January 3, 1957

Mr. Robert S. Bruner
County Attorney
Carroll, Iowa

My dear Bob:

I have yours of the 29th ult. in which you submitted the following:

> "Our County Assessor died on November 16, 1956. His successor is soon to be appointed by the Conference Board. Meanwhile, we find that, prior to his death, the Assessor had completed many of the assessments for the forthcoming year. These assessment rolls bear a facsimile of his signature and are proper order.
>
> "My question is whether or not it is permissible for the new Assessor to send out these assessments which bear the name of the deceased Assessor."

In reply thereto I advise you that I am of the opinion that it is not permissible or authorized for the new assessor to send out these assessments which bear the name of the deceased assessor. The statute requires the assessor to furnish assessments to persons, etc. Obviously, the deceased assessor is not the assessor. However, I see no objection to the successor assessor adopting these assessments if he be so advised and to send them out bearing his signature.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

57-1-1

January 3, 1957

Mr. Mark D. Buchheit
Fayette County Attorney
West Union, Iowa

Dear Mr. Buchheit:

Receipt is acknowledged of your letter of December 18th as follows:

"I have had a recent inquiry concerning the establishment of an Oil Bath coupled with a Massage treatment.

"I interpret this practice as coming under Chapter 157 of the 1954 Code of Iowa as being the Practice of Cosmetology and as such, no applicant could practice this profession unless he or she were licensed, as set out in 157.3.

"A treatment consists of an oil bath followed by a complete body massage for either men or women whichever the case may be.

"I would like to have you confirm my ideas on the above matter."

Section 157.1, Code 1954, defines the practice of cosmetology and provides as follows:

"Definitions. For the purpose of this chapter the following classes of persons shall be deemed to be engaged in the practice of cosmetology:

"1. Persons who, for compensation, engage in or who hold themselves out to the public as being engaged in any one or any combination of the following practices: Cutting, dressing, curling, waving, bleaching, coloring, and similar work, on the hair of any woman or child by any means whatever.

57-1-2

"2. Persons who, with hands or mechanical or electrical apparatus or appliances, or by the use of cosmetic preparations, antiseptics, tonics, lotions, or creams, engage for compensation in any one or any combination of the following practices: Massaging, cleansing, stimulating, manipulating, exercising, manicuring, beautifying, or similar work, the scalp, face, neck, hands, arms, bust or upper part of the body, or the removing of superfluous hair by the use of electricity or otherwise, on or about the body of any woman or child." (Emphasis ours)

It should be noted at the outset that both subsections of the quoted statute are limited to services performed for women and children. Subsection 1 further appears irrelevant to your question for the reason that it refers to work done upon the hair only.

Thus, the question is narrowed to whether Section 157.1(2) requires one who gives "an oil bath followed by a complete body massage" to a woman or child to obtain a license to practice cosmetology.

It should be noted that the list of preparations contained in Subsection 2 appears to include items used primarily for the beautification of skin and hair and makes no express reference to "oil" as such or to rubbing agents such as mineral oil, olive oil, or alcohol commonly used in connection with massage for purposes of ordinary cleanliness or relaxation as distinguished from skin or hair beautification.

It is, therefore, my opinion that complete oil baths with incidental massage given for the purpose of ordinary cleanliness and relaxation as distinguished from cosmetic or skin beautification purposes are not within the contemplation of Section 157.1.

The application of said section to the particular operation giving rise to your question presents, therefore, a question of fact to be determined from the actual operation and the manner in which the operator holds forth his services to the public.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

57-1-2

January 4, 1957

Dr. H. T. Opsahl, Chiropractor
Secretary, Board of Chiropractic
State Department of Health
L O C A L

Dear Dr. Opsahl:

Receipt is acknowledged of your letter of January 3rd as follows:

> "Your opinion is requested as to what means are lawfully available for removing from office a chairman or secretary of an examining board selected under the provisions of Section 147.22, Code 1954."

Section 147.22, Code 1954, to which your letter refers, provides as follows:

> "Officers. Each examining board shall organize annually and shall select a chairman and a secretary from its own membership."

It is to be noted that the quoted section provides only for selection of such officers at the annual organization meeting and makes no provision whatsoever for removal of officers of an examining board or selection of successors prior to the next annual organization meeting thereafter.

Section 66.1, Code 1954, provides as follows:

> "Removal by court. Any appointive or elective officer, except such as may be removed only by impeachment, holding any public office in the state or in any division or municipality thereof,

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may be removed from office by the district court for any of the following reasons:

"1. For willful or habitual neglect or refusal to perform the duties of his office.

"2. For willful misconduct or maladministration in office.

"3. For corruption.

"4. For extortion.

"5. Upon conviction of a felony.

"6. For intoxication, or upon conviction of being intoxicated."

Thus, the grounds for removing an officer of an examining board from office are the same as for removing any other member of such board from office.

In answer to your question, I would, therefore, advise you that the exclusive method for removal from office of an officer of an examining board during the annual term for which he was selected is the method provided in Chapter 66, Code 1954, which method, if successfully employed against such officer, would result in his removal both as officer of the board and as member of the board.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

January 4, 1957

Honorable David O. Shaff
Senator, Clinton County
304 Weston Building
Clinton, Iowa

Dear Sir:

Receipt is acknowledged of your letter of December 28th as follows:

> "It has been brought to our attention that the doctors in Clinton County believe it is against the state law for them to give out information concerning patients who have received blood transfusions.
>
> "The Red Cross chapters in counties in western Iowa have been receiving this information for the past five years from their doctors and are of the opinion that it is perfectly legal. Would you please advise concerning the legality of giving out this information concerning blood transfusions received by doctors' patients."

The only general statutory restriction on disclosure of information I have been able to discover is contained in Section 622.10, Code 1954, which, of course, pertains only to admissibility of evidence in court. As to any common law liability which a physician might incur by disclosure of information had by him by virtue of doctor-patient relationship if such disclosure should result in a private lawsuit for written or oral defamation, this office expresses no opinion.

I would advise you that the matter appears to be one wherein the canons of ethics of the medical profession

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rather than the statutes of Iowa would govern the discretion of the physician in disclosing information.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

January 4, 1957

Mr. Charles Mather
Sac County Attorney
Sac City, Iowa

Dear Mr. Mather:

Receipt is acknowledged of your letter of December 28th as follows:

> "I have been asked to inquire what the duty of a town marshal is in arresting persons for violation of law committed outside the jurisdiction of the town which he serves, but in the county which includes that town. Does he have a duty to arrest persons for public offenses committed in his presence, or is his authority no more than that of a citizen?"

In answer thereto, I would refer you to Section 748.4, Code 1954, which provides as follows:

> "Duties. It shall be the duty of a peace officer and his deputy, if any, throughout the county, township, or municipality of which he is such officer, to preserve the peace, to ferret out crime, to apprehend and arrest all criminals, and insofar as it is within his power, to secure evidence of all crimes committed, and present the same to the county attorney, grand jury, mayor or police courts, and to file informations against all persons whom he knows, or has reason to believe, to have violated the laws of the state, and to perform all other duties, civil or criminal, pertaining to his office or enjoined upon him by law. Nothing herein shall

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be deemed to curtail the powers and duties otherwise granted to or imposed upon peace officers." (Emphasis ours)

I would further refer you to Section 368.15, Code 1954, which provides in pertinent part:

> "They (cities and towns) shall provide for the preservation of the peace and enforcement of law within the corporate limits, and may establish, house, equip, staff, uniform and maintain a police department of which the marshal shall be chief. . . They shall have power, when authorized by a majority vote of the electors thereof, to maintain a joint police department with any contiguous municipal corporation. . . " (Emphasis ours)

I would further refer you to Section 368A.17, Code 1954, which provides as follows:

> "The marshal. The marshal shall be ex officio chief of police and may appoint one or more deputy marshals, who may perform his duties, and who, in cities of fifteen thousand or more population shall be members of the police force. He shall have the supervision and general direction of the police force, and shall be the ministerial officer of the corporation. He shall suppress all riots, disturbances, and breaches of the peace, arrest all disorderly persons in the city or town and all persons committing any offense against the ordinances thereof, and forthwith bring such persons before the proper court for examination or trial. He shall pursue and arrest any person fleeing from justice, and shall diligently enforce all laws, ordinances, and regulations for the preservation of the public welfare and good order, and shall have the same powers and duties as constables in similar cases. He shall attend upon the sittings of the mayor's and police court, and execute within the county and return all writs and other processes directed to him therefrom." (Emphasis ours)

I would, therefore, advise you that, in general, the power of a town marshal to make arrests outside the corporate limits of the town in which he serves is no greater than that of any citizen. There are, of course, exceptions to the rule as for example, in the case of fresh pursuit, or where such marshal is called upon by the governor or attorney

general under Section 748.6, Code 1954, or if he be acting under other special statutory authority.

However, in the specific situation described in your letter, to wit, where a public offense is committed in his presence his authority to make an arrest as a private citizen appears entirely adequate under Section 755.5, Code 1954, which provides in pertinent part as follows:

"A private person may make an arrest:

"1. For a public offense committed in his presence . . . "

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

January 4, 1957

Mr. Ned Willis
Dallas County Attorney
Bruce Building
Perry, Iowa

Dear Mr. Willis:

Receipt is acknowledged of your letter of December 20th as follows:

"A member of the Dallas County Board of Education plans to move from the County in January 1957. The first regular meeting of the Board of Education following his move will be April 1, 1957, which would be the earliest date when a successor could be appointed according to Section 273.4 Code of Iowa 1954. However, the March school election precedes this meeting and the Board is desirous of knowing whether it would be possible for the successor to be elected at the March 1957 election.

"I have advised the Board that if the procedure set forth in Chapter 273 of the Code is followed that the vacancy in the office would not be declared until the April 1, 1957 meeting and that at this time a successor should be appointed who would serve until April 1, 1959 and that a Director would be elected to this office in the election in March 1959. I pointed out that while it was true that there would be a vacancy in January 1957, that this vacancy would not be acknowledged until the meeting of April 1, 1957.

"Nevertheless the Board of Education wishes

57-1-6

an Attorney General's opinion as to whether it is possible for a successor to be elected at the March 1957 election to serve the balance of the unexpired term and if so what steps should be taken, by whom should they be taken and at what intervals or periods of time should they be taken in the procedure to bring about such an election."

Section 273.4, Code 1954, to which your letter refers, provides in pertinent part as follows:

"Elections to the county board of education shall be held at the annual school elections in odd-numbered years for members whose terms expire on the first Monday in April following said elections and their term of office shall be for six years. Vacancies on said board shall be filled at the next regular meeting of the board by appointment by the remaining members of the board until the next odd-numbered year election at which election a member shall be elected to fill the vacancy for the balance of the unexpired term. A vacancy shall be defined as in section 277.29."

It is thus provided that vacancies must be filled by appointment "at the next regular meeting". The frequency and time of "regular" meetings are prescribed in Section 273.10, Code 1954, as follows:

"Regular meetings. The board shall meet regularly four times each year according to a schedule adopted at the organization meeting and shall meet in special session upon call of the president or upon call of the secretary when a request is filed with the secretary signed by two members of the board."

From the quoted sections it would appear that the advice you have given the board is correct if "the next regular meeting" is held <u>after</u> the March election. However, there is nothing to prevent the board from calling a <u>special</u> meeting for the purpose of amending the schedule of regular meetings previously adopted by it so as to place one of said <u>regular</u> meetings <u>before</u> the March election and thus satisfying the requirements of Section 273.4.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

January 7, 1957

Dr. Edmund G. Zimmerer
Commissioner of Health
State Board of Medical Examiners
L O C A L

Dear Dr. Zimmerer:

Receipt is acknowledged of your letter of December 28th as follows:

"Pursuant to the authority of Section 135D.20 of the 1954 Code of Iowa, the State Department of Health has the authority to delegate to local Boards of Health duties of inspection and regulation of mobile home parks within their jurisdiction. This section further provides for the payment of fifty per cent (50%) of the annual license fee to the Treasurer of the local jurisdiction involved when duties are so delegated to the local Board of Health.

"The original law as enacted (Acts 1953, 55 G.A., Chapter 138, Section 22) did not provide for an appropriation from which the fifty per cent (50%) annual license fee could be paid, and these fees have not been returned to local jurisdiction. This section was amended by Acts 1955 (56th G.A.), Chapter 97, Section 1, effective July 1, 1955, to provide an appropriation from the general fund of the State in an amount sufficient to pay the proportionate fees allowable to the local jurisdiction involved, as provided in Section 135D.20 of the 1954 Code of Iowa.

" * * * * * *

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"1. In the absence of an appropriation provision in the original enactment of this law, on what dates are the local jurisdictions legally entitled to claim the fifty per cent (50%) annual license fee?

"2. From what date may the State Treasurer's office authorize the payment of the fifty per cent (50%) annual license fee to the local jurisdiction under this law?"

Section 135D.20, Code 1954, to which your letter refers, provides as follows:

"Powers delegated to local boards. The state department of health shall have the power to delegate to local boards of health the duties of inspection and regulation of mobile home parks located within the jurisdiction of such local board of health, where, in the opinion of the state department of health, such delegation can best effectuate the policies of this chapter. When said duties are so delegated, fifty percent of the annual license fee collected therefrom shall be turned over to the treasurer of the jurisdiction involved."

Chapter 97, Section 1, Acts of the 56th General Assembly, under which your question arises provides as follows:

"Section 1. Section one hundred thirty-five D point twenty (135D.20), Code 1954, is hereby amended by striking the period at the end thereof and adding the following:

"', and there is hereby appropriated from the general fund of the state an amount sufficient to pay the proportionate fees allowable to the jurisdiction involved, as provided in this section.'"

In answer to your questions, I would advise you that local boards of health to which duties of inspection and regulation have been delegated by the state department of health under Section 135D.20, Code 1954, are entitled by the express terms of said section to make claim on account of services performed thereunder for whatever period or periods they have performed such services.

However, as to payment of such claims from the appropriation to which your letter refers, it is elementary law

that a statute may be given retroactive effect only when its language expressly manifests legislative intent that it shall have such effect. Section 1, Chapter 97, Acts of the 56th General Assembly contains no express provision making its effect retroactive. I would, therefore, advise you that only claims accruing on or after July 4, 1955, the effective date of said statute, may be paid from the appropriation provided therein.

As respects those claims under Section 135D.20 which accrued prior to July 4, 1955, further legislative appropriation would be required.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

January 8, 1957

Mr. John J. Williams
Montgomery County Attorney
Montgomery County National Bank Bldg.
Red Oak, Iowa

Dear John:

Receipt is acknowledged of your letter of January 3 in which you state:

> "In this county there has been filed by our Sheriff a charge alleging failure 'to tarp load of gravel'. There is no allegation that any of the contents of the vehicle was spilled onto the public thoroughfare. I find no legal basis for such charge, but I do know that there is considerable thought among local and state officials that the mere failure to cover a load of gravel with a tarpaulin is unlawful.
>
> "I would appreciate your advising me as to whether or not my conclusions are correct. If so, I believe further effort should be made to co-ordinate law enforcement in such matters."

In answer to your letter I would state that the only sections of the Code which might be applicable are 321.369 entitled "Putting Glass, etc., on Highway," 321.370 entitled "Removing Injurious Material," and 321.460 entitled "Spilling Loads on Highways."

It would appear that the charge indicated by you was probably filed under Section 321.460 in that the vehicle was not "so constructed or loaded as to prevent any of its load from dropping, sifting, leaking, or otherwise escaping therefrom." There are no annotations under this section and I would agree with you that there appears to be no legal basis for charging a commission of a crime by reason of failure to cover a load of gravel with a tarpaulin, if the provisions of 321.460 are otherwise complied with.

57-1-8 ✓

I do not understand what you have in mind concerning the coordination of law enforcement in connection with this problem.

I send personal regards and good wishes to you.

Yours very truly,

NORMAN A. ERBE
Attorney General

NAE:md

CC: Mr. C. J. Lyman
Assistant Attorney General
Highway Commission
Ames, Iowa

Mr. Clinton H. Moyer
Commissioner of Public Safety
State Office Building
L o c a l

January 8, 1957

Mr. Charles King
Marshall County Attorney
Courthouse
Marshalltown, Iowa

Dear Sir:

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

"The Marshall County Board of Supervisors have asked me to advise them as to the legal steps to be taken in connection with a proposed installation of approximately 12,800 feet of pipe to convey a gas supply to the Marshall County Home for heating and cooking purposes in the installation of gas conversion burners in the furnaces in said County Home. At present the heating is done with coal by the use of stokers. The equipment is in good condition but the Board of Supervisors feel that a substantial saving will be ultimately effected if the gas heating system is installed. Preliminary negotiations with the Iowa Electric Light and Power Company in Marshalltown indicate the probable cost of installing the pipe to be $19,200.00. A meter installation necessitates the purchase of a small tract of land at an approximate cost of $650.00 and the two gas conversion burners required will cost approximately $500.00 each. If possible, the Board desires to pay for the installation of the pipe by means of a monthly 'service charge' added to each gas bill over a period of three to five years.

"I have examined the following statutes:

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"332.3. The Board of Supervisors at any regular meeting shall have power:

" . . .

"(6) To represent its county and have the care and management of the property and business thereof in all cases where no other provision is made.

" . . .

"(12) To purchase, for the use of the county, any real estate necessary for county purposes; . . .

" . . .

"(15) To build, equip, and keep in repair the necessary buildings for the use of the county and of the courts.

"332.7. No building shall be erected or repaired when the probable cost thereof will exceed $2000.00 except under an express written contract and upon proposals therefor, invited by advertisement for three weeks in all the official newspapers of the county in which the work is to be done.

"332.8. Contracts for buildings and repairs specified by section 332.7 shall be let to the lowest responsible bidder at a time and place which shall be distinctly stated in the advertisement. The board may on the day fixed for letting such contract adjourn the hearing to some later date and place, of which all parties shall take notice. The board may reject any and all bids and advertise for new ones. The detailed plans and specifications for such improvements shall be on file and open to public inspection in the office of the auditor of the county in which the work is to be done before advertisement for bids.

"345.1. The board of supervisors shall not order the erection of, or the building of an addition or extension to, or the remodeling or reconstruction of a . . . county home when the probable cost will exceed $10,000 . . . , until a proposition therefor shall have been first submitted to the legal voters of the county, and

voted for by a majority of all persons voting for and against such proposition at a general or special election, notice of the same being given as in other special elections.

"253.2. The board of supervisors, or any committee appointed by it for that purpose, may make all contracts and purchases requisite for the county farm and home . . . .

"23.1. The words 'public improvement' as used in this chapter shall mean any building or other construction work to be paid for in whole or in part by the use of funds of any municipality. The word 'municipality' as used in this chapter shall mean county, ...

"23.2. Before any municipality shall enter into any contract for any public improvement to cost $5000.00 or more, the governing body proposing to make such contract shall adopt proposed plans and specifications and proposed form of contract therefor, fix a time and place for hearing thereon . . . , and give notice thereof by publication in at least one newspaper of general circulation in such municipality at least ten days before said hearing.

"I should like your opinion on the following:

"1. Would the installation heretofore outlined or any part thereof constitute the 'building of an addition or extension to, or a remodeling or reconstruction' of a county home within the meaning of section 345.1 of the code so as to require submission of the proposition to the voters?

"2. Would said installation or any part thereof constitute a 'public improvement' within the meaning of section 23.1 of the code so as to require a compliance with the procedure outlined in chapter 23 of the code and would such installation or any part thereof constitute 'public improvement' within the meaning of section 573.2 thereby making necessary the furnishing of a performance bond for said installation?

"3. Would said installation or any part thereof constitute 'repairs' of a building within

the meaning of section 332.7 of the code?

"4. Chapter 23 of the code on the one hand and section 332.8 of the code on the other set forth certain provisions relative to the adoption of plans and specifications, notice, hearing, etc. Which of these procedures are to be followed with respect to the proposed installation discussed herein?

"5. From what funds should the cost and installation of the pipe, and the conversion burners, and the cost of the real estate be paid?

"6. Is there any legal objection to the payment of the cost and installation of the pipe being paid over a period of three to five years by means of an additional monthly 'service charge' being added to the monthly gas bill?

"The only authority I have found to date bearing upon the answers to any of the foregoing questions are two opinions from your office written in the year 1928. One of said opinions deals with the question of the authority of the board of supervisors to erect a transmission line at a cost of three thousand dollars to carry electric current to the county home. In that opinion at page 304 you state that the board had authority under section 5130, Code of Iowa 1927, (now section 332.3 of the Code) to erect the transmission line. In this opinion you state:

"'Under these provisions we are of the opinion that the county board of supervisors would have the authority to build a transmission line for the purpose of carrying electric current to the county farm. It would be necessary, however, for the county to advertise for bids under the provisions of section 5131 (now section 332.7) if the cost would exceed two thousand dollars.' In the other opinion at page 330 it is stated that a contract for the purchase of machinery to be used as a replacement in a municipally owned water plant was not a contract for a public improvement within the meaning of what is now section 23.2 of the code."

In answer to the foregoing I would advise as follows:

1. In answer to your question number one I am of

the opinion that the proposed pipeline and the installation of gas conversion burners in the county home are not within the meaning of Section 345.1, Code of 1954, and submission of the proposition to the voters, therefore, is not relative.

2. In answer to your question number two I would advise you that in my opinion the proposed construction and installation constitutes a public improvement within the meaning of Section 23.1, Code of 1954, and would necessitate the furnishing of a performance bond provided for under Section 573.2, Code of 1954.

3. In answer to your question number three I would say that in my opinion the foregoing described proposed construction does not constitute a repair. See the case of Fuchs vs. Cedar Rapids, 158 Iowa 392, 139 N.W. 903, 44 L.R.A. (N.S.) 590.

4. In answer to your question number four I would advise you that the procedure prescribed under Chapter 23 in the installation and completion of the improvements should be followed.

5. In answer to your question number five I would advise that in my opinion the cost of the proposed improvement and purchase of the real estate is payable out of the county general fund.

6. In answer to your question number six I would advise that the cost of the improvement cannot be paid over a period of three to five years under the guise of monthly

servicecharges. On the other hand, the cost thereof shall be paid from the collectible revenues for the tax year in conformity with the provisions of Section 343.10 which provides as follows:

> "Expenditures confined to receipts. It shall be unlawful for any county, or for any officer thereof, to allow any claim, or to issue any warrant, or to enter into any contract, which will result, during said year, in an expenditure from any county fund in excess of an amount equal to the collectible revenues in said fund for said year, plus any unexpended balance in said fund for any previous years.
>
> "Any officer allowing a claim, issuing a warrant, or making a contract contrary to the provisions of this section, shall be held personally liable for the payment of the claim or warrant, or the performance of the contract."

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:mfm

January 9, 1957

Honorable Leo A. Hoegh
Governor of Iowa
B u i l d i n g

Dear Governor:

You have submitted to me a letter from President Virgil M. Hancher of the State University of Iowa, in which he describes to you the need in the State of Iowa for the selection and appointment of a State Archeologist in order to comply with certain provisions of the Federal-Aid Highway Act of 1956. Such an individual would have as a chief concern in connection with highway construction the preservation of anthropological and archeological specimens as may be uncovered in the process of highway construction.

You advise that there is no statutory authority for such a position under the present Iowa law and inquire concerning the advisability of the appointment of such a person under the broad general powers of appointment by the Governor on a non-salaried status and the subsequent question of the official status of such an appointee.

I would like to invite your attention to the fact that the Federal-Aid Highway Act of 1956 insofar as it relates to the preservation of anthropological and archeological specimens would involve the expenditure of certain funds either in a discovery or a preservation process. The expenditure of public funds, whether State or Federal, would preclude the appointment of of the administrator of such funds without statutory authority.

I would suggest that this matter be presented to the Legislature so that appropriate provisions can be made for such a position.

Respectfully yours,

NORMAN A. ERBE
Attorney General

NAE:md

57-1-10

January 9, 1957

Mr. John J. Williams
Montgomery County Attorney
Montgomery County Nat'l. Bank Bldg.
Red Oak, Iowa

Dear Mr. Williams:

Receipt is acknowledged of your letter of January 5th as follows:

"This office is currently completing a special assessment program for the Town of Essex, Iowa. Upon delivery of the assessment certificates to the contractor said certificates were objected to upon the basis, which is supported by the Treasurer of Page County, that the coupons for said certificates did not state thereon the 1/10th share of the total assessment plus the interest which would be then due thereon, both included in one figure.

"Upon further discussion with the Treasurer I find that in Page County they do not permit partial payment of the total assessment, by the payment, for example, of five coupons, and thereby relieving the property owner assessed of the interest for that portion paid. If the property owner desires, he can pay the entire assessment at any time, and at that time must pay only the interest to date on the sum then outstanding.

"In Montgomery County payment of one, two, or more coupons in advance is rather common. The property owner, as I understand it, must then pay interest only on that portion of the total

57-1-11 ✓

assessment remaining unpaid. He must make annual interest payments on the balance due during those years for which the coupons have been previously paid, but he is not required to pay, simply because he did not pay the entire assessment, interest on those coupons which he did pay in advance.

"A copy of an assessment certificate which we have proposed is herewith enclosed. The form used is adapted from the publication of Matt Parrott & Sons, 'Forms and Procedure Covering Special Assessments'."

Although your letter does not expressly so state, I assume the special assessment procedure to which you refer is the general procedure provided in Chapter 391, Code 1954, rather than the alternate procedure provided in Chapter 391A, Code 1954. If this be true, then the answer to your question is directly furnished by Section 391.60 which provides in pertinent part as follows:

"Any or all installments not yet paid together with accrued interest thereon may be paid on the due date of any installment."

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

January 10, 1957

Mr. Marshall F. Camp
Union County Attorney
Creston, Iowa

My dear Mr. Camp:

This will acknowledge receipt of yours of the 8th in which you submitted the following:

> "The County Auditor has inquired as to whether the minutes of the Board of Supervisors should include the resolutions as to the names of non-residents on whom notice is authorized under Section 252.20 of the Code, when they are sent to the newspaper for publication.
>
> "Section 349.16 requires the publication of the proceedings and such information is not excluded in said section.
>
> "The minutes have included the names of those on whom notice is to be served.
>
> "I find nothing authorizing leaving such information out of the published proceedings, or otherwise requiring it to be published, and advised him to go ahead with the publication at this time including the information, and that I would write to you for an opinion.
>
> "May I have your advice as to whether such information should be deleted from the published minutes or left in them."

In reply thereto I would advise you that I am of the opinion that so-called notices to depart provided in Section 250.20, Code of 1954, designed to prevent county charges or those potentially so from acquiring a settlement in the County are required to be published as part of the proceedings of the

252.20

57-1-12

Board of Supervisors within the terms of Section 349.16, Code of 1954. This action of the Board is not excepted from publication under that Section and therefore should be deemed legal material for publication.

Very truly yours,

NORMAN A. ERBE
Attorney General of Iowa

NAE:MKB

January 10, 1957

Mr. Donald E. Skiver
Osceola County Attorney
Sibley State Bank Bldg.
Sibley, Iowa

Dear Mr. Skiver:

Receipt is acknowledged of your letter of January 4th as follows:

> "The Osceola County Board of Education has requested the writer to obtain your opinion on the following proposition:
>
> "The last sentence of Section 275.5 of the 1954 Code of Iowa provides 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 hereinafter 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 County Board of Education has a so-called unit plan for our redistricting, wherein the whole county was regarded as one educational unit and as school districts in the county were reorganized, this unit plan was modified and amended to leave out the area in the reorganized districts.

57-1-13 ✓

"Following the successful reorganization of the Harris School District last week, there is now an area of less than four government sections remaining out of a former school district. It appears that some of the people in the area desire to be designated by the County Board to one school district and the remainder of the residents desire to be attached to another school district.

"It will be appreciated if you will advise whether the last sentence in Section 275.5 requires the attaching of all of said area of less than four sections to one school district or whether the area of less than four sections can be separated and attached to two school districts."

I am unable to discover any previous opinion of this department or decision of the Supreme Court on the question. Therefore, the best guide to its meaning is its own language. An analysis of the provision quoted in your letter reveals that it authorizes two things to be done.

(1) Reduction of existing districts below the size historically considered to be capable of existing as self-supporting governmental units.

(2) Disposition of "such remaining portions" by attaching them "to another school district."

What then is authorized to be so attached? According to the specific statutory language "remaining portions" are authorized to be so attached. The intent of the statute, as manifested by its own language then is, that the attachment of such "portions" is to be made in the condition in which they remain after the principal reorganized district has been voted into existence. Since the language of the statute requires attachment of portions as they remain, further subdivision of such portions for purposes of more varied attachment by the county board of education is not authorized by the statute.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

January 10, 1957

Honorable W. H. Tate
State Senator
Cerro Gordo County
28 First Street, N.E.
Mason City, Iowa

Dear Sir:

Receipt is acknowledged of your letter of January 4th as follows:

"Section 499.30 of the 1954 Code of Iowa refers to distribution of earnings of cooperative associations. Your attention is directed to paragraph 3 of said Section which is as follows:

"'At least 10% of the remaining earnings must be added to surplus until surplus equals either 30% of the total of all capital paid in for stock or membership, plus all unpaid patronage dividends, plus certificates of indebtedness payable upon liquidation, or $1000.00, whichever is greater. No addition shall be made to surplus, whenever it exceeds either 50% of such total or $1000.00, whichever is greater.'

"I would like to have your opinion concerning the meaning of this paragraph. The ordinary cooperative association is hard up for cash to operate on during the early months of the year because they usually pay their patronage dividends in January. Some of the cooperatives, apparently limit their surplus to only 50% of their capital stock. A good many cooperatives, however, do a

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not do this as can be seen at a glance from their annual report. If a corporation ends its fiscal year on December 31st, the patronage dividends, of course, are not paid by the end of the year. However, they are usually paid in about two weeks, say January 15th. Is it proper, therefore, for said cooperative association to consider the patronage dividends as unpaid and thus establish a surplus of 50% of the capital stock plus this unpaid patronage dividend, although said dividend will be paid within a couple of weeks? Apparently many cooperatives are doing this and those that are not are enduring quite a hardship because they must borrow money."

Section 499.30, Code 1954, quoted in part in your letter, provides as follows:

"Distribution of earnings. The directors shall annually dispose of the earnings of the association in excess of its operating expenses as follows:

"To provide a reasonable reserve for depreciation, obsolescence, bad debts, or contingent losses or expenses.

"At least ten percent of the remaining earnings must be added to surplus until surplus equals either thirty percent of the total of all capital paid in for stock or memberships, plus all unpaid patronage dividends, plus certificates of indebtedness payable upon liquidation, or one thousand dollars, whichever is greater. No additions shall be made to surplus whenever it exceeds either fifty percent of such total, or one thousand dollars, whichever is greater.

"Not less than one percent nor more than five percent of such earnings in excess of reserves may be placed in an educational fund, to be used as the directors deem suitable for teaching or promoting co-operation.

"After the foregoing, to pay fixed dividends on stock or memberships, if any.

"All remaining net earnings shall be allocated to a revolving fund and shall be credited to the account of each member including subscribers

described in section 499.16 ratably in proportion to the business he has done with the association during such year. Such credits are herein referred to as 'deferred patronage dividends'." (Emphasis ours)

I am unable to discover any decision of the Supreme Court of Iowa or reported opinion of this officer answering the question you submit. However, the question appears to have been incidentally considered by the United States District Court, Northern District of Iowa in Farmers Cooperative Co. v. Birmingham, 86 F. Supp. 201, at pages 221 and 222, in connection with taxability of such earnings. The Court said:

"'Cooperative corporations organized and operated under the above-cited Code are not authorized by the Code to make "patronage dividend payments" within the usual comprehension of that term. The Code by section 8512-g30 (I.C.A. § 499.30) provides that corporate earnings in excess of operating expenses (which include specified reserves, stated additions to surplus, permitted additions to an educational fund and payment of fixed dividends on stock or memberships) shall be allocated to a revolving fund and shall be credited to the account of members in proportion to the business done with the association during the year. Such credits which are referred to as "deferred patronage dividends" must be applied against unpaid or stock membership subscriptions, if any.

"'The directors are permitted by section 8512-g33 (I.C.A. § 499.33) to use the revolving fund to pay debts or add to the capital of the association or retire its preferred stock. If so used, the deferred patronage dividend credits constitute a charge on the fund and on the corporate assets, subordinate to creditors and preferred stockholders then or thereafter existing. The cited section also provides that deferred patronage dividends for any year shall have priority over those for any subsequent year.

"'Section 8512-g34 (I.C.A. § 499.34) provides that the association may issue transferable or nontransferable certificates for deferred patronage dividends.

"'Section 8512-g35 (I.C.A. § 499.35) provides

that such dividend credits or certificates issued therefor shall not mature until the dissolution or liquidation of the association but shall be callable by it in the order of their issuance.

"'Section 8512-g48 (I.C.A. § 499.48) provides that on dissolution or liquidation, the association shall first pay liquidation expenses, then its obligations other than patronage dividends and the remaining assets shall be distributed in the following order (1) to preferred stockholders to the extent of their capital plus accrued dividends; (2) to holders of deferred patronage dividend credits or certificates issued therefor; (3) to members of common stockholders to the extent of their capital plus accrued dividends; and (4) the remaining assets to members in proportion to their deferred patronage dividend credits.

"'A sample Participation Certificate issued by one of the corporations in question purports to certify that it has an established revolving fund credit on its books in the amount stated to the person named. It is stated thereon that such credits are noninterest bearing and payable at dissolution but the association reserves the right to retire the certificate in whole or in part at any time. Such certificate further states that it represents capital contributed to the revolving fund from patronage dividends, and that all money, property and assets representing revolving fund credits need not be segregated or allocated and this certificate shall remain subject and inferior to the rights and claims of all creditors, common, secured or preferred.

"'<u>It seems manifest under the terms of the Code in question that the amounts credited to the members as "deferred patronage dividends" represent contributions to the working capital of the corporation involved rather than an indebtedness of such corporation</u>. The members thus credited are entitled to receive the amount of such credit only at retirement, upon call by the corporation prior to liquidation, or upon liquidation if the assets of the corporation are sufficient to pay off such credits after paying off prior claims. Such credits do not mature during the life of the organization, they do not bear

> interest and are made subordinate to the claims of preferred stockholders. The holders of such credits divide accumulated earnings of the corporation after payment of preferred and common stock plus accrued dividends thereon. The holders are thus made a third class of shareholder in the corporation. As the status of a shareholder in a corporation is not dependent upon the actual issuance of stock, the stated conclusion does not depend upon the issuance of participation certificates evidencing the credits in question." (Emphasis ours)

Section 499.33, to which the quoted decision also refers, provides as follows:

> "Use of revolving fund. The directors may use the revolving fund to pay the obligations or add to the capital of the association or retire its preferred stock. In such event the deferred patronage dividends credited to members shall constitute a charge on the revolving fund and future additions thereto, and on the corporate assets, subordinate to creditors and preferred stockholders then or thereafter existing. Deferred patronage dividends for any year shall have priority over those for any subsequent year."

From the final two paragraphs of Section 499.30, Code 1954, and Section 499.33, it appears that "fixed dividends" are required to be paid annually and that it would be improper to consider them as "unpaid patronage dividends" for the purposes of the provision quoted in your letter. However, the said sections together with the quoted federal decision lead to the conclusion that "deferred patronage dividends" are properly considered as "unpaid patronage dividends" for purposes of computing maximum surplus.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

January 10, 1957

Special Assistant Attorney General
State Tax Commission
Marvin A. Iverson

Mr. William Q. Norelius
Crawford County Attorney
Court House
Denison, Iowa

Dear Mr. Norelius:

This will acknowledge receipt of your letter of January 3, 1957, wherein you raise the following question:

> "Should the County Assessor assess a Moneys and Credits tax as provided for by Chapter 429, 1954 Code of Iowa, on a savings account in the Commercial Savings and Loan Association located in Omaha, Nebraska. The savings account is insured by the FDIC. The owner of the account is a resident of Crawford County, Iowa."

In answering your question we will assume the Iowa resident depositor acquired a shareholder status in the savings and loan association by reason of such deposit, as is certainly the general rule as to such deposits, and that his deposit represents a share interest in that association. Such a share interest is intangible personal property and the law is well settled that the jurisdiction to tax the intangible personal property of an individual follows that individual's domicile under the maxim: mobilia sequuntur personam, which you will recognize. The only exception to this rule is that where the intangible personal property has acquired what is known as a "business situs" elsewhere, such business situs constitutes an additional tax situs. In the

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case of Utah v. Aldrich, 316 U.S. 174, 62 S.Ct. 1008, holds, "there is no constitutional rule of immunity from taxation of intangibles by more than one state." The case of Crane Company v. City Council of Des Moines, 208 Iowa 164, 225 N.W. 344, 76 A.L.R. 801, 804, is generally pertinent but is based upon decisions rendered obsolescent by the Utah v. Aldrich decision.

It is the general rule that all property of which the state has jurisdiction is subject to taxation except such as has been specifically exempted therefrom by the Legislature. See Beers v. Langenfeld, 149 Iowa 581, 128 N.W. 847, and Section 427.13 of the 1954 Code of Iowa.

We believe the following provisions of the 1954 Code of Iowa are pertinent:

Section 427.13(7) provides:

> "What taxable. All other property, real or personal, is subject to taxation in the manner prescribed, and this section is also intended to embrace:
>
> "* * *.
>
> "7. Corporation shares or stocks not otherwise assessed or excepted."

Section 429.2 provides:

> "Moneys -- credits -- annuities -- bank notes -- stock. Moneys, credits, and corporation shares or stocks, except as otherwise provided, cash, circulating notes of national banking associations, and United States legal tender notes, and other notes, and certificates of the United States payable on demand, and circulating or intended to circulate as currency, notes, including those secured by mortgage, accounts, contracts for cash or labor, bills of

exchange, judgments, choses in action, liens of any kind, securities, debentures, bonds other than those of the United States, annuities, and corporation shares or stocks not otherwise taxed in kind, shall be assessed and, excepting shares of stock of national, state, and savings banks, and loan and trust companies, and moneyed capital as hereinafter defined, shall be taxed upon the uniform basis throughout the state of five mills on the dollar of actual valuation, same to be assessed and collected where the owner resides."

Section 428.8 provides:

"Place of listing. Moneys and credits, notes, bills, bonds, and corporate shares or stocks not otherwise assessed, shall be listed and assessed where the owner lives, except as otherwise provided, and except that, if personal property not consisting of moneys, credits, corporation or other shares of stock, or bonds, has been kept in another assessment district during the greater part of the year preceding the first of January, or of the portion of that period during which it was owned by the person subject to taxation therefor, it shall be taxed where it has been so kept."

Section 431.6 provides:

"Shares assessed against association. The value of the shares of each mutual building and loan or savings and loan association exclusively engaged in such business shall be assessed against each association at its principal place of business."

Section 431.9 provides:

"Determination of value. In arriving at the value of the shares of each mutual building and loan or savings and loan association the assessor shall allow as a deduction the total amount of indebtedness of all borrowing members to the association and shall fix and determine the value of the shares based upon the information contained in the statement provided for in section 431.7, and upon such other information as he may secure."

Section 431.10 provides:

"Amount of tax. There is hereby levied and imposed against each mutual building and loan or savings and loan association a tax of one mill on the dollar on the actual value of the shares of stock of each such association."

Section 431.11 provides:

"Apportionment of tax. Each such association shall apportion against the owners of the shares of stock upon the value of which the said tax is so levied their pro rata share of said tax."

Section 431.16 provides:

"Tax exclusive. Taxes herein provided for shall be in lieu of all other taxes against building and loan or savings and loan associations and against the shares of stock of such association."

Section 431.17 provides:

"Foreign company -- statement required -- duty of auditor of state. The auditor of state shall, on or before the tenth day of February of each year, send to the county auditor of each county a statement of the name and post-office address of each stockholder of a foreign building and loan, or savings and loan association residing in their respective counties, together with the number of shares owned by each person on the first day of January preceding, and the actual value of each share of stock on said first day of January, which facts shall be reported to him by such associations under the law governing building and loan, or savings and loan associations."

Section 431.18 provides:

"County auditor -- duty. It shall be the duty of the county auditor to immediately furnish to each assessor in his county the name of each stockholder in any such foreign association residing in such assessor's district, together with the number of shares held by each person, and the actual value of each share on the first day of January preceding."

It will be noted by reference to Section 427.13(7) above that corporate shares not otherwise assessed or excepted are taxable, and by reference to Section 429.2 that such shares not otherwise taxed in kind are subject to the tax provided by Section 429.2. We must then determine whether such shares are otherwise assessed or excepted or otherwise taxed in kind. Under Section 431.6 a provision is made for the assessment of shares of savings and loan

associations exclusively engaged in such business to such associations at their principal place of business. It is standard statutory construction to construe state statutes within the framework of the jurisdiction of the state and such a construction would tend to exclude the possibility of Section 431.6 applying to an association with its principal place of business in a state other than the State of Iowa. Support for this construction is to be found in Section 431.9, above cited, which makes reference to a statement different from that statement provided by Section 431.17 in the case of a foreign company. It is to be noted that the tax provided by Section 431.10 is levied upon the value determinable from the type of statement required of associations provided by Section 431.7. It is, therefore, our conclusion that the tax so levied is not levied upon the shares of associations having their principal place of business in states other than Iowa. Consequently, Section 431.16, providing that such taxation should be in lieu of all other taxes against such shares, would not be applicable. Exemption from the tax under Section 431.10 precludes the application of Section 431.16 to provide an exception to the general rule that corporation shares are taxable under more general laws, such as those set forth in Chapter 429 of the Code. It will be noted that Sections 431.17 and .18 do not in themselves provide for a tax levy and the assumption would be that the information there referred to is for the purposes of applying Section 429.2.

It is the holding of the Iowa Supreme Court in the case of In re

Assessment Sioux City Stock Yards Company, 149 Iowa 5, 127 N.W. 1102, and Equitable Life Insurance Company v. City of Des Moines, 207 Iowa 879, 223 N.W. 744, that the assessment of shares of stock to a corporation is to the corporation as an agent of the stockholders. The assessment and apportionment of liability in those cases is very similar to the assessment and apportionment under the provisions of Section 431.6, etc. of the Code. The rule to be derived from these cases and applied in the instant case is that the liability is actually that of the shareholder for any tax assessable with reference to the shares. We have demonstrated that the shares of an association having its principal place of business in a state other than Iowa do not fall within the taxing or excepting provisions of Chapter 431. As to shares of stock generally not otherwise taxed or excepted, we find the jurisdiction to tax may be found in the residence of the owner of such shares within the taxing state. It is accordingly our conclusion that the share or shares of an Iowa resident taxpayer in a savings and loan association having its principal place of business in a state other than Iowa are subject to taxation under the provisions of Section 429.2 of the 1954 Code of Iowa. The fact that the interest of the Iowa resident in the Commercial Savings & Loan Association is insured by the Federal Deposit Insurance Corporation is immaterial. Our conclusion in this matter is in full accord with the decisions in the cases of Judy v. Beckwith, 137 Iowa 24, 114 N.W. 565, and Morril v. Bentley, 150 Iowa 677, 130 N.W. 734, which decided similar cases of taxing jurisdiction

in favor of the tax.

Very truly yours,

Marvin A. Iverson,
Special Assistant Attorney General

MAI:fs

January 10, 1957

Special Assistant Attorney General
State Tax Commission
Marvin A. Iverson

Mr. Ballard B. Tipton, Director
Property Tax Division
Iowa State Tax Commission
State Office Building
Des Moines, Iowa

Dear Mr. Tipton:

This will acknowledge receipt of your letter of January 3, 1957 wherein you pose the following question:

> "Pursuant to our conversation of Wednesday, January 2, I am turning over to you herewith, a letter dated December 21, 1956, written by Mr. William W. Gilkey, County Attorney of Delaware County, to the State Tax Commission, regarding what years may be taken into consideration by the Board of Supervisors of Delaware County in passing upon a claim filed for refund of taxes paid upon cement mixers permanently mounted on a motor vehicle. You will note that Mr. Gilkey made reference to a letter written by Mr. Louis H. Cook, former Director of the Property Tax Division, under date of May 4, 1956. I am also turning over to you herewith, the copy of Mr. Cook's said letter, also letter dated May 3, 1956, written to Mr. Cook by Mr. Roy Weltelen, County Assessor of Delaware County, Iowa. It appears that Mr. Cook was holding that refunds of the kind involved in the claim filed with the Delaware County Board of Supervisors were not to be allowed for any date prior to 1954, the year that there was an Attorney General's Opinion filed holding such cement mixers exempt from property taxes."

The taxes covered by the Delaware County claim are for the years 1951 through 1955, inclusive.

The question raised by your letter is answered by the case of Crown Concrete Company v. Conkling, 75 N.W.2d 351, wherein the Supreme Court

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ruled the taxpayer would be entitled to refunds of taxes paid on such concrete mixers for a five-year period, including years preceding the 1954 Opinion of the Attorney General referred to in your question. An examination of the statutes considered by the Court in that case discloses no material amendment to such statutes during the period here in question to suggest that the law was different in 1949 from what it was at the time of the Crown Concrete Products Company decision, supra, in 1956.

The only limitation on such refunds is that contained in Section 614.1(5) of the 1954 Code of Iowa which has been interpreted as providing that no refund of taxes under Section 445.60 of the Code can be compelled where more than five years has elapsed since the date the taxes for which refund is claimed were paid. See 1934 Report of Attorney General, p. 275. This statute of limitations may not be waived. Welu v. City of Dubuque, 202 Iowa 201, 209 N.W. 439.

Mr. Gilkey should be cautioned to ascertain the date of payment of the 1951 taxes payable in 1952 when advising the Board of Supervisors as to their duties under Section 445.60. We are not able to concur in Mr. Cook's opinion. There is no time limitation on refund of the taxes paid on these cement mixers other than that above indicated.

Very truly yours,

Marvin A. Iverson,
Special Assistant Attorney General

MAI:fs

January 14, 1957

Mr. Arthur H. Johnson
Attorney at Law
607 Snell Building
Fort Dodge, Iowa

Dear Mr. Johnson:

This will acknowledge receipt of your letter of January 9, 1957. In response thereto we would advise that Mr. Sharp correctly quoted this office to the effect that the life tenant is assessable for the full value of all moneys and credits in which the life estate exists. In the case of White v. City of Marion, 139 Iowa 479, 485, 117 N.W. 254, the Supreme Court states:

> "A life estate in land is not subject to taxation as such. The land itself is taxed, and the only question which may arise with reference to the taxation thereof, is who should pay the taxes, the life tenant, or the owner of the fee?"

The life tenant as between the life tenant and the remaindermen is the party responsible for the payment of property taxes. This is well supported by such authorities as Williams v. Williams, 200 Iowa 398, 403, 202 N.W. 434; Rich v. Allen, 226 Iowa 1304, 286 N.W. 434; Kregel v. Fredelake, 184 Iowa 1318, 169 N.W. 642; McCarty, Iowa Probate, Section 649, and other cases too numerous to mention noted in the above cited McCarty section and in Note 8 to Section 428.1, I.C.A. We recognize that the cases cited deal, at least primarily, with a real estate situation but see no logical basis for distinguishing between real estate and either tangible or intangible personal property under this rule. The analogy is supported by Section 429.10 of the 1954 Code of Iowa, In re Van Dyke, 229 Iowa 295, 294 N.W. 319, and 1940 Report of Attorney General, page 526.

As we understand the contentions of your client, we are faced only with the contention that the life estate should be valued on an actuarial basis instead of its full value for purposes of taxation and not with any contention that the property should have been assessed to a trustee or fiduciary. The answer to your client's contention must be that the tax on intangible personal property is against the actual valuation of such property as opposed to an actuarial valuation and during the term of the

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life estate the life tenant is liable for the taxes thereon.

We believe an examination of the authorities cited above will lead you to concur in this opinion. We have failed to find any authority to the contrary but, of course, would be happy to view any that you might find.

Very truly yours,

Marvin A. Iverson,
Special Assistant Attorney General

MAI:fs

57-1-17

January 16, 1957

Mr. Carl Hendrickson, Jr.
Assistant County Attorney
Cedar Rapids, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 11th inst. in which you submitted the following:

> "This office has been requested by the Trustees of Linn Township of this County to submit an Opinion on the following question:
>
> "'Do the Township Trustees have authority to discontinue an existing tax levy for fire protection, or must an election be held pursuant to Section 359.42 et seq. of the 1954 Code of Iowa?'
>
> "It is the understanding of this office that the township is desirous of discontinuing its fire protection in favor of fire protection on an individual basis."

In reply thereto I enclose herewith copy of opinion issued April 24, 1956, to Mr. Mark D. Buchheit, County Attorney at West Union, Iowa, in which the answer to question No. 5 appears to be pertinent to your problem. There appears to be no statutory authority for discontinuing this tax. In other words, the authority conferred on the trustees is continuing but its exercise, except where bonds have been issued, is discretionary.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB
Encl.

57-1-18

January 16, 1957

Mr. Robert C. Lappen, Member
Board of Control of State Institutions
L O C A L

Dear Mr. Lappen:

Receipt is acknowledged of your letter of January 11th as follows:

"There is a situation confronting us, and we think we have the answer, but want to be sure it is right - particularly in the future - as this matter comes up occasionally, and we should have the Attorney General's opinion.

"We have a woman at Rockwell City who is pregnant, and is soon to give birth to a child. Her husband is in Fort Madison, and has been in there for some time. There is no question in the minds of us, here, and this woman admits that the husband, who is in Fort Madison, is not the father of her unborn child.

"First - because of the incarceration of the father, it is physically impossible that he should be the father.

"Second - the wife admits that her husband is not the father of the child. She desires to release the child for adoption, and has informed the Superintendent at Rockwell City, and the Children's Division of the Board of Control. However, this woman does not want to go through the regular procedure of having the husband and wife join in the signing of the release for adoption, which is usually customary, because she does not want

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her family and husband to know of this. The wife is hoping that when they both have paid their debt to society that they can start anew.

"However, in view of the strict interpretation of the law, that a husband is presumed to be the father of a child born to his wife, in my opinion, consent is a necessity. We are wondering how to get around the situation and help this woman solve her problem.

"We feel we should obtain a ruling of the Attorney General regarding the above matter."

Under the facts of your letter, the child was born in wedlock. In Heath v. Heath, 222 Iowa 660, 269 N.W. 761, our Supreme Court said at page 661:

"When a child is born in wedlock, the law presumes legitimacy. This court said in Craven v. Selway, 216 Iowa 505, 508, 246 N.W. 821, 823:

"'This rule is founded on decency, morality, and public policy. By that rule the child is protected in his inheritance and safeguarded against future humiliation and shame. No one, by incompetent evidence, can malign the virtue of the mother, and no one, by such evidence, can interrupt the harmony of family relationship and undermine the sanctity of the home.' (citing cases)

"'Such presumption may be rebutted by showing: . . . that the husband was entirely absent so as to have no access to the mother . . .'"

Also see Wallace v. Wallace, 137 Iowa 37, 114 N.W. 527, at page 46, wherein the court said:

"It is safe to say, then, in the light of authority, that neither the declarations nor the testimony of either spouse may be received in evidence to prove access or nonaccess to the other. . . "

I would, therefore, advise you that the presumption of legitimacy exists in the situation described in your letter and, unless rebutted in proper court proceedings brought by the aggrieved husband, is conclusive on the board.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

57-1-19

January 16, 1957

Mr. Ben H. Peterson, Ph.D., Secretary
Board of Examiners in the Basic Sciences
Coe College
Cedar Rapids, Iowa

Dear Mr. Peterson:

Receipt is acknowledged of your letter of January 14th as follows:

> "The Iowa Board of Examiners in the Basic Sciences would like to have a ruling on the following situation:
>
> "An application has written the examination in a certain subject before the Iowa Board, receiving a passing grade. Subsequently, he repeated the examination in the same subject, receiving a lower grade. We would like to know if the applicant MUST accept the last grade, or does the higher grade stand. The reason for the repeat examination is for the purpose of raising the over all average for the entire set of examinations."

In answer to your question I would refer you to Section 146.16, Code 1954, which provides in pertinent part as follows:

> "The board shall establish rules for conducting of all examinations, grading or examinations and passing upon the technical qualifications of applicants as shown by such examinations. An applicant to pass the examination must obtain

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a grade of not less than seventy percent in any one subject and a total average grade of seventy-five percent in all subjects. If an applicant fails to attain the required grade in one or more subjects, he may be re-examined in the subject or subjects in which he failed, at any examination within one year without further application or examination fee. No part in the preparation of questions, the actual giving of the examinations or the grading of papers can in any way be delegated to any person other than a member of the board, or otherwise performed by any person not then a member of such board." (Emphasis ours)

The answer to your question is, therefore, to be determined by the rules and policies of your board.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

57-1-20

January 16, 1957

Mr. Lee R. Watts
Adams County Attorney
Corning, Iowa

Re: Joan Kay LaGrange, #2966
State Juvenile Home

Dear Mr. Watts:

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

"I desire to know as to the liability of Adams County for the care of the above minor child at the State Juvenile Home, Toledo, Iowa.

"This child was placed for adoption by the Board of Control with Clyde S. Lewis and wife Helen Lewis who for many years have been residents of Adams County. The consent to adoption was issued about May 7th, 1954 and a decree of adoption was entered by the District Court of Adams County, Iowa on November 9, 1954 whereby the child was adopted by Mr. and Mrs. Lewis.

"It developed that the child was not a proper person for adoption and on July 24th, 1956, a decree was entered in said court annulling the adoption, and the child was ordered turned over to the Board of Control, which board instructed us to deliver the child to Toledo.

"Adams County has now received a bill from Toledo for $144.44 for keep of this child for the quarter ending September 30, 1956.

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"We were of the opinion that since this child was a ward of the State before adoption, was not kept by the adoptive parents for two years in Adams County, and was not a fit child for adoption when offered by the State, Adams County is not the residence so as to incur liability for her keep at this time."

The decree of annulment to which your letter refers provides as follows:

"NOW on this 24 day of July, 1956, the above entitled matter comes on for hearing before the court upon the petition of the above named adoptive parents, Clyde S. Lewis and Helen Lewis, to set aside and annul the decree of adoption entered herein on or about the 5th day of November, 1954, and all the evidence having been considered and being full advised in the premises, the court finds:

"1. That it has jurisdiction of all of the necessary parties and of the subject matter of this hearing:

"2. That the allegations of the petition for annulment now on file herein are true, and that the said child, Joan Kay La Grange, has developed feeble mindedness and an otherwise permanent and serious disability as a result of conditions existing prior to the adoption of said child by the said Clyde S. Lewis and Helen Lewis, and of which they had no knowledge or notice at the time of the said adoption;

"3. That the said decree of adoption heretofore entered herein should be set aside and annulled and that said child should be returned to the custody of the Board of Control of State Institutions of Iowa;

"WHEREFORE it is ordered, adjudged and decreed by the court that the decree of adoption heretofore entered in this matter on about the 5th day of November, 1954 be and the same is hereby annulled, set aside and held for naught; that the above named child shall hereupon cease to be the child of the said Clyde S. Lewis and Helen Lewis, husband and wife and that all rights of inheritance between said child Joan Kay La Grange, herein known as Joan Kay Lewis, and the said

57-1-21

parents, Clyde S. Lewis and Helen Lewis are hereby annulled, and set aside, and the said child is restored to the name of Joan Kay La Grange.

"IT IS FURTHER ordered, adjudged and decreed by the Court that said child shall be delivered by said petitioners herein to the State Juvenile Home at Toledo, Iowa.

"(signed) H. J. Kittleman,
"Judge of the Third Judicial District of Iowa."

Said decree was apparently rendered under Section 600.7, Code 1954, which provides as follows:

"Annulment. If within five years after the adoption, a child develops feeble-mindedness, epilepsy, insanity, or venereal infection, or an otherwise permanent and serious disability as a result of conditions existing prior to the adoption, and of which the adopting parents had no knowledge or notice, a petition setting forth such facts may be filed with the district court of the county where the adoptive parents are residing. If upon hearing the facts alleged are proved, the court may annul the adoption and refer the child to the juvenile court or take such other action as the case may require. In every such proceeding it shall be the duty of the county attorney to represent the interests of the child."

When a thing is "annulled" the term is generally understood to destroy all legal relations arising therefrom ab initio and restore the status quo ante. See 3 C.J.S. 1389 wherein it is stated:

" . . . the word has been defined as meaning . . . the act of making void retrospectively as well as prospectively . . . "

I am, therefore, of the opinion that, when the adoption was "annulled" all legal relations resulting from the would-have-been relationship of parent and child, including that of legal settlement, were voided ab initio, with the result that the child's legal settlement is and remains the same as it would have been had the "adoption" never taken place.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfs

57-1-21

January 16, 1957

Mr. Charles E. Sayre
Supt. of Land Acq. and Surveys
Conservation Commission
L O C A L

Dear Mr. Sayre:

Enclosed herewith I am returning copies of letters you left with me, one dated January 2, 1957, to Kenneth M. Christensen, County Recorder at Guthrie Center, Iowa, and the other dated January 11, 1957, to E. R. Swickard, County Auditor at Muscatine, Iowa

With your letter to Mr. Christensen you forwarded two warranty deeds, one dated December 13, 1956, and the other December 18, 1956, conveying two tracts of land to the State of Iowa, purchased by the Conservation Commission, to be recorded. As I understand from your statements these deeds were forwarded to you by U. S. Mail and received by you on or about December 29, 1956.

In our conference on January 14, 1957, you raised the question as to what effect this recording would have as to taxes levied on this real estate for the year 1956, which ordinarily, as against a purchaser, such liens shall attach to real estate on and after December 31st, in each year. (Section 445.30, Code of Iowa, 1954).

Section 445.28 of the Code provides that taxes upon real estate shall be a lien thereon against all persons, <u>except the state</u>.

57-1-22

If the State of Iowa acquired title to the real estate in question prior to December 31st, it then follows that the taxes levied for the year 1956 could not attach as a lien against the State. (See Opinion Attorney General, 1911 - 1912, page 845).

The next question is, when did the State acquire title? This is predicated on the time of delivery and the intent of the parties. I do not believe there is any question as to the intent of the vendors and the State. A deed, if delivered, passes title immediately. (Conway v. Rook, 139 Iowa 162, 117 N.W. 273; Benson v. Custer, 236 Iowa 345).

The two deeds in question were delivered by mail. Our supreme court in the case of Richardson v. Estle, 214 Iowa 1007, 243 N.W. 611, held: "We deem it clear that the surrender of the deed by the grantors when they deposited the same in the United States Mail was a good delivery."

Under these authorities it is our opinion that the State of Iowa acquired title to the lands in question prior to the time the taxes became a lien and are no longer subject to a levy for taxes.

Yours very truly,

FRANK D. BIANCO
Assistant Attorney General

FDB:mfm
Enclosures 2

57-1-22

January 17, 1957

Mr. Robert Prichard
Monona County Attorney
Onawa, Iowa

Dear Sir:

Reference is herein made to your telephone request for answer to the following question:

> "Can a person who is buying a farm on contract and paying the taxes but does not yet have title to the farm vote in the drainage election?"

In answer to the foregoing, under Section 462.9, Code of 1954, conditioning the eligibility of a voter in a drainage election to a "record owner", I am of the opinion that a person buying a farm on a contract and paying the taxes is not such "record owner". A person of record holding the legal title is, in my opinion, the proper party to be termed the "record owner" within the terms of Section 462.9, Code of 1954.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:mfm

57-1-23

January 18, 1957

Honorable A. C. Hanson
Chairman, Contest Committee
House of Representatives
B u i l d i n g

My dear Mr. Hanson:

This will acknowledge receipt of yours of the 15th inst. in which you submitted the following:

> "As Chairman of the Committee assigned to consideration of the contest involving S. E. Robinson, newly elected Representative from Guthrie County, we would like to have your opinion on matters involved in this case.
>
> "We are especially concerned whether or not the grounds would be justified on the part of the petitioner as to whether or not Mr. Robinson's holding the position of Justice of Peace would disqualify him from being permitted to be seated as a member of the House.
>
> "By way of a little more detail on the situation, Mr. Robinson's name appeared as candidate for Justice of Peace, as well as State Representative at the primary in June election, as well as at the general election on November 6th. He was elected to both positions; had previously been serving as Justice of Peace with continuous bond, and presumes that he has qualified for the office of Justice of Peace as well as for State Representative.
>
> "We would like to have your interpretation on this matter."

In reply thereto I advise as follows.

The foregoing problem, impersonal at the time, was submitted to the Department previously. The problem and the answer given was made as follows:

57-1-24

"I have yours of the 30th ult. in which you submitted the following:

"'Is a Justice of the Peace whose annual income from such office is over the sum of $100.00 barred from the office of State Senator because of the provisions of Article 3 Section 22 of the Constitution of the State of Iowa:

"'Article 3 Section 22 is as follows: "No person holding any lucrative office under the United States, or this State, or any other power, shall be eligible to hold a seat in the General Assembly: but offices in the militia, to which there is attached no annual salary, or the office of justice of the peace, or postmaster whose compensation does not exceed one hundred dollars per annum, or notary public, shall not be deemed lucrative."

"'Does the $100.00 limitation apply only to postmasters or does the limitation apply also to the office of justice of the peace?

"'Is the office of justice of the peace and member of the general assembly incompatible offices for any other reasons?'"

"In reply thereto, I would advise you that in my opinion according to the plain terms of the Constitutional provisions the office of Justice of the Peace would not be regarded as a lucrative office. In my opinion (1) the maximum of $100.00 compensation applies only to the office of postmaster and (2) the offices of Justices of the Peace and members of the General Assembly are otherwise compatible."

Re-examination of the question presented by your letter confirms the opinion expressed in the foregoing letter. It seems sufficient to state that no question of interpretation would be required were it not for the $100.00 compensation limitation expressed in the Constitution previously quoted in the foregoing letter. However, it seems sufficient to state that this condition

attaching to the eligibility of a postmaster to be a member of the Legislature does not attach to the eligibility of a Justice of the Peace. Reason therefor is that the office of the Justice of the Peace is compensated upon a fee basis. See Section 601.128, Code of 1954. To determine the eligibility upon that score would require evidence extrinsic to the Constitution, of the compensation of the Justice of the Peace whose office is in controversy, to determine whether his compensation aggregates $100.00 per annum. Such is a contradiction of this fundamental of our Constitution, to-wit: "In the United States, the word 'constitution,' as applied to the organization of the Federal and state governments, always implies a writing." 11 Am. Jur., Title Constitutional Law, paragraph 2.

And, according to the case of Rasmussen v. Baker, 7 Wyoming 117, 50 P. 819, 38 L. R. A. 773:

> "In this country it is unvariably understood and received as indicating something less than that which is embraced within its comprehensive definition. In the language of Judge Cooley: 'In American constitutional law, the word "Constitution" is used in a restricted sense, as implying the written instrument agreed upon by the people of the Union, or any one of the states, as the absolute rule of action and decision for all departments and officers of the government, in respect to all the points covered by it, which must control until it shall be changed by the authority which established it.' Cooley, Const.Lim. 3. And Mr. Justice Miller, in further defining it, did so as follows: 'In America when we speak of a Constitution, we refer to a written instrument, one in which the powers, granted and duties imposed by it are reduced to writing.' And again:

57-1-24

'A Constitution, in the American sense of the word, is a written instrument by which the fundamental powers of the government are established, limited, and defined, and by which these powers are distributed among several departments, for their more safe and useful exercise, for the benefit of the body politic.' And he added: 'A search for a more satisfactory definition has been in vain, but this language perhaps, fairly expresses the meaning of the term in this country.' Miller, Const. (66) 71. In the case of State v. Parkhurst, 9 N. J. L. *427 (528) at page *443 (548), the court defined it in the following language: 'What is a Constitution? According to the common acceptation of the word in these United States, it may be said to be an agreement of the people, in their individual capacities reduced to writing, establishing and fixing certain principles for the government of themselves.'"

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

57-1-24

January 21, 1957

Mr. William M. Tucker
Johnson County Attorney
Iowa City, Iowa

Dear Bill:

I have yours of the 16th inst. in which you submitted the following:

> "Would you kindly advise as to whether or not, in the opinion of your office a duly elected and qualified constable, elected under the provisions of 39.21 of the 1954 Code of Iowa, is a qualified person for an appointment as an assistant county assessor to the extent that he can hold down both jobs at the same time and receive compensation for both jobs from the County at the same time."

In reply thereto I am of the opinion that a duly elected and qualified constable may not at the same time occupy the office of assistant county assessor. My reason therefor is found in the following statutes, assuming that what is designated as assistant is in fact a deputy. Section 441.4, Code of 1954, establishes the office of deputy county assessor and provides he shall in the absence or disability of the assessor perform all the duties pertaining to the duties of assessor. Section 441.9, subsection 1, Code of 1954, requires of the assessor the following:

57-1-25

"Duties of assessor. The County assessor shall:-

"1. Devote his entire time to the duties of his office and shall not engage in any occupation or business interfering or inconsistent with such duties."

The potential statutory duty of the assistant assessor would deny him the right to occupy both the office of constable and assessor or deputy assessor.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

57-1-25

January 21, 1957

Mr. Charles Mather
Sac County Attorney
Sac City, Iowa

Dear Mr. Mather:

Receipt is acknowledged of your letter of January 17th as follows:

> "I would like to find out whether the State of New York has a reciporcal statute for auctioneers so as to allow an auctioneer licensed in New York City to cry an auction in Iowa.
>
> "We have an auctioneer from New York City, who is employed by a firm, which I believe is from New York, to sell out a stock of goods owned by a jewelry store in Sac City. It is pretty well established that they are shipping in goods to sell and prolonging this activity for several weeks with the out-of-state firm actually owning everything that is being sold including what had formerly been owned by the local merchant.
>
> "If you can determine in any way how this might be curtailed, I would appreciate the suggestion. At any rate, we would like a prompt determination of my initial question in this letter."

Your reference to reciprocal statutes is apparently based on Section 546.1, Code 1954, which provides as follows:

> "Nonresident auctioneers -- crying sales. It shall be unlawful for any nonresident of the

57-1-26

state to cry any sale of property as an auctioneer within the state, unless by law of the state of which such person is a resident, a resident of this state would be permitted to cry any and all sales of property within such state as an auctioneer without a license."

It should be noted that Chapter 546 does not provide for the licensing of auctioneers but merely permits unlicensed nonresidents to cry sales in Iowa if the state of their residence would permit unlicensed Iowans to do likewise. I have examined the New York statutes relating to auctions and auctioneers as set forth in McKinneys Concolidated Laws of New York, Annotated, and was unable to discover any general statute requiring the licensing of auctioneers as such. The New York statutes confer power on cities and towns to license auction sales which, of course, is a different matter than licensing auctioneers and bears no relevance to the reciprocal (or retaliatory) provisions of Section 546.1. It follows that the party in question may act as auctioneer at the said auction sale without a license insofar as the provisions of said section are concerned.

However, it should be noted that Section 546.1 merely describes certain circumstances under which it shall be unlawful for certain nonresident auctioneers to cry sales in Iowa. It does not provide that such activity will be lawful in all other circumstances. I would, therefore, direct your attention to the provisions of Section 368.5(5) and of Section 368.8(5), Code 1954, which confer powers on cities and towns with respect to the regulation and licensing of auctions and auctioneers and contain no reciprocity provisions. Since it appears that the auction sale in question is to be held in Sac City, it may well be that the answer to your question is to be found in the ordinances of Sac City.

In the event Sac City has no ordinance on the subject, then the mere fact that the auctioneer need not be licensed does not mean that the auction sale need not be licensed. In this connection I would refer you to Chapter 546A, Code 1954. Except for such portion of the stock of goods as may be exempt under Section 546A.8 as amended by Chapter 225, Acts of the 56th General Assembly it appears that the auction described in your letter is subject to the licensing provisions of said chapter and particularly that portion of the stock which you state is being shipped in for sale.

Very truly yours,

LCA:mf

LEONARD C. ABELS
Assistant Attorney General

57-1-26

January 21, 1957

Mr. Elmer Heckinger, Director
Income Tax Division
State Tax Commission
State Office Building
Des Moines, Iowa

Dear Mr. Heckinger:

Reference is made to a question you have raised as to the possibility of using the collection procedures provided by the income tax law against a large number of old delinquent accounts.

The facts, as we understand them, are as follows:

An individual filed an income tax return prior to his entry into the service during World War II and made no payment of the amount shown on that return as the tax due. The Soldiers and Sailors Civil Relief Act which was in effect at that time as well as at the present time deferred any collection from a person in the military service if such person's ability to pay was materially impaired by reason of such service. The deferment of collection was for the period of service plus six months from the termination of such service. Because of these provisions, the Tax Commission made no attempt to collect these accounts during World War II and as to the accounts

57-1-27V

about which you are now concerned, no collection has been effected up to this time. The question you now raise is whether the State Tax Commission may now, after the passage of some ten years, use the collection procedures set up by the income tax law.

The Soldiers and Sailors Civil Relief Act in addition to providing for deferment of collection also tolled the statute of limitations during the period of military service and for an additional period of nine months beginning with the day following the period of military service. The question then boils down to what statute of limitations are imposed by the Iowa law upon the collection of income tax.

85 Corpus Juris Secundum, Taxation, section 1107 states:

> ". . . Enforcement of collection of taxes is subject to such period of limitation as is fixed by the statute but where no period of limitation is fixed by law, enforcement of taxes may not be defeated on such ground."

51 American Jurisprudence, Taxation, section 991 states:

> "In general it may be said that unless other provision is made by law, the obligation to pay a tax persists until the tax is paid. It is well established that statutes of limitation do not run against sovereign states unless

57-1-17

> by the terms of the limitation statute it is made applicable to the state; nor as a general rule do the statutes of limitation run against municipal corporations and counties in actions involving their public or governmental rights and duties. The existence of a time limit beyond which the government may not sue to recover unpaid taxes is therefore dependent upon some express statutory provision, and provisions limiting the time for the collection of taxes are strictly construed in favor of the government".

Chapter 422 of the Code of Iowa does not appear to specifically provide for any period of limitation on collection. Section 422.25 which we commonly refer to as a statute of limitations in the income tax law imposes a limitation only upon the determination or computation of the amount of tax which is due. It makes no reference to a limitation on collection. Section 422.26 of the Iowa Code refers to the collection methods. It refers to the lien of the tax and provides for the preservation of such lien against certain persons by filing a Notice of Lien with the Recorder of the County. The section provides that the lien shall attach at the time the tax becomes due and payable and shall continue until the liability for such amount is satisfied. As against the person owing the tax, the lien is in existence without filing and the wording of the statute is that the lien shall

continue until the liability is satisfied no matter how long that might be. There is no provision setting any time limit within which the Notice of Lien must be filed in order to preserve it against subsequent mortgagees, purchasers of judgment creditors. It is, therefore, our conclusion that the Notice of Lien could be filed at any time regardless of the period of time which had elapsed. It would only be a giving of notice to certain individuals of a lien which had been in existence at all times since the tax became due and which would continue in existence until the tax was paid.

Section 422.26 of the Code of Iowa also provides:

> "TheCommission shall, substantially as provided in section 445.6 and 445.7, proceed to collect all taxes and/or penalties as soon as practicable after the same become delinquent,. . ."

Section 422.26 also provides:

> "That the Attorney General upon the request of the Commission may bring an action at law or equity to enforce payment of any tax and/or penalties." Section 422.26 imposes no limitation upon when such an action may be brought.

Since no limitations are provided by Chapter 422, we must look to Chapter 614 of the Iowa Code which is the Chapter which sets up the general limitations of action.

Section 614.1, subsection (5) provides:

> "Actions may be brought within the times herein limited respectively after their causes are proved and not afterwards except when otherwise especially declared. . . ." .
>
> "(5) Those founded on unwritten contracts, those brought for injuries to property or for relief on the ground of fraud in cases heretofore solely cognizable in a court of Chancery and all other actions not otherwise provided for in this respect, within five years except as provided by subsection (9)."

The underlined portion of the above quoted statute is the only part of the general limitations chapter which could possibly apply. The Iowa Court and the Attorney General have both held that the five-year statute of limitations does not apply to collection of taxes by distress and sale. It applies only to "actions". See Collins Oil Company vs. Perrine 188 Iowa 295, 176 N.W. 303; 1930 A. G. O. 132; 1914 A. G. O. 142; 1898 A. G. O. 117. It, therefore, appears that there is no limitation imposed by the Iowa law as to when collection by distress and sale can be instituted other than the rather vague provision of section 422.26 which states; "as soon as practicable."

As to"the procedure set up by section 422.26 whereby the Attorney General may upon the request of the Commission bring an action to enforce payment of the tax, it might seem that the general limitation statute imposing a five-year limitation might be applicable in view of the citations set

out in the preceding paragraph. However, it has been held repeatedly by the Iowa Court and also by the Attorney General that general statute of limitations does not run against the state. See In Re Peers' Estate, 234 Iowa 403, 12 N.W. 2d. 894; State Ex Rel. Weede vs. Iowa Southern Utilities Company, 231 Iowa 784, 2 N.W. 2d. 372; Perley vs. Heath, 201 Iowa 1163, 208 N.W. 721; 1899 A. G. O. 45. The holding that the statute of limitations does not run against the State is limited to those situations in which the State brings an action as a representative of the public and not as a representative of a particular individual or group.

In line with the above statements it is our conclusion that there is no limit upon the time when the State Tax Commission may file its Notice of Lien nor is there any limit upon when the state may bring an action at law or equity for the collection of such delinquent tax. There is no limitation specifically set by the statutes upon when collection by distress and sale may be instituted other than the somewhat vague wording of section 422.26 which provides, "as soon as practicable". In so far as this phrase suggests application of the doctrines of "laches" or "estoppel" it is well to point out that such

doctrines are not normally applicable against the State.

Very truly yours,

M. A. Iverson
Special Assistant Attorney General

Mrs. Ruth B. Klotz
Assistant Commission Attorney

RBK:lp

57-1-27

January 22, 1957

Mr. Earl E. Hoover
County Attorney
Spencer, Iowa

Dear Sir:

This is to acknowledge receipt of your communication of January 16, 1957, wherein you request an opinion from our office with respect to the application of Section 726.9, Code of Iowa 1954, to Masonic halls and YMCA buildings.

Section 726.9, Code of Iowa 1954, provides as follows:

> " No person who keeps a billiard hall, or the agent, clerk, or servant of any such person, or any person having charge or control of any such hall, shall permit any minor to remain in such hall, or to take part in any of the games known as billiards."

It is to be noted that the specific mandate of the statute is that "no person who keeps a billiard hall . . . . . shall permit any minor to remain in such hall, or to take part in any of the games known as billiards". This section of our Code does not refer to public billiard halls but refers to any billiard room and makes no exception in regard to billiard rooms operated by fraternal or charitable organizations.

If a minor is permitted to enter the room and remain there for any purpose, and that room is a billiard hall, the keeper or the person having charge or control of such hall is amenable to the penalties of the law, and it is quite immaterial whether the minor indulges in any game whatsoever. In this connection see State v. Johnson, 108 Iowa 245, 79 N.W. 62, 1928 AGO 123, and 1938 AGO 176.

