State of Iowa
1956

THIRTY-FIRST BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1956

DAYTON COUNTRYMAN
Attorney General

Published by
THE STATE OF IOWA
Des Moines

PERSONNEL

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ATTORNEY GENERALS OF IOWA

1853-1956

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

REPORT OF THE ATTORNEY GENERAL

December 31, 1956

HONORABLE LEO A. HOEGH

Governor of Iowa

Dear Governor:

In compliance with Section 17.6 of the 1954 Code of Iowa, Iowa, I herewith submit the biennial report of the Attorney General covering the period beginning January 1, 1954, and ending December 31, 1956.

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

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

The duties of the department also require preparation and appearance in all appeals to the Supreme Court in the criminal cases. During the biennium, 99 criminal cases were processed.

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

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

Respectfully submitted,

DAYTON COUNTRYMAN

Attorney General of Iowa

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OFFICIAL OPINIONS

OF THE

ATTORNEY GENERAL

FOR

BIENNIAL PERIOD

1955-1956

January 7, 1955

SHERIFF: VACANCY IN OFFICE: EMMET COUNTY: EMLET TWITO RESIGNATION: A vacancy in the office existed on Jan. 3, 1955; the appointment of J. P. Betty as sheriff was a valid appointment; Walter W. Wittneben had no right to the office subsequent to Jan. 2, 1955.

Mr. Francis Fitzgibbons, County Attorney, Estherville, Iowa: You have requested an opinion of this office as follows:

"At the general election held in November, 1952, Emlet Twito was elected Sheriff of Emmet County for the years 1953 and 1954. At the general election held on November 3, 1954, the same Emlet Twito was elected Sheriff of Emmet County for the years 1955 and 1956.

"On November 8, 1954, a petition was filed in the District Court of Iowa in and for Emmet County, entitled State of Iowa, ex rel Leo A. Hoegh, Attorney General of Iowa, and Daniel Sanderson, Emmet County Attorney, Plaintiff, vs. Emlet Twito, Defendant, which petition asked that the said Emlet Twito be removed from the office of Sheriff. On November 8, 1954, by order of Honorable G. W. Stillman, Judge, Fourteenth Judicial District, State of Iowa, Defendant Emlet Twito was suspended from the office of Sheriff of Emmet County, Iowa, until such date as the suspension may be revoked.

"On November 9, 1954, the Board of Supervisors of Emmet County appointed Walter W. Wittneben as temporary Sheriff and the minutes of the Board of Supervisors' meeting regarding this appointment states as follows:

> " 'It was moved by Camden that Walter W. Wittneben be appointed temporary Sheriff during the suspension of Emlet Twito from that office under Sec. 66.19 of the 1954 Code of Iowa. Camden seconded the motion. Vote on motion was, AYES, Camden, Conrad, Oleson and Peterson, NAYS, none.
>
> "Absent, Finn. Book 11 of the Board Proceedings, Page 82.

"On or about December 3, 1954, the County Auditor of Emmet County and the Board of Supervisors received a written resignation from said Emlet Twito in which he stated that he resigned from the office of Sheriff for the balance of the years 1953 and 1954. On December 3, 1954, the Board of Supervisors of Emmet County appointed Walter W. Wittneben as Sheriff for the balance of 1953-54 term and the minutes of the Board of Supervisors' meeting regarding this appointment are as follows:

> " 'Board of Supervisors received the resignation of Emlet Twito for the balance of the present term. It was moved by Camden, seconded by Conrad, that Walter W. Wittneben be appointed Sheriff on December 3, 1954, for the balance of 1953-54 term. All voted AYE.
>
> "Book 11, Board Proceedings, Page 83.
>
> "On December 31, 1954, the said Emlet Twito filed the following statement with the Board of Supervisors, who were then in session: 'To the Honorable Board of Supervisors. I am herewith advising I do not intend to qualify for the office of Sheriff of Emmet County, for the term commencing January 1, 1955. Signed — Emlet Twito.'

"The above statement was filed with the Board of Supervisors after the County Auditor's office closed. On January 3, 1955, said statement was filed in the office of the County Auditor.

"On January 3, 1955, the Board of Supervisors of Emmet County, Iowa, appointed J. P. Betty as Sheriff of Emmet County, Iowa, for the period commencing January 3, 1955 to the November 1956 General Election or until his successor qualifies.

"On January 3, 1954, Walter Wittneben filed his bond and attempted to qualify for the office of Sheriff but the Board of Supervisors refused to accept his bond.

"Would your opinion please advise as follows:

"1. Was there a vacancy in the office of Sheriff on January 3, 1955?

"2. Is the appointment of J. P. Betty as Sheriff valid?

"3. Did Walter W. Wittneben as incumbent have any rights to the office of Sheriff for the years 1955 and 1956?"

Section 66.19, Code of Iowa 1954, the provisions under which Mr. Walter W. Wittneben was appointed as a temporary officer, states:

"Upon such suspension, the board or person authorized to fill a vacancy in the office shall temporarily fill the office by appointment. In case of a suspension of a clerk or sheriff, the District Court or Judge thereof may supply such place by appointment until a temporary appointment shall be made. Such orders of suspension and temporary appointment of county and township officers shall be certified to the county auditor, and be by him entered in the election book; those of city and town officers, certified to the clerk and entered upon the records; in case of other officers, to the personal body making the original appointment."

It is to be noted that the statute does not refer to a "vacancy" in the sense of a permanent "vacancy" but rather specifies an appointment to "temporarily fill the office" and to a "temporary appointment." Section 6 of Article XI of the Constitution of the State of Iowa provides:

"In all cases of elections to fill vacancies in office occurring before the expiration of a full term, the person so elected shall hold for the residue of the unexpired term; and all persons appointed to fill vacancies in office, shall hold until the next general election, and until their successors are elected and qualified."

This provision is in two parts. Part 1 provides for a situation where the vacancy is filled by a special election. In such a situation the person elected at the special election holds office for the residue of the term. The second part pertains to those vacancies filled by appointment. It is not the sense of the provision that a vacancy filled by appointment is of greater duration than a vacancy filled by a special election, but on the contrary provides for a shorter period of office. Clearly, the reason for the distinction is that in the first situation the electorate has spoken in a special election. In the second situation, that is, that of appointment, it is intended that the appointee shall hold only until the electorate has had an opportunity to make a selection.

The latter situation is illustrated by recent events with relation to the office of Attorney General of Iowa. A vacancy resulted from the appoint-

ment of Attorney General Robert L. Larson to the Supreme Court of Iowa. Mr. Leo A. Hoegh was appointed by the Governor of Iowa to fill the vacancy. Such appointment was not for the entire unexpired term, but rather only until the electorate would have an opportunity to make a selection without the calling of a special election. The second provision is obviously intended to provide a shorter term than the full unexpired term in which a vacancy exists.

It is also to be observed that while the said Section 6 of Article XI of the State Constitution provides for the filling of "vacancies" it leaves to the legislature when "vacancies" exist. This the legislature has done by enacting the provisions which appear as Section 69.2 of the Code:

"69.2 What constitutes vacancy. Every civil office shall be vacant upon the happening of either of the following events:

"4. The resignation or death of the incumbent or of the officer-elect before qualifying."

If one appointed to fill a temporary vacancy were deemed an "incumbent" under the foregoing provision relating to the resignation or death of the officer-elect would be rendered meaningless in practically all situations. If one temporarily filling the office were deemed an incumbent under this particular statute it is hardly conceivable that there would be any occasion for application of the second provision. It would apply only in a situation where a vacancy existed which had not been filled and one who had been regularly elected to the office died before qualifying. The Supreme Court of Iowa held in State vs. Brown, 144 Iowa 739, that one temporarily appointed to fill a vacancy was not an "incumbent" and did not hold over as a new vacancy occurred after the expiration of the term for which the temporary appointee was appointed.

In that case, at the regular election in the year 1908 the newly qualified and acting clerk of the District Court for Emmet County, Iowa, was re-elected for the ensuing term of two years commencing January 1, 1909. On November 18, 1908, the said clerk died, and on November 24, 1908, Hon. A. D. Bailie, Judge of the District Court for that district, acting under authority conferred by statute, appointed one C. M. Brown to act as clerk until the vacancy created by the death should be filled in the manner provided by law. On December 23, 1908, the Board of Supervisors of Emmet County appointed one L. Heffelfinger to fill the vacancy in the old term ending with the year 1908, and also by separate resolution appointed him to fill the vacancy for the new term beginning with the year 1909.

On January 5, 1909, the Board of Supervisors again passed a resolution appointing Mr. Heffelfinger to fill the vacancy for the new term. Mr. C. M. Brown, who had been appointed by the Court, refused to surrender the office of clerk. An action was brought in the nature of quo warranto proceedings against Mr. C. M. Brown. Among other things it was contended by Mr. Brown that in the event it was held in the action that his appointment by the court was temporary only, that in any event the

appointment was good until the close of the term ending with the year 1908, and that inasmuch as Mr. Heffelfinger had failed to qualify in time under his appointment by the Board of Supervisors, that he, Mr. Brown, was entitled to hold over for the ensuing term.

The Supreme Court of Iowa said:

"* * * While performing the duties of the office, appellant was not an incumbent thereof, and such being the case there is neither statute nor precedent extending his tenure of the position beyond the time when the 'vacancy is filled according to law.' We are aware of no statute making it necessary that the Board of Supervisors shall fill the vacancy within any specified length of time, or requiring that its appointee shall qualify on or before any specific date. It is therefore immaterial to the case before us whether relator (Heffelfinger) qualified prior to January 5, 1909, nor is it material as against the appellant (Brown) that he did not qualify or requalify as an alleged hold over prior to the date mentioned. As we have already seen appellant did not, and could not, acquire any right as an alleged hold over simply because the regular term of the office expired with the year 1908, and no other person had qualified for the new term. He was appointed to act as clerk only until such time as the vacancy should be lawfully filled, and when it was filled, whether during the year 1908 or the year 1909, it was his duty to turn over the office to the appointee."

Superficially, it might appear that State vs. Carvey, 175 Iowa 344, 154 N. W. 931, is applicable to the question presented. In that case, one Jesse Lyon, a member of the Board of Supervisors of Buchanan County for the term ending January 2, 1915, was re-elected at the general election held in November, 1914. However, Mr. Lyon died on or about December 1, 1914. On December 16, 1914, Mr. D. M. Freeman, was appointed to fill the vacancy resulting from the death of Mr. Lyon, in accordance with statutes pertinent to such vacancy. Mr. Freeman served until and including January 1, 1915. On January 2, 1915, the board responsible for such appointments, appointed Mr. D. C. Carvey, to fill the vacancy caused by the death of Mr. Lyon. In an action brought to determine whether Mr. Freeman or Mr. Carvey was entitled to fill the vacancy, it was held by the Supreme Court of Iowa that under the statute as it then existed one filling a vacancy under such circumstances as were involved in that case, was entitled to fill the new vacancy as a "hold-over" officer. It is pertinent to note, however, that subsequent to the decision the statute was significantly amended, which fact was emphasized by the Supreme Court of Iowa in State vs. Best, 225 Iowa 338, 280 N. W. 551. Before examining the case of State vs. Best, supra, it should be recognized that even though the statute had not been amended and even though the case of State vs. Best, supra, had not arisen, under the situation presented by your request for opinion, the case of State vs. Brown, supra, would be controlling as the appointee under the circumstances of appointment is expressly declared by statute to be a temporary appointee. State vs. Best, supra, concludes the question without reference to the temporary quality of the appointment. In that case one Fred W. Jones was elected to the office of county supervisor for the first district of Dickinson County, Iowa, for a term of three years beginning in January, 1938. On the 13th day of June, 1937, Mr. Jones died without having qualified for the office.

Mr. Charles A. Best, the incumbent in the office, filed a bond claiming the right to said office as a hold-over incumbent. On the forenoon of January 3rd, 1938, the board authorized by statute to fill vacancies in such office, appointed one B. K. Bradfield to fill the vacancy for the term beginning in January. Bradfield qualified by filing bond and oath and Best, the incumbent, resisted the seating of Bradfield. The action resulted.

It was contended by the incumbent that there was no vacancy under the holding of the Supreme Court of Iowa in the case of State vs. Carney, supra. In holding that a vacancy existed to be filled by appointment the Supreme Court of Iowa pointed out the error of the incumbent's contention and stated:

"However, after the decision in the cited case was filed, the 42nd General Assembly, chapter 26, laws, 1927, amended section 1146 of the Code, defining what constitutes vacancy, by adding to par. 4 of said section the words 'or of the officer elect before qualifying, so that the section, as amended, now reads:

> "'1146. What constitutes vacancy. Every civil office shall be vacant upon the happening of either of the following events: * * *
>
> "'4. The resignation or death of the incumbent, or of the officer elect before quailfying. * * *'

"This was certainly intended to cover just such a situation as we find here. There was no vacancy in the term Mr. Best was serving, but, by this statutory provision, a vacancy in the term for which Jones was elected was created by the death of Jones 'the officer elect' before qualifying."

Analysis of the facts submitted by you establishes that the appointment of Mr. Walter Wittneben to serve in the stead of Mr. Emlet Twito was a temporary appointment to continue during the disability of Mr. Twito. That disability continued, first by virtue of suspension from office, and later by resignation for the balance of the term until the end of the term Mr. Twito was serving at the time the disability commenced. The disability terminated on the last day of such term. Thereafter the officer elect by failing to qualify left a vacancy for the term for which he had been elected, which vacancy was properly filled by the action of the Board of Supervisors of Emmet County, Iowa, by their appointment of Mr. J. P. Betty as Sheriff of Emmet County, Iowa, on January 3, 1955.

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

1. A vacancy in the office of Sheriff of Emmet County, Iowa, existed on January 3, 1955.

2. The appointment of J. P. Betty as Sheriff was a valid appointment.

3. Mr. Walter W. Wittneben had no right to the office of Sheriff of Emmet County, Iowa, subsequent to 12:00 p. m. January 2, 1955.

4. On January 3, 1955, prior to the action of the Board of Supervisors of Emmet County appointing Mr. J. P. Betty as Sheriff, Mr. Walter W. Wittneben was de facto Sheriff of Emmet County but not Sheriff de Jure.

January 17, 1955

PETITION: CONSTRUCTION OF ROADS: Where a petition for the improvement of roads abutting secondary roads under Chapter 311 is filed, the Board of Supervisors is required to construct the project and build it to permanent grade and, if necessary, to acquire by condemnation a right-of-way in the construction of the project.

Mr. William R. Ruther, Des Moines County Attorney: In your letter of Jan. 5, 1955, you inquire as follows: "Under section 311.7 of the 1954 Code of Iowa, in the situation where seventy-five percent of the landowners adjacent to or abutting upon any secondary roads, petition the Board of Supervisors for the improving of or graveling of said roads, upon the filing of such petition is the Board of Supervisors then required to procure the additional right-of-way necessary to comply with section 311.22 of the 1954 Code of Iowa either by purchase or condemnation, or is it the duty of the petitioners to see that such right-of-way is acquired. In other words, upon the filing of such petition is it the statutory duty of the County Board of Supervisors then to proceed to obtain the necessary right-of-way to build such road to permanent grade?"

An examination of the provisions of Chapter 311, coupled with the provisions of Chapter 306, discloses that secondary roads as defined in 306.2 sub-section 3 is — "The term 'Secondary Roads' or 'Secondary Road System' shall include all public highways outside of cities and towns, except primary roads and state park and institutional roads" and goes on to define local secondary roads in sub-division 5 thereof as follows: "Local secondary roads" or "local secondary road system" shall include all those secondary roads which are not now or may not hereafter be included in the farm-to-market road system."

With respect to purchase or condemnation of right-of-way, section 306.13 provides that the Commission or Board having jurisdiction or control of such roads shall have authority to purchase or institute and maintain proceedings for the condemnation of a necessary right-of-way therefor, and it further provides that "in the condemnation of right-of-way for secondary roads, the Board of Supervisors may proceed as provided in sections 306.22 to 306.31 both inclusive."

Under the provisions of section 311.7, which relates to the improvement of secondary roads by private funds, upon the compliance with certain requirements and the filing of a petition with the Board of Supervisors, the section states:

"The Board of Supervisors *shall* proceed during the ensuing year with the construction and completion of said project under the same procedure as is prescribed generally for the improvement of secondary roads by assessment."

In a related provision for the assessment of secondary road assessment districts, section 311.22 provides "Any such secondary road *shall* be built to permanent grade and drained in a manner approved by the county engineer before being surfaced as provided in this chapter." It would appear from the examination of the two sections in question, that there

is no discretion in the Board of Supervisors as to whether or not they desire to go ahead with the construction and completion of a road improvement project when requested by a group of land-owners who properly petition therefor and provides the required proportionate part of funds needed for the project. Section 311.22 also makes it mandatory that the secondary road be built to permanent grade before being surfaced.

Based upon an examination and interpretation of the above sections referred to, upon the filing of a petition for the improvement of a secondary road under the provisions of section 311.7, the Board of Supervisors is required to construct and complete said project and must build it to a permanent grade and drain it before surfacing the secondary road, and since the Board of Supervisors has the power to condemn for the right-of-way in connection with said construction and the completion of the project, if the necessary right-of-way is not obtained by the petitioning land-owners, the Board of Supervisors must procure the necessary right-of-way to build to a permanent grade, drain, construct and complete the project.

January 26, 1955

FARM HOME LANES: Farm home lanes cannot be elevated to the station of public roads or highways. Therefore, they cannot qualify for the benefits of public funds for improvements. Expenditures of public funds for grading such lanes would be an illegal expenditure.

Mr. R. E. Merrill, Secondary Road Engineer, Iowa State Highway Commission: You present the following question submitted to you by the Keokuk County Engineer:

"The specific information I am searching for is a detailed description of the proper and legal procedure to establish farm home lanes as new public highways in the county secondary local road system, (1) — When petitioned for by the farmer or farmers involved and they deposit money for one-half the surfacing, and (2) — When the lane is placed on the county construction program by the township trustees. In both cases, the lane is to be graded, drained, bridged, and surfaced in the county secondary local road construction program."

In order to answer the question presented in your letter, it is necessary to first examine the definitions for the words "road" and "highway." In Volume 37A of Words and Phrases at page 498, the following definitions are found: "The word 'road' is ordinarily applied to a *free public way* in the county, *Parsons vs. Wright* (27 SE 2d 534, 536, 223 North Carolina 520); a 'road' or 'highway' is nothing more than a strip of ground set aside, improved and *dedicated to the public* for use as a passageway; *State ex rel Wabash vs. Public Service Commission of Missouri* (100 SW 2d 522, 525, 340 Mo. 225-109 ALR 754)"

The Iowa Supreme Court in referring to the definition and use for "highways" said in *Solberg vs. Davenport* (211 Ia. 612, 232 NW 477): "The highways *belong to the public* for ordinary use and general traffic

and they are free and common to all." The Code of Iowa, 1954, Section 4.1 sub 5, defines "highway" or "road" as follows: "The words 'highway' and 'road' include public bridges and may be held equivalent to 'county way,' 'county road,' 'common road' and 'state road.' " All of these definitions point out to the reader that the nature of a highway or road necessarily carries with the definition, a dedication of its use to the public.

The law of the State of Iowa relating to the collection of taxes and the expenditure of funds from the taxes collected for road purposes, refers in all cases to "highways," "primary roads," "secondary roads," "county trunk roads," and "county roads." The expenditure of any public fund for the improvement of any roads other than those specifically enumerated in the statute, would be in violation of the law.

Your reference to the establishment of a road by petition when a deposit of one-half the surfacing cost is made, evidently refers to Section 311.7 and you will note that that section is specifically made applicable to lands *adjacent to or abutting upon any secondary road or roads.*"

"Secondary Roads" have been defined in Section 306.2 (3) as follows: "The term 'secondary roads' or 'secondary road system' shall include all *public highways,* outside of cities and towns, except primary roads and state park and institutional roads."

Insofar as surfacing is concerned, your attention is invited to Section 311.22 which states "*Any such secondary road* shall be built to permanent grade and drained in a manner approved by the county engineer before being surfaced, as provided in this chapter." Your attention is also invited to the first paragraph of Section 309.39 which states in part "No traveled roadway shall be less than 22 feet from shoulder to shoulder."

It would appear from an examination of the sections above referred to, that under the particular circumstances set out in your letter, the farm home lanes to which you refer, cannot be elevated to the status of *public roads* or *public highways,* and thus cannot qualify to benefit from the proceeds of public funds for improvement; and as pointed out above, the expenditure of public funds for grading farm home lanes would be an illegal expenditure of public funds.

In the light of the conclusions set out above, it has been found unnecessary to refer specifically to your numbered questions 1 and 2.

January 31, 1955

REFUND: OVERPAYMENT OF INCOME TAX: The Tax Commission may provide by its own regulations for refund of income or corporation tax overpayments or for credits therefore, even though the taxpayer has filed no claim for refund or credit, provided, however, that regulations would not permit a refund or credit when overpayment is discovered more than five years after tax payment became due or one year after the payment is made, whichever time is later.

State Tax Commission of Iowa: We are in receipt of your request for an opinion whether the State Tax Commission may refund overpayments of income tax, in accordance with Code Section 422.25 (4), without a claim therefor being filed by the taxpayer in accordance with the provisions of Code Section 422.66.

Section 422.25 requires the Commission to examine an income tax return within two years after its filing, and to determine the correct amount of tax, "and the amount so determined by the Commission shall be the tax." If the Commission finds the taxpayer underpaid what was due, it shall give the taxpayer notice by registered letter and the excess due shall be paid "within ten days" after such notice was given. If the Commission finds that the taxpayer overpaid what was due, subsection 4 states that:

"The excess shall be refunded with interest after sixty days from the date of payment at six percent per annum under the provisions of such regulations as may be prescribed by the Commission."

Section 422.25 is made applicable to the corporation tax by Section 422.39.

Standing alone, Section 422.25 (4) would appear to authorize the Commission to adopt rules regulating refunds of overpayments even though no claims therefor had been filed by the taxpayer. But this section does not stand alone. Section 422.66 deals with refunds or credits because of tax overpayment, and provides:

"422.66. Correction of errors.

If it shall appear that, as a result of mistake, an amount of tax, penalty, or interest has been paid which was not due under the provisions of this chapter, then such amount shall be credited against any tax due, or to become due, under this chapter from the person who made the erroneous payment, or such amount shall be refunded to such person by the Commission. No claim for refund or credit that has not been filed with the commission within five years after the tax payment upon which a refund or credit is claimed became due, or one year after such tax payment was made, whichever time is the later, shall be allowed by the Commission."

In addition, Section 422.28 provides that a taxpayer may appeal to the Commission for revision of the income tax, interest, or penalties thereon assessed against him within ninety (90) days from the date of notice of the assessment. The Commission is to grant a hearing, to notify the taxpayer of its findings, and to "refund to the taxpayer the amount, if any, paid in excess of the tax, interest, and/or penalties found by it to be due with interest after sixty days from the date of payment by the taxpayer at six percent per annum."

The Income, Corporation, and Sales Tax Chapter of the Code was originally adopted as one "package", as *Chapter 82, Acts of Extra Session, 45th General Assembly.* Thus sections 422.25, 422.28, and 422.66 were part of one bill when adopted, with one exception, the second sentence of Section 422.66. This second sentence of Section 422.66, containing the only reference in the Chapter to claims for refunds or

credits, was added in 1941 (Acts of the 49th General Assembly, Chap. 236, Sec. 1) and further amended in 1945 (Acts of the 51st General Assembly, Chap. 188, Sec. 1). The 1941 addition related only to claims for refund; the 1945 amendment added claims for credit against other taxes; and their purpose is stated as "providing for a limitation of time during which claims for refund may be allowed by the State Tax Commission."

In its original form, then, the Act contained no reference to filing of claims for refund or credit, and these were the alternatives available: (1) The taxpayer could appeal to the Commission for hearing, and if on such hearing it was found that he overpaid, he was to be refunded his overpayment (apparently without further claim on his part) (Sections 422.28, 422.41); (2) If the Commission's audit disclosed an overpayment it was to be refunded under such regulations as the Commission might prescribe (Sections 422.25, 422.39); (3) If because of mistake some amount of tax, penalty or interest was paid that was not due, it was to be credited against any tax due or to become due under the chapter, or refunded by the Commission (Section 422.66). The first two alternatives were available both to excess income and corporation tax payments, the last to sales tax overpayments as well and in addition permitting an excess of one to be credited against amounts due for the others. At this point a *claim* for refund or credit of income tax was not required by statute, although it could be by Commission regulation.

What was the effect of adding in 1939 the second sentence of Section 422.66? To hold that it repealed the power of the Commission to make refunds under such regulations as it saw fit to adopt would give the change the effect of a repeal by implication. Repeals by implication are not favored by the Iowa court. Read literally the sentence does not say: Refunds or credits may be given only where claims therefor are filed, and then only if filed within the appropriate period. Instead, it says, when claims are filed, they shall be allowed only if filed within the appropriate period.

Considering the foregoing statutory history, and the language of the three sections quoted above, it is our opinion that the Commission may provide by its own regulations for refunds of income or corporation tax overpayments or for credits therefor against other taxes due or to become due, even though the taxpayer has filed no claim for refund or credit. In view of the policy expressed in the last sentence of Section 422.66, Commission regulations should not permit allowance of refund or credit when the overpayment is discovered more than five years after the tax payment which was excessive became due, or one year after it was made, whichever time is the later.

February 1, 1955

TAX RETURNS: The two-year limitation provided by Section 422.25 Code of 1954, gives the Tax Commission power within that period to

determine the correctness of a tax for a period of two years where the return correctly reports the number of dependents and individual exemptions.

Mr. E. H. Fairburn, Director, Income Tax Division, State Tax Commission: This is in response to your recent inquiry (1) as to the extent to which the examination mentioned in Section 422.25 (1) is limited, and (2) as to the scope of the Commission's authority in determining the correct amount of the tax as provided in Section 422.25 (2). As you noted, these two subsections have been considered in a staff opinion dated March 4, 1954, which answered another inquiry from the Tax Commission. The two matters you now raise were not involved in the previous inquiry, and it is our understanding that, as there are some differences of opinion as to the effect of our March 4th opinion upon the matters now in question, you desire clarification and amplification of that opinion.

Section 422.25 (1) requires the commission, within two years after a return is filed, to "examine it and determine the correct amount of tax." Section 422.25 (2) permits the commission to determine the correct amount of tax at any time within five years after the return was due, "if the commission discovers from the examination of the return or otherwise that the income of the taxpayer, or any portion thereof, has not been listed in the return, or that no return was filed when one was due."

A pertinent paragraph from our March 4th opinion was:

"The provisions of the foregoing paragraph are quite clear and it specifically provides that the commission shall examine the return and determine the correct amount of the tax from what is shown by that return. The Legislature evidently contemplated an audit of the facts and figures disclosed by the return within two (2) years after the return was filed. We are of the opinion that *after two (2) years* the commission could not determine the correct amount of the tax based upon the facts, figures and information disclosed by the return and if it were not so determined within such period of time, the authority of the commission to determine the correct tax would be barred."

This paragraph indicates, and it is our opinion, that the two-year limitation in Section 422.25 (1) applies only to mistakes disclosed by examination of the return itself, and does in no way limit the power of the commission to examine the correctness of amounts shown on the return that are transcribed from sources such as the taxpaper's books. For example, assume an employer who has reported on his return gross income of $100,000, and expenses other than salary of $60,000. If on this return salary expense is shown as $20,000, and net income as $19,000, there is a mistake appearing on the face of the return, and the two-year limitation is applicable. However, if his return showed salary expense as $25,000 (and net income of $15,000), but a subsequent audit of his records discloses that proper salary expense was only $17,500, this error is not apparent on the face of the return, and the two-year limitation does not apply. In the second case, a portion of the taxpayer's net income, or if he is an individual a portion of his gross income as defined

in Section 422.8 (1), has not been listed in the return. Under Section 422.25 (2), therefore, the Commission would have five years from the time the return was due to ascertain whether the amount reported as salary expense was correct.

To summarize, the power of the Commission to determine correctness of a tax is limited to two years where the return correctly reports the number of dependents and individual exemptions to which the taxpayer is entitled although a mistake is made in computing the credit therefor, or where the amounts of income or expense items are correctly reported but computations on the return are made incorrectly, or where the taxpayer has reported items of income or deductions therefrom which should have been omitted but the facts with regard thereto are sufficiently stated on the return so that the Commission is in a position to exclude or disallow such items.

Where the taxpayer on his return has incorrectly stated the number of dependents or exemptions, or has incorrectly reported items of income and expense, or has reported items of income or deductions which were improper, but the incorrectness and impropriety is not apparent on the face of the return, the five-year limitation is applicable.

February 1, 1955

STATE APPEAL BOARD:

1. **The timely character of the report of the Appeal Board was not lost because it was not filed within the prescribed time of Section 25.3, Code of 1954.**

2. **Sections 8.13 and 8.14, Code of 1954, are not applicable to allowances of claims by the legislature.**

3. **Section 25.8 does not prohibit the Claims Committee and the 56th General Assembly from considering and allowing claims filed subsequent to the second day after the convening of the 56th General Assembly which claims have not been processed in accordance with Sections 25.1 and 25.2.**

Senator E. J. McManus, State Senate of Iowa: This will acknowledge your letter of the 28th inst., in which you have submitted the following:

"The 56th General Assembly convened on Monday, January 10, 1955. On Thursday, January 13, 1955, the State Appeal Board filed with the secretary of the Senate a communication containing claims against the State of Iowa of a general nature numbered 1 to 118, inclusive, and Highway Commission Claims numbered H-1-55 to H-80-55; H-85-55 to H-93-55, inclusive, and H-101-55.

"As a member of the Senate Claims Committee of the 56th General Assembly, I hereby respectfully request your opinion on the following questions:

"No. 1. Section 25.3 of the Code of Iowa, 1954, provides in part "on the second day after the convening of each regular session of the General Assembly, the State Appeal Board shall file with the clerk of the House of Representatives and the secretary of the Senate a copy of the report made to it by the Special Assistant Attorney General for Claims . . ."

Was the report by the State Appeal Board filed on January 13, 1955, timely? If your answer to this question is in the negative, does the failure to comply with this provision of the law prevent the Senate Claims Committee of the 56th General Assembly from taking action on the claims contained in said report?

"No. 2. Section 8.13, subsection 1, of the Code of Iowa, 1954, provides as follows: '1. Three months limit. No claims shall be allowed by the state comptroller's office when such claim is presented after the lapse of three months from its accrual.' Does this statute of limitations prohibit the Senate Claims Committee of the 56th General Assembly from considering any claim contained in said report which was not presented within three months from its accrual?

"No. 3. Section 25.8 of the Code of Iowa, 1954, provides as follows: 'Limitation on claims to be considered. No claim against the state shall be considered or allowed by the general assembly except it be presented before the state appeal board as provided in this chapter.' Does this action prohibit the Senate Claims Committee and the 56th General Assembly from considering or allowing any claims filed with the secretary of the Senate subsequent to the second day after the convening of the 56th General Assembly, which claims have not been presented before the State Appeal Board and processed in accordance with Sections 25.1 and 25.2 of the Code of Iowa, 1954?"

In reply thereto, we would advise as follows:

(1) In answer to question number 1, we would advise you that the fact that the report of the State Appeal Board was filed on January 13, 1955, such time not being within the period defined by Section 25.3 of the Code of Iowa, does not deprive such report of its timely character. The rule pertinent to the timely character of this filing is stated in 43 American Jurisprudence, paragraph 259, entitled Public Officers, as follows:

"And when a statute prescribes a time within which a public officer is to perform official acts affecting the rights of others, the general rule is that it is directory as to the time, unless from the nature of the act the designation of the time must be considered a limitation on the power of the officer."

And our Supreme Court, in the case of Younker Brothers vs. Zirbel, 234 Iowa, 269 12 N. W. 2nd., 219, 151 ALR 242 addressed itself to the rule as follows:

"The general rule is well expressed by a quotation from 23 Am. & Eng. Ency. of Iaw, 458, in Hubbell vs. Polk County, supra, 106 Iowa 618, 622, 76 N. W. 854, 856, to-wit: 'Statutory prescriptions in regard to the time, form and mode of proceeding by public functionaries are general directory, as they are not of the essence of the thing to be done, but are given simply with a view to secure system, uniformity and dispatch in the conduct of public business.' The thought is repeated in Hawkeye Lbr. Co. vs. Board of Review, supra, 161 Iowa 504, 507, 143 N. W. 563, 565, as follows: 'Ordinarily statutes which are for the guidance of officers in the conduct of business devolving upon them, designed to secure order, system, and dispatch in the proceedings and in the disregard of which the rights of persons interested cannot be injuriously affected, are held to be directory.' See supporting quotations therein from Cooley, Constitutional Limitations, 5th Ed., page 92, and 2 Sutherland on Statutory Construction, section 611. See to the same effect a quotation, in Easton vs. Savery, supra, 44 Iowa 654, 655-657, of a state-

ment of the principle by the Supreme Court of the United States in French vs. Edwards, 13 Wall. 506, 20 L. Ed. 702. Quoting from Sutherland on Statutory Construction, sections 446-448, the Court in Hubbell vs. Polk County, supra, 106 Iowa 618, 621, 76 N. W. 854, 856, said: 'Though a statute directs a thing to be done at a particular time, it does not necessarily follow that it may not be done afterwards. In other words, as the cases universally hold, a statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others is directory, unless the nature of the act to be performed, or the phraseology of the statute, is such that the designation of the time must be considered as a limitation of the power of the officer.' In Easton vs. Savery, supra, 44 Iowa 654, 656, the court said: 'While the statute provides the levy shall be made at the September meeting, it is entirely silent as to whether it may be done at any other time or not. There are no negative, or words prohibiting the levy being made either before or after the day fixed by the statute, nor is there any penalty attached for a failure to make the levy on the required day, or rendering it void if made at any other time.' "

By reason of the foregoing, we are of the opinion that the provisions of Section 25.3 with respect to the time of filing of the report of the Appeal Board is directory and not mandatory.

(2) In answer to question number 2, we are of the opinion that Section 8.13 and 8.14 are applicable to the situation of payment by the comptroller of the contractual obligations of the state in the operation of its various branches and are not applicable to allowances of claims by the Legislature, which are appropriation acts.

By reason of the foregoing, we would advise you that in our opinion the fact that a claim was disallowed by the State Comptroller after the lapse of three months from its approval does not justify denial of power over said claim by the Claims Committee.

(3) In answer to question number 3, we would advise you that in our opinion Section 25.8 does not prohibit the Claims Committee and the 56th General Assembly from considering or allowing any claims filed with the secretary of the Senate subsequent to the second day after the convening of the 56th General Assembly, which claims have not been presented or processed in accordance with Section 25.1 and 25.2, Code of Iowa. Our reason for this conclusion is stated in the case of Solberg vs. Davenport, 211 Iowa 612 at 624:

"The general rule is too well settled to need citation of authority that each legislature is an independent body, entitled to exercise all legislative power under the limitation of the constitution of this state and the United States, and no legislature can pass a law which would be binding on subsequent legislatures. We think this rule applies to the situation before us. In other words, Section 47 of the Code was utterly disregarded by the legislature; yet this act cannot be held invalid because thereof."

Reference is herein made to the following from 59 C.J. 900, 82 C.J.S. 471 as follows:

"One legislature cannot enact irrepealable legislation or limit or restrict its own power or the power of its successors, as to the repeal of statutes; and an act of one legislature is not binding on and does not tie the hands of future legislatures."

And in Carlton vs. Grimes, 237 Iowa 912, 23 N. W. 2d. 883, the court states as follows:

"With the exception of a few mandatory provisions noted, the Constitution of Iowa has given the G. A. a free hand in determining its rules of procedure. Whether either chamber strictly observes these rules or waives or suspends them is a matter entirely within its own control or discretion so long as it observes the mandatory requirements of the Constitutions."

February 3, 1955

LOTTERY: GAMBLING: DISTRIBUTION OF TICKETS TO GENERAL PUBLIC: The arrangement submitted is in violation of gambling laws of Iowa.

Mr. Samuel O. Erhardt, County Attorney, Ottumwa, Iowa: By letter dated February 1, 1955, you have submitted a contract form to this office requesting an opinion whether the enterprise contemplated by the terms of the contract would constitute a lottery under the laws of the State of Iowa.

An examination of the contract reveals the following pertinent facts:

1. A civic organization will provide merchants of the community with tickets to be used in a drawing for a prize.

2. The merchants pay a stipulated sum for each block of 500 tickets.

3. A drawing will be held at a specified time and place where the winner will be determined by lot.

4. The merchants will distribute the tickets which they have purchased to the general public without charge.

The fact of distribution of tickets to the general public by the purchasers of the tickets without making a charge for the tickets thus distributed does not alter the fact that the tickets have been sold in the first instance by the group conducting the drawing. This situation is analogous to one where "A" has purchased a lottery ticket and given it to a friend "B". The fact that "A" made no charge for the ticket and the reasons that motivated the gift do not affect the proposition that the matter was a lottery in the first instance. Under the facts submitted by you the merchants of the community purchase lottery tickets. There is a consideration paid for a ticket which constitutes a chance to win a prize. The three elements constituting a lottery are present.

You are therefore advised that it is the opinion of this office that the arrangement submitted is in violation of the gambling laws of the State of Iowa.

February 9, 1955

KEEPING BEER WHERE LIQUOR IS SOLD: Class "B" permits to sell beer prohibits the presence of any liquor having an alcoholic content of more than 4% being kept on the premises for any purpose. This prohibition applies with equal force to clubs as well as to individuals.

Mr. Leo J. Tapscott, County Attorney, Polk County Court House, Des Moines, Iowa: In answer to your letter of January 19, 1955, wherein you make inquiry concerning Sections 124.15 and 124.31 of the Code of Iowa 1954, and the Attorney General's opinion of March 13, 1952, defining private clubs, I submit the following:

Section 124.15 simply states that a club may be issued a Class "B" permit.

Section 124.31 states:

"Alcoholic content. No liquor for beverage purposes having an alcoholic content greater than four percent by weight, shall be used, or kept for any purpose in the place of 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."

Attorney General's Opinion, March 13, 1952, states in part:

"* * * the Code provides in pertinent part:

'For the interpretation of this chapter, unless the context indicates a different meaning:

* * * * * *

6. 'Person' includes any natural person, association, partnership, corporation, and club.

"From this definition it results that whenever the word 'person' occurs throughout the chapter, it refers to clubs as well as individuals. It follows that all of the rights, privileges, and prohibitions relating to individuals by express reference or by implication, also relate with equal force and effect to clubs."

It is therefore the opinion of this Department that the statutory provisions of Section 124.31 apply equally to clubs and is in full force and effect.

February 9, 1955

ISSUANCE OF STOCK: CORPORATIONS: Corporations are authorized to issue both voting and non-voting common stock. Opinion of the Department appearing in the Report of the Attorney General for 1932, page 197, insofar as it is in conflict is overruled.

Hon. Melvin Synhorst, Secretary of State: This will acknowledge receipt of yours with attached letter from the firm of Donnelly, Lynch, Lynch and Dallas requesting opinion in a situation set forth in such letter. The letter follows:

"As we advised in our conference on the 15th we have several clients who are contemplating adopting or changing Articles of Incorporation to provide for two classes of common stock, one voting and one non-voting. We have no doubt as to the legality of such a provision and know that your office entertains none in view of your repeated approval of Articles authorizing voting and non-voting classes of stock. However, the Attorney General's opinion of 1932, to which reference is made, in the accompanying brief, though long forgotten still stands unwithdrawn to frighten stockholders. Our clients take the position that they should not submit Articles to stockholders which are clouded by this ruling and, therefore, would ask that your office obtain a ruling from the Attorney General's office without necessity of presenting specific Articles for approval.

"Inasmuch as the question is of immediate concern to one of our clients, who would like to adopt Articles providing for two classes of common stock, we would appreciate your submitting this on an urgency basis."

The question submitted is whether Articles of Incorporation may be adopted or Articles already adopted and filed could be changed to provide for two classes of common stock, one voting and one non-voting.

No statute either authorizes or denies the power of issuance of such shares having no voting right nor has the question been adjudicated in Iowa. Case and text authority elsewhere is limited. Such authority and text justify the conclusion herein:

(1) That public policy does not require that corporation stock have voting power.

(2) A person holding stock in a corporation may by contract consent to the issuing and holding of stock either common or preferred possessing no voting power. That public policy denies the power to issue a class of stock without voting rights is unsupported.

In the case of *General Investment Co. vs. Bethlehem Steel Corporation, 100 Atl. 347,* it is stated as follows:

"No broader language could have been used, and, unless the usual meaning of these words is to be restricted by reason of the existence of some public policy, it is inconceivable to me that a corporation may not issue this class of common stock, or call it what you will. I have failed to find the existence of any such public policy. The matter is one for the stockholders to determine by their contract. If the public does not want to buy, it does not have to. The legal rights of the present stockholders are not affected; they contracted at the time they went in that they would have the advice, consultation with, and action by (or rather the opportunity of securing such advice, consultation, and action) of the then existing stock (and this subject to its reduction in accordance with law); but there was no contract that the corporation would, if it created further stock, give that further stock the voting privilege, so that the present stockholders might have the opportunity of securing advice by and consultation with and action by the new stockholders."

In the case of St. Regis Candies, Inc., vs. Hovas, 3 S. W. 2nd 429, it is stated as follows:

"* * * in the situation presented it is difficult to perceive harm to the public in allowing able-minded men, dealing at arms' length, to contract with reference to their own property and the conditions upon which a transfer of it to their corporate representative shall be made."

In the case of *Barrow Haematite Steel Co., L. R. 39, Ch. Div. 582 England,* it is stated as follows:

"* * * 'it is said to be unfair that the preference shareholders should be affected by the passing of resolutions by the votes of ordinary members of the company, the preference shareholders themselves being excluded by contract from any power of voting. I think the answer is that it is by contract that they are excluded — it is part of the bargain with them. They were content to take their shares subject to the regulations of the company, although they knew that those regulations might be altered by the votes of persons whose votes they could not influence — at any rate directly — by taking part in the voting themselves.' "

In Fletcher's Cyclopedia Corporations, Volume 5, Section 2025, the rule is stated as follows:

"The right to vote is an incident to membership or of the property in the stock, of which the stockholder or member cannot be deprived without his consent; and he may vote it as he chooses, whether it be minority or majority, except contrary to law or public policy or fraudulently. Speaking generally, the right to vote is a right which is inherent in and incidental to the ownership of corporate stock, and as such is a property right, and it follows that the stockholder cannot be deprived of it, and that the right cannot be essentially impaired, either by the legislature or by the corporation, without his consent, through amending the charter, or by bylaw."

Addressing itself to this particular proposition, it is stated in Fletcher's supra, paragraph 2026, that it is lawful by charter to give voting power to one class of stock and to deny it to another in the absence of positive law against it, citing in support thereof in re *American Elevator and Machine Company, 73 F. Supp. 473; St. Regis Candies, Inc. vs. Hovas, 3 S. W. 2nd 429, 8 S. W. 2nd 574; General Investment Company vs. Bethlehem Steel Corp., 100 Atl. 347, and annotation 21, A. L. R. 643.*

Correlative to the above, it is to be observed that neither the Constitution nor the Statutes of Iowa prohibit the issuance of stock without voting power. On the other hand there is implied statutory and case authority for the issuance of such non-voting stock. Insofar as our statutes are concerned, implication to this effect may be drawn from Sec. 491.20, which refers to voting stock, and Sec. 491.104 and Sec. 491.105 both referring to shares entitled to vote. For case implication see *Wright vs. Johnson, 183 Iowa 807, Fleming vs. Casady, 202 Iowa 1904, McDonald vs. Failey, etc. Co., 226 Iowa 53.*

Finally, what is said with respect to administrative construction of this rule in the *General Investment Company case supra* may be said of the rule as it has been applied in Iowa, to-wit:

"The bar generally, I think, has put the construction that I have put on this section. There were introduced in evidence some 15 or more charters, some of very large corporations, providing for classes of common stock with and without voting power and one or more with the preferred stock having the exclusive voting power. The conclusion I have reached is that the corporation may issue this peculiar class of stock."

The opinion of this Department appearing in Attorney General's Report for 1932, page 187 insofar as it is in conflict herewith is overruled.

February 23, 1955

CATFISH: Section 109.107, Code of 1954, making it unlawful for fish peddlers, wholesale fish markets, et al. to have in possession catfish under the legal 13-inch commercial size limit provided in the Iowa laws is a prohibition of possession of catfish taken within the borders of the State of Iowa.

Mr. Bruce Stiles, Director, State Conservation Commission: You have requested an opinion of this office as follows:

"Section 109.107, Code of 1954, states in part, 'It shall be unlawful for fish peddlers, wholesale fish markets, jobbing houses or other places for the wholesale or retail marketing of fish to have in possession catfish under the legal thirteen inch commercial size limit provided in Iowa laws.'

"Does this size limit apply to catfish legally taken outside the State of Iowa and legally shipped into Iowa?"

The foregoing quoted provision is not ambiguous. It is an unequivocal prohibition against the possession by the commercial institutions named of catfish under "the legal thirteen inch commercial size limit." Therefore, standing alone, it would appear that it was the belief of the legislature that management and preservation of the species demanded an absolute prohibition. This view could be sustained by a consideration of enforcement difficulties arising from the determination of the origin of fish in possession.

However, this provision does not stand alone inasmuch as Chapter 109 of the code includes various possession prohibitions. Section 109.83, Code of Iowa, 1954, provides:

"It shall be unlawful for any person to take, capture, or have in possession frogs from December 1 to May 11 in any year."

Section 109.83 of the Code above quoted is modified by Section 109.84 which provides in pertinent part:

"Nothing in this chapter shall be construed to prevent the purchase, sale or possession of frogs or any portion of the carcasses of frogs that have been legally taken and shipped in from without the state.

"Nothing herein shall prevent any person from catching frogs on his own premises for his private use."

The statutory qualifications of Section 109.83 of the Code might lend strength to a construction of Section 109.107 as an absolute prohibition. In view of the fact that the legislature expressly qualified Section 109.83, and having made no qualification of Section 109.107, it could be argued that an intent was thereby evidenced that Section 109.107 was to be absolute in effect. Such conclusion, however, is subject to question in view of the provisions of Section 109.67 of the Code which states in pertinent part:

"It shall be unlawful for any person at any time to have in possession more than thirty fish of all kinds in the aggregate, except that this aggregate possession limit shall not apply to the fish named in this section in which there is no daily catch limit, or to the director and his

duly authorized representatives when carrying out duties imposed by state law, or commercial fishermen, or wholesale fish markets, when operating under proper license and dealing in commercial fish."

The quoted provisions of Section 109.67, if construed as an absolute prohibition, would make it practically impossible to engage in the business of a retail fish market and likewise would bar fish from the menus of many hotels and restaurants. These matters would present grave questions of validity. In such a situation it is basic that a construction must be adopted if the statute is so susceptible which would render the statute of undoubted validity. It follows that the proper construction of the quoted provisions of Section 109.67 must be that the possession limits therein set forth relate to fish taken in the State of Iowa.

As this provision is equally positive in language with that of Section 109.107, we believe that the fact of qualification of Section 109.83 is not material in determining legislative intent.

We do not mean to say that if the provisions of Section 109.107 of the Code, here under examination, were construed as an absolute prohibition that such prohibition would be unreasonable or unjustified. In this respect we do not think it analogous to the provisions of Section 109.67. It is our opinion that in view of the necessary construction of Section 109.67, as a matter of consistency in legislative intent it must follow that a similar intent should be deduced from the use of similar language. Therefore, in each instance the prohibition relates to fish taken in Iowa.

You are therefore advised that it is the opinion of this Department that the provisions of Section 109.107, Code of Iowa, 1954, referred to in your request for opinion, relate to a prohibition of possession of catfish taken within the borders of the State of Iowa.

February 25, 1955

SPECIAL ASSESSMENTS: In respect to Special Assessments, the following rules are pertinent:

1. **Annually, as used in Code Section 391.60, means each year after the first installment is due and payable so that if the levy is made on September 1st, the second installment would be payable in the month of March following. See opinion of Attorney General appearing in the report of the Attorney General for 1930, page 50.**

2. **If the 30-day period following the levy of assessments by the city council and within which period the first installment is due, expires after December 31st, then the second installment does not become payable until a year after the month of March following the levy; in the latter situation the 30-day period for the payment of the first installment has extended into the succeeding year and hence certification to the county auditor could not be made until after January 1st. See opinion of the Attorney General appearing in the report of the Attorney General for 1925-26, page 295.**

3. **The City Council may certify to the county auditor special assessments at any time and it is the duty of said official to place the same upon the appropriate tax list. See Code Section 391.61.**

4. Certification of special assessments as authorized by Code Section 391.61 is not affected by the provisions of Section 404.3 requiring the certification on annual levies by cities to be made prior to August 15th of each year.

Mr. C. B. Akers, Auditor of State: Reference is herein made to the letter to you of February 11th, 1955, from Walter W. Lehman, County Treasurer of Pottawattamie County, Iowa. The letter follows:

"Special assessments are payable annually and due January 1st next succeeding date to be placed on the tax list for the current year and collected with the first half of the regular tax and in the same manner as other taxes when delinquent, shall draw the interest and penalty.

"Please note that the project of 1953 was levied September 2, 1953, and certified to the County Treasurer's Office on November 1st, 1953, for collection after all regular taxes had been paid. In reality the first installment dated 1953 should have been paid with the first half of the regular tax.

"The date of levy was November 1st, 1954, and certified to the County Treasurer's Office on December 7th, 1954, which is practically in the same comparison as exhibit A. Question, would it be justified to the property owners if penalty would be applied to the 1953 and the 1954 first installments after all regular taxes had been paid not having an opportunity of paying such special assessments when the county treasurer's office was not in a position to have placed them on the tax list with the regular taxes as of January 1st, 1953, and 1954.

This places the first and second installments payable upon the property owners whereas they are under the impression they have only one installment to be paid. This has caused considerable confusion to the Banks, Building and Loan Companies, Insurance Companies, and Realtors who are carrying FHA and GI loans, and also to the property owners who are not financially able to pay two installments and places a hardship upon them to make such payments.

"The City has a new sewer assessment with the date of acceptance December 21st, 1954, date of levy January 17th, 1955, with the privilege of paying the first installment or principal at the City Treasurer's Office on or before February 17th, 1955, which means that it would be certified to the County Treasurer's Office about March 1st, 1955, after all special assessments on record had been placed upon the tax list for collection and at this time about one-half of the first half of the regular taxes have been paid and most of the banks and building and loan companies have received their statements of the taxes due for 1955. As we all know, March is one of the heaviest months of tax collections and would be almost impossible to place such assessments on the tax list.

"Also, I wish to call to your attention that these special assessments have been certified at different dates and according to law should be delivered on or before December 31st. I am inclined to believe that I would be justified in not accepting such special sewer taxes under these conditions with the opinions of one and two enclosed. This is very important to me and if these opinions are correct, kindly phone me or advise by mail if possible on or before February 28th, 1955."

In response to the foregoing, we would state the following:

(1) Section 404.3, Code of 1954, relating to annual certification of levies of taxes on current expenditures has no applicability to the foregoing situation. It expressly eliminates from the provisions thereof taxes levied to pay bonds and tax assessments which are otherwise provided for by law.

(2) Annually, as used in Code Section 391.60, means each year after the first installment is due and payable so that if the levy is made on September 1st, the second installment would be payable in the month of March following. See opinion of Attorney General appearing in the report of the Attorney General for 1930, page 50.

(3) If the 30-day period following the levy of assessments by the city council and within which period the first installment is due, expires after December 31st, then the second installment does not become payable until a year after the month of March following the levy; in the latter situation the 30-day period for the payment of the first installment has extended into the succeeding year and hence certification to the county auditor could not be made until after January 1st. See opinion of the Attorney General appearing in the report of the Attorney General for 1925-26, page 295.

(4) The City Council may certify to the county auditor special assessments at any time and it is the duty of said official to place the same upon the appropriate tax list. See Code Section 391.61.

(5) Certification of special assessments as authorized by Code Section 391.61 is not affected by the provisions of Section 404.3 requiring the certification on annual levies by cities to be made prior to August 15th of each year.

February 28, 1955

HOTEL PERMIT: Under section 124.19, Code of 1954: (1) The term "guest" can include only those who have come to the hotel to obtain lodging or food. (2) The Lessee of the dining room of a hotel is not authorized by virtue of the hotel owner's permit to sell beer to patrons of the dining room. (3 & 4) Under a hotel permit, the hotel may sell beer to its guests in the hotel dining room but a leased dining room can not be considered a hotel dining room.

Mr. J. R. Sokol, County Attorney, Maquoketa, Iowa: This will acknowledge your recent inquiry concerning the privileges to sell beer to which an owner of a hotel and the lessee of the dining room therein would be entitled by virtue of a Class B Hotel permit issued to the owner. As you recognized, this matter is governed by Code section 124.19, which provides that: "Hotels holding class 'B' permits may serve beer to their guests either in the dining room or dining rooms or to any guests duly registered at such hotel in the rooms of such guests."

You have asked our opinion on four questions, which are:

1. Is the hotel owner entitled by reason of his hotel permit to serve beer in the basement bar and cafe to all persons regardless of whether or not said persons are registered and staying at said hotel?

2. Is the lessee who operates the main floor dining room entitled, by virtue of the owner's hotel permit, to keep beer on the leased premises and to sell the same, either by himself or his employees, to patrons of said dining room?

3. May the owner of the hotel, by virtue of his hotel permit, sell and deliver beer to patrons of the leased dining room while said persons are on the leased premises?

4. Is the leased dining room in fact a separate and distinct operation and not to be considered a "hotel dining room" within the contemplation of the above noted section and therefore not covered by the owner's hotel permit?

Your first question requires a determination whether the purchaser of the beer is a guest of the hotel, and whether the beer is served in a hotel dining room, within the meaning of Section 124.19. For purposes of liability of a hotelkeeper for injury to person or property of guests, the term "guest" usually is interpreted broadly, and in some early cases included those who had come only for the purpose of drinking liquor, as well as those coming to obtain lodging. 28 Am. Jur., Innkeepers, §§ 14, 19. A contra position is taken by a recent decision, Wallace vs. Shoreham Hotel Corp., 49 Atl. 2d 81. Where the question of the status as "guest" arises under statutes regulating hotel sales of beer or liquor, the cases unanimously treat one who came to the hotel only to purchase beer as not a "guest" within the meaning of the statute. Commonwealth vs. Ryan, 182 Mass. 22, 64 N.E. 407; Farley vs. Bronx Bath & Hotel Co., 163 App. Div. 459, 150 N.Y.S. 579. However, the permit statutes involved usually defined a guest to include a purchaser of food or lodging. What did the Iowa legislature intend when it used the term "guest"? It was giving the hotel owner a special privilege, and opportunity to obtain a permit at a reduced rate over that ordinarily required for class B permits. This is some indication that the legislature anticipated that the hotel owner would operate in a manner different from the ordinary tavernkeeper. In view of this, it would seem that the legislature meant the term "guest" to cover persons coming to a hotel for purposes of obtaining lodging, or, possibly, meals. If anyone wishing a drink of beer, and nothing more, has a choice of purchasing it either at a hotel or at an ordinary beer tavern, there would seem to be no reason to distinguish between the two in the manner in which the legislature did. Therefore, it is our opinion that under Section 124.19 the term "guest" can include only those who have come to the hotel to obtain lodging or food.

It would also seem that, in using the term "dining room," the legislature was contemplating a room where meals are served at regular intervals. Whether a particular room is a "dining room" would be a question of fact, determined by the facts present in each individual instance.

If the hotel owner wishes to operate a basement bar as an ordinary tavern, in which others than "guests" as above defined may purchase beer, he may do so if he first obtains an ordinary class B permit. Whether he should be issued such a permit is a matter for decision by the local authorities.

In answer to your second question, the lessee is not authorized by virtue of the hotel owner's permit to sell beer to patrons of his dining room. Section 124.1 makes it unlawful for any person to manufacture

for sale or to sell beer unless a permit is first obtained in accordance with the requirements of Chapter 124. Nothing in the statute indicates that when the hotel and its dining room are operated under separate ownerships, one hotel permit is sufficient for both interests. See 1938 Report of the Attorney General, 232, which held that the Amana Society could not dispense beer in stores in each of the Society's villages under but one permit. Further, Section 124.23 indicates the legislature's desire that there be a thorough investigation of the fitness of the person who is to operate under a permit; if the sale is by the lessee, there has been no opportunity to make such an investigation of him.

Answering your third and fourth questions, under a hotel permit, a hotel may sell beer to *its* guests, in the hotel dining room, but a leased dining room is clearly a separate and distinct operation, and cannot be considered a "hotel dining room" within the meaning of the term in Section 124.19. Persons who have come solely for the purchase of food in a leased dining room are not guests of the hotel, within the meaning of the term in Section 124.19. Indeed, it is doubtful that they are guests of the hotel where the question involved is liability of hotelkeepers to guests. See Alspaugh vs. Wolverton, 184 Va. 943, 36 S.E. 2d 906.

Where the hotelkeeper has leased a portion of the hotel for dining room purposes, the power to sell by virtue of a hotel beer permit, in that leased area, is not expressly covered in Section 124.19. No one has a legal right to sell beer; legally all that he may have is a license, a privilege, to do so. If the privilege given him fails to cover the action he wishes to take, that action is beyond his privilege.

In the situation you have described, both the hotel owner and the operator of the dining room may sell beer on the appropriate premises to anyone legally entitled to purchase it, if they obtain the ordinary class B permit. Whether such a permit should be issued is clearly a matter for decision by the local authorities.

March 1, 1955

ARTICLES OF INCORPORATION: Section 491.25, Code of 1954, respecting the renewals of corporations and providing for the purchase by those voting for renewal of stock of those voting against renewal is not the subject of contract and the Secretary of State is within his powers in objecting to a contract provision in its Articles, waiving his right under the statute.

Hon. Melvin Synhorst, Secretary of State: This will acknowledge receipt of yours of the 16th inst., in which you submitted the following:

"Attached hereto please find a letter directed to this office which poses a problem regarding the purchasing of a stockholder's stock who votes against Renewal. The problem is set forth quite thoroughly in the letter and your opinion is requested as a result of the fact that the writer of this letter stated that such a statement is not permissable in the Articles of Incorporation."

And the accompanying letter follows:

"A few weeks ago I transmitted to you for filing Articles of Incorporation of the Hanstrom-Hubly Tractor Co.

"Said Articles, in paragraph 5.03, provided the following:

" 'No stockholder shall have the right to require his stock to be purchased in the event such stockholder shall vote against the renewal or extension of the corporate period, and any and all rights now or hereafter granted by statute to require any such purchase in that event are waived by any holder of stock in this corporation.'

"You objected to this particular provision because it was contrary to the statutory right granted to stockholders in Section 491.25 of the 1954 Code. It was your contention that stockholders could not waive this provision and that it was within the province of the Secretary of State to refuse to accept for filing Articles with such provision. It was our contention that any question as to the validity of such a provision was one for determination by the courts and not by the Secretary of State.

