter of 1941 should be included in determining the future contribution rate of the employer, we feel that it must necessarily follow in computing the average pay roll of the employer for the last three or five years, the Commission should take into consideration the pay roll for the last quarter of the calendar year 1941.

SOCIAL WELFARE: EMERGENCY RELIEF FUNDS: MAXIMUM COUNTY POOR TAX LEVY REQUIRED TO QUALIFY FOR STATE FUNDS: The maximum tax that any county must levy for its poor fund in order to qualify for state emergency relief funds is three mills in all counties except Polk and Woodbury and five mills in those two counties. The extra 25% which might be levied under chapter 59, 49th G. A., has no effect and does not relate to the words "maximum amount authorized by law for poor relief" as used in §3828.114, as amended by chapter 149, 49th G. A.

January 22, 1942. *Mrs. Mary Huncke, Chairman, State Board of Social Welfare, Des Moines, Iowa:* This will acknowledge receipt of your request for an opinion under date of January 14, 1942, relative to the following question:

"Section 3828.114, 1939 Code of Iowa, was amended by Chapter 149, Laws of the 49th General Assembly, which, in effect, provided that the one and one-half mill poor fund levy could be increased by one and one-half mills in all counties except Polk and Woodbury, and in those two counties, by three and one-half mills.

"Chapter 59, Laws of the 49th General Assembly, provided for an additional 25% levy in all special funds in certain instances.

"Should the State Department of Social Welfare grant emergency relief funds to counties which have levied an extra one and one-half or three and one-half mill levy but have not levied the additional 25% levy provided in Chapter 59, 49th General Assembly?"

Section 3828.114, as amended, reads as follows:

"*Poor tax.* The expense of supporting the poor shall be paid out of the county treasury in the same manner as other disbursements for county purposes; and in case the ordinary revenue of the county proves insufficient for the support of the poor, the board may levy a poor tax, not exceeding one and one-half mills on the dollar, to be entered on the tax list and collected as the ordinary county tax.

"Should the one and one-half mill levy fail to provide adequate funds to take care of the poor, then the board of supervisors, with the approval of the state comptroller, shall levy an additional tax of not to exceed one and one-half mills in all counties except counties having a population of over 100,000 and in such counties having more than 100,000 population the board shall be authorized to levy not to exceed an additional three and one-half mills for poor relief to be entered on the tax list and collected as the ordinary county tax. Such additional tax shall be levied only during the years 1941 and 1942. Before any such additional levy is made, a showing of the necessity for such additional levy shall be made to the state comptroller and no such additional levy shall be made unless it shall be approved in writing by the comptroller.

"Before any county can receive aid from the Iowa emergency relief fund for the aid of the poor, such county must have levied the maximum amount authorized by law for poor relief.

"The state board of social welfare shall not require any county to issue warrants or bonds, except anticipatory warrants which will be paid by taxes already levied, as a condition for receiving state aid, but after the county has used all of its poor funds and the said board has allocated all of its emergency relief fund throughout the various counties of the state in accordance with the need therefor, then the board of supervisors of any county may issue warrants or bonds, for the purpose of raising additional poor relief funds; provided, however, that the board of supervisors shall have the authority and shall be required to increase the poor relief levy sufficiently to repay such warrants or bonds on or before December 31 the second year after issuance of such warrants or bonds."

Senate File 66, Section 1, as set forth in Chapter 59, Laws of the 49th General Assembly, reads as follows:

"In all counties, school districts and cities and towns and cities under special charter where the maximum permissible or mandatory statutory millage tax levies for any fund or funds authorized by law, including those which may be increased by the state comptroller upon application to him, will not produce revenue in dollars sufficient to equal the budget requirements for such fund or funds, the comptroller may for the years 1941 and 1942 only approve increases in such maximum statutory millage levies up to but not exceeding 25% but in no event shall he authorize increased millage levies, which, when applied to the assessed valuation will exceed in dollars the average amount certified in dollars for such fund or funds in the years 1939 and 1940, except as may be otherwise provided by law as to the county general and poor funds."

Senate File 66, above quoted, was intended to take care of the situation where counties formerly levying an assessment on the basis of 100% valua-

tion were forced by another amendment passed by the 49th General Assembly to base their levy on 60% for the assessed valuation.

It is our opinion that the legislature did not intend such additional 25% levy to apply to Section 3828.114, as amended. It will be noted that the provision, "Before any county can receive aid from the Iowa emergency relief fund for the aid of the poor, such county must have levied the maximum amount authorized by law for poor relief" is contained in Chapter 149, Laws of the 49th General Assembly, and immediately followed the provision authorizing a county to levy an extra one and one-half or three and one-half mills. It is our opinion that the maximum any county must levy for its poor fund in order to qualify for state emergency relief funds is three mills in all counties except Polk and Woodbury and five mills in those two counties.

It is our further opinion that the extra 25% which might be levied under the provisions of Chapter 59, Laws of the 49th General Assembly, has no effect and does not relate to the words "maximum amount authorized by law for poor relief" as used in Section 3828.114, as amended by Chapter 149, Laws of the 49th General Assembly.

NEWSPAPERS: OFFICIAL COUNTY NEWSPAPER: AFFIDAVIT BY CONTESTANT: STATEMENT THAT REQUIREMENTS OF LEGAL NEWSPAPER ARE MET IS UNNECESSARY: An affidavit filed by a newspaper in a contest for selection of an official county newspaper is not fatally defective for failing to include a statement that the newspaper meets the requirements of a legal newspaper, as specified by §11099.1, C., '39.

January 27, 1942. *Mr. Paul L. Kildee, County Attorney, Waterloo, Iowa:* We wish to acknowledge receipt of your recent letter in which you ask for our opinion on the following matter:

A newspaper objects to the affidavit filed by B newspaper for the following reason: A claims that B has failed to include in its affidavit that B newspaper meets the requirements of a legal newspaper, or is a legal newspaper, or words to that effect. Is B newspaper's affidavit fatally defective for failing to include this phraseology in its affidavit?

We wish to set out the following Code Sections concerning your question:

"5400 *Application—contest.* Any publisher who desires that his newspaper be so selected may make written application therefor to the board of supervisors at any time prior to the making of the selection. If more applications are filed than there are newspapers to be selected, a contest shall exist.

"5401 *Contest—verified statements.* In case of a contest, each applicant shall deposit with the county auditor, in a sealed envelope, a statement, verified by him, showing the names of his bona fide yearly subscribers living within the county and the place at which each such subscriber receives such newspaper, and the manner of its delivery."

It should be noted that nowhere in Chapter 274, said chapter dealing with the selection of official newspapers, is there any mention that in case of a contest the verified statement mentioned in Section 5401 must include the statement that the newspaper is a newspaper as defined in the following Code Section 11099.1:

"11099.1 *'Newspaper' defined.* For the purpose of establishing and giving assured circulation to all notices and/or reports of proceedings required by statute to be published within the state, where newspapers are required to be used, newspapers of general circulation that have been established, published regularly and mailed through the post office of current entry for more than two years and which have a bona fide paid circulation recognized by the postal

laws of the United States shall be designated for the publication of notices and/or reports of proceedings as required by law."

A copy of the verified statement in question, which you submitted with your letter, sets out all of the matters required by Code Section 5401 and further states, in accordance with paragraph 1 of Code Section 5402.1, that each of said subscribers was continuously a subscriber to said newspaper for at least six months prior to date of making said application.

It is true that the Board of Supervisors in determining the contest will have to decide whether the newspapers involved meet the requirements as set forth in Section 11099.1. However, it is our opinion that the verified statement does not have to contain a statement that the newspaper is one meeting the requirements of Code Section 11099.1.

In your letter you refer to the pamphlet of Iowa Publishing Laws of 1939, said pamphlet being approved by the Auditor of State of Iowa, Attorney General and the State Comptroller, and make specific reference to the following language which appears at page 13, Section 3, of said pamphlet:

"The affidavit should also show that the newspaper meets the requirements of a legal newspaper, as defined in Section One of this pamphlet."

In examining Section 1 we find that the reference is to the requirement of Code Section 11099.1. It is our opinion that this language contained in the Iowa Publishing Laws of 1939 was not intended to mean that such a statement must be included in the affidavit. It is clear that such a statement would be beneficial to the Board in determining a contest of this kind but it is our opinion that the inclusion of this information is not mandatory.

FEES: WITNESS FEES: COUNTY SHERIFF, CLERK, OR RECORDER: NO AUTHORITY TO RECEIVE FEES: FEES NOT TAXED: REFUND OF FEES RECEIVED: A county sheriff, clerk, or recorder may not legally receive witness fees for testimony given on matters pertaining to his office, and no witness fee should be taxed when such officer is testifying. Where such officer has received a witness fee, it should be refunded to the party who paid it.

January 27, 1942. *Mr. Chet B. Akers, Auditor of State:* We wish to acknowledge receipt of your recent letter in which you ask for our opinion on the following matter:

In a County the Sheriff, Clerk and Recorder have received witness fees for testimony given in civil cases on matters pertaining to their respective offices. Should these witness fees be accounted for to the County or should they be refunded to the party who paid the costs into the office of the Clerk of District Court?

Code Section 11328 provides as follows:

"11328 *Peace officer.* No peace officer who receives a regular salary, or any other public official, shall, in any case, receive fees as a witness for testifying in regard to any matter coming to his knowledge in the discharge of his official duties in such case in a court in the county of his residence, except police officers who are called as witnesses when not on duty."

We note in your letter that reference is made to "matters pertaining to their respective offices." We assume that this language is intended to mean that the testimony was in regard to matters coming to the officers' knowledge in the discharge of their official duties. In connection with the interpretation of

Code Section 11328 it is necessary for us to consider Code Section 5245, which provides as follows:

"5245 *Fees belong to county.* Except as otherwise provided, all fees and charges of whatever kind collected for official service by any county auditor, treasurer, recorder, sheriff, clerk of the district court, and their respective deputies or clerks, shall belong to the county."

Section 11328, in brief, provides that no public officer shall *receive fees* as a witness for testifying in regard to any matters coming to his knowledge in the discharge of his official duties. It is our opinion that the use of the word "receive" precludes any interpretation of Code Section 11328 that the officer is required to account to the County for a witness fee. It is our opinion that the fee cannot be said to belong to the County because the officer is precluded from receiving the fee. If the Legislature intended that the fee in such a case was to be turned over to the County the use of the word "retain" instead of "receive" would have clearly expressed such an intention.

It is, therefore, our conclusion that in as much as the officer cannot receive the fee that no witness fee is to be taxed where such an officer is testifying and in the instant case the fee paid should be refunded to the party that paid these witness fees.

MILITARY SERVICE: STATE EMPLOYEES: 30 DAYS PAY WHEN ENTERING MILITARY FORCES SECOND TIME: State employees who received 30 days pay upon being inducted into military service, and who returned to work as state employees after being discharged because of being over the age limit, are entitled to a full 30 days pay when called back into military service.

January 28, 1942. *Iowa Liquor Control Commission, Des Moines, Iowa:* We are in receipt of your request for an opinion with respect to the following situation:

Section 467.25 of the 1939 Code of Iowa as amended by Chapter 73, Acts of the 49th General Assembly provides that employees of the State who enter military service are entitled to receive 30 days pay. The question presented is with respect to employees who either volunteered or were inducted into military service during the year 1941 and then later were discharged because of being over the age limit. Such employees returned to work as State employees and later were called back into military service. They received the first thirty days pay when they first entered the service and the specific question is whether or not such employees should again receive thirty days pay upon their second entry into the military service.

Section 467.25 of the 1939 Code of Iowa provides as follows:

"467.25 *State and municipal officers and employees not to lose pay while on duty.* All officers and employees of the state, or a subdivision thereof, or a municipality therein, who are members of the national guard, shall, when ordered by proper authority to active service, be entitled to a leave of absence from such civil employment for the period of such active service, without loss of status or efficiency rating, and without loss of pay during the first thirty days of such leave of absence."

Chapter 73, Acts of the 49th General Assembly, extends the operation of the above statute to include not only those entering the national guard, but to all persons entering the "organized reserves or any component part of the military, naval, or air forces * * * or who are or may be otherwise inducted into the military service of this state or of the United States". We find no limita-

tion in the foregoing law with respect to the number of times the state employee shall receive the thirty days pay upon entry into the military service. It would seem from this Act that if the person is, at the time of such entry, employed by the State of Iowa, or a subdivision thereof, or a municipality, he should, when entering the military forces, receive the thirty days pay and this would not be affected by a former entry into the service.

Some authority for our position is contained in our opinion of May 8, 1939, where we held that an employee of the state who attended field training in 1938 and again in June of 1939 would be entitled to pay while absent upon such active service each time. Some of the language of that opinion to the effect that the absence for the two periods did not exceed thirty days is unfortunate, but the true basis of the opinion is that the second induction into active service will entitle the soldier to the full absent pay. In that case it was only fifteen days, but the rule would be the same if the absence from the state employment is thirty days or more.

In view of the above, we are of the opinion that such employee is entitled to the full thirty days pay upon his second entry into the military forces of the United States.

HEALTH: LOCAL BOARD OF HEALTH JURISDICTION: CITY PARK OUTSIDE CITY LIMITS: TOWNSHIP JURISDICTION: In the absence of a statute giving the local board of health of a city jurisdiction beyond the corporate limits of the city or town, the local board of health of a township in which is located a city park which is outside the city limits has jurisdiction to handle all health matters arising in the city park.

February 4, 1942. *Mr. E. B. Shaw, County Attorney, West Union, Iowa:* We wish to acknowledge receipt of your recent letter in which you ask for our opinion on the following matter:

The City of Oelwein maintains a city park located entirely outside the city limits. In this park the City has rented small tracts of ground to perhaps forty or more individuals who have constructed cottages thereon. Some of these cottages are so constructed that they can be, and are occupied throughout the year, and sometimes questions involving the public health arise. Does the local Board of Health of the City of Oelwein or the local Board of Health of the Township in which the park is located have jurisdiction within the park?

Code Section 2228 provides as follows:

"2228 Organization. The local board of health shall consist:

"1. In cities and towns, of the mayor, health physician, and members of the city or town council.

"2. In townships, of the members of the board of township trustees."

You have mentioned in your letter that the ordinances of the City of Oelwein are in full force and effect over the park. Code Section 5805 provides as follows:

"5805 Jurisdiction. The jurisdiction of such board shall extend over all lands used for parks within or without the corporate limits, and all ordinances of such cities and towns shall be in full force and effect in and over the territory occupied by such parks."

It is clear that all of the ordinances of the City of Oelwein are in full force and effect in and over the territory of the park and any person violating any ordinance of the City of Oelwein while in the park, above mentioned, is subject to the usual punishment for violation of city ordinances. However, there is no specific provision in our laws giving the local board of health of a city or town

jurisdiction on matters arising beyond the boundaries of the city or town. It is our opinion that the legislature did not intend, when enacting Code Section 5805, that the local board of health for the city or town should also have jurisdiction over a city park that lies outside the corporate limits.

It is our opinion that the local board of health of the township wherein the city park is situated has jurisdiction to handle all health matters arising in said township, including those arising in the city park above mentioned. The legislature by specific law has made the ordinances of cities or towns applicable to its parks lying wholly outside the corporate limits and we believe if the legislature had intended that the local board of health of a city or town was to have extra territorial jurisdiction that a specific law to this effect would have been enacted. In the absence of such an expression it is our opinion that the local board of health of a city or town does not have any jurisdiction beyond the corporate limits of the city or town.

EMPLOYMENT SECURITY: EMPLOYER'S CONTRIBUTION RATES: RATES RAISED IF TOTAL CONTRIBUTIONS ARE LESS THAN TOTAL BENEFITS: NOT SUBJECT TO LAW FOR LAST THREE CONSECUTIVE CALENDAR YEARS: By not prohibiting the Employment Security Commission from increasing the contribution rates of an employer who has not been subject to the Employment Security Act for the last three calendar years, the legislature intended that the employer's rates should be raised, even though he has not been subject to the act for three calendar years, if his total contributions for all past periods or for the past sixty months is less than the total benefits charged against his account for the same period.

February 4, 1942. *Hon. J. R. Pefferle, Hon. Claude M. Stanley, Hon. Peter J. Kies, State of Iowa Employment Security Commissioners, Des Moines, Iowa:* We wish to acknowledge receipt of your recent letter in which you ask for our opinion as to the interpretation of Section 1551.13 of the 1939 Code of Iowa in so far as that section relates to the increase or decrease of contribution rates for the year 1942 and each year thereafter. Your specific question being:

Is the Employment Security Commission required to raise the contribution rate of an employer who has not been subject to the Act for three years if the facts of the case indicate that an increase in rate would be required if the employer had been subject to the law for more than three years?

The material portion of Code Section 1551.13 is as follows:

"1551.13 Payment—rates.
"* * *

"C. Future rates based on benefit experience.
"* * *

"3. Each employer's rate shall be two and seven-tenths per centum, except as otherwise provided in the preceding or following provisions of this section. No employer's rate shall be less than two and seven-tenths per centum after December 31, 1937, unless and until there shall have been three calendar years after he becomes liable for contributions under this chapter throughout which any individual in his employ could have received benefits if eligible.

"4. Each employer's rate for the twelve months commencing January 1 of any calendar year, after December 31, 1941, shall be determined on the basis of his record up to the beginning of such calendar year. If, at the beginning of such calendar year, the total of all his contributions, paid on his own behalf, for all past years exceeds the total benefits charged to his accounts for all such years, his contribution rate shall be:

"(a) One and eight-tenths per centum, if such excess equals or exceeds seven

and one-half but is less than ten per centum of his average annual pay roll [as defined in section 1551.25 subsection 'A' paragraph 2];

"(b) Nine-tenths of one per centum, if such excess equals or exceeds ten per centum of his average annual pay roll. If the total of his contributions, paid on his own behalf for all past periods or for the past sixty consecutive calendar months, whichever period is more advantageous to such employer for the purposes of this paragraph, is less than the total benefits charged against his account during the same period, his rate shall be three and six-tenths per centum."

As noted in your letter there is a specific provision in paragraph 3 of subsection C of the above-mentioned Code section, providing that no employer's rate shall be less than two and seven-tenths per centum after December 31, 1937, unless and until there shall have been three calendar years after he becomes liable for the contribution under this chapter throughout which any individual in his employ could have received benefits if eligible. It has been suggested that if the legislature prohibited the lowering of rates unless and until the employer had been subject to the Act for three calendar years, as above mentioned, that perhaps the legislature also intended that the rate of contribution not be increased until the employer had been subject to the Act for three calendar years, as provided in paragraph 3 of subsection C. In this connection it might also be mentioned that in determining the rate of contribution of an employer after December 31, 1941, there is repeated mention in Code Section 1551.13 of the average annual pay roll. Code Section 1551.25 defines the average annual pay roll as the "average of the annual pay rolls of any employer for the last three or five years, whichever average is higher." However, it should be noted that the average annual pay roll only becomes important in figuring the rate of contribution where the rate is to be lowered.

It is our opinion that the following language that appears in subparagraph (b) of paragraph 4 of subsection C indicates that the legislature did not intend to prohibit the Commission from increasing the contribution rate of an employer who has not been subject to the Act for the last three calendar years, "* * * If the total of his contributions, paid on his own behalf for all past periods or for the past sixty consecutive calendar months, whichever period is more advantageous to such employer for the purposes of this paragraph, is less than the total benefits charged against his account during the same period, his rate shall be three and six-tenths per centum." In determining the rate under this language we wish to point out that the legislature did not make any reference to the average annual pay roll but merely mentioned "all past periods" or "for the past sixty consecutive calendar months." This would indicate that the legislature did not intend to limit such increases to employers who had been subject to the Act for at least three calendar years.

It is our further opinion that this position is strengthened by the fact that the legislature specifically provided that no employer's rate shall be less than two and seven-tenths per centum unless and until there shall have been three calendar years after he becomes liable for contributions under this chapter throughout which any individual in his employ could receive benefits if eligible. This specific reference to the lowering of a contribution rate is further evidence that the legislature did not intend to prohibit the increase of contribution rates. We must assume that the legislature by not making any specific prohibitions as to the increase in rates must have intended that the Commission raise the rates in any case covered by the last sentence of subparagraph (b) of para-

graph 4 of subsection C of Code Section 1551.13 regardless of the fact that the employer has not been subject to the Act for three calendar years as above mentioned.

TAXATION: EXEMPTIONS: RESIDENT WIDOWED MOTHER OF NONRESIDENT WORLD WAR VETERAN: Although a World War veteran resides outside the state, his widowed mother who lives in Iowa and is dependent upon the veteran for support is eligible for tax exemption under §6946, C., '39.

February 5, 1942. *Mr. Francis J. Kuble, County Attorney, Des Moines, Iowa:* We are in receipt of your request for an opinion upon the following question:

The widowed mother of a World War veteran resides in the City of Des Moines, Iowa, but the veteran, holding an honorable discharge from the military forces of the United States, resides outside of the State of Iowa. The question is whether or not the widowed mother can receive tax exemption upon property she owns in Polk County, Iowa.

It is clear that under paragraph 4 of Section 6946 of the 1939 Code of Iowa, the mother, who is dependent upon a war veteran son, can obtain the tax exemption. Chapter 242 of the Acts of the 49th General Assembly now places the exemption upon a residence basis, but the statute starts out "any person named in section 6946, 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 property owned by such person", etc. It will be noted that the exemption is given to any person named in Section 6946. The widowed mother is a person named in Section 6946. The use of the masculine pronoun "he" is not significant, for we learn in Section 63, paragraph 3, of the 1939 Code, that in the construction of statutes words importing the masculine gender may be extended to females.

It is very clear that the legislature intended that the person filing for the soldiers' exemption be a resident of the State of Iowa. Throughout the amendment, or Chapter 242 of the 49th General Assembly, we find the legislature using the words "said person shall file", etc. and "the person claiming same", etc. The legislature did not state that the veteran need be a resident of the State of Iowa.

From the above we are of the opinion that the widowed mother of a World War veteran, who lives in Iowa, and is dependent upon such veteran for support, is eligible for the tax exemption provided for in Section 6946.

TAXATION: CERTIFICATE SHOWING PERSONAL TAX PAYMENT FOR FIVE YEARS: REFUSAL WHEN PREVIOUS TAXES UNPAID: STATUTE OF LIMITATIONS INAPPLICABLE: A county treasurer correctly refuses to give a certificate showing that there are no unpaid personal taxes against an estate for five years, when all personal taxes previous to the five-year period have not been paid. Section 11007, C., '39, barring an action after five years, is not applicable, as no "action" is involved.

February 11, 1942. *Mr. Ralph Bastian, County Attorney, Fort Dodge, Iowa:* We are in receipt of your request for an opinion with respect to the payment of personal taxes by a fiduciary under the provisions of section 12781.1 of the 1939 Code. We understand that a fiduciary is seeking a certificate from the county treasurer upon a showing that there are no unpaid taxes for the past

five years against the decedent, but that the treasurer is refusing to give the certificate for the records show that there are unpaid personal taxes charged against the decedent between the years 1922 and 1934.

Section 12781.1 of the 1939 Code provides as follows:

"No final report of a fiduciary shall be approved by any court unless there is attached thereto and made a part thereof, the certificate of the county treasurer of a county in which the estate is held by the fiduciary that all personal taxes due and to become due the county in such estate matter have been fully paid and satisfied."

It is difficult for us to understand how it can be asserted that under the above statute any state treasurer could be compelled to give a certificate provided for in the statute without a showing that "all personal taxes due and to become due the county * * * have been fully paid and satisfied."

No doubt the claim is being asserted under the provisions of section 11007 and probably pragraph 5 of that section that the tax claim is barred after the lapse of five years. This section is not applicable for it will be noted that section 11007 provides for a limitation period within which "actions may be brought". The county treasurer is not bringing any action. In this connection see *Collins Oil Company v. Perrine,* 188 Iowa 295, where the plaintiff brought an action to enjoin the county from collecting taxes after the lapse of five years where the court pointed out that the statute of limitations if it did operate only operates to bar an action brought by the county to recover taxes. In that case the treasurer was not bringing any action and the court held the limitation action had no application. The same would be true in this case if the administrator brought a mandamus action to compel the issuance of such a certificate. Upon the authority of the *Collins Oil Company* case, the plaintiff in such an action could not recover even if it be conceded that section 11007 would apply, for the treasurer would not be bringing any action.