Very truly yours,

RRRD/fm

RAPHAEL R. R. DVORAK
First Assistant Attorney General

57-1-28

January 23, 1957

Mr. N. E. Hyland, Legal Adviser
Department of Public Instruction
L O C A L

Dear Mr. Hyland:

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

> "We respectfully request an attorney general's opinion upon the following propositions:
>
> "'Does a board of education have the right to effect a change order in a building contract so as to allow additional construction to an addition or building presently being built without the usual procedure of advertising and bid letting? If possible for a board of education to negotiate further contracts with the builders for this added construction, is there any limitation as to the cost of the proposed addition written under the new contracts covered by the change order?'
>
> "Can a school district legally allow a change order of unlimited amount making possible the construction of more class rooms without following the usual procedure of advertising and bid letting?"

As you know, the cost of any construction undertaken by a school district is limited to the amount authorized by the voters and the purpose for which such funds might be expended is likewise limited to that authorized by the voters.

57-1-29

Since your office has been so advised in numerous opinions rendered over a period of years, I assume that the situation giving rise to your current question is one where the funds voted are sufficient in amount and the purpose authorized is broad enough in scope to cover the additional expenditure for classrooms to which you refer and that the matter of bids for the additional construction is the only question inhering in your inquiry.

If this be the case, the answer to your question is provided directly by the statutes. Section 297.7, Code 1954, as amended by Chapter 146, Acts of the 56th General Assembly provides in pertinent part as follows:

> " . . . before <u>any</u> schoolhouse containing more than one room shall be erected or repaired at a cost exceeding twenty-five hundred dollars, proposals therefor <u>shall</u> be invited . . . and the contract shall be let to the lowest responsible bidder . . . " (Emphasis ours)

I would, therefore, advise you that assuming the voters have authorized sufficient money to pay for the proposed additional structure and have granted authority to spend the same sufficiently broad to cover the proposed additional construction, then the answer to your question depends upon whether or not the cost of such additional construction will exceed $2,500.00.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

57-1-29

January 23, 1957

Mr. Harry E. Harbeck
Clerk of Municipal Court
Municipal Building
Sixth and Water Streets
Sioux City, Iowa

Dear Mr. Harbeck:

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

> "Since the establishment of the Municipal Court in Sioux City in 1932, it has been the practice of my office to require the parties entitled to the proceeds of a judgment, or their agent, to satisfy the judgment in full either by recording the satisfaction on the docket of record, or by a written instrument, before moneys are paid out.
>
> "This procedure has not been questioned except by a few and before altering the practice of many years' standing, I would appreciate an opinion from you regarding the matter. If what I have required in the past is not necessary, would you please state what should be required, if anything. Thank you for your cooperation and assistance in this matter."

The duties and the parties who can request an opinion of this office are set out by statute. The Clerk of a Municipal Court is not a party to whom this office may give an opinion. The proper legal adviser for you on this matter would be your city solicitor.

57-1-30

However as a courtesy to you and without stating the opinion of this office I would point out to you that Section 624.20, Code of Iowa 1954, prescribes a duty of the clerk; section 624.37 prescribes a duty of the party entitled to the proceeds. The enforcement of this latter section and the right to recover are for the party aggrieved. The clerk of the municipal court would be entitled to demand a receipt for any monies paid out by him if he deemed this necessary and proper for efficient operation of his office. A combined receipt for the clerk and satisfaction under section 624.37 would be a convenience to the party entitled to the proceeds.

Very truly yours,

JAMES H. CRITTON
Assistent Attorney General

JHC:mfm

57-1-30

60M 7-56 10779
PB-C7976

Form 13

IOWA STATE HIGHWAY COMMISSION

AMES, IOWA

Ames, Iowa

January 23, 1957

Mr. Floyd E. Ensign
Attorney at Law
Northwood, Iowa

Re: Roadway across drainage channels on drainage districts.

Dear Mr. Ensign:

I have your letter of December 28 in which you inquire if it is the duty of the county to build road crossings made necessary by the installation of a drainage district.

As I understand your letter, the drainage district is one established by mutual agreement of the landowners. The Code of Iowa seems to provide three methods by which a drainage district can be established.

ection 455.1 of the Code of 1954 gives the Board of Supervisors of ne county jurisdiction to establish drainage districts. Section 455.7 of the Code of 1954 as amended by Chapter 202 of the 53rd General Assembly, and the sections following provide for establishment of drainage districts by Petition of two or more landowners. Section 455.152 Code of 1954 and following sections provide for the establishment of a drainage district by mutual agreement of landowners, Section 455.154 of the Code gives the County Board of Supervisors the power to establish such drainage district after the mutual agreement has been filed with the Auditor and contains all the necessary provisions for the establishment of the drainage district.

If the drainage district has been legally established by one of the three methods above, all of them requiring some affirmative action by the Board of Supervisors, then the Board of Supervisors under Section 455.118 has the duty to construct roadway over the drainage ditch.

I presume from your letter that this is a drainage district established by mutual agreement of the landowners and affirmative action has been taken by the Board of Supervisors to so establish. I call your attention to the wording of Section 455.118, Code of 1954 which reads in part, "***The Board of Supervisors when in the exercise of its sound discretion it appears that it will promote the general public welfare shall move, build, or re-build the same***".

rusting this answers your inquiries, I remain,

Very truly yours,

C. J. Lyman
Special Assistant Attorney General
for Iowa State Highway Commission

CJL:jb

57-1-21

February 4, 1957

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

Dear Mr. Leir:

Receipt is acknowledged of your letter of January 30th as follows:

> "I have received a request from Mr. John M. Strelow, Assessor for the City of Davenport, for an opinion of your office, a copy of which request is being enclosed herewith.
>
> "I believe the material submitted by the Assessor's office sets out in full the problem that is bothering him.
>
> "I will greatly appreciate receiving your opinion."

The material enclosed with your letter states as follows:

> "The City Assessor has received complaints from members of two of the local taxing bodies, namely, the Scott County Supervisors and the Independent School district, that the office of the City Assessor is over-extending the service to the City of Davenport at the expense of the two taxing bodies by completing the annual tax books, delivered complete for collection. This office

57-2-1

processes each assessment after the millage is set by the City Council the first meeting in July.

"As the City of Davenport is a special charter city, the City Treasurer collects the real and personal property assessments. The office of the City Assessor sets up the tax books for both the city and county treasurers to the extent that in place of the Auditor entering the taxable value on the tax books as per Code 428.4, the office of the city assessor extended this service; however, the County Auditor, as per Code 443.2, shall complete the same by entering the amount due on each installment separately, and carrying out the total of both installments.

"The City Assessor's office sets up the second set of tax books, one for the County Auditor as stated above, the other for the City Treasurer, having increased the service for the Treasurer by entering the amount due on each assessment after the millage is set.

"There are approximately 29,000 assessments in the city; therefore the members of the two taxing bodies protested that this office is overextending the required service to the City of Davenport, at their expense.

"It is therefore requested that an Attorney General's opinion be given as to the legality of rendering this additional service, namely, the entering of the amount due on the tax books of each assessment after the City of Davenport's millage is set. The city clerk's office duties are similar to the county Auditor."

The authority for existence of the office of city assessor is provided in Section 405A.1, Code 1954, which provides in pertinent part as follows:

"Optional procedure. Any city having a population of ten thousand or more, according to the latest federal census, or which shall attain such population in the future but shall not have a population in excess of one hundred and twenty-five thousand, may by ordinance provide for the selection of a city assessor and for the assessment of property in such cities <u>under the provisions of chapter 405 of this chapter</u>." (Emphasis ours)

Section 405A.4, Code 1954, provides for payment of the expenses of the city assessor's office as follows:

"Expenses. All expenditures in cities selecting an assessor under this chapter shall be paid under the provisions of Chapter 405." (Emphasis ours)

Chapter 405, as made applicable by the underscored reference in the hereinabove quoted statutes, governs expenses of the city assessor's office and payment thereof by the provisions of Section 405.18, as amended by Chapter 200, Acts of the 56th General Assembly, which provides:

"Budget. All expenditures under this chapter shall be paid as hereinafter provided.

"Not later than July 15 of each year the city assessor, the examining board and the local board of review shall each prepare a proposed budget of all expenses for the ensuing year. The city assessor shall include in his proposed budget the probable expenses for defending assessment appeals, and court costs taxed against the public bodies. Said budgets shall be combined by the city assessor and copies thereof forthwith filed by him with the board of supervisors, city council and school board.

"Such combined budget shall contain an itemized list of the proposed salaries of the city assessor and each deputy, the amount required for field men and other personnel, their number and their compensation; the estimated amount needed for supplies, printing, mileage and other expenses necessary to operate the assessor's office, the estimated expenses of the examining board and the salary and expenses of the local board of review.

"Not later than July 21 of each year, the mayor shall, by written notice, call a joint meeting of the city council, school board and county board of supervisors to consider such proposed budget and shall fix and adopt a consolidated budget for the ensuing year.

"The mayor shall act as chairman and the city assessor as secretary of such meeting. The proposed budget or any item thereof may be increased

or changed in any manner at this joint meeting. The majority vote of the members present of each taxing body shall count as one vote, and no action shall be valid except by the vote of not less than two out of three taxing bodies.

"At the joint meeting the three taxing bodies shall authorize:

"1. The number of deputies, field men, and other personnel of the assessor's office.

"2. The salaries and compensation of members of the board of review, the assessor, chief deputy, other deputies, field mena, and other p personnel, and determine the time and manner of payment.

"3. The miscellaneous expenses of the assessor's office, the board of review and the examining board, including office equipment, records, supplies, and other required items.

"4. The estimated expense of assessment appeals.

"All such expense items shall be included in the budget adopted for the ensuing year.

"Each of the three taxing bodies shall contribute one-third of the amount required to make the final budget and shall, on the first day of January, April and July of each year remit one-third of its share to the county treasurer to be credited by him to a separate fund to be known as 'The City Assessment Expense Fund', and from which fund all expenses incurred under this chapter shall be paid.

"The county auditor shall keep a complete record of said fund and shall issue warrants thereon only on requisition of the city assessor.

"The city assessor shall not issue requisitions so as to increase the total expenditures budgeted for the operation of the city assessor's office. However, for purposes of promoting operational efficiency, the city assessor shall have authority, with the approval of the three taxing bodies, to transfer funds, budgeted for

specific items for the operation of the city assessor's office from one unexpected balance to another; such transfer shall not be made so as to increase the total amount budgeted for the operation of the office of the city assessor, and no funds shall be used to increase the salary of the city assessor or the salaries of permanent deputy assessors. He shall issue requisitions for the examining board and for the board of review on order of the chairman of each board and for costs and expenses incident to assessment appeals, only on order of the city legal department.

"Unexpected funds remaining in the city assessment expense fund at the end of a year shall be carried forward into the next year. Such balance of unexpected funds shall be credited to the final payment of the fund by the respective taxing bodies for the next year on an equal basis. The treasurer shall notify such taxing bodies of any such credits to which they are entitled." (Emphasis ours)

The answer to your question is furnished by the statute. The contribution of each taxing body is expressly limited to "one-third of the amount required to make the final budget" and the permissible items for inclusion in such budget, as enumerated, make no express reference, and none would seem to be implied, to performance by the city assessor of the work normally performed by the county auditor under Section 443.2, Code 1954, or to such portion thereof as may be performed in special charter cities by the "auditor, clerk, or recorder" under the provisions of Section 420.230, Code 1954. I would, therefore, advise you that there is no authority for inclusion of such items in the city assessor's budget and hence no authority for payment of the cost of same from the contribution of the three taxing bodies.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

February 5, 1957

Honorable W. H. Tate
Senate Chamber
B u i l d i n g

My dear Senator:

This will acknowledge receipt of yours of the 4th inst. in which you recite that Section 359.42, Code of 1954, authorizes the township trustees to purchase fire apparatus independently or jointly with any adjoining township and that following sections provide for payment therefor by levy and the use of anticipatory bonds.

You query as to whether three townships that have joined together for fire protection can purchase a fire engine and legally sign a chattel mortgage therefor or enter into a contract for the purchase and pay for the engine on assessment dates without resorting to the issuance of bonds.

In reply thereto I advise you that the only statutory authority for going into debt for the purchase of fire equipment by township trustees is by a fire tax levy or by the issuance of bonds. Any other method for paying for such fire equipment has no statutory authority.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:md

57-2-2

February 11, 1957

Hon. W. H. Tate
Senator, 43rd District
B u i l d i n g

My dear Senator:

This is in reply to yours referring to my letter of the 5th inst. in reply to your inquiry as to whether three townships that have joined together for fire protection can purchase a fire engine and legally sign a chattel mortage therefor or enter into a contract for the purchase and pay for the engine on assessment dates without resorting to the issuance of bonds. You inquire now specifically as to whether if these bodies levy an annual tax can they legally sign a chattel mortgage or enter into a purchase contract and thus pay for the engine over a period of time on the assessment dates of the levy.

In answer to this specific question I advise you that it is the opinion of the Department that the townships may not legally sign a chattel mortgage or enter into a purchase contract and pay for the engine over a period of time on the assessment dates of the levy.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

57-2-3

February 11, 1957

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

Dear Sir:

This will acknowledged yours of the 8th inst. in which you submitted the following:

> "I should like the opinion of your office on the following questions:
>
> "Chapter 120 of the Fifty-sixth General Assembly provides 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.'
>
> "Does this act, in effect, wipe out the liens or charges built up prior to the passage of this act?
>
> "Does the word 'imposed' have a meaning or connotation synonymous with the word 'enforced' so that the county would be prohibited from enforcing and executing upon the property of any such minor, or his parents, for charges or liens built up in the county books, for support and treatment provided prior to the passage of this act?"

In reply thereto I advise that the Department has previously answered the foregoing question to the effect "that Chapter 120 contains no express language purporting to give it retroactive effect. Neither does it contain any express language cancelling or forgiving any obligation existing prior to the date

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it went into effect, which was July 4, 1955. It follows that Chapter 120, Acts of the 56th G. A. has no effect for any purpose prior to July 4, 1955, and the answer to your question is also in the negative."

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

February 11, 1957

Mr. E. S. Gage, Jr., C.P.A.
Secretary-Treasurer
Iowa Board of Accountancy
725 Brick and Tile Building
Mason City, Iowa

Dear Mr. Gage:

We have your letter of November 9, 1956, addressed to Mr. Dayton Countryman, Attorney General, requesting an opinion as to the nature of the expenses which may be paid under Section 116.4 of the 1954 Code of Iowa, the pertinent parts of which read as follows:

" . . . We are particularly interested in the interpretation of the portion of this section which reads as follows: 'and other expense incident to the discharge of their duties.'

"The Board believes that the proper interpretation of this phrase would call for the payment of 'expense incident to the discharge of their duties' not only including those outlined in Section 116.02 under powers and duties of the board, but also other duties of the board as specified in Chapter 116. An example of such duty is the conduct of an examination as specified in Section 116.08. An illustration of an expense which might be incurred in connection with the conduct of the C.P.A. examination might be the cost of the services of an administrative assistant to investigate the qualifications of applicants for examination under Section 116.09.

57-2-5

"Another example of a Board duty which is not specified in Section 116.02 has to do with the registration of practitioners (Section 116.13 and 116.14).

"In addition, the Board would like an opinion as to its duties, if any, in connection with the administration of paragraphs 2 and 3 of Section 116.11 pertaining to accountants' bonds.

" . . . . . " (Emphasis ours)

The answer to the two questions propounded in the first paragraph and the last paragraph of your letter quoted above, comes within the philosophy of the following quoted maxim, and the rule almost universally followed by the Courts, in construing powers expressly conferred by statutes, as follows:

"(1) 'Inclusio unius est exclusio alterius', the inclusion of one is the exclusion of the other.

"(2) Creatures of statute have only those powers expressly conferred by statute or reasonably and necessarily implied as incident to carrying out an express power."

Section 116.2 of the Code which enumerates the powers and duties of the Board of Accountancy reads as follows:

"Powers and duties. The board shall have power and it shall be its duty to: (1) adopt, print, publish, and distribute reasonable rules not inconsistent with the provisions of this chapter for the guidance of the public, registered practitioners, and applicants for examination; (2) compel the attendance of witnesses; (3) administer oaths; (4) take testimony; (5) require proof in all matters pertaining to the administration of this chapter; (6) keep a record of all their proceedings including applications for examinations, registration, and certificates to practice showing the reasons for the refusal of any such application or for the revocation or suspension of any registration or certificate to practice; (7) preserve testimony taken in all hearings provided for in this chapter. Testimony may be oral or by deposition; and when oral the questions and answers shall be taken down by a certified shorthand reporter and full transcripts thereof made for the use of the parties interested;

(8) the treasurer elected shall upon assuming office file with the auditor of state a good and sufficient bond in a company authorized to do business in this state in the penal sum of five thousand dollars and shall on or before June 30 in each year, pay all sums remaining after the payment of the expenses authorized by this chapter into the state treasury to be there carried to the credit of and subject to withdrawal by the board of accountancy; (9) the board shall make a biennial report to the governor of its proceedings, with an account of all moneys received and disbursed, a list of the names of all practitioners whose certificates to practice have been revoked or suspended, and such other information as it may deem proper or the governor request, and do all other things required by this chapter to be done by said board."

To carry out these powers and duties, Section 116.4 provides for payment of expenses as prescribed therein, to-wit:

"No compensation -- expenses. No compensation shall be paid to any member of the board for services as such, but the members thereof shall be allowed the necessary traveling, printing and other expenses incident to the discharge of their duties. Bills for the expense of the board or its members shall be audited and allowed by the state comptroller and shall be paid from the fees received under the provisions of this chapter." (Emphasis ours)

The words "other expense" and "incident or incidental" have been defined by Courts in the following language:

(Words and Phrases, Volume 30, pages 387 and 388 -- Referring to an appropriation ordinance)

"Held, that the term 'other expenses' means expenses of the character theretofore mentioned in that clause of the appropriation act, and does not include an appropriation for expenses incurred by a committee appointed by a resolution of the house of delegates to investigate tax returns. State ex rel Gavigan v. Diekes, 113 S.W. 1077, 214 Mo. 578; State ex rel Barrett v. Dierkes, 113 S.W. 1081, 214 Mo. 592." (Emphasis ours)

(Words and Phrases, Volume 20, page 423)

"The word 'incidental', as used in Code Cv. Proc. § 308, authorizing, when services are rendered by counsel appointed by order of the court in a capital case, the court to allow the incidental expenses of such counsel, is associated with the word 'personal', and is used conjunctively, and does not confer authority on the counsel to make contracts of a special character involving a large liability. The word 'incidental' must be construed in accordance with its ordinary meaning, which is, of minor importance, occasional, casual, as incidental expenses, often used in the plural to mean minor expenses. Cohn v. Palmer, 79 N.Y.S. 762, 766; People v. Cartwell 70 N.Y.S. 755, 756; In re Waldheimer 82 N.Y.S. 916, 917, 84 App. Div. 366, quoting Cent. Dist." (Emphasis ours)

Referring then to the question propounded in the first paragraph of your letter, it is our opinion that the words, "and other expenses incident to the discharge of their duties." refers to the expenses of the character referred to, i.e., traveling, printing, and the expenses reasonably and necessarily implied as incident to carrying out the powers and duties granted under Section 116.2, which imply employment of necessary clerical help in preparing for and conducting examinations for applicants for registration as certified public accountants, and thereafter the registration of practitioners. It does not give the Board authority to employ an administrative assistant or full time secretary which would be in the nature of a major expense, as opposed to a minor expense which is the meaning ordinarily given to the word "incident" as contained in Section 116.4.

In answer to your second question contained in the last paragraph of your letter quoted above, it is our opinion that under the duties of the Board expressed in subparagraph (5) of Section 116.2, "require proof in all matters pertaining to the administration of this chapter", it is the duty of the Board to see that a bond or insurance certificate is filed with the Auditor of State for the reason that until this is done, the applicant or practitioner cannot be properly registered as required under Sections 116.10 and 116.11.

Yours very truly,

FRANK D. BIANCO
Assistant Attorney General

FDB:mfm

February 11, 1957

Mr. Gordon L. Winkel
Kossuth County Attorney
P. O. Box 405
Algona, Iowa

Dear Mr. Winkel:

Reference is made to your letter of January 26, 1957 in which you asked for an opinion as to whether the Board of Supervisors may cancel the tax assessment made on certain property in Kossuth County. The facts as we understand them are as follows:

A church entered into a contract to purchase certain property in January 1956 and the contract was recorded on January 31, 1956. On this same date the church filed an application for exemption. At the time the contract was made the legal title to the property was not in the name of the seller but such title was in his name by August 21, 1956. The Board of Supervisors made their levy on September 10, 1956. On September 18, 1956, warranty deed from the seller to the church was recorded. In December 1956, the church sold this property to a third person and that deed was recorded on January 21, 1957.

In considering this situation, we see two basic questions:

1. Was the church the owner of the property on the date of levy so that the property would qualify for the exemption provided for in section 427.1 (9) of the Code of Iowa?

2. If the church was the owner of the property upon the date of levy within the meaning of the exemption statute, does the Board of Supervisors have the power to cancel the assessment?

We make reference first to question No. 2. The facts given us indicate that the church filed its application on January 31, 1956. We must assume that the Assessor made some disposition of the application and that the Board of Review acted upon it. We also assume that no complaint to the Board of Review was taken by the church from the action of the Assessor as provided in section 442.5 or that no appeal was taken from the action of the Board of Review by appeal to the District Court as provided in section 442.6.

We refer you to an opinion of the Attorney General found in 1948 Report of the Attorney General, page 196. In that opinion the Attorney General held that the Board of Supervisors has no authority to pass on tax exemptions. He held that the claim for exemption should be made to the Assessor, the Board of Review or the County

Auditor and if refused the exclusive remedy would lie in appeal to the District Court. We believe the 1948 opinion is pertinent in the instant situation and we re-affirm the holding that the Board of Supervisors has no authority under the law to cancel its levy against this property because it now has reason to believe that the exemption which was denied by the Assessor and/or the Board of Review should have been allowed. The only power to grant such exemption after the Assessor and Board of Review have denied it is in the District Court or Supreme Court of the State of Iowa. There have been four sessions of the Iowa Legislature since the 1948 Opinion and the legislature must be deemed to have acquiesced in the interpretation given by the Attorney General. See John Hancock Life Insurance Company vs. Lookingbill, 218 Iowa 373, 253 N. W. 604; Lamb vs. Kroeger 233 Iowa 730, 8 N. W. 2d 405.

As to Question No. 1 concerning the problem of whether under the facts the property should have been exempted from taxation, we refer to section 427.1 (9) which provides:

> "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 and leases by which such property is

held shall be filed for record before the property herein described shall be omitted from the assessment."

We would follow your view that ordinarily when the parties enter into a contract of purchase there is an equitable conversion whereby the purchaser is deemed the owner of a real property interest and the seller has from that time on only a personal property interest. In this situation the equitable conversion probably was not effective until such time as the seller had legal title. However, the statute further requires that "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". We believe that the use of the term, "deeds or leases" must be given a strict construction. Section 427.1 is a tax exemption statute and as such must be strictly construed in favor of taxation and against the taxpayer. See Readlyn Hospital vs. Roth, 223 Iowa 341, 272 N. W. 90; Trustees of Iowa College vs. Baillie, 236 Iowa 235, 17 N. W. 2d 143; Theta Xi Building Association of Iowa City vs. Board of Review of Iowa City, 217 Iowa 1181, 251 N. W. 76; Jones vs. State Tax Commission Iowa , 74 N. W. 2d 563. In view of the foregoing authorities, we believe that the words of the statute cannot be extended to include "contracts" or

"agreements".

One other question might be involved as to whether this property qualifies for the exemption. That is, as to whether the church meets the provisions of section 427.1 (9) in reference to the use made of such property. That section provides that to be entitled to the exemption the grounds and buildings must be used by such institutions "solely for their appropriate objects". In answer to our inquiry on this point, you have assured us that there is no question but what the property qualifies in this regard and we, therefore, do not deem it necessary to discuss that point in this opinion.

In conclusion, therefore, it is our opinion that the property owned by the church does not qualify for the exemption provided by section 427.1 (9) in that no deed or lease by which such property is held had been filed for record on the date of levy. Even though the property of the church might meet the requirements of the statute in other respects, we are of the opinion that the Assessor and the Board of Review having acted in accordance with the procedure provided by law, the only avenue open to the taxpayer was by appeal to the District Court. The Board of Supervisors has no power to cancel the assessment. To hold otherwise would have the effect of giving the Board of

Supervisors a power to pass on exemptions when such power is not provided by Iowa law.

Very truly yours,

Marvin A. Iverson,
Special Assistant Attorney General

MAI:lp

February 13, 1957

Mr. Clare H. Williamson
Adair County Attorney
Greenfield, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 11th inst. in which you have submitted the following:

"I am requesting your unofficial opinion based on the following facts: Adair County has paid all of the costs of a woman patient who was committed in 1921 to the State Hospital at Clarinda and whose bill to and including the quarter ending September 30, 1956 amounts to the sum of $13,930.61. This patient has no property of her own. It is our understanding that the husband of the patient left Iowa shortly after she was committed and obtained a divorce in Nevada, has remarried and now lives in Colorado. The patient had four children prior to her commitment one of whom now lives in Iowa. This son who now lives in Iowa has ample funds and a considerable amount of property according to the best information that we are able to obtain. No action of any kind has ever been commenced by Adair County to obtain any of the amounts it has expended.

"1. Based on Attorney General's Opinion 1938 at page 785 am I correct in assuming that only the amounts expended by the County since July 4, 1939 can be obtained by action against the son?

"2. Is it possible for the County to bring an ordinary action at law against the son without joining any of the other children to obtain the full amount expended since July 4, 1939 based on Section 230.15 of the 1954 Code of Iowa?

"3. May this action be commenced without first resorting to the provisions of Section 252.2 et seq of the 1954 Code?"

57-2-7

In answer to the foregoing I advise as follows:

1. In answer to your question #1 I would advise you that insofar as the recovery from the son is concerned, recovery under the statute is limited to amounts expended since July 4, 1939. Prior to that time the liability of the son, if any, is based upon the common law.

2. In answer to your question #2 I am of the opinion that an ordinary action at law against the son without joining any of the other children may be maintained and recovery of the full amount expended since July 4, 1939, may be had. Section 230.15 of the 1954 Code of Iowa provides for the joint and several liability.

3. In answer to your question #3 I advise that the action for the recovery of expenses subsequent to July 4, 1939, against the son may be maintained without resorting to the provisions of Section 252.2 et seq. of the 1954 Code of Iowa. If recovery is sought under common law liability then prior resort to the provisions of Section 252.2, Code of 1954, may be required.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

See also Sec. 252A.

Andrew Davis v Davis
246 Iowa 262, 67 NW2d 566.

February 14, 1957

Mr. Isadore Meyer
Winneshiek County Attorney
Decorah, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 11th inst. in which you submitted the following:

> "Section 250.20 of the 1954 Code of Iowa as amended provides that the Board of Supervisors shall set up an emergency fund of 10% of the annual budget for an Emergency Soldier's Relief Fund. This Fund is subject to the direction and control of the Commission. Then after review by the Board of Supervisors the County Auditor is directed to issue a warrant to reimburse said Commission Emergency Fund.
>
> "In Winneshiek County this Emergency Fund has been set up but has never been drawn upon since the Soldier's Relief Commission has a secretary and the claims are approved as a regular routine rather on an emergency basis.
>
> "At the end of the year, can the Board of Supervisors transfer the Emergency Fund from the previous year back to the regular Soldier's Relief Fund or must it continue to build up? Your attention is called to an official opinion of the Attorney General dated November 14, 1955, which is the only law that I am able to find on this matter and in my opinion is not in point so far as the question here.
>
> "Please advise whether the Board of Supervisors of Winneshiek County after the end of a year may transfer the 10% Emergency Soldier's Relief Fund back to the regular Soldier's Relief Fund. Your attention to this matter is appreciated."

In reply thereto I advise you that there appears to be no authority for transferring the Emergency Fund back to the

57-2-8V

Soldiers' Relief Fund at the end of the year. The act does not so provide and there appears to be no implied intent that it should so revert. This rule applies notwithstanding the fact that no use is made of the Fund by your Commission and the fund thereby continues to increase.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

February 14, 1957

Mr. John H. Holley
Butler County Attorney
Shell Rock, Iowa

Dear Mr. Holley:

Reference is made to your letter of November 30, 1956 and subsequent correspondence in regard to the same matter in which you request an opinion as to the tax liability in regard to certain property in your county. The facts as we understand them are as follows:

Many years ago an individual erected a business building on land owned by him. At the time the building was being constructed, he entered into a contract with a corporation known as the Auditorium Company whereby the Auditorium Company was given the right to construct second and third stories on the building which was being constructed by the land owner. The land owner gave what is designated as a deed to the Auditorium Company to the upper stories of the building and to the stairways leading from the first floor to the second and a certain portion of the basement. The deed provides:

> "The intent and object of this conveyance being to secure to the Auditorium Company aforesaid, their successors, or assigns, the exclusive

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> use, enjoyment only of the said second story, the stairways leading thereto, basement room and stairway and a portion of the unoccupied portion of said lot as above specified for the purposes aforesaid and for no other purposes whatever and its use for any other purpose may be immediately and perpetually enjoined by the said first party or his assigns or representatives against the said second party or their successors, . . ."

The reference in the above quoted portion of the deed to the purposes aforesaid in the deed which provides that the parties of the first part sell to the Auditorium Company "for their occupancy, use and benefit for theatrical performances, lectures, dance hall, entertainments, public dinners, and public meetings, and for all such other purposes as country opera houses or halls are generally used and for no other use or purpose whatever, . . ."

As we understand the situation, the Auditorium Company used the premises for the purposes set out in the deed for about fifty years. In recent years, however, they have been unable to make use of the premises and have been unable to pay the taxes on the second and third stories. We also understand that the Auditorium Company plans to dissolve itself. We also understand from the information you have given us that the property of the Auditorium Company has been assessed as real estate.

The question now arises as to who is liable for the

delinquent taxes and as to what steps the county must take to collect such delinquent tax.

Section 428.4 provides in part as follows:

> ". . . but if such buildings are erected by another than the owner of the real estate, they shall be listed and assessed to the owner as personal property, but buildings and fixtures erected on real estate held under a lease of longer than three years duration shall be assessed as real estate."

Under the wording of the above quoted section, it would seem that the portion of the building owned by the Auditorium Company should have been assessed to the Auditorium Company as personal property since it is not a situation in which there is a lease of longer than three years duration. However, since this property has been assessed as real estate, we believe it proper to continue to treat it as a real estate tax. In Security Trust and Savings Bank vs. Mitts, 220 Iowa 871, the Iowa Supreme Court held that where a taxpayer failed to interpose timely objections to the local Board of Review or to the State Board of Assessment or Review as to the wrongful classification of property, such taxpayer could not enjoin the collection of the tax. We believe it follows that in the instant situation, there having been no objection to classifying this as real property, that we must proceed to treat it as a real property tax.

Section 445.28 provides:

"Taxes upon real estate shall be a lien thereon against all persons except the State."

It follows therefore that the real estate taxes which were assessed and levied in the instant situation became a lien upon the real estate of the taxpayer. They would not become a lien upon the real estate of some other person. That is, in this situation, they would not become a lien upon the real estate of the individual who owns the land and lower portion of the building. In that connection, see 1944 Report of the Attorney General page 113 and more particularly that portion answering question No. 3.

Since these delinquent taxes are a lien upon the real property of the Auditorium Company, such property may be sold at tax sale under the provisions of Chapter 446. We wish to call your attention to section 448.3 of the 1954 Code of Iowa which relates to the tax deed and provides as follows:

"The deed shall be signed by the treasurer as such, and acknowledged by him before some officer authorized to take acknowledgments, and when substantially thus executed and recorded in the proper record in the office of the recorder of the county in which the property is situated shall vest in the purchaser all the right, title, interest, and estate of the former owner in and to the land conveyed, subject to all restrictive covenants, resulting from prior conveyances in the chain of title to the former owner, and all the right, title, interest, and claim of the state and county thereto."

As indicated in the aforequoted section, restrictive covenants are not removed by a tax sale. Therefore, if there is a restrictive covenant upon this property, there will no doubt be difficulty in finding a purchaser at tax sale.

This opinion does not purport to decide whether the restrictions in the deed to the Auditorium Company contain restrictive covenants which run with the land. We only call to your attention the possibility that such a restriction does exist. We believe that it would be necessary to have the court determine the effect of the restriction. We also feel that it would be possible for either the county or some other party in interest to apply to the court for a removal of the restriction. We feel that if there were no objection to such an application by the successor to the grantor and in view of the change in conditions since such restriction was imposed, that the court would view such application favorably.

We realize that a full answer to your problem has not been given but we feel that part of the problem can only be answered by the court.

Very truly yours,

Marvin A. Iverson,
Special Assistant Attorney General

MAI:lp

February 15, 1957

Mr. Clinton H. Moyer, Commissioner
Department of Public Safety
L o c a l

Dear Mr. Moyer:

Re: Taxation of Costs under Motor Vehicle Financial Responsibility Act

I have your letter of January 3, 1957, asking for an opinion from this Department on the following questions under the motor vehicle financial responsibility act:

"1. If a court, under the authority of Section 321A.12 provides this department with a certified copy of the judgment for costs, are we authorized or required under Section 321A.13(1) to suspend the operating privileges of the defaulting party?

"2. Assuming the same facts as above, and that in addition security has been posted with the department by the defaulting party prior to judgment and in compliance with Section 321A.5, would these funds be applicable toward satisfaction of the judgment for costs as contemplated in Section 321A.10?

"3. In the above situation would this department be permitted to release such funds for application to the payment of a judgment for costs in the absence of garnishment proceedings by the court?

"4. If the answer to question number two above is yes, would the judgment on the merits, or would the judgment for costs have priority as to funds deposited with this department by the judgment debtor in compliance with Section 321A.5?

57-2-10

"5. Would this department be permitted to release such funds for application to the payment of an ordinary judgment on the merits in the absence of garnishment proceedings by the judgment creditor?"

The general rule with regard to the construction of statutes imposing costs requires that such statutes be strictly construed. See State Line Democrat v. Keosauqua Independent, 16 Iowa 566, 143 N. W. 409. However, the particular questions with regard to costs which you have asked apparently have not been decided by our Supreme Court or previously examined by this office.

With regard to your first question the statutory language of Section 321A.12 contains the words "any such judgment." Section 625.1 of the 1954 Code of Iowa provides that costs shall be recovered by the successful party against the losing party and would appear to make them part of any judgment which might be obtained. It is, therefore, the opinion of this office that the answer to your first question would be yes unless some of the specific exceptions as set forth in the statute were to become operative.

It therefore follows that with regard to your second question the answer would also be yes since the same reasoning would apply under the language of the statute referring to "any such judgment."

Your third question pertains to the release of the funds for the payment of any such judgment for costs. There is no

statutory authority for the release of such funds except under the Code provisions relating to executions. We therefore believe that without an execution in the nature of a garnishment your Department has no authority to release funds for the payment of court costs unless the judgment debtor should specifically authorize the release.

Your fourth question relates to the priority in the application of the funds deposited with you. This would appear to be a matter which would be handled by the clerk of the court in which the costs were to be paid and there is no statutory authority for the apportionment of these funds by your office. I am advised that it is a matter of long practice among the clerks of the various courts to apply funds tendered to them first to the payment of court costs and the balance on the remaining portions of the judgment. In some instances the judgment debtor does give instructions when making payment to the clerk and these are usually followed by the clerk of that particular court.

The answer to your question five would be no with the same reasoning which applied with the answer to your question three.

Very truly yours,

DON C. SWANSON
Assistant Attorney General

DCS:MKB

February 15, 1957

Mr. Donald L. Nelson
Story County Attorney
Nevada, Iowa

Dear Mr. Nelson:

Re: Coroner's Fees as Claims in Estates

I have your letter of February 7, 1957, in which you make the following request for an opinion from this office:

> "Story County has filed a claim in an estate in the amount of $212.50. This claim is the result of coroner's fees that were paid by the County to the Coroner and to a physician whom the Coroner employed to perform an autopsy. After Story County paid the $212.50, they then filed a claim in the estate for the full amount. The question then is, is Story County entitled under Section 340.19 of the 1954 Code, to be reimbursed from the assets of the estate of the decedent, for the full claim in the amount of $212.50, or is Story County limited only to that part of the claim which constitutes coroner's fees under Section 340.19."

The taxation of coroners' fees as claims in estates is strictly controlled by statute. Section 340.19, 1954 Code of Iowa, outlines the various fees which a coroner may charge and for which claims may be filed and collected from the estate of decedents.

There is no right given the coroner to file claims except under this Code section. Claims against estates are in the nature of pecuniary demands which could be enforced against

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the decedent had he not departed this life. See Patterson v. Carr, 189 Iowa 69, 176 N. W. 265. Exceptions to this general rule have been provided for the limited coroners' claims as hereinbefore mentioned for expenses of last sickness and burial and for the support of widows or children of deceased. But without some specific statutory authority the coroner has no right to file claims against the estates of decedents.

Chapter 339 of the 1954 Code outlines the duties of the coroner. Section 339.8 gives the coroner the right to call witnesses, Section 339.19 provides for the disposition of bodies, and Section 339.22 provides for the calling of a physician for scientific examination if an inquisition is conducted by the coroner. This last section provides that reasonable compensation for the physician or surgeon called shall be allowed by the Board of Supervisors. There is no further statutory directive regarding the payment of this physician or surgeon.

Earlier Attorney General opinions have followed the context of this opinion although they did not pass upon this specific point. See 1928 Report of the Attorney General, page 197, and 1940 Report of the Attorney General, page 22.

It is, therefore, the opinion of this office that the Board of Supervisors and the coronor have no claim against the

estate of a decedent for a physician called to perform an autopsy under the sections as outlined in your letter.

Very truly yours,

DON C. SWANSON
Assistant Attorney General

DCS:MKB

February 18, 1957

Honorable W. C. Hendrix
House of Representatives
L O C A L

Dear Sir:

Receipt is acknowledged of your letter of February 14th as follows:

"Referring to our conversation of yesterday regarding nomination and election of aldermen and mayor of the City of Muscatine, population 20,000.

"Would you kindly give me a ruling on what should be done to permit the City of Muscatine to return to election of nominees on a party basis?"

Section 43.112, Code 1954, provides in pertinent part as follows:

"Nominations in certain cities and towns. This chapter shall, so far as applicable, govern the nominations of candidates by political parties for all offices to be filled by a direct vote of the people in cities acting under a special charter in 1950 having a population of over fifteen thousand, except all such cities as adopt a plan of municipal government which specifically provides for a nonpartisan primary election.

" . . . . . " (Emphasis ours)

57-2-12

Section 43.114, Code 1954, provides as follows:

"Time of holding special charter city primary. In special charter cities holding a municipal primary election under the provisions of section 43.112 such primary shall be held on the first Monday in October of the year in which general municipal elections are held."

Section 363.2, Code 1954, provides in pertinent part as follows:

"This chapter shall apply in all municipal corporations . . . except as provided in section 43.112."

In the conversation to which your letter refers you advised me that Muscatine changed to nonpartisan elections by ordinance adopted by the council. I am not informed as to the statutory source of authority for adoption of such ordinance but from the facts related by you it seems clear that Muscatine at no time changed its "plan" of government, that is, it did not adopt the "city manager plan" or the "commission plan" or any other plan ineligible to come under the provisions of the quoted portion of Section 43.112.

Therefore, assuming the ordinance referred to was adopted by proper authority, it is my opinion that all the city of Muscatine need do prerequisite to resuming partisan primaries and elections is to repeal the said ordinance. Section 43.112 would then authorize the holding of a party primary, Section 363.2 would make the nonpartisan nomination and primary provisions of Chapter 363 inapplicable, and the election itself would be conducted under the remaining provisions of Chapter 363 as in other cities except for the use of party ballots.

Very truly yours,

LEONARD C. AHELS
Assistant Attorney General

LCA:mfm
Enclosure - copy

February 19, 1957

Mr. Charles W. Wagner, Superintendent
Buildings and Grounds
B u i l d i n g

Dear Sir:

This will acknowledge receipt of yours of the 18th inst. in which you submitted the following:

> "It seems that this season of the year, we have a great number of lay-offs because of so called colds, sore throats, etc.
>
> "In order to cure this, we are thinking of docking the people who are hiding under the sick leave clause, for each and every day they are off, unless they show a doctor's certificate.
>
> "Kindly advise what can be done about this."

In reply thereto I advise you as follows. Section 79.1, Code of 1954, among other things, provides, "Leave of absence of thirty days per year with pay may be granted in the discretion of the head of any department to employees of such department when necessary by reason of sickness or injury;". In view of the discretion that is vested in you as head of a department I am of the opinion that you may reasonably require of your employees a doctor's certificate of illness as a means of avoid-

57-2-13

ing a reduction in compensation by reason of claimed sickness.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

February 19, 1957

Mr. J. F. Rabe, Secretary
Iowa Pharmacy Examiners
L O C A L

Dear Mr. Rabe:

Receipt is acknowledged of your letter of February 19th as follows:

> "The Pharmacy Examiners desire a written opinion as to whether all fees collected by this department under Chapter 147 are required to be paid into the State Treasury for general revenue, excepting the $2.50 renewal license fee of registered pharmacists.
>
> "It is the legislator's contention that Section 147.100 precludes Sec. 147.82 and that the Pharmacy Department is not required to deposit fees with the State Treasurer.
>
> "It has been the department's interpretation and practice that all revenue has been deposited with the State Treasurer, excepting the $2.50 renewal fee, which has been paid to the Iowa Pharmaceutical Association."

Section 147.82, Code 1954, to which your letter refers, provides as follows:

> "Fees paid into treasury. All fees collected under this chapter shall be paid into the state treasury." (Emphasis ours)

57-2-14V

The meaning of the word "all" requires no construction. The meaning of the term "this chapter" includes all of Chapter 147, including those sections thereof referring to the pharmacy examiners.

Section 147.94, Code 1954, provides in pertinent part as follows:

> "The provisions of this chapter relative to the collection . . . of license and renewal fees . . shall not apply to the licensing of persons to practice pharmacy . . . " (Emphasis ours)

Note should be taken that the quoted exception applies only to the "collection" of fees, not the "paying over" thereof. Section 147.82, supra, relates to "paying over" rather than "collection".

The "collection" provision of Chapter 147 to which the quoted part of Section 147.94 is an exception is Section 147.10 which provides that applications for renewal of licenses under the practice acts "accompanied by the legal fee" shall be submitted to the department of health. Thus, Section 147.94, supra, merely changes the collection agency for pharmacists licenses and has no effect on the disposition of the monies so collected.

Section 147.100, Code 1954, to which your letter also refers, provides as follows:

> "Renewal fee. The secretary of the pharmacy examiners shall annually add two dollars and fifty cents to the renewal fee provided in this chapter for a person licensed to practice pharmacy. Such additional amount shall be considered as a part of the regular renewal fee and payment of the same shall be a prerequisite to the renewal of his license. The funds derived from the additional renewal fee collected under this section shall be paid to the state pharmacy association upon the order of its treasurer and secretary. Said funds shall be used by such association in the advancement of the art and science of pharmacy." (Emphasis ours)

Note that the only provision in the quoted statute affecting disposition of monies collected is with respect to the additional fee and that no such exception is made for the regular fee.

I am, therefore, of the opinion that the administrative

interpretation heretofore placed upon the said laws by your board and which has been followed by your board, as stated in your letter, is the only possible legally correct procedure under the quoted statutes as they now exist.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

February 1, 1957

Mr. W. Grant Cunningham
Secretary, Executive Council
B u i l d i n g

Dear Mr. Cunningham:

This will acknowledge receipt of yours of the 22nd ult. enclosing a letter to the Council from Dr. J. E. Slocum, Chairman of the State Board of Chiropractic Examiners. His letter with respect to the Board of Chiropractic Examiners and the administration of its affairs requests the following:

> "1. Approval of our Board's employment of Mrs. Margaret DeBeck as Clerical Assistant to the Board as provided by Section 147.103, since her capacity, character and six years' experience have never been questioned; and
>
> "2. A letter from your Honorable Body to Charles Wagner, Superintendent of Building and Grounds, authorizing and directing him to deliver to the undersigned, or to Dr. Leo Boyce, a duplicate key to the chiropractic office."

In reference thereto I would advise as follows.

1. Section 147.103, 1954 Code of Iowa, so far as is applicable, provides as follows:

> "Clerical help, inspectors and supplies. Subject to the approval of the executive council, the examining boards for medicine and surgery, chiropractic, osteopathy, and osteopathy and surgery, may employ such clerical assistance as may be necessary to enable said boards to perform the duties imposed upon them by law. Payment for such assistance shall be made out

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> of the appropriation provided for said examining boards in the biennial departmental appropriations. The executive council shall also furnish said boards with the necessary quarters and all articles and supplies required for the public use, and the provisions of section 147.26 shall not apply to said boards. * * * *"

Note that the power of approval of appointment of clerical assistance is vested in the Executive Council. The extent of the power of approval thus vested is not fixed by statute. However, the rule pertinent to the extent of this power is set forth in the case of McCarton v. Sanderson, 109 P. 2d 1108, 132 A. L. R. 1229. There it is said:

> "There is no occasion to construe the word 'approval' otherwise than in its usual and accepted sense; neither the context nor the apparent intention of the legislature justifies any such departure; and we must assume that the legislature meant to use the word in the full ordinary meaning, and not subject to the express mandatory duty imposed on the state board of acting favorably upon all applications where the statutory requirements are met, nor as a duplication of or an advisory adjunct to, the state board's authority. The legislature found no difficulty in finding words directing the state board to issue licenses to all those found qualified under the statute; and if it had intended merely to duplicate a finding of those qualifications it could readily have directed the local authority to approve all applications, subject only to the statutory requirements. 'Approval' is the opposite of 'disapproval;' it necessarily involves discretionary power, which ordinarily is complete unless limited in some way. Since the limitation contended for does not appear in the act, either specifically or by necessary or reasonable implication, we may not read it in.
>
> "According to Webster's New International Dictionary (Merriam-Webster 2d Ed.), 'approval'

> means 'approbation' 'sanction,' 'endorsement,' 'support.' 'Approval of the application' is not ordinarily limited in meaning to a mere verification of the facts stated in the application. 'Approval' implies knowledge and the exercise of discretion after knowledge (State v. Duckett, 133 SC 85, 130 SE 340), the exercise of judgment (Leroy v. Worchester St. R. Co., 287 Mass 1, 191 NE 39), the act of passing judgment, the use of discretion, and the determination as a deduction therefrom (Melton v. Cherokee Oil & Gas Co., 67 Okla. 247, 170 P. 691; In re State Bank, 84 Utah 147, 30 P. 2d 211), unless limited by the context of the statute. Fuller v. Board of University and School Lands, 21 ND 212, 129 NW 1029. For other cases, see 3 Words and Phrases, Perm. Ed., 829-832. Here it is not limited by the context of the statute, and there seems to have been an obvious intent not to limit the local authority's discretion, like that of the state board, by directing the act to be done if only the applicant and premises possess the statutory qualifications. We cannot, therefore, limit our construction of 'approval' as contended for by plaintiff."

As applied to the situation submitted, I am of the opinion that the Council is vested with discretion in reaching a conclusion as to whether the appointment should be approved or disapproved and in the exercise thereof may take into consideration the necessity for clerical assistance as well as the qualifications of the appointee.

2. In answer to question #2 I would advise you that the statute pertinent to the problem provides, "The executive council shall also furnish said boards with the necessary quarters and all articles and supplies required for the public use,".

It appears that the power thus vested has previously been exercised by allocating certain premises in the Capitol building to the use of this examining board. The use thereof is available to the board and the members thereof and I am of the opinion that Dr. Slocum is entitled to a key to the quarters allocated.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

Jackson Co.

February 4, 1957

Mr. Asher E. Schroeder
County Attorney
Maquoketa, Iowa

Dear Mr. Schroeder:

This is to acknowledge receipt of your communication of January 29, 1957, in which you inquire whether or not a certain type of pinball machine is a gambling device. In your letter you state that in the operation of the machine if a certain score is made the player is awarded one or more free games but, in order to avail himself of the free games, the player must put a penny for each such game in a second slot in the machine.

Pinball games generally are games of chance and have been recognized as gambling devices within the inhibitions of Chapter 726, Code of 1954. In State v. Wiley, 232 Iowa 443, our Supreme Court held that a pinball machine so constructed and operated that free games may be played thereon is a gambling device and such free games are things of value. The Court in its opinion cited the decisions of many other jurisdictions in support of its views. In a later case, State v. John Doe, 242 Iowa 458, an action to condemn a one-ball machine as a gambling device, our Supreme Court held that a one-ball pinball machine which automatically gave a free game for each point scored was a gambling device, and cited the Wiley case among other cases as authority for its holding. The mere fact (or subterfuge) that an additional penny must be placed in the machine for the player to avail himself of free games which have been recorded on the machine would not essentially change the nature of the machine as being a gambling device. It is our opinion that the keeping or operation of the machine

57-2-16

described in your letter would be in violation of Chapter 726, Code of Iowa 1954, and that the person keeping or operating such a machine would be subject to the penal provisions thereof. In this connection we also call attention to the provisions of Chapter 99A, Code of Iowa 1954, which relate to the revocation of a retail dealer's license on conviction for possessing a gambling device.

Trusting this answers your inquiry, I am

Very truly yours,

RRRD/fm

RAPHAEL R. R. DVORAK
First Assistant Attorney General

February 8, 1957

Honorable W. H. Tate
Senate Chambers
B u i l d i n g

Dear Senator Tate:

This is to acknowledge receipt of your recent communication directed to Attorney General Erbe wherein you state your inquiry as follows:

> "Suppose a non profit organization, such as a Chamber of Commerce, sponsors a building and home furnishing show and an admission fee of 25¢ is charged for all adults. They would like to give an attendance prize of a 1957 automobile. The winning name to be drawn from those who purchased tickets. Can this now be done?
>
> "If the above cannot be done under our present laws is there any legal way in which such a drawing could be conducted?"

The proposal outlined in your letter is in violation of the laws of our state in that it involves (1) a consideration (2) for a chance or opportunity (3) to win a prize. It is definitely a lottery or species of gambling. See State v. Mabrey, 245 Iowa 428, 60 N.W.(2d) 889. Also note Article III, Sec. 28, Constitution of the State of Iowa, and Section 726.8, Code of Iowa 1954. The fact that the proceeds received from such an enterprise might be entirely devoted to a worthy cause would not negate the offense.

It seems clear from the facts as stated by you that the general public would not be eligible for the prize other than

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by purchasing admission tickets for the show. However, even though some free tickets were given to some persons participating in the drawing, the scheme would nevertheless remain objectionable under the holding of the Mabrey Case. Under our present constitutional and statutory provisions there is no way such a drawing can be conducted legally where there is any consideration paid by anyone for his chance to win a prize.

Very truly yours,

RRRD/fm

RAPHAEL R. R. DVORAK
First Assistant Attorney General

February 12, 1957

Honorable Niels J. Nielsen
State Representative
B u i l d i n g

Dear Sir:

You orally inquired of this office concerning the status of the proceeds of a bond issue authorizing the construction of a county court house in your county and you specifically inquired concerning two problems related thereto.

1. The accumulation of interest since the bonds were sold makes available additional funds over the amount authorized by the voters for the construction of the court house. May this accumulated interest fund be used for the construction of the court house?

2. In the event that insufficient funds are on hand to erect the building, may funds be transferred from the county general fund to assist in the cost?

In answer to your question No. 1, I would state that this matter has been previously considered by this office in an official Attorney General's opinion dated March 19, 1953 and found at page 41 of the Official Report of the Attorney General of 1954, a copy of which is enclosed herewith for your information. It was the ruling of that official opinion that accumulated interest may not be used for the expense of constructing the building.

In answer to your second question, I would advise that the vote of the electorate authorizing the construction of a public building at not more than a certain cost limits the expenditure which may be made for the construction of such building and the use of the general fund for such a purpose is not authorized.

Yours very truly,

NORMAN A. ERBE
Attorney General

NAE:md
Enc.

57-2-18

February 13, 1957

Honorable Clifford M. Vance
and
Honorable W. C. Hendrix
House of Representatives
B u i l d i n g

Gentlemen:

You have inquired of me concerning the possibility and my opinion as to the legality of an enactment by the Legislature which would transfer the balance of the funds remaining in the World War I Soldiers' Bonus account to the Korean Bonus account and thus make those funds available to pay the Korean Bonus.

I have visited at length with members of the staff of this office concerning this question and beg to inform you that in the opinion of the members of the Attorney General's staff and myself such an enactment would be declared unconstitutional by the Supreme Court of the State of Iowa.

I call to your attention several quotations from the opinion of the Supreme Court written by Justice Smith in the case entitled "Patterson vs. Iowa Bonus Board," 246 Iowa 1087, in which the court in analyzing the provisions of the World War I Bonus reached the conclusion that the bonus was payable to members of a class, which class was constituted and made up of soldiers who were veterans of World War I. The court said at page 1094:

> "Section 4 of the Bonus Law clearly contemplated payment of a cash bonus to each member of the class on the basis of fifty cents for each day spent in active service. After this cash bonus was distributed and expenses of administration paid, what remained of the proceeds of the bond issue (not in excess of $2,000,000) was (under section 8) to 'constitute an additional bonus to be administered by the bonus board for the amelioration of the condition of (members of the class) suffering from disability.' The effect of the decision in Crout v. Kendall, supra, was to uphold this second provision (section 8) as a part of the same 'single object'--the payment of an additional bonus."

And again, the court said at page 1096:

> "We think it quite obvious the intention expressed in section 8

See also 1952 a 30 161 R 3 D

57-2-19

of the Bonus Law was to pay disabled veterans of the class defined in section 4 an additional cash bonus, adjustable to their varying needs on account of disability."

Section 4 of the act relates to the class of persons who are to receive the cash bonus and makes such fund available for the payment of a cash bonus to all Iowa veterans who served in World War I "at any time between April 6, 1917 and November 11, 1918." In my opinion this limitation of the class cannot be extended to include Iowa veterans who served during the Korean War.

You will no doubt be interested to know that Mr. Clarence Kading, presently Supreme Court Statistician, tried the Patterson case in the lower court and presented the case on appeal.

Yours very truly,

NORMAN A. ERBE
Attorney General

NAE:md

CC: Mr. Clarence A. Kading
Supreme Court Statistician
B u i l d i n g

February 15, 1957

Honorable Herschel C. Loveless
Governor of Iowa
State House
L o c a l

Dear Governor:

Receipt is acknowledged of your letter of February 14 as follows:

> " I hereby request a ruling on the following question: Is Senate confirmation required for interim appointments for unexpired terms on the Iowa Aeronautics Commission?
>
> " The relevant section of the Code of Iowa (328.4) does not appear to require confirmation by a subsequent session of the General Assembly, for interim appointments for the balance of an unexpired term."

Section 328.4, Code 1954, to which your letter refers, provides as follows:

> " Vacancies on the commission shall be filled by appointment by the governor, for the balance of the unexpired term."

Section 328.2, Code 1954, provides for original appointments as follows:

> " There is hereby created and established an aeronautics commission to be known as the 'Iowa Aeronautics Commission', to consist of five members, only three of whom shall be members of the same political party, and who shall be appointed by the

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governor with the approval of the senate in executive session."

As you point out, Senate confirmation is not referred to in Section 328.4 on vacancies although it is expressly required in Section 328.2 on original appointments.

Article IV, Section 10, Constitution of Iowa, provides as follows:

> " When any office shall, from any cause, become vacant, and no mode is provided by the Constitution and laws for filling such vacancy, the Governor shall have power to fill such vacancy, by granting a commission, which shall expire at the end of the next session of the General Assembly, or at the next election by the people."

However, said expiration provision would appear to have no application to the current problem for that Section 328.4 does expressly provide for the duration of tenure of vacancy appointees thereunder.

Examination of the annotations to Section 328.4 indicates the question presented has not been before the Supreme Court or considered in prior opinions of this office.

Reference to language used in other provisions of the law relating to vacancy appointments to fill offices where the original appointment requires confirmation reveals that such requirement with respect to vacancy appointments is usually spelled out. For example, see Section 505.3, Code 1954, which provides as follows:

> "Vacancies that may occur while the general assembly is not in session shall be filled by appointment by the governor, which appointment shall expire at the end of thirty days from the time the general assembly next convenes. Prior to the expiration of said thirty days the governor shall transmit to the senate for its confirmation an appointment for the unexpired portion of the regular term. Vacancies occurring during a session of the general assembly shall be filled as regular appointments are made and before the end of said session, and for the unexpired portion of the regular term."

Also see Section 307.3, Code 1954, which provides as follows:

> "Vacancies occurring while the general assembly is in session shall be filled for the unexpired portion of the term as full-term appointments are filled. Vacancies occurring while the general assembly is not in session shall be filled by the governor, but such appointments shall terminate at the end of thirty days after the convening of the next general assembly. Vacancies shall be filled from the same political party from which the vacancy occurs."

Had the Legislature intended to require Senate confirmation of vacancy appointments under Section 328.4 it could very easily have done so by use of language similar to that employed in the case of vacancies in the office of insurance commissioner or highway commissioner in the quoted sections, or as provided with respect to vacancies in the office of public safety commissioner (Section 80.3, Code 1954). It did not do so and, therefore, presumably did not intend to make such requirement with respect to vacancies on the aeronautics commission.

It is, therefore, our opinion that no confirmation of vacancy appointments made under Section 328.4 is required.

Very truly yours,

LCA/fm

NORMAN A. ERBE,
Attorney General of Iowa

LEONARD C. ABELS,
Assistant Attorney General

February 19, 1957

Special Assistant Attorney General
Marvin A. Iverson

Mr. Bryce M. Fisher
Assistant County Attorney
Office of Linn County Attorney
Cedar Rapids, Iowa

Dear Mr. Fisher:

This will acknowledge receipt of your letter of February 15 wherein you ask questions as to the delinquency date for the payment of property taxes in view of the late certification of the tax list and as to the situation existing as to prepaid moneys and credits taxes in estate matters prior to the statutory levy of the additional one (1) mill thereon for the Korean Bonus.

1940 c. 143

Your question number one is answered by the 1940 Attorney General's Opinion to which you refer in your letter and by an opinion of this department dated January 29, 1957, to Mr. William M. Tucker, Johnson County Attorney, confirming same. The period of time during which payment of such taxes may be made without penalty has been recomputed in accordance with the formula set forth in the 1940 opinion and has been found to be 83 days, as is indicated by the later opinion. We enclose a copy of the January 29, 1957, opinion herewith.

The answer to your second question would depend upon the terms of the prepayment arrangement. If the prepayment of the moneys and credits

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taxes for the year 1956 was pursuant to a compromise under the terms of Section 682.36 of the 1954 Code of Iowa, such liability would seem to be fully and finally fixed upon payment of the taxes determined by the compromise agreement. In those cases where no compromise was effected under and in compliance with Section 682.36, Code 1954, the question of liability can be reopened and the additional one (1) mill tax collected on the moneys and credits subject thereto, if, but only if, the estates to which such questions relate are still open. Under those circumstances it would seem that the certificate of tax payment might be rescinded and a copy of the recision filed in the estate matter to secure full settlement. However, in those cases where the estates to which the certificates relate have been closed on the strength of such certificates, it would seem impractical and impossible to collect from the estates the additional tax even in those situations where the treasurer did not procure the consent of the board of supervisors to the issuance of a certificate covering the 1956 moneys and credits taxes.

In connection with the above observations, please see In re Estate of Meinert, 204 Iowa 355, 213 N.W. 938, where a somewhat similar situation existed.

We are sending a copy of this letter to Mr. Dewey S. Butterfield, County Treasurer, Waterloo, Iowa, who is an officer of the County Officers Association and might be interested in proposing a legalizing Act to the legislature to make provision for absolving county treasurers from any liability

which might be predicated upon their certification of full payment of the 1956 taxes without the collection of the additional one (1) mill provided in the Korean Bonus Act.

Very truly yours,

Marvin A. Iverson,
Special Assistant Attorney General

MAI:fs
Encl.

cc: Mr. Dewey S. Butterfield,
County Treasurer,
Waterloo, Iowa.

February 20, 1957

Mr. William M. Tucker
County Attorney
405 Iowa State Bank Building
Iowa City, Iowa

Dear Bill:

I must apologize for not answering your letter of December 21, 1956, promptly, but the truth of the matter is that I misplaced it with a number of office papers and it did not again come to my attention until today.

If you will recall, your specific questions were: (1) Whether or not a house trailer with a gross weight of one thousand pounds is required to have brakes, assuming of course that such trailer coach is intended for use of human habitation, and (2) if the answer to the above inquiry should be in the affirmative, whether or not such trailer coach must be equipped with such brakes at the time of sale, and, if not so equipped, whether the same would constitute a criminal offense on the part of the seller thereof.

Subsections 3 and 4 of our present Code Section 321.430, Code 1954, were enacted in 1937 by the 47th General Assembly and have remained identically the same since that time. The 1937 enactment, however, did not contain any definition of the term "trailer coach". That term as it now appears in Section 321.1(11), Code 1954, was added by the 49th General Assembly as Section 1 of Chapter 172 of its Acts. By adopting a specific definition for a "trailer coach", the Legislature expressed its intent to take this type of vehicle out of the general definition of "trailer" for certain purposes.

You will note that subsection 3 of Section 321.430 not only provides that "every trailer or semi-trailer of a gross weight of three thousand pounds or more" shall be equipped with adequate brakes, but further provides by the

57-J-22

use of punctuation and the conjunctive "and", that "every trailer coach intended for use of human habitation" shall be so equipped. In other words, subsection 3 sets up two separate and distinct classes of vehicles (trailers) which must be equipped "with brakes adequate to control the movement of and to stop and hold such vehicle".

The specific question has been previously ruled upon by this department in opinions issued to the State Department of Public Safety under dates of November 7, 1940 and February 25, 1942 - neither of which, however, appear in the bound volumes of the Attorney General's Reports. We concur in the reasoning contained in the 1940 opinion that:

> "As we read the statute, it appears that the legislature had in mind that all trailers or semi-trailers not for human habitation and of 3000 pounds gross weight or more, must be equipped with brakes and every trailer coach without weight limitation, if it is intended for use for human habitation, must be equipped with brakes.
>
> "It is the thought of the writer that the weight limitation does not apply to house trailers and that all trailers of this nature must be equipped with brakes."

Prior to the meeting of the 56th General Assembly, Section 321.425, Code 1954, provided among other things that no person should have for sale, sell or offer for sale any trailer which was not at all times equipped with such brakes in proper condition and adjustment as required in Chapter 321. Section 1 of Chapter 166, Acts of the 56th General Assembly, repealed this section of our Code and, insofar as brakes on vehicles are concerned, enacted nothing in its stead. Section 321.381, Code 1954, would not reach the seller in your particular situation and it does not appear that there are any other provisions in Chapter 321 under which he might be prosecuted.

I trust this answers your inquiries.

Very truly yours,

RRRD/fm

RAPHAEL R. R. DVORAK
First Assistant Attorney General

February 20, 1957

Mr. John H. Holley
Butler County Attorney
Shell Rock, Iowa

Dear Mr. Holley:

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

"This letter is a request for an opinion concerning the duties and liabilities of a school district concerning the education of a mentally retarded child. There are also certain allied questions which will be set forth later in this letter. The fact situation is this: A citizen of this county is married to the mother of a mentally retarded child. About November of last year the man and his wife voluntarily placed the retarded child in the school for mentally retarded children which, I understand, is being conducted at the State Mental Hospital at Independence. The man, who is not related to the boy, but who apparently stands in the position of step father due to his marriage to the boy's mother, is finding that the cost of maintaining the child at the special school at Independence is more than he can assume over a long period of time.

"The questions which have been raised concerning this problem are as follows:

"1. Under the provisions of Chapter 281

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of the Code can the school district in which the mother and the step father of the retarded child reside be obliged to pay all or part of the cost of maintaining this mentally retarded child in the school at Independence?

"2. If the answer to Question 1, above, is 'no', can this county, through its general relief program, help with the expense of maintaining this mentally retarded child at that school?

"3. If the answer to either of the foregoing questions is 'yes', will the help provided result in a lien against the land of the step father in a manner similar to the lien against parents who have children in the institution for the feeble minded at Woodward?"

1. In answer to your first question, I would refer you to Section 281.4, Code 1954, which empowers local school boards to (1) organize classes, (2) provide transportation to such classes, (3) give instruction in the home, and (4) co-operate with county boards of education or other local boards in organizing classes. Similar powers were granted to county boards of education by amendment to said section as contained in Chapter 141, Acts of the 54th General Assembly. Thus, the powers of both local and county boards with respect to the special education of handicapped children are expressly prescribed by statute. "Inclusio unius est exclusio alterius" is a rule of construction universally employed in determining the scope of statutes granting expressly specified powers. The rule that "creatures of statute have only those powers expressly conferred by statute or reasonably and necessarily implied as incident to exercise of an express power" seems equally applicable to your question. Section 281.4 is an express grant of specified powers and the power concerning which you inquire is not among those expressed therein. School districts are creatures of statute. The answer to your first question is, therefore, in the negative.

Further, note should be taken that the powers expressed in Section 281.4 exist only with respect to "handicapped" children as defined in Section 281.2 as amended by Chapter 141, 56th General Assembly. Said amended section expressly excludes from the operation of Chapter 281 children "attending special schools or institutions provided by the state."

2. Your letter states that the child in question was admitted to the Independence Mental Health Institute as a voluntary patient. Assuming such admission to have been

proper, then it must have been made pursuant to Section 229.41, Code 1954, which governs voluntary admission. If this be the case, then the matter of the support of the child at the institution is governed by the final paragraph of Section 229.41 or, if the parents are unable to pay, by Section 229.42. Said provisions are as follows:

"229.41 Voluntary admission. . . . . .

"Persons making application directly to the superintendent and received for observation and treatment on such application, shall be required to pay the costs of hospitalization, which costs may be collected weekly in advance and shall be payable at the business office of the hospital. Such costs shall be the same as for regularly committed patients, and the treatment shall be the same as for other patients."

"229.42 Costs paid by county. If a person wishing to make application for voluntary admission to the hospital is unable to pay the costs of hospitalization or those responsible for such person are unable to pay such costs, application for voluntary admission must be made to the insane commission of the county in which said person is a resident and the commission, after satisfying itself that the person is in need of observation and treatment in the state hospital, may on forms prescribed by the board of control, authorize such person's admission as a voluntary case, the costs of hospitalization of such case to be paid in the same way as regularly committed cases. Persons admitted under this section shall be released on application in writing to the superintendent in the same way as voluntary patients are released as provided for in section 229.41." (Emphasis ours)

3. The answer to your third question is provided by Section 230.25, Code 1954, which provides as follows:

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

Since the quoted section makes no reference to parents, no lien would attach thereunder to the property of the parents.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

February 21, 1957

Mr. Mark D. Buchheit
Fayette County Attorney
West Union, Iowa

Dear Mr. Buchheit:

This will acknowledge receipt of your letter of February 11th wherein you inquire as to whether the lien of the State of Iowa for sales taxes would apply to the homestead real estate of a sales tax obligor. The answer to this question is that the Iowa sales tax lien is applicable to the homestead of the taxpayer and such a homestead may be sold for the payment of sales taxes.

Section 561.16, Code 1954 exempts the homestead from judicial sale,

> " * * * where there is no special declaration of statute to the contrary."

Section 422.26 made applicable to sales taxes by section 422.56, Code 1954 specifically provides:

> " * * * No property of the taxpayer shall be exempt from the payment of such tax."

See Slane vs. McCarroll, 40 Iowa 61, and Hampe vs. Phillipp, 210 Iowa 1243, 232 N. W. 648, to the effect

57-2-25

that a statute exempting property from execution cannot be construed to exempt it from taxes or sale therefor.

Very truly yours,

Marvin A. Iverson,
Special Assistant Attorney General

MAI:lp

February 22, 1957

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

Dear Governor:

In response to your oral inquiry of this morning, please be advised that under the provisions of Section 69.8, subsection 2, Code 1954, the vacancy in the office of Municipal Court Judge at Cedar Rapids, Iowa, occasioned by the death of Judge Patterson, shall be filled by the Governor. The person appointed by you to fill such vacancy would continue to hold such office until the next regular election at which such vacancy could be filled.

Answering your second inquiry, please be advised that under the provisions of Section 602.22, Code 1954, in the case of the inability of any municipal court judge to act, any other judge of any municipal or district court may hold municipal court during such inability, or the governor may appoint an "acting" judge to hold court during such inability of the regular judge. The word "inability" is defined as the "quality or state of being, unable; lack of ability; want

57-1-26

of sufficient power, strength, resources, or capacity." Webster's New International Dictionary (1948 Ed.), page 1254. It is our understanding that the situation brought about by the prolonged illness and "inability to act" of Municipal Court Judge Farmer of Cedar Rapids has been taken care of, and that Mr. Barnes has been acting as Municipal Court Judge under proper appointment in Judge Farmer's stead and during his absence from the bench. Under Section 602.22, Mr. Barnes is entitled to be paid the same salary and in the same manner as a regular judge of such court. Such salary is set by Section 602.49, Code 1954, which also provides for the payment thereof from county and city funds on alternate months, and not for payment from state funds, as in the case of district court judges.

The office of municipal court judge is an elective office. The holder of an elective office is entitled to the salary connected with that office during his entire term, unless his office becomes vacant by operation of law, (See Section 69.2, Code 1954), or ceases to exist. Our present statutes make no provision for withholding the salary of an elective official because of mere "inability to act" or absence from his office. It would therefore seem that there is no present statutory inhibition prohibiting the payment

of salaries to both the regularly elected municipal court judge and the person appointed to act in his stead during his inability to hold court. The problem is one of more concern to the county and city that has to pay the dual salaries than it would be to the state.

Very truly yours,

RRRD/fm

NORMAN A. ERBE
Attorney General of Iowa

RAPHAEL R. R. DVORAK
First Assistant Attorney General

February 25, 1957

Mr. Robert Lappen, Member
Board of Control of State Institutions
L O C A L

Dear Sir:

Confirming our telephone conversation of February 25th, I would advise you that the following citations affirm that the State and its officers in their official capacities may not be summoned as garnishees:

1. Official opinion appearing at page 433 of the 1912 Report of the Attorney General. (Set forth for your convenience as follows:)

"Mr. M. M. O'Bryon, November 22, 1911.
Marshalltown, Iowa.

"Dear Sir: Your letter of the 15th inst. addressed to the attorney general was referred to me for reply.

"You request an opinion from this department as to whether the treasurer of state can be garnished.

"It is my opinion that said officer cannot be garnished. In the first place there is no provision in the statute permitting the garnishment of such officer and in the next place it

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is, in my view, in legal effect a suit against the state because the necessary legal effect of a judgment against the garnishee would be to require the payment of funds of the state and the state would be the real party in interest and the real defendant. It is fundamental that the state cannot be sued in its own courts without its consent.

"Respectfully yours,

N. J. LEE,
Special Counsel."

2. Letter opinion dated June 16, 1950, a copy of which is attached hereto.

3. 4 American Jurisprudence pages 640 - 642, Attachment and Garnishment §§ 140, 141 and cases cited therein.

4. 38 C.J.S. page 244, Garnishment § 43 and cases cited therein.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm
Enclosure 1

February 25, 1957

Mr. L. B. Cunningham
Secretary
Iowa State Fair Board
L O C A L

Dear Mr. Cunningham:

We wish to acknowledge receipt of your letter of February 19th, 1957, in which you state that the State Fair Board has been notified by the Polk County Treasurer that a special assessment is being proposed to be levied against State property for the purpose of constructing a storm sewer some distance east of the State Fair Grounds, and in which you ask an opinion on the following question:

> "Is property belonging to the State of Iowa subject to a special assessment tax levied for the purpose of constructing a storm sewer?"

In answer to said question may we state that in our opinion a city may not levy special assessments against State property, and the State is not liable for a special assessment by a city against its property for construction of a storm sewer. This department has issued two opinions on this question previously. One being Opinion of the Attorney General, 1922 at page 189, and the other Opinion of the Attorney General, 1925-1926 at page 352, in which are cited the cases of the Supreme Court of Iowa on this question.

The Supreme Court has said that property held by the State cannot be made liable for special assessments for

57-2-28 ✓

two reasons: First, because it cannot be sold on execution, nor may a lien be created against it, and second, because the State may not be sued, nor may judgments be enforced against it.

However, if the City of Des Moines could show conclusively that the State Fair property is benefited by the construction of the said proposed sewer, it could go to the Legislature and request relief for the reasonable cost of the benefits accruing to the State Fair Board's property, if any.

Yours very truly,

FRANK D. BIANCO
Assistant Attorney General

FDB:mfm

February 26, 1957

Mr. Ray Hanrahan
Polk County Attorney
Court House
Des Moines, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 7th inst. in which you submitted the following:

> "We have received the following communication from the Board of Supervisors:
>
> "'The Polk County Board of Supervisors are making plans to purchase cars for use in the Sheriff's office. We would appreciate it very much if your office would obtain from the Attorney General the following opinion: "Is it legal for the Board of Supervisors to purchase cars for the Sheriff to use in his criminal and civil departments? If so, what mileage and fees is he required to collect and turn into the County Treasurer, and what fees is he entitled to keep for himself, if any?"
>
> "'We would appreciate an early reply as we are receiving bids for cars February 19, 1957.'
>
> "The following are the questions that the Board would like to have answered:
>
> "1. Can the Board under Section 332.3, Paragraph 18, furnish the Sheriff with cars to use for his civil work as well as his criminal work?
>
> "2. If the Board furnishes automobiles to the Sheriff for both his criminal and civil work, what mileage and fees is the Sheriff required to collect and turn over to the County, and what mileage and fees is he entitled to keep for himself?"

In reply thereto I advise as follows. On March 2, 1932, this Department issued the following opinion appearing now in the Report of the Attorney General for 1932, page 188:

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R.J.

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"Sheriff - Fees: Sheriff may determine whether or not he will furnish his own means of transportation or that furnished by the county. If he uses transportation furnished by the county, he can charge only expenses incurred in connection therewith.

"March 2, 1932. Sheriff, Audubon, Iowa. You have requested the opinion of this Department upon the proposition as to what mileage fees shall be paid the county when the sheriff is furnished an automobile by the county for use in the performance of his official duties.

"The fees which a sheriff is permitted to charge and receive are scheduled and set out in Section 5191 of the Code. There are a few other provisions in other parts of the law providing fees for the sheriff for performing certain special services. It will be observed in sub-paragraph 10 of Section 5191, that the sheriff is entitled to mileage at the rate of ten cents per mile in all cases required by law. It was the purpose and intention of the law, when this provision was enacted, that the sheriff should furnish his own means of transportation, and the Legislature in its wisdom has fixed ten cents per mile as a fair compensation to cover the costs thereof.