"However, in order to expedite the filing of the proposed Articles, I authorized that said Section 5.03 be stricken.

"This office has used similar provisions in Articles for several years, and this is the first instance wherein your office has raised this issue. We would appreciate your submitting this question to the Attorney General for his opinion and furnishing us with a copy of said opinion."

In reply thereto, we advise as follows: The statute which is sought to be contracted away is Section 491.25, Code of Iowa for 1954, in terms as follows:

"Corporations existing for a period of years may be renewed from time to time for the same or shorter periods, or may be renewed to exist perpetually, if a majority of votes cast at any regular election or special election called for that purpose be in favor of such renewal, at any time during the corporate life or within three months after the termination thereof, with such renewal taking effect upon the filing with and approval by the secretary of state and the payment of fees as set forth in section 491.28, although corporations may renew within a three months period prior to normal expiration, and if those voting for such renewal will purchase at its real value the stock voted against such renewal. Stockholders voting for renewal shall have three years from the date such action for renewal was taken in which to purchase the stock voted against such renewal, which purchase price shall bear interest at five percent per annum from the date of such renewal action until paid."

However, in our view this statute is not the subject of contract as between the corporation and its stockholders. It will be noted that the statute is concerned with the continuity of the life of the corporation. It is a provision conditioning the right of renewal of a corporation if those stockholders voting for such renewal will purchase at its real value the stock voted against such renewal. The question to which address is given appears not to have been the subject of adjudication in Iowa but in some of the several states having similar statutes the question has been considered and adjudicated.

The case of Warnock Company vs. Hudson Manufacturing Company, 273 N. W. 710, 711, stated the following:

"We do not think such general laws for the renewal of corporate existence, applicable to a large class of corporations, can be regarded as

conferring contract rights in property. Such laws are intended to control and operate whenever the time arrives at which a corporation must determine whether it shall wind up its existence or seek extension of its life. And it is but reasonable that the state reserve the power to regulate the manner in which extension of the corporate existence of its own creations may be had. There is much reason and force in what is said on this subject in Smith vs. Eastwood Wire Mfg. Co., 58 N. J. eq. 331, 43A. 567, 568: 'The period of corporate existence is a matter which prima facie concerns the state only, and the limitation to a definite period is an exercise of control in the interest of the public. Stockholders may, perhaps under the laws which authorize special restrictions in charters, exclude the power of continuing corporate existence beyond a fixed period; but, unless this power is excluded, the corporation may, as between itself and the stockholders, extend its corporate existence under the laws for that purpose which existed at the time of the incorporation, provided these laws still remain in force at the time of the proceedings for continuance, or under subsequent laws, by which the state, as it has the right to do, in its control over corporation, restricts, rather than enlarges, the power of continuing the existence."

In the case of State vs. Crookston Trust Company, 22 N. W. 2nd 911, it is stated as follows:

"The statute authorizing the renewal of a corporation creates no contract or vested rights to a renewal either as between the state and the corporation or as among the stockholders. See Wm. Warnock Co. Inc. vs. H. D. Hudson Mfg. Co. 200 Minn. 196, 273 N. W. 710."

By reason of the foregoing, we are of the opinion that paragraph 5.03 of the Articles of Incorporation of the Hanstrom-Hubly Tractor Company confers illegal contract rights upon its stockholders. The objection of your office to its inclusion in the Articles is approved.

March 3, 1955

ROADS AND HIGHWAYS: Board of Supervisors duty to repair and maintain a dedicated highway is dependent upon whether there was an acceptance of the dedication by the public; such acceptance being a prerequisite to the existence of a public road as defined in Section 4.1 (5) and Section 306.2, Code 1954.

Mr. Martin D. Leir, County Attorney, Scott County, Davenport, Iowa:
Your letter of Feb. 3, 1955, with enclosed brief, presents the following proposition:

"There are located in Scott County, Iowa two real-estate sub-divisions, one or which is known as "Ridgeway Park" and the other as "Ridgeview Park Second Addition." The plats for these additions were filed on Nov. 12, 1953 and Jan. 5, 1954, respectively. Under the terms of the platting certificates in each instance, the owner dedicated the streets and other thoroughfares shown on the attached plats to the public "for public use." There are 654 houses built in the two sub-divisions upon the lots platted in the respective additions. The streets and thoroughfares shown on the plats were improved with curb and gutters. Nearly 500 of these homes are now occupied by individual families. Well over half of these homes are now owned by individual persons. The main highway U. S. No. 150, is located between Ridgeview Park, the first addition, and Ridgeview Park Second Addition. The streets which are platted in Ridgewood Park also connect with adjoining county highways. At the present time, a complete

mail route has been established for the additions. Farmers and other residents of the county who have reason to cross Highway No. 150 to the adjoining county roads, use these streets as a means of going from one area to another area of the county."

Your inquiry is directed to the question of whether Scott County is required to accept these streets and thoroughfares as public roads and include them in the county maintenance program.

Roads and highways may be established as provided by statute (Sections 306.4, 306.12, 306.20, Code of Iowa 1954); or by dedication by the owner, *Dugan vs. Zurmuehlen* 203 Iowa 1114, 211 N. W. 986; *Baldwin vs. Herbst,* 54 Iowa 168, N. W. 257; *Sioux City vs. Tott,* 244 Iowa 1285, 60 N. W. 510; or by prescription, *Dugan vs. Zurmuehlen,* supra; *Culver vs. Converse,* 207 Iowa 1173, 224 N. W. 834, OAG — 1921, P. 238.

A dedication is a devotion to public use of land, or an easement in it. In order to constitute an effective dedication, there must be present an intent on the part of the owner coupled with a setting aside of the physical property for public use in praesenti which constitutes an offer and there must be an acceptance of the dedication. *DeCastello vs. City of Cedar Rapids* 171 Iowa 18, 153 N. W. 353.

The tender or offer continues until accepted or shown to have been withdrawn and the owner may preclude himself from withdrawing the offer by the selling of lots or blocks as shown on the plat. *Town of Kenwood Park vs. Leonard* 177 Iowa 337, 158 N. W. 655.

An offer of dedication to bind the dedicator need not be accepted by the city, but may be accepted by the general public *Laughlin vs. City of Washington,* 103 Iowa 652, 19 N. W. 819; 18 C. J. Sec. 73 P. 77; *Dugan vs. Zurmuehlen,* supra, *Wolfe vs. Kemler,* 228 Iowa 733, 293 N. W. 322 (1940).

It must be determined from the particular facts whether there has been a dedication of the roads and streets in Ridgeview Park and Ridgeview Park Second Addition by the owner and an acceptance of the dedication by the public. If from the facts it is determined that there has been a dedication accepted by the public, and there is in existence a public road as defined in Section 4.1 (5) and 306.2 Code of Iowa, 1954 and OAG 1-26-55, then such a public road is a part of the secondary road system and is under the jurisdiction and control of the Board of Supervisors, as provided in Section 306.3 and they are charged by Section 309.67 with the duty of repair and maintenance of said road.

March 22, 1955

OATH OF OFFICE: Article III, Section 32 of the Iowa Constitution prescribing the oath to be taken by members of the General Assembly while mandatory in its terms becomes directory if and as there is a failure to comply therewith.

Honorable Howard C. Reppert, Jr., House of Representatives: We have your letter of February 15th in which you submitted the following:

"I have had several inquiries as to whether or not the present members of the House of Representatives have legally taken their oath of office. Also, the obvious second question if the oath of office was not properly administered are the acts of this body legal? The basis for the inquiries stems from the fact that all but two of the members were sworn in by the temporary chief clerk of the House, while Article 3, Section 32 of the Iowa Constitution empowers only members of the General Assembly to administer the oath.

"Realizing that there could be some very serious repercussions if there were a possibility that the actions of this Assembly be determined illegal, I am therefore requesting your official opinion as to the above questions at your earliest convenience."

In reply thereto, we would advise you as follows: While your letter includes a request as to whether the temporary clerk has the power to administer the oath of office, in the view that we take of the situation, specific answer thereto is not required. It is true that Article 3, Section 32, of the Constitution, provides that members of the General Assembly are empowered to administer to each other the oath or affirmation and does not expressly endow the clerk with such power, and it is to be remembered that the administration of the oath to members of the House as defined "in its broadest sense, includes all forms of attestation by which a party signifies that he is bound in conscience to perform an act faithfully and truthfully." (State vs. Gay, 60 NW 676, 59 Minn. 6.) And in Respublica vs. Newell, Pa., 3 Yeates, 407, 412, 2 Am. Dec. 381, it is said:

"What is universally understood by an 'oath' is that the person who takes it imprecates the vengeance of God upon him if the oath he takes is false (1 Atk. 20), and the words 'corporal oath' may stand for lifting up an arm or bodily member. Therefore, where an indictment for perjury charged the defendant did then and there in due form of law take his 'corporal oath', the indictment was not faulty for its failing to state that he took the oath on the holy Gospel of God, or in the presence of Almighty God by uplifted hands."

Such an oath does not lay the basis for a perjury claim. To constitute such an oath, it is said:

"To constitute valid 'oath,' for falsity of which perjury lies, affiant must consciously take on himself obligation of an oath by unequivocal act in presence of person authorized to administer oath. Weadock vs. State, 36 S. W. 2nd 757, 762, 118 Tex. Cr. R. 537."

"To constitute a valid 'oath,' on the basis of which perjury may be charged, there must be in some form, in the presence of an officer authorized to administer it, an unequivocal and present act, by which the affiant consciously takes on himself the obligation of an oath. State vs. Ruskin, 159 N. E. 568, 570, 117 Ohio St. 426, 56 A. L. R. 403."

In any event, it is to be remembered that our Constitution is a grant of legislative powers by the people of Iowa. See Knoor vs. Beardsley, 240 Iowa 828, and while the provision for taking of an oath is mandatory upon each member of the House, the failure to administer it in accordance with the Constitution, however, does not operate to deny legal qualification of a member of the Legislature. The Constitutional provision is to be regarded as directory. The cases so hold:

"Clause in statute is 'directory' where provisions contain mere matter of direction and nothing more. State vs. Hager, 136 S. E. 263, 264, 102 W. Va. 689."

"Under a general classification, statutes are either 'mandatory' or 'directory,' and, if mandatory, they prescribe, in addition to requiring the doing of the things specified, the result that will follow if they are not done, whereas, if directory, their terms are limited to what is required to be done. Hudgins vs. Mooresville Consol. School Dist. 278 S. W. 769, 770, 312 Mo. 1."

"A statute which specifies time within which officer is to perform official act affecting rights and duties of others is 'directory,' unless nature of act to be performed or language used by legislature shows that designation of time was intended as limitation on officer's power. People ex. rel. Larson vs. Thompson, 35 N. E. 2d 355, 357, 377 Ill. 104."

"In determining whether statute is 'directory' or 'mandatory' prime object is to ascertain legislative intent from a consideration of the statute as a whole, bearing in mind its object and the consequences that would result from construing it one way or the other. State ex rel. Hay vs. Flynn, 147 S. W. 2d 210, 211, 212, 235 Mo. App. 1003."

"Where prescriptions of statute relate to performance of public duty, and invalidation of acts done in neglect thereof would work serious general inconvenience or injustice to persons having no control over those intrusted with the duty without promoting essential aims of the Legislature, such prescriptions are merely 'directory.' People ex rel. Huff vs. Graves, 13 N. E. 2d 599, 277 N. Y. 115."

Illustrative of a provision of the character that is mandatory and not directory is exhibited in the case of Little vs. Schul, 84 Atl. 649, 654 where the Constitution there declared that a refusal or neglect to take the oath shall be considered a refusal to accept an office and the Code provides that the officers shall take the oath prescribed by the Constitution and shall take the oath within 30 days after appointment and any person so appointed who neglects to take the oath within 30 days must under the mandatory provisions of the Constitution, be held to have refused to accept the office to which it was said:

"There are cases which hold that provisions like Section 1 of Article 20 of the Code in statutes merely requiring the oath of office to be taken within a certain time are directory only; while there are others sustaining the contrary view. 23 Ency. of Law (2d ed.) 357-359. But where, in addition to such a statutory provision, the Constitution provides that a neglect to qualify shall be deemed a refusal to accept the office, there would seem to be no escape from the conclusion that a neglect to take the oath within the time fixed by the statute must be treated as a refusal to accept the office. The question is, however, no longer an open one in this state, and is conclusively settled by the case of Archer vs. State, 74 Md. 443, 22 Atl. 8, 28 Am. St. Rep. 261, where section 7 of Article 1 was construed in connection with section 5 of article 6 of the Constitution, which declared that 'the Treasurer shall qualify within one month after his appointment by the Legislature.' In that case Judge Miller said: 'The plain mandate of the Constitution is that a person appointed by the Legislature to the office of Treasurer shall qualify by taking the constitutional oath of office within one month after his appointment; and with equal explicitness it is declared that if he refuses or neglects to do so within that period of time such refusal or neglect shall operate as a refusal to accept the office, and a new appointment must be made as if he had by affirmative words declined or refused to accept it. We are unable to give these clauses of the Constitution any

other interpretation. We cannot treat them as merely directory, and not mandatory.' It is true that in that case the Court was dealing with several sections of the Constitution, to which a more rigid rule of construction applies than frequently applied to statutes of like import. But what the Court expressly determined in that case was that the terms 'neglect to take the oath,' used in section 7 of Article 1 of the Constitution, meant neglect to take the oath within the time within which a person appointed or elected is required to take it; and that such neglect, under that section of the Constitution, amounts to a refusal to accept the office. A different construction would render Section 7 of article 1 of the constitution meaningless and of no effect; for there would be no time when a person appointed or elected to office could be held to have refused the office because of his neglect to take the oath."

The conclusion here reached is quite consistent with the intention of the people in its grant to the legislature, and enables the legislature to comply with the mandate of Article XII of the Constitution which provides.

"The General Assembly shall pass all laws necessary to carry this Constitution into effect."

March 22, 1955

INCOME TAX, CORPORATIONS — ALLOCATION OF DIVIDENDS, INTEREST, RENTS and ROYALTIES RECEIVED: When corporation owns stock of another corporation for business or control purposes, the owned corporation's operation is to be treated as part of the business of the parent and dividends, interest or royalties received therefrom allocated on the basis. Where the stock is owned for investment purposes, the State Tax Commission may adopt rules prescribing equitable methods of allocation of such income.

Mr. E. H. Fairburn, Director, Income Tax Division, Iowa State Tax Commission: This is in answer to your letters of recent date concerning the proper treatment of dividends and other income received from assets of an intangible nature by corporations domiciled or having their business situs in Iowa.

Section 422.33 imposes a tax upon each corporation organized under the laws of Iowa, and upon every foreign corporation doing business in Iowa, annually in an amount equivalent to 2% of the net income, as defined in the section, received by it during the income year.

Subsection 1, in part, provides:

"If the trade or business of the corporation is carried on entirely within the state, the tax shall be imposed on the entire net income, but if such trade or business is carried on partly within and partly without the state, the tax shall be imposed only on the portion of the net income reasonably attributable to the trade or business within the state, said net income attributable to the state to be determined as follows:

"a. Interest, dividends, rents, and royalties (less related expenses) received in connection with business in the state shall be allocated to the state, and where received in connection with business outside the state, shall be allocated outside of the state.

"b. Net income of the above class having been separately allocated and deducted as above provided, the remainder of the net income of the taxpayer shall be allocated and apportioned as follows:

"When income is derived from business other than the manufacture or sale of tangible personal property, such income shall be specifically allocated or equitably apportioned within and without the state under rules and regulations of the commission.

"Where income is derived from the manufacture or sale of tangible personal property, the part thereof attributable to business within the state shall be in that proportion which the gross sales made within the state bear to the total gross sales."

The question posed is whether interest received by such a corporation on bonds issued by foreign corporations, on mortgages on non-Iowa real estate, or on other non-Iowa contracts, is to be allocated as business within Iowa; whether dividends paid by non-Iowa corporations are to be allocated as business within Iowa; whether rents on real or personal property outside Iowa are to be allocated as business within Iowa; and whether royalties paid for uses outside Iowa are to be allocated as business within Iowa.

Interest, dividends, and royalties clearly are earnings on intangible property. Rent is less clearly so, but is essentially based on an intangible, a contract right, even though tied specifically to use of some tangible property. The statute should be interpreted so that all four categories are subject to the same basic treatment.

Where the corporation's trade or business operations are entirely within Iowa, the entire net income of the corporation is subject to tax. Only in the event the corporation carries on trade or business in other states as well is an allocation necessary. The alternative allocation methods possible under the statute are: (1) to allocate this type of income entirely according to the location of the recipient, on the theory that the intangible on which the income is earned has a situs there; (2) to allocate the income entirely according to the location of the payor, on the theory that it is his business situs that controls; (3) to allocate within or without Iowa according to the proportion of Iowa business of the payor; or (4) to allocate within or without Iowa according to the proportion of business of the recipient within Iowa unless some alternative allocation can be demonstrated to be more equitable.

You point out that the first alternative has been adopted by the Department in Income Tax regulations 507, 508 and 509, regulations of long standing and until recently applied practically without objection by taxpayers affected thereby. However, two taxpayers are now objecting to these rules, one claiming that the location or business of the payor controls, and the other that the dividends are to be apportioned according to their relation to the Iowa business of the recipient. The effect of these rules is to apply a business situs test, except with respect to rent. Thereunder, a corporation which has its sole business situs in Iowa includes all dividends received in income, regardless of the location of the paying corporation; while a corporation with no business situs in Iowa

includes none of the dividends it receives. Only in case a corporation with a business situs in Iowa has a separate business unit carrying on business outside Iowa is it permitted to apportion its dividends received. As a practical result, dividends received usually are either entirely includable or entirely excludable according to the business situs theory; rarely will there be any apportionment.

However, the language of 422.33 does not clearly indicate that the legislature intended to adopt a business situs theory to the extent adopted by your present regulations, and there are indications that the legislature did contemplate more apportionment of such income than the present rules of the Commission effectively permit.

One of the taxpayers objecting to the Commission's position contends that the term "business in this state," in subsection (a-1), means the business of the dividend paying corporation. In support thereof he cites the case of Kentucky Tax Commission vs. Fourth Avenue Amusement Corp., 293 Ky. 668, 170 S. W. 2d 42 (1943). The Kentucky court, applying a statute identical in form with the first paragraph and subsection *a* of our Code section 422.33(1), said that dividends paid by a fully owned subsidiary operating solely in Indiana to its Kentucky parent corporation, were to be treated as received in connection with business outside the state. The parent also operated some Indiana theaters directly, and income therefrom clearly was not income from business in Kentucky. And the Court thought it was anomalous to tax the income from the subsidiary's Indiana theater operation obtained as dividends where income from the parent's Indiana theater operation was nontaxable. But the Court clearly indicates that in its opinion the dividends were received in connection with the parent corporation's business in Indiana. On this basis, unless the receiving corporation holds a controlling interest in the paying corporation, the source of earnings upon which the dividend is paid is immaterial. Further, the term "business" is used ten times within Section 422.33, and the taxpayer's argument as to "business within the state" would give the term a different connotation in this subsection from that appropriate anywhere else in the section, although there is no clear indication from the words used in this subsection that a different meaning was intended. The term must be read in context within the whole section, not within the subsection alone. In addition, the effect of the suggested method would be to allocate the entire income of the type under discussion either to Iowa or outside Iowa, except in rare instances, and the apparent intent of the legislature that there be apportionment would be defeated.

If the business of the payor is controlling, the third alternative would be the appropriate solution where the paying corporation does both Iowa and non-Iowa business. That corporation also might receive dividends subject to apportionment. To require apportionment on the basis of the business done by the paying corporation poses such administrative and accounting difficulties for all parties concerned that it is not reasonable to assume the legislature so intended unless such an intent has been clearly and unmistakably manifested. But that is not the case. Alterna-

tives 2 and 3 are not the proper method for allocation of this type of income.

Under the fourth and remaining alternative, this income would be allocated or apportioned according to the business of the taxpaying corporation within this state. Corporate income obtained from manufacture or sale of tangible personal property is allocated, by the statute, on the basis of the proportion of Iowa gross sales to total gross sales. Had the legislature intended this rule to apply to interest, dividends, rents and royalties, it could have said so, the manner in which the section is written implies that such basis was not the one necessarily required to be used.

The Kentucky decision cited above seems to apply this alternative where the parent corporation actually carries on its business by means of a subsidiary corporation, but the decision offers no guide where the recipient is merely investing funds without intent to use the corporation whose stock is acquired to conduct or further the purchaser's business operations.

It should be noted that the current rules of the Kentucky Tax Commission as to the latter type situation are as follows:

"120-1 (b). Nonbusiness income. The net income derived from rents, royalties, interest, dividends and capital gains constitute nonbusiness income when derived from property not used or held in connection with business. . . .

"120-3. Nonbusiness income as defined in article 120-1 (b) shall be specifically assigned to the state where the property producing such income has acquired a business situs.

"Generally, interest and dividends shall be assumed to have acquired a situs within Kentucky if the domicile of the corporation is Kentucky and/or if the securities have acquired a business situs within the state. If, however, the dividends received are from stocks of a subsidiary corporation held for business or control purposes, the dividends shall properly be allocated outside this state if the subsidiary operations are entirely outside this state. Dividends shall acquire a situs within this state and be allocable to Kentucky if the stock is held for investment purposes and has acquired a business situs within this state. . . .

"Rental income shall acquire a situs within this state if the property producing the income is physically located within this state. In the event the property is characteristically in motion, the rental income assigned to this state shall be determined in accordance with an equitable allocation formula. . . ."

If a corporation owns intangible assets for purposes of investment rather than for business or control purposes, it is possible that income from such investment may be used in connection with the owing corporation's business in this state or with its business elsewhere. But the precise place in which such income actually is used ordinarily is impossible to ascertain.

Therefore, it is our opinion that where stock is held for control purposes the operation of the corporation whose stock is so owned should be considered part of the business of the parent. Where stock or other in-

tangibles are held for investment purposes, your department has authority to adopt rules prescribing equitable methods of allocation applicable to the various types of situations — and may adopt a rule based upon the business situs theory.

In the event any taxpayer believes that the method prescribed for his situation subjects him to taxation of a greater portion of his net income than is reasonably attributable to his business within the state, he may propose to the State Tax Commission such method as he believes proper under the circumstances [under Section 422.33 (b)], and the Commission may then determine what method of allocation and apportionment is appropriate to his particular circumstances.

March 24, 1955

ABSENT VOTING: SCHOOL ELECTIONS: The absent voting statute is applicable: (1) to the election of members of the county board of education, and (2) to elections held for the purpose of re-organization of school districts.

Mr. L. C. Abels, Legal Consultant: This will acknowledge receipt of yours of the 24th ult. in which you have submitted the following:

"With the approaching school elections several questions have arisen on absentee ballots to which the statutes fail to give a clear answer.

"The authority for use of absentee ballots in connection with election of members of the county board of education and in elections on re-organization proposals does not seem to be clearly defined.

"Section 53.1 authorizes use of such ballots in 'any general, municipal, special, or primary election, or at any election held in any independent town, city or consolidated school district.'

"Apparently, use of absentee ballots for election of *local* school officials is limited to 'independent town, city or consolidated school districts.' This would seem to preclude use of such ballots in school townships, rural and village independent school districts and possibly community school districts.

"Ballots for county board members are voted on at all regular school elections. The question is whether the election of county board members is a 'special' election held concurrently with the regular local election or a part of the regular election. If the former be the case then it would seem that absentee ballots could be used in any district. If the latter be the correct interpretation, then use of such ballots would seem to be restricted to the districts specifically enumerated in Section 53.1.

"The second question is the same as the first except directed to the applicability of the absent voters law to reorganization elections."

In reply thereto, we advise as follows:

(1) Insofar as election of members of the County Board of Education is concerned and the applicability of the absentee voters' law to such election, we advise as follows: The right to vote by absentee ballots is provided by Section 53.1, Code of 1954, in terms as follows:

"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 independent town, city or consolidated school district:

"(1) When, in the conduct of his business or due to other necessary travel, he expects to be absent on election day from the county in which he is a qualified voter.

"(2) When, through illness or physical disability, he expects to be prevented from personally going to the polls and voting on election day."

Conceding that such an election for the County Board is not a municipal, special or primary election, or an election held in any independent town, city or consolidated school district, the question as to whether it is a general election is determined by Section 49.2, Code of 1954, in terms as follows:

"For the purposes of this chapter:

"(1) The term 'general election' means any election held for the choice of national, state, judicial, district, county or township officers.

"(2) The term 'city election' means any municipal election held in a city or town.

"(3) The term 'special election' means any other election held for any purpose authorized or required by law."

Concededly, if the election of the County Board of Education is an election of County Officers, then it is a general election. It has been the view of the Department that members of the County Board of Education are County Officers. Therefore, the use of absentee ballots in the election of such officers is authorized under the provisions of Section 53.1, Code of 1954.

(2) Insofar as your question concerns the use of absentee ballots in an election for reorganization under Chapter 275, Code of 1954, and referring herein to the statutes heretofore quoted, it is clear that an election looking to reorganization of school districts is not a general election and is not a city election. However, it is a special election held for a purpose authorized or required by law. Chapter 275, Code of 1954, treating of reorganization of school districts is authority for such elections. The view that this is a special election is supported by the case of Willis vs. Consolidated School Districts, 210 Iowa, page 391 where the use of absentee ballots on a proposition to dissolve a consolidated school district was questioned. The Court therein says:

"The terms 'general' and 'special' election are defined by Sections 720 as follows:

"1. The term 'general election' means any election held for the choice of national, state, judicial, district, county or township officers. * * *

"3. The term 'special election' means any other election held for any purpose authorized or required by law.

"Manifestly, elections of the character we are discussing do not come within the foregoing definition of general elections. The term 'special election' means any election not general, held for any purpose authorized or required by law.

"Hutchins vs. City of Des Moines, 176 Iowa 189. Are not, therefore, elections called by the county superintendent in pursuance of the provisions of Chapter 209 special elections? They are elections authorized by law, and, upon the filing of a petition signed by a specified number of citizens, required to be called. It seems to us that they come within the plain definition of the statute, and that the absent voters' law is applicable thereto. At any rate, it seems clear that the purpose and intent of the legislature was to enact an absent voters' law broad and comprehensive enough to enable absent voters to cast their ballots at any election legally held in this state, except as noted above. It would be an anomaly in legislation for the legislature to provide a method by which absent voters might express their will at an election for the dissolution of a consolidated district and deny them the same privilege when the election to be held has been called to determine whether such a district shall be established. It would seem clear that the word 'in' as used in Paragraph 1 of Section 927, Code, 1927, with reference to elections, must be interpreted to mean 'for,' or 'on behalf of' that is, to refer to elections in which some interest of the district's is involved or to be served. The election in question was a special election, and there can be no doubt that it was the purpose and intention of the legislature to authorize absent voters to cast their ballots at such elections. The question, then, that naturally arises at this point is: Is the failure of the legislature to designate the county superintendent as the proper officer to receive the application thereof and to issue official ballots to absent voters a fatal defect in carrying out the general purpose? Not only does the statute require the county superintendent to call the election, but he is also required to appoint the judges thereof, who are required to make return of the ballots to him. Unless authority has been conferred upon the county superintendent to receive applications and issue official ballots, the general purpose of the legislature to make provision for absent voters must fail as to such special elections. It is the universal rule of statutory construction that, wherever a power is conferred by statute, everything necessary to carry out the power and make it effectual and complete will be implied. State vs. Baltimore & O. R. Co., 78 W. Va. 526 (89 S. E. 288); State vs. Huxford 34 R. I. 387 (87 Atl. 171); State ex rel. Otto vs. Kansas City, 310 Mo. 542, (276 S. W. 389); Clegg vs. City of Spartanburg, 132 S. C. 182 (128 S. E. 36); Paine vs. Savage, 126 Me. 121 (136 Atl. 664); Barrett vs. Union Bridge Co., 117 Ore. 220 (243 Pac. 93).

We are therefore of the opinion that an election held for the purpose of reorganization of school districts is a special election and one in which absentee ballots may be used.

March 25, 1955

TAX REMISSION: The Board of Supervisors has no power to remit taxes under provisions of section 445.62, Code of 1954, upon a building destroyed by explosion and fire where it was insured and the building restored by the insurance company although the owner suffered substantial rental loss.

Mr. Charles King, County Attorney, Marshall County: This is in answer to your letter of March 18, 1955, requesting an opinion as to the application of Code section 445.62, where a building has been "destroyed by an explosion and fire on February 27, 1954," that building was insured and restored by the insurance company to its original condition before September 1, 1954, and the owner has suffered a substantial loss in rental income during the period between those two dates.

Section 445.62 provides:

"The board of supervisors shall have power to remit in whole or in part the taxes of any person whose buildings, crops, stock, or other property has been destroyed by fire, tornado, or other unavoidable casualty, if said property has not been sold for taxes, or if said taxes have not been delinquent for thirty days at the time of the destruction. The loss for which such remission is allowed shall be such only as is not covered by insurance. The loss of capital stock in a bank operated within the state and the making and paying of a stock assessment for the year such stock was assessed for taxation shall be a destruction within the meaning of this section."

You state:

"I should like your opinion as to whether or not under the facts stated above the Board of Supervisors has the power to remit to the owner of the building any part of the 1954 taxes thereon, payable in the year 1955 and in that connection I would also like to know whether the words 'other property' embrace rental income and also whether the word 'loss' can embrace rental income."

If under the terms of the leases the owner was entitled to collect rent from any of the various lessees during the period the building was unusable, and failed to collect, his loss to that extent is not the result of destruction by fire, tornado, or other unavoidable casulty. In this connection, see 1923-24 Report of the Attorney General at page 405.

If the owner lost his right to collect rent for the period the building was destroyed, because of that destruction, his situation comes within the coverage of the statute only if rental income is within the term "other property" or if this is a "loss" from the destruction of his building not covered by insurance.

The apparent purpose of the statute is to permit relief from taxation with respect to property subject thereto that has been destroyed to the extent that loss thereon can not be recovered through insurance.

An interpretation of the term "other property" will be found in 1926 Report of the Attorney General at page 334. That opinion held that a bank deposit, lost because of failure of the bank, was not "other property," and it states:

"Property covered by the statute must be of such a character that it may be physically destroyed in some manner . . . ."

We see no reason to depart from this position. The right to rental income is an intangible not subject to physical destruction.

While the loss that the owner realized was the result of destruction of his building, it was not a direct loss but was only a consequential injury. Statutes exempting or relieving one from liability for taxes generally imposed should be strictly construed, and this statute so construed does not cover consequential injuries. The actual loss to the value of the property destroyed was covered by insurance; the object of the statute has been fulfilled; and your Board of Supervisors has no power to remit any portion of the property taxes of the owner of this building.

April 1, 1955

TAX EXEMPTIONS: Property owned by literary, scientific, charitable, benevolent, agricultural and religious institutions and societies which is vacant, that is not used by the society for the purposes of that society, is not used solely for their appropriate objects, and is not exempt from taxation within the terms of section 427.1, subsection 9.

Mr. Louis H. Cook, Director, Property Tax Division, State Tax Commission: This is in answer to your recent inquiry concerning exemption from property taxation of tracts of vacant land owned by certain religious institutions. According to the information given this office, you are immediately concerned with four tracts of vacant land which are located in districts where the various denominations hope to build either a church or a parochial school sometime in the future but have no immediate plans for use of the land. In connection with one tract of forty acres, we understand two goal posts have been placed upon it and some portion of the tract is occasionally used by an educational institution, not the owner of the tract, as a football practice field.

The statute involved is Section 427.1(9) which is set forth in full as follows:

"All grounds and buildings used by literary, scientific, charitable, benevolent, agricultural, and religious institutions and societies solely for their appropriate objects, not exceeding three hundred twenty acres in extent and not leased or otherwise used with a view to pecuniary profit. All deeds or leases by which such property is held shall be filed for record before the property herein described shall be omitted from the assessment."

This exemption has been part of the law of this state since the Code of 1851 substantially in its present form with the only major change being a reduction in the number of acres which could be exempt. This section has been construed in a number of cases and attorney general's opinions of which the following relate directly to the problem with which you are concerned.

Mulroy vs. Churchman, 60 Iowa 717, was an action at law to recover possession of forty acres based upon a tax title. Defendant claimed the legal title had been in a church and that the land was used as a cemetery and was not subject to taxation. The Court found that only one-half acre of the tract was used as a cemetery; that the balance had been vacant for many years although it had recently been rented for farming purposes. The Court held that except for the one-half acre this tract was not devoted solely to the appropriate objects of a religious society.

Kirk vs. St. Thomas' Church, 70 Iowa 287, raised the question of the taxability of vacant unimproved land owned by a church which was favorably located for the establishment of a church or school but with respect to which no action had been taken indicating an intention to devote the property to that use. The Court says until the property "was devoted to such object it was taxable under the statute." This property was held not to be exempt.

Nugent vs. Dilworth, 95 Iowa 49, involved a tract of land purchased for the purpose of erecting a church but not used for that purpose because the society found a better location. The society involved mortgaged these lots and used the proceeds for the purpose of building the church on their other lots. The lots in question remained vacant. The Court held that these lots were not used solely for the appropriate objects of the society and were subject to taxation.

Foy vs. Coe College, 95 Iowa 689, related to the status of a tract of vacant land which the college had had subdivided and was holding for sale. The Court held that these lots were not exempt from property taxation.

In 1898 Report of the Attorney General at page 232, the opinion is given that lands owned by a benevolent society in its own name, which lands are vacant but are held with the intention of building thereon a building to be used by the society, are not exempt from property taxation.

In view of the foregoing decisions of the Supreme Court of Iowa and the opinion of the Attorney General, it is the opinion of this office that property owned by literary, scientific, charitable, benevolent, agricultural, and religious institutions and societies which is vacant and is not used by the society for the purposes of that society is not "used solely for their appropriate objects," and is not exempt from taxation. On the basis of the information given as to the use of the forty-acre tract, it would appear to be an extremely casual use not by the society which owned the land and, therefore, not used solely for the appropriate object of the owner. Whether the use of the tract of land is such as to qualify it for the exemption is, of course, a factual question that must be determined at the local level.

April 5, 1955

TAX EXEMPTIONS: Where life tenant claims homestead exemption and the remaindermen consist of two daughters of the life tenant and the surviving husband of another deceased daughter, the life tenant is not an owner within section 425.11, subsection 2, Code of 1954, and claim should be denied.

Mr. Martin Lauterbach, Chairman, State Tax Commission: This is in response to your oral inquiry of recent date with regard to disallowance of homestead exemption claim filed by a life tenant, when the remainder interest is owned jointly by two daughters of the life tenant and by a son-in-law who is the surviving spouse of a third daughter. The son-in-law holds his interest by virtue of survivorship. We are not informed whether this ownership is the result of deed or bequest.

The life tenant is entitled to homestead exemption if she is "owner" of the premises involved. By definition in section 425.11(2) the term "owner" includes, in part, "the person occupying the homestead under devise or by operation of the inheritance laws where the whole interest passes or where the divided interest is shared only by blood relatives, or

by legally adopted children, or where the person is occupying the homestead under a deed which conveys a divided interest where the other interests are owned by blood relatives or by legally adopted children."

As the situation imposed involves a life estate and remainder in real estate, with no equitable conversion, whether these interests were created by deed or by bequest they are a divided interest and the Rule of Holzhauser vs. Iowa State Tax Commission, 62 N. W. 2d 229, is not applicable.

Only one other published opinion is relevant to this matter. In 1938 Report of the Attorney General, at 325, it was held that although husband and wife are not generally considered to be blood relatives, the legislative intent was such that they should be considered blood relatives for the purposes of this statute. However, the same opinion held that a man and his mother-in-law were not related by blood, and no homestead exemption could be claimed by either of them on land in which each held an undivided interest.

The position taken that husband and wife are to be considered blood relatives has been upheld in several unreported district court decisions construing this section. For this reason, we understand, during the lifetime of the third daughter in the case in question the fact that her interest was jointly held with her husband was not considered to violate the statutory requirement "owned by blood relatives."

Without passing on the correctness of the position taken by you during the lifetime of the third daughter, it is our opinion that at least after her death her husband can not be considered "related by blood" to his mother-in-law and sisters-in-law. Accordingly, while he owns a remainder interest the mother-in-law does not qualify as "owner" under section 425.11(2), and is not entitled to the benefit of the Homestead Tax Exemption.

April 6, 1955

LEGISLATORS, COMPENSATION: By election and qualification, members of the General Assembly become entitled to the compensation provided by the sections 2.11 and 2.15 of the Iowa Code of 1954.

Mr. A. C. Gustafson, Chief Clerk, House of Representatives: This will acknowledge receipt of yours of the 5th instant in which you ask for a reconsideration of a letter opinion issued to you March 25, 1955, which was based upon a previous opinion of this department appearing in the Report for 1936, page 645.

Your letter calls attention to several facts both distinguishing the situation presented and the situation to which the 1936 opinion was addressed and doubting the applicability of certain sections quoted in the cited opinion. Upon reconsideration we advise as follows:

Section 2.11, Code of 1954, provides for the compensation of full-time members and section 2.15, Code of 1954, provides for the compensation of part-time members. They are exhibited here as follows:

"Section 2.11. *Compensation of full-time members.* The compensation of the members of the general assembly, except the speaker, shall be: To every member, for each full regular session, two thousand dollars, and for each extra session the same compensation per day while in session, to be ascertained by the rate per day of the compensation of the members of the general assembly at the preceding regular session; and in going to and returning from the place where the general assembly is held, five cents per mile, by the nearest traveled route; but in no case shall the compensation for any extra session exceed twenty dollars per day, exclusive of mileage.

"Section 2.15. *Compensation of part-time members.* When a vacancy occurs during the session of the general assembly, and by reason thereof the term of office of any member does not cover the entire session, such member shall be paid as follows:

"To a member whose term of office covers fifteen session days or less, three hundred dollars.

"To a member whose term of office covers more than fifteen session days and less than thirty-one such days, five hundred dollars.

"To a member whose term of office covers more than thirty session days and less than fifty-one such days, seven hundred dollars.

"To a member whose term of office covers more than fifty session days, two thousand dollars.

The terminology there used is plain and unambiguous and to amplify their meaning by interpretation is not authorized. As so worded, both the provision for compensation of full-time members and that for part-time members are related to the sessions of the legislature as opposed to the idea of any individual service during the session. The rule is that a plain unambiguous statute does not lend itself to interpretation. The 1936 opinion upon which reliance was placed was based upon what is now designated section 2.21, Code of 1954. This section provides as follows:

"Section 2.21. *Issue of warrants.* The state comptroller shall also issue to each officer and employee of the general assembly, from time to time, upon certificates signed by the president of the senate and the speaker of the house, warrants for the amount due for services rendered."

We are of the opinion that the words "officer and employee" as used therein do not refer to members of the legislature. It is true that members of the state legislature are state officers but they are not officers of the general assembly. In our opinion section 2.21 heretofore quoted is corollary to section 2.19, Code of 1954, which provides as follows:

"Section 2.19. *Compensation of chaplains, officers, and employees.* The compensation of the chaplains, officers, and employees of the general assembly shall be fixed by joint action of the house and senate by resolution at the opening of the session, or as soon thereafter as conveniently can be done, and no other or greater compensation shall be allowed such chaplains, officers, and employees, except that they shall be furnished by the state such stationery and supplies as may be necessary for the proper discharge of their duties."

There, provision is made for the compensation of officers and employees of the general assembly by joint meeting of the house and senate. These are the officers and employees referred to in section 2.21.

The Constitutional provision for compensation of members of the general assembly is section 25 of Article III and provides as follows:

"*Compensation of members.* Sec. 25. Each member of the first General Assembly under this Constitution, shall receive three dollars per diem while in session; and the further sum of three dollars for every twenty miles traveled, in going to and returning from the place where such session is held, by the nearest traveled route; after which they shall receive such compensation as shall be fixed by law; but no General Assembly shall have power to increase the compensation of its own members. And when convened in extra session they shall receive the same mileage and per diem compensation, as fixed by law for the regular session, and none other.

Note that while the per diem compensation is provided therein for the first session of the General Assembly, compensation of members of subsequent general assemblies is directed to be fixed by law. Such direction has been followed by the legislature from time to time and now exists in the form of sections 2.11 and 2.15 heretofore exhibited.

These sections fixed the compensation for each regular session at two thousand dollars and is within the powers of the legislature. No provision has been enacted which would deny compensation to members of the legislature during periods of absence.

It therefore follows that by election and qualification the member becomes entitled to the compensation provided by sections 2.11 and 2.15, Code of 1954. The letter of opinion issued to you on March 25 and resultantly, the 1936 opinion therein relied upon are withdrawn.

April 28, 1955

MOTOR VEHICLES: Chauffeur's license for operator of private school bus. Operator of private school bus required to have chauffeur's license and may obtain same for that purpose upon attaining the age of seventeen years. Statutory provisions in Code of 1954, authorizing special chauffeur's license to one sixteen years of age to operate school bus, do not apply to operators of buses belonging to private schools.

Mr. William G. Klotzbach, Buchanan County Attorney, Independence, Iowa: By letter dated March 7, 1955, you request an opinion of this office as to whether operators of private school busses must be of the age of 21 years.

For the purposes of chapter 321, Code of Iowa 1954, (Motor Vehicles and Law of the Road) the following definition appears in subsection 27 of section 321.1.

" 'School bus' means every vehicle operated for the transportation of children to or from school, except privately owned vehicles, not operated for compensation, or used exclusively in the transportation of the children in the immediate family of the driver."

The foregoing definition does not exclude private school busses. It follows that unless the context of any specific provision of the chapter relating to school busses connotes otherwise, the provision will apply to busses of both public and private schools.

Subsection 43 of section 321.1 of the Code provides in pertinent part:

" 'Chauffeur' means any person who operates a motor vehicle in the transportation of persons, including school busses, for wages, compensation or hire. * * *."

Section 321.174 of the Code provides in pertinent part:

"No person shall operate a motor vehicle as a chauffeur unless he holds a valid chauffeur's license."

Section 321.177 of the Code provides in pertinent part:

"The department shall not issue any license hereunder:

"2. To any person, as a chauffeur, who is under the age of eighteen years, * * *."

The above provision of section 321.177 is qualified by the provisions of section 321.178:

"Notwithstanding the provisions of subsection 2 of section 321.177, the department is hereby authorized to issue to a person seventeen years of age a license to operate a motor vehicle as a chauffeur, upon application showing the information and signatures required in section 321.184."

The information and signatures required in section 321.184 of the Code referred to in section 321.178 relate to "both the father and mother of the applicant, if both are living and have custody of him, or in the event neither parent is living, then by the person or guardian having such custody or by an employer of such minor."

By virtue of the foregoing provisions of the Code, the drivers of all school busses, both public and private, must have a chauffeur's license.

Section 321.376 of the Code provides:

"The driver of every school bus shall have a regular or special chauffeur's license issued by the department of public safety, and in addition thereto, must hold a school bus driver's permit issued by the department of public instruction.

"Notwithstanding the provision of subsection 2 of section 321.177, the department of public safety is hereby authorized to issue a special chauffeur's license to a person sixteen years of age to operate a school bus on request of local school board and recommendation of the state superintendent of public instruction."

As the department of public instruction, the local school board and the state superintendent of public instruction have no jurisdiction over private schools, it is the sense of section 321.376 that the provisions therein set forth apply only to public schools.

Section 321.378 of the Code provides:

"The provisions of sections 321.372 to 321.380, inclusive, shall apply to any and all types of school districts where children are transported to and from public schools."

The reference in section 321.378 to " all types of school districts" relates to public school districts and does not affect the question here con-

sidered. However, this provision is not exclusionary and the provisions of sections 321.372 to 321.380 may apply to private school busses where the context does not indicate otherwise. For example, the provisions of section 321.377 apply to private school busses as well as public school busses:

"No motor vehicle in use as a school bus shall be operated at a speed in excess of thirty-five miles per hour. Any violation of this section, by a driver, shall be deemed sufficient cause for canceling his contract."

You are therefore advised that under the Code sections hereinbefore set forth, it is the opinion of this office that the operator of a private school bus must have a chauffeur's license and may obtain such a license for the purpose of operating a school bus upon attaining the age of seventeen years. The provisions relating to the issuance of a special chauffeur's license to a person sixteen years of age to operate a school bus do not apply to operators of busses of private schools.

May 19, 1955

VACATION: Right of state employees. Section 79.1, Code 1954, as amended by House File 101, Acts of the 56th G. A., prescribes length of vacation varying with employee's completed year or years of consecutive service. The three-week period of vacation authorized by House File 101 being available only to those employees who completed ten or more years of consecutive service on or after April 21, 1955, as the effective date of House File 101 was April 22, 1955. Due to the provisions of Section 29.28, Code 1954, induction into military service of an employee who returns to state employment following that service does not disrupt consecutive service.

Mr. K. L. Hart, Auditor, Iowa State Highway Commission: You present the following questions with reference to an interpretation of House File 101, an amendment to Sec. 79.1, Code of Iowa 1954, insofar as it relates to vacation for state employees:

"1. On what date would a state employee be entitled to have granted to him the three weeks vacation specified in the statute as amended?

"2. If an employee with twelve years of continuous service has already taken two weeks vacation, is he entitled to an additional week of vacation because of the change in the statute which became effective by publication on April 22, 1955?

"3. Does a non-military break in the employer-employee relationship affect the vacation time to be granted to a state employee? Would the situation be different if the break or absence of the employee was due to military induction?"

The amendment to Sec. 79.1 passed by the 56th G.A. and effective on April 22, 1955 provides as follows:

"All employees of the state, including highway maintenance employees of the State Highway Commission, are granted one week's vacation after one year's employment and two weeks vacation per year after the second and thru the tenth year of employment, and three weeks vacation per year after the tenth and all subsequent years of employment with pay."

Answering your first question, the amount of vacation to which an employee is entitled is fixed by his completed years of consecutive service for the State of Iowa. The grant of vacation rights for service during the prior year is made as of the first day of the current year of service. OAG 1942, p. 184. The enjoyment of these vacation rights so granted will be taken by the employee during the current year. To cite an example, if an employee has completed ten consecutive years of service for the State of Iowa on April 20, 1955, he would on April 21, 1955 be granted two weeks vacation which he may take at any time during the current year. However, if another employee has completed ten consecutive years of service for the State of Iowa on April 21, 1955, he would on April 22, 1955 be granted three weeks vacation to be taken during the current year, since the grant of vacation rights was made on the effective date of the amendment.

Referring now to your question number 2, your attention is invited in part to the answer to question number 1 and the further advice that any state employee who has completed ten or more years of consecutive service to the state on or after April 21, 1955, is granted three weeks vacation. If such an employee has taken two weeks vacation since April 21, 1955, he is entitled to an additional week of vacation. If a state employee completed his twelfth consecutive year of state employment on July 5, 1954, irrespective of whether or not he has already taken his two weeks vacation, he is not entitled to an additional week of vacation since on July 6, 1954 he was granted two weeks vacation under the provisions of the law then in force. On July 6, 1955 such an employee would be granted three weeks vacation.

With respect to your question number 3, you are advised that the vacation time to be granted to state employees is based on consecutive years of service. The statute specifically gives to the employee one week's vacation after one "year's employment." It would be a strained construction indeed, which would prescribe the "grant" of a week's vacation to an employee who had worked 52 weeks for the state, which 52 weeks of employment was spread over a five-year period. Such was not the intent of the legislature. The requirement for consecutive employment is no less applicable in the case of an employee who works more than one year than it is for one who works just one year. Nor is the situation changed for those who seek three weeks vacation per year as provided for in House File 101, 56th General Assembly.

The grant of vacation periods to employees based on successively longer periods of service, was provided to serve as an incentive to employees to continue their employment with the State of Iowa with the natural consequences of mutual benefit to both the employer and the employee. Any construction which would relieve the necessity for consecutive service as a basis for determining the length of vacation which is granted by the State of Iowa, would destroy the purpose for which the longer vacation period was provided. A non-military break in the employer-employee relationship would destroy the requirement for consecutive service for the purpose of computing vacation rights.

Sec. 29.28, Code of Iowa 1954, relating to military leave of absence of state employees states:

"All officers and employees of the state, or a subdivision thereof, or a municipality therein, who are members of the national guard, organized reserves or any component part of the military, naval, or air forces or nurse corps of this state or nation, or who are or may be otherwise inducted into the military service of this state or of the United States, shall, when ordered by proper authority to active state or federal service, be entitled to a leave of absence from such civil employment for the period of such active state or federal service, without loss of status or efficiency rating, and without loss of pay during the first thirty 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."

This section specifically provides that state employees shall not lose their status "for the period of such active state or federal service." Thus, if an employee, while employed by the state, is inducted into the military service of "this state or of the United States" and returns to such state employment following his military service, the portion of time spent in the armed forces will count toward the accumulation of vacation benefits. OAG 1946, p. 138.

May 23, 1955

BEER: Keeping and Using Liquor on Premises of Holder of Class "B" Permit. Anyone keeping or using liquor with more than four per cent alcohol content on premises of Class "B" permittee violates Code Section 124.31, including permittee himself if keeping or using is within his knowledge, unless premises is one of excepted category. Opinion of September 5, 1940, withdrawn.

Mr. Leo J. Tapscott, County Attorney, Des Moines, Iowa: This is in response to your recent inquiry with respect to proper interpretation of Section 124.31 of the Iowa Code, pertaining to the using or keeping of liquor of an alcohol content of more than four per cent on the premises of a Class B permit holder.

You state that city police have reported the existence of certain "bottle men" who purchase liquor from authorized sources and furnish it to patrons of a tavern. Attempts to charge these men with violations of Section 124.31 have resulted in dismissals, after their attorneys have cited to the Court an opinion issued by the Attorney General, September 5, 1940, which appears in 1940 Attorney General Reports at page 573. You request review of the prior opinion.

Section 124.31 has been involved in three cases before the Supreme Court of this state. In the first of these, State vs. Talerico, 227 Iowa 1315, decided in March, 1940, the Court upheld the constitutionality of the section, assumed its purpose was not only to prevent sale of intoxicating liquors on premises of a Class B permittee but also to completely separate and divorce the beer business from any connection with the handling of intoxicating liquors containing more than four per cent alcohol. The Court also referred to the section as an interdiction against

the presence of intoxicating beverages in a licensed beer parlor. (This decision was not discussed in the 1940 Attorney General's opinion.) The Talerico case, and the two cases subsequent, State vs. Bradley, 231 Iowa 1112, and Williams vs. Jordan, 243 Iowa 605, arose out of prosecutions against the permittee, and do not deal directly with the problem of the "bottle man."

Thereafter, the 1955 Legislature, in Senate File 227, amended Section 124.31. As amended, it now reads:

"No liquor for beverage purposes having an alcoholic content greater than four percent by weight, shall be used, or kept for any purpose in the place of business of 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 any railway car of any dining car company, sleeping car company, railroad company or railway company, having a special class 'B' permit; to the premises of any hotel for which a class 'B' permit has been issued, other than that part of such premises regularly used by the hotel for the principal purpose of selling beer or food to the general public; to the private premises of any bona fide private club or association for which a class 'B' permit has been issued, having a select and discriminate membership and owned and operated by and for the benefit of the members which is under the exclusive control of the membership or,* to drug stores regularly and continuously employing a registered pharmacist, from having alcohol in stock for medicinal and compounding purposes."

Although the section could have been read, before amendment, to prohibit anyone from using or keeping the forbidden liquor on premises of a class "B" permittee, and by virtue of Sections 124.37 and 687.6 the violator subject to punishment, the prior opinion of this office was that the prohibition applied only to the permit holder himself. This conclusion was fortified by the provision for revocation of the permit and the reference to the drug store. To some extent *State vs. Bradley* may cast doubt on the correctness of the opinion. Although the accused in that case was the permit holder, the implication of that opinion is that the keeping of liquor on the premises *by anyone* with the knowledge of the permittee amounts to a violation thereof at least by the permittee. If this is true, and if the 1940 opinion is correct also, the anomalous result is that the customer may lawfully keep or use liquor on the premises but if with the knowledge of the permittee, the permittee's conduct is unlawful.

With the recent amendment to Section 124.31, the Legislature has clarified its intentions in these respects. The clear import of the section seems to be that the prohibition against use or keeping applies to anyone, whether a holder of a permit or otherwise. For example, in setting forth exemptions from the prohibition, the section as amended refers to any railway car of a holder of the type of special permit issued to dining car companies, sleeping car companies, or railroad or railway companies; and to the premises of hotel and private clubs or associations to which class "B" permits have been issued. Had the Legislature understood the prohibition to apply only to the holder of a permit, reference to the premises would have been unnecessary.

We therefore advise you that in our opinion the prior opinion of this office of September 5, 1940, does not now express the proper interpretation of Section 124.31 as amended, and it is hereby withdrawn. It is our opinion that anyone using or keeping liquor of the proscribed alcoholic content on the premises of a class "B" permittee (and the permittee if the keeping or using is with his knowledge) violates Section 124.31, unless the exceptions expressed in that section are applicable.

May 26, 1955

HIGHWAYS: Source of funds for secondary road research fund authorized in 310.34. Highway Commission authorized by section 310.34 to set aside 1½% of farm-to-market money in secondary road research funds prior to allocation of farm-to-market funds to counties contemplated in section 312.5 and to place 1½% of federal funds in secondary road research fund.

Mr. John G. Butter, Chief Engineer, Iowa State Highway Commission: You inquire in your letter of May 18, 1955, as follows:

"1. In the exercise of the authority granted to the Iowa State Highway Commission in Section 310.34 to set aside 1½% of the Farm-to-Market fund for secondary road research, may the Highway Commission set this amount aside prior to making the allocation of funds to the counties contemplated in Section 312.5;

"2. Should 1½% of funds from federal sources for highway purposes be placed in the secondary road research fund provided in Section 310.34.

Referring to your first question, we should first examine Section 310.34 which provides as follows:

"Notwithstanding the provisions of Section 310.4, the State Highway Commission is hereby authorized to set aside each year, not to exceed one and one-half percent of the receipts in the farm-to-market road fund in a fund to be known as the Secondary Road Research Fund."

Section 310.34 was passed by the 53rd General Assembly and approved on April 1, 1949 with effective date of July 4, 1949 while the pertinent provisions of Chapter 312 relating to the road use tax fund were passed by the 53rd General Assembly, approved on March 28, 1949 and became effective by publication on April 7, 1949. You are advised that with respect to any possible discrepancies between the two acts, the Iowa Supreme Court has held in Iowa Farm Serum Co. vs. Board of Pharmacy Examiners, 240 Ia. 734, 35 NW 2d 848 that "The rule that statutes in pari materia shall be construed together applies with peculiar force to statutes passed at the same session of the Legislature."

Section 310.4 designates the uses which may be made of the farm-to-market road fund. Section 310.34 is by statute made an exception to the various uses prescribed in Section 310.4. Funds which flow into the farm-to-market fund are by law certified to the State Highway Commission in their entirety and under the provisions of Section 312.5 are allocated out to the counties on either an area basis or an equalization basis by the Highway Commission.

Section 310.34 refers specifically to "receipts in the farm-to-market road fund" to which the 1½% is to be applied for the purpose of setting up the secondary road research fund. This must, of necessity, consist of "new money" which comes into the fund (42 NE 2d 30) prior to being made available for payment of demands against the money. 154 So. 47, 179 La. 430. Following the allocation of the "receipts" by the Highway Commission, the credit accruing to the counties is not subject to levy for funds which should have been set aside before the allocation was made. Consequently you are advised that the Highway Commission is, under the provisions of Section 310.34 authorized to set aside out of the receipts in the farm-to-market funds, enumerated in Section 310.3, the 1½% for secondary road research prior to allocation of the funds to the counties as provided in Section 312.5.

You next question the authority of the Highway Commission to credit the secondary road research fund with 1½% of federal funds received. The question of the propriety of placing such funds in the secondary road research fund seems to arise because of the definition of the farm-to-market fund set out in Section 310.3, notwithstanding the mandate given to the Iowa Highway Commission in the Federal Aid Act of 1916 as amended to credit the secondary road research fund with 1½% of all federal funds allocated and/or received and to allocate 1½% of matching funds from state sources. Similar funds and expenditures therefrom and receipts thereof, have been previously considered in prior opinions of the Attorney General (See OAG 1944 p. 123; OAG 1952 p. 66; OAG 1952 p. 102; OAG 1954 p. 157) with the holding that such funds from federal or other sources should be deposited to the source which initially supplied the funds for the project. When the secondary road research fund has been provided as set out in 310.34, that money loses its identity as farm-to-market funds as far as the Highway Commission is concerned. This fund should then be credited with 1½% of all secondary federal funds received. The answer therefore, to your question number 2 is "Yes".

June 9, 1955

COUNTY OFFICERS: Official Bonds — Senate File 88, Acts of the 56th G. A., effective July 4, 1955, merely authorizes county to pay the premium on surety bonds furnished by the named county elected officials and their deputies, named appointed county officials and county employees. It does not authorize the purchasing of a "blanket bond" covering all of the positions.

Hon. C. B. Akers, Auditor of State. Attention, Mr. Earl C. Holloway, Supervisor County Audits: This is in reply to your request for an opinion on whether Senate File 88, Acts of the 56th General Assembly, effective July 4, 1955, authorizes counties to purchase a "blanket bond" for the county elective officials, their deputies and the county appointed officials and employees designated in said Act.

The apparent purpose of Senate File 88 is to authorize the county to pay the premium on surety bonds furnished by the clerk of court, county

attorney, recorder, auditor, sheriff, member of the board of supervisors, engineer, steward or matron in the same manner as has heretofore been provided regarding a county treasurer's surety bond by the provisions of Section 64.11, Code 1954, and also by amending Section 64.15, Code 1954, to authorize the payment by the county of the premium on a surety bond required of a deputy county officer.

It has been the consistent opinion of this department that, unless otherwise expressly authorized, public officials are required to furnish individual bonds. This requirement is evident as to deputy county officers in the introductory words of Section 341.4, Code 1954, which are as follows:

"*Each* deputy shall be required to give a bond in an amount to be fixed by the officer having the approval of the bond of his principal, * * *."
(Italics ours)

As to the other county officers, the matter is controlled by the provisions of Section 64.2, Code 1954, wherein the introductory words appear as follows:

(Italics ours)

"*All* other public officers, except as otherwise specially provided, shall give bond with the conditions, in substance, as follows: * * *."

We have repeatedly held that the use of the word "all" in this section has the connotation similar to the word "each" in Section 341.4, Code 1954.

There are some cases where the legislature has expressly provided for a blanket bond; such an instance is that as set forth regarding responsible and accountable officers of the Iowa National Guard under the provisions of Section 29.37, Code 1954. It is there provided that *each* such officer shall execute and deliver a bond. The section then sets forth an express exception as follows:

"Provided, however, that the adjutant general, with the approval of the governor, may obtain an adequate indemnity bond covering all or part of the officers so accountable or responsible, in which case the officers so covered shall not be required to furnish individual bonds as hereinbefore provided."

In the instant case, had the legislature intended to provide for a blanket bond we must assume that a similar clear statement of authority would have been made by them in Senate File 88, Acts of the 56th General Assembly.