We are of the opinion that he is right in refusing to give any certificate until all personal taxes have been paid even though the taxes go back more than five years. We do not in this opinion decide whether or not the provisions of section 11007 would be applicable to bar an action brought by the county treasurer for personal property taxes after the lapse of five years. We do not believe the answer to this question is involved in your inquiry.

INCOME TAX LAW: SOCIAL SECURITY ACT: RAILROAD RETIREMENT ACT: DEDUCTIONS FROM SALARIES ALLOWABLE: Deductions from salaries under the Social Security Act and the Railroad Retirement Act are permissible deductions under the provisions of paragraph 3 of Section 6943.041, C., '39, of the Iowa Income Tax Law.

February 18, 1942. *Iowa State Tax Commission, Des Moines, Iowa:*

You have requested an opinion with regard to the following question:

"Are the amounts deducted from salaries under the Social Security Act and the Railroad Retirement Act permissible deductions under the provisions of paragraph 3 of Section 6943.041 of the Iowa Income Tax Law, Code of 1939?"

Paragraph 3 of Section 6943.041 provides as follows:

"3. Taxes paid or accrued within the income year, imposed by the authority of the United States or of any of its possessions or of any state, territory or

the District of Columbia or of any foreign country; except inheritance taxes, federal estate taxes or estate taxes this or any other state, and except income taxes imposed by this division and taxes assessed for local benefit, of a kind tending to increase the value of the property assessed."

The Social Security Tax Act is contained in Title VIII, H.R. 7260, Seventy-fourth Congress, and the Act contains the following significant language:

"Sec. 801. In addition to other taxes there shall be levied, collected and paid upon the income of every individual a tax equal to the following percentages of wages * * * ."

And again, in Section 807, the following appears:

"Sec. 807. (a). The taxes imposed by this Title shall be collected by the Bureau of Internal-Revenue under the direction of the Secretary of the Treasury and shall be paid into the Treasury of the United States as internal-revenue collections."

The Carrier Taxing Act of 1935 is H.R. 8652, and this Act provides for an income tax upon the wages of railroad employees and the Act contains this significant language:

"The taxes imposed by this Act shall be collected by the Commissioner of Internal-Revenue and shall be paid into the Treasury of the United States as internal-revenue receipts."

The amendment to this Act in 1937 merely changed the Commissioner of Internal-Revenue to the Bureau of Internal-Revenue.

After the passage of each Act, there was an appropriate Act passed giving benefits to wage earners and railroad employees. It is clear from a reading of the two acts that they are each Federal taxing acts. Our own statute allows a deduction of Federal taxes accrued within the income year, and we can therefore see no escape from the conclusion that payments by wage earners and railroad employees in the form of deductions from wages provided for under the above two acts constitute allowable deductions from income under the provisions of paragraph 3 of Section 6943.041 of the 1939 Code of Iowa.

We are fortified in our conclusion by the history of this social legislation. The first Railroad Retirement Act of June 27, 1934, U.S.C.A. Title 45, paragraph 201 was held unconstitutional in the case of *Railroad Retirement Board v. Alton Railroad* by the Supreme Court of the United States on May 6, 1935, 295 U. S. 330, 79 L. Ed. 1468. This Act was properly named a Railroad Retirement Act in that it was not a taxing act. It was a pension act providing for benefits to those who contributed to the fund created by the contributions. It was to overcome the unconstitutional feature of this first act that Congress adopted the Carrier's Taxing Act of 1935, and the Social Security Act followed the same pattern as this Act and the two went into effect August 14, 1935. In each instance a plain taxing act was passed with a companion appropriation.

To determine the deductions allowable under the Iowa Income Tax Law, we are only concerned with the taxing act. Since this act confers no benefit upon the taxpayers, we are of the opinion that the payments made under either act are allowable deductions under the Iowa Income Tax Law.

SOLDIERS RELIEF LAW: STATUS OF SOLDIERS NOW SERVING IN PRESENT EMERGENCY: Soldiers now serving in the present emergency

are not entitled to relief provided by Sec. 3828.051, C., '39, when they have not been honorably discharged from service.

SOLDIERS RELIEF LAW: MEDICAL DISCHARGE: EFFECT: A "medical discharge" should be considered in the same category as an honorable discharge.

SOLDIERS RELIEF LAW: STATUS OF SOLDIERS HONORABLY DISCHARGED BEFORE AND AFTER DECEMBER 7, 1941: A soldier discharged from military service subsequent to December 7, 1941, is entitled to relief as provided by Sec. 3828.051, C., '39, while a soldier discharged previous to December 7, 1941, is not entitled to relief since he has not served in a war.

February 19, 1942. *Mr. Edwin H. Curtis, Executive Secretary Bonus Board, Des Moines, Iowa:*

We have your letter of February 10 inquiring as to the status of soldiers who become inducted into the service during the present emergency and with respect to their rights under the Soldier Relief Law.

Your inquiries are all controlled by the provisions of section 3828.051, Code, 1939, which reads as follows:

"A tax not exceeding one-fourth mill on the dollar may be levied by the board of supervisors upon all taxable property within the county, to be collected at the same time and in the same manner as other taxes, to create a fund for the relief of, and to pay the funeral expenses of honorably discharged, indigent United States soldiers, sailors, marines, and nurses who served in the military or naval forces of the United States in any war and their indigent wives, widows, and minor children, not over fourteen years of age if boys, nor sixteen if girls, having a legal residence in the county."

Your first question is as follows:

"Is the soldier now in service or his family eligible to aid from the funds of the County Soldiers' Relief Commission?"

Our answer to this is in the negative. Such a person fails to come within the provisions of the above section; the soldier has not been "honorably *discharged*"; he is still connected with the service.

Your second question is as follows:

"If a Veteran, honorably discharged on or after December 7, 1941, is in need, may he or his family be aided from County Soldiers' Relief Funds?"

To this our answer is in the affirmative, having been discharged subsequent to December 7, 1941. He has served in a war and comes within the terms of the above section.

Your third question is as follows:

"Is a Medical Discharge given because of injuries caused in the service of his country on or after December 7, 1941, considered honorable?"

It is our studied conclusion that this must be answered in the affirmative. Certainly a medical discharge is not a dishonorable discharge, and we are sure would be considered in the same category as though the word "honorable" had been used in connection therewith.

Your fourth question is as follows:

"Does a soldier discharged previously to December 7, 1941 receive any consideration from funds of the Soldier Relief Commission?"

We presume you have reference to a soldier who was serving prior to December 7, 1941, was honorably discharged prior to that date, but had never

served in any other war in which the United States was a participant. Assuming the foregoing premise, our answer to your inquiry is in the negative. Such a person has not served in any war.

PAROLE: DISTRICT COURT'S AUTHORITY TO COMMIT TO BOARD OF PAROLE PERSONS GRANTED SUSPENDED JAIL SENTENCE: Under the provisions of Sec. 3801, C., '39, the District Court has authority to commit to the Board of Parole persons convicted of a felony and given a suspended jail sentence and paroled under the provisions of Sec. 3800, C., '39.

February 24, 1942. *State Board of Parole, Des Moines, Iowa:*

This is in answer to your letter of the 19th instant, wherein you ask the opinion of this department relative to the following legal question:

"Under Sections 3800 and 3801 is the trial Court authorized to parole from the bench to the custody of the State Board of Parole prisoners who are sentenced to jail by the Court for a felony and not to a penal institution of Iowa?"

In formulating an opinion on this subject, we believe that the following sections of the Code should be given consideration:

3786: The board of parole shall, except as to prisoners serving life terms, or under sentence of death, or infected with venereal disease in communicable stage, have power to parole persons convicted of crime and committed to either the penitentary or the men's or women's reformatory.

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.

3788: Said board may, on the recommendation of the trial judge and prosecuting attorney, and when it appears that the good of society will not suffer thereby, parole, after sentence for less than life imprisonment and before commitment, prisoners who have not been previously convicted of a felony.

3790: All paroled prisoners shall remain, while on parole, in the legal custody of the warden or superintendent and under the control of said board, and shall be subject, at any time, to be taken into custody and returned to the institution from which they were paroled.

3800: The trial court before which a person has been convicted of any crime except treason, murder, rape, robbery, arson, second or subsequent violation of any provision of title VI, or of the laws amendatory thereof, may, by record entry, suspend the sentence and parole said person during good behavior:

1. If said person has not previously been convicted of a felony.
2. If said person is shown to be free from venereal disease.
3. If said person, if an adult and able to labor, has obtained apparently permanent employment for a reasonable time.

3801: When a parole is granted under section 3800, the court shall order said person committed to the custody, care, and supervision:

1. Of any suitable resident of this state; or
2. Of the board of parole.

It is our opinion that under the provisions of section 3801, the District Court has the authority to commit to the Board of Parole persons convicted of a felony and given a suspended jail sentence and paroled under the provisions of section 3800.

It is our view that the provisions of section 3801 are clear and unambiguous and permit of no other construction than the one herein placed upon it.

We are conscious of what is said in section 3790 to the effect that all paroled prisoners shall remain, while on parole, in the legal custody of the warden.

We interpret this statute to refer to prisoners committed to the penitentiary and not paroled from the bench. The provisions of said section do not, as we see it, militate in any manner against the construction that we have placed upon section 3801.

LIBRARIES: BOARD OF SUPERVISORS: CONTRACT WITH FREE PUBLIC LIBRARY TRUSTEES WITHOUT AN ELECTION: Under Sec. 5859, C., '39, Boards of Supervisors may enter into a contract with a Board of Trustees of any Free Public Library without an election authorizing such a contract.

March 4, 1942. *Hon. C. B. Akers, Auditor of State, Des Moines, Iowa:*

We wish to acknowledge receipt of your recent letter in which you ask for our opinion on the following question:

"Section 5859, 1939 Code, provides for contracts; Section 5861 provides that contracts shall remain in force until terminated by a majority vote of the electors of such school corporation, civil township, county, city or town voting on the proposition at such election.

"Please advise whether or not county board of supervisors can legally enter into a 'Library Contract' under Section 5859 without a favorable vote of the electors of the county outside of cities and towns."

Code Section 5859 provides as follows:

5859 *Power to contract.* Contracts may be made between the board of trustees of any free public library and any city, town, school corporation, township, or county for its use by their respective residents. Townships and counties may enter into such contracts, but may only contract for the residents outside of cities and towns. Such contract by a county shall supersede all contracts between the library trustees and townships or school corporations outside of cities and towns.

Code Section 5861 provides as follows:

5861 *Rate of tax.* Such contracts shall provide for the rate of tax to be levied during the period thereof, and shall remain in force until terminated by a majority vote of the electors of such school corporation, civil township, county, city, or town voting on the proposition at such election.

Code Section 5863 provides as follows:

5863 *County tax.* The board of supervisors, after it makes such contract, shall levy annually on the taxable property of the county outside of cities and towns, a tax of not more than one-fourth mill to create a fund to fulfill its obligation under the contract.

Section 5859 provides that contracts may be made between the Board of Trustees of any free public library and the County. There is no mention that before entering into such a contract that the question must be submitted to the voters of the County residing outside of cities and towns.

Section 5861 provides that the contract may be terminated by a majority vote of the electors of the County voting on the proposition at such election. We believe that this provision for an election adequately protects the residents affected by such a contract and that there is no requirement that there be an election to authorize the County to enter into a contract as provided in Section 5859. As noted above, Code Section 5863 limits the tax that may be levied by the Board of Supervisors to not more than one-fourth mill.

It is our conclusion that the Board of Supervisors may in accordance with Code Section 5859 enter into a contract with the Board of Trustees of any free public library without an election authorizing such a contract.

COUNTY BOARD OF EDUCATION: POWER TO FIX SALARY OF DEPUTY COUNTY SUPERINTENDENT OF SCHOOLS: The County Board of Education shall fix the salary of the Deputy County Superintendent of Schools each year and does not have authority to change such salary at any regular meeting during the course of such year. (5234, C., '39)

March 4, 1942. *Mr. Edward C. Schroeder, County Attorney, Boone, Iowa:*

We wish to acknowledge receipt of your recent letter in which you ask for our opinion on the following question:

"The Deputy County Superintendent of Schools had a salary fixed in August, 1940, at $95.00 and she was appointed for a period of three years. In February, 1942, at the regular meeting of the County Board of Education, her salary was increased by the Board of Education to $100.00. It was presented to the Board of Supervisors for approval.

"They're questioning whether or not the salary could be increased during the year or whether it would have to run for a period of a year from the time the salary was fixed."

Code Section 5234 provides as follows:

5234 *Deputy county superintendent.* Each deputy county superintendent shall receive such annual salary as shall be allowed by the county board of education, and which said board shall fix each year in accordance with the provisions of the teachers minimum wage law.

It is our opinion that the County Board of Education having fixed the annual salary of the Deputy County Superintendent may not increase the salary during the course of the year for which the salary has already been fixed.

We believe that the situation is analogous to the question before the court in the case of *Kellogg vs. Story County Board of Supervisors*, 219 Iowa 399, which case was discussed in our opinion of April 5, 1939, written to D. W. Dickinson, County Attorney, Eldora, Iowa.

The language of Code Section 5234, providing that the County Board of Education shall fix the salary each year, clearly negatives any idea that the Board has authority to change the salary at any regular meeting during the course of the year.

EMPLOYMENT AGENCIES: LICENSE NOT REQUIRED WHERE NO ATTEMPT MADE TO SECURE POSITION: An individual who operates an agency that merely secures recommendations for applicants for positions and makes no attempt to place the applicant in any position is not required to secure a license to operate an employment agency. (1551.02, C., '39)

March 4, 1942. *Mr. Edward F. Rate, County Attorney, Iowa City, Iowa:*

We wish to acknowledge receipt of your letter in which you ask for our opinion as to whether an employment agency license would be required based upon the following facts:

There is an agency here operated by a private individual which features collection of confidential recommendations for professions and trades, especially teachers.

To cover initial enrolling expense and to insure the seriousness on the part of the client, an enrollment fee of $1.00 payable but once is charged. When a client wishes to use the service he requests the collection of recommendations from individuals named by him. The agency then attempts to get such recommendations, making a charge of 50c for each. The recommendations are then placed in a permanent file and a folder is made up including the recommendations, a picture of the client, and a summary of his experience. At the request of the client these folders are sent out to any person he designates, a charge of 50c being made for each folder.

Code Section 1551.01 provides as follows:

1551.01 *License.* Every person, firm or corporation who shall keep or carry on an employment agency for the purpose of procuring or offering to procure help or employment, or the giving of information as to where help or employment may be procured either directly or through some other person or agency, and where a fee, privilege, or other things of value is exacted, charged or received either directly or indirectly, for procuring, or assisting or promising to procure employment, work, engagement or situation of any kind, or for procuring or providing help or promising to provide help for any person, whether such fee, privilege, or other thing of value is collected from the applicant for employment or the applicant for help, shall before transacting any such business whatsoever procure a license from a commission, consisting of the secretary of state, the industrial commissioner, and the labor commissioner, all of whom shall serve without compensation.

The following portion of Code Section 1551.02 should also be noted in this connection:

1551.02 *Application.****
Any person, firm, or corporation applying for a license, as provided in this chapter, to operate an employment agency for furnishing or procuring of employment shall furnish the commission with its contract form, which form shall distinctly provide that no fee or other thing of value in excess of one dollar shall be collected in advance of the procuring of employment and no license shall be issued unless such contract form contains such provision. ***

While the provisions of Code Section 1551.01 seem to be rather broad and all inclusive, it is our opinion that a license would not be required in the situation above described.

We believe the type of agency intended to be regulated by the Legislature is the one that holds out to the applicant that the agency can provide help or employment by virtue of contacts that the agency has with various employers and employees.

The usual contract used by such an agency provides that the applicant is to pay a certain per cent of his salary to the agency if employment is procured through the agency.

In the instant case there is no attempt on the part of the agency to contact any employer, the agency has no positions to offer and does not attempt to learn of vacancies, etc. The service of the agency is confined to gathering recommendations as requested by the person using the agency, such recommendations to be used by the applicant as he desires. As above stated, the agency merely secures recommendations for the applicant and does not attempt to place the applicant in any position, and it is our opinion that such an agency is not properly classified as an employment agency.

It is our conclusion that such an agency is not required to be licensed under Chapter 77.1 of the 1939 Code of Iowa.

BOARD OF SUPERVISORS: DISTRICTS ABOLISHED BY VOTERS DECREASING NUMBER OF SUPERVISORS: SUBSEQUENT INCREASE: ELECTION AT LARGE: Where voters decrease the number of supervisors the Supervisor Districts are abolished and when subsequently the number of Supervisors is increased the Supervisors must be elected at large. (5108-5111, C., '39).

March 5, 1942. *Mr. Morse Hoorneman, County Attorney, Le Mars, Iowa:*

We have your letter inquiring as to the legal status of the supervisor districts in your county in view of the following factual situation:

Prior to the general election in 1938 a petition was circulated in the county requesting a reduction of the board of supervisors from five, as it then existed, to three. At the general election in 1938 the proposition to reduce the board from five to three members was voted on and carried. In 1940, prior to the general election, another petition was circulated to increase it from three to five. At the general election in 1940 three supervisors were elected at large and at the same election the proposition to increase the board from three to five was submitted and carried. On January 1, 1941, the three supervisors who had been elected at large took office. No action was ever taken by the board with reference to limiting the supervisor districts.

Your question is, will members of the board of supervisors to be nominated in the June, 1942, primaries, and elected in the November, 1942, election, be nominated and elected by districts or at large.

It is our conclusion that members of the board to be nominated at the primary election in June, 1942, and elected in the general election in November, 1942, will be elected at large and not by districts.

Section 5108 of the code provides for the method of reducing the number of supervisors. This was followed and the reduction accomplished in the 1938 election. Section 5109 provides as to when such a reduction can take place, and section 5110 provides that at the next general election following the one at which the proposition to reduce was carried there shall be elected the number of members required by such proposition. Section 5111 provides that the board of supervisors may at its regular meeting in January in any even numbered year, divide the county into any number of supervisor districts corresponding to the number of supervisors in such county, or at such regular meeting may abolish such supervisor districts and provide for electing supervisors for the county at large.

We believe that it follows as a matter of necessity that whenever the voters of the county decrease or increase the number of supervisors, the supervisor districts which have heretofore existed are automatically abolished, and the supervisors who are elected in the decrease or increase, as the case may be, are elected at large and continue to be elected at large until the board of supervisors at the time provided for by section 5111 divide the county into supervisor districts. The districts having once been abolished by reason of the action of the voters in decreasing the number of supervisors, it follows that when the voters reversed themselves and increased the number of supervisors, that that did not have the effect of reforming the former districts.

It is therefore our conclusion that the supervisors to be nominated and elected in the forthcoming primary and general election will be nominated and elected at large, and not by districts as there are no districts in existence.

TOWNSHIP CLERK: COMPENSATION: FUNDS FROM WHICH PAYABLE: Compensation for township clerk provided for by Sec. 5572(2), C., '39, is to be paid from funds coming into his hands by virtue of his office and is not to be paid from county funds.

March 11, 1942. *Mr. D. W. Dickinson, County Attorney, Eldora, Iowa:* We wish to acknowledge receipt of your letter in which you present a question concerning our interpretation of Code Section 5572 of the 1939 Code of Iowa, particularly as to whether the compensation provided for in paragraph two of said Section is payable from county funds or from the money coming into the hands of a clerk by virtue of his office.

Code Section 5572 provides as follows:

5572 *Compensation of clerk.* The township clerk shall receive:
1. For each day of eight hours necessarily engaged in official business, where no other compensation or mode of payment is provided, to be paid from the county treasury, four dollars.
2. For all money coming into his hands by virtue of his office, except from his predecessor in office, unless otherwise provided by law, one percent.
3. For filing each application for a drain or ditch, fifty cents.
4. For making out and certifying the papers in any appeal taken from an assessment by the trustees of damages done by trespassing animals, such additional compensation as the board of supervisors may allow.

It will be noted that the township clerk is entitled to receive for each day of eight hours necessarily engaged in official business, where no other compensation or mode of payment is provided to be paid from the county treasury, four dollars. Paragraph one of the above mentioned Code Section specifically mentions that the compensation therein provided is to be paid from the county treasury where no other compensation or mode of payment is provided. In other words, this paragraph makes sure that the township clerk will be paid for his official services and the county will assume the burden of paying for said services when no other means is mentioned.

Paragraph two of Section 5572 does not clearly state as to what fund the one per cent compensation is to be paid. However, in determining the compensation as being one per cent, we believe that it is a fair inference, in lieu of any other specific reference, that the compensation is to be paid from the funds coming into the clerk's hands by virtue of his office.

Paragraph one of the above mentioned Code Section specifically provides for payment of compensation out of county funds. Paragraph two makes no mention of payment by the county and it must be assumed that the Legislature did not intend that the compensation provided in paragraph two be paid from county funds but rather from the township money which is determinative of the compensation provided therein.

It is our conclusion that the compensation provided for in paragraph two of Code Section 5572 is not payable from county funds.

SOLDIERS RELIEF: HONORABLE OR DISHONORABLE DISCHARGE: NO COMMITMENTS TO COUNTY HOME: A person who has served in the Army or Navy of the United States, whether honorably or dishonorably discharged, cannot be placed in the County Home. (3828.102, C., '39)

March 11, 1942. *Mr. Wm. W. Crissman, County Attorney, Cedar Rapids,*

Iowa: We wish to acknowledge receipt of your recent letter in which you ask for our opinion on the following matter:

Code Section 3828.102 provides for special privileges to soldiers and others. We have a situation wherein a party who had had two honorable discharges from service and later a dishonorable discharge, is now a public relief client of this county. The county desires to place him in the County Home, to which he objects. Question: does the fact that this man was dishonorably discharged from the service, although having previously had two honorable discharges, affect his status in any way under the above mentioned Code section?

Code Section 3828.102 provides as follows:

3828.102 *Special privileges to soldiers and others.* No person who has served in the army or navy of the United States, or their widows or families, requiring public relief shall be sent to the county home when they can and prefer to be relieved to the extent above provided, and other persons and families may, at the discretion of the board, also be so relieved.

It will be noted that there is no mention of "honorable discharge" in the above Code Section. The Section merely refers to "person who has served in the army or navy of the United States" and it is our opinion that inasmuch as the person involved has served in the army or navy of the United States that such person cannot be sent to the county home.

If the Legislature had intended that this particular privilege, if it may be called such, was to apply only to honorably discharged soldiers and sailors it would have been very easy to have so stated. In view of the broad language that is used in this Section we are of the opinion that it cannot be qualified by interpretation to apply only to honorably discharged soldiers and sailors.

SHERIFF'S CERTIFICATE OF SALE: LIMITATION BY CH. 299, Sec. 1 (2), 49th G. A.: NONAPPLICABLE TO CERTIFICATES ISSUED MORE THAN 8 YEARS PRIOR TO JULY 4, 1941: The limitation created by Ch. 299, Sec. 1 (2), 49th G. A. for failure to obtain a deed under a sheriff's certificate is not applicable to Sheriff's Certificates of Sale issued more than eight years prior to July 4, 1941.

March 25, 1942. *Mr. Francis J. Kuble, County Attorney, Des Moines, Iowa:* We wish to acknowledge receipt of your recent letter in which you ask for our opinion relative to the effect of Paragraph 2 of Section 1 of Chapter 299, Acts of the 49th General Assembly, on sheriff's certificates of sale which were issued more than eight years prior to the effective date of the above mentioned Act.

Paragraph 2 of Section 1 of Chapter 299, Acts of the 49th General Assembly provides as follows:

SECTION 1. Chapter four hundred ninety-eight (498), Code, 1939, is hereby amended by adding as new sections, the following:

* * *

2. After eight (8) years have elapsed from the date of issuance of any sheriff's certificate of sale, and no action has been taken by the holder of such certificate to obtain a deed thereunder, it shall be the duty of the sheriff and clerk of the district court to cancel such sale and certificate of record and all rights thereunder shall be barred.

It is the general rule of construction that statutes are to be prospective only in their operation rather than retrospective unless the contrary clearly appears or is necessarily implied.