"It, therefore, follows perforce that if the county furnishes the sheriff his means of transportation, he would not be entitled to charge a fee therefor. Under such circumstances the county should pay the cost of maintaining such means of transportation, and should pay all repair bills and gasoline and oil bills necessary because of the use of an automobile furnished by the county for official services.

"The sheriff should charge all individuals from whom costs may be collected and which have been incurred the statutory rates, and in case mileage is recovered as a part of the costs in any matter where the sheriff has used transportation furnished by the county, such mileage fees should be paid to the county by the sheriff.

"You are advised that it is optional with the sheriff as to whether or not he will use transportation furnished by the county, or his own transportation. In case he furnishes his own means of transportation, he is, of course, entitled to the statutory fees provided for mileage."

While specific statutes are not mentioned therein, undoubtedly in reaching the conclusion therein the Department was interpreting the statutes pertinent to this question, to-wit: Section 332.3, subsection 18, as it existed at that time and as it now exists, and Section 337.11, subsection 10. Section 332.3, subsection 18, provides as follows:

> "General powers. The board of supervisors at any regular meeting shall have power:
>
> "* * * *
>
> "18. To own and operate automobiles used or needed by the county sheriff and used in the performance of the duties of that office; to operate a service garage for the purpose of servicing automobiles or other motor vehicles owned and operated by the county in the performance of its duties, and the board may own and service all motorcycles used by the county sheriff in the performance of the duties of that office. The board of supervisors may also make such contracts with the employees of the sheriff's office who use automobiles in the performance of their duties in connection with the use of such automobiles as in their judgment shall be advantageous to the county."

and Section 337.11, subsection 10, provides as it did in the year 1932 (with the exception of the charge for mileage):

> "Fees. The sheriff shall charge and be entitled to collect the following fees:
>
> "* * * *
>
> "10. Mileage in all cases required by law, going and returning, nine cents per mile, provided that this subsection shall not apply where provision is made for expenses, and in no case shall the law be construed to allow both mileage and expenses for the same services and for the same trip.* * * *"

I am of the opinion that the foregoing statutes justify the conclusion reached in the quoted opinion, to-wit:

> "You are advised that it is optional with the sheriff as to whether or not he will use transportation furnished by the county, or his own transportation. In case he furnishes his own means of transportation, he is, of course, entitled to the statutory fees provided for mileage."

and is therefore now confirmed.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

February 26, 1957

Mr. Bruce F. Stiles, Director
State Conservation Commission
L O C A L

Dear Mr. Stiles:

Your letter dated December 28, 1956, addressed to Mr. Countryman has been referred to the writer for attention, said letter with reference to the matter of recovering a body following a drowning in Lake Okoboji, and in which you ask the specific question, to-wit:

> "'are we under the law responsible for such operations, or is the County Sheriff or the County Coroner responsible for the recovery of bodies?'"

In answer to your inquiry, may we state that one may search in vain among the statutes of the Code of Iowa to ascertain who is specifically responsible for such a duty. It would appear that the recovery of a body, such as you describe, is a humanitarian matter rather than one of specific law in which every one interested may contribute aid if in a position to do so.

There are several sections of the Code which spell out the duties and powers of the Conservation Commission, i.e. Sections 107.23, 107.24, 111.2, and 111.3, which, generally speaking, provide for the conservation of the natural resources of the State in the field of parks, forests, fish, game, birds, animals, and state-owned bodies of water. Included in these powers is the power to adopt and enforce departmental rules

57-2-30

governing procedure as may be necessary to carry out the provisions of the law within the jurisdiction of the Commission. State Conservation officers are vested with powers and charged with the duties of peace officers. (Sections 107.15, 109.11, and 111.26.) They are given the authority of peace officers within the scope of the duties imposed on them by the statutes with respect to the subject matter under the jurisdiction of your department, which of course, would be the enforcement of the laws with respect to the duties and powers of the Conservation Commission above enumerated. The provisions of these sections limit their authority as peace officers to those matters. (See Merchant Motor Frt. v. State Highway Commission, 239 Iowa at page 892.)

The duties of peace officers are much broader in scope. They are set out in Section 748.4 of the Code as follows:

> "It shall be the duty of a peace officer . . . throughout the county, township, or municipality of which he is such officer, to preserve the peace, to ferret out crime, to apprehend and arrest all criminals, . . . and to perform all other duties, civil or criminal, pertaining to his office or enjoined upon him by law. . . "

Peace officers are defined as follows: Section 748.3, (1) Sheriffs and their deputies, (2) Constables, (3) Marshals and policemen of cities and towns, (4) All specific agents appointed by the commissioner of public safety and all members of the state department of public safety excepting the members of the clerical force, (5) Such persons as may be otherwise so designated by law. It will be seen that State Conservation Officials would come within the provisions of category five (5) above.

We now come to the question of the responsibility for the recovery of bodies.

A dead body is the body of a human being deprived of life. There is no right of property in the dead body of a human being; however, the right to bury and preserve the remains is recognized and protected as a quasi-property right. The right of burial generally belongs to the surviving spouse, or, if there is none, to the next of kin. (See C.J.S. Vol. 25, p. 1016 et seq, Sections 1, 2, and 3.) It is a universally recognized principle that there is a duty owing to society and to decedent that the body of a deceased person shall be decently buried without unnecessary delay. (25 C.J.S. 1024, Section 5.) As was stated in the case of Seaton v. Commonwealth, 149 S.W. 871, 149 Ky. 498, 42 L.R.A.N.S. 211, -- by common consent the determination of these matters is left exclusively to the relatives or friends of the deceased.

It may, therefore, be seen from the statutes above referred to that no specific duty is imposed upon peace officers in general, nor officials of the Conservation Commission for the recovery of the body of the person drowned in Lake Okoboji. We believe the primary duty and responsibility rests with the surviving spouse or next of kin. However, in equity and good conscience we feel that any public officials, within their proper jurisdiction, may lend such aid as they may be able to, commensurate with their other duties as prescribed by law.

Yours very truly,

FRANK D. BIANCO
Assistant Attorney General

FDB:mfm

February 28, 1957

Mr. Donald L. Nelson
Story County Attorney
Nevada, Iowa

Dear Mr. Nelson:

Reference is made to your letter of February 15 last concerning the requirement for registration of automobiles owned by R. O. T. C. instructors at Iowa State College. You ask specifically that we examine the case of Dameron v. Brodhead, 345 U. S. 322.

This particular case dealt with the taxation of household goods owned by a serviceman named Dameron assigned to Lowry Field, Denver, Colorado. The Supreme Court of the United States in that case examined Section 514 of the Soldiers and Sailors Civil Relief Act of 1940 and found that said household goods should be exempt from taxation in Colorado.

321.55

The case has nothing whatsoever to do with the licensing of automobiles. It should be kept in mind that the fees charged for registration of automobiles in the state of Iowa are for the use of the highways in this state and are in lieu of all taxes either general or local to which motor vehicles might be subjected. You will note that Section 321.155, 1954 Code of Iowa, provides that even a nonresident who is engaged in remunerative employment in this state is subject to the payment of these fees.

It would therefore be the opinion of this office that the case of Dameron v. Brodhead, supra, is in no way controlling upon the registration of automobiles in this state and your County Treasurer should proceed to require the registration of such automobiles.

Naturally, each case must turn upon its individual facts and there may be instances of temporary assignment or temporary duty where registration would not be required. It should also be kept in mind that if these servicemen should see fit to put their automobiles in dead storage and not use the highways of the state the situation would be entirely different.

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If you have any further question concerning this particular case please feel free to call upon us.

Very truly yours,

DON C. SWANSON
Assistant Attorney General

DCS:MKB

March 1, 1957

Hon. Niels J. Nielsen
State Representative
Ringsted, Iowa

Dear Representative Nielsen:

Receipt is acknowledged of your letter of February 27th relative to charges or liens against the property of persons liable for the support of patients within the age bracket of 21 to 31 years of age for care at the Woodward State Hospital.

In answer thereto I would refer you to Chapter 120, Section 2, Acts of the 56th General Assembly which provides in pertinent part as follows:

> "'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.'"

Very truly yours,

NORMAN A. ERBE
Attorney General of Iowa

NAE:LCA:mfm

57-3-1

March 1, 1957

Should opinions on "pending legislation" be made public? R.G.

Hon. W. C. Hendrix
State Representative
Letts, Iowa

Dear Sir:

Receipt is acknowledged of your letter of February 26th as follows:

> "Enclosed is a copy of House File 117, which was introduced by myself and Representatives Dillon, Dodds and Johnson. This bill, by amending Section 427.1 of the Code, in effect makes certain state-owned lands under the jurisdiction of the Conservation Commission liable to taxation by drainage and levee districts for benefits received from such districts. This bill is in response to a recommendation by the Budget and Financial Control Committee that the previous method of compensating drainage and levee districts for such benefits through legislative appropriation each biennium be abandoned and a permanent statute be enacted authorizing such payments. In the past, in the rush of preparing appropriation bills, such payments have on occasion been directed by the appropriation bill to be paid out of an inappropriate state fund.
>
> "Since the introduction of this bill, it has been questioned on the ground that to permit a political subdivision of the state to tax state-owned property might be an unconstitutional delegation of the state's sovereignty. However, a

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precedent for this action appears in Section 455.50, of the Code where drainage districts are permitted to assess benefits and the apportionment of costs and expenses to primary highways, and the Highway Commission is directed to pay such assessments from the primary road fund.

"Your opinion is requested as to whether House File 117, if enacted, would violate the Constitution of the State. If you conclude that the bill as presently drafted is unconstitutional, I would appreciate it if you could suggest any method whereby the same end result could be accomplished and, if possible, that a bill be drafted."

It is fundamental that the State is sovereign and that taxation is an incident of sovereignty. Drainage Districts are creatures of statute and subordinate to the sovereign State. The legislature has power to delegate authority to tax private property to its creatures. However, were power to tax state-owned property delegated to such creature it would amount to ceding sovereignty and the creature to which such power was given would for that purpose be placed in a position paramount to the sovereign.

However, as respects the example to which your letter refers, namely the assessment of benefits under Section 455.50, Code 1954, no tax is involved but rather an assessment based upon benefits conferred. Such an assessment, more familiarly known as a "special assessment" is not a tax. See annotations at Volume 39A, Words and Phrases, page 121 to 126.

Section 455.50, to which your letter refers provides as follows:

"Public highways. When any public highway extends into or through a levee or drainage district, the commissioners to assess benefits shall ascertain and return in their report the amount of benefits and the apportionment of costs and expenses to such highway, and the board of supervisors shall assess the same against such highway.

"Such assessments against primary highways shall be paid by the state highway commission from the primary road fund on due certification of the amount by the county treasurer to said commission, and against all secondary roads, from

the secondary road construction fund or from the secondary road maintenance fund, or from both of said funds."

As may be seen from the express language of the quoted section, it provides, not for the payment of a tax, but for the purchase of certain benefits or services, in other words, for payment of special assessments. There is no lack of statutory precedent whereby the State has agreed to pay special assessments for benefits conferred upon its property by a local political subdivision. See, for example, Section 391A.21, Code 1954, a provision similar to Section 455.50, supra.

House File 117, 57th General Assembly, a copy of which you enclosed with your letter, however, does not provide for assessment of benefit but rather for levy of a tax and expressly amends Section 427.1 on tax exemption. It is, therefore, bad for two reasons:

1. It places a creature of statute in a position paramount to the sovereign state with respect to a particular "tax".

2. Since the announced purpose of the bill is to specially assess benefits conferred rather than tax, the bill amends the wrong section and fails to accomplish its announced purpose. (Note that neither Section 455.50 nor Section 391A.21 necessitated any amendment to Section 427.1.)

You are therefore advised that a proper method of accomplishing the announced object of the bill would be to strike all of said bill after the enacting clause and insert a new section in Chapter 455 similar to Section 455.50 which might read substantially as follows:

"Section 1. Chapter four hundred fifty-five (455), Code 1954, is amended by adding the following new section:

"'When any state-owned lands under the jurisdiction of the state conservation commission are situated within a levee or drainage district, the commissioners to assess benefits shall ascertain and return in their report the amount of benefits and the apportionment of costs and expenses to such lands and the board of supervisors shall assess the same against such lands.

"'Such assessments against lands used by fish and game division of the state conservation

commission shall be paid by the state conservation commission from the state fish and game protection fund on due certification of the amount by the county treasurer to said commission, and against lands used by the division of land and waters from the state conservation funds.'"

The foregoing suggested form simply adapts the terminology of House File 117 as submitted to the style of Section 455.50. It is assumed that the divisions and funds described have been properly identified and described in the preparation of the original bill.

Very truly yours,

NORMAN A. ERBE
Attorney General of Iowa

NAE:LCA:mfm

March 1, 1957

Mr. Donald E. O'Brien
Woodbury County Attorney
203 Court House
Sioux City, Iowa

Dear Mr. O'Brien:

Receipt is acknowledged of your letter of February 6th as follows:

> "It is the contention of the Sioux City Building Trades Council that the specifications could contain the following provisions:
>
> "(1) That preference be given to Iowa domestic labor for and in connection with the construction or building of any such public improvement for work, subject only to the following provision hereof:
>
> "(2) Such specifications for bids and contracts awarded provide that the building contractor pay to the various classes of mechanics and laborers employed only upon the site of the work on projects concerned such wages for the corresponding classes of mechanics and laborers the wages prevailing in this locality for such corresponding work as determined by the Secretary of Labor under the provisions of the Davis-Bacon Act (40 USCA 321) as amended."

With regard thereto, I would refer you to Sections

57-3-3

13.7(4) and 336.2(7), Code 1954, which define the authority and duties of this office and your office with respect to the rendition of opinions and limit rendition of such opinions to certain public officers and bodies. Also see 41 Iowa Law Review 351. I would, therefore, advise you that the Building Trades Council identified in your letter as the source of the inquiry submitted, is not authorized to request the opinion of your office nor is it entitled to request the opinion of this office but should obtain its legal services from attorneys engaged in private practice.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

March 4, 1957

Mr. Marshall F. Camp
Union County Attorney
Court House
Creston, Iowa

In re: Weed Commissioner

Dear Sir:

Receipt is acknowledged of your letter of March 1 in which you state that the Union County Board of Supervisors would like to appoint a man for the position of weed commissioner under Section 317.3 and would also like to employ this same man for the purpose of inspecting gravel which the county buys from a gravel pit in Union County.

You state that the duties of the two positions would not be conflicting but inquire whether the person who holds the position of weed commissioner may also hold another employee position under the county and you advise that you feel it is contrary to law for such a man to hold two positions.

I must say that I am in complete agreement with your views on this subject. The statute is clear wherein it states:

> "The board of supervisors of each county shall annually appoint a county weed commissioner who shall be a person not otherwise employed by the county. . . ."

There is no room for construction of this statute.

With kind personal regards.

Yours very truly,

NORMAN A. ERBE
Attorney General

NAE:md

57-3-4

March 4, 1957

Mr. C. H. Akers
Auditor of State
B u i l d i n g

Attention: Mr. Earl C. Holloway

Dear Sir:

I have yours of the 28th ult. in which you submitted the following:

> "We are submitting the following letter from our examiner, Mr. Leonard Mogren, who would like to obtain an opinion on same.
>
> "'The board of supervisors by minute resolution dated February 7, 1956, appointed Gordon H. Willis, the county auditor, a member of the County Board of Social Welfare, to fill a vacancy caused by the resignation of one of its members.
>
> "'He has served as a member of that Board since his appointment and is a member at the present time.
>
> "'Mr. Willis filed a claim in January 1957 for services as a member of the board of social welfare in 1956, the claim being for 12 meetings at $3.00 per meeting. This claim has been paid.
>
> "'The question of the legality of the appointment of the county auditor as a member of the county board of social welfare has arisen and I would therefore ask for an opinion on the following question:
>
> "'Can the board of supervisors legally appoint the county auditor as a member of the county board of social welfare, and can he be paid for such services.'
>
> "I would appreciate an opinion on the above question at your earliest convenience."

57-3-5

In reply thereto I am of the opinion that the County Auditor may not be a member of the County Board of Social Welfare. Section 234.9, Code of 1954, insofar as applicable provides as follows:

> "The board of supervisors of each county shall appoint a county board of social welfare, which shall consist of three members in counties of less than thirty-three thousand population, not more than two of whom shall belong to the same political party, and at least one of whom shall be a woman; and which shall consist of five members in counties of more than thirty-three thousand population, not more than three of whom shall belong to the same political party, and at least one of whom shall be a woman. At the discretion of the board of supervisors one or more of said members may be chosen from the membership of said board of supervisors. * * * *"

The fact that the Board of Supervisors may appoint one or more of its members to membership in the Board of Social Welfare evidences a legislative intent that other county officials are excluded from membership therein. The rule of expressio unius est exclusio alterius applies.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

03:MKB

March 4, 1957

Mr. N. S. Gould
Delaware County Attorney
Manchester, Iowa

Dear Sir:

I have yours of the 28th ult. in which you submitted the following:

> "We recently had a situation in which certain minors inherited personal property from an estate. The Court appointed one guardian and the Clerk of Court carried the guardianship or guardianships under one file number. The question arose as to whether one $5000.00 exemption should be allowed for all of the wards or if each one of them should have a $5000.00 exemption on the theory that they were each separate guardianships.
>
> "If we could have an opinion on this set of facts from you at your earliest convenience it will be sincerely appreciated. Thank you very much."

In answer thereto I would advise you that I am assuming that in the foregoing letter you have reference to the inheritance exemption provided in Section 450.9, Code of 1954. With that understanding I exhibit Section 450.9 as follows:

> "Individual exemptions. In computing the tax on the net estate passing to the surviving spouse, heirs or beneficiaries of the deceased the following credits or exemptions shall be allowed:
>
> "1. Wife, forty thousand dollars.
>
> "2. Husband, forty thousand dollars.
>
> "3. Each son and/or daughter including legally adopted sons and/or daughters, or illegitimate sons and/or daughters entitled to inherit under

57-3-5

the law of this state, fifteen thousand dollars.

"4. Father or mother, ten thousand dollars.

"5. Any other lineal descendant of the deceased, five thousand dollars."

The language of sub-section 5 heretofore quoted clearly authorizes this exemption to each lineal descendant and therefore each of the minors is entitled to the five thousand dollar exemption. The fact that one guardian has been appointed to administer the several guardianships and that the Clerk of the Court has docketed the guardianships under one file number does not have any effect to override the plain words of this statute.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

March 5, 1957

Board of Parole
State House
B u i l d i n g

Attention: Mr. R. W. Bobzin, Director

Dear Sirs:

In re: Daniel Thomas #24168

Receipt of your letter of January 23, 1957, is hereby acknowledged. The pertinent parts therein for consideration are set forth as follows:

> "In the particular case in point, Daniel Thomas was sentenced in Black Hawk County by Honorable Blair C. Wood, Judge of the District Court, to a term of five years at the Iowa State Penitentiary in Fort Madison as provided by Section 204.22 of the 1954 Code of Iowa. The County Attorney's Information sets out that the defendant did 'wilfully and unlawfully possess and have under his control narcotic drugs, contrary to and in violation of Section 204.2 of the 1954 Code of Iowa, said Defendant having been previously convicted under Chapter 204 of the 1950 Code of Iowa, in the District Court of Black Hawk County, Iowa District Court Criminal Case No. 9438, on November 13, 1952, of illegal sale of narcotics.'
>
> "* * * *
>
> "It will be noted that since Daniel Thomas was previously convicted under Chapter 204 he would be sentenced under Sec. 204.22 (1), 1954 Code of Iowa, providing for second offenses to be imprisoned in the State Penitentiary not less than five or more than ten years.
>
> "Under No. 4 of this section, however, it is stated: 'For violation of the provisions of this chapter the imposition or execution of sentence shall not be suspended and probation

57-3-8

or parole shall not be granted until the minimum imprisonment herein provided for the offense shall have been served.'

"The question then arises whether the Board of Parole has any jurisdiction whatever in the case of Daniel Thomas, since he quite apparently was sentenced to five years, which is the minimum sentence provided under this particular section for a second offense, and the statute goes on to provide that parole shall not be granted until the minimum imprisonment herein provided for the offense shall have been served.

"* * * *

"The Board believes (also) that there have been some decisions particularly with reference to the indeterminate sentence law that might or might not have a bearing on this particular statute. However, there is another question involved as to what is meant by the wording in paragraph 4 as to the 'minimum imprisonment herein provided for the offense.' Actually a 5-year sentence at Fort Madison is served in 2 years 10 months and 9 days, and a 10-year sentence is served in 4 years 8 months and 29 days. The statute permits the Warden and the Board of Control to release the prisoner at the end of these particular terms with time off for good behavior."

Section 204.22 (1), Code of 1954, in part reads as follows:

"Any person violating any provision of this chapter, * * * * shall upon conviction (of) * * * * a second offense, * * * * be fined not more than two thousand dollars and be imprisoned in the state penitentiary not less than five or more than ten years. * * * *"

Section 246.39, Code of 1954, relating to "Reduction of sentence", provides as follows:

"Each prisoner who shall have no infraction of the rules of discipline of the penitentiary or the

> men's or women's reformatory or laws of the state, recorded against him, and who performs in a faithful manner the duties assigned to him, shall be entitled to a reduction of sentence as follows, and if the sentence be for less than a year, then the pro rata part thereof.
>
> "1. On the first year, one month.
>
> "2. On the second year, two months.
>
> "3. On the third year, three months.
>
> "4. On the fourth year, four months.
>
> "5. On the fifth year, five months.
>
> "6. On each year subsequent to the fifth year, six months."

As you say in your letter above, it appears that while on the one hand imprisonment in the penitentiary shall not be less than five years, (204.22 (1) and (4)) yet, on the other hand, assuming compliance by the prisoner with the rules of the penitentiary, the Board may reduce his sentence to two years, ten months and nine days (246.39).

You go on to point out that under the indeterminate sentence law (Section 789.13) it has been suggested to you that cases decided thereunder indicate that this law also conflicts with the section in question (204.22). (Note: Cave v. Haynes, 221 Iowa 1207, 268 N. W. 39, in which the Court said:

> "We * * * * conclude * * * * that: (1) Except in cases of treason, murder, or rape, the district court has no power fixing or limiting the time of confinement; and (2) in case the sentence does recite confinement for a certain term of years, or limits the confinement to a certain

> term of years less than the maximum period provided by the statute under which the conviction is had, the same is surplusage and of no effect. These rules cover <u>all</u> convictions for felonies where the defendant is over sixteen years of age and where he is sentenced to the penitentiary * * * *").

On the face of it, a conflict between the statutes seems to exist. However, after close inspection it is our opinion that subsections 204.22 (1) and (4) are exceptions to, and not in conflict with, Sections 246.39 and 789.13.

Reviewing the Court's wording in the <u>Cave</u> case, supra, it will be noted that the Court speaks only in terms of the <u>District Court fixing</u> a certain time of confinement.

Reviewing the statute it will be noted the <u>Legislature has fixed</u> a minimum confinement for such a violator.

In the case at hand (second offense) the minimum confinement is five years, and, together with the minimum confinement periods set out therein for the first and third offense, constitutes an exception to the general rules set out in Sections 246.39 and 789.13. These sections are broad in scope and by their all-inclusive language are intended to catch all situations to which they respectively refer but do not preclude specific exceptions set out by the Legislature.

It is the opinion of this office that Section 204.22 is such an exception.

Even if conflict could have been found to exist between the statutes, the well settled rule that the later manifested

intent of the Legislature prevails would necessarily bring us to a like conclusion, since 204.22, as amended by the 55th General Assembly, is the most recent expression of legislative intent in this matter.

Therefore, in answer to your question, since the sentence was for the minimum sentence only, the Board is precluded from applying Section 246.39 or any parole or probationary provisions to the confinement time allotted by the sentence of the above named prisoner, and he must remain confined for the five year period.

Very truly yours,

FREEMAN H. FORREST
Assistant Attorney General

FHF:MKB

March 6, 1957

Mr. Charles W. Wagner
Superintendent of
Buildings and Grounds
B u i l d i n g

My dear Charlie:

I have yours of the 4th inst. in which you submitted the following:

> "There seems to be a question on what police power this department has on various parking lots.
>
> "As you know, this becomes quite a mixed up affair, if the Department of Buildings and Grounds, or some other department, does not have the authority to police them.
>
> "Please advise us on this matter."

In reply thereto I would advise you that your department, through your employees, does not have what you have denominated police power on the various parking lots. As I have advised you orally, your employees in or about the parking lots and the State buildings are not at this writing peace officers and do not have the power of arrest except as outlined in Chapter 755, Code of 1954, which Chapter outlines the general provisions with respect to arrest. Your employees in respect to that would have no more authority than a private citizen.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

57-3.9

March 7, 1957

Bernice Wickard, Chairman
Board of Examiners
Division of Cosmetology
State Department of Health
646 Harwood Drive
Des Moines, Iowa

Dear Madam:

Receipt is acknowledged of your letter of February 8th as follows:

> "The Board of Cosmetology Examiners would like to have an opinion on the following.
>
> "'1. What is the power of the Examining Board as to the appointment of an executive secretary for the Cosmetology Division?
>
> "'2. Is it possible to make this appointment without the approval of the Examining Board?'"

In reply thereto I would advise you that the Board of Cosmetology Examiners is one of several boards created under and governed by the provisions of Chapter 147, Code 1954. The board is a "creature of statute" and as such is subject to the well-known rule that "creatures of statute have only those powers expressly conferred by statute or reasonably and necessarily implied as incident to exercise of an express power".

There is no such office as "executive secretary"

57-3-10

provided in the statues creating and governing the board of cosmetology examiners. Section 147.22, Code 1954, provides, with respect to all examining boards under the practice acts, as follows:

"Officers. Each examining board shall organize annually and shall select a chairman and a secretary from its own membership."

However, by use of the term "executive secretary" it is my understanding that you intend to refer to some position other than that of member-secretary of the examining board.

Section 147.39, Code 1954, provides as follows:

"Clerk. Upon the request of any examining board, the department shall detail some employee to act as clerk of any examination given by said examining board. Such clerk shall have charge of the candidates during the examination and perform such other duties as the examining board may direct. If the duties of such clerk are performed away from the seat of government, he shall receive his necessary railroad and hotel expenses, which shall be paid from the appropriations to the department in the same manner in which other similar expenses are paid."

If, by the use of the term "executive secretary" you mean to refer to a clerk detailed to assist in the conduct of examinations and performance of other duties under Section 147.39, I would point out that the language of the quoted section expressly provides that such clerk be an employee of the department of health.

In addition to the general provisions of Chapter 147 applicable to all examining boards therein created, certain special statutory provisions pertaining only to the practice of cosmetology appear in Chapter 157, Code 1954. Of these, Section 157.8 may be relevant to your question. It provides as follows:

"Assistants. The commissioner of public health, with the approval of the cosmetology examiners, shall appoint such inspectors and clerical assistants and incur such other expense as may be necessary to properly administer and enforce the provisions of law relating to the practice of cosmetology. The amount of compensation of such ap-

> pointees shall be fixed by the executive council. There is hereby annually appropriated out of the cosmetology fund in the state treasury a sum sufficient to pay the compensation and the expenses of said examiners, inspectors and clerical assistants, and other necessary expense. Provided however that the entire cost of the administration and enforcement of the provisions of law relating to the practice of cosmetology shall not exceed in any one year, the receipts under such laws for such year together with the balance held by the treasurer of state in the cosmetology fund from preceding years."

If the "executive secretary" to whom your letter refers is a "clerical assistant" appointed under the provisions of Section 157.8 such appointment is made by the commissioner subject to the approval of the board as therein provided.

It is noted that your letter refers to the "Division of Cosmetology" rather than the Board of Cosmetology Examiners. It is assumed that such "Division" exists by virtue of Section 135.11(16), Code 1954, which provides in pertinent part as follows:

> "Powers and duties. The commissioner of public health shall be the head of the 'State Department of Health', which shall:
>
> " . . . . . .
>
> "16. Establish and maintain such divisions in the department as are necessary for the proper enforcement of the laws administered by it, . . . the various services of the department shall be so consolidated as to eliminate unnecessary personnel and make possible the carrying on of the functions of the department under the most economical methods.
>
> " . . . . . "

As to staffing such divisions, Section 135.6 provides:

> "Assistants and employees. The commissioner shall employ such assistants and employees as may be authorized by law, and the persons thus appointed shall perform such duties as may be assigned to them by the commissioner, but the head of the division of examinations and licenses shall not be

a person who has been licensed to practice any of the professions for which a license must be obtained from the department to practice the same in this state."

Except as provided with respect to certain examining boards granted a special degree of autonomy in Sections 147.94 to 147.110, Code 1954, the functions of licensure and enforcement of the provisions of Title VIII, Code 1954, are committed to the Department rather than to the respective examining boards whose function it is to examine and recommend. It is assumed the "Division" is the Department's instrument for exercising such functions.

I would, therefore, advise you in answer to your first question, that unless the office of "executive secretary" of the "Division" of cosmetology combines the function of "clerical assistant" under Section 157.8 with divisional "assistant" to the commissioner as provided in Section 135.6, the Board of Examiners has no power with respect to such appointment.

In answer to your second question, I would advise you that the power to appoint or employ Division assistants and employees under Section 135.6 vests solely in the commissioner of public health and that no power of approval exists in the examining board unless the duties of such Divisional assistant or employee be combined with those of the "clerical assistant" to the board provided in Section 157.8.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

March 7, 1957

Mr. Nels W. Branstad
Winnebago County Attorney
Forest City, Iowa

Dear Mr. Branstad:

Receipt is acknowledged of your letter of February 6th as follows:

"The School Board of Forest City-Leland Community School District, Forest City, Iowa, has requested that I write to you for an opinion relative to the annexing of certain property from one county into the corporation of a city in another county.

"The City of Forest City abuts on the Hancock County line. It has been contemplated to build a new school building on a tract of land in Hancock County. There is only one house on this tract of land, and it has been thought to have the owner of the tract of land who lives in the only house on said tract of land request that the property be annexed to the corporation of Forest City, Iowa.

"It is our understanding that it is impossible to force an area outside of the county to be annexed to a corporation of a city. Now the question is: 'May an adjacent property owner petition a corporation to annex his property into the corporation of a city even though the property to

57-3-11

be annexed is in another county than that in which the city is located?'"

It is my understanding you have already been advised by informal opinion of this office that cities and towns may not annex adjoining territory in another county by action of such city or town under Section 362.26, Code 1954. Your question is whether the same would be true where the owner of adjacent property voluntarily petitions for annexation under Section 362.30, Code 1954. A comparison of the two sections reveals that neither expressly authorizes annexation of territory in another county. In both sections the final act of annexation is by the city. It is not an act of "annexing" in one case and "joining" in the other. I am, therefore, of the opinion that the same disability with respect to annexation of territory in another county would exist irrespective of whether the machinery for annexation was set in motion by the council or by the landowner.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

March 8, 1957

Mr. Earl E. Hoover
Clay County Attorney
Spencer, Iowa

Dear Sir:

This is to acknowledge receipt of your request of February 1, 1957, for an opinion of this office on the legality of a certain puzzle contest which you outline as follows:

> "Puzzles containing 25 squares will be published in a local newspaper for a certain period of time; a letter would appear in three of the squares of each puzzle and it would be necessary for any contestant who desires to take part to fill out as many of the remaining squares with letters forming words as is possible, with each five letter word being worth 5 points, each 4 letter word being worth 3 points and each 3 letter word being worth 2 points. Each contestant would seek to fill the 22 open spaces so as to form words, seeking to form a puzzle with the greatest point total. There is no pre-determined solution or any key to the puzzle; it is a matter of each individual seeking to form the greatest number of five letter words.
>
> There is no charge to enter the contest. The winning entry is to be awarded $15.00 first prize, the second prize being $10.00 and the third prize being $5.00. Now, if a contestant desires, he may purchase a decal which portrays a little leaguer of the type used on automobile windshields. He may pay any amount he wishes for the decal to the little league group at the time the contest is entered, and if he wins a prize, he will receive a bonus cash award forty times greater than his purchase price of the decal, not to exceed a maximum figure of $200.00 in any event however."

You inquire whether, under the circumstances outlined above, such a contest would constitute a lottery under our laws.

57-3-12

The prohibition against lotteries has been a part of the basic law of Iowa for more than a century. Sec. 28, Article III, Constitution of the State of Iowa. There are as many types of lotteries as the seemingly inexhaustible inventiveness of their promoters can devise in their efforts to outwit the law. When such schemes reach the courts, the decision, of necessity, usually turns on whether the scheme, on its own peculiar facts, constitutes a lottery. So varied has been the techniques used by promoters to conceal the joint factors of prize, chance and consideration, and so clever have they been in applying these techniques to feigned as well as legitimate business activities, that it is often difficult to apply the decision of one case to the facts of another. Thus, the courts throughout the United States have uniformly refused to define a lottery except in broad generic terms, for as quickly as a definition is framed, that same instant the ingenuity of man seeks ways to circumvent it. However, our state Supreme Court has indicated that generally any enterprise which consists of the giving of any consideration for an opportunity to win a prize is in violation of the lottery laws of this state. See State v. Mabrey, 245 Iowa 428, 60 N.W. 2d 889.

It is clear that the sponsors or promoters of "WINIT" have in mind achieving a financial profit out of the scheme and not merely the purpose of becoming public benefactors. It is their intention to stimulate the sale of little leaguer decals by offering a chance for an enhanced prize to those contestants purchasing such decals. Those who buy the decals in the scheme of "WINIT" pay for any chance of the charity contestants. Obviously, the prize money is acquired by the sponsors from profits from the paying contestants. This benefit to the sponsors furnishes a consideration for the chance to win the prizes offered. It is highly improbable that the sponsors would want to continue the puzzle contests if the decal sales were not sufficient to pay the prize money.

An additional consideration flowing from the promoters to the participants or contestants is the so-called "bonus," or enhanced prize. The opportunity to obtain an additional or greater prize is that extra inducement to purchase the decal. It is this extra inducement which creates the increase in profits which must be realized by the promoters. These extra profits can only come from the participants or customers so therefore the promoters are or will be enjoying the consideration flowing to them from the participants. A game, contest or lottery does not cease to be a lottery because some, or even many, of the players or contestants are admitted to play or compete free, so long as others continue to pay for their chances. It is evident that the two elements of prize and consideration are clearly present in the outlined scheme.

This leaves for consideration whether or not there is "chance" in the scheme.

Conceding that the choice of words or letters in completing the puzzle will be to some extent affected by intelligent calculation, the conclusion is nevertheless irresistible that it is largely a matter of chance which competitor will submit the solution containing the highest point total. While the highest possible score might be fixed and definite, yet the ascertainment of that score can be nothing other than a mere matter of guessing as to the proper arrangement of the letters and words to obtain such score. If the contest were solely between experts, possibly elements affecting the results which no one could foresee might be held dependent upon judgment; but not so when the contest is unrestricted as to the general public. "What is a matter of chance for one man may not be for another." A lottery does not cease to be such and become a mere contest because its results may be affected, to some slight extent, by the exercise of a contestant's intelligence, thought power or judgment, nor because it may be denominated by its sponsors as "purely a game of skill." Here the possibility of ties is so remote that even the sponsors have made no provision in their rules for duplicate awards in such cases. Here "chance" inheres in the contest. As supporting these views, see: State ex rel. McKittrick v. Globe-Democrat Publishing Co., 341 Mo. 862, 110 S.W. 2d 705; People ex rel. Ellison v. Lavin, 179 N.Y. 164, 71 N.E. 753; Eastman v. Armstrong-Byrd Music Co. (CCA 8th), 212 F. 662; Willis v. Young, (1907) 1 K.B. 448; 34 Am. Jur. 649-650, 655-656, Lotteries, Secs. 6, 12; 54 C.J.S. 846-847, 857, Lotteries, Secs. 2b, 12.

One other matter warrants attention. It is our understanding that the anticipated profits from the contest are to be used for a very worthy cause, namely the sponsoring and financing of a "Little League" in your city. The fact that such proceeds may be used for a worthy cause, while perhaps cloaking the scheme with "a mantle of respectability", nevertheless does not take it out of the inhibitions of our laws. Even if a particular contest in its practical effect is harmless to public morals no relaxation of legal principles against lotteries is permissible to justify the contest. Any deviation from legal rules against lotteries in favor of any person, group, or institution, creates a precedent which can be seized upon by the unscrupulous to justify schemes harmful to the public with resultant embarrassment to officials who have the difficult duty of enforcing laws against lotteries generally. Moreover, in dealing with the subject of lotteries, flexible rules cannot be made to authorize a particular scheme. The applicable laws do not have the latitude of an amusement establishment which may stamp a particular pass or ticket, "good for this show and day only."

After considerable research not directly referred to herein, and after careful consideration of the matter, we conclude that the scheme of "WINIT," as described in your request for an opinion set out above, violates the lottery laws of our state.

Very truly yours,

RAPHAEL R. R. DVORAK
First Assistant Attorney General

RRRD:md

March 6, 1957
(Dictated February 15, 1957)

Mr. Loren N. Brown
Mitchell County Attorney
515 Main Street
Osage, Iowa

Dear Mr. Brown:

Reference is hereby made to the letter opinion of this office dated January 28, 1957, rendered in response to your inquiry of January 23, 1957, and pertaining to election of directors in the several school districts scheduled to resume operation upon the final dissolution of the de facto St. Ansgar school corporation.

Because of certain inquiries received at this office as to the effect of said opinion, it is deemed desirable to further clarify it at this time. I would call your attention to the following language at page 2 of the said opinion:

> "At the outset I would advise you that the procedure taken in the matter should in every respect conform exactly to the decision and supplemental opinion of the Supreme Court to which your letter refers. Insofar as the specific questions set forth in your letter are not therein answered, the procedure taken should follow the pertinent statutes governing school elections . . . "

And at page three of the said opinion:

> " . . . unless, as is hereinabove stated, the supplementary opinion of the Court to which you refer, so directs."

57-3-13

The said "supplementary opinion", State of Iowa, ex rel Warrington v. Community School District of St. Ansgar, remands the cause to the District Court of Mitchell County with the following direction:

> "Said Court shall also take proper steps to dissolve said de facto corporation as of the end of said school year, and in any event not later than July 1, 1957, under the statutory provisions for such dissolution and according to law."

Since the said action was in quo warranto it was governed by the rules and statutes appearing in Chapter 660, Code 1954. Under the grounds provided in RCP 299 it appears the dissolution of the said school corporation is for:

> "Acting as a corporation in Iowa without being authorized by law so to act; . . . "

And the quoted supplementary opinion was made pursuant to RCP 305 which provides:

> "If the judgment dissolves a corporation, the Court shall make appropriate orders for the dissolution as provided by the statutes in force."

An essential part of such dissolution will be the distribution of assets of the de facto corporation to the revived de jure corporation. In order to effect such distribution, boards will have to be in existence in the said revived corporation to receive such distribution from the trustees appointed therefor. Thus, getting such boards into existence is an essential incident of the dissolution and by virtue thereof subject to order of the District Court of Mitchell County.

You are, therefore, advised and should understand that the hereinabove quoted reservations from my opinion of January 28th apply not only to the literal text of the decision and supplementary opinion of the Supreme Court, but also to orders issued by the District Court of Mitchell County pursuant to said supplementary opinion as hereinabove quoted. In other words, the statutory procedure to which my opinion refers you is to be followed only if and to the extent that the District Court does not otherwise provide in its orders setting forth the steps for dissolution.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

March 8, 1957
(Dictated February 28, 1957)

Mr. Ray Henrahan
Polk County Attorney
Room 406 Court House
Des Moines, Iowa

Dear Mr. Henrahan:

Receipt is acknowledged of your letter of February 26th as follows:

"Mr. Ralph Norris, County Superintendent of Schools has requested our office to write you for an opinion in regard to the following problem:

"Under the provisions of Section 277.4, nomination papers for candidates shall be filed with the Secretary of the School Board, further describing the manner in which this shall be perfected. In Polk County, in one instance only one candidate filed nomination papers as required. Upon examination, it was discovered that an 'e' was left out of the name as it appeared on the petition, thus creating a different name from that person who sought to be a candidate.

"The deadline for filing the petitions has now passed and as there is no apparent provision in the statutes for correction as there is in Section 43.25, the question is:

"'Can the provisions of Section 43.25 be interpolated and the Secretary of the School Board

57-3-14

be authorized to correct the petitions in conformation showing the intent of the petitioners?'"

It is assumed that by your reference to Section 277.4 rather than 273.5 and to filing with the secretary of the "school board" rather than county superintendent, you refer to election of a local director rather than member of the county board of education. However, your statement relative to deadline for filing appears inconsistent with the provisions of Section 277.4.

Section 277.4, Code 1954, to which your letter refers, provides as follows:

"Nominations required. Nomination papers for all candidates for election to office in each independent city, town, or consolidated district shall be filed with the secretary of the school board not earlier than thirty days nor later than noon of the tenth day prior to said election. Each candidate shall be nominated by a petition signed by not less than ten qualified electors of the district, except that in city independent districts where the regular election is held biennially such petition shall be signed by not less than fifty qualified electors of the district. To each such petition shall be attached the affidavit of a qualified elector of the district that all the signers thereof are electors of such district and that the signatures thereto are genuine."

Section 277.4 contains no express provision for correcting errors in nominating petitions. Section 277.33, Code 1954, provides as follows:

"Application of general election laws. So far as applicable all laws relating to the conduct of general elections and voting thereat and the violation of such laws shall, except as otherwise in this chapter provided, apply to and govern all school elections."

Section 43.25, Code 1954, to which your letter refers provides as follows:

"Correction of errors. The county auditor shall correct any errors or omissions in the names of candidates and any other errors brought to his knowledge before the printing of the ballots."

If Section 43.25 has any application to the situation you describe it must be by virtue of Section 277.33. However,

Section 277.33 refers only to laws relating to "the conduct of general elections and voting thereat". Chapter 43 in which Section 43.25 appears does not relate to "the conduct of general elections". Quite to the contrary, it relates to nominations by political party primaries. Further note that Section 43.25 applies to nomination papers filed with the county auditor whereas the papers in question are filed with the secretary of the school district. Further note that Chapter 43 applies to partisan primaries whereas the problem you present relates to a nonpartisan school election.

For the foregoing reasons, I am of the opinion that Section 43.25, Code 1954, has no application to the problem described in your letter.

Yours very truly,

LEONARD C. ABRAMS
Assistant Attorney General

LCA:mfm

March 8, 1957
(Dictated March 1, 1957)

Dr. George W. Glann, Member
State Board of Dental Examiners
1816 Beaver Avenue
Des Moines, Iowa

Dear Dr. Glann:

Receipt is acknowledged of your recent inquiry relative to responsibility for enforcement of the provisions of the Code of Iowa pertaining to licensing dentists and practice of dentistry. Specifically you inquire:

(1) Who is responsible for licensing dentists?

(2) Who is responsible for investigation and enforcement of licensing requirements against unlicensed practicioners.

In answer to your first question, I would advise you that issuance of licenses is committed by law to the State Department of Health by the provisions of Sections 147.2 to 147.11, Code 1954. The Commissioner of Public Health is head of the State Department of Health by virtue of Section 135.11, Code 1954. A prerequisite to the issuance of a departmental license to practice is that the applicant for license successfully pass a professional examination. Boards for the purpose of giving such examinations are created by Sections 147.12 to 147.28, Code 1954. Provisions governing the manner of conducting such examinations are contained in Sections 147.29 to 147.43, Code 1954.

In general, the power and duty to conduct examinations and recommend the issuance of licenses is vested in the Board

57-3-15

of Dental Examiners. The duty to issue such licenses to otherwise qualified applicants who have passed the appropriate examination and received the examining board's recommendation is vested in the Commissioner. The examining board also has certain other duties with respect to issuance of licenses, for example; rules and recommendations with respect to reciprocity licenses as provided in Sections 147.45 to 147.51, Code 1954, and approval of schools and recommendations for reinstatement of licenses as provided, respectively, in Section 153.3(1) and Sections 153.22 and 153.23, Code 1954.

In summary, the power to examine and recommend applicants for licensure, the power to make rules and recommendations with respect to license by reciprocity, the power to approve schools of dentistry for the purposes of admitting applicants to the examination and the power to recommend reinstatement of former or lapsed licenses is committed by law to the Board of Dental Examiners. All other licensure powers are committed to the State Department of Health under the Commissioner of Public Health.

The answer to your second question is furnished by Section 147.87, Code 1954, which provides as follows:

> "Enforcement. The state department of health shall enforce the provisions of this and the following chapters of this title and for that purpose shall make necessary investigations relative thereto. Every licensee and member of an examining board shall furnish the department such evidence as he may have relative to any alleged violation which is being investigated."

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

March 11, 1957

Mr. W. N. Dunn
Hardin County Attorney
Eldora, Iowa

Dear Sir:

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

> "This letter is written to you in confirmation of my telephone conversation with you on Monday, March 4, 1957 at which time I discussed the erection of a maintenance shop by the County.
>
> "You will recall that I stated that at the General Election the voters of Hardin County voted affirmatively for the following proposition, 'Shall the County of Hardin in the State of Iowa erect and equip a maintenance shop at a cost not to exceed $50,000.00 and to pay the cost thereof from funds now on hand in the maintenance fund of Hardin County, Iowa?'
>
> "You will recall in our conversation last Monday, I informed you that originally the Board of Supervisors proposed to erect one building to serve as both a maintenance shop and for storage purposes. The County Engineer has now recommended to the Board instead of erecting one building that they erect two, approximately 75 feet apart, one to be used for maintenance shop and the other for storage purposes. The total cost of the two buildings will not be greater than the costs of one large building because of savings that can be made in the way of grading and fill.
>
> "I would appreciate your confirming to me your opinion that such procedure by the Board would be in compliance with the law."

In reply to the foregoing I confirm to you my oral opinion that under authority of the foregoing proposition your County could erect and equip two buildings for maintenance purposes

57-3-16

within seventy-five feet of each other if such structures can be built within the limits of the authorized sum of $50,000.00.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

March 11, 1957

Mr. R. T. Smith,
County Attorney
O'Brien County Court House
Primghar, Iowa

Dear Mr. Smith:

Reference is made to your letter of March 1, 1957 in which you ask a number of questions in regard to a military exemption matter. The facts as we understand them are as follows:

A veteran purchased property in 1951. In 1955 he filed application for the exemption on the property. The veteran had executed a warranty deed to this property on September 8, 1954. This deed was recorded on September 22, 1955. On August 10, 1956, the State Tax Commission set aside the exemption for the reason that the applicant had sold the property prior to the date of levy in 1955. Since that time the veterans grantee has sold the property to a subsequent grantee who has in turn sold to another. In 1956 the County Treasurer re-entered the tax against the property.

The primary question you raise is as to the liability of the present owner for the re-entered tax. Your other questions relate to the propriety of the

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disallowance and the possible relief which might be given by the Board of Supervisors under the circumstances. We refer you to section 426A.6, which provides in part as follows:

> ". . .In any case, where a claim is so disallowed by the state tax commission and no appeal is taken from such disallowance, any amounts of credits allowed and paid from the military service tax credit fund shall become a lien upon the property on which said credit was originally granted, if still in the hands of the claimant, and not in the hands of a bona fide purchaser, and any amount so erroneously paid shall be collected by the county treasurer in the same manner as other taxes and such collections shall be returned to the state tax commission and credited to the military service tax credit fund. . ."

It would appear under the facts you have given that the present owner of this property would be a bona fide purchaser. That, of course, is a question of fact. It would appear to us that there would be no constructive notice as to such individual if that individual purchased prior to the time of the disallowance and re-entry by the County Treasurer. There could possibly be actual notice by the owner which would dis-qualify him as a bona fide purchaser but it seems unlikely under the facts given.

There appears to be nothing in the law as to the procedure to be followed by the Treasurer in such instance. We would assume he would merely correct his records to eliminate the re-entry of the tax if he is convinced that the property is in the hands of a bona fide purchaser and

he would then make no further effort to collect the amount of the re-entered tax.

We are not passing specifically upon the propriety of the disallowance. It appears to be a factual question to determine when delivery actually took place. We believe the general rule is that in absence of evidence on this point, the presumption is that delivery was at the time of the execution of the deed. You do not give us the name of the veteran in this instance so that we might check our records. The Field Auditor's report might very possibly indicate the facts upon which the recommendation for disallowance was based, such as whether it was a transfer of possession, etc. The State in making a disallowance does not base its action on merely presumption. It has been our experience that the Field Auditor makes a very thorough investigation of the facts before making a recommendation for disallowance. In this instance, we believe that no appeal was taken from the disallowance as our records do not indicate an appeal pending in O'Brien County.

In view of the answer given as to the rights of the bona fide purchaser, it does not seem necessary for us to answer the question as to the authority of the Board of Supervisors to compromise the tax. However, in partial answer we refer you to section 445.16 of the Iowa Code

in stating that the Board of Supervisors would have no authority to compromise re-entered taxes until the property had been offered for sale for taxes for two consecutive years and not sold.

We trust we have answered the questions raised in your letter of March 1st.

Very truly yours,

E. A. Iverson,
Special Assistant Attorney General

EAI:lp

State of Iowa

Department of Justice

Des Moines

Ames, Iowa

NORMAN A. ERBE
ATTORNEY GENERAL

March 11, 1957 C O P Y

Mr. Donald L. Nelson
County Attorney
Nevada, Iowa

Dear Mr. Nelson:

Your letter of March 6 to Mr. Norman Erbe, the Attorney General, has been referred to this office for reply. In your letter you ask whether a brooder house being transported by a farmer from one farm to another is an implement of husbandry and does it make any difference whether or not the brooder house was being transported on skids, wheels of its own, or on a straight truck.

After examination of this problem, we have come to the conclusion that a brooder house is not an implement of husbandry. Section 321.453 excepts implements of husbandry from certain regulations governing size, weight and load. Section 321.1 (16) defines an implement of husbandry to be every vehicle which is designed for agricultural purposes and exclusively used by the owner thereof in the conduct of his agricultural operations. It is the opinion of this office that a brooder house cannot come under the protective wing of Section 321.453 for the reason that it is not a vehicle.

The transportation of a brooder house more than 8 feet wide on skids would also not be exempted by the above statutes for the same reasons.

If the brooder house were mounted on a straight truck, then it would still not come within the exceptions because it is not an implement of husbandry as above defined and would necessitate the securing of a permit from the Safety and Traffic Department of the State Highway Commission for the reason that it would be more than the eight feet in width described in Section 321.454 as being the maximum width.

If there are any further questions with respect to this opinion, please feel free to contact us again.

Yours very truly,

Daniel T. Flores
General Counsel for
Iowa State Highway Commission

DTF:js

57-3-18

March 12, 1957

Mr. Dale D. Levis
Audubon County Attorney
Audubon, Iowa

Dear Sir:

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

"I respectfully request an opinion from your office on the following matter:

"I have attached hereto a Clear Zone Easement which has been drawn at the request of Civil Aeronautics Administration in connection with the Audubon, Iowa, Municipal Airport, and request an opinion as to whether or not the Board of Supervisors of Audubon County, Iowa, have the power and capacity to grant said easement under the following facts.

"The Audubon County Board of Supervisors are entirely familiar with the request for an easement, which is in connection with the Audubon City Municipal Airport, said easement being over land owned by Audubon County, as a part of the Audubon County Home and Farm. The tract of land over which the said easement is proposed to be established is more than one-quarter of a mile from any buildings on the said County Home and is separated from the buildings by U. S. Highway #71 and the Chicago, Rock Island and Pacific Railroad, so that the possibility of building and buildings on said county home on the tract herein involved is greatly remote.

"The tract of land owned by the county over which the easement is desired and proposed lies immediately south of the said Audubon

57-3-19

Municipal Airport and is the only land over which an easement is desired or required on the south of said airport.

"The Audubon County Board of Supervisors are perfectly willing to sign and execute said easement, if they have the power and authority to do so.

"Chapter 329, Code of Iowa, 1954, entitled 'Airport Zoning' provides a method by which a hazard zone could be established by statute; however, it is the thought of the City Attorney, L. L. Ryan, and of myself that it is unnecessary to go through the procedures outlined in said chapter to establish this hazard zone on the south of said municipal airport, due to the fact that there is only one owner of real estate involved in the entire hazard zone - that being the County of Audubon. It appears to us that proceedings outlined in said Chapter 329, is available for use where you have a number of owners and where you have owners hostile to the establishment of said hazard zone and who would be unwilling to give or sell easement for the purpose of establishing the said hazard zone.

"We feel it is particularly desirable to obtain the easement from Audubon County, if it is possible for them to grant such an easement, due to the fact that the one owner of property lying to the north of said airport has already sold an easement for the hazard zone to the north of said airport and if we can obtain a similar easement from Audubon County to the south of said airport, we can avoid the expense and work involved in establishing the said hazard zone as set out in Chapter 329 of the Code."

In reply thereto I advise as follows: There is no express provision granting power to a County to impose an easement upon County property. However, where there is County

property no longer needed for County purposes, I am of the opinion that the power to sell (Section 332.3) such property would include the power of imposing an easement thereon. The property described does not appear to be property no longer needed. I am of the opinion, therefore, that this easement is unauthorized.

In view of the foregoing conclusion it seems unnecessary to pass upon the form of easement accompanying your letter. However, I would observe that it contains covenants and agreements that appear beyond the authority of the Board.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

60M 11-56-10915
PB-C-8776

Form 13

IOWA STATE HIGHWAY COMMISSION

AMES, IOWA

Ames, Iowa

March 12, 1957

Mr. William Q. Norelius
County Attorney
Court House
Denison, Iowa

Dear Mr. Norelius:

I have your letter of January 17 which requests a reply to the question, "I would like to have your opinion as to the legality of transferring funds from the county road fund to pay for the cost of construction of this bridge when the bridge had previously been constructed with drainage district funds in order to compromise a claim against the drainage district."

Since this bridge was constructed by the drainage district on private property, it should be considered a private bridge. I have ascertained that the bridge is not within the right of way of any established county or township road, but is in fact on private land to which access must be gained by opening gates and traveling over private land.

Further, it appears that on the old highway a lateral to the drainage district is established, and that it is no longer feasible that the old road could be reconstructed. The facts of this situation are such as it must be concluded that the bridge serves private landowners only, that that therefore it cannot be considered a part of the county road system.

There are other reasons why this bridge could not at this time be paid for out of county road funds. These are principally that the evidence in the case discloses that the bridge was built entirely for the use and benefit of the landowner and the drainage district, and that it was built at the instance of the trustees of the drainage district. I know of no way at this time to reimburse the drainage district for the cost of said bridge.

Naturally the Supervisors as representatives of the county lack authority to do work for the benefit of private individuals utilizing county machinery and county funds. Such would be the result if the county were to reimburse the drainage district for such bridge constructed wholly on private property and for the use and benefit of private individuals.

Under Section 309.3 the secondary bridge system of the county is defined to embrace all bridges and culverts on all public highways within the county except on primary roads and certain cities. This

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60M 11-56-10915
PB-C-8776

Form 13

IOWA STATE HIGHWAY COMMISSION

AMES, IOWA

bridge being on private property and not on any public road could not be a part of the secondary bridge system.

I can certainly understand why the owners of property within the drainage district desire a refund. Such is not hard to see. It is a matter of dollars and cents. However, as I have stated above, I know of no way in which payment to the drainage district can be made for this bridge.

If there are any further questions with respect to this matter, or if I have misunderstood or misinterpreted any of the facts, please do not hesitate to write again immediately.

Yours very truly,

Daniel T. Flores
General Counsel for
Iowa State Highway Commission

DTF:js

March 13, 1957

Hon. J. Henry Lucken
House of Representatives
B u i l d i n g

My dear Henry:

Replying to yours of the 26th ult. in which you have stated the following:

> "Enclosed herewith is copy of a letter received from Mr. E. R. Burham, Secretary of the Soldier's Relief Commission, Washington County.
>
> "I would appreciate your opinions on some of the questions raised by Mr. Burham's letter. Specifically, considering the Supreme Court ruling on an act passed by the General Assembly proposing to use some of the bonus funds for the purpose of building a domiciliary building at Marshalltown, would it be your opinion that there would probably be no way to legally make use of these bonus funds for this purpose?
>
> "Mr. Patterson of the Bonus Board states that the Bonus Board has been passing half of the relief granted by the Soldiers County Relief Commission in all instances where the county commission is cooperating with the Bonus Board. In your opinion, does that raise the question as to whether or not this is being done legally.
>
> "Any helpful observations you may have will be appreciated, regarding this matter."

I advise as follows: (1) With reference to the use of the bonus fund for the purpose of building a domiciliary building in Marshalltown, the Attorney General had this question before

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him recently and advised Representative Halling by letter dated February 21st, a copy of which I am attaching for your guidance.

(2) Respecting the action of the Bonus Board in passing half of the relief granted by the Soldier's Relief Commission where the County Commission is cooperating with the Bonus Board, I advise that there appears to be no express statutory authorization for the practice and I know of no opinion of this Department treating thereof. However, I understand that this has been a long standing practice in the interest of and desire to reduce the cost of administering the Disability Fund.

In regard to the matter of fixing dates for the termination of benefits conferred by the Legislature on veterans, I would be glad to advise with you personally about this.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

March 13, 1957

Mr. E. A. Hart, Director
Real Estate Commission
B u i l d i n g

My dear Earl:

This will acknowledge receipt of yours of the 26th ult. in which you submitted the following:

> "We attach hereto an inquiry from Vanderheiden Moving and Storage Company. We would appreciate your letter opinion as to whether such activity would constitute acting in the capacity of a real estate broker, as set out in section 117.3, chapter 117 of the 1954 Code of Iowa.
>
> "Your particular attention is respectfully directed to the words 'or other consideration' in subsection 1. Is there a consideration involved?
>
> "We have had a number of inquiries on the same subject from similar companies dealing mostly in interstate transportation of household goods, so your opinion will be a guide to the Commission in establishing a policy."

and the accompanying letter appearing as follows:

> "This letter is in regard to a little information I would like to have in regard to renting of houses. As we are in the moving business, we have many occasions that arise whereby if we get a family a house to rent, we are awarded with their moving job. So it means a lot to us to be able to have some setup where we know of houses to rent.
>
> "We do not make a charge for doing such things. The question that is in my mind is if we start a program whereby people can give us their names

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> if they have houses to rent. We would keep lists of these names for any incoming families. Then they would contact us for houses to rent. If we supply this service and advertise such, but do not charge for it, would we have to have a real estate license? Any information you might give me in this regard would be greatly appreciated, or do you issue a special type of license for supplying this service to the public?"

On consideration thereof I am disposed to the view that the practice designed to be pursued in accordance with the attached letter does not constitute "dealing in real estate" within the terms of Section 117.5, 1954 Code, providing as follows:

> "'Salesman' defined. 'Real estate salesman' as used in this chapter is a person employed by or otherwise associated with a real estate broker, as a selling, renting, or listing agent or representative of said broker."

Nor does it make the person pursuing the foregoing practice a real estate broker within the terms of Section 117.3, subsection 2, 1954 Code, providing as follows:

> "'Broker' defined. The term 'real estate broker' within the meaning of this chapter shall include any person, other than a salesman and except as herein provided, who engages for all or part of his time in the following:
>
> "* * * *
>
> "2. Listing real estate of other for sale, exchange, or rental for a fee, commission, or other consideration or advertises or holds himself out as a real estate broker."

While the practice proposed does undoubtedly constitute a listing of real estate for rental purposes, it obviously is not done for a fee or commission nor is other consideration present.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

March 13, 1957

Mr. Donald L. Nelson
Story County Attorney
Nevada, Iowa

Attention: Mr. George Larson

Dear Sir:

Receipt is acknowledged of your letter in which the following problem was presented:

> "The county auditor has presented to the board a claim of Dr. James H. Bailey, Veterinarian, which has been certified by the Department of Agriculture and which is for the expense of testing certain cattle belonging to the Iowa State College. Everything is in order and the procedure provided by the statute has been followed.
>
> "Now, the code provides that the board in each year is to levy up to ½ mills on the taxable value of all the property in the county in order to provide a fund for the payment of the expenses for the eradication of Bang's disease under said chapter. Since Iowa State College is exempt from such tax and pays nothing into said fund, the board questions the right of the college to have the expense of testing cattle owned by it paid out of said fund.
>
> "This situation would arise only in this county since Iowa State is the only tax exempt agricultural college within the state and quite probably the legislature did not consider the problem when adopting the statute."

We do not consider your question with respect to the tax base not including property of the college, since in analyzing

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the statute concerned the question does not arise.

Reference is made to Section 164.4, 1954 Code of Iowa, as follows:

> "Expense of inspection and tests. If the owner shall agree to comply with and carry out the rules and regulations made by the department under section 164.2, the expense of such inspection and test shall be borne by the United States department of agriculture, or by the department, or both."

This section puts the burden of the testing expense upon either or both the Iowa State or United States Department of Agriculture. Presumably, the levy of which you speak is that contained in Section 164.21, set out in pertinent part hereunder, which is confined to indemnity claims.

> ". . . the board . . . shall . . . levy a tax sufficient to provide a fund to pay the indemnity and other expenses provided in this chapter, except as provided herein, . . .". (Emphasis ours)

It is the opinion of this office that the phrase "except as provided herein" in this section excludes payment of testing fees incurred under Sections 164.3 and 164.4 since payment thereof is otherwise provided for.

Therefore, the answer to your question is that your Board is not obligated for the expenses of testing to which your letter refers.

Yours very truly,

FREEMAN H. FORREST
Assistant Attorney General

FHF:MKS

March 14, 1957

Hon. Dewey E. Goode
Davis County Representative
House Chamber
L O C A L

Dear Sir:

Receipt is acknowledged of your letter of March 12th as follows:

> "In regard to Senate Concurrent Resolution 16, a copy of which I enclose, I would like to know -- if it does not involve too much research -- if the legislature of the State of Iowa has ever passed a resolution recognizing any other religious faith as a major faith in the State of Iowa."

In answer thereto I would advise you that a member of my staff has examined the index of resolutions contained in the back of each volume of session laws of previous general assemblies and reports no instance where a similar resolution has been adopted. The explanation for lack of such resolutions may be furnished by the provisions of Article I, Section 3, Constitution of Iowa, which provides as follows:

> "Religion. Sec. 3. The General Assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship,

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or the maintenance of any minister, or ministry."

Also see Article I, Section 4, Constitution of Iowa, as follows:

> "Religious test -- witnesses. Sec. 4. No religious test shall be required as a qualification for any office, or public trust, and no person shall be deprived of any of his rights, privileges, or capacities, or disqualified from the performance of any of his public or private duties, or rendered incompetent to give evidence in any court of law or equity, in consequence of his opinions on the subject of religion; and any party to any judicial proceeding shall have the right to use as a witness, or take the testimoney of, any other person not disqualified on account of interest, who may be cognizant of any fact material to the case; and parties to suits may be witnesses, as provided by law."

Note should also be made of Section 735.3, Code 1954, as follows:

> "Religious test. Any violation of section 4, Article I of the constitution of Iowa is hereby declared to be a misdemeanor."

Further note Section 735.4, Code 1954, as follows:

> "Evidence. If any person, agency, bureau, corporation, or association employed or maintained to obtain, or aid in obtaining, positions for others in the public schools, or positions in any other public institutions in the state, or any individual or official connected with any public school or public institution shall ask, indicate, or transmit orally or in writing the religion or religious affiliations of any person seeking employment in the public schools or any other public institutions, it shall constitute evidence of a violation of section 735.3."

In view of the prohibitions contained in the quoted laws it would appear little occasion for reference to specific religious faiths in public documents exists or has existed. It seems likely that such lack of occasion for such reference

furnishes the explanation as to why no example of any previous resolution similar to the one in question can be discovered.

Yours very truly,

NORMAN A. ERBE
Attorney General of Iowa

NAE:LCA:mfm

March 14, 1957

Honorable Clifford M. Vance
House of Representatives
B u i l d i n g

Dear Representative Vance:

In re: House File 230

Reference is made to our recent discussions concerning House File 230 which provides for the reimbursement to utilities for nonbetterment costs associated with relocation of facilities occasioned by Federal aid highway projects.

It should first be pointed out that the bill in its present form covers not only the interstate highway system but would cover any Federal aid project there might be in the state.

Section 111 of the Highway Act of 1956 provides for the reimbursement to utilities for the costs of relocation of their facilities provided "that Federal funds shall not be apportioned to the states under this section when the payment to the utility violates the law of the state or violates a legal contract between the utility and the state".

Chapter 319 of the 1954 Code sets forth the present law with regard to relocation of facilities along our existing primary and secondary roads. There is no liability on the part of either the County or the State Highway Commission for relocation of facilities under the Chapter.

There are also in existence a number of franchises between the various utilities and the Iowa Commerce Commission. This standard form contains a clause specifically incorporating the provisions of Chapter 319 in these various franchises.

We therefore feel that since the Federal act specifically refers to existing state laws and existing conditions such as franchises the State might very well deprive itself of rights under the Highway Act of 1956 if the broad language of the present House File 230 were adopted. We would, therefore, suggest the following amendment to the language of the bill as it now stands:

57-3-25

"Add to Section three (3) as amended the following:

'If for any reason payment to the utility violates any law of the State of Iowa or violates any legal contract between the utility and the State of Iowa including but not limited to Chapter 319, such reimbursement shall not be made, and if any such cost shall have been advanced or paid by the State to said utility for which reimbursement cannot be obtained such advance or payment shall be promptly returned by said utility to the State.'"

If we may be of further service to you, please call upon us.

Very truly yours,

DON C. SWANSON
Assistant Attorney General

DCS:MKB

March 14, 1957

Honorable X. T. Prentis
Chairman, Iowa Taxation Study Committee
State House
Des Moines 19, Iowa

Dear Senator Prentis:

In response to your inquiry as to whether the Iowa Taxation Study Committee should make withholding from the pay of Grace D. Needham and Carolyn Jamison for federal income taxes and F.I.C.A. contributions, I have checked the federal law on this point as well as the facts I deem to be material under the federal statutes involved. The facts as I understand them are that Carolyn Jamison and Grace D. Needham worked during only one quarter of the year 1956 and were paid approximately $150.00 and approximately $350.00, respectively, for their work in proofreading the two sections of the Iowa Taxation Study Committee Report. It is also my understanding that they were paid by the hour pursuant to a verbal contract with the committee but were not subject to the control of the tax study committee -- only as to the result to be accomplished and not as to the means and details by which that result was accomplished.

The federal statutes involved appear to be Sections 3401, 3101, 3102 and 3121(d) of the Internal Revenue Code of 1954. Section 3401, above cited, provides in part as follows:

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> "(a) Wages.--For purposes of this chapter, the term 'wages' means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include remuneration paid--" (Emphasis ours).

It is my firm opinion that the two proofreaders above-named were not employees of the Iowa Taxation Study Committee as that word is used in Section 3401.

Since the requirements for withholding F.I.C.A. contributions are based upon the same definitions for the purpose of your question as those appearing in Section 3401 relating to income tax withholding, the same result would follow as to such contributions.

The Iowa Taxation Study Committee may pay the amounts due the proofreaders above-named without the necessity of making deductions for federal income tax withholding or F.I.C.A. contributions.

In confirmation of the above please see Sections 925 and 926 of Commerce Clearing House 1956 United States Master Tax Guide.

I have checked this matter with the office of Mr. Frank Blauser, Assistant Director of Internal Revenue, and have obtained informal oral confirmation of the opinion above expressed.

Very truly yours,

M. A. Iverson,
Special Assistant Attorney General

MAI:fs

March 14, 1957

Iowa State Tax Commission
State Office Building
Des Moines, Iowa

Subject: Midwest Carbide Corporation, Keokuk, Iowa -- Liability for Use Tax on Carbon Electrodes Used in Manufacturing Operations.

Gentlemen:

With apologies to your Commission your writer must advise that the Tax Commission was incorrectly advised by this office at the time of the hearing before your Commission concerning the subject of this letter. Such electrodes are definitely taxable under the Iowa Use Tax Law. Recent court decisions in other states which have recently come to the attention of your writer and which are definitely on point fully justify and compel this change of position. It is my advice in the premises that the Tax Commission revise its position in this matter in light of the decisions reported in:

Androscoggin Foundry Co. v. Johnson, 147 Maine 452, 88 A.2d 158;
Union Portland Cement Co. v. State Tax Commission, 170 P.2d 164, 110 Utah 135; and
Pacific Northwest Alloys, Inc. v. State Tax Commission (Wash. Sup. Ct., No. 33587, Dept. Two, 1-25-57),

and proceed to tax the use of such electrodes.

The substance of the authorities above cited is that the integration of the used electrodes into the finished carbide product is purely incidental to the main function of the electrodes even though the residue of such electrodes falls

57-3-27

into and combines with the basic raw materials of the operation, and it consequently cannot be said to be intended to, by means of fabrication, compounding, manufacturing, or germination, become an integral part of other tangible personal property intended to be sold ultimately at retail. Such electrodes are readily obtainable in Iowa for the reason that they are manufactured in Iowa for sale. Thus, such electrodes are not exempt from the Iowa Use Tax under either the "processing" or "not readily obtainable" provisions of Section 423.1(1) of the 1954 Code of Iowa.

Very truly yours,

M. A. Iverson,
Special Assistant Attorney General

MAI:fs

March 14, 1957

Mr. Harold G. De Kay
County Attorney
Cass County Court House
Atlantic, Iowa

Dear Mr. De Kay:

Reference is made to your letter of March 4, 1957 in which you enclose a letter from Joseph T. Shubert, Cass County Assessor. You asked for an opinion on three questions raised in Mr. Shubert's letter. The first question is as follows:

> 1. Is a portion of the Reserve Money held by a bank and partially owned by the Federal Government subject to assessment under the Monies and Credits law? (Reference is made to "Liabilities-amount of undivided profits- of Iowa State Tax Commission Form No. 103).

You do not tell us in connection with the question the kind of bank involved in the situation. We are assuming that it is a National or State bank in view of the fact that private banks are of limited number in this State. Section 430.2 of the 1954 Code provides:

> "Shares of stock of national banks and state and savings banks and loan and trust companies, located in this state, shall be assessed to the individual stockholders at the place where the bank or loan and trust company is located."

Sections 430.6 and 430.7 provide for the valuation of the shares of stock of the bank. These sections provide that

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a value shall be placed on the stock and added thereto should be the bank's surplus and undivided profits. Section 430.6 provides for the deduction of the value of all real estate owned by the bank. The value of the capital stock is the amount reached by the addition of such amounts less the amount of real estate. It has been held that in fixing the value of the stock for taxation the assessor should not include the shares owned by the Reconstruction Finance Corporation or other governmental agencies. See Iowa Des Moines National Bank and Trust Company vs. City of Des Moines, 227 Iowa 372, 288 N. W. 405. It has also been held repeatedly that the part of the surplus and undivided profits invested in government securities by the bank cannot be deducted from the assessed valuation of the bank stock. See National Bank vs. City of Burlington, 119 Iowa 696, 94 N. W. 234; First National Bank vs. City of Independence, 123 Iowa 482, 99 N. W. 142; Des Moines National Bank vs. Fairweather, 191 Iowa 1240, 181 N. W. 459; affirmed 44 Sup. Ct. 23, 263 U. S. 103, 68 Le 191; 1918 A.G.O. 224; 1922 A.G.O. 164.

Form 103 contains a memorandum defining the term "Undivided profits" for the purposes of taxation as all reserves, if any, belonging to the bank. We find no cases specifically dealing with the question of reserves. However, it would seem to follow by analogy from the above

cited cases that any part of the reserve actually owned by the Federal government would not be included in determining the valuation of the capital stock, but if it were owned by the bank and merely invested in governmental securities or pledged with the government in order to qualify as a member of the Federal Reserve System then such amount should be included in determining the value of the capital stock. It would seem to be a question of fact in the instant situation as to whether the amounts referred to are actually owned by the Federal government or whether it is merely an investment in Federal securities or a pledge of funds as required by law.

Question No. 2 is as follows:

> "Party has purchased real estate for $30,000 and has agreed on November 30, 1956 to make settlement on March 1, 1957 and further agreed to pay 1957 taxes on said real estate due in 1958. Is purchaser subject to assessment on January 1, 1957 for Money? Assessed party protests under grounds that this is "double-assessment".

If we correctly interpret the question, it would seem on January 1, 1957 that an enforceable contract of sale exists between the parties. Therefore, by the doctrine of equitable conversion the real estate would be assessed to the purchaser and the amount due on the contract would be a credit assessable to the seller. As to the money held by the purchaser on January 1st which is to be paid on the settlement date, it would seem to be assessable to him as

money. However, the same amount would appear to be deductible as a debt under section 429.4. The Iowa Supreme court in Morril vs. Bently, 150 Iowa 177, 130 N. W. 734 defined the word "debt" as follows:

> "A 'debt' is generally defined as a sum of money due by certain and express agreements founded upon an express or implied contract to pay a certain amount at a certain time."

It would appear that in the instant situation the amount payable to fulfill the contract would qualify under the above definition as a "debt" deductible under section 429.4 of the Code.

Question No. 3 is as follows:

> "A resident of Cass County, Iowa has money on deposit in a Des Moines, Iowa bank--where is this money assessable? Depositors state that Des Moines banks have notified them that they are not assessable here."

This question would appear to be answered by section 428.3 of the Code which provides:

> "Moneys and credits, notes, bills, bonds, and corporate shares or stocks not otherwise assessed, shall be listed and assessed where the owner lives, except as otherwise provided, and except that, if personal property not consisting of moneys, credits, corporation or other shares of stock, or bonds, has been kept in another assessment district during the greater part of the year preceding the first of January, or of the portion of that period during which it was owned by the person subject to taxation therefor, it shall be taxed where it has been so kept." (Emphasis supplied.)

The wording of this section definitely seems to

establish that the bank deposits would be listed and assessed where the owner lives. Bank deposits are definitely in the nature of monies and credits and, therefore, would not come within the latter provision of this section as to "personal property" which has been kept in another assessment district during a greater part of the year. The exceptions to the rule stated are not here material.

We are wondering if perhaps the information sent to the depositor by the bank did not refer to bank stock rather then to deposits since under the Iowa law bank stock is assessable where the bank is located. The same is true of deposits in building and loan or savings and loan associations which under their method of operation are shares of stock in the association and assessable at the place where the building and loan association is located.

We trust we have answered the questions raised by the County Assessor, Mr. Shubert.