Our attention has been directed to that part of the explanation attached to House File 147, a companion bill to Senate File 88, wherein the authors stated:

"* * *, and by including the other officers, the county will be able to purchase blanket bonds at a substantial savings on the premiums now paid by the individual county officers."

We find it unnecessary to determine the legal effect, if any, of a mere conclusion stated by an author in the explanation to a house bill when

the journal shows the legislature had no opportunity to amend that act to correspond with the expressed intention or purpose of the author's. Such was the situation with House File 147 because the General Assembly chose to devote its attention to Senate File 88. We are of the opinion that the quoted statement from the explanation to House File 147 has no bearing upon the question under consideration.

It is our conclusion that the provisions of the statutes requiring individual bonds for county officers and their deputies have in no way been changed by the provisions of Senate File 88, Acts of the 56th General Assembly.

June 9, 1955

PERSONAL PROPERTY TAXES: **List of delinquent taxes to be published twice, within two consecutive weeks, last publication to be any time during the two weeks preceding first Monday in December; only list of delinquent taxes for current assessment year to be published; delinquent dog taxes not to be included in list.**

Mr. Edward P. Powers, County Attorney, Appanoose County, Centerville, Iowa: This will acknowledge your recent inquiry with respect to the effect of House File 237, relating to the lien of personal property taxes and publication of the list of delinquent personal property taxes. You have asked four questions, which we set forth and consider separately.

First, you ask, "Is November 15th the date for publication of notice or if not, what date is provided for the publication of the notice?" The applicable portion of House File 237 requires the list of delinquent taxes to "be published in some newspaper in the county once each week for two consecutive weeks, the last of which shall be not more than two weeks before the first Monday in December, and by immediately posting a copy of the first publication thereof at the door of the courthouse. * * *." From this it is apparent that the last publication may occur at any time during the two weeks before the first Monday in December. The first publication must be in the week preceding the second publication. There is no requirement for publication on November 15th and the date of publication is not defined more specifically than was indicated previously in this paragraph.

Second, you ask, "Is it the intention of the bill to require publication of all delinquent personal taxes as shown by the delinquent personal tax lists, or does it intend the publication only of the delinquent taxes for the current assessment year?" The applicable portion of House File 237 provides: "The treasurer shall cause to be compiled a list of all delinquent personal property taxes for the current assessment year, as shown by the delinquent personal property tax list." It is the compiled list which is to be published, not the entire record on the delinquent personal property tax list covering delinquencies of several years. In view of the language used by the Legislature, and the provisions for collection of

tax by distress warrant proceedings, it is apparent that the list to be published should be limited to delinquent personal property taxes for the current assessment year.

Your third question is: "Are delinquent dog taxes which has always been carried forward with delinquent personal taxes to the delinquent personal tax lists to be included in the published delinquent personal property taxes?" House File 237 refers only to delinquent personal property taxes. Dogs are licensed under the provisions of Chapter 351 of the Code. The auditor certifies the unpaid license fees plus a one dollar per dog penalty, on or before May 15th, and the treasurer thereupon is to enter the amount due as a tax against the owner. But said tax is not a tax on personal property, within the provisions of Chapter 427 of the Code. You are, therefore, advised that although the delinquent dog tax may be listed on the delinquent personal property tax list in accordance with Section 445.8, it is not required by House File 237 to be included in the list published in the newspapers.

Your fourth question is: "What sort of penalty is provided in the event the Treasurer fails to comply with House File 237?" This law imposes certain duties upon the Treasurer. Other duties have been imposed upon him by other laws. If the Treasurer fails to comply with the requirements of House File 237, he will be subject to the same sanctions as apply where he fails to comply with other requirements imposed by law under similar circumstances, including those appearing in Chapter 66 of the Code.

June 9, 1955

COUNTY ASSESSORS: County conference may review assessor's salary and fix it, effective from July 4, 1955, in accordance with revised county officers' salary law.

Mr. Louis H. Cook, Director, Property Tax Division, State Tax Commission, Des Moines, Iowa: This will acknowledge your recent request for an opinion as to whether or not the county conference can consider and fix the salary of the county assessor so as to reflect the adoption by the 56th General Assembly of House File 128 and Senate File 252.

House File 128 provides, in part, that auditors of counties with a land area of less than 390 square miles shall receive the same salary as is provided in Code Section 340.1 for auditors in counties having a population of 20,000 and less than 25,000.

Senate File 252 increased the salaries to be received by county auditors in each of the various county-population brackets.

Section 441.6, Iowa Code, in part provides as follows:

"The county conference as established by the provisions of Section 442.1 shall fix the salary of the county assessor which shall not be more than that of the salary of the county auditor in each county, provided, however, that with the approval of the board of supervisors the county

conference may fix such salary in excess of the salary of the county auditor."

This section became effective July 4, 1951. Under the provisions of Sections 441.2 and 441.3, county assessors are appointed by the county conference for a term of four years.

In a letter opinion from this office dated July 12, 1949, it was held, on the authority of Kellogg vs. Story County, 219 Iowa 399, that the conference having once fixed the salary of the assessor could not change the same during his term of office. The matter was further examined, and in an opinion of July 20, 1950, appearing in 1950 Report of the Attorney General at 180, it was held that the county conference having once fixed the assessor's salary on a term basis could not thereafter during the term change that salary.

Following the 1951 adoption (House File 422) of the present Section 441.6, the matter was further reconsidered, and an opinion was issued June 7, 1951, 1952 Report of the Attorney General 32. That opinion concluded that it was the intention of the Legislature to permit the county conference to revamp the salary of the county assessor to reflect increases granted at that time to the other county officers. It indicated that the conference was directed by the law to review the assessor's salary and fix the same effective as of July 4, 1951, for the remainder of the term. (House File 422 contained provisions relative to the salary of other county officers, deputies, assistants, and clerks, and its title enumerated these officers, county attorneys and their assistants, and county assessors.)

Neither House File 128 nor Senate File 252 refer specifically to county assessors. The Title of Senate File 252 is "An Act Relating to the Compensation of County Officers, Probation Officers and Appointive Jury Commissioners." However, there is no indication that the Legislature intended to revamp the salaries of all other officers and leave the salary of the assessor unchangeable. The conclusions of our 1951 opinion would appear to be applicable to the current situation.

You are, therefore, advised that the county conference may review the salary of the county assessor and fix it in accordance with the revised laws for the remainder of the term to be effective from July 4, 1955.

June 9, 1955

MILITARY SERVICE TAX EXEMPTIONS: Exemptions for veterans of Korean conflict becomes effective with respect to 1956 taxes; county auditors without authority to accept applications prior to July 1, 1955.

Honorable Thomas J. Dailey, Burlington, Iowa: This will acknowledge receipt of your request of May 28 for an opinion as to the availability of military tax service exemptions on 1955 taxes for veterans of the Korean conflict. You point out that Section 427.6 of the Iowa Code requires that applications for exemption must be filed on or before July 1st

of the year for which exemption is claimed. Senate File 152, which amended Section 428.3 so as to provide exemption for Korean conflict veterans had no publication clause, and, therefore, becomes law on July 4, 1955.

You, therefore, asked the following question:

"Shall the county auditors of the respective counties proceed immediately to accept applications for military service tax exemption for veterans of the Korean War as defined in Senate File 152 and proceed to process the same, and shall said exemptions be granted with respect to taxes for the year 1955 due and payable in 1956 in accordance with Chapter 427, 1954 Code of Iowa?"

It is the opinion of this office that as there is no legal basis as of July 1, 1955, for granting exemption to such veterans, the county auditors are without authority to accept application therefor. As a claim for such exemption cannot be filed within the time specified in the present law, no exemptions can be granted on the basis of Senate File 152 with respect to taxes for the year 1955.

The situation is analogous to that created by enactment of Senate File 18 which requires the annual filing of claims for military exemption. This law also becomes effective on July 4 and will be applicable to claims for exemption for the year 1956 and for subsequent years.

June 16, 1955

HIGHWAYS: Secondary road districts — eligibility for refund of over-assessments. Under provisions of Section 311.7 landowners who voluntarily pay proportionate cost of surfacing thus relieving necessity of establishing assessment district, entitled to proportionate refund if cost is less than engineer's estimate. Where secondary road assessment district is established, landowners assessed are not entitled to proportionate refund if cost is less than engineer's estimate.

Mr. Richard H. Wright, County Attorney, Bloomfield, Iowa: In your letter of May 6, 1955, you state:

"Does Section 311.7 contemplate the refund of the difference between the engineer's estimated cost and the actual cost of surfacing, to an assessment district landowner who pays his assessment in full immediately after the establishment of the assessment district?

"The question has arisen in the situation where a Secondary Assessment District has been established on petition of landowners. Immediately after the establishment, one of the landowners in the district paid his assessment in full. Other landowners have, and are continuing on the 10 year installment basis.

"In the purchase of the rock for surfacing, the County was able to purchase at a cost less than the estimate.

"The landowner who paid his assessment in full has asked for a refund of the excess between the actual cost of the rock surfacing and the estimated cost of the surfacing used as the basis for the Engineer's estimate in establishing the assessment."

An analysis of Section 311.7 reveals that an owner or group of owners of land adjacent to, or abutting on secondary roads, may pay for the improvement of their roads through the use of one of two particular methods. One of the methods is when "the owner or owners of *all* the lands included in any special road assessment district . . . . . subscribe and deposit with the county treasurer an amount not less than fifty percent . . . . of the engineer's estimated cost of the surfacing of the road . . . .", in which case the Board of Supervisors are authorized to accept such amount in lieu of setting up a secondary road assessment district. In that event, the money has been paid in by the landowners and is on hand in the county treasurer's office and is available for the purpose of making a refund if necessary.

The other method of paying for the improvement is by the establishment of a secondary road assessment district based on the estimated cost as provided in Section 311.20 as computed by the county engineer, which is presumed to be the correct cost as provided in Section 311.10. Appropriate machinery is provided in Section 311.24 for appeal from the assessment as so made and in Section 311.28 for the issuance of anticipatory tax certificates and in Section 311.29 for the sale of said certificates.

It will be seen that under the assessment method of financing improvements, not only is it true that in the absence of issuance and sale of tax certificates, there may be no money on hand in the county treasurer's office to return to them "the remaining funds provided by the sponsors" as required in paragraph 6 of Section 311.7, but even if tax certificates were sold to cover the cost of the improvement, the cost would be borne from the sale of tax certificates and not from "funds provided by the sponsors." The fact that one or more landowners in the secondary road assessment district has paid his entire assessment does not bring him within the class of landowners who have voluntarily paid in their portion of the cost of the improvement and so rendered unnecessary the establishment of an assessment district.

You are, therefore, advised that under the provisions of Section 311.7 and related sections referred to above, if a secondary road assessment district is established as provided therein, the funds in the hands of the county treasurer for the payment of the cost of such improvement are not subject to the payment of proportionate refunds following completion of the project and a determination of the final cost, which is lower than the engineer's estimated cost.

Specifically answering your question, an assessment district landowner is not entitled to a refund following completion of the project, even though he has paid his entire assessment in full.

June 16, 1955

CONTRACTS — PUBLIC OFFICIALS: State and County officials and employees are not prohibited from selling materials to contractors for the construction or maintenance of highways, bridges and culverts

unless under the circumstances such person is "directly or indirectly" interested in the contract.

Hon. Leo Elthon, Lieutenant Governor, Des Moines, Iowa: By letter dated May 4, 1955, directed to the Attorney General you inquire whether it is the effect of Section 314.2, Code of Iowa, 1954, that appointive and elective state and county officials and employees are prohibited from selling materials to contractors contracting for the construction, reconstruction, improvement or maintenance of any highway, bridge or culvert.

Section 314.2 of the Code of Iowa, 1954, provides:

"No state or county official or employee, elective or appointive shall be directly or indirectly interested in any contract for the construction, reconstruction, improvement or maintenance of any highway, bridge or culvert or the furnishing of materials therefor. The letting of a contract in violation of the foregoing provisions shall invalidate the contract and such violation shall be a complete defense to any action to recover any consideration due or earned under the contract at the time of its termination. Acts 1949 (53 G. A.) Ch. 125.3."

These provisions first appeared in the highway statutes as a result of legislation of the 38th G. A. which at Chapter 237, Section 11 provided in part:

"No contract shall be let to any state or county official, elective or appointive, nor to any relative of such state official, nor to any partnership or corporation in which such state official or relative thereof is financially interested. No contract shall be let to any partnership or corporation in which a county officer of the contracting county, or relative of such county officer, is financially interested. The letting of a contract in violation of the foregoing provisions shall not invalidate the contract, nor any bonds issued thereunder, but upon discovering such violation, the Board of Supervisors or the State Highway Commission may terminate the contract, and such violation in case of such termination shall be a complete defense to any action by the contractor to recover any consideration due or earned under the contract at the time of such termination."

The 42nd G. A. in Chapter 101 at Section 11 provided that Section 4700 quoted in part above, be amended, revised and codified to read in part as follows:

"No contract shall be let to any state official, elective or appointive, nor to any relative within the third degree, of a member of the State Highway Commission, nor to any partnership or corporation in which a member of the Highway Commission is financially interested. The letting of a contract in violation of the foregoing provisions, shall invalidate the contract, and such violation in case of such termination, shall be a complete defense to any action to recover any consideration due or earned under the contract at the time of such termination."

This section, as amended, became codified as Section 4655.10 and subsequently Section 313.10, until it was amended by the 53rd G. A. at Chapter 125, Section 3 into its present form as set out above in Section 314.2, Code of Iowa, 1954.

There have been no decided cases or attorney general opinions touching on the present code section, 314.2.

June 16, 1955—2

CONTRACTS—PUBLIC OFFICIALS: A direct sale by a "state or county official, elective or appointive" either on a contract basis or the direct furnishing of materials for the "construction, reconstruction, improvement or maintenance of any highway, bridge, or culvert" is clearly prohibited by statute and by the interpretations of similiar statutes by the Supreme Court of Iowa. Wayman vs. City of Cherokee, 204 Iowa 675, 215 N W 655 (1927), and cases therein cited.

An example of a transaction between public bodies and public officers which has been held to be "indirect" within the meaning of similar provisions, is found in Krueger vs. Ramsey, 188 Iowa 861, 175 N W 1 (1919), where the court held that a city councilman who has an understanding that if the city would vacate a road he would deed to the city his own private road would be void.

The Attorney General in considering the question as it applied to the Board of Education in 1930 OAG 207 stated in pertinent part:

"The fact that the state officer . . . . was a member of a wholesale company and happened to be the managing officer of such company and that said wholesale company sold material to the contractor who secured his contract from the State Board of which the managing officer of the wholesale company was a member, would not in itself be a violation of Section 13324, Code of Iowa, 1927. If, however, *there was some understanding* between the managing officer of the wholesale company, who was a member of the State Board which was letting the contract, and the contractor to the effect that if the contractor received the contract he would buy his material from a dealer who was handling this wholesale company's particular material, then we think the member of the State Board would have such an interest in the contract as would make such transaction a violation of Section 13324, Code of Iowa, 1927, for then such member of the State Board would have an interest in the contract."

Again, at 1934 OAG 443, the Attorney General considered an interpretation of the then Section 13324 which stated in part:

". . . . 'it shall be unlawful for . . . any other officer of any educational . . . institution . . . to be interested directly or indirectly in any contract to furnish or in furnishing provisions, materials, or supplies of any kind to or for the institution of which he is an officer . . . . . .' Therefore I do not believe your company could sell directly to the institions, nor do I believe that your company could sell directly to the contractor who was the successful bidder on a project of the institution, as you would be interested in the contract. But your company would not be prohibited from selling material to a dealer, even though the company knew that this dealer was in turn going to sell the product to the contractor for a project at the institution, as this would be a matter of two separate contracts, that is, a contract of sale by your company to the dealer, and a contract of sale by the dealer to the contractor, and would not come within the prohibition of the statute . . . . You, of course, could not have an agreement with the contractor prior to the letting, that as a condition securing the contract, he would use the material of the Sheffield Brick & Tile Company, as that would be wholly illegal . . . . but in my opinion there is no prohibition in the Sheffield Brick & Tile Company selling to a dealer who, in turn, sells to the contractor on an institution project, even though the Sheffield Brick & Tile Company may know at the time of its sale to the dealer that the dealer plans in turn on selling part of the material to the contractor."

The question of the propriety of selling by contract to another who in turn will contract with the Iowa Highway Commission and the effect of such an arrangement as it relates to the prohibitions set out in similar statutes was considered in the case of Wayman vs. City of Cherokee, 204 Iowa 675, 215 N W 655 (1927), where the Court said:

"The agreement between J. D. Wayman and appellant for the rental of the cement mixers, tools and other equipment is not a part of the contract to do the work of the city. If the agreement had been entered into for the purpose of securing contracts with the city and for the division of profits, on contracts made therewith in pursuance thereof, the situation would be different."

The particular question as to whether a contract or agreement is indirect within the prohibition of the statute must, of necessity, depend on the facts in each particular case. The element of "prior agreement" referred to above would seem to cause an otherwise simple business transaction to come within the prohibition of the statute.

You are advised that it is the opinion of this office that appointive and elective state and county officials and employees are not prohibited from selling materials to contractors contracting for the construction, reconstruction, improvement or maintenance of any highway, bridge or culvert, under Section 314.2, Code of Iowa, 1954, provided there is no understanding existing prior to or at the time the contractor enters into his contract that the contractor will purchase materials from such officials or employees in the event the contract is awarded to him. To the extent that this opinion may be in conflict with any prior opinion of this office, such prior opinion is hereby accordingly modified.

June 23, 1955

LICENSED EMPLOYMENT AGENCIES: Fee Limitation. A high school certificate does not fall within the phrase, "license, certificate or college degree," and therefore even though an employer requires such a certificate of graduation it does not constitute an exemption to the fee limitation fixed in Section 94.6, Code 1954.

Hon. Melvin D. Synhorst, Secretary of State: This is in reply to your recent request for an official opinion interpreting the provisions of Section 94.6, Code 1954, which you make in your capacity as an ex officio member of the Commission existing under the provisions of Chapter 95, Code 1954. You set forth a proposed schedule of fees recently submitted to your commission by an applicant for a license in the following form:

FEE SCHEDULE

On positions which do not require a High School certificate, 25% of one full month's (4 1/3 weeks) gross earnings.

On all others:

25% of one full month's (4 1/3 weeks) gross earnings, paying up to $276.00 per month.

50% of one full month's (4 1/3 weeks) gross earnings for a position paying over $276.00 per month.

Fee to be paid in full within 30 days from date of employment.

EXECUTIVE, ADMINISTRATIVE, ENGINEERS AND SALES POSITIONS: 5% of my earnings for one year including bonus and any commissions that may be gained during the year. Fee to be paid within 60 days from date of employment, with adjustment to be made at end of the year covering any bonus or commissions not included in the initial fee calculation. I further agree that I will furnish ACME EMPLOYMENT SERVICE, a true and accurate statement at the end of the first 12 months on all salary, commissions and bonuses received by me from my employer.

TEMPORARY EMPLOYMENT: 10% of the total gross amount earned during the entire period of employment, payable as received by me, but in no case to exceed the service fee for a permanent position.

You specifically ask whether a high school certificate is a "license, certificate or college degree" within the contemplation of that phrase appearing in Section 94.6, Code 1954. You also ask whether the Commission has any concern with regard to that part of the fee schedule listed under the heading, "On all others."

Section 94.6 as it appeared in the Code of 1946 provided as follows:

"No such person, firm, or corporation shall charge a fee for the furnishing or procurement of any situation or employment which shall exceed ten percent of the wages offered for the first month of any such employment or situation furnished or procured.

"The provisions of this section shall not apply to the furnishing or procurement of employment in any profession for which a license or certificate to engage therein is required by the laws of this state, nor to the furnishing or procurement of vaudeville acts, circus acts, theatrical, stage or platform attractions or amusement enterprises."

Had the question been presented as to whether a high school certificate fell within the terminology, "license or certificate," as used in the foregoing statute, the answer clearly would have been dependent upon whether or not it was a "license" or "certificate" *required by the laws of this state to engage in any profession.*

A search of the statutory provisions in the Iowa Code fails to reveal mention made of a high school certificate or diploma. The graduation ceremony and award of a diploma upon completion of a course of study prescribed by the local school board is only traditional. Such was the holding of the Iowa Supreme Court in *Valentine vs. Independent School District,* 187 Iowa 555, 174 NW 334, 191 Iowa 1100, 183 NW 434, and in the case of *Switzer vs. Fisher,* 172 Iowa 266, 154 NW 465. It follows then that such a certificate could not have been held to be one required "by the laws of this state" as a prerequisite to engaging in a profession under the foregoing statute.

Section 94.6 as it appears in the 1954 Code is as follows:

"No such person, firm, or corporation shall charge a fee for the furnishing or procurement of any situation or employment which shall ex-

ceed *twenty-five* percent of the wages offered for the first month of any such employment or situation furnished or procured.

"The provisions of this section shall not apply to the furnishing or procurement of employment in any profession *or occupation* for which a license, certificate or *college degree* to engage therein is required by the laws of this state *or by the employer*, nor to the furnishing or procurement of vaudeville acts, circus acts, theatrical, stage or platform attractions or amusement enterprises."

The *italics* in the first paragraph indicate a change by Senate File 191 enacted by the 54th General Assembly which has no bearing on the question you present. The *italics* in the second paragraph indicates additions made by the provisions of House File 29 in 1949, which appears as Chapter 65, Laws of the 53rd General Assembly. Neither the term, "license," nor "certificate" are redefined by this amendment. Another qualification, namely, a college degree, is added in the enumeration of those things "required by the laws of this state" to engage in any profession or occupation. What then is the legal effect of the added phrase, "or by the employer?" In our opinion the effect was not to enlarge or change the class of "license," "certificate," or "college degree" which might be required but rather was to provide an additional source over and above the requirement of the laws of this state from which the requirement might come; namely, the prospective employer.

It follows then that if a high school diploma was not within the class of a "license" or "certificate," as contemplated by the original statute, it is not within the class of either a "license" or "certificate" within the contemplation of the present provisions of Section 94.6, Code 1954.

Without attempting to pass upon the legal effect of the "Explanation" appended to a bill introduced in the House of Representatives, we would direct your attention to the provisions appearing in the one appended to House File 29 as considered by the members of the 53rd General Assembly. It was as follows:

"Under the provisions of section 94.6, Code 1946, Employment Agencies are permitted to charge as their fees no more than 10% of a month's salary, except on certain cases therein listed among which are those where a *state license or certificate* is required to practice the profession. However, in many cases a *state certificate or license* is not required but the employer does require that the applicant have a college degree and the purpose of this bill is to include those cases within the exceptions."

The *italics* indicates that the authors understood the terms, "license" and "certificate," in accordance with the conclusion we have reached herein.

As to the balance of the sample schedule of fees set forth in your inquiry, we would direct your attention to the subheading entitled "On all others." This, to us, denotes that they are therein referring to the fees they propose to charge on those placed in exempt positions, namely, positions where a license, certificate or college degree, is required to engage in a profession or occupation by either the laws of this state *or* by the prospective employer, and to their furnishing or procuring of

vaudeville acts, circus acts, theatrical, stage or platform attractions or amusement enterprises. For this reason your Commission can do no more than accept this portion of the schedule for informational purposes as there is no limitation on the fee which they may charge.

June 28, 1955

CITIES AND TOWNS—SPECIAL ASSESSMENTS: Provisions in section 391.31 that notice shall be given "by two publications . . . the first of which shall be not less than fifteen days before the date set for receiving bids" requires notice to be given on consecutive weeks when read in connection with the general publication provisions in sections 618.5 and 618.9, Code 1954.

Hon. D. C. Nolan, Iowa City, Iowa: We are in receipt of your letter of June 21, in which you submit the following question:

"Question has arisen as to the legality of certain legal proceedings in connection with the construction of a sewage works and facilities in the town of Solon, Iowa.

"The notice of hearing and letting in the special assessment proceedings and also the notice of hearing and letting in the sewage works construction matter were published on March 3rd and March 24, 1955, in the Solon Economist, a newspaper published in the town of Solon, Iowa. These notices were to bidders. Hearing on the letting was held on March 29, 1955, pursuant to the notice.

Section 391.31 of the 1954 Code requires two publications of each of such notices, the first publication to be not less than fifteen days before the date set for receiving bids. Two publications were made, the first publication was more than fifteen days before the date set for receiving bids, but the last publication was not. The question which has been raised is whether or not the publication must be on successive weeks."

Reference to section 391.31 reveals that the words in question are as follows:

". . . upon giving notice by two publications in a newspaper published in said city, the first of which shall be not less than fifteen days before the date set for receiving bids . . ."

It thus appears that the time of making the first publication is established by the words "not less than fifteen days before the date for receiving bids" but that the time of the second publication is not specifically prescribed.

Section 618.5 makes the following general provision in respect to publication of notices in newspapers:

"Publications may be made in a newspaper published once a week or oftener."

Section 618.9 provides as follows:

"When the publication is in a newspaper which is published oftener than once a week, *the succeeding publications of such notice shall be on the same day of the week as the first publication.* This section shall not apply to any notice for the publication of which provision inconsistent herewith is specially made." (*Italics* ours)

Section 618.5, by eliminating publication of notice in any newspaper published less often than weekly, appears to contemplate that notices shall be published on consecutive weeks. The further provision in section 618.9 that "succeeding publications" shall be made "on the same day of the week as the first publication" seems to strengthen such conclusion.

The Iowa cases appear to be confined to instances where the statute fixed the time of the second publication rather than of the first and hence are of no assistance in determining the problem at hand. A general rule stated in volume 2 of *Merrill On Notice*, p. 242, § 665, is as follows:

"In the absence of some (statutory) prescription no definite period of publication is essential, the familiar common law standard of reasonable time being applicable. Reasonableness depends on the peculiar circumstances attending each notification. Significant factors are the situation of the parties, the purpose of the notification, the subject matter, etc. A number of cases, some holding the time to be reasonable and others holding it not, illustrate the application of the rule."

Unless a requirement of publication on *consecutive* weeks is implied in sections 618.5 and 618.9 as read in connection with section 391.31, it appears that sufficiency of notice becomes a question of fact in every special assessment procedure undertaken by cities and towns under chapter 391.

We are inclined to doubt that the legislative intent was to create a situation where sufficiency of notice would be a question of fact open to litigation in each and every special assessment procedure undertaken by a city or town.

It is, therefore, our opinion that sections 618.5 and 618.9, Code 1954 as applied to section 391.31, Code 1954, require that publications of notice under section 391.31 be made on consecutive weeks.

June 28, 1955

CAP PISTOLS: The legislature intended to legalize the sale, gift, and use of toy pistols, toy revolvers and caps used therein within the meaning of sections 695.26 and 695.27, Code of 1954, by passing House File 296 which becomes effective on July 4, 1955.

Mr. Willis A. Glassgow, Linn County Attorney, Cedar Rapids, Iowa. Attention, Bryce M. Fisher, Assistant County Attorney: In your letter of June 23, 1955, you asked the question as to whether the sale of toy pistols, toy revolvers and paper caps will be legal in Iowa when House File 296 becomes effective on July 4, 1955.

Section 695.26, Code 1954, provides as follows:

"No person shall knowingly sell, present, or give any pistol, revolver, or toy pistol to any minor. Any violation of this section shall be punished by a fine of not less than twenty-five nor more than one hundred dollars, or by imprisonment in the county jail not less than ten nor more than thirty days. Nothing herein contained shall prohibit the sale of ammu-

nition to minors who have been licensed to hunt by the State of Iowa and to those minors who by reason of hunting on their own premises are not required by law to have a hunting license."

Section 695.27, Code 1954, provides as follows:

"No person shall use, sell, offer for sale, or keep for sale within this state any toy pistols, toy revolvers, caps containing dynamite, blank cartridges for toy revolvers or toy pistols, or firecrackers more than five inches in length and more than three-fourths of an inch in diameter; provided caps containing dynamite may be used, kept for sale, or sold when needed for mining purposes, or for danger signals, or for other necessary uses."

House File 296 provides as follows:

"Section 1. Section six hundred ninety-five point twenty-six (695.26), Code 1954, is hereby amended by striking from line three (3) the words ', revolver, or toy pistol' and inserting in lieu thereof the words 'or revolver'.

"Sec. 2. Section six hundred ninety-five point twenty-seven (695.27), Code 1954, is hereby amended by striking from lines two (2), three (3), four (4) and five (5) the words 'toy pistols, toy revolvers, caps containing dynamite,'."

Clearly the legislature intended to legalize the sale, gift, and use of toy pistols, toy revolvers and caps used therein within the meaning of sections 695.26 and 695.27, Code of 1954.

The question remains whether use of such caps in toy pistols (commonly known as "cap" pistols) is within the definition of "fireworks" as defined in section 732.17 and is, therefore, a violation of section 732.18, Code 1954. Section 732.17 defines "fireworks" and enumerates a variety of substances constituting "fireworks." It is our opinion that paper caps when used in toy pistols or toy revolvers, do not fall within the statutory definition of "fireworks."

Thus, since the prohibition against toy pistols, toy revolvers and paper caps for use therein formerly contained in sections 695.26 and 695.27 has been repealed, and for the further reason that paper caps, when used in such toy pistols or toy revolvers, do not fall within the definition of "fireworks" contained in section 732.17, it is our opinion that the sale of toy pistols, toy revolvers and paper caps will not be in violation of sections 695.26, 695.27, or 732.18 when House File 296 becomes effective on July 4, 1955.

June 30, 1955

INCOME TAXATION: Under H.F. 225, the State Tax Commission has power to adopt rules providing for allocation of net income and deductions of individuals whose residence status changes during the tax year. Net income from operation of a business in Section 422.8(1) includes losses from operation, and federal income taxes pertaining to such income, but does not include gains or losses from the sale of such business. One optional standard deduction is allowable on a joint return; if each spouse files a separate return each may claim an optional standard deduction.

Mr. E. H. Fairburn, Director Income Tax Division, State Tax Commission: The following is in answer to some of the questions raised by you recently regarding proper interpretation of the income tax legislation enacted by the 56th General Assembly.

Your first questions relate to the proper reporting of income and deductions by individuals who become residents of Iowa during the tax year or who move from the state and cease to be Iowa residents during the tax year.

Under H.F. 225, Section 422.7 has been amended to read: "The term 'net income' means the adjusted gross income as computed for federal income purposes under the Internal Revenue Code of 1954" subject to certain adjustments not material to your question. Section 422.8, as amended, provides for allocation of net income of individuals under rules and regulations prescribed by the State Tax Commission, in the case of residents having net income from operation of a trade or business in another state, and in the case of nonresidents having income from activities in Iowa and also in other states. There is no provision as to time for determining residence status.

The Rules of the Commission prior to the adoption of H.F. 225 permitted an individual whose residence status changed to file as a resident for the portion of the year in which he actually resided in Iowa, and as a nonresident for the portion in which he was not residing in Iowa. The Rules also permitted proration of personal exemption or dependent credit in case of changes. Section 422.12, as amended, would seem specifically to remove the power to prorate personal exemption. In view of the failure of the Legislature to provide specifically against the similar proration of residence, it would seem to be proper for the commission to continue to provide by rule that where an individual's residence status changes during the year his income for the portion of the year he was a nonresident may be allocated in a manner similar to that of an individual who is nonresident for the entire year.

The allocation would apply both to income and deductions. H.F. 225 amends Section 422.9 to read as follows:

"4. A taxpayer affected by section four hundred twenty-two point eignt (422.8) shall, if the optional standard deduction is not used, be permitted to deduct only such portion of the total referred to in subsection two (2) above as is fairly and equitably allocable to Iowa under the rules and regulations prescribed by the state tax commission."

This provision would affect deductions for "contributions, interest, taxes, medical expense, child-care expense, losses and miscellaneous expenses deductible for federal income tax purposes under the Internal Revenue Code of 1954," (less, of course, Iowa income taxes), and also federal income taxes paid or accrued during the year adjusted by any federal income tax refunds.

Your next questions relate to the Iowa resident who has net income from the operation of a business in a state other than Iowa which, under the provisions of Section 422.8 as amended by H.F. 225 may be allocated

to such other state and thus not subjected to Iowa income tax. Your inquiries are whether losses from operation of such a business are to be excluded in determining Iowa taxable income, whether federal tax on such income is deductible, whether refunds of federal tax on such income are to be included, and whether a capital gain arising because of the sale of such a business is within Section 422.8.

As amended Section 422.8, to the extent herein involved, reads:

"*Allocation of income.* Under rules and regulations prescribed by the state tax commission, net income of individuals shall be allocated as follows:

"1. In the case of resident taxpayers, net income from the operation of a business in a state other than Iowa shall be allocated to such other state if a state income tax has been or will be paid on said net income to said other state and if said other state allows a similar allocation of net income from the operation of a business outside said other state. Net income from the operation of a business, as used in this section, shall not include salaries, commissions, fees or other remuneration for personal or professional services."

The term "net income" either has the same meaning as in Section 422.7, as quoted earlier in this opinion, less the specific exclusions in Section 422.8(1), or it is undefined in the act and may be defined by Commission Rules and regulations so long as the same are consistent with the law. If the term means net income as defined in Section 422.7, it is necessary to ascertain what amount would be reflected in adjusted gross income for federal income tax, as far as the operation of the business is concerned. This, under present federal law, includes net profit or loss from operation. Therefore, if the non-Iowa business operations show a profit, to the extent that appears in adjusted gross income computed for federal income tax purposes, it must be deducted therefrom for Iowa income tax purposes; if they show a loss, the amount of that loss must be added to the adjusted gross income figure.

With respect to federal taxes paid, saved, or refunded because of such non-Iowa income, adjustments are necessary because of the provisions of Section 422.9(4), as amended by H.F. 225. Therefore, if the taxpayer had a profit from non-Iowa business operations allocated outside Iowa under Section 422.8, he may be required by Commission Rules to exclude from his deductions that portion of Federal income taxes paid or accrued because of such income. If he incurred a loss, and thereby reduced federal taxes, he may be permitted by Commission Rules to deduct as federal tax the amount he would have been required to pay but for such loss. If he receives refunds of federal tax, by Commission rule that may be excludible from Iowa income tax to the extent it relates to such non-Iowa business.

It should be noted that Section 422.8, as amended by H.F. 225, permits allocation only of "net income from the *operation* of a business." Nothing in the Act indicates that the term "operation" includes sale or disposal of the business. Therefore, when the business is sold, the capital gain or loss resulting therefrom is not subject to allocation but must be reflected in Iowa taxable income.

Your next question relates to the optional standard deductions available in case a husband and wife elect to file separate returns. Section 422.9, as amended by H.F. 225, provides an optional standard deduction which is five percent of net income after deduction of federal income tax, but not to exceed $250. Section 422.9 permits deduction of the larger of the optional standard deduction or itemized deduction from net income, "in computing taxable income of individuals." If a joint return is filed, the section by its language limits the optional standard deduction to 5%, not to exceed $250. However, if separate returns are filed, there is no language in the statute requiring the splitting of the optional standard deduction. It should be noted that under the short form returns used in the past several years by the Commission, which in effect resulted in allowance of a standard deduction, husband and wife filing separately were able to take twice as large a deduction as husband and wife filing jointly.

You also ask what is the proper interpretation of Section 422.13 as a result of the amendments in H.F. 225 and H.F. 522 to subsection 4, thereof. Subsection 4 originally read:

"Provided, also, that every individual having a gross income of three thousand dollars a year or over, shall file a return."

Section 12 of H.F. 225 amended this subsection to read:

"A nonresident taxpayer shall file a copy of his federal income tax return for the current tax year with the return required by this section."

H.F. 225 had no provision comparable to the original subsection 4. H.F. 225 was approved by the Governor April 15, 1955, was effective on publication, and publication was completed April 20, 1955.

Section 2, H.F. 522, contains the following amendment to Section 422.13:

"Subsection four (4) is amended by striking the words 'three thousand' in line two (2) and inserting in lieu thereof the words 'twenty-five hundred'."

This provision was part of H.F. 522 at the time of its introduction on March 18, 1955. H.F. 522 was approved in different forms by the Senate and the House, and its final version is that agreed upon by a conference committee of the two bodies on April 25, 1955. H.F. 522 was approved April 29, 1955 by the Governor, was effective on publication, and publication occurred May 12, 1955. It would appear that H.F. 522 attempts to amend the original version of Section 422.13(4), but that in view of the complete change of that subsection accomplished by H.F. 225 and effective prior to April 25, 1955, the amendment of H.F. 522 is of no effect.

July 11, 1955

SCHOOL DISTRICT REORGANIZATION: Section 275.10 and sections 275.11 to 275.23, Code 1954, provide separate, distinct, and independent methods of reorganization. It follows that the limitation on frequency of resubmission of a proposition for reorganization contained in section 275.10 is not applicable to a procedure under sections 275.11 to 275.23.

Mr. William M. Tucker, Johnson County Attorney: We are in receipt of your letter of July 10 in which you submit the following questions:

"On May 26, 1954, August 2, 1954, May 10, 1955, June 6, 1955, Petitions for school reorganizations under Section 275.11 of the 1954 Code of Iowa were filed here in Johnson County. All Petitions involved the Lone Tree Independent School District and all or portions of adjoining Township School Districts. On each of these Petitions the matter was brought up for vote and the reorganization defeated except the Petition of August 2, 1954, which after hearing, was dismissed by the County Board of Education.

A new Petition involving the same school Districts with slight changes in boundary lines was filed on July 6, 1955, and the Petition is set for hearing on July 19, 1955. At the last two such hearings held, the Objectors to such reorganization have raised the question that such an election cannot be held in view of the provisions of Section 275.10 which states that no more than one election shall be held in any twelve calendar months. We are anticipating that such question will again be raised before the County Board.

Accordingly, I respectfully request an Opinion as to whether or not the prohibition above referred to in Section 275.10 of the 1954 Code also applies to reorganizations involving three or more districts under Section 275.11 of the 1954 Code?"

In answer to your question we would refer you to section 275.9 which provides as follows:

"When any school district is enlarged, reorganized, or changes its boundaries pursuant to the plans hereinabove provided for, such enlargement, reorganization or boundary change shall be accomplished by one of the methods hereinafter provided."

We would also refer you to section 275.24 which provides:

"When any school district is enlarged, reorganized, or changes its boundary by the method provided in section 275.10 or by the method provided in sections 275.11 to 275.23 hereof . . ."

We would also refer you to section 275.25, the pertinent parts of which are as follows:

"If the proposition to establish a new corporation carries *under the method provided in sections 275.11 to 275.23* hereof . . .

"If a proposition submitted under section 275.10 carries . . ."

The foregoing excerpts indicate a legislative intent to create two methods of school district reorganization. One method is provided in section 275.10. The other method is provided in sections 275.11 to 275.23. When it is desired to proceed by the latter method the procedure for carrying out the former method is inapplicable. For this reason the restriction on resubmitting the question contained in section 275.10 would have no application to a reorganization under sections 275.11 to 275.23.

That said sections provide distinct, separate, and independent procedures is further borne out by reference to their legislative forbears. Section 275.10, Code 1954, is derived from section 274.16, Code 1950. Sections 275.11 to 275.23 are derived from chapter 276, Code 1950. That the procedure in chapter 276 was independent of any method in chapter 274 was expressly held in *Cook v. Cons. Sch. Dist.*, 240 Iowa 744.

July 13, 1955

COUNTY OFFICERS: Boards of supervisors may in their discretion allow reasonable expenses of county officers who attend conferences which are for the betterment of the officers in the performance of his official duties. Whether the meeting attended is such a conference or is a convention is a fact question to be determined by the Board of Supervisors.

Mr. Martin D. Leir, County Attorney: In response to your inquiry as to whether or not any county elective or appointed official may attend a meeting of an organization involving his particular field such as county auditor, clerk, county recorder, county treasurer or board member, and to have the actual and necessary expenses of attending such meeting allowed and paid by said county, we advise as follows:

In case the said meeting of the organization is a convention the answer is "No," in that Section 343.12 specifically prohibits the allowance of a claim in payment thereof for attending any convention.

However, should the meeting of the organization be a conference for the betterment and benefit of the individual officer, the Board of Supervisors may so allow the claim if they find the same to be a conference for the betterment of the said officer in the performance of his official duties.

In determining whether or not the meeting of the organization is a conference so that the Board of Supervisors may justify the allowance of the necessary and actual expenses in attending same, every case is a factual situation to be determined by the Board of Supervisors. The said Board of Supervisors should determine the factual situation upon the following set of standards:

(1) Does the meeting have instructional value?

(2) Does the instruction to be given relate directly to the duties of the officer requesting approval?

(3) Is the value of the instruction likely to be such as to justify the absence of the officer from his duties for the period involved?

If the Board can in good conscience answer all of said questions in the affirmative, it may properly conclude that the meeting in question is a legitimate study conference for attendance at county expense.

Before any county official goes to such meeting at county expense, he should first get the approval of his Board of Supervisors because in each instance it is a question of fact to be determined by the Board of Supervisors.

July 19, 1955

WORKMEN'S COMPENSATION—PEACE OFFICERS: When a law-enforcing officer is injured or killed while on duty in his official capacity and while performing duties which are directly related to preserving the peace or preventing breaches of the peace such officer would be entitled to workmen's compensation under section 85.62, 1954

Code. Where such officer was injured or killed while performing other types of duties he would be entitled to workmen's compensation from his employer.

Mr. Earl R. Jones, Industrial Commissioner, Des Moines, Iowa: In your letters concerning file numbers 180136, 182947, and 183393, you present the following question: What is the extent or coverage under workman's compensation for law-enforcing officers under section 85.62, 1954 Code of Iowa?

An examination of the statutory history of section 85.62 is necessary in order that a proper interpretation of the statute in its present form may be given. This history is hereinafter set forth.

The pertinent part of section 1422 of the Code of 1939 is set forth as follows:

"Any policeman (except those pensioned under the policemen's pension fund created by law), any sheriff, marshal, constable, and any and all of their deputies, and any and all other such legally appointed or elected law-enforcing officers, *who shall, while in line of duty or from causes arising out of or sustained while in the course of their official employment, meaning while in the act of making or attempting to make an arrest or giving pursuit, or while performing such official duties where there is peril or hazard peculiar to the work of their office,* be killed outright, or become temporarily or permanently physically disabled, or if said disability result in death, shall be entitled to compensation, the same to be paid out of the general funds of the state for all such injuries or disability.

"Where death occurs, compensation shall be paid to the dependents of the officer, as in other compensation cases. Such compensation shall be the maximum allowed in compensation cases. The industrial commissioner shall have jurisdiction as in other cases."

Section 1422 was amended by chapter 80 of the Laws of the 51st G. A. in House File 193; the pertinent portion of which is herein set out:

"Be It Enacted by the General Assembly of the State of Iowa:

"SECTION 1. Section one thousand four hundred twenty-two (1422), Code, 1939, *is amended by striking* from lines nine (9) to thirteen (13), inclusive, *the following:* 'meaning while in the act of making or attempting to make an arrest or giving pursuit, or while performing such official duties where there is peril or hazard peculiar to the work of their office,' "

The legislative reason for changing section 1422, which resulted in this amendment, is clearly shown in the explanation of House File 193 which stated that:

"This amendment is proposed for the reason that judicial interpretation (Roberts v. City of Colfax, 219 Iowa 1139) has practically nullified any protection under the present statute. Peace officers must be armed at all times. They are subject to call of duty under all conditions and at all hours and are subjected thereby to many extreme hazards other than hazards incidental to making an arrest or giving pursuit."

It will be noted that the effect of amending section 1422 by deleting the phrase "meaning while in the act of making or attempting to make an arrest or giving pursuit, or while performing such official duties where there is peril or hazard peculiar to the work of their office," was to liberal-

ize the coverage under this section and to expand the meaning of "official employment."

Following this amendment the pertinent part of section 85.62 appeared in the Code of 1946 as follows:

"Any policeman (except those pensioned under the policemen's pension fund created by law), any sheriff, marshal, constable, and any and all of their deputies, and any and all other such legally appointed or elected law-enforcing officers, *who shall, while in line of duty or from causes arising out of or sustained while in the course of their official employment,* be killed outright, or become temporarily or permanently physically disabled, or if said disability result in death, shall be entitled to compensation, the same to be paid out of the general funds of the state for all such injuries or disability.

"Where death occurs, compensation shall be paid to the dependents of the officer, as in other compensation cases. Such compensation shall be the maximum allowed in compensation cases. The industrial commissioner shall have jurisdiction as in other cases."

Section 85.62 of the 1946 Code was entirely repealed by chapter 70 of the Laws of the 52nd G. A., approved on April 22, 1947; the pertinent section of which provides as follows:

"SECTION 1. Section eighty-five point sixty-two (85.62), Code, 1946, is hereby repealed and the following enacted in lieu thereof:

" 'Any policeman (except those pensioned under the policemen's pension fund created by law), any sheriff, marshal, constable, state highway patrolmen, conservation officer, and any and all of their deputies and any and all other legally appointed or elected law-enforcing officers, *who shall sustain an injury while performing the duties of a law-enforcing officer and from causes arising out of and in the course of his official duty, or employment as a law-enforcing officer,* become temporarily or permanently physically disabled or if said injury results in death shall be entitled to compensation for all such injuries or disability together with statutory medical, nursing, hospital, surgery and funeral expenses, and where the officer is paid from public funds said compensation shall be paid out of the general fund of the state.

" 'Where death occurs, compensation shall be paid to the dependents of the officer the same as in other compensation cases.' "

Chapter 70 of the Laws of the 52nd G. A. now appears as section 85.62 of the Code of 1954.

A comparison of section 85.62 of the 1946 Code and section 85.62 of the 1954 Code discloses that the criteria of coverage were changed from:

"*who shall, while in line of duty or from causes arising out of or sustained while in the course of their official employment,* be killed outright, or become temporarily or permanently physically disabled, or if said disability result in death, shall be entitled to compensation,"

under the 1946 Code, to:

"who shall sustain an injury while performing the duties of a law-enforcing officer and from causes arising out of and in the course of his official duty, or employment as a law-enforcing officer, become temporarily or permanently physically disabled or if said injury results in death shall be entitled to compensation,"

under the 1954 Code, reflecting a legislative intent to restrict workmen's compensation coverage in comparison to the more liberal criteria of coverage under section 85.62 of the 1946 Code. Thus, under the 1946 Code the designated officers were covered either "while in the line of duty" or "from causes arising out of or sustained while in the course of their official employment." Whereas under the 1954 Code, the designated officers, to be covered, must "sustain an injury while performing the duties of a law-enforcing officer" *and* "from causes arising out of and in the course of his official duty, or employment as a law-enforcing officer." These criteria of coverage under the 1954 Code appear as words of limitation, for otherwise the section could have read "the following law-enforcing officers are covered by this section;" with *no* words of limitation.

Law enforcement officers usually are classified as "those whose duties are to preserve the peace." See Frazier v. Elmore, 180 Tenn., 232, 173S.W.2d 563, 565 and Black's Law Dictionary, 4th Edition, at page 1029. Furthermore:

"By 'peace' is meant the tranquility enjoyed by the citizens of a municipality or community where good order reigns among its members. It is the natural right among all persons in a political society." Town of Neola v. Reichart, 109 N.W. 5, 6, 131 Iowa, 492; Catlette v. U.S., C.C.A.W.Va., 132F.2d 902, 906; Woods v. State, 213 S.W. 2d 685, 687, 152 Tex. Cr.R. 338; McKee v. State, 132 P. 2d 173, 177, 75 Okl. Cr. 390.

Continuing:

"Any riotous, forcible, or unlawful conduct or proceeding is a breach of the peace. Offenses against the public peace include all acts affecting the public tranquility, such as assaults and batteries, riots, unlawful assemblies, forcible entry and detainer, etc." City of Corvallis v. Carlile, 10 Or. 139, 142, 45 Am. Rep. 134.

Clearly, the duties of law-enforcing officers are those directly concerned with preserving the peace or preventing breaches of the peace as defined above. Therfore, to be eligible for workmen's compensation coverage under section 85.62 of the 1954 Code of Iowa, the officials designated in that section must sustain an injury while performing the duties of a law-enforcing officer (meaning those duties concerned with preserving the peace or preventing breaches of the peace), *and* said injury must be from causes arising out of and in the course of his official duty, or employment as a law-enforcing officer.

It follows that the right to compensation under section 85.62, 1954 Code, depends upon the *type of duties being performed* at the time the injury is sustained, or death occurs. It is conceivable that certain law-enforcing officers designated in section 85.62, 1954 Code, may have assigned duties to perform which are not directly related to preserving the peace or preventing breaches of the peace. In these cases section 85.62, 1954 Code, would not be applicable, although such officers were injured or killed while on duty in their official capacity and while performing such assigned duties, and in such instances these officers would be entitled to workmen's compensation from their employers.

July 21, 1955

SCHOOL REORGANIZATION — Equalization levy may be used to raise part of agreed distribution of assets. There is no express limitation on rate to be levied other than that it be "equitable." Levy may be made for one year only.

Mr. Charles King, Marshall County Attorney, Marshalltown, Iowa: We are in receipt of your letter of July 13 in which you submit the following:

"As a result of school reorganization in this county, a problem has arisen with respect to the levy of a tax as provided in section 275.31 of the 1954 Code of Iowa to equalize the division and distribution of assets and liabilities between an old district and a reorganized district. The Marshalltown Community School District, hereinafter referred to as Marshalltown, is the reorganized district and the LaMoille School District, hereinafter referred to as LaMoille, is the old district.

"The portion of LaMoille which was annexed by Marshalltown by virtue of reorganization contains property amounting to approximately 30% of the tax value of all the taxable property of LaMoille, and therefore, the division of the assets of LaMoille probably will be on a 70-30 basis. The net assets of LaMoille amount to approximately $80,000 and therefore Marshalltown would be entitled to $24,000, (30% x $80,000). Marshalltown can use about $1,000 worth of LaMoille's personal property and LaMoille apparently can pay to Marshalltown approximately $3,000 in cash leaving a balance of $20,000 to which Marshalltown is entitled. Most of the cash which LaMoille now has, plus tax income which it will receive, will be needed to pay operating expenses for the remainder of the school year and apparently the tax levy provided for by said section 275.31 will have to be utilized.

"Based upon the foregoing statement of facts, I should like your official opinion on the following:

"1. May LeMoille levy a tax as provided for in said section 275.31?

"2. Is there any restriction as to the tax rate so levied?

"3. Must the entire amount needed to effect the equalization be levied in one year and if a tax may be levied for such purpose for more than one year, how many years would be permissible?"

Section 275.31, Code 1954, provides as follows:

"If necessary to equalize such division and distribution, the board or boards may provide for the levy of additional taxes upon the property of any corporation or part of corporation and for the distribution of the same so as to effect such equalization."

The words "such division" as used in section 275.31 refer to the method of division of assets and liabilities provided in section 275.29 which provides as follows:

"Within twenty days after the organization of the new boards, they shall meet jointly with the several boards of directors whose districts have been affected by the organization of the new corporation or corporations and all of said boards acting jointly shall recommend to the several boards an equitable division of the assets of the several school corporations or parts thereof and an equitable distribution of the liabilities of such school corporations or parts thereof among the new school corporations."

Section 275.31, Code 1954, was derived from and is for practical purposes identical with section 274.21, Code 1950, which was originally enacted as chapter 16, § 6-al, 40th Ex. G. A.

Assuming, but not purporting to decide, that the plan for distribution of assets and liabilities referred to in your letter is "equitable" within the meaning of section 275.29, it nevertheless is necessary to consider several other factors to determine whether the tax provided in section 275.31 was intended to be used for the purpose proposed in your letter, namely, easing the impact immediate settlement would have on funds on hand in the treasury. The announced purpose of the tax provided in section 275.31 is "to equalize such division and distribution." In *Dist. Twp. of Williams v. Dist. Twp. of Jackson,* 36 Iowa 216 and in *Dist. Twp. v. Wiggins,* 110 Iowa 702, it was held that schoolhouses and real estate used for school purposes are to be considered in the division of assets but that the division need not result in partition of the real estate. In other words, it was recognized that where school must be maintained in the portion of the original district remaining after boundary change, it is logical that existing school plant facilities be used therefor. It follows that where sufficient cash assets exist to make up for the proportionate value of the school plant, the law contemplates that they be used to effect the distribution. Where the cash assets are inadequate to effect the distribution as well as operate the school, it logically follows that the levy for equalization provided in section 275.31 may be properly used. In this connection see *Ind. School Dist. of Jewell v. Cons. School Dist. of Ellsworth,* 232 Iowa 992, at page 999, wherein the court said:

"It seems to us sections 4137, 4138, and 4139 [now 275.29, 275.30, and 275.31] provide the proper procedure for the matter of the distribution of assets and liabilities and this consists in the action by the two boards, or by arbitration if they fail to agree, and the levy of taxes, if necessary, to equalize such distribution."

The answer to your first question is, therefore, in the affirmative.

In answer to your second question, we would advise you that section 275.31 places no express millage limit on the equalization levy. An examination of sections 291.13 and 286A.7 reveals that the equalization levy is no part of the general fund, schoolhouse fund, or special courses fund as defined therein. It follows that the proceeds of an equalization levy constitute a special fund separate from any of the said regular school funds. Consequently, it is subject to none of the limitations imposed on the levies making up said regular school funds. However, the requirement that any distribution of assets and liabilities, of which such levy is part, must be equitable should be borne in mind as imposing some practical restriction on the size of the levy. In refusing to interfere with the distribution of assets and liabilities agreed upon by the two boards in *Independent School District of Jewell v. Consolidated School District of Ellsworth,* supra, the court said: "We are satisfied there is no extreme hardship to the taxpayers of the Jewell District in the proposed change requiring our interference." Thus, remedy may be had by proper proceedings should the imposed levy be so excessive as to constitute a hardship on the taxpayers.

In answer to your third question, it is our opinion that an equalization levy may be made only for one year. In this connection we would refer you to an opinion which appears at page 59 of the 1946 Report of the Attorney General, and authorities cited therein, to the effect that taxing bodies in general are without power to make continuing levies without express statutory authority. The tax herein in question is distinguished from that in question in *Chappell v. Board of Directors*, 241 Iowa 230, in that the tax here considered is not required to be submitted to a vote of the electors nor is any provision made for its termination by a subsequent vote of the electors.

July 21, 1955

BEER-HOTEL PERMIT. Under hotel Class B beer permit, operator of hotel may serve beer only to hotel guests in hotel dining rooms or guests' rooms. If the dining room or other rooms meet necessary qualifications, operator of hotel may serve beer therein under regular Class B permit, and may serve to hotel guests in guests' room as sale for off-premises consumption.

Mr. William M. Tucker, Johnson County Attorney: This is to acknowledge receipt of your letter of June 24, in which you state that there is a hotel in your county which has a dining room and also operates a tap room in another part of the building. You ask the following four questions:

"1. Is it necessary that the hotel have both a class B and a Class B hotel beer permit?

"2. Can the hotel, under a regular class B permit, serve beer in the dining room or must they have in addition a class B hotel permit?

"3. Can the hotel, under a regular class B permit, serve beer in the hotel rooms or must they have in addition a class B hotel permit?

"4. Is it permissible for the hotel to operate the tap room under a class B hotel permit without holding an additional class B permit?"

In our opinion of February 28, 1955, with regard to the privileges that could be exercised by the owner of a hotel to whom a class B hotel permit had been issued and by the lessee of the dining room in that hotel, that opinion assumed without discussion the existence of several subclasses of Class B permits. In view of your questions, clarification of this latter point is desirable.

The question whether Chapter 124 provides for several subclasses of Class B permits has not been considered in reported cases or prior Attorney General opinions. In 1934 Report of the Attorney General at page 261, it is suggested that the section 124.19 type permit describe the entire premises. Upon careful analysis it is apparent that that opinion is not decisive of the question. It was written in answer to the question whether the hotel owner must get a new permit because he had converted another type of room into a dining room and wished to sell beer in the dining

room. The answer was that the permit he already had should be broad enough to permit sales in the new dining room as well as the old, and that the entire premises should be described in the permit so that the sales could be in both dining rooms (or others which might later be converted into dining rooms). The drafters of the opinion obviously assumed that sales under the permit would only be in dining rooms or guest rooms. It should also be noted that this opinion was written in connection with a prior law, and that law contemplated that the holder of a Class B permit (other than for hotels, clubs and railroad cars) be a restaurant operation.

The only statement in 1936 Report of the Attorney General at 190 is to the effect that the holder of a hotel permit may sell in the places enumerated in Section 124.19. The opinion implies that under such permit he is not authorized to serve in places other than those enumerated.

1940 Report of the Attorney General at 358 apparently also assumes the existence of various types of B permits, for it describes the fee for "a hotel Class 'B' permit."

It is not unusual to find several Class B permits issued for operations within what in one sense is the premises of a hotel. One portion of the hotel building may be leased to a private club; another may be leased to a tavern operator; some or all of the dining rooms may be leased. Yet only the owner or the lessee of the hotel can claim the "permit issued to hotels," and each of the others must procure a separate permit.

It is our belief that the Legislature, in 1935, did contemplate the existence of an ordinary Class B permit, a Class B permit for hotel use with certain somewhat different privileges and limitations, a Class B permit for private clubs, and a Class B permit for railroads. In our opinion, section 124.19 describes the powers granted to the holder of a hotel Class "B" permit, under that permit. At the same time, it is our belief that the Legislature did not intend that an otherwise qualified individual or corporation be denied a regular Class B permit merely because he is the operator of a hotel and will use the permit to make sales in a hotel. We, therefore, answer your questions in the following manner:

(a) A hotel operator may operate a tap room under his Class B hotel permit only if the service of beer in the tap room is to "guests of the hotel" in a "hotel dining room." If not, a regular Class B permit is required for such operation.

(b) A hotel operator may obtain a regular Class B permit rather than a hotel Class B permit, if necessary qualifications therefor are met, covering service in his dining room. If the tap room and the dining room are so located that a proper description of the premises can cover both areas, and the necessary qualifications are met, one regular Class B permit will cover the sale of beer in both areas. (The provisions of section 124.24 regarding the fees for hotel class B permits, and of the last paragraph of section 124.34 regarding exclusion of hotel class B permits, would not be applicable to the regular class B permit so obtained.)

(c) If the hotel operator chooses to operate under a regular Class B permit which describes the area within the hotel in which sales will regularly be made, beer may be sold by the hotel operator to hotel guests in guests' rooms and delivered to such rooms as a sale for *off-premises* consumption, (because, by virtue of his lease, a guest of a hotel may exclude the landlord from the leased room except as otherwise provided by the rental contract.)

(d) We cannot state specifically whether it is necessary for the particular hotel to which you refer to obtain both a Class B and a Class B hotel permit. However, from the foregoing comments and answers, we believe that it will be possible to determine whether the particular operations require a regular Class B permit, a hotel Class B permit, or both.

July 27, 1955

TAXATION: HOMESTEAD CREDIT: (1) Where property has been deeded to the State Board of Social Welfare, subject to a life estate for the recipient of old-age assistance and his spouse, the property is exempt from taxation and does not qualify for homestead credit. Where the recipient retains title and the State Board has merely a lien, homestead credit may be allowed even though taxes therein are suspended. (2) If taxes on property for the current year are cancelled, homestead credit apportioned thereto must be remitted by the county to the State Tax Commission.