This rule is applicable to remedial statutes but the rule is not so rigid inasmuch as the courts favor remedial legislation. Remedial statutes may be retroactive in their operation providing they do not impair contracts, do not create new obligations or disturb vested rights. Remedial statutes may be construed to be retroactive but, generally speaking, such construction must be based on expressed language of the statute or based on consideration of controlling public necessity. If the intention is not clearly expressed the doubt must be resolved against the retroactive operation. See 37 Corpus Juris 687 and following, 59 Corpus Juris 1169 and following.

It is well settled that a statute shortening the period of limitation is within the constitutional power of the legislature, provided a reasonable time, taking into consideration the nature of the case, is allowed for bringing an action after the passage of the statute and before the bar takes effect. See *Turner vs. State of New York,* 168 U. S. 90, cited in *Berg vs. Berg,* 221 Iowa 326.

The Act in question took effect on the 4th day of July, 1941, as provided in Section 53 of the 1939 Code of Iowa. The Act before us is not the usual statute setting forth a limitation of action and we believe it affects substantive rights rather than mere remedy. However, assuming it is merely a statute of limitation it does not provide any period in which the holder of a certificate more than eight years old could protect his rights. We do not believe that the period between the approval of the Act by the Legislature and its effective date, a period of approximately two and one-half months, is to be considered a period of reasonable time in which the holder of a certificate could have protected his rights. To require the holder of a certificate to protect his rights in this period would be to charge him with notice of law that was not yet effective.

Because of the failure of the legislature to provide a reasonable time in which the holder of a sheriff's certificate of sale could protect his rights we are of the opinion that the statute in question was not intended to apply to certificates more than eight years old at the time of the effective date of this law. To hold otherwise would cast a doubt upon the constitutionality of the law.

It is, therefore, our conclusion that Paragraph 2 of Section 1 of Chapter 299, Acts of the 49th General Assembly, does not apply to a sheriff's certificate of sale which was issued more than eight years prior to July 4, 1941.

BANK STOCK: ASSESSMENT AT ACTUAL VALUE: "OTHER PROPERTY" AT PER CENT OF ACTUAL VALUE: REFUND DENIED: Where bank stock was assessed at actual value in accordance with Section 7003, C., '39, a refund was denied when based on the fact that "other property" was assessed at a per cent of actual value, since any "erroneous or illegal" assessment was with reference to "other property."

March 25, 1942. *Mr. Francis J. Kuble, County Attorney, Des Moines, Iowa:* I have your letter of March 19th requesting an opinion upon a question which I will state as follows:

Several Des Moines banks have filed petitions asking for refund of taxes levied and assessed against their capital stock for the years 1937 to 1940 inclusive. The alleged error in the assessment is based upon a claim that Section 7003 of the Code was not complied with in that the bank stock was

assessed at 100 per cent of its value while real estate in Polk County was assessed at 65 to 67½% of its actual value. At the time the assessments were made the statute provided that property should be assessed for tax purposes at actual value, but it can be established that the assessed valuation placed on real estate was 65 to 67½% of its actual value. In no case was any application made to the local board of review for a reduction of the assessment and of course no appeal to any court for a reduction of the assessment.

The question is whether or not there should be a refund upon the ground that the tax was "erroneously or illegally exacted or paid" within the provisions of Section 7235 of the 1939 Code of Iowa.

At the outset we must bear in mind that the valuation placed on the bank stock of 100% was the statutory assessment valuation (Section 7109 of the 1939 Code of Iowa). It is well known that this actual valuation statute was not followed with respect to real estate, but the fact remains that the assessment of the bank stock was upon a correct valuation and it was the real estate assessment that was incorrect. This was decided in the case of *Pierce v. Green, et al.*, 229 Iowa 22. We have then, a situation where the bank stock received an excessive assessment only in the sense that it was discriminatory. No appeal was made to the local board of review within the provisions of Section 7132 of the 1939 Code of Iowa. In this situation we believe the question is ruled by the case of *Insurance Exchange Building v. The Board*, 231 Iowa 133 and the case of *Home Owners Loan Corporation v. Polk County*, 231 Iowa 661. In these two cases the assessments were excessive in that an order of the State Tax Commission was not complied with and the Supreme Court held that the taxes based on such excessive assessment were not "erroneously or illegally exacted or paid" within the meaning of Section 7235 of the 1939 Code of Iowa where the taxpayer failed to appeal to the local board of review or to the District Court. It is the doctrine of these cases that where a taxpayer fails to make use of the means provided by statute for correcting erroneous assessments, then no refund shall be made. There is no difference in principle between the erroneous assessment which was the subject of the litigation in the two cases heretofore cited and the erroneous assessment set forth in your question. In those two cases the error was in failing to follow a valid reduction order of the State Tax Commission. Here the statutory direction was followed, but a resultant discrimination existed because the statutory direction was not followed with respect to real property. It would seem that there would be more reason for denying refund here than in the cases involving the board order for excessive and discriminatory assessments have always been held to be proper subjects of correction upon appeal.

We have examined the case of *First National Bank v. Hayes*, 186 Iowa 892 where the assessor's duty in assessing bank stock has been termed a ministerial function, but we do not believe it would apply here for we doubt whether any court would hold that the county auditor could reduce the assessor's figures below the statutory actual value even though the auditor's own investigation convinces him that real property was assessed at something less than actual value.

In view of the above, we are of the opinion that the refunds in these cases should be denied.

ABSENT VOTER'S BALLOTS: REQUEST MUST BE BY VOTER HIMSELF: SAILORS ON THE HIGH SEAS: Request for Absent Voter's Ballot must be made by the voter himself. A sailor on the high seas may vote by complying with the statute. (928; 936, C., '39) (Ch. 86, 49th G. A.)

April 1, 1942. *Mr. Walter J. Willett, County Attorney, Tama, Iowa:* We have your letter of March 30, inquiring with reference to soldiers and sailors under the armed forces of the United States voting absent voter's ballot. Your inquiries are:

(1) Whether anyone other than soldiers and sailors may make request for absent voter's ballot; and
(2) Whether sailors on the high seas have a right to vote by absent voter's ballot.

With reference to your first question, it is our considered opinion that a request for absent voter's ballot must be made by the voter himself, regardless of whether he is in the service or not, and such request cannot be made by someone else.

Section 928 of the Code provides as follows:

"*Application for ballot.* Any voter, under the circumstances specified in section 927, may, on any day not Sunday, election day, or a holiday and not more than twenty days prior to the date of election, make application to the county auditor, or to the city or town clerk, as the case may be, for an official ballot to be voted at such election."

The foregoing indicates that the voter is the one who must make the application. In addition to this, section 936 of the Code provides:

"*Application mailed.* If the voter is absent from the county and requests said application by letter, the auditor may send him both the application and ballot at the same time."

In connection with section 936, it is persuasive that section 936, as appeared in the 1931 Code, provided as follows:

"If the voter is absent from the county and requests said application by letter, or someone makes the request for him, after the ballots are printed, then the auditor may send him both the application and ballot at the same time."

Section 4 of Chapter 13, Acts of the 45th Extra General Assembly, amended section 936 to read as it now does, and as quoted above, that is, by striking from the section as just quoted "or someone makes the request for him, after the ballots are printed, then".

This history clearly indicates that the application in all cases must be made by the voter himself, and that someone cannot make the request for him.

In particular reference to the elector who is in military service, the 49th General Assembly enacted what appears in the published laws as Chapter 86, Laws of the 49th General Assembly. This provides first, that the act shall apply only to the primary and general elections to be held in 1942.

Section 2 provides as follows:

"Any qualified elector of the state of Iowa who is in the active military service of the United States and is or expects to be absent from the county in which he is a qualified voter may make request in writing for an application for absent voter's ballot and for an absent voter's ballot to the county auditor of the county in which he is a qualified voter not more than thirty (30) days

prior to the date of the election. Such request shall state the city and street address from which he was eligible to vote at the time of his induction into service. Upon the receipt of such request the county auditor shall mail to the elector so requesting an application blank and ballot for the proper precinct with the proper envelopes and with instructions."

The foregoing language is further indicative that the elector is the one who must make the request. Section 3 of the Act provides that the oaths required to be executed in connection with such ballots may be taken before any commissioned officer, and section 4 provides that the provisions of Chapter 44 of the Code (Absent Voter's Law) shall be applicable to the voting of the absent voter's ballot by a qualified elector in the military service, insofar as those provisions do not conflict with the provisions of the Act.

From the foregoing it can be readily seen that the request must be made by the voter himself.

As to your second question, as to whether a sailor on the high seas would have a right to vote by absent voter's ballot, the answer must necessarily be that he has the right, provided he can bring himself within the provisions of the absent voter's law and said Chapter 86, Acts of the 49th General Assembly.

LOCAL REGISTRAR: DEPUTY COUNTY REGISTRAR NOT TO ACT AS LOCAL REGISTRAR: A Deputy County Clerk who has been appointed as Deputy County Registrar should not be appointed as Local Registrar, for the reason that in the absence or disability of the County Registrar to perform his duties the Deputy as Local Registrar would be compelled to report to himself as Deputy County Registrar. (Ch. 114, C., '39) (Ch. 117, Section 7, 49th G. A.)

April 3, 1942. *Mr. Clinton H. Turner, County Attorney, Clarinda, Iowa:* We wish to acknowledge receipt of your recent letter in which you ask for our opinion on the following matter:

Is the Deputy Clerk of Court, who has been appointed by our Clerk of District Court to the position of Deputy County Registrar and also to the position of Local Registrar of Vital Statistics, entitled to receive fees as such Local Registrar of Vital Statistics?

We previously held that the County Registrar cannot appoint himself as Local Registrar. See opinion dated November 26, 1941.

Section 7 of Chapter 117, Acts of the 49th General Assembly, provides:

"Each county registrar shall appoint one of his deputy clerks of court as deputy county registrar and said deputy county registrar shall act in his place in case of his absence or disabilities; and such deputy shall, in writing, accept such appointment."

Among the duties of the Local Registrar are the following:

2394 Duties of local registrar. The local registrar shall, subject to the direction and supervision of the state registrar:

* * *

8. On the third day of each month, transmit to the county registrar, in a stamped return envelope furnished by the state registrar, all original certificates registered by him for the preceding month. If no births or deaths occur in any month, he shall on the third day of the following month report that fact to the county registrar, on a card provided for such purpose.

In the case of the County Registrar's absence or inability to act the Deputy

County Registrar would act in his place. During such time the Local Registrar, who is also the Deputy County Registrar, would be making the report required by subsection 8 of Section 2394 of the 1939 Code of Iowa, to himself.

Such a situation is not looked upon with favor by the Courts and it is our opinion that the Deputy County Clerk, who is appointed Deputy County Registrar, may not also be appointed as Local Registrar under the provisions of Chapter 114 of the 1939 Code of Iowa as amended by Chapter 117, Acts of the 49th General Assembly.

TAXATION: PROPERTY "FROZEN" BY FEDERAL GOVERNMENT SUBJECT TO ASSESSMENT AND TAXATION: Personal property "frozen" by order of the Federal Government is subject to assessment and taxation.

April 15, 1942. *Mr. Francis J. Kuble, County Attorney, Des Moines, Iowa:* We wish to acknowledge receipt of your letter in which you ask for our opinion on two questions arising from the local Assessor's office, these are:

1. "A situation has arisen regarding the assessing of stocks of tires and typewriters that are frozen by order of government authority. The contention of the taxpayer is that they are not assessable. We find nothing that would make the situation clear to us, therefore, we are asking about our rights or power to assess such stocks that are impounded by order of the United States Government."
2. "This matter also comes up on their rights to assess property in what are termed 'bonded warehouses'. It seems that many companies selling merchandise, particularly typewriters, in dealing with their manufacturer have worked out a plan with a bank, or banks, here in Des Moines wherein the manufacturer ships a large number of typewriters into Des Moines and they are put in what is termed a bonded warehouse. As the agent or seller of the typewriter needs these machines he goes to the bank and pays for the commodity to be taken by himself, whether it be one or a dozen, and gets a release from the bank upon payment for the commodity desired. The Assessor's question also pertains to this situation—against whom should the assessment be made for those items of merchandise?"

As to your first question, we find no provision in our law that would exempt personal property, which has been "frozen" by order of the Federal Government, from assessment and taxation.

We must keep in mind that taxation is the rule and exemption the exception. If there is no statutory exemption applicable to the property in question it is subject to the usual assessment and taxation. As above stated, we find no exemption from taxation applicable to the property mentioned and it is, therefore, our conclusion that the property is subject to taxation. If the present situation regarding this property works a hardship it is one that cannot be altered by any interpretation of our existing laws.

As to your second question, we wish to set out the following Code Sections:

6973 *Warehouseman to file list.* A warehouseman as specified in section 6971 shall, upon request, file with the assessor of the township or municipality wherein his warehouse is situated, 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.

6974 *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.

We believe that the Assessor should ask for the list of the owners of the property in the warehouse as mentioned in Section 6973 and if such list is furnished the property would be taxable to the owners. If no list is furnished the warehouseman would be considered the owner for the purpose of taxation.

CEMETERIES: TAX LEVY FOR NONOWNED CEMETERIES: ONE-FOURTH MILL LIMIT REGARDLESS OF THE NUMBER OF CEMETERIES: Cemetery trustees are authorized by Section 5562, C., '39, to levy a tax not to exceed one-fourth mill, to improve and maintain any cemetery not owned by the township, regardless of the number of such cemeteries.

April 22, 1942. *Mr. Clinton H. Turner, County Attorney, Clarinda, Iowa:* We wish to acknowledge receipt of your recent letter in which you ask for our opinion on the following matter:

"Buchanan township in our County has two rural cemeteries therein. These cemeteries are not owned by the township, but are devoted to public use.

"The trustees of this township find that one-fourth of a mill levy is not sufficient to properly maintain and care for both cemeteries. You will note that the Statute uses the term, 'any cemetery,' being singular and not plural.

"Can the trustees of this township levy not to exceed one-fourth of a mill for each of these cemeteries, or does the Statute limit the total township levy to one-fourth of a mill for all the township cemeteries?"

Section 5562 of the 1939 Code of Iowa provides as follows:

5562 *Tax for nonowned cemetery.* They may levy a tax not to exceed one-fourth mill to improve and maintain any cemetery not owned by the township, provided the same is devoted to general public use.

It is our opinion that the trustees may levy a tax of not more than one-fourth mill under the provisions of Section 5562, regardless of the number of cemeteries involved.

We believe the limitation appears in the following language: "they may levy a tax not to exceed one-fourth mill * * *." The language that follows merely sets out how the tax funds collected are to be used. It is our opinion that the words "any cemetery" do not indicate that the trustees may levy a one-fourth mill tax for each cemetery that the trustees choose to aid. We believe a fair interpretation of the statute in this regard is that the trustees may levy a tax of not to exceed one-fourth mill to improve or maintain any one or more "cemeteries" not owned by the township provided the same is devoted to general public use. The word "any" as used in Section 5562 should be defined as "an indefinite number."

In other words, our interpretation of the statute is that the trustees are authorized by Section 5562 to levy a tax not to exceed one-fourth mill and cannot levy a tax of one-fourth mill for each cemetery that is aided by the trustees in accordance with the provisions of said Section.

TAXATION: VOLUNTARY COURT SETTLEMENT OF ASSESSMENT APPEALS: Ch. 202, 49th G. A. NOT APPLICABLE TO APPEALS PRIOR TO EFFECTIVE DATE OF ACT: Section 28, Chapter 202, 49th G. A., providing for written notice to taxing bodies of voluntary court settlement of an assessment appeal, is applicable only to assessment appeals perfected under provisions of the above chapter and does not apply to appeals perfected prior to the effective date of the act.

April 23, 1942. *Mr. Francis Kuble, County Attorney, Des Moines, Iowa:* We wish to acknowledge receipt of your letter in which you ask for our opinion as to whether Section 28 of Chapter 202, Acts of the 49th General Assembly, is applicable to voluntary court settlements, which are made after the effective date of the above mentioned law, of appeals from the 1937 assessment.

Section 28 of Chapter 202, Acts of the 49th General Assembly, provides as follows:

SEC. 28. No voluntary court settlement of an assessment appeal shall be valid unless written notice thereof shall first be served upon the city council, school board, and board of supervisors.

Looking first at the Title to Senate File No. 3, Acts of the 49th General Assembly, we find that it is an Act providing for "the procedure for assessing real and personal property * * * in cities having more than 125,000 population; providing for * * * the procedure by which a taxpayer, the assessor and public bodies may protest and appeal from an assessment to the local board of review and to the court * * *." The first section of the Act shows the prospective operation of the Act, for within 30 days after the effective date of the Act, action is to be taken to establish an examining board for the purpose of conducting an examination for the selection of an assessor. The Act goes on to provide for the appointment of the assessor and lists his duties. Among them, it will be noted, is included the power to appeal the same as an individual taxpayer. The Act also sets up a new local board of review. It is no longer the city council, but a board consisting of five members selected by the school board, board of supervisors and city council. The machinery of appeal is somewhat different in that a protest is necessary outlining the grounds upon which the appeal is based and appeals to the district court from the decision of the local board of review differ somewhat from the usual appeal in that no new ground in addition to the grounds set out in the protest can be pleaded.

Then follows Section 28 providing that no court settlement can be made of an assessment appeal without serving notice upon the city council, school board and board of supervisors. This Section 28 must, we believe, be referring to assessment appeals perfected under the provisions of Chapter 202. Like all other sections in the chapter, it must be restricted in its application by the Title which clearly purports to be a prospective law.

All of the provisions of this Act are to go into effect when a city reaches the population of 125,000, or if a city has already reached that population figure, then the provisions of the Act are to go into effect within 30 days from the effective date of the Act. We do not believe we can single out any one section of the statute and say that this section can have any effect upon existing assessments where the framers of the Act were rather careful to state that the Act would take effect step by step beginning with the first examining board to examine applicants to be assessors.

We are, therefore, of the opinion that Section 28, Chapter 202, Laws of the 49th General Assembly, and the procedure therein provided, is applicable only to assessment appeals perfected under the provisions of Chapter 202 and does not apply to appeals perfected prior to the effective date of the act.

TAXATION: BOARD OF SUPERVISOR'S POWER TO CANCEL OR REMIT TAXES PREVIOUSLY SUSPENDED: The County Board of Supervisors may cancel or remit taxes assessed against property for any number of years when such taxes have been previously suspended under provisions of sections 6950, 6950.1, C., '39. (6951, C., '39)

April 29, 1942. *State Board of Social Welfare, Des Moines, Iowa*: This will acknowledge receipt of your request for an opinion on the following question:

"Would it be possible for a County Board of Supervisors to remit any or all suspended taxes which would include both petitioned suspensions and old age assistance suspensions so that the property involved might be sold and revert back to taxation?"

The question arises by reason of the fact that some property is not worth the amount of the suspended taxes. Section 6950, 1939 Code of Iowa, provides for exemption of taxes each year upon petition. Section 6950.1, 1939 Code of Iowa, provides for the suspension of taxes of old age recipients without the necessity of filing a petition. Section 6951, 1939 Code of Iowa, reads as follows:

"*Additional order.* The board of supervisors may, if in their judgment it is for the best interests of the public and the petitioner referred to in section 6950, or the public and the aged person referred to in section 6950.1, cancel and remit the taxes assessed against the petitioner referred to in section 6950, or the aged person referred to in section 6950.1, his polls or estate or both, even though said taxes have previously been suspended as provided in sections 6950 and 6950.1."

From the wording of section 6951, it is our opinion that it is within the sound discretion of the County Board of Supervisors to cancel and remit the taxes assessed against a property for any year or for any number of years when such taxes have been previously suspended, either under the provisions of section 6950 or section 6950.1, 1939 Code of Iowa.

POOR: NOTICE TO DEPART: WIDOW IN CARE OF CHILD: WITHIN ONE YEAR: Notice to depart as provided by section 3641, C., '39, must be served, on a widow in care of a child, within one year and Ch. 148, 49th G. A. extending the time to two years is not applicable to the above section.

April 29, 1942. *Mr. Hubert H. Schultz, County Attorney, Primghar, Iowa:* This will acknowledge receipt of your letter of April 21, wherein you ask the following question:

"The 49th General Assembly enacted a statute known as Chapter 148, which increased the period which the county has to serve a non-residence notice from one year to two years. Section 3641 of the Code of Iowa, 1939, states that jurisdiction for a widow's allowance is residence in the county for one year. However, the last paragraph of that section states that if a person has been served with a notice to depart in accordance with Section 3828.088, he shall not be considered a resident for purposes of that statute. I find nowhere where the legislature modifies Section 3641 to make jurisdiction residence for two years.

"However, I am wondering in view of the last paragraph of that section as to whether or not the one or the two year period is a requirement for residence for a widow applying for a widow's allowance. We have such a case, at the present time. This particular individual did not live in our county one year prior to the 4th of last July. She has now been served with a notice to

depart, but has made application for widow's allowance, claiming that she has resided in our county for more than one year. Would you, therefore, give me an opinion as to whether or not Chapter 148 of the 49th General Assembly applies to Section 3641, or whether residence for just one year is the requirement."

Section 3641, 1939 Code of Iowa, provides for widow's pension. The last paragraph of said section reads as follows:

"* * *

No person on whom the notice to depart provided for in chapter 189.4 shall have been served within one year prior to the time of making the application, shall be considered a resident so as to be allowed the aid provided for in this section."

Sections 1, 2 and 5 of Chapter 148, Acts of the 49th General Assembly, amend sections 3828.088 and 3828.092, 1939 Code of Iowa, by increasing the length of residence for the purpose of establishing a legal settlement from one to two years. We find nothing in the Acts of the 49th General Assembly which amends section 3641, part of which is above quoted.

It is our opinion that the last paragraph of section 3641 only refers to the type of notice which may be served. It is our further opinion that such notice must be served before the expiration of one year in order to make the provisions of section 3641 inapplicable. It follows that it is our opinion that in the instant case, the widow could be paid a widow's allowance by O'Brien County.

TAXATION: INVESTMENT CONTRACTS: INSTALLMENT PAYMENTS: ASSESSMENT MADE BEFORE AND AFTER MATURITY: Investment contracts providing for installment payments for the purchase of a securities unit are taxable and should be assessed before and after maturity.

May 6, 1942. *State Tax Commission, Des Moines, Iowa:* You have submitted questions to us concerning the taxation of investment contracts. We understand such contracts provide for installment payments to be made to an Investors Company or Syndicate until a unit has been purchased. Assuming the unit is $2500.00 and the installment payment $125.00 annually for 15 years, the question is whether or not the contract is taxable during each year of the fifteen year period and whether it is taxable after all installment payments have been made. The contract also provides for settlement amounts for each year prior to maturity which amounts the company will pay if default occurs, and there are further provisions for payments after maturity ranging from payment of the maturity amount ($2500.00 in the supposititious case) to life annuities.

In answer to the first question with respect to whether or not the contract should be taxed during the period that installment payments are being made, we are of the opinion that this contract is subject to taxation. It would appear that the contract has a definite value for each year during the installment years. It is a plain credit and hence taxable under the provisions of Section 6984 of the 1939 Code of Iowa.

We feel the second question is partly answered by our opinion of August 12, 1940, appearing in the 1940 Attorney General's Report at page 561 where we held annuities are taxable as credits. This would be true even if other

options for payments after maturity were selected. Section 6984 of the 1939 Code of Iowa would cover all of the settlement options and bring them within the definition of credit for the money and credit tax.

As we stated in our opinion of August 12, 1940, we do not feel we should lay down any rule that would govern the assessment value. There are many different kinds of contracts and we believe it is within the province of the State Tax Commission to properly instruct the assessors. All we do hold is that the contracts have a definite taxable value and should be assessed for taxation before and after maturity.

TAXATION: HOMESTEAD TAX CREDIT: DENIED TO PERSON OWNING HOUSE ON LEASED LAND: No homestead tax credit should be granted to persons who merely own a house located on leased land. (Ch. 329.6; 6959,C., '39)

May 13, 1942. *Iowa State Tax Commission, Des Moines, Iowa:* We are in receipt of your request for an opinion upon the question of whether or not a person who builds a home on leased land and occupies it for six months or more of the year and the lease is for more than three years is entitled to homestead credit.

The homestead credit law is contained in Chapter 329.6 of the 1939 Code of Iowa and throughout the chapter it is apparent that the credit is to be given to the owner of real estate. In Section 6943.152, subsection (1b) we find the homestead may contain one or more contiguous lots or tracts of land and in subsection (2) the word "owner" means the person who holds the fee simple title to the homestead. Whereas it may be true that such a building on leased land is assessed as realty under the provisions of Section 6959 of the 1939 Code of Iowa, the fact remains that the property is personalty. It is merely classed as realty for the purpose of assessment when the lease is longer than three years duration.