Very truly yours,

M. A. Iverson,
Special Assistant Attorney General

MAI:lp

March 15, 1957

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

Dear Sir:

This will acknowledge receipt of yours of the 9th inst. in which you submitted the following:

> "The Sheriff of Lyon County has, for some time, hired his wife as extra help at the County Jail for purpose of taking care of radio and telephone calls on holidays, Sundays and at night when the Sheriff is out on calls. In accordance with provisions of Section 71.1 of the Code of Iowa 1954 her pay has not exceeded $600.00 per year. The Board of Supervisors of Lyon County had been paying these claims as presented until the radio bill came up at this session of the legislature, at which time the Board ceased paying same. Sheriff Tonne feels that the procedure is legal, but uncertainty exists as far as the Board is concerned in light of the publicity given the above mentioned bill. There is no controversy between the Board and the Sheriff and the Board will pay the monthly claims provided they have assurance that they are proceeding properly in doing so. I would appreciate an affirmation from your office in regards this matter."

In reply thereto I advise you that it has been the view of the Department that the wife of the Sheriff is not entitled to compensation for operating a radio in assistance to the Sheriff in the performance of his duties. In connection with that holding there appears to have been a Bill

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introduced in the House of Representatives, being House File 204, which provided that the necessary operator to help the Sheriff in the operation of a two-way radio system could be compensated, including the wife of the Sheriff as such operator. The Bill appears to have been recommended for indefinite postponement. See House Journal 519. This action of the House would have the effect of confirming the Department's view of the right to pay the wife of the Sheriff for these services.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

March 15, 1957

Mr. C. B. Akers
Auditor of State
B u i l d i n g

Attention: Mr. Earl C. Holloway

Dear Sir:

This will acknowledge receipt of yours of the 11th inst. In which you submitted the following:

> "We have had an inquiry from a county auditor in regard to the expense of the superintendent of schools within the county.
>
> "The question is, can the superintendent bill the county for meals while visiting schools or on other business within the county.
>
> "An early reply will be appreciated."

In reply thereto I call attention to the following statute with respect to the expense of the county superintendent. Section 273.13, Code 1954, provides as follows:

> "Specific duties. The county board of education shall:
>
> "1. Appoint a county superintendent of schools provided in this chapter and fix his salary. The board shall also fix traveling expense of the superintendent. Upon the recommendation of the county superintendent, the county board may appoint an assistant county superintendent and such other supervisory, and clerical assistants, as are deemed necessary and fix their salaries and duties. During the absence or disability of the superintendent the assistant superintendent shall perform all the duties of the county superintendent."

57-3-30

According to the foregoing, the traveling expense of the county superintendent is fixed by the Board of Education. However, I would advise you, if so fixed, the cost of meals may properly be paid as traveling expense of the county superintendent.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

60M 11-56-10915
PB-C-3776

Form 13

IOWA STATE HIGHWAY COMMISSION

AMES, IOWA

Ames, Iowa

March 15, 1957

Mr. Grover W. Brown
City Attorney
Shenandoah, Iowa

Re: Routing of ammunition truck traffic around the city.

Dear Mr. Brown:

Your letter on the above noted subject asking whether or not a town has the power to re-route vehicles carrying explosives has been referred to this office.

I call your attention to Chapter 368, Code of Iowa, 1954 and namely section 368.11 which reads in part as follows:

> "They shall have power to provide for the protection of life and property against fire and to establish, house, equipment, staff, uniform and maintain a fire department. They may establish fire limits. They may ... consistent with code standards promulgated by nationally recognized fire prevention agencies regulate the storage, handling, use and transportation of all inflammables, combustibles, and explosives, within the corporate limits, and inspect for and abate fire hazards....."

There have been no cases in Iowa on this particular question. However, the above Code sections constitutes an express grant of authority to cities and towns to regulate the transportation of explosives through cities and towns. It appears to be a reasonable exercise of the police power to protect the public health, safety, and general welfare. The re-routing of ammunition trucks around the city is not a restriction of interstate commerce.

If this office can be of further assistance, please call upon us.

Yours very truly,

C. J. Lyman
Special Assistant Attorney General
for Iowa State Highway Commission

CJL:js

57-3-3

March 18, 1957

Mr. Marshall F. Camp
Union County Attorney
Court House
Creston, Iowa

Dear Mr. Camp:

Receipt is acknowledged of your letter of March 4th as follows:

"In 1953 the Iowa Employment Security Commission requested elective officials of Iowa to join in the Social Security Act titled Two and requested the officials who wished and were willing to enter into such an arrangement to pay 3% of their wages retroactive to January 1st, 1951.

"Under that authority various county employees of Union County, Iowa paid into such fund 3% of their wages since January 1st, 1951 and the money was forwarded on into the Iowa Employment Security Commission.

"We find that in some counties only 1½% was paid by the elective officials and the other 1½% was met by the County as is usually done under the Social Security Act of the Federal Government.

"The Board of Supervisors of Union County are now ready to refund to these county employees the 1½% that they over paid, which would represent

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the employers part of the payment and I would like an opinion from you that it will be all right for the Board of Supervisors to refund such payment which was made by the employees and should have been made by the employer."

Although your letter refers in part to "county employees" and in part to "elective officials" it appears from the whole that the "elective officials" is meant. If this be the case, then Section 97C.14, Code 1954, appears to answer your question. It provides as follows:

"Elected officials -- retroactive payments. Any elective official of the state of Iowa, or any of its political subdivisions, who becomes subject to federal socity security coverage under the provisions of the agreement referred to in section 97C.3 of this chapter shall, not later than October 1, 1953, pay into the contribution fund established by section 97C.12 a tax sufficient to pay in his behalf an amount equal to three percent of his compensation received as a public official for each year or portion thereof that he has served as a public official since January 1, 1951, not to exceed thirty-six hundred dollars for any year of service. The employment security commission shall collect the tax hereby imposed and the proceeds f from such tax shall be used for the purpose of obtaining retroactive federal social security coverage for elective officials, for the period beginning January 1, 1951, in the same manner as is provided in the case of other public employees by the provisions of subsection 2 of section 97.51 in order to obtain retroactive federal social security coverage during this period of time, such contribution to be collected and guaranteed by the employer. The employment security commission will pay any such amount contributed to provide for retroactive federal social security coverage for the individual in question in the same manner as other payments are made for retroactive coverage of public employees." (Emphasis ours)

From the underscored portions it seems manifest that the 3% contribution be paid by the official, not the county.

The quoted section was amended in 1955 by Chapter 86, § 2, Acts of the 56th General Assembly as follows:

"Section ninety-seven C point fourteen (97C.14), Code 1954, is hereby amended by adding thereto the following: 'Provided that no member of a county board of supervisors shall be deemed to be an elective official in a part-time position, but every

member of a county board of supervisors shall be deemed to be an employee within the purview of this chapter and shall be eligible to receive all of the benefits provided by this chapter to which he may be entitled as an employee.'."

It is to be noted that the requirement in Section 97C.14 that payment of the 3% be made "not later than October 1, 1953," remained unchanged and that the 1955 amendment contains no language making it expressly retroactive nor does it refer to any county official other than members of the board of supervisors. It, therefore, appears to have no relevance to the question raised by your letter or to the hereinabove emphasized provisions of Section 97C.14.

I am, therefore, of the opinion that no statutory basis exists for the "refunds" concerning which you inquire.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

March 20, 1957

Honorable Henry C. Nelson
State Representative
B u i l d i n g

Dear Representative Nelson:

In re: Chapter 358A - County Zoning Commission

Receipt is acknowledged of your letter of March 18 in which you state:

"Would appreciate opinion by your office on the above chapter in its application on an existing unsightly junk or automobile wrecking yard in my county.

It is located outside of any incorporated town and no county zoning regulation is now in effect that I'm aware of.

Can the county board of supervisors in my county effect such zoning measure as to regulate this existing business?"

In reply to your letter I would advise that the powers of the county zoning commission under the provisions of this chapter and the board of supervisors are set out in Section 358A.3 as follows:

". . .hereby empowered to regulate and restrict the height, number of structures, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence or other purposes, and to regulate, restrict and prohibit the use for residential purposes of tents, trailers and portable or potentially portable structures;. . ."

The chapter also provides in Section 358A.5 as follows:

"Plan--objectives. Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the street or highway; to secure safety from fire, panic, and other dangers;

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to protect health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements.

Such regulations shall be made with reasonable consideration, among other things, as to the character of the area of the district and the peculiar suitability of such area for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such county."

It is my considered opinion that based on these limited powers and objectives quoted above that if your county established a county zoning commission as provided in Chapter 358A, they still would not have the power to regulate unsightly junk or automobile wrecking yards outside of the city limits.

I would suggest to you that perhaps the matter can be taken care of as a public nuisance under the provisions of Section 657.2 of the Code of Iowa.

Yours very truly,

NORMAN A. ERBE
Attorney General

NAE:md

March 20, 1957

Mr. Elmer W. Hertel, Chairman
Board of Examiners in the Basic Sciences
Wartburg College
Waverly, Iowa

Dear Sir:

Receipt is acknowledged of your letter of March 12 as follows:

> "Our Board of Examiners in the Basic Sciences would like your opinion on a matter of testing procedures. Our law states that a candidate for a certificate must pass all tests with at least a grade of 70 but must have an average of 75 in order to obtain a certificate. A situation sometimes occurs in which a candidate may have passed in one subject but wishes to take it over to raise his average. Can we permit him to do this, and if so, which grade stands on his record? Suppose he received a lower grade on his retake test than he originally had - will the grade he made on his retake examination replace all others?
>
> "I don't believe the law is specific on the above. Shall our board establish a policy on this or what is your opinion on the matter?"

In answer thereto, I would advise you that the authority of your board to permit "retake" examinations is expressly curtailed by Section 147.16, Code 1954, which provides in pertinent part:

> ". . . If an applicant <u>fails</u> to attain the required grade in one or more subjects, he

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> may be re-examined in the subject or subjects in which he failed, at an examination within one year without further application or examination fee. . ." (Emphasis ours)

Since the quoted statute expressly limits "retakes" to subjects in which the candidate has failed, the grading problem presented in your letter cannot lawfully exist.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCS:MKB

March 20, 1957

Mr. Louis W. Wolverton
Air Enf. Officer
Iowa Aeronautics Commission
L O C A L

Dear Mr. Wolverton:

Receipt is acknowledged of your letter of March 11th as follows:

> "It is the desire of the Aeronautics Commission that an opinion be given relative to application of 330.15, Code of Iowa, as to the liability of municipally owned public use airports.
>
> "In other words, what liability, if any, do the cities have for the general public use facilities. By general public use facilities, I mean facilities other than proprietary facilities."

Section 330.15, Code 1954, provides as follows:

> "Deemed as public use. Any property acquired, owned, controlled, or occupied for the purposes enumerated in this chapter, shall be and is hereby declared to be acquired, owned, controlled, and occupied for a public purpose and as a matter of public need, and the liability of any city or town in connection therewith shall be no greater than that imposed upon municipalities in the maintenance and operation of public parks."

57-3-35

At the outset, I must advise you that if your request for an opinion was submitted at the request of some city or town, it is an improper one. Opinions of this office are limited by statute to questions submitted by members of the legislature, state officers, and county attorneys in connection with the duties of their respective offices. See Section 13.2(7), Code 1954. Also see 41 Iowa Law Review 351.

However, as a matter of general information, I would advise you that the liability "imposed upon municipalities in the maintenance and operation of public parks" is defined by the decision of our Supreme Court in Smith vs. Iowa City, 213 Iowa 392, 239 N.W. 29, wherein the Court said at page 394:

> "The rule long established in this state is that a municipality, in the exercise of its purely governmental function, is not liable for negligence. Saunders v. City of Fort Madison, 111 Iowa 102; Ford v. Board Park Commissioners, 148 Iowa 1; Fitzgerald v. Town of Sharon, 143 Iowa 730; Hensley v. Inc. Town, supra; Mocha v. City of Cedar Rapids, supra; Norman v. City of Chariton, supra; Harris v. City of Des Moines, 202 Iowa 53; Armstrong v. Waffle, 212 Iowa 335; Leckliter v. City of Des Moines, 211 Iowa 251; Lage v. City of Marshalltown, 212 Iowa 53.
>
> "Governmental functions are exercised by municipalities for the benefit of the public. They are acts from which the city, as a municipality, derives no peculiar advantage, pecuniary or otherwise, but acts and functions designed to advance and conserve the convenience, comfort and welfare of the public. . . "

Operation of an airport has been held a governmental function. See Abbot v. City of Des Moines, 230 Iowa 494. Compare Brown v. City of Sioux City, 242 Iowa 1196, where the city was held liable to its tenant on lands adjacent to its airport for negligence in spraying insecticide but on the ground that renting the said adjacent land to a tenant was a proprietary function.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

March 20, 1957

Mr. Martin Lauterbach, Chairman
State Tax Commission
State Office Building
Des Moines, Iowa

Dear Mr. Lauterbach:

This will acknowledge receipt of your question wherein you ask the proper basis for the assessment, if one is to be made, of that merchandise which is sold by Sears, Roebuck & Company through catalogue stores operating in the State of Iowa. We understand from your question that the catalogue stores do not sell merchandise directly from stock kept in the stores but that they do have on hand certain items for the purpose of display. We understand also that the Sears, Roebuck & Company raises no question as to the assessability of such display merchandise. We understand that under the plan of operation of such catalogue stores a customer comes into a catalogue store, looks at the catalogues which are available there and orders some particular item or items. The order is sent in to one of the warehouses of the company, which in most cases would be Chicago for this area. The customer, when he orders the merchandise, may in some instances pay cash and in some instances arrange for credit. The customer has the choice of where the merchandise is to be sent by the warehouse. It can be delivered direct to the purchaser (which is what happens in cases of large items),

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to a third person (notably in the gift situation) or to the purchaser and persons he may designate at the catalogue store subsequent to its arrival at the catalogue store from the warehouse. It is our understanding that when the items are delivered to the catalogue store they have upon them the names of the purchasers and that the catalogue store employees place these items in a storage room until they are picked up by the purchasers.

The pertinent provisions of the Iowa Code relative to this situation are Sections 428.16 and .17 of the 1954 Code of Iowa, which provide as follows:

> "428.16 'Merchant' defined. Any person, firm, or corporation owning or having in his possession or under his control within the state, with authority to sell the same, any personal property purchased with a view to its being sold, or which has been consigned to him from any place out of this state to be sold within the same, or to be delivered or shipped by him within or without this state, except a warehouseman as defined in section 542.58, shall be held to be a merchant for the purposes of this title.
>
> "428.17 Stocks of merchandise. In assessing such stocks of merchandise, the assessor shall require the production of the last inventory and enter the date thereof in the assessment roll. If, in the judgment of the assessor, the inventory is not correct, or if it was taken at such time as to render it unreliable as to the amount or value of such merchandise, he shall assess the same by personal examination. The assessment shall be made at the same ratio of the average value of the stock during the year next preceding the time of assessment, as is provided by section 441.13, and if the merchant has not been engaged in business for one year, then at a like ratio of the average value during such time as he shall have been so engaged, and if commencing on January 1, then at the same ratio of the value at that time."

These provisions of the law were construed by the Supreme Court of Iowa in the case of Transfer Co. v. Des Moines, 128 Iowa 732, 105 N.W. 211, with the following conclusions:

> "Again, the language of the section is in the alternative, and the power is given to assess (1) property in possession within the State with power to sell, or (2) property purchased with a view of being sold, or (3) property which has been consigned to the holder to be delivered or shipped by him within or without the State. If any particular item of property within the State falls within the description of either clause, it is assessable. The property in controversy had been consigned to appellant from without the State and was being held by it for the purposes of delivery and shipment, and unless there be other reason for its exemption than is contained in the language of this statute the judgment appealed from must be affirmed."

It will be noted from the discussion in the above quotation that the context of Sections 428.16 and .17 requires the word "consigned", as it appears in Section 428.16, to be construed to include the shipment of goods to an agent for care, storage or future shipment as well as shipment of goods to an agent for purposes of sale. This interpretation was necessary to the holding in the above cited case and is consistent with definitions of "consign" and "consigned" as they appear in 15 Corpus Juris Secundum, page 987, Black's Law Dictionary, Fourth Edition, page 380, and Words and Phrases, Perm. Ed., Vol. 8A, page 327. The consignment in this case of the goods from the Sears, Roebuck warehouse to the Sears, Roebuck branch or agency in the State of Iowa is a consignment of such goods to be delivered at the convenience of the purchaser to the purchaser at the branch or agency within the third alternative stated in the quotation from the Iowa Supreme Court case above cited.

As we understand the situation, those goods delivered to the branch or agency are not consigned beyond that branch or agency but are simply held by

the branch or agency for the convenience of the purchaser in accepting delivery thereof. The interstate commerce aspect of such a situation is discussed in the Iowa Supreme Court case cited and it was there concluded that the goods in that case, which were consigned to the transfer company from out-of-state and held by the transfer company for such subsequent disposition as the owner thereof might elect, were no longer in transit from one state to another and taxation thereof was not a violation of the provisions of the Constitution of the United States. The case of State v. Maxwell Motor Sales Corporation, 142 Minn. 226, 171 N.W. 566, holds to the same effect as the Iowa Supreme Court case above cited. In this case the Minnesota Supreme Court ruled that interstate commerce had ceased as to automobiles received by a storage agency for temporary storage intended for future deliver to residents of the state on orders received prior to storage. In the Sears, Roebuck situation the property consigned to the branch or agency is not ultimately destined in its journey from out-of-state beyond such branch or agency and the continuity of interstate commerce is broken upon its delivery to such branch or agency. See State v. Continental Oil Co., 218 Minn. 123, 15 N.W.2d 542, cert. den. 65 S. Ct. 562, 322 U.S. 803, 89 L. Ed. 641. The goods in the Sears, Roebuck situation have "come to rest for causes serving the purposes of the owner" within the meaning of that case and similar cases there cited. It is immaterial and no part of the contract of purchase or delivery, as it is understood by this department, what disposition the purchaser makes of the goods upon his receipt of

same from the branch or agency. Such goods might or might not ultimately be taken by the purchaser to his place of residence or business.

Those goods which are consigned from the warehouse outside of the state directly to the purchaser within the state and are not received by the branch or agency for delivery at that branch or agency to the purchaser do not come within the provisions of Sections 428.16 and .17 of the Code and, if they did, would not be taxable while in transit in interstate commerce. However, the Sears, Roebuck catalogue stores must pay Iowa personal property taxes upon the average value of the display merchandise above referred to and upon the average value of goods received and on hand for delivery to the purchasers thereof during the year preceding the year of assessment according to the ratio set out in Section 428.17 of the 1954 Code whether or not the purchaser of such goods has title to such goods at the time of their storage pending delivery.

Very truly yours,

M. A. Iverson,
Special Assistant Attorney General

MAI:fs

March 21, 1957

Mr. Carl Hendrickson, Jr.
Assistant County Attorney
Linn County Courthouse
Cedar Rapids, Iowa

Dear Mr. Hendrickson:

Receipt is acknowledged of your letter of March 19th as follows:

> "The County School Superintendent of Linn County has requested this office to confirm its opinion given him relative to the following question: Do the Electors of an Independent School District have the power by virtue of Section 278.1 to purchase a home for the School Superintendent from funds accumulated by virtue of a 2½ mill levy for school purposes?
>
> "It is the opinion of this office that no power is granted the Electors for such purpose."

Section 278.1(7), Code 1954, to which your letter refers provides as follows:

> "The voters at the regular election shall have power to:
>
> * * * * *
>
> "7. Vote a schoolhouse tax, not exceeding two and one-half mills on the dollar in any one year, for the purchase of grounds, construction of schoolhouses, the payment of debts contracted for the erection of schoolhouses, not including interest on bonds, procuring libraries for and opening roads to schoolhouses."

57-3-37 ✓

The express enumeration of authorized purposes in the quoted section makes no reference to purchase of a superintendent's home. Therefore, under the well-known rule, "expressio unius est exclusio alterius", your opinion is correct.

However, in addition to confirming your opinion, it appears desirable to comment upon the manner in which it reached this office. As you know, opinions of this office are limited by statute to questions submitted by members of the legislature, state officers and county attorneys in connection with the duties of their respective offices. It is manifest from your letter that the instant question originated with a county officer and that pursuant to Section 336.2(7) you had rendered an opinion answering the question submitted. The point I wish to bring to your attention is that when your office has rendered its opinion to any of the public officers or bodies entitled to such under Section 336.2(7), Code 1954, you are under no compulsion to request confirmation of your opinion from this office simply because the recipient thereof may desire an answer different than the one he received. This office is, of course, pleased to render an opinion to your office on any question which may exist in your mind but it should not be considered as an administrative court of appeal from opinions of your office in cases where you have no doubt in your own mind that the opinion you have so rendered is correct.

Very truly yours

LEONARD C. ABELS
Assistant Attorney General

LCA:br

March 21, 1957

Honorable Robert B. Carson
House of Representatives
B u i l d i n g

Dear Mr. Carson:

Reference is made to a letter of March 5, 1957, in which you inquire as to the right to tow a patrol or grader behind a pickup truck.

Section 321.309 of the 1954 Code of Iowa provides:

> "Towing - convoys - drawbars. No person shall pull or tow by motor vehicle another motor vehicle over any highway outside the limits of any incorporated city or town, except in case of temporary movement for repair or other emergency, unless such person has complied with the provisions of sections 321.57 and 321.58. * * * *"

These last two sections cited refer to manufacturers and dealers transporting motor vehicles.

Since a road grader or motor patrol would meet the definition of "motor vehicle" under the Iowa statute it would appear to this office to be a violation of this section to tow a motor grader behind a pickup truck from point to point for conservation (construction?) work.

Several weeks ago the Department of Public Safety called with regard to a proposed amendment to correct this situation. I do not know the present status of this proposed legislation but I believe one of the Representatives

57-3-38

has in mind modifying this section to allow the towing of certain types of construction equipment.

Very truly yours,

DON C. SWANSON
Assistant Attorney General

DCS:MKB

March 22, 1957

Honorable Jack Miller
~~House of Representatives~~ Senate Chamber
B u i l d i n g

Dear Sir:

This will acknowledge receipt of yours in which you have enclosed a Senate Bill now bearing Senate File 372. In connection therewith you state the following:

> "I understand informally that you have questioned the legality of a proposed 'expense allowance' for legislators. The enclosed was prepared only after careful review of the law, taking cognizance of the requirement that such allowances be 'uniform'. Indeed, I feel that even though labeled 'expense allowance', this would be regarded as 'compensation'.
>
> "Re the effective date, Senator Byers advises that there was an Attorney General's opinion several years ago (when legislative salaries were increased from 1 - 2 thousand) holding that such increase applied to carryover senators in their second session. Your comments would be appreciated."

In reference thereto, after careful consideration, the only conclusion to be drawn is that expense is allowable only as compensation and that compensation is constitutionally limited to per diem and mileage. My reasons for this conclusion are these. The constitutionality of an act of the character filed was under consideration and adjudication in the case of Gallarno v. Long, State Auditor, 214 Iowa 805, 243 N. W. 719. The act there under conside

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tion was Chapter 1, Acts of the 43rd General Assembly, providing as follows:

> "Section 1. Each member of the general assembly and the lieutenant governor shall be paid his actual necessary expenses incurred while in attendance at a session of the legislature, which shall in no case exceed five hundred dollars ($500.00) for any regular session. Sworn itemized claims therefor shall be filed with the state board of audit and the provisions of chapter twenty-five (25) of the code shall be applicable thereto. The members of the forty-third general assembly, including the lieutenant governor, shall be entitled to the benefits thereof."

Under the authority of that Chapter claims were filed by certain members of the Legislature and the Lieutenant Governor for board, room, taxicab hire, repair of automobile, the expense of attending funerals, cost of entertaining constituents, garage rent, and other miscellaneous items. Injunctive relief was sought to restrain the payment of the foregoing expense allowance to the members of the Legislature and Lieutenant Governor. The lower court denied the relief but on appeal relief was granted. Drawing in question the constitutionality of the foregoing designated act on these grounds under Section 25, Article III of the Constitution which provides as follows:

> "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."

and Section 15, Article IV, providing as follows:

> "The official term of the Governor, and Lieutenant Governor, shall commence on the second Monday of January next after their election, and continue for two years, and until their successors are elected and qualified. The Lieutenant Governor, while acting as Governor, shall receive the same pay as provided for Governor; and while presiding in the Senate, shall receive as compensation therefor, the same mileage and double the per diem pay provided for a Senator, and none other."

(1) under the Iowa Constitution is the alleged personal expense money allowed under Chapter 1, Acts of the 43rd General Assembly, expense of the proposed recipients, and compensation to them, and (2) whether the kind of compensation provided for in Chapter 1, Acts of the 43rd General Assembly, is prohibited by the Constitution.

1. An analysis of this case discloses the following:

a. After differentiating between legislative and personal expense the Court observed with respect to the authorities as follows:

> "So far, then, as the authorities are concerned, it is apparent that chapter 1, Acts of the Forty-Third General Assembly, contemplates compensation, as distinguished from legislative expenses. Such

> expenses thus contemplated by the act under consideration are personal and not legislative. Hence they amount to additional compensation. This conclusion finds support in the history of the Iowa Constitution, the history of the times under which it was adopted, the legislation thereunder, and the evils sought to be avoided by the Constitution. Those historical and other matters may be taken into consideration when interpreting the Constitution. Allen v. Clayton, 63 Iowa 11, 18 N. W. 663, 50 Am. Rep. 716; State v. Dammann (201 Wis. 84, 228 N. W. 593) supra; Toncray v. Budge, 14 Idaho 621, 95 P. 26; 12 Corpus Juris, pp. 712, 714 and 715; Halsey & Co. v. City of Belle Plaine (128 Iowa 467, 104 N. W. 494) supra; State v. Sheldon, (78 Neb. 552, 111 N. W. 372) supra; District Township v. City of Dubuque, 7 Iowa 262; Town of McGregor v. Baylies, 19 Iowa 43."

b. After exploring the history of the legislative attitude toward this question, the Court observed the force of history upon this question as follows:

> "* * * *After that history and those years of uninterrupted uniform interpretation, together with the great weight of authority in the sister states, as before indicated, sound constitutional interpretation compels the conclusion that the personal expenses contemplated by chapter 1, Acts of the Forty-Third General Assembly are personal as distinguished from legislative expenses and therefore amount to and are additional compensation to the legislators."

After concluding that Chapter 1, Acts of the 43rd General Assembly, was unconstitutional, the Court stated:

> "Furthermore, this result is supported by the express limitations placed in, and at the end of, the following sections in the Iowa Constitution: Section 25 of article 3, and section 15 of article 4. When fixing the compensation for the Lieutenant Governor, section 15, article 4, of the Constitution, declares that the mileage and per diem compensation there provided shall be received by him 'and none other.'

> Likewise, in arranging the compensation for the legislator in extra session, section 25 of article 3 provides for mileage and per diem, and then concludes with the phrase 'and none other'. This phrase 'and none other' obviously, according to the arrangement of, and recitals in, section 25 of article 3, limits the Legislature in regular session to a compensation composed of mileage and per diem only."

In explanation of his concurrence in the Gallarno opinion, Justice Evans stated:

> "I concur in the result. I do not concur fully in the discussion. I readily agree that the distinction between legislative expenses and personal expenses is to be observed in the consideration of the case. The power to allow the former inheres in the legislative function and may always be exercised. The power to allow the latter does not so inhere, nor may it be exercised by the Legislature, except to the extent of constitutional permission. Section 25, article 3, of the Constitution, expressly forbids the allowance of any other personal expenses than the mileage provided for in said section. Chapter 1, Acts of the 43rd Gen. Assem., does purport to permit the allowance of personal expenses, which section 25, article 3 of the Constitution forbids. The Act is therefore in violation of the Constitution. In my judgment, that ends the argument. I think that the decision should be predicated upon that ground and not upon the ground that the act in question constituted an allowance for compensation. The act purports to allow personal expenses. I would read it according to its terms."

2. Our view of the Gallarno case is confirmed by the following from an annotation concerned with the law of expense allowance to public officers, in 5 A. L. R. 2d 1217, stating as follows:

> "In an action to enjoin the payment of claims for alleged expenses for board, room, taxicab hire, repair of automobiles, expenses incident to attending

> funerals, the cost of entertaining constituents, garage rent, mileage, drayage for moving household goods, and miscellaneous unestimated items filed by the lieutenant governor and certain members of the legislature under a statute providing that the legislators and the lieutenant governor should be paid actual necessary expense, not exceeding $500, incurred while in attendance at a session of the legislature, the court in Gallarno v. Long, (1932) 214 Iowa 805, 243 N. W. 719, construed such statute to contemplate 'personal' and not 'legislative' expenses, and held that allowance for such expenses amount to an increase in compensation and contravened constitutional provisions declaring '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, 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 . . . The Lieutenant Governor while acting as Governor, shall receive the same pay as provided for Governor; and while presiding in the Senate, shall receive as compensation therefor, the same mileage and double the per diem pay provided for a Senator, and none other, on the ground that the constitutional provisions limited compensation which any legislature might fix for its successors to mileage and per diem."

In this connection I would advise that Senator Byers is correct in stating that there is an Attorney General's opinion holding that an increase in compensation of members of the Legislature is available to carryover Senators in their second session. This

opinion appears in the Report of the Attorney General for 1913 at page 36.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

March 22, 1957

Mr. Oliver P. Bennett, Commissioner
Insurance Department of Iowa
L O C A L

Dear Mr. Bennett:

Receipt is acknowledged of your letter of March 15th as follows:

> "Pursuant to our conversation of this morning, enclosed you will find the complete file on the matter of the Iowa State Highway Commission Reinsurance Rule consisting of our correspondence with Mr. Fred K. Stiner, Vice President of the Universal Surety Company, Lincoln, Nebraska.
>
> "It would seem that Mr. Stiner has raised a good point here and that his suggestion is a constructive one and would be advantageous both to the Iowa State Highway Commission and to the insurance companies."

The question to which your letter refers as deduced from the correspondence file enclosed with your letter relates to Section 662.17, Code 1954, and is set forth in a letter dated February 25, 1957, addressed to you by Mr. Stiner as follows:

> "Upon re-reading the section of the statute involved, I do not see that it would exclude the possibility of our filing a yearly certificate with the Department stipulating that we will re-

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insure all of our cases over and above the 10% limitation . . . " (Emphasis ours)

The quotation thus appears to be whether a surety company furnishing an official bond under the provisions of Chapter 662, Code 1954, must file the reinsurance certificate required in Section 662.17, Code 1954, with each bond or whether it may file an annual certificate promising to obtain the required reinsurance.

Section 662.17, Code 1954, provides as follows:

"Limitation on acceptance. No such security shall be accepted on any bond for an amount in excess of ten percent of the paid-up cash capital of such company or corporation unless the excess shall be reinsured in some other company or corporation authorized to do business in the state and in no case to exceed ten percent of the capital of the reinsuring company and provided that a certificate of such reinsurance shall be furnished to the insured." (Emphasis ours)

Thus, the requirement of the statute is that a certificate be filed showing that the requisite reinsurance is actually in effect not that it "will" be obtained.

I am, therefore, of the opinion that the opinion of this office heretofore rendered and to which the correspondence file enclosed with your letter refers is correct.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

March 22, 1957

Honorable W. E. Whitney
Chairman, Schools Committee
House of Representatives
L O C A L

Dear Sir:

Receipt is acknowledged of your letter of March 21st as follows:

"House File 228 has been discussed recently in Schools Committee. A question was raised as to the legality of what this bill is trying to do.

"Before considering the bill further, it was thought advisable to get an opinion from your office."

House File 228 is as follows:

"An Act to amend section three hundred twenty-one point eighteen (321.18), Code 1954, relating to the exemption of certain vehicles from registration.

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

"Section 1. Section three hundred twenty-one point eighteen (321.18), Code 1954, is amended by adding thereto the following subsection:

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"'Any school bus used exclusively to transport pupils to and from school and school activities within the state of Iowa.'

"EXPLANATION OF HOUSE FILE 228

"Individuals and private schools now owning and operating school buses for the purpose of transporting pupils to and from school are required to purchase registration licenses for their buses. It is the feeling that they should enjoy the same privilege as that granted to the public school districts for the transportation of pupils."

From the explanation, it appears that the purpose of the bill is to extend the exemption from registration fees provided in Section 321.18, Code 1954, for certain publicly-owned vehicles to school busses owned and operated by private contractors and private or parochial schools.

If the bill be unconstitutional, then it must be so by virtue of the provisions of Article I, Section 3, Constitution of Iowa, which provides as follows:

"Religion. Sec. 3. The General Assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry."

This constitutional provision has been applied to schools by the decision of our Supreme Court in Knowlton v. Baumhover, 182 Iowa 691, 166 N.W. 202, in which it was held that public taxes may not be legally diverted to the maintenance of a school which is under sectarian management. However, the purpose announced in the explanation to House File 228 differs from the Knowlton case in that it proposes not to divert tax moneys but rather to exempt from taxation certain personal property, to wit, school busses owned by such schools. Although the net effect upon the public revenue would seem to be the same whether the money be paid out or simply not collected, thus creating a border-line case under the quoted article, tax exemptions to such institutions are not without precedent in our statutes. See, for example, Section 427.1(9) which exempts real property held by religious societies for certain purposes from taxation and which has been held constitutional under Article I, Section 3, Constitution of Iowa in Trustees of Grinnell College v. State, 46 Iowa 275, 26 Am. Rep. 138.

However, even though the object expressed in the explanation of the bill be constitutional, it is doubtful whether the language of the bill accomplishes such object. It should be noted that the word "school" as used in the bill is modified by no descriptive adjective. In construing similar language, our Supreme Court has held in Silver Lake Cons. School Dist. v. Parker, 238 Iowa 904, 29 N.W.2d 214, that the word "school" used alone without further express qualification includes public schools only.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm
cc - Fred M. Jarvis

March 22, 1957.

Mr. Lee R. Watts
County Attorney
Corning, Iowa

Dear Mr. Watts:

The Attorney General has referred your inquiry as to the legal settlement of a young man nineteen years of age and his wife who are in need of poor relief, wherein the facts indicate:

> The young man was born on November 14, 1937 in "A" County, Iowa, at which time his parents had legal settlement in "A" County. Subsequently, he and his parents moved to and continue to live in "B" County. On November 24, 1944, "B" County, Iowa served a notice of warning to depart on the young man's parents thereby preventing the young man and his family from acquiring legal settlement in "B" County.
>
> In the Fall of 1956, the young man married a girl who resided in, and who had legal settlement in "B" County. After their marriage, they continued to reside in "B" County and found it necessary to apply to "B" County for poor relief and support.

It is clear that a legitimate minor child follows and has the legal settlement of his father. 1899 Report of Attorney General, page 145. Section 252.16 (5) 1954 Code. Accordingly, the service of notice of warning to depart by "B" County was sufficient to preclude the acquisition of legal settlement in said county by the young man or his parents. Section 252.16 (1) and 252.20. The subsequent failure of the young man or his father to file an affidavit with the Board of Supervisors stating that they were no longer paupers and intended to acquire settlement in "B" County, precluded their acquisition of legal settlement in "B" County. Section 252.16 (1), 1940 Report of Attorney General, p. 316.

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However, it is important to note that although he was under 21 years of age at the date of marriage, the young man attained his majority by his marriage. Section 599.1. Therefore, he acquired the status of an emancipated child -- one no longer subject to the control and care of the parent. See 1940 Report of Attorney General, p. 525. Upon the young man's marriage to a girl having legal settlement in "B" County, his wife took his legal settlement providing they lived together as husband and wife. Section 252.16 (4) 1940 Report of Attorney General, p. 442, 1932 Report of Attorney General, p. 165.

There can be no doubt that any person having attained majority, and residing in this state (two) years without being warned to depart, gains a settlement in the county of his residence. See Clay County v. Palo Alto County, 82 Iowa 626, 48 N.W. 1053. Accordingly, the young man might acquire a legal settlement in his own right in "B" County after living in said county for a period of two years without being warned to depart. Section 252.16 (1).

Accordingly, it is my opinion that inasmuch as the facts indicate that the young man and his wife have not yet resided the requisite two year period in "B" County since the date of their marriage, that they have yet not acquired legal settlement in "B" County.

Yours very truly,

Harrison E. Cass
Assistant Attorney General

HEC/sp

March 25, 1957

Mr. Joseph M. Dean, Chairman
State Board of Examiners for
Professional Engineers and Land Surveyors
1112 Locust Street
Des Moines, Iowa

Dear Mr. Dean:

Reference is made to your recent inquiry in which you ask the following two questions:

1. May a city or town in Iowa employ as a city engineer one who is not qualified under our statute as a registered engineer or a land surveyor?

2. May a city engineer perform contractual services for the city or town of which he is an officer?

With regard to your first question, Chapter 114 of the 1954 Code of Iowa sets out the Iowa law relating to the profession of engineering. The only exceptions to the requirements of the statute appear to be in Section 114.26 in which certain employees of corporations and of the United States Government are exempted from the qualifying requirements. There is also an early Attorney General's opinion issued December 27, 1919, which states that the exemptions referred to in this section do not apply to municipal or city engineers. It is therefore the opinion of this office that one serving in the capacity of a city engineer must be qualified under Chapter 114 of the 1954 Code of Iowa.

With regard to your second question, there seems to be little doubt but what the position of city engineer, whether by appointment or contract, makes that individual an officer of the city or town. Section 368A.1, subsection 7, of the 1954 Code of Iowa, authorizes the city council to appoint an engineer and fix the terms of his employment. Section 368A.20 provides

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that the city engineer shall have such power and perform such duties as are prescribed by law or ordinance. Both of these sections refer to the city engineer as an officer.

Section 368A.22 reads as follows:

> "Interest in contracts. No officer, including members of the city council, shall be interested directly or indirectly, in any contract or job of work or material or the profits thereof or services to be furnished or performed for the city or town." (Emphasis ours)

It is therefore the opinion of this office that when one accepts the appointment as city engineer he becomes an officer of that city or town and is forbidden by Section 368A.22 to be interested directly or indirectly in any other contract or job or work or services to be furnished.

Very truly yours,

NORMAN A. ERBE
Attorney General of Iowa

DON C. SWANSON
Assistant Attorney General

DCS:MKB

March 26, 1957

Honorable Roscoe E. Greenwood
State Representative
Capitol Building
Des Moines, Iowa

Dear Mr. Greenwood:

Mr. Norman A. Erbe, Attorney General of the State of Iowa, has handed to your writer a carbon copy of a letter addressed to Mr. M. K. Moore, County Assessor, Mills County, Glenwood, Iowa, from Mr. Ballard B. Tipton, Director, Property Tax Division, State Tax Commission, with the advice that you have asked the opinion of this office as to the correctness of the conclusions stated therein to the effect that corn purchased by a farmer for feeding purposes is assessable, and that corn harvested more than one year previous to the listing is also assessable if on hand on January 1st of the year of assessment.

Section 427.1(13)(22) provides:

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

"* * *.

"13. Agricultural produce. Growing agricultural and horticultural crops and products, except commercial orchards and vineyards, and all hotticultural and agricultural produce harvested by or for the person assessed within one year previous to the listing, all wool shorn from his sheep within such time, all poultry, ten stands of bees, all swine and sheep under nine months of age, and all other domestic animals under one year of age.

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"* * *.

"22. Grain. Grain handled, as defined under section 428.35."

Section 427.13 provides in part:

"427.13 What taxable. All other property, real or personal, is subject to taxation in the manner prescribed, * * *."

The balance of Section 427.13 is in no way here pertinent.

Section 499.55 of the Code as it relates to agricultural co-operatives provides:

"499.55 Individual exemptions applicable. All exemptions or privileges applying to agricultural products in the possession or control of the individual producer shall apply to such products in the possession or control of any association which have been delivered to it by its members."

Section 428.35 of the Code provides:

"428.35 Grain handled.

"1. Definitions. 'Person' as used herein means individuals, corporations, firms and associations of whatever form. 'Handling or handled' as used herein means the receiving of grain at or in each elevator, warehouse, mill, processing plant or other facility in this state in which it is received for storage, accumulation, sale, processing or for any purpose whatsoever. 'Grain' as used herein means wheat, corn, barley, oats, rye, flaxseed, field peas, soybeans, grain sorghums, spelts, and such other products as are usually stored in grain elevators. Such term excludes such seeds after being processed, and the products of such processing when packaged or sacked. The term 'processing' shall not include hulling, cleaning, drying, grading or polishing.

"2. Tax imposed. An annual excise tax is hereby levied on such handling of grain in the amount hereinafter provided. All grain so handled shall be exempt from all taxation as property under the laws of this state. The amount of such excise tax shall be a sum equal to one-fourth mill per bushel upon all grain as herein defined so handled. (Emphasis ours).

"3. Statement filing form. Every person engaged in handling grain shall, on the first day of January of each year and not later than

sixty days thereafter, make and file with the assessor a statement of the number of bushels of grain handled by him in that district during the year immediately preceding, or the part thereof, during which he was engaged in handling grain; and on demand the assessor shall have the right to inspect all such persons records thereof. A form for making such statement shall be included in the blanks prescribed by the state tax commission. If such statement is not furnished as herein required, section 441.16, shall be applicable.

"4. Assessment. The assessor of each such district, from the statement required or from such other information as he may acquire, shall ascertain the number of bushels of grain handled by each person handling grain in his district during the preceding year, or part thereof, and shall assess the amount herein provided to such person under the provisions of this section.

"5. Computation of tax. The rate imposed by subsection 2 of this section shall be applied to the number of bushels of grain so handled, and the computed amount thereof shall constitute the tax to be assessed.

"6. Payment of tax. Such specific tax, when determined as aforesaid, shall be entered in the same manner as general personal property taxes on the tax list of the taxing district, and the proceeds of the collection of such tax shall be distributed to the same taxing units and in the same proportion as the general personal property tax on the tax list of said taxing district. All provisions of the law relating to the assessment and collection of personal property taxes and the powers and duties of the county treasurer, county auditor and all other officers with respect to the assessment, collection and enforcement of the tax imposed by this section."

We find no other provision of law relating to your question.

We find reference in Volume 23, Iowa Code Annotated, page 355, to four opinions of the Attorney General dealing with the subject of your inquiry, including the opinion cited in Mr. Tipton's letter, which are 1940 Report of Attorney General, page 42; 1928 Report of Attorney General, page 98; 1919-20 Report of Attorney General, page 377, and 1898 Report of Attorney General, page 213. These opinions, while dealing with statutes

which have been modified in some particulars since their publication, are entirely consistent with the conclusions of Mr. Tipton's opinion.

The provisions of Section 428.35 of the Code above cited are under study by this office at the request of the County Attorney of Wright County and it is our present impression that answers to his questions concerning same will necessarily involve the question as to whether the exemption provided by Sections 427.1(22) and 428.35(2) for property subjected to the grain handling tax are applicable to such property when such property is no longer in the hands of the grain handler and/or in subsequent tax years. As it affects your present question the problem would be: "Is grain purchased from a grain handler for feeding or any other purpose subject to taxation in the hands of the farmer?". It is your writer's intention to make an exhaustive study of this and related questions for staff consideration and you will be furnished a copy of this opinion.

Except to the extent they may be qualified by Sections 428.35(2) and 427.1(22), Mr. Tipton's conclusions, as above stated, are perfectly correct.

Any expression the legislature collectively or legislators individually would wish to make concerning the intent scope of the grain handling tax and its exemptions would be most appreciated, for this tax is at present, in the opinion of your writer, so indefinite and vague as to practically defy interpretation. See in this connection Preamble to Report of State Tax Commission for 1956, page 12, paragraph number 3, a copy of which preamble is herewith enclosed.

Very truly yours,

M. A. Iverson,
Special Assistant Attorney General

MAI:fs
Encl.

March 27, 1957

Honorable W. H. Tate
Senate Chamber
B u i l d i n g

Dear Senator Tate:

Re: Chapter 517A, Code of 1954

Reference is made to your recent inquiry to this office concerning the interpretation of Chapter 517A, Code of 1954, relative to non-ownership liability insurance.

The general question involving this Chapter of the Code came before this office in 1953 and an opinion was written October 5, 1953, by Oscar Strauss, Assistant Attorney General, which in part stated as follows:

> "It is to be noted that providing this insurance coverage is not a duty imposed upon the several state departments, commissions, etc. By the terms of the Act such departments, commissions, etc. are authorized to purchase the coverage therein prescribed and to pay the premiums thereon. This difference between the duty imposed and authority conferred explains the intention of the legislature in the enactment of this Act. Coverage for which the authority is granted is limited to the individual personal liability that state officials and employees may incur in the operation of state-owned or controlled automobiles in the performance of an official duty. Under this power an agency of the state is authorized to purchase a policy of insurance that will cover the personal liability of each of its employees when using state cars in the performance of their official duties. Whether such purchase of coverage shall be made and paid for is a matter within the discretion of the commission, agency, etc., which employs the individual who performs the official duty."

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You also ask a question concerning the coverage furnished to the State of Iowa. Section 517A.1 provides in part: "which insurance shall insure, cover and protect against individual personal legal liability". Since the words "individual" and "personal" are used it is the opinion of this office that it was not the intention to in any way cover the State of Iowa but only the officers and employees.

If we may be of any further assistance in connection with this matter, please let us hear from you.

Very truly yours,

NORMAN A. ERBE
Attorney General of Iowa

DON C. SWANSON
Assistant Attorney General

DCS:MKB

March 27, 1957

Hon. Hillman H. Sersland
House of Representatives
L O C A L

Dear Sir:

Receipt is acknowledged of your inquiry of March 25th as to whether Senate File 1 or Senate File 2 are repugnant to the provisions of the Constitution of Iowa.

Senate File 1 appears to require all school districts in Iowa which do not maintain a high school to become part of a district which does maintain a high school by a certain date. Senate File 2 provides for aid to school districts which meet certain standards of approval.

With regard to Senate File 1, I would refer you to the decision of our Supreme Court in Dean v. Armstrong, 246 Iowa 412, 68 N.W.2d 51, wherein the Court said, at page 415:

> " . . . As stated in Waddell v. Board of Directors, 190 Iowa 400, 406, 175 N.W. 65, 67, a school district 'is a legislative creation. It is not organized for profit. It is an arm of the state, a part of its political organization. It is not a "person" within the meaning of any bill of rights or constitutional limitation. It has no rights, no functions, no capacity except such as are conferred upon it by the Legislature. The legislative power is plenary. It may prescribe its form or organization and its functions to-day, and it may change them tomorrow.'"

Thus, the provisions of Senate File 1 are within the constitutional powers of the legislature.

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With regard to Senate File 2, I would advise you that a similar type of legislation has existed as part of the statutes of Iowa since 1919. See Chapter 293, Code 1954, which provides for aid to certain schools qualifying as "standard" schools. Since Chapter 293 has existed as part of the Laws of Iowa for a considerable number of years, has never been challenged as to constitutionality, and is similar to Senate File 2 in that both measures provide aid to districts meeting certain standards, it is my impression Senate File 2 would be found "constitutional".

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

Note:

The above opinion applies only to the bill as passed by the Senate and does not purport to cover any of the House amendments thereto.

March 27, 1957

Mr. James E. Bromwell
Assistant Linn County Attorney
Court House
Cedar Rapids, Iowa

Dear Mr. Bromwell:

Receipt is acknowledged of your letter of March 21st as follows:

> "Question has been brought to us by the Township Trustees of Grant Township of this county concerning the duty of the Township Trustees to settle disputes arising under Chapter 113, Code of Iowa (1954) in circumstances under which the parties to the boundary line dispute are residents of an incorporated town. The boundary line dispute involves tracts of land entirely within the incorporated limits of the town.
>
> "It is the duty of the Township Trustees to serve as fence viewers or to settle disputes arising under Chapter 113 in these circumstances?"

In answer thereto, I would refer you to an opinion which appears at page 396 of the 1934 Report of the Attorney General and states in pertinent part as follows:

> "There is nothing in Chapter 88 which limits the jurisdiction of fence viewers to that part of their township which lies outside of cities

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and towns. It would not be assumed that township trustees as fence viewers have any authority to compel the construction of a fence between adjoining owners of property in the business district of a city or town. If they have jurisdiction with reference to fences in the outlying portion of a city, they have the same jurisdiction in all other parts of it. Section 5744 gives cities and towns the power to restrain and prohibit the use of barbed wire to enclose land within the corporation and to restrain and prohibit the running at large of cattle, horses, swine, sheep and other animals and fowl within the limits of such corporation.

"While the statutes might be more specific in regard to the territorial jurisdiction of the fence viewers, we believe they have no jurisdiction in cities and towns and that the city and town officers and the courts have exclusive jurisdiction within such corporate limits."

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

March 27, 1957

Mr. William Pappas
Cerro Gordo County Attorney
15 Second Street, N.E.
Mason City, Iowa

Dear Mr. Pappas:

Receipt is acknowledged of your letter of March 25th as follows:

"The Town of Rockwell and several adjoining Townships located in Cerro Gordo County, Iowa, are planning jointly to own, operate and maintain, fire protection facilities and services. The authorization for the townships to participate in such an arrangement is found in Sections 359.42 to 359.45 of the 1954 Code of Iowa. The authority for the town to participate is found in Section 368.12 of the 1954 Code of Iowa.

"From the reading of this latter section you will note it provides that the Town shall have the power, 'when authorized by majority vote of the electors thereof at a regular or special election called for that purpose upon notice required by law' to engage in the joint activity.

"The question which we have is, what is the notice that is required to be given of the regular or special election called to vote upon this matter? It is the provision for posting of notice as is contained in Section 359.44 relating to the elections on such matter to be held by the townships or is it some other provisions? I do not

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find any other provision in the law with reference to what the notice should consist of.

"I would appreciate your opinion as to what notice is required under the provisions of Section 368.12 for the holding of the election referred to therein."

In answer thereto, I would advise you the question has been previously considered in a letter opinion of this office addressed to Mr. Robert Shepard and dated September 21, 1954, hereinafter exhibited in pertinent part as follows:

"In reply thereto I advise you that I too find no general provision for notice of a special election. Insofar as the township is concerned when it intends to join with another township or any city or town in the purchase and maintenance of fire equipment a notice of such election is given by posting in three public places in the township not less than ten days before the time of such election. See Section 359.44, Code of 1954. However, insofar as the election authorizing a city to join in the operation of fire equipment with an adjoining township there appears to be no general or special statute providing for the posting of any notice. I am disposed to the view that a notice in the form and manner of the provisions of Section 407.8, Code of 1954, would be a sufficient notice of special election to join with the township in the operation of fire equipment under the authority of Section 368.12, Code of 1954."

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

March 27, 1957

Hon. Niels J. Nielsen
House of Representatives
L O C A L

Dear Sir:

Receipt is acknowledged of your inquiry of March 25th in which you inquire whether a city council has power to sign a contract with a labor union governing wages, hours, and working conditions of city employees.

In answer thereto, I would advise you that our Supreme Court has ruled on many occasions that cities and towns are creatures of statute with only those powers conferred by statute or reasonably and necessarily implied as incident to exercise of an express power. Central States Elec. Co. v. Randall, 230 Iowa 276, 297 N.W. 562 and cases cited therein.

An examination of the statutes conferring powers on cities and towns reveals no authorization for an agreement with a union for the purpose of fixing wages, hours, and working conditions of public employees. Powers conferred upon a municipal corporation cannot be enlarged by liberal construction. Dyer v. Des Moines, 230 Iowa 1246, 300 N.W. 562.

I would also refer you to an official opinion of this office which appears at page 102 of the 1946 Report of the Attorney General, to the effect that County boards of supervisors cannot enter into such agreements. The principles therein set forth apply with equal force to cities and towns.

57-3-19

You are, therefore, advised that city councils have no authority to enter into agreements with unions fixing wages, hours, and working conditions of municipal employees.

Yours very truly,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm
cc - Governor's Office

March 27, 1957

Mr. Elmer F. Heckinger, Director
Income Tax Division
State Tax Commission
State Office Building
Des Moines, Iowa

Dear Mr. Heckinger:

This will acknowledge receipt of your request for an opinion which was submitted to this office in the following form:

> "Several inquiries have been received by this office concerning the net operating loss deduction for Iowa corporation income tax purposes. In all cases the question relates to the amount of operating loss allowable on such returns. There seems to be considerable doubt by the corporations in question as to the propriety of non-recognition of federal income tax refunds and or payments which accrue to the year of loss. It is pointed out to us in each instance that our regulations effectively provide that refunds and payments of federal income taxes are not to be taken into consideration in arriving at a net operating loss deduction for Iowa income tax purposes. Reference, regulation 22.9-6(b).
>
> "It has been our position that refunds which stem from net operating loss carrybacks accrue to the year of loss in the case of accrual basis taxpayers. This is so because the event which fixes the refund is the loss year. This seems to be a well accepted position and I do not believe that this particular point warrants any research. You will find, I am sure, that most states which have an income tax law hold that such refunds accrue to the year of loss. I am also informed that the Bureau of Internal Revenue holds likewise. Taking this into consideration together with Section 422.35 and more particularly Subsection 4 of such section, leads the writer to but one conclusion; that being that regulation 22.9-6(b) is inconsistent with the law and, therefore, invalid. It would appear that for Iowa corporate income tax purposes an operating loss should be reduced by refunds and increased by payments of federal income tax applicable to the loss year. Such a holding means, of course, that the operating loss deduction

57-3-51

in all cases will differ from the operating loss for federal tax purposes.

"Attached you will find two examples which reflect the thoughts expressed in this letter. Your respected opinion relative to the question posed would be greatly appreciated."

The examples attached to your inquiry are as follows:

"Example 1. (On accrual basis)

"Corporation X sustained an operating loss of $20,000.00 in the year 1957. This loss when carried back to the year 1956 (for federal tax purposes) results in a refund from that year of $5,000.00. The refund is properly accrued to the 1957 Iowa corporation return, thus actually reducing the Iowa loss to $15,000.00 for that year. Applying regulation 22.9-6 to this case would result in the following application to the years 1955 and 1956 for Iowa tax purposes:

1957		1956		1955	
($20,000.00)	Federal loss	Net Income	$10,000.00	Net Income	$10,000.00
5,000.00	Less refund				
($15,000.00)	Net loss	Carryback Income	10,000.00 None	Carryback Income	10,000.00 None

"If in the above example Subsection 4 of Section 422.35 is applied, the following application applies to the years 1955 and 1956.

1957		1956		1955	
($20,000.00)	Federal loss	Net Income	$10,000.00	Net Income	$10,000.00
5,000.00	Refund		5,000.00		10,000.00
($15,000.00)	Net loss	Income	$ 5,000.00	Income	None

"Example 2. (On cash basis)

"Corporation X sustained an operating loss of $20,000.00 in the year 1957. During 1957 said corporation paid additional back federal income taxes of $10,000.00, thus reflecting a $30,000.00 loss for Iowa income tax purposes. Applying regulation 22.9-6 to this case would result in the following application to the years 1955 and 1956 for Iowa income tax purposes:

1957		1956		1955	
($20,000.00)	Federal loss		$10,000.00		$10,000.00
10,000.00	Additional tax	Carryback	10,000.00	Carryback	10,000.00
($30,000.00)	Total loss	Net	None	Net	None

"If in the above example Subsection 4 of Section 422.35 is applied, the following application applies to the years 1955 and 1956.

1957			1956		1955
($20,000.00)	Federal Loss		$10,000.00		$10,000.0
* 10,000.00	Additional federal tax	Carryback	10,000.00	Carryback	10,000.0
($30,000.00)	Total loss	Net	None	Net	None

*AVAILABLE FOR CARRYOVER TO 1958 $10.000.00"

The section of the 1954 Code of Iowa, as amended, which is here pertinent is Section 422.35(4), which provides as follows:

"422.35 Net income of corporation--how computed. The term 'net income' means the taxable income less the net operating loss deduction, both as computed for federal income tax purposes under the Internal Revenue Code of 1954, with the following adjustments:

"* * *,

"4. Subtract federal income taxes paid or accrued, as the case may be, during the tax year, adjusted by any federal income tax refunds."

The first sentence of Reg. 22.9-6(b) provides as follows:

"b. Net operating losses occurring in tax years beginning on or after January 1, 1955, are to be reflected in the computation of Iowa taxable income for each tax year beginning on or after that date in the manner and to the same extent as they are reflected in federal taxable income for the same tax years."

This first sentence of Reg. 22.9-6(b) is obviously an attempt by the Tax Commission to restate that portion of Section 422.35 which states the "term 'net income' means the taxable income less the net operating loss deduction, both as computed for federal income tax purposes under the Internal Revenue Code of 1954, * * *", and does not purport to state that the net operating loss as computed for federal income tax purposes shall without adjust-

ment represent the "net income" or net loss on any Iowa income tax return for any given year. Immediately following the last quotation from Section 422.35 appear the following words, "with the following adjustments: * * *. 4. Subtract federal income taxes paid or accrued, as the case may be, during the tax year, adjusted by any federal income tax refunds." Reg. 22.9-6 is somewhat ambiguous in that it fails to mention the fact that under Section 422.35 taxable income and the net operating loss deduction as computed for federal income tax purposes under the Internal Revenue Code of 1954 are subject to certain adjustments, including that for federal income taxes paid, accrued or refunded during the tax year period. In the event of conflict or suggestion of conflict between the statutes and the regulations of the Iowa State Tax Commission, the statutes must, of course, prevail. Under Section 422.35 of the 1954 Code of Iowa, there can be no doubt that in computing the "net income" which is subjected to income tax under the provisions of Section 422.33 of the 1954 Code of Iowa taxable income and the net operating loss deduction, as they obtain for federal income tax purposes, are subject to and must be adjusted by those federal income taxes paid or accrued, as the case may be, during the tax year, adjusted by any federal income tax refund. The statute itself is so clear as to preclude application of any rule of statutory construction other than that which is to the effect that where the language of a statute is plain and the meaning thereof clear, neither the courts nor this office may search for its meaning beyond the express terms of the statute. In this connection please see Iowa Public

Service Co. v. Rhode, 230 Iowa 751, 298 N.W. 794; McJimsey v. City of Des Moines, 231 Iowa 693, 2 N.W.2d 65; Stuart v. Pilgrim, _____ Iowa _____, 74 N.W.2d 212, and Michel v. State Board of Social Welfare, 245 Iowa 961, 65 N.W.2d 89, which are from a long line of cases in Iowa and other jurisdictions to this same effect.

The portion of Reg. 22.9-6(b), above cited, is not necessarily void for the reason that it is not necessarily in conflict with the statute. This portion of this regulation is simply ambiguous as to whether its reference is to the net operating loss before or after adjustment and is consistent with the statute when read as applying to the net operating loss deduction prior to the adjustment thereto which must necessarily be made under the provisions of Section 422.35 of the Code.

It is, therefore, our conclusion that your interpretation of Section 422.35 of the 1954 Code of Iowa, as amended, is correct insofar as the ultimate result is concerned, and that the taxable income and the net operating loss deduction of corporations subject to the Iowa corporation income tax law are to be adjusted by those items specified in Section 422.35 of the Code, as amended, including an adjustment for those federal income taxes paid or accrued, as the case may be, during the tax year, adjusted by any federal income tax refund. To the extent that the first sentence of Reg. 22.9-6(b) may in its ambiguity be construed to be inconsistent with this conclusion it is of no force or effect.

Very truly yours,

M. A. Iverson,
Special Assistant Attorney General

MAI:fs

April 1, 1957

Colonel Albert J. Clark, USAF
Director of Civil Law
Office of The Judge Advocate General
Department of the Air Force
Washington 25, D. C.

Dear Colonel:

Receipt is acknowledged of your letter of March 27 with reference to an Attorney General's opinion dated February 28, addressed to Donald L. Nelson, Story County Attorney, Nevada, Iowa, the subject of which was the auto-licensing requirements as they apply to armed forces personnel stationed within the State of Iowa, and in which you request: (1) That we reconsider the opinion in the light of the authorities cited in your letter; and (2) That we take such steps as may be appropriate and available to postpone any action by local authorities against military personnel in Iowa for failure to display Iowa license plates.

In response to your inquiry, I would like to point out several things in connection with the two cases referred to me by you.

In the case of Dameron v. Brodhead, decided by the U. S. Supreme Court on April 6, 1953, it appears obvious that the tax therein complained of was a personal property tax for the Court states that they "assessed a tax of $23.51 on his personal property, mostly household goods in the apartment which he valued at $460." This was properly held to be in violation of the provisions of the Soldiers' and Sailors' Civil Relief Act as a property tax.

Referring to the case of Woodroffe v. The Village of Park Forest, decided on October 16, 1952 in the United States District Court for the Northern District of Illinois, Eastern Division, a servicemen, under the provisions of the Soldiers' and Sailors' Civil Relief Act, was held to have been improperly taxed on a personal property tax basis by the Court where it states:

> "It is the view of the Court that the provisions of the aforementioned statute (Soldiers' and Sailors' Civil Relief Act) exempt the petitioner from the payment of the vehicle tax to the Village of Park Forest. . . . personalty of such military person, which by this section includes a motor vehicle, shall not be considered to have a situs for tax purposes in any political subdivision."

87-1-1

It appears obvious to the writer that both of these cases refer to the imposition of a personal property tax and thus fall within the prohibitions set out in the Act of 1940.

Referring now to the pronouncements of our Iowa authorities concerning the nature of the automobile registration in Iowa, I would cite to you an Opinion of the Attorney General, 1926, page 369, which states:

> "The license fee provided by statute is not a tax and the mere exemption of the automobile from personal taxation does not make it so. The supreme court of this state has held in an early case, State vs. Gish, 168 Iowa, 70, at page 81, as follows: . . .
>
> That such license fees are paid for the privilege of using the roads and highways of this state has been accepted over so long a period of time that we do not deem it necessary to cite further authority upon this question."

Our Iowa Supreme Court said in the case of Solberg v. Davenport, 211 Iowa 612, 232 N.W. 477, at page 621:

> "It is quite evident that the charge herein is a charge for the privilege of using the streets and highways as a place of business. The highways belong to the public for ordinary use and general traffic, and they are free and common to all. Such use, however, is a mere privilege, and not an inherent or natural right. (Citing cases)"

And, at page 623:

> "Our conclusion is that, while the charges made herein are considered as a tax, they are not a property tax, and therefore do no violate Article VII of Section 7 of the Constitution."

This problem was again considered in the Report of the Attorney General, 1932, at page 15, where it was held that:

> "A person who kept and operated his automobile in the state for periods totalling six months or longer in one year, would be required to purchase a license; and in case he did not procure such license at once upon his entrance into the state, he would be subjected to all of the penalties provided in such cases, including the criminal penalty provided in Chapter 251."

Under the present status of the law of Iowa concerning this subject, as interpreted by our Supreme Court, as well as opinions of the Attorney General and this current office, I must advise you that we have reconsidered our opinion of February 28 and find that it is in conformity with the law of the State of Iowa.

With respect to your request that we defer action by local authorities against military personnel in Iowa for failure to display Iowa license plates, I must advise you that this is a matter for our local law enforcement officers and this office sees no reason for delay in enforcing our Iowa law.

Many thanks to you for your interest in this matter and your providing this office with copies of the federal opinion and the Soldiers' and Sailors' Civil Relief Act of 1940.

Yours very truly,

NORMAN A. ERBE
Attorney General

NAE:md

CC: Department of Public Safety
L o c a l

Mr. Donald L. Nelson
Story County Attorney
Nevada, Iowa

Iowa Military District
Att: Colonel Garten

Major General Fred C. Tandy
Adjutant General
B u i l d i n g

HEADNOTE: It is our conclusion in response to your question that motor vehicle fuel purchased by a manufacturer may be either subject to or exempt from Iowa sales taxation according to the facts concerning the use to which it is applied.

April 2, 1957

Honorable John A. Walker
State Senator
Senate Chamber, Capitol Building
Des Moines, Iowa

Dear Senator Walker:

We have for study your question concerning the propriety of the collection of sales taxes on that motor vehicle fuel used by manufacturing companies engaged in manufacturing in the State of Iowa. To use an illustration to your question, the question might be paraphrased, "Should companies such as the Maytag Manufacturing Plant at Newton, Iowa, be paying the Iowa sales tax on such motor vehicle fuel as is consumed by that company in or in connection with its manufacturing operations?"

You advise us the Treasurer of State through the Motor Vehicle Fuel Tax Division has indicated to you that that division grants a full refund of the state gasoline and other motor vehicle fuel taxes only in the event such products become ingredients of the product manufactured, as is the case, for instance, of motor vehicle fuel used as a thinning ingredient in paint manufactured for sale.

The provisions of the Iowa Sales Tax Law which are here pertinent are Sections 324.50, 422.42(3), 422.46 and 422.52(4), which provide:

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"324.50 Refund. Any person who shall use any motor fuel for the purpose of operating or propelling stationary gas engines, farm tractors, aircraft or boats or for cleaning or dyeing purposes, or for any other purpose except in motor vehicles operated or intended to be operated upon the public highways, and who shall have paid the license fees for such motor fuel imposed by this chapter, either directly to the treasurer or indirectly by having the same added to the price of such fuel, and who shall have obtained a permit therefor as provided in this chapter, shall be reimbursed and repaid the amount of such license fees so paid, * * *." (Emphasis ours)

"422.42 Definitions The following words, terms, and phrases, when used in this division, have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning.

"* * *.

"3. 'Retail sale' or 'sale at retail' means the sale to a consumer or to any person for any purpose, other than for processing or for resale of tangible personal property and the sale of gas, electricity, water, and communication service to retail consumers or users, but does not include commercial fertilizer or agricultural limestone, or electricity or steam when purchased and used in the processing of tangible personal property intended to be sold ultimately at retail. Tangible personal property is sold for processing within the meaning of this subsection only when it is intended that such property shall by means of fabrication, compounding, manufacturing, or germination become an integral part of other tangible personal property intended to be sold ultimately at retail, or shall be consumed as fuel in creating heat, power, or steam for processing or for generating electric current." (Emphasis ours)

"422.46 Credit on tax. A credit shall be allowed against the amount of tax computed to be due and payable on the gross receipts from sales at retail of any tangible personal property upon which the state now imposes a special tax, whether in the form of a license tax, stamp tax, or otherwise, to the extent of the amount of such tax imposed and paid. * * *."

"422.52 Payment of tax--bond.

"* * *.

"4. The tax by this division imposed upon those sales of motor

> vehicle fuel which are subject to tax and refund under chapter 324 shall be collected by the state treasurer by way of deduction from refunds otherwise allowable under said chapter. The amount of such deductions he shall transfer from the motor vehicle fuel fund to the special tax fund."

The sections cited are to the effect that the Iowa sales tax shall not apply where the Iowa motor vehicle fuel tax does apply, which means that there would be no Iowa sales tax initially applicable to the purchase of motor vehicle fuel by the consumer no matter what the business, occupation, vocation or avocation of the consumer might be. The sales tax comes into effect and is applicable to such a purchase only in the event that the exemption set forth in Section 422.46 is cancelled by a claim for refund of the motor vehicle fuel tax paid, in which event the Treasurer of State, as the collector of the sales tax on such motor vehicle fuel, is authorized by law to deduct from the gross refund the amount of sales tax applicable to the purchase price of the fuel and remit the excess to the consumer. (See 1938 Report of Attorney General, page 72.). However, it is very possible that motor vehicle fuel may be exempt from the imposition of sales taxes for reasons other than its initial subjection to the motor vehicle fuel tax as such exemption is created in Section 422.46 of the Code. Such other exemptions would not be cancelled or in any other way affected by the fact that a refund of the motor vehicle fuel tax is asked or granted and such exemptions, where they apply, would serve to preclude the Treasurer of State from making any deduction from the motor vehicle fuel tax refund claim for the amount of the Iowa sales tax otherwise applicable. Without endeavoring to discuss all such exemptions,

we refer you again to Section 422.42(3) which, by exclusion from the definition of "retail sale" or "sale at retail", deletes from taxable transactions the sale of tangible personal property to a consumer for processing or for consumption as fuel in creating heat, power, or steam for processing or for generating electric current. Under this statute tangible personal property is sold for processing only when such property shall by means of fabrication, compounding, manufacturing or germination become an integral part of other tangible personal property intended to be sold ultimately at retail. The words "for processing" as they relate to tangible personal property consumed as fuel must be construed with the processing definition and seem to require that tangible personal property consumed as fuel in creating heat, power, or steam must, to be exempt, be so consumed for the purpose of integrating tangible personal property by means of fabrication, compounding, manufacturing, or germination with other tangible personal property intended to be sold ultimately at retail. Obviously, not every activity of a manufacturing company would fall within the limits set forth in the statute and, consequently, some purchases of motor vehicle fuel would remain subject to Iowa sales taxation even though the motor vehicle fuel tax with relation thereto would be refundable, for the reason that this processing exemption would not apply thereto. On the other hand, it is quite likely that there would be many uses of motor vehicle fuel by manufacturers which would be exempt under the processing definition above cited and as to which the gross amount of the motor vehicle fuel tax must be refunded by the Treasurer of State without reduction for any Iowa sales tax otherwise

applicable and otherwise deductible. It is a question of mixed fact and law as to each application a manufacturer might make of motor vehicle fuel as to whether it does nor does not come within the processing exemption above cited. We, thus, cannot say categorically that motor vehicle fuel used by a manufacturing company is exempt from Iowa sales taxes and conversely cannot say categorically that such fuel is subject to the Iowa sales taxes. Each consumption must stand on its own facts as to exemption or taxability. Assuming your information is correct that the Treasurer of State is currently exempting from the sales tax deduction only those refunds of motor vehicle tax which relate to paint thinner used as an ingredient of a product manufactured for sale, we must state that such a position is not warranted under the statutes.

It is, accordingly, our conclusion in response to your question that motor vehicle fuel purchased by a manufacturer may be either subject to or exempt from Iowa sales taxation according to the facts concerning the use to which it is applied. For a more explicit statement of the Iowa law as to the scope of the processing exemption as it presently exists, we call your attention to the case of Fischer Artificial Ice & Cold Storage Company vs. Iowa State Tax Commission decided by the Iowa Supreme Court March 5, 1957. The opinion in this case may be readily obtained from the Clerk of the Supreme Court of Iowa upon request.

Very truly yours,

M. A. Iverson,
Special Assistant Attorney General

MAI:fs

April 2, 1957

Honorable Vern Lisle
State Representative
State Capitol Building
Des Moines, Iowa

Dear Sir:

We have before us for study your contemplated proposal that the Legislature pass a Sales Tax Bill which would provide that the Sales Tax should be 2% until the State balance reaches a certain figure. Under your contemplated proposal a responsible executive (such as the Governor or the Executive Council) would be required by law to keep accurate check on the state of such balance and make an official finding or order to the effect that the certain minimum figure had been reached. Then the Sales Tax rate would be increased to 3% and remain at that point for the rest of the biennial.

You ask as to the constitutionality of such a statute and whether the alternative 3% rate could be imposed on the basis of a formal finding as to the state of the balance in the State Treasury by such a responsible executive or the Executive Council.

We have studied your proposal and assuming it were

57-4-4

presented to the Legislature in proper form, the only constitutional question which would appear to warrant discussion would be that relating to whether or not the fact determination which would necessarily have to be made by someone in a position to observe the state of the balance in the State Treasury would involve an unconstitutional delegation of legislative authority. Some authority on this point is embodied in 42 Am. Jur. 340 which provides:

> "To avoid an unlawful delegation of power the law-making body must declare the policy and purpose of a law and fix the legal principles which are to control in given cases by setting up standards or guides to indicate the extent, and prescribe the limits of the discretion which may be exercised under the statute by administrative officers."

Following this rule and applying it to given situations are the following Iowa decisions:

Goodlove vs. Logan, 217 Iowa 98, 251 N. W. 39;

State vs. Van Trump, 224 Iowa 504, 275 N. W. 569;

Gilchrist vs. Bierring, 234 Iowa 899, 14 N. W. (2d) 724;

Central States Theatres vs. Sar, 245 Iowa 1254, 66 N. W. (2d) 450.

The Iowa Supreme Court in the case of Goodlove vs. Logan, 217 Iowa 98, 102; 251 N. W. 39, quotes with approval from the leading case of Field vs. Clark, 143 U. S. 649,

12 S. Ct. 495, 505 36th L. Ed. 294, as follows:

> "The Legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend."

As we understand your proposal, the function of the responsible executive or group of executives would be purely ministerial and not involve the exercise of any discretion whatsoever. Under the circumstances, there can be no serious question as to the constitutionality of your proposal. Some aspects of your proposal are not yet clear to your writer. In general comment thereon, we would say that any finding or order required of the executive or executives aforementioned should be required to be given adequate publicity and that some minimum period of time following the making of such a finding or order be prescribed before such finding or order should be in effect that the people of the State may be fully cognizant of their duties.

There is some precedent for a statute of this kind in the provisions of sections 8.6, subsection 13, and 444.22 of the 1954 Code of Iowa. These are the provisions of law which would be operative should a general state property levy be necessary and which provide that the State Comptroller shall annually certify to the State Tax Commission

the amount of money to be levied for general state taxes and that the State Tax Commission shall annually fix the rate and percentage to be levied upon the assessed valuation of the property of the State in order to raise such amount. The powers delegated to the State Comptroller in section 8.6 are of the same nature as those which would be invested in an executive or executives in your contemplated proposal. We see no constitutional objections to your contemplated proposal and believe that the administrative difficulties which might arise from a change in the tax rate would not be substantially different from those which would result from a direct legislative pronouncement of such a change.

Very truly yours,

M. A. Iverson,
Special Assistant Attorney General

MAI:lp

April 3, 1957

Mr. John J. Duhigg
Palo Alto County Attorney
Emmetsburg, Iowa

Dear Mr. Duhigg:

Your letter of March 18, 1957 raises the question of whether or not the Moneys and Credits tax is payable to Palo Alto County in the case of the Swedish citizen, Jennie Larson, who had lived in Iowa many years, returned to Sweden in July of 1955 and there died in December of 1955, leaving some $22,000 on deposit in the Iowa Trust and Savings Bank, Emmetsburg, Iowa.

A letter dated March 19, 1957 from Carl L. Spies, Attorney at Law, Emmetsburg, Iowa, of which you probably received a copy, gives additional information as to the circumstances surrounding the matter and a copy of this letter is, therefore, being sent to Mr. Spies.

There is comment in each letter to the effect that Palo Alto County cannot tax the money in the Iowa Trust and Savings Bank on the theory that the deposit is an intangible, a debt owed by the bank to the estate of Jennie Larson but we think this does not follow for the reason that section 427.13-4, Code, 1954, as amended, specifically provides that "money whether in possession or on deposit" is a taxable item and it has been held that bank deposits are taxable to the depositors, and not to the bank.

57-4-5 ✓

Branch vs. Town of Marengo 43 Iowa 600; Citizens National Bank, Grinnell, Iowa vs. Johnston 199 Iowa 460, 202 N. W. 382.

Section 428.1, Code, 1954, as amended, provides:

"Every inhabitant of this state, of full age and sound mind, shall list for the assessor all property subject to taxation in the state, of which he is the owner, or has the control or management, in the manner herein directed:

"1. The property of one under disability, by the person having charge thereof.

"2. The property of a married woman, by herself or husband.

"3. The property of a beneficiary for whom the property is held in trust, by the trustee.

"4. The personal property of a decedent, by the executor or administrator, or if there is none, by any person interested therein.