Mr. Louis H. Cook, Director Property Tax Division, State Tax Commission, State Office Building, Des Moines, Iowa: This is in response to your letter of July 26, in which you ask the following questions:

"1. Where an individual claims a homestead credit when she holds a life estate in a property deeded to the State Welfare Board, is the property entitled to such credit?

"2. Is any property, the title in which is held by the State Welfare Board, but occupied by an old age assistance recipient, entitled to the homestead credit?

"3. Are old age assistance recipients, who occupy property upon which taxes have been suspended under the provisions of Section 427.9 of the Code, entitled to a homestead credit upon such property?

"4. Is any property entitled to a homestead credit for a year for which the property taxes have been cancelled under the provisions of Section 427.8 of the Code?"

The State Department of Social Welfare, created under Section 234.2 of the 1954 Code, consists of the State Board of Social Welfare and officers and employees. The State Board is vested with authority to administer old-age assistance. Code Sections 234.6, 249.2. The State Department and State Board are agencies of the State of Iowa.

When old-age assistance is furnished, the amount thereof becomes a lien against any real estate owned by the recipient or his spouse. Code Sections 249.19, 249.20. However, if the State Board deems it necessary to protect the interest of the State, it may require an applicant for

assistance to make an "absolute conveyance or assignment of all, or any part" of his property. The deed or assignment is to reserve a life estate to the grantor and his spouse. The State "department" is to pay delinquent taxes against the property upon taking the deed or assignment. Grantor and his heirs are given an opportunity to repurchase the property by repaying the total amount paid for the benefit of the recipient. The heirs' option is for six months from death of grantor or his surviving spouse. Title is taken in the name of the State Board of Social Welfare. Code Section 249.20, as amended by H. F. 109, 56th General Assembly.

Where property has been deeded to the State Board of Social Welfare, homestead credit may be allowed thereon only if the property qualifies under Code Section 425.11 as a "homestead" occupied by an "owner", and if the property is not exempt from taxation.

A "homestead" must include the dwelling house in which the "owner" is actually living at the time of filing of application for homestead credit. Mere intent to live there at a future time is insufficient. The "owner" must hold fee simple title to the homestead, or occupy under a deed which conveys a divided interest where the other interests are owned by blood relatives. In the case posed, the fee simple title is held by the State Board, not the occupant. The occupant who once held fee simple title has conveyed subject to a life estate and thus occupies under a deed which conveys a divided interest. But the divided interests are not held by blood relatives. Thus, the property is not occupied by an owner.

Under Code Section 427.1(1), all property owned by the United States and the State of Iowa is exempt from taxation. As the State Board is an agency of the State of Iowa, property to which title has been taken in the name of the State of Iowa is property of the State and exempt from taxation. It should be noted that under Section 249.20 the Board was authorized only to pay taxes delinquent at the time the property was acquired.

Our answer to your first two questions therefore is that where property has been deeded to the State Board of Social Welfare, no homestead credit is allowable because the property is not a homestead occupied by an owner, and because it is exempt from taxation so homestead credit is unnecessary.

Your third question has been the subject of a previous opinion, in 1938 Report of the Attorney General at 288. That opinion held that, where the recipient of old-age assistance retains title to his property, even though taxes thereon must be suspended under the provisions of Section 427.9, if the property and the owner qualify under 425.11, credit should be given. A further substantiation of the position taken in that opinion is that under Section 425.2 the county old-age assistance investigator is charged with the duty of applying for homestead credit as the agent of and for the benefit of the recipient. This provision was adopted in 1943.

Section 427.8, referred to in your fourth question, authorizes the Board of Supervisors to suspend collection of taxes assessed for the current year against the real estate of a person who because of age or infirmity is unable to contribute to the public revenue. As an alternative, the taxes may be completely cancelled. Under the provisions of Section 425.9, if the credit apportioned to a particular homestead in any year exceeds the total tax levied against the homestead (exclusive of special assessments) the county treasurer is to remit the excess to the State Tax Commission to be re-deposited in the homestead credit fund. This is indicative of a legislative intent that no property be given homestead credit in excess of the amount of tax to which the property is subject. Therefore, our answer to your fourth question is that if property taxes for the current year are cancelled as to property which has qualified for homestead tax credit, the county treasurer must remit to the State Tax Commission the entire homestead credit apportioned to that property.

July 29, 1955

TAXATION — Property which would have been exempt from tax under Code Section 427.1 (9), is subject to taxation for the entire year if transferred to someone not entitled to claim the exemption before the date of levy.

Mr. Louis Cook, Director, Property Tax Division, State Tax Commission, Des Moines, Iowa: We are in receipt of your letter of July 13, 1955, requesting an opinion as to the proper treatment for property taxation of certain property in the City of Des Moines. You state that the property was owned for part of the year 1954 by the Cumming School of Art, but was transferred by them to an individual on August 6, 1954, which date was prior to the date of levy. The School had filed claim for tax exemption on March 2, 1954, the same was allowed by the Board of Review on May 1, 1954. Because of the sale prior to the assessment date, the property was assessed for tax purposes. Your inquiry therefore is whether the property tax status of property is affected by such a change in ownership, occurring after the last date on which a claim for exemption could be filed, but before the date of levy of taxes.

This is a problem that has been before the courts several times, and the subject of several Attorney General opinions, all of which, however, are prior to the adoption of H. F. 67, of the 52nd General Assembly, which required the filing of certain claims for tax exemption by July 1 of the year for which exemption was claimed.

This first case before the Supreme Court was First Congregational Church v. Linn County; 70 Iowa 396. In that case the property was transferred by its individual owner to a church in August, after assessment but before date of levy. The Court recognized that the law did not permit apportionment of tax — the property was either taxable the entire year or exempt the entire year. The position was taken that the property was taxable seven months; the state was entitled not to lose its revenue; the

exemption was not intended to be retroactive; but to exempt from future liability; and the property was therefore taxable. Examination of the record fails to show that the deed was filed for record, and although the point apparently was not argued nor is it discussed by the court, this necessary pre-requisite to tax exemption, under Code section 427.1 (9), was missing.

Subsequently, in Iowa Wesleyan College v. Knight, a case factually similar except that the deed was recorded, the Court held that if the property was acquired before the tax was levied, by an organization in whose hands the property was entitled to be exempted from tax, no tax could be collected for the year in which the sale took place.

In 1940 Report of the Attorney General at 604, and 1948 Report of the Attorney General at 3, it was held that no exemption could be obtained for the year in which the sale took place, if the sale to the organization qualifying for exemption occurred after the date of levy.

1942 Report of the Attorney General at 201 is the only opinion dealing with the transfer of property held by an organization qualifying for exemption to an individual. The transfer discussed therein occurred before the date of levy. The opinion states that the situation is the converse of that in the Iowa Wesleyan case, and says: "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." In the opinion of this office, that ruling would be applicable to the problem before you, unless a different result is dictated by H. F. 67, 52nd General Assembly, now Iowa Code sections 427.1 (24) — 427.1 (27).

The effect of the sections referred to is to require associations of war veterans, and literary, scientific, charitable, agricultural, benevolent, and religious institutions and societies which desire to claim tax exemption for real property used by them solely for their appropriate objects, to file a statement with the assessor by February 1, or the Board of Review or Auditor no later than July 1, of the year for which exemption is claimed. What information the statement shall contain is specified, and it is apparent that the statement is intended to enable the assessor and the Board of Review to evaluate the claim for tax exemption and to ascertain whether some of the property is being used for commercial or profit purposes and to that extent disqualifying property for exemption. The obvious purpose of the bill is to require the formal filing of a claim for exemption with information sufficient to justify granting or denying the claim, or granting the claim to the extent the property is used for organizational objectives but denying it to the extent the property is commercially used. This is clearly evident in the explanation attached to the bill as introduced in the House. The apparent purpose of the closing date for filing claims is to give the reviewing officials opportunity to examine and pass upon the claim before the date of levy.

This provision should be compared with a related bill, H. F. 76, 52nd General Assembly, which established a procedure for the filing of claims for military service tax exemption. Section 6 of H. F. 76, now Code

section 427.6, provides in part: "Said claim for exemption, if filed on or before July 1 of any year and allowed by the board of supervisors, shall be effective to secure an exemption for the year in which such exemption is filed . . ." No such language can be found in H. F. 67.

We are also mindful of the rule that taxation is the rule and exemption the exception, and that the burden is upon the one claiming the exception to establish that he comes within that exception as strictly interpreted. See Readlyn Hospital v. Hoth, 223 Iowa 341.

The fact that the claimant for exemption must submit his claim by July 1 has no necessary bearing on the rights of an owner of property not entitled to the claim. The position of the individual purchaser, in the case you present, is no different than it would have been had he purchased on June 30, 1954. It does not follow that, because a pre-requisite of obtaining exemption is the filing a claim therefor by July 1, a transfer to a party not entitled to exemption will terminate the privilege if made before July 1, but will not if made between July 2 and the date of levy.

In view of the foregoing, we are of the opinion that had the legislature meant the claim for exemption, once allowed, to secure an exemption for the entire year, had it intended to reverse the prior rulings, it would have said so specifically and not left the determination of its intent to inference. Accordingly, we hold that if real property is to be exempt from tax under the provisions of section 427.1 (9), it must meet all the qualifications required by that section on the date of levy of tax, including the pre-requisite for recordation of deed or lease, and in addition must meet the pre-requisites in sections 427.1 (24)—427.1 (27). As the property involved was not used by a literary, scientific, charitable, benevolent, agricultural or religious institution or society solely for its appropriate objects on the date of levy, the property is not entitled to be exempted from tax for the year 1954.

August 4, 1955

FAIR GROUNDS—City of Des Moines does not have jurisdiction over the licensing of merchants who conduct their business at the State Fair Grounds, notwithstanding the fact that the Fair Grounds is within the corporate limits of the City of Des Moines.

Honorable Melvin D. Synhorst, Secretary of State: This will acknowledge receipt of yours of the 13th inst., in which you submit the following:

"A question has arisen in connection with Senate File 146, Acts of the Fifty-sixth General Assembly of Iowa.

"We have had inquiries as to the necessity for transient merchants to procure a license under the provisions of this Act to conduct a business at the State Fair Grounds during the annual State Fair. The question primarily is whether or not the City of Des Moines has jurisdiction over licensing merchants who conduct a business at the State Fair Grounds, which is situated within the corporate limits of the City of Des Moines. It would appear that Senate File 146 places in an exempt category transient merchants who conduct a business within a City that has by ordi-

nance provided for the licensing of transient merchants. It is my understanding that the City of Des Moines has in effect an ordinance which provides for the licensing of business activities of this type."

In reply thereto, we advise you as follows: Section 173.14, Code of 1954, describes the powers and duties of the State Fair Board, as follows:

"Powers and duties of board. The state fair board shall have the custody and control of the state fair grounds, including the buildings and equipment thereon belonging to the state, and shall have power to:

* * * * *

"6. The state fair board may grant a written permit to such persons as it deems proper to sell fruit, provisions, and other articles not prohibited by law, under such regulations as the board may prescribe.

* * * * *

"8. Adopt all necessary rules in the discharge of its duties and in the exercise of the powers herein conferred."

In the case of State v. Cameron, 177 Iowa 262, 158 NW 470, the status of the state fair board in the exercise of the foregoing powers is described as follows:

"It is conceded by the State, from the statutory provisions before referred to, that the state board of agriculture is a public corporation, provided for by statute and organized solely for public purposes, and that it is an arm or agency of the state upon which is enjoined the duty of carrying on a public enterprise for the benefit of the people of the state; that no local or private interests are subserved by the organization; and the State says further that the officers of the executive committee, in conducting the annual fair and in making the improvements upon the grounds owned by the state, are exercising governmental functions as state officers, and the clear weight of authority is to that effect, and they cite: Hern v. Iowa State Agricultural Society, 91 Iowa 97, Melvin V. State, 121 Cal. 16; Minear v. State Board of Agriculture, 259 Ill. 549; Berman v. Minnesota State Agricultural Society, 93 Minn. 125 (100 N. W. 732); Berman v. Cosgrove, 95 Minn. 353 (104 N. W. 534); Morrison v. MacLaren (Wis.) 152 N. W. 475."

"Under the sections of the statute before quoted, and under the authority of Hern v. Agricultural Society, 91 Iowa 97, 98, the state board of agriculture is an arm or agency of the state. The instant case involves the same society, under the old name of Iowa State Agricultural Society, and in the Hern case, supra, it was said:

" 'The only question for us to determine is as to the liability of the society for the acts complained of; and at the outset it is important to have in mind that the society is in no sense a corporation for pecuniary profit. It is an agency of the state. It exists for the sole purpose of promoting the public interest in the business of agriculture. Its public character more fully appears when we consider that its organization is provided for by statute; that is has no stockholders; that by law the president of each county agricultural society in the state, or other delegate therefrom, duly authorized, is made a member of the board of directors, that said board is required to make annual reports to the governor, which are to be distributed throughout the state; that the powers of the board are prescribed by statute. Code, Sections 1103-1108, 1114-1116, inclusive.' "

" 'The state may and must commit the discharge of its sovereign political functions to agencies selected by it for that purpose. Such agencies, while engaged exclusively in the discharge of such public duties, do not

act in any private capacity, but stand in the place of the state, and exercise its political authority. Therefore, when the state creates public corporations solely for governmental purposes, such corporations, while engaged in the discharge of the duties imposed upon them for the sole benefit of the public, and from the performance of which they derive no compensation or benefit in their corporate capacity, are clothed with the immunities and privileges of the state; and no private action, in the absence of an express statute to that effect, can be maintained against them for negligence in the discharge of such duties.' "

According to the foregoing, the status of the State Fair Board as an independent agency of the State exercising sovereign powers thereof is established. The status of such a state agency as related to the exercising of the powers of the municipality within the geographical confines in which the agency is located appears not to have been the subject of opinion by this Department or the Supreme Court. However, such a situation was considered by the California Supreme Court in the case of Means, 93 P.(2d)105, 123 A. L. R. page 1378. There, Means was seeking a discharge from custody under warrant of arrest issued upon a complaint charging him with a violation of an ordinance of the city of Sacramento requiring that every person performing labor as a journeyman plumber procure a certificate of registration. Means alleged in support of his application that at the time of his arrest he was a civil service employee of the state of California engaged in the work of a plumber at the California State Fair grounds and, as such employee, the ordinance did not apply to him. In reference to this question the court observes:

"There can be no question concerning the power of the state in its proprietary capacity to lay down the qualifications for its employees. It acts in an exclusive field (Atkin v. Kansas, 191 U. S. 207, 24 S. Ct. 124, 48 L. Ed. 148; Heim v. McCall, 239 U S. 175, 36 S. Ct. 78, 60 L. Ed. 206, Ann. Cas. 1917B, 287), and is not subject to the legislative enactments of subordinate governmental agencies. For example, it has been held that a state has no power to require employees of the United States to obtain a license to operate an automobile. 'Such a requirement,' said the Supreme Court of the United States, 'does not merely touch the Government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient. It is the duty of the Department to employ persons competent for their work and that duty it must be presumed has been performed.' Johnson v. State of Maryland, 254 U. S. 51, 57, 41 S. Ct. 16, 17, 65 L. Ed. 126. Furthermore, considering the language of the particular enactment now in question, it is a rule of statutory construction based upon sound public policy that the state is not bound by the provisions of a charter or ordinance unless it is mentioned specifically or by necessary implication. Estate of Miller, 5 Cal. 2d 588, 55 P. 2d. 491; Sunny Slope Water Co. v. City of Pasadena, 1 Cal. 2d 87, 33 P. 2d. 672; Marin Municipal Water District v. Chenu, 188 Cal. 734, 207 P. 251; Balthasar v. Pacific Electric Ry., 187 Cal. 302, 202 P. 37, 19 A. L. R. 452; Mayrhofer v. Board of Education, 89 Cal. 110, 26 P. 646, 23 Am. St. Rep. 451. Courts will not assume a legislative intention on the part of a city council to interfere with the act of the general government.

"Turning to the contentions of the respondent that the regulation of plumbing is a municipal affair, the rule to be applied is not entirely a geographical one. Under certain circumstances, an act relating to property within a city may be of such general concern that local regulation concerning municipal affairs is inapplicable. Young v. Superior Ct., 216 Cal. 512, 16 P. 2d 163; Civic Center Ass'n. v. Railroad Comm., 175 Cal.

441, 166 P. 351; Key System Transit Co. v. City of Oakland, 124 Cal. App. 733, 13 P. 2d 979. For example, where one of the city's streets has been declared by an act of the legislature to be a secondary highway, the improvement of that street is not a municipal affair within the meaning of the Constitution. Southern California Roads Co. v. McGuire, 2 Cal. 2d 115, 39 P. 2d 412. Also, regulations prescribed by charter or ordinance of a city requiring that the work of altering and improving buildings be subject to local supervision have been held inapplicable to state buildings. City of Milwaukee v. McGregor, 140 Wis. 35, 121 N. W. 642, 17 Ann. Cas. 1002."

The Annotation in the case of Means states on Page 1383 of Vol. 123, the following:

"The importance of Ex Parte Means (Cal.) (reported herewith) ante, 1379, is shown by the fact that, apart from it, there appears to be little authority directly on the point indicated in the above title, although, as indicated in that case, there are various authorities which appear valuable by way of analogy or argument. It is therein held that a state civil service employee, working as a plumber on state property within the limits of a municipality, is not subject to an ordinance of such municipality providing for the examination and licensing of all persons engaged in the work of plumber, since, as so applied, the regulation was not one having to do with a 'municipal affair,' and although the legislature had enacted no statute regulating plumbing, there would be a direct conflict of authority, in that one whom the state had examined and found eligible for employment as a plumber and who had entered the state civil service might be unable to work on state property because he could not pass the examination of a city health officer or licensing board. (Generally, as to validity of regulations as to plumbers and plumbing see Annotations in 36 A. L. R. 1342 and 57 A. L. R. 136.)"

The rule has the sanction of the City of Jackson v. Wallace, 196 So. 223, in terms as follows:

"The appellees in the court below relied upon the cases of Oliver v. Loye, 59 Miss. 320, and Archibald v. Mississippi & T. R. Co., 66 Miss. 424, 6 So. 238, as controlling the subject of venue, taken in connection with sections 495 and 496, Code of 1930. These sections do not apply, in terms, to municipal corporations, and it is a settled rule of construction that the state shall never be subjected to the provisions of the disabling statute, or affected in any of its privileges, unless the intention to do so is clearly expressed in the law; State v. Joiner, 23 Miss. 500. And unless it be clear and indisputable from the act (of the legislature) that it was intended to include the state or its subdivisions; Josselyn v. Stone, 28 Miss. 753. Statutes restricting rights or imposing liabilities on the state or public subdivisions would be held inapplicable to them unless included expressly by necessary implication; City of Jackson v. State, 156 Miss. 306, 126 So. 2; cf., also, Furlong v. State, 58 Miss. 717."

The principle herein in question is stated in the case of Kentucky Inst. v. Louisville, 97 S. W. 402, N. L. R. S. 553, in terms as follows:

"An act granting a charter for a municipal government will not be deemed a cession of the legislature's prerogative to govern for itself the institutions of the state which may be located within such municipality unless it may be clearly gathered from the latter act that such was the legislative intent. The principle is that the state, when creating a municipal governments, does not cede to them any control of the state's property situated within them, nor over any property which the state has authorized another body or power to control. The municipal government is but

an agent of the state, not an independent body. It governs in the limited manner and territory that is expressly, or by necessary implication, granted to it by the state. It is competent for the state to retain to itself some part of the government even within the municipality, which it will exercise directly, or through the medium of other selected and more suitable instrumentalities. How can the city ever have a superior authority to the state over the latter's own property, or in its control and management? From the nature of things it cannot have."

By reason of the foregoing we are of the opinion that the City of Des Moines does not have jurisdiction over the licensing of merchants who conduct their businesses at the State Fair Grounds, notwithstanding the fact that the Fair Grounds are within the corporate limits of the City of Des Moines.

August 8, 1955

COURTHOUSE LUNCH STAND—Operation of a lunch counter at a Court House by disabled, honorably discharged veteran is valid under the provisions of Section 332.5, Code of 1954.

Mr. Leo J. Tapscott, County Attorney, Des Moines, Iowa: This will acknowledge yours in which you have submitted the following:

"For the past two years the lunch counter on the first floor in the corridor of the Polk County Court House has been leased to one Kenneth Klauenburch, a veteran of World War II. This lease expired on the 8th day of July, 1955 and the Board of Supervisors of Polk County have requested that this office obtain an opinion of your office in regard to the following questions:

"1. The lunch counter on the first floor in the corridor of the Court House consists of a counter at which there are approximately sixteen stools. This business consists of the sale of cigarettes, cigars, candies and other sundry items, and in addition thereto Mr. Klauenburch has been in the custom of bringing prepared food from outside the Court House and offering it in a pre-prepared state. These items generally consist of soup, one or two hot meats and some sort of salad. The Board of Supervisors are desirous of obtaining an opinion of your office as to the legality of this type of operation.

"2. Section 332.5 says that the Board of Supervisors shall upon application of any disabled veteran of specified foreign actions cause to be reserved in the Court House a rent free space for the sale of tobaccos and candies. The Board of Supervisors are desirous of obtaining an opinion from your office as to whether or not this is limited only to disabled veterans or if the Supervisors have the authority to grant this concession to any veteran. We would appreciate your cooperation in this matter."

1. The granting and the operating of a concession in the court house is authorized in Section 332.5, Code of 1954, in terms as follows:

"Veterans' newsstands. The board of supervisors of any county shall, on the application of any honorably discharged soldier, sailor, marine, or nurse of the army or navy of the United States in the late civil war, Spanish-American war, Philippine insurrection, China relief expedition, World War I or World War II, who was disabled in said war, cause to be reserved in the court house of the county a reasonable amount of space in the lobby of said courthouse to be used by such applicant rent-free as a

stand for the sales of news, tobaccos, and candies. Should there be more than one applicant for such reserved space, the board of supervisors shall award the same to the person in their opinion most deserving of the same. The supervisors shall prescribe the regulations by which the stands shall be operated."

Precedent for the validity for the operation of the lunch counter in the manner stated is found in the operation of the concession in the Capitol building at Des Moines. This is authorized under the provision of Section 19.16, Code of 1954. This Section in terms is the following:

"Veterans' newsstands. The executive council shall, on the application of any disabled, honorably discharged soldier, sailor, marine or woman who served in the military or naval forces of the United States in the late Civil war, Spanish-American war, Philippine insurrection, China relief expedition, World War I or World War II, cause to be reserved in the state capitol a reasonable amount of space in the lobby of said state capitol to be used by such applicant rent-free as a stand for the sale of news, tobaccos, and candies and may in such application permit installation of merchandise vending machines. Should there be more than one applicant for such reserved space, the executive council shall award the same to the person in its opinion most deserving of the same. The executive council shall prescribe the regulations by which the stand shall be operated."

It may be observed that the language of that statute is substantially the same as that under which the concession is granted and operated in the court house. Insofar as the operation of the concession in the Capitol building is concerned, it is common knowledge that the use thereof amounts practically to the operation of a restaurant. This has been a practice approved by the Executive Council of the State and has been pursued in that manner for many years, and is known to the Legislature and its members who have been patrons of the concession as so operated. Such operation includes not only the handling and sale of candies and tobaccos, but articles of food usually and normally handled by a restaurant or eating house. By such conduct the Legislature has approved and ratified the construction of the powers conferred upon the Executive Council in granting them the operation of this concession under the statutes herein exhibited by Sec. 19.16.

Such approval by the Legislature of the acts of the administrative officials of the State amounts to the validation of this construction of the authority vested in the Executive Council by Sec. 19.16 under the case of State v. Ind. Foresters, 226 Iowa 1339, 1345, where it is stated:

"The legislature is presumed to know the construction of its statutes by the executive departments of the state, and if the legislature of this state was dissatisfied with the construction which has been placed upon them by the duly elected officials in the past years, the legislature could very easily remedy this situation, as it has the power to pass such legislation, and the only conclusion we can come to is that the legislature must have been satisfied with the construction placed upon the action by the secretary of the State.

As was also said in this case:

" A settled practice under which the state has collected and the companies have paid such important amounts for so long a time ought not to be disturbed without compelling reasons therefore."

"* * * * *

"Courts have always given great weight to the construction of statutes of this kind by the executive department of the state, * * *."

"Thus it will be seen that our Courts have always given weight to the construction of statutes by an executive department of the State. Since it has been the settled practice for so many long years for the Board of Supervisors to make such payments as proper items of poor relief, unless there are compelling reasons therefor, it should not be disturbed."

* * * * *

"It is, therefore, our holding that hospitalization, medical services, medical supplies and nursing are included within the term 'medical attendance,' as used in Section 3828.099, Code 1939, that the same constitutes proper items of poor relief. It naturally follows that the county of legal settlement of the soldier and his family are liable for such expenditure."

By reason of the foregoing, we are of the opinion that the operation of the lunch counter in the court house is valid.

2. In answer to your second question I would refer you to specific terms of statute set forth at the beginning of this letter. The concession is limited to a war veteran "who was disabled in said war." The plain intent of the statute is to benefit disabled veterans.

August 23, 1955

HIGHWAYS: The Iowa State Highway Commission has authority to regulate the erection of traffic control signals on primary roads and extensions of primary roads except in the business district on primary road extensions of cities with a population of 4,000 or over.

Mr. John Butter, Chief Engineer, Iowa State Highway Commission, Ames, Iowa: In your letter of August 23, 1955 you advise:

"The Iowa State Highway Commission has, under the authority granted it by the provisions of Sections 321.254 and 321.347 and related sections of the Code of Iowa 1954, exercised control over traffic control devices sought to be erected by local authorities on roads and highways under the jurisdiction of the Iowa State Highway Commission.

"The right of the Highway Commission to exercise this control over such roads and highways and the erection of traffic control devices has been questioned by certain municipalities in Iowa.

"The question at issue is: Does the Iowa State Highway Commission have the power to regulate the erection of traffic control devices on primary roads and extensions of primary roads in the State of Iowa?"

The apparent conflict in opinion to which you refer arises from an interpretation of Section 306.2, Subsection 1, which defines "primary road system" as "those main market roads (not including roads within cities and towns) which connect all cities and main market centers"; Section 313.2 which defines road systems; Sections 313.21 and 313.22 which refer to approval of cities and towns prior to improvement of extensions of the primary road systems within cities and towns; all of which relate to the powers and duties of the Iowa State Highway Commission in connec-

tion with construction and maintenance of highways and the corresponding obligations and limitations imposed upon the governmental subdivisions involved, as distinguished from the provisions of Chapter 321 as they relate to motor vehicles and the law of the road.

The cases of Wallace vs. Foster, 213 Iowa 1151, 211 NW 9, and Smith vs. City of Algona, 232 Iowa 362, 5 NW 2nd 625, consider and discuss the problems of responsibility for construction and maintenance of primary road extensions within municipal corporate limits, as well as the possible pecuniary liability of a municipality in the event of a failure to *maintain* an extension of a primary road. Neither of these cases are concerned with the power of a municipality to erect traffic control signals nor do they involve an interpretation of code sections concerned with motor vehicles and the law of the road set out in Chapter 321.

Chapter 321 of the Code of Iowa 1954 initially grants the enforcement power of its general provisions to the Commissioner of Public Safety. (Section 321.3)

A number of its provisions, however, concern delegations of authority which are granted either to the local municipality or to the Iowa State Highway Commission or to both.

Section 321.252 imposes upon the Highway Commission the duty to adopt a sign manual in order to promote a uniform system of signs and signals for traffic control. The following section, 321.253, imposes upon the Highway Commission the duty to erect signs "upon all primary highways as it shall deem necessary to indicate and to carry out the provisions of this chapter or to regulate, warn, or guide traffic." Similarly, Section 321.289 places upon the Highway Commission the duty to furnish and place on primary roads or on extensions of primary roads within any city or town suitable standard signs showing the points at which the rate of speed changes. Section 321.290 grants to the Highway Commission the right to alter speed limits "hereinbefore set forth" following a determination by the Highway Commission, based on an engineering and traffic investigation, that such previously fixed speed limits are greater than is reasonable or safe. The authority thus granted to the Highway Commission is applicable "at any intersection or other place or upon any part of a highway." Op. Atty. Gen. 1940, page 306. Section 321.242 imposes upon the Highway Commission, with reference to primary highways, the obligation to erect signs at dangerous highway grade crossings of railroads. Section 321.345 authorized the Highway Commission to designate through highways and erect signs controlling traffic thereon.

Cities and towns are, in Section 321.236, given the power among other things to "regulate traffic by means of police officers or traffic control signals." Section 321.254 restricts local authorities from placing or maintaining any traffic control devices upon any highway under the jurisdiction of the State Highway Commission except by the latter's permission. Section 321.255 grants local authorities the power to "place and maintain such traffic control devices upon highways under their jurisdiction" and requires that "all such traffic control devices hereafter erected shall con-

form to the state manual and specifications." Section 321.289, in addition to authorizing the Highway Commission to place speed signs on primary roads or on extensions of primary roads states "on all *other* main highways, the city or town shall furnish and erect suitable signs giving similar information to traffic on such highways." Section 321.293 authorizes local authorities in their respective jurisdiction to increase the speed limit above that set out in Section 321.285 "upon through highways" with a top speed limitation of 55 miles per hour. Section 321.342 also authorizes local authorities to erect stop signs at railroad crossings, and Section 321.345 grants to local authorities the right to designate through highways and erect stop signs thereon. Section 321.347 requires that the council must first secure the approval of the Highway Commission before determining that a stop is required or a traffic control signal erected at the intersection of through highways with boulevards or heavy traffic streets, and Section 321.348 restricts the city council from closing any street or highway which is used as the extension of a primary road within such city or town without the consent of the Highway Commission, and further makes it unlawful for any city or town "to erect or cause to be erected or maintain any traffic sign or signal inconsistent with the provisions of this chapter." Section 321.349 exempts from the two preceding sections those cities with a population of four thousand or over who desire to erect stop and go signals within the business districts of said cities. Section 321.350 specifically designates primary roads and primary road extensions within cities and towns as "through highways."

A close examination of the above quoted sections and the particular wording used therein might cause some doubt as to the particular dividing line between the authority of the Highway Commission and that of the "local authorities" with respect to traffic control devices. Where such doubt exists, the Iowa Supreme Court has said in the case of Wallace vs. Foster, 213 Iowa 1151, 211 NW 9,

"we must reconcile the statutes to carry out the legislative intent if this can reasonably be done."

Again, that Court considered seeming discrepancies in the entire chapter in the case of Reynolds vs. Aller, 226 Iowa 642, 284 NW 825, and stated:

"from reading Chapter 134 in its entirety, . . . , it becomes evident that in many sections of the chapter the legislature either intended that the word highway be inclusive of streets in towns and cities in the broad generic sense of 'highway,' or intended things that, in its wisdom, the legislature could hardly have had in mind. A few instances will illustrate. Section 205 provides that no person shall drive a motor vehicle upon a *HIGHWAY* unless he has a valid operator's or chauffeur's license. It is quite improbable that this prohibition was not intended to affect those driving on streets in cities and towns. Section 286 vests in local authorities the power in their respective jurisdictions to place traffic control devices upon *highways* under their jurisdiction. Section 320 requires that the highway commission furnish and place on primary roads or on extensions of primary roads within cities or towns certain signs respecting speed, and provides that on all other *main highways* the city shall so do. Sectoin 375 provides that 'Primary roads, and extensions of primary roads within cities and towns are hereby designated as through high-

ways.' East 14th Street was such a *through highway* within the city of Des Moines. To such a highway, though it may traverse a street, section 354-a was quite evidently intended to have application. For imputing a contrary intent we discover no sound reason when the whole act is read. A lessened hazard for the pedestrians on all highways was a probable end to be accomplished in this enactment."

If local authorities were not required to obtain the consent of the Highway Commission prior to erection of traffic control signals on primary roads and primary road extensions, then Sections 321.254, 321.255, 321.347, 321.348, and the exception set out in Section 321.349 for cities and towns with a population of over four thousand who desire to erect stop and go signals within the business districts of said cities would all be meaningless. This result "the legislature could hardly have had in mind" in passing this legislation.

In order to give effect to the statutory provisions as enacted by the legislature and the legislative intent as evidenced by those provisions, insofar as traffic control signals are concerned, the authority of the Highway Commission to control the same exists on primary roads and extensions of primary roads.

You are therefore advised that the Iowa State Highway Commission has the power to regulate the erection of traffic control devices on primary roads and extensions of primary roads and permission must be sought and obtained from the Highway Commission by local authorities prior to the erection of such traffic control devices. Cities with a population of four thousand or over may erect traffic control signals on primary road extensions within the business districts of said city without first securing permission of the Highway Commission, but this is by virtue of the specific exemption found in Section 321.349. The traffic control signals referred to herein are those defined in Section 321.1 (62) and are to be distinguished from speed detection devices which by their very nature do not come within that definition.

August 25, 1955

PEACE OFFICERS EXPENSES: Peace officers called to state service by the Governor or Attorney General under section 748.6, Code 1954, may be reimbursed for mileage and reasonable and necessary expenses under section 19.10, Code 1954.

Mr. Donald Nelson, Story County Attorney, Nevada, Iowa: Receipt is hereby acknowledged of your letter of August 24, in which you submit the following:

"Your official opinion is hereby requested as to whether peace officers called upon to enforce the law by the Governor or Attorney General under the provisions of Section 748.6, Code 1954, may be reimbused by the state for mileage and expense incurred while performing duties pursuant to such call and outside the territorial limits of their ordinary jurisdiction."

Under the provisions of section 748.6, Code 1954, the Governor or Attorney General may call upon any peace officer to assist in enforcement of the law in any part of the state.

When peace officers are called upon to render services it is proper that they be reimbursed for expense incident to such services when performed for the state and outside the territorial limits of their ordinary jurisdiction.

Section 79.9, Code 1954, provides that public officers or employees other than state officers and employees may be reimbursed at a rate not to exceed seven cents per mile for use of an automobile.

The authority for payment of the said expenses is section 19.10, Code 1954, which provides that the executive council may pay expense incurred in any proceeding in which the state is interested from any money in the state treasury not otherwise appropriated.

In an opinion which appears at page 17 of the 1916 Report of the Attorney General it was ruled that expenses of special agents of the Attorney General were payable under section 170-i, Code Supplement 1913 (now section 19.10, Code 1954).

Specifically, a "proceeding" in which reasonable and necessary expenses, including mileage, would be payable under section 19.10, includes raids, briefings preparatory to raids, investigative work, expenses incident to procuring evidence and any other proceeding directly related to law enforcement.

August 25, 1955

LEGAL SETTLEMENT: A private nursing home inmate does not acquire legal settlement in the county wherein the home is located unless the person had legal settlement in that county prior to becoming an inmate of the home.

Mr. Isadore Meyer, County Attorney, Decorah, Iowa: In your letter of July 22, 1955, you raise a question as to legal settlement for the purpose of determining a dispute between two counties as to which will pay at this date the necessary poor relief in a situation wherein the facts are as follows:

"A maiden lady who lived and had her domicile in "A" County, Iowa, all of her life, moved to "B" County, Iowa on January 26, 1951 where she entered a private nursing home. She sold her home in "A" County on or about July, 1951, and also moved her personal effects to the private nursing home. She had her own personal funds from which she paid for her care at the private nursing home in "B" County, Iowa, until on or about June 26, 1955, * * *

"The charge for her care at this private nursing home is $110.00 a month and the county of her legal settlement will have to pay for the balance of nursing care, doctors and drugs. * * * *"

Section 252.16, subsection 3, 1954 Code of Iowa, states:

"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 scope of this section is broad. The intent of the legislature is clear. Legal settlement is not to be easily lost in one county by a person entering an institution in another county. This is true whether the institution be public or private in character. The literal meaning of the words in this subsection draws a clear distinction between institutions of various types, but in any event, an inmate of all such institutions shall not acquire a legal settlement in the county of the institution's location. See 1938 A.G.O., pp. 160, 162.

It thus seems that the question you have presented here turns upon whether or not the so-called private nursing home is an institution within the meaning of Section 252.16, Subsection 3.

Webster's New International Dictionary, Unabridged, states that an institution is: "Any association, custom or relationship consciously approved by a society, and organized and maintained through prescribed rules and agencies." In this instance, it seems that in the event the so-called private nursing home is subject to the prescribed rules of any governmental agency, it would clearly be an institution within the meaning of Chapter 252, 1954 Code of Iowa.

Chapter 135C, 1954 Code of Iowa — Nursing Homes Regulation, defines a nursing home in Section 1, as follows:

"As used in this chapter 'nursing home' is any institution, place, building or agency in which any accommodation is primarily maintained, furnished, or offered for the care over a period exceeding twenty-four hours of two or more nonrelated aged or infirm persons requiring or receiving chronic or convalescent care, and shall include sanatoriums, rest homes, boarding homes, or other related institutions within the meaning of this chapter. Nothing in this chapter shall apply to hotels or other similar places that furnish only food and lodging, or either, to their guests."

The phrase "or other related institution" in the above section is all inclusive. The legislative intent was that all nursing homes should be considered as institutions.

Upon the facts presented in your question, it is our opinion that if the nursing home was one properly subject to rules and regulations of the State Department of Health and was a home subject to licensure by said State Department of Health under the provisions of Chapter 135C, 1954 Code of Iowa, then clearly, under the provisions of Chapter 252, 1954 Code of Iowa, the maiden lady in this instance has not acquired a legal settlement in "B" County, Iowa.

August 25, 1955

SALES TAX: Where County Fair Association purchases and pays for items of tangible personal property, and obtains reimbursement therefor from the county fair ground fund, the exemption from sales tax for purchases by a tax certifying or tax levying body is inapplicable.

Mr. Ray Johnson, Chairman, State Tax Commission, Des Moines, Iowa: This office is in receipt of your recent inquiry whether gross receipts from sales of tangible personal property to the X County Fair Association are subject to sales tax or exempt therefrom.

According to your information, the following facts are applicable: X County Fair Association is a stock corporation which owns the grounds on which the fair is conducted. The annual county fair is operated by a nonprofit corporation, the X County Agricultural Association, which uses the grounds rent free but pays all expenses, such as electricity, water, and the like, during the fair season. At other times the grounds are rented at a relatively nominal rent sufficient to cover insurance costs on grounds and buildings. X County levies a tax, under Section 174.13, the proceeds of which are used to aid both the Fair Association and the Agricultural Association. When repairs are made to the buildings, and tangible personal property is purchased in connection therewith or is purchased for other purposes, the Treasurer of the Fair Association pays the vendor from funds in his hands. The Association Treasurer then files a claim with the county officials and obtains reimbursement of the amount paid by him through county warrant drawn on the fair ground fund. The county has refused to reimburse the Association Treasurer for sales tax paid by him, contending that no sales tax is due under the circumstances.

If the gross receipts are exempt from sales tax, it is by virtue of Section 422.45(5), Code of 1954, a subsection added by the 55th General Assembly, which reads as follows:

"422.45.

"There are hereby specifically exempted from the provision of this division and from the computation of the amount of tax imposed by it, the following:

"* * * * *.

"5. The gross receipts of all sales of goods, wares or merchandise used for public purposes to any tax certifying or tax levying body of the state of Iowa or governmental subdivision thereof, except sales of goods, wares or merchandise used by or in connection with the operation of any municipally-owned public utility engaged in selling gas, electricity, or heat to the general public.

"The exemption provided by this subsection shall also apply to all sales of goods, wares or merchandise used for public purposes to any tax certifying or tax levying body of the state of Iowa or governmental subdivision thereof which are subject to use tax under the provisions of chapter 423."

Under the facts stated above, the sale is to the Fair Association, not to the County. The County is merely extending aid by reimbursing the Fair Association for the amount of its purchases. The sale is not exempt, therefor, unless the Fair Association is a tax certifying or tax levying body. Clearly it does not levy taxes and is not a tax levying body. The question of what is a certifying board or certifying body was considered previously in 1948 Report of the Attorney General at 219, and using that opinion as a guide, it is apparent that the Fair Association is not a tax certifying body.

We, therefore, conclude that the gross receipts from sales of tangible personal property to the X County Fair Association in the manner described are subject to sales tax, and the County is not justified in refusing fully to reimburse the association from the fair ground fund for amounts paid by the Association's Treasurer because the amount paid by him includes an item of sales tax.

September 1, 1955

INSANE PERSONS: "Private institutions for care of the insane" as used in section 227.11, Code 1954, includes licensed private nursing homes.

Board of Control of State Institutions: Receipt is hereby acknowledged of your letter of August 11 in which you inquire whether a nursing home licensed under the provisions of Chapter 135C, Code 1954, is a "private institution for the care of the insane" within the meaning of Section 227.11, Code 1954.

Section 227.11, Code 1954, provides as follows:

"A county chargeable with the expense of a patient in a state hospital for the insane shall remove such patient to a county or private institution for the insane which has complied with the aforesaid rules when the board so orders on a finding that said patient is suffering from chronic insanity or from senility and will receive equal benefit by being so transferred. A county shall remove to its county home any patient in a state hospital for the insane upon a finding by a commission, consisting of the superintendent of the state hospital in which the patient is confined and a physician or physicians chosen by the board of supervisors of the county of the patient's residence, said physician or physicians to be paid by the county of the patient's residence, that such patient can be properly cared for in the county home; and the finding of the commission, after its approval by the board of supervisors of the county of the patient's residence, shall be complete authority for such removal. In no case shall a patient be thus transferred except upon the written consent of a relative, friend, or guardian if such relative, friend, or guardian pays the expense of the care of such patient in a state hospital."

In an opinion dated August 24, 1955, it was ruled that a private nursing home licensed under Chapter 135C is a "private institution" and the same is by reference made a part hereof.

Whether an "institution" may be considered as "for the insane" logically must be determined by the same tests whether the person determined to be insane is awaiting transfer from the county to a state hospital or from a state hospital back to the county. Where the patient is awaiting admission to a state hospital "the commission of insanity shall require that such person be *suitably provided for* either in the county home *or otherwise*" — Section 229.24. "Such patients may be cared for *as private patients . . .*" — Section 229.25, ". . . at the county home or some other *suitable* place" — Section 229.26. Also note that section 227.1 is phrased in terms of "county and private institutions where *insane persons are kept.* Section 227.14 provides for confinement of the insane "in any convenient and proper county or private institution for the insane that is

willing to receive them." The ultimate test as to whether a private institution is an "institution for the insane" thus seems to be whether it is a *proper or suitable* place for the insane persons to be kept rather than whether it was founded for the express and exclusive purpose of keeping insane persons. In other words, "private institution for the insane" as used in Section 227.11 means "private institution suitable for the care of the insane."

Although Section 227.11 provides for removal of certain insane persons to either the "county home" or a "private institution (suitable) for the insane" the procedural part of the section is phrased only in terms of removal to the "county home." However, it does not necessarily follow that said procedure may not be used to effect removal of such patient to a private institution. The foregoing cited sections all provide in the alternative for care of insane persons in a county in either the county home or private institutions. Section 253.10 even authorizes the county board to "let out the support of the poor, with use and occupancy of the county home." It thus appears that the procedure in Section 227.11 is broad enough to cover transfers to either the county home or a private institution suitable for the insane and that suitability is to be determined by the commission established in said section after approval of the transfer by the board of supervisors.

In conclusion we would, therefore, advise you that a private nursing home is a private institution for the insane if found suitable for care of the insane by the commission created in Section 227.11. In reaching this conclusion we are not unmindful of the provision in rules and regulations for licensed nursing homes which appears at 1954 I.D.R. 136 and provides:

"*Disturbed* mental patients shall not be cared for in a nursing home licensed under these regulations. A person requiring general use of restraints shall be considered disturbed mentally."

Since the provisions of section 227.11 are specifically limited to patients "suffering from chronic insanity or from senility," such persons as are eligible for transfer under section 227.11 would not fall within the definition of "disturbed" mental patients and no violation of the regulation would result from their transfer to a nursing home.

In answer to the further questions contained in your letter, we would advise you that when transfer to such nursing home is approved under section 227.11 the county would become entitled to reimbursement at the rate of three dollars per week under the express terms of Section 227.16 and that the nursing home would be subject to the supervision of the board of control as provided in Section 227.1 and to inspection by members of the board of control or an inspector appointed by it as provided in Section 227.2.

September 2, 1955

SOLDIERS' RELIEF: Chapter 250, Code of 1954, as amended by 56th General Assembly, interpreted as follows:

1. Korean veterans entitled to relief if service subsequent to June 27, 1950.

2. **If administrative assistant employed or appointed, members of Commission entitled to compensation for annual and monthly meetings only.**

3. **Administrative assistant not authorized to issue regular relief orders on his own initiative, but under authority of Commission may issue requisitions for emergency relief.**

4. **Emergency Fund may be reimbursed from the annual budget fund each month to the extent emergency relief granted during preceding month.**

5. **Commission has authority to send indigent veterans to county public hospital and pay for such hospitalization from Soldiers' Relief Fund.**

6. **Commission has no authority to buy hospitalization insurance for veterans.**

7. **One receiving Soldiers' Relief may also be eligible for other relief such as Aid to Dependent Children.**

8. **If Soldiers' Relief Fund exhausted, additional money may be secured by stamping warrants "not paid for want of funds" or "payable from anticipated revenue," or money in some other county fund, if available, may be transferred to Soldiers' Relief Fund.**

Iowa Bonus Board: Reference is herein made to the letter received by you from Mr. Paul Shearer, Washington, Iowa, which reads as follows:

"This will acknowledge receipt of the mimeographed letter dated July 26, 1955, from D. S. Barr, president, Iowa Association of County Soldiers' Relief Commissions.

"There are several legal questions which I would appreciate your forwarding to the Attorney General for his opinion.

"1. Under Sec. 250.1 of the new law, is relief available to Korean veterans? If so, during what period of time must the veteran have served?

"2. Under Sec. 250.5 if the Soldiers' Relief Commission uses one of the Deputy Auditors as an administrative assistant as provided in Sec. 250.6, can the members of the Soldiers' Relief Commission receive compensation for meetings other than the annual and monthly meetings?

"3. Under Sec. 250.6 would the Deputy County Auditor if appointed as administrative assistant have power to issue relief orders on his own initiative? Could he do so on the authorization of the Commission?

"4. Under Sec. 250.20, from what fund would the county reimburse the Commission emergency fund? Also, suppose that the County has a Soldiers' Relief budget of $5000.00. Does the law permit only reimbursements up to a total amount of $500.00 which in this example would be the emergency fund established or can the County reimburse repeatedly so that actually more than $500.00 has been reimbursed although the emergency fund at any one time never is in excess of $500.00?

"We also have several questions here in this county in reference to the use of Soldiers' Relief funds for the County public hospital. I would appreciate your answering the following questions:

"1. Do Soldiers' Relief Commissions have power and authority to send indigent veteran cases to the County public hospital?

"2. If they do, are they authorized to pay the County public hospital for such services?

"3. If Soldiers' Relief Commissions have to pay for indigent veteran cases, would it be proper for said Commission to purchase some type of hospital insurance such as Blue Cross for potential chronic cases?

"4. If the Commission does not have power to send indigent cases to the Washington County Hospital, who is authorized to send indigent veteran cases to the hospital and from what funds are such services paid, if paid?

"5. Does the Soldiers' Relief Commission have exclusive jurisdiction in reference to the giving of relief to indigent veterans, their wives, widows and children, or can the county office of State Dept. of Social Welfare also render assistance from their general relief funds? Would there be any difference if funds are paid from the aid-to-dependent children fund? In other words, does the County Welfare office and Soldiers' Relief operate in mutually exclusive areas or do we have certain areas where both may properly function? If so, could these areas be defined?"

In answer thereto, I advise as follows:

1. A veteran of the Korean conflict is included in the phrase "in any war" as used in Section 250.1. (Weissman v. Metropolitan Life Ins. Co., 112 F. Supp. 420). To entitle a veteran to relief he must have served at any time subsequent to June 27, 1950. Termination of the Korean conflict has not been fixed.

2. Section 250.5, Code 1954, provides:

"In the event the *commission has employed administrative* or clerical *help*, the members shall receive compensation for attendance at the annual and monthly meetings only."

Section 6, Chapter 128, 56th G. A., added the following provision to Section 250.6:

"The *commission* with the approval of the board of supervisors *shall appoint* one of the deputies of the county auditor to serve as *administrative assistant* to the commission to serve without additional compensation, unless for good reasons shown, this arrangement is not feasible."

The underscored portions would seem to directly answer the question. If the *commission appoints* the deputy county auditor as *administrative assistant* they have obviously by their own act *employed administrative help* within the meaning of Section 250.5. In such event the Commission is not entitled to additional compensation.

3. Section 4, Chapter 128, 56th G. A., provides:

"At each regular meeting *the commission* shall submit to the board of supervisors a certified list of persons to whom relief has been authorized and the amounts so awarded. The amount awarded to any person may be increased, decreased, or discontinued by the commission at any meeting. New names may be added and certified thereat."

And Section 5 provides:

". . . All claims certified shall be reviewed by the board of supervisors and the county auditor shall issue his warrant . . ."

Thus, the third question appears directly answered ~~by statute~~. "Relief orders" are certified by the commission, reviewed by the supervisors, and

warrants issued by the auditor. There is no short circuit procedure provided whereby the administrative assistant may act on his own initiative in the granting of relief. However, in the administration of the emergency fund the requisitions may be issued by the administrative assistant under the authority of the Commission.

4. It is assumed that reference to "250.20" means Section 8, Chapter 128, 56th G. A., as Chapter 250, Code 1954, has only 19 sections. Under this section it appears that the "commission emergency fund" would be reimbursed from the regular annual budget fund of the commission of which it constitutes 10%. Reimbursement of the emergency fund is made "at each regular meeting, if warrants of the commission are drawn thereon in the preceding month." Thus, the emergency fund might be reimbursed up to twelve times in any one year with each such reimbursement equal to the amount expended therefrom in the preceding month. However, in the example given in your question, the balance on hand in the emergency fund could never exceed $500. at any one time.

On the five additional questions on page 2 of the letter:

1. Soldiers' Relief Commissions do have power and authority to send indigent veteran cases to the County public hospital and are authorized to pay for such hospitalization from Soldiers' Relief funds. See 1940 Report of the Attorney General, 206.

2. (Covered by 1.)

3. There is no statutory authorization for the commission to buy hospital insurance nor is such insurance within the meaning of the word "relief."

4. (Covered by 1.)

In answer to your question No. 5, in the opinion issued by this Department on page 49 of the 1948 Report, it was said:

"that a person receiving relief under Chapter 250 of the 1946 Code of Iowa may also be eligible to receive relief under the provisions of Chapter 239 of the 1946 Code of Iowa, if the relief received from the Soldiers' Relief Commission is not sufficient to meet the needs of such person."

In the event of exhaustion of soldiers' relief funds two methods are available to provide additional money: (1) warrants may be stamped "payable from anticipated revenue" or "not paid for want of funds" or (2) money may be transferred from any other available county fund. See opinion of the Attorney General at page 60 of the 1954 Report.

September 16, 1955

COUNTY HOSPITALS: Additional mill for erection and equipment of county hospital in counties of 12,000 or less population provided in 56th G.A., Chapter 175, may not be levied and expended for addition to existing hospital without authorization by electors.

Mr. Richard H. Wright, County Attorney, Bloomfield, Iowa: Receipt is hereby acknowledged of your letter of August 15th in which you submit the following:

"I would like to request an opinion concerning the interpretation of Section 347.7 as amended by 56 G. A. Page 208 with regard to the levy of the additional mill. The question is as follows:

"Would it be permissible for the Board of Trustees, through the Board of Supervisors, to levy the extra mill provided by the amendment, for the erection of an addition to an existing County Hospital, without a vote of the people of the county prior to the levy of this additional mill?"

Section 347.7, Code 1954, as amended by Chapter 175, Acts of the 56th G.A., provides as follows:

"If the hospital be established, the board of supervisors, at the time of levying ordinary taxes, shall levy a tax at the rate voted not to exceed one mill; *and may levy one additional mill in counties of 12,000 population or less,* in any one year for the erection and equipment thereof and also a tax not to exceed one mill for the improvement, maintenance, and replacement of the hospital, as certified by the board of hospital trustees . . . The proceeds of such taxes shall constitute the county public hospital fund. Provided, however, that the board of trustees of a county hospital of said county, where funds are available in the county public hospital fund of said county which are unappropriated, may use such unappropriated funds for erecting and equipping hospital buildings and additions thereto without authority from the voters of said county." (Italics identifies amendment by 56th G. A. Material omitted applies only to counties having 125,000 or more population.)

It should be noted that the "one additional mill in counties of 12,000 population or less" is simply in addition to the original one mill authorized for the erection or equipment of a hospital when establishment of a hospital has been approved by the voters under the preceding sections of chapter 347. No *new purposes* were enumerated by the amendment to section 347.7 enacted by the 56th G. A. It follows that the said *additional* mill is subject to the same limitations as to use as is the original one mill levy for erection or equipment.

In an opinion of this office dated October 22, 1951, the limitations on the *original* one mill levy for erection or equipment were set forth as follows:

"1. If the hospital has been constructed and equipped, a levy for erection and equipping is unauthorized.

"2. If the hospital is in process of construction or erection and equipping, a levy for erecting and equipping may be authorized and allowable as part of a levy made to service the bonds, if such two levies do not exceed the maximum of a mill provided by Section 347.7, and the proceeds used only for such purposes.

"3. After construction and equipping, if bonds have been authorized and issued for the purpose of purchasing a site for a county hospital, and the construction and equipping thereof, a levy for servicing the bonds only is authorized. A levy for equipping is unauthorized.

"4. After a hospital is constructed and equipped, the hospital trustees are limited to a levy for maintenance."

Since the additional levy would be subject to the same limitations as the original levy, the answer to your specific question is that the additional mill provided in the said amendment may not be levied for the erection of an addition to an existing county hospital without a vote of the people. In other words, the procedure for authorizing an addition to a county hospital is necessarily the same as the procedure for the establishment of a county hospital.

September 20, 1955

COUNTY RECOVERY FOR POOR RELIEF: County cannot require a person receiving assistance from State Welfare Aid to Dependent Children, Aid for Blind, or Old Age Assistance programs to pay to the county from said person's State Welfare assistance grant either by way of reimbursement, or advance payments for such relief as the county may have granted or may grant under Chapter 252, 1954 Code of Iowa.

Mr. L. L. Caffrey, Chairman, State Board of Social Welfare, Des Moines, Iowa: In your communication dated August 10, 1955, you request an opinion on the following questions:

1. Can a County Board of Supervisors require that a recipient of assistance under a categorical program administered by the State Department of Social Welfare reimburse the county from his current assistance grant as a repayment of hospital, medical or other expenses previously advanced by the county under the provisions of Chapter 252, Code of Iowa, 1954?

2. Can a County Board of Supervisors require a payment by a recipient of a categorical form of assistance from an assistance grant advanced for current needs as recognized by the State Department of Social Welfare to establish a fund to defray the cost of future hospital or medical expenses to be incurred by the recipient?

As to your first question, it is generally accepted that in the absence of some express statutory provision, where public authorities relieve a poor person pursuant to their statutory obligation, neither the person nor his estate is under any obligation to make any reimbursement. See 1938 Report of Attorney General, 155, and authorities cited therein.

Section 252.13, 1954 Code of Iowa, provides for recovery by the county "* * * from such a poor person should he become able * * *", the money the county expended for his relief or support; and only then "* * * by action brought within two years after becoming able * * *". In this instance, a condition precedent to county recovery is that the person is "able." Another condition to recovery is that the two year limitation period has not expired. See *Cherokee County vs. Smith*, 219 Iowa, 490, 496.

As stated in the April 6, 1937 official opinion appearing in 1938 Report of Attorney General, 155, 156, we believe the word "able" as used in Section 252.12 means "able to exist without relief" rather than "able to pay for past assistance furnished."

There is no reason to believe that the legislature intended that a needy and dependent person, (See Section 239.2 — Eligibility for Aid to Dependent Children) or one that has not sufficient income or resources to provide a reasonable standard of living consistent with decency and health (See Section 241.2 — Eligibility for Assistance to the Needy Blind) is "able," as contemplated in Section 252.13. The Iowa Supreme Court has stated that old age assistance is an additional help to that provided by the poor laws. (See Warren County vs. Decatur County, 232 Iowa 613.)

Before public welfare assistance is granted to an applicant under the appropriate social welfare chapters, viz, Chapter 239 — Aid to Dependent Children, Chapter 241 — Aid for the Blind, and Chapter 249 — Old Age Assistance, both the applicable statutes, and the rules and regulations promulgated by the State Board of Social Welfare provide for a proper administrative investigation and finding as to the "current needs" of an applicant for relief in accordance with uniformly established criteria.

Such criteria, the public assistance standards of the State Welfare Department, base welfare grants on the "current needs" of a person to the extent that assistance funds are provided to the State Board from Federal, State and County sources, as provided for by law. The State Board distributes the welfare grants to eligible, needy applicants to meet their particular and specific requirements for such items as food, shelter, clothing, etc. in accordance with accepted schedules of the public assistance standards.

Welfare grants of the State Board of Social Welfare do not purport or attempt to fulfill all of the conceivable, or even necessary requirements of a needy person. The Code provides for a great many kinds of relief for poor persons and dependent persons and an applicant might be eligible under more than one chapter to receive relief. The legislature has in some instances provided that one receiving aid under one form of relief cannot participate in another form; but in no place can we find, nor is it conceivable that the legislature would permit a needy person relief from "Peter to pay Paul." See 1938 Report of Attorney General, 204.

The applicable code chapters of the aforementioned Public Welfare Assistance programs each has a section exempting or restricting assignment or transfer of such welfare funds in the hands of the recipient. See Sections 239.13, 241.10 and 249.34, 1954 Code of Iowa. The purpose of such provisions are to secure to the needy persons the public welfare assistance granted to him. Public policy dictates, and the legislature by enacting such exemption sections assures that the recipient of aid or relief shall have such funds available to apply toward his subsistance requirements and "current needs" — the purpose for which such aid and relief was granted. See *Shephard v. Findley*, 204 Iowa 107.

We conclude as to your first question by stating it is our opinion the legislature did not intend that the county might recover for relief furnished to dependent or needy persons of little or no means who are unable to reasonably provide for their needs without aid or relief from the State.

We fail to find a specific provision of the statute authorizing such recovery by the County. Accordingly, it is our opinion that your first question should be answered in the negative.

As to your second question, we would call your attention to an official opinion issued June 26, 1937 appearing at 1938 Report of Attorney General, 327. In that opinion, it was determined that a County Board of Supervisors could not demand an assignment of future wages from an applicant for poor relief as a condition precedent to the granting of such relief. It was therein pointed out that in the absence of specific statutory provision authorizing the county to recover for aid furnished to needy and poor persons "* * * that it would be against good morals and public policy for any county to withhold aid from its poor, indigent and needy people until they had assigned away a wage to be earned in the future which under the statute of Iowa, would be exempt to them."