We are of the opinion that no homestead credit should be granted to persons who merely own a house located on leased land.

LEGAL SETTLEMENT: HUSBAND AND WIFE NONRESIDENTS: DEATH OF HUSBAND: WIFE NOT ENTITLED TO RETURN TO COUNTY OF LEGAL SETTLEMENT BEFORE MARRIAGE: Where husband and wife established a residence outside the state the wife cannot elect to return to the county of her legal settlement at the time of her marriage.

June 2, 1942. *Mr. Carl Burbridge, County Attorney, Logan, Iowa:* This will acknowledge receipt of your request of recent date for an opinion on the following facts:

Mr. "A" was born in Missouri Valley, Harrison County, Iowa, in 1903. He lived in Missouri Valley until he was nine years old and the family moved to Nebraska. Mr. "A" returned to Iowa in December of 1929 and worked off and on for nine months, at the end of which time he and Mrs. "A" went to Custer County, Nebraska and were married. They immediately returned to Mrs. "A's" family home in Pottawattamie County, where they resided for four months. At the end of that time, they moved back to Nebraska where they lived until Mr. "A's" death in March of 1940. In August, 1940, Mrs. "A" returned to Harrison County but has never established legal settlement in Harrison County due to the fact that she has been served with non-residence notice.

Our question is this: Could Mrs. "A" under section 3828.088, elect to assume the place of her settlement at the time of her marriage?

Section 3828.088, 1939 Code of Iowa, reads as follows:

"*Settlement—how acquired.* A legal settlement in this state may be acquired as folows:
* * *
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. * * *"

From the facts as stated, it is our opinion that Mrs. "A" had a legal settlement in Pottawattamie County at the time of her marriage although her husband did not. Mr. "A" subsequently established legal settlement in Pottawattamie County by residence there from December of 1929 to March of 1931. It is our further opinion that by removal from Pottawattamie County to Nebraska in March of 1931, and staying in Nebraska for approximately nine years, any legal settlement which Mr. or Mrs. "A" had in Pottawattamie County was lost. We assume that a legal settlement for the family was established in some county in Nebraska. If we held that the widow could elect to return to the county of her legal settlement at the time of her marriage no matter how long she had been outside the state, then there would be nothing to prevent a widow who had a valid legal settlement in some other state, to return to Iowa and be taken care of at public expense when the burden should fall on the county of some other state in which she had made her home with her husband. The last phrase in subsection 4 of section 3828.088 above quoted, reading "if both settlements were in this state", we believe refers to the situation where both husband and wife had legal settlement somewhere in the State of Iowa at the death of the husband.

It is therefore our opinion that Mrs. "A" in the instant case, does not have legal settlement in Pottawattamie County.

MOTOR VEHICLES: FOREIGN VEHICLES BROUGHT INTO STATE: REGISTRATION DELINQUENCY BEGINS THE FIRST OF FOLLOWING MONTH: Delinquency of registration on foreign motor vehicles brought into the state begins the first of the month following the date the vehicle is brought into the state. (5009.03,C., '39)

June 9, 1942. *Mr. Karl W. Fischer, Commissioner of Public Safety, Des Moines, Iowa:* We wish to acknowledge receipt of your recent letter in which you ask for our opinion on the following matter:

"A private passenger car was brought into Iowa in May, 1942, with 1941 foreign license plates, by an owner newly establishing residence in Iowa.
"Do Sections 5001.12, 5002.02 and 5008.02 of the 1939 Code of Iowa, as the same relate to delinquencies, apply to foreign delinquent registration as well as to delinquent Iowa registration?"

Generally speaking, the laws of Iowa have no application beyond the territorial limits of the State. Under the facts set out in your letter the nonresident car owner is not subject to the Iowa law until May, 1942. Section 5009.03 provides as follows:

5009.03 *When fees delinquent.* Such delinquencies shall begin and penalty accrue the first of the month following the purchase of a new vehicle, and the first of the month following the date cars are brought into the state, except as herein otherwise provided.

You will note from this section that delinquency begins the first of the month following the date the car is brought into the State, except as otherwise provided. This Section indicates that the law of the State of Iowa does not cover delinquencies other than those accruing in the State of Iowa.

It is our opinion that the reference to registration and delinquency in Sections 5001.12, 5002.02 and 5008.02 are limited to registrations and delinquencies arising in the State of Iowa. It is true that every foreign vehicle driven or moved upon a highway in the State of Iowa is subject to Iowa registration unless the vehicle has a valid registration card and registration plate or plates issued for such vehicle in the place of residence of such owner. However, a foreign vehicle which is subject to Iowa registration does not become subject to the Iowa law until it comes into the State. It would become subject to registration immediately but there would be no delinquency as far as the Iowa law is concerned even though the car does not bear current foreign registration. Delinquency would begin the first of the month following the date the car was brought into the State in accordance with the provisions of Section 5009.03 of the 1939 Code of Iowa.

MOTOR VEHICLES: DELINQUENT REGISTRATION: TOTAL PENALTY NOT LESS THAN ONE DOLLAR: The monthly penalty for nonpayment of motor vehicle registration fees is determined by the number of months of delinquency and in no case shall the total penalty be less than one dollar. (5009.02, C., '39)

June 9, 1942. *Mr. Karl W. Fischer, Commissioner of Public Safety, Des Moines, Iowa:* We wish to acknowledge receipt of your letter in which you ask for our opinion on the following matter:

"Do the words 'provided that said penalty in no case shall be less than one dollar' in Section 5009.02 of the 1939 Code of Iowa mean that the penalty shall not be less than one dollar per month or does it mean that the penalty shall not be less than one dollar in the aggregate?"

The pertinent part of Code Section 5009.02 of the 1939 Code of Iowa reads as follows:

5009.02 *Monthly penalty.* On February 1 of each year, a penalty of five percent of the annual registration fee shall be added to all fees not paid by that date, and five percent of the annual registration fee shall be added to such fees on the first of each month thereafter that the same remains unpaid, until paid, provided that said penalty in no case shall be less than one dollar,* * *."

It is our opinion that the words "provided that said penalty in no case shall be less than one dollar" mean that the total penalty shall not be less than one dollar. You will note that the reference to the one dollar minimum penalty follows the language which provides for the additional penalty of five per cent the first of each month after the delinquency arises. This indicates to us that the one dollar minimum refers to the total penalty and not to the monthly portion of the penalty.

It is our opinion that there is but one penalty, said penalty being determined

by the number of months the same is delinquent and which penalty shall not be less than one dollar.

ELECTIONS: NO CANDIDATES FOR OFFICE: NAME WRITTEN IN: LESS THAN 10% REQUIRED: NO NOMINATION: NO METHOD WHEREBY NOMINATION CAN BE MADE: Where no candidates filed in a supervisor district and one person's name was written in but failed to receive 10 per cent of the number of votes for governor at the last general election there was no nomination and no method whereby a nomination could be made. (594, 614, 624, 625, C., '39) (Ch. 81, 49th G. A.)

June 9, 1942. *Mr. John R. Cronin, County Attorney, Nashua, Iowa:* We have your letter requesting an opinion of this office on the following situation:

No candidates filed seeking the nomination on the Republican ticket for supervisor in one of the supervisor districts in your county. Consequently no name appeared on the Republican primary ballot for this office in that district. However, one person's name was written in and voted for that office on 49 ballots, which exceeded five percent of the vote cast for governor, but was less than ten percent of the votes cast for governor in the party in that district at the last general election.

Two questions are presented: (1) Whether this person has been nominated, and (2) if he has not been nominated, whether the members of the County Central Committee in that district or the county convention may make a nomination.

Answering your first question, it is our conclusion that no nomination was made under the provisions of section 594 of the Code, which is as follows:

"*Minimum requirement for nomination.* A candidate whose name is not printed on the official ballot, must, in order to be nominated, receive such number of votes as will equal at least ten percent of the whole number of votes cast for governor at the last general election in the state, or district of the state, as the case may be, on the ticket of the party with which such candidate affiliates."

Under the foregoing a failure to receive ten percent of the votes cast for governor at the last general election would prevent the nomination.

Turning to the second question as to the power to make a nomination, section 624 provides the duties and authority of the county convention and nowhere therein is the county convention given authority to make a nomination for any office to be filled by the voters of the subdivision of the county. It does authorize the county convention to make nominations for any office to be filled by the voters of the county subject to the limitations provided for in section 625 as amended by section 1 of Chapter 81, Acts of the 49th General Assembly.

Section 614 is the only section which provides for nominations in offices to be filled by territories smaller than the county in a manner other than by selection at the primary itself. This section 614 provides as follows:

"*Vacancies in nominations and in offices for subdivisions of county.* Vacancies in nominations made in the primary election, and nominations occasioned by vacancies in offices, when such offices are to be filled by a territory smaller than a county shall be filled by the members of the party committee for the county from such subdivision."

It is to be noted that this section covers just two contingencies, 1, vacancies in nominations made in primary elections, and 2, nominations occasioned by vacancies in office. The situation presented in your case is covered by neither of these. It is not a vacancy in nomination made in the primary election because no nomination was made in the primary election, and it is not a nomination occasioned by a vacancy in the office, because there is no vacancy in the office.

It follows that there is no method whereby a nomination can be made in the situation outlined by you.

OLD AGE ASSISTANCE: CHILD'S LIABILITY: SUPPORT DOES NOT INCLUDE BURIAL EXPENSE OF RECIPIENT: Section 3828.029 providing for child's liability for recipient of old age assistance refers to the support during the lifetime of the recipient and does not refer to burial expense. (3828.029,C., '39)

June 11, 1942. *State Board of Social Welfare, Des Moines, Iowa:* This will acknowledge receipt of your request of recent date for an opinion on the following question:

"Must the State Board of Social Welfare use the provisions of Section 3828.029, 1939 Code of Iowa, as a rule and guide in connection with the payment of burial expenses of old age assistance recipients?"

Section 3828.029, 1939 Code of Iowa, reads as follows:

When child's liability begins. The state board or the court in determining the responsibility of a child for the support of a claimant or recipient, shall deem liability to begin when said child is receiving a net income from whatever source, commensurate with that upon which he would make an income tax payment to this state.

It will be noted that said section provides for the responsibility of a child for *the support of a claimant or recipient* of old age assistance. Said section makes no reference to the liability of a child for the burial expenses of a deceased recipient. It is our opinion that the word "support" has reference to the support during the lifetime of a recipient and does not in anyway refer to burial expense after the death of a recipient.

It is, therefore, our conclusion that section 3828.029 above quoted has no application to the provisions of the old age assistance law relating to the funeral expenses of deceased recipients of old age assistance.

MINORS: LICENSED BOARDING HOMES: SCHOOL TUITION PAID FROM STATE FUNDS: EXCEPTION: Where a child of school age lives in a licensed boarding home, in a school district other than the home of the child, the school tuition should be paid from state funds, an exception being when a child from such home is placed in a free home, where no board is paid, such child should attend school, tuition free. (4283.01, C., '39)

MINORS: CHARITABLE INSTITUTIONS: PUBLIC SCHOOL TUITION PAID FROM STATE FUNDS FOR HIGH SCHOOL BUT NOT GRADE SCHOOL: Charitable institution school tuition should not be paid from state funds, but where a child completes the eighth grade it is proper to pay high school tuition from state funds. (4275.1, C., '39)

June 11, 1942. *Miss Jessie M. Parker, Superintendent of Public Instruction, Des Moines, Iowa:* This will acknowledge receipt of your letter of recent

date asking for our opinion as to when school tuition should be paid by the state for (1) children in boarding homes and (2) children in charitable institutions.

We will not attempt to make this a lengthy opinion or go into all of the reasoning involved in arriving at the following conclusions as we have heretofore given several opinions on this general subject.

It is our opinion that the rules which you should follow authorizing the payment of tuition are as follows:

1. In the case of a child of school age between five and twenty-one living in a boarding home licensed by the State Department of Social Welfare and said boarding home being located in a school district other than the home of the child, the tuition of such a child should be paid from state funds upon your requisition.

An exception to the above is the case where a child is placed by a child-placing agency in a free home where no board is paid. In such a case, the child should attend school, tuition free.

You should not inquire into the sufficiency or validity of the boarding home license issued by the State Department of Social Welfare. That department is under instructions from this office as to which homes should be licensed.

2. In a case of a child of grade school age residing in a charitable institution, you should not authorize payment of such child's tuition from state funds.

3. In the case of a child residing in a charitable institution who has completed the eighth grade, you should follow the provisions of section 4275.1, 1939 Code of Iowa and authorize the payment of high school tuition for such child from state funds.

All former opinions of this office in conflict with this opinion are hereby overruled.

GENERAL ASSEMBLY: RETRENCHMENT AND REFORM COMMITTEE: NO AUTHORITY TO FILL VACANCY: There is no authority which may make an appointment to fill a vacancy created by the resignation of a member of the Retrenchment and Reform Committee of the General Assembly of Iowa. (39, C., '35; 39, C., '39) (Ch. 39, 48th G. A.)

June 15, 1942. *Hon. C. Fred Porter, State Comptroller, Des Moines, Iowa:*

We have your letter transmitting request of the Committee on Retrenchment and Reform for the opinion of this department on the manner of filling a vacancy on the said committee.

The committee on Retrenchment and Reform is composed of the chairman of the committees on Ways and Means, Judiciary, and Appropriations, of the two Houses of the General Assembly respectively, and two members from each House appointed by the presiding officer of each House, said two members being from the minority party. A member of the Retrenchment and Reform committee sitting by reason of his chairmanship in the House of one of the three above named committees has resigned his seat in the House. The question presented is whether or not the vacancy on the committee created by this member resigning his seat in the House may be filled, and if it may be filled, by whom and in what manner.

On August 4, 1939, this department rendered an opinion to you in which it was held that Chapter 39 (S. F. 509) Acts of the 48th General Assembly, as

enrolled, was of no vitality as a legislative enactment, and was in fact no enactment of the legislature because the procedure it took in the legislature was not in accordance with the mandatory provisions of the constitution. The result of this is that the law with reference to the committee on Retrenchment and Reform, as it appears in section 39, Code of 1939, (it there appearing as Chapter 39, Acts of the 48th General Assembly, purported to amend it) is not the effective provision of law, but the effective provision of law with reference to the Committee on Retrenchment and Reform is as section 39 appears in the Code of Iowa, 1935.

Section 39, Code of 1935, reads as follows:

"*Committee on retrenchment and reform.* The chairmen of the committees on ways and means, judiciary, and appropriations, of the senate and house, respectively, and two members from the senate, to be appointed by the president of the senate, and two members from the house, to be appointed by the speaker of the house, at each regular session, shall constitute a standing committee on retrenchment and reform."

From the above it is apparent that six members of the committee hold their memberships thereon by virtue of the official status which the respective branches of the General Assembly conferred upon each of them, to-wit: That of the chairmanship of one of each of the above named committees.

The said several committees of the House and Senate are neither statutory nor constitutional committees. The committees in the respective Houses are the creatures of the House in which the committees are appointed and function. The method of the creation of the committees, what the committees shall be, and their authority are all within the power of the particular House of the General Assembly. When the 49th General Assembly adjourned *sine die* on April 10, 1941, the committees ceased to exist, and the committees having ceased to exist, there would be no committee following the *sine die* adjournment of which anyone could be chairman, or to which any authority could designate any member of the House to be chairman of, and there is no one who could now qualify as chairman of the committee on Judiciary, the former chairman of that committee having resigned his seat. The essential qualification for six members on the Retrenchment and Reform Committee is the chairmanship of one of the named committees. The only authority for appointment by anyone is for two members on said committee from each House to be appointed by the presiding officer from the minority party. Authority for the presiding officer to make these appointments from the minority party does not extend to the making of appointments to fill vacancies, and particularly any vacancy which exists in the socalled ex officio membership of the committee.

It follows that there is no authority which may make an appointment to fill the vacancy created by the resignation heretofore referred to.

IOWA STATE GUARD: COMPENSATION ON ACTIVE DUTY: SAME AS U. S. ARMY: Officers and enlisted men of the Iowa State Guard, while in active service, shall receive the same pay and allowances as paid for the same rank and grade for service in the army of the United States. (467.21, C., '39) (Ch. 74 (4), 49th G. A.)

June 17, 1942. *Lt. Col. Arthur T. Wallace, Judge Advocate, Iowa State Guard, Des Moines, Iowa*: We wish to acknowledge receipt of your letter of

June 11, 1942, in which you present a question concerning the compensation of officers and enlisted men of the Iowa State Guard when on active duty

The pertinent part of Section 467.21 of the 1939 Code of Iowa provides as follows:

467.21 *Compensation for services, death and injury.* Officers and enlisted men while in active service of the state shall receive the same pay and allowances as paid for the same rank or grade for service in the army of the United States. * * *

Section 4 of Chapter 74, Acts of the 49th General Assembly provides as follows:

SECTION 4. Officers and enlisted men of the Iowa State Guard while in active service of the State shall receive the same pay, allowances, and compensation as provided by law for members of the Iowa National Guard.

In reading the above provisions together it is clear that the officers and enlisted men of the Iowa State Guard while in active service shall receive the same pay and allowances as paid for the same rank or grade for service in the army of the United States.

In your letter you mention the fact that certain legislation is pending in the Congress of the United States which will increase the pay of officers and enlisted men of the United States army. It is our opinion that if the pending legislation becomes law the pay and allowances of the officers and enlisted men of the Iowa State Guard will be the same as provided in the new law governing pay and allowances for service in the army of the United States.

SCHOOLS AND SCHOOL DISTRICTS: COUNTY SUPERINTENDENT: TERM OF OFFICE: STARTING AND TERMINATING: A county superintendent of Schools who takes office on the first secular day of September, 1942, will serve only until the first secular day of August, 1945, or until his successor is elected and qualified. (4096, C., '39) (Ch. 156, 49th G. A.)

June 17, 1942. *Mr. Henry C. Meyer, County Attorney, Britt, Iowa:* We wish to acknowledge receipt of your letter in which you ask for our opinion as to when the term of office of the County Superintendent of Schools will be terminated.

Section 4096 of the 1939 Code of Iowa provided as follows:

4096 *Term of office.* There shall be a county superintendent of schools of each county in the state, whose term of office shall be for three years, from the first secular day of September following his election and until his successor is elected and qualified. A regular term began in 1918.

Section 4096 of the 1939 Code of Iowa was amended by Chapter 156 of the 49th General Assembly and the law, as amended, now provides that the term of office of the County Superintendent of Schools shall be for three years from the first secular day of August following his election and until his successor is elected and qualified. Sections 1 and 3 of Chapter 156, Acts of the 49th General Assembly, provides as follows:

SECTION 1. Amend section four thousand ninety-six (4096), Code, 1939, by striking from line four (4) the word "September" and by inserting in lieu thereof the word "August". * * *

SECTION 3. The provisions hereof shall only effect those who take office after this act becomes effective.

From a reading of Section 3 of Chapter 156, Acts of the 49th General Assembly, it is clear that the Legislature did not intend to shorten the term of the incumbent Superintendent of Schools and that the newly elected Superintendent of Schools will not take office until the first secular day of September. The Superintendent of Schools who takes office on the first secular day of September of this year will serve only until the first secular day of August, 1945, or until his successor is elected and qualified.

STATE EMPLOYEES AS IOWA STATE GUARD MEMBERS: COMPENSATION: State employees being also members of the Iowa State Guard are entitled to additional compensation as provided by §§467.25 as amended by Ch. 74, 49th G. A.; 467.21, C., '39, except that when on active duty under Martial law or aid to civil authorities they are not entitled to additional $1.00 per day.

June 17, 1942. *Lt. Col. Arthur T. Wallace, Judge Advocate, Iowa State Guard, Des Moines, Iowa*: We wish to acknowledge receipt of your recent letter in which you present the following matter:

"The opinion of your office is requested upon the pay of officers and enlisted men while on active service with the Iowa State Guard who are employees of the State of Iowa, receiving compensation therefrom at the time they are serving with the State Guard."

In answer to your inquiry we wish to set out Section 467.25 of the 1939 Code of Iowa as amended by the 49th General Assembly:

467.25 *State and municipal officers and employees not to lose pay while on duty.* All officers and employees of the state, or a subdivision thereof, or a municipality therein, who are members of the national guard, organized reserves or any component part of the military, naval, or air forces or nurse corps of this state or nation, or who are or may be otherwise inducted into the military service of this state or of the United States, shall, when ordered by proper authority to active service, be entitled to a leave of absence from such civil employment for the period of such active service, without loss of status or efficiency rating, and without loss of pay during the first thirty days of such leave of absence.

The proper appointing authority may make a temporary appointment to fill any vacancy created by such leave of absence.

We also wish to call attention to the following portion of Section 467.21 of the 1939 Code of Iowa:

467.21 *Compensation for services, death and injury.* Officers and enlisted men while in active service of the state shall receive the same pay and allowances as paid for the same rank or grade for service in the army of the United States. If the said active service is under martial law or is aid to civil authorities, enlisted men shall receive an additional sum of one dollar per day; provided, however, that no officer or enlisted man who is an employee of the State and receives compensation from the state as such employee during said active service shall receive the compensation herein provided. * * *

From an examination of the above provisions of the Iowa law it is our opinion that an employee of the State of Iowa, who is receiving compensation from the State as such employee during the time that he is in active service, shall receive the compensation that is provided for members of the Iowa State Guard, with the exception that such man is not entitled to the additional sum of one dollar per day when such active service is under martial law or is aid

to civil authorities. The portion of the above mentioned law providing for the additional sum of one dollar per day for enlisted men when the active service is under martial law or is aid to civil authorities was enacted as Chapter 54, Acts of the 48th General Assembly. Section 1 of said Act providing as follows:

SECTION 1. Section four hundred sixty-seven-f twenty-one (467-f21), Code, 1935, is hereby amended as follows:

1. By inserting after the word "States." in the fifth line of the first paragraph the following sentence: "If the said active service is under martial law or is aid to civil authorities, enlisted men shall receive an additional sum of one dollar ($1.00) per day; provided, however, that no officer or enlisted man who is an employee of the state and receives compensation from the State as such employee during said active service shall receive the compensation herein provided."

From this legislative history it is clear that the man who is an employee of the State of Iowa is entitled to the regular military pay with the exception of the additional sum of one dollar per day as above mentioned. You will note from an examination of Section 467.25, as amended, that all officers and employees of the State when ordered by proper authority to active service are entitled to a leave of absence for the period of such active service without loss of pay during the first thirty days of such leave of absence.

In conclusion we reiterate that an employee of the State of Iowa, who is receiving pay as such employee under the provisions of Section 467.25 of the 1939 Code of Iowa, as amended by the 49th General Assembly, is entitled to the compensation provided in Section 467.21, with the exception that he is not entitled to the additional sum of one dollar per day when the active service is under martial law or is aid to civil authorities.

OLD AGE ASSISTANCE: GRANT OF LIEN: RECORDER'S FEE FOR FILING AND INDEXING: A county recorder should charge a fee for recording and indexing a grant of lien even though such lien is made in connection with an old age assistance case. (382.023, C., '39)

June 17, 1942. *Mr. Forest L. Bedell, County Attorney, Newton, Iowa:* This will acknowledge receipt of your letter of June 10, wherein you ask for an opinion on the following question:

"On March 10, 1942, a lady, who later applied for old age assistance, conveyed by quit claim deed, her undivided one-third interest in certain real estate. In order to enable the applicant to obtain old age assistance, the grantee of the real estate on June 2, 1942, executed an instrument entitled "Grant of Lien" a copy of which I enclose herewith.

The question upon which we would like your opinion is whether or not the County Recorder should collect a recording fee as directed by Section 5177 of the Code for recording this Grant of Lien and indexed without charge under the provisions of Section 3828.023.

* * *"

The first paragraph of Section 3828.023, 1939 Code of Iowa, reads as follows:

"*Transfer of property to the state.* In any event, the assistance furnished under this chapter shall be and constitute a lien on any real estate owned either by the husband or wife for assistance and funeral benefit furnished to either of such persons. Whenever an order is made for such assistance to any person, a copy of such order shall be indexed and recorded in the manner pro-

vided for the indexing of real estate mortgages in the office of the county recorder of the county in which the recipient lives and in which the real estate belonging to the recipient or the spouse of such recipient is situated, and such recording and indexing shall constitute notice of such lien. The county recorder shall not charge a fee for such recording and indexing or for releasing said lien."