"5. The property of a body corporate, company, society or partnership, by its principal accountant, officer, agent, or partner, as the assessor may demand.

"6. Property under mortgage or lease is to be listed by and taxed to the mortgagor or lessor, unless listed by the mortgagee or lessee."

Section 428.2, Code, 1954, as amended, provides:

"Any person required to list property belonging to another shall list it in the same county in which he would be required to list it if it were his own, except as herein otherwise directed; but he shall list it separately from his own, giving the assessor the name of the person or estate to which it belongs."

Section 428.3, Code, 1954, as amended, provides:

"Any person acting as the agent of another, and having in his possession or under his control

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

Section 428.8, Code, 1954, as amended, provides:

> "Moneys and credits, notes, bills, bonds, and corporate shares or stocks not otherwise assessed, shall be listed and assessed where the owner lives, except as otherwise provided, and except that, if personal property not consisting of moneys, credits, corporation or other shares or stock, or bonds, has been kept in another assessment district during the greater part of the year preceding the first of January, or of the portion of that period during which it was owned by the person subject to taxation therefor, it shall be taxed where it has been so kept."

It may be urged that section 428.1 applies to "every inhabitant' and, therefore by inference would exclude non-residents from the operation of the statute, but sub-section 4, section 428.1 provides that the personal property of a decedent shall be listed by the executor and section 428.2 provides that any person required to list property belonging to another shall list it in the same county in which he would be required to list it if it were his own, which would necessarily apply to the property of non-residents of the county in which the executor lives.

Section 428.8, Code, 1954, as amended, provides that moneys and credits shall be listed and assessed where the owner lives, "except as otherwise provided" and we think, "it is otherwise provided" with reference to the property of decedent or non-residents of the county in which the executor is found, as covered in the preceding paragraph thereof.

It is stated in Mr. Spies' letter of March 19, 1957 that Jennie Larson's estate has been exempted from paying any Federal estate tax or income tax. This may well be in view of the modest amount of the income and the estate. For the same reason, it is possible that no State of Iowa income tax is payable.

In Black Hawk County vs. Doris 116 Iowa 446, 449, it was held that moneys and credits belonging to a citizen of another state, in the hands of an agent in this state, are taxable here, after the agency has been revoked by the death of the owner and the property became subject to local administration, until it is transferred by Order of the Court to the administrator appointed in the state where the owner resided. As a general rule, personal property in the hands of an executor or administrator in his official capacity is assessable and taxable at the place of his domicile, as between different states or countries. See 51 Am. Jur. section 483 and cases there cited.

An executor, administrator, or trustee is regarded as the owner, for purposes of property taxation of the personal property which he holds by virtue of his office and is taxable in the state in which he is domiciled.

Nor in the absence of statute is such situs affected by the fact that the beneficiaries are not residents. See 67 A.L.R. 393 and cases there cited.

By the provisions of paragraph 3 of the Will of Jennie Larson, John Swanson and Joe Schmidt, both of Ayrshire, Iowa, were named executors of her estate and have since performed duties as such.

Taxation is the rule and exemption the exception. The universal rule of construction is that tax exemption provisions are to be strictly construed against the one who asserts the claim of exemption.

We find full support in the authorities cited for moneys and credits taxation of the $22,000 deposited by Jennie Larson in the Iowa Trust and Savings Bank, Emmetsburg, Iowa, find no authority to the contrary, and, therefore, conclude that it is taxable.

Very truly yours,

M. A. Iverson,
Special Assistant Attorney General

W. M. Wilson,
General Counsel,
State Tax Commission

WMW/lp

CC: Mr. Carl L. Spies, Attorney at Law, Emmetsburg, Iowa.

April 4, 1957

Honorable David O. Shaff
Senate Chamber
B u i l d i n g

My dear Senator:

I have yours of the 26th ult. in which you submitted to the Department the following:

> "The House of Representatives has passed House File 113 which is an Act relating to garnishment. This bill was referred to the committee on Manufacturing, Commerce and Trade of the Senate and the Senate Committee adopted an amendment to the House File which is identical with the garnishment law of the State of Illinois.
>
> "Inquiry has been raised as to whether the amendment is in correct form for purposes of amending the Iowa garnishment statute. It has been suggested by Senator O'Malley of Des Moines that under the amendment as proposed garnishment would not be auxiliary to judgment and execution, but would constitute a judgment procedure in and of itself.
>
> "As chairman of the committee on Manufacturing, Commerce and Trade I would appreciate your office examining the amendment as proposed and with the end in mind of maintaining the substance of the amendment so that it would be workable under the present Iowa garnishment law, would appreciate your redrawing the amendment in the event that you deem that it is necessary.
>
> "Inasmuch as the garnishment bill probably will be on the Senate calendar in the near future, we would appreciate your early action on this matter."

I am of the view that this amendment from lines one to thirty-three can be correlated into our garnishment statutes

57-4-4

and at the same time preserve the substantive features thereof. Our garnishment authority is provided by Rule 54 of the Rules of Civil Procedure, which contains the following:

> "Special cases - appearance of garnishee.
>
> "* * * *
>
> "(b) The officer serving a writ of attachment or execution shall garnish such persons as the plaintiff may direct as supposed debtors, or having in possession property of the principal defendant, which shall be effected by a notice served in the manner and as an original notice in civil actions, forbidding his paying any debt owing such defendant, due or to become due, and requiring him to retain possession of all property of the defendant in his hands or under his control, to the end that the same may be dealt with according to law, and, unless answers are required to be taken as provided by statute, it shall cite the garnishee to appear in not less than ten days after service of the notice and at a time specified when court will be in session and a judge will be present, and answer such interrogatories as may be propounded, or he will be liable to pay any judgment which the plaintiff may obtain against the defendant."

It will be noted that garnishment therefore is not an original action but is a method of enforcing the remedies of attachment and execution. In Eller v. National Motor Vehicle Co., 181 Iowa 679, 165 N. W. 64, this is stated in these words:

> "'Garnishment' is a proceeding by which an attachment or execution plaintiff seeks to subject to his writ the property, rights, and credits of his debtor by calling into court and requiring answer of some third person who has either property, credits, or effects of the debtor in his possession, or who is himself indebted to the debtor."

In the view that garnishment is auxiliary to the remedies stated and not the subject or original action, so much of the amendment as is contained in lines thirty-three to sixty-two can be eliminated. Proper pleading in garnishment proceedings by the judgment debtor and the garnishee in my view can preserve to the employee the weekly $30.00 exemption and make available to the plaintiff-creditor the excess earnings over that sum.

In this connection I would suggest the substitution of the word "notice" for the word "writ" in line thirty-three.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

April 4, 1957

Mr. Lloyd B. Cunningham
Secretary
Iowa State Fair Board
L O C A L

Dear Mr. Cunningham:

I am returning herewith the copy of an agreement which I understand is a proposed form of agreement for an enterprise in which the State Fair Board could participate and of which you desire an opinion as to whether or not it constitutes a lottery under the Iowa statutes.

The proposal contemplates an agreement between the State Fair Board, Exhibition Advertising, Limited, a Canadian corporation, and a sponsor as the third party, the purpose of which is to raise funds:

(a) By selling tickets for a consideration;
(b) Said tickets constituting a chance;
(c) To win a house to be constructed and furnished by said corporation, the profits, if any, thus realized to be divided between the parties thereto.

Our Supreme Court has said that generally any enterprise which consists of the giving of any consideration for an opportunity to win a prize is in violation of the lottery laws of this State. See State v. Mabrey, 245 Iowa 428, 60 N.W.2d 889. Also see letter opinion, office of the Attorney General, March 8, 1957.

There is no doubt that the attached proposed agreement, as outlined above, constitutes a lottery under the rule stated in the Mabrey case, and is illegal under the laws of Iowa.

Very truly yours,

FDB:mfm
Enclosure

FRANK D. BIANCO
Assistant Attorney General

57-4-7

April 5, 1957

Mr. Wayne L. Pratt, Director
Division of Vocational Education
Department of Public Instruction
L O C A L

Dear Mr. Pratt:

Receipt is acknowledged of your letter of April 3rd as follows:

> "We respectfully request an Attorney General's Opinion on the legality of accepting funds as provided by the George-Barden Act, Title II, P.L. 911, which provides funds for the extension and improvement of practical nurse training.
>
> "In view of the recently enacted bill, Senate File 39, passed by the Senate on January 30, 1957, and by the House on March 21, 1957, and signed by the Governor March 27, 1957, is the Division of Vocational Education given authority to accept the George-Barden Funds and its amendments - namely, P.L. 911, Title II (84th Congress)?
>
> "Section 258.1, Code of Iowa, 1954, did read:
>
> "'The provisions of this act of congress entitled, "An act to provide for the promotion of vocational education; to provide for cooperation with the states in the promotion of such education in agriculture and in the trades and industries; to provide for cooperation with the states in the preparation of teachers of vocational subjects; and to appropriate money and regulate its expenditure," approved February 23, 1917, and the ben-

57-4-8 ✓

efit of all funds appropriated under said act, are accepted.'

"Section 258.1, Code of Iowa, 1954, as amended by Senate File 39:

"'The provisions of the act of congress entitled, "An act to provide for the promotion of vocational education; to provide for cooperation with the states in the promotion of such education in agriculture and in the trades and industries; to provide for cooperation with the states in the preparation of teachers of vocational subjects; and to appropriate money and regulate its expenditures," approved February 23, 1917, AND ALL AMENDMENTS THERETO, and the benefit of all funds appropriated under said act AND ALL OTHER ACTS PERTAINING TO VOCATIONAL EDUCATION, are accepted.'"

It is my understanding that the reason for your request is that the United States Department of Health, Welfare and Education requires an opinion of the Attorney General in each state claiming benefits under the George-Barden Act as to whether the laws of such state permit acceptance of benefits under said act. However, the language of Section 258.1 as amended by S.F. 39, Acts of the 57th General Assembly, appears so plain and unequivocal on its face that little room is left for construction by way of opinion of this office.

The said statute as amended accepts the benefits of one specific act of congress "and all other acts pertaining to vocational education". Thus, the only possible question of construction is whether the "George-Barden Act" is an Act of Congress "pertaining to vocational education". I trust the federal agency needs no clarification on that point.

However, I would point out that S.F. 39, supra, contains no publication clause and hence the authority conferred by it will not become effective as law until July 4, 1957.

Very truly yours,

LEONARD C. ADELS
Assistant Attorney General

LCA:mf

SCHOOLS. Compensation of board members is expressly prohibited by section 279.29, Code 1954. Member of sch. bd. cannot receive compensation for serving as sec. to supt of school.

April 5, 1957

Mr. J. Alfred Armiger, Sec'y.
Board of Education
Inwood Independent District
Inwood, Iowa

Dear Mr. Armiger:

Receipt is acknowledged of your letter of April 2nd as follows:

> "One of our regular elected board of education members is now serving as Secy. to the Supt. of School.
>
> "I would like to know if there is any legal way that we can pay this board member for their services.
>
> "According to the school laws of Iowa Chapter 71 section 71.2 if this board member was paid unlawfully then either my bondsman or my self would be held liable for this unlawful payment."

Opinions of this office are limited by statute to questions submitted by members of the legislature, state officers, and county attorneys in connection with the duties of their respective offices.

However, there is no need for an opinion on the question you submit as Section 279.29, Code 1954, plainly furnishes the answer in its express terms as follows:

57-4-9

"Compensation of officers. The board shall fix the compensation to be paid the secretary. No member of the board or treasurer shall receive compensation for official servides, except that in school townships, rural or village independent districts, and in consolidated districts that contain a city or town having a population less than one thousand, the board may pay a legally qualified school treasurer a reasonable compensation." (Emphasis ours)

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

COUNTY OFFICERS - BOARD OF REVIEW: Removal of residence by a member of the board of review from the township from which he was appointed to a township in which another member of the board resides creates no automatic vacancy.

April 9, 1957

Mr. Howard M. Manley
Jones County Attorney
Anamosa, Iowa

Dear Mr. Manley:

Receipt is acknowledged of your letter of March 28th as follows:

"I have been requested by the Jones County Assessor's office to submit the following question to you for legal opinion:

"Section 442.1 of the 1954 Code of Iowa provided among other things, as follows: 'No two members of the Board of Review shall be citizens of the same town or township, and not more than two members shall be of the same profession or occupation * * * * * *'.

"At the time the Jones County Board of Review was last constituted, Henry Biere of Hale Township (Hale Township voting precinct, as well) was appointed for a four-year term on the Board of Review, commencing January 1, 1956. In the Fall of 1956, said Board member moved from Hale Township into the town of Olin, in Rome Township, Jones County, Iowa, in which same town and township another member of the Board of Review, to-wit: C. M. Miles, (real estate broker member) also now resides, and resided for many years last past. Therefore, at the time of his appointment, Henry

57-4-10

Hiers did not live in any town or township in which any other member resided, but at the time of his moving, he did move into a town and township and voting precinct in which another member of the Board of Review, to-wit: the real estate broker member, did reside, does reside, and had resided for many years last past. The question submitted is to whether or not the above quoted provisions in Section 442.1 prevent the member of the Board of Review who moved into the town, township and voting precinct of another member from continuing to serve on the Jones County Board of Review? Further, if the member who moved into the town, township and voting precinct of another member refuses to resign, or does not resign, how is it determined which of the two members shall continue to serve on the Board, and which shall be replaced, or can both members serve until the end of their appointed terms, respectively?"

The provision from Section 442.1, Code 1954, quoted in your letter is preceded by the following provision:

"The board as selected shall include at least one farmer, one registered real estate broker and at least one person experienced in the building and construction field . . . " (Emphasis ours)

Physical proximity of the two provisions gives rise to an inference that the words "as selected" relate to the residence as well as occupation requirements.

Section 442.1 does not define "vacancy". It merely provides that:

"Vacancies in the board of review shall be filled temporarily by the board of supervisors until such time as a regular conference is called for the selection of new members."

"Vacancy" is defined in terms of removal of residence in Section 69.2(3), Code 1954, as follows:

"Every civil office shall be vacant upon the happening of either of the following events:

* * * * * * *

> "The incumbent ceasing to be a resident of the state, district, county, township, city, town or ward by or for which he was elected or appointed, or in which the duties of his office are to be performed."

This definition doesn't fit the situation described in your letter. The officer in question was elected "from" rather than "by or for" a given township. His duties are exercised within the entire county rather than in said township.

We are, therefore, of the opinion that no "vacancy" is created by the situation described in your letter within the terms of the quoted pertinent statutes, although a disability has been created which, if circumstances remain unchanged, will prevent appointment of said incumbent for a new term upon the expiration of his present term, or will prevent reappointment of the other member currently residing in the same township for a new term, depending upon whose present term first expires.

Very truly yours,

NORMAN A. ERBE
Attorney General of Iowa

LEONARD J. ASELD
Assistant Attorney General

LJA:mfa

April 10, 1957

Mr. Emery L. Goodenberger
Madison County Attorney
Winterset, Iowa

Dear Sir:

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

> "I wish to have an opinion in connection with the collection of dog tax based on the following facts:
>
> "'The Board of Supervisors of Madison County passed a resolution exacting a dog license fee of $2.00 on male and spayed female dogs and $5.00 on all other female dogs pursuant to the provisions of Chapter 351.6 of the 1954 Code of Iowa. No exception was made as to cities and towns having an ordinance providing for a dog tax. The Town of Earlham, Iowa, has adopted an ordinance requiring a license fee of $2.00 on all dogs irrespective of male or female. The County Assessor and County Auditor did not have knowledge of this ordinance and proceeded to assess and collect the tax within the town of Earlham based on the amounts mentioned above in the resolution of the Board of Supervisors. The only year in question is the tax collected by the County for dog tax in 1957.'
>
> "It would seem that the provisions of Chapter 351.6 of the 1954 Code of Iowa would limit the County to collecting $1.00 in the case of each male and spayed female dog and $3.00 on other female dogs so far as the town of Earlham is concerned. My question is what procedure should be followed in refunding the erroneous collection of dog tax by the County within the town of Earlham?
>
> "Your reply will be greatly appreciated."

57-4-11 V

In reply thereto I would advise you that recovery of this dog license fee exacted by the County may be had under the provisions of Section 331.21, Code of 1954, providing as follows:

> "Unliquidated claims. All unliquidated claims against counties and all claims for fees or compensation, except salaries fixed by statute, shall, before being audited or paid, be so itemized as to clearly show the basis of any such claim and whether for property sold or furnished the county, or for services rendered it, or upon some other account, and shall be duly verified by the affidavit of the claimant, filed with the county auditor for presentation to the board of supervisors; and no action shall be brought against any county upon any such claim until the same has been so filed and payment thereof refused or neglected."

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

April 10, 1957

Mr. Eliot Thomas
Mills County Attorney
Glenwood, Iowa

Dear Sir:

I have yours of the 8th inst. in which you submitted the following:

> "It will be very much appreciated if you will forward me written confirmation of our oral discussion of April 5, at which time you gave me affirmative answers to the following questions:
>
> "1. Can the County Board of Supervisors sell a county poor farm upon a determination that it is no longer needed as a farm?
>
> "2. Can the County Board of Supervisors in making such sale employ the services of a licensed realtor and pay a reasonable commission from the proceeds of said sale for such services?
>
> "3. Must the sale be for cash, and must the proceeds go into the general fund?
>
> "Such written opinion is desired as promptly as possible for presentation to the Mills County Board of Supervisors."

In reply thereto I advise you in confirmation of our oral discussion as follows:

1. The answer to your question #1 is in the affirmative.

2. The answer to your question #2 is in the affirmative.

57-4-12

3. In answer to your question #3 I would advise that the sale must be made for cash and the proceeds allocated to the County General Fund.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

April 10, 1957

Honorable George H. Sackett
Warren County Court House
Indianola, Iowa

Dear Judge Sackett:

I should like to thank you for referring to our office the stipulation and brief in connection with the case of State v. Buss which is to be submitted to you this week. We cannot tell from the stipulation or the brief whether the defendant has been charged with a violation of Section 321.304 of the Code or whether he is charged specifically with subsection 3 thereof.

The brief of the defendant quotes from the case of State v. Brighi, 232 Iowa 1087, 7 N. W. 2 9. This case has been distinguished in several later cases, the first of these being State v. Paul, 242 Iowa 853, 48 N. W. 2d 309. The Court distinguished the Brighi case because it was submitted on a specific legislative act which at that time contained no penal provision. In the very recent case of State v. Holling, 78 N. W. 2d 25 on page 26, the Court said: "Were the Brighi case before us at this time with the statute there involved as it is now, Section 321.319 of the 1954 Code of Iowa connected as it is with Section 321.482 of the Code, we would hold it valid and that it does state a criminal offense, particularly under the precedent of State v. Paul."

The case of State v. Coppes decided by the Supreme Court in 1956, appearing at 78 N. W. 2d 10, re-examines the authorities with regard to strict construction of the statutes. Although this was a speed case it nevertheless points out that statutes dealing with regulation of motor vehicles cannot always be drawn in strict terms. We feel that this case overrules the Brighi case and that such statutes must be interpreted in the light of the legislative intent.

In the case of Young v. Blue Line Storage Company, 242 Iowa 125, 44 N. W. 2d 391, subsection 2 of Section 321.304 of the 1954 Code was examined in a civil case. The same argu-

57-4-13

ment was used and is now being advanced by the defendant to you. The Court in that case stated:

> "'2. * * * when approaching within one hundred feet of or traversing any intersection * * *.'
>
> "The theory of the defendant as shown in its argument is that when approaching 'within 100 feet' it can only mean within the distance of 100 feet the driver should not start to pass, and that it does not mean that if a collision happens within 100 feet of the intersection the individual who is passing is guilty of negligence. We disagree with the defendant in this respect. The statute itself indicates the contrary. It says, 'when approaching within 100 feet' of an intersection. Therefore, no matter when defendant's truck was started to be driven, if, when within 100 feet of the intersection it remained on the left side of the highway it was traversing, it violated this statute. The driver of a following car could very well pass to the left side of the road, but if he continued in that position until within 100 feet of that intersection he would violate the rule. The court in the instruction upon this phase of the evidence so instructed and was correct. Such has been the holding in other jurisdictions and in certain cases cited by the plaintiff. See Holland v. Edelblute, 179 Va. 685, 20 S. E. 2d 506, Greer v. Marriott, 27 Ala. App. 108, 110, 167 So. 597, 598, in which, in interpreting an act similar to our own, the court says:
>
> "'We hold that the passing of one car by another going in the same direction is one continuing act, from the time the rear car pulls out of the direct lane of travel in the rear of the car to be passed, up to and including the completion of the passing and the passing car is again in its proper lane.'
>
> "American Products Co. v. Villwock, 7 Wash. 2d 246, 271, 109 P. 2d 570, 581, 132 A. L. R. 1010, 1027, in discussing a statute similar

> to ours, but applied to curves, the court instructed that it should be unlawful to overtake and pass another vehicle proceeding in the same direction upon any curve when the view of the operator of such overtaking vehicle is obstructed or obscured within a distance of 800 feet, and says, in part:
>
> "'While the literal language of the statute lends support to appellant's contention, the impracticable, and almost absurd, results that would flow from the construction contended for, indicate clearly that the statute was intended, and should be interpreted, to prohibit the overtaking and passing of other vehicles proceeding in the same direction, not only while actually upon a curve, but also while approaching any curve, when the view of the operator of the overtaking vehicle is obstructed within a distance of 800 feet.'"

We have discussed the particular problem informally with the Department of Public Safety and they feel very strongly that our interpretation is correct. They feel that if the defendant's position were sustained it would greatly interfere with the enforcement of all of the provisions of Section 321.304.

We trust these suggestions will be of some assistance to you in connection with reaching your decision and if we may be of any further service to you please feel free to call on our office.

Very truly yours,

NORMAN A. ERBE
Attorney General of Iowa

DON C. SWANSON
Assistant Attorney General

DCS:MKB

April 11, 1957

Honorable William H. Nicholas
Lieutenant Governor
Senate Chamber
B u i l d i n g

In re: Senate File 460

Dear Sir:

You have presented to this office the question as to whether an affirmative vote by two-thirds of the members of your body is required to pass Senate File 460, which includes among its provisions an allocation of revenue from the proceeds of the sales tax (Chapter 422 of the Code) to the Agricultural Land Tax Credit fund established by Section 426.1 of the Code, as amended, and thus made available for the payment of the Agricultural Land Tax Credit.

A question has been raised as to whether the mandatory provisions of Article III, Section 31 of the Constitution apply in this case where it is said:

> "No public money or property shall be appropriated for local, or private purposes, unless such appropriation, compensation, or claim, be allowed by two-thirds of the members elected to each branch of the General Assembly."

You have requested an informal expression of my views concerning this question.

I would call to your attention that the case of Dickinson v. Porter, 31 N.W.2d 110, which was the first Supreme Court decision concerning the status of the Agricultural Land Tax Credit, held that such credit was for a private purpose. At page 122 of the Northwestern Reporter, the Court said:

> "The exemption, therefore, was for a private purpose and it necessarily follows that the appropriation of state funds to pay the exemption would be for a private purpose."

57-4-14

A rehearing was granted in this case and a new opinion was issued by the Supreme Court, which is now part of the law of the State of Iowa. In the opinion of the Court found at 240 Iowa 393, 31 N.W. 2d 110, the Supreme Court held that such Agricultural Land Tax Credit was for a public purpose.

Since it is for a public purpose, the provisions of Article III, Section 31, requiring a two-thirds vote of the members elected to each branch of the General Assembly is not required. As applied to the situation as presented, the point of order of Senator Dailey, in my view, is not well taken.

The precedent of the announcement of the vote by the presiding officer in the past is not pertinent in my opinion to the present inquiry.

Yours very truly,

NORMAN A. ERBE
Attorney General

NAE:md

CC: Honorable Thomas J. Dailey
State Senator
Building

April 11, 1957

Honorable Duane E. Dewel
Senator - 49th District
B u i l d i n g

My dear Duane:

This will acknowledge receipt of yours of the 8th inst. in which you stated the following:

> "I call your attention to the amendment to Senate File 1 by Representative Milroy in which he struck the complete title and substituted a different title; however, he did not leave the words 'An Act' and substitute after that.
>
> "My question, which I believe is a constitutional one, is whether by striking the complete title he did not in effect reject the bill. My contention is that he should have left the words 'An Act' and substituted thereafter.
>
> "We are holding the bill up in the Senate to determine this question, so the House can call it back and correct it if necessary. We would appreciate an early reply."

In reply thereto I advise as follows. I am of the opinion that while the Milroy amendment in striking the title included therein the word "Act" and at the same time included in the proposed substitute title the word "Act", the striking of the original title including the word "Act" and the adoption of the substitute title including the word "Act" operated instanter and concurrently, and therefore the word "Act" was always in the bill.

57-1-15 ✓

However, more important and impressive is the fact that the constitutional provision, Article III, Section 29, treating of the title to an act is limited to an act of the legislature and not to a bill for an act. The meaning of the word "act" in the title of a bill in the constitutional sense is stated in the case of Sedgwick County Commissioners v. Bailey, 13 Kan. 600, 608, as exhibited in Words and Phrases, volume 2, page 12, as follows:

> "The language of the constitutional provision that no bill shall contain more than one subject, which shall be clearly expressed in its title, differs in some respects in the different states. In some the word 'act' is used, while in others the word 'bill' or 'law' is used. However, each of these provisions as presented to the courts means the final determination of the Legislature upon the particular subject embraced in such 'bill', 'act,' or 'law.' The word 'act' is probably the best word to use, for it includes no action of the Legislature of any person prior to the final act of the Legislature, and it includes the whole of the act, nothing more and nothing less. The word 'law' is probably the worst word to use, for a portion of any act may be law as well as the whole of the act. The word, however, as used in such connection, is intended to be synonymous with 'act.' The word 'bill' means the bill as it is first introduced, and as it may be at any time or in any of its stages until it is finally passed, signed by the necessary officers, and filed away as the highest evidence of what the law is. And when it is thus filed it is called the 'enrolled bill.' Where the constitutional provision uses the word 'bill,' it means that if any bill should in any stage be in conflict with the provision it should be amended by the Legislature, and, if the Legislature should fail to correct it, the bill itself, or some portion of it, would be void."

The bill bearing the substituted title appears to conform with constitutional requirements.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

April 12, 1957

Mr. Eugene R. Nelson
Greene County Attorney
Jefferson, Iowa

Dear Sir:

You inquire concerning the following:

> "Is the Greene County Hospital, a public county hospital operating under the provisions of Chapter 347 of the Code of Iowa, 1954, authorized to pay for a membership in the Jefferson Chamber of Commerce?"

In answer to your question I would state that Chapter 347 of the Code of Iowa, 1954, does not include either especially or by implication any authority for the Greene County Hospital to pay for membership in the Jefferson Chamber of Commerce.

Yours very truly,

NORMAN A. ERBE
Attorney General

NAE:md

57-4-15

April 12, 1957

Mr. Earl E. Hoover
Clay County Attorney
Spencer, Iowa

Dear Mr. Hoover:

I have your letter of March 30, 1957, in which you ask the following question:

> "On January 9, 1957, the Eagles Club, Clay County Aerie #2273, was convicted of the crime of 'aiding, assisting and abetting in keeping and maintaining a club room in which intoxicating liquors are kept for use and sale, contrary to Section 125.13 of the 1954 Code of Iowa, and said Club is fined the sum of $500.00 together with the costs of the action taxed at $10.50.'
>
> "I would like your opinion on the question whether this violation makes it mandatory that the City Council of the City of Spencer, Iowa revoke the beer permit issued to the said Eagles Club, Clay County Aerie #2273."

Section 124.30 of the 1954 Code of Iowa sets out the provisions for the mandatory revocation of a beer permit, none of which appears to specifically cover the crime for which the Eagles Club was convicted. It would rather appear to us that the facts as outlined by you would fall within the provisions of Section 124.31, commonly referred to as "keeping liquor where beer is sold." An earlier Attorney General's opinion in 1942 found at page 31 of the bound volume states that such a violation calls for an optional rather than a mandatory revocation.

It is therefore the opinion of this office that if the only facts affecting this situation are outlined in your letter,

57-4-17

the revocation in question calls for an optional rather than a mandatory revocation by the City Council of the City of Spencer, Iowa.

Very truly yours,

NORMAN A. ERBE
Attorney General of Iowa

DON C. SWANSON
Assistant Attorney General

OS:MKB

April 15, 1957

Honorable Jack Schroeder
The Senate
B u i l d i n g

My dear Senator:

You request an opinion on the following points in connection with the passage of House File 440:

> "Does it include any and all acts passed by the 57th General Assembly so as not to repeal any acts passed into law during this session? I am particularly interested in seeing that the road use tax fund is retained and that the tax structure is retained as passed by the general assembly in prior acts."

In response to your request I advise as follows:

1. Senate File 97, a bill now passed into a law approved by the Governor, amends sections 324.50, 324.57, and 324.59, Code of 1954, and by adding a section to that chapter. Repeal of Chapter 324, Code of 1954, as amended by the Acts of the 56th General Assembly, will operate as a repeal of Senate File 97, now passed into a law of the 57th General Assembly.

2. Senate File 229, amending sections 1 and 2 of Chapter 44, Acts of the 56th General Assembly, amending Chapter 324, Code of 1954, will stand repealed upon the repeal of Chapter

57-4-18

324.

3. House File 320 amending sections 324.50 and 324.57, Code of 1954, if enacted would stand repealed upon the repeal of Chapter 324, Code of 1954.

4. The Dailey amendment to House File 440, if and when adopted in its entirety by an amendment to Chapter 324, would not survive a repeal of Chapter 324 and its 56th General Assembly amendment and would stand nullified.

5. The road use tax law, sought to be amended through House File 440, appears not to have been changed. The rule with respect to repeal of amendments as effected by repeal of the original act is stated in Sutherland Statutory Construction, 3rd Edition, Section 1939, as follows:

> "On the theory that provisions of the original act re-enacted in an amendatory act are a continuation of the original act, it is held that repeal of the original act repeals those provisions of the original act which were re-enacted in the amendatory act. And provisions added by the amendatory act which are not complete within themselves, that is, those that must be read together with the re-enacted provisions of the original act in order to be understood or enforced are also held repealed. The same result follows if the original act is not re-enacted as amended because the amendatory act cannot be understood or enforced without reference to the original act. However, if the amendatory act adds a provision that is complete within itself, it is not repealed by the repeal of the original act." Also see State v. Burk, 88 Iowa 661, 56 N.W. 180 (1893).

Very truly yours,

OS/fm

OSCAR STRAUSS
Second Assistant Attorney General

April 15, 1957

Mr. Robert N. Johnson
Lee County Attorney
Fort Madison, Iowa

Dear Mr. Johnson:

Your letter of February 20, 1957, has been handed to me by Mr. Erbe for reply. The first paragraph thereof sets out your problem:

> "The Board of Supervisors of Lee County, Iowa has an excess of funds in the County's domestic animals funds left over from the year of 1956 within the meaning of Section 352.6 of the Iowa Code of 1954. There exists a humane society in the city of Keokuk in our County. That society either already has erected a dog shelter or proposes to erect such shelter and is in need of funds not only for that purpose but for the purpose of maintaining such shelter and the further purpose of furthering the general purpose and intent of any humane society including the care, keep and maintenance of abandoned or injured domestic animals and fowls. The Humane Society is asking the Board of Supervisors to use the excess or part thereof in the payment of the claim of the Society. The question arises with the Board of Supervisors as to whether or not they would have the legal authority to make such contribution or payment of claim when a part of such payment would be used for the care and maintenance of abandoned or injured dogs as well as domestic animals and fowls."

You continue, citing cases, showing that dogs in various jurisdictions have been held both as being within and not within the term "domestic animals" and state: "Therefore, from an examination of the above citations it appears that what is required here is an interpretation of just what the Legislature meant in the enactment of 352.6 in the use of the expression 'Domestic Animals'* * * *."

There appear to be two lines of cases in considering the domesticity of dogs.

In holding that a dog is a domestic animal the reasoning is generally characterized by holding that there is nothing to indicate that the term "domestic' is used in other than its ordinary and popular meaning, and the term in its popular meaning is a broad one, meaning inhabiting, belonging or relating to the household, domesticated, tame as distinguished from wild, etc. On the other hand, reasoning to the effect that a dog is not a domestic animal is generally based on the proposition that dogs are not property. That is, that the dog is of an incomplete or qualified character with respect to its status as property as opposed to animals of a utilitarian character, such as a beast of burden.

Perhaps the status of the dog is best set out at 2 Am. Jur. 691, wherein we find:

> "Above all other animals, the dog has been the subject of spirited discussion in the courts. In the reports of the many cases in which he has figured as a casus belli are to be found glowing tributes to his fidelity and virtue. Poetry and history have been cited in his behalf, and constant allusion has been made to him as the friend of the poor man, the companion of the rich, and the protector of women and children. ****Where the words 'domestic animals' or 'domesticated animals' have appeared in statutes, they have been generally held to include dogs. On the other hand, less admiring courts have not hesitated to stigmatize the dog as a carnivorous beast or a yelping cur. **** While the higher breeds rank among the noblest representatives of the animal kingdom, and are justly esteemed for their intelligence, sagacity, watchfulness, affection, and, above all, for their natural companionship with man, other are inflicted with such serious infirmities of temper as to be little better than a public nuisance. **** on account of their liability to break through all discipline and act according to their original savage nature **** they have always been made the subject of special and peculiar regulations."

In view of such diversity of reasoning and legal precedent we feel that it is best to attempt to define the terms of the section in question in the terms of the context of its own chapter of the Code. As set out in Ellis v. Oliphant, 139 Iowa 514, 141 N. W. 415, and affirmed in Wisdom v. Board of Supervisors, 19 N. W. 2d 602, at 606, the basic plan of the chapter (352) has been the creation of a special fund contributed to by all owners of dogs to meet the claims for damages to domestic animals caused by dogs. With this in mind it seems clear that the Legislature looked with disfavor on the unpredictableness of canine behavior and sought to make dog owners pay for injury to other animals resulting therefrom.

Therefore, feeling certain that the Legislature could not have intended to perpetuate the very evil it sought to provide against in writing such a chapter into law, it is our irresistible conclusion that where the excess monies referred to are paid over to a humane society under this section (352.6) it is incumbent upon the Board to first ascertain that the same will not be used in payment for the care, keep and maintenance of dogs.

I should like to add a further observation in view of the paragraph quoted above. The authority to pay the claims of such societies for the care, keep and maintenance of domestic animals, could not include payment for construction of shelters (to which your letter refers) for such animals.

Very truly yours,

FREEMAN H. FORREST
Assistant Attorney General

FHF:MKB

April 17, 1957

Mr. William G. Klotzbach
Buchanan County Attorney
201½ East Main
Independence, Iowa

Dear Mr. Klotzbach:

Receipt is acknowledged of your letter of April 6th in which you submit the following question:

> "We have the situation in our County wherein Consolidated School District A merged with rural independent B several months ago. Recently this same consolidated School District merged with Rural Independent District C and now petitions are on file for a Rural Independent District D to become merged with consolidated School A. It was brought to the attention of the County Supt. by one of the staff of the State Department that Section 275.10, and in particular the above quoted part thereof, prohibited more than one of these mergers within any 12 month period. Through informal conversations with members of the State Department, I gained the impression that 275.10 only applied to a particular proposal that was defeated and would have no application to a new and different proposal involving 2 different school districts. In view of the existing situation here in Buchanan County, I would appreciate it very much if you would advise me as to your thinking on this particular problem."

57-4-20 ✓

In answer thereto, I enclose a letter opinion dated March 6, 1956, addressed to Mr. Frank Kreamer, Worth County Attorney, pointing out that the 12 month limitation in Section 275.10, Code 1954, applies only to identical propositions but that another practical limitation on frequency of mergers exists under Section 275.24, Code 1954, i.e. no new district exists for the purpose of further enlargement until the following July 1st. I would further advise you that the original successful merger retains exclusive jurisdiction of its territory until said following July 1st under the decision of our Supreme Court in State ex rel Harberts v. Klemme Community School District, 72 N.W.2d 512.

Thus, after one merger has carried under Section 275.10, no further alteration in the new district thus authorized by the voters may take place until after the following July 1st when such new district becomes effective.

Very truly yours,

LEONARD C. ADKINS
Assistant Attorney General

LCA:mfm
Enclosure 1

April 17, 1957

Mr. James L. McDonald
Cherokee County Attorney
Cherokee, Iowa

Dear Mr. McDonald:

Receipt is acknowledged of your letter of April 9th as follows:

"The Aurelia Community School District is engaged in a reorganization, pursuant to the provisions of Chapter 275 of the 1954 Code. This tentative reorganization proposes to include a portion of Afton Consolidated School District. The portion not affected will exceed four government sections. Several of the residents of the Afton Consolidated School District, who are at present included in the tentative reorganization plan of the Aurelia School District, desire to remain in the Afton Consolidated School District. If the Cherokee County Board complies with their wishes to the letter, it would mean that there would be two areas remaining in the Afton Consolidated School District -- one consisting of more than four government sections and the other with less than four government sections, and which two areas are not contiguous.

"The two specific questions are as follows, is it possible to exclude a present school district from a proposed reorganization and in so doing fix the boundaries so that the two remaining areas are not contiguous. Secondly, in the event this is possible and one of the remaining portions of the existing school district is larger than four government sections and the other non-contiguous portion is less than four government sections, is it

57-4-21

possible for the County Board of Education to attach the smaller portion containing less than four sections to another school district according to their county plan, as such procedure is set out in Sec. 275.5 of the Code."

Under our statutes no such thing as a school "district" composed of two non-contiguous bodies of land may lawfully exist. Such was the holding of our Supreme Court in State ex rel Jamieson v. Community Sch. Dist. of St. Ansgar, 75 N.W.2d 86, wherein the Court said at page 91:

"The Iowa Legislature has consistently permitted only the organization of contiguous territory. For example, the Iowa Code section 1801 (1873) in providing for organization of urban independent districts used the words 'such contiguous territory as may best subserve the convenience of the people for school purposes'. Also see Iowa Code sections 2794 and 2794(a) (1917) and Iowa Code revision of 1860, chapter 69 . . . "

Thus, the answer to your first question is that a presently-existing consolidated school district the territory of which is reduced by creation of a new school district may not continue its existence in a non-contiguous state.

In answer to your second question, I would refer you to the decision of our Supreme Court in Liberty Consolidated School District v. Schindler, 246 Iowa 1300, 70 N.W.2d 544, which holds that a consolidated district may be reduced to less than sixteen sections. Thus, given that non-contiguous districts may not exist; that a consolidated district may be reduced to less than sixteen sections; and that under Section 275.5, Code 1954, remaining portions of less than four sections are to be attached by the county board to some (contiguous) school district; it follows that in the situation you describe the remaining portion of more than four sections in area would continue to exist as a consolidated school district and that the remaining portion of less than four sections in area would be subject to attachment by the county board of education to any contiguous school district.

Such attachment, under prior opinions of this office, may be to any contiguous school district including the newly-formed community school district but, in any event, the "remain-

ing portion" must be attached as a whole without further subdivision in the process of attachment.

Very truly yours,

LEONARD C. ADELS
Assistant Attorney General

LCA:mfm

April 18, 1957

Frances G. Knight
Director, Passport Office
Department of State
Washington 25, D. C.

Re: Y130 - Hatt, Steven Patrick

Dear Madam:

Your letter of April 2nd has been referred to me by Governor Loveless. In your letter you state as follows:

> "We have under consideration a report of birth executed at the American Consulate at Rabat, Morocco on September 4, 1953 by Russell Lowell Hatt in behalf of his alleged son, Steven Patrick Hatt, who was born at Port-Lyautey, Morocco on August 12, 1953.
>
> "Russell Lowell Hatt was born at Sioux City, Iowa on November 10, 1924 and is said to have resided in the state of Iowa until 1943 when he entered the United States Air Force. He married the alien mother of Steven Patrick Hatt on December 10, 1954 in Morocco. Mrs. Hatt, who was married at the time of the birth of Steven Patrick Hatt to one Fernand Saoud Dray from whom she was not legally divorced until April 14, 1954, has said that she left Mr. Dray in 1948 and commenced to live with Mr. Hatt in Morocco as his wife in November 1952. Russell Lowell Hatt died in Morocco on December 2, 1955.

57-4-22

"Section 309(a) of the Immigration and Nationality Act of 1952 provides as follows:

"'The provisions of paragraphs (3), (4), (5), and (7) of Section 301(a) and of paragraph (2) of Section 308, of this title shall apply as of the date of birth to a child born out of wedlock on or after the effective date of this Act, if the paternity of such child is established while such child is under the age of twenty-one years by legitimation.'

"In determining whether Steven Patrick Hatt has been legitimated by Russell Lowell Hatt the Department may resort to either the laws of the state in the United States in which the putative American citizen father claimed domicile or the laws of the foreign country of the child's birth. Since Mrs. Hatt, who desires to proceed to the United States with her family, has not been able to produce any evidence that Steven Patrick Hatt has been legitimated by Russell Lowell Hatt under the laws of Morocco, we would appreciate your opinion whether or not under the laws of the state of Iowa, Steven Patrick Hatt is considered for all purposes to be the legitimated child of Russell Lowell Hatt."

In answer thereto I would advise you that the laws of Iowa relating to illegitimacy refer to children born out of wedlock (Chapter 675, Code 1954). According to the facts of your letter, the child in question was not born out of wedlock but rather while the mother was married to one Fernand Saoud Dray. In view of the presumption of legitimacy (see enclosed opinion dated January 1-, 1957, addressed to the State Board of Control), it appears that had the events described in your letter taken place in Iowa the child, in the absence of Court decision to the contrary, would be presumed the legitimate offspring of Fernand Saoud Dray and not the offspring of Russell Lowell Hatt.

Very truly yours,

NORMAN A. ERBE
Attorney General of Iowa

NAE:LCA:mfn
Enclosure

April 18, 1957

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

My dear Governor:

This will acknowledge receipt of yours of the 11th inst. in which you have submitted the following:

> "I respectfully request a ruling of the Attorney General on the following question:
>
> "Does the Constitution of Iowa require that the General Assembly reconsider a bill which is vetoed by the Governor? In particular, is a reconsideration required for a disapproved revenue bill?
>
> "Article III, (Legislative Department,) Section 16, Constitution of Iowa, provides that if a Governor disapproves a bill which has passed the General Assembly 'he shall return it with his objections, to the house in which it originated, which shall enter the same upon their journal, and proceed to reconsider it;' (emphasis supplied). The relevant aspect of the question, then, would appear to be whether or not the mandatory provision for entry upon their journals also applies to reconsideration.
>
> "An early reply to this request will be appreciated."

In reply thereto we advise as follows:

1. Insofar as the mandatory character of the constitutional provision for reconsideration after the receipt of a veto

57-4-23 ✓

message and its journalization on the records of the house in which the vetoed bill originated is concerned, we would call to your attention the following from the case of Smith v. Thompson, 219 Iowa 888, 258 N. W. 190:

> " * * * * In Iowa, we have consistently held that our constitutional provisions are mandatory, and that they must apply to and govern the people as well as all government agencies, including the Legislature."

2. Incident to the mandatory requirement imposed upon the Legislature in respect to governmental veto, their further duty and power in the premises is described in the case of James Clyde Meeks, Petitioner v. Percy A. Lainson, Warden, Iowa State Penitentiary, Respondent, 236 F. 2d 395, wherein addressing itself to the foregoing proposition, the court said:

> " * * * * The only alleged defect in the organization of the 43rd Iowa Legislative Assembly, claimed to render its enactments void, was the failure of the Iowa legislature to carry out the designated mandates of the state constitution. But those mandates are directed to the legislature and not to the courts. Their language is that 'The General Assembly shall pass laws' and 'The General Assembly shall fix the ratio of representation' and it is elemental that such constitutional directions to the legislature are not self-executing. As stated in 16 C. J. S., Constitutional Law:
>
> "'Constitutional provisions are not self-executing * * * if the language of the constitution is directed to the legislature.' §48, p. 145.

> "'Although the legislature is bound or concluded by mandatory provisions of a constitution, and it is under an obligation to perform the duties and discharge the function imposed on it by the constitution in accordance with its mandate, if the legislature fails to do so, and neglects or refuses to pass legislation as required by a mandatory constitutional provision, there is no remedy which can be invoked to compel performance.' §65, pp. 177, 178.
>
> "'A constitutional provision which is not self-executing remains inoperative until rendered effective by supplemental legislation.' §48, p. 146.
>
> "'Clauses in a constitution which are not self-executing, but which direct legislation to carry them into effect, have at most no more than moral force, even when mandatory in terms; and there is no remedy if the legislature fails to act in accordance with the directions of a mandatory provision.' §48, p. 146.
>
> "Many cases are cited in support of these texts. As to Iowa, the last citation is to Pierce v. Green, 229 Iowa 22, 294 N. W. 237, 243, 131 A. L. R. 335, where the court said:
>
> "'The provisions of the State Constitution, above noted, are not self-executing, but require legislative action to make them effective.'"

From the foregoing it seems that while a duty rests upon the General Assembly to reconsider a vetoed bill, no remedy is provided for its failure to perform such duty or its pursuit

of other procedure in connection with the veto short of actual reconsideration.

Very truly yours,

NORMAN A. ERBE
Attorney General of Iowa

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

April 18, 1957

Mr. L. E. Sauvain, Purchasing Agent
Iowa State College
Ames, Iowa

Dear Sir:

We have your letter of April 16 and are in complete support of your position that Iowa State College is exempt from all taxes that might relate to the cost of recapped or recapping tires. Section 422.45(5), Code 1954, is very explicit with regard to the Iowa sales and use tax and the exemption therein provided as to tax certifying and tax levying bodies of the State of Iowa and subdivisions of same.

Section 4224 of the Internal Revenue Code, made applicable to Part II of Chapter 32, Internal Revenue Code of 1954, which last chapter imposes a tax on tires, tubes and retread rubber, provides:

"SEC. 4224. STATE AND LOCAL GOVERNMENTAL EXEMPTION.

"Under regulations prescribed by the Secretary or his delegate, no tax shall be imposed under this chapter upon the sale of any article for the exclusive use of any State, Territory of the United States, or any political subdivision of the foregoing, or the District of Columbia."

We cannot know from your letter the exact reference of the Firestone Company in what is nominated by that company as "Estimated Tax Expense" on recapped tires but fail to see, on the facts available, how such an item would have any relevance to a purchase or recapping contract relating to recapped tires.

Very truly yours,

M. A. Iverson,
Special Assistant Attorney General

MAI:fs

57-4-24

60M 11-56-10915
PE-C-8776

Form 13

IOWA STATE HIGHWAY COMMISSION

AMES, IOWA

Ames, Iowa

April 18, 1957

Mr. Frank H. Kreamer
County Attorney
Northwood, Iowa

Dear Mr. Kreamer:

This will acknowledge receipt of your letter of the 4th of April, wherein you ask, "If the drainage system is not established under any Code provision***and the County Board of Supervisors has no jurisdiction or obligation to supervise or in any way manage the affairs of the mutual agreement drainage project; then do they have the duty to pay the cost of changing present adequate culvert installations if requested to do so by the property owners?"

In my letter to Mr. Ensign of January 23, 1957, I discussed the various methods of establishing drainage districts. I now quote from that letter: "If the drainage district has been legally established by one of the three methods above, all of them requiring some affirmative action by the Board of Supervisors, then the Board of Supervisors under Section 455.118 has the duty to construct a roadway over the drainage ditch.

I presume from your letter that this is a drainage district established by mutual agreement of the landowners and affirmative action has been taken by the Board of Supervisors to so establish. I call your attention to the wording of Section 455.118, Code of 1954, which reads in part, '***The Board of Supervisors when in the exercise of its sound discretion it appears that it will promote the general public welfare shall move, build, or rebuild the same***'".

It should be emphasized that the drainage district must have been legally established. The requirements for legal establishment of a mutual agreement drainage district are set out in Sections 455.152 to 455.155, inclusive. There must be a mutual agreement in writing which sets down such matters as are prescribed in 455.153, then 455.154 requires affirmative action by the Board.

From the facts given in your letter and the enclosure from the County Engineer, it would appear that what really exists is not a drainage district by mutual agreement, but rather something which might be termed a gentlemen's agreement brought about by

57-4-25

60M 11-56-10915
PR-C-8776

Form 13

IOWA STATE HIGHWAY COMMISSION

AMES, IOWA

good fellowship wherein a group of individuals make no attempt to comply with the statutory requirements, but are simply digging a ditch with little regard to where it terminates.

Under the facts assumed, this office is of the opinion that you are entirely correct, and that the case of Droegmiller vs. Olson, 241 Iowa 456 does support your interpretation. Insofar as my last letter to Mr. Ensign is concerned, it should be emphasized that the Board of Supervisors is given the power to exercise its discretion with respect to moving, building or rebuilding a road which a drainage district crosses, and that it's only obligated to do so in cases of legally established drainage districts.

Yours very truly,

C. J. Lyman
Special Assistant Attorney General
for Iowa State Highway Commission

CJL:js

April 22, 1957

Hon. Don A. Petrucelli
House of Representatives
L O C A L

My dear sir:

Referring to your oral request for an opinion of the status of House File 372 relating to urban transit companies and systems effected by opinion issued April 15th to the Hon. Jack Schoeder concerning matters connected with the passage of House File 440, I would advise you that the opinion referred to concerned itself with the effect of the repeal of Chapter 324, Code of 1954, upon bills either passed by the 57th General Assembly and now law or bills in process of legislative action which proposed to amend parts of Chapter 324, Code of 1954, when and as repealed.

It was my opinion, as voiced in the letter referred to, that repeal of Chapter 324 would result in the repeal of the foregoing bills enacted or to be enacted. The foregoing

57-4-2.6

is not the situation presented by the repeal of Chapter 324 and its effect upon House File 372.

The relation between House File 372 and Chapter 324 is contained in Section 4 of House File 372 which provides as follows:

> "Sec. 4. Sections three hundred twenty-one point one hundred nineteen (321.119) and three hundred twenty-four point two (324.2), Code 1954, as amended by chapters forty-four (44) and one hundred seventy-one (171), Acts of the Fifty-sixth General Assembly, and section three hundred twenty-six point two (326.2), Code 1954, shall not be applicable to urban transit companies or systems."

It will be seen this provision is merely a reference to a certain section of Chapter 324 to the point that the Legislature deemed it not applicable to House File 372 treating of urban transit companies and systems.

In other words, Section 4 of House File 372 negatives any effect of a certain section of Chapter 324 as having any bearing upon House File 372.

The rule applicable to this situation is stated in Sutherland Statutory Construction, 3rd Edition, page 549, as follows:

> "Similarly, repeal of the statute referred to will have no effect on the reference statute unless the reference statute is repealed by implication with the referred statute."

The same rule is stated in the following language in the case of In re Heath, 144 U.S. page 93:

> "Prior acts may be incorporated in a subsequent one in terms or by relation, and when this is done, the repeal of the former leaves the latter in force, unless also repealed expressly or by necessary implication."

As applied to the situation presented, the repeal of the section quoted of Chapter 324 would not operate to repeal the reference to Section 324.2 by House File 372 and on the other hand, would recognize the reference in House File 372 to any substitute to Section 324.2.

The foregoing conclusion bears confirmation of like treatment of like previous situations by the Code Editor.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:mfm

April 22, 1957

Mr. Arthur H. Johnson
County Attorney of Webster County
607 Snell Building
Fort Dodge, Iowa

Dear Mr. Johnson:

We have re-examined our opinion of June 13, 1956 in conjunction with your letter of April 18, 1957 and the petition in the matter of Paul F. Bestick, et al, plaintiffs, vs. Webster County, Iowa, et al, defendants. We re-affirm our views of this situation for the reasons stated in our opinion of June 13, 1956.

In response to the specific questions in your letter of April 18th, I would suggest a special appearance questioning the jurisdiction of the court over the subject matter of this action on the combined grounds that this question was res judicata and that the court has no original jurisdiction to adjust property tax valuations along this line. It may be noted that the petition does not allege jurisdictional facts in that it does not allege an appeal was taken to the Board of Review and that this action is an appeal from any action they might have taken.

Under the Jewett Realty Company case which is reported in 239 Iowa 988, 33 N. W. 2d 377 and the case of Crown Concrete Company vs. Conkling, 1956, 75 N. W. 2d 351, mandamus will lie to compel refund of taxes illegally or erroneously paid in a proper case even though such payment was voluntary. Thus the essential question is whether the taxes were "erroneously or illegally exacted or paid" and whether the taxes were paid under protest or not would seem to be of no particular significance. With respect to your question regarding a statute of limitations, we are sending you a copy of our opinion dated January 10, 1957 addressed to Mr. Ballard B. Tipton, Director of the Property Tax Division of the Tax Commission.

You asked if there is a statute or body of law which prohibits an assessment being made on a business of this sort by the methods which the plaintiffs allege were

57-4-27 ✓

employed by the assessor and as to whether the petition is merely a claim of excessive valuation or is predicated on something more. The petition is obviously drafted with the end in mind of bringing it under the provisions of section 445.60 by showing, if possible, that the formula used by the assessor produced inequitable results. It is always difficult to predict whether the court might be led astray on such contentions but to our mind the conditions with regard to the formula are pure "window-dressing" to try to get this case under section 445.60 and the only real contention of the petition is that the average inventories were overvalued. Under the statutes, appeal from an excessive assessment, not subject to the exceptions set out in the Jewett case, supra, is to take an appeal to the Board of Review and then, if necessary, to the District Court. This procedure is mandatory and jurisdictional as you will note by note 11 to section 445.60 of the Iowa Code Annotated.

We know of no body of law which suggests that an assessor, in his own mind, cannot use any thought process he sees fit in arriving at a valuation. As you will note by such cases as Corn Belt Theatre Corporation vs. Board of Review, City of Oskaloosa, 334 Iowa 355, 12 N. W. 2d. 820 and Deur vs. Local Board of Reveiw of Cass Tp., Harrison County, 232 Iowa 989, 7 N. W. 2d. 39, it is presumed that the assessing officer has acted legally in making his assessment and the burden of proving otherwise is upon the complainant. For further citations on this point see note 15 to section 441.13 of the Iowa Code Annotated. You have a point in your favor in your finding that the assessment of the stock of all gas stations within the assessment district were made on the same basis. In this connection see J. Rosenbaum and Sons, Inc., vs. Coulson, 246 Iowa 848, 69 N. W. 2d. 403.

We send herewith the briefs and arguments of the Iowa Power and Light Company and the Iowa State Tax Commission in their recent controversy for your temporary use for the reason that there is much authority in them which we believe will be helpful to you. This case was settled amicably without loss to the State but since these are the only copies we have, we would appreciate your returning these briefs as soon as you can conveniently do so.

One further remark we would make is that under no circumstances would the plaintiffs in this case be entitled to interest on any tax refund the court might find otherwise proper. See the Conkling case above cited.

As you may have concluded already, your best hope in this situation is to defeat the petition on jurisdictional grounds. I know you have some doubt in your own mind as to the accuracy of the assessment if it should come to its merits. The jurisdictional questions should, we feel, be raised in the interests of orderliness and certainty in tax assessment and collection. The plaintiffs have had their statutory day in court in that they had the right of appeal which they waived by their inaction.

Very truly yours,

M. A. Iverson,
Special Assistant Attorney General

MAI:lp

P. S. -- We are returning the petition herewith.

M. A. I.

April 24, 1957

SF 1 as amended and passed after this question was written changes the answer to the second question [illegible]

Hon. Herschel C. Loveless
Governor of the State of Iowa
Office of the Governor
L O C A L

Dear Sir:

Receipt is acknowledged of your letter of April [illegible] as follows:

"I hereby request opinions of the Attorney General on two questions raised in connection with House File 158, as amended, an Act relating to the Reorganization of School Districts, as follows:

"First, Section 12, House File 158 repeals Section 275.12, Code 1954, and enacts a substitute therefore, House File 14, previously passed by the 57th General Assembly and signed by the Governor contains (as Section 1, HF 14) an amendment to Section 275.12, Code 1954. The question at issue is 'Does (Will) the signing of House File 158, by the Governor, repeal, or supersede Section 1, House File 14?'

"Second, an amendment to House File 158, amended Section 5 by substituting the following (only the portions of the amendment relevant to the question raised is quoted below):

"'The voters residing within the proposed boundaries shall vote separately in each existing school district affected upon the proposition to create such new corporation. School districts affected

57-4-28

shall be defined as those districts, all or any portion of which are within the area included in the proposed new school district.'

"The question raised in connection with the portion of the amendment quoted is as follows:

"Is there a conflict between the first and second sentences? That is, the first sentence seems to define an eligible voter as one residing within the proposed boundaries; the second sentence seems to define an eligible voter as one living in any district any portion of which is included in the proposed boundaries (emphasis supplied).

"Your early attention to this request will be appreciated. House File 150 must be acted on Thursday."

To review the situation presented by your first question:

1. House File 150 repeals Section 275.12 of the Code and enacts a substitute.

2. House File 14 amends the Code section so repealed by House File 150 by adding thereto an independent provision.

Your question is whether the repeal of the said Code section by House File 150 also repeals the amendment thereto in House File 14.

The significant factor which controls the answer to your question is that House File 150 contains a publication clause but House File 14 does not. This means that House File 150 will become effective as law upon publication but House File 14 will not become effective as law until July 4th. Thus, upon publication of House File 150, the present provisions of Section 275.12 will cease to exist but Section 275.12 will continue in existence containing the new provisions enacted in lieu of those repealed. Thus, when July 4th arrives, Section 275.12, as it then exists, will be further amended by addition of the independent provision in House File 14 effective as law that date.

The rule with respect to repeal of amendments as affected by repeal of the original act is stated in Sutherland Statutory Construction, 3rd Edition, Section 139, as follows:

"On the theory that provisions of the original act re-enacted in an amendatory act are a continuation of the original act, it is held that repeal

of the original act repeals those provisions of the original act which were re-enacted in the amendatory act. And provisions added by the amendatory act which are not complete within themselves, that is, those that must be read together with the re-enacted provisions of the original act in order to be understood or enforced are also held repealed. The same result follows if the original act is not re-enacted as amended because the amendatory act cannot be understood or enforced without reference to the original act. However, if the amendatory act adds a provision that is complete within itself, it is not repealed by the repeal of the original act." Also see State v. Hunt, 84 Iowa 661, 51 N.W. 193 (1893). (Emphasis ours)

In direct answer to your question, this office is of the opinion that approval of House File 153 of the Governor would not have the effect of repealing or superseding Section 1 of House File 14.

In answer to your second question, the portion of Section 5, House File 153, quoted in your letter, defines in its first sentence, the class of voters eligible to vote at a school reorganization election as those "residing within the proposed boundaries". The second sentence merely defines the phrase "school districts affected" which phrase is not used in the preceding sentence and bears no apparent relation to the qualification of voters. Thus, by virtue of the language of the first quoted sentence, only those residing "within the proposed boundaries" are eligible to vote at a school reorganization election."

Very truly yours,

MURRAY E. KRUSE
Attorney General of Iowa

LEONARD C. ABBAS
Assistant Attorney General

LCA:mfm
Enclosures

April 28, 1957

Hon. Wilbur C. Nelson
Senate Chambers
L O C A L

Dear Sir:

Receipt is acknowledged of your letter of April 23rd as follows:

"In connection with Senate File 1 your attention is invited to that part of the bill which provides for payment of the Agriculture Land Tax Credit.

"The Senate has adopted an amendment inserting after the word 'law' in line 24 the word 'hereafter'.

"You are requested to advise as to the necessity of this amendment in order that Senate File 1 will clearly require the payment of the tax credit after the enactment of Senate File 1 and you are requested to advise as to the effect of the payment of said tax credit in full prior to but effective date of Senate File 1.

"In the event that the legislature amends House File 153 relative to section 1 of the Senate Committee Amendment by striking the words in lines three and four thereof, namely 'within the proposed boundaries' and inserting in lieu thereof the words 'in the school districts affected', then what will be the effect of the words in section 4 lines two and four of Senate File 1 which read 'or portion thereof'."

57-4-29

The provisions of Senate File 1 to which your first question pertains, would read as follows:

> " . . . provided . . . the full payment of the agriculture land tax credit as provided in Chapter 426, Code of Iowa, has been made (hereafter) for at least one year prior to July 1, 1962."

Your question is whether the word "hereafter", as indicated in parentheses, need be inserted in order to insure that the condition stated will operate only prospectively and will not be deemed satisfied by the full payment of agricultural land tax credit reported to have been made in the year 1956. On several occasions our Supreme Court has announced the rule of construction that the legislature is presumed not to have knowingly enacted any meaningless statutes. However, the inclusion in a statute of a condition known to have been fulfilled would seem to be meaningless. Accordingly, to give meaning to the quoted provision, it must only be considered as operating prospectively whether or not the word "hereafter" be inserted.

The provision in House File 15 to which your second question relates is as follows:

> "The voters residing within the proposed boundaries shall vote separately in each existing school district affected upon the proposition to create such new district. School districts affected shall be defined as those districts, all or any portion of which are within the area included in the proposed new school district . . .

As the quoted provision now stands, the first quoted sentence defines the class of eligible voters as those "residing within the proposed boundaries". The second sentence defines "school districts affected" but bears no relation to the eligible class created in the first sentence for the reason that the term so defined is not used in the first sentence. Consequently, the amendment suggested in your second question would have the effect of broadening the class of eligible voters to include those residing within any portion of "school districts affected" irrespective of whether or not they resided "within the proposed boundaries.

Very truly yours,

RICHARD C. TURNER
Attorney General of Iowa

LEONARD C. ADKINS
Assistant Attorney General

LCA:mfh

April 24, 1957

Mr. Leslie P. Turner
Chickasaw County Attorney
Nashua, Iowa

Dear Mr. Turner:

Receipt is acknowledged of your letter of April 20th as follows:

"I would like an opinion from your office relative to the validity of an election held under the provisions of Chapter 275 of the 1954 Code, to form a community School District. The facts of the situation are as follows:

"On April 9, 1957, an election was held to vote on the question as to whether or not the Nashua Community School District should be created. This election resulted in an affirmative vote in 18 of the 24 districts voting which is 75% of the districts involved. Two of the districts that voted affirmative are islands and not contiguous to the districts that voted affirmatively in any manner, being separated from the rest of the districts by those districts who voted against the reorganization plan. The County Superintendent of Schools has ruled, on advice from the office of the State Board of Education, that the election failed to carry because two of the districts voting affirmatively were not contiguous to the rest of the districts that voted in the affirmative. My questions are as follows:

"1. Is the Nashua Community School District

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legally formed where two of the districts voting affirmative are not contiguous with the rest of the districts voting affirmatively?

"2. If the answer to the above question is yes, are those two districts part of the reorganized district even though they are not contiguous in any manner, or is the district comprised of only those districts that voted affirmatively and are contiguous.

"3. In the event that it is your opinion that the district is legally formed, is it the duty of the County Attorney to compel the County Superintendent of Schools to call an election to elect the members of the Board of the newly organized District by an action in mandamus?"

In answer thereto, I would advise you that the answer to your first question is furnished in the negative by the decision of our Supreme Court in State ex rel Worrington v. Community School District of St. Anmar, 76 N.W.2d 86, at pages 91 and 92.

In view of the answer to your first question, it is unnecessary to answer your second and third questions.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

April 25, 1957

Mr. Clinton H. Moyer, Commissioner
Department of Public Safety
L o c a l

Attention: Mr. Barry Minear
Deputy Commissioner

Dear Mr. Moyer:

We have your recent letter concerning the registration of farm equipment in which you submit the following questions:

> "1. Does the registration of a wagon box trailer, as provided in Section 321.123 (1) at a fee of $5.00, permit such a trailer to be used in the same manner as trailers registered under the provisions of the other paragraphs of this section; or is such registration limited to the uses enumerated, i. e., 'in transporting produce, farm products or supplies hauled to and from market'?
>
> "2. Would a vehicle designated specifically for agricultural purposes be exempt under Section 321.18 (3) regardless of the use of the vehicle, or does the exemption depend upon the use to which the vehicle is put? For example, would a manure spreader be exempt from registration requirements if it were used by its owner to transport personal household goods?"

With regard to your first question concerning the interpretation of Section 321.123 (1) the statute appears to be self-explanatory. It is our opinion that so long as the trailer is of a wagon box type and is being used by a farmer in transporting produce, farm products or supplies to and from market, the $5.00 fee would be all that would be required. The weight provisions contained in the later sections would not be applicable so long as the specific terms of the exceptions pertaining to farmers were followed.

57-4-31

With regard to your second question, the authorities indicate that such exemptions shall be strictly construed. See Wood Brothers Thresher Company v. Eicher, 231 Iowa 550, 1 N. W. 2d 655; Worthington v. McDonald, 246 Iowa 466, 68 N. W. 2d 89. The Worthington case indicates that if the implement of husbandry is used exclusively for agricultural operations but is only temporarily being moved upon the highway the exemption from width limitations would prevail. We likewise feel the exemption from registration requirements would be treated by the courts in the same manner. See also Bean v. Reeves, 77 S. W. 2d 737.

It is therefore our opinion that if a manure spreader was being used temporarily upon the highways by a farmer moving from one farm to another and carrying his personal household effects as an incidental part of the temporary movement that the manure spreader would be exempt from registration requirements under Section 321.18 (3) of the 1954 Code.

Very truly yours,

DON C. SWANSON
Assistant Attorney General

DCS:MKB

April 25, 1957

Mr. A. F. Draheim, Jr.
Wright County Attorney
Clarion, Iowa

Dear Mr. Draheim:

Re: Registration of Farm Trailers

We have your recent letter in which you set forth the following questions concerning the registration of farm trailers:

> "A case now pending in a Justice of Peace Court in Cerro Gordo County involving a citizen from Wright County has been brought to the attention of this office. The case involves a statutory interpretation by two State Departments.
>
> "The Iowa State Highway Department has apparently instructed their officers, pursuant to Iowa Code Section 321.466 (1954), to summon individuals pulling farm trailers by motor vehicles, on the public highways, and who do not have such trailers registered or licensed.
>
> "The Department of Public Safety has apparently informed their officers not to issue any summons for the above in view of Iowa Code Section 321.123 (1954), unless the farm trailer being drawn by a motor vehicle is transporting a product to market. The County Treasurer in and for Wright County has advised the owners of farm trailers that no registration is necessary, pursuant to Section 321.123.
>
> "Please forward an opinion from your office. This lack of uniformity has caused considerable concern by several counties, their officials, citizens and law enforcement agencies."

Under Section 321.123 of the 1954 Code and under Section 321.466 all trailers are required to be registered in some manner unless they fall within one of the specific exemptions. These exceptions are set forth in Section 321.18 of the 1954 Code and subsections 2 and 3 which read as follows would appear to be applicable to your question.

57-4-32

"321.18 Vehicles subject to registration - exception. Every motor vehicle, trailer, and semitrailer when driven or moved upon a highway shall be subject to the registration provisions of this chapter except:

* * * *

2. Any such vehicle which is driven or moved upon a highway only for the purpose of crossing such highway from one property to another.

3. Any implement of husbandry.

* * * *"

Naturally the interpretation of both of these sections depends upon the facts of the individual case. If a trailer were merely crossing over the highway or a farmer was taking it from one field to another it would appear to fall within the exceptions listed. Likewise, if its use on or about the farm was such as to classify it as an implement of husbandry and its movement on the highway was merely incidental it would also be exempted from registration. See Wood Brothers Thresher Company v. Eicher 231 Iowa 550, 1 N. W. 2d 655; Worthington v. McDonald, 246 Iowa 466, 68 N. W. 2d 89; Bean v. Reeves, 77 S. W. 2d 737.

From a discussion with the Department of Public Safety it would appear that the vast majority of farm trailers fall within the first paragraph of Section 321.123 covering "wagon box trailers used by a farmer in transporting produce, farm products or supplies hauled to and from market".

It is therefore the opinion of this office that unless a farm trailer falls specifically within the exceptions set forth in Section 321.18 of the 1954 Code that it should be registered under the provisions of Section 321.123.

Very truly yours,

DON C. SWANSON
Assistant Attorney General

DCS:MKB

April 26, 1957

Mr. Herman J. Schaefer
City Attorney
Ottumwa, Iowa

My dear Mr. Schaefer:

I acknowledge receipt of yours of the 20th inst. in which you enclosed a copy of an opinion issued by you to the Chairman of your Civil Service Commission under date of April 11, 1957. Your opinion including a statement of the situation presented follows:

> "This is in answer to your letter of April 3, 1957, in regard to promotional examinations for policemen.
>
> "I called your attention to Section 365.9 Code of Iowa, 1954. I am setting out in full this Section for your convenience and guidance.
>
> "'The commission shall, during the month of April of each second year, and at such other times as shall be found necessary, under such rules as shall be prescribed and published in advance by the commission and posted in the City Hall, hold competitive promotional examinations for the purpose of determining the qualifications of applicants for promotion to a higher grade under civil service, which examinations shall be practical in character, and shall relate to such matters as will fairly test the ability of the applicant to discharge the duties of the position to which he seeks promotion.
>
> "'Hereafter, all vacancies in the civil service grades above the lowest in each department shall be filled by promotion of subordinates when such subordinates qualify as eligible, and when so promoted, they shall hold such position with full civil service rights therein.'

57-4-33 ✓

"You will note that the paragraph reads in part as follows: 'The commission shall, during the month of April of each second year, **** hold competitive promotional examinations for the purpose of determining the qualifications of applicants for promotion to a higher grade under civil service ****.' In my opinion the word 'shall', as used in this Section, means that you are obligated or must hold such examinations in the month of April of each second year.

"From the records I find that the last regular promotional examination held for policemen was in April, 1953. The examination that should have been held in April, 1955, was not held.

"I also find that on October 3, 1956, you held a promotion examination for policemen, and in April, 1955, you did hold a promotional examination for firemen.

"In my opinion it is mandatory that the Civil Service Commission hold promotional examinations for all grades in both the police department and fire department and these examinations must be held during this month of April, 1957.

"The result of these examinations will be that you will have in each department a new eligibility list or in other words, the present eligibility list in both departments will be ineffective.

"It is suggested that all members of the fire department and police department be advised of this opinion in order that any of them that might wish to be promoted during the next two years will have an opportunity to take promotional examinations during this month.

"I trust that this answers all of your inquiries."

With reference to the foregoing I would advise you that in my view the intermediate examinations taken for firemen in April, 1955 and for policemen in October, 1956, provided a legal promotional eligibility list. My reason for this conclusion is

two-fold. First, by the terms of the statute such examinations are provided for. The statute, Section 365.9, provides as follows:

> "Promotional examinations - promotions. The commission shall, during the month of April of each second year, and at such other times as shall be found necessary, under such rules as shall be prescribed and published in advance by the commission, and posted in the cityhall, hold competitive promotional examinations for the purpose of determining the qualifications of applicants for promotion to a higher grade under civil service, which examinations shall be practical in character, and shall relate to such matters as will fairly test the ability of the applicant to discharge the duties of the position to which he seeks promotion.
>
> "Hereafter, all vacancies in the civil service grades above the lowest in each department shall be filled by promotion of subordinates when such subordinates qualify as eligible, and when so promoted, they shall hold such position with full civil service rights therein."

It is clear, therefore, that while the foregoing statute does provide that promotional examinations shall be held in April every two years, it also authorizes such promotional examinations when found necessary. Nothing in the statute expressly or impliedly voids the promotional list resulting from such intermediate examinations. Therefore, in my view such lists are valid eligibility lists for promotional purposes.

Second, the law with respect to the performance of duties of public officials at the time fixed by statute is stated in Younker Brothers v. Zirbel, 234 Iowa 269, 12 N. W. 2d 219, 151 A. L. R. 42, as follows:

"The general rule is well expressed by a quotation from 23 Am. & Eng. Ency. of Law, 458, in Hubbell v. 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 generally 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. v. 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 v. Savery, supra, 44 Iowa 654, 655-657, of a statement of the principle by the Supreme Court of the United States in French v. Edwards, 13 Wall. 506, 20 L. Ed. 702. Quoting from Sutherland on Statutory Construction, sections 446-448, the court in Hubbell v. 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 time must be considered as a limitation of the power of the officer.' In Easton v. 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.'"

From the foregoing it is my view that while the statute provides for holding the promotional examinations in April every two years the statute is directory and failure to hold the examinations at such time does not deprive the Commission of power to hold such examinations at such other times as they may find necessary.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB
cc: Honorable Herschel C. Loveless

April 26, 1957

Mr. R. W. Bobzin, Secretary
Board of Parole
B u i l d i n g

Dear Mr. Bobzin:

Your letter to the Attorney General dated March 4, 1957, has been handed to me for reply.

In it are two questions, the first of which you set out as follows:

> "Specifically, is it the duty or responsibility of the Board of Parole to make recommendations to the Governor wherein applications have been made to him for suspended jail sentences, discharges from suspended sentences, restoration of citizenship, and remission of fines.
>
> "It is recognized that under Section 248.3 the Board shall recommend to the Governor the discharge or pardon of prisoners committed to the penitentiary or men's or women's reformatory as have acceptably served not less than twelve months of their paroles and who have by their conduct given satisfactory evidence that they will continue to be law-abiding citizens. It is also evident under Section 248.6 that after conviction for a felony no pardon or commutation of sentence shall be granted by the Governor until he shall have presented the matter to and obtained the advice of the Board of Parole.
>
> "Because of the increasing burden of this additional work and the shortage of help in our office, the Board is requesting your opinion as to whether it has any responsibility to make recommendations in these other cases."

For convenience, the following pertinent Code sections, or parts thereof, are set out:

57-4-34

"247.5 Power to parole after commitment. The board of parole shall, except as to prisoners serving life terms, or under sentence of death, or infected with venereal disease in communicable stage, have power to parole persons convicted of crime and committed to either the penitentiary or the men's or women's reformatory. * * * *"

"Sec. 247.13 Investigations. Said board shall have power to make any investigation which it may deem necessary in order to determine the facts relative to matters coming before it, * * * *."

"248.3 Recommendation for pardon. The board of parole shall recommend to the governor the discharge or pardon of such prisoners committed to the penitentiary or the men's or women's reformatory as have acceptably served not less than twelve months of their parole and who have, by their conduct, given satisfactory evidence that they will continue to be law-abiding citizens."

"248.5 Record. All recommendations of the board shall be entered in the proper records of the board."

"248.6 Conditions prerequisite to a pardon. After conviction for a felony, no pardon or commutation of sentence shall be granted by the governor until he shall have presented the matter to, and obtained the advice of, the board of parole, but he may commute a death sentence to imprisonment in the penitentiary for life, without making such reference or obtaining such advice."

"248.8 Investigation. The board shall, under the direction of the governor, take charge of all correspondence in reference to the pardon of persons convicted of crimes and carefully investigate each application, and file its recommendation with the governor with its reasons for the same."

Under Section 247.5 the Board's functions are limited to parole of persons committed to the penitentiary or the men's or women's reformatory, and under Section 247.13 its investigative powers is limited to determination of "the facts relative to matters coming before it."