Your second question raises an almost identical situation that of a county requiring advance payment from exempt funds as a condition precedent to authorizing relief from the County Poor Fund. A reading of the statute fails to indicate wherein the county might find authority for such restriction upon granting of relief under Chapter 252. Such action is tantamount to the County establishing itself in the health, accident and hospitalization insurance business for the purpose of indemnifying itself against payment of relief from the County Poor Fund. Assuming for the moment that such unusual authority could be found, it would be most unusual for the legislature to allow in effect forced collection of premiums from the public assistance grants paid by the State Board of Social Welfare to the County's indigent, dependent and needy.

In view of the foregoing, we are of the opinion that the answer to your second question should be answered in the negative. As was pointed out in 1938 Report of Attorney General, 327, 328, the legislature provided that the relief to be granted under Chapter 252 is a burden placed upon the county to be taken care of by taxation, and such relief becomes a burden upon all of the taxpayers of the county. Aid to the indigent, poor and needy under Chapter 252 is a charity. As in the prior opinion, we conclude that charities are not to be bartered or sold, and should not be withheld until the recipient or applicant makes, or is able to make an advance payment, whether an assignment of wages as in the prior opinion, or State assistance grants as in this instance.

September 29, 1955

LEGAL SETTLEMENT: Eligibility for old age assistance as set out in Chapter 249 does not depend upon or affect criteria determining the acquisition of legal settlement as set out in Subsection 3, Section 252.16.

Mr. John J. Williams, County Attorney, Red Oak, Iowa: In your recent letter, you request an opinion of this department upon certain questions based upon the following facts:

"Mr. 'X' applied for and was approved to receive old age assistance through 'A' County Department of Social Welfare in March, 1938. In June, 1953, the 'A' County Department cancelled this assistance grant when it learned that Mr. 'X' had become a beneficiary under a trust fund and thus lost his eligibility for old age assistance.

"In October, 1952, while receiving old age assistance, Mr. "X" moved to "B" County, Iowa and continued receiving such assistance. He neglected to notify "A" County of his change of address. The "A" County Department of Social Welfare has never transferred Mr. "X" 's old age assistance case record to the "B" County Department of Social Welfare.

"The money from the trust fund is now depleted and Mr. "X" has now reapplied for old age assistance through the "B" County Department of Social Welfare."

From your letter, the following questions are apparent:

1. Would not Mr. "X" 's place of legal settlement continue to be in "A" County since he was receiving old age assistance at the time he moved into "B" County and continued to receive this public assistance for approximately seven months afterwards?

2. "B" County is of the opinion that the size of the trust fund was obviously inadequate to support Mr. "X" for the balance of his life. Thus should not the cancellation of old age assistance by "A" County be viewed as a suspension which would prohibit Mr. "X" from acquiring legal settlement in "B" County?

In answer to your first question, we wish to state that the opinion of this department has not changed from that heretofore set out in 1948 Report of Attorney General, at page 241. In summary, that opinion stated — One receiving old age assistance under the provisions of Chapter 249 of the Code is not being supported by public funds within the meaning of Subsection 3 of Section 252.16, Code of 1946 (now 1954 Code) relating to legal settlement, so as to make inoperative Subsection 2 of said section. The decision of the Iowa Supreme Court in the dispute involving Warren County vs. Decatur County, set out in the Reports, 232 Iowa, at page 614, is controlling on this point. Also see 1954 Report of Attorney General, 67.

As to your second question, Chapter 249, 1954 Code of Iowa, establishes certain limitations on funds an old age assistance applicant or recipient may have or receive. These statutory limitations are a condition precedent to eligibility to receive old age assistance funds. (See Sections 249.6 —249.9) Upon the "A" County Board of Social Welfare determining that Mr. "X" had certain funds available to him as a trust beneficiary that exceeded the aforementioned statutory limitations, it had no alternative under the law and the applicable rules and regulations of the State Board of Social Welfare than to cancel his old age assistance grant. (See 1952 I.D.R., pp. 251, 253, 275-277, 299-305; also see 1954 I.D.R., pp. 344-346).

However,the finding by the "A" County Board as to eligibility and disposition to be taken in this matter — whether to cancel or suspend Mr. "X" 's old age assistance grant, has no bearing upon this person's legal settlement. As heretofore pointed out, the Iowa Supreme Court in

1942 established the law on this point. (Wayne County vs. Decatur County, supra) The Court therein stated:

"* * * we hold that, while old age assistance is an additional help to that provided by the poor laws, the statutes affording this assistance are not to be construed in the light of the laws with reference to the poor which have been in force for many years.

* * *

"* * * we are unable to conclude that the legislature intended that appellant (Wayne County) in which Hurst (old age assistance recipient) had been a resident for three years, could challenge his status and hold appellee (Decatur County) liable for relief merely because Hurst had been or was receiving old age assistance in appellant (Wayne) County."

Therefore, in the opinion of this department, your second question should be answered in the negative.

October 7, 1955

LEGAL RESIDENCE: Legal residence as used in Section 255.26 1954 Code of Iowa, means actual residence at the time of commitment. Cost of care for patients at the University Hospital or other places as provided for by Chap. 255 should be the burden of the county of commitment rather than the county of legal settlement.

Mr. Orvey C. Buck, Attorney at Law, Keosauqua, Iowa: In your recent letter, you raise a question as to the liability between two counties for payment of emergency surgical treatment under Chapter 255, 1954 Code of Iowa, in a situation wherein the facts as to residence are as follows:

"An old age assistance recipient made his home in 'A' county, Iowa. Following the establishment of a guardianship of property by Court Order in 'A' county, Iowa, on November 8, 1952, his home and furnishings in 'A' county were properly sold and he moved to 'B' county, Iowa on April 15, 1953 to live with his daughter. He subsequently entered a nursing home in 'B' county and in December, 1954, moved to another nursing home in 'C' county, Iowa.

"This old age assistance recipient has legal settlement in 'A' county, but now resides in a 'C' county nursing home. He has no other established residence and is in need of surgery. 'C' county wherein this person resides, refuses to assume its liability under Chapter 255, 1954 Code of Iowa, contending 'A' county, the county of legal settlement, is responsible for the expense of emergency surgical treatment."

The first consideration to be taken up is whether or not the status of an old age assistance recipient has any effect upon liability of the counties herein. As has been previously pointed out by Attorney General's opinion (Note 1938 A.G.O., page 204) Section 249.29, 1954 Code of Iowa, does not preclude such recipient from receiving medical and surgical assistance. In fact, the old age assistance grant of the State Department of Social Welfare does not purport to include funds for such necessary medical and surgical care.

In prior opinions of the Attorney General, the matter of counties' liability in such situations had been passed upon. In an opinion appearing

at 1940 A.G.O., at page 84, it was there stated that the county of actual residence and from which a patient is admitted, would be liable for care of the patient at the University Hospital. This, even though the patient does not have a legal settlement in that county. County payment for such care of its patients commences at the time such county's quota is exhausted in excess of ten per cent, as provided by Section 255.16. As was pointed out in the aforementioned opinion,

"This chapter (Chapt. 255, 1954 Code of Iowa) has decidedly humane and beneficient purposes and we believe it was the intention of the Legislature that indigent persons should receive both medical and surgical care and were not to be subjected to controversy in relation to legal settlement."

A subsequent opinion and the last opinion from this office upon this point appears at 1946 A.G.O., page 205, wherein the conclusion was that legal residence as used in Section 255.26, 1946 Code of Iowa, means actual residence at the time of commitment and that the cost of care for patients at the University Hospital should be the burden of the county of commitment rather than the county of legal settlement.

We concur in these prior Attorney General's opinions to the effect that the county of commitment would be liable for the expense of such treatment as provided for by Chapter 255 when steps are taken in accordance with the procedure outlined in said chapter to secure such medical and surgical treatment of an indigent person. This, whenever such treatment ordered by the Court as provided for in Section 255.8, is obtained at the University Hospital, at another hospital, at the patient's home or other place found suitable under the circumstances.

Therefore, it is the opinion of the department that inasmuch as the person receiving old age assistance resides in a "C" county nursing home, that this fact of residence at the time of commitment is sufficient to place liability under the provisions of Chapter 255, 1954 Code of Iowa upon "C" county for the county expense incurred, regardless of the locale of the person's legal settlement.

October 10, 1955

TAXES: PERSONAL PROPERTY—The lien for personal property taxes created by Section 5, Chapter 220, Acts of the 56th General Assembly is not a prior and superior lien.

Mr. Chet B. Akers, Auditor of State: This will acknowledge receipt of yours of the 6th inst. in which you submitted the following:

"We have received the following from the county treasurer of Wright County in which he asks about liens on personal property.

" 'I will appreciate your advice as to the standing of the lien on personal property as established in Chapter 220 of the Acts of the 56th G. A.

" 'The various liens (Sections 445.28-445.29, 445.31 and 445.32) are referred to or mentioned as liens but do not state first lien. 445.28 does state ". . . a lien against all persons except the state." and consequently would be a first lien to all intents and purposes.

" '445.31 and 445.32 have been held by the courts as being the intent of the legislature that they shall be a first lien and prior claim to either mortgages or sales in bulk.

" 'In each of the cases (445.28-445.31-445.32) the tax that is conceded to be a first lien has been the tax upon the property upon which it is designated as a lien.

" '445.29 has differed in the past to the extent the tax on personal property was made a lien on real property and has been recognized as junior to both the taxes on the real estate, both general and special assessment, and also any mortgages or other liens of record at the time such taxes became due.

" 'The present Act is amending Sec. 445.29 which in the past has established junior liens on property other than the property taxes but is it now (like 445.28-445.31 & 445.32) a first lien upon the property taxes and a junior lien upon real estate?

" 'In the event this is true, when will such liens become first liens? Will they be junior to all liens of record at the time this Act became effective (July 5, 1955) and superior to all liens subsequent to that date?'

"An early opinion on the above matter will be greatly appreciated."

In reply thereto, we advise as follows. The portion of the statute referred to in your letter relating to the lien of personal property taxes, being an amendment to Section 445.29, Code of 1954, and being Section 5 of Chapter 220, Acts of the 56th General Assembly, provides:

"Personal property taxes, together with any interest, penalty, or costs, shall be a lien in favor of the county upon all the taxable personal property and rights to property belonging to the taxpayer whose personal property tax is delinquent."

The approach to the question whether such language creates a prior lien is discussed in an opinion of this Department appearing in the 1940 Report at page 361, considering another statute involving a like claim. There it is said:

"The court in this opinion recognizes the well established principle of law to the effect that whether this statutory lien is paramount to other liens upon the property depends upon whether the legislature intended it to be such and this intent must be ascertained from the express language of the statute or by necessary implication, and then goes on to discuss a number of authorities and the language of the statutes involved."

This thought, as so couched, is comparable to the language of the Supreme Court in the case of Bibbins vs. Clark, 90 Iowa 230, 57 N. W. 884. In addressing itself to the same question the Supreme Court said this:

"In these and other cases which might be cited the language used to give the lien is general, as in the case at bar. In none of them is it said that the lien shall be prior to existing liens, but in each case the priority of the lien is left to be determined by the rules of law applicable to all liens in the absence of special provisions. An examination of our statutes will show that when the legislature has intended to create a lien which should take precedence of existing liens, apt language has been used to express such intention. See Code §1558 and chapter 100, Acts 16th Gen. Assem. The section under consideration makes a clear distinction between liens upon real estate for taxes assessed thereupon

and liens upon real estate for taxes assessed upon personal property. In the former case the lien is 'against all persons,' and 'perpetual;' in the latter it is simply declared that there shall be a lien. Now, in the opinion referred to this language of the statute is so enlarged by construction that in effect the statute is made to say that this lien upon real estate for personal taxes shall be superior to all other liens then existing against said real estate. The statute does not say so, the legislature has not so declared, nor can any such result be reached by applying to this provision of the statute the same rule of construction applied to like language used elsewhere in the code."

Application of the test of these opinions to the statute here cited results in the conclusion that the Legislature did not intend this personal property lien to be a first and prior lien upon the property taxed. The Act does not expressly so state and no language from which an inference of priority can be drawn is used. The case of Linn County vs. Steele, 223 Iowa 864, is plainly distinguishable. The language of Section 72.05, Code of 1935, there involved was this: The taxes "shall be a lien thereon and shall continue a lien thereon". The language of Section 72.06, Code of 1935, also there involved was this: Taxes "'shall be and remain a lien until paid". The Court held the language of the foregoing statutes necessarily implied the creation of a prior lien.

We are therefore of the opinion that Section 5 of Chapter 220, Acts of the 56th General Assembly, while creating a lien upon personal property, does not create a first and prior lien thereon.

October 21, 1955

CITIES AND TOWNS: Municipal Elections. Where there is no ordinance adopting the nomination procedure in chapters 44 and 45 there are no "groups of petitioners" within the meaning of section 49.35 and the requirement of arranging candidates in separate columns is not applicable.

Mr. T. C. Strack, Grundy County Attorney, Grundy Center, Iowa: Receipt is hereby acknowledged of your letter of October 17th as follows:

"As I advised you in our telephone conversation of this afternoon I am asking that you furnish us with an Attorney General's Opinion as to the form of ballot to be used in a regular municipal election.

"Briefly, the facts are as follows: The city of Grundy Center has a population of less than 10,000. The city has not passed an ordinance which would bring it under the provisions of Chapters 44 and 45 of the Code as permitted under Chapter 182, Sec. 2, of the Laws of the 56th G.A. Chapter 363 of the Code would apply to the election to be held. Section 363.19 provides among other things that, 'No ballot shall have any party designation thereon,' and the City Clerk has interpreted this to mean that the names of all candidates shall be listed in one column on the ballot. Section 363.26 provides that the municipal election shall be conducted as provided by law for the conduction of general elections, which in our opinion makes Chapter 49 applicable. Section 49.31 provides for nominations of tickets by groups of petitioners and Section 49.42 shows the form of official ballot. Certain of the candidates for office are of the opinion that the ballot must be arranged with the names in as many columns as there are tickets without any party designations."

Section 363.15 provides as follows:

Population 10,000 or less — procedure. "Four weeks prior to the election, the clerk and mayor shall canvass the petitions of all candidates that have been filed with the clerk, and in all municipal corporations having a population of ten thousand or less, as shown by the latest federal census, shall find all candidates that have filed proper petitions, as herein provided, to be the nominees for the offices sought. The clerk shall then do all things necessary for conducting the election. The election shall be conducted in the manner provided by law for general elections."

Section 363.26 provides as follows:

Municipal election procedure. "The municipal election shall be conducted in the manner provided by law for conducting general elections."

Section 49.35 provides as follows:

Order of arranging names. "Each list of candidates for the several parties and groups of petitioners shall be placed in a separate column on the ballot, in such order as the authorities charged with the printing of the ballots shall decide, except as otherwise provided, and be called a ticket."

Section 49.36 provides as follows:

Candidates of nonparty organization. "The term 'group of petitioners' as used in the foregoing sections shall embrace an organization which is not a political party as defined by law."

Organizations which are not political parties are "defined" by law in sections 43.2 and 44.1.

Section 43.2 provides as follows:

Political party defined. "The term 'political party' shall mean a party which, at the last preceding general election, cast for its candidate for governor at least two percent of the total vote cast at said election.

"A political organization which is not a 'political party' within the meaning of this section may nominate candidates and have the names of such candidates placed upon the official ballot by proceeding under chapters 44 and 45."

Section 44.1 provides as follows:

Political nonparty organizations. "Any convention or caucus of qualified electors representing a political organization which is not a political party as defined by law, may, for the state, or for any division or municipality thereof, or for any county, or for any subdivision thereof, for which such convention or caucus is held, make one nomination of a candidate for each office to be filled therein at the general election."

However, your letter points out that the city in question has not enacted an ordinance adopting the procedure for nomination of candidates by nonparty organizations as authorized in chapters 44 and 45, Code 1954. It should be noted that chapter 363 provides only for filing of nomination petitions on behalf of individual candidates. It follows that the subject city has no "groups of petitioners," as defined in sections 49.36, 43.2, and 44.1, supra, whose candidates would be required to be placed "in a separate column on the ballot" by the terms of section 49.35, supra.

Section 49.42, which sets forth the form of ballot for *general* elections provides:

"Said ballot shall be *substantially* in the following form:"

"Said ballot," of course, refers to the ballot described in sections 49.35 to 49.41. In other words, the form set out in section 49.42 is illustrative of the requirements expressed in sections 49.35 to 49.41. It illustrates a situation where political parties and groups of petitioners have nominated *lists* of *candidates* and, of a consequence, columns on the ballot are necessitated by the terms of section 49.35.

However, it has already been stated that political parties may not be named on a municipal ballot and that the city in question has no "groups of petitioners" as defined by law. This means that there are no "lists of candidates" within the meaning of section 49.35 and that the requirement of separate columns stated in said section and illustrated in section 49.42 is not applicable in the set of circumstances described in your letter.

In summary, we would therefore advise you that, in the circumstances described in your letter, the requirement of separate columns or tickets on the ballot has no applicability.

October 24, 1955

HOTELS AND FOOD ESTABLISHMENTS—Restaurant license: Where no application for license renewal is made within the period prescribed by statute, the restaurant ceases to be an "existing business" on expiration of the old license and becomes subject to the license and inspection fee for opening a new business.

Mr. Clyde Spry, Secretary of Agriculture: Receipt is hereby acknowledged of your letter of October 17th as follows:

"Section 170.3 states:

"Application for License. Every application for a license under this chapter shall be made upon a blank furnished by the department and shall contain the items required by it as to ownership, management, location, buildings, equipment, rates, and other data concerning the business for which a license is desired. An application for a license to operate an existing business shall be made at least thirty days before the expiration of the existing license."

"Our specific question is, would a cafe or restaurant operator who had not made application for a license as prescribed in Sec. 170.3, and who had been operating without a license, be classified as an existing place of business?

"We would further like to know whether we would be within our jurisdiction in charging the operator a full $18.00 as provided in Section 170.6."

The answer to your first question as to what constitutes an "existing business" for purposes of section 170.3 is answered by the provision in said section that the "application for a license to operate an existing business *shall be made at least thirty days before the expiration of the*

existing license." The use of "shall" makes the provision mandatory. This conclusion is borne out by the provisions of section 170.2 which provides:

"No person shall *maintain or conduct* a hotel, restaurant, bakery, candy factory, ice cream factory, bottling works, canning factory, wholesale grocery store, wholesale fruit and vegetable store, bakery supply store, egg breaking plant, egg drying plant, milk drying plant, milk drying (for human consumption) plant, peanut products plant, milk condensery, slaughterhouse, meat market, or place where fresh meats are sold at retail until he shall obtain a license from the department of agriculture. Each license shall expire September 1 each year, except a hotel or restaurant license which shall expire on the last day of December following the date of issuance. . . ." (italics ours)

Thus, the law expressly provides that none of the named businesses shall be maintained or conducted without a license and further expressly provides when each license shall expire. An expired license is no license and, except when application for new license has been made as provided in section 170.4, "no person shall maintain or conduct" any of the said businesses without a license. It follows that the term "existing business" as used in section 170.3 means "existing licensed business."

In answer to your first question, we would, therefore, advise you that one who has permitted his license to expire without making application for renewal within the thirty day period provided in section 170.3 ceases to be an "existing business" within the meaning of section 170.3 upon the expiration of the license he then holds.

Your second question relates to the fee for restaurant license. The annual fee for such license is fixed at three dollars under the provisions of section 170.5(6). Section 170.6 provides for an additional inspection fee in certain cases as follows:

"In addition to the annual license fee required by sections 170.2 and 170.5, each restaurant hereafter opened and each restaurant hereafter changing ownership shall, before it opens for business or before the new owner assumes management and control of same, pay to the department an inspection fee of fifteen dollars. This section shall not apply to any temporary restaurant."

The answer to your second question follows from the first. As was hereinabove pointed out, section 170.2 provides that no person shall maintain or conduct a restaurant without a license. Section 170.3 fixes the expiration date of all restaurant licenses as December 31 and requires that applications for renewal "*shall* be made at least thirty days before the expiration of the existing license." Where application has not been so made, lawful operation of such business ceases at midnight December 31. Where a restaurant so ceases to be a lawful operation, it logically follows that it must comply with the requirements of statute governing the opening of restaurants before it can again become a lawful operation which would include the three dollar license fee provided in section 170.5(6) and the fifteen dollar inspection fee provided in section 170.6. The answer to your second question is, therefore, in the affirmative.

November 4, 1955

DELINQUENT TAXES: The $5.00 minimum amount for the publication provision of Chapter 220, Acts of the Fifty-sixth General Assembly relates to the amount of personal property taxes that are delinquent for the current assessment year rather than to the total assessment for that year where a portion of the total assessment has been paid prior to the preparation of the list for publication.

Mr. Leo J. Tapscott, Polk County Attorney, Des Moines, Iowa: This will acknowledge receipt of your recent letter wherein you asked for an opinion on the following question:

"Shall the list (required by House File 237) to be prepared, include delinquent personal property taxes in all cases where the entire tax is in the amount of more than $5.00 — or shall the list include only those delinquent personal taxes where the amount still due is more than $5.00, by virtue of installment payment of the first half?"

Reference to House File 237 appearing as Chapter 220, Acts of the Fifty-sixth General Assembly, shows that Section 1 thereof reads as follows:

"Section four hundred forty-five point eight (445.8), Code 1954, is hereby amended by adding thereto the following:

" 'The treasurer shall cause to be compiled a list of all delinquent personal property taxes for the current assessment year, as shown by the delinquent personal property tax list. Such list shall show the amount of the taxes delinquent when the amount of the tax is more than five dollars ($5.00) and the amount of penalty, interest and costs thereon, the name of the owner, if known, or the person, if any, to whom it is taxed, shall be published in some newspaper in the county once each week for two consecutive weeks, the last of which shall be not more than two weeks before the first Monday in December, and by immediately posting a copy of the first publication thereof at the door of the courthouse, if there be one, if not, at the door of the place where the last term of district court was held. The provisions of sections four hundred forty-six point ten (446.10) and four hundred forty-six point eleven (446.11) of the Code shall prevail in connection with the publication of such notice. The treasurer shall obtain a copy of the notice as published, and a certificate of the publication thereof from the printer or publisher, and file it in the office of the auditor.'."

It is our opinion that the answer to the question propounded is in the quoted section of Chapter 220, Acts of the Fifty-sixth General Assembly. It will be noted that said section directs the treasurer to compile a list of all *delinquent personal property taxes* for the current assessment year. The treasurer is next directed to show the amount of the taxes delinquent on said list when the amount of *the tax* is more than $5.00 and to make some further notations on said list. Said section then directs the publication of this list in the manner there stated. It will be noted that the words "the tax" underlined above, follow directly the reference in the section to taxes delinquent and it is our opinion that this is significant. It appears that this reference controls the meaning of the words "the tax," and that such words mean the delinquent personal property tax of the taxpayer as it appears on the delinquent personal property tax list, the list the treasurer is directed to use in compiling the list for publication.

Further support for this conclusion is found in the fact that Chapter 220, Acts of the Fifty-sixth General Assembly, is an amendment by addition to Section 445.8 of the 1954 Code of Iowa, which directs the treasurer to prepare the delinquent personal property tax list from which the published list is to be prepared, referred to in Section 1 of Chapter 220. The only possible reference in Section 445.8 as amended is, therefore, to *delinquent taxes.*

It is apparent from a study of the cited section and amendment thereto that the intent of the Legislature was to publicize the names of those taxpayers who are delinquent in their personal property tax payment by more than a minimum stated amount, which in this case is stated to be $5.00. The amount of the initial assessment for the assessment year would appear to be inconclusive to any determination of the personal property taxes delinquent in applying this legislative intent.

It is, therefore, our conclusion that the list required by Chapter 220, Acts of the Fifty-sixth General Assembly, shall include delinquent personal property taxes only in those cases where the amount of tax that is delinquent at the time the list is prepared is for any taxpayer an amount of more than $5.00 regardless of what the amount of the original assessment for the current tax year might have been. In other words, the treasurer shall include on the list for publication the name of any person owing delinquent personal property taxes in an amount greater than $5.00 for the current assessment year and shall not include on that list the name of any taxpayer whose taxes for the current assessment year are delinquent in the amount of $5.00 or less, even though the total assessment for that year before reduction by partial payment, was in excess of $5.00.

November 4, 1955

CONSERVATION COMMISSION. Appropriation in section 1, chapter 12, Acts of the 56th General Assembly may not be expended to purchase property for county parks as such parks are not among the express objects set forth in said section. However, property purchased for one of the express objects may have incidental use as a county park as provided in section 7 of said Act.

Mr. Bruce F. Stiles, State Conservation Director: Receipt is hereby acknowledged of your letter of October 21st in which you submit the following question:

"The State Conservation Commission respectfully requests your opinion as to whether the funds appropriated to the State Conservation Commission under Chapter 12 of the Acts of the 56th General Assembly could be used by the county conservation boards in establishing county parks."

Section 1, Chapter 12, Acts of the 56th General Assembly, contains the appropriation to which your letter refers and provides:

"There is hereby appropriated and set out of the general fund of the state from any moneys not otherwise appropriated, to the state conserva-

tion commission the sum of one million one hundred seventy-three thousand dollars ($1,173,000.00) or so much thereof as may be necessary for construction, acquisition, replacements, alterations for state parks and reserves, *state* forests, *state* waters, for dredging, for sanitary sewer projects for artificial lake development, for erosion control, for streams and lake access, for land acquisition and for design and investigation, but said funds appropriated and set aside by this act shall not be expended until it shall be determined by the conservation commission with approval of the budget and financial control committee and that its expenditures shall be for the best interests of the state." (Underscoring ours)

Thus, the express provisions of section 1 limit expenditure of the said appropriation to purposes related primarily to the statewide program of the conservation commission.

Circumstances under which property under the control of the conservation commission *may* be transferred to a county conservation board are specified in subsection 2, section 7, chapter 12, Acts of the 56th General Assembly, as follows:

". . . The state conservation commission, the county board of supervisors, or the governing body of any city, town or village may, upon request of the county conservation board, designate, set apart and transfer to the county conservation board for use as parks, preserves, parkways, playgrounds, recreation centers, play fields, tennis courts, skating rinks, swimming pools, gymnasiums, rooms for arts and crafts, camps and meeting places, community forests, wildlife areas and other recreational purposes, any land and buildings owned or controlled by the state conservation commission or such county or municipality and not devoted or dedicated to any other inconsistent public use . . ."

We would therefore advise you that the appropriation in question may be expended only for the express purposes named in section 1, supra, which do not include procurement of land for county parks. However, where property is acquired for one of the purposes expressly named in section 1, and use of all or part of such property as a county park is not inconsistent with the public use for which it was acquired, the conservation commission, under the provisions of section 7, supra, *may*, at its discretion, upon request of the county conservation board, designate or set apart lands or waters for such park use.

November 14, 1955

SOLDIERS RELIEF: Chapter 128, Acts of the 56th General Assembly providing for review of claims for Soldiers' Relief by Board of Supervisors shall be privileged and confidential and authorizes review only by the Board of Supervisors to the extent of confirming the amount of relief allowances; and the confidential nature of the claim does not allow the claims to be included in the published claims of the Board of Supervisors.

Mr. Chet B. Akers, Auditor of State: Receipt is hereby acknowledged of your letter in which you submit the following:

"Section 5, Chapter 128 of the 1956 G. A. provides that 'in the first Monday in each month all claims certified shall be reviewed by the board of supervisors and county auditor shall issue warrants in payment of same drawn upon the Soldiers' Relief Fund.'

"Section 8 of Chapter 128, provides for the emergency fund to be set aside by the Soldiers' Relief Commission and the Board of Supervisors. If warrants are drawn on this fund a complete report of said payments, together with receipts for same, shall be filed at the regular meeting and after reviewed by the Board of Supervisors the county auditor shall be directed to issue a warrant to reimburse said commission fund.

"(1) The question is 'What is meant by Section 250.10 when it states the Board of Supervisors shall review the claims. Can the Board of Supervisors refuse or reject any of the claims or allow the claim in a less amount than certified by Soldiers' Relief Commission or approve the claims. (2) Should these claims be published along with other claims allowed by the Board.

"(3) When the Board of Supervisors reviews the report on Emergency fund can they disallow any part of this claim for reimbursement to Emergency fund. (4) Should this claim be included in the published claims of the Board of Supervisors.' "

Section 5, Chapter 128, Acts of the 56th General Assembly provides as follows:

"Section two hundred fifty point ten (250.10), Code 1954, is hereby repealed and the following enacted in lieu thereof:

" 'On the first Monday in each month, all claims certified shall be reviewed by the board of supervisors and the county auditor shall issue his warrants in payment of same drawn upon the soldiers' relief fund. All applications, investigation reports and case records shall be privileged communications and held confidential, subject to use and inspection only by persons authorized by law in connection with their official duties relating to financial audits and the administration of the provisions of this chapter. Provided, however, that the county soldiers' relief commission shall prepare and file in the office of the county auditor on or before the thirtieth (30th) day of each January, April, July and October a report showing the names and addresses of all recipients receiving assistance under this chapter, together with the amount paid to each during the preceding quarter. Each report so filed shall be securely fixed in a record book to be used only for such reports made under this chapter.

" 'The record book shall be and the same is hereby declared to be a public record, open to public inspection at all times during the regular office hours of the county auditor. Each person who desires to examine said records, other than in pursuance of official duties as hereinbefore provided, shall sign a written request to examine the same, which shall contain an agreement on the part of the signer that he will not utilize any information gained therefrom for commercial or political purposes.

" 'It shall be unlawful for any person, body, association, firm, corporation or any other agency to solicit, disclose, receive, make use of or to authorize, knowingly permit, participate in or acquiesce in the use of any lists, names or other information obtained from the reports above provided for, for commercial or political purposes, and a violation of this provision shall constitute a misdemeanor punishable by a fine of not to exceed two thousand dollars ($2,000) or by imprisonment in the county jail not to exceed one (1) year, or by both such fine and imprisonment.' "

Your first question relates to the scope of the power of review conferred on the Board of Supervisors by the first sentence of the quoted section. It should be noted that said provision relates to "ordinary" relief as distinguished from the emergency relief provided in Section 8 of the Act and that such ordinary relief claims are not paid until *after* review by the Board of Supervisors.

"Review" is defined by various authorities as follows:

Black's Law Dictionary — "To re-examine judicially. A reconsideration; second view or examination; *revision; consideration for purposes of correction.* Used especially of the examination of a cause by an appelate court, and of a second investigation of a proposed road by a jury of viewers."

Words and Phrases — " 'Review' indicates a re-examination of a proceeding, already concluded, for the purpose of preventing a result which appears not to be based upon the exercise of an unbiased and reasonable judgment. Bd. of Pub. Works v. Third Dist. Ct. 67 NE 2d 232, 319 Mass. 638."

"Re-examination of a compensation case in which no additional evidence is adduced before the court is 'review' and not 'trial de novo' and hence decision of Industrial Accident Board can be overturned only if on examination of cold record it can be said that evidence clearly preponderates against decision. Doty v. Industrial Accident Fund. 59 P 2d 782, 102 Mont. 511."

These definitions of the term "review" are persuasive of its meaning when used in these statutes under consideration, where the review there provided fails to prescribe the nature, method or effect of the review accorded to the Board of Supervisors. Therefore, we are of the opinion that the power of the Board of Supervisors in review is ministerial and contemplates re-examination of the relief claims allowed by the soldiers' relief commission and certified by it to the Board of Supervisors "for the purpose of preventing a result which appears not to be based upon unbiased and reasonable judgment." However, such review must be confined to the record before it. What then is the "record" subject to "re-examination" by the supervisors? Section 4, Chapter 128, Acts of the 56th General Assembly, provides that it is a "certified list of those persons to whom relief has been authorized and the amounts so awarded." In addition to said "certified list" Section 5, supra, provides that certain confidential records consisting of "applications, investigation reports and case records" are available to the Board of Supervisors in connection with their official duties under Chapter 250. It follows that the review by the Board of Supervisors is confined to the record, consisting of the certified list of names and amounts, applications, investigation reports and case records, and may overturn the decision of the soldiers' relief commission only if on examination of the record it can be said that the evidence clearly preponderates against the decision.

The answer to your second question is furnished by the balance of Section 5 as hereinabove set out. The balance of the first paragraph provides that all reports in the hands of the commission shall be privileged and confidential, and further provides for a quarterly report of names and amounts to the county auditor to be by him recorded in a record book. The second paragraph permits public inspection of such record book provided any person wishing to inspect same makes request therefor and agrees not to use information gained for commercial or political purposes. The third paragraph provides a criminal penalty for disclosure or use of information for commercial or political purposes. It

is apparent that publishing the list of names and amounts reviewed by the supervisors would render meaningless and ineffectual the provisions of Section 5 which are designed to provide a record of all persons gaining access to the information. It follows that the answer to your second question is in the negative.

In answer to your third question, we would refer you to Section 8 of the said Act which provides as follows:

"Chapter two hundred fifty (250), Code 1954, is hereby amended by adding thereto the following section:

" 'At the annual meeting there shall be established by the commission and the board of supervisors a commission emergency fund of ten (10) per cent of the annual budget, subject to the direction and control of the commission, and at each regular meeting, if warrants of the commission are drawn thereon during the preceding month, a complete report of said payments, together with signed receipts for same, shall be filed at the regular meeting and after review by the board of supervisors, the county auditor shall be directed to issue a warrant to reimburse said commission emergency fund.' "

It should be noted that emergency claims differ from ordinary claims in that payment of emergency claims is completed prior to review by the Board of Supervisors. As a practical matter, the Board of Supervisors is limited, in respect to such paid claims, to advising the soldiers' relief commission of reasons for which it would have disapproved the claim had it been for ordinary relief and of its recommendations for future handling of such claims. In respect to reimbursement of the emergency relief fund, Section 8 simply provides that the fund "shall" be reimbursed after review. The language used would appear to give no discretion to the supervisors as to whether or not such reimbursement should be made.

The nature of the "emergency" fund supports the logic of this result for, were the Board to have power to refuse such reimbursement, it would not correct any improvidence in the claims reviewed, as payment has been completed prior to review, but would simply deplete the emergency fund to the disadvantage of future claimants with just emergency claims. The answer to your third question is, therefore, in the negative.

The answer to your second question is also applicable to your fourth question.

November 15, 1955

PARTNERSHIP TAXES: A limited partner is a special participant in a general partnership whose participation is so limited as to preclude him from being an "individual of a partnership" within the meaning of Section 428.15 of the Code and personal property taxes which become debts of the partnership do not become a lien against the real property of a limited partner.

Mr. Leo J. Tapscott, County Attorney, Des Moines, Iowa: Receipt is hereby acknowledged of your recent letter wherein you raise the question as to whether or not personal-property taxes owned by a partnership to

the county constitutes a lien on the real property owned by the limited partners personally. You state that your question relates to a "stock form" limited partnership with the limited partners exercising no direct control of the management or conduct of the business, though entitled, however, to a specific percentage share of the profits.

We note that the provisions of the following sections of the 1954 Code are pertinent to your question:

Section 445.29
"All poll taxes and taxes due from any person upon personal property shall, for a period of one year following December 31 of the year of levy, be a lien upon any and all real estate owned by such person or to which he may acquire title and situated in the county in which the tax is levied. * * *"

Section 428.15
"Any individual of a partnership is liable for taxes due from the firm."

Section 545.1
"A limited partnership is a partnership formed by two or more persons under the provisions of this chapter, having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligations of the partnership."

Section 545.9
"A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business."

These cited sections of the Code appear on first examination to be contradictory in that a "limited partner" within the meaning of Section 545.1 would seem to be an "individual of a partnership" within the meaning of Section 428.15. However, an examination of the theory of limited partnership associations casts great doubt on any assumption that limited partners are within the meaning of Section 428.15 of the Code "individuals of partnerships liable for taxes due from the firm."

In 40 Am. Jur., Partnership, Section 504, it is stated:

"A limited partnership is one in which the liability of some members but not all is limited; such a partnership is formed under laws permitting an individual to contribute a specified sum to the capital of a firm and then limiting his liability for losses to that amount, on the parties complying with certain established requirements."

Iowa has adopted the Uniform Limited Partnership Act which appears as Chapter 545 of the Code and which provides specifically for just such a business association and just such a limited liability.

In Fifth Ave. Bank v. Colgate, 120 N.Y. 381, 24 NE 799, 8 LRA 712, it is said that the policy of laws authorizing the formation of limited partnerships is to bring into trade and commerce funds of those not inclined to engage in that business, who are disposed to furnish capital upon such limited liability with a view to the share of profits which might be expected to result to them from its use.

Since such is the policy of the law; since imposing a lien on the separate property of a limited partner would tend to extend that liability

beyond the funds invested; and since Section 545.1 of the Code purports to exclude limited partners personally from "obligations of the partnership," it is our conclusion that there are by law no taxes personally *due from any person* qualifying as a limited partner with relation to the personal property of the partnership which could be the basis for a lien upon any real estate owned by such a person.

In view of the fact that the legislature chose to foster capital investment by making possible partnership investment with corporate type liability by Chapter 545 of the Code we must hold that personal property taxes which become debts of the partnership do not become a lien against the real property of a limited partner.

A limited partner is a special participant in a general partnership whose participation is so limited as to preclude him from being an "individual of a partnership" within Section 428.15 of the Code, such a description being much more aptly applied to the general partners in whose name and under whose control the partnership operates.

November 15, 1955

PERSONAL TAXES: Personal property taxes must be assessed in the name of the owner of the personal property on the 1st day of January of any tax year in order for such taxes to be a valid lien upon such property and it is not sufficient to create such a lien to assess such property in the name of the purchaser of such property from a sheriff's sale pursuant to a decree for mortgage foreclosure where such purchaser at Sheriff's sale does not take title to the property prior to January 1 of the assessment year.

Mr. K. C. Acrea, County Attorney, Logan, Iowa: This will acknowledge your recent letter in which you submitted the following:

"The County Assessor has submitted to me a question concerning the legality of an assessment of personal property. The facts are as follows:

"On January 27, 1953 the township assessor listed certain machinery found on the farm of a non-resident to the owner of the farm. No one was living on the premises at the time the assessment was made, and the assessor claims that he mailed a copy of the assessment to the owner of the farm. The owner had a mortgage on the machinery which was owned by the tenant, and on December 9, 1952 the owner obtained a judgment and decree of foreclosure and the property was levied on by the Sheriff on December 12, 1952 and was sold to the mortgagee who owned the land on February 19, 1953. In making up the tax books for 1953 the assessment of said personal property was included with the assessment against the land of the farm owner, and the tax placed on said assessment appeared on the tax rolls as a tax of the farm owner who had not acquired title to the personal property until February 19. No protest was made by the farm owner against the personal property assessment until about the first of October, 1955, and the farm owner now claims that he is not liable for the tax.

"* * * The question is was the assessment against the execution creditor who purchased the personal property valid since he did not own the property until the date of the Sheriff's sale, February 19? Further can it now be properly assessed against the then owner who lost the property

in foreclosure and the lien of the tax enforced against the property even though the execution purchaser is not personally liable? * * *"

We believe the answer to your question lies in the following sections of the 1954 Code of Iowa and the following cited amendment to that Code.

428.4 "Property shall be taxed each year, and personal property shall be listed and assessed each year in the name of the owner thereof on the first day of January. * * *"

445.29 "All poll taxes and taxes due from any person upon personal property shall, for a period of one year following December 31 of the year of levy, be a lien upon any and all real estate owned by such person or to which he may acquire title and situated in the county in which the tax is levied. From and after the expiration of said one year said taxes shall be a lien on all such real estate for an additional period of nine years provided said taxes are entered upon the delinquent personal tax list as provided by law. But in no instance shall said taxes be a lien after the expiration of ten years from December 31 of the year in which levied. This section shall apply to all poll taxes and to all taxes on personal property whether levied prior or subsequent to the time this section takes effect."

Chapter 220, Sec. 5, Acts of the 56th G.A. "Personal property taxes, together with any interest, penalty, or costs, shall be a lien in favor of the county upon all the taxable personal property and rights to property belonging to the taxpayer whose personal property tax is delinquent."

We find that Section 428.4 of the Code requires that "* * * personal property shall be listed and assessed each year in the name of the owner thereof on the first day of January." This listing of such property in the name of the *owner* of the property as of January 1 of the tax year has been held by the Iowa Supreme Court in Wangler v. Black Hawk County, 56 Iowa at page 384 to be prerequisite to a legal assessment. This case is discussed in 1954 Report of Attorney General at page 88.

For the entire period covered by the acts recited till the effective date of Chapter 220 Acts of the 56th G.A. the only lien securing personal property taxes, except in the special cases covered by Sections 445.31 and 445.32, has been that under Section 445.29 above applying to the real estate owned by such personal property owner. No lien existed against ordinary personal property to secure the taxes assessed thereon. Consequently the only tax lien which could now apply as to any personal property for any delinquent personal property taxes under the law relating to personal property generally is the lien created by Section 5, Chapter 220, Acts of the 56th G.A. Since this act took effect on July 4, 1955 and since this office has previously ruled that the lien then created for personal property taxes is not a prior and superior lien (by an opinion bearing date of October 10, 1955) the lien thus created, even if predicted on some correction of the 1953 assessment could not prevail over the judgment lien and execution thereon standing against the subject property on January 1 of the 1953 assessment year.

Though it would appear that because of the void original assessment in this case an assessment might be made against the prior owner thereof under the provisions of sections 443.6 and 443.12 relating to omitted property, such an assessment would not create a lien relating back to January 1, 1953 and in any event the lien created by such an assessment would not now be enforcible against the subject property.

November 23, 1955

LEGAL SETTLEMENT: Although legal residence, domicile and legal settlement are not synonymous terms, the element of intent enters into the proper determination of legal settlement under Chapter 252, 1954 Code of Iowa.

Mr. John R. Thornell, County Attorney, Sidney, Iowa: In your recent letter, you inquire whether legal residence, domicile and legal settlement are synonymous terms. We should advise you that the Iowa Supreme Court has definitely settled that domicile, residence and legal settlement are not synonymous. *In Re: Newhouse*, 233 Iowa 1007, 1013 and cases cited. *State ex rel Rankin v. Peisen*, 233 Iowa 865, 872, and authorities cited.

Secondly, you inquire as to whether the element of intent enters into the proper determination of legal settlement under Chapter 252, 1954 Code of Iowa, in two situations wherein the facts are:

1. A bachelor, Mr. "X" whose home was in "A" County, went to "B" County in 1952 to visit his sister and her husband. The purpose of the visit was to assist her sister who was losing her sight, and her ailing husband. His continuing assistance being needed in his sister's household, Mr. "X" remained in "B" County.

Mr. "X" gave no assurance to anyone that he intended to permanently reside in his sister's household or elsewhere in "B" County. He retained real estate interests in "A" County. In June, 1955, Mr. "X" was taken to the State Sanitorium at Oakdale.

2. Mr. "Y", a school teacher, left "C" County ten years ago to reside in a particular city in another state where he is, and has been engaged as a teacher at a boys' school.

Since moving from "C" County, Mr. "Y" has intended and in fact, has kept a residence in "C" County to which he intends to return some day. He has voted in "C" County and has retained his Masonic membership in that county.

A proper determination of legal settlement in the fact situation entitled No. 1 is dependent in the first instance upon the fact question of whether Mr. "X" has met the statutory criteria set out in Section 252.16, 1954 Code of Iowa requisite to acquiring such settlement in "B" County. The decision is controlled primarily by whether Mr. "X" was "continuously residing" in "B" County as contemplated by Section 252.16, Subsection 1, 1954 Code of Iowa; and secondly, upon whether "B" County is now estopped from contesting the legal settlement of Mr. "X".

As to the "continuously residing" requirement of Section 252.16, Subsection 1, supra, the Iowa Supreme Court has ruled that essential elements of residence in the acquiring of legal settlement in a given county by a poor person are:

"First, personal presence in a fixed and permanent abode, or permanency of occupation as distinct from lodging, boarding or temporary occupation; and second, an intention to there remain, without any present intention of removing therefrom. Audubon County v. Vogessor, 228 Iowa 281, 285; Cass County v. Audubon County, 221 Iowa 1037, 1041; Cerro Gordo County v. Wright County, 50 Iowa 439; Hinds v. Hinds, 1 Iowa 36."

As to whether "B" County is now estopped from contesting legal settlement, the Iowa Supreme Court has pointed out that the legislature did not intend that the county where one had been a resident for three years could challenge his status as to legal settlement. See Section 252.16, Subsection 2, 1954 Code of Iowa. The Court has stated that "If the question of legal settlement could be raised after nearly four years * * * the question arises: When would counties be barred from litigating the status of those who at one time lived elsewhere in the State." *Warren County v. Decatur County*, 232 Iowa 613.

Evidence that Mr. "X" voluntarily went to a relative's home in "B" County and resided therein for over three years without leaving, would tend to establish that he had personal presence in a fixed and permanent abode and did reside in "B" County long enough to acquire legal settlement. *1936 Report of Attorney General, 332.* Further, the presumption is raised that he intended to remove permanently from "A" County or from wherever he may have previously acquired legal settlement. *1946 Report of Attorney General, 122.*

To substantiate a finding that legal settlement was not acquired in "B" County, it must be shown that Mr. "X" at all times considered his absence from "A" County or the county in which he had acquired legal settlement, as temporary and that he at all times had a present intention to return to that county. *1946 Report of Attorney General, 122.*

In our opinion, the foregoing, when applied to the fact situation entitled No. 1, seems to substantiate that Mr. "X" acquired legal settlement in "B" County in the absence of clear, undisputed evidence that he did not intend to remain in, or acquire a legal setlement in "B" County. We believe the facts as to one's intent flavor and determine one's subsequent acts. Thus the fact that Mr. "X" did voluntarily stay on in "B" County is significant in establishing that he intended to remain there.

Proceeding next to the fact situation entitled No. 2, the controlling factors as to whether Mr. "Y" has continuing legal settlement in "C" County turn upon whether Mr. "Y" has removed from this State for more than one year, or has acquired a legal settlement in some other county or state. *Section 252.17, 1954 Code of Iowa; State ex rel Rankin v. Peisen*, 233 Iowa 865, 870. In the absence of a contrary showing, statutes of another State relative to acquiring a legal settlement are presumed to be the same as those of this State. *In Re: Maintenance of Newhouse*, 233 Iowa 1007, 1013.

In the *1946 Reports of Attorney General*, appearing at page 122, this same matter of removal from the State for more than one year was considered with regard to temporary absence. There, at page 123, it was properly stated "that mere physical absence is not enough to lose one's settlement, but * * * when one removes his domicile from his county or his state for over one year, he then loses his settlement regardless of his intention to return. This, of course, involves one's intention indirectly at the time of his departure, for his intention to remove his domicile is determined by the surrounding circumstances. One, therefore, intending to retain his domicile in the county of his legal settlement, would not lose his settlement by being absent therefrom for over a year * * *."

We also confirm the further statements appearing in the *1946 Reports of Attorney General*, 122, 125, which were followed in the May 10, 1947 opinion of this Department appearing at the *1948 Reports of Attorney General*, pages 21-23 — namely, that when a person removes from this state for more than one year, there is a presumption raised that he intends to remove permanently from the State, and he therefore loses his legal settlement in Iowa. As pointed out in the aforementioned Reports of Attorney General, this is not more than a presumption and is subject to being rebutted by competent evidence that at the time a person left the State, he had no intention to remove permanently from Iowa, but intended at all times to return to the county of his legal settlement.

Further, we point out that Section 252.17 provides that aside from the apparent loss of legal settlement after one year's removal from the State, such settlement may be lost by acquiring a legal settlement in some other state.

It is therefore, our opinion that the burden is on Mr. "Y" to establish the fact that he did not intend to abandon his legal settlement in "C" County. He may overcome this burden by satisfactory showing that he retained his domicile and legal settlement in "C" County; or by showing that he had no intention to permanently remove from Iowa, but intended at all times during his absence to return to "C" County, Iowa; and that in any event he did not acquire a legal settlement in another state.

December 2, 1955

BOARD OF CONTROL — Disputes over legal settlement of institution inmate: Section 230.12 authorizing Board of Control to request the Attorney General to commence action for determining legal settlement is applicable only where Board has an interest, that is, where costs of commitment and care remain unpaid.

Mr. Henry W. Burma, Chairman, Board of Control of State Institutions: Receipt is hereby acknowledged of your letter of October 24th as follows:

"On July 10, 1910, A was committed to the Mental Health Institute at Mt. Pleasant, as insane by the Commissioners of Insanity of X County, Iowa. The expenses for her care and keep were paid by X County until her death on December 20, 1953, at said hospital.

"Recently X County has requested reimbursement from the State of Iowa for all sums so expended by X County, and said claim for reimbursement is based upon the claim of X County that A never had a legal settlement in X County, or in any other county of the State and that, therefore, the State of Iowa should pay for said care and keep.

"The records of the Board of Control and X County, which have heretofore been made available to you, disclose certain facts and proceedings, but we do not feel that the Board of Control should make any determination of the legal effect of same or to authorize payment of the claim of X County.

"It is our opinion that a dispute now exists between the Board of Control and X County, Iowa, as to the legal settlement of A and that such dispute should be determined by a proper court.

"Would you, therefore, under the provisions of Section 230.12, Code of Iowa, 1954, institute an action in equity in the District Court to determine the legal settlement of the said A."

Section 230.12, Code 1954, to which your letter refers provides as follows:

"Action to determine legal settlement. When a dispute arises between different counties or between the board of control and a county as to the legal settlement of a person committed to a state hospital for the insane, the attorney general, at the request of the board of control, shall, without the advancement of fees, cause an action to be brought in the district court of any county where such dispute exists, to determine such legal settlement. Said action may be brought at any time when it appears that said dispute cannot be amicably settled. All counties which may be the place of such legal settlement, so far as known, shall be made defendants and the allegation of such settlement may be in the alternative. Said action shall be tried as in equity."

Rule of Civil Procedure No. 2 requires: "Every action must be prosecuted in the name of the real party in interest."

Thus, where costs attending the commitment and support of a patient at a state institution remain unpaid, and a dispute exists as to whether a certain county or counties have an obligation to pay for such costs, the state has an interest in collecting the unpaid account which entitles it to be plaintiff under the provisions of section 230.12.

However, in the case described in your letter it appears that payment in full has been made for the cost of commitment and support of the patient in question. There is no unpaid bill. The state has no complaint and consequently no interest in the matter whereby it might properly assume the role of plaintiff. In fact, were any cause of action to exist in the circumstances described in your letter, the state would necessarily be in the position of defendant, rather than plaintiff, as the issue is not as to whether the state shall collect from a certain county but rather as to whether it should pay a certain county. However, the state is immune from suit. See *Bachmann v. Highway Commission*, 236 Iowa, 778, 20 NW 2d 18; *DeVotie v. Fair Board* 216 Iowa 281, 249 NW 429.

We would, therefore, advise you that in the matter described in your letter no cause exists whereunder this office could commence an action at the request of the board of control under the provisions of Section 230.12, Code 1954, or any other section of the Code. The proper recourse of the county in question, if there be any proper recourse, is by filing their alleged claim for consideration by the claims committee of the General Assembly.

December 8, 1955

APPROPRIATION: The appropriation made by Sec. 2, Chap. 1, Acts of the 56th G. A., is an appropriation for the performance of duties imposed on the Secretary of Agriculture including duties imposed by Acts of the 56th G. A., and the Budget & Financial Control Committee may make allocations from the contingent fund to augment the funds appropriated under the said Sec. 2, Chap. 1, Acts of the 56th G. A.

Mr. Glenn D. Sarsfield, State Comptroller: By letter dated November 3, 1955, an opinion of this office is requested as follows:

"Chapter 43, Acts of the 56th General Assembly, makes provision for the General Contingent Fund of the State for the biennium ending June 30, 1957, and sets forth provisions under which said fund may be used.

"Chapter 1, Section 2, Acts of the 56th General Assembly appropriated for the Department of Agriculture the sum of $650,772.00 for each year of the biennium ending June 30, 1957. Included in this appropriation is the annual amount of $222,162.00 for the Main Office, salaries, support, maintenance and miscellaneous purposes, from which is paid the salaries and expenses of the dairy and food inspectors and various other personnel performing the statutory duties assigned to the Department of Agriculture.

"The Secretary of Agriculture has requested the Budget and Financial Control Committee to allocate from the general contingent fund the amounts of $37,000.00 and $43,500.00 for the fiscal years ending June 30, 1956 and 1957 respectively, for salaries, support, maintenance and miscellaneous purposes deemed necessary by him in order to give proper supervision to his statutory duties including the new laws as provided in Chapters 109, 111, 112, 113, 114 and 116, Acts of the 56th General Assembly.

"I respectfully request an opinion as to whether or not the Budget and Financial Control Committee may allocate from the general contingent fund of the state to the Department of Agriculture — Main Office appropriation provided in Chapter 1, Section 2, Acts of the 56th General Assembly, funds to be used as outlined above."

Chapter 43, Acts of the 56th G. A., referred to in your letter provides in part:

"The general contingent fund of the state for the biennium beginning July 1, 1955, and ending June 30, 1957, is hereby created and said fund shall consist of the sum of two million dollars ($2,000,000.00) hereby appropriated thereto from the general fund of the state. Said contingent fund shall be administered by the budget and financial control committee and allocations therefrom may be made only for contingencies arising during the biennium which are legally payable from the funds of the state."

This provision grants authority to the budget and financial control committee to make allocations from the contingent fund. The committee is directed to make such allocations "only for contingencies arising during the biennium which are legally payable from the funds of the state." Whether a contingency exists is a question for the determination by the committee. Whether the purpose is one for which funds of the state are legally payable is a question of law. Funds of the state are legally payable for salaries, support, maintenance, and miscellaneous purposes of the various state governmental departments and agencies. The use of the funds requested by the Secretary of Agriculture, as stated in your letter, meets this legal condition.

Chapter 109, Acts of the 56th G. A., relates to inspection and labeling of foods and food products. Chapter 111, Acts of the 56th G. A., relates to the taking of composite samples of milk for the Babcock test. Chapter 112, Acts of the 56th G. A., relates to the grade labeling of butter. Chap-

ter 113, Acts of the 56th G. A., relates to the transportation and grading of milk or cream. Chapter 114, Acts of the 56th G. A., relates to the regulation of the business of buying, selling, receiving or dealing in eggs. Chapter 116, Acts of the 56th G. A., relates to permits to sell and distribute agricultural seeds. None of these acts are appropriation measures.

Chapter 43, Acts of the 56th G. A., hereinbefore referred to contains the following provision:

"* * *, no allocation from said fund shall be made for the administration of, or carrying out, the provisions of an act passed by the Fifty-sixth General Assembly which does not contain an appropriation."

Such provisions have consistently been construed to mean that no allocation may be made by the Budget and Financial Control Committee for the carrying out of any law for which an appropriation *has not been made*. The question then is whether an appropriation was made by the 56th General Assembly to carry out the provisions of the mentioned chapters. Whether an appropriation was made for the purposes of the Act generally cannot be determined solely from the Act itself. As mentioned by you in your letter, Section 2 of Chapter 1, Acts of the 56th G. A., appropriates to the Department of Agriculture the sum of $222,162.00 for the main office, salaries, support, maintenance and miscellaneous purposes. Included in this appropriation are the salaries and expenses of the dairy and food inspectors of the Department of Agriculture.

The effect of the enactment of Chapters 109, 111, 112, 113, 114 and 116, Acts of the 56th G. A., is to impose new duties upon the Department of Agriculture. Historically, the Legislature has from time to time enacted legislation imposing new duties upon the various departments and agencies of the state government. It is the rule rather than the exception that, where new duties have been imposed upon existing agencies, no especially earmarked appropriation was made for the carrying out of the new duties. The appropriations are found in the general appropriations for the department or agency involved in each instance. The fact of new duties imposed is presumed to have been taken into consideration by the Legislature when the amounts of the general appropriations are fixed.

Other examples of legislation enacted by the 56th G. A. imposing new duties upon certain departments containing no especially earmarked appropriation are found in Chapter 77, Acts of the 56th G. A., an act relating to the licensing of transient merchants, and Chapter 237, Acts of the 56th G. A., an act imposing new duties upon the commissioner of insurance with relation to unfair methods of competition and unfair or deceptive acts and practices in the business of insurance. If it were to be held that no appropriation was made for the purpose of carrying out the provisions of these acts, it would be impossible for the Secretary of State to perform the duties imposed upon him under the provisions of the said Chapter 77, as the salaried personnel of that office and the facilities of that office could not be used for the administration of the act. Likewise, it would be impossible for the commissioner of insurance to

perform the duties imposed upon him under the provisions of the said Chapter 237. In all such instances legislation imposing new duties has been deemed to be included as a part of the duties for which the general appropriations were made for the department or agency. The chapters of the Acts of the 56th G. A. here involved are in this general category of enactments imposing new duties, and an appropriation was made therefor by the appropriating of the sum of $222,162.00 for the main office salaries, support, maintenance and miscellaneous purposes.

You are therefore advised it is the opinion of this Department that appropriation of the sum of $222,162.00 to the Department of Agriculture for the main office, salaries, support, maintenance and miscellaneous purposes was an appropriation to carry out the duties imposed by law upon the Secretary of Agriculture, including the duties specified in Chapters 109, 111, 112, 113, 114 and 116, Acts of the 56th G. A., and that therefore it is within the power of the Budget and Financial Control Committee to allocate funds from the general contingent fund for the purpose of carrying out the duties imposed upon the Secretary of Agriculture by the said chapters upon the finding of a "contingency arising during the biennium."

December 12, 1955

SCHOOL REORGANIZATION: County board of education, under section 275.15, can't attach territory to a school district in another county without concurrence of a county board of education of other county.

Mr. Dale D. Levis, County Attorney, Audubon, Iowa: Receipt is hereby acknowledged of your letter of December 1st, in which you inquire whether, under section 275.5, Code 1954, the county board of education of one county may attach an area of less than four sections of land, remaining after a school district reorganization in such county, to a school district in the county school system of another county, without the concurrence of the county board of education of such other county.

Section 275.5 provides in pertinent part as follows:

"Such proposals may provide for reducing an existing school district to less than four government sections and where such proposal is put into effect by election by one of the methods hereafter provided the county board shall attach such remaining portions of less than four sections to another school district as provided for in their county plan."

The territorial jurisdiction of the county board of education is defined in sections 273.2 and 273.3, Code 1954, and by virtue thereof embraces only territory within the county itself plus certain joint school districts.

The act of attaching territory in one county to a school district situated in another county would result in creation of a "joint district" as defined in section 275.8, which provides:

"Joint districts shall mean districts that lie in two or more counties."

Attachment of territory under section 275.5 is required to be "as provided for in their county plan." However, section 275.8 indicates that "joint districts" require joint planning. It follows that one county board cannot, by the process of attachment, create a joint district by unilateral action, but that such attachment must result from joint planning by and concurrence of the respective county boards of education having jurisdiction over the respective territorial components proposed to be included in such joint district.

Had the legislature intended to confer extraterritorial powers on county boards of education in connection with its power to attach territory under section 275.5, it could easily have done so by language similar to that used in section 274.13, Code 1954, relating to temporary transfers of territory by reason of natural obstacles, wherein it is provided:

"Township or county lines shall not be a bar to the operation of this section."