It is our understanding that the copy of the Grant of Lien which you have enclosed with your letter is in general use in the State Department of Social Welfare in all similar cases. However, we find nothing in the statute above quoted which would permit the County Recorder to record and index such an instrument without charging a fee. The Grant of Lien is not a copy of an Order made by the State Department of Social Welfare granting old age assistance.

We, therefore, reach the conclusion that your County Recorder should charge a fee for recording and indexing a Grant of Lien even though such Grant of Lien is made in connection with an old age assistance case.

GENERAL ASSEMBLY: RETRENCHMENT AND REFORM: NO AUTHORITY TO INVESTIGATE OR PROPOSE LEGISLATION: There is no authority for the Committee on Retrenchment and Reform to engage in any investigation or to prepare proposed legislation, and no authority to expend any of the funds provided for in Chapter 34, 49th G. A. for such purpose. (42; 45, C., '39)

June 23, 1942. *Joint Legislative Committee on Retrenchment and Reform, Des Moines, Iowa:* We have your letter of June 19. You state therein that your committee has before it the problem of formulating appropriate legislation to create a central sewage district in the vicinity of Spirit Lake and Lake Okoboji. Your letter indicates that it is the thought of the committee that they should make some research looking toward the drafting of legislation by the committee for the creation of such a sanitary sewage district.

The authority of the committee on Retrenchment and Reform, as found in the code, is in sections 42 and 45 thereof. Section 42 grants the committee the same authority after the adjournment of the legislature until the succeeding legislature convenes, as it has during the period the legislature is in session. Section 45 provides that the committee shall examine into the reports and official acts of the Executive Council, and other officers, boards, commissions and departments of state at the seat of government, with respect to their conduct and expenditures thereof, and receipts and disbursements of public funds. This is the sole authority of the committee, except what additional authority may be found in the acts of the General Assembly of a temporary nature. The 48th General Assembly, in enacting the capital expenditures appropriation act, provided that the committee, with the Executive Council, should approve plans and specifications for the various works for which funds were appropriated in the act, and should approve with the Executive Council the payments made. The act also contained a provision that the Executive Council and the committee investigate with reference to the housing of various state departments then housed in leased buildings, and to make recommendations to the 49th General Assembly, and further provided that the committee, with the Executive Council, should approve all leases. Capital improvements for which appropriations are made are not necessarily com-

pleted by the end of the biennium for which the appropriation is made, and the appropriation therefor continues until the improvements are completed. With this in view, the 49th General Assembly, by what appears in its published acts as Chapter 24, eliminated the provision for the approval of payments, and the approval of leases.

Chapter 34, Acts of the 49th General Assembly provided for the approval by the committee with the Executive Council of the use of funds therein appropriated for use "to enable the State of Iowa to participate in the program of the civilian conservation corps, the works progress administration, with federal and other agencies, and in making available and/or improving conservation areas." The authority here given is confined solely to approving the use of the funds appropriated.

Chapter 142, Acts of the 49th General Assembly created the Iowa emergency relief fund for the present biennium. One of the sources for the fund provided for therein was from the revenue collected under Chapter 329.3 of the Code 1939 in the amount of $125,000.00 each quarter during the biennium, and provided that before any of the last four payments should be expended by the board of social welfare, that the committee should approve the same. The authority here provided for is confined to the approval of the expenditure of funds.

The foregoing covers all the provisions of law granting authority to the committee on Retrenchment and Reform. Nowhere therein is there any provision, either directly or by inference, which authorizes or empowers the committee to either propose legislation or to engage in any investigation looking toward proposed legislation.

The only other provision of law pertaining to the committee on Retrenchment and Reform is found in Chapter 1, Acts of the 49th General Assembly, the general appropriation bill. In section 34 thereof is the following language:

"For the purpose of establishing a general contingent fund of the state there is hereby appropriated from the general fund of the state for each year of the biennium beginning July 1, 1941, and ending June 30, 1943, the sum of three hundred thousand dollars ($300,000.00) or so much thereof as may be necessary to be administered by the retrenchment and reform committee for contingencies arising during the biennium which are legally payable from the general fund of the state; reports of all receipts and expenditures shall be printed in the budget report."

This appropriation creates a general contingent fund. The appropriation is not made to the committee on retrenchment and reform, but the appropriation is set up as a contingent fund and the administration of the contingent fund is placed in the retrenchment and reform committee for contingencies arising during the biennium "which are legally payable from the general fund of the state". This section 34 of the Act cannot be construed as empowering the committee to propose legislation or to make investigations looking toward proposed legislation. Furthermore, funds of the state cannot be used for a purpose for which there has been no appropriation. Section 24 of Article III of the Constitution provides:

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

It would seem to follow that in order for an expenditure to be legally pay-

able from the general fund of the state, there must have been some action on the part of the legislature at least indicating that it countenanced and approved of the activity or purpose for which the expenditure is contemplated. Under the language of the appropriation made in section 34 of Chapter 1, Acts of the 49th General Assembly, the money therein provided for can only be used for a contingency which is legally payable from the general fund. It is unnecessary to go into the question as to what such a contingency would be, because we can find no legislative enactment indicating that the purpose or activity proposed by the committee was one in which the committee or anyone else may legally engage in.

It necessarily follows that there would be no authority to use any of the funds appropriated in said section 34 for the purposes outlined in your letter.

Summarizing, we hold:

First, that there is no authority or power in the committee to engage in any investigation with the view of formulating legislation, or to prepare proposed legislation, and

Second, that there would be no authority to expend any of the funds provided for in section 34 for the purpose of investigation of proposed legislation, or preparing drafts thereof, either on the part of the committee or anyone else.

ELECTIONS: PERMANENT REGISTRATION: CITY CLERK AS COMMISSIONER: ADDITIONAL COMPENSATION: COUNTY'S LIABILITY: Where a city adopts an ordinance providing for additional compensation to be paid the city clerk as commissioner of registration the county is liable for its share of additional compensation.

June 23, 1942: *Mr. Edward F. Rate, County Attorney, Iowa City, Iowa:* We have your letter in regard to the following questions:

"The city council of Iowa City, Iowa, has by ordinance adopted the plan for permanent registration of voters as provided by Chapter 39.1 of the Code of Iowa of 1939. Section 718.01 of this chapter provides for the office of Commissioner of Registration with the city clerk of the city constituted as such commissioner.

"Section 718.18 provides that the 'cost of material, equipment and labor for the installation and maintenance of the permanent registration system shall be shared equally by the county and the city.' The same section further provides that the city council may compensate the Commissioner of Registration for the additional services as such commissioner in addition to his salary as city clerk.

"My question is in two parts as follows: If the city council desires to provide such additional compensation for the city clerk as commissioner of registration,

1. Is the board of supervisors of the county in which the city is located required to pay one-half of such additional compensation?
2. May the board of supervisors legally pay one-half of such additional compensation if it desires to do so?"

It is our purpose to determine the intent of the Legislature in the enactment of Chapter 39 and Chapter 39.1, Code of Iowa, 1939, in construing the provisions of Section 718.18.

Chapter 39 was adopted prior to the time of the adoption of Chapter 39.1. The latter chapter was enacted into law by the Forty-second General Assembly, at which time Section 718-b18 was adopted as follows:

718-b18 *Expenses.* The necessary expense in each city for carrying out the provisions of this chapter shall be paid by such city, and the city council of such city shall provide out of the current revenues of the city sufficient funds, based upon the estimate prepared by the commissioner of registration and subject to the approval of the city council. The city council of any city in which this chapter applies may, in its judgment, compensate the commissioner of registration for the additional service required by the performance of the duties herein described, in addition to any salary such commissioner of registration as city clerk may receive at the time of the adoption of this chapter, and notwithstanding any provisions of the charter of such city, and the compensation so paid to the commissioner of registration may be retained by him, notwithstanding any provisions in the charter or ordinances of such city to the contrary. The city council shall by ordinance fix the compensation paid to deputies or clerks.

At the time of the adoption of Chapter 39-B1, Section 688 of Chapter 39 was in force, and provided as follows:

688 *Expenses.* Said registry book and all blanks and materials necessary to carry out the provisions of this chapter shall be furnished by the city clerk and shall be printed at the equal expense of the city and county. Registers shall be paid by the city in city elections and in all other cases by the county.

Section 718-b18 as originally adopted was the same as Section 718.18, with the exception of the first sentence of Section 718-b18, which provides as follows:

"The necessary expense in each city for carrying out the provisions of this chapter shall be paid by such city, and the city council of such city shall provide out of the current revenues of the city sufficient funds, based upon the estimate prepared by the commissioner of registration and subject to the approval of the city council. * * *."

The Forty-third General Assembly, at Chapter 37, Section 7, changed the first sentence of Section 718-b18 to its present form as found in Section 718.18, by striking the words "the necessary expense in each city for carrying out the provisions of this chapter shall be paid by such city," and inserting in lieu thereof the following words: "the cost of material, equipment and labor for the installation and maintenance of the permanent registration system shall be shared equally by the county and the city." The remaining part of Section 718-b18 was left unchanged, and appears now in Section 718.18 in the same verbiage as it appeared in Section 718-b18.

Up to the time of the adoption of Chapter 39.1 by the Forty-second General Assembly, the only law in effect as to the registration of voters appeared in Chapter 39, which provided that the registration of voters should be made for all elections in all cities having a population of 10,000 or more, or by ordinance in any city having a population of not less than 6,000, and Section 688 of said chapter provided that the materials and supplies for that purpose should be printed at the equal expense of the city and the county, and that the registers should be paid by the city in city elections, and in all other cases by the county.

When Chapter 39.1 was adopted, it provided for permanent registration, and applied to cities of more than 125,000 inhabitants, except that Section 718.22 provided for permissive adoption of the procedure of Chapter 39.1, by ordinance by the city council of any other city in which registration was required, in which event all of the provisions of Chapter 39.1 should apply to said city.

It will be noted that until the change was made by the Forty-third General Assembly in the section which is now 718.18, that the city was liable for all of the costs of the registration system, and at that time as a part of said section the provision that the city council may in its judgment compensate the commissioner of registration for the additional service required by the performance of his duties in addition to his salary as city clerk, was in force and effect.

When the amendment to Section 718.18 was adopted by the Forty-third General Assembly, the city was relieved of the total cost of the operation of the registration system, and the amendment provided that the county and city should share equally the cost of material, equipment and labor for the installation and maintenance of the permanent registration system.

We therefore conclude that it was the legislative intent of the amendment to Section 718.18, adopted by the Forty-third General Assembly, that the cost of the material, equipment and labor for the installation and maintenance of the permanent registration system which would include the service of the commissioner of registration, his deputies and clerks, as provided by city ordinance, should be shared equally by the city and the county.

The whole question hinges on the construction to be placed on the word "maintenance" of the system, as found in the amendment.

It is our opinion that if the city adopts an ordinance providing for additional compensation to be paid to the city clerk as commissioner of registration, that the county is liable to pay its share of this additional compensation as part of the cost of maintenance of the registration system.

BOARD OF SUPERVISORS: REFUNDS: ERRONEOUS TAX ASSESSMENT: A Board of Supervisors has the duty to direct a refund of erroneously assessed property. (7235, C, '39)

July 2, 1942. *Mr. Francis J. Kuble, County Attorney, Des Moines, Iowa:* We are in receipt of your letter of June 30 requesting an opinion upon the following question:

"Is a claimant barred from securing a refund under Section 7235, Code of Iowa, 1939, to which he would otherwise be entitled by reason of the fact that the illegally or erroneously assessed property upon which such claim is based was intermingled with other property on the assessment roll?"

Section 7235, 1939 Code of Iowa, provides as follows:

"The board of supervisors shall direct the treasurer to refund to the taxpayer any tax or portion thereof found to have been erroneously or illegally exacted or paid, with all interest and costs actually paid thereon."

It will be noted that the above statute gives the refund right to the taxpayer for "any tax or portion thereof." We must assume that the assessor's records in some manner show that the erroneously assessed property was included in the assessment. If it was, then clearly a "portion" of the tax was an illegal exaction within the meaning of this statute and the board of supervisors would have the duty to direct the refund.

Some authority for our position can be found in the reasoning in *Chicago R. I. & P. R. Co. vs. Slate*, 213 Iowa 1294. Although that case did not involve refunds it did discuss the taxpayer's right to pay a separable part of a consolidated tax and contest the balance of the tax. If this could be done with

respect to levies, asserted to be illegal, it would seem that the taxpayer could do the same with respect to the assessment of exempt property included in a blanket property assessment. Generally speaking, if a taxpayer possessed the right to contest on the ground of illegality he has the right of refund if the tax has been paid.

C. Hewitt & Sons Co. vs. Keller, 223 Iowa 1372, and cases there cited

We are of the opinion that a taxpayer is not barred from securing a refund to which he would otherwise be entitled by reason of the fact that the property, which it is claimed was erroneously assessed, was included in an assessment with other properly assessed property upon the assessment roll.

TAXATION: EXEMPTION: MILITARY SERVICE: CHINESE RELIEF EXPEDITION: PHILIPPINE INSURRECTION: A record of military service alone is not sufficient where tax exemption is being sought by virtue of applicant being a soldier of the Chinese Relief Expedition or the Philippine Insurrection. (6946, C., '39)

July 6, 1942. *Mr. Francis J. Kuble, County Attorney, Des Moines, Iowa:* We wish to acknowledge receipt of your recent letter in which you present a question concerning Section 6946 of the 1939 Code of Iowa, with reference to the right of persons who have served in the military forces of the United States to secure tax exemptions therein allowed. Since other questions have arisen, we desire to make a general interpretation which will probably govern in a number of situations.

Section 6946 provides in part as follows:

6946 *Military service—exemptions.* The following exemptions from taxation shall be allowed:

* * *

2. The property, not to exceed eighteen hundred dollars in actual value, and poll tax of any honorably discharged soldier, sailor, marine or nurse of the war with Spain, Tyler Rangers, Colorado volunteers in the war of the rebellion, 1861 to 1865, Indian wars, Chinese relief expedition or the Philippine Insurrection.

* * *"

The questions we desire to answer in this opinion involve the right of honorably discharged soldiers to obtain the tax exemption by virtue of being soldiers of the war with Spain, the Chinese Relief Expedition or the Philippine Insurrection. We must first determine the beginning and ending dates of the above mentioned war, Expedition and Insurrection. An examination of the United States statutes and Presidential Regulations shows the following to be the beginning and ending dates for the Spanish American War, Chinese Relief Expedition (Boxer Rebellion) and the Philippine Insurrection, towit:

Spanish American War, April 21, 1898 to August 13, 1898;
Chinese Relief Expedition (Boxer Rebellion) June 20, 1900 to May 12, 1901;
Philippine Insurrection, August 13, 1898 to July 4, 1902, but as to engagements in the Moro Province the ending date shall be July 15, 1903.

It is our opinion that these dates shall be used in determining whether a person is eligible for the tax exemption contained in Section 6946 of the 1939 Code.

The next question presented is whether or not an honorable discharge from the military forces showing service in the military forces of the United States

during the dates heretofore set forth would be sufficient to secure the tax exemption.

It will be noted that the exemption is granted to the "honorably discharged soldier * * * of the war with Spain * * * Chinese Relief Expedition or the Philippine Insurrection." We are inclined to believe that service in the military forces would be sufficient if during the dates of the Spanish American War. Every person who bears an honorable discharge from the military forces of the United States showing service during the period from April 21, 1898 to August 13, 1898 would be entitled to the tax exemption provided in said statute.

With respect to the Chinese Relief Expedition or the Philippine Insurrection, we feel the situation is somewhat different. If exemption is to be claimed by virtue of being a soldier of the Chinese Relief Expedition or the Philippine Insurrection, we believe the discharge from the military forces should show service within the dates heretofore set forth and also some participation in the Chinese Relief Expedition or the Philippine Insurrection. In other words, a record of service in the military forces of the United States would not alone be sufficient if exemption is being sought by virtue of the applicant being a "soldier * * * of * * * the Chinese Relief Expedition or the Philippine Insurrection.

BOARD OF SUPERVISORS: CLERICAL HELP FOR PROBATION OFFICERS: COMPENSATION: The Board of Supervisors has power to appoint clerical help for a county probation officer, after considering the necessity for such help and also has power to fix the compensation. (3612; 5130, C., 1939)

July 7, 1942. *Mr. Edward F. Rate, County Attorney, Iowa City, Iowa:* We are in receipt of your request for an opinion on the following questions:

1. Does the probation officer, with the approval of the court, but without the knowledge and consent or authority of the board of supervisors, have power to appoint a clerk or assistant in the office to do clerical work in addition to the deputy appointed by the court pursuant to the provisions of section 3612 sub. sec. 2?
2. Does the board of supervisors have the power and authority under the sections referred to or any other sections of the code to employ clerical help for the probation officer in addition to the deputy provided by section 3612, subsection 2.
3. If the answer to the last question is in the affirmative, does the board have the sole power to determine the necessity of such help and to select the clerks and determine th amount of such clerical help necessary and the compensation thereof?

Section 3612 of the Code provides for the appointment of a probation officer, and subsection 2 provides for the appointment of a deputy in certain counties, which includes Johnson County.

Section 3614 provides that such probation officer shall be furnished by the county with a proper office, and all necessary blanks, books and stationery.

Section 3616 provides that the Judges making the appointments shall fix the salaries of all appointees at not exceeding the amount authorized by law.

Previous opinions by this office dealing with questions of the employment of clerks and deputies by County Officers have generally been based upon the broad provisions of Section 5130, subsection 6, and in the interpretation of this section, the conclusion has been reached that County Attorneys may

employ a stenographer, and be furnished with a typewriter, and other office furnishings, with the approval of the Board of Supervisors.

In an opinion found at 1938 AGO, 714, this was held to be the rule, but the opinion was also based upon the express statutory provision found in Section 5238 of the Code. That opinion cites prior opinions from this office, all of which were based upon the broad provisions of Section 5130, subsection 6.

Section 5238 refers to the appointment and employment of deputies, assistants, and clerks for certain County Officers, but does not include the probation officer.

After considering these previous opinions, it is our opinion that the provisions of Section 5130, subsection 6, are broad enough to include the employment of a clerk for the probation officer, but this employment may only be made by the Board of Supervisors after consideration by it of the necessity for such employment. As a condition precedent to the employing of a clerk for the probation officer, the appointment of the clerk should have the approval of the Board by resolution made of record in the proceedings of the Board, and the compensation to be paid to be fixed at that time.

It follows, therefore, that our answer to your first question must be in the negative.

The answer to your second question is in the affirmative; as is the answer to your third question.

LICENSE: REAL ESTATE BROKER: DIVIDING FEES WITH ONE EXEMPT FOR LICENSE: NO REVOCATION OF LICENSE: The division of a fee between a licensed real estate broker and one who is exempt under Par. 1905.23, C., '39, is not of itself sufficient grounds for revocation of the real estate broker's license.

July 8, 1942. *Mr. Earl G. Miller, Secretary of State, Des Moines, Iowa:* You have asked for the opinion of our office upon the following question:

Can a real estate broker lawfully divide his commission with or pay for services performed to an attorney at law or person acting as attorney in fact, or to a receiver or trustee in bankruptcy, administrator or executor, or any person selling real estate under order of any court, or to any state or national bank chartered to do business in the state, or to an auctioneer?

Section 1905.23 provides that the persons mentioned in this question are exempt from the provisions of the chapter requiring the possession of a license to act as a real estate broker.

Section 1905.20 provides that it shall be unlawful for any person, co-partnership, association or corporation to act as a real estate broker without a license issued by the Iowa Real Estate Commission.

There is no prohibition in the statute against the division of fees by licensed real estate brokers, and hence the division of a fee between a licensed real estate broker, and one who is exempt under the provisions of Section 1905.23 would not be a violation, except in the event that the division of such a fee would be grounds for revocation under Section 1905.45.

Section 1905.45, among other things provides as grounds for revocation or suspension of a license, as follows:

"* * * 8. Being unworthy or incompetent to act as a real estate broker or salesman in such manner as to safeguard the interests of the public, or

9. Paying a commission or valuable consideration to any person for acts or services performed in violation of this chapter, or

10. Any other conduct, whether of the same or a different character from that hereinbefore specified, which constitutes improper, fraudulent, or dishonest dealing. * * *."

Where there is a division of fees between a licensed broker and any other person, whether exempt or not, in which there has been a violation of any of the provisions hereinabove cited, or a violation of any other provision of the Chapter, each case must be judged on its own facts.

But it is our opinion that the mere division of a fee between a licensed broker, and one who is exempt under Section 1905.23, is not of itself sufficient as grounds for the revocation of a broker's license.

LEGAL SETTLEMENT: TWO YEARS TO ESTABLISH: To establish a legal settlement in a county requires two years residence after July 1, 1941. (3829.088, 3828.092, C., '39)

July 8, 1942. *Mr. Clark O. Filseth, County Attorney, Davenport, Iowa:* This will acknowledge receipt of your letter of June 22, wherein you ask our opinion on the following question:

"I have a request for an opinion from our Scott County Welfare Department that hinges on the interpretation of the statutes on residence for poor relief purposes and particularly the statute as amended, which now requires a two year residence in order to establish a legal settlement for poor relief.

The following are the facts:

'A resided in Davenport, Scott County, Iowa until July 12, 1940, at which time her legal residence was unquestionably in Scott County. On July 12 she moved to Keokuk where she remained a legal resident until November 3rd, 1941, at which time she was taken to Iowa City where she is now in the hospital and under medical care.'"

Section 3828.088, as it appeared in the 1939 Code of Iowa, read in part as follows:

"*Settlement—how acquired.* A legal settlement in this state may be acquired as follows:

1. Any person continuously residing in any one county of this state for a period of one year without being warned to depart as provided in this chapter acquires a settlement in that county, but if such person has been warned to depart as provided in this chapter, then such settlement can only be acquired after such person has resided in any one county without being warned to depart as provided in this chapter for a continuous period of one year from and after such time as such persons shall have filed with the board of supervisors of such county an affidavit stating that such person is no longer a pauper and intends to acquire a settlement in that county.

2. Any person having acquired a settlement in any county of this state shall not acquire a settlement in any other county until such person shall have continuously resided in said county for a period of one year without being warned to depart as provided in this chapter.***"

The 49th General Assembly amended said section by striking the words "one year" in lines two and ten thereof, and substituting in lieu thereof the words "two years".

Section 3828.092 as it appeared in the 1939 Code of Iowa reads as follows:

"*Notice to depart.* Persons coming into the state, or going from one county to another, who are county charges or are likely to become such, may be prevented from acquiring a settlement by the authorities of the county, township, or city in which such persons are found warning them to depart therefrom. After such warning, such persons cannot acquire a settlement except by the requisite residence of one year without further warning."

The 49th General Assembly amended said section by striking th words "one year without further warning" and by inserting in lieu thereof the following: "two years after the filing of the affidavit as provided in subsection one of section 3828.088."

Under the facts, as stated in your letter, "A" had a legal settlement in Scott County at the time of the effective date of the amendments to Section 3828.088 and 3828.092 above quoted. The question then arises as to whether or not the legislature could by amendment lengthen the time necessary for "A" to reside in a county without notice to acquire a legal settlement.

It is our opinion that by merely residing in a county for any number of months less than the number necessary for the establishment of a legal settlement, no person acquires a vested right in his claim for legal settlement. It is our further opinion that the manner by which a person acquires a legal settlement is merely procedural and can be changed at any time by an act of the legislature. We have previously held that a notice to depart is unnecessary where a person receives aid from public funds. In your question, "A" did not reside in Lee County for a period of two years without being warned to depart or without receiving aid from public funds.

It therefore follows that it is our opinion that the legal settlement of "A" in your question is still in Scott County, Iowa.

Your attention, however, is called to the fact that liability for medical care in the Iowa City hospital is not dependent upon legal settlement. See our opinion under date of February 13, 1939, found at Page 84 in the 1940 report of the Attorney General.

MINORS: COMMITTED TO GLENWOOD: COUNTY OF MOTHER'S LEGAL SETTLEMENT LIABLE TO STATE FOR EXPENSE: Where a child is committed to the State School at Glenwood the county liable for the expense to the state is the county wherein the child's mother has established legal settlement.