Section 248.3 makes it the duty of the Board to recommend to the Governor the discharge or pardon of such prisoners committed to the penitentiary or men's or women's reformatory as have met certain conditions.

Section 248.6 requires that the Governor present to, and obtain the advice of the parole board before granting any pardon or commutation after a felony conviction. Under Section 248.8 the Governor may direct the Board to take charge of all correspondence and carefully investigate each application for pardon of any person convicted of a crime and file with him their recommendations and reasons therefor.

Sections 687.2 and 687.3 define a felony as a crime, conviction for which the punishment may be death or imprisonment in the penitentiary or men's or women's reformatory.

The province of the Governor in criminal rehabilitation under the Constitution of Iowa (Sec. 16, Art. IV) and Sections 248.1, 248.9, 248.10, 248.11, 248.12 and 248.13 is to grant reprieves, pardons, commutations of sentence, restoration of citizenship rights or remittance of fines or forfeitures and to maintain the records thereof.

The province of the Parole Board is (1) to makenecessary investigations preparatory to granting paroles, and, if certain standards are met, to grant the same, and to follow through on each parole history until disposed of by discharge or revocation (Ch. 247); (2) to make recommendations to the Governor for discharge of parolees meeting certain qualifications (248.3); (3) to make recommendations to the Governor on pardons or commutation of sentences of felons (248.6); (4) to recommend certain military parolees for pardon (248.4); and (5) to conduct investigations at the direction of the Governor prior to his granting of a pardon (248.8).

Your question speaks of recommendations by the Board to the Governor in four instances: (1) discharges from suspended sentences, (2) suspended jail sentences, (3) restoration of citizenship, and (4) remission of fines. With respect to the latter three areas no statutory provision is made for Board assistance to the Governor. In considering the first area (discharges from suspended sentences) only Section 248.3, acknowledged in your letter as your responsibility, requires recommendations by the Board to the Governor, and, of course, this is limited to offenders sentenced to the penitentiary and men's and women's reformatories. All other provisions for recommendations by the Board to the Governor are confined to advice on pardons or commutation of sentences. (See Sections 248.4, 248.6 and 248.8.)

The Board of Parole is a creature of statute. Under familiar rules the exercise of its functions is limited to the scope of its statutes. Implied powers are to be awarded only when unreasonable results would obtain from confinement to the statutory authorities. No such inconsistencies appear here.

Thus, in answer to your first question, not only is there no requirement or duty to advise the Governor in these matters, but, much more significantly, the Board of Parole has no authority to make such recommendations.

Your second question was stated as follows:

> "The Board of Parole under Section 248.3 has been recommending to the Governor the discharge from parole of such prisoners committed to the penitentiary or the men's or women's reformatory as have acceptably served not less than twelve months of their parole, etc.
>
> "The board has drafted a bill to be presented to the Legislature giving it the power to discharge or terminate paroles at its sole discretion. In discussing the matter with the Governor, there seemed to be no objection on his part. The question then arose as to who has the right under the present law to grant a final discharge from parole. It is recognized the Governor has the right of pardon, commutation, remission of fines and forfeitures, and restoration of citizenship rights. It does not appear, however, anywhere in the Code sections that he has the right to discharge from parole."

The statute referred to, 248.3, has been set out above. In considering the power to discharge from parole the statute is controlling. While it does not say, "The Governor shall have power to discharge from parole" it does say the Board shall recommend to him the "discharge or pardon" of certain offenders on parole. It is the opinion of this office that, though somewhat incidental in character, such phraseology unmistakably comprehends lodging the parole discharge power in the Governor. Further, acquiescence by the Supreme Court of Iowa (see State v. Rand, 239 Iowa 551, 32 N. W. 2d 79) in accepting without comment such a discharge tends to strengthen this contention.

Trusting this has answered your inquiries, I remain,

Very truly yours,

FREEMAN H. FORREST
Assistant Attorney General

FHF:MKB

April 29, 1957

Mr. George R. D. Kramer
Chief Probation Officer
Municipal Building
Fort Dodge, Iowa

Dear Sir:

Your letter of April 23, 1957, addressed to the Attorney General has been handed to me for reply.

Your first question is as follows:

> "Do all parolees, whether they have been committed to the County Jail for one, three or six months, have to be released through the Governor's office? The same thing is true of committing a man to Anamosa for a year or less, and then paroling him to me; how long is it necessary to have him remain on parole?

The answer to your question is yes. The power to discharge from parole is imputed to the Governor under Section 248.3, 1954 Code of Iowa.

You then ask:

> "As a parole officer, should I suggest to these parolees that they should be released at a certain time, or not? When I ask the Judges, they always remark 'you are the officer'. The same is true when I question the County Attorney.
>
> "Now I would like to have an answer from you. If this question does not come under the jurisdiction of your office, kindly refer me to the proper authority."

In reply thereto, the following answer is given. As a matter of law discharge from parole is the province of the Governor of Iowa. As a matter of fact, however, you, as a probation officer, have peculiar access to fact situations, several of which you have described in your letter, in which discharge of the parolee is extremely desirable from the standpoint of both the individual and society in general.

57-4-35

Since there is no reviewing authority set up under the law to follow through on parole histories in the type cases you mention, and, since the authority to discharge is in the Governor, the individual himself must initiate a request for discharge and should write the Governor's office, attention of the Pardon Clerk, requesting forms of the type herewith enclosed. Although they may be forwarded later with the completed form it would be appropriate to forward with the letter requesting forms the following items: Letters from the prosecuting attorney, judge and sheriff concerned, parole supervisor, and three character references, and also a showing that all costs and fines due have been paid. These items are prerequisite to disposition of the request, hence the sooner forwarded, the sooner the administrative processing can be completed.

There is nothing in law or ethics to prevent you from making this procedure known to interested persons. Might I also suggest that at your State Association meeting you have some suitable personage give a brief talk on this matter. I feel sure from previous questions directed to me that there are many other probation officers who have questions relating to this general problem.

Trusting this has answered your inquiries, I remain

Very truly yours,

FREEMAN H. FORREST
Assistant Attorney General

FHF:MKB
Encl.

April 29, 1957

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

Dear Governor:

This will acknowledge receipt of yours of the 26th in which you have submitted the following:

> "I hereby request opinions on the following questions, raised in connection with House Joint Resolution 23, 'proposing a joint bipartisan committee to be created and known as an election and privilege committee, establishing its powers and duties and to make a report to the fifty-eighth General Assembly'.
>
> "First, are the provisions contained in Section 2, as follows, '- - - to investigate, inquire into and examine into all matters related but not limited to a study of the question of revision and improvement of existing laws governing elections - - -' consistent with the Title of H. J. R. 23?
>
> "Second, are the broad powers of investigation contained in H. J. R. 23, including the power 'to summon and subpoena witnesses' consistent with the Constitutional powers of the Legislative branch of government?"

In reply thereto we advise as follows:

I. In answer to your first request, to-wit: whether the following provision of House Joint Resolution 23 is consistent with the title, it is to be noted that the relationship between the contents of an Act or Resolution to the title thereof is controlled by Art. III, Sec. 29 of the Constitution providing as follows:

57-4-24

> "Acts - one subject - expressed in title. Sec. 29. 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."

and Section 3.1, subsection 4, 1954 Code, providing as follows:

> "Form of bills. Bills designed to amend, revise, codify, or repeal a law:
>
> " * * * *
>
> "4. The title to a bill shall contain a brief statement of the purpose of the bill, however all detail matters properly connected with the subject so expressed may be omitted from the title."

Insofar as the Constitutional provision above quoted is concerned, its purpose is described in the case of Iowa-Nebraska Light & Power Co. v. City of Villisca, 220 Iowa 238, 261 N. W. 423, as follows:

> "An examination of the development of this provision shows that originally it read: 'Every law shall embrace but one subject, which shall be expressed in the title.' This provision was soon changed so that it now reads: 'Every act shall embrace but one subject, and matters properly connected therewith; which subject shall be expressed in the title.' It is obvious that the present provision containing the italicized words shows an intention on the part of the framers of the Constitution to give it a liberal construction, so as to embrace all matters reasonably connected with the title and which are not incongruous thereto. Such has been the uniform holdings of this court from an early date. State ex rel. Weir v. County Judge, 2 Iowa 280, loc. cit. 282, (1856); Cook v. Marshall County, 119 Iowa 384, 93 N. W. 372, 104 Am. St. Rep. 283; State v. Hutchinson Ice Cream Co., 168 Iowa 1, 147 N. W. 195, L. R. A. 1917D, 198; State v. Gibson, 189 Iowa 1212,

174 N. W. 34; Rural Independent District v. McCracken, 212 Iowa 1114, 233 N. W. 147, Beaner v. Lucas, 138 Iowa 215, 216, 112 N. W. 772; Porter v. Thomson, 22 Iowa 391; State v. Fairmont Cr. Co., 153 Iowa 702, 133 N. W. 895, 42 L. R. A. (N. S.) 821. In State ex rel. Weir v. County Judge, 2 Iowa 280, loc. cit. 282, this court said: 'The intent of this provision * * * was to prevent the union in the same act of incongruous matter, and of objects having no connection, no relation. And with this it was designed to prevent surprise in legislation, by having matter of one nature embraced in a bill whose title expressed another. It is manifest, however, that there must be some limit to the division of matter into separate bills or acts. It cannot be held with reason that each thought or step toward the accomplishment of an end or object, should be embodied in a separate act. * * * It is important to bear in mind that to declare an act unconstitutional and void, is the exercise of the highest power of the court, and is not to be resorted to, unless it becomes necessary. * * * And it is the duty of the courts to give such a construction to an act, if possible, as will avoid this necessity, and uphold the law.'

"In State v. Gibson, 189 Iowa 1212, loc. cit. 1220, 174 N. W. 34, 37, we said:

"'The subject of the bill need not be specifically and exactly expressed in the title. * * * The prohibition is against incongruity. The title must not contain matter utterly incongruous — to the provisions of the body of the statute, and that is the limitation of the prohibition. * * * That only is prohbited which by no fair intendment can be considered as germane. * * * No matter how broadly the general subject is expressed in the title, the act is valid unless the statute contains matter utterly incongruous to that general subject. * * * It does not matter that the title does not reveal means and methods if those means and methods are reasonably adapted to secure the general objects set forth in the title, and the objects of the statute. * * * The Constitution is not violated if all the provisions relate to the one subject indicated in

> the title and are parts of it, or incidental to it, or reasonably connected with it, or in some reasonable sense auxiliary to the subject of the statute.' (Italics ours.)
>
> "The rules hereinabove referred to have been so frequently declared by this court, so unanimously adhered to, and the reasons therefor so fully expressed that we deem it unnecessary to consider them further. It is the settled law that all matters reasonably connected with the subject named in the title and not incongruous thereto are properly included in the bill. If therefore the matters contained in this bill are germane, and reasonably connected with the subject named in the title and not incongruous thereto, it must be sustained (upheld)."

and the construction of that provision was stated in the case of Andrew v. Farmers & Merchants Savings Bank, 216 Iowa 244, 249 N. W. 377, as follows:

> "It has been generally and universally held that the language of the Constitution that requires that every act shall embrace but one subject and the matters properly connected therewith, which subject shall be expressed in the title, should not be given a narrow or limited construction, and that it is not necessary that the subject of the bill shall be specifically and exactly expressed in the title, or that the title shall be an index of the details of the act; that 'but one subject and matters properly connected therewith' does not and cannot prohibit the uniting in one act of any number of provisions having one general object fairly indicated in the title. The rule of construction to be used in determining whether or not the title is expressive of the subject-matter therein contained is well expressed in State v. Gibson, 189 Iowa 1212, 174 N. W. 34. On page 1221 of 189 Iowa, 174 N. W. 34, 38, this court says:
>
> "'The Constitution is not violated if all the provisions relate to the one subject indicated in the title and are parts of it, or incidental to it, or reasonably connected with it, or in

some reasonable sense auxiliary to the subject of the statute.'"

Tested by the foregoing authority we are of the opinion that the foregoing question does not transcend the foregoing rule and is consistent therewith, especially when viewed in the light of the investigative powers of the Legislature or a committee thereof as disclosed hereafter. Insofar as the statute quoted is concerned, we are of the opinion that the title of the Resolution is likewise unobjectionable as in violation of its terms.

2. In answer to your question #2, we cite to you the following text book statements pertinent thereto. In 49 Am. Jr., title States Territories, and Dependencies, 39, it is stated:

"Trials and Investigations. - A legislative body is clothed with many of the powers of a court having final and exclusive cognizance of all matters within its jurisdictiom, for the purpose for which it was vested with jurisdiction. It has jurisdiction of the election of its members, the choice of its officers, and its rules of proceeding. Inherent power is reposed also in legislative bodies to conduct investigations in aid of prospective legislation and for the purpose of securing information requisite to the proper discharge of its functions and powers. This power it may exercise directly or through properly constituted legislative committees. Power to secure needed information by such means has long been treated as an attribute of the power of the legislature. It existed in the British Parliament and in the colonial legislatures, and has been carried into effect in most if not all of the state legislatures. As has been pointed out, the possession of a degree of general intelligence is an essential requisite to the proper exercise of the powers and duties reposed in the legislature and members during the comparatively brief and hurried periods of legislative sessions. Hence, in many instances, in order for the legislature to prepare and enact wise and timely laws,

necessity of investigation must exist as an indispensable incident and auxiliary to the proper exercise of legislative power.

"The inherent power of the legislature to conduct investigations in aid of prospective legislation and to secure other needed and proper information carries with it in proper cases power to require and compel the attendance of witnesses and the production of books and papers by means of legal process, whether such proceedings are conducted directly by the legislative body or through a properly constituted committee thereof, and to institute and punish by contempt proceedings the failure to comply with such requirements. The power of a state legislature to punish for contempt may be conceded in cases involving obstruction of legislative proceedings by refusal to attend as witness or to testify in inquiries within the legitimate scope of the functions of the legislative body. It has been held that when a witness testifies before a committee of the legislature with respect to a criminal charge in which he is implicated, he must be regarded as testifying against another person so offending, upon a 'trial, hearing, proceeding, or investigation,' within the meaning of code provisions."

and paragraph 42 of the foregoing reference provides as follows:

"Scope of Powers. The scope of the powers of a legislative committee and the matters which it may investigate are referable primarily to the act or resolution to which it owes its existence. Its powers are, generally speaking, as broad as the subject which it is directed to inquire into; when created and appointed for the purpose of securing information and data upon the need of legislation upon a given subject, it may inquire into any subject and any matter relative to the needs of legislation on the subject matter, the kind of legislation required, and the scope of the legislation needed. A duly authorized legislative committee, like the legislative body from which it derives its power, may summon persons not members of the legislature to attend as witnesses any meetings which it has power to hold - provided, of course, that the subject of investigation is within the range

> of legitimate legislative inquiry and the proposed testimony of the witness called relates to that subject - enforce obedience to its process, compel obedience to a summons, and punish as for contempt those summoned who fail or refuse to obey the call. The exercise of its powers are not, as a general rule, subject to control by the courts, unless the act or resolution under which the committee purports to act is unconstitutional, illegal or void. The powers of a legislative committee of investigation are not limited to the time within which it is directed to report to the legislature where the resolution creating the committee does not indicate that failure to file a report on or before the date mentioned will ipso facto terminate the powers of the committee."

In this connection it is to be noted that a statute of long standing, being Section 2.29, Code of 1954, expressly confers upon a committee of either the House or Senate or both the House and Senate the power to require the personal attendance of witnesses.

In view of the foregoing we regard the powers of investigation contained in the enclosed House Joint Resolution as being within the constitutional powers of the legislative branch of the government.

Very truly yours,

NORMAN A. ERBE
Attorney General of Iowa

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB
Encl.

60M 11-56-10915
PB-C-8776

Form 13

IOWA STATE HIGHWAY COMMISSION

AMES, IOWA

Ames, Iowa

April 29, 1957

Edward P. Powers
County Attorney
Iowa Trust & Savings Bank Bldg.
Centerville, Iowa

In re: Width of highways.

Dear Mr. Powers:

You asked the following question: "A county road was established in 1858 into the village of Jerome. No width was specified. The village of Jerome was platted in 1894 and the county road was platted as a street having a width of 40 feet. It is our understanding that where county roads have no width specified, that the width shall be considered as 66 feet.

Our question is - Will this particular road have a width of 66 feet or the 40 foot width specified in the platting proceeding?"

The road in question being a county road and laid out without mention of the width assumes a width of 66 feet under Chapter 38, Section 515, Code of Iowa 1851, and therefore the road throughout its length would be 66 feet.

However, there is a question of the establishment of this road through a town. If the portion of the road under consideration was, at the time laid out not within the limits of Jerome, it would very definitely have a width of 66 feet. The record of establishment for the portion within town should be somewhere indicated what width was acquired within the town, and I assume that it was in town or the question would not arise. Since the road was legally established and laid out it would have a maximum width specified by the code at that time. At the time this road was laid out the code made no distinction as to cities and towns as is presently made. The platting of the street through town is 40 feet instead of 66 and naturally would not provide anyone with a valid claim. That the platting might be erroneous does not constitute an abandonment or conveyance of that property by either the city or the county. Presently of course, the road through the town of Jerome, if Jerome is incorporated, would be under the control of the town. If unincorporated, the road would be under the control of the county. I assume that the road has been in continuous use so that it could not be said that it was abandoned. Secondly, I assume that the road was

57-4-37

IOWA STATE HIGHWAY COMMISSION

AMES, IOWA

legally established. If these two assumptions are corract and the road has been in continuous use, the county should be in possession of 66 feet of right-of-way despite the fact that the platting of the town of Jerome showed 40 feet.

If there is anything further we can do to be of assistance please feel free to inform us.

Very truly yours,

Daniel T. Flores
General Counsel for Iowa
State Highway Commission

DTF:rb

April 30, 1957

Mr. Bert A. Bandstra
Marion County Attorney
Knoxville, Iowa

Dear Mr. Bandstra:

Receipt is acknowledged of your letter of April 24 as follows:

> "The Superintendent of Public Schools in Marion County has requested an opinion concerning the opening of polls in a school reorganization election conducted pursuant to Chapter 275 of the Code. His specific question relates to an interpretation of Section 277.9 regarding 'other independent School Districts'.
>
> "His particular question is this: 'Does the County Superintendent have the authority in such an election to open the polls at 1 o'clock P. M. and to keep them open until 7 o'clock P. M. on election day?' His second question is this: 'Does the County Superintendent have the authority to open the polls at 3 o'clock P. M. and cause them to close at 7 P. M.?' I have advised him that in my opinion the answer to the first question is yes and that the answer to the second question is no, in view of the fact that the law specifically states that the polls should open at 1 o'clock P. M.
>
> "He has, however, requested that I write to your office for a verification of my opinion and I would very much appreciate it if you would advise me on whether or not my advice to him was correct."

The provision to which your letter refers is as follows:

> " . . . in all other independent school districts and school townships the polls shall open at one o'clock p. m. and remain open not less than two hours . . ."

57-4-38

In view of the plain, clear, and unambiguous language of the provision quoted, no answer other than the one you have given seems possible. As our Supreme Court has said on several occasions, "interpretation lies in the realm of ambiguity". Where, as in the quoted provision, no ambiguity exists, there is no room for interpretation and unless there be some conflicting provision elsewhere in the statutes it must be taken to mean exactly what it says.

However, in addition to confirming your opinion, it appears desirable to comment upon the manner in which it reached this office. As you know, opinions of this office are limited by statute to questions submitted by members of the Legislature, State officers and County Attorneys in connection with the duties of their respective offices. It is manifest from your letter that the instant question originated with a County officer and that pursuant to Section 336.2(7) you had rendered an opinion answering the question submitted. The point I wish to bring to your attention is that when your office has rendered its opinion to any of the public officers or bodies entitled to such under Section 336.2(7), Code 1954, you are under no compulsion to request confirmation of your opinion from this office simply because the recipient thereof may desire an answer different than the one he received. This office is, of course, pleased to render an opinion to your office on any question which may exist in your mind but it should not be considered as an administrative court of appeal from opinions of your office in cases where you have no doubt in your own mind that the opinion you have so rendered is correct.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:MKB

May 1, 1957

Hon. Howard C. Reppert, Jr.
House of Representatives
L O C A L

Dear Sir:

Receipt is acknowledged of your letter of April 24th as follows:

"I would very much like to have your opinion as to the following two questions:

"1. Under Chapter 411.6 - Can a policeman or fireman retire from the service after twenty-two years of service - then wait until age fifty-five to start drawing his pension?

"2. If a policeman or fireman becomes ill or injured - and the sick-leave granted by the city runs out - what is the procedure?

"a. Must the city either keep him on the payroll until he is able to return to work - or must the city put him on disability pension until upon examination by the Pension Board, he is found to be able to return to work? Or -

"b. Must he be taken off the payroll until he is able to return to work?"

In answer to your first question, I would advise you that Section 411.6, Code 1954, provides in pertinent part as follows:

"a. Any member <u>in service</u> may retire upon his written application to the board of police or

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fire trustees as the case may be, setting forth at what time, not less than thirty nor more than ninety days subsequent to the execution and filing therefor, he desires to be retired, provided, that the said member at the time so specified for his retirement shall have attained the age of fifty-five and shall have served twenty-two years or more in said department, and notwithstanding that, during such period of notification, he may have separated from the service." (Emphasis ours)

The answer to your question is furnished directly by the statute which expressly provides that the member must be "in service" at the time of applying for retirement, that the time specified in such application cannot be "more than ninety days" subsequent to making the application, and that the applicant "at the time so specified . . . shall have attained the age of fifty-five and shall have served twenty-two years or more".

In direct answer to your question, the words of the statute permit a policeman or fireman to retire from the service after twenty-two years of service and then wait until age fifty-five to start drawing his pension only if he attains the age of fifty-five within ninety days after filing his application for retirement.

In answer to your second question, I would advise you that Chapters 410 and 411 deal with pensions and benefits rather than with salary. Although certain benefits are computed in terms of percentage of salary under said chapters, the questions whether, when, how much and for how long salary shall be paid are not answered therein except to the extent of determining the time or times when an injured employee may be transferred from an active status to a retired status or pensioned status. See Sections 410.8 and 411.6 (3 to 6).

Similarly, Chapter 365 on civil service does not answer your question as to salary. It prescribes how a person may attain status thereunder, how he may advance in status and in what ways he is protected from demotion in status or loss thereof but does not provide or prescribe the method for providing the incidents of any given status. In other words, its provisions are directed to the preservation of a status and its incidents created elsewhere.

Sections 368.11 and 368.15, Code 1954, authorize the establishment of fire and police departments in cities and towns. Section 404.7 (1 and 2), Code 1954, authorizes the city council to levy a tax to "staff" a fire department and police department. Section 368A.7, Code 1954, authorizes the city council to "fix the terms of employment" for municipal employees

in cities and towns generally. Section 363C.7 authorizes the city manager, in cities to which Chapter 363C applies, to "employ, reclassify . . . and to fix the compensation" of employees "subject, however to the provisions of Chapters 70 and 365". It thus appears that the incidents of any given status of employment in the categories to which you letter refers are initially fixed by ordinance (or administrative act of the city manager) and that once so fixed, such status may be acquired and preserved as provided in Chapter 365 in cities where said Chapter is applicable.

Thus, an employee at any given time may have status as an employee or may have retired status but manifestly cannot have both at the same time. Further, it appears status as an employee is fixed locally whereas the incidents of retired status are prescribed by statute. Your question apparently refers to the case of an employee eligible for retired status who presently retains status as an employee but is incapacitated from performing duties in that status and seeks an alternative to being placed on retired status.

The rule to be deduced from the statutes thus seems to be that entitlement to salary depends, not upon statute, but upon ordinance or administrative act of the city manager fixing the incidents of status as an employee. Entitlement to salary of municipal personnel depends upon the acquisition and maintenance of status as an employee and not upon the performance of duties in such status unless specifically required by the ordinance or administrative act fixing the incidents of such status. In the absence of such specific requirement to the contrary, accrual of salary commences when status as an employee is acquired and terminates only when a termination by death, discharge, resignation, or acquisition of retired or pensioned status is effected.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

May 2, 1957

Mr. Earl Hart, Director
Real Estate Commission
B u i l d i n g

Dear Mr. Hart:

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

> "We have exhausted every source known to us to obtain a specific statement as to the exact time when real estate taxes become a lien and are due and payable.
>
> "Section 445.30 of the 1954 Code of Iowa reads: 'As against a purchaser, such liens shall attach to real estate on and after the thirty-first day of December in each year.' Our interest concerns the exact time of day the lien attaches on December 31, and, when such lien attaches, are the taxes due and payable.
>
> "We respectfully request an opinion on the foregoing questions."

In reply thereto I advise you that according to an opinion of this Department appearing in the Report for 1936 at page 202 taxes upon real estate attach as a lien against such real estate in this state on the 31st day of December of any year subsequent to assessment and levy. Copy of this opinion is attached hereto and subject only to the following is by this reference made a part thereof. The referred to opinion

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states that, "as far as I am able to find we have no statutory provision when the tax books are certified to the Treasurer for collection". This is not a statement of the facts in view of Section 448.4, Code 1954, providing as follows:

> "Tax list delivered - informality and delay. He shall make an entry upon the tax list showing what it is, for what county and year, and deliver it to the county treasurer on or before the thirty-first day of December, taking his receipt therefor; and such list shall be a sufficient authority for the treasurer to collect the taxes therein levied. No informality therein, and no delay in delivering the same after the time above specified, shall affect the validity of any taxes, sales, or other proceedings for the collection of such taxes."

Insofar as the exact time of December 31st that the lien attaches I would advise you that the lien attaches immediately after the termination of December 30th at 12:00 o'clock p. m. and thereafter the taxes are due and payable in accordance with the provisions of Section 445.36, Code 1954, providing as follows:

> "Payment - installments. No demand of taxes shall be necessary, but it shall be the duty of every person subject to taxation to attend at the office of the treasurer, at some time between the first Monday in January and the first day of March following, and pay his taxes in full, or one-half thereof before the first day of March succeeding the levy, and the remaining half before the first day of September following."

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

May 2, 1957

Mr. James D. McKeon
Assistant Polk County Attorney
Room 406 Court House
Des Moines, Iowa

Dear Mr. McKeon:

Receipt is acknowledged of your letter of April 15th as follows:

> "Our Board of Supervisors, for a number of years, has been condemning land for new roads under the provisions and policies as established in Sections 471 and 472 of the 1954 Code of Iowa.
>
> "However, the bulk and vast majority of work carried out by our County engineer has been in relationship to the widening and straightening of secondary roads. In connection with these activities, we have been following the provisions of Section 306.21 and subsequent provisions contained in that chapter.
>
> "Apparently at some time in the past, on opinion was issued which indicated that the fees allowable to the appraisers appointed under the provisions of Section 306.22, was limited to 50 cents per hour. I have been unable to find this opinion in our office or in any of the Annotations. However, our engineer refuses to approve bills in excess of that figure.
>
> "Our question is:
>
> "In the event that appraisers are appointed

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under this last quoted section, what compensation may the county legally pay for their services?"

Although specific compensation is provided for some types of appraisal, e.g. Section 382.4, Code 1954, on interstate bridges; Section 450.25, Code 1954, on inheritance tax; Section 455.157, Code 1954, on drainage and levee districts; Section 500.9 on river channels which provide compensation, respectively, at $15 per day, $5 to $10 for each 8 hours, as the board may fix, and $5 per day; no rate or provision for compensation is specified for appraisers appointed under Section 300.22, Code 1954.

In the absence of specific provision fixing such compensation, it appears that the general provisions of Section 79.2, Code 1954, apply. It provides as follows:

"Appraisers of property. The compensation of appraisers appointed by authority of law to appraise property for any purpose shall be fifty cents per hour for each appraiser for the time necessarily spent in effecting the appraisement and five cents a mile for the distance traveled in going to and returning from the place of appraisement, which shall, unless otherwise provided, be paid out of the property appraised or by the owner thereof."

Very truly yours,

LEONARD C. ADELS
Assistant Attorney General

LCA:mfm

May 2, 1957

Mr. Ray E. Johnson, Vice-Chairman
State Tax Commission
State Office Building
Des Moines, Iowa

Dear Mr. Johnson:

This will acknowledge receipt of your letter wherein you make the following request for an opinion:

> "I have received a letter from Mr. Frank Warner, Secretary of the Iowa Bankers Association in Des Moines, asking if approval would be necessary to review the county or city assessor's tax records to ascertain the name of the stockholders and the amount of their holdings of any particular national or state bank.
>
> "I respectfully ask an opinion if any approval is necessary for anyone to review any assessment record or file with the various county or city assessors."

Sections 430.2, 430.3 and 430.4, Code of Iowa 1954, provide as follows:

> "430.2 National and state bank stock--place of assessment. Shares of stock of national banks and state and savings banks and loan and trust companies, located in this state, shall be assessed to the individual stockholders at the place where the bank or loan and trust company is located.
>
> "430.3 List of stockholders and their holdings. At the time the assessment is made the officers of national banks and state and savings banks and loan and trust companies shall furnish the assessor with lists of all the stockholders and the number of shares owned by each.
>
> "430.4 Listing to stockholders. The assessor

57-5-4 ✓

shall list to each stockholder under the head of corporation stock the total value of such shares."

It will be noted that the assessor's list of stockholders and the number of and value of shares of stock owned by such stockholders is based upon information the officers of national banks and state and savings banks and loan and trust companies are required by law to furnish the assessor. The information so furnished is filed and becomes an official record of the assessor's office. In Iowa we have no statutory provision relating specifically to the inspection of public records of this type and their availability for inspection must be determined with reference to the common law. Under the common law, the right to inspect public records is not an absolute right but is a qualified right. (23 R.C.L., p. 160, Section 10). However, the qualifications to this right are limited and may be summarized as follows:

1. The applicant for the right to inspect such records must have some public or private beneficial interest to serve in making such an inspection as contrasted with mere curiosity or purposes which are in their nature unlawful or purely political.

2. That the application for inspection be reasonable as to the time and place of such inspection, giving recognition to the regular office hours of the public official having custody of the records and recognition of the responsibilities of the public officer for the safety of such records. Within the qualifications above cited, the applicant for the inspection of the records of a city or a county assessor as to the list of stockholders with the amount

of their holdings of any particular national or state bank may as a matter of right examine such records. This may be done without prior approval of the State Tax Commission. Permission to examine such records should be obtained from the city or county assessors or other officers or boards having custody of same. Under the law such permission may not be withheld if the purpose of examination is constructive.

The conclusions before stated are supported in principle by Section 622.46, Code of Iowa 1954, which requires officers having the custody of a public record or writing to furnish any person upon demand and payment of the legal fees therefor a certified copy thereof, and by the following authorities:

> Nowack vs. Auditor General, 243 Mich. 200, 219 N.W. 749; 60 A.L.R. 1356; 169 A.L.R. 653, and 45 Am. Jur., Records and Recording Laws, Section 20, et seq. and many cases therein cited.

You may advise your correspondent that the authority of the State Tax Commission is not considered such that prior approval by the State Tax Commission would be necessary for an applicant to examine the official records of a city or county assessor relating to such assessment of shares of bank stock. Such records are in the custody of the several city and county officers and boards who have duties relating thereto and it is of such officers and of such boards that permission must be obtained to inspect same.

Very truly yours,

M. A. Iverson,
Special Assistant Attorney General

MAI:fs

May 7, 1957

Mr. David A. Dancer, Secretary
State Board of Regents
L o c a l

Dear Sir:

Receipt is acknowledged of your letter of April 24 as follows:

"The officials of Iowa State College are concerned about the liability of the College and its employees in connection with recommendations issued by the College for use of pesticide chemicals and have asked me to present the matter to you for an opinion.

"The College has conducted considerable research in connection with special pesticide chemicals for pest and weed control and has published the results obtained from research, which publication has had quite wide distribution. In the publications there appear recommendations for the use of such chemicals. The farmers of the state and others are following these recommendations. Some of the chemicals used are quite dangerous to human and animal health unless properly used and controlled.

"Enclosed is copy of a letter addressed to Mr. V. T. Middlebrook, Vice President, University of Minnesota, by Honorable Miles Lord, Attorney General of Minnesota, in reply to a letter to the Attorney General concerning the liability of the University of Minnesota. The facts presented in the letter regarding the University's research and the publications issued are quite parallel to the situation here in Iowa. I am sending this material to you because I feel it will give you a better background and more information than I should try to include in this letter. It may be that you will like to have copies of some of the publications on this subject which have been issued by Iowa State College. If so, I shall be glad to have them furnished to you."

Examination of the Minnesota opinion to which your letter refers indicates that it is based in part upon the status of the University of Minnesota as a corporate entity separate from the sovereign state. Said opinion cites a Minnesota statute entitled "An Act to Incorporate the University of Minnesota at the Falls of St. Anthony."

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However, the status of Iowa State College is considerably different. It is not a corporate body, chartered by statute but rather a department or arm of the sovereign state itself. Although Iowa State College is a land grant college there is nothing in the federal enabling legislation (7 U.S.C.A. 301 et seq.) or the statutes of Iowa showing it to be other than a departmental division or institution of the sovereign state. Section 262.7, Code 1954, lists "The college of agriculture and mechanic arts, including the agricultural experiment station" as one of the institutions governed by the State Board of Regents.

Thus, the institution in question has the same status as the State University of Iowa concerning which our Supreme Court held in Weary, et al v. State University, et al, 42 Iowa 335, "the State University of Iowa is not a corporation and is not liable to be sued."

Thus, Iowa State College, being of like status with the State University, is not a separate corporate entity but partakes of the sovereign immunity of the state itself. Hence, it cannot be sued except in contract or where the legislature has given its express consent. Since the terms of your inquiry describe no contractual relationship and since the statutes pertaining to the college express no such consent, it follows that the college has no liability in the matter described by your letter (from which we understand the college merely publishes the results of and makes recommendations based on research and does not engage in the manufacture or sale of chemicals).

As to the liability of employees, the ordinary rules governing negligence of government employees are applicable. See Montanick v. McMillan, 225 Iowa 442, 280 N.W. 608. In other words, in order to hold an employee liable it would be necessary for a plaintiff to prove that some act of personal negligence by such employee was the legal cause and cause in fact of the injury alleged.

Yours very truly,

NORMAN A. ERBE
Attorney General

NAE:md

May 7, 1957

Hon. Howard C. Reppert, Jr.
State Representative
4108 Oak Forest Drive
Des Moines, Iowa

Dear Sir:

Receipt is acknowledged of your letter of May 2nd as follows:

> "Thank you for your letter of May 1 with answers to questions in my letter of April 24.
>
> "May I say, however, that question #2 was not intended to refer to an employee eligible for retired status, but rather to any employee in the police or fire department who temporarily becomes incapacitated due to illness or injury on the job. So, question #2 should be put in this way:
>
> "2. If a policeman or fireman becomes temporarily ill or injured - and the sick-leave granted by the city runs out - what is the procedure?
>
> "a. Must the city either keep him on the payroll until he is able to return to work - or must the city put him on disability pension until upon examination by the Pension Board, he is found to be able to return to work? Or -
>
> "b. Must he be taken off the payroll until he is able to return to work?"

In further answer to paragraph (a) of your question, assuming the city to which your question refers comes under Chapter 365, Code 1954, on civil service, tenure or payroll status, is governed by Sections 365.18 to 365.26. Once one has acquired tenure under said chapter, he is on the payroll

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until "removed" or "suspended". A cause for suspension is "failure to properly perform his duties". See Sections 365.18 and 365.19.

In your question it is given that the employee is too sick or badly injured to perform his duties and it must, therefore, be assumed he will fail to perform them and will be subject to suspension when, as you state, his "sick leave runs out". Since sick leave is a creature of local regulation, when it "runs out" depends on the local regulation. When it "runs out" as in your question there seems no alternative but to suspend one having payroll status as an employee for so long as he fails to perform his duties.

However, it is in such a situation that Section 411.6, subsection 3, providing for "ordinary disability retirement" or subsection 5, providing for "accidental disability benefit" may come into play. Thus, when sick leave runs out as stated in your question, the sick or injured employee may be temporarily retired under the applicable section, subject to restoration to service under subsection 7 when he is again able to perform his duties. Since payroll status as an employee is based on performance of duties and "disability pension" is based upon inability to perform duties, no employee can be carried in more than one status at any given time, as pointed out by our letter of May 1st.

Thus, in direct answer to paragraph (a) of your question, the answer is that the employee be removed from the payroll and placed on temporary retired status under Section 411.6, subsection 3 or 5, as may be applicable.

The answer to paragraph (b) of your question is in the affirmative for the reasons hereinabove stated.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

May 8, 1957

Mr. Earl E. Hoover
Clay County Attorney
Spencer, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 17th ult. in which you submitted the following:

> "In 1954 a resident of Palo Alto County came to Clay County and she has lived here since said time and has not been served with a notice to quit. In 1954 and in August 1955, Palo Alto County paid some of her medical expenses here in Clay County consisting of a bill for medicine in the amount of $4.00. This $4.00 payment was made in August 1955.
>
> "Does the fact that Palo Alto County made such a payment prevent her from obtaining a residence in Clay County although no notice to quit the county was served upon her? Is the payment for medicine to be considered a payment from a county or relief agency such as would prevent her from obtaining legal residence here?

In reply thereto I would advise as follows:

1. Neither residence nor settlement in Clay County is prevented by the payment of the described medicine bill by Palo Alto County.

2. While it is true that under Section 252.16, subsection 3, one supported by public funds does not acquire a legal settlement, it would hardly be disputed that $4.00

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provided publicly in a period of two years falls considerably short of being support.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

May 8, 1957

Mr. Donald E. Skiver
Osceola County Attorney
Sibley, Iowa

Dear Sir:

This will acknowledge yours of the 22nd ult. in which you submitted the following:

> "As I explained to you last Wednesday, Osceola County is confronted with the following problem:
>
> "A family which formerly resided in 'A' County moved to Osceola County; shortly after they came to this County they were served with a Notice to Depart. Shortly thereafter, the County Auditor of Osceola County notified the Auditor of 'A' County that relief had been granted to a poor person having settlement in 'A' County. The Auditor of 'A' County immediately answered our Auditor by refusing to accept service of notification that relief had been granted and that we would hold 'A' County responsible. Please note that it was a refusal to accept service of notice rather than a statement that the poor person's settlement was in dispute. The answer of 'A' County's Auditor was received by our Auditor within the required 15 days. Some 45 days after receiving the refusal to accept legal service of the notice from the Auditor of 'A' County, the Osceola County Auditor filed a copy of the notices sent and received in the office of the Clerk of Court of 'A' County.
>
> "I will appreciate being advised as follows:
>
> "(1) Under Section 252.22, is the Auditor granted authority to determine settlement of a poor person or does that Section merely direct him to do his ministerial duty of notification?

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In the event the Auditor's duty is ministerial only, what would be the status of the refusal to accept service executed by the Auditor of 'A' County and returned to Osceola County?

"(2) Section 252.22 provides that the Auditor of 'A' County "shall inform the Auditor of the County granting relief if the claim of settlement is in dispute'. In your opinion, does a refusal to accept due, timely and legal service of the notice necessarily mean that settlement of the recipient is disputed?

"I will appreciate hearing from you at your earliest convenience regarding the foregoing."

In reply thereto I would advise you as follows.

1. Section 252.22, Code 1954, does not vest the Auditor with authority to determine settlement of a poor person. Notice by mail of relief granted to a poor person as provided by that Section is not service. Hence, refusal to accept service would have no bearing upon the proposition.

2. Since no "service" is provided for refusal to accept it does not mean anything. If Auditor in second county wished to dispute legal settlement he should have said so. However, to keep to the statutory procedure Osceola County should probably treat it as a dispute and proceed under Section 252.23, 1954 Code.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

May 8, 1957

Honorable Melvin D. Synhorst
Secretary of State
B u i l d i n g

Dear Mr. Synhorst:

Reference is herein made to your request for opinion arising out of the letter of Cosson, Stevens, Hauge & Cosson, under date of May 7, 1957, to you, in which they state:

> "Submitted herewith are papers for qualifying in Iowa a newly organized Delaware Corporation of the name of Dewey Portland Cement Company. Included in the papers is a certified copy of the agreement of merger filed in Delaware April 30th, 1957 between the above corporation and another corporation of identical name, organized under the laws of West Virginia, in which the Delaware corporation is the surviving corporation. This is the matter which the writer hereof has previously discussed with you.
>
> "The West Virginia Corporation has heretofore been qualified with authority to transact business in Iowa and has paid a fee based on property and assets in Iowa in the amount of $10,051,000. The authority so obtained expires April 7th, 1966, at which time, under the existing statute (Section 494.8 Code of Iowa 1954), fees for another twenty (20) years period of qualification would become due and payable.
>
> "It will be observed that this instrument filed in Delaware April 30th, 1957 effects a merger and not a consolidation and while the Delaware Corporation is referred to as the surviving corporation, paragraph C of Section 111 of the

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agreement of merger specifically provides that all of the rights, privileges, powers, franchises, estates and property of the West Virginia Corporation shall continue to exist in the survivor.

"It is the position of the Delaware Corporation that the nature of the merger is such that the existence and personality of the West Virginia Corporation is preserved and survives to the extent that no new qualification fees are legally due and payable at this time with reference to the property and assets remaining in Iowa after the merger with respect to which fees have already been paid by the West Virginia Corporation. In the alternative, it is the position of the company that no new or separate qualification in Iowa of the Delaware Corporation need be effected but that the merger instrument filed herewith should be considered as in the nature of an amendment which changes the state of incorporation of the business from West Virginia to Delaware, and that the authority heretofore granted to the West Virginia Corporation be continued as authority to the surviving Delaware Corporation to transact business in the State of Iowa.

"Under these facts and under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and the laws and constitutions of Iowa, Delaware and West Virginia, it is the position of the surviving corporation that it is entitled to a proportionate credit in computing the qualification fee to be paid by the Delaware Corporation now being qualified in Iowa for the fees heretofore paid by the West Virginia Corporation. It is, therefore, respectfully requested that the qualification fee of $12,789.60 which would otherwise be payable in connection with the qualification in Iowa of a foreign corporation having perpetual existence in its home state and $11,546,000. of property and assets in Iowa be reduced by 107/240 or such other amount as the company may be legally entitled to as credit for the fees

> heretofore paid by the said West Virginia Corporation, a party to the merger, which West Virginia Corporation is withdrawing from the State of Iowa. In the alternative, it is requested that this merger be treated as an amendment, as above outlined, and that it be your decision that the only fees payable at this time be such as might be due under Section 494.5 of the Code because of increase of capital in this state.
>
> "Please be advised that the above Delaware Corporation reserves the right to present this matter to the Courts of Iowa for judicial decision in event your ruling is contrary to the position of the corporation as set forth in this letter."

In reference thereto, I advise that I find no statutory authority, express or implied, in you to credit the above described Delaware corporation with the unused portion of the qualifying fees of the West Virginia corporation upon its own fees required to qualify it as a foreign corporation in Iowa. I am of the opinion to comply with this request would amount to legislating and is unauthorized.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

60M 11-56-10315
PB-C-8776

Form 13

IOWA STATE HIGHWAY COMMISSION

AMES, IOWA

Ames, Iowa

May 8, 1957

Mr. Gilbert Cranberg
Editorial Writer
Des Moines Register & Tribune
Des Moines 4, Iowa

Re: Billboards along right of way

Dear Mr. Cranberg:

I have your letter of May 7 in which you inquire as to the authority of the Iowa State Highway Commission to prohibit billboards along the proposed interstate system.

Sections 319.10 through 319.13 is the authority for the State Highway Commission to remove or cause to be removed any billboards or advertising signs within the right of way. It prohibits the construction of any advertising signs or billboards within the right of way and it allows the Highway Commission (or Board of Supervisors) to remove any such billboards that are erected within the right of way.

Section 321.259 of the Code of Iowa declares that billboards and signs which obstruct the view of any public highway or railroad track whether on public or private property are public nuisances and may be abated by appropriate action. To summarize, billboards and advertising signs are prohibited within the right of way and are prohibited outside the right of way if they obstruct vision.

In relation to billboards on private property, there was introduced in the 57th General Assembly Senate File 204 which, if it had passed, would zone all land within 500 feet of the right of way of any interstate highway non-commercial for advertising purposes. As noted, this bill did not pass.

At the present time it would appear that Iowa has no statutory authority for purchasing property adjoining the right of way if such purpose was solely for the prevention of erection of billboards and advertising signs. The Code of Iowa does allow the purchase of entire lots, blocks, or tracts of land, "If, by so doing the interests of the public will be best served, even though the entire lot, block, or tract, is not immediately needed for right of way property."

At the present time there appears to be several bills in Congress which anticipate some type of legislation in the states prohibiting advertising signs within a certain distance from the right of way of the interstate system. By and large, these bills require that before states are eligible for federal participation on the interstate system, they must take some appropriate action to prevent the construction of

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60M 11-56-10915
PB-C-8776

Form 14

IOWA STATE HIGHWAY COMMISSION

AMES, IOWA

advertising signs within a certain distance of either side of the interstate system. Until we know what final legislation Congress is going to pass, it would appear that state legislative bodies will not be able to pass appropriate legislation for the prohibition of such signs.

Trusting this answers your inquiry, I remain,

Yours very truly,

C. J. Lyman
Special Assistant Attorney General
for Iowa State Highway Commission

CJL:js

May 9, 1957

Mr. David A. Dancer
Secretary
Finance Committee
State Board of Regents
L O C A L

Re: Nathan Allambaugh, State Sanatorium

Dear Mr. Dancer:

Receipt is acknowledged of your letter of May 7th as follows:

"Enclosed are the following papers:

"Letter from Dr. W. M. Spear, Superintendent, State Sanatorium, Oakdale, Iowa, addressed to me, dated April 30, 1957.

"Copy of letter dated April 25, 1957, addressed to Dr. Spear by Ed. Rhoads, Jr., Chairman, Page County Board of Supervisors.

"Copy of letter dated April 29, 1957, addressed to Mr. Rhoades by Dr. Spear.

"You will notice that this correspondence is in connection with the cancellation of a Free Treatment Certificate formerly issued to Mr. Nathan Allambaugh, a patient at the State Sanatorium. Dr. Spear has asked me to inquire of you whether a Free Treatment Certificate may be cancelled in the manner proposed by the Page County Board of Supervisors. Your advice on this will be appreciated."

The correspondence to which your letter refers indi-

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cates that the patient in question was issued a "free treatment certificate", was admitted to the State Sanatorium at Oakdale, has not been discharged therefrom but that the Board of Supervisors of patient's county of legal settlement propose to "revoke" the said certificate.

Pertinent to your inquiry are Chapters 240 and 271, Code 1954, and 1954 I.D.R., pp. 169 and 170. Section 254.1, Code 1954, provides as follows:

"Care and treatment. The board of supervisors of each county shall provide suitable care and treatment for persons suffering from tuberculosis, and where no other suitable provision has been made, they may contract for such care and treatment with the board of trustees of any hospital, not maintained for pecuniary profit." (Emphasis ours)

Under the terms of the quoted statute, it would seem that "other suitable provision has been made" by means of admission of said patient to Oakdale Sanatorium.

Section 254.6, Code 1954, provides as follows:

"Free treatment to any resident. Treatments shall be supplied free to any legal resident of Iowa suffering from tuberculosis upon the signed certificate of his county director of social welfare, or the overseer of the poor, as the board of supervisors may direct, or in case of a county maintaining a separate public tuberculosis hospital, his board of hospital trustees, that such person has applied for such treatment and agreed to remain under treatment until discharged by the sanatorium, as no longer having tuberculosis in a communicable stage and is not possessed of sufficient income or estate to enable him to make payment of the costs of such treatment in whole or in part without affecting his reasonable economic security or support, in light of his resources, obligations and responsbilities to dependents; and expenditures of public funds for treatment of tuberculosis shall be considered expenditures for the protection of the public health and not as moneys advanced in the nature of welfare or relief. The state department of health shall promulgate rules and regulations for the uniform administration of the provisions of this section, which shall govern the county directors of social welfare, overseers of the poor, and boards of hospital trustees in the issuance of such certificates. Any applicant who is denied a certificate by the county director of

> social welfare, overseer of the poor or the board of hospital trustees, may apply to a judge of the district court of his county of residence, either in term or on vacation, for a review thereof and hearing thereon which shall be de novo. The district judge shall promptly hear such application and shall render final decision thereon and enter an order accordingly. The director, overseer and board of hospital trustees shall file a copy of such certificates issued by them and the clerk of the court shall file a copy of any order entered by the district judge with the county auditor of the county of legal settlement of the applicant." (Emphasis ours)

From the underscored portion, it appears that issuance of a "certificate of free treatment" is merely a condition for admission to a sanatorium and that once so admitted the certificate remains in force and the patient remains in the sanatorium "until discharged from the sanatorium as no longer having tuberculosis in the communicable stage". The only provisions in Chapter 254 for hospitalization in a different sanatorium than that to which originally admitted are contained in Section 254.6 which is limited to transfer of refractory tubercular's and Section 254.9 which is limited to persons refusing to receive or continue free treatment. Neither provision appears applicable in the situation described in your inquiry. Further, Chapter 254 contains only provisions requiring issuance of certificates. It contains no provision whatsoever referring to revocation of certificates. Treatment is terminated by discharge from the sanatorium not by revocation of the certificate.

Rules and regulations promulgated under Section 254.6 appear at 1954 I.D.R. 169. Again no reference to "revocation" of certificates can be found and again it appears the purpose of such certificate is to "obtain admission of the tuberculous patient to a tuberculosis sanatorium with a minimum of delay" rather than to determine the duration of treatment once admitted.

Chapter 271 pertains directly to the Oakdale Sanatorium. Section 271.10, Code 1954, provides as follows:

> "Indigent patients. The state shall, on certificate of the finance committee of the board of regents, pay, out of any money in the state treasury not otherwise appropriated, the actual and necessary expense attending the transportation of an accepted applicant for admission, to and from the sanatorium, and the expense of treating said applicant at said institution, if said applicant

is entitled to free treatment under chapter 254."

Section 271.14, Code 1954, provides as follows:

"Liability of county. Each county shall be liable to the state for the support in the state sanatorium of all patients having a legal settlement in that county, and the state shall be liable for such support when such patients have no legal settlement in this state, or when such settlement is unknown. The amounts due shall be certified by the superintendent to the state comptroller, who shall collect the same from the counties liable, at the times and in the manner required for the certification and collection of money from counties for the support of insane patients." (Emphasis ours)

Again there is nothing in the statutes to suggest that once a patient has been admitted to the state institution as an indigent the county has any further function in the matter except to pay for such patient's support until the patient is discharged by the institution. If, during the course of treatment, the patient's financial circumstances have changed to the extent that he is able to pay for the treatment the county has its proper remedy under Section 271.16. As is stated at page 111 of the 1940 Report of the Attorney General with reference to Section 271.14, hereinabove quoted:

"According to the foregoing, in the event that the patient has a legal settlement, the County of that settlement is liable for the support at the sanatorium."

Very truly yours,

NORMAN A. ERBE
Attorney General of Iowa

NAE:LJA:mfm

May 13, 1957

Mr. W. S. Edmund, D.O., Secretary
Board of Osteopathic Examiners
621 Third Street
Red Oak, Iowa

Re: County Public Hospitals

Dear Sir:

Receipt is acknowledged of your letter of May 7th in which you submit the following:

> "A question has arisen concerning the powers and duties of the county hospitals regulating the jurisdiction of doctors of osteopathy in restricting the privilege of doctors of osteopathy to those residing within the county, wherein the county hospital is located, or within a reasonable distance thereof, and denying such privileges if they do not reside within the county or a reasonable distance."

You further state that your question originates in the provision of Section 347.14(4), Code 1954, that the board of hospital trustees shall:

> "Determine whether or not, and if so upon what terms, it will extend the privileges of the hospital to nonresidents of the county." (Emphasis ours)

However, it appears from Section 347.16 that the "privilege" referred to is that of admission as patient and that the "nonresidents" referred to are those who seek admission as patients. Said section provides in part:

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"Any resident of the county who is sick or injured shall be entitled to the benefits of such hospital . . .

"Free care and treatment . . . to any indigent or tuberculous persons shall be furnished to such residents . . . " (Emphasis ours)

As you suggest, further evidence that it was not the legislative intent to apply the qualification of county residence to physicians is furnished by Section 347.18, Code 1954, which provides as follows:

"Discrimination. In the management of such hospital, no discrimination shall be made against the practitioners of any recognized school of medicine; and each patient shall have the right to employ at his expense any physician of his choice; and any such physician, when so employed by the patient, shall have exclusive charge of the care and treatment of the patient; and attending nurses shall be subject to the direction of such physician." (Emphasis ours)

Since Section 347.18 is phrased in terms of "any physician" and no express restriction as to residence of physicians is made in Section 347.18 or any other provision of Chapter 347, I am of the opinion that no physician may be denied "exclusive charge of the care and treatment" of his patient nor the authority to "direct" the attending nurse by reason of non-residence in the county. That osteopaths are "physicians" within the meaning of Section 347.18, see 1954 OAG 136 at page 141. That the legislature did not intend to exclude physicians from county hospitals on the basis of county residence is further supported in logic when it is considered that many persons, particularly in rural areas, are likely to select their family physician from the nearest community without reference to county lines. It seems highly improbable that the legislature would attempt to dictate changes in choice of regular physician for those who happen to become hospitalized in a county hospital.

In conclusion, I would, therefore, advise you it is my opinion that the powers conferred on county hospital trustees to restrict county hospital privileges on the basis of county residence extend only to patients and not to physicians.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfa

May 13, 1957

Mr. Mark D. Buchheit
Fayette County Attorney
West Union, Iowa

Dear Mr. Buchheit:

Receipt is acknowledged of your letter of May 7th as follows:

"Numerous questions have arisen concerning the purchase and sale of medicines and drugs by the Steward and Matron of the Fayette County Farm.

"I desire to have an opinion rendered by your office, informing me of the answers to the following questions:

"1. May the County Farm Steward and Matron purchase medicines and/or drugs from a wholesale house and dispense same to County patients who are being cared for by the County at the County Home?

"2. May the County Farm Steward and Matron purchase medicines and/or drugs and dispense same to patients who are being cered for at the County home, but who are paying their own way or having their relatives pay their way and as such reimburse the County for medicines and/or drugs which the Steward and Matron are obtaining in behalf of the County and dispensing to them?

"3. May the County Farm Steward and Matron purchase medicines and/or drugs from a wholesale house and dispense same to County Farm employees, said County Farm employees reimbursing the County

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for said purchases, which were made by the County Farm Steward and Matron for the County for said County Farm employees.

"4. In the event that purchases were made for any and/or all of the above classes of people, by the said County Farm Steward and Matron on behalf of the County, which of said classes of persons are required to pay sales tax on said purchases, and if any are required to pay such sales taxes on what amounts should the said sales taxes be figured? By way of explanation would the wholesale amount, which is the amount that was paid for by the classes in questions 2 and 3, be the amount that the sales taxes would be based on?"

It is presumed that by "drugs and medicines" you used the term in the sense defined in Section 155.3, Code 1954, which provides in pertinent part as follows:

" * * * * * *

"1. 'Drugs and medicines' shall include all medicinal substances and preparations for internal or external use recognized in the United States Pharmacopoeia or National Formulary, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or animals.

" * * * * * * * "

It is, therefore, my opinion that purchase in wholesale lots and dispensation or sale in the manner described in your first three questions would come within the meaning of Section 155.1, Code 1954, which provides as follows:

"Persons engaged in. For the purpose of this title the following classes of persons shall be deemed to be engaged in the practice of pharmacy:

"1. Persons who engage in the business of selling, or offering or exposing for sale, drugs and medicines at retail.

"2. Persons who compound or dispense drugs and medicines or fill the prescriptions of licensed physicians and surgeons, dentists, or veterinarians." (Emphasis ours)

Since no exception with respect to county home stewards or matrons appears in Chapter 155 and no authorization for such

activity appears in Chapter 253 on county homes, the answer to your first three questions is in the negative and no answer is required to your fourth question.

This, of course, would not prevent county homes from keeping on hand first-aid items and common proprietary sundries commonly found in most households, where purchased pursuant to authorization of the board of supervisors in the same manner as other common items of supply such as groceries, soap, and toilet paper and furnished inmates as part of the ordinary care given at the home.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

May 13, 1957

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

Dear Mr. Leir:

Receipt is acknowledged of your letter of May 1st as follows:

> "I would appreciate receiving the opinion of your office with reference to the following problem:
>
> "Recently the City Council of the City of Davenport considered adopting an Ordinance setting up the creation of two new jobs in the City Administration.
>
> "Subsequently it develops that two of the Councilmen have been considered as possible appointees to such offices, subject to Civil Service requirements, of course.
>
> "Section 368A.21, Code of Iowa, 1954, would appear to prohibit any elective officer from taking an appointive office from which they would receive salary, before the tenure expires.
>
> "Specifically I desire to know if, in your opinion, there is any way in which such officers could accept such positions before their terms expire next January 1st, assuming, of course, that they resign their positions as Aldermen in the meantime."

Section 368A.21, Code 1954, to which your letter refers provides in pertinent part:

57-1-14

> "No member of any city or town council shall, during the time for which he has been elected be appointed to any municipal office which has been created . . . during the term for which he was elected . . . " (Emphasis ours)

No case decisions exist under the quoted portion of the statute. In view of the unequivocal nature of the prohibition stated, there appears to be no room for construction. The historical references indicate the prohibition has existed in the law since 1858 and, as was said with respect to the general language of the statute by our Supreme Court when considering another of the prohibitions therein contained in its decision in the case of Ryce v. City of Osage, 58 Iowa 558, 55 N.W. 532:

> "The language is general and absolutely prohibitive . . . "

Since the disability of a council member to be appointed to any office created "during the term for which he was elected" is unequivocally stated to exist throughout "the time for which he was elected", resignation by a council member would in no way relieve the disability as such resignation although shortening his occupancy of the post of councilman would not vary the time for which he was elected.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

May 13, 1957.

Iowa Development Commission
411 Central National Bank Bldg.
Des Moines, Iowa

Attention of Mr. G. R. Wimmer,
Industrial Field Representative

Gentlemen:

In your letter of May 9, 1957, you inquire as to the following:

> "Under Iowa law, dealing with the check-off of union dues, must an employer withhold wages if the employee and his wife sign an authorization before a Notary Public requesting same?"

With regard thereto, I would advise you that it is my opinion that a reasonable interpretation of the laws of this State do not require an employer in the foregoing situation to withhold union dues from an employee's wages and pay same to a labor union, association, or organization in the absence of a specific contract providing for a so-called system of "check-off."

The following provisions of the 1954 Code of Iowa are applicable to your question:

> "Section 736A.4 provides:
>
> "Union dues as prerequisite to employment - prohibited. It shall be unlawful for any person, firm, association, labor organization or corporation, or political subdivision, either directly or indirectly, or in any manner or by any means as a prerequisite to or a condition of employment to require any person to pay dues, charges, fees, contributions, fines or assessments to any labor union, labor association or labor organization."

57-5-15

Section 736A.5 provides:

"Deducting dues from pay unlawful. It shall be unlawful for any person, firm, association, labor organization or corporation to deduct labor organization dues, charges, fees, contributions, fines or assessments from an employee's earnings, wages or compensation, unless the employer has first been presented with an individual written order therefor signed by the employee, and by his or her spouse, if married, in the manner set forth in section 539.4, which written order shall be terminable at any time by the employee giving at least thirty days written notice of such termination to the employer."

Section 539.4 provides:

"Assignment of wages. 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."

I have been unable to find that the Iowa Supreme Court has considered the specific question you have presented. There have been no Supreme Court interpretations of Sections 736A.4 and 736A.5. An opinion of the Attorney General dated September 16, 1955, relating to assignment of union dues under Section 736A.5 merely states said section not to be in conflict with Section 302 of the National Labor Management Relations Act 29, USCA, Section 186. Said section was also involved in opinions appearing in 1948 Report of Attorney General, page 28 and page 116, wherein it was stated that group insurance, Red Cross and Community Chest deductions are now within said section. (Section 736A.5)

Section 539.4 pertains to assignment of wages as distinguished from a revocable order to deduct dues from wages. Said section, in my opinion, is pertinent to "check-off" only to the extent it determines the "manner" and form of an employee's "order" to his employer to deduct union dues, etc. from his wages. In this regard, note that Section 736A.5 states that "check-off" is unlawful * * * unless the employer has first been presented with an individual written order signed * * *

in the manner set forth in Section 539.4 * * *." Said authorization is revocable and in my opinion not actionable inasmuch as under the terms of the statute, it is merely an order. I do not believe such voluntary orders are properly classified as assignments under Chapter 539. (See 1948 Report of Attorney General, 28,30) Also Poole v. Carhart, 71 Iowa 37, Brink v. Coutts, 87 Iowa 197, 188; Cuttinger v. Mullany, 191 Iowa 804.

As the Iowa statutes seem to distinguish between the assignment of wages under Section 539.4 and an order for "check-off" under Section 736A.5, it may be well to set out some general considerations to guide you in your discussions with regard to assignment of wages. Generally, in the absence of statute, it does not appear necessary to obtain the assent of an employer to a single assignment of wages. Even if an employer gives notice that he will not consent to an assignment of wages by an employee, it appears that he cannot thereby escape liability to an assignee. I find that the Court decisions in the various states are not in agreement as to whether the "check-off" is within a State's general statute prohibiting or regulating the assignment of future earning and wages. 14 ALR 2nd 177.

As to assignments of wages in Iowa, the Iowa Court in Metcalf v. Kincaid, 87 Iowa 443, stated at page 448:

> "The true rule is that an assignment of wages to be earned is good if accepted, and if at the time it is made, there is an existing engagement or employment by virtue of which, wages are being, and in the future, may reasonably be expected to be earned, even though there is no contract or fixed time of employment."

Subsequently, the Iowa Court, in Coyle v. Gately's Inc., 230 Iowa 511, at page 514, changed their opinion with regard to assignment of wages in expectancy. The Court stated:

> "* * * The great weight of authority holds that assignments of future personal earnings, wholly in expectancy and to accrue from employment and not yet entered into or contracted for, are invalid." (note citations therein)

It is equally well established that the right of an assignee of salary or wages to recover from the employer, is the same as, but no greater than that of the employee. Stetzer v. C.M.

& St. P. Ry. Co., 156 Iowa 1. Also see 4 Am. Jur., Sections 41-44, pp. 260,264. Accordingly, it would appear that the employer has the right to pay the whole wage. If he were besieged by various assignees of his employee, or for partial payment of the debt for wages, it would seem that he might in law properly refuse to be subjected to suits by several assignees of an employee. 4 Am. Jur., Assignments, Sec. 65, p. 279. However, in equity, when the employee and all his assignees are parties, it would appear that an assignment of a claim for wages would be enforceable, as all parties would be present, and no prejudice to the employer would result by splitting up claims. 80 A.L.R. 413, 414, 423. It should be noted that we are not here concerned with action to enforce a collective bargaining contract which specifically provides for check-off of dues.

The law of the State of Illinois, with regard to assignment of wages generally, would appear to be the same as that of this State. In State St. FurnitureCo. v. Armour & Co., 345 Ill. 160, 177 N.E. 702, 76 A.L.R. 1298, the Illinois Supreme Court, as reported in the last citation, ruled "that an assignment of wages made without the consent of the employer was valid notwithstanding the fact that, in the contract of employment, it was specifically provided that an assignment could not be made without the written consent of the employer, applied to wages that had been fully earned. The court took the position that, since the consent of an employer was not one of the elements of an assignment of an entire claim for wages, his failure to give consent could not be said to make an assignment void; that otherwise the power to withhold consent would be the power to destroy valuable property rights. The court stated that nothing was involved, as between the employer and employee, except that the former had become the debtor of the latter, the contract of employment having been fully executed, and the wages earned, and that, as between a debtor and creditor, the former had no more right to restrain an alienation of the claim than he would have had to forbid the sale or pledge of other chattels."

Although the question has not been specifically determined in Iowa, there is good authority to the effect that "to force" the employer to recognize individual partial assignments of wages earned, or to be earned, when made by numerous employees to a labor union as a convenience in the payment of Union dues, would be against the spirit, if not the letter of the National Labor Relations Act. Pacific Mills v. Textile Workers Union, 197 S.C. 330, 15 S.E. 2d, 134, 135 A.L.R. 497.

The aforementioned Pacific Mills case has been good authority (adopted by the Illinois Court in Pure Milk Association v. Kraft Foods Co., 130 N.E. 2nd 765) and should, and in my opinion would be followed in Iowa on the point that where an employer refuses to write a "check-off" provision into its contract with the union, that subsequently executed individual partial wage assignments directing the employer to deduct monthly dues and pay same to the Union, should not be enforced in equity due to the burden to the employer. The Court reasoned that to enforce the assignments would be tantamount to compelling the employer to write into its contract with the Union a provision objectionable to the employer, and would compel the company to act as agent for the Union in collection of dues.

"Check-off" has normally been considered a matter between the employee and the Union and not a condition of employment between the employee and employer; and likewise, not a mandatory subject of collective bargaining under the National Labor Relations Act. Chabot v. Prudential Ins. Co. of America, 75 A. 2d 317. Some State statutes either expressly authorize or prohibit a "check-off" of union dues. 14 ALR 2d 177. However, in Iowa Sections 736A.4 and 736A.5 of the 1954 Code control. Section 736A.5 allows voluntary "check-off" providing the statutory procedure is followed. Whereas, Section 736A.4 provides "check-off" is illegal when required "as a prerequisite to a condition of employment." Thus, in Iowa, it is my opinion that "check-off" is by statute recognized as a voluntary matter for consideration between the employer, the employee and a union -- as a condition of employment.

Although , Section 736A.4 has not been interpreted by the Court, it would appear that its terms are so all inclusive as to make it unlawful for any person, including an employee or his union, to require another person, including an employer, "to pay dues, charges, fees, contributions, fines, or assessments to any union, as a condition of the employment contract existing between the employee, the union and employer. Section 736A.5 allows an employer to deduct labor union dues on presentation of a proper order; but under Section 736A.4, it is doubtful, at least, that the employer would be required "to pay" same "to any labor union, labor association or labor organization. "

Yours very truly,

Harrison E. Cass
Assistant Attorney General

HEC/sp

May 14, 1957

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

Dear Sir:

This will acknowledge receipt of yours of the 8th inst. in which you have submitted the following:

> "Article III, Legislative Department, Section 24, Constitution of the State of Iowa, reads as follows:
>
> "'Appropriations. Sec. 24. No money shall be drawn from the treasury but in consequence of appropriations made by law.'
>
> "Senate File 460, Acts of the 57th General Assembly, contains the following section:
>
> "'On June 30, 1958 and each June 30 thereafter, the state comptroller shall allocate from the general fund all unobligated balance above twenty-four million dollars to the various school districts of the state of Iowa an amount based on the average daily attendance of resident pupils in each such school district and the average number of pupils for whom they pay tuition as certified to him by the state department of public instruction.'
>
> "I respectfully request an official opinion as to whether or not provisions of Senate File 460 constitute an appropriation, and if the Comptroller is authorized to issue his warrants based upon the authority of this Act."

In reply thereto we advise as follows. We are of the opinion that the foregoing statute constitutes an appropriation and you, as

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Comptroller are authorized to issue warrants under its authority. Basic in this conclusion we refer to this definition of appropriations appearing in 42 Am. Jur., paragraph 43, title Public Funds:

> "Definitions and Distinctions. - In specific terms, an 'appropriation' may be defined as an authority of the legislature, given at the proper time and in legal form to the proper officers, to apply a distinctly specified sum from a designated fund out of the treasury, in a given year, for a specified object or demand against the state. In general terms, an appropriation is the act of setting money apart formally or officially for a special use or purpose by the legislature in clear and unequivocal terms in a duly enacted law.
>
> "Neither a promise to pay a debt of a state, contained in a certificate thereof issued by its authority, nor a promise on the part of the legislature to make an appropriation, or a pledge of the faith of the state, can amount to an appropriation."

and to this rule of what language will constitute an appropriation or fail as such also appearing in 42 Am. Jur., paragraph 45, in words as follows:

> "Intent to Make Appropriation. - No particular form of words is necessary to constitute a valid appropriation, but the legislative intent to appropriate funds must be clear and certain; it cannot be inferred by a construction of doubtful acts or ambiguous language. It is sufficient if an intention to make an appropriation is clearly evinced by the language of the statute, or that no effect can be given to the statute unless it is considered as making the necessary appropriation. Such intention may be ascertained from the entire statute. An act setting apart for the payment of the state debt certain funds which shall not be paid out for any other purpose, declaring that the purpose of the act is to provide for the payment of certain bonds or certificates, constitutes and appropriation for their payment."

These rules as applied to the Act under consideration disclose that the language of the Act does not merely provide for a bookkeeping transaction to be effected by you but is an allocation of State money to specified school districts of the State. The intention of the Legislature to invest such school districts with this money is clear and under the foregoing rules this statute evidences this intent of appropriation, and warrants may issue in conformity therewith.

Very truly yours,

NORMAN A. ERBE
Attorney General of Iowa

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

May 14, 1957

Dr. Ralph H. Heeren
Deputy Commissioner
Department of Health
L O C A L

Dear Dr. Heeren:

Receipt is acknowledged of your letter of May 8, 1957, as follows:

> "A question has arisen in regard to the administration of Chapter 135D, Code of Iowa, 1954, of which we request your opinion.
>
> "In the year 1956, an individual submitted an application for the first annual primary license to operate a mobile home park and said application was accompanied by the first annual primary license fee prescribed in Section 135D.5 of the Code for the operation of a facility with more than 20 mobile homes. This fee was deposited at the State Treasurers Office. However, the mobile home park in question did not qualify for licensure during the calendar year 1956 because of uncorrected deficiencies noted by representatives of this department, in the sanitary facilities of the park.
>
> "The same individual submitted an application for a license to operate the same mobile home park for the calendar year 1957, accompanied by a personal check in an amount equivalent to the first annual primary fee.
>
> "Should the individual referred to above, pay the first annual primary license fee for the calendar year 1957 again, due to the inability of his

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park to qualify for licensure during the calendar year 1956; or does the reduction in license fee prescribed by law subsequent to the first annual primary license apply? In short, is this individual required to pay a fee of $25.00, or $50.00 for the current calendar year under Section 135D.5 of the Code?"

Section 135D.5, Code 1954, to which your letter refers, provides in pertinent part as follows:

"Primary and annual license fees. The application for the first annual primary license shall be submitted with all plans and specifications enumerated in section 135D.4*, and payment of twenty-five dollars for each mobile home park with facilities for twenty or fewer mobile homes, or fifty dollars for each mobile home park with facilities for more than twenty mobile homes, and shall be accompanied by an approved permit from the municipality whereon the park is to be located, or a statement that the municipality does not require an approved permit. In the event a mobile park has facilities for three or less mobile homes, the annual license fee shall not exceed ten dollars.

"Each year thereafter, the license fee shall be twenty-five dollars. All annual license fees collected by the department of health shall be deposited with the state treasurer.

" * * * * * * * " (Emphasis ours)

"* Section 135D.3 referred to in enrolled Act."

Since the quoted statute refers to the first license rather than the first application and it is stated in your letter that applicant has never before been issued a license, the reduction in license fee provided in the case of renewals is not applicable.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

May 15, 1957

Mr. C. T. Howard, D.S.C.
Secretary
Board of Chiropody Examiners
Lippert Building
Boone, Iowa

Dear Mr. Howard:

Receipt is acknowledged of your letter of May 7th as follows:

> "As Secretary of the State Board of Chiropody Examiners I have been instructed to get an official opinion from you. I feel that perhaps a few words of explanation would first be in order.
>
> "Last year a National Board of Chiropody Examiners was formed. The purpose of this board was to more nearly standardize the type of examinations given by the various State Boards of Chiropody Examiners. The National Board is now in the process of preparing a standardized list of examination questions.
>
> "It is our desire that you give us your official opinion as to whether or not our law permits us to accept examinations of the National Board of Chiropody Examiners as our written examinations at our discretion. Our next board meeting will be June 9th and, if at all possible, I would like to have something to report to them at that time regarding your opinion."

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Section 149.3, Code 1954, provides in pertinent part as follows:

> "Every applicant for a license to practice chiropody shall:
>
> * * * * * * *
>
> "3. Pass an examination in the subjects of anatomy, chemistry, dermatology, diagnosis, pharmacy and materia medica, pathology, physiology, neurology, practical and clinical chiropody, foot orthopedics, and others as prescribed by the board of chiropody examiners, and must obtain a general average of at least seventy-five percent and not less than seventy percent in any one subject."

Section 147.12, Code 1954, provides in pertinent part:

> "For the purpose of giving examinations to applicants for licenses to practice the professions for which a license is required by this title, the governor shall appoint a board of examiners for each of said professions."

Section 147.28, Code 1954, provides in pertinent part:

> "Each examining board may maintain a membership in the national association of the state examining boards of its profession . . . "

Thus, the statutes recognize the existence of national associations and approve membership therein. However, the duty of giving examinations is clearly imposed on the state examining board. Under the maxim of construction, delegatus non potest delegare, the state board cannot cede its power or delegate its duty to examine applicants by means of a set of questions covering the full scope of Section 149.3(3) to the National Association. However, the statutes do not state how the examination questions shall be arrived at by the board and consequently it appears permissible for the board to screen the questions contained in examinations promulgated by the National Association and adopt such examination as its own if it be sufficiently comprehensive to cover the full scope of subjects named in Section 149.3(3), Code 1954. It further appears that the state board may adopt as its own questions contained in the National Association's examination pertaining to and in the opinion of the board adequately covering individual subjects named in Section 149.3(3) provided that the board supplements such questions with further examination questions covering subjects

therein specified which may be omitted from or insufficiently treated in the National Association's examination.

In other words, the source of questions used by the board in discharging its duties under the quoted sections is at the board's discretion and may derive from the National Association or any other source available to the board so long as the examination given is sufficiently comprehensive in scope to comply with Section 149.3(3) and is conducted in the manner prescribed by Section 147.23.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

May 15, 1957

Mr. G. A. Cady
Franklin County Attorney
Hampton, Iowa

Dear Mr. Cady:

Receipt is acknowledged of your letter of May 11th as follows:

> "I am enclosing herewith a Problem presented to me by the attorney for the Hampton Consolidated School District.
>
> "I previously submitted to you this problem in a somewhat different form and apparently they would like to have an answer in somewhat greater detail. Therefore, I would appreciate it if one of your assistants would investigate the matter and advise as to the legality of the propositions enumerated herein."

It appears that the problem to which you refer was presented to you for your opinion pursuant to Section 336.2(7) and that you are, in turn, requesting the opinion of this office under Section 13.2(7), Code 1954, because of some doubt or difficulty encountered in formulating your opinion in the matter. In future correspondence it is suggested that you specify the particular point of doubt which you encountered in formulating an opinion.