That such language is not used in section 275.5 is further indication that the legislature had no intention to confer extraterritorial powers on any county board of education.

In conclusion, we would, therefore, advise you that a county board of education has no power under section 275.5 to attach territory to a school district under the jurisdiction of another county board of education, without the concurrence of such other county board of education.

December 16, 1955

SCHOOL AND SCHOOL DISTRICTS. A school district has no authority to purchase land outside its territorial limits for use as a school site.

Mr. K. L. Kober, County Attorney, Waterloo, Iowa: Receipt is hereby acknowledged of your letter of December 7th as follows:

"The Independent School District of _____, has presented a proposition to this office upon which they desire an attorney general's opinion.

"As a result of the expansion of the city limits of _____, Iowa, the real estate lying within the city limits does not correspond with the real estate included in the Independent School District of _____ so that property lying within the City of _____ is located in an adjoining consolidated school district. By reason of the fact that the population is increasing and expanding in the City of _____, in the adjoining consolidated school district, it is possible that in the very near future that such territory may be transferred from the consolidated school district to the Independent School District of _____, Iowa, and real estate will be needed by the Independent School District within such territory for school purposes.

"The Independent School District of _____, Iowa, therefore submits the following proposition. 'May the Independent School District of _____, Iowa, purchase real estate lying outside the territorial limits of the Independent School District for the purpose of retaining the same for future school building and educational purposes until such time

as said real estate may come within the territorial limits of the Independent School District at which time said real estate might then be used for a school house site'."

In an opinion which appears at page 357 of the 1928 Report of the Attorney General the following answer was given to a somewhat similar question:

"Although it is entirely extraordinary, we know of no provision which would prohibit a school district from maintaining a school in a building outside the territorial limits of its own district."

However, section 274.1, Code 1954, provides:

"Powers and jurisdiction. Each school district now existing shall continue a body politic as a school corporation, unless hereafter changed as provided by law, and as such may sue and be sued, hold property, and exercise all the powers granted by law, and shall have exclusive jurisdiction in all school matters *over the territory therein contained.*" (Italics ours)

It is a well-established rule that school districts are creatures of statute with only those powers expressly conferred by statute or reasonably and necessarily implied as incident to carrying out an express power. *Silver Lake Consolidated School District v. Parker*, 238 Iowa 984, 29 N.W. 2d 214; *Independent School District v. Christiansen*, 242 Iowa 963, 49 N.W. 2d 263; *Lincoln District v. Redfield District*, 226 Iowa 298, 283 N.W. 870.

The question is not whether an act is prohibited by statute but rather whether it is authorized. There is no express authority in the statutes, and we are of the opinion none is implied, for the purpose of enabling a school district to purchase a school site outside its territorial limits.

Insofar as the opinion appearing at page 357 of the 1928 Report of the Attorney General may be in conflict herewith, said opinion is hereby withdrawn.

December 29, 1955

LEVY BY COUNTY OR DISTRICT FAIR SOCIETY: A County or District fair society may receive concurrently the funds realized from a levy not to exceed one-quarter mill under Section 174.13 and a levy not to exceed one-quarter mill under Section 174.17, providing that such society complies with the criteria of eligibility for aid under said sections.

Mr. L. B. Cunningham, Secretary, State Fair Board: In your recent inquiry, you requested an opinion concerning the following question:

"Can a County or District Fair Society receive concurrently the funds realized from a levy not to exceed one-quarter mill under Section 174.13 and a levy not to exceed one-quarter mill under Section 174.17?"

Both of these sections provide for taxes levied by the county board of supervisors, the funds realized therefrom to be known as the fair ground fund.

Section 174.13 provides that:

"The board of supervisors of the county in which any such society is located may levy a tax of not to exceed one-quarter mill upon all the taxable property of the county, the funds realized therefrom to be known as the fair ground fund, and to be used for the purpose of fitting up or purchasing fair grounds for the society, or for the purpose of aiding boys and girls 4-H Club work and payment of agricultural and livestock premiums in connection with said fair, provided such society shall be the owner in fee simple, or the lessee of at least ten acres of land for fair ground purposes, and shall own buildings and improvements thereon of at least eight thousand dollars in value."

Section 174.17, in pertinent part, provides that:

"The board of supervisors of any county which has acquired real estate for county or district fair purposes and which has a society using said real estate, may levy a tax of not to exceed one-quarter mill upon all the taxable property of the county, the funds realized therefrom to be known as the fair ground fund."

Thus, to be entitled to receive the benefit of a tax levy not to exceed one-quarter mill under Section 174.17, the fair society must be using real estate acquired by the county for county or district fair purposes. In addition, to be entitled to receive the benefit of a tax levy not to exceed one-quarter mill under Section 174.13, the fair society must own the realty in fee simple, or be the lessee of at least ten acres of land for fair ground purposes, and must own buildings and improvements thereon of at least eight thousand dollars in value; and the funds received from a tax levy under this section must be used either for the purpose of fitting up or purchasing fair grounds for the society, or for the purpose of aiding boys and girls in 4-H Club work and payment of agricultural and livestock premium in connection with said fair.

A prior opinion of this department established that a county board of supervisors, upon compliance with statutory requirements, could levy a tax under Section 174.13 as well as a tax under Section 174.17. See 1938 Report of Attorney General at page 55.

Furthermore, another prior opinion of this department held that county fair societies are required to account for an appropriation under Section 174.13 as well as for aid under Section 174.17. See 1925-26 Report of Attorney General, page 168.

Therefore, it is our opinion that a county or district fair society may receive concurrently the funds realized from a levy not to exceed one-quarter mill under Section 174.13 and a levy not to exceed one-quarter mill under Section 174.17, providing that such society complies with the criteria of elegibility for aid under said sections as set out above.

January 12, 1956

TAX EXEMPTIONS: The State Board of Social Welfare, upon taking title to a remainder interest in property under the provisions of section 249.20 of the 1954 Code of Iowa, is liable only for taxes delinquent

at the time of taking such title and may not pay taxes suspended during the life estates reserved by the grantor out of its own funds or out of funds or property fully accrued to said Board free of lien against the State until its own claim for funds advanced or expended for the benefit of the grantor thereof is satisfied, and the Board of Supervisors should direct the cancellation of the apparent lien for such taxes on application of said Board to facilitate sale of such property to a party other than one holding an option under the original deed to the estate.

Mr. C. J. Anderson, County Attorney, Cresco, Iowa: This will acknowledge your letter wherein you recite the following factual situation and raise the following question:

"'A' was the owner of real estate in our county, which real estate was deeded to the Iowa State Board of Social Welfare, reserving a life estate in 'A'. This property was carried on the tax assessment roll against the life tenant until August of 1955, at which time 'A' deeded her life estate to the Iowa State Board of Social Welfare. The Iowa State Board of Social Welfare now requests that the taxes assessed against said property be found to be erroneously assessed and should be cancelled for the reason that title was in the State of Iowa.

"The question now given rise to is as follows: Was the property properly taxed in the name of the life tenant or was the property exempt from tax because the State of Iowa's agency held a remainder interest therein?"

The answer to your question is suggested by the following Code sections:

"427.8 Petition for exemption.

'Whenever a person, by reason of age or infirmity, is unable to contribute to the public revenue, such person may file a petition, duly sworn to, with the board of supervisors, stating such fact and giving a statement of property, real and personal, owned or possessed by such applicant and such other information as the board may require. The board of supervisors may thereupon order the county treasurer to suspend the collection of taxes assessed against such petitioner, his polls or estate, or both, for the current year, or such board may cancel and remit said taxes, provided, however, that such petition shall first have been approved by the council of the city or town in which the property of the petitioner is located, or by the township trustees of the township in which said property is located.

"427.9 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 427.8, 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.

"249.20 Transfer of property to the state.
"* * *.

"If the state board deems it necessary to protect the interest of the state, it may require, as a condition to the grant of assistance, the absolute conveyance or assignment of all, or any part, of the property of an applicant for assistance to the state board; upon the taking of such deed or assignment the state department shall pay any delinquent taxes against said property and said deed shall reserve to the grantor and his spouse a life estate in said property and an option to the grantor and his heirs to purchase said property by repayment of the total amount paid for the benefit of the recipient. Said option insofar as the heirs are concerned shall be for six months from the date of the death of the grantor or the grantor's surviving spouse, if any.

"Title to any real estate may be taken in the name of the state board of social welfare.

"Such property shall be managed by the state department which shall credit the net income to the account of the person or persons entitled thereto. The state board shall have power to sell, lease, assign or convey such property or defend and prosecute all suits concerning it, and to pay all just claims against it, and to do all other things necessary for the protection, preservation and management of the property.

"Upon the death of the recipient, or person who has received assistance, and the surviving spouse of such person, which spouse meets the requirements set out in section 249.19, and the expiration of the option to the heirs, the property shall be disposed of at public auction after notice by publication in some newspaper in the county where located, once each week for two consecutive weeks, before the day of sale and so much of the proceeds as is necessary for the repayment of the amount of assistance and other benefits paid to the grantor and/or his spouse and repayment of amount expended for the preservation of the property shall be transferred to the old-age assistance revolving fund. The balance, if any, shall be paid through the old-age assistance revolving fund to the heirs.

"* * *.

"427.1 Exemptions.

"The following classes of property shall not be taxed:

"1. Federal and state property. The property of the United States and this state, * * *.

"445.28 Lien of taxes on real estate.

"Taxes upon real estate shall be a lien thereon against all persons except the state."

Your question logically divides itself into three parts:

1. What is the liability of the State Board of Social Welfare for taxes delinquent at the time that the Board takes title to the property of an old-age assistance recipient subject to life estate reservations and option in favor of the recipient, his spouse, and his heirs?

2. What is the liability of the State Board of Social Welfare for taxes accruing or becoming delinquent while the reserved life estates are in existence?

3. What is the liability of the State Board of Social Welfare for taxes accruing or becoming delinquent after the life estates are terminated by

death of the life tenants or conveyance to the State Board of Social Welfare?

The answer to the first part of your question so divided is in section 249.20 of the Code partially quoted above. The taxes which are delinquent on property conveyed by an old-age assistance applicant at the time such applicant transfers title to the remainder interest in his property to the State Board of Social Welfare shall in every case be paid by said Board upon its taking title thereto. The amounts so expended shall be accrued as a part of the total amount expended for the benefit of the recipient and be included in the measure of the option price applying to the option available to the grantor and his heirs under said section.

The answer to the second part of said question is largely a question of priorities between county and state funds so far as taxes assessable against the property during the pendency of the life estate are concerned. Iowa Real Property Taxes are levied against the property itself in the name of the owner thereof. A life tenant of such property is deemed to be the owner thereof for purposes of taxation under Iowa Law. Chicago, Milwaukee & St. Paul Railway Company vs. Hemenway, 117 Iowa 599, and White vs. City of Marion, 139 Iowa 479. 1938 Report of Attorney General, 400, 403. Such taxes accrue against the property subject to such life estate during such life estate but must be suspended during such period because of the provisions of Code sections 427.8 and 427.9 above quoted. The State Board of Social Welfare has no duty and no authority to pay from its funds any taxes not delinquent at the time it takes title to a remainder interest in the property of the old-age assistance recipient. The authority of the Board to pay taxes from its own funds is that set forth above in section 249.20. Thus during the life estate such taxes accrue as a lien against the subject property. Such taxes are not, however, a lien against the State Board of Social Welfare for the reason that it is simply an agent of the state and not subject to such lien because of the provisions of section 445.28 of the Code, above quoted, the state being specifically excepted from the effects of that lien.

At the expiration of the reserved life estates the State Board of Social Welfare takes possession of the property previously subject to said estates as remainderman in said property and holds said property subject only to the option reserved to the heirs of the grantor in the event the life estates and options reserved have not been conveyed to the state by the parties holding such rights or interests during the pendency of the life estates reserved. Of course, the option to the grantor's heirs applies only in the event the property is received directly from the old-age assistance recipient. It is indicated in your question that the life tenant did deed her life estate to the State Board of Social Welfare thus terminating the life estate reserved. The State at the date of such deed became the full owner in fee of such property subject only to any options outstanding in favor of the grantor's heirs and the statutory duty to refund any excess received on sale of the property over the amounts expended for the benefit of the recipient to the grantor's heirs. This Department has previously ruled that the suspended taxes levied during the life estate

remain a lien as to the grantor or his heirs should they elect to exercise their option and that "repayment of the total amount paid for the benefit of the recipient" under section 249.20 of the Code includes payment by the party exercising the option of not only the amounts expended by the State Board of Social Welfare but also the benefits received under tax suspension privileges. 1938 Report of Attorney General, 400, 404. Since the State is not subject to the lien for such taxes the Board of Social Welfare may sell any property to which it takes title after termination of the life estates and of the options reserved to a third party free of the lien and this department has previously ruled that under such circumstances the board of supervisors has authority under its general powers to authorize the county treasurer to cancel the apparent lien of record for the reason that such lien is unavailable against the state. 1938 Report of Attorney General, 692, 696.

Should the Board of Social Welfare sell the property after the release of the apparent lien of record said Board is entitled to apply the proceeds of the sale of such property to reimburse the expenditures of the Board of Social Welfare, may pay all suspended taxes against such property under its management power to pay just claims to the extent there is an excess of the proceeds from the sale in excess of its own claim and pay the balance to the heirs of the grantor all as provided by section 249.20 of the Code.

Under section 427.1(1) of the Code, above quoted, no taxes may be levied against any property to which the State of Iowa has the possessory interest by conveyance or death of the life tenants on the annual levy date, such date being the second Monday in September as provided by sections 444.9 and 331.15 of the Code. Iowa Wesleyan College v. Knight, 207 Iowa 1238. Any taxes levied against such property after the remainder therein has vested in possession in the State of Iowa would, of course, be erroneous and, of course, should be directed to be cancelled by the Board of Supervisors of the County in which it is located.

It is our conclusion that the State Board of Social Welfare upon taking title to a remainder interest in property under the provisions of Section 249.20 of the 1954 Code of Iowa is liable only for taxes delinquent at the time of taking such title and may not pay taxes suspended during the life estates reserved by the grantor out of its own funds or out of funds or property fully accrued to said Board free of lien against the State until its own claim for funds advanced or expended for the benefit of the grantor thereof is satisfied and that the Board of Supervisors should direct the cancellation of the apparent lien for such taxes on application of said Board to facilitate sale of such property to a party other than one holding an option under the original deed to the state.

January 19, 1956

BEER PERMITS: Cities or towns may not by ordinance designate additional places of business for any class "B" beer permittee other than the one place of business covered by the permit issued, and this lack

of authority applies to permits issued to clubs equally with other class "B" beer permits.

Mr. Walter J. Willett, County Attorney, Tama, Iowa: We have your recent letter wherein you make the following inquiry:

"We have a Legion Post in one of our small towns that has been issued a class 'B' beer permit for their club location. At various times throughout the year there are functions in the town held at premises other than the business premises for which the beer permit was issued. The question that has been presented to me is as follows:

"Can a city or town by ordinance authorize a class 'B' beer license holder to sell beer on premises other than the one for which the license is issued without requiring an additional license? Would it make any difference if the class 'B' permit holder is a club? Would it make any difference if the town or city ordinance designates the specific separate places of business where beer could be sold other than the premises for which it was issued?

"The question was presented to me by the Town Attorney citing Section 124.29 of the 1954 Code which states to the effect that a class 'B' beer license is required for each place of business except as otherwise herein provided. These last few words raises the above question as in Section 124.34 cities and towns have the power and authority to make all rules and regulations not in contrary to the state law. The town would like to authorize this club to sell beer at certain functions at a designated hall."

In response thereto we advise we find the following sections of the 1954 Code of Iowa pertinent:

"124.9 Class "B" application

"Except as otherwise provided in this chapter a class "B" permit shall be issued by the authority so empowered in this chapter to any person who:

"1. Submits a written application for a permit, which application shall state under oath:

"* * *.

"d. The location of the place or building where the applicant intends to operate.

"e. The name of the owner of the building and if such owner is not the applicant, that such applicant is the actual lessee of the premises.

"f. That the place of business for which the permit is sought is and will continue to be equipped with sufficient tables and seats to accommodate twenty-five persons at one time, and is located within a business district or an area now or hereafter zoned as a business district.

"2. Establishes:

"* * *.

"b. That the place or building where he intends to operate conforms to all laws, health and fire regulations applicable thereto, and is a safe and proper place or building.

"* * *.

"124.15 Permits to clubs

"Cities and towns, including cities under special charter, shall upon proper application, issue to a club within their respective limits a class "B" permit for the sale of beer for consumption on the premises subject to the provisions of this chapter. The board of supervisors of any county shall issue class "B" permits to clubs located in such counties outside of the limits of cities and incorporated towns."

"124.17 Application

"Every club desirous of obtaining a class "B" permit shall make a written application therefor, executed by its president and attested by its secretary or other similar officers performing the duties usually performed by a president or secretary which application shall state under oath:

"1. The name of the club and the location of the premises occupied by it.

"* * *.

"3. That the buildings occupied by said club are wholly within the corporate limits of the city or town to which such application is made.

"* * *."

"124.29 Separate locations — class "B" or "C"

"Every person holding a class "B" or class "C" permit having more than one place of business wherein such beer is sold shall be required to have a separate license for each separate place of business, except as otherwise herein provided."

"124.34 Power of municipalities

"* * *, and said city and town councils are further empowered to adopt ordinances, * * * for the location of the premises of class "B" permittees; and are empowered to adopt ordinances, not in conflict with the provisions of this chapter, governing any other activities or matters which may affect the sale and distribution of beer under class "B" permits and the welfare and morals of the community involved.

"* * *."

It is to be noted that the provisions of Section 124.9 above quoted requires specific data as to the location, ownership, accommodations and compliance with laws and health and fire regulations of the place or building of each class "B" permittee. The words "place or building" are in the singular rather than the plural and have been construed in 1934 Report of Attorney General, pages 543 and 570, and 1938 Report of Attorney General, page 232, to mean one specific location for each class "B" permittee.

Section 124.15 above quoted, providing for permits to clubs in cities and towns, specifically makes such issuance subject to the other provisions of Chapter 124.

Section 124.17(1) requires the application of every club desirous of obtaining a class "B" permit to show the location of the premises occupied by it.

Section 124.29 requires every person holding a class "B" or class "C" permit having more than one place of business wherein such beer is sold

to have a separate license for each separate place of business, except as otherwise herein provided. The term "person" as used in said section is defined by Section 124.2(1) as including corporations, firms, copartnerships and associations. Prior rulings of this department have been to the effect that one place of business would include those situations where the operation of the class "B" permittee might cover more than one room or more than one lot so long as the operations of the two places of sale were not independent but were so connected physically as to in fact constitute one operation. Some doubt has arisen because of the words "except as otherwise herein provided" in Section 124.29.

It is our opinion that the words above quoted apply to those situations governed by Section 124.14, relating to sales on trains, providing for a state class "B" permit with duplicates of such permit to be posted in each car of any train where such beverages are sold. There is no similar provision for multiple coverage of locations applicable to individuals or clubs by statute. The question of whether such multiple locations for any other class "B" permittees could be authorized by City and town councils through ordinance is answered by the provisions of Section 124.34, which says that "city and town councils are empowered to adopt ordinances *not in conflict with the provisions of this chapter.*" Section 124.29 is specific in requiring a separate license for each separate place of business, the only provision for multiple locations is in Section 124.14 and any ordinances adopted specifying additional locations or places of business for any class "B" permittee whether individuals, corporations, firms, copartnerships or associations would be inconsistent with such provisions of Chapter 124 and would, therefore, be void for lack of authority.

It is, therefore, our conclusion that cities or towns may not by ordinance designate additional places of business for any class "B" beer permittee other than the one place of business covered by the permit issued, and this lack of authority applies to permits issued to clubs equally with other class "B" beer permits.

February 10, 1956

BEER PERMITS: A Board of Supervisors may issue or refuse to issue Class "B" or "C" Beer Permits in unincorporated villages in its sole discretion, and may issue such permits for premises in areas platted as additions to incorporated villages after January 1, 1934, if the original village was platted prior to said date.

Mr. K. L. Kober, County Attorney, Waterloo, Iowa: Receipt is hereby acknowledged of your letter of January 7 wherein you raise the following questions:

"1. Does the Board of Supervisors have the power to grant a Class "C" Permit to sell beer to an applicant whose premises for which the permit is requested is located on a platted addition to an unincorporated village, which *addition* was platted after January 1, 1934?

"2. Is the discretion granted to a Board of Supervisors under Section 124.5 of the 1954 Code of Iowa such a power of discretion that they can

absolutely refuse to issue another Class "B" or a Class "C" Permit in an unincorporated village where only one permit, to-wit, a Class "B" Permit has been issued?"

In your statement of facts, you recite that there is in Black Hawk County an unincorporated village which was platted as to its original area on March 18, 1880. That such village has had additions to such original area by plats filed in 1940, 1953, and 1954, respectively. That an application has been made by a supermarket to the Black Hawk County Board of Supervisors for a Class "C" Beer Permit for premises situated on the addition platted in 1953. That there is in existence but one beer permit as to said village, that being a Class "B" Permit for premises located in the original platting. That the estimated population of the village, including the inhabitants living in the platted additions, is in excess of five hundred.

We find the following sections of the 1954 Code of Iowa pertinent to your questions:

"124.5 Power to issue permits.

"* * *. Power is hereby granted to boards of supervisors to issue, at their discretion, class "B" and "C" permits in their respective counties in villages platted prior to January 1, 1934, * * *.

"354.9 Villages.

"Town sites platted and unincorporated shall be known as villages."

"363.4 Classification.

"Municipal corporations are divided into cities and towns.

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

"2. Any municipal corporation which has a population less than two thousand is a town."

Question number one above has been the subject of a prior ruling by this Department appearing in 1934 Report of Attorney General, page 521. The factual situation presented in that request for an opinion involved, as does this case, the propriety of the issuance of a beer permit by a board of supervisors to an applicant whose premises were on an addition to a village where the original village was platted prior to January 1, 1934, but the addition thereto was not. It interpreted Section 8 of House File No. 336, Acts of the Extra Session of the Forty-fifth General Assembly, which so far as here material was identical with Section 124.5 of the 1954 Code above quoted. A portion of said opinion is as follows:

"We construe the wording of Section 8 of the act that if there is a platted area which would constitute a village or that has platted lots, streets, alleys, etc., it meets the requirements of this section. This being true, the unincorporated village of Woodlawn Place was platted prior to January 1, 1934, and meets the requirements of the act. It necessarily follows that the plat could be extended and the supervisors would be allowed under the act to issue a permit in the territory which will be included in the plat of Woodlawn Place."

We have found no other Iowa Attorney General's opinions and no Iowa Supreme Court decisions dealing with this exact question, and believe no other Iowa interpretations of such character exist. There has been no change in the quoted portion of Section 124.5 since said ruling was made and it is our opinion that the quoted opinion accurately states the present law. The reference of the Legislature in Section 124.5 of the 1954 Code of Iowa is to "permits * * * in *villages* platted prior to January 1, 1934." (Emphasis ours). The word "platted" and the following words in that phrase describe "villages," and such villages qualify as locations for the premises of applicants for class "B" or "C" beer permits if they had a platted status as they existed prior to January 1, 1934. Additions to such villages when platted subsequent to said date become part of such villages and enjoy the status of such villages so far as this section is concerned though they necessarily increase the size of the villages which existed in the village plats on January 1, 1934. There is no specific provision of law relating to subsequent additions, but, for the reasons stated and because the Legislature could have stated that such permits should be limited to those portions of such villages as were platted prior to January 1, 1934, if such was its intent, we believe the prior opinion cited is correct and is still applicable.

Further support for this conclusion is found in Lamb v. Kroeger, 233 Iowa 730, 738, 8 N. W. 2nd 405, where the Supreme Court states that the Legislature is presumed to know the interpretations of its laws by the duly elected officials of this state charged with the duty of making such interpretations and in the absence of corrective legislation after opportunity for such correction is considered to be satisfied with the interpretations made.

Your second question is not fully answered by the case of Gunson v. Williams, 242 Iowa 916, 48 N. W. 2nd 809, mentioned in your letter, wherein the Court recognizes that unincorporated villages are not cities or towns within the meaning of Section 124.34 of the Code setting forth for such municipal corporations directions that a limited number of permits be issued in their incorporated area. This holding is consistent with the Code definitions above cited. It states that the issuance of class "C" beer permits in such villages is at the discretion of the Board of Supervisors. This case does not attempt to define the discretion of the Board of Supervisors. This department has, however, ruled repeatedly that the matter of the issuance of a beer permit by a county board of supervisors is entirely discretionary with the board. See 1940 Report of Attorney General, 575.

It is, therefore, the conclusion of the Department that the answer to your first question is yes and the answer to your second question is also yes.

February 13, 1956

ARTICLES OF INCORPORATION: When articles of incorporation or amendments thereto are submitted for filing Secretary of State must

consider whether they are in proper form, of honest purpose, not against public policy, nor otherwise objectionable, but is not a fact-finding agency to determine facts not of common knowledge and not appearing in the articles or amendments.

Honorable Melvin D. Synhorst, Secretary of State: This is to acknowledge receipt of your recent request for an opinion of this department, in which you submitted the following:

"The undersigned hereby requests your opinion from your office concerning the following:

"An Amendment to Renewal, Amended and Substituted Articles of Incorporation of Amana Society has been received by this office for filing.

"A question has arisen as to the construction of Chapter 491.6 of the 1954 Iowa Code, the question being as to the extent to which the Secretary of State should go in examining the content of Articles and Amendments before filing same. Certain questions have arisen that are pertinent to the Amendment to the Articles of Incorporation of the Amana Society and certain questions are hereinafter set forth:

"1 — The present Amana Society Articles provide for participating class A common stockholders as the only stockholders who participate in the funds of the Society. Under the Amendment presented for filing there would be class A and class B common stock which would participate equally with class A common stock presently outstanding, that is, the new stock would participate in surplus funds and it is contended that the present class A common stock would be diluted in value approximately four and one-half times per share. The existing Articles provide that the directors have power to provide for the issuance of all classes of stock and this provision was rewritten into the proposed Amendment at Article VII Section 4.07, paragraph 'e'. It is also contended that in the new Amendment it is provided that stock can be issued only upon the authority of the stockholders. The Amendment appears to be ambiguous in this matter. No preemptive rights for purchase of stock exist under either the old Articles or new Amendment except that under the new Amendment preemptive rights do exist when class B common stock is issued for cash. The question presented is as followed: Does this dilution in value of participating stock presently outstanding destroy vested rights of the owner of such stock in his proportionate share of surplus? An answer to this question is requested only if in your opinion this is a matter in which the Secretary of State should be concerned.

"2 — Section 7.01 Article V of the proposed Amendment provides in substance that no existing class A common stock may be sold or transferred except in exchange for class B common stock of the same par value, and requires such exchange upon the death of the owner or his removal from the territory of the Society. There are presently 660 owners of class A stock, none of them owning more than one share. Does this prohibition against sale or transfer of present class A common stock outstanding operate as an infringement of the property rights of the owner thereof and does it operate as a restraint upon the disposition of property in the stock of the corporation in restraint of trade so as to make such prohibition illegal? An answer to this question is requested only in the event you feel this is a matter about which the Secretary of State should be concerned.

"3 — The present Articles provide that upon death or removal of an owner of a share of class A common stock he or his estate may require the Society to buy such share at its true value or if the Society does not purchase the stock it may be sold on the open market. A contention is made that this corporation is presently a membership corporation in

that only one share may be owned by one person and certain benefits are derived from the ownership. The proposed Amendment purports to convert the Society into a business corporation. The question presented therefore is: Does the proposed Amendment constitute an abandonment of corporate purposes and objects and would therefore be an illegal amendment if passed without unanimous consent of the presently existing stockholders. An answer to this question is requested only in the event you find this is a matter about which the Secretary of State should be concerned.

"4 — The procedure under which the proposed Amendment was passed followed Section 491.20 of the 1954 Iowa Code and sixty days notice as required was given after affirmative approval of two-thirds of the Board of Directors. This office has been informed by attorneys representing individuals both for and against the filing of the Amendment that the Amendment was amended at the meeting and therefore the sixty days notice was not given to the Amendment to the Amendment. This Amendment which did not receive the sixty days notice was Section 4 of Article V of the proposed Amendment. The question therefore is whether the proposed Amendments were adopted under a lawful procedure that would make same binding upon the Corporation. An answer to this question is requested only in the event you feel that this is a matter about which the Secretary of State should be concerned."

Accompanying your letter is a copy of the amendments in question.

Section 491.20 of the Iowa Code provides, in part, as following:

"491.20. Amendments — fees. Amendments to articles of incorporation making changes in any of the provisions of the articles may be made at any annual meeting of the stockholders or special meeting called for that purpose, and they shall be valid only when *recorded, approved and published as the original articles are required to be,* * * *" (Italics supplied.)

As this section contemplates the same action by the Secretary of State, when amendments are submitted, as when articles are submitted, it is necessary to consider the power and duty of the Secretary when articles are first submitted for filing.

The power of an officer to whom application for a corporate charter is made is discussed in 18 C. J. S., Corporations, 443. It is there pointed out that in some states the official's duties are purely ministerial, and if the articles are in proper form and within the statutes authorizing incorporation, he must file the same. But other states have clothed such officials with more than ministerial functions. It is evident from the language of the statutes involved, now sections 491.6 – 491.9, that the Secretary of State of Iowa has far more than a ministerial function, in ascertaining whether articles or amendments should be filed.

These Iowa statutes were enacted as Section 1, Chapter 70, Acts of the 32nd General Assembly, in 1907. For editorial purposes the Code Editor has separated this law into four sections, the first of which, section 491.6, provides as follows:

"491.6 Filing or refusal to file. When articles of incorporation are presented to the secretary of state for the purpose of being filed, if he is satisfied that they are in proper form to meet the requirements of law, that their object is a lawful one and not against public policy, that their plan for doing business, if any be provided for, is honest and lawful, he

shall file them; but if he is of the oponion that they are not in proper form to meet the requirements of the law, or that their object is an unlawful one, or against public policy, or that their plan for doing business is dishonest or unlawful, he shall refuse to file them."

Consideration of these words alone might suggest that assuming the articles are in proper form, the inquiry is only whether the object or purpose of incorporation specified in the articles is unlawful or against public policy, or whether the plan for doing business if disclosed therein is dishonest or unlawful. But, in the light of the remainder of the law (now appearing in sections 491.7 – 491.9) such a narrow view of the Secretary's power to inquire is improper. Questions of legality are to be submitted to the Attorney General for opinion. Rejection for reasons other than legality can be referred to the Executive Council for review, and they shall uphold the refusal to file unless the *articles* are "in proper form, of honest purpose, not against public policy, nor otherwise objectionable." It has been indicated that the Secretary's inquiry is not limited to consideration of the corporate object, nor its plan for doing business, either expressly or by necessary implication, in the following cases, opinion, and articles. Lloyd v. Ramsay, 192 Iowa 103; Mason v. Mallard Telephone Company, 213 Iowa 1076; 1930 Report of the Attorney General 304; 1932 Report of the Attorney General 187; letter opinion of the Attorney General, February 9, 1955; Loth, Possibilities of Abuse in Corporation Stock without Par Value, 23 Iowa Law Review, Bar Review Section, 85, at 91; Rutledge, Significant Trends in Modern Incorporation Statutes, 22 Wash. U. Law Quarterly 305, 313-314; Rutledge, Comparison of Present Incorporation Laws of Iowa 2 (1939); Roberts, 33 Iowa Law Review 325-328; student note, 34 Iowa Law Review 67, 71-2; student note, 7 Iowa Law Bull. 58.

We therefore hold that the Secretary of State, in determining whether articles of incorporation, or amendments thereto should be filed, should determine (1) whether the articles or amendments are in proper form to meet requirements of law, which question may be referred to the Attorney General for his views, or (2) whether they either as a whole or section by section meet the requirements of "honest purpose, not against public policy, nor otherwise objectionable." The latter question is to be determined within the reasonable discretion of the Secretary of State, subject to possible review by the Executive Council. However, as the Secretary is acting in no more than a quasi-judicial capacity and does not have a fact-finding function such as is possessed by the courts, he is not in a position to determine factual issues relevant to the rights of various parties such as stockholders, where essential facts are not apparent in the articles, or amendments, or other relevant documents on file in his office, or are not matters of common knowledge such that he should have "judicial notice" of them. Accordingly, the specific questions you ask are answered as follows:

Question one raises no legal issues as to which there is a positive statutory prohibition. The question whether the rights of existing class A stockholders are being diluted by the proposed amendment to their detriment improperly and without adequate compensation is a factual

issue upon which you are not required to pass. You may, however, reject the amendment if you conclude that an amendment under which the rights of some stockholders might be improperly diluted is against the public policy of this state or is otherwise objectionable. While, as noted in the question, the amendment may result in an ambiguity as to the body to authorize new issues of stock, ambiguity in draftsmanship is not of itself unlawful, and this is a matter to be resolved in your discretion. The question also refers to the failure to provide preemptive rights when class A stock is issued.

The "preemptive right" is basically an equitable remedy to safeguard a stockholder against the issuance of new shares so as unfairly to dilute interest or voting power, and exercise of the right is dependent entirely on the facts existing at the time the new stock is issued. Apparently the "right" will be recognized even though not set forth in the corporate charter. We hold, therefore, that the failure to provide for such right does not establish that the right has been denied in the articles as a matter of law; and that whether articles which fail to provide specifically for preemptive rights are against public policy or otherwise objectionable is within your discretion to determine. See Ballantine, Corporations, section 209, Gord v. Iowana Farms, 245 Iowa 1.

Question two is concerned with the provision which forbids the sale or exchange of class A stock except to the corporation for class B stock, and requires the stock to be surrendered for class B stock if the holder dies or removes from the corporate property except under certain conditions. Although many American courts have considered an absolute restraint on disposal of stock to be an improper restriction on alienation, this is not the law of England, Gower, Corporation Law in England and America, 11 The Business Lawyer 39. The American courts appear to treat the problem as a matter of public policy. The only Iowa statute touching on the point invalidates any restriction on transferability which is not printed on the stock certificate 493A.15. In view of the decision in Mason v. Mallard Telephone Company, 213 Iowa 1076, we hold that the restriction in section 7.01, Article V of the proposed amendment is not unlawful unless it violates the public policy of this state, and whether it is against public policy is a matter for your determination. We are informed that the existing class A stock is subject to a similar restriction under the present articles. You may conclude that the provision should in the first instance have been rejected as in violation of public policy, but that if the amendment does not alter the provision public policy would not require rejection of the amendment.

Question three relates to an alleged abandonment of corporate purposes and objects. Whether the alleged object existed by implication and has been abandoned is of course a fact which you may determine from the articles and proposed amendment. Assuming that the object did exist and has been changed with less than unanimous consent of the stockholders, we hold that requirements of section 491.6 and 491.7 as to legality are met if the adoption was with the consent of the number of shares required either by the articles of incorporation or by the special provisions

of paragraph two, section 491.20. The Iowa court has not required amendments changing corporate purpose to be adopted by unanimous consent when by charter or statute a lesser number of shares has power to adopt amendments. See Wolf. v. Lutheran Mutual Life Ins. Co., 236 Iowa 334.

The fourth question relates to the procedure followed in adoption of the amendments. The amendments as filed appear on their face to be regular and properly adopted. No objectors have sought by court action to prevent corporate officials from filing these amendments on such ground. As the provisions of the articles themselves have not been furnished us, we are unable to determine whether the sixty day notice was required by the articles or was only an alternative permissive procedure under section 491.20. See Wolf vs. Lutheran Mutual Life Insurance Co., supra. Assuming the sixty day notice requirement would ordinarily be applicable, it would not apply if the substance of the amendment to the amendment was covered by the notice actually given, or if the stockholders can be deemed to have waived the requirement of sixty days notice. As these points may involve determination of fact issues outside the papers filed, which the Secretary is not required nor equipped to make, we hold that section 491.6 does not require the Secretary to ascertain whether the amendment was properly adopted if no impropriety in the adoption is apparent in the amendment or certificate of adoption attached thereto.

Please be advised that this office finds no grounds of *illegality* to justify rejection of the articles, under section 491.6, with respect to the points concerning which you made inquiry. You may, however, refuse to file the amendment if you conclude that it is not of honest purpose, is against public policy, or is otherwise objectionable.

February 13, 1956

UNIVERSITY HOSPITAL APPROPRIATION: The appropriation of the sum of $130,000 for capital improvements, repairs and alterations to the Board of Education for the University Hospital under House File 588, Acts of the 56th General Assembly, is a valid appropriation to be administered by the State University of Iowa.

State Board of Regents: You have requested an opinion of this office on the following questions:

1. Are the provisions of Section 9 of House File 588 within the Title of the said Act?

2. What department or agency is charged with the administration of the funds referred to in Section 9?

3. What facility is to be used in the carrying out of the provisions of the Act?

Article III, Section 29, Constitution of the State of Iowa, states:

"Every act shall embrace but one subject, and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

The Title of House File 588 provides:

"AN ACT to appropriate funds to the state board of education and state historical society for capital improvements, repairs and alterations at state institutions."

Section I of the said Act states:

"There is hereby appropriated from the general fund of the state to the state board of education the sum of five million twenty thousand seven hundred fifty dollars ($5,020,750.00) to be used in the following manner."

In making provision for the allocation of the appropriation set forth in Section 1, Section 2 states in part:

"Said sum shall be allocated in the following amounts:"

There follows a list of allocations for capital improvements, repairs and alterations at the State University of Iowa, Iowa State College, Iowa State Teachers College, Iowa Braille and Sight-Saving School, Iowa School for the Deaf, and the State Sanitorium. The total of these appropriations is in the sum of $4,860,750.00.

Section 7 of the Act makes an appropriation to the State Historical Society for the erection of a centennial building.

Section 9 of the Act states:

"There is hereby appropriated from the general fund of the state to the university hospital for the purpose of improving buildings to provide necessary equipment and facilities for observation, diagnosis, care and treatment of emotionally disturbed or mentally retarded children and for the purpose of research, study, training of professional workers in respect to the care, treatment and training of such children.....$130,000.00
For salaries, support and maintenance.....$ 30,000.00"

It is to be noted that the total appropriations made under the provisions of Section 2 in the sum of $4,860,750.00 is $160,000.00 less than the amount appropriated to the State Board of Education in Section 1 of the Act and the total amount involved under the provisions of Section 9 is in the said sum of $160,000.00. This fact suggests that Section 9 was intended to be an allocation included in the appropriation set forth in Section 1 of the Act. This intent is manifest in the legislative history of the provisions of Section 9. Section 9 was not a part of House File 588 as the bill was filed. On the 37th day of April, 1955, House File 588 was called up for consideration. The following amendment was offered:

"Amend House File 588 as follows:

1. By adding the following new section:

'Section 9. There is hereby appropriated from the general fund of the state to the university hospital for the purpose of erecting, constructing, or improving buildings to provide necessary equipment and facilities for

observation, diagnosis, care and treatment of mentally retarded children and for the purpose of research, study, training of professional workers in respect to the care, treatment and training of such children.....$130,000.00
For salaries, support and maintenance.....$ 30,000.00
For the purpose of erecting, constructing, or improving buildings to provide necessary equipment and facilities for observation, diagnosis, care and treatment of emotionally disturbed children and for the purpose of research, study, training of professional workers in respect to the care, treatment and training of such children.....$250,000.00
For salaries, support and maintenance.....$200,000.00

2. By striking from lines two (2) and three (3) of section one (1) the words and figures 'four million eight hundred sixty thousand seven hundred fifty dollars ($4,860,750.00) and inserting in lieu thereof the correct words and figures to include the appropriation made in section nine (9).'."

It is pertinent to note that paragraph 2 of the amendment amended the appropriation set forth in Section 1 to include the sum of the items set forth in paragraph 1 of the amendment, thus raising the total amount of the appropriation to the Board of Education to $5,470,750.00. Here is found legislative intent to provide for the items set forth in paragraph 1 by inclusion in the appropriation to the Board of Education.

The amendment was adopted and the bill was passed. On the same date the bill was received by the Senate, read the first and second times and referred to the Committee on Appropriations. On April 28 the following report was made by the Senate Committee on Appropriations:

"Mr. President: Your committee on appropriations, to which was referred House File 588, a bill for an act to appropriate funds to the state board of education and state historical society for capital improvements, repairs and alterations at state institutions, begs leave to report it has had the same under consideration and recommends the same be amended as follows; and when so amended the bill do pass:

"Amend House File 588, section 1, lines 2, 3 and 4 by striking the words and figures 'five million four hundred seventy thousand seven hundred fifty dollars ($5,470,750.00)' and inserting in lieu thereof the following 'four million eight hundred sixty thousand seven hundred fifty dollars ($4,860,750.00)'.

"Further amend House File 588 by striking all of section 9."

The amendment proposed indicates that the Senate Committee understood and intended that the items set forth in paragraph 1 of Section 9 of the bill, as passed by the House, constituted a part of the total appropriation to the Board of Education contained in Section 1 of the bill. On April 29 the report of the Appropriations Committee recommending passage, was taken up, considered, and adopted. The following committee amendments were then considered and adopted:

"Amend House File 588, section 9, lines 2 and 3 by striking the words 'erecting, constructing, or'.

"Further amend section 9 by striking all of lines 9 through 15.

"Amend section 1, lines 2, 3 and 4, by striking the words and figures 'five million four hundred seventy thousand seven hundred fifty dollars ($5,470,750.00)' and insert in lieu thereof 'five million twenty thousand, seven hundred fifty dollars ($5,020,750)'."

The effect of the amendment was to eliminate the item of $250,000.00 and the item of $200,000.00 contained in the House amendment to the bill and to amend the total appropriation to the Board of Education contained in Section 1 of the bill to $5,020,750, thus including the item of $130,000.00 and the item of $30,000.00 contained in the House amendment. Here, again, is found legislative understanding and intent that the appropriation to the Board of Education contained in Section 1 of the bill included the items for which expenditures were to be made under the provisions of the House amendment which became Section 9 of the bill.

Upon adoption of the Senate amendment the Chairman of the Appropriations Committee asked and received unanimous consent to withdraw the proposed committee amendment hereinbefore set forth which was submitted with the committee recommendation for passage. The bill was then voted upon and passed. On the same day the Senate amendment, fixing the appropriation to the Board of Education contained in Section 1 of the bill at $5,020,750.00 and providing for the $130,000.00 item and the $30,000.00 item, was considered by the House and on motion the House concurred. The bill then passed the House.

It is to be noted that the Title of the Act encompassed appropriations to the Board of Education, now the Board of Regents, and the State Historical Society. Appropriations to the University Hospital are not mentioned. It is a fundamental rule of legislative construction that in the event a legislative enactment is susceptible to more than one interpretation and if doubtful constitutionality would result by the adoption of a particular construction, the construction favored is that which is the least doubtful as to constitutionality. Applying this rule to the questions herein involved and considering the legislative history indicating legislative understanding and intent, it must follow that the sum of $160,000.00 allocated for the items set forth in Section 9 of the Act as passed was a part of the appropriation in the total sum of $5,020,750.00 to the Board of Education made by virtue of the provisions of Section 1 of the Act. Hubbell v. Herring, 216 Iowa 728, 249 N.W. 430; Craven v. Bierring, 222 Iowa 613, 269 N.W. 801; Wiess v. Incorporated Town of Woodbine, 228 Iowa 1, 289 N.W. 469; State v. Talerico, 277 Iowa 1315, 290 N.W. 660; Eysink v. Board of Supervisors, 229 Iowa 1240, 296 N.W. 376; Independent School District of Cedar Rapids v. Iowa Employment Security Commission, 237 Iowa 1301, 25 N.W. (2d) 491. It follows that Section 9 is an allocation of a portion of the sum appropriated in Section 1 and that the reference to the University Hospital is to be construed as a designation of the facility or agency for which the allocation was made.

The stated purpose of the allocation of the sum of $130,000.00 in Section 9 is that "of improving buildings to provide necessary equipment and facilities for observation, diagnosis, care and treatment of mentally retarded children *and for the purpose of research, study, training of professional workers in respect to the care, treatment and training of such children.*" Italics supplied for purposes of reference. The italicized portion of the provision is not to be read as an independent

purpose but rather as a part of the descriptive purpose of the improved buildings, necessary equipment and facilities. The subject of the act as expressed in the title is, appropriations for certain capital expenditures by the State Historical Society and by the Board of Education for institutions under its control. It does not embrace appropriations other than "for capital improvements, repairs and alterations." If ambiguity is involved that construction must be favored which would sustain the validity of the legislation and render it effective. State ex rel Johnson v. Marsh (Neb.), 29 N.W. (2d) 799; State v. Maas (Wis.), 16 N.W. (2d) 406; Brutsche v. Incorporated Town of Coon Rapids, 218 Iowa 1073, 256 N.W. 914; Central States Electric Co. v. McVey, 232 Iowa 469, 5 N.W. (2d) 817; Case v. Olson, 234 Iowa 869, 14 N.W. (2d) 717.

As to the item of $30,000.00 "for salaries, support and maintenance," such allocation clearly is beyond the scope of the Title and, therefore, this portion of the appropriation of $5,020,750.00 is not available.

For the reasons hereinbefore discussed, it is the opinion of this office:

(1) That the allocation of the sum of $130,000.00 is within the Title of House File 588, Laws of the 56th General Assembly;

(2) That the allocation of the item in the sum of $30,000.00 is not within the Title of the said House File 588;

(3) That the appropriation is to the Board of Regents to be administered by the State University of Iowa in the same manner as appropriations for the University Hospital set forth in Chapter 4, Laws of the 56th General Assembly;

(4) That the allocation is for the improvement of buildings of the University Hospital to provide for the declared purposes.

February 13, 1956

HIGHWAY CONTRACTS: Highway Commission may authorize department head to sign contracts, resolutions, and agreements following approval of the same by Commission.

Iowa State Highway Commission, Ames, Iowa: You advise that it has been customary for the Chairman of the State Highway Commission to indicate the approval by the State Highway Commission of contracts for the purchase of rights-of-way, contracts for construction of primary highways and farm-to-market roads, contracts for the purchase of materials and equipment, and other required resolutions and agreements, by affixing his signature to these documents. You further advise that the total number of separate documents which, under this procedure, require the signature of a representative of the State Highway Commission exceed ten thousand a year.

Your question is: May the State Highway Commission, by resolution, approve contracts, resolutions, and agreements required in the ordinary conduct of its business and authorize a member of the Highway Com-

mission staff to evidence such approval by signing his name to the appropriate document for and on behalf of the Highway Commission?

Illustrative applicable sections of the Code of 1954 which are involved include: Section 309.42 (Secondary Roads) which requires that contracts for secondary road construction "shall be first *approved* by the State Highway Commission"; Section 309.80, referring to bridge contracts on secondary roads, requires that they "shall be first *approved* by the State Highway Commission"; Section 310.14, relating to farm-to-market contracts, stating in pertinent part "the State Highway Commission shall take final action in *awarding* said contract"; and Section 313.1, referring to primary highways, which authorizes the Highway Commission to "enter into any arrangements or contract with and required by the duly constituted federal authorities". (Italics ours)

No legislative enactments require that the Highway Commission or any of its members actually *sign* the various documents which evidence their approval of contracts, agreements and resolution which they are authorized by law to negotiate. Where a signature is required by law it has been held proper to utilize a rubber stamp or copper plate so long as it is applied by the signator or one authorized to act for him. 1. Opinions of Attorneys General (U. S.) page 673. 1946 Report of Attorney General, page 133.

The mandate required of the Highway Commission is the *approval* of the contract, agreement, or resolution which approval is evidenced by the ministerial act of signing the appropriate document. May this ministerial act of affixing a signature to the document be delegated?

In answer to this question the Iowa Supreme Court stated in the case of Burlington Savings Bank vs. Prudential Insurance Company, 206 Iowa 475, 218 N.W. 949:

"What one may do himself he may do by another, and what he does by another he does by himself. Agency is a representative relationship. 'The distinguishing features of the agent are his representative character and his derivative authority.' Mechem Agency, Section 1; Story, Agency, Section 3; Sternaman vs. Metropolitan Life Ins. Co., 170 N.Y. 13, 62 N.E. 763, 765, 57 L.R.A. 318, 88 Am. St. Rep. 625; 2 C. J. 421."

You are advised that it is the opinion of this office that following approval by appropriate resolution of the Highway Commission of contracts, agreements, and resolutions, the Commission may properly authorize one or more members of its staff to evidence such approval by affixing the signature of the staff member to the instrument involved.

March 1, 1956

EGG GRADING: The provisions of Section 12, Chapter 114, Laws of the 56th General Assembly, are applicable to persons buying eggs in the state of Iowa for resale, and none of the provisions of the said section involve an attempt by the State of Iowa to exercise extraterritorial jurisdiction.

Hon. Eugene Halling, State Representative: By letter dated January 25, 1956, you request an opinion of this office on questions hereinafter set forth. We assume that this opinion is requested for the purpose of assisting you in your duties in connection with your office. The questions submitted are as follows:

1. Must the producer selling his own eggs direct to the consumer candle and grade such eggs?

2. What jurisdiction does the State of Iowa have within a fifty (50) mile border outside the State Boundary?

3. Are "set in stations" legal?

4. How can eggs be candled and graded in the presence of the producer if the eggs are trucked for candling and grading to a point thirty miles distant from the point of delivery by the producer?

5. Does the Secretary of Agriculture have legal authority to issue the attached "Directive"?

6. Does he have authority to enforce item No. 15 of the "Directive"?

Section 12 of Chapter 114, Laws of the 56th General Assembly provides:

"Sec. 12. Candling and grading required. Every person buying eggs from producers for resale shall candle and grade all eggs according to the United States standards for quality for individual eggs, or cause to be candled and graded within the state of Iowa or within fifty (50) miles outside the state boundary, all eggs offered to him, and shall refuse to buy all eggs unfit for human food. Such candling and grading shall be done in the presence of the producer if requested."

It is to be noted that the obligation to candle and grade eggs is placed upon persons "buying eggs from producers for resale." Under no circumstances is a "producer" required to candle and grade eggs. Neither is a "consumer" under any circumstances obliged to candle and grade eggs. It follows that there is no requirement for the candling and grading of eggs sold by a producer directly to a consumer.

Generally the jurisdiction of a state is coextensive with its boundaries extending throughout its territorial limits and operating on all persons and things located or situated there. Conversely, it is restricted to its own territorial limits and does not extend beyond its boundaries. 81 C.J.S. 860. Mercier v. John Hancock Mutual Life Insurance Company (Me.), 44 A. (2d) 372; McLaughlin v. Bahre (Del.), 166 A. 800; Case of Lynch (Mass.), 183 N.E. 834; Department of Financial Institutions v. General Finance Corporation (Ind.), 86 N.E. (2d) 444; Swift & Company v. Peterson (Or.), 233 Pac. (2d) 216.

If a statute is ambiguous and susceptible to more than one construction, in the event doubtful constitutionality would result from the adoption of a particular construction that construction must be favored which would sustain the validity of the legislation and render it effective. Hubbell v. Herring, 216 Iowa 728, 249 N.W. 430; Craven v. Bierring, 222 Iowa 613, 269 N.W. 801; Wiess v. Incorporated Town of Woodbine, 228 Iowa 1, 289

N.W. 469; State v. Talerico, 227 Iowa 1315, 290 N.W. 660; Eysink v. Board of Supervisors, 229 Iowa 1240, 296 N.W. 376; Independent School District of Cedar Rapids v. Iowa Employment Security Commission, 237 Iowa 1301, 25 N.W. (2d) 491.

Section 12 above quoted must be construed in the light of the propositions (1) that a state generally cannot exercise extraterritorial jurisdiction and (2) construction sustaining the validity of a statute is favored. It follows that the phrase, "Every person buying eggs from producers," is to be construed to refer to persons within the state of Iowa. In other words, the phrase is to be read as follows: "Every person buying eggs within the state of Iowa from producers." By this construction persons buying eggs outside of the state of Iowa from Iowa producers are not within the provisions of the section.

We turn to the effect of the provision for candling and grading of eggs within fifty (50) miles outside the borders of the state of Iowa. This provision is a permissible privilege. No one is required to candle and grade eggs or cause eggs to be candled and graded outside of the state of Iowa. The effect is that a purchaser, in the state of Iowa, for resale is required to candle and grade, or cause to be candled and graded, eggs purchased for such purpose. In the event such purchaser deems it a convenience to candle and grade, or cause to be candled and graded, eggs purchased from non-resident producers, which eggs are to be shipped into the state of Iowa at or near the point of residence of the non-resident producer, such is permitted provided that the non-resident candler and grader has obtained a license from the Department of Agriculture. Also, one purchasing eggs in the state of Iowa for resale may find it convenient to candle and grade, or cause to be candled and graded, such eggs outside the state of Iowa within the fifty-mile zone.

The probable reason for fixing a fifty-mile limit is to restrict the area within which agents of the Department of Agriculture would be required to travel in making inspections of operations under the candling and grading license. As the purchaser in Iowa has the option of using such extraterritorial facilities or having the candling and grading done in the state of Iowa, no instance of attempted exercise of extraterritorial jurisdiction is found. Inasmuch as an extraterritorial privilege is granted rather than an extraterritorial obligation imposed, it is within the power of the state to provide the conditions under which the privilege is extended.

The term "set in stations" refers to candling and grading facilities used by a purchaser which are not located at the point of delivery by the producer. For example, a grocery may be a purchaser for resale and the candling and grading facilities of the grocery may be at some point other than the grocery to which the producer delivers his eggs. The law does not require that the grading and candling facilities be located at the point of delivery. The law does provide that the candling and grading must be done in the presence of the producer if he so demands. The fact that the candling and grading is done at a point other than the point of delivery does not abrogate this right. Some inconvenience to the producer

may result; however, the producer has a right of selection as to those with whom he desires to do business. Presumably, the producer would consider the matter of lack of convenience in determining the person or concern selected as a purchaser.

Question number four (4) above is not a legal question; however, as a practical matter we refer to the discussion with relation to "set in stations."

The "directive" which you have attached, copy of which is attached to this opinion, is an instrument promulgated by the Department of Agriculture entitled, "Policy to be followed in buying, selling, and enforcement of Iowa Candling and Grading Law." It appears that this instrument was not issued as a "directive" but rather as a statement of suggested policy to achieve uniformity under the law. It is noted that certain statements therein set forth are restatements of the law, i.e., "Each buying establishment buying from producers requires a separate dealers and processors license." Other statements appear only as policy suggestions.

Item number fifteen (15) of the instrument promulgated by the Department of Agriculture relates to "laundering" of eggs by a dealer. This statement is not a restatement of the law and, therefore, is limited in effect to a statement of suggested policy.

You are advised that it is the opinion of this department: (1) That a producer selling his own eggs directly to a consumer is not required to candle and grade such eggs; (2) That persons in Iowa purchasing eggs for resale from non-resident producers, which are to be shipped in Iowa, may candle and grade, or cause to be candled or graded, such eggs so purchased within the state of Iowa or by a non-resident Iowa licensed candler and grader located within fifty (50) miles of the borders of the state of Iowa; (3) That a person purchasing eggs in Iowa from an Iowa producer, which are purchased for resale, may candle and grade, or cause to be candled and graded, such eggs within the state of Iowa or by an Iowa licensed candler and grader located within fifty (50) miles of the borders of the state of Iowa; (4) That a producer has the right to be present when his eggs are being candled and graded by or for a purchaser; (5) That the law does not require that the candling and grading done for a purchaser be done at the point of delivery by the producer; (6) That the Department of Agriculture has not exceeded its authority in promulgating restatements of the law and suggestions of policy with relation to transactions under the law; (7) That item number fifteen (15) of the instrument promulgated by the Department of Agriculture with relation to Chapter 114, Laws of the 56th General Assembly, is a statement of suggested policy and, therefore, does not exceed the authority of the department.

March 16, 1956

MILITARY TAX CREDIT: A joint tenant in property is presumed to own a share in such property equal with all other joint tenants and

such ownership is a qualifying ownership under the military service tax credit laws.

Mr. William M. Tucker, Johnson County Attorney, Iowa City, Iowa: This will acknowledge receipt of your letter wherein you set out the following factual situation:

" 'W', a widow of a Spanish American War Veteran, had made application for exemption on real estate, upon which property she lives, under the provisions of the above Section (427.4), and such exemption was granted. Recently, however, 'W' deeded the property to herself and to her son, an adult who does not live in this County, as joint tenants with right of survivorship, and application was made for the exemption."

The question you raise is as follows:

Is the widow "W" entitled to the exemption under a situation where she and her adult son own such property as joint tenants and with right of survivorship?

Section 427.3 provides for exemptions from taxation in varying amounts according to the war in which the veteran served. **Subsection (2) provides** that veterans of the War with Spain shall have an exemption of eighteen hundred dollars.

Section 427.4(1) **provides as follows:**

"EXEMPTIONS TO RELATIVES. In case any person in the foregoing classifications does not claim any such exemption from taxation, it shall be allowed in the name of such person to the same extent on the property of any one of the following persons in the order named:

"1. The wife, or widow remaining unmarried, of any such soldier, sailor, marine, or nurse, where they are living together, or were living together at the time of the death of such person."

The last quoted section provides that the exemption to the widow shall be allowed to the same extent on property owned by her as it would to the veteran himself. Therefore, if a veteran would be entitled to the exemption when he owned property in joint tenancy, his widow would also be so entitled.

"A joint tenancy exists where a single estate in property, real or personal, is owned by two or more persons, under one instrument or act of the parties, or where an estate is held by two or more jointly, with an equal right in all to share in the enjoyment during their lives. * * * Survivorship is the distinctive characteristic of an estate in joint tenancy. On the death of a joint tenant, the property descends to the survivor or survivors, and at length to the last survivor." 48 C.J.S., p. 910

In Wood v. Logue, 167 Iowa 436, 149 N. W. 613, the Iowa Court in discussing the rights of the parties under a joint tenancy said:

"The survivors do not acquire title through the deceased, but by virtue of the deed. * * * As we have already suggested, neither of the successive survivors takes or receives anything from or through the deceased tenant for the title is derived directly from the grantor through the deed which created the tenancy."

The Circuit Court of Appeals in Estate of Emmet Awtry, 221 F. 2d 749, reversed the Tax Court opinion reported at 22 T. C. 91. The Circuit

Court quoted with approval from the dissenting opinion of the Tax Court as follows:

"It is a fundamental principle of law that property held in joint tenancy passes to the surviving tenant by operation of law. Property thus held is not capable of testamentary devise or disposition. As stated by Judge Phillips of the Tenth Circuit in Hernendez v Becker, 54 F. 2d 542, 547. 'The chief incident of such an estate is the right of survivorship. * * * The survivor does not take the moiety of the other tenant from him or his successor, but takes it under and by virtue of the conveyance or instrument by which the joint tenancy was created.' "

Under the definitions of joint tenancy as stated above it is clearly ownership of property. It appears that the survivor takes his own interest at the time of the conveyance creating the joint tenancy. At the death of the other joint tenant, he takes that share by operation of law, not by succession from the decedent, but from the grantor. Each joint tenant has a legal interest in such property and it is such ownership as to entitle the holder of such interest to the exemption. The joint ownership need not be between husband and wife in order to qualify but may be between other persons. Any statements in any former opinions which may be inconsistent herewith are hereby withdrawn.