July 16, 1942. *Mr. Glenn L. Eichhorn, County Attorney, Montezuma, Iowa:*

This will acknowledge receipt of your letter of July 9, wherein you ask our opinion on the following question:

"We would like an Attorney General's opinion as to the legal settlement under the following facts:

Mrs. A. holds an undisputed legal settlement in Jasper County, Iowa. She acquired her legal settlement through marriage approximately three years ago. Before she was married she made her home with her parents in Grinnell, Poweshiek County, Iowa. Prior to her marriage she delivered two illegitimate children. After her marriage she took the youngest son with her, leaving the older one, R. with the grandparents in Grinnell, Poweshiek County, Iowa. Recently Mrs. A.'s son, R., 12 years old has been committed to the state school at Glenwood, Iowa.

Which county would be liable for the expense to the State of Iowa for the care and keep of this son while confined in the Glenwood school. Would it be Jasper County, the mother's place of legal settlement, or Poweshiek County?"

Section 3828.088, 1939 Code of Iowa, reads in part as follows:

"*Settlement—how acquired.* A legal settlement in this state may be acquired 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. * * *

6. Illegitimate children take the settlement of their mother, or, if she has none, then that of their putative father."

From the facts as stated, Mrs. A. holds undisputed settlement in Jasper County. Also, it is apparent that, under the provision of Section 3828.088, Subsection 6, above quoted, that the child, R, has the same legal settlement as his mother, namely Jasper County.

Chapter 135, Acts of the 49th General Assembly, which became effective January 1, 1942, repeals Sections 3406 to 3410, inclusive, 1939 Code of Iowa, and Subsections 2 of said Chapter 135 provides as follows:

Chapter one hundred seventy (170) Code, 1939, is amended by adding thereto the following: "Sections three thousand four hundred seventy-seven and one-tenth (3477.1) to three thousand four hundred seventy seven and seven-tenths (3477.7) inclusive of chapter one hundred seventy-two (172) of this title shall, insofar as applicable, apply to this chapter. As applied to this chapter, unless from the context another meaning is apparent, the terms "the hospital" and "this hospital" used therein shall mean "this school", and the terms "patient" or "patients" shall mean the same as "inmate" or "inmates".

Sections 3477.1 and 3477.3, 1939 Code of Iowa read as follows:

"*Clothing.* The superintendent shall supply all patients with clothing when not otherwise supplied. The actual cost thereof together with the necessary and legal costs and expenses attending the care, investigation, commitment, and support in the hospital shall be paid:

1. By the county in which the patient has a legal settlement provided that for the purpose of this chapter a minor child must have physically resided in the county at least one year for same to be deemed the county of his settlement.

2. By the state when such person has no legal settlement in the state or when his settlement is unknown. The residence of any patient shall be that existing at the time of admission.

Liability of county for support. Each county shall be liable to the state for the support of all patients from that county in the hospital. The amounts due shall be certified by the superintendent to the state comptroller who shall collect the same from the counties liable, at the times and in the manner required for the certification and collection of money from counties for the support of inmates of hospitals for the insane."

It will be noted that the child, R, has not lived with his mother in Jasper County for a period of one year. Therefore, Subsection 1 of Section 3477.1, above quoted, has no application. Also, the legal settlement of the child, R, is definitely known to be in Jasper county. Consequently, Subsection 2 of Section 3477.1, above quoted, has no application. We turn then to the first sentence of Section 3477.3, which, when read in conjunction with Section 2 of Chapter 135, Acts of the 49th General Assembly, reads as follows:

"Each county shall be liable to the State for the support of all inmates from that county in the school . . . . . ."

It is our opinion that the problem presented should be controlled by the wording of Section 3477.3, and that consequently Poweshiek County should pay for the care of the child, R, while he is an inmate at the State School at Glenwood.

LEGAL SETTLEMENT: MINOR COMMITTED TO WOODWARD HOSPITAL: CHILD'S LEGAL SETTLEMENT REMAINS IN COUNTY WHERE COMMITTED: REGARDLESS OF PARENTS' CHANGE OF SETTLEMENT: The legal settlement of a child committed to Woodward Hospital remains in the county from which it was committed, regardless of any change of legal settlement of its parents.

July 31, 1942. *Mr. Wm. C. Hanson, County Attorney, Jefferson, Iowa:* This will acknowledge receipt of your letter of July 27, wherein you ask our opinion on the following question:

"A and B are husband and wife and have a child C, who is a minor. All three are residents of Greene County, Iowa, at the time that C is committed to the Woodward Hospital. Later A and B moved to Des Moines in Polk County. On the 15th day of August, 1940 A sued B for divorce and a decree was granted on that date, and under and by virtue of the terms of the decree, the defendant B was granted the care, custody and control of the minor child C.

"While in Des Moines and on the 27th day of September, 1940, B was served with notice to depart, on the 9th day of November, 1940 A was likewise served with a notice to depart. Subsequent to the divorce, B married D, and D's legal settlement is Polk County; and B and D have been living together since their marriage in Des Moines, Iowa.

"On the 22nd day of April, 1942, C died, still an inmate of the Woodward institution. The question now arises, 'Where is the legal settlement of the minor child C?'

"I wish now to call your attention to the fact that on April 25, 1939 in the 1940 volume of Reports of the Attorney General, at page 195, and also on April 27, 1939, at page 203 of the same volume, the Attorney General's Office ruled that the legal settlement of the wife is the same as her husband, and her children by a previous marriage have the same legal settlement as their mother if they are left in her custody.

"However, in paragraph 3 of section 3828.088 of the 1939 Code of Iowa, it is provided that no person being supported by public funds can change his legal settlement, and the question arises as to whether or not this is applicable to a person under the disability of minority, the same as it is to a person under the disability of insanity, feeblemindedness and other disability.

"The Attorney General's opinions of 1938 at page 254 indicate that the settlement of a person committed to a state institution does not change during the time of commitment, even though the person controlling the committed person's settlement may change his own settlement. This is also indicated in 207 Iowa 1117 to 1120.

"In the facts as stated here, however, the Court by order has changed the custody of the child to the mother, B, and the mother has remarried another and has obtained a legal settlement in a different county.

"I have recited the above situations with the thought that you will be able to reconcile the opinions and indicate to me where in your opinion the legal settlement of C was at the time of her death, said settlement being for the purposes of administering relief for funeral expenses. The question has resolved itself into the payment of the funeral bill."

Section 3828.088, 1939 Code of Iowa, reads in part as follows:

Settlement—how acquired. A legal settlement in this state may be acquired as follows:

* * *

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

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.

5. Legitimate minor children take the settlement of their father, if there be one, if not, then that of the mother.

As you have stated, we have previously held and still hold that the legal settlement of a wife is the same as her husband, and the children by her previous marriage have the same legal settlement as their mother, if they are left in her custody.

Under the facts as stated in your letter, the child "C" had a legal settlement in Greene County at the time she was committed to Woodward. From the time the child was committed to Woodward, the public exercised a restraint upon the activities of such child and insofar as the family relationship between the child and its mother was concerned, such relationship ceased to exist. In the case of *Polk County vs. Clarke County*, 171 Iowa, 558, the Supreme Court held in effect that the legal settlement of an insane wife committed to the hospital for the insane from the county of her residence and legal settlement, remained unchanged by any act of the husband, such as a removal and the establishment of a new legal settlement in another county, so long as public restraint continued over the wife.

It is our opinion that the principles as stated in the above mentioned case are applicable to the instant case and that consequently, the legal settlement of the child "C" remained in Greene County.

It is our further opinion that the mere fact that the custody of "C" was given to her mother after the date of "C's" commitment to Woodward, and the mere fact that her mother now has a new legal settlement through remarriage, have no bearing on the issue any more than a voluntary removal and the establishment of a new legal settlement by "C's" mother.

SCHOOLS AND SCHOOL DISTRICTS: TEACHERS NOT HIRED OR RE-HIRED: APPEALS: COUNTY AND STATE SUPERINTENDENTS WITHOUT JURISDICTION: A County Superintendent of Schools does not have jurisdiction of appeals of teachers who are not hired or re-hired by School Board Directors, consequently the State Superintendent of Public Instruction has no jurisdiction in the matter. (4237, 4298, C., '39)

August 10, 1942. *Miss Jessie M. Parker, Superintendent of Public Instruction, Des Moines, Iowa:* We wish to acknowledge receipt of your recent inquiry relative to the case of Emerald Olson vs. Independent School District of Fort Madison.

The facts of this case, as we gather them from the documents and records submitted by your office and from the correspondence we have received from

the County Attorney of Lee County, Iowa, are that the teacher in question was not re-elected and was not given a new contract for the coming school year. It appears that the teacher was not discharged under the provisions of Section 4237 of the 1939 Code of Iowa. It is a case of the school board not giving a teacher a new contract to teach in that particular school.

The record shows that an affidavit was filed by the teacher in question in accordance with the provisions of Section 4298 of the 1939 Code of Iowa, with the County Superintendent and that in compliance with an order of the County Superintendent the Secretary of the Board of Directors of the Independent School District of Fort Madison filed a copy of the minutes of the Independent School District of Fort Madison relative to the action taken by the Board in connection with the immediate controversy. It is clear from this record that the action taken by the Board of Directors, in the instant case, was that the teacher would not be offered a new contract and that the employment would terminate at the end of the school year.

The County Superintendent when considering this matter, among other things, ruled as follows:

"* * * that the action of the Directors of the Independent School District complained of constitutes a failure to re-hire; that the hiring, re-hiring, failure to hire and failure to re-hire are actions peculiarly within the discretion of the Directors of the School District; that no appeal is contemplated by Chapter 219 of the Iowa Code from an exercising of this discretion; that an examination of the transcript does not disclose that the appellant was discharged by any action of the Directors of said School District but rather was not hired or re-hired.

"It is therefore ordered that the Appeal of Emerald Olson be and the same is hereby dismissed."

Without adopting any of the above quoted language it is our opinion that the County Superintendent properly ruled that he had no jurisdiction in the immediate case.

Section 4298 of the 1939 Code of Iowa provides as follows:

4298 *Appeal to county superintendent.* Any person aggrieved by any decision or order of the board of directors of any school corporation in a matter of law or fact may, within thirty days after the rendition of such decision or the making of such order, appeal therefrom to the county superintendent of the proper county; the basis of the proceedings shall be an affidavit filed with the county superintendent by the party aggrieved within the time for taking the appeal, which affidavit shall set forth any error complained of in a plain and concise manner.

Our Supreme Court has recently considered this section in the case of *Independent School District vs. Samuelson,* 222 Iowa 1063. In that case the teacher entered into a contract with the School District as Superintendent for the School District for the ensuing school year, the contract was in the ordinary form but contained the following clause: "This contract may be terminated at any time by the second party for any reason by giving thirty days notice in writing of such intention to said first party". Following the making of the contract some friction arose between the School Board and the Superintendent and the School Board cancelled the contract and gave notice as provided therein. The Superintendent attempted an appeal to the County Superintendent by filing an affidavit with the County Superintendent as provided in Section

4298 of the Code. Quoting from the Court in its opinion we find the following discussion relative to the applicability of Section 4298 of the Code:

"We have held recently that if a teacher is discharged under the provisions of section 4237 an appeal must be taken to the county superintendent and a failure to do so appeal will bar an action at law for the recovery of compensation or damages. Schrader v. School District, 221 Iowa 799, 266 N. W. 473. But we have no situation under this record similar to the facts appearing in the cited case. *However, it would follow that unless the teacher was discharged under the provisions of section 4237 an appeal to the county superintendent would not be available.*

"Section 4298 of the Code provides that any person aggrieved by any decision or order of the board of directors of any school corporation may appeal within thirty days from the rendition of such decision or order, *but it must be held that the provisions of this section are not all inclusive and that it is not all actions of the school board which must be appealed to the county superintendent before action in the courts will lie.* The last mentioned section provides that such an appeal may be taken on any matter involving questions of law or fact, and section 4302 provides an appeal from the decision or order of the county superintendent to the state superintendent, and the latter section provides that the decision when made by the state superintendent shall be final. *These sections are only applicable however in cases or questions in which the county superintendent and the state superintendent have jurisdiction.* [Italics ours].

"We do not think that either the county superintendent or the state superintendent had jurisdiction to entertain the appeals of the teacher, Baker, in the instant case, and it is our conclusion that the motions interposed by the school district questioning such jurisdiction and asking that the alleged appeal be dismissed, should have been sustained. If the school board had no jurisdiction under the provisions of the teacher's contract to cancel the same, then the teacher had his action at law for compensation or damages when his contract was illegally terminated by the board, and it was not necessary for him, indeed it was not permissible, to appeal to the county superintendent."

It is our conclusion that the above mentioned language is applicable to the immediate case and that the County Superintendent was correct in his ruling that he had no jurisdiction to entertain the appeal and that he was not required nor did he have authority to hear the appeal on the merits of the controversy. Inasmuch as the County Superintendent had no jurisdiction to entertain the appeal it necessarily follows that the State Superintendent would have no jurisdiction in the matter, and it is our opinion that the order of that State Superintendent of Schools directing the County Superintendent of Schools of Lee County, Iowa, to reopen the case, should be withdrawn.

STATE OFFICERS AND DEPARTMENTS: STATE EMPLOYEES' VACATION TIME CONSIDERED EARNED VACATION: CHANGING POSITIONS WITH STATE: VACATION TIME FOLLOWS TO NEW POSITION: Vacation time granted to State Employees should be treated as an earned vacation and where employee leaves one state department to go to work for another state department his vacation time should follow him to his new employment. (Ch. 90, 49th G. A.)

August 11, 1942. *State Board of Social Welfare, Des Moines, Iowa:* This will acknowledge receipt of your letter of August 7, wherein you have asked our opinion on the following question:

"The State Department of Social Welfare respectfully requests your opinion as to whether vacation pay should be given an employee of this department in the following situations:

1. An employee who has worked for the department more than two years, resigns and goes into private employment.
2. An employee who has worked for the department more than two years, resigns and goes into federal employment.
3. An employee who has worked more than two years for the department, resigns and goes to work for another agency of the State of Iowa.
4. An employee who has worked for the department more than two years, resigns and goes into the federal military service."

Chapter 90 of the Acts of the Forty-ninth General Assembly, State of Iowa, reads in part as follows:

"* * * All employees of the state * * * are granted one week's vacation after one year's employment and two weeks' vacation per year after two or more years' employment, with pay. * * * "

There seem to be two interpretations of the meaning of the word "vacation". The first is that a vacation is something that is earned and is, therefore, a bonus for services past rendered. The second is that a vacation is a rest period or a period between terms of employment, during which, the employee is relieved from his active duties under the theory that the employee will be better fitted to perform his duties for the employer after he returns from such vacation.

It is our understanding that the federal government and most private employers recognize the bonus theory, that is, under the federal rule, for each month that an employee has worked, he earns two and one-half days' vacation and the pay for two and one-half days per month of employment under ordinary circumstances, will be given to the employee on the termination of his employment.

Vacation leave of a state employee, however, is governed by the above quoted statute. An employee of the state must work one full year before he is "granted one week's vacation" and such employee must work two years before he is "granted two weeks' vacation". It is plain to see that a state employee must work fifty-two weeks of the first year of his employment; that he must work fifty-one weeks of the second year of his employment and fifty weeks of each succeeding year of his employment in order to receive full pay.

For the purposes of this opinion, let us suppose that "A" is employed by the state on March 1, 1939; that "A" takes one week's vacation in the month of June, 1940 and takes two weeks' vacation in the month of June, 1941 and that he has not as yet taken any vacation in the year 1942. Under the provisions of our statute, he "is granted" two week's vacation in the year 1942. Also it appears that "A" should be entitled to take his vacation in the year 1942 any time after March 1, 1942. Through reasons best known to "A" or his immediate supervisor, "A" has not taken his vacation up to the present date and now submits his resignation effective two weeks from date and wishes to quit work immediately. Can it be said that "A" has not earned two weeks' vacation with pay? We think not. In such case, "A" would have worked fifty weeks between the dates, March 1, 1941 and March 1, 1942—all that he had to work, and through reasons of his own and at the request of his immediate supervisor, he has not taken any time off in 1942. We believe that he should be paid for the two weeks in 1942 from and after March 1, 1942, in which he worked and during which time, he did not have to work.

In support of the theory that a vacation is a rest period, it might be argued that when "A" ceased to perform duties, he ceased to be an employee, and therefore, should be removed from the payroll, effective immediately. We do not feel that this is the preferable interpretation. It is our opinion that as long as an employee is carried on the payroll, that he is entitled to receive his pay even though the employee did not, in fact, perform any services during the last two weeks of his employment.

We do not mean to say that an employee could insist upon his vacation pay as a matter of right. If the employer wishes to discharge the employee, effective immediately, it is our opinion that the employee would not be entitled to vacation pay. In other words, the employee would cease to become an employee effective immediately and so could not be carried on the payroll.

Again, supposing "A" took his two weeks' vacation and came back to the office long enough to receive his check and then quit. There is nothing in the statute which would prevent this. In sections 1, 2 and 4 of your letter, there is no question involved of an employee being on two state payrolls. We believe that what an employee does during his vacation time is a matter that concerns only him and does not concern the state of Iowa. We do not believe that the state has a right to ask what an employee is going to do in his vacation period and if he chooses to go to work at some other job, that is his own affair.

With regard to section 3 of your letter, we feel that a distinction should be made. An employee of the State Department of Social Welfare or any other department of the state who switches jobs to another department of the state, does not cease to become an employee of the state. His relationship to the state continues on. If he were allowed to draw vacation pay from one department and actual pay from another department of the state, he would be receiving double pay from the same employer, viz., the state of Iowa. However, this does not mean that his vacation rights should not continue and follow him over to his new job. He should receive his vacation in his new employment by a new state agency just as he would if he remained in the employ of the original state agency.

We reach the conclusion, therefore, that vacations should be treated as earned vacation and that the answer to sections 1, 2 and 4 of your letter should be that such employee should receive two weeks' vacation with pay and that the answer to section 3 of your letter should be that such employee should not receive two weeks' vacation with pay from your department, but rather that his vacation rights should follow him to his new employment and that he should receive two weeks' vacation with pay from the new state agency employing him.

MOTOR VEHICLE FUEL TAX: REFUNDS: RECORDS AND APPLICATION TO BE CONFIDENTIAL: Under the Motor Vehicle Fuel Tax Law it would be unlawful for the Treasurer of State to permit oil companies to make photostatic copies of refund applications, since by law the records are to be confidential. (Ch. 251.3,C., '39) (Ch. 180, 49th G. A.)

August 13, 1942. *Hon. W. G. C. Bagley, Treasurer of State, Des Moines, Iowa:* This will acknowledge receipt of your letter of the 11th instant wherein you ask the opinion of this department relative to the following legal question. The facts are as follows:

Under the Iowa Motor Vehicle Fuel Tax Law, it is provided that when motor vehicle fuel is used for the purpose of operating or propelling stationary gas engines, farm tractors, etc., the person paying the license fees for such motor vehicle fuel shall be reimbursed and repaid the amount of such license fee upon presenting to the Treasurer a claim for refund, which claim shall be upon a form prescribed by the State Treasurer and shall be verified by the oath of the claimant and shall have attached thereto the original invoice or invoices showing the purchase of the motor vehicle fuel on which a refund is claimed.

Legal question:

May the Treasurer of State lawfully permit officers, employees or other representatives of certain oil companies to make photostatic or other copies of the applications for refund above referred to?

The answer to this question involves the interpretation of several sections of the Iowa Motor Vehicle Fuel Tax Law, to-wit: Chapter 251.3, Code of Iowa, 1939.

We hereinafter set out such sections which we think are pertinent:

Section 5093.26

"All books and records required to be kept under the provisions of this chapter *or which the treasurer is authorized to require under the provisions of this chapter, whether by the distributor, a service station operator,* a motor vehicle transport license holder or a railroad company or other carrier, shall at all times be open to the inspection of the treasurer of state or his duly authorized representatives, and it shall be lawful for the treasurer of state or his representatives or agents, or employees, to enter upon the premises where the business of any such person is conducted, or wherever said records may be found for the purpose of examining the same or any other records relating to the payment or the liability for payment of any motor vehicle fuel license fees due the state and remain as long as necessary to complete said inspection and examination. It shall be lawful also for said treasurer or his agents, employees, or representatives, to examine all of the equipment used by any of said persons in the transaction of such business and to enter upon the premises of any such persons for that purpose." (Italics ours)

Section 5093.27

"All information obtained by the treasurer or his representatives, agents or employees from the examination of the records *required to be kept under the provisions of this chapter* shall be treated as confidential and shall not be divulged except to a representative of the state having some responsibility in connection with the collection of motor vehicle license fees, or in proceedings brought under the provisions of this chapter; *provided, however, that the treasurer shall make available for public information on or before the last day of the month following the month in which the tax is required to be paid the names of the distributors and the amount of the tax paid by each and the amount due, if any, from each of said distributors.* * * * (Italics ours)

"Any person violating the provisions of this section, and disclosing the contents of any *records or reports required to be kept or made under the provisions of this chapter,* except as hereinabove provided shall upon conviction be fined not less than one hundred dollars nor more than one thousand dollars or be confined in the county jail not less than thirty days nor more than six months." (Italics ours)

Section 5093.29

"Any person who shall use any motor vehicle fuel for the purpose of operating or propelling stationary gas engines, farm tractors, aircrafts or boats or for cleaning or dyeing purposes or for any other purpose except in motor vehicles operated or intended to be operated upon the public highways of the state and who shall have paid the license fees for such motor vehicle fuel imposed by this chapter, either directly to the treasurer or indirectly by having the same added to the price of such fuel, and who shall have obtained a permit therefor as provided in this chapter, shall be reimbursed and repaid the amount of such license fees so paid, upon presenting to the treasurer a claim

for refund, which claim shall be in a form prescribed by the treasurer and shall be verified by the oath of the claimant and shall have attached thereto the original invoice or invoices showing the purchase of the motor vehicle fuel on which a refund is claimed, and shall state the name of the person from whom the motor vehicle fuel was purchased, the date of purchase, the total amount of such motor vehicle fuel, that the purchase price thereof has been paid and that said price included the motor vehicle fuel license fee payable to the state under the provisions of this chapter, that such fuel was used by the claimant otherwise than in motor vehicles operated or intended to be operated upon the public highways of this state * * *.

"When motor vehicle fuel is sold to a person who shall claim to be entitled to a refund of the motor vehicle fuel license fees herein imposed, the seller of such motor vehicle fuel, shall make out separate invoices for each purchase on forms which shall be approved by the treasurer showing the name and address of the seller and the name and address of the purchaser, the number of gallons of motor vehicle fuel so sold, written in words and figures, and the nature and kind of fuel so sold, and the date of purchase, and shall state that the purchase price includes the motor vehicle fuel license fee payable to the state; * * *."

Section 5093.36, Code of Iowa, 1939 as amended by Section 14 of Chapter 180 Laws of the 49th General Assembly:

"The treasurer is authorized and empowered to make such reasonable rules and regulations relating to the administration and enforcement of this chapter as he may deem reasonable * * *."

In this connection, it should be said that pursuant to the authority vested in the treasurer by said Section 5093.36, the treasurer of this state has promulgated a rule to the effect that all dealers must retain a carbon copy of the invoice given to purchasers who claim to be entitled to a refund of the motor vehicle fuel license fees provided for in this chapter.

In construing new statutes, the rule was laid down in a leading English case, decided in 1584, and referred to in 25 R. C. L. pp. 1015, 1016, section 254, Heydon's Case, 2 (III) Coke 7, 14 E. R. C. 816.

"It was resolved by the barons of the exchequer that for the sure and true interpretation of all statutes in general, four things are to be discerned and considered:

1. What was the common law before the making of the act?
2. What was the mischief and defect for which the common law did not provide?
3. What remedy the Parliament hath reserved and appointed to cure the diseases of the commonwealth?
4. And the true reason of the remedy."