The general problem as enclosed with your letter is as follows:

> "A city independent school district is considering the purchase of a tract of land adjacent to its school site. The tract contains four apartments

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and garage space suitable thereto. The school will use the improvements for housing for members of the teaching staff. In the more distant future the land would probably be used as a site for construction of a new school building. The cost of the property would not exceed 1½ per cent of the assessed value of the taxable property in the district.

"Your opinion is requested as to whether this school district may legally purchase the said property (a) By issuing a warrant or warrants which will be stamped 'not paid for want of funds', (b) By a vote of the people authorizing a tax or a bond issue under Section 275.32 Iowa Code (1954), (c) By a vote of the people authorizing purchase, payment, and tax levy under Section 278.1(7) Iowa Code (1954), (d) By a vote of the people and a bond issue under Chapter 296 Iowa Code (1954), or (e) any combination of (a), (b), (c), and (d)."

A fundamental rule announced by our Court on too many occasions to require citation is that creatures of statute have only those powers conferred by statute or reasonably and necessarily implied as incident to exercise of expressly conferred powers. School districts are, of course, creatures of statute.

Thus, alternative (a) stated in your inquiry is inapplicable for want of statutory authority to use stamped warrants for purchase of real estate. Alternative (b) is inapplicable for the reason that Chapter 275 is an act for formation of community school districts and your inquiry states the question involves an independent school district. Alternative (c) has no application because Section 278.1(7), Code 1954, does not include teacher's homes in the express list of purposes for which said subsection may, by its own terms, be employed. Alternative (d) is the proper method for carrying out the described project as Section 296.1 is not limited to any type or types of school districts and expressly refers to teachers' homes. Prior opinions of this office have construed "building" as used in Section 296.1 to include purchase of existing buildings for purposes therein authorized.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

May 15, 1957

Mr. Robert D. Parkin
Jefferson County Attorney
Fairfield, Iowa

Dear Mr. Parkin:

In your letter of March 23, 1956, you ask the following questions:

"This matter arises in Justice of the Peace court frequently, where a defendant charged with a misdemeanor appears, enters his plea of guilty, judgment is rendered by the assessment of a fine, and at that time the Defendant is given time to pay his fine. The defendant leaves the justice of the peace court on his promise to pay the fine assessed. Thereafter the Defendant does not appear to pay the fine, these being the material facts, the following questions are posed.

"1. Can the Justice of the Peace at a later time place a Mittimus in the hands of the sheriff, ordering the sheriff to confine the Defendant to jail for a certain period of time?

"2. If the answer to question #1, is in the affirmative, does this mittimus act the same as a Warrant of Arrest, giving the sheriff the authority to pick up the Defendant and place him in jail?

"3. If the answer to questions #1 and #2 is in the affirmative, does the mittimus give the sheriff authority to place a hold order on a defendant in another county, and give him the right to pick up said Defendant in another county on the basis of the Mittimus alone?

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4. "If the answers to questions 1, 2, and 3 are in the negative, is it not proper for the justice of the peace to hold the Defendant in contempt of court for not paying the fine as so ordered, and thereby have a Warrant of Arrest issued for the defendant and also gaining jurisdiction over said defendant by the use of the Warrant of Arrest."

I assume that the Justice of the Peace did not provide in the judgment that the defendant be imprisoned until the fine was satisfied.

1. The answer to the first question is found in Lanpher v. Dewell et al, 56 Iowa 153. The Court there held that a Justice of the Peace had no authority to commit a person to prison for nonpayment of a fine for contempt, where the judgment imposing the fine does not provide for imprisonment, and he is liable for damages in an action for tort to a person so illegally committed. The answer to the first question is, therefore, in the negative.

2 and 3. No answer is required in view of the answer to question 1.

4. The pertinent Code sections in relation to the fourth question are set out below.

"762.32 Imprisonment for nonpayment of fine. A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine is satisfied."

"791.6 Execution for fine. Upon a judgment for a fine, an execution may be issued as upon a judgment in a civil case, and return thereof shall be made in like manner."

"665.5 Imprisonment. If the contempt consists in an omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he perfor s it. In that case the act to be performed must be specified in the warrant of the commitment."

"626.1 Enforcement of judgments and orders. Judgments or orders requiring the payment of money, or the delivery of the possession of property, are to be enforced by execution. Obedience to those requiring the performance of any other act is to be coerced by attachment as for a contempt."

A reading of the pertinent statutes shows that there are at least two ways that a judge may draw his judgment imposing a fine. Under the familar rule to give effect to all pertinent statutes, the Court not choosing to order the imprisonment of the defendant until the fine was satisfied in the judgment, the enforcement of the judgment is controlled by Section 626.1. Section 626.1 contemplates that judgments requiring the payment of money are to be generally enforced by execution. The answer to the fourth question is in the negative.

Very truly yours,

JAMES H. GRITTON
Assistant Attorney General

JHG:mfm

May 16, 1957

Mr. Vincent E. Johnson
Poweshiek County Attorney
Montezuma, Iowa

Dear Mr. Johnson:

Receipt is acknowledged of your letter of May 11th as follows:

> "I herewith request your opinion in the following matter, to-wit: A resident of Grant Township, Poweshiek County, resides outside the Independent School District of Grinnell, Iowa, but sends his children to school in the Independent School District. The resident of Grant township owns real estate and personal property within the Independent School District of Grinnell, and is taxed on both real and personal property.
>
> "Section 282.2 of the Code of Iowa provides that such an individual 'shall be allowed to deduct the amount of school taxes paid by him in said district from the amount of the tuition required to be paid.'
>
> "Does the terms and provisions of Section 282.2 extend to personal property as well as real estate, so that in computing the offsetting tax said offset shall include school tax paid on both real and personal property; or does the provisions of Section 282.2 restrict the offset to tax paid on real property only?"

Section 282.2 to which your letter refers provides as follows:

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

Since the statutory offset provided is for "school tax paid by him in said district" without reference to type of property taxed the ultimate question to be determined is: On what property does the party claiming the offset pay school tax in the district. Pertinent to this question are Sections 428.8, 428.11, 429.3, and 444.3, Code 1954.

Reference to these sections reveals that the tax rate applied to taxable personal property other than personal property taxed as moneys and credits is the same as that applied to real estate (Section 444.3). It further appears that moneys and credits are generally taxed where the owner lives (Section 428.8) but in some instances are taxed at the place where the business in connection with which they are used is located (Section 428.11). It further appears that 50% of moneys and credits taxes collected within each school district are paid over to the school district (Section 429.3) and that such share of the moneys and credits tax is taken into account in computing the millage levy to be applied against other taxable personal property and real estate for the purpose of raising the amount certified by such local school district to the board of supervisors (see Section 444.3) under Chapter 290, Code 1954.

Thus, taxes collected on personal property situated within a school district on the basis of certification by such school district and levy by the board of supervisors are clearly school "taxes". Similarly, taxes on moneys and credits used in connection with a business in such school district considered in computing a millage levy under a tax certification by such school district are "school taxes".

I am, therefore, of the opinion that the party to whom your letter refers is entitled to a tax offset against tuition under Section 282.2 for all personal property owned by him other than moneys and credits upon which he pays a school tax based on certification by the Independent School District of Grinnell to the county board of supervisors and levied by them pursuant to such certification.

He is further entitled to an offset on 2½ mills of tax paid on such moneys and credits as are used by him in conducting his business and are included by the county auditor in computing the millage levy on other property in the Independent School District of Grinnell. He is not entitled to an

offset on any property owned by him taxed at the millage rate for such property in the school district where he resides nor on account of 2½ mill tax on any moneys and credits owned by him and considered by the county auditor in computing the millage rate in such district on other property.

In short, he is entitled to an offset on all taxes paid on any type of property where such tax derived from or applied to any tax certification made by the Independent School District of Grinnell to the county board of supervisors for levy by them.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

May 17, 1957

Mr. Gordon L. Winkel
Kossuth County Attorney
Algona, Iowa

Re: Grand Jury Indictment of Robert Brecht

Dear Mr. Winkel:

A thousand pardons for not getting around to answering your letter of March 28 sooner but, as I explained to you at the County Attorneys' meeting held recently, other office commitments prevented me from giving your matter any serious consideration as long as the Legislature was in session.

I have examined the copy of the Grand Jury Indictment, together with minutes of evidence attached, which you enclosed with your letter, and it is my opinion that under the facts stated in your letter and the information contained in the Indictment and attached minutes of evidence it would be exceedingly difficult, if not impossible, to secure the extradition of the defendant from the State of Illinois in the event that he should refuse to waive extradition and ask for a hearing thereon before the Illinois Governor.

The decisions applicable to the questions you submit are very meager in Iowa. In State v. Julien, 48 Iowa 445, the prosecution arose under the forerunner of the statute under which Brecht has been indicted (Sec. 710.12, Code 1954). In reversing the conviction had in the lower Court, the Supreme Court made these observations:

> "Under this statute and indictment the defendant must have wilfully concealed, sold, or in some manner disposed of the property in Plymouth county, without the consent of the mortgagee, before he could be convicted.
>
> "* * * * * * * *
>
> "We do not understand that the defendant

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would be guilty if he openly, and in the usual and ordinary course of business, removed the property from Plymouth county. The mortgage does not prohibit such a removal, and in the absence of such a provision such a removal would not be a concealment or disposal of the property. What the effect of such a provision would be we do not determine. By the terms of the mortgage in question the only effect of a removal of the property from the county is to give the mortgagee the right to take possession, and sell the property before the debt becomes due."

In 1929 the State Legislature amended what was then Section 13037, Code of 1927 (See Sec. 27, Chap. 30, Acts of the 43rd G. A.), by adding thereto what are now the provisions of Section 710.13, Code of 1954. Our Supreme Court in State v. Delevie, 219 Iowa 1317, again considered the statute as amended (and as the two sections now appear in our Code), and concluded that before an offense could be established under the provisions of the statute it was necessary for demand to be made by the mortgagee or the seller under a conditional bill of sale for a satisfaction of the debt or a return of the property constituting the security. From the information submitted to our office it does not appear that any demand was ever made on Brecht for the return of the property covered by the conditional bill of sale prior to the return of the indictment. In fact, all three of the witnesses who appeared before the Grand Jury specifically stated that they did not know the whereabouts of the defendant Brecht and it is reasonable to assume that, not knowing his whereabouts, no demand such as contemplated by the statute was made upon him.

From the language contained in the cases above cited, and from a reading of the pertinent statutes, we believe it is plain that the seller under a conditional bill of sale must make a demand upon the buyer under such conditional bill of sale for the satisfaction of the debt or a return of the property prior to the institution of criminal proceedings. We further believe it must be clearly shown that the buyer under a conditional bill of sale must have had a felonious intent to conceal or destroy mortgaged property and must have acted wilfully in that respect in order to be guilty of a violation of Section 710.12. While it is true that the indictment charges an "intent to defraud,

destroy, conceal, sell or in some manner dispose" of the property in question, yet the supporting evidence falls far short of that which would be required to successfully obtain extradition from a foreign jurisdiction. In fact, it might be difficult for you to prove venue in that it might be impossible for you to prove that the property in question was destroyed, concealed, sold, or in some other manner disposed of in Kossuth County. In this connection see the Court's comments in State v. Julien, supra.

It is our opinion that the mere removal from this state, in the absence of any other showing, of the property covered by the conditional sales contract would not be sufficient to constitute a violation of this statute.

As per your request, we are returning herewith copy of the Grand Jury Indictment enclosed with your communication.

Very truly yours,

RRRD/fm
Enc

RAPHAEL R. R. DVORAK
First Assistant Attorney General

May 17, 1957

Mr. T. C. Strack
Grundy County Attorney
Grundy Center, Iowa

Dear Mr. Strack:

Receipt is acknowledged of your letter of May 15th as follows:

"I should like to have an informal opinion from your office on the following problem.

"Does the board of directors of a community or independent school district have the authority, under the provisions of Sec. 279.8 of the 1954 Code, to regulate the operation of automobiles by students during school hours, particularly during the lunch period, when the student has a regular operator's license and uses an automobile to go to and from school?

"In the event that the board has such authority, would it have any authority to regulate the operation of automobiles during the lunch hour by students who reside in the city or town where the school buildings are located and who leave the school grounds to obtain their lunch at home or some other place?"

Section 279.8, Code 1954, to which your letter refers confers rule and regulation making power on the board as follows:

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"General rules — bonds of employees. The board shall make rules for its own government and that of the directors, officers, teachers, and pupils, and for the care of the schoolhouse, grounds, and property of the school corporation, and aid in the enforcement of the same, and require the performance of duties by said persons imposed by law and the rules.

" * * * * * * * "

The Courts have uniformly upheld all reasonable rules and regulations governing conduct of pupils at school, on their way to and from school, and over the noon hour. Pertinent decisions of the Iowa Supreme Court are: Burdick v. Babcock, 31 Iowa 562, and Kinzer v. Ind. School District, 129 Iowa 441. Also see Lander v. Seaver, 32 Vt. 114, and Deskins v. Case, 89 Mo. 465.

It appears that school boards have ample authority to make reasonable rules and regulations governing pupils in their use of automobiles during their lunch hour, and also have the authority to enforce such rules and regulations by suspension or expulsion under Section 282.4 of the Code.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

May 17, 1957

Mr. Asher E. Schroeder
Jackson County Attorney
Maquoketa, Iowa

Dear Mr. Schroeder:

Receipt is acknowledged of your letter of May 15th as follows:

> "Our Sheriff, Lorin Felderman, has asked me to obtain the opinion of your office in regard to the meaning of the phrase, 'having in his care or custody any prisoner under the age of eighteen years, shall keep such prisoner separate and apart etc'. This in Section 356.3 of the 1954 Code of Iowa.
>
> "From time to time in the past the Sheriff has had in custody, persons under the age of 18 years, but who were married, and thus had attained their majority, for at least some purposes. Our jail facilities are quite limited in this County, and it works some hardship if it is necessary to quarter such prisoners separately.
>
> "Therefore we should be most appreciative if your office could tell us whether or not a person must be 18 years of age before he can be kept with older prisoners, even though he may be married."

Section 356.3, Code 1954, provides as follows:

> "Minors separately confined. Any sheriff, city marshal, or chief of police, having in his care or custody any prisoner under the age of eighteen years, shall keep such prisoner separate and apart, and prevent communication by such prisoner with prisoners above that age, while such prisoners are not under the personal supervision of such

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officer, if suitable buildings or jails are provided for that purpose, unless such prisoner is likely to or does exercise an immoral influence over other minors with whom he may be imprisoned. Any officer having charge of prisoners who without just cause or excuse neglects or refuses to perform the duties imposed on him by this section may be suspended or removed from office therefor."

Your inquiry is, essentially, as to what effect, if any, Section 599.1, Code 1954, has on Section 356.3. Section 599.1, Code 1954, provides as follows:

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

The effect of Section 599.1 has been the subject of several opinions of this office. The following excerpt is from a letter opinion dated November 1, 1956, to Martin D. Leir, Scott County Attorney:

"Questions similar to yours have arisen under Section 124.20, which provides, ' . . . it shall be unlawful for any person to sell, give or make available to any minor . . . any beer . . . ': under Section 123.43, which provides ' . . . no person shall give, sell, or otherwise supply liquor to any . . . person under the age of twenty-one years . . . ': under Section 282.1 which provides, 'Persons between five and twenty-one years of age shall be of school age . . . ': and under Section 98.2, which provides, 'No person shall furnish to any minor under twenty-one years of age . . . any cigarette . . . '. The rule of construction to be deduced therefrom appears to be that where the limiting language is stated in terms of majority and minority, Section 599.1 controls, but where it is stated in terms of specific age Section 599.1 has no effect.

"Thus, for example, since Section 282.1 refers to 'Persons between five and twenty-one years of age . . . ' it has been construed as including all persons within that age bracket without reference to marital status. See 1926 Report of the Attorney General, page 477. Section 123.43 is similarly phrased and a like effect obtains."

In its very recent decision in City of Des Moines v. Reisman, 57/49137, filed May 7, 1957, (N.W.2d and Iowa citations not yet reported) our Supreme Court said:

> "It is to be said the ordinance, quoted and involved here, even avoids the terms 'minority' and 'majority': 'It shall be unlawful for a person under twenty one years of age * * * .' The ordinance certainly does not indicate the city meant the terms 'minority' and 'majority' as used in the code section (599.1, supra). It does not profess to make it unlawful for a minor, as such, to be in a tavern. It is not because he is a minor, but because he is under twenty-one."

Therefore, I would advise you that Section 356.3, Code 1954, does not depend for its operation upon the marital status of the prisoner. "It is not because he is a minor that he is required to be separately confined but because he is under eighteen." Section 599.1 has no applicability to Section 356.3 for the reason that the latter statute is phrased in terms of specific chronological age rather than in terms of "majority" or "minority".

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

May 20, 1957

Mr. Jack W. Frye
Floyd County Attorney
Charles City, Iowa

Re: Expenditures -- Section 345.1 of the 1954 Code of Iowa

Dear Mr. Frye:

Receipt is acknowledged of your letter of May 15th as follows:

> "The Floyd County Board of Supervisors has considered air-conditioning the Floyd County Court House at a cost in excess of $10,000.00. The air-conditioning contemplated would be window units which units I am told, would replace existing heating radiators, that is each air-conditioning unit would also be a heating and ventilating unit and would be tied and connected with the existing heating plant of the Floyd County Court House. It is further explained to me that the court house will necessarily have to be rewired in order to complete the proposed work.
>
> "The board has inquired of me as to whether or not this work would come within the described expenditures of Section 345.1 of the 1954 Code of Iowa; that is whether the contemplated work described above would be an addition to the court house or a remodeling or reconstruction and therefore necessitate that the proposition be first submitted to the legal voters of Floyd County in the event the probable cost exceeds $10,000.00."

57-5-25

Section 345.1, Code 1954, to which your letter refers provides as follows:

> "Expenditures -- when vote necessary. The board of supervisors shall not order the erection of, or the building of an addition or extension to, or the remodeling or reconstruction of a court-house, jail, county hospital,* or county home when the probable cost will exceed ten thousand dollars, or any other building, except as otherwise provided, when the probable cost will exceed ten thousand dollars, nor the purchase of real estate for county purposes exceeding ten thousand dollars in value, until a proposition therefor shall have been first submitted to the legal voters of the county, and voted for by a majority of all persons voting for and against such proposition at a general or special election, notice of the same being given as in other special elections.
>
> " * Exception as to county hospital organized under ch 269, Code 1939, see 51 GA, ch 158, §3"

In answer to your question, I would refer you to the enclosed letter opinion dated January 8, 1957, and addressed to Mr. Charles King, Marshall County Attorney. In that letter the opinion is rendered that certain modifications to a court house heating system including replacement of stokers with a conversion gas burner is not within the meaning of Section 345.1, Code 1954, Your instant proposition is basically similar in that it deals with modification of an existing heating system by substitution of late type heating and ventilating units in place of existing units. On the basis of the January 8 opinion, I am of the opinion the work would not come within Section 345.1.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm
Enclosure - opinion

May 20, 1957

Mr. Martin Lauterbach, Chairman
Iowa State Tax Commission
State Office Building
Des Moines, Iowa

Dear Mr. Lauterbach:

This will acknowledge your submission to this department of a request for an opinion concerning the tax law applicable to the following set of facts:

"Westpott Hybrid Seed Cooperative is a lawfully established Cooperative with its principal place of business at Treynor, Iowa.

"The Coop is in the business of producing or purchasing Hybrid Seed Corn for its members. Each year, prior to the commencement of the crop season, it contacts its members and ascertains the number of bushels of corn that the members of the Coop will need for the second succeeding crop year, e.g. in 1957 it ascertains what seed will be needed for the 1958 crop year. The Coop then has each member of the Coop purchase the number of shares that are equivalent to the number of bushels desired at the ratio of one share for each one and one-half bushels of seed corn desired. They guage (sic) their contracting with farmers for production of corn on the number of shares on the basis of one acre of contract corn for each 30 shares.

" The Coop itself does not own any land and does not raise the Hybrid Seed Corn. Instead it enters a contract with a farmer under which they furnish the farmer the seed, pay a percentage of the fertilizer, furnish the labor for cross-pollination and agree that if the product is of sufficient grade they will purchase same for the market price at the closest grain elevator or sealing price which ever is higher. The price is usually computed on or about

57-5-26

December 15 after the crop season. In the event their contract purchasers do not produce sufficient grain of a quality desired by them they purchase the need that they will need to fill the orders from other producers which is usually at a much higher price. Mr. Saar explained that whereas the market price last year from their contract producers was about $1.47 1/2 per bushel the price that they had to pay other producers was approximately $3.50 per bushel.

"During the last two crop years, due to drought conditions, it has been necessary for the Coop to purchase corn from other producers. As a result thereof, the County Assessor has subjected purchased from other producers the corn on hand on January 1 of the years 1955 and 1956 as being taxable personal property.

"The corn that they have produced under their contract arrangements has never been subject to tax as the County Assessor has agreed that it is exempt under the provisions of Section 427.1 (13) of the Code which exempts agricultural products harvested by or for the person assessed within one year previous to the listing.

"The Coop has unsuccessfully contended that if the purchased corn is subject to tax at all it is taxable under the provisions of Chapter 423 of the Code which creates an excise tax on grain handlers and excludes the property subject to such excise tax from property taxation. The County Assessor has taken the position that the purchased grain is not subject to the grain handler's excise tax due to the fact that under the provisions of Section 428.35 (1) the term grain does not include seeds which have been processed or are the products of such processing when packaged and sacked. The Coop takes the position that said subsection also states that the term 'processing' shall not include hulling, cleaning, drying, grading or polishing and they do not do anything more than hull, clean, dry, grade or polish the grain. They, therefore feel they do come within the grain handler's excise tax if the grain is subject to tax at all."

The provisions of the 1954 Code of Iowa which are pertinent to this problem are as follows:

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

"***

"22. Grain. Grain handled, as defined under section 428.35."

"428.35 Grain handled.

"1. Definitions. "Person" as used herein means individuals, corporations, firms and associations of whatever form. 'Handling or handled' as used herein means the receiving of grain at or in each elevator, warehouse, mill, processing plant or other facility in this state in which it is received for storage, accumulation, sale, processing or for any purpose whatsoever. 'Grain' as used herein means wheat, corn, barley, oats, rye, flaxseed, field peas, soybeans, grain sorghums, spelts, and such other products as are usually stored in grain elevators. Such term excludes such seeds after being processed, and the products of such processing when packaged or sacked. The term 'processing' shall not include hulling, cleaning, drying, grading or polishing.

"2. Tax imposed. An annual excise tax is hereby levied on such handling of grain in the amount hereinafter provided. All grain so handled shall be exempt from all taxation as property under the laws of this state. The amount of such excise tax shall be a sum equal to one-fourth mill per bushel upon all grain as herein defined so handled."

" ***

"6. Payment of tax. Such specific tax, when determined as aforesaid, shall be entered in the same manner as general personal property taxes on the tax list of the taxing district, and the proceeds of the collection of such tax shall be distributed to the same taxing units and in the same proportion as the general personal property tax on the tax list of said taxing district. All provisions of the law relating to the assessment and collection of personal property taxes and the powers and duties of the county treasurer, county auditor and all other officers with respect to the assessment, collection and enforcement of personal property taxes shall apply to the assessment, collection and en-

forcement of the tax imposed by this section.

There was previously submitted to your commission under date of February 16, 1956 an opinion of the assistant commission attorney, acting as an assistant to your writer, in which your writer then concurred, which dealt with the taxability of that seed corn which was produced for the co-operative under contract. For reasons hereafter stated such opinion is hereby withdrawn.

The provisions of Section 428.35 above cited originated with House File 178, appearing as Chapter 236, Acts of the 52nd General Assembly. The first section of Chapter 236 removes grain dealers from the coverage of a section in the 1946 Code by which grain, ice or coal dealers were theretofore assessed upon the average amount of capital used by them in conducting their businesses. Section 2 of Chapter 236 prescribes a wholly new plan for imposing a tax with reference to the business of grain dealers and also as to others handling grain. By the terms of Section 2, which is presently subsection one of Section 428.35, Code 1954, it was prescribed that handling was not to be considered accomplished as to grain where the sole functions performed as to the grain were those of hulling, cleaning, drying, grading or polishing, and it was also

prescribed that it was not to be considered grain which was being handled when such grain had previously been processed or the products of such processing had been packaged or sacked. An exemption was provided in Subsections 2 and 7 of Section 2, Chapter 236, Acts of the 52nd General Assembly, from property taxation for grain handled as defined in subsection one of the said Section 2. The plain intent of the legislature was to prescribe a comprehensive and exclusive tax program applicable to the grain handled by grain dealers and other grain handlers. The words "seed" and "grain" have been used interchangeably by the legislature in Section 428.35 (1). Under the grain handling excise tax, ownership of the grain handled is no criterion as to the subjectivity of the grain to the tax and neither is the purpose for which it is received, except in the event it is received for the purpose of those nominal services such as hulling and cleaning above enumerated. In other words, in all situations where a person receives grain before it is processed and before the products thereof are packaged or sacked for any purpose other than for those purposes specifically enumerated, the grain so received must be included in the measure of the grain handling excise tax regardless of the ownership of the grain.

A co-operative is a person within the definitions of Section 428.35 (1) cited and, for the reasons last stated, we need not determine whether the co-operative is acting as owner or agent for the members of the co-operative with reference to the receipt of the seed grain to be produced on contract or acquired by purchase. The functions of the co-operative as to such grain, while they might include those enumerated services above mentioned, would also include accumulation of such grain, storage of such grain and allocation of such grain in pursuance of its contracts with its members. The co-operative is thus engaged in grain handling and is responsible for the excise tax imposed upon such grain handling. It also enjoys the corresponding and consequent exemption from property taxation as to such grain. Section 427.1 (13) has no application to the grain handler's excise tax. See State v. City of Des Moines, 221 Iowa 642, 266, N.W.41. Exemptions from property taxation are not applicable to excise taxation unless specifically made so. The only exemption provided by Chapter 236, Acts of the 52nd General Assembly, was as to "grain handled." The provisions as to procedure for assessment and collection of that excise tax do not in themselves grant any exemptions and it will be noted that sections two and seven of that Act refer only to "grain handled", raising the rule of statutory construction to the effect that in such cases there was intentional omission

of other exemptions. Sutherland Statutory Construction, 3rd Edition, Section 4915.

In reading this opinion it should be kept in mind that for either the purposes of tax imposition or tax exemption under the provisions of the grain handling tax, the product handled must be grain. In other words, if the grain has been milled or processed in any way other than through those services above enumerated at the time of its receipt, it would not be subject to the grain handling tax and conversely, if it had been so milled or processed as of January 1st of the tax year, it would no longer be grain to qualify for exemption under the provisions of Sections 427.1 (22) and 428.35 (2). The facts as reported to this office indicate this grain, when received by the co-operative, had not been so treated that it might be said to have been as of that time "processed". We conclude that the co-operative must pay the grain handling excise tax upon the grain purchased on behalf of its members and is thus exempt from payment of any property tax with relation thereto.

Very truly yours,

M. A. Iverson,
Special Assistant Attorney General

MAI:bm

May 20, 1957

Mr. Mark D. Buchheit
Fayette County Attorney
West Union, Iowa

Dear Mr. Buchheit:

This will acknowledge receipt of your letter of May 16th addressed to Mr. Norman A. Erbe, Attorney General, Attention: Leonard C. Abels, wherein you ask that question number four of your letter of May 7, 1957 be answered, for the reason that there were in fact sales made of medicines and drugs by the Steward and Matron of the Fayette County Farm. In conversing with Mr. Abels, your writer learned that he had this question from you but your writer did not then volunteer to supply the answer to this question pending receipt of a field investigator's report on an investigation which was then in progress. The question you submitted is for purposes of the record as follows:

> "4. In the event that purchases were made for any and/or all of the above classes of people, by the said County Farm Steward and Matron on behalf of the County, which of said classes of persons are required to pay sales tax on said purchases, and if any are required to pay such sales taxes on what amounts should the said sales taxes be figured? By way of explanation would the wholesale amount, which is the amount that was paid for by the classes in questions 2 and 3, be the amount that the sales taxes would be based on?"

It would serve little purpose to review the facts as they are stated in your letter of May 7th or as found by the Field Examiners for the State Tax Commission in view of the very small amount of potential sales tax

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liability involved. Suffice it to say, your writer and the Director of the Sales and Use Tax Division of the State Tax Commission, Mr. Don Cunningham, have reviewed these facts and have failed to find any "gain", "benefit" or "advantage" to the vendors at the County Farm in sales of such medicines and drugs and, therefore, conclude that such vendors were not retailers for the purposes of the sales tax law, Section 422.42, subsections 4 and 5, and thus have no sales tax liability under the provisions of Sections 422.43 and 422.52 of the 1954 Code of Iowa. The sales tax file on this matter will be closed on the strength of this joint conclusion.

Very truly yours,

M. A. Iverson,
Special Assistant Attorney General

MAI:fs

May 21, 1957

Major General Fred C. Tandy
Adjutant General
L o c a l

Re: Leave of Absence Status for Inactive Duty Training

Dear General Tandy:

In your letter of April 8 you state that a City Attorney in one of our Iowa cities has ruled that city employees who are members of the Iowa National Guard are not entitled to leave of absence for the purpose of attending inactive duty training or drills with the National Guard under the provisions of Section 29.28 of the Code of Iowa. You request a clarification of the status of "inactive duty training" and whether such "inactive duty training" falls within the leave-of-absence privilege created by Section 29.28 of the Code of Iowa.

In examining this problem, I set out as follows the provisions of Section 29.28:

> "Leave of absence of civil employees. 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 nurses corps of this state or of the United States, shall, when ordered by proper authority to active state or federal service, be entitled to leave of absence from such civil employment for the period of such active state or federal service, 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."

Section 92 of the National Defense Act, as amended, provides as follows:

> "Under such regulations as the Secretary of War shall prescribe, each company, troop, battery and detachment of the National Guard shall assemble for training and instruction * * * not less than 48 times each year * * *."

"Inactive duty training" is defined in National Guard Regulations 45 (3 Aug. 1956), citing as authority the National Defense Act as amended; Career Compensation

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Act of 1949 (PL 351, 31st Congress); and the Armed Forces Reserve Act of 1952 (PL 476, 82d Congress), as follows:

> "Any of the training, instructions, duty, appropriate duties or equivalent training, or hazardous duty performed with or without pay by members of the National Guard, while in an armory drill status, pursuant to Section 92, National Defense Act, or Section 501, Career Compensation Act of 1949. This includes those assemblies conducted on week-end or holidays as a single or multiple drill in lieu thereof."

An examination of our state statutory authorization for leave of absence of civil employees for military service discloses that it is applicable and the employee is entitled to leave-of-absence privileges "when ordered by proper authority to active state or federal service." Where the wording of the statute is clear there is no need for interpretation.

It is the opinion of this office that National Guardsmen performing inactive duty training or drills while in such status are not authorized to receive the benefits of the provisions of Section 29.26, Code of Iowa, 1954.

Yours very truly,

NORMAN A. ERBE
Attorney General

NAE:md

May 21, 1957

Mr. Donald L. Nelson
Story County Attorney
Nevada, Iowa

Re: Special education

Dear Mr. Nelson:

Receipt is acknowledged of your letter of May 17th as follows:

"Story County has an average daily attendance of 7,057. The Story County Board of Education is contemplating engaging the services of a person to act as special education supervisor in the County.

"With respect to this proposal, there are several questions that do not appear to be clearly answered in the Code. And it is my understanding that you talked with Robert Lounsberry, Art Sheld, and Mr. E. P. Schindler, Story County Superintendent of Schools, with respect to this problem. It is also my understanding that you will receive a request for an opinion from Mr. Drexel Lange, who is head of the special education division.

"At the present time according to the information furnished me by Mr. Lounsberry, the Ames School system is receiving some state aid for the purpose of paying the wages of the person who is acting as special education supervisor for Ames only.

"Specifically then, the Story County Board would like to know first of all if the state aid

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would be paid directly to the Story County Board of Education, which would mean that they in turn would decide exactly how it was to be spent, or, in view of the situation existing between the State Department and the Ames School system, would we simply receive the balance of our pro-rata share of the state aid based on our average daily attendance."

The matter to which you refer appears governed by Section 281.3(3, 12), Code 1954, as amended by Chapter 141, Acts of the 56th General Assembly as follows:

"The division of special education, subject to the approval of the state board shall have the following duties and powers:

" . . . . . .

"3. To adopt plans of equitable reimbursement, in whole or in part, for costs of carrying out programs of special instruction, as provided for therein.

" . . . . . .

"12. To make rules and regulations to carry out the foregoing powers and duties."

Rules and Regulations made pursuant to the quoted statute appear at January 1956 Supplement to 1954 I.D.R., pages 60 and 61. Said rules provide basis for reimbursement, and have been duly approved and filed pursuant to the provisions of Chapter 17A, Code 1954. Nothing appears on the face of said rules indicating any overreaching of the authority conferred by the quoted authorization.

The application of said rules to reimbursement of local and county programs of special education presents a fact question to be determined between the local or county school authorities providing special education services and the Division of Special Education of the Department of Public Instruction.

Very truly yours,

LEONARD C. ADKINS
Assistant Attorney General

L.C.A.:mfm

May 21, 1957

Mr. Charles Mather
Sac County Attorney
Sac City, Iowa

Dear Mr. Mather:

Your letter of April 25th was referred to the writer for attention and in reply beg to advise as follows.

Your letter in pertinent part reads as follows:

> "One of the official newspapers in Sac County during the past two years has filed claims for legal notices published by it and the same have been approved and warrants issued and cashed for them. They now find that they were entitled to make a greater charge for the publication of these notices.
>
> "Is the Board of Supervisors required or empowered to approve an additional claim for charges which were not made by a newspaper under this circumstance?"

I assume the charges referred to are those provided by Section 618.11 as amended by the Acts of the 54th General Assembly, Chapter 213, Sections 1 and 2 (1951).

It appears from your letter that the newspaper, through mistake or ignorance of the statute, failed to make a charge for the full statutory fee as fixed by said statute above referred to.

This statute merely limits amount which may be paid. (See OAG 1909, pages 296, 351, and 370.)

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Therefore, in answer to your question, the Board of Supervisors, under the provisions of Sections 331.21 and 332.3(5), Code of Iowa, 1954, is empowered to approve additional claims up to the amount authorized to be paid in fees for publicati ns as set out in Section 618.11, Code of Iowa, 1954.

Yours very truly,

FRANK D. BIANCO
Assistant Attorney General

FDB:mfm

May 22, 1957

Mrs. Eva Parsons - Deportation Clerk
Board of Control of State Institutions
L O C A L

Dear Mrs. Parsons:

Receipt is acknowledged of your letter of May 14th as follows:

"In recent months several problems have arisen concerning legal settlement. I would appreciate your opinion in regard to the following:

"1. If a woman, having legal settlement in a county in the State of Iowa, marries a man who has no known settlement, does she retain her original legal settlement?

"2. A married woman continuously resided in Iowa County from September 1952 to October 1956. Her husband was in Iowa for two brief periods, from April 1954 to November 1954 and from August, 1956 to November 1956. His absence from the State for a period of one year constitutes loss of legal settlement. Would the wife retain her legal settlement?

"3. What constitutes abandonment?

"4. What constitutes living apart?

"5. A minor child was committed to Eldora in 1947. In 1951, while still a minor, on escape from Eldora, he was sentenced to the Men's Reformatory at Anamosa. In 1947 his parents were non-

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residents of the State of Iowa. In 1951 they had gained a legal settlement in an Iowa county. Since this prisoner was a minor at the time he was committed to Eldora and Anamosa, would he acquire the legal settlement of his parents even though he was incarcerated?"

1. In answer to your first question, I would refer you to Section 252.16(4), Code 1954, which provides in pertinent part:

"A married woman has the legal settlement of her husband, if he has one in this state . . . " (Emphasis ours)

I would further refer you to Section 252.17, Code 1954, which provides as follows:

"Settlement continues. A legal settlement once acquired shall so remain until such person has removed from this state for more than one year or has acquired a legal settlement in some other county or state."

Since the woman in question has neither removed from the state nor acquired a new legal settlement, the settlement she had at the time of her marriage would continue pending happening of one of the events named in Section 252.17.

2. The answer to your first question also answers your second question. Section 252.16(4), Code 1954, quoted in part above, pertains to the acquisition of legal settlement and is conditioned on whether the husband has one in this state. Section 252.17, quoted above, controls the loss of settlement. Obviously the wife cannot acquire a new settlement from the husband under Section 252.16(4) if he has none in this state. Since she has neither departed from the state for more than one year nor acquired a new settlement, she retains her legal settlement.

3 and 4. It appears that your third and fourth questions are submitted under the assumption that the definitions requested control the answer to your second question. Such is not the case. However, for your information and guidance, I would advise you that "abandoned" in the law of Domestic Relations is for practical purposes synonymous with "deserted". "Desertion" is defined as the "act of leaving one's spouse or children and renouncing one's duties toward them." See 27A C.J.S., Desertion, 661. Also see cases and opinions annotated at note 9, Section 252.16, I.C.A.

"Living apart" has been defined as "to live in a separate abode", McDaniel v. McDaniel, 165 So.2d 966, 967, 292 Ky. 56. It has also been defined to include the situation where "cohabitation ceased though both spouses lived in the same house." Randall v. Randall, 29 So.2d 238, 240, 156 Fla. 502; Gove v. Crosby, 102 A.2d 905, 906; 98 N.H. 469. For situations where the terms have applied see State ex rel Rankin v. Nelson, 233 Iowa 865, 10 N.W.2d 645; Washington County v. Polk County, 137 Iowa 333, 133 N.W. 833; 1942 Report of the Attorney General, page 40; 1940 Report of the Attorney General, page 159.

5. In answer to your fifth question, Subsection 3 of Section 252.16 provides that an inmate of an institution acquires no settlement in the county where the institution is located. It is also apparent, from the nature of the institutions in which the subject was an inmate, that his father had no right to care, custody, or control of subject during the term of confinement. Your question states that the father had no settlement in Iowa prior to the original commitment. Neither can it be said that the father had lawful care, custody, or control of the subject during the time he was at large following his escape. In an opinion which appears at page 525 of the 1940 Report of the Attorney General, the following statement is made with respect to Section 252.16(5) which provides a minor takes the settlement of his father:

> "This section, as we view it, has no application to a case where the father has lost the right to the care, custody and control by judicial determination."

Since the father had no Iowa settlement at the time subject was committed, had lost the right to care, custody, and control of subject by the time he acquired Iowa settlement, and the subject had attained majority prior to release from confinement, I am of the opinion that subject has no legal settlement in Iowa and can acquire one only by continuous residence in one county for a period of two years without being warned to depart as provided in Subsection 1 of Section 252.16.

Very truly yours,

LEONARD C. ANEL
Assistant Attorney General

LCA: mfm

May 23, 1957

Mr. Edgar S. Gage, Jr., C.P.A.
Secretary-Treasurer
Iowa Board of Accountancy
725 Brick and Tile Building
Mason City, Iowa

Dear Mr. Gage:

Reference is made to your letter of May 16, 1957, the pertinent part to be considered in this opinion reading as follows:

"Section 116.4, Code of Iowa, 1954 reads as follows:

"'No compensation-expenses. No compensation shall be paid to any member of the board for services as such, but the members thereof shall be allowed the necessary traveling, printing and other expenses incident to the discharge of their duties. Bills for the expense of the board or its members shall be audited and allowed by the state comptroller and shall be paid from the fees received under the provisions of this chapter.'

"This Section has been amended by House File 500, Acts of the 57th General Assembly, which, incidentally, has not yet been signed by the Governor. House File 500, Acts of the 57th General Assembly reads as follows:

"'Section 1. Amend section one hundred sixteen point four (116.4), Code 1954, by adding after the word 'duties.' in line six (6) the following:

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> "'The board shall have power to employ such legal, technical, and clerical assistants and incur such expenses as may be necessary to properly carry out the provisions of this chapter, but the total amount expended to carry out the provisions of this act shall not exceed thirty-six hundred dollars ($3,600.00) per year.'
>
> "We respectfully request an official opinion as to the following:
>
> "Is the $3,600.00 per year limitation in House File 500, Acts of the 57th General Assembly, applicable only to the additional provisions set forth in House File 500, Acts of the 57th General Assembly, and not to the entire provisions of Chapter 116, Code of Iowa, 1954, as amended?"

The general rule of construction or interpretation of this question appears to be stated in 82 C.J.S. 636, Section 334, which reads as follows:

> ". . . Amendments are to be construed together with the original act to which they relate as constituting one law, and also together with other statutes on the same subject, as well as previous amendments on the same subject, as part of a coherent system of legislation; and this rule is applicable where a later independent statute amends a former statute by implication.
>
> " * * * * * * *

General terms in a statute may be regarded as limited by subsequent more specific terms; and the mention of one thing implies the exclusion of another: expressio unius est exclusio alterius. The legislature is its own lexicographer.

A statute is not open to construction as a matter of course. It is open to construction only where the language used in the statute requires interpretation, that is, where the statute is ambiguous or will bear two or more constructions or is of doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning.

It is, therefore, our opinion that the plain meaning of House File 500, Acts of the 57th General Assembly, restricts the Board of Accountancy to a total expenditure for expenses of the board to $3,600.00 per year for legal, technical, and

clerical assistants and such expenses as may be necessary to properly carry out the provisions of Chapter 116, Code of Iowa, 1954.

Respectfully submitted,

NORMAN A. ERBE
Attorney General of Iowa

FRANK D. BIANCO
Assistant Attorney General

FDB:mfm
cc - G. H. Hansen, Chairman
L. R. Bock, Member

May 24, 1957

Mr. Bert Bandstra
Marion County Attorney
Court House
Knoxville, Iowa

Dear Sir:

Please accept my apologies for not answering your letter directed to Attorney General Erbe under date of April 12, 1957, and which was assigned to me for reply. Other office commitments have prevented me from giving this matter much thought prior to this time.

From the text of your letter I am presuming the following facts: That "A" and "B" were apprehended in a motor vehicle at a time when "A" was operating the same and was in an intoxicated condition. That "B", who was not operating the vehicle, was nevertheless arrested and charged with the crime of"OMVI, Second Offense" and as an accomplice, it appearing that she had previously been convicted in Marion County, Iowa, on an OMVI charge. "B" at the time of the arrest admitted ownership of the car, but it was later discovered that the certificate of title to the car bore the name of her sister who resides in Perry, Iowa. It is assumed that the prosecution can prove that "B", who resides in Des Moines, Iowa, was actually in possession of the car at all times.

Your question, as stated, is as follows: "Does ownership for the purposes of this particular offense mean the legal title holder or does it mean the person who is the equitable owner and has the right to possession of the car at all times?". As you stated in your letter there is little, if any, authority on the question and certainly none directly in point in Iowa.

Of course, you are confronted at the outset of the case with the proposition of proving "B" to be an aider and abettor. Mere presence at the scene of a crime as a general rule may not amount to aiding and abetting therein (State v. Bosworth, 170 Iowa 329, 152 N.W. 581), but mere presence alone under some circumstances will show guilt as an aider and abettor (State v.

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Dunn, 116 Iowa 219, 89 N.W. 984; State v. Farris, 189 Iowa 505, 178 N.W. 361). As said in the Dunn case:

> "To constitute aiding and abetting, it is not necessary that the principal be encouraged by words. The facts of the defendant's presence may alone, under some circumstances, bring him within the rule of the statute, and it then becomes a question of fact for the jury to determine, under proper instructions."

and, of course, where participation of a person is evidenced by some affirmative conduct or act such person is guilty of aiding and abetting. See State v. Davis, 191 Iowa 720, 183 N.W. 314; State v. Canalle, 206 Iowa 1169, 221 N.W. 847; State v. Griffin, 218 Iowa 1301, 254 N.W. 841; and State v. Myers, 207 Iowa 555, 223 N.W. 116; State v. Storms, 233 Iowa 655, 10 N.W. 2d 53; State v. Russell, 245 Iowa 1190, 66 N.W. 2d 35. See also 22 C.J.S. 158,159.

The facts of the case are that at the time of apprehension "A" was behind the wheel of the car driving it and "B" was presumably sitting in the front seat next to him. The actual ownership of the car is not disputed, "B" claiming the ownership, and it being assumed that the State can prove "B" was actually in possession of the car at all times, though not the legal titleholder. In effect, the act of "B" in getting into the right-hand seat of the car away from the driver's seat was such an act that she in effect said to "A", "I want you to drive my car." Her actions were just the same and certainly had the same effect as spoken words of approval or command. In other words, her affirmative act and conduct would be sufficient to take the case out of the rule that mere presence is not sufficient to make her an aider and abettor. There is certainly something more than mere presence in the instant case; "B" was not a bystander who innocently happened to be on the scene of the crime. The common purpose of "B" and "A" was to drive the car and to ride in it. It would be immaterial as to where they were going and for what ultimate purpose, and "B" was present in the car by preconcert. Furthermore, "B" must have known that her escort, the actual driver of the car, was intoxicated, and, as a reasonable person, must certainly have realized that a crime was being committed by allowing him to drive in his intoxicated condition.

It does not seem to me to be too material to your case as to who owned the motor vehicle involved. In the case of State v. Myers, supra, the other occupant and actual driver of

the vehicle were both intoxicated, and together they had agreed that the driver should drive the other occupant's car. The Court in holding such occupant to be an accomplice made this observation:

> "It is the operation of the motor vehicle while in an intoxicated condition that constitutes an offense. * * * * *
>
> " * * * * * * * * *
>
> "Even though only one person can be engaged in the physical operation of a motor vehicle at one time, and even though another may be incompetent in person to commit the crime, it is plain that such other, though not engaged in such physical act, may have caused or aided in the operation by the drunken person, and hence be liable to indictment therefor. * * * * *."

"B" in the instant case had the possession and control, if not the equitable ownership to the vehicle. The common mission of "B" and "A" was to drive the car. It would make no difference as to what the ultimate purpose of the drive was, whether it was to procure more liquor to drink, to go on a joy ride or just to ride home. The main fact is whether or not the car was being driven, as that is the element in issue. It is not a crime to drive from one place to another, but it is a crime to so drive while intoxicated.

It is true that in the Myers case there was direct testimony of actual words of encouragement to the driver of the car, and in your particular case the encouragement given to the driver of the car may be, because of want of other proof, confined to encouragement by physical acts and physical conduct but, as pointed out in the citation in 22 C.J.S. referred to above, the cases make no distinction between words of encouragement, acts or deeds. In addition to this fact, as stated before, there can be an aiding and abetting by mere presence even though no words are spoken or physical acts or deeds are done, and our cases also hold that if a person is present by preconcert there is an aiding and abetting (for illustration, a lookout at a robbery or a driver of a car involved in a robbery).

I realize that what I have said above does not specifically answer your question, a question which I feel will have to be resolved by the courts; however, I have attempted to point out

some ideas which you might be able to use in argument to the Court, and I trust you will find the same helpful.

Very truly yours,

RRRD/fm

RAPHAEL R. R. DVORAK
First Assistant Attorney General

May 24, 1957

Mr. W. Grant Cunningham
Secretary, Executive Council
L O C A L

Dear Mr. Cunningham:

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

> "Will you kindly give me an opinion that I would like to have before the Council meeting on Monday, May 27th, on Chapter 82.1, Code of Iowa, 1954, as to whether it is mandatory that the Board of Mine Examiners be maintained at five members.
>
> "I might explain that at the present time we have only three members, having lost one in October of last year. This coming Monday, a new appointment will be approved bringing it up to four, but as I say, the question in my mind is, as to whether or not the Board must be maintained at five members."

In reply thereto, I advise as follows:

The statute to which you refer, Section 82.1, Code 1954, provides as follows:

> "Board of examiners -- compensation. The executive council shall, on or before June 30 of each even-numbered year, appoint a board of five examiners, consisting of two practical miners and two mine operators, all holding certificates of competency as mine foremen, and one mining engineer,

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each of whom shall have had at least five years actual experience in his profession immediately preceding his appointment, who shall hold office for a term of two years, and until their successors have been appointed and have qualified.

"Each member of the board of examiners shall, in addition to necessary traveling and hotel expenses, receive ten dollars per day for each day actually engaged in the discharge of his duties, including compensation for the time spent in traveling to and from the place of conducting the examination and for a reasonable number of days for the preparation of examination questions and the reading of papers, in addition to the time actually spent in conducting examinations. No examiner shall receive more than four hundred dollars per diem compensation in any one year."

In my opinion, the above statute in the use of the word "shall" in the first line thereof, imposes the duty upon the Executive Council to appoint and maintain a Board of Mine Examiners composed of five (5) members.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:mfn

May 24, 1957

Dr. H. T. Opsahl, Chiropractor
Secretary, Board of Chiropractic Examiners
State Department of Health
L O C A L

Dear Dr. Opsahl:

This will acknowledge receipt of yours of the 23rd in which you submit the following:

> "Your opinion is requested whether a Secretary of an Examining Board selected under section 147.22 is entitled to compensation for each day actually engaged in the discharge of duties."

In reply thereto I advise as follows:

According to Section 147.14 the composition of examining boards, including the Board of Chiropractors, is this:

> "Composition of boards. Each examining board shall consist of three members, except the dental, medical examiners and nurse boards each of which shall consist of five members."

Organization for the conduct of the affairs of such examining boards, including the Board of Chiropractic Examiners, is provided by Section 147.22 as follows:

> "Officers. Each examining board shall organize annually and shall select a chairman and a secretary from its own membership."

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Compensation for the members of such boards, including the Board of Chiropractic Examiners, is provided by Section 147.24, Code 1954, in terms as follows:

> "Compensation. Each member of an examining board shall, in addition to necessary traveling and hotel expenses, receive ten dollars per day for each day actually engaged in the discharge of his duties, including compensation for the time spent in traveling to and from the place of conducting the examination and for a reasonable number of days for the preparation of examination questions and the reading of papers, in addition to the time actually spent in conducting examinations."

Accordingly, under the authority of the foregoing sections, a member of an examining board who, among other duties, performs duties as secretary, is entitled to be compensated for performance of such duties in accordance with the directions of the quoted sections.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:mfm

May 24, 1957

Hon. Dewey Butterfield
President
County Treasurer's Association
Waterloo, Iowa

My dear Mr. Butterfield:

I address you as President of the County Treasurer's Association in connection with certain questions propounded by you in connection with House File 372, 57th General Assembly. The questions propounded are these:

> "With the law effective July 4, 1957, can transit companies ask for a refund of current registration, and pay in lieu $12.50 for balance of year 1957?
>
> "In 1959 will transit companies pay $12.50 for first six months, and then register their vehicles on a prorated basis for balance of year 1959?
>
> "What type of registration receipt and license plate can County Treasurer issue to urban transit companies - because all money is turned over to municipalities?"

House File 372, 57th General Assembly, effective July 4, 1957, provides as follows:

> "An Act relating to urban transit companies and systems, providing for temporary license fees for transit system vehicles, and making certain

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tax provisions of law temporarily inapplicable.

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

"Section 1. 'An urban transit company' is one which operates buses or trolley cars or both, primarily upon the streets of cities and towns over well-defined routes between certain termini, for the transportation of passengers for a uniform fare, and which accepts for passengers all who present themselves for transportation without discrimination up to the limit of the capacity of each vehicle. Included are street railways, plants, equipment, property and rights, used and useful in the transportation of passengers. Motor carriers and interurbans subject to the jurisdiction of the state commerce commission, and taxicabs, are not included. The physical property and operation herein described shall be known as 'an urban transit system'.

"Sec. 2. Any person, firm, corporation or company operating an urban transmit system shall pay to the county treasurer annually as a registration fee for each bus, car or vehicle used in the transportation of passengers, twenty-five dollars ($25.00), which shall be paid into the municipal street fund. No other provision of law providing for the payment of taxes, registration, or license fees for vehicles shall be applicable to any bus, car, or vehicle for the transportation of passengers owned and operated by any urban transit company.

"Sec. 3. Sections three hundred twenty-one point one hundred nineteen (321.119) and three hundred twenty-four point two (324.2), Code 1954, as amended by chapters forty-four (44) and one hundred seventy-one (171), Acts of the Fifty-sixth General Assembly, and section three hundred twenty-six point two (326.2), Code 1954, shall not be applicable to urban transit companies or systems.

"Sec. 4. Section four hundred seventeen point fifty-four (417.54), Code 1954, as amended by chapter two hundred six (206), Acts of the Fifty-sixth General Assembly, is inapplicable to urban transit companies or systems.

"Sec. 5. Section four hundred thirty-four point

fifteen (434.15), Code 1954, is amended by adding thereto the following:

"'Trackless trolleys, buses, cars and vehicles used for the transportation of passengers owned and operated by any urban transit company as a part of an urban transit system shall not be included in the determination of the value of an urban transit system for taxation purposes.'

"Sec. 6. The provisions of this Act shall be in force and effect for the biennium beginning July 4, 1957, and ending June 30, 1959."

In respect thereto and in answer to your questions, I advise as follows:

1. The foregoing statute makes no provision for a refund of fees paid for registration of any bus, car, or vehicle, within the terms of the foregoing statute and lacking statutory authority to make a refund thereof, refund cannot be made.

2. In answer to your question numbered 2, I advise that registration of any bus, car, or vehicle within the terms of the foregoing statute will require payment of $25.00 if payment be made in 1959 prior to June 30th of that year. Registration thereafter will be made and fees paid by registration under the permanent law.

3. In answer to your question numbered 3, I advise that registration receipt and plates will be issued for any bus, car, or vehicle within the terms of the foregoing statute the same as if the registration fees were paid to the County Treasurer to become part of the County fund.

Transmission of the fees paid to the County Treasurer to the city is an implied duty of the County Treasurer.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:mfm

May 27, 1957

Honorable Clark H. McNeal
State Representative
Belmond, Iowa

Dear Mr. McNeal:

Re: Belmond Municipal Hospital

Reference is made to your recent inquiry of this office at which time you requested an answer to the following question:

> "May a City or Town Treasurer withhold from hospital funds a sufficient amount to pay a past due water bill due and owing the municipality?"

Confirming my previous oral opinion, it is our belief that such funds cannot be withheld by the City or Town Treasurer. Section 380.4 of the 1954 Code of Iowa imposes merely ministerial duties upon the Treasurer and I quote: ". . . shall receive and disburse all funds under the control of said board as ordered by it . . .".

Therefore, it is the opinion of this office that the City or Town Treasurer has no authority to make any disbursements from the funds of said hospital trustees unless specifically ordered by them.

Very truly yours,

DON C. SWANSON
Assistant Attorney General

DCS:MKB

57-5-37

May 28, 1957

Mr. Martin Lauterbach, Chairman
State Tax Commission
State Office Building
Des Moines, Iowa

Dear Mr. Lauterbach:

This will acknowledge receipt of your request for an opinion of this department concerning a question presented to your office by Elmer F. Heckinger, Director of the Income Tax Division of your commission. This question is as follows:

> "In the very near future it will be necessary to have prepared the 1957 Iowa Individual Income Tax forms.
>
> "With that thought in mind, I am handing you herewith a suggested income tax form for use in 1957. As you can readily ascertain, this form is quite a radical departure from the forms in use these past two years. In my opinion, however, it is mandatory to use this type of form if we are to properly perform our audit function. The audit staff of this Division cannot properly function unless we receive more detailed income tax forms. Continued use of the existing tax forms will undoubtedly result in tremendous losses of revenue to the State of Iowa.
>
> "In suggesting the attached form I am mindful of the fact that the author of our present income tax law intended the use of a tax form of extreme brevity. I respectfully suggest, therefore, that, to alleviate any doubt as to the validity of using this type of a form, this matter be submitted to the office of the Attorney General with a request for an official opinion as to whether or not the State Tax Commission is empowered, under chapter 422, Iowa code 1954, as amended, to design a return of its own choosing, if it is the Tax Commission's belief that such form will permit a more effective administration of the income tax law."

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We note from the suggested income tax form for use in 1957 submitted with your inquiry that the departures from the requirements of the present forms call for additional information to be supplied by the taxpayer in the following categories:

1. Itemization of sources of wages, salaries, bonuses and other compensation before pay roll deductions.

2. Entry of and explanation of "excludable sick pay."

3. Accounting of receipts and operating expenses to determine profit or loss from an individual business or profession.

4. Summary of other income received by the taxpayer in the form of rents, royalties, dividends, interest and capital gains.

5. Itemization of personal deductions where the standard deduction is not taken.

Except for the time of filing returns, Section 422.21 of the 1954 Code of Iowa, as amended, was left unchanged by Acts of the 56th General Assembly. Such section, as amended, provides as follows:

> "422.21 Form and time of return. Returns shall be in such form as the commission may, from time to time, prescribe, and shall be filed with the commission on or before the last day of the fourth month after the expiration of the tax year. In case of sickness, absence, or other disability, or whenever, in its judgment, good cause exists, the commission may allow further time for filing returns. The commission shall cause to be prepared blank forms for said returns and shall cuase them to be distributed throughout the state and to be furnished upon application, but failure to receive or secure the form shall not relieve the taxpayer from the obligations of making any return herein required. The state tax commission may as far as consistent with the provisions of the code so draft income tax forms as to conform to the income tax forms of the internal revenue department of the United States government.
>
> "The state tax commission is hereby authorized and directed to

make available to persons required to make personal income tax returns under the provisions of this chapter, and when such income is derived mainly from salaries and wages or from the operation of a business or profession, a form which shall take into consideration the normal deductions and credits allowable to any such taxpayer, and which will permit the computation of the tax payable without requiring the listing of specific deductions and credits. In arriving at schedules for payment of taxation under such forms the state tax commission shall as nearly as possible base such schedules upon a total of deductions and credits which will result in substantially the same payment as would have been made by such taxpayer were he to specifically list his allowable deductions and credits. In lieu of such return any taxpayer may elect to list permissible deductions and credits as provided by law. It is the intent and purpose of this provision to simplify the procedure of collection of personal income tax, and the commission shall have the power in any case when it deems it necessary or advisable to require any taxpayer, who has made a return in accordance with the schedule herein provided for, to make an additional return in which all deductions and credits are specifically listed. The commission may revise the schedules adopted in connection with such simplified form whenever such revision is necessitated by changes in federal income tax laws, or to maintain the collection of substantially the same amounts from taxpayers as would be received were the specific listing of deductions and credits required." (Emphasis ours).

Section 422.61(1) of the 1954 Code, unchanged by the Acts of the 56th General Assembly, provides:

"422.61 Powers and duties.

"1. The commission shall have the power and authority to prescribe all rules and regulations not inconsistent with the provisions of this chapter, necessary and advisable for its detailed administration and to effectuate its purposes."

The definition of income subject to tax was changed by Section 6, Chapter 208, Acts of the 56th General Assembly, to provide as follows:

"Sec. 6. Section four hundred twenty-two point seven (422.7), Code 1954, is amended to read as follows: 'The term "net income" means the adjusted gross income as computed for federal income tax purposes under the Internal Revenue Code of 1954, with the following

adjustments:

" '1. Subtract interest and dividends from federal securities.

" '2. Add interest and dividends from foreign securities and from securities of state and other political subdivisions exempt from federal income tax under the Internal Revenue Code of 1954.

" '3. Where the adjusted gross income includes capital gains or losses, or gains or losses from property other than capital assets, and such gains or losses have been determined by using a basis established prior to January 1, 1934, an adjustment may be made, under rules and regulations prescribed by the state tax commission, to reflect the difference resulting from the use of a basis of cost or January 1, 1934, fair market value, less depreciation allowed or allowable, whichever is higher. Provided that the basis shall be fair market value as of January 1, 1955, less depreciation allowed or allowable, in the case of property acquired prior to that date if use of a prior basis is declared to be invalid.' "

Section 422.7, Code of 1954, before such amendment, provided as follows:

"422.7 'Net income' defined. The term 'net income' means the gross income of the taxpayer less the deductions allowed by this division."

The audit function of the Tax Commission is not substantially altered by the revision of the definition of income subject to tax. That "net income" is to be "adjusted gross income as computed for federal income tax purposes under the Internal Revenue Code of 1954" with certain adjustments does not suggest that the taxpayer's computation of such figure is conclusive as to the tax base or that the Tax Commission could not review such computation and adjust such computation to conform with the Internal Revenue Code. We find no statutory limitation on the Commission's authority to prescribe income tax

forms or the information required to be supplied thereon so long as such forms and requirements are reasonably related to the purposes of the income tax law. The departures suggested from the requirements of the present individual income tax form meet this test. Such suggested revision would be consistent with the legislative authorization in Section 422.21 of the 1954 Code, above cited, that the Commission may, consistent with the Code, draft income tax return forms to conform to those of the internal revenue service which require such information.

Accordingly, we conclude that a return form such as that submitted with your inquiry could legally be prescribed. Since questions of policy in income taxation within the framework of the law are within the exclusive jurisdiction of the Tax Commission, we do not consider, in rendering this opinion, those questions of such nature which are inherent in the question posed.

Very truly yours,

M. A. Iverson,
Special Assistant Attorney General

MAI:fs

May 29, 1957

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

My dear Governor:

This will acknowledge receipt of yours of the 22nd inst. in which you submitted the following:

> "For use in connection with my evaluation of House File 440, an Act to provide a substitute for Chapter 324, Code of Iowa, 1954, I respectfully request opinions of the Attorney General on the following questions:
>
> "First, are the provisions of House File 440 consistent with related acts of the 57th General Assembly, such as House File 162, and House File 372, and with related Sections of the Code of Iowa, 1954?
>
> "Second, insofar as it is ascertainable, do the provisions of House File 440 safeguard the revenues of the State of Iowa in all respects now provided for in Chapter 324, Code of Iowa, 1954?
>
> "Third, insofar as can be determined, are the administrative procedures provided for in House File 440 free of legal barriers?
>
> "Fourth, are the definitions of receipt contained in House File 440 exhaustive and mutually exclusive to a degree that would include all types of 'receipts', and, simultaneously, avoid serious question of when 'receipt' occurs?
>
> "Fifth, are the substantive portions of Chapter 324, Code of Iowa, 1954, all covered in House File 440 which purports to be a substitute therefore?"

57-5-39

In reference thereto and in order that you may understand the general nature of this reply to your question, we recite the fact that these questions arise out of an enactment extending over sixty-four pages dealing with a subject which in itself is a complicated quantity. On information, this enactment is the result of months of research and study by one familiar with the operations of the subject under the previous statute and who is now absent and unable to explain the enactment, its theory, and the results desired to be obtained. Therefore, in the limited time available for a minute study thereof we can only observe to you the following.

We find no inconsistencies between House File 440 and House Files 162 and 372. House File 162 seems to impose an independent tax not in conflict with the provisions of House File 440. House File 372, while providing temporary exemptions from Chapter 324 of the 1954 Code likewise appears consistent with House File 440.

It is to be further observed that the Act generally was designed to remedy defects which have appeared in the administration of Chapter 324, 1954 Code. Note that a defect previously existent was the fact that motor fuel used and sold to the State was not exempt from tax. While this exemption was provided by an opinion of this Department, House File 440 now expressly exempts motor fuel sold to the State from tax.

Section 6, subsection 4, House File 440. It is to be observed further that this exemption by the provisions of the same section is not available to political subdivisions. In this connection we call to your attention Section 324.54 of the 1954 Code which provides as follows:

> "No refund for vehicles used in public work. No tax refund shall be paid to any person, firm, or corporation on any motor vehicle fuel used in any construction or maintenance work which is paid for from public funds. Construction or maintenance work as used in this section shall not be so construed as to include motor vehicle fuel used in the actual production of sand, gravel, shale, slag or crushed rock."

This section does not appear in House File 440 but a limited refund for fuel purchased with public funds appears in Section 324.17, subsection 8, House File 440, providing as follows:

> "No refund shall be paid with respect to motor fuel used in the performance of a contract which is paid out of state funds unless the contract for the work contains a certificate made under penalty for false certificate that the estimate, bid or price to be paid for the work includes no amount representing motor fuel tax subject to refund."

Apparently this opens the field to refund allowances to political subdivisions. The provisions of Chapter 324 for the filing of distributor's bonds has been greatly expanded in the interest of the public revenue. Enforcement and administration provisions are strengthened including a provision making

certain employees of the Treasurer peace officers. See paragraph 60, House File 440.

Our view of the provisions of House File 440 insofar as legal sufficiency is concerned as compared with that of Chapter 324 leads to the conclusion that generally the substantive features of Chapter 324, Code 1954, are preserved in House File 440; that the interests of the State are protected in the administration and enforcement provisions, and that the receipt provisions adequately define the situations deemed to be receipts. Whether this Act in its entirety or in any of its several parts will withstand legal attack you will understand is a situation that we cannot forecast.

Again, our respects.

Very truly yours,

NORMAN A. ERBE
Attorney General of Iowa

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

May 31, 1957

Mrs. Eva Parsons, Deportation Clerk
Board of Control of State Institutions
L O C A L

Dear Mrs. Parsons:

Receipt is acknowledged of your letter of May 14th as follows:

> "A question has arisen as to the rate being charged by the sheriff when transporting persons to the state hospitals.
>
> "Section 337.11, Paragraph 10, states: 'Mileage in all cases required by law, going and returning, nine cents per mile, provided that this subsection shall not apply where provision is made for expenses etc.'
>
> "Section 337.11, Paragraph 14, states: 'For conveying one or more persons to any state, county, or private institution by order of court, or commission, he shall be allowed his necessary expenses etc.'
>
> "The sheriffs are charging nine cents per mile for transporting patients to the state hospitals.
>
> "May I have your opinion as to 'necessary expenses' and, in particular, is nine cents a mile (as stated in Paragraph 10) the legal rate for such trips?"

Section 337.11(10), Code 1954, provides as follows:

> "10. Mileage in all cases required by law, going and returning, nine cents per mile, provided

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that this subsection shall not apply where provision is made for expenses, and in no case shall the law be construed to allow both mileage and expenses for the same services and for the same trip. In case the sheriff transports by auto, one or more persons to any state institution or any other destination required by law, or in case one or more legal papers are served on the same trip, he shall be entitled to but one mileage at the rate prescribed herein, the mileage cost thereof to be prorated to the respective persons transported and also in the case of separate papers served. Provided, however, that in the serving of original notices in civil cases the sheriff shall be allowed mileage at the rate of nine cents per mile in each action wherein such original notices are served, and, he may refuse to serve original notices in civil cases until the statutory fees and mileage for service have been paid." (Emphasis ours)

Section 337.11(14), Code 1954, provides as follows:

"14. For conveying one or more persons to any state, county, or private institution by order of court, or commission, he shall be allowed his necessary expenses, for himself and such person or persons, and in addition thereto, forty cents per hour for the time necessarily employed in going to and from such institution, same to be charged and accounted for as fees. Should the sheriff need any assistance in taking any person to any such institution, the same shall be furnished at the expense of the county."

It appears the basis for your question is the underscored provision in subsection 10. The language in question has been construed in an official opinion which appears at page 372 of the 1936 Report of the Attorney General hereinafter set forth as follows:

"SHERIFF: Sheriff is entitled to certain compensation (as set out in opinion) in the performance of his duties, re delivery of prisoners, etc.

"January 24, 1936. County Attorney, Lellars, Iowa: We have your request of January 7th for an opinion on the following question:

"'When the Sheriff of this county delivers prisoners to Fort Madison and files claim with the Board of Supervisors for mileage, hotel expenses

and meals for transporting the prisoners to the pentitentiary, the board has been inclined to want to disallow the charge for both mileage and expenses on account of the wording of the statute, and because of an opinion issued by your department in February, 1933.'

"You refer to an opinion issued from this department under date of February 20, 1933. The law was somewhat different at that time thanat the present time, because Chapter 90 of the Acts of the 45th General Assembly did not take effect until February 24, 1933, and this department, of course, issues its opinion on what the law is at the time the opinion is issued, rather than what the law may be at some future time. Consequently, we say that that opinion would, of necessity, have to be changed in view of Chapter 90 of the Acts of the 45th General Assembly.

"Prior to the taking effect of said Chapter 90, Section 5191 (10) of the Code of 1931, provided that the subsection providing for mileage, should not apply where provision is made for expenses. Section 5191 (14) then provided for expenses for conveying prisoners to the penitentiary. We, therefore, of necessity rule that in our opinion of February 20, 1933, Paragraph 14 was the provision under which the sheriff should be paid for conveying such prisoners.

"However, by the enactment of Chapter 90 and especially Section 6 thereof, the Legislature amended Section 10, which had theretofore provided that that section should not apply where the provisions of Paragraph 14 could apply, by inserting a provision for mileage. The effect of Section 6 of Chapter 90 then was to nullify that portion of Paragraph 10 of Section 5191 of the Code of 1931, which prohibited mileage where Paragraph 14 provided for expenses. Section 6 of Chapter 90 cannot be reconciled with the words contained in Section 5191 (10) as follows:

"'Provided that this subsection shall not apply where provision is made for expenses.'

"We must, therefore, say that that portion of Paragraph 10 just quoted was repealed by implication.

"The last clause in Paragraph 10 of Section 5191 is as follows:

"'And in no case shall the law be construed to allow both mileage and expenses for the same services and for the same trip.'

"We believe the provision just quoted in the use of the term 'expenses' has reference not to meals and lodging but to gasoline and oil and expenses incident to the operating of an automobile, as well as to railroad fare. The provision does not mean that the sheriff in taking three prisoners from LeMars to Fort Madison would be required to pay for the lodging and meals of himself, the prisoners and his helper out of his mileage. The mileage is for the use of his car.

"We must, therefore, say that when the sheriff in the performance of his duties is required to make a trip from LeMars to Fort Madison or to Anamosa, he is entitled to receive the following:

"(1) For that portion of the mileage outside of his own county, five cents per mile.

"(2) For that portion of the mileage within the limits of his own county, seven and one-half cents per mile.

"(3) His own reasonable hotel expense and meals.

"(4) Expense of meals and lodging for his prisoners.

"(5) The amount which he pays his helper, including the amount which he spends for meals and lodging for his helper, provided the helper has not already been paid by the county."

Chapter 97, Acts of the 53rd General Assembly amended subsection 10 by eliminating the five (5) cent rate on trips outside the county and set the rate at nine (9) cents per mile "in all cases required by law".

I would, therefore, advise you that the answer to your question is furnished by the 1936 opinion except that the mileage rate is now nine (9) cents per mile in all cases.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfw

June 3, 1957

Mr. W. Grant Cunningham
Secretary, Executive Council
B u i l d i n g

Dear Mr. Cunningham:

This will acknowledge receipt of yours of the 31st ult. with attached request from the Highway Commission for approval of gifts of certain lands in Guthrie County to the State of Iowa for roadside purposes, one an offer by the Coon Rapids Federated Club and one by Ethel Brutsche Ris. These gifts may be accepted by the Highway Commission under the authority of Chapter 150, Acts of the 56th General Assembly, which provides as follows:

> "Section 1. Section three hundred thirteen point two (313.2), Code 1954, is hereby amended by adding thereto the following paragraph:
>
> "'The state highway commission shall have the authority to utilize any land acquired incidental to the acquisition of land for highway right-of-way, and to also accept by gift, lands not exceeding two acres in area, for roadside parks and parking areas, provided, however, that the upkeep and maintenance of said roadside parks and parking areas shall involve only minor maintenance expense. The commission shall also have authority to accept by gift, equipment or other installations incidental to the use of said parks and parking areas. Said parks and parking areas shall be a part of the primary road system and the commission may at its discretion sell or otherwise dispose of said lands.'"

However, the request made to the Council merely asks for approval of the gift and acceptance thereof by the Council under and by virtue of Section 565.3, Code 1954. The statute in question authorizes the acceptance of a gift by the Highway Commisssion

57-6-1

and the request before me does not contain any record of such acceptance. Prior to acceptance by the Council for the State acceptance by the Highway Commission of this gift under the terms stated in the statute is a prerequisite. In connection with the transaction itself, tested by the foregoing Chapter 150, Acts of the 56th General Assembly, I would observe:

1. The deeds convey the property to the Highway Commission. The Highway Commission has no power to possess itself of title to real estate. The grantee should be the State of Iowa for the benefit of the Highway Commission.

2. Chapter 150, Acts of the 56th General Assembly, does not authorize acceptance of a gift with conditions attached. The deeds involved here provide for reversion in the event of discontinuance of the use of the property as a wayside park.

3. A gift of real estate may not be accepted without investigation of title and encumbrances and liens that may exist upon the property. Abstracts therefor should be provided.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

June 3, 1957

Mr. L. W. Wolverton
Air Enforcement Officer
Iowa Aeronautics Commission
L O C A L

Re: Transferring Special and Air School Certificates.

Dear Mr. Wolverton:

Receipt is acknowledged of your letter of May 20th as follows:

"It has come to the attention of this office recently that on occasion a flight operation is sold which has either or both Special Certificate and Air School Certificate. The question that arises from this transaction is whether or not the certificates are transferrable upon sale.

"This brings to mind also the possibility of a situation where the certificate owner is located in more than one city or relocates in same or other city after sale. In any event, is a statement as to intended action necessary? If so, what should be the context of said statement?

"Your opinion on this matter is indeed appreciated."

Insofar as your question relates to air schools, the "certificate" in question is governed by Chapter 328, Code 1954. Section 328.19 provides in pertinent part as follows:

"Registration. Every . . . air school, shall register annually with the aeronautics commission.

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"There shall be paid to the commission, at the time of such registration, the following annual registration fees:

" * * * * * * *

"2. Air school, twenty dollars for the first registration and ten dollars for each annual renewal thereof.

" * * * * * * * "

Section 328.1(9) provides as follows:

"9. 'Air school' means any person engaged in giving, or offering to give, instruction, in aeronautics, either in flying or ground subjects, or both, for hire or reward, and who employs other persons for such purposes. It does not include any public school or university of this state, or any institution of higher learning duly accredited and approved for carrying on collegiate work." (Emphasis ours)

Section 328.1(15) provides as follows:

"15. 'Person' means any individual, firm, partnership, corporation, company, association, joint stock association, or body politic, and includes any trustee, receiver, assignee, or similar representative thereof."

Section 328.26 provides that applications for registration under Section 328.19 "shall be made upon such forms and shall contain such information as the the commission may prescribe".

Section 328.27 provides that registration shall be evidenced by a certificate "which shall state the name and address of the person to which it is issued".

Section 328.34 specifies several grounds for refusal to issue certificates which grounds have to do with the character and qualifications of the person making application.

Section 328.43 on transfer, expressly refers to "the transfer of ownership of registered aircraft" but makes no reference to transfer of an air school.

Since an "air school" is defined as a "person" and it is such "person" who makes the application for certificate,

has the certificate issued in his name and furnishes the information as to character and qualifications entitling him to receive such certificate, I am of the opinion the certificate is not transferrable. The air school is a "person" (as defined in Section 328.1(15)). If some other person wishes to become an "air school", such other person must qualify and be registered on the basis of his own qualifications. Within the statutory definition of "air School" the "person" who is certificated as such has such certification as part of his identity as a person. Although he may be capable of transferring his clientele and equipment, he cannot transfer his identity as a "person".