The question then arises as to the extent of the interest of a joint tenant in such property to which the exemption may be applied. 48 C. J. S., p. 930 states:

"An estate held in joint tenancy is but one estate, not a number of estates equal to the number of joint tenants, and for some purposes the joint tenants are as one person. Each joint tenant is seized of the whole estate; he has an undivided share of the whole estate rather than the whole of an undivided share. Each tenant is said to hold per my et per tout, by the half and by the whole. The shares or interests of joint tenants are presumed to be equal, although the contrary may be shown by proof."

It is our opinion, therefore, that in the situation about which you inquire in the absence of any showing to the contrary it may be presumed that the interests of the widow and her adult son are equal.

48 C. J. S., p. 932 states;

"A joint tenant in possession of the property is required to preserve it, and a joint tenant is entitled to contribution from his co-tenants for the expense of making repairs which are clearly necessary and inure to the benefit of the co-tenants. * * * A joint tenant may also be entitled to proportionate reimbursement for necessary expenditures made in protection of the joint property, such as the payment of insurance premiums, taxes, or removal of liens, and, under some statutes, in prosecuting or defending suits relative to the joint property."

Since one joint tenant is entitled to reimbursement for expenditures, including taxes, from the other joint tenants, the exemption should only be allowed as against the share of property owned by the one entitled to such exemption. No part of the exemption should be allowed against a share in the property which belongs to one entitled to no exemption.

In this instance, the exemption would be applied against one-half the value of the property, the share presumed to be owned by the widow.

March 16, 1956

TRUCKS: Whether a crane mounted upon a truck is an integral part of the truck or is a load carried is a question of fact and whether the provisions of Section 321.458 are applicable will depend upon this fact determination.

Mr. Clinton H. Moyer, Commissioner, Department of Public Safety: By letter dated February 22, 1956, an opinion is requested as to whether it would be in violation of the laws of the State of Iowa to operate a truck on the highways bearing a crane, the boom of which extends more than three (3) feet beyond the front wheels of the vehicle. You state that the equipment in question presents a problem as to whether the crane is a part of the vehicle, pointing out that the manufacturers maintain that the boom is a part of the vehicle and not a load. You state that the motor vehicle departments of the states of Wisconsin and Illinois have ruled that the particular equipment is an integral part of the vehicle and not a load.

Section 321.458, Code of Iowa, 1954, provides:

"The load upon any vehicle operated alone, or the load upon the front vehicle of a combination of vehicles, shall not extend more than three feet beyond the front wheels of such vehicle or the front bumper of such vehicle if it is equipped with such a bumper."

Whether the crane is an integral part of the equipment is a question of fact and not of law. This department does not attempt to determine fact questions. In the event the crane, as a matter of fact, is an integral part of the vehicle Section 321.458 would not be violated. Conversely, if the crane is not a part of the vehicle and constitutes a load there would be a violation of the said section if the vehicle carrying the load were operated on the highways of this state.

Section 321.457, Code of Iowa, 1954, provides in pertinent part:

"The maximum length of any motor vehicle or combination of vehicles, * * * *, shall be as follows:

"1. No single truck, unladen or with load, shall have an overall length, inclusive of front and rear bumpers, in excess of thirty-five feet."

If it is found as a matter of fact that the crane is an integral part of the truck and that the overall length, including the boom of the crane, is in excess of thirty-five (35) feet operation on the highways of this state would be in violation of Section 321.457, Code of Iowa, 1954.

You are therefore advised:

1. Whether a crane is an integral part of a vehicle or is to be deemed a load carried on a vehicle is a question of fact, which questions this department does not attempt to determine.

2. If the boom of a crane, which is found as a matter of fact to be a load, extends more than three (3) feet beyond the front wheels or the front bumper of the carrying vehicle operation on the highways involves a violation of Section 321.458, Code of Iowa, 1954.

3. In the event that the crane is an integral part of a truck as contrasted from a load carried, and the overall length including the boom is in excess of thirty-five (35) feet, operation of such truck on the highways of this state is a violation of Section 321.457, Code of Iowa, 1954.

March 19, 1956

FEEBLE-MINDED: Under Chapter 120, Acts of the 56th General Assembly, patients under twenty-one years of age at Glenwood State School or Woodward State Hospital are entitled to free support and treatment.

Mr. Robert S. Bruner, Carroll County Attorney, Carroll, Iowa: We have yours of the 23rd ult. in which you submitted the following:

"I should like the opinion of your office on the following questions:

"Section 223.16 of the 1954 Code of Iowa as amended by Chapter 120 of the Acts of the 56th General Assembly provides that (as regards Woodward State Hospital and Glenwood State School) 'No charge or lien shall be imposed upon the property of any patient under 21 years of age * * * for the cost of his support and treatment in this institution'.

"Of course the above statute must be construed in conjunction with Section 230.15 and 230.25 of the Code.

"My question is whether the words 'charge' and 'lien' as used in Chapter 120 of the Acts of the 56th General Assembly are synonymous or if the word 'charge' is used in a separate sense. If these words are synonymous, then the effect of the amendment is simply to remove the statutory lien on the property of the persons mentioned. However, if the word 'charge' is used in a separate sense and in its ordinary meaning, this amendment could be construed as providing free care for the patients in the described categories.

"I would appreciate your opinion at your convenience."

In answer thereto we advise as follows. The statute under consideration is Chapter 120, Acts of the 56th General Assembly, which provides as follows:

"Section 1. Section two hundred twenty-three point sixteen (223.16), Code 1954, is amended by striking the period (.) at the end of the section and adding thereto the following:

" ', provided that no charge or lien shall be imposed upon the property of any patient under twenty-one years of age or upon the property of persons legally bound for the support of any such minor patient, for the cost of his support and treatment in these institutions.'

"Sec. 2. Chapter two hundred twenty-three (223), Code 1954, is hereby further amended by adding the following new section:

" 'The charge or lien imposed upon the property of any patient over twenty-one years of age and under thirty-one years of age or upon the property of persons legally bound for the support of any such patient for the cost of his support and treatment in these institutions shall be limited to seventy-five percent of the cost thereof. For patients over thirty-one years of age and under fifty years of age such charge or lien shall be limited to fifty percent of the cost and for patients over fifty years of age no such charge or lien shall be imposed.'

"Sec. 3. Chapter two hundred twenty-three (223), Code 1954, is hereby amended by adding the following new section:

" 'The provisions of sections two hundred seventy point four (270.4) to two hundred seventy point seven (270.7), inclusive are hereby made applicable to the Glenwood state school and the Woodward state hospital.' "

As a matter of interpretation it is true that where by statute a charge is made upon property it is regarded as a lien thereon. See 6 Words and Phrases, permanent edition, page 569. However, to apply the foregoing rule to the quoted statute would deduce the legislative intent to be a repetitious meaning in using both the words "charge" and "lien." In other words, to so apply the rule would result in attaching no separate meaning to the word "charge." This result is contrary to this elementary rule. Sutherland Statutory Construction, pargaraph 4705, 3rd edition.

"Effect given every word. 'It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.' A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error."

In that view of these words a "charge" would be deemed not a lien but a liability or obligation.

Therefore, in answer to your question we advise that the words "charge" and "lien" are used separately and not synonymously, and that a patient at Woodward or Glenwood under twenty-one years of age is entitled to support and treatment without charge or a lien therefor.

March 20, 1956

LABOR COMMISSIONER, Accident Reports. Section 88.11, 88.12, and 88.13(3), Code 1954, requiring records and reports of certain accidents be submitted by "corporations operating . . . workshops" are applicable to railroad corporation maintenance shops.

Mr. Curtis M. Kallem, Deputy Labor Commissioner: Receipt is hereby acknowledged of your inquiry of February 28th as to whether railroad corporations having maintenance shops within the State of Iowa are required to maintain records of accidents occurring in such shops, file reports thereof, and be subject to penalty for failure so to do, under the provisions of sections 88.11, 88.12, and 88.13(3), Code 1954. Said sections provide as follows:

"88.11 Record of Accidents. Manufacturers, manufacturing corporations, proprietors, or *corporations operating any* mercantile establishment, mill, *workshop,* business house, or mine, other than those subject to inspection by the state mine inspector, shall keep a careful record of any accident occurring to an employee while at work for the employer, when such accident results in the death of the employee or in such bodily injury as will or probably may prevent him from returning to work within two days thereafter. The said record shall at all times be open to inspection by an inspector of the bureau of labor."

"88.12 Report of accidents — evidence. Within forty-eight hours after the occurrence of an accident, the record of which is required to be kept, a written report thereof shall be forwarded to the commissioner of labor and said commissioner may require further and additional report to be furnished him should the first report be by him deemed insufficient. No statement contained in any such report shall be admissible in any action arising out of the accident therein reported."

"88.13 Penalties. Any person, corporation, firm, agent, or superintendent violating any of the provisions of this chapter shall be guilty of a misdemeanor and shall be punished as follows: . . .

"3. For a violation of any one of the provisions of sections 88.6, 88.7, 88.8, 88.9, 88.11, and 88.12, by a fine not exceeding one hundred dollars."

You further state it has been suggested that the quoted sections have no application to railroad shops for the reason that section 474.46, Code 1954, requires certain railroad accident reports to be filed with the Iowa Commerce Commission. Section 474.46 provides as follows:

"Accidents — investigation of — report. Upon the occurrence of any serious accident upon any railroad within the state, which shall result in personal injury, or loss of life, the corporation operating *the road upon which the accident occurred* shall give immediate notice thereof to the state commerce commission whose duty it shall be, if they deem it necessary, to investigate the same, and promptly report to the governor the extent of the personal injuries, or loss of life, and whether the same was the result of mismanagement or neglect of the *corporation on whose line the injury or loss of life occurred;* but such report shall not be evidence or referred to in any case in any court."

It appears from the plain language of the quoted sections that there is no duplication between the accident reports required by sections 88.11 to 88.13 and section 474.46. The former statutes refer to "corporations operating any . . . workshop" whereas the latter sections refer to "the *road* upon which the accident occurred" and to "the corporation on whose line the injury or loss of life occurred." It thus seems clear that the reports to be filed with the labor commissioner are those taking place in "workshops" as distinguished from those taking place on the "road" or "line." In other words, the former class of reports relates to accidents occurring at fixed maintenance facilities, whereas the latter class of reports relate to the operations function of the railroad in receiving and transporting passengers and freight. Thus, there appears to be no necessary duplication between the reports required in sections 88.11 to 88.13 and those required by section 474.46.

However, even if duplication were found to exist, we are unaware of any constitutional provision or rule of construction which would tend to exempt any corporation from filing a report required by statute with one state department simply because another statute required the same event to be reported to another state department. The question of duplication, therefore, appears immaterial as respects your principal inquiry as to whether sections 88.11 to 88.13 apply to railroad maintenance shops.

The term "workshop" as it relates to railroad activities was construed in *Richmond and D. R. Co. v. Commissioners of Alamance*, 84 N.C. 504 as embracing "foundaries, engine houses, depots, machine shops, neces-

sary offices, and all the usual appliances for the manufacture or repair of engines and other stock required for the operation of the road."

Similarly, in *Fort Smith Aircraft Co. v. State Industrial Commission,* 1 P2d 682, 151 Okl. 67, the term "workshop" was held applicable to an airport equipped with power-driven machinery for building, cleaning, and repairing airplanes. Also, in *Hoffmeyer v. State,* 77 N.E. 372, 37 Ind. App. 526 it was held that a shop maintained by a street railroad company, where the principal work was repair of cars or other appliances used in carrying on the business, is a "workshop."

In answer to your question, we would, therefore, advise you that a shop maintained by a railroad corporation for the manufacture or repair of engines and other stock and appliances used in carrying on the business of the railroad is a "workshop" within the meaning of sections 88.11 to 88.13, Code 1954; that records and reports of accidents occurring in such shops must be made as required in said sections; and that refusal to so record and report would make the corporation and its agent or superintendent subject to the penalties prescribed in subsection 3 of section 88.13

March 20, 1956

PHARMACY EXAMINERS. Reciprocal licensing. Issuance of a pharmacy license to a practitioner of another state raises a presumption that reciprocal agreement exists with such other state in each year reciprocal licensing occurred and that the pharmacy examiners have made an expert finding of fact in each year in which licenses were so issued that the requirements of such other state were substantially equivalent to Iowa's licensing requirements.

Mr. J. F. Rabe, Secretary, Iowa Pharmacy Examiners: In an opinion dated March 1, 1955, written in response to your request it was held that no reciprocal relations existed between the states of Iowa and Colorado in 1931 for purposes of licensing pharmacists. This conclusion was reached as a result of an examination of the qualifications possessed by a person admitted to the practice of pharmacy in Colorado in 1931 and comparing those qualifications with the requirements for the admission to practice pharmacy in the state of Iowa during the same year. It was concluded that the requirements for admission to the practice of pharmacy in the state of Colorado were not "substantially equivalent" to the requirements for admission to such practice in the state of Iowa and that, therefore, in the absence of any evidence that an agreement actually existed it was presumed there was no such agreement.

Section 147.45, Code of Iowa, 1954, requires the Pharmacy Examiners to examine the requirements for admission to practice in the various states and to "certify to the department the states having substantially equivalent requirements to those existing in this state." Said section is applicable to the Pharmacy Examiners by virtue of the provisions of section 147.96, which provides as follows:

"Pharmacy examiners. In discharging the duties and exercising the powers provided for in sections 147.94 and 147.95, the pharmacy examiners and their secretary shall be governed by all the provisions of this chapter which govern the department of health when discharging a similar duty or exercising a similar power with reference to any of the professions regulated by this title."

That such state's licensing requirements be "substantially equivalent requirements to those existing in this state" is a condition precedent to the entering into a reciprocity agreement with any state. Whenever a reciprocity agreement has been entered into, it must be presumed that the Board, as a board of experts, has found that the then existing requirements for admission to practice in the reciprocating state are "substantially equivalent" to the then existing requirements for admission to practice in this state. It will not be presumed that a governmental board has acted contrary to law. The finding of such an expert board is a finding of fact and is not subject to review by this department. It follows that if, in fact, there was a reciprocity agreement in existence between the states of Iowa and Colorado in 1931, there remains no question to be determined at this time as to whether the requirements for admission by the two states involved were "substantially equivalent." Therefore, the opinion of March 1, 1955, hereinbefore referred to, must be read in the light of the fact situation so far as known to this office at that time.

As previously indicated, it was the impression of this office that the question was necessarily resolved by a comparison of the statutes of the two states and that such comparison, based upon an examination of the qualifications of one who had been admitted in Colorado with the Iowa requirements, indicated that the requirements for admission to practice in Colorado were not "substantially equivalent" to the requirements for admission to the practice in Iowa. However, as previously pointed out in this letter, this determination should be a determination by professional experts as a fact determination rather than a determination as a matter of law. However, for the reasons hereinbefore stated, whether the determination should, under the circumstances have been attempted as a matter of law is not material in the event that reciprocal relations existed between the two states in 1931.

This department has now been advised that the Secretary of the Iowa Pharmacy Examiners has in a letter dated December 15, 1955, stated that reciprocal relations did exist between Iowa and Colorado in 1931. This department is also advised that according to the records of the Iowa Pharmacy Examiners persons have been admitted from time to time to the practice of pharmacy in Iowa by virtue of such reciprocity agreement. On the other hand, this office has been advised that there is evidence that no reciprocal agreement existed between the state of Iowa and the state of Colorado in 1931. Whether an agreement existed is a question of fact. This department does not give opinions on fact questions.

In view of the subsequent further explanation of this situation upon which the letter dated March 1, 1955, undertook to rule a qualification of that opinion appears indicated as hereinafter set forth.

You are advised, it is the opinion of this office that if reciprocal relations existed between the state of Iowa and Colorado in 1931, it is presumed that the Pharmacy Examiners found the requirements of the two states to be "substantially equivalent," which necessarily involves a finding that one admitted in the state of Colorado in 1931 had qualifications "substantially equivalent" to those required by the state of Iowa and that by virtue of the statutory reciprocity provisions and the rules of the Pharmacy Examiners such agreement would require the admission of one admitted to practice in the state of Colorado in 1931 if reciprocity relations presently exist between the two states insofar as professional qualifications are concerned.

You are further advised, in the event that, as a matter of fact, there was no reciprocity agreement between the states of Colorado and Iowa in 1931, a person admitted in the state of Colorado in that year would not be entitled to be admitted by reciprocity in the state of Iowa under the present reciprocity agreement.

May 4, 1956

INCOME TAX: A husband and wife filing a joint income tax return are limited by law to one standard deduction on such return and are not entitled to a greater deduction because such return might include the income of both.

Mr. Ray E. Johnson, Chairman, Iowa State Tax Commission: This will acknowledge receipt of your recent letter wherein you advise this office that a question has been raised concerning the Tax Commission interpretation of Section 422.9 of the 1954 Code of Iowa, as amended by Acts of the 56th G. A., Chapter 208, Section 8, and more specifically whether the following portion of Regulation 22.9-2 of Rules and Regulations 10 of the Iowa State Tax Commission is a correct interpretation of the law. Such portion is as follows:

"Reg. 22.9-2. Optional Standard Deduction.

"An optional standard deduction is provided in the Iowa income tax law. Before determining the amount of the deduction, federal income tax payments, as adjusted in accordance with reg. 22.9-5, must be subtracted from net income. The optional standard deduction is then computed as 5% of the remaining balance, but may not exceed $250. (Where joint returns are filed, the optional standard deduction is limited to 5% of net income after deduction of federal income tax not to exceed $250.) Where the spouses file separate returns, each may take the optional standard deduction of 5%, not to exceed $250. * * *."

Only the portion of such regulation as is in parentheses above is questioned and we understand the contention to be that the Commission is in error in allowing but one standard deduction against the combined incomes of a husband and wife filing a joint return.

Before discussing this question further, we would point out that all new and amended rules and regulations of the Iowa State Tax Commission are subject to the approval of the Attorney General's office as to

both form and legality, by the provisions of Chapter 51, Acts of the 54th G. A., Section 2, appearing in the 1954 Code of Iowa as Section 17A.2(3), and that there is on file in the office of the Secretary of State written approval of both the form and legality of Regulation 22.9-2 by this Department. In other words, this Department has previously ruled the Commission's interpretation of Section 422.9 to be a legal interpretation of that section.

We also must keep in mind that Regulation 22.9-1 of Rules and Regulations 10 correctly states the law to be that whether and to what extent deductions shall be allowed depends upon legislative grace; and only where there is a clear provision therefor can any particular deduction be allowed. See Helvering v. Independent Life Insurance Company, 292 U. S. 371, 54 S. Ct. 758.

A further guide to interpretation of Section 422.9 is furnished by the Iowa Supreme Court in the case of John Hancock Mutual Life Insurance Co. v. Lookingbill, 218 Iowa 373, 253 N. W. 604, where said Court states:

"The legislature is presumed to know the construction of its statutes by the executive departments of the state, and if the legislature of this state was dissatisfied with the construction which has been placed upon them by the duly elected officials in the past years, the legislature could very easily remedy this situation, as it has the power to pass such legislation, and the only conclusion we can come to is that the legislature must have been satisfied with the construction placed upon the act by the secretary of state."

§ 422.132., as you know, provides that if husband and wife living together have an *aggregate net income* of two thousand dollars or over, each shall make such a return, unless the income of each is included in a single *joint return.*

Where it is a joint return, § 422.7 defines *net income* as "*the adjusted gross income* as computed for federal income tax purposes . . ." And § 422.9 provides that in computing *taxable income* of individuals (defined in 422.4 as "a natural person" as distinguished from corporations and trusts), there shall be deducted from *net income* the larger of the following amounts . . . 1. An optional standard deduction of five per cent of the *net income* after deduction of federal income tax, not to exceed two hundred fifty dollars.

From the foregoing, it should be clear that the base on which the standard deduction is computed is the *net income* (whether contained in a joint return or a separate return), and *NOT* the number of individuals whose income is included in the base.

§ 63(b), I. R. C. (1954) provides for use of the standard deduction in computing "taxable income". In turn, § 141 provides as follows:

"The standard deduction referred to in section 63(b) . . . shall be an amount equal to 10 percent of the adjusted gross income or $1,000 whichever is the lesser, *except that in the case of a separate return by a married individual the standard deduction shall not exceed $500.*"

Many years ago, the Supreme Court adopted the "*taxable unit*" theory of joint returns. In *Helvering v. Janney*, 311 U. S. 189, 85 L. Ed. 118,

61 S. Ct. 241 (1940), the Court had to consider the precise meaning of the phrase "aggregate income". It is stated that "aggregate income" (in connection with a joint return) (and compare the phrase "aggregate net income" in Iowa Code § 422.13) "is clearly aggregate net income on which 'the tax shall be computed' . . ." Thus the Court allowed deductions of each spouse, used in arriving at net income [adjusted gross income under the present Code]. See also Taft v. Helvering, 311 U. S. 195, 85 L. Ed. 122, 61 S. Ct. 241.

The Court went on to point out that the Solicitor of Internal Revenue had stated: "If a single joint return is filed it is treated as the return of a *taxable unit* and the net income disclosed by the return is subject to both normal and surtax as though the return were that of a *single individual.*" (emphasis supplied).

In short, the federal approach to joint returns is the "taxable unit" theory with respect to "aggregate net income". The State Tax Commission has quite properly followed the "taxable unit" theory in its interpretation of § 422.9 in the case of a joint return. The taxpayer has confused the tax base (net income) on which the optional deduction of the taxable unit is computed with the number of individuals contained in the taxable unit.

Section 422.13(2) of the 1954 Code of Iowa is exactly the same as Section 13(2) of Chapter 82, Laws of the 45th General Assembly, Extra Session, by which the income tax law originated, except only as to the amount of aggregate net income necessitating the filing of returns. The provision of Section 13(2) of Chapter 82, Laws of the 45th General Assembly, Extra Session, is as follows:

"Section 13. Return by Individual

"* * *.

"2. If husband and wife living together have an aggregate net income of eleven hundred dollars or over, each shall make a return, unless the income of each is included in a single joint return."

Section 9(7) of that same chapter provided as follows:

"Section 9. Allowable deductions on gross income.

"In computing net income there shall be allowed as deductions:

"* * *.

"7. For the purpose of simplifying returns, in all cases where the taxpayer's gross income does not exceed, in the case of a single individual, one thousand dollars, and in the case of husband and wife or head of a family, one thousand six hundred dollars, the taxpayer may claim a deduction of ten (10) per cent of the gross income, in lieu of all other deductions which might be claimed under this division."

It is to be noted that the last cited section, which became the law of this state in the year 1934, embraced the unity theory of taxable income on the joint return of a husband and wife and there provided a smaller standard deduction on a joint return for a husband and wife than would be available to them filing separately. The unity theory of taxation of the income reported on such joint returns has been carried forward

through the years and finds expression in Article 206(2) of Rules and Regulations 8 of the State Tax Commission, and again in Reg. 22.9-2 of Rules and Regulations 10, as well as in the cited sections of the Code. Under this theory, where husband and wife elect to file but one return to report the income of both, the income is treated as that of the family unit for the purpose of applying the 5% limit on the standard deduction provided by Section 422.9(1) of the 1954 Code of Iowa, and also for the purpose of applying the tax rates prescribed by Section 422.5 of said Code to the net income thus computed. Such a return has never been considered such as to necessitate or permit the segregation of either income or deductions of the husband and wife with a separate computation as to each. To follow the taxpayer's contention in this case, to the effect that each of the two persons reporting income on a joint return would be entitled to the standard deduction, would necessitate ascribing to the Legislature an intention to change long-standing legislative and administrative interpretations without any indication in the law that such a change was intended, and would also lead to the anomalous result, since only one aggregate net income is reported on a joint return, of having the 5% standard deduction twice applied to and subtracted from such aggregate net income.

It is, therefore, our conclusion that there is but one standard deduction possible on a joint return of a husband and wife — that being the standard deduction of 5% of the aggregate net income reported on such joint return after deduction of the Federal income tax not to exceed $250, and that Reg. 22.9-2 of Rules and Regulations 10 of the Iowa State Tax Commission correctly interprets the Iowa law in this respect.

May 9, 1956

FARM-TO-MARKET ROADS: The use of farm-to-market road funds is limited to construction, reconstruction and improvement and may not be used for maintenance of a completed farm-to-market road.

The 40% equalization farm-to-market fund is available for expenditure on the farm-to-market system and authorized additions to the farm-to-market system.

Mr. John G. Butter, Chief Engineer, Iowa State Highway Commission: In your letter of March 21st, you desire an interpretation of the farm-to-market road law and specifically ask two questions as follows:

1. Following the completion of construction, reconstruction, or improvement of a farm-to-market road, may farm-to-market funds be used for re-rocking or re-graveling a farm-to-market road?

2. May the 40% equalization farm-to-market funds referred to in Section 312.5 be used for the construction, reconstruction, or improvement of roads which have been added to the farm-to-market system since the enactment of the farm-to-market law or is the use of that fund limited to the original farm-to-market system referred to in Section 310.10, Code of Iowa, 1954?

The use which may be made of the farm-to-market fund is specifically set out in Section 310.4 which states in part: "Said farm-to-market road

fund is hereby appropriated for and shall be used in the establishment, construction, reconstruction or improvement of the farm-to-market system . . . . and all other expenses incurred in the construction, reconstruction, or improvement of said farm-to-market road system under this chapter."

"Establish" involves acquiring lands, preparing them for public use by grading and filling, to make a roadway, gutters, and parking. Royal v. City of Des Moines, 195 Iowa 23, 191 N. W. 377. "Construct" means to build; "reconstruct" means to rebuild, to build over again; and a street is not reconstructed by being resurfaced either in whole or in part." Farraher v. Keokuk, 111 Iowa 310, 82 N. W. 773; Covington v. Bullock, 103 S. W. 276, 126 Ky 236. The word "improvement" means "that by which the value of anything is increased, its excellence enhanced, or the like, or an amelioration of the condition of property effected by the expenditure of labor or money, for the purpose of rendering it useful for other purposes than those for which it was originally used, or more useful for the same purposes." State v. Reis, 38 Minn 371, 38 N. W. 97.

Section 310.29 states in part: "Any farm-to-market road constructed under the provisions of this chapter shall be maintained by the county in a manner satisfactory to the federal authorities and to the state highway commission." The section further provides that in the event the county fails to maintain any such road then the highway commission shall place the road in proper condition of maintenance, shall charge the cost of such maintenance to the county's allotment of the farm-to-market road fund, and, as a prerequisite to approval of additional farm-to-market road projects by the highway commission, the county is required to reimburse the farm-to-market road fund from its secondary road maintenance fund for the cost of maintenance work expended by the highway commission.

The word "maintain" does not mean "to provide" or "construct" but means to "keep up, not to suffer to fail or decline". Ferguson v. Rochford, 84 Conn 202, 79 A 177, Ann Cas 1912B, 1212.

Re-rocking or re-graveling a road which has been constructed would not fall within the definitions of "establish, construct, reconstruct or improve" and would be included within the meaning of the word "maintain".

The legislature specifically provided in Section 310.29 that the cost of maintenance of farm-to-market roads should be borne by the county secondary road maintenance fund and specifically excluded the farm-to-market road fund from liability for maintenance of the farm-to-market system.

The answer to your first question, therefore, is "no".

Turning now to your second question we quote from that part of Section 312.5 which is pertinent to the question:

"The equalization farm-to-market fund shall be used for such construction and reconstruction of farm-to-market roads and bridges as is necessary to accomplish a uniformity of relief for the improvement of such roads and bridges among the counties of the state. Each county seeking relief from the equalization farm-to-market road fund shall make application to the state highway commission on or before July 1 each year, showing cause for need of such relief. The state highway commission shall take into consideration all costs such as the cost of grading, bridges, culverts, drainage, surface material and labor required to complete said farm-to-market roads in all counties. In allotting equalization farm-to-market road funds among counties, the state highway commission shall also take into consideration existing unobligated credit

balances in each county's farm-to-market road fund at the time such allotments are made. Allotments of equalization road funds shall be made to the counties in the ratio that each county's requirements bears to the requirements of the state as a whole. The state highway commission shall make allotments as are required to carry out the objects of this section."

In the disbursement of the farm-to-market funds the highway commission is required to take into consideration, (A) the various costs "required to complete said farm-to-market roads in all counties", and, (B) the "existing unobligated credit balances in each county's farm-to-market road fund at the time such allotments are made." Following this, the highway commission is then to make allotments to the counties in the ratio that each county's requirements bear to the requirements of the state as a whole. The allotment is for "farm-to-market roads and bridges . . . . "Farm-to-market roads and bridges . . . ." referred to in Section 312.5 include the original farm-to-market system referred to in Section 310.10 as well as additions thereto referred to in the same section.

The answer to your second question is that the use of the equalization farm-to-market fund is not limited to the original farm-to-market system referred to in section 310.10, Code of Iowa, 1954, but may be expended on additions to the farm-to-market system since the enactment of that law.

June 8, 1956

PUBLIC EMPLOYEES — MILITARY LEAVE. The phrase "without loss of pay during the first thirty days of such leave of absence" as used in section 29.28, Code 1954, refers to "pay" as a civilian public employee.

Mr. Leo J. Tapscott, Polk County Attorney, Des Moines, Iowa: Receipt is acknowledged of your letter of May 26th as follows:

"Section 29.28 of the Code of Iowa, 1954 provides:

"'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 ***** shall, when ordered by proper authority to active state or federal service, be entitled to a leave of absence from such civil employment for the period of such active state or federal service, without a loss of status or efficiency rating, and without loss of pay during the first thirty days of such leave of absence.'

"It has been the practice of the Independent School District of Des Moines to pay an employee, when he is called into military service for reserve training or full time active duty, the difference between his military pay and his school district pay for the first thirty days of his service. For example, if he were gone two weeks and he received $50.00 military pay and if his teaching salary was $300.00, the School District would pay him $250.00.

"One employee, whose rank is sufficiently high that he receives more pay from the military when on duty than he does from his teaching salary, the School District has paid nothing to on the theory that he had suffered no loss of pay.

"This employee has now presented a claim to the Independent School District for his full salary as a teacher covering the first thirty days of his military service. The School District has not made payment to date on the theory that there was no loss of pay while in the military service and would like an Attorney General's opinion as to whether or not this employee is entitled to any pay and as to whether or not the rule heretofore adopted by the Board, of paying to an employee the difference between his military pay and the pay he received from the School District for the first thirty day period, or part thereof, that he is in military service, is a compliance with Section 29.28 of the Code.

"The Attorney General's opinions for 1936, page 619, for 1940, page 587, for 1940, page 579 and 1942, page 136, all deal with the question of leave of absence, but none of them specifically answers the question raised by the Independent School District of Des Moines."

It is our opinion that the phrase "without loss of pay" as used in section 29.28 means without loss of pay from the state, subdivision thereof or municipality. There is no authority in the section for deduction of military pay from regular salary. The section clearly contemplates that the first thirty days of military leave shall be with full pay. This is the administrative construction which has consistently been followed by all state departments since the enactment of the law.

June 14, 1956

WAR ORPHANS EDUCATION: An adopted child of a veteran is eligible to assistance from the War Orphans' Educational Fund provided by Section 35.9, Code of 1954.

Mr. Frost J. Patterson, Executive Secretary, Iowa Bonus Board: Reference is herein made to yours of the 22nd ult. in which you submitted the following:

"We are desirous of an official opinion clarifying Section 35.9 of the 1954 Code.

" 'John Doe' married 'Mary Roe' who had one child which 'John Doe' adopted. Later 'John Doe' was killed in service during the war.

"Would this child qualify for War Orphans' Aid. We refer you to an official opinion which you mailed this office on December 15th, 1949. In this opinion you state 'the primary sense of "children" is off-spring'. Does this statement mean that an adopted child would not qualify because he was not an offspring of 'John Doe'?"

In reply thereto I advise you that the opinion referred to, its reasoning and conclusion concern the right of a stepchild of a veteran to the benefits of the War Orphans' Educational Fund. It might be controlling were it not for the following statutory provision prescribing the legal relationship between an adopted child and the parent by adoption. Section 600.6 provides:

"Status of the adopted child. Upon the entering of such decree the rights, duties, and relationships between the child and parent by adoption shall be the same that exist between parents and child by lawful birth and the right of inheritance from each other shall be the same as between parent and children born in lawful wedlock.'

Consistent therewith, the relationship between the adopted child of John Doe and John Doe, the adoptive parent, is the same as though the child were the natural child of John and Mary Doe. By reason hereof the adopted child may qualify for the benefits of the War Orphans' Educational Fund.

June 20, 1955

COUNTIES: POOR FUND: BOARD OF SUPERVISORS: CONTRACT FOR NURSING CARE: The County Board of Supervisors may enter into a contract for nursing service, provided that such contract does not provide for payment for more than the customary charges in that locality, and provided further that the services to be rendered are not those which may properly be performed only by a practitioner of medicine or dentistry.

Mr. Leo J. Tapscott, County Attorney, Des Moines, Iowa: This will acknowledge receipt of your letter bearing date of May 20, 1955 relating to an informal letter opinion of March 3, 1954, which opinion held that although nursing services were an authorized expenditure pursuant to Section 252.27 of the 1950 Code of Iowa, the provisions of Section 252.39 of the 1950 Code of Iowa precluded the execution of a contract between the Board of Supervisors and the Public Health Nursing Association to provide nursing services for indigent persons in Polk County.

The applicable Code provisions are as follows:

"252.27. Form of relief-condition. The relief may be either in the form of food, rent or clothing, fuel and lights, medical attendance, or in money, and shall not exceed two dollars per week for each person for whom relief is thus furnished, exclusive of medical attendance. They may require any able-bodied person to labor faithfully on the streets or highways at the prevailing local rate per hour in payment for and as a condition of granting relief; said labor shall be performed under the direction of the officers having charge of working streets and highways.

"252.28. Medical Services. When medical services are rendered by order of the trustees or overseers of the poor, no more shall be charged or paid therefor than is usually charged for like services in the neighborhood where such services are rendered.

"252.39. Medical and Dental Service. The board of supervisors may make contracts with any reputable and responsible person licensed to practice medicine or dentistry in this state to furnish medical or dental attendance or services required for the poor, for any term not exceeding one year, and shall require all such contractors to give bonds in a company authorized to do business in this state in such sum as it believes sufficient to secure the faithful performance of such contracts."

The words "medical attendance" as used in Section 252.27, 1954 Code of Iowa, have been uniformly construed by the Courts and by previous Attorney General's opinions to include nursing care. In OAG, 1916, on page 31, at the request of Polk County, it was specifically stated that Polk County Board of Supervisors was authorized to employ visiting nurses to the purpose of looking after poor families during sickness.

Further, subsequent to the enactment of what is now Section 252.39, 1954 Code of Iowa, the prior interpretation of "medical attendance" was reaffirmed, and the authorities reviewed in OAG 1946, page 8, which stated in part as follows, commencing at page 9:

"section 3828.099, Code 1939, outlines the kinds of relief which can be given and the material portions thereof are as follows:

'The relief may be either in the form of food, rent or clothing, fuel and lights, medical attendance or in money. * * *"

"However, it will be noted that hospitalization, medicines, etc. are not included therein unless they come within the purview of the term, 'medical attendance.' This term was construed in the case of Scott vs. Winneshiek County, 52 Iowa 579, to include nursing, washing and board furnished a pauper upon the order of the township trustees. Therein, the Court said:

'We have no reason to suppose that the Legislature used the words "medical attendance" with the design that any narrow or technical meaning should be put upon them. The statute contemplates that there are persons who need county assistance but who should not be sent to the county poor house. It provides that the township trustees shall determine who such persons are and supply the necessary relief. We think that they should be allowed in all proper cases to furnish attendants other than professional attendants to administer the medicine professionally prescribed, and do whatever else *constitutes a part of the medical treatment.* To hold that they cannot be so allowed under the statute would in our judgment convict the legislature of committing a grave oversight.' (The italics are ours)

"Thus, it will be seen that as early as 1879, our Supreme Court stated that the legislature did not use the term 'medical attendance' in this statute with a narrow or technical meaning; that to so hold would be an imputation against the legislature; that the Board of Supervisors should be allowed to furnish attendants other than professional attendants to administer the medicine professionally prescribed and 'do whatever else constitutes a part of the medical treatment.' Certainly, hospitalization, medical supplies, nursing, etc. would constitute 'a part of the medical treatment.'"

* * *

"Sections 3828.097, 3828.098 and 3828.099, Code 1939, originally appeared in the Code of 1873 in substantially their present form. It is a matter of common knowledge that the Boards of Supervisors of this state for many long years have allowed the cost of hospitalization, medical services, etc., as proper items of poor relief. Such payments must have been approved by the state auditors or such expenditures would have been stopped. These auditors work under the supervision of the Auditor of State. It would, therefore, appear that the Auditor of State has for many long years construed the statute to include such expenditures. During that time, the legislature has met in session many times but has made no change in statute."

As was said in State vs. Ind. Foresters, 226 Iowa 1339, 1345:

'The legislature is presumed to know the construction of its statutes by the executive departments of the state, and if the legislature of this state was dissatisfied with the construction which has been placed upon them by the duly elected officials in the past years, the legislature could very easily remedy this situation, as it has the power to pass such legislature, and the only conclusion we can come to is that the legislature must have been satisfied with the construction placed upon the action by the secretary of state.'

As was also said in this case:

"A settled practice under which the state has collected and the companies have paid such important amounts for so long a time ought not to be disturbed without compelling reasons therefor.

'* * * * * *

'Courts have always given great weight to the construction of statutes of this kind by the executive department of the state, * * *.'

"Thus it will be seen that our Courts have always given weight to the construction of statutes by an executive department of the State. Since it has been the settled practice for so many long years for the Board of Supervisors to make such payments as proper items of poor relief, unless there are compelling reasons therefor, it should not be disturbed."

* * *

It is, therefore, our holding that hospitalization, medical services, medical supplies and nursing are included within the term 'medical attendance,' as used in Section 3828.099, Code 1939, that the same constitutes proper items of poor relief. It naturally follows that the county of legal settlement of the soldier and his family are liable for such expenditures.

The sole and remaining question is, therefore, whether or not the provisions of Section 252.39, 1950 Code of Iowa, preclude the execution of a contract for the nursing services which the Board of Supervisors are authorized to provide pursuant to Section 252.27.

In view of the holding of the Supreme Court, in *Scott vs. Winneshiek County, supra,* that the provisions of the present Section 252.27 include "attendance other than professional attendance," it is apparent that the provisions of Section 252.39 relating to contracts with persons licensed to practice medicine and dentistry, refer to those professional services which may properly be performed only by members of the respective professions. OAG 1934, page 189.

Therefore, to the extent that a contract may be entered into between the Polk County Board of Supervisors and the Public Health Nursing Association for nursing services, as opposed to any services which may properly only be furnished by a duly licensed practitioner of medicine or dentistry, such contract would be authorized pursuant to Section 252.27 of the 1954 Code of Iowa; in view of the restrictions of Section 252.28 of the 1954 Code of Iowa requiring that such expenditures be no more than is usually charged for like services in the neighborhood, it will be necessary that such agreement be related to payment for services as rendered or be based upon sufficient data from prior years so that the costs involved can be ascertained with a high degree of accuracy.

To the extent that the prior letter opinion of March 3, 1954, above referred to is inconsistent herewith, it is withdrawn and superseded by this opinion.

July 12, 1956

Banks and Banking — The phrase ". . . provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same" embodied in standard mortgage clauses should be interpreted as a condition and not a covenant or agreement to pay unpaid premiums.

Mr. N. P. Black, Superintendent, Department of Banking: This is in reply to your letter of June 8, 1956, in which you request an opinion and in which you state as follows:

"The above described Standard Mortgage Clause Form has been submitted to this office with the inquiry as to just what the part underscored (which we quote below) means and how should it be construed in Iowa:

" '. . . provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same'.

"Is a bank mortgagee liable for the payment of an insurance premium where the mortgagor has failed to pay the same? It appears that there are at least two lines of decisions by Courts in other States as to the meaning of the above quoted clause.

"JUST HOW IS THIS PHRASEOLOGY TO BE CONSTRUED IN IOWA?"

It is our opinion that the phrase ". . . provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same" as used in the standard mortgage clause, Uniform Standard Form No. 127-B, in the state of Iowa should be interpreted in line with the majority view of the Courts which hold that the clause should be construed as "a condition" and not an express contract.

The word "provided" is defined in Bouvier's Law Dictionary as follows:

"The word always expresses a condition, unless it appears from the context to be the intent of the parties that it shall constitute a covenant."

The leading case of *Coykendall v. Blackmer*, 246 N. Y. S. 631, interprets the word "provided" as a condition and not as an express contract which binds the bank or the mortgagee to pay any unpaid premiums which may become due upon the part of the mortgagor. The Court said, however, that if the mortgagee shall, after demand is made, neglect or refuse to pay the unpaid premium it shall no longer be entitled to avail itself of the stipulation that it may take advantage of the benefits under the policy itself. The Court said on page 633:

"It is certain, as it is said by Judge Swift, that there is no word more proper to express a condition than this word 'provided'; and it shall always be so taken unless it appears from the context to be the intent of the parties that it shall constitute a covenant. Many authorities in other states might be cited to the same effect."

The appellate courts in the states of California, Wyoming, New York, New Jersey likewise hold the rule to be that the phrase is merely a condition and does not describe or create a covenant. It appears that liability

to pay premiums of an insurance policy would result only from an express or implied contract.

In the North Dakota case of *St. Paul Fire Insurance Co. v. Upton*, 2 N. Dak. 229, 50 N.W. 702, which states the minority view, the Court held that the clause was a promise on the part of the mortgagee to pay the insurance premium in the event that the mortgagor failed to pay it. However, in this case the mortgagee negotiated directly with the insurance agent for the insurance and the cases following the minority view point out that the insurance company must give notice of the insured's default before the mortgagee can be held for payment of the premium.

In the Texas case of *Johnson, Sanson and Company v. Fort Worth State Bank*, 244 S. W. 657, the Court, in following the majority view, pointed out that in the Colorado, North Dakota, and Kansas cases the mortgagee had promised, on being notified that the policy would be cancelled for default premium, that he would pay the premium if the mortgagor did not do so. Insurance premiums are payable on delivery of the policy and if a broker makes delivery without payment, credit for the premiums should be regarded as having been extended to the owner and not to the mortgagee in absence of an agreement imposing liability on the latter. Unless it is clearly shown that there is a contract or an express agreement on the part of the bank to pay the premium the payment by the mortgagee is purely a voluntary payment without any right acquired by the mortgagee of subrogation to any original right to the insurance company to demand such payment of the mortgagor.

It is clear that the standard mortgage clause, containing the phrase under consideration, constitutes a new agreement between the insurance company and the mortgagee and is attached to the policy so that the mortgagor may perform the covenant of insurance contained in the mortgage. It should be interpreted in such a manner so as to carry out the intention of the parties and viewed in that light, the whole clause must be considered.

It is, therefore, our opinion that the phrase ". . . provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same" does not make a bank mortgagee liable for the payment of an insurance premium where the mortgagor has failed to pay the same, but should be interpreted as a condition and a right under which the mortgagee may act if it so desires.

July 12, 1956

STREAMS AND WATERCOURSES: **(1) It is within the discretion of the Board of Supervisors to change the course of any watercourse or stream if designed to prevent an encroachment upon a highway, and payment for such change may be made from either the secondary construction or the secondary maintenance fund depending upon the nature of the work. (2) Assessment of benefits to tracts of land is made according to acreage plus the value of improvements, if any,**

and like assessments to highways provided for by Section 455.50, Code of 1954, is analogous to Section 455.49, Code of 1954, providing for assessments against railroad property.

Mr. Max Turner, County Attorney, Clarinda, Iowa: You present the question as to whether the use of maintenance funds may, in the discretion of the Board of Supervisors, be appropriated for the purpose of relocating the course of a stream that has meandered from its established channel in a situation where such expenditures would be required for repair work outside an established highway and within an established drainage district.

Your attention is first invited to the provisions of Section 306.21, which provides in pertinent part:

"Boards of Supervisors on their own motion may change the course of any . . . stream, watercourse, or dry run . . . for the purpose of preventing encroachment of a stream, watercourse, or dry run upon such highway."

Under the provisions of said section, it is within the discretion of the Board of Supervisors of any county to change the course of any watercourse, stream or dry run so long as such change is for the purpose of preventing the encroachment of such a stream, watercourse, or dry run upon such highway.

Now as to the particular fund from which payment of such cost is to be made, your attention is invited to the provisions of Section 309.10 (8), which authorizes the payment from the secondary road construction fund of the cost of "reconstruction" of bridges and culverts and the cost of "protection" of bridges and culverts. Again, in Section 309.13 the secondary road maintenance fund is pledged in subsection (1) thereof "To the payment of the cost of maintaining its secondary roads according to their needs".

You are aware of the fact that transfers may be made at will from the secondary road construction fund to the secondary road maintenance fund and vice versa (Section 309.15). The determination as to the particular fund from which payment is to be made for the work to be done is dependent upon the nature of the work. If the work is not done initially by the county but is undertaken by the drainage district as a "repair" or "improvement" (Section 455.72) the additional assessment, if any, may be paid from either the secondary road construction fund (Section 309.10(5)) or the secondary road maintenance fund (Section 309.13(3)). See also Mayne vs. Board of Supervisors 208 Iowa 987, 223 N. W. 904 and 225 N. W. 953.

You next ask, "When there are two tracts of land of equal size and all within the same flood plane, but one tract has several thousand dollars of building improvements thereon, is it proper to assess benefits according to the benefits to the acreage plus any value of improvements?"

This question is answered in the affirmative by the case of Cordes v. Board of Supervisors, 197 Iowa 136, 196 N. W. 997 in which the court said . . .

"The portion of the land in the district platted into town lots, while such that it would have been designated as high, had it been agricultural lands, was in fact considered as low land. The result of this was that a given area of platted land bore an assessment six times as great as an equal area of unplatted agricultural high land, while the only benefit it received, aside from that resulting from the drainage of surrounding lands, was the connection of the storm sewer, which already supplied drainage for cellars and the like, to the drainage system of the district. This was doubtless in recognition of the fact that the lots were, or probably would be, occupied by buildings and other improvements, the convenient use of which would be enhanced by the improvement."

You next question, "Should county roads within the flood plane and within the drainage district be assessed on the mile basis or the acreage basis, the same as any other tract of land of equal size receiving the same benefits regardless of the improvements which might include grades, surfacing and bridges?"

Section 455.50 providing for assessment of benefits to highways is analogous to Section 455.49 providing for assessment of benefits to railroad property. You are referred to In re Johnson Drainage District No. 9, 141 Ia. 380, 118 N. W. 380 wherein the Court found the legislative intent to make railroad assesments a class entirely distinct from that of the ordinary landowner and that there was no intent that such property be classified in tracts of 40 acres or less in a graduated scale of benefits. Quoting from Chi. & N. W. Ry. Co. vs. Board, 196 Ia. 447, 194 N. W. 213,

"There is no recognized rule for accurately determining to just what extent a railroad right-of-way and roadbed will be benefited by the ordinary drainage improvement. An approximation only is possible."

The Court has said that benefits of drainage to a railway are to be ascertained by reference to the greater ease and lessened expense of maintenance and the greater permanence and security of fills and embankments; in reducing an assessment, it was noted that there were no bridges, trestles or cattle passes on the right-of-way within the district. Chi. and N. W. Ry. Co. vs. Board, 171 Ia. 741, 153 N. W. 110; Chi. R. I. & P. R. Co. vs. Board of Supervisors of Clay County, 200 Ia. 577, 204 N. W. 311; Chi. & N. W. Ry. Co. v. Dreessen, 243 Ia. 397, 52 N. W. 2d 34. In the latter case the Court noted that, with respect to highways, the Board had taken into consideration the mileage, parts subject to flood, future maintenance, damage and inconvenience from floods in the past and from possible future floods in the absence of the construction.

In an opinion in Chicago R. I. & P. R. Co. vs. Board of Supervisors of Kossuth County, 199 Ia. 857, 201 N. W. 115, the Court in considering the railroad company's complaint that its right-of-way was assessed at about $26.00 an acre for the number of acres in the district stated:

"We think it would be unfair to compare the assessment against the right-of-way with the assessment against the adjoining and adjacent farmlands acre by acre."

The Court also noted that on 26 acres of federal aid highway in the district, the assessment amounted to $63.00 per acre.

July 13, 1956

UNEMPLOYMENT COMPENSATION: The supplemental unemployment benefit arising out of a trust fund created and maintained by contributions of an employer is not remuneration under the provisions of Chapter 96, Code of 1954, disqualifying an employee from receiving statutory unemployment compensation.

Hon. Don G. Allen, Counsel, Iowa Employment Security Commission: This is in reply to your letter in which you requested an opinion and in which you state as follows:

"I have been instructed by the Iowa Employment Security Commission to request for that agency an opinion from you concerning the effect of certain agreements negotiated between the United Auto Workers on the one hand and certain motor car and farm implement manufacturing companies on the other hand.

"Specifically the Iowa Employment Security Commission desires to know if an individual receiving supplemental unemployment benefits under the terms of one of these agreements also may receive concurring full benefits under the provisions of the present Iowa Employment Security Law.

"All of these agreements appear to be substantially the same and their salient features would appear to be:

"1. The employer pays into a separately established trust fund 5 cents per hour for each hour worked by the employees covered by the agreement until the maximum amount called for has been reached.

"2. These payments made by the employer into the trust fund are not subject to recovery by the employer under any circumstances.

"3. The trust fund is to be used to pay supplemental unemployment benefits to employees over and above any sum to which they might be entitled under the provisions of a state Employment Security Law.

"4. It might also be stated as a general rule contained in these agreements that an employee is not entitled to receive any payments from the trust fund unless he is also concurrently eligible for benefits under a state Employment Security Law.

"5. The amount which an employee is entitled to receive from the trust fund fluctuates with his length of service with the employer.

"6. The employee has no vested right in any of the monies paid into the trust fund except as he may qualify for benefits under the terms of the agreement.

"I enclose herewith a pamphlet published by the Ford Motor Company about a year ago which contains its agreement, or agreements, with the UAW-CIO and which, for all practical purposes, seems to be identical with other agreements concerning supplemental unemployment benefits.

"The Commission will appreciate your opinion relative to this matter."

We find the identical question has been considered by the Attorneys General or administrative agencies charged with the enforcement of substantially identical statutes in about twenty states. We find ourselves to be in accord with the almost unanimous opinions of the Attorneys General throughout the country who have held that payments of the

type contemplated in your letter are not "remuneration" for the purpose of reducing or preventing payment of unemployment compensation.

In our opinion the receipt of said supplemental unemployment benefits would not affect eligibility to receive unemployment compensation under Chapter 96, Code of Iowa 1954, provided the employee is otherwise qualified.

July 26, 1956

LIQUOR CONTROL—TAXATION: Under subsection 25 of Section 427.1, Code of Iowa 1954, an exemption from taxation must be denied as to the entirety of any property owned by a veterans' organization which is the location of a federal retail liquor sales permit (retail liquor dealers stamp).

Mr. Lester L. Kluever, Cass County Attorney, Atlantic, Iowa: This is to acknowledge receipt of a communication dated June 26, 1956, from Mr. Joseph T. Shubert, the Cass County Assessor, forwarded to this department. In his letter he makes particular inquiry as to the status of certain property of a V. F. W. Post under the property tax exemption laws of this state. We note that the "V. F. W. Club" of that Post is separately incorporated and that it is this separately incorporated Club which is the holder of a retail liquor dealer's stamp. (Federal Retail Liquor Sales Permit). We understand his specific question is: To what extent does the presence of such a stamp disqualify the property of the V. F. W. Post for the property tax exemption? It is our understanding that the separately incorporated Club occupies approximately one-fourth of the Post building and the question is whether one-fourth of the property of the Post or all the Post building is disqualified because of such stamp.

Subsections 6, 23, and 25 of Section 427.1, Code of Iowa 1954, are pertinent to the inquiry under discussion herein. They are as follows:

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

"* * *

"6. *Property of associations of war veterans.* The property of any organization composed wholly of veterans of any war, when such property is devoted entirely to its own use and not held for pecuniary profit.

"* * *

"23. *Statement of objects and uses filed.* Every society or organization claiming an exemption under the provisions of either subsection 6 or subsection 9 of this section shall file with the assessor not later than February 1 of the year for which such exemption is requested, a statement upon forms to be prescribed by state tax commission, describing the nature of the property upon which such exemption is claimed and setting out in detail any uses and income from such property derived from such rentals, leases or other uses of such property not solely for the appropriate objects of such society or organization. The assessor, in arriving at the valuation of any property of such society or organ-

ization, shall take into consideration any uses of the property not for the appropriate objects of the organization and shall assess in the same manner as other property, all or any portion of the property involved which is leased, let or rented and is used regularly for commercial purposes for a profit to any party or individual. In any case where a portion of the property is used regularly for commercial purposes no exemption shall be allowed upon property so used and the exemption granted shall be in the proportion of the value of the property used solely for the appropriate objects of the organization, to the entire value of the property. No exemption shall be granted upon any property upon or in which persistent violations of the laws of the state of Iowa are permitted. Every claimant of an exemption shall, under oath, declare that no such violations will be knowingly permitted or have been permitted on or after January 1 of the year for which a tax exemption is requested. Claims for such exemption shall be verified under oath by the president or other responsible heads of the organization.

"25. *Mandatory denial.* No exemption shall be granted upon any property which is the location of a federal retail liquor sales permit or in which federally licensed devices not lawfully permitted to operate under the laws of the state of Iowa are located."

It is apparent from a study of subsection 23, above quoted, that the applicability of said section is limited in its terms to those societies or organizations claiming an exemption under the provisions of either subsection 6 or subsection 9 of Section 427.1. The exemption claimed by the V. F. W. Post in this case is under the provisions of subsection 6 referred to in subsection 23. It thus appears that though subsection 23 is a procedural section rather than an exemption section, the property of associations of war veterans should be treated as divisible and that a partial disallowance should be made only in those cases where the use of a portion of the subject property is not for the appropriate objects of the organization or is used regularly for commercial purposes.

It is further to be noted that the bases set forth in subsection 23 justifying a partial disallowance, as opposed to the allowance of an exemption of the entire property or the disallowance of an exemption of the entire property or the disallowance of an exemption of the entire property, are specifically nonuse of a portion of the property for the appropriate objects and use of the subject property for commercial purposes. The Iowa Supreme Court has held in the recent case of *Jones vs. Iowa State Tax Commission*, 246 Iowa....., 74 NW 2d 563, 565, dealing with Section 427.3 of the Iowa Code, that statutes passed for the purpose of exempting property from taxation must be strictly construed, and, if there is any doubt upon the question, it must be resolved against the exemption and in favor of taxation. The Court goes on to state that the exemption is not to be made by judicial construction and that the claimant for an exemption must show that his demand is within the letter as well as the spirit of the law. The letter of the law is there defined as being the strict and exact force of the language employed. Since subsection 23 does not suggest a divisibility of a claimant's property with regard to any criteria for qualification other than those of use for the appropriate objects and use for commercial purposes, we are not justified under the decisions of the Supreme Court in assuming any other criteria. The language of subsection 6, above

quoted, authorizes the exemption of the property of veterans organizations when said property is devoted *entirely* to its own use, et cetera. The implication in this subsection is, in the absence of a conflicting statutory provision to be harmonized therewith, that the property of such organization is indivisible for the purpose of determining qualification. Since subsection 23 has no relation to the R. L. D. stamp situation, no conflict exists between said subsection and subsection 6.

A provision in subsection 23 which we believe pertinent reads as follows:

"No exemption shall be granted upon any property upon or in which persistent violations of the laws of the state of Iowa are permitted."

And this provision follows the provisions of subsection 23 relating to the allocation on the basis of the use criteria, but makes no provision for allocation of the exemption where persistent violations of the laws are involved. In addition, it is to be noted that the words *upon any property upon or in which* are very broad and would seem to include the entirety of the property of the organization claiming the exemption. This last quoted portion of subsection 23 is cited not as being a restatement of subsection 25, for the reason that we recognize the possession of a retail liquor dealer's stamp is not in and of itself a violation of state law, but is cited only as an illustration of the apparent legislative intent that where violations of state laws have occurred or are probably the entirety of the property of the organization in a position to control such activities should be denied the exemption. It seems that the exemption must in this case be denied as to the entirety of the property of the V. F. W. organization in which a retail liquor dealer's stamp is located for the reasons heretofore cited.

An additional reason for the disallowance of the exemption on the entire building of the V. F. W. Post would appear in this case in that it would seem the V. F. W. Club, though separately incorporated, is little more than an alter ego or other self for the V. F. W. Post claiming the exemption. It seems significant on this point that the entire profits from the Club operations are credited to and become the property of the Post itself. It would thus appear that the V. F. W. Post participates in the Club operation at least to the extent of participating in the profits of such operation and, regardless of whether or not the V. F. W. Club is an alter ego of the V. F. W. Post, the Post is an adjunct to the operation under the retail liquor dealer's stamp. The participation, even to such an extent, would seem to be in violation of the spirit of subsection 25 of Section 427.1, Code of Iowa 1954, and that violation would in and of itself be a disqualifying factor under the holding of the *Jones case* cited.

It is, therefore, our conclusion that so long as the building of the V. F. W. Post is the location of a federal retail liquor sales permit no exemption should be granted as to any part thereof.

August 22, 1956

PUBLIC OFFICERS AND EMPLOYEES: A county employee also a member of the Iowa National Guard is entitled to his usual compensation undiminished by his military pay when in attendance at an annual encampment, and this rule is unaffected by the provisions of Chapter 59 of the Acts of the 56th General Assembly providing for leave of absence from private employment.

Mr. Edward P. Powers, Appanoose County Attorney, Centerville, Iowa: This will acknowledge your letter of the 6th inst. in which you submit the following:

"A county employee is a member of the Iowa National Guard and he has raised the question that he is entitled not only to a leave of absence in order to attend his annual encampment but also is entitled to his usual pay during the time that he is on the encampment. The leave of absence not to in any way affect his right to vacation, sick leave and other employment benefits. The Board of Supervisors has requested an interpretation of Chapter 59 of the Laws of the 56th General Assembly.

"Does the final three and one-half lines of said chapter which provides, 'Such period of absence shall be construed as an absence with leave, and shall in no way affect the employee's right to vacation, sick leave, bonus, or other employment benefits relating to his particular employment.' entitle the employee to his usual pay while attending the annual encampment?

"Chapter 29 of the Code, which is amended by Chapter 59 of the 56th General Assembly, in Section 29.1, sub-paragraph 12, the following appears: 'Except when otherwise expressly defined herein military words, terms and phrases shall have the meaning commonly ascribed to them in the military profession.' Did the legislators in using the word 'absence with leave' intend to have the military meaning ascribed to such term? If so, it would appear that the employee would be entitled to his usual pay.

"We would appreciate your giving us your views upon this question."