The above guide for the construction of new statutes was approved by the Supreme Court of our state in the comparatively recent case of Jones v. Dunkelberg, 221 Iowa 1031, 1035. After quoting from this famous English case, the Supreme Court of Iowa, speaking through Justice Parsons, said:

"The doctrine therein (Heydon's case) stated has been followed ever since. It is common sense applied to these conditions. As supporting these views, Woods v. Mains, 1 G. Greene, 275; Stephens v. Davenport & St. P. R. Co., 36 Iowa 327; State v. Sherman, 46 Iowa 415; Cosson v. Bradshaw, 160 Iowa 296, 141 N. W. 1062, * * * Smith v. Sioux City Stock Yds. Co., 219 Iowa 1142 * * *. We say, what was the state of the law before the passage of the act; what was the mischief and defect for which the law did not provide; what remedy does the new act create; and what is the true reason of the remedy?"

In line with the reasoning employed in this case we think it pertinent to in-

quire as to what was the purpose of the passage of the law providing for refunds to certain users of motor vehicle fuel. The refund law was passed for the sole purpose of providing exemptions to certain classes of individuals from the imposition of the license fees provided for in Chapter 251.3 of our Code.

In order to obtain the refund the Legislature required that the person who claimed to come within the exempted class file an application setting forth certain facts. The applicant was further required to attach to said application the original invoice covering the purchase of motor vehicle fuel on which exemption was claimed. This original invoice is of course obtained from the dealer who is required by Section 5093.29 to make out separate invoices for each purchase on forms which shall be approved by the treasurer. In addition thereto, by rules promulgated by the department, the motor vehicle fuel retailer is required to keep a copy of said invoice for a period of three years.

Now, it is clear that these requirements were included in the Act for the sole and only purpose of enabling the treasurer to determine whether or not the applicant was entitled to the refund claimed.

Clearly, it was not the intention of the Legislature that the public was to become the beneficiary of the information furnished by the dealer and the claimant.

In other words, in setting up the machinery by which exempted persons obtain the refund, the Legislature clearly had one purpose and one only in mind and that was to provide the treasurer with sufficient information to enable him to pass on the validity of the claim. The question then arises as to whether, under the provisions of Sections 5093.26 and 5093.27, the treasurer may lawfully divulge the information contained in the refund applications. We think not. Section 5093.26 provides:

"All books and records required to be kept under the provisions of this chapter, or which the treasurer is authorized to require under the provisions of this chapter, whether by distributor, a service station operator * * *, shall at all times be open to the inspection of the treasurer of state or his duly authorized representatives * * *."

Section 5093.27 provides:

"All information obtained by the treasurer or his representatives, agents or employees, from the examination of the records *required to be kept under the provisions of this chapter shall be treated as confidential* and shall not be divulged except to a representative of the state." (Italics ours)

The statute further provides:

"Provided, however, that the treasurer shall make available for public information on or before the last day of the month * * * the names of the distributors and the amount of the tax paid by each and the amount due, if any, from each of said distributors."

The last paragraph of said section contains the penalty clause. We find, therefore, that these sections specifically require that all information obtained by the treasurer or his representatives, agents or employees from the examination of the records required to be kept under the provisions of this chapter shall be confidential. It, therefore, becomes pertinent to inquire as to whether the invoice which forms a part of the application for refund is a record "required to be kept". We answer this in the affirmative. Section 5093.29 provides:

"When motor vehicle fuel is sold to a person who shall claim to be entitled to a refund * * * the seller of such motor vehicle fuel shall make out separate invoices for each purchase on forms which shall be approved by the treasurer * * *."

We are of the opinion, therefore, that this is a record required to be kept under the provisions of Sections 5093.26 and 5093.27. Particularly do we believe this conclusion justified because the treasurer, under authority of this chapter, has promulgated a rule that copies of said invoices shall be retained by the dealer for a period of three years.

It is therefore, under the provisions of this chapter, manifestly, a record "required to be kept" and as we have learned, all records required to be kept under the provisions of this chapter must be treated as confidential.

Lastly, we make the following observation:

In reading Section 5093.27, it will be noted that the treasurer is prohibited not only from divulging information furnished by distributors, but "all records required to be kept under the provisions of this chapter". If it had been the intention of the Legislature to limit the application of Section 5093.26 and Section 5093.27 to the information contained in reports required to be made by distributors, it would have been an easy matter to have so provided. Instead, the Legislature used the all-inclusive phrase, to-wit: "records required to be kept under the provisions of this chapter".

We reach the conclusion, therefore, that it would be unlawful for the treasurer of state to permit the oil companies referred to earlier in this opinion to make photostatic or other copies of the refund applications.

HIGHWAYS: HEDGE AND TREES GROWING IN HIGHWAY: NO DUTY ON ADJOINING LANDOWNER TO TRIM OR DESTROY: There is no duty on adjoining landowner to trim or destroy brush or trees, growing naturally upon public highways, which are not being used as hedge or fences. (Ch. 247, C., '39)

August 24, 1942. *Mr. Forest L. Bedell, County Attorney, Newton, Iowa:* We wish to acknowledge receipt of your recent letter in which you ask for our opinion on the following question:

Can the owner of land adjoining public highways, other than primary highways, be required to cut or otherwise destroy or remove brush or trees growing on such public highway adjoining his land?

We find in the 1917-18 volume of the Attorney General's opinions, page 532, an opinion that the owner of land adjoining a public highway cannot be required to remove trees and underbrush from that portion of the highway lying between a hedge fence owned and used by him and the travel portion of the highway. This opinion, in part, in discussing what is now Chapter 247, 1939 Code of Iowa, reads as follows:

"The object and purpose of this act is to require the owner of hedges along the public highways to keep them trimmed and cut back to a given height above the ground and upon failure to do so the expense thereof may be assessed and taxed against the land upon which the hedge is located."

While it is true that the law in effect at the time the opinion was written was not quite as broad as Section 4830 in that, in part, the statute at that time read "* * * With the exception of osage hedge fences, no trees or shrub-

bery, except as hereinafter provided, shall be permitted on the line of the highway along the public road, * * *". Whereas, Section 4830 now reads, "* * * no trees or shrubbery, except as hereinafter provided, shall be permitted on the line or within the limits of the highway, * * *".

It is our opinion that the purpose of the law was to require the trimming of hedges that were used as fences and to require the destruction of certain trees that were used as fences and not to make it the duty of the adjoining landowner to keep the brush cut that grows in the public highway. You will note in Sections 4830 and 4831 the following language:

4830 *Hedges and windbreaks—trimming* * * * With the exception of osage orange hedge fences, no trees or shrubbery, except as hereinafter provided, shall be permitted on the line or within the limits of the highway, unless the same shall be used as a windbreak for residences, orchards, or feed lot, and no windbreak shall exceed forty rods in length, such forty rods to be determined by the owner within one day when requested by the board of supervisors; and in case he neglect or refuse to designate the forty rods of windbreak he desires, the board of supervisors shall select such forty rods of hedge.

4831 *Destruction by supervisors—tax.* The board of supervisors shall have the authority to enforce the provisions of this chapter and destroy or cut back the hedges or trees, as specified above, *upon the failure of any owner of the hedge or fence so to do.* * * * (Italics ours)

This language would seem to indicate that the Legislature did not intend to require the adjoining landowner to destroy the brush that volunteers in the public highway.

It is our opinion that the amendment of the 39th General Assembly, above mentioned, was not intended to make it the duty of the landowner to cut brush and trees growing on the public highway but rather to require the trimming or cutting of hedge fences that extend over the line of the highway.

It is our conclusion that Chapter 247 of the 1939 Code of Iowa does not make it the duty of the adjoining landowner to trim or destroy the brush or trees growing naturally upon the public highway and not used as hedge or fence.

INSURANCE: RETALIATORY STATUTE: RECIPROCAL OR INTER-INSURANCE EXCHANGE: A domestic reciprocal exchange need not be actually licensed to do business in the state of domicile of the foreign exchange seeking to do business in Iowa before the Insurance Commissioner is permitted or required by Chapter 280, 49th G. A. to retaliate in the collection of taxes or fees.

August 28, 1942. *Hon. Charles R. Fischer, Commissioner of Insurance, Des Moines, Iowa:* We have your request for an opinion on the following question:

"Must a domestic reciprocal exchange be actually licensed and doing business in the state of domicile of such foreign exchange, before the Commissioner is permitted or required by Chapter 280, 49th G. A. to retaliate in the collection of taxes or fees?"

Chapter 280, Acts of the 49th General Assembly provides as follows:

"Section 1. If the Commissioner of Insurance or chief insurance officer of any other state or territory of the United States, claiming to proceed under existing or future laws of any such state or territory, shall require reciprocal

or inter-insurance exchanges of this state or the agents thereof to make any deposit of securities in such other state or territory for the protection of policyholders or otherwise or to make payment of taxes, fines, penalties certificates of authority, license fees or otherwise or subject them to any restrictions, obligations, conditions or penalties, greater than are required or imposed by the laws of the state of Iowa relating to reciprocal or interinsurance exchanges, from such exchanges of such other states or territories by the then existing laws of this state then and in every such case all such reciprocal or interinsurance exchanges of such other states or territories shall be and they are hereby required to make like deposits for like purposes with the insurance department of this state and to pay to the Commissioner of Insurance taxes, fines, penalties, certificates of authority, license fees and otherwise in an amount of such charges and payments, and shall be subjected to the same restrictions, obligations, conditions or penalties imposed by the Commissioner of Insurance or chief insurance officer of such other states under and by virtue of law, upon reciprocal or interinsurance exchanges of this state and the agents thereof."

This statute is what is commonly known as a retaliatory statute. Retaliatory statutes in connection with the transaction of the business of insurance, exist in practically every state of the United States.

The courts of last resort of various states have in a number of instances had occasion to interpret retaliatory statutes, and in general it may be said that they have held that if the law of the state of the domicil of the foreign corporation seeking to do business in the state whose statute is under consideration provides for or permits a requirement not provided for in that state, that the retaliatory statute of that state is in effect. See

Germania Insurance Co. v. Swigert, 21 N. E. 530 (Ill.)
Phoenix Insurance Company v. Welch, 29 Kan. 672
State v. Insurance Company of North America, 100 N. W. 405 (Nebr.)

The Iowa Court had occasion to pass upon a similar retaliatory statute in the case of *State ex rel Phillips v. Fidelity & Casualty Company*, 77 Iowa 648. The statute before the court was section 1154 of the code of 1873 . It appeared in the 1897 code as section 1736, and in the codes of 1924 and 1927 as section 8969. Then it was superseded by an enactment found in Chapter 225 Acts of the 43rd General Assembly. The language of the statute which was before the court in State v. Casualty Company was as follows:

"When by the laws of any other state any taxes, fees, * * * or other obligations or prohibitions, are imposed or would be imposed on insurance companies of this state doing, or that might seek to do, business in such other state * * *, so long as such laws continue in force, the same obligations and prohibitions, of whatever kind, shall be imposed upon all insurance companies of such other state doing buiness within the state. * * *"

The court held that it was not the enforcement of the law of New York against Iowa companies that gave rise to the retaliatory law of Iowa, but when by the laws of another state prohibitions "are imposed, or would be imposed, upon insurance companies of this state."

While the language of the statute then under consideration was not exactly as that on which your inquiry is made, nevertheless we can find no substantial difference. Certainly if the law of a foreign state makes any kind of provision for the Insurance Commissioner or chief insurance officer of that state to impose any tax prohibition, etc., which is different from that in Iowa, it is to be presumed that the insurance officer will carry out the provisions of the law. We believe the Iowa case just above alluded to is controlling.

We therefore hold in answer to your inquiry that a domestic reciprocal ex-

change need not be actually licensed to do business in the state of domicil of the foreign exchange seeking to do business in Iowa before the Commissioner of Insurance is permitted or required by Chapter 280 Acts of the 49th General Assembly to retaliate in the collection of taxes or fees. The existence of laws authorizing and requiring the collection of such taxes or fees is sufficient to make the Iowa retaliatory act as found in Chapter 280 Acts of the 49th General Assembly effective.

CLERK OF DISTRICT COURT: LICENSING AGENT FOR FEDERAL GOVERNMENT: CLERK TO RETAIN LICENSING FEE: Where a clerk of the district court is appointed licensing agent by federal authority the clerk is entitled to retain the twenty-five cent fee for each license issued in accordance with Federal Law. (5245, C., '39)

September 2, 1942. *Mr. Arthur H. Jacobson, County Attorney, Waukon, Iowa:* We wish to acknowledge receipt of your letter of July 31, 1942, in which you ask for our opinion on the following matter:

"The Clerk of the District Court of Allamakee County, Iowa, has been designated as a licensing agent to issue permits to persons seeking to purchase explosives in this county. This appointment is apparently made under public law No. 381 of the 77th Congress, chapter 633, first session, H. R. 3019.

"Section 7 of this Act, which refers to the designation of licensing agents, states in part: 'Such agents may collect a fee of 25c for each license issued, and shall be entitled to no other compensation from the United States for their services.'

"Code Section 5245 of the 1939 Code provides that fees and charges of whatever kind collected for official services by the Clerk of the District Court shall belong to the county.

"The question now is—may the Clerk of the District Court who has been appointed a licensing agent under the above Federal Act, personally retain the 25c fee which he collects for issuing permits?"

Section 5245 of the 1939 Code of Iowa provides as follows:

5245 *Fees belong to county.* Except as otherwise provided, all fees and charges of whatever kind collected for official service by any county auditor, treasurer, recorder, sheriff, clerk of the district court, and their respective deputies or clerks, shall belong to the county.

It will be noted that this Section relates to "all fees and charges *** collected for official service by *** clerk of the district court." The designation of licensing agents, as above mentioned, is made by Federal authority and there is no absolute duty on the proper Federal official to designate the clerk of the district court to serve as a licensing agent. The Federal law authorizes the appointment of persons to serve as licensing agents who are authorized by law to administer oaths and wherever possible the licensing agents shall be qualified officers or employees of the several States of political sub-divisions or public bodies thereof.

It is our opinion that Section 5245, quoted above, is applicable only to fees and charges collected for official service which is required or provided for by the laws of the State of Iowa and that the clerks of district courts of the State of Iowa are entitled to retain the twenty-five cent fee for each license issued in accordance with the provisions of the above mentioned Federal law.

WARDEN OF PENITENTIARY: COPY OF MITTIMUS DELIVERED ON DEMAND OF INMATE: TENDER OF FEE: The Penitentiary Warden must deliver a copy of a mittimus when demanded by an inmate, when fees for such copy are tendered, as provided by law. (12488, C., '39)

September 14, 1942. *Hon. Percy A. Lainson, Warden, Iowa State Penitentiary, Fort Madison, Iowa*: This will acknowledge receipt of your letter of the 12th instant wherein you ask for an interpretation of Section 12488, Code of Iowa, 1939 which provides as follows:

"An officer refusing to deliver a copy of any legal process by which he detains the plaintiff in custody to any person who demands it and tenders the fees therefor, shall forfeit two hundred dollars to the person who demands it."

The specific legal question is as to whether the above section applies to the warden of the penitentiary. In other words, must the warden of the penitentiary, upon demand, deliver to a prisoner a copy of the commitment under which such prisoner is held, providing, of course, that fee therefore is paid in accordance with the provisions of said section?

We are of the opinion that the answer to this inquiry must be in the affirmative. The statute in question is a part of Chapter 534, relating to habeas corpus. We know that this writ is frequently employed by prisoners in an attempt to gain their freedom. Therefore, we are of the opinion that when the legislature passed Section 12488, it must be presumed to have included under the term "an officer" the warden of the penitentiary. Certainly he is the officer who detains the plaintiff. As you will note, the statute places the burden of furnishing a copy of the process upon the officer who detains the person, who, it is alleged, is illegally deprived of his liberty.

We reach the conclusion, therefore, that when demand is made by an inmate of the penitentiary upon the warden for a copy of the mittimus by virtue of which such warden detains said prisoner, and the fees required by law are tendered, it is the duty of the warden to forwith furnish such prisoner with a copy of the process referred to.

BEER: PERMIT: RENEWAL: PERMITTEE ABSENT FROM STATE: QUESTION OF "RESIDENCE" FOR COUNCIL: Where Class "B" beer permittee is temporarily absent from the state it is for the council to determine whether permittee is a "resident" or "citizen" of Iowa in renewing the permit. (1921.104, C., '39)

September 17, 1942. *Mr. J. E. Don Carlos, County Attorney, Greenfield, Iowa:* This is in answer to your letter of the 3d instant wherein you request the opinion of this department relative to the two following legal questions. For a statement of the facts, we quote from your letter:

1. A Class B beer permit which had been issued to the wife expires this month. The husband left about six months ago for California and is working in a defense plant. The wife left Iowa as soon as school was over last spring which would be the last part of May and has not returned to Iowa. The children are now going to school in California. The applicant does own a house in town but they have stored most of their furniture.

2. A Class B permit holder who is single with no dependants, left the State of Iowa about July 1st to work in a defense plant in the State of Georgia. Should his Class B permit be revoked as long as he has moved out of the State of Iowa and will not return for the duration?

It is our opinion as to your first question that as to whether the applicant is entitled to a renewal of her permit depends on whether or not she is still a citizen of the State of Iowa. This is a fact question to be determined by the City Council. If the permittee is still a citizen of Iowa, we are of the opinion that her mere temporary absence from the State would not constitute a ground for a denial of her application, assuming, of course, that she meets all other requirements.

Section 1921.104 provides:

"Except as otherwise provided in this Chapter, a Class B permit shall be issued by the authority so empowered in this Chapter to any person who:

1. Submits a written application for a permit, which application shall state under oath:
   a. The name and place of residence of the applicant and the length of time he has lived at such place of residence.
   b. That he is a citizen of the State of Iowa.
   c. * * *
   d. * * *
   e. * * *
   f. * * *
2. Establishes:
   a. That he is a person of good moral character.
   b. * * *
3. * * *."

You will note that the permittee in question can readily comply with all of the requirements set out in Section 1921.104 unless it be with reference to the requirement contained in sub-section b. under Section 1, to-wit:

"That he is a citizen of the State of Iowa."

The pertinent inquiry then, in our opinion, is as to the true interpretation of the term "citizen" as used in this statute. Under the facts outlined, is the permittee, referred to in your letter, a "citizen" of the State of Iowa? It is our opinion that as that term is used in this statute, it is synonymous with the term "residence." The courts, many times, had occasion to pass on the meaning of this term. In *Prowd v. Gore*, 57 Cal. App. 458, 207 Pac. 490, the court said:

"The word 'citizen,' while not convertible with the word 'resident' is often used synonymously with it, without any implication of political privileges."

In the case, *Standard Stoker Company v. Tower*, 46 Federal (2d) 678, the court held that the terms "citizen," "inhabitant" and "resident" are for jurisdictional purposes synonymous terms.

In the case of *Darst v. Bates*, 51 Ill. 439, the court held that one might be a citizen of one state within the meaning of Action of Congress, March 2, 1867, providing for the removal of a cause from a state court to a federal court, and yet be a resident of another state. In the case of *State v. Trustees*, 11 Ohio 24, it was held:

"The word 'citizen' does not always mean the same thing. Thus we speak of a person as a 'citizen' of a particular place when we mean nothing more than that he is a resident of the place * * *."

Thus, we find that the courts have held that the words "citizen" and "resident", as frequently used in statutory enactment, are synonymous. We think that it is synonymous with the term "resident" as used in the beer law of our state.

We are constrained to say that the sole and only question to be determined in the posited case is whether the permittee in question is still a resident of the State of Iowa. If she is, we are firmly of the opinion that she is entitled to a renewal of her beer permit. As to whether or not she is a resident, is, of course, as we have indicated, a mixed question of law and fact. The Supreme Court of our state has many times had occasion to define the word "residence" or "legal residence." In Hinds v. Hinds, 1 Iowa 36, 41, the Supreme Court held that a "legal residence" as distinct from actual residing is such a residence as that when a man leaves it temporarily or on business he has the intention of returning to it and which, when he has returned to it, becomes and is de facto and de jure his residence.

We reach the conclusion, therefore, that if the permittee in question has an intention of returning to the State of Iowa, and has not abandoned her home in your city as her permanent place of residence, she is a citizen of our state and is, therefore, entitled to a renewal of her permit, providing that she can meet all of the other requirements of law. The question with reference to her residence and the sufficiency of the application in its entirety is, of course, for the Council to determine.

With reference to the second question contained in your letter, we are of the opinion that what we have herein above said disposes of this question. We are of the opinion that as the statute is now written, one may leave the state for an indefinite period of time and still be entitled to a Class B permit providing he is still a resident of the state. Of course, in this case, as in the case under question number one, it is for the Council to determine whether the permittee still has a residence in your county.

FEDERAL SOLDIERS AND SAILORS RELIEF ACT: TAXATION: DWELLING TO BE OCCUPIED WHEN ENTERING SERVICE: Under the Federal Soldiers and Sailors Relief Act a dwelling must be occupied by a person entering the military service, or his dependents, at the time he enters the military service before he can avail himself of the provisions of said act.

September 21, 1942. *Hon. C. B. Akers, Auditor of State, Des Moines, Iowa:* This is in reply to your letter of September 14, 1942, in which you request an opinion upon the following question:

"Does Section 500 of the Federal Soldiers' and Sailors' Relief Act of 1940 apply to a person in the armed service who owns a dwelling which is not occupied by that person's family or dependents but which is rented and which returns a small income?"

Subparagraph one of Section 500 of the above Act provides as follows:

The provisions of this section shall apply when any taxes or assessments, whether general or special, falling due during the period of military service in respect of real property owned and occupied for dwelling, agricultural, or business purposes by a person in militarv service or his dependents at the commencement of his period of military service and still so occupied by his dependents or employees are not paid.

It is our opinion that under the statute quoted above no one may avail himself of the provisions of this Act whose dwelling was not occupied by himself or his dependents at the time he entered the military service or which is not still occupied by his dependents after his entrance into the military ser-

vice and when taxes fall due upon the dwelling. The language of this statute seems in itself so clear that we feel it unnecessary to elaborate further upon this proposition and conclusion.

TOWNSHIP TRUSTEES: COUNTY ATTORNEY TO REPRESENT: TRUSTEES WITHOUT AUTHORITY TO EMPLOY COUNSEL: EXEMPTION: It is the duty of the County Attorney to represent the Township Board of Trustees, the trustees have no authority to employ counsel unless the interests of the township are adverse to those of the county. (5544; 5545, C., '39)

September 23, 1942. *Mr. Geo. F. Allen, County Attorney, Creston, Iowa:* We wish to acknowledge receipt of your recent letter in which you ask for our opinion on the following matter:

"There have been several appeals taken from various Boards of Review in this county naming township trustees as defendants. Several of the trustees were in my office and are wondering whether or not they have a right to employ additional counsel to assist me in the trial of these cases. Union County has a population of approximately seventeen thousand. I would appreciate your opinion on this matter at your earliest convenience."

Among the duties of the township trustees, is the duty of the board to act as the township board of equalization. Sections 5544 and 5545 of the 1939 Code of Iowa provide as follows:

5544 *County attorney as counsel.* 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.

5545 *Employment of counsel.* When litigation shall arise in any case not covered by section 5544, involving the right or duty of township trustees with reference to any matter within their jurisdiction, and the trustees become or are made parties to such litigation, they shall have authority to employ attorneys in behalf of said township, and to levy the necessary tax to pay for their services, and to defray the expenses of such litigation.

From an examination of these Sections it is clear that the authority of the board of township trustees to employ legal counsel is very limited. It is a well recognized rule that governmental bodies, such as board of township trustees, have only such authority as is expressly given by the Legislature or as is necessarily implied from the express grant.

In view of the above mentioned rule it is our opinion that the board of township trustees has no authority to employ counsel other than as specifically mentioned in Section 5545 of the 1939 Code of Iowa. Unless the interests of the county and those of the trustees are adverse it is the duty of the County Attorney to appear for the township trustees and the trustees would have no authority to employ additional counsel. In the instant case there appears to be no such conflict of interest.

COUNTY HOSPITAL TRUSTEES: DUTY TO COLLECT ACCOUNTS: COUNTY ATTORNEY TO RENDER LEGAL SERVICES: It is the duty of the County Hospital Trustees to collect accounts and in the alternative the Superintendent of the hospital, there is no authority for trustees to have accounts collected on contingent fee basis by an outsider. All legal services are to be rendered by County Attorney. (5363, C., '39)

September 23, 1942. *Mr. Wm. C. Hanson, County Attorney, Jefferson, Iowa:* We wish to acknowledge receipt of your recent letter in which you ask for our opinion on the following matter:

"Recently a reputable finance company contacted this office in relation to the collection of county hospital accounts, and as a result thereof, a question arose in my mind as to the authority of the Board of Trustees to permit this finance company to handle these accounts."