In reply thereto we enclose herewith copy of opinion issued June 8, 1956, to Mr. Leo Tapscott, Polk County Attorney, holding that under Section 29.28, Code of 1954, an *employee of the state or a subdivision thereof* is entitled to his pay for the first thirty days of military leave without deduction therefrom of his military pay. In this view we find Chapter 59 of the Acts of the 56th General Assembly amending Section 29.43 of the Code of 1954 has no bearing upon the problem presented. (Underscoring ours.)

Chapter 59 of the Acts of the 56th General Assembly provides as follows:

"* * *

"Section twenty-nine point forty-three (29.43), Code 1954, is hereby further amended by inserting in line eleven (11) preceding the word 'Any' the following: 'Any member of the national guard or organized reserves of the armed forces of the United States ordered to temporary active duty for the purpose of military training or ordered on active state service, shall be entitled to a leave of absence during the period of such duty or service from his private employment, other than employment of a temporary nature, and upon completion of such duty or service

the employer shall restore such person to the position held prior to such leave of absence, or employ such person in a similar position, provided, however, that such person shall give evidence to the employer of satisfactory completion of such training or duty, and further provided that such person is still qualified to perform the duties of such position. Such period of absence shall be construed as an absence with leave, and shall in no way affect the employee's rights to vacation, sick leave, bonus, or other employment benefits relating to his particular employment.' "

It is to be observed with reference to this amendment that it is added to Section 29.43, Code of 1954, which provides as follows:

"Discrimination prohibited. No person, firm, or corporation, shall discriminate against any officer or enlisted man of the national guard because of his membership therein. No employer, or agent of any employer, shall discharge any person from employment because of being an officer or enlisted man of the military forces of the state or hinder or prevent him from performing any military service he may be called upon to perform by proper authority. Any person violating any of the provisions of this section shall be punished by a fine of not to exceed one hundred dollars, or by imprisonment in the county jail for a period of not to exceed thirty days."

Obviously the Legislature, in the enactment of Chapter 59 and amending the foregoing numbered section, did not intend that it should apply to officers and employees of the State or subdivision thereof or of a municipality therein, who are the classes whose leave of absence is controlled by Section 29.28, and it is to be further observed that the benefits of the amendment are restricted to members of the National Guard or organized reserves of the armed forces of the United States who have taken leave of absence from *private employment.* (Italics ours.)

September 6, 1956

MOTOR VEHICLE CHAUFFEUR'S LICENSES: Persons engaged in raising mink are not "farmers" within the meaning of Section 321.1(43).

Mr. Frank J. Karpan, Monroe County Attorney: Receipt is acknowledged of your letter of August 28th as follows:

"The advice of your department is requested relative to the interpretation of Section 321.1(43) of the Code of Iowa, 1954. The question has arisen with respect to the exemption of farmers and their hired help with respect to the necessity for having a chauffeur's license.

"The fact situation is that an individual has a six and one-half acre tract of land on which he raises minks. He has approximately 800 breeding minks and at the proper time of the year kills the animals, skins them and ships the furs to processors. The feed for these animals is purchased and none is raised on the tract of land. The truck used is required to be registered at a gross weight classification exceeding five tons and is used exclusively in connection with the operation of this enterprise. This individual claims that he is a farmer and that he and his hired help come within the exemption.

"Under the above factual situation would a person engaged in such an enterprise be considered a farmer?"

Section 321.1(43), Code 1954, to which your letter refers, provides as follows:

"43. 'Chauffeur' means any person who operates a motor vehicle in the transportation of persons, including school busses, for wages, compensation or hire, or any person who operates a truck tractor, road tractor or any motor truck which is required to be registered at a gross weight classification exceeding five tons, or any such motor vehicle exempt from registration which would be within such gross weight classification if not so exempt except when such operation by the owner or operator is occasional and merely incidental to his principal business.

"Subject to the provisions of section 321.179, a farmer or his hired help shall not be deemed a chauffeur, when operating a truck owned by him, and used exclusively in connection with the transportation of his own products or property."

Your question is whether one who raises mink as an exclusive pursuit is a "farmer". Although the statute does not define "farmer" and there appears to be no Iowa decisions directly in point, the question has been considered in court decisions in other states.

In *Eberlein v. Industrial Commission*, 237 Wisconsin 555, 297 N.W. 429, it was held that one who raises foxes as a separate pursuit is not a "farmer". So much of said decision as is pertinent hereto is hereinafter exhibited as follows:

"The question in this case is whether Eberlein and Eberlein, the employers, and Willard Tetting, the injured employee, were subject to the provisions of the Workmen's Compensation Act. St. 1339, § 102.01 et seq. Fred A. Eberlein and M. G. Eberlein own and operate a number of farms, one of which is called the Wildwood Farm. This farm contains three hundred acres, and most of the acreage is devoted to general farming operations. The partnership, however, devote a small portion of the farm to the raising of foxes and another small portion of the farm to the raising of ginseng, a root considered by the Chinese to have medicinal properties and which, when harvested and prepared for use, is shipped to China. * * * It had an insurance policy in effect covering the fox farm and the ginseng gardens. Tetting, the employee, did general work on the farm. He also spent some time working on the fox farm and some time in the ginseng gardens. He was injured while husking corn.

"* * * *

"The fox farm is operated by building pens and sheds for the foxes which are kept in pairs and which have to be fed and cared for, and ultimately pelted and sold. This also, requires specialized and different work from ordinary farm labor.

"It is pretty clear to us that fox farming, when separately pursued, is not farming within the meaning of the statute, and that one who raises foxes as a separate pursuit is not a farmer. Thus, if one should buy a small tract of land appropriate for the raising of foxes and engage in no other agricultural pusuits, he would have no election to stay out of the Workmen's Compensation Act. When the tools, the amount and type of labor required, and the hazards of workmen, income and investment are considered, he must be treated as engaged in an industry. See Hein v. Ludwig, 118 Pa. Super. 152, 179 A. 917. * * * Such activities are not farming as that term is commonly understood and as the legislature must have understood it when the act was drafted. The real difficulty comes when a large tract of land, operated by the same person, is de-

voted to general farming, raising foxes, and raising ginseng. It is here proper to consider the activities as a whole and where the major part of the activity is ordinary farming consider the business as farming, whatever the specialized raising of foxes and ginseng may be considered separately? Perhaps so, but we have not that case here and need not determine it. Neither the contiguity of the tracts nor the common ownership of the land and enterprises can overcome the unmistakable fact that the three enterprises were separately run as distinct businesses. So considered, there is no question that fox farming and ginseng gardening are not farming, and liability could be sustained by the owner under the Act for these operations without imposing a liability upon him for the general farm operations. Since this conclusion is conceded to establish the correctness of the trial court's ruling, we deem further discussion unnecessary."

In *Cedarburg Fox Farms v. Industrial Commission,* 241 Wisconsin 604, 6 N.W. 2d 687, the court said at page 689:

"In this case, as we concluded in Eberlein v. Indust. Comm., supra, an employer conducting fox farming on the scale and in the manner in which plaintiff operated its fox farming enterprise, with its proportionately large capital investment in specialized machinery and equipment, and labor and feed, as well as breeding stock, can rightly be held to be engaged in an industry, and not in a customary type of farming as that term is ordinarily and commonly understood. In the absence of a definition or other express term to the contrary in sec. 108.02(e) as to the intended meaning of the legislature in using the term 'employment as a farm laborer', it was natural and proper for the commission in creating Rule 10 (above quoted) to interpret and conclude that term to mean 'only those persons employed on a farm in customary types of farm work or employed and paid directly by a farmer in transporting his raw produce'. Thus the Commission rightly endeavored to define the term 'farm laborer' by reference to its customary and ordinary usage; and attempted to distinguish the common and ordinary significance of the terms 'farm' and 'farm labor' from the specialized meanings thereof when, in exceptional and rare instances, the use of the word 'farm' is extended to embrace such areas as a worm, rattle snake, crocodile or even oyster farm. These instances clearly are not within the common and ordinary usage of the term 'farm'. Substantially to the same effect as Rule 10, created by the Industrial Commission, is the United States Treasury Department's Regulation 90, Article 206, by which the term 'agricultural labor' used in the federal Social Security Act 42, U.S.C.A. § 301 et seq., was defined (until an amendment of the act became effective on January 1, 1940) as labor 'on a farm', and a 'farm' was defined as embracing 'the farm in the ordinarily accepted sense'; and in applying that definition the Treasury Department issued specific rulings holding that fur raising was not to be regarded as agricultural labor. Rulings to the same effect appear to have been made also under state Unemployment Compensation Acts."

Also see *In re Bridges,* 287 N.Y. 782, 40 N.E. 2d 648, wherein an owner of forty acres of agricultural land conducted general farming operations on 35 acres and used the remaining 5 acres to house and restrain some 3,000 mink, fox, and raccoons. In a per curiam decision the Court of Appeals held that an employee hired to feed and care for said animals was not a farm laborer.

Your attention is also directed to sections 109.60 and 109.61, Code 1954, which provides for licensing of game breeders. There appears, however, to be no comparable provision in the statutes requiring a license for the

purpose of engaging in any of the activities commonly understood as "farming". It would, therefore, seem that the legislature in providing the licensing provision recognized care and breeding of fur bearing animals as something distinct and different than "farming" in the "approved usage of the language". (See sec. 4.1, Code 1954).

We are, therefore, of the opinion that in the absence of express statutory provision to the contrary and on the basis of the quoted decisions and approved usage of the language, in the specific circumstances set forth in your inquiry one who raises mink is not a "farmer" within the meaning of Section 321.1(43), Code 1954.

September 6, 1956

KOREAN BONUS: Submission of the Korean bonus for veterans of the Korean War authorized by Chapter 61, Acts of the 56th General Assembly, must be submitted to the electorate under the provisions of Section 49.45, et seq., and not upon voting machines.

Honorable Melvin D. Synhorst, Secretary of State: This will acknowledge receipt of yours of the 21st ult. in which you submit the following:

"Your opinion is respectfully requested on the following question. Would it be permissible to submit House File 143, Acts of the Fifty-sixth General Assembly of Iowa, to the voters by placing this public measure on voting machines in those counties where voting machines are in use in Iowa, or should the provisions of Chapter 49, Code of Iowa, 1954, be interpreted to mean that this public measure should be printed on separate ballots, upon yellow colored paper, one of which is to be given to each voter by the judges of election in every county in Iowa?"

In reply thereto, we advise as follows:

Chapter 61, Acts of the 56th General Assembly, is the act authorizing the State of Iowa to become indebted in the amount of twenty-six million dollars ($26,000,000) to be used for the payment of service compensation for veterans of the Korean War, and Section 13 thereof, provides with respect to the method of its submission to the electors, the following:

"This law, after legal publication shall be submitted to the people of this state at the general election to be held in November, nineteen hundred fifty-six, and shall not take effect unless at such election it shall receive a majority of all votes cast for and against it. Separate ballots shall be provided for the electors which shall be in substantially the following form:

"(Notice to voters: For an affirmative vote upon any question submitted upon this ballot, mark a cross mark in the square after the word 'Yes'. For a negative vote, make a similar mark in the square following the word 'No.)

" 'Shall the following public measure, being an act of the 56th General Assembly, be adopted and approved?'

"(Here insert in full this law) Yes ☐
No ☐"

Comparison of the language of the foregoing section above quoted with Section 49.45, Code of 1954, discloses that the 56th General As-

sembly in the foregoing section incorporated for the specific act here referred to the exact language of the general authority for the submission of public measures. Section 49.45 provides as follows:

"General form of ballot. Ballots referred to in sections 49.43 and 49.44 shall be substantially in the following form:

"'Shall the following amendment to the constitution (or public measure) be adopted?' Yes ☐ No ☐

"(Here insert in full the proposed constitutional amendment or public measure.)"

Likewise, the 56th General Assembly incorporated in Chapter 61 the following from the general power extended in Section 49.47.

Section 49.47 provides:

"Notice on ballots. At the top of ballots on such public measures shall be printed the following:

"'(Notice to voters. For an affirmative vote upon any question submitted upon this ballot make a cross (X) mark in the square after the word "Yes". For a negative vote make a similar mark in the square following the word "No".'"

The following additional statutes of general application to the submission of the public measure to the electorate unquestionably spell out the details of the authorized submission of the Korean Bonus Law to the electors.

Section 49.49 provides as follows:

"Printing of ballots on public measures. All of such ballots for the same polling place shall be of the same size, similarly printed, upon yellow colored paper. On the back of each such ballot shall be printed appropriate words, showing that such ballot relates to a constitutional or other question to be submitted to the electors, so as to distinguish the said ballots from the official ballot for candidates for office, and a facsimile of the signature of the auditor or other officer who has caused the ballot to be printed."

Section 49.50 provides as follows:

"Indorsement and delivery of ballots. Ballots on such public measures shall be indorsed and given to each voter by the judges of election, as in case of ballots generally, and shall be subject to all other laws governing ballots for candidates so far as the same shall be applicable."

We are of the opinion, therefore, that the public measure being Chapter 61, Acts of the 56th General Assembly, shall be printed upon a separate ballot pursuant to the provisions of Chapter 49, Code of 1954.

This conclusion is consistent with the language of Section 52.24, Code of 1954, which provides:

". . . Nothing in this chapter shall be construed as prohibiting the use of a separate ballot for constitutional amendments and other public measures."

which was interpreted by the case of *Younker v. Susong*, 173 Iowa 663, 669, 670, as follows:

"It is contended by defendants that Sections 1136-a7 to 1137-a27 of the Code Sup., 1923, providing for the use of voting machines 'at all state, county, city, town, primary and township elections hereafter held in the state of Iowa' apply only to elections of officers. Section 1137-a27 provides:

" 'All of the provisions of the election law now in force and not inconsistent with the provisions of this act shall apply with full force to all counties, cities, and towns adopting the use of voting machines. Nothing in this act shall be construed as prohibiting the use of a separate ballot for constitutional amendments and other public measures.'

"The last clause of this section expressly authorizes the use of the separate ballot in submitting 'other public measure', when the voting is by voting machine. This bill expressly comes under this head."

And consistent herewith is the following opinion of this department appearing at page 417 of the 1928 Report of the Attorney General.

"September 26, 1928

"Secretary of State:

"I wish to acknowledge receipt of your favor of the 25th in which you ask our opinion on the following question:

" 'While this department does not have supervision of election supplies, we are daily receiving inquiries as to the legality of the use of voting machines to handle the special ballot to be voted on November 6th. This ballot will be approximately 17 x 22" in size, and carries both the Constitutional Amendment and the Public Measure, the law requiring both to be placed on one ballot.'

"The question submitted appears to be more a mechanical than legal question. If the ballot containing the constitutional amendment and public measure to be voted upon can be contained in the voting machine, there is nothing in the statute to prohibit the use of the machine if the will of the voter can be properly registered thereon. The statute, however, in the chapter relating to the use of voting machines, does provide for and authorizes the use of separate ballots for constitutional amendments and other public measures. We refer you to Section 926, Code, 1927. It would appear that the legislature contemplated the use of separate ballots for constitutional amendments and other public measures in precincts where voting machines are used."

It is the opinion of this Department therefore that the foregoing measure may not be submitted to the electors on voting machines.

September 6, 1956

SCHOOLS—District of residence is liable under section 285.12 for tuition of pupil attending school designated by county board of education for period during which an appeal is pending.

Mr. Charles Mather, Sac County Attorney: Receipt is acknowledged of your letter of August 25 as follows:

"The Jackson Township School Board of Sac County, Iowa, has taken an appeal to the State Superintendent of Public Instruction from a decision by the Sac County Board of Education in regard to the desig-

nation of pupils living in Jackson Township. The Jackson Township School Board had designated attendance by pupils living in a subdistrict school area where the school has been closed to an adjoining subdistrict school in the same township. Under provisions in 285.4 of the Code, the Sac County Board changed the designations of some pupils to the Sac City Public School and provided that the Jackson Township Board should pay it tuition and cost of transportation for these students.

"Under 285.12 it states: 'Pending final order made by State Superintendent of Public Instruction, or the District Court, or the Supreme Court, as the case may be, upon any appeal prosecuted to such superintendent or to such Courts, the order of the County Board of Education from which the appeal is taken shall be operative and be in full force and effect.' In the event that it is the ultimate decision of the superintendent or Court that the designation of pupils made by the Jackson Township Board should be upheld, what individual or body would be liable to the Sac City Public Schools for tuition during the period of attendance by pupils under the designation by the Sac County Board of Education?"

Section 285.4, Code 1954, to which your letter refers, provides in pertinent part as follows:

"All designations must be submitted to the county board of education on or before July 15, for review and approval. The county board of education shall after due investigation alter or change designations to make them conform to legal requirements and established uniform standards for making designations and for locating and establishing bus routes. After designations are made, they will remain the same from year to year except that on or before July 15, of each year, the rural board or parents may petition the county board for a change of designation to another school. Appeals from the decision of the county board on designations may be made by either the parents or board to the state superintendent of public instruction as provided in section 285.12 and section 285.13."

Section 285.12, Code 1954, to which your letter also refers, provides as follows:

"Pending final order made by the state superintendent of public instruction, or the district court, or the supreme court, as the case may be, upon any appeal prosecuted to such superintendent or to such courts, *the order of the county board of education from which the appeal is taken shall be operative and be in full force and effect.*" (Emphasis ours)

Section 285.9, Code 1954, provides in pertinent part:

"The powers and duties of the respective county board of education shall be to:

"****

"2. Review and approve all transportation arrangements between districts in the county and in all districts in the county not operating high schools. If such transportation arrangements, designations, and contracts are not in conformity to law or established uniform standards for the locating and operating of bus routes, the county board shall, after receiving all facts, make such alterations or changes as necessary to make the arrangements, designations, and contracts conform to the legal and established requirements and shall notify local board of such action."

"****"

Four parties are involved in the situation you describe. They are:

1. The district of residence
2. The district of attendance
3. The county board of education
4. The parents

Obviously, schooling during the period of appeal must be at the expense of one of the parties. From the quoted portion of section 285.12 it is apparent from the plain language of the statute that, pending reversal of appeal, the designation by the county board of education remains in force. From the second paragraph of section 285.4 it is equally apparent that the school in the district of residence must be closed or no occasion would arise necessitating the making of any designation by either the local board or county board.

It is basic in our public school law that every educable person residing in a school district and of school age is entitled to twelve grades of schooling at the expense of the district of his residence and that the district may provide such schooling either by operating a school or by designating a school. (See generally chapters 279, 282 and 285, Code 1954, specifically, sections 279.15 to 279.18, 282.1, 282.6 to 282.17, 282.19, 282.20 and 285.4.)

Given that the pupils in question are entitled to free schooling somewhere, that there is no school for their attendance in their home district, that the only designation in force pending appeal is the designation made by the county board of education, it follows that there can be no liability on the part of the parents for attendance at said designated school during the pendency of the appeal.

Section 282.20, Code 1954, as amended by chapter 143 Acts of the 56th General Assembly, prohibits rebates of tuition. It follows that there is no liability on the part of the district of attendance to furnish free schooling during the said period (and, indeed no authority on its part to forgive tuition).

The county board of education is a creature of statute with the same limitations as other such creatures. It has neither statutory authority to pay tuition for pupil designees from local districts nor has it any funds with which to pay tuition.

Thus, in the premises described, of the four parties involved, only the district of residence has the primary *duty* to provide schooling and the *authority* to pay for it. We are, therefore, of the opinion that during the period the designation made by the county board of education remains in force pending final decision of an appeal under section 285.12, Code 1954, schooling furnished under such designation must be at the expense of the district of the pupil's residence.

September 16, 1955

LABOR LAW. By enactment of section 302c of the Taft-Hartley Act, Congress did not pre-empt the field of wage assignment so as to render sections 539.4 and 736A.5 inapplicable to employers within the State of Iowa and engaged in interstate commerce as respects assignments for union dues.

The Honorable Leo A. Hoegh, Governor of the State of Iowa, State House, Des Moines, Iowa: We are in receipt of your letter of July 25th requesting an official opinion of this office on a matter of labor law. Your inquiry relates to section 302(c) of the *National Labor Management Relations Act of 1947*, commonly referred to as the *Taft-Hartley Act*. Section 302(c) excepts assignments of union dues for certain expressly restricted terms from the general prohibition in section 302 making it a misdemeanor for an employer to pay money to a union representative or a union representative to accept money from an employer. However, section 539.4, Code of Iowa, requires assignment of wages by the head of a family to be signed and acknowledged, before an officer entitled to take acknowledgments, by both husband and wife. Section 736A.5, Code of Iowa, requires that section 539.4 be complied with in connection with any assignment of wages for purposes of paying union dues and section 736A.6 make failure of such compliance a misdemeanor. You inquire whether in enacting section 302(c) of the Taft-Hartley Act Congress so exercised its power to regulate commerce under *Article I, section 8, Constitution of the United States* as to pre-empt the field in respect to "check off" of union dues and render sections 539.4, 736A.5, and 736A.6 of no force and effect as respects wage assignments for "check off" purposes made by persons employed in Iowa by employers engaged in interstate commerce.

Your question, then, concerns the constitutionality of the said Iowa statutes under *Article I, Section 8, Constitution* of the *United States* and the exercise of power thereunder by Congress. Initial inquiry must be directed to whether the General Assembly intended sections 736A.5 and 736A.6 to apply to wages paid by employers within the territorial jurisdiction of the State of Iowa but engaged in interstate commerce. The answers to this question is provided by section 736A.8 as follows:

"The provisions of this chapter shall not apply to employers or employees covered by the Federal Railroad Labor Act."

Thus, had the General Assembly intended to make any similar exception for employers or employees under the National Labor Relations Act or National Labor Management Relations Act, it would have specifically so stated. It so becomes apparent that by adoption of section 736A.8, the General Assembly intended Chapter 736A to apply to all employers and employees within the territorial jurisdiction of the State of Iowa, irrespective of whether engaged in intrastate or interstate commerce, except for employers and employees covered by the Railroad Labor Act. (Also note that section 736A.8 is nearly identical in language with section 212 of *N. L. M. R. A.*)

Having concluded that the General Assembly intended inclusion of persons engaged in interstate commerce under section 736A.6, attention may properly be focused upon the question submitted. Constitutionality of a statute may be determined only by the courts. "Every law found on the statute books is presumptively constitutional, until declared otherwise by the court . . . "—*State of Florida v. State Board of Equalizers*, 84 Fla. 592, 94 So. 681. Also see 22 R.D.L. 458, 30 A.L.R. 378, 129 A.L.R. 941, 11 Am. Jur. S. 117 and cases cited therein.

Nevertheless, from an examination of the Federal and Iowa Statutes in question and case decisions in point from other jurisdictions, it is our conclusion that sections 539.4, 736A.5 and 736A.6, Code 1954 are not in conflict with section 302 of the National Labor Management Relations Act.

Sections 539.4, and 736A.5, Code 1954, provide as follows:

"No sale or assignment, by the head of a family, of wages, whether the same be exempt from execution or not, shall be of any validity whatever unless the same be evidenced by a written instrument, and if married, unless the husband and wife sign and acknowledge the same joint instrument before an officer authorized to take acknowledgments."

736A.5—"It shall be unlawful for any person, firm, association, labor organization or corporation to deduct labor organization dues, charges, fees, contributions, fines or assessments from an employee's earnings, wages of compensation, unless the employer has first been presented with an individual written order therefor signed by the employee, and by his or her spouse, if married, in the manner set forth in section 539.4, which written order shall be terminable at the time by the employee giving at least thirty days written notice of such termination to the employer."

Section 302 of the National Labor Management Relations Act provides as follows:

"(A) It shall be unlawful for any employer to pay or deliver any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

"(B) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or thing of value.

"(C) The provisions of this section shall not be applicable . . . (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, that the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner . . .

"(D) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or imprisonment for not more than one year, or both."

The form of the section reveals the intent of Congress. Paragraphs (a) and (b) define a public offense. Paragraph (d) prescribes the punishment for commission of the offense. Paragraph (c) defines the scope of the statute by describing the areas where paragraphs (a), (b), and (d) do not apply. In other words, Congress has described in paragraphs (a), (b), and (d) the field it wishes to "pre-empt" and in paragraph (c) has expressly vacated that portion of the field it has no intention to occupy but wishes to leave open for state regulation. In reaching this conclusion we are fully cognizant of the opposite conclusion stated by the Supreme Court of Utah in *State v. Montgomery Ward and Company*, 233 P 2d 685. It should be noted that the Utah decision was a 3-2 decision with a vigorous dissent. It should also be noted that the Utah decision was based on a conflict between the Utah Statute and paragraphs (a), (b), and (d) of the Federal Statute. The check-off agreement in question in the Utah case did not fall within the area vacated by paragraph (c) for the reason that it was for more than one year. The Utah statute provided as follows:

"Whenever an employee of any person, firm, school district, private or municipal corporation within the state of Utah executes and delivers to his employer an instrument in writing whereby such employer is directed to deduct a sum at the rate not exceeding three percent per month, from his wages and to pay the same to a labor organization or union or any other organization of employees as assigned, it shall be the duty of such employer to make such deduction and to pay the same monthly or as designated by employee to such assignee and to continue to do so until otherwise directed by the employee through an instrument in writing.

"Any employer * * * who willfully fails to comply with the duty here imposed shall be guilty of a misdemeanor."

The majority holding in the Utah decisions was as follows:

"There is no merit to the appellant's contention that sections 49-14-1 and 3 UCA 1943, complement but do not conflict with sec. 302 of the L. M. R. A. Section 302(c) *permits* an employer to "check off" membership dues from the wages of those employees who have delivered to him an assignment executed in accordance with the provisions of that section. There is nothing in that section compelling an employer to 'check off' dues; he has an option, to 'check off' dues or refuse to do so, absent an agreement requiring it. However, secs. 49-14-1 and 3 UCA 1943 destroy that option by making the *refusal* of the employer to honor an assignment a misdemeanor. The Utah statutes further conflict with section 302 of the L. M. R. A. by compelling employers to recognize assignments which may be made irrevocable for a period longer than one year and which may be made for the payment of obligations other than 'membership dues' . . .

"Thus, it follows that secs. 49-14-1 and 3, U.C.A. 1943, being repugnant to sec. 302 of the L.M.R.A., must yield to the latter and be held not applicable to employers and employees in any 'industry affecting commerce' as defined in the L.M.R.A."

Note that the holding is specifically based on the fact that the Utah statute made it a misdemeanor for an employer to refuse to do what the Federal statute made it a misdemeanor for the employer to do.

The real basis of the decision is the direct conflict between the statutes. The statements by the court that Congress had pre-empted the field were plainly unnecessary to the decision and hence were dicta as well as contrary to the holdings in the two Rhode Island cases infra. There is no such conflict between the Iowa Statutes and section 302C of the N.L.M.R.A. Section 302C (4) simply exempts check-off assignments for not more than one year from the general prohibition on employers and union representatives. It neither requires nor permits such assignments. Section 302C (4) merely indicates that the general prohibition of the section has *no* effect on checkoff assignment of not to exceed a specified duration. By *expressly excluding* such assignments from the purview of the section it would seem more accurate to say that Congress *vacated* rather than *pre-empted* that particular portion of the field. This appears also to be the view taken by the dissenting judges in the Utah case, as follows:

"However, the provisions dealing with exceptions leaves a vacant space in the Federal Act, which permits unimpaired vision of our statute . . ."

In other words, the effect of the exception Congress has enacted in section 302C is not to say 'we authorize' but rather says '*we* do not prohibit'.

As was stated by our Supreme Court in *Fleming v. Richardson*, 237 Iowa 808, at page 831, quoting *Kelly v. Washington*, 230 U. S. 352.

"There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulations outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together' . . ."

In rendering its decision, the Supreme Court of Utah was apparently unaware of two previous decisions of the Supreme Court of Rhode Island. This unawareness is manifested by the following statement of the court:

"Neither party has cited any judicial decisions determining what effect if any, N.L.M.R.A. has upon state statutes regulating or controlling the 'check off' . . ."

The essence of the Rhode Island decisions is as follows:

". . . We find that the National Labor Relations Act (as amended by the Labor Management Relations Act) by its terms makes mandatory as an essential subject matter for collective bargaining the rates of pay, wages, hours or other conditions of employment, and certain grievances therein set forth; that a check off of dues out of the wages of the employees is not included thereunder as mandatory; that the provision in the instant collective bargaining agreement purporting to authorize such a check off of dues is in substance and effect an assignment of future wages and violates the assignment of wages statute and weekly wage payment law of this state, which laws are not inconsistent with

the inherent essential scope of the terms of the National Labor Relations Act; and therefore that such provision is not valid and binding upon the complainants and the employer." *Shine et al v. John Hancock Mut. Life Ins. Co.* (S. Ct. of R. I.) 68A 2d 379 (1949).

"However, respondents urge here, as did respondents in the Shine case, that the National Labor Relations Act and the amendment thereof in 1947, 61 Stat 136, 143, chap. 120, sec. 101, superseded state statutes which are inconsistent with them. Speaking generally the soundness of such view may be conceded. In the case at bar respondents argue in support of their position that a state law barring check off provisions in a union agreement could not constitutionally apply to interstate commerce by reason of a conflict with the National Labor Relations Act . . .

". . . We are of the opinion that check off of union dues, while a proper subject for voluntary collective bargaining between an employer and employee, is not mandatory under the provisions of the National Labor Relations Act and its amendment of 1947, so that a refusal to include it would constitute an unfair labor practice; and therefore that such act and amendment did not supersede the provisions of a state statute in full force and effect, such as our weekly wage payment law, which does not permit the check off of union dues of an employer even under an agreement of the parties. *In our judgment since congress has not made the check off mandatory in collective bargaining, it follows that this state through its weekly wage payment law is not unlawfully attempting to enter a field appropriated by congress; that no question of interference with interstate commerce is involved herein; and that no constitutional problem is raised." Chabot et all v. Prudential Ins. Co. of America* (S. Ct. of R. I., 1950) 75A 2d 317 (Italic ours)

The statutes considered in the Rhode Island cases were similar to our 539.4 and 736A.5; whereas the Utah statute differed from our statute as hereinabove pointed out. After the first Rhode Island decision, the Rhode Island legislature repealed their statute corresponding to our section 736A.5 but in the second Rhode Island decision it was nevertheless held that neither the said repeal nor the existence of section 302 of the N.L.M.R.A. prevented application of the remaining Rhode Island Statute to check off agreements.

It is, therefore, our opinion that sections 539.4, 736A.5 and 736A.6 do not invade a field that has been pre-empted by congress but rather operate in a field that has been expressly vacated by the language of the N.L.M.R.A.

September 24, 1956

VOTER REGISTRATION: Where in cities permanent registration exists, change of residence of an elector must be made known to the commissioner of registration whether the change of location be within the same precinct or to another precinct.

Mr. Robert N. Johnson, Lee County Attorney: We have yours of the 30th ult. with the subsequent letter of Doyle Heutt, City Clerk of Fort Madison. You state in your letter the following:

"During the last primaries the question arose as to whether a voter who is properly registered in a ward or precinct at a certain address

therein but who removes from that address to another address in the same ward or precinct must again register or whether such voter is qualified to vote again in that same ward. The City Clerk of Fort Madison tells this office that it has been his understanding that a new registration is required. He states that this is also the understanding of the City Clerk at Burlington and Keokuk and that at one of the meetings of the Association of Municipal Officers the question was discussed and it seemed to be the general opinion that a new registration would be required. Last spring when this question arose I called your office and talked with Mr. Strauss. Mr. Strauss gave as his informal opinion that no new registration would be required under these situations. This is the same opinion that I had previously given to the Clerk of the City of Fort Madison. Fort Madison has a permanent registration. Section 48.7 of the present Code seems to be the law that would control this question. I have found that in the 4th and 5th lines from the end of that section the expression 'and the applicant shall thereupon be qualified to vote in the *new election precinct*' indicates a legislative intent that the requirement of a new registration applies only where a voter moves out of the ward or precinct in which he is registered and into a ward or precinct where he is not registered. By implication, in my opinion, there is no requirement for a new registration where a voter merely changes his address within the same ward or precinct.

"In order to have a uniform compliance in respect to voters' qualifications I respectfully request an opinion as to whether or not a voter changing his residence within the same precinct is required to register."

and the city clerk's letter, the following:

"We feel that your letter to the Attorney General is not clear as to the question involved.

"We are requesting clarification on the phrase: '48.7 CHANGE OF RESIDENCE. There shall be provided removal notices to be given out upon request for the use of any registered voter moving to a new location.'

"We are not interested in a *new registration* as you refer to it in your letter, but we do insist that in order to have any control over registration records, a correct address must be kept at all times.

"Will you please amend your letter to the Attorney General to show the question as we have it."

In reply to the foregoing, we advise you that the booklet entitled "Voting in Iowa" issued by the Institute of Public Affairs of the State University of Iowa, at page 15, in a discussion of the law controlling permanent registration states: "And all voters have to change their registration whenever they move." We are of the opinion that the foregoing statement has full justification under the statute.

Section 48.6, Code 1954, provides among other information required of each application for registration under subsection 3(b) the residence of the applicant giving the name and number of the street, avenue, or other location of the dwelling and such additional clear and definite description as may be necessary to give the exact residence of the applicant.

Section 48.7 provides for removal notices for the use of any registered voter moving to a new location. The statute requires that such notices shall contain a blank form showing where the applicant last resided and the exact location to which he is moving.

Section 48.9 bestows power on the commissioner of registration to notify registrants at any time after the close of registration, when deemed necessary, of the manner in which the name appears on the registration and if there be any mistake therein and the address. If there be such mistake, the registrant is directed to present the card for correction. If the card is returned otherwise to the commissioner, such return will be deemed evidence on which to challenge the registered voter on election day.

Section 48.9 further in the event of such return of the notice, invests power in the commissioner to check up the name and address of any voter and if said voter is found to have removed from the address recorded on the original registration list, the commissioner is then required to cause to be entered on the election card in the proper precinct the word "challenged".

The meticulous manner in which residence of an elector is required to be shown, as well as such manner where there has been a change of such residence, shows an intent that a change thereof is required to be made known to the commissioner whether such change be a change within the same precinct or into another precinct.

September 24, 1956

SCHOOLS — SECRETARY IN COMMUNITY SCHOOL DISTRICT is an "officer" of the district and must be a resident of the district as prerequisite to appointment and continue to be a resident to hold such office the same as in other districts.

Mr. William M. Tucker, Johnson County Attorney: Receipt is acknowledged of your letter of September 10th as follows:

"Would you kindly advise as to whether or not, in the opinion of your office, a secretary of the Board of Directors of a community school district is a school officer within the meaning of the provisions of Section 277.27 of the 1954 Code of Iowa, and as such has to be a resident of such community school district."

Section 277.27, Code 1954, to which your letter refers, provides as follows:

"Qualification. A school officer or member of the board shall, at the time of election or appointment, be a qualified voter of the corporation or subdistrict."

Section 275.27, Code 1954, provides with respect to community school districts as follows:

". . . all provisions of law applicable to the common schools generally shall be applicable to such districts . . ."

Section 279.3, Code 1954, provides with respect to the board of directors of each school corporation as follows:

". . . the board shall appoint a secretary . . . Such officers . . ." (Emphasis ours)

Section 279.5, Code 1954, provides:

"Temporary officers. The board shall appoint a temporary president or *secretary*, in the absence of the regular *officers*." (Emphasis ours)

Also note the provision in Section 279.6, Code 1954, providing for filling vacancies "in an *appointive office*", which reference must be to the secretary and, in districts having an appointive treasurer, the treasurer for the reason that the preceding sections in Chapter 279 provide for no other appointments by the board.

Further, see Section 291.4, Code 1954, which provides, with respect to the secretary and treasurer, that:

"Each shall take the oath required of *civil officers*, . . ." (Emphasis ours)

We would, therefore, advise you there is no question but that the secretary of the board of directors of a school corporation is an "officer" whether he be serving in a community school district or any other type of school district existing under the laws of Iowa. We would further advise you that since the secretary is an "officer" and since it is provided in Section 275.27 that all provisions of law applicable to the common schools generally are applicable in community school districts, it follows that the secretary of the board of directors in a community school district must be a resident of such district as required in Section 277.27. It should further be noted that "the incumbent ceasing to be a resident" creates a vacancy in such office under Section 277.29, Code 1954.

September 24, 1956

SCHOOL DISTRICTS — "Designation" of pupils for attendance in other districts may only be made by local board when statutory prerequisite of "closing school" or "discontinuing facilities" is met.

Mr. C. D. Riter, Lyon County Attorney: Receipt is acknowledged of your letter of September 5th in which you submit the following:

"The Highland Independent School District of Lyon County, Iowa, is comprised of approximately six and three-quarters sections of land in a rural agricultural area and operates one school. This school is located on the west side of the school district, and the district is interspersed by a river. One patron residing on the east side of the school district is required to drive approximately 5 miles in order to reach the school. This patron's home is within approximately two miles of a rural school in an adjoining district and within approximately two miles of the City of Rock Rapids Public School.

"This patron desires to have his children attend either the Rock Rapids Public School or the school in the adjoining School District, and desires that the Board of his District pay tuition and transportation for his children.

" * * * * *

"It is respectfully requested that you advise this office whether the Highland Independent School District can designate the patron's children

above referred to, to an adjoining school District and pay tuition and transportation for such children.

"Would the answer to this question be different if the Highland School District was a Rural Township School District rather than a Rural Independent School District?

" * * * * * * "

In *Howell School Board v. Hubbart*, 246 Iowa 1265, 70 N.W. 2d 531, it was held that neither the county board of education nor the state superintendent of public instruction may *compel* the local board to designate a school when its own school is in operation. You inquire whether the local board may voluntarily make such designation.

It is fundamental that school districts are creatures of statute with only those powers expressly conferred by statute or reasonably and necessarily implied as incident to exercise of a power or performance of a duty expressly conferred or imposed by statute. See *Silver Lake Consol. Sch. Dist. v. Parker*, 238 Iowa 984, 29 N.W. 2d 214; *Ind. Sch. Dist. of Danbury v. Christiansen*, 242 Iowa 963, 49 N.W. 2d 263; *Lincoln Dist. v. Redfield Dist.*, 226 Iowa 298, 283 N.W. 881. If, therefore, the district in question has the power concerning which you inquire, it must derive from the express provisions of some statute.

The statutes authorizing designation of pupils for attendance in other school districts are sections 274.15, 279.16, 282.7, 285.4 and to a limited extent, 282.8 and 282.17, Code 1954. Said Sections provide in pertinent part as follows:

"274.15. Any school district . . . may *discontinue* any or all of its educational facilities and contract with any school district maintaining approved schools to furnish such facilities, . . ." (Emphasis ours)

"279.16. *If a school is closed* . . . the board of directors *shall designate* . . . schools for attendance . . ." (Emphasis ours)

"282.7. The board of directors may . . . *discontinue* . . . school facilities. *When such action is taken the board shall designate* an appropriate approved public school . . ." (Emphasis ours)

"285.4. . . . When a board *closes* its elementary school facilities . . . it shall, . . . designate . . ." (Emphasis ours)

Thus, all of the quoted provisions expressly condition pupil designation upon discontinuance of school facilities or closing schools.

Section 282.8, which authorizes "designation" of out-of-state schools when nearer than "any appropriate public school in Iowa" immediately follows and continues the thought expressed in section 282.7 which expressly limits "designation" to cases where school facilities are discontinued.

Section 282.17 is expressly limited in application to high school pupils who reside in a district *not maintaining* its own high school.

Section 285.4, supra, also makes provision for designation of high school pupils but is expressly limited to districts *maintaining no high school.*

The only reference to the process of selection of schools in districts where school facilities are in operation is contained in section 279.11, Code 1954, which uses the word "determine" rather than designate and limits such determination to schools located within the district.

From the express provisions of the plain language of the quoted statutes it is thus evident that the power to "designate" exists only when a school is "closed" or when "facilities" have been "discontinued" or, in the case of high school pupils, where the high school has been closed, discontinued, or never existed.

Formerly, the statutes provided, in section 282.7, *Code 1946*, as follows:

"Attending in another corporation — payment. A child residing in one corporation may attend school in another in the same or adjoining county if the two boards so agree. In case no such agreement is made, the county superintendent of the county in which the child resides and the board of such adjoining corporation may consent to such attendance, if the child resides nearer a schoolhouse in the adjoining corporation or nearer to a regularly established transportation route to a consolidated school and two miles or more from any public school in the corporation of his residence. Before granting such consent the county superintendent shall give notice to the board where the child resides and hear objections, if any. In case such consent is given, the board of the district of the child's residence shall be notified thereof in writing, and shall pay to the other district the average tuition per week for the school or room thereof in which such child attends. If payment is refused or neglected, the board of the creditor corporation shall file an account thereof certified by its president with the auditor of the county of the child's residence, who shall transmit to the county treasurer an order directing him to transfer the amount of such account from the funds of the debtor corporation to the creditor corporation, who shall pay the same accordingly."

Clearly, under the wording of the former law, the authority concerning which you inquire existed. However, section 282.7, Code 1946, was repealed by section 13, Chapter 116, Acts of the 53rd General Assembly and the present section as hereinabove quoted enacted in its place.

From the plain language of the express provisions of the quoted statutes as well as from the legislative intent manifested by the repeal of section 282.7, Code 1946, it is evident that the power of a local board to "designate" exists only when a school is "closed" or when "facilities" have been "discontinued" or, in the case of high school pupils, where the high school has been closed, one of its four grades discontinued, or where such school or grade never existed.

In answer to your further inquiry, we would advise you that the answer to your first question is applicable to all types of school districts which would, of course, include school townships.

September 25, 1956

VOTING — NATURALIZED CITIZENS. Requirements of citizenship as prerequisite to right to vote must be met as of time of offering to vote rather than throughout all of preceding six months.

Mr. Donald L. Nelson, Story County Attorney: Receipt is acknowledged of your letter of August 30th as follows:

"Article II of our State Constitution, Section 1 provides that every male citizen of the United States, of the age of 21 years who shall have been a resident of this State six months, etc. shall be entitled to vote.

"Is a person who obtained his citizenship on August 21st, 1956, eligible to vote in the November 6th election? The situation that I have in mind is one where a person has been a resident of the State of Iowa for something like three years. But, as above stated, he gained his citizenship on August 21st of this year."

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

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

"*The above section was amended in 1868 by striking the word 'white' from the first line thereof. See first amendment of 1868.

"For qualifications of electors, see also amendment 19, U. S. Constitution."

"Residence" as used in Article II, Section 1, Constitution of Iowa, means "domicile". *Dodd v. Lorenz*, 210 Iowa 513, 231 N.W. 422. "Domicile is not dependent upon political allegiance and a person may acquire a domicile in a country of which he is not a citizen." — *Goodrich on Conflict of Laws*, §29. It follows that the actual residence for a period of three years next preceding the election with intent to remain indefinitely postulated in your letter, would satisfy the "residence" requirement of the quoted section.

However, your question also goes to whether the requirement of citizenship must be met throughout the period of six months next preceding the election, or whether it need to be met only as of the time of offering to vote. The answer to your question appears to be furnished by the language of Sections 49.79 to 49.81, Code 1954, hereinafter exhibited as follows:

"49.79. Challenges. Any person offering to vote may be challenged as unqualified by any judge or elector; and it is the duty of each of the judges to challenge any person offering to vote whom he knows or suspects not to be duly qualified. No judge shall receive a ballot from a voter who is challenged, until such voter shall have established his right to vote."

"49.80. Examination on challenge. When any person is so challenged, the judges shall explain to him the qualifications of an elector, and may examine him under oath touching his qualifications as a voter."

"49.81 Oath in case of challenge. If the person challenged be duly registered, or if such person is offering to vote in a precinct where registration is not required, and insists that he is qualified, and the challenge be not withdrawn, one of the judges shall tender to him the following oath:

" 'You do solemnly swear that you *are* a citizen of the United States, that you *are* a resident in good faith of this precinct, that you *are* twenty-one years of age as you verily believe, that you *have been* a resident of this county sixty days, and of this state six months next preceding this election, and that you have not voted at this election.'

"If said person takes such oath, his vote shall be received." (Emphasis ours)

It is significant that the "oath on challenge" is phrased in terms of "are" as respects age and citizenship but in terms of "have been" as respects residence. In other words, a voter whose qualifications are challenged swears to his *present* qualifications as of the time of taking the prescribed oath as respects age and citizenship. However, as to his residence, the oath is phrased in the past-perfect. Since words and phrases "shall be construed according to the context and approved usage of the language", (Sec. 4.1, Code 1954) it would seem to follow that the citizen to whom your letter refers meets the citizenship requirement for voting at the November election.

Section 336(c), Act of June 27, 1952, C477, 66 Stat 163, which appears at pages XXVII to LVI, Volume I, 1954 Code of Iowa, at page XLVI provides:

" . . . in any case in which the final hearing on any petition for naturalization is scheduled to be held within sixty days preceding the holding of a general election within the territorial jurisdiction of the naturalization court, such final hearing shall be held, but the petitioner shall not be permitted to take the oath required in section 377(a) of this title prior to the tenth day following such general election. In any case in which the oath is not taken at the time of the final hearing, the petitioner shall not be a citizen of the United States until such oath is taken."

It has been held that any *state* regulation pertaining to the right to vote which discriminates against naturalized citizens and in favor of native-born citizens is unconstitutional. See 18 Am. Jur. 214, §52, and cases cited in footnotes thereto. Thus, an election law providing that a native-born citizen attaining voting age between the last day of registration and the day of election might vote but that a naturalized citizen who attained citizenship between the said dates might not vote was held unconstitutional in *Atty. Gen. ex rel Conely v. Detroit*, 78 Mich 545, 44 N.W. 388. Similarly a statute which provided that "no person hereafter naturalized shall be registered as a voter within thirty days of such naturalization" was held unconstitutional in *Kinneen v. Wells*, 144 Mass. 497, 11 N.E. 916.

Thus, any person who has become a citizen under the terms of the quoted federal statute will have been a citizen for at least sixty days prior to the general election even though, as is hereinabove pointed out, our statute requires, in respect to citizenship, only that he be a citizen as of the time he offers to vote.

October 5, 1956

MOTOR VEHICLES — Registration refund on junked vehicle under Section 321.126 may be applied for only by the owner in whose name it was registered at the time of dismantling.

Mr. Clinton H. Moyer, Commissioner, Department of Public Safety: Receipt is acknowledged of your letter of August 23rd as follows:

"A question has recently arisen concerning the proper interpretation of Section 321.126 of the 1954 Iowa Code. The problem arises when a licensed Iowa dealer makes application for a refund on a junked vehicle having taken only assignment of title and registration certificates. The Department in the past has accepted such applications; but the section cited above would indicate that before a refund should be granted, the dealer should be required to secure title and registration in his own name.

"Therefore your opinion is respectfully requested on the following question: Does a licensed Iowa dealer qualify for a refund by submitting title and registration certificates showing assignment to him, or does the dealer first have to complete the transfer of the vehicle and obtain title and registration in his name?"

Section 321.126, Code 1954, provides in pertinent part as follows:

"Refunds of fees. If during the year for which a motor vehicle was registered and the required registration fee paid therefor.

"1. Such vehicle *is destroyed by fire or accident, or junked and its identity as a motor vehicle entirely eliminated* or removed and continuously used beyond the boundaries of the state, then *the owner in whose name it was registered, at the time of such* destruction, *dismantling* or removal from the state, shall return the plates to the county treasurer and within thirty days thereafter make affidavit of such destruction, dismantling or removal and make claim for refund. With reference to the destruction or dismantling of a vehicle, the affidavit shall be accompanied by the certificate of title as provided in section 321.52. . . " (Emphasis ours)

From the express langauge of the quoted provision, two significant points appear to furnish the answer to your inquiry. They are:

(1) The identity of the vehicle as a motor vehicle must be entirely eliminated prior to application for refund.

(2) The application for refund must be made by "the owner in whose name it was registered at the time of such . . . dismantling . . . ".

Thus, where the dealer has failed to complete the transfer of a motor vehicle to himself by obtaining title and registration in his name prior to the "entire elimination" of its identity as a motor vehicle, there is in existence nothing upon which he can obtain such title or registration and application for refund could then be made only by the last registered owner.

If the dealer contemplates applying for such refund in his own name, he must complete transfer of title and registration in his own name while the motor vehicle retains identity as such in order to qualify as "the owner in whose name it was registered at the time of such . . . dismantling . . . ". The actual application for refund may not be made until

after the identity of the motor vehicle has been "entirely eliminated".

In summary, a dealer who wishes to obtain a refund in his name on a junked vehicle under Section 321.126(1), must take the following steps in the order indicated:

(1) Obtain registration and title in his own name.

(2) "Entirely eliminate" the identity of the vehicle as a motor vehicle.

(3) Make application for refund as provided in the statute.

Where step number (2) is taken without first obtaining registration or title, no motor vehicle exists for purposes of motor vehicle registration or title. In such event application for refund could only be made by the last owner in whose name the vehicle was registered prior to such elimination of identity.

November 1, 1956

ROAD MACHINERY: Board of Supervisors has no authority to lease or otherwise dispose of county road machinery or equipment to a city or town unless no longer needed for county purposes.

Mr. A. Elton Jensen, Taylor County Attorney, Bedford, Iowa: Receipt is acknowledged of your letter of October 1st as follows:

"Please advise whether a county through its Board of Supervisors can rent machinery and equipment such as road building and maintenance equipment to a city or town."

A review of the cases pertaining to the nature of counties in general, reveals that they are creatures of the legislature and, therefore, have only those powers expressly conferred by statute or reasonably and necessarily implied as incident to a power expressly conferred by statute. See *Herrick v. Cherokee County*, 199 Iowa 510, at page 513; 202 N.W. 252, at page 253, wherein the Court said:

"A county is in reality, an arm of the state, to aid in its governmental functions only; and being such it and its property are wholly under the control of the legislature."

Also, see *Hewitt v. Keller*, 223 Iowa 1372, 275 N.W. 94, 97 wherein the Court said:

"Counties and other municipal corporations are, of course, the creatures of the legislature; they exist by reason of the statutes enacted within the power of the legislature . . . "

And in *McSurely v. McGrew*, 140 Iowa 163, 118 N.W. 415, the Court said:

"A county, while a body corporate under our law, is a subdivision of the State, created for administrative and other public purposes, owes its creation to the State, and is subject at all times to legislative control . . . "

An examination of the statutes reveals no provision expressly authorizing the act concerning which you inquire. Chapter 93, Section 1, Acts of the 56th General Assembly authorizes the Board of Supervisors to

permit use of county road machinery in state parks and other lands under the control of the Conservation Commission, but makes no permissive reference to leasing county machinery or for its use by cities and towns.

Section 332.3(4) authorizes the Board of Supervisors:

"To make such orders concerning the corporate property of the county as it may deem expedient and not inconsistent with law."

However, in an opinion appearing at page 269 of the 1940 Report of the Attorney General it is stated that such power to manage does not include the power to lease county property. Also see *Hilgers v. Woodbury County*, 200 Iowa 1318, 206 N.W. 660, *State ex rel Wadsworth v. Board of Supervisors of Linn Co.*, 232 Iowa 1092, 6 N.W. 2d 877, and 1932 Report of the Attorney General, page 112, all to the effect that the power to lease does not exist in the absence of express statutory authorization.

Although said authorities all are concerned with the specific problem of leasing a portion of the courthouse to a private party, the rule stated therein appears as a denial of the power to lease public property without express authorization and does not appear to depend on the nature of the property or status of the lessee. Thus, in the *Hilgers* case, the Court said:

"Counties are recognized as quasi corporations, and it is universally held that the board of supervisors of a county *has only such powers as are expressly conferred by statute, or necessarily implied from the power so conferred.* There is no provision in the statute . . . conferring upon the board of supervisors any power to rent any portion of the court houses *or any other public property* for private use. The langauge of the statute cannot be extended by fair construction to confer such power upon the board of supervisors. *Nor is the power . . . to be implied from the power granted to the board of supervisors to have general management and care of the county property . . .* " (Emphasis ours)

In 1945, subsequent to the decision in the Linn County case, Section 332.3 was amended so that subsections 13 and 17 thereof now confer authority upon the Board of Supervisors with respect to leasing county property as follows:

"13. When any real estate, buildings, or other property are no longer needed for the purposes for which the same were acquired by the county, to convert the same to other county purposes* or to sell or lease* the same at a fair valuation."

"17. To lease or sell real estate owned by the county and not needed for county purposes."

"Exception as to county hospital organized under ch 269, Code 1939, see 51 GA, ch 158, §3."

However, it is to be noted that Subsection 17 applies only to real estate and consequently has no relevance to your question. It should also be noted that Subsection 13 applies to the machinery which is the subject of your inquiry only to the extent that it might be "other property . . . no longer needed for the purposes for which . . . acquired".

For further evidence of legislative intent see Section 455.135 as amended by Chapter 222, Section 1, Acts of the 56th General Assembly, wherein use of county road machinery in connection with minor repairs to the works of levee and drainage districts is expressly authorized. That the legislature deemed it necessary to make the express authorization therein contained further demonstrates legislative awareness of the limitations on the powers of the Board of Supervisors hereinabove set forth.

Thus, in conclusion, unless the machinery or equipment to which your letter refers is no longer needed for county purposes, no authority exists for its lease or other disposition to any city, town or, for that matter, to anyone in the absence of express statutory authorization. In short, the answer to your question in is the negative.

November 5, 1956

DRAINAGE DISTRICTS: Purchases on behalf of a drainage district are exempt from the imposition of the Iowa Sales Tax so long as the use of the property purchased is for the public purposes of the drainage district.

Mr. John R. Thornell, County Attorney, Sidney, Iowa: We acknowledge receipt of your letter of September 7, 1956, requesting an opinion on the following question:

"Is a drainage district considered a tax certifying or tax levying body of the state of Iowa, or governmental subdivision thereof, so that it is an exempt body for sales tax purposes under the provisions of Section 422.45(5)?"

Section 422.45(5) provides as follows:

"There are hereby specifically exempted from the provisions of this division and from the computation of the amount of tax imposed by it, the following:

"5. The gross receipts of all sales of goods, wares or merchandise used for public purposes to any tax certifying or tax levying body of the state of Iowa or governmental subdivision thereof, except sales of goods, wares or merchandise used by or in connection with the operation of any municipally-owned public utility engaged in selling gas, electricity, or heat to the general public.

" * * * * * *."

Chapter 455 of the 1954 Code of Iowa gives the board of supervisors the jurisdiction, power and authority to establish drainage districts and cause such to be constructed. The board takes such action when petitioned by the owners of at least 25% of the land named in the petition. Thereafter an engineer appointed by the board makes a survey of the land described and makes a report to the county auditor as to the proposed drainage district, the boundaries and probable cost and other recommendations. The board then takes action upon such report and holds a hearing on the petition. The board may then take action on the petition

either denying it or establishing the drainage district in accordance with the recommendation of the engineer. The board then advertises for bids and under provisions of Section 455.44, infra, enters into contracts for the construction thereof:

"Section 455.44. All agreements and contracts for work or materials in constructing the improvements of such district shall be in writing, signed by the chairman of the board of supervisors for and on behalf of the district, and the parties who are to perform the work or furnish the materials. * * * ."

Chapter 455 further provides that after the drainage district has been established and contracts let, the board "shall appoint three commissioners to assess benefits and classify the lands affected by such improvement." The board further provides for the time within which such assessment, classification and apportionment shall be made. The commissioners then file in the auditor's office a written report showing the entire classification of the lands in the district and the apportionment and assessment of costs and expenses against each forty-acre tract. The board of supervisors then holds a hearing on the report of the commissioners and evidence is heard both for and against approval of the report.

Section 455.57 then provides:

"When the board has finally determined the matter of assessments of benefits and apportionment, it shall levy such assessments as fixed by it upon the lands within such district, and all assessments shall be levied at that time as a tax and shall bear interest at four percent per annum from that date payable annually except as hereinafter provided as to cash payments thereof within a specified time."

A drainage district may be under the management of trustees under the provisions of Chapter 462 of the Iowa Code. Section 462.1 provides:

"Trustees authorized. In the manner provided in this chapter, any drainage or levee district in which the original construction has been completed and paid for by bond issue or otherwise, may be placed under the control and management of a board of three trustees to be elected by the persons owning land in the district that has been assessed for benefits."

These trustees are given control, supervision and management of the district with all the powers given the board of supervisors for such management under Chapter 455 as to the cost and expenses in such operation. Section 462.28 provides:

"Costs and expenses. All costs and expenses necessary to discharge the duties by this chapter conferred upon trustees shall be levied and collected as provided by law and such levy shall be upon certificate by the trustees to the board or boards of supervisors of the amount necessary for such levy."

Under the quoted section, the trustees are made a tax certifying board in their management of the drainage district.

Section 455.58 provides:

"Such *taxes* shall be a lien upon the premises against which they are assessed as fully as taxes levied for state and county purposes."

Section 455.62 provides:

"Assessments — maturity and collection. All drainage or levee *tax* assessments shall become due and payable at the same time as other *taxes*, and shall be collected in the same manner with the same penalties for delinquency and the same manner of enforcing collection by *tax* sales." (Emphasis ours)

It would seem, therefore, that any purchase for use by drainage districts would be either by a tax levying body under the provisions of Chapter 455 or by a tax certifying body under the provisions of Chapter 462.

We are advised by the Tax Commission that it has regularly allowed an exemption with reference to those purchases made for improvements to be paid for by special assessment. The Tax Commission has been guided in part by the spirit of the exemption statute and has reached the interpretation that a special assessment levied and collected as a tax under the provisions of Chapter 455 of the Code is a tax within the meaning of Section 422.45(5). This interpretation of the State Tax Commission is one of long standing and a position taken upon the advice of this department. Under the decision of the Court in John Hancock Mutual Life Insurance Company v. Lookingbill, 218 Iowa 373, 253 N.W. 604, the legislature is presumed to know of this interpretation and is presumed to have acquiesced therein.

Section 422.45(5) also requires that the goods purchased must be for a public purpose. Drainage is usually considered to be a public benefit.

The legislature in Section 455.2 clearly indicated the public purpose for which drainage districts are authorized as follows:

"The drainage of surface waters from agricultural lands or the protection of such lands from overflow shall be presumed to be a public benefit and conducive to the public health, convenience, and welfare."

There is also considerable authority that a drainage district is a governmental subdivision of the State. Words and Phrases, Volume 13, p. 376.

The definitions of "levying board," "certifying board" and "tax" as they appear in Section 24.2, Code of Iowa, 1954, are of course controlling as to Chapter 24 of the Code but are not controlling of the meaning of such words for all purposes or of the meaning of such words in Section 422.45(5) of the Code because of the more pertinent statutes above cited.

It is, therefore, our conclusion that purchases on behalf of a drainage district are exempt from the imposition of the Iowa Sales Tax so long as the use of the property purchased is for the public purposes of the drainage district.

This opinion shall not be construed as suggesting any change in procedure in those factual situations to which Section 422.45(6) of the 1954 Code of Iowa is applicable.

We trust the foregoing answers the questions you raise.

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Attorney General opinions usually quote or interpret Code sections or acts of the General Assembly. Following in numerical order, the chapters and sections of the Code of Iowa and Acts of the General Assemblies are indexed where reference is made in the opinions.

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