Section 5363 of the 1939 Code of Iowa provided as follows:

5363 *Accounts—collection.* It shall be the duty of the trustees either by themselves or through the superintendent to make collections of all accounts for hospital services rendered for other than indigent patients. Such account shall be payable on presentation to the person liable therefor of an itemized statement and if not paid or secured within sixty days after such presentation the said trustees shall proceed to enforce collections by such legal proceedings as they may deem necessary.

All legal services for such purpose shall be performed by the county attorney without additional compensation.

It is to be noted from this Section that the trustees either by themselves or through the superintendent have the duty to make collections of all accounts for hospital services rendered for other than indigent patients. The fact that the statute specifically makes it the duty of the trustees by themselves or through the superintendent to collect the accounts of the hospital indicates that the Legislature intended that the accounts in question should be handled by these persons and that some outsider could not be hired to collect the accounts on a contingent fee basis.

The statute in question outlines in detail the procedure to be followed in the collection of these accounts and provides that the trustees shall proceed to enforce collections by such legal proceedings as they may deem necessary if the account in question is not paid or secured within sixty days after presentation of the account to the person liable therefor. In addition thereto the statute further provides that the County Attorney shall render all legal services necessary in the collection of these accounts without additional compensation.

In conclusion it is our opinion that it was the intention of the Legislature in enacting Section 5363 of the 1939 Code of Iowa to make it the personal duty of the trustees to collect these accounts, or in the alternative to have the superintendent of the hospital collect the accounts and there is no authority for the trustees of the hospital to turn these accounts over to an outsider for collection on a contingent fee basis.

POOR: BOARDS OF SUPERVISORS: SUPPLIES FOR POOR: CONTRACTS NOT MANDATORY: Section 3828.110, C., '39 does not make it mandatory for boards of supervisors to enter into contracts for the furnishing of supplies required for the poor.

September 29, 1942. *Mr. William M. Spencer, County Attorney, Oskaloosa, Iowa:* We wish to acknowledge receipt of your letter of September 24, 1942, in which you present a question concerning the provisions of Section 3828.110 of the 1939 Code of Iowa relating to the rights and duties of the Board of Supervisors to enter into a contract for the furnishing of supplies for poor persons. Your specific question being: Whether said Section makes it man-

datory for the Board of Supervisors to make contracts for furnishing supplies required for the poor.

Section 3828.110 of the 1939 Code of Iowa provides as follows:

3828.110 *Contracts for support.* The board of supervisors may make contracts with the lowest responsible bidder for furnishing any or all supplies required for the poor, for a term not exceeding one year, or it may enter into a contract with the lowest responsible bidder, through proposals opened and examined at a regular session of the board, for the support of any or all the poor of the county for one year at a time, and may make all requisite orders to that effect, and shall require all such contractors to give bonds in such sum as it believes sufficient to secure the faithful performance of the same.

We note that the Section in question provides that the "board of supervisors *may* make contracts with the lowest responsible bidder for furnishing any or all supplies required for the poor * * *."

We note the following language from Corpus Juris regarding the use of the word "may" and use of the word "shall."

"As a general rule the word 'may,' when used in a statute, is permissive only and operates to confer discretion, while the word 'shall' is imperative, operating to impose a duty which may be enforced. Of similar effect and import with 'shall' is the word 'must.' These words, however, are constantly used interchangeably, in statutes, and without regard to their literal meaning; and in each case are to be given that effect which is necessary to carry out the intention of the legislature as determined by the ordinary rules of construction. * * *

"Where, from a consideration of the whole statute, and its nature and object, it appears that the intent of the legislature was to impose a positive duty rather than a discretionary power, the word 'may' will be held to be mandatory. A mandatory construction will usually be given to the word 'may' where public interests are concerned, and the public or third persons have a claim de jure that the power conferred should be exercised, or whenever something is directed to be done for the sake of justice or the public good; * * *" (see 59 C. J. 1079 and following).

In the instant case it may be argued that the word "may" should be construed as mandatory in interpreting the Code Section in question, for the reason that public interests are concerned. That the act directed to be done is for the sake of justice or for public good. However, in examining the statute as a whole we find that it provides that the board may make contracts for furnishing "*any* or *all* supplies." It is our opinion that the use of the words "any or all" are a further indication that the Legislature, in the instant case, intended to use the word "may" in its usual and ordinary meaning as being permissive and not mandatory.

It is our conclusion that the Section in question does not make it mandatory for the Board of Supervisors to enter into a contract for the furnishing of supplies (in your case coal) required for the poor.

LEGAL SETTLEMENT: HUSBAND CHANGING LEGAL SETTLEMENT: WIFE RECEIVING OLD AGE ASSISTANCE: WIFE'S LEGAL SETTLEMENT ALSO CHANGED: Where a husband changes his legal settlement while his wife is receiving old age assistance the legal settlement of the wife is also changed regardless of the fact she is receiving support from public funds. (3828.088, C., '39)

September 30, 1942. *Mr. Raymond H. Wright, County Attorney, Burlington, Iowa:* This will acknowledge receipt of your letter of September 24 wherein you ask our opinion on the following question:

"Mr. and Mrs. C are man and wife. Though they originally came from Henry County, they were legally settled in Des Moines County in 1932, and in that year applied for and received relief from Des Moines County. They continued to receive relief intermittently up to 1935 in which year Mrs. C was granted old age assistance. The old age assistance grant was made while Mrs. C resided and was legally settled in Des Moines County. At the time Mrs. C received old age assistance, the relief grant to the family was terminated.

"In 1936, Mrs. C and her husband moved to Henry County where they took up physical residence and where, subsequently, Mr. C at least, gained legal settlement since notice was not served upon him within the statutory period by that county. Mrs. C continued to receive old age assistance, the case having been transferred from Des Moines County to Henry County for service. Des Moines County, of course, pays no part of the cost of old age assistance which is financed jointly out of State and Federal funds.

"Now, Mrs. C has become seriously ill. The Henry County Department of Social Welfare has asked Des Moines County to assume responsibility for the hospital and medical costs on the normally sufficient ground that a person is incapable of changing his legal settlement while he is receiving public assistance and that, therefore, as Mrs. C was legally settled in Des Moines County when granted old age assistance which has been given continuously ever since, legal responsibility rests with Des Moines County.

"On the other hand, however, Des Moines County is in doubt in this particular case since Section 3828.088 of the code specifically states that a married woman not separated from her spouse takes his legal settlement which, in this instance, is Henry County.

"In the face of the specific language employed in Section 3828.088, is it possible for a man and wife living together to have different counties of legal settlement for poor relief purposes under any circumstances?"

Section 3828.088, 1939 Code of Iowa, reads in part as follows:

"*Settlement—how acquired.* A legal settlement in this state may be acquired as follows:
* * *

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

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. * * *"

We have previously held under the provisions of subsection 3 of section 3828.088 above quoted, that a person receiving old age assistance cannot acquire a new legal settlement because that person is being supported by public funds. It is obvious that if we followed the provisions of subsection 3 of the above quoted statute, the legal settlement of Mrs. C is in Des Moines County. It is equally obvious that if we followed the provisions of subsection 4 of the statute above quoted, the legal settlement of Mrs. C is that of her husband, viz, Henry County.

We are thus faced with the problem of determining which section of the statute should govern. We do not believe it was the intention of the legislature to provide that different members of the same family should have different legal settlements. Generally speaking, the husband is the head of the family, and we reach the conclusion that it is our opinion that the legal

settlement of Mrs. C should be considered to be the same as that of her husband, viz, Henry County.

MILITARY SERVICE: EXEMPTIONS: CADET AT U. S. MILITARY ACADEMY DURING WORLD WAR I: A cadet at the United States Military Academy during World War I would be considered a soldier in the War with Germany.

September 30, 1942. *State Tax Commission, Des Moines, Iowa:* You have requested an opinion on the following question:

Should a cadet at the United States Military Academy who entered the Academy prior to November of 1918 and resigned in 1919 receive soldier's exemption under the provisions of Section 6946 of the 1939 Code of Iowa?

Section 2 of the Act of Congress of June 3, 1916 Chapter 134 states the composition of the Regular Army of the United States. It provides as follows:

"Sec. 2. Composition of the Regular Army. The Regular Army of the United States, including the existing organization, shall consist of sixty-four regiments of Infantry, twenty-five regiments of Cavalry, * * *. The officers and enlisted men on the retired list; the additional officers; the professors, the Corps of Cadets, * * *."

We are also advised that a cadet at the Military Academy is classified in the same category as an officer under Articles of War 95.

In view of the foregoing, we are of the opinion that such a candidate was a soldier of the War with Germany and his severance from service was honorable with the meaning of the statute.

TAXATION: EXEMPT PROPERTY ACQUIRED BY INDIVIDUAL FROM RELIGIOUS ORGANIZATION: TAXABLE FOR FULL YEAR: Where tax exempt property is acquired by an individual from a religious corporation prior to levy of tax, such property is subject to tax for the full year in which the property is acquired. (70 Iowa 396; 207 Iowa 1238)

October 6, 1942. *Mr. John F. Burrows, Deputy County Attorney, Keokuk, Iowa:* We wish to acknowledge receipt of your letter of September 28, 1942, in which you ask for our opinion on the following matter:

"For a number of years past a residence property in this city was owned by a local church and occupied as a parsonage. During the years it was so used, it was classified as exempt property for taxation and no tax was imposed against it. In the month of August, 1941, this residence property was sold by the church to an individual and has been occupied by him as his home since that date.

"A question now arises with regard to taxes against the property for the year 1941. Would this property be subject to tax for the full year, or would it be exempt for the full year, or should the amount of taxes to be paid upon it be computed for the period of time during the year that it was not used for purposes coming within the statutory exemption?"

We find from a search of the Iowa law that our Supreme Court has never had occasion to consider the question presented in your letter. However, the Supreme Court of Iowa in the case of *First Congregational Church of Cedar Rapids v. Linn County*, 70 Iowa 396, held that property conveyed to a religious corporation in August, 1880, for the purpose of erecting thereon a house of worship was not exempt, in the hands of such corporation, from taxation for

the year 1880. In this case the Court specifically recognizes that there is no provision of law under which a tax may be apportioned. The Court stated that the state must lose the whole tax or the plaintiff must pay it. The Court reached the conclusion that in the exercise of its power to protect its revenue the state may enforce the tax for the whole year.

The Iowa Supreme Court held in the case of *Iowa Wesleyan College v. Knight,* 207 Iowa 1238, that the act of assessing land to the individual owner thereof does not deprive an educational institution of its statutory exemption from taxation when the title subsequently passed to the educational institution prior to the levy of any tax on the land. The Court in deciding this case did not mention the *First Congregational Church of Cedar Rapids v. Linn County,* 70 Iowa 396, where the Court relied on the fact that the assessment had been made against the individual owner before the property was sold to the religious corporation.

So we find that the last expression of the Iowa Supreme Court is to the effect that if the property is acquired before the tax is levied, by an organization in whose hands the property is not taxable, that no tax can be collected for the year in which the sale takes place.

The situation presented in your letter is just the converse of the *Iowa Wesleyan College* case and it is our opinion that where tax exempt property is acquired by an individual prior to the levy of the tax that property is subject to the tax for the full year in which the property is sold.

SCHOOLS AND SCHOOL DISTRICTS: TUITION: DUTY OF CREDITOR HIGH-SCHOOL DISTRICT TO FURNISH STATEMENT TO DEBTOR-DISTRICT: AMOUNT CHARGED: It is the duty of a creditor-high-school district to furnish, to a debtor district, a statement of pro rata cost per pupil, but such cost cannot exceed $9.00 per month per pupil without the consent of the debtor district. (4277, C., '39) (Ch. 159 (1), 49th G. A.)

October 12, 1942. *Mr. Woodford R. Byington, County Attorney, Malvern, Iowa:* This is in reply to your letter of October 5, 1942, in which you request an opinion upon the following facts, as affected by Code Section 4277.

A creditor-high-school district has failed to furnish a debtor non-high-school district a statement of the pro rata cost of maintaining pupils in the high school in question. You inquire whether or not it is mandatory upon the creditor-high-school district to furnish the non-high-school district a statement of this pro rata cost.

The final paragraph of Section 4277, provides:

"On or before February 15 and June 15 of each year the secretary of the creditor district shall deliver to the secretary of the debtor district an itemized statement of such tuition fees."

The statutory provision last quoted, in our opinion, makes it the duty of the creditor district to furnish to the debtor district an itemized statement of the pro rata cost of maintaining pupils in the high school of the creditor district.

You further inquire as to whether or not the creditor-high-school district may require the non-high-school district to pay up to $12.00 per pupil if the pro rata cost per pupil in the said creditor-high-school district equals said amount.

Our answer to this question is that the creditor district may not force the debtor district to pay tuition exceeding $9.00 per month per pupil, for the

reason that the amendatory provision contained in Chapter 159, Section 1, of the 49th General Assembly makes the payment of the additional amount per pupil discretionary with the Board of the debtor school district. It, of course, is the law that the creditor-high-school district need not accept any pupils from a non-high-school district unless it chooses to do so. This being true, it might be wise for the debtor district to make some effort to satisfy the creditor district in reference to the amount of tuition paid.

SCHOOLS AND SCHOOL DISTRICTS: GENERAL FUND ESTIMATES: LIMITATION: A school corporation, not maintaining a high-school district, cannot make an estimate for general fund higher than the actual cost of operating the schools within the district and the cost of educating high-school students outside the district. (4386, C., '39)

October 12, 1942. *Mr. Leroy H. Johnson, County Attorney, Red Oak, Iowa:* This is in answer to your letter of October 8, 1942, in which you submit the following question for an opinion:

A school corporation which does not maintain an approved High School, has within its territory 108 pupils of school age. Twenty (20) of these pupils attend High School in another district. You inquire as to whether or not the Board of this district in estimating the amount required for the General Fund under Code Section 4386 of the 1939 Code of Iowa, may levy a tax of $80.00 per pupil for all pupils, including those attending High School outside the district, and may in addition thereto levy up to $12.00 per month for each of the twenty (20) High School pupils.

Section 4386 of the 1939 Code of Iowa, in its first paragraph provides as follows:

The board of each school corporation shall at its regular meeting in July, or at a special meeting called between the time for the regular meeting and the twenty-fifth day of July, estimate the amount required for the general fund. The amount so estimated shall not exceed the following sum for each person of school age: * * *

Sub-section 3 of Section 4386, provides as follows:

3. In all other school corporations, eighty dollars; provided that corporations not maintaining an approved high school and which have tuition pupils attending high school in other districts may levy such an additional amount above the said eighty dollars as will be necessary to pay the cost of tuition for such pupils.

It is our opinion that in estimating the amount required for the General Fund this school corporation may estimate up to $80.00 per year for each person of school age residing within the district including those attending High School outside the district. If it is found that the cost of maintaining the schools within the district, and the cost of educating the High School students attending school outside the district exceeds $80.00 for each person of school age residing within the district, an amount in addition to the $80.00 may be levied not to exceed $12.00 per month for each of the High School pupils. In other words it is our opinion that the Board may not levy the sum of $80.00 for each person of school age residing within the district, and in addition thereto levy the sum of $12.00 per month for each High School student, unless the cost of operating the school,and the cost of maintaining the High School pupils in schools outside the district requires that amount to be levied. The school district may not under this section, as we interprete it, accumulate

a surplus by making these two levies higher than the actual cost of operating the schools within the district, and educating the High School students outside the district requires.

LEGAL SETTLEMENT: NOTICE TO DEPART SERVED ON PARENT: EFFECT ON MINOR CHILDREN: Notice to depart served on husband and wife is effective to prevent their minor children from obtaining legal settlement in the county until such minors reach the age of 21, at which time notice to depart should be served upon them, to prevent their obtaining legal settlement.

November 3, 1942. *Mr. Henry C. Meyer, County Attorney, Britt, Iowa:* This will acknowledge receipt of your request for an opinion on the following facts:

Where notice to depart is served on a husband, wife and family, will that notice be effective against any member of the family to prevent legal settlement after they grow up and arrive at maturity; and going further, would it be effective against a woman married to one of these minors who had grown up?

Section 3828.088, 1939 Code of Iowa, as amended, reads in part as follows:

Settlement—how acquired? A legal settlement in this state may be acquired as follows:

1. Any person continuously residing in any one county of this state for a period of two years without being warned to depart as provided in this chapter acquires a settlement in that county, but if such person has been warned to depart as provided in this chapter, then such settlement can only be acquired after such person has resided in any one county without being warned to depart as provided in this chapter for a continuous period of two years from and after such time as such persons shall have filed with the board of supervisors of such county an affidavit stating that such person is no longer a pauper and intends to acquire a settlement in that county.

* * *

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.

5. Legitimate minor children take the settlement of their father, if there be one, if not, then that of the mother.

* * *

It will be noted that the legislature does not use the word "person" and the word "children" interchangeably. It is our opinion that where the legislature has used the word "person" that it has intended to use such word as applying only to adults.

It is our further opinion that a notice to depart served upon the husband and wife is effective to prevent the acquisition of legal settlement in that county by their minor children so long as they remain minor children. However, it is our further opinion that as soon as a child reaches the age of twenty-one years, he legally becomes able to select his own county of legal settlement and that therefore, it is necessary to serve such minor child who has reached the age of twenty-one years with a new individual notice to depart if the county wishes to prevent such twenty-one-year old person from acquiring a legal settlement.

It follows that if such person is a man and married, his wife takes whatever legal settlement he might have.

TAXATION: POLL TAX: EXEMPTION TO IOWA STATE GUARD: Members of the Iowa State Guard are exempt from paying poll tax. (467.24, C., '39) (Ch. 74 (2), 49th G. A.)

November 10, 1942. *Mr. Edward C. Schroeder, County Attorney, Boone, Iowa:* We wish to acknowledge receipt of your recent letter in which you ask for our opinion as to whether or not the members of the Iowa State Guard are exempt from paying poll tax.

The Title of the Act, which authorizes the establishment of the Iowa State Guard, reads as follows:

An Act to amend the military code, chapter twenty-eight and one-tenth (28.1), Code, 1939, by providing for the organization, administration, employment, and pay of the Iowa State Guard during the period the National Guard of Iowa is in federal service. (Chapter 74, Acts of the 49th General Assembly.)

Section 2 of Chapter 74, Acts of the 49th General Assembly provides as follows:

Sec. 2. The laws of the State of Iowa pertaining to the administration and employment of the National Guard of the State of Iowa shall be applicable to the Iowa State Guard. The term of service, enlistment, commission, and condition of discharge in the Iowa State Guard shall be as prescribed by the Governor.

It will be noted from the above that Chapter 74 is an amendment to Chapter 28.1 of the 1939 Code of Iowa, which is the State's Military Code. It is our opinion that it was the intention of the Legislature to authorize the establishment of the Iowa State Guard to take the place of the Iowa National Guard when the latter was called into active federal service and that the members of the Iowa State Guard were to be governed by the same laws as were applicable to the Iowa National Guard. It is our position that the members of the Iowa State Guard are entitled to all of the rights, privileges and subject to the duties that are by law applicable to the Iowa National Guard.

Among other things, Section 467.24 of the 1939 Code of Iowa provides that "Every officer and soldier of the national guard shall be exempt from * * * the payment of poll tax * * *", and it is our opinion that this exemption is applicable to members of the Iowa State Guard.

TAXATION: DRAINAGE MAINTENANCE ASSESSMENT: LEVY BETWEEN ISSUANCE OF TAX CERTIFICATE AND TAX DEED: NO LIEN: The holder of a tax sale certificate is not compelled to pay a drainage maintenance tax levied against the land between the time of taking the tax sale certificate and the issuance of the tax deed.

November 18, 1942. *Mr. Robert N. Johnson Jr., County Attorney, Fort Madison, Iowa:* We wish to acknowledge receipt of your recent letter in which you ask for our opinion on the following matter:

"We have a question that is arising quite frequently. The Treasurer now has two cases upon which he must decide. The question is that where land located in the Green Bay District is sold at tax sale the purchaser of the certificate has the certificate in his possession but has not yet acquired a tax deed. Is he compelled to pay the taxes assessed against the land between

the time of the receiving of the certificate and the taking of the deed? A recent case is that of Reconstruction Finance vs. Deihl, 229 Iowa 1276, and Shipman vs. Bucher, 296 N. W. 394 and 396. These cases hold that the deed extinguishes the lien for special drainage taxes previously levied against the land. Our question is not exactly the same in that the special assessments in question are maintenance assessments levied each year."

From an examination of the Iowa law it is our opinion that the holder of the tax certificate is not compelled to pay the drainage taxes assessed against the land between the time of receiving the tax sale certificate and the taking of the tax deed. It is our further opinion that the taking of the tax deed extinguishes any lien arising in connection with the assessment of the drainage taxes levied after the tax sale certificate is issued and before the taking of the tax deed.

In the case of *Harrington vs. Valley Savings Bank*, 119 Iowa 312, certain lots in the City of Des Moines were sold in December, 1896, for the ordinary taxes of 1895, and in November, 1900, a tax deed was made to the plaintiff. In April 1895, street improvements were regularly ordered in front of these lots which were completed later and the cost thereof assessed upon the lots in September, 1897, for which assessment certificates were issued and which were held by the defendant. In this case, which was an injunction action to enjoin the enforcement of this special assessment against the lots, the Court held that a purchaser of land sold for ordinary taxes takes title free from lien of special assessment which is not attached at the time of the sale. Our Supreme Court in the case of *Montgomery vs. City of Des Moines*, 190 Iowa 705, while expressing some doubt as to the wisdom of the opinion in the above mentioned case reached the same conclusion that a tax deed issued on the sale for ordinary taxes displaces the lien of the special assessment which attached after the sale and before the issuance of the tax deed. In this connection see also *Means vs. Incorporated City of Boone*, 214 Iowa 948.

In the case of *Fergason v. Aitken*, 220 Iowa 1154, the plaintiff brought an action as a purchaser of the tax deed to quiet his title against any lien of subsequent deferred installments of the drainage tax. The property in question was on December 1, 1928, sold for the delinquent general taxes levied against this property for the year 1927. The assessment for the drainage tax was levied in 1921 but by action of the Board of Supervisors the tax was apportioned for payment in future deferred equal annual installments. The deferred installments did not become due and payable until 1929 and annually thereafter until paid. It was the appellant's contention that the lien of the deferred future installments of the drainage tax was of equal priority as the general taxes for which the property was sold in 1928.

In determining this question the Court considered the cases dealing with the priority of special assessments for paving and sewer improvements and assessments made for drainage purposes. The Court cited the case of *Charles City vs. Ramsay*, 199 Iowa 722, where the Court held that the lien given for a drainage tax and that given for a special assessment for street improvements "were of force and effect the same as though worded identically." The Court in the *Fergason* case continued by saying that if these liens are of the same force and effect "as though worded identically" it necessarily follows that they are of equal priority. And quoting directly from the decision in the *Fergason* case we find the following statement:

"It is the law of this state that the lien of special assessments for unpaid future installments is cut off by the sale of the property for general taxes. *Montgomery vs. City of Des Moines*, 190 Iowa 705; *Charles City vs. Ramsay*, 199 Iowa 722 (and other Iowa cases).

"It necessarily follows that if the lien of a drainage tax has no superiority over lien of a special assessment, that a sale of the property for delinquent general taxes also cuts off the lien of future unpaid installments of the drainage tax."

From the statements of the Court in the *Fergason* case and the cases of *Harrington vs. Valley Savings Bank*, and *Means vs. Incorporated City of Boone*, it is our opinion that the issuance of the tax deed arising from the sale of land for the general taxes cuts off the lien of a drainage tax that is levied after the tax sale and before the issuance of the tax deed.

We appreciate that none of the above mentioned cases deal with the drainage maintenance tax but we believe that the statement in the Fergason case as to the status of the drainage tax in relation to the status of the special assessment tax is authority for our position that the drainage tax in the instant case rises to no higher plane than the special assessment tax considered in the *Means* case. As it will be noted from reading the *Montgomery* case the position of our Court as to the status of the special assessment tax lien is not free from doubt. However, we feel that the cases herein cited must be interpreted as controlling the effect of the lien of a drainage maintenance tax until the Supreme Court sees fit to distinguish this tax from the general drainage tax and the special assessment tax.

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