"Special certificates" are governed by Sections 328.28 to 328.33. Section 328.23 provides in pertinent part:

> "Operation under special certificate. A manufacturer or dealer owning any aircraft otherwise required to be registered hereunder may operate the same for purposes of transporting, testing, demonstrating or selling the same without registering each such aircraft, upon condition that any such aircraft display therein a special certificate issued to such owner as provided in this section and sections 328.29 to 328.33, inclusive.
>
> " * * * * * * * " (Emphasis ours)

Again, it is the "owner" not the aircraft to which the "special certificate" pertains. Hence, 328.43 on transfer of registered aircraft doesn't apply. It is "such owner" rather than "some other owner" to whom the "special certificate" pertains. Hence, "special certificates" are not transferrable from one owner or dealer to another.

As to your third question, Section 328.12(2) provides that the Aeronautics Commission has power as follows:

> "2. Rules and regulations. It shall have power to make such reasonable rules and regulations, consistent with the provisions of this chapter, as may be deemed by the commission to be necessary and expedient for the administration of the affairs of the commission, and the administration and enforcement of this chapter, and to amend said rules and regulations at any time."

Since address of the certificate holder is part of the information contained in the certificate (see Sections 328.27,

328.30), requirement of notice of change of address would be a proper exercise of the power conferred by Section 328.12(2).

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

June 3, 1957

Mr. John H. Holley
Butler County Attorney
Shell Rock, Iowa

Dear Mr. Holley:

Receipt is acknowledged of your letter of May 23rd as follows:

> "The Butler County Auditor and the Board of Supervisors are desirous of destroying or otherwise disposing of the files of old newspapers containing the publication of the official proceedings of the Board and other official notices. I understand that there is a collection of newspapers going back more than 25 years. They have asked me for an opinion as to whether such old files of newspapers can be destroyed and, if they can be so destroyed, how many years must such files be kept by the County Auditor before they are eligible for destruction?
>
> "I cannot find anything in the Code which appears to make it a duty of the county auditor to preserve files of the newspapers in which official publications have appeared. The purpose of this letter is to request that you advise me whether the county auditor has any duty to preserve the files of newspapers in which official publications have appeared; and if he has such a duty, how many years he is obliged to keep those files before they may be destroyed or otherwise disposed of."

Chapter 349, Code 1954, relating to county official newspapers makes no provision for preservation of files of such

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newspapers. On the other hand, I am unable to find any provision authorizing the destruction of county records.

I would, therefore, advise you that there is nothing to require the preservation of or prevent the destruction of files of newspapers kept as such but that notices published as part of some proceedings pursuant to law, as for example, a bond issue, election, etc., and proof of publication thereof, where required, should be preserved as part of the file on the particular proceedings. If the files of newspapers in question are in duplication of specific items in such other files, there is nothing to prevent their destruction as nothing required their preservation.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

June 3, 1957

Mr. William G. Klotzbach
Buchanan County Attorney
201½ East Main
Independence, Iowa

Dear Bill:

Receipt is acknowledged of your letter of May 21st as follows:

"Recently I conversed with you by telephone in regard to interpretation of the first phrase in Chapter 279.15 of the 1954 Code. In our particular situation a rural sub-district did not operate a school last year, because they were unable to find a competent teacher that was acceptable to the persons charged with the responsibility of hiring a teacher. There was also strong feeling towards merger of the sub-district with a consolidated district. By record action the school-board closed the school and designated that the pupils should attend the Jesup Consolidated School. This, in fact, was done, and the rural board paid tuition for 13 students from the sub-district that attended Jesup Consolidated School. Following this action petitions were circulated and an election was held in accordance with Chapter 275.10. This proposal was not successful. Recently, the school-board, by a vote of 3 to 2, voted to open the sub-district school again. The directors, desiring the school to be closed, point to Chapter 279.15, and the provision that no contract shall be entered into with any teacher to teach elementary school when the average daily attendance of elementary pupils in such school the last preceding term therein was less than 5 such pupils of school age. They contend that inasmuch as the school was closed last

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year there could not have been 5 pupils in the school that last preceding term. I have advised the rural board that the provision has no application to our situation, as there were at least 13 school children in the sub-district, as that was the amount for whom tuition was paid by the rural-board."

In answer thereto, I would advise you that my files indicate a letter opinion of this office dated August 11, 1954, ruled the petition and permission of county superintendent provisions of Section 279.15 are inapplicable to schools closed for reason other than insufficient enrollment or average daily attendance.

Examination of the statutes indicate such conclusion is correct for the reason that Section 279.15, Code 1954, deals exclusively with the subject of minimum enrollment and average daily attenance. Section 282.7, which provides for closing schools by board action contains no petition or permission requirements. Section 279.11 confers discretion on boards "to determine the number of schools to be taught". I would, therefore, advise you that the petition and permission clause in Section 279.15 relates only to schools closed by the operation of said section.

A copy of the previous letter opinion on the subject is enclosed herewith.

Very truly yours,

LEONARD C. ADAMS
Assistant Attorney General

LCA:mfm
Enclosure - 1

June 3, 1957

Mr. Lee R. Watts
Adams County Attorney
Corning, Iowa

Re: Chapter 244, Code of 1954.

Dear Mr. Watts:

Receipt is acknowledged of your letter of May 21st as follows:

"I desire your opinion as to the liability of Adams County for the support of certain children of a non-veteran in the Iowa Annie Wittenmyer home at Davenport.

"These children were legal residents of Union County, Iowa at the time they were sent to the Wittenmyer home by the District Court of Union County. For the purposes of this opinion, it is admitted that these children had a legal settlement in Adams County, Iowa at the time of the commitment.

"Adams County received a statement for the keep of these children from the Superintendent at Davenport. Commitment was made under Chapter 244 of the Code of 1954. Since I have been unable to find anything in this Chapter which makes the county of legal settlement liable for this bill, I have recommended that payment be withheld until the matter of liability could be determined."

Section 244.14, Code 1954, provides as follows:

"Counties liable. Each county shall be liable for sums paid by the home in support of all

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> its children, other than the children of soldiers, to the extent of a sum equal to one-half of the net cost of the support and maintenance of its children. The sums for which each county is so liable shall be charged to the county and collected as a part of the taxes due the state, and paid by the county from the state institution fund at the same time state taxes are paid." (Emphasis ours)

Your question is whether the underscored word, "its", refers to residence or legal settlement. The word is patently ambiguous on its face and requires construction. However, reference to Section 244.3, Code 1954, on admission to the Iowa Annie Wittenmyer home reveals that admission is confined to "destitute" children or "neglected, dependent or delinquent" children. "Dependent" or "neglected" children are defined as "destitute" in Section 232.2, Code 1954. Reference to Section 232.27(1), Code 1954, would seem to indicate that "neglected" or "dependent" rather than "delinquent" children are committed to the Iowa Annie Wittenmyer Home. "Destitute" is synonymous with "indigent" and with "poor". See 12 W & P 440, 441. If said children were given relief outside an institution as poor persons such relief would, in general, be based on legal settlement. See Chapter 252, Code 1954. Relief of poor persons on the basis of legal settlement is a concept of long standing in our laws.

There seems no basis in logic for supposing the support of a poor person committed to a public institution would derive from a different source than relief given such person were he not institutionalized.

I am, therefore, of the opinion that the word "its" as used in Chapter 244 refers to legal settlement rather than residence.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

June 4, 1957

Mr. Donald E. O'Brien
Woodbury County Attorney
203 Court House
Sioux City, Iowa

Dear Sir:

Belatedly I acknowledge receipt of yours in which you have submitted the following:

> "I realize at this time your office is very busy with legislative problems, however, I want to request your opinion on the following election matters, but I respectfully suggest that your opinion in this matter can wait until after some of your other duties have been completed. Propositions which I wish to submit are as follows:
>
> "1. ON RIGHTS OF PARTY CHALLENGERS TO WITNESS COUNTING OF BALLOTS:
>
> "49.104 provides for challenging committees 'to witness the counting of ballots'.
>
> "51.~~47~~ 7 provides that the counting board shall commence counting at one o'clock p. m., or before.
>
> "51.11 provides that 'no person shall be admitted into the space or room where such ballots are being counted until the polls are closed, except the counting board.
>
> "Op. Atty. Gen. 1940, p. 578 explains that the challenging committee may not be present during the counting of ballots by the counting board while the polls are open but after the polls are closed they may be present.
>
> "QUESTIONS:
>
> "1. Can the challenging committee demand to see those ballots counted before the closing of the polls?

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"2. Can the committee physically examine the counted ballots, or must they be exhibited by the counting board?

"II. ON ABSENT VOTERS' BALLOTS:

"53.17 provides that 'said ballot may be personally delivered by the voter to the Auditor - at the office of said Auditor, prior to election day. If not so delivered, said envelope - shall be mailed by the voter, postage paid, to reach said auditor prior to election day.'

"53.22 provides that 'all ballots forwarded to absent voters and not received by the auditor- in time for delivery to the judges of election before the closing of the polls, shall be rejected'.

"QUESTIONS:

"1. In order to be counted must ballots reach Auditor prior to election day, or in time for delivery to judges before closing of polls on election day?

"2. If ballots must reach Auditor prior to election day, is a postmark before midnight on the day prior to election day sufficient?

"III. ON RECEIVING BOARD & COUNTING BOARD MEMBERSHIP:

"49.15 states that the receiving board 'shall be made up from the parties which cast the largest and next largest number of votes in said precinct at the last general election'.

"51.4 on the counting board states ' -- that two of such judges shall be chosen from the political party casting the highest number of votes in the last preceding general election'.

"QUESTIONS:

"1. Do 'highest number of votes' and 'largest number of votes' refer to the votes cast for Governor in each general election, for Governor

In one general election and for President in the next, or for the total number of votes cast by the parties in the general election?

"Your opinion will be appreciated."

In answer thereto I would advise as follows. Sections 49.70 to 49.81, 1954 Code, state that the function of "challenging committees" is to challenge persons offering to vote not ballots. Their only right with respect to the canvass is under Section 50.1 providing the judges shall "publicly canvass the vote" and such right is merely as members of the general public and not as "challenging committees". They have no right to inspect or handle the ballots at any time.

II. 1. In answer to the first part of your question No. II, I would advise that in order to be counted ballots must reach the Auditor before closing of polls in accordance with the provisions of Section 53.22. In answer to the second part of your question No. II I would advise that the postmark is immaterial. "Arrival in time for delivery" is the statutory requirement. If the mail delivery is too slow the ballot would not count.

III. In answer to your third question I would advise that prior opinions of this Department have held the highest number of votes and largest number of votes to mean the "head of the ticket" which could mean President, Senator or Governor, depending on what offices were to be filled.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

60M 11-56-10915
PB-C-8776

Form 13

IOWA STATE HIGHWAY COMMISSION

AMES, IOWA

Ames, Iowa

June 4, 1957

Mr. Henry J. TePaske
County Attorney
Court House
Orange City, Iowa

Re: Construction of Bridge within the city of Hawarden at county expense.

Dear Mr. TePaske:

I must apologize for not answering your letter sooner, but due to the legislative session and the volume of work in this office, I was unable to give you an answer.

In reference to your letter on whether or not the county is authorized to pay all, or a portion of the construction of a bridge to be constructed in the City of Hawarden where the bridge is located on a city street which is neither a primary highway or a secondary road, I direct your attention to the following sections of the Iowa Code of 1954.

Section 309.3, Code of Iowa, 1954, entitled Secondary Bridge System provides, "The Secondary Bridge System of a county shall embrace all bridges and culverts on all public highways within a county except on primary roads and on highways within cities which control their own bridge levies, except that culverts which are 36 inches or less in diameter shall be constructed and maintained by the city or town in which they are located."

An opinion of the Attorney General (1954 volume at page 50) dated April 16, 1953 holds that all cities control their own bridge levies under the present law as enacted in Code section 404.7. Therefore, it would seem that Section 309.3 standing alone would not constitute authority to construct this bridge because of the exception contained in this section.

Section 309.10 entitled General Pledge, reads as follows: "The balance of said secondary road construction funds shall be used for any or all of the following purposes at the option of the Board of Supervisors: "The section sets out several authorized usages of said fund and paragraph 9 of this section provides, "The payment of all or part of the cost of construction of bridge in cities and towns having a population of 8,000 or less and all or part of the cost of construction of roads located within an incorporated town, of less than four hundred (400) population, which lead to state parks." It would seem that this section very clearly authorizes the construction of any or all bridges in cities and towns regardless of whether they be located on a secondary road extension or not. This certainly is true unless there is some limitation contained in other sections of the Code.

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60M 11-56-10815
PB-C-8776

Form 13

IOWA STATE HIGHWAY COMMISSION

AMES, IOWA

Section 309.8 provides for and defines the secondary road construction fund. Section 309.9 provides that 35% of the secondary road construction fund is pledged to the improvement of those local roads which the Board finds are of the greatest utility to the people of the various townships. There appears to be no Iowa statute which contravenes paragraph 9 of section 309.10

The 57th General Assembly passed House file 42 which will become effective on July 4, 1957. House file 42 re-writes several sections of Chapter 309 of the Code. Briefly, it creates one secondary road system, other then farm to market roads, creates one secondary road fund and eliminates the 35% pledge to local county roads. Sub-section 3 of Section 4 of House file 42 reads exactly the same as sub-section 9 of Section 309.10 of the present Code of Iowa. I am sending you a copy of House file 42 for your information.

Therefore, in answer to your question, "Is the Board of Supervisors authorized to construct a bridge or to share in the cost of the construction under these circumstances?" it would appear that there is ample authority in Chapter 309 and in particular sub-section 9 of section 309.10 of the Code of Iowa, 1954 authorizing the Board to share in that construction cost. I would agree with your letter of April 3 in which you set out that the county does not have the duty to construct this bridge.

If there is anything further that you require, please write.

Yours very truly,

C. J. Lyman
Special Assistant Attorney General
for Iowa State Highway Commission

CJL:js

encl.

June 5, 1957

Mr. John H. Holley
Butler County Attorney
Shell Rock, Iowa

Dear Sir:

Reference is herein made to yours in which you submitted the following:

> "The Board of Supervisors of this county intends to submit to the voters of this county the question of issuing $350,000 in bonds and taxing therefor under the provisions of Chapter 345 of the Code. The purpose of this letter is to inquire whether it is the duty of the county attorney to guide the board through the calling of the election in the proper manner and the issuing and selling of the bonds in the event the voters signify their approval of the proposed bond issue. I can find nothing in Chapter 336 of the Code which would indicate that it is part of my regular duties as county attorney to do the legal work in connection with this bonding procedure without extra compensation.
>
> "To put the question another way: Is it part of the regular duties of a county attorney to do and perform the legal work involved in a vote and bonding procedure under the provisions of Chapter 345 of the Code, or may the county attorney receive extra compensation from the county for performing such duties?
>
> "I am certain that such a question has been put to the Attorney General's office on numerous occasions in the past, but I can find nothing in the Annotations to the Code on this particular point. I will be obliged to receive any information which you can furnish."

In reply thereto I advise you that it is the view of the Department that the foregoing is the duty of the County Attorney for which additional compensation is not authorized.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

June 6, 1957

Mr. Oliver P. Bennett
Commissioner
Insurance Department of Iowa
L O C A L

Dear Mr. Bennett:

Receipt is acknowledged of your letter of May 29th transmitting a copy of a proposed "Contract of Reinsurance" between an Iowa insurance company and a Minnesota mutual benefit society for tentative approval under Section 521.5, Code 1954.

The said proposed "Contract of Reinsurance" recites that said mutual benefit society is organized under Sections 63.01 and 63.22, Minnesota Statutes of 1953; that it is doing business under a plan "not based on adequate rates or fixed benefits"; that "ever increasing assessments" are probable thereunder; and it refers to "certificates" and "certificate holders" rather than "policies" and "policyholders". It further recites the authority for its adoption as Section 63.16, Minnesota Statutes of 1953.

There must be insurance before there can be reinsurance. However, it is well established that membership in a mutual benefit society is not insurance nor is the certificate of membership in such society an insurance policy. See 29 Am. Jur., Insurance, §590; 38 Am. Jur., Mutual Benefit Societies, §4. Also see State ex rel Kuble v. Capitol Benefit Association, 237 Iowa 363 at page 370, wherein the Court said:

> "Appellant cites a number of cases which construe the term 'insurance' and deal with its operations. The term is well known and has frequently been defined. Bliss on Life Insurance, section 3, defines life insurance to be an agreement to

> pay a given sum on the happening of a particular event, contingent upon the duration of human life, in consideration of the immediate payment of a smaller sum, or certain equivalent periodic payments. . . . " (Emphasis ours)

By the express declarations of the proposed "Reinsurance Contract" the mutual benefit society does not agree to pay any "given sum" nor does it receive any "periodic payments". Benefits, assessments and periods between assessments are all uncertain. Thus, the certificates of membership in said society are not "insurance" within the accepted definition of the word and the so-called "Contract of Reinsurance" does not provide for reinsurance at all but merely for the original sale of insurance to members of an existing "mutual benefit society" in anticipation of its dissolution.

For this reason the tentative approval requested in your letter cannot be given under Chapter 521, Code of Iowa. For further reason note that Section 521.1, Code 1954, refers to insurance companies organized under certain specified Chapters of the Code of Iowa whereas the mutual benefit society in question is described as organized under Sections 63.01 and 63.22, Minnesota Statutes of 1953.

Very truly yours,

NORMAN A. ERBE
Attorney General of Iowa

NAE:LCA:mfm

June 6, 1957

Mr. Donald E. O'Brien
Woodbury County Attorney
203 Court House
Sioux City, Iowa

Dear Sir:

This is to acknowledge receipt of your communication of May 21, 1957, directed to Attorney General Norman A. Erbe. You state that your office has been approached by a concern in the trading stamp business, the operation of which consists of giving stamps with each purchase, the same being redeemable for merchandise at a store. You further state that there are now several such operations in your city and that one of them would like to begin redeeming books of stamps for cash.

Under our statutes, sections 553.15 to 553.18 inclusive, Code of Iowa 1954, known as the "Iowa Gift Enterprise Law", the issuance of trading stamps furnished in retail establishments by trading stamp companies is prohibited. However, in the case of Sperry & Hutchinson Company v. Leo A. Hoegh, Attorney General, et al., 246 Iowa 9, 65 NW 2d 410, the Supreme Court of Iowa declared these statutes to be unconstitutional. A similar result was obtained in the case of Gold Bond Stamp Company v. Leo A. Hoegh, Attorney General of Iowa, et al., Polk County, Iowa District Court, Equity No. 62037 (the case did not reach the Supreme Court; hence, is unreported). The effect of these decisions is that Iowa now has no effective anti-trading stamp law.

Most trading stamp concerns print a definite cash value on the face of their stamps, such as 1 mill, 1.8 mills, etc. Such stamps have a definite cash redemption value per stamp. Generally there are no requirements printed on the stamp that the holder must collect a certain number of similar stamps before he may present them for redemption. On the

basis of the limited information which you have submitted, if such be your situation, it would not appear that any existing Iowa laws would be violated if the stamps were redeemed for cash at their stated face value rather than in merchandise.

There is, however, one type of operation which is illegal under our gambling statutes, since it involves the element of chance together with a prize and consideration. The writer has observed "cash discount" cards which have been used by certain companies which, in addition to places for the affixing of stamps, contain a seal under which is printed an amount allegedly running from one dollar to ten dollars. When the card is filled it is returned to the merchant with the seal unbroken and the amount of "cash discounts" is then determined by breaking the seal and reading the amount printed thereunder.

I trust this will answer your inquiry.

Very truly yours,

RRRD/fm

RAPHAEL R. R. DVORAK
First Assistant Attorney General

June 6, 1957

Hon. Don A. Petruccelli
State Representative
First National Building
Davenport, Iowa

Re: House File 372

Dear Sir:

Receipt is acknowledged of your letter of June 3rd as follows:

> "I am requesting an attorney general's opinion regarding the interpretation of paragraph 2 of House File 372,
>
> "'No other provision of law providing for the payment of taxes, registration or license fees for vehicles shall be applicable to any bus, car, or vehicle for the transportation of passengers owned and operated by any urban transit company.'
>
> "My question regarding this paragraph is as follows: How will this apply to city ordinance wherein the city has an annual charge or annual license fee on each bus of the transit company. In other words, will the city ordinance be inapplicable or applicable according to the above quoted provision of paragraph 2 of House File 372."

The full text of Sec. 2, House File 372, 57th General Assembly, is as follows:

> "Sec. 2. Any person, firm, corporation or company operating an urban transit system shall pay to the county treasurer annually as a registration fee for each bus, car or vehicle used in the

57-L-12

> transportation of passengers, twenty-five dollars ($25.00), which shall be paid into the municipal street fund. No other provision of law providing for the payment of taxes, registration, or license fees for vehicles shall be applicable to any bus, car, or vehicle for the transportation of passengers owned and operated by any urban transit company."

The answer to your question depends upon whether or not a city ordinance is a "provision of law" for purposes of the quoted section. Ordinances have been held to be "laws" for some purposes but not for others.

In Gomeringer v. McAbee, 99 A. 787, 789, 129 Md. 557, it was held:

> "An ordinance passed by legislative authority is a law within the meaning of that term as used in constitutions."

In Norfolk & W. Ry. Co. v. White, (Va.), 150 S.E. 218 at page 22 it was held that an ordinance regulating railroad signals pursuant to statutory authority was "law" within the meaning of a statute penalizing the railroad's failure to give "signals required by law".

In Choice v. City of Dallas, (Texas), 210 S.W. 753, 756 it was held:

> "An ordinance is not a 'law' in one sense of the word, but is a local law emanating from legislative authority and operative within its sphere as effectively as general law of the soveriegnty."

With respect to licensing ordinances, it was held in Ex Parte Johnson, 190 P. 852, 853, 47 Cal. App. 465 that:

> "An ordinance is deemed a law within Pen. Code § 435, making failure to take out a license a misdemeanor, so that it is immaterial whether the provisions in an ordinance imposing a license fee that failure shall be a misdemeanor be invalid."

I assume that the ordinance to which your letter refers was adopted pursuant to Section 369.39, Code 1954, which provides in pertinent part:

> "Conveyances -- transportation. They (cities and towns) shall have power:
>
> "1. To regulate, license and tax all carts,

wagons, street sprinklers, drays, coaches, and every description of conveyance kept for hire.

" * * * * * * * " (Emphasis ours)

If so, it follows the ordinance is within the class constituting "law" within the precedent of the cited case authorities and it follows that such city ordinance is a "provision of law" within the meaning of Sec. 2, House File 372, 57th General Assembly.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

June 7, 1957

Mr. Harlyn A. Stoebe
Humboldt County Attorney
429 Sumner Avenue
Humboldt, Iowa

Dear Mr. Stoebe:

Receipt is acknowledged of your letter of June 4th as follows:

"This office has been requested to render an opinion for certain law enforcement officers concerning the construction of Section 321.304, paragraph three of the Code of Iowa which defines certain prohibited passing in the following instance:

"Does the code section above mentioned prohibit a vehicle entering into the left hand land in overtaking and passing a vehicle within such reasonable proximity to the end of a distinctive off-center line indicating a 'no passing' zone, which situation renders it impossible for the over-taking vehicle to return to the right hand land without crossing said distinctive center line in the 'no passing' zone?"

Section 321.304, Code 1954, provides as follows:

"Prohibited passing. No vehicle shall, in overtaking and passing another vehicle or at any other time, be driven to the left side of the roadway under the following conditions:

"1. When approaching the crest of a grade or upon a curve in the highway where the driver's view along the highway is obstructed for a distance of approximately seven hundred feet.

51-6-3
57-1-12

"2. When approaching within one hundred feet of any narrow bridge, viaduct, or tunnel, when so signposted, or when approaching within one hundred feet of or traversing any intersection or railroad grade crossing.

"3. Where official signs are in place directing that traffic keep to the right or a distinctive center line or off-center line is marked, which distinctive line also so directs traffic as declared in the sign manual adopted by the state highway commission."

I am unable to discover any existing case or ruling directly answering your question under subsection 3 of the quoted statute.

However, in construing subsection 2 of said section, our Supreme Court in its decision in the case of Young v. Blue Line Storage Co., 242 Iowa 125 at page 133, 44 N.W.2d 391, stated as follows:

" . . . The pertinent parts of the statute referred to in section 321.304, Codes 1946 and 1950, read:

"'No vehicle,shall, in overtaking and passing another vehicle or at any other time, be driven to the left side of the roadway under the following conditions:

"'* * *

"'2. * * * when approaching within one hundred feet of or traversing any intersection * * *.'

"The theory of the defendant as shown in its argument is that when approaching 'within 100 feet' it can only mean within the distance of 100 feet the driver should not start to pass, and that it does not mean that if a collision happens within 100 feet of the intersection the individual who is passing is guilty of negligence. We disagree with the defendant in this respect. The statute itself indicates the contrary. It says, 'when within 100 feet' of an intersection. Therefore, no matter when defendant's truck was started to be driven, if, when within 100 feet of the intersection it remained on the left side of the highway it was traversing, it violated this statute. The driver of a following car could very well pass to the left

side of the road, but if he continued in that position until within 100 feet of that intersection he would violate the rule. The court in the instruction upon this phase of the evidence so instructed and was correct. Such has been the holding in other jurisdictions and in certain cases cited by the plaintiff. See Holland v. Edelblute, 179 Va. 685, 20 S.E.2d 506; Greer v. Marriott, 27 Ala. App. 108, 110, 167 So. 597, 598, in which, in interpreting an act similar to our own, the court says:

"'We hold that the passing of one car by another going in the same direction is one continuing act, from the time the rear car pulls out of the direct lane of travel in the rear of the car to be passed, up to and including the completion of the passing and the passing car is again in its proper lane.'

"American Products Co. v. Villwock, 7 Wash.2d 246, 271, 109 P.2d 570, 581, 132 A. L. R. 1010, 1027, in discussing a statute similar to ours, but applied to curves, the court instructed that it should be unlawful to overtake and apss another vehicle proceeding in the same direction upon any curve when the view of the operator of such overtaking vehicle is obstructed or obscured within a distance of 600 feet, and says, in part:

"'While the literal language of the statute lends support to appellant's contention, the impracticable, and almost absurd, results that would flow from the construction contended for, indicate clearly that the statute was intended, and should be interpreted, to prohibit the overtaking and passing of other vehicles proceeding in the same direction, not only while actually upon a curve, but also while approaching any curve, when the view of the operator of the overtaking vehicle is obstructed within a distance of 600 feet.'

"And the same rule may apply to our statute. We are satisfied that the court correctly instructed upon this subject."

It appears entirely logical and consistent that what the Court said with respect to subsection 2 is equally true of subsection 3. The act prohibited in the introductory paragraph of Section 321.304 is driving to the left side of the roadway in overtaking and passing another vehicle. The numbered subsections specify circumstances in which the prohibitions apply.

Given that "passing is one continuing act", it follows that operation of a motor vehicle to the left of the center line in a "no passing" zone at any time during said "continuing act" is a violation of the statute irrespective of whether or not the tires of such vehicle ever come in physical contact with such distinctive center line in the process of commission of the act.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfm

June 10, 1957

Since Greene Co. has a population of less than 25,000, should have added provisions of sec. 359.18 - "... where the ... are made parties to litigation in connection with the performance of their duties ... the County Atty. or a part of his official duties, shall appear in behalf of the Township ..." (cf. sec 359.19)

Mr. Eugene R. Nelson
County Attorney
Jefferson, Iowa

Dear Sir:

Receipt is acknowledged of your letter of June 6 in which you state:

> "This is written to request an official opinion whether, in view of the provisions of Section 472.2 subsection 2, a County Attorney is required to handle, without pay, the defense against landowner's appeal to the District and Supreme Court from condemnation proceedings conducted on behalf of a township."

In answer thereto, I would call your attention to the provisions of Section 472.2 (2), cited in your letter, which states that:

> "Such proceedings shall be conducted:
>
> "* * * * *
>
> "2. By the county attorney, when the damages are payable from funds disbursed by the county, or by any township, or school district."

It would appear from the plain provisions of the law that this is one of the duties placed upon the county attorney, and that the pay of the county attorney is meant to include such duties without extra compensation. In other words, the duty to conduct such proceedings by the county attorney is mandatory, and there is no discretion or mention of additional pay therefor.

Yours very truly,

NAE/fm

NORMAN A. ERBE, Attorney General of Iowa

57-6-14

June 10, 1957

Mr. R. G. Bullard, Acting Director
Iowa Natural Resources Council
B u i l d i n g

Re: Section 9, paragraph 5, House File 553

Dear Sir:

In your letter of June 6, 1957, you state:

"Section 9, paragraph 5, found on page 11 of House File 553 which went into effect May 16, 1957 states:

'The applicant for a permit shall pay a fee to the council in the amount of ten (10.00) dollars at the time of filing his application which fee shall include the cost of publishing notice and which publication shall then be paid for by the council.'

We believe it was the intent that this $10.00 fee go into the funds of the Iowa Natural Resources Council and be used in part to pay the cost of publication of notices of hearings required by this law. The wording of this section is not too clear and there is some thought that the $10.00 fee should go into the General Fund and not be available for our use.

Since we have received some fees we would like to know as soon as possible whether or not these funds can be deposited to our account."

In answer to your letter of inquiry, I would advise that it is the opinion of this office, based upon the wording of the statute as enacted by the Legislature, that the proceeds of the ten-dollar fee shall go into the General Fund of the State of Iowa and may not be retained by the Council for the payment of publication costs.

This fact situation is similar to other fee cases in our

57-6-15

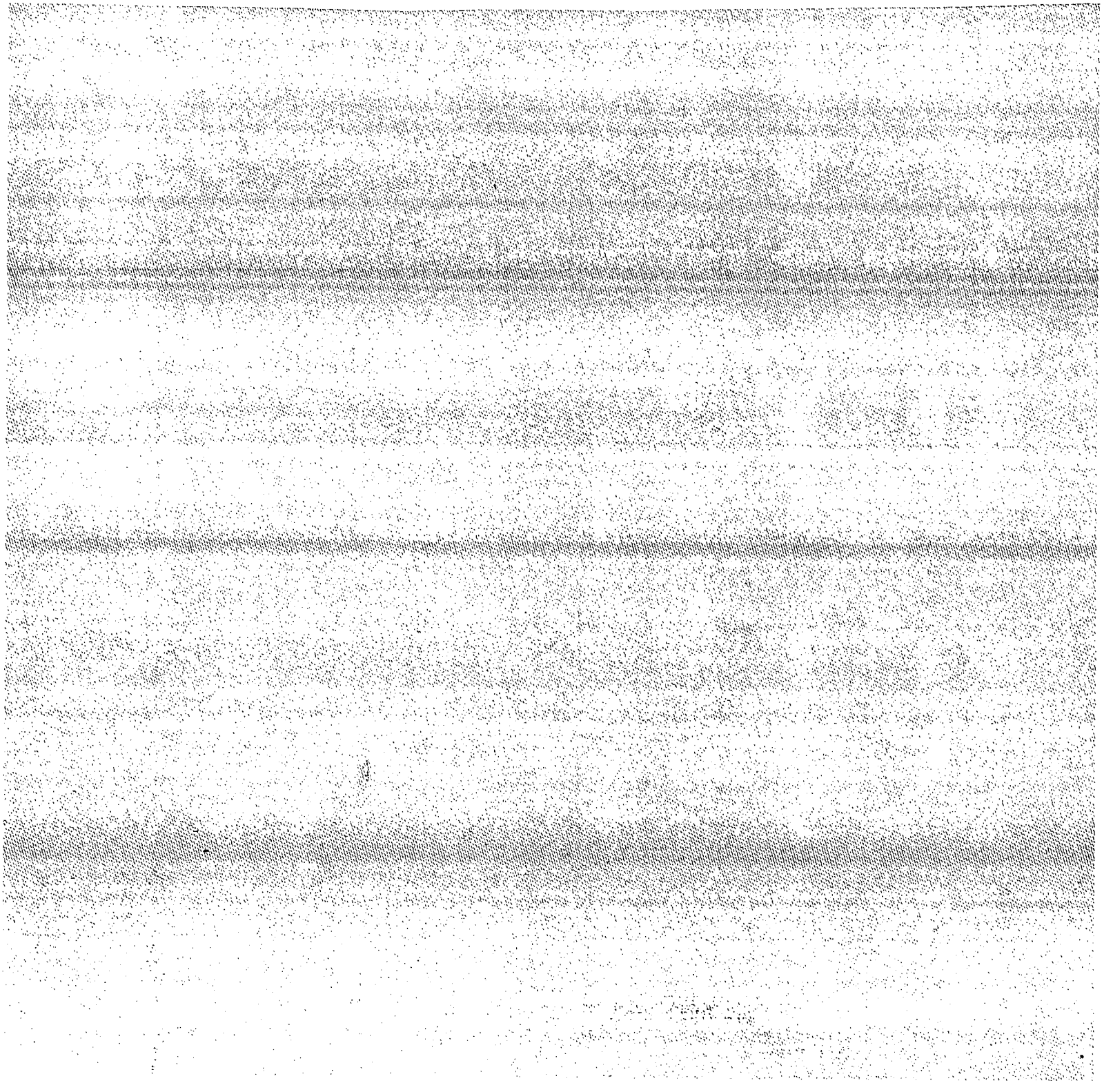
Iowa law which fail to provide for a trust fund out of which certain expenses are to be paid. Since the Legislature failed to establish a trust fund as a depository for these fees, such fees go into the General Fund.

Very truly yours,

NAE/fm

NORMAN A. ERBE
Attorney General of Iowa

HEADNOTE: Sales of liquefied gas by a retailer or dealer to a contractor for use as a temporary heating fuel for drying purposes in a torch and blower system, which is similar to a salamander, on a construction project, even though paid for from public funds, is exempt from imposition of the motor vehicle fuel tax. If such sale is made by a dealer, any tax the dealer may have paid may be recovered by the dealer.



5/28/57 - held over
unofficial
Passed 6/18/57

Mr. M. L. Abrahamson,
Treasurer of State of Iowa
State Capitol Building
Des Moines, Iowa

Dear Mr. Abrahamson:

Reference is made to the letter of May 1, 1957 addressed to you by Mr. Gordon J. Forsyth, attorney-at-law Estherville, Iowa in which the question is raised:

> Is motor vehicle fuel tax payable on the sale of liquefied gas used by a contractor as a temporary heating fuel for drying purposes, in a torch and blower system which is similar to a salamander, on a construction project which project is paid for from public funds?

upon which question you have requested an opinion.

It is our opinion that such sale of liquified gas by a retailer is exempt from the motor vehicle fuel tax imposed by Chapter 324, Code of Iowa, 1954, as amended, and if the sale is made by a dealer, the tax he may have paid, if any, under the provisions of section 324.29, code 1954, as amended, may be recovered as provided in section 324.56.

Prior to 1931 Chapter 251-A1, Code of Iowa, 1927 was comparable to Chapter 324, Code, 1954 but was entitled "Gasoline License Tax" and referred only to a tax on gasoline. In 1931 there was enacted Chapter 108, Laws of the Forty-fourth General Assembly, whereby the title of Chapter 251-A1, Code, 1931, was changed to Motor Vehicle Fuel Tax

57-6-16 V

and wherever the word "gasoline" appeared in Chapter 251-A1 there was substituted in lieu thereof the words "motor vehicle fuel" Motor vehicle fuel was defimed to

> "mean and include any substance or combination of substances which is intended to be or is capable of being used for the purpose of propelling or running by combustion any internal combustion engine and kept for sale or sold for that purpose, except the products commonly known as kerosene and/or distillate or petroleum products of lower gravity (Baume scale) when not used to propel a motor vehicle or for compounding or combining with any motor vehicle fuel."

The law remained the same until March 31, 1934, the effective date of Chapter 56, Laws for the Forty-fifth General Assembly, Extraordinary Session, the avowed purpose of which was to

> "amend, revise, codify and supplement the existing laws of the State of Iowa relating to the collection of license fees on motor vehicle fuel, and to continue the policy of collecting for highway purposes an excise tax or license fee on all motor vehicle fuel used to propel motor vehicles on the highways of this state, and to provide such regulations as will prevent the evasion of the payment of such license fees and to insure the collection thereof and to that end to collect the license fee on all motor vehicle fuel in the state and from the first person receiving the same in this state for sale or use in this state and to require such person, and all subsequent sellers to collect such license fee from purchasers to whom the same is sold for use or resale in this state so that said license fees shall be ultimately paid by the person using said motor vehicle fuel in this state and to refund to such user such license fees so paid by him on all motor vehicle fuel not used in connection with the operation of motor vehicles on the public highway."

In this Act, for the first time, there appears the provision:

> "No tax refund shall be paid to any person, firm or corporation on any motor vehicle fuel used in any construction or maintenance work which is paid for from public funds."

Effective date of this Act was March 31, 1934, and it became a part of Sec. 5093 - F 29, Code, 1935.

Laws of the Forty-eighth General Assembly, Chapter 133, Section 4 provides:

> Section 5094-f-29 Code, 1935, as amended, is hereby amended by inserting the last line of the next to the last paragraph thereof, after the word "funds" the following: 'but this provision shall not be construed as requiring payment of the tax herein imposed with respect to the sale or use of fuel oil so used unless the same is used as fuel to propel motor vehicles operated upon the public highways for purposes of transportation.' "

Effective date of this amendment was July 4, 1939.

Laws fo the Forty-ninth General Assembly, Chapter 180, included, for the first time in the Code of Iowa, liquefied gas as a motor vehicle fuel and Section 3 thereof provided:

> "that payment of the tax to the State of Iowa on Liquefied gas shall be made in the manner provided for in this chapter for the payment and collection of the tax on liquefied gas. Liquefied gas sold for any purpose other than the purposes set out in paragraph 4 of Section 5093.02 (Code, 1939) may be sold tax free, provided that on sales for the purposes set out in paragraph 4 of Section 5093.02 (Code, 1939) the amount of the tax shall be collected from the purchaser along with the selling price thereof."

Section 16 of the Act provided:

> "Section 5093.29, Code 1939, is amended by adding to said section the following:

> A liquefied gas dealer shall be entitled to refund of the tax on all sales made by him for purposes other than the purposes set out in paragraph 4 of Section 5093.02 (Code, 1939). Application for such refund shall be made within two months of sale, under oath on forms prescribed by the treasurer. Any person licensed under this Chapter to sell liquefied gas who uses liquefied gas for any of the purposes set out in paragraph 4 of Section 5093.02 shall keep a record of all liquefied gas so used by him on records prescribed by the Treasurer."

Effective date of the Act was July 4, 1941.

Laws of the Fiftieth General Assembly amended, revised and codified Chapter 251.13, Code, 1939, but made no additions or changes here important, and the statute is substantially the same in the Code of Iowa, 1954, as amended.

Section 324.1-(4,) Code, 1954, as amended, provides:

> "The term 'motor vehicle fuel' shall mean any petroleum product or other substance which alone or in combination with any other petroleum product or other substance is capable of being used to operate by combustion any internal combustion engine of the type used in automobiles, trucks, airplanes, motorboats, tractors, or other mechanical contrivances which are propelled by their own power and which is practicable for use for such purpose, including the products commonly known as gasoline - - - - and liquefied gas."

Liquefied gas is clearly defined as "motor vehicle fuel" by the statute.

Section 324.1-(17)defines "liquefied gas dealer" as :

> "any person, other than a liquefied gas distributor, who is licensed to sell liquefied gas for use in operation by combustion in any internal combustion engine of the type used in automobiles, trucks - - - or other mechanical contrivances which are propelled by their own power, as well as sales for other purposes."

Section 324.1-18 defines "liquefied gas retailer" as:

> "any person other than a licensed liquefied gas dealer, or a liquefied gas distributor who sells liquefied gas a t retail only for uses other than the uses provided in sub-section 4 of this section, and as such is permitted to sell same to purchasers tax free."

By the immediately foregoing quoted words the only sales of liquefied gas made by a "retailer" which are subject to motor vehicle fuel tax are those for use in internal combustion engines of the type used in automobiles and other vehicles or contrivances propelled by their own power. In the definition of the term "liquefied gas retailer" an exception is made which renders a sale by him to a user for heating purposes exempt from tax, "heating" not being one of the "uses" provided in sub-section 4 of section 324.1

Section 324.2 is the tax imposition section and it is there provided:

> "A license fee of four cents per gallon or fraction of a gallon is hereby imposed on the sale or use of all motor fuel sold or used in this state for any purpose whatsoever; and a license fee of seven cents per gallon or fraction of a gallon is hereby imposed on the following:
>
> "1. All fuel oil used or sold for the purposes of propelling motor vehicles on the highways of the state;
>
> "2. All fuel oil used in any maintenance and construction work which is paid for from public funds."

Section 324.3 provides in part, relative to the payment of the tax:

> "Such distributor or other person having paid said tax, or being liable for its payment shall collect the amount thereof from any person to whom said motor vehicle fuel

> is sold in this state long with the selling price thereof, provided that payment of the tax to the state on liquefied gas shall be made in the manner provided for in this chapter for the payment and collection of the tax on liquefied gas. Liquefied gas sold for any purpose other than the purposes set out in subsection 4 of section 324.1 may be sold tax free, provided that on sales for the purposes set out in subsection 4, section 324.1, the amount of the tax shall be collected from the purchaser along with the selling price thereof."

Thus an exception is again made for liquefied gas and it is removed from provisions of paragraph 2, section 324.2, inas much as

> "fuel oil used in any maintenance and construction work which is paid for from public funds"

is not one of the purposes set out in subsection 4 of section 324.1.

Section 324.17 provides, in part:

> "At the same time each liquefied gas distributor shall remit to the treasurer the amount of the license fees on the liquefied gas sold or used by him, for use in automobiles, trucks, airplanes, motorboats, tractors, and/or other mechanical contrivances propelled by their own power, and on the liquefied gas sold by him to liquefied gas dealers."

The payment of motor vehicle fuel tax to be made by the distributor does not by the words of the statute require the distributor to pay tax on any sales made other than those where the use of liquefied gas is in vehicles or other mechanical contrivances propelled by their own power and on sale s made to dealers.

Section 324.29 provides:

> "Liquefied Gas dealers and liquefied

> gas retailers shall purchase liquefied gas only from distributors licensed under this chapter to distribute liquefied gas. Sales by distributors to liquefied gas dealers shall be made with the amount of the tax added; sales to liquefied gas retailers shall be made tax-free."

The general refund section of Chapter 324 is section 324.50 whereas liquefied gas tax refunds are covered by the provisions of section 324.56 which reads in part:

> "A liquefied gas dealer shall be entitled to refund of the tax on all sales made by him for purposes other than the purposes set out in subsection 4 of section 324.1."

a provision not found in the general refund section 324.50, and a provision under which the dealer is entitled to a refund of the tax added to the price by the distributor under the provisions of section 324.29, unless the liquefied gas is sold for use in motor driven contrivances.

Section 324.58-12 provides that it shall be unlawful

> "for any person to use liquefied gas for any of the purposes set out in subsection 4 of section 324.1 without paying the tax."

and section 324.58-13 provides that it shall be unlawful

> "for any person to sell for use liquefied gas for any of the purposes set out in subsection 4 of section 324.1 without collecting the tax."

The other paragraphs of section 324.58 do not so limit the illegality of sales of other types of motor vehicle fuels without payment or collection of the tax to sales made for use in motor driven contrivances.

It is a rule of construction that statutes should be construed so as to give force and effect to the manifest legislative intent as embodied therein and this legislative intent should

and will be determined from a consideration of the entire statute relating to the same subject matter. State v. City of Des Moines, 221 Iowa 642; Howard v. Emmet County 140 Iowa 527, 532.

It is clear from the plain words of the many exception paragraphs and sections found in chapter 324, Code, 1954 that the intent of the legislature was to exempt from the Iowa motor vehicle fuel tax all sales of liquefied gas except the narrowly defined class of uses for the operation of internal combustion engines of the type used in automobiles, trucks, airplanes, motorboats, tractors or other mechanical contrivances which are propelled by their own power.

It is our conclusion, therefore, that a sale of liquefied gas used by a contractor as a temporary heating fuel, in a torch and blower system, which is similar to a salamander, on a construction project which is paid for from public funds is exempt from the motor vehicle fuel tax imposed by Chapter 324, Code of Iowa, 1954 as amended, if such sale is made by a retailer and if such sale is made by a dealer the tax he may have paid, if any, under the provisions of section 324.29 may be recovered in accordance with section 324.56.

Very truly yours,

NORMAN A. ERBE,
Attorney General of Iowa

M. A. IVERSON
Special Assistant Attorney General.

June 12, 1957

Mr. R. G. Bullard
Acting Director
Natural Resources Council
L O C A L

Dear Mr. Bullard:

Reference is made to your letter of February 15, 1957, which, because of legislative matters and press of other duties, has prevented its consideration until now. You request an opinion from this office and we quote your request as follows:

> "At a meeting on February 5, 1957 the Iowa Natural Resources Council directed that we request an opinion from your office on the matter of the Resources Council's authority relating to existing levees. This question confronts the Council in their consideration of a petition from sixteen Keokuk County landowners requesting that action be taken to have an existing levee along the South Skunk River in Sec. 27-34, T15N, R13W 'removed from its present position and if rebuilt be placed at least 250 feet north from the present center of the river.'
>
> "In accordance with our discussion on February 13, 1957, we have attached copies of pertinent correspondence, an extract from the minutes of the Council meeting of February 5, at which Mr. Adams appeared, and three sketches of the flood plain area. You will note that the request for movement of the Powers levee was preceded by objections raised against proposed levee construction on the Adams property on the south bank of the Skunk River opposite the Powers levee. The Resources Council also has pending an application from Mr. Adams

57-6-17

requesting approval of his proposed levee construction.

"The Resources Council believes that similar situations will occur in the future inasmuch as there are many levees in existence which were constructed prior to the date of creation of the Council. Therefore, your opinion would have widespread applicability and would be of material aid to the Council in their consideration of such problems.

"More specifically we would welcome your opinion on the following questions:

"Does the Resources Council have authority to force removal or relocation of a levee which was in existence at the time the Council was created, or a levee constructed without Council approval since that time? If so, what procedure should be followed as in this particular instance?"

We have carefully studied the file submitted with your letter, which includes letters respecting Mr. E. J. Adams' proposed levee construction on his farm, petitions protesting said construction, as well as a petition requesting removal of a levee on the Powers farm across the river from the Adams farm, together with sketches of the levees now in place on both farms, and additional levee work proposed on the Adams farm.

A review of the file and the record of the minutes of the Resources Council meeting of February 5, 1957, reveals that Mr. Adams testified that the levee on the Powers farm was started in 1946 and most of it completed in 1947 which indicates that said levee has been in existence for at least ten years. I find nothing in the file indicating that there were any complaints or protests as to the Powers levee until the petition was presented to the Council and received January 21, 1957, requesting removal of the levee.

The Council was created by Chapter 203, Acts of the 53rd General Assembly, approved March 31st, effective April 16, 1949. The Powers levee was constructed several years prior to the creation of the Council.

There can be no question but that the purpose of the levees now in place and proposed are for protection against flood waters, or "backwater", as shown by the file and the minutes of the Council meeting. Dr. Hershey specificially referred to this in one question: "What would be the <u>backwater</u> on this if it were constructed, would it go back three miles?"

In the case of Downey v. Phelps, found in 201 Iowa 826, a levee almost identical with the Powers levee, which was constructed on the north side of the South Skunk River in Mahaska County, was the subject of an injunction action wherein the plaintiffs sought to enjoin the defendants from maintaining the levee. In said case the Supreme Court held as follows:

> "The maintenance of a dike along lands for the purpose of warding off backwater from a river may not be enjoined by an adjoining landowner unless he shows (1) that his lands constitute the dominant estate and the diked lands the servient estate, and (2) that the dike materially and substantially interferes with surface drainage. High lands which are last covered by backwater from a river are not servient to adjoining low lands which are first covered by such backwater."

The levee in the Downey case, as is the case of the construction of the Powers levee, was for the purpose of protection against flood waters and not to divert surface water. Under the facts before us, we believe that Mr. Powers has acquired certain presciptive rights to maintain the levee on his farm. The rule governing this right is stated as follows in the case of Thiessen v. Claussen, 135 Iowa 187, 189, 112 N.W. 545, and cited in the case of Fennema v. Menninga, 236 Iowa at page 547, and in other cases cited therein.

> "'It is equally well settled that if a landowner, claiming the right to repel the surface water coming from an adjacent tract, erects a barrier or constructs a ditch upon the partition line to produce that result, and maintains the same with the knowledge or express or implied consent of the owner of said adjacent premises for ten years or more, the right of the latter to demand an injunction against the maintenance of such alleged obstruction will be barred.' See, also, 67 C.J. 886, section 310." (Emphasis ours)

Section 455A.22 purports to apply only to "All works of any nature for flood control . . . which are hereafter established and constructed, . . . " (See Board of Trustees v. Iowa Natural Resources Council, ___ Iowa ___, 78 N.W.2d 798, loc. cit. p. 803.)

Since the Powers levee was constructed and established prior to the creation of the Council and its powers as stated in Section 455A.22 apply only to "works . . . hereafter established and constructed, . . . ", the Council is without authority to force removal or relocation of a levee which was in existence at the time the Council was created, except by condemnation

proceedings under its powers of eminent domain granted to it by Sections 455A.14 and 455A.19.

In regard to the levee constructed by Mr. Adams and the proposed extension of his levee, Exhibits 12, 12a, and 12b, the file, and data submitted does not definitely indicate when his levee was commenced. Assuming that it was commended after the creation of the Council, his levee would be subject to the authority and power of the Council to order its removal if it was constructed in violation of the provisions of Section 455A.19 upon a determination of the Council of the fact -- "whether it will adversely affect the efficiency of or unduly restrict the capacity of the floodway". (See Section 455A.19 and Board of Trustees v. Iowa Natural Resources Council, ___ Iowa ___, 78 N.W.2d 298, 304.)

As to what procedure should be followed, please be advised that each situation is governed by its own facts and circumstances and is a matter of policy within the discretion of the Council under its powers as granted in Section 455A.19, -- " . . . determining the fact and permitting or prohibiting the same."

Yours very truly,

FRANK D. BIANCO
Assistant Attorney General

FDB:mfm

June 12, 1957

Mr. Loyd VanPatten, Assistant
Secretary of Agriculture
Iowa Department of Agriculture
B u i l d i n g

Dear Sir:

In your letter of May 31, 1957 you request our opinion on the following questions relative to certain sections of House File 163, which was passed by the Fifty-Seventh General Assembly:

> "1. Under Section 6, Subsections 2 and 3, how do you define an intimate and uniform mixture? In other words, should one sample taken from a load of this type be sufficient for analysis?
>
> "2. Section 4 sets up requirements for registration of each brand and grade of fertilizer, while Section 10 sets up the procedure to be followed in the establishment of a grade list. Should the Department of Agriculture, as a regulatory department, tie Section 10 to Section 4, in accepting registrations? In other words, should we advise with the Director of the Iowa Agricultural Experiment Station before we approve for registration fertilizer mixtures not mentioned in the list which has been submitted to the manufacturer for guidance?"

1. Webster's "New International Dictionary," Second Edition, defines "intimate" as "closely united; very close or thorough in connection; as, an 'intimate mixture'". See also James v. Clayton, Cust & Pat. App., 90 F.2d 337, 343. "'Uniform' means unvariable; resembling itself at all times; conforming to one rule or mode." 43 Words and Phrases, 225.

Whether a single sample taken from a load is sufficient for a scientific determination that the entire load complies with the standards set up in the section, is a fact question to be determined by the Secretary of Agriculture based upon his specialized knowledge and experience in these matters.

57-1-18

2. Sections 4 and 10 of House File 163 are as follows:

"Sec. 4. Registration.

"1. Each brand and grade of commercial fertilizer and each soil amendment shall be registered by the manufacturer before being offered for sale, sold, or distributed in this state. The application for registration shall be submitted to the secretary on forms furnished by the secretary and shall be accompanied by a fee of one dollar ($1.00) for each grade per brand of commercial fertilizer and for each soil amendment. Upon approval by the secretary, a copy of the registration shall be furnished to the applicant. All registrations expire on June 30 each year. The application shall include the following information in the following order:

a. The net weight.
b. The name and address of the registrant.
c. The brand.
d. The grade.
e. The guaranteed analysis."

"Sec. 10. Grade List. The secretary, upon advice or recommendation by the director of the Iowa agricultural experiment station, shall, prior to June 30 of each year, or as early thereafter as practicable, promulgate a list of grades of mixed fertilizers adequate to meet the agricultural needs of the state. Such list is only for the guidance of manufacturers, distributors and users and additional fertilizer mixtures may be submitted to the secretary for approval and upon approval shall be included in the list."

The Secretary of Agriculture is directed to seek the advice, recommendation and counsel of the Director of the Iowa Agricultural Experiment Station in preparation of the grade list (Sec. 10) and again in inspecting, sampling and analyzing fertilizers (Sec. 11). Registration (Sec. 4) contains no similar provision and therefore none must have been intended.

By the express language of the Act, the grade list is only for the guidance of manufacturers, distributors and users. The purpose of the grade list is limited by the express language of the section (Sec. 10) and, therefore, cannot be read in conjunction with registration provisions of Section 4.

Very truly yours,

JAMES H. GRITTON
Assistant Attorney General

JHG:md

60M 11-56-10815
PB-C-8776

Form 13

IOWA STATE HIGHWAY COMMISSION

AMES, IOWA

Ames, Iowa

June 12, 1957

Mr. Charles Mather
County Attorney
Sac City, Iowa

Dear Mr. Mather:

Your letter of June 4, 1957, directed to the Honorable Norman Erbe, Attorney General of Iowa, has been referred to this office for answer. It is my understanding that you desire to know whether the county or town has the duty to repair the approaches to bridges originally constructed by the county and located within the confines of the town.

Section 309.10, Code of Iowa, 1954, sub-section 9, grants to the county the authority to expend funds for the construction of bridges in cities and towns having a population of 8,000 or less. Section 309.13 gives them authority to maintain the same. Section 404.7, Code of Iowa, 1954, gives to municipal corporations the authority to expend funds, "8. For all bridge purposes, except for the payment of bonds issued for bridge purposes". Sections 381.9, etc. Code of Iowa, 1954 authorize cities and towns to vote aid in the construction of any county bridge. I understand that there is a new statute covering chapter 309 questions but with no change regarding our question. It would seem that under present law there is no mandatory duty upon either the county or the town to construct bridges located within a town.

The question of whether an approach is a part of the bridge has been considered by the Iowa Supreme Court in several cases. The principal cases on this question are Newcomb vs. Montgomery County, 44 NW 715, 79 Iowa 487; Magee vs. Jones County, 142 NW 957, 161 Iowa 296; Shope vs. City of Des Moines, 177 NW 79, 188 Iowa 1141; Moreland vs. Mitchell County, 40 Iowa 394. In addition a case was decided in 1956 wherein there is dicta to the effect that the court reaffirms the holdings in these previous cases. The case is entitled Linn County Iowa vs. The Town of Central City. I question some of the Court's reasoning in that case. It seems that in all of these cases the Court has treated this question of approaches as a part of the bridge as a question of fact. In other words, the factual determination is generally made by the governing body which is expending public funds for constructing or repairing approaches. There is one further case that should be read also. Becker vs. City of Waterloo, 63 NW 2nd 919, 245 Iowa 666.

When Mr. Erbe was at Ames he answered a similar question regarding a bridge in Glenwood, Iowa. I shall quote three paragraphs from page 2 of his unofficial opinion addressed to Mr. Elliot Thomas, County Attorney, Glenwood, Iowa, "In addition, Section 389.12 imposes upon cities and towns the 'care, supervision and control of all public highways, streets, etc. and directs the cities and towns to 'cause the same to be kept open and in repair and free from nuisance'. No where in the Code

57-L-19

IOWA STATE HIGHWAY COMMISSION

AMES, IOWA

is there a mandate set out imposing upon counties the duty to construct, maintain or repair bridges in cities or towns, altho they are permitted to do so as they desire in their discretion.

The cases are numerous which impose upon the town liability for their negligence in either the construction or maintenance of bridges within cities or towns. This liability rests upon the city, not only by statute, but also at common law. Bird vs. City of Keokuk 226 Ia. 456, 284 NW 438; Fowler vs. Town of Strawberry Hill 74 Ia. 644, 38 NW 521; Rusch vs. City of Davenport 6 Ia. 443; Manderschid vs. City of Dubuque 25 Ia. 108.

It has also been held that after a county has erected a bridge inside the city limits that the bridge becomes a city street and the city alone is required to keep the same in reasonable and ordinary good care. Holmes vs. Hamburg, 337 Ia. 348; Sachs vs. City of Sioux City 109 Ia. 224; Freeman vs. Independence 123 Ia. 1; Opinion of Attorney General 1920, page 276.

I suggest that this whole question should be decided on the basis of practical considerations. If the town has excess funds in its street fund, it is conceivable that it could pay for the major repair of bridge approaches located within its boundaries. However, it has been my experience that small towns do not have excess funds for street construction. Therefore, it would seem that if this bridge is located on a farm to market road and major repairs or construction is needed, it would be wise to use farm to market funds for this work. Prior to the passage of Chapter 404 there were written several Attorney General opinions to the affect that the county has the duty to construct all county bridges located within a county including those located within a town. In view of the limitations placed upon municipal taxation it would seem there is no good reason for this burden to shift after the passage of Chapter 404. I suggest that minor repairs and the maintenance of approaches should be taken care of by the towns.

I trust that this will be of some assistance to you, and if you have any further questions, please let us know.

Yours very truly,

Francis J. Pruss
General Counsel for
Iowa State Highway Commission

FJP:js

June 13, 1957

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

Dear Sir:

This will acknowledge receipt of yours of the 11th inst. in which you submitted the following:

"Senate File 32 is 'An Act relating to the number of members of the Iowa Highway Safety Patrol, to the compensation of the members thereof, and extending the duties of the supervisory officers of said patrol, and to amend Sections Eighty Point Four (80.4), Eighty Point Eight (80.8) and Eighty Point Twenty (80.20), Code of Iowa 1954.'

"Section 54, Senate File 457, Acts of the 57th General Assembly, also makes certain provisions regarding salaries and employees of certain departments, including the Department of Public Safety.

"Enclosed find 'Exhibit A' which shows the classification of Highway Patrolmen under the provisions of Section 8.5, Code of Iowa 1954, and also the present classification plus the effects of Senate File 32 and the proposed schedule of salaries.

"From 'Exhibit A' you will observe that it is proposed that certain new position titles be created, regarding Highway Patrolmen which do not exist at this time and also to provide a basic salary for certain position titles which would appear to be different from the present status plus the effects of Senate File 32.

"I respectfully request an opinion as to the following:

"1. Are increases in compensation to the members of the Highway Patrol provided in Senate File 32 to be in addition to the salary ranges provided

57-6-20

> under the provisions of Section 8.9, Code of Iowa, 1954, or are they to be in addition to a specific amount of salary being paid specific members of the Highway Patrol and if so as of what date?
>
> "2. May the principles involved in this proposal (shown on 'Exhibit A') be carried out by the Governor and Commissioner of Public Safety and if so, is the approval of the Executive Council required?"

In reply thereto I would advise you that in the view that I take of this situation your questions do not require answer. Senate File 32 of the 57th General Assembly insofar as it pertains to the compensation of members of the Highway Patrol provides as follows:

> "Sec. 2. Section eighty point eight (80.8), Code 1954, is hereby amended by inserting after the period following the word 'governor' in the eighth line of the third paragraph thereof the following: 'The compensation of each member of the highway patrol shall at the effective date of this Act be increased in the sum of fifty dollars ($50.00) per month beginning with such effective date. In addition, the members of the highway patrol shall be paid additional compensation in accordance with the following formula: When members of the highway patrol have served for a period of five (5) years their compensation then being paid shall be increased by the sum of fifteen dollars ($15.00) per month beginning with the month succeeding the foregoing described five (5) year period; when members thereof have served for a period of ten (10) years their compensation then being paid shall be increased by the sum of fifteen dollars ($15.00) per month beginning with the month succeeding the foregoing described ten (10) year period, such sums being in addition to the increase provided herein to be paid after five (5) years of service; when members thereof have served for a period of fifteen (15) years their compensation then being paid shall be increased by the sum of fifteen dollars ($15.00) per month beginning with the month suc-

> ceeding the foregoing described fifteen (15) year period, such sums being in addition to the increases previously provided for herein; when members thereof have served for a period of twenty (20) years their compensation then being paid shall be increased by the sum of fifteen dollars ($15.00) per month beginning with the month succeeding the foregoing described twenty (20) year period, such sums being in addition to the increases previously provided for herein. Members of the highway patrol at the effective date of this Act, who have the foregoing service records, shall be entitled to the foregoing increases from and after such effective date.'"

This statute seems to be certain, unambiguous and interpretation thereof unnecessary if possible. By its plain terms members of the Patrol on July 4, 1957, whose service records meet the conditions provided therein are entitled to the compensation increases stated in the foregoing Senate File 32.without reference to classifications of personnel or without reference to salary schedules. Failure of any member of the Highway Patrol qualifying in accordance with the formula of Section 2 of Senate File 32 as heretofore exhibited to receive this compensation increase may invest such member with a cause of action for these increases. The right of qualified members of the Patrol to receive the increases is not affected by changes in administration proceedings, administrative rules or administrative practices.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

June 13, 1957

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

Dear Sir:

This will acknowledge receipt of yours of the 11th inst. in which you submitted the following:

"Section 54, Senate File 457, Acts of the 57th General Assembly reads as follows:

"'The provisions of Section Eight Point Five (8.5), Code 1954, shall not be applicable to the employees whose salaries are paid from the appropriation provided in this Act. All departments shall use the table of organization and salary schedule in effect on April 24, 1957, except that changes in the table of organization or salary schedule of any department may be made only with the approval of the Executive Council.'

"I respectfully request an opinion as to the following:

"1. Does the term 'Salary Schedule', used in Senate File 457, refer to a specific salary being paid a specific employee as of April 24, 1957, or does it refer to the salary ranges in effect on that date as provided by the personnel rules and regulations?

"2. In the event that you should rule that the term 'Salary Schedule' refers to the salary ranges, is it then necessary for the Executive Council to approve changes in rates of pay within said salary ranges?

"3. Does the employment of temporary and part-time personnel, paid from Senate File 457, require the approval of the Executive Council, or anyone else?"

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In reply thereto I answer your request as follows.

1. In answer to your question #1 I advise that I am of the opinion that the salary schedule referred to in Senate File 457 refers to the salary ranges in effect on that date as provided by the personnel rules and regulations.

2. In answer to your question #2 I advise you that in view of the conclusion that the salary schedule refers to salary ranges that changes in rates of pay within the salary range may be effective without approval of the Executive Council.

3. In answer to your question #3 I advise that I am of the opinion that the employment of temporary or part-time or casual personnel paid from the appropriations provided by Senate File 457 is not subject to the approval of the Executive Council or anyone else. Such employment is within the discretion of the department heads.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

60M 11-56-10915
PB-C-3778

Form 13

IOWA STATE HIGHWAY COMMISSION

AMES, IOWA

Ames, Iowa

June 14, 1957

Mr. James L. McDonald
County Attorney
McDonald Building
Cherokee, Iowa

Dear Jim:

I have your letter of June 13 in which you inquire as to what the responsibilities of a Board of Supervisors is to maintain an established road. Secondly, what action rights by a private individual to force the Board to maintain, and if necessary, to re-build an existing right of way, and third, how would you suggest the Board go about avoiding the maintenance of an existing right of way which services so few persons as to not be economically feasible.

I think perhaps the third question might be answered first for the reason that the action of vacation of a road, if done, would prevent the problems of the first and second questions arising.

Section 306.4 through 306.8 provides for a means of vacating the secondary road. It is a fact that the Board may vacate any road after holding the public hearings as provided in the afore mentioned sections. The only thing that is incumbent on the Board with respect to expense on these roads, if vacated, is to pay damages if it is felt that damages are warranted.

It may be that the Board could get this problem out of its hair by vacating the road. However, since it may be that the Board would not want to vacate the road, the other two questions require an answer. Perhaps before proceeding further, it should be brought to mind that vacating a road may be a problem of economics as well as policy in that it may cost much more to maintain the road than it would to pay damages for the vacating of it.

As to the first question I believe that the responsibilities of the Board of Supervisors to maintain an established road does depend somewhat upon the amount of use which the road gives to the public. That is to say that in expenditure of funds for new construction, maintenance, grading and snow removal, the Board will always work on a priority system so that the roads which serve the most people and carry the most traffic get the most concentration. There is a positive duty to maintain a road, but naturally the degree of maintenance will almost have to depend upon the use by the public. In this case the road, actually a trail, served only two persons, and therefore the Board would not be warranted in providing construction or maintenance equal to a similar stretch of road which may serve many more persons.

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60M 11-56-10915
FB-C-8776

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IOWA STATE HIGHWAY COMMISSION

AMES, IOWA

(2) As to the second question, a private individual can probably bring an action in mandamus to compel maintenance of a road which is a part of the county system. There is authority for this, and I believe that in the past I have read a case or two in which the Board was compelled to do maintenance upon its roads where they had fallen into such poor condition as to become almost impassable.

I hope, Jim, that I have been of some help. However, if not, please write again and I'll try to get something more concrete for you. Ordinarily, I would have researched the question, but since you requested that no such effort be made, and I am very busy at this time, I didn't go thoroughly into the problem.

It was nice to hear from you, and I hope that you will convey my very best wishes to Bill and your father.

Yours very truly,

Daniel T. Flores
General Counsel for
Iowa State Highway Commission

DTF:js

June 17, 1957

Mr. Jack R. Vollertsen
Phelps & Vollertsen
808 Putnam Building
Davenport, Iowa

Dear Mr. Vollertsen:

Your letter of May 28th addressed to Mr. Wilbur A. Rush of the State Conservation Commission has been referred to the writer for attention and in reply we beg to advise as follows.

We note in your letter that you claim title to the low water mark of the Mississippi River which is more than sixty feet out from the existing shore line. We must respectfully disagree with you in this contention that your title extends to the low water mark. On the contrary, the title of the State of Iowa in the beds of all navigable streams extends to the ordinary high water mark.

We call your attention to the following authorities in support of our position in this matter.

> "Under the law of the United States a grant of land bordering on navigable waters carries title to ordinary high water mark." Shivley v. Bowlby, 152 U. S. 1, 38 L. Ed. 331.

> "Unless otherwise provided by articles of admission as a state, the state owns the beds of navigable lakes and rivers within its borders." U. S. v. Ashton, 170 F. 509.

We also quote the following from an opinion of the Attorney General 1906, page 362:

> "The territory now embraced within the boundaries of the State of Iowa was acquired by the United States by the treaty with France negotiated on the 30th day of April, 1803. Article III of that treaty provides:

57-6-25

> "'The inhabitants of the ceded territory shall be incorporated into the Union of the United States and admitted as soon as possible, according to the principles of the federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States.'
>
> "The act of Congress of December 28, 1846, by which Iowa was admitted into the Union provided:
>
> "'That the State of Iowa shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union upon an equal footing with the original states in all respects whatsoever.'
>
> "Under this treaty and the act of Congress admitting Iowa into the Union, she came in upon an equal footing with the original thirteen states in every particular, and at once acquired in her sovereign right the title to all meandered lakes, lake beds and beds of meandered streams. The fact that such lakes, lake beds and streams were not then surveyed or meandered in no wise could or did change the title of the state thereto. The survey was simply the means by which the government ascertained the public lands which belonged to it under the treaty with France, and the lakes, lake beds and streams which belonged to the state under such treaty and the act of Congress."

In further support of our contention that to permit you to fill in a part of the river bed as requested by you and that it would constitute an encroachment on State owned property, we call your attention to the case of Park Commissioners v. Taylor, 133 Iowa 462, in which the Court stated as follows:

> "Now, we think it is well established that a riparian owner cannot encroach upon the banks of a navigable stream on which he is bounded by filling out his lots and thus infringing upon the banks or bed of the stream belonging to the public. Illinois Cent. R. Co. V. Illinois, 146 U. S. 387 (13 Sup. Ct. 110, 36 L. Ed. 1018) Saunders v. New York C. & H. R. R. Co., 144 N. Y. 75 (38 N. E. 992, 26 L. R. A. 378, 43 Am. St. Rep. 729); People v. Commissioners,

135 N. Y. 447 (32 N. E. 139); McKeesport Gas Co. v. Carnegie Steel Co., 189 Pa. St. 509 (42 Atl. 42); Revell v. People, 177 Ill. 468 (52 N. E. 1052, 43 L. R. A. 790, 69 Am. St. Rep. 257). So far, then, as the area of defendants' lots has been increased by filling, no rights as against the plaintiff representing the State have been acquired."

We trust that our position has been made satisfactorily clear to you and that the refusal of the grant by the State Conservation Commission is final.

Very truly yours,

FRANK D. BIANCO
Assistant Attorney General

FDB:MKB
cc: Mr. Wilbur A. Rush
Division of Lands and Waters
Conservation Commission

June 17, 1957

Mr. Bruce F. Stiles
State Conservation Director
State Conservation Commission
L o c a l

Dear Mr. Stiles:

In your letter of June 12 you advise:

"For some time the State Conservation Commission has been getting further and further behind in their legal work.

"That this situation might be corrected, I would greatly appreciate it if you would ask the Executive Council if they would furnish this department with a full time Assistant Attorney General."

In answer thereto I would advise that this office is extremely concerned about the volume and complexities of the legal problems and court work which is presently existing in your department. As you know, Governor Loveless vetoed Senate File 83, which would have authorized a Special Assistant for your department. The Governor's veto message with respect thereto states:

"In general, professional employees of each department of State government should be selected by the responsible officer, or board, of each department, subject to whatever standards of training, experience, and other qualifications are in effect for the various classifications of employees."

This statement is utterly contrary to the laws of the State of Iowa for, in fact, Section 13.7, Code of Iowa, 1954, states:

"No compensation shall be allowed to any person for services as an attorney or counselor of any department of the state government, or the head thereof, or to any state board or commission, * * *."

Thus, in fact, there is a strict prohibition against any department or the head thereof, or any state board or commission hiring legal counsel.

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In addition, Section 13.2, subsection 2, Code of Iowa, 1954, states:

The Attorney General shall:

> "Prosecute and defend in any other court or tribunal, all actions and proceedings, civil or criminal, in which the state may be a party or interested, when, in his judgment, the interest of the state requires such action, or when requested to do so by the governor, executive council, or general assembly."

Although Governor Loveless may believe it is desirable to permit heads of state boards, commissions, and agencies to select their own attorneys, such selection would be contrary to law. Senate File 83, which was passed by this session of the 57th General Assembly, was the result of a report of the Governmental Reorganization Commission of 1950, which recommended the same for submission to the 54th General Assembly, and a report of the Governmental Reorganization Study Committee, which recommended the same to the 57th General Assembly, and is part of the recommendations of the so-called Little Hoover Committee, the recommendations of which were endorsed and passage urged by Governor Loveless in his inaugural message.

Prior to the veto of the bill, I personally advised the Governor that the bill was a committee bill by the Committee on Governmental Reorganization and its enactment and final approval would save the state "tens of thousands of dollars" through the availability of legal counsel to various state departments who have been forced to do without. The veto of the bill restricts the legal services available to state departments and hampers administrative efficiency throughout state government.

As you know, Section 13.7 states:

> "* * *but the executive council may employ legal assistance, at a reasonable compensation, in any <u>pending action or proceeding</u> to protect the interests of the state, but only upon a sufficient showing, in writing, made by the attorney general, that his department cannot for reasons stated by him perform said service, which reasons and action of the council shall be entered upon its records."

This provision limits the employment of a Special Assistant Attorney General for reasons stated to a "pending action or proceeding." The interests of the Conservation Commission are so numerous as to require many Special Assistants to handle the work under the provisions of this section when in actuality the appointment of one Special Assistant to take care of these matters would be desirable.

I am exceedingly sorry that we cannot comply with your request under the provisions of our present law.

Yours very truly,

NORMAN A. ERBE
Attorney General

NAE:md

June 18, 1957

Mr. Garth Mann
Publisher, The Dallas Center Times
Dallas Center, Iowa

Dear Mr. Mann:

This is to acknowledge receipt of your communication of June 13, 1957, directed to Attorney General Erbe. Mr. Erbe will be absent from the office and out of the state for approximately a month on official business; hence, I have taken the liberty of answering your letter.

As you no doubt know, opinions of this office are limited by statute to questions submitted by state officers, members of the state legislature, and county attorneys in connection with the duties of their respective offices. We are not permitted to render opinions on legal matters to private individuals. The matters of which you write are of such a nature that they should be brought to the attention of your county attorney so that he may take such action thereon as the circumstances would warrant. However, as a courtesy to you, and without expressing an opinion on the part of the office, I call your attention to the following provisions of our Code. Section 726.9, Code of Iowa, 1954, as amended by the 57th General Assembly, states that:

> "No person who keeps a billiard hall where beer is sold, or the agent, clerk, or servant of any such person, or any person having charge or control of any such hall, shall permit any minor to remain in such hall, or to take part in any of the games known as billiards. The council in any city or town shall have power by ordinance to establish minimum age limits for minors for the purpose of regulating their admittance to billiard halls which do not sell beer and their participation while therein in the games known as pool and billiards."

Section 599.1, Code of Iowa, 1954, provides as follows:

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

You will note that the prohibition in Section 726.9, Code of Iowa, 1954, is not against the entering a billiard hall, but is against permitting a minor to remain in such hall or to take part in any of the games known as billiards. Under the 1957 amendment a city council may by ordinance establish minimum age limits for minors for the purpose of regulating their admittance to billiard halls which do not sell beer and regulating their participation while there in games of pool and billiards. This authorization to the city or town council, however, has not been extended by the amendment to billiard halls which do sell beer. Under past decisions of our Supreme Court and opinions of this office it has been held that Section 726.9, Code of Iowa, 1954, was passed for the protection of the minor, and even the parent of the minor would have no authority to waive it and, therefore, no minor could be permitted to remain in a pool hall and to play pool or billiards therein even though a parent or guardian might give his written consent therefor. It was also held, prior to the 1957 amendment, that a city or town might lawfully pass an ordinance preventing minors from entering pool halls and providing for punishment for a violation of such ordinance by fine. Thus, it appears that your hypothetical situation would be controlled by the state statute unless your town or city council would see fit to impose additional restrictions by way of ordinance.

Insofar as the tavern end of your question is concerned, you will note that the only restriction contained in our beer law, as to the presence of minors in a place where beer is sold, is contained in Section 124.21, Code of Iowa, 1954, where minors are prohibited from serving beer in a place of business of any permit holder in which the business of selling beer constitutes more than fifty percent (50%) of the gross business transacted therein. There is no provision under Chapter 124, Code of Iowa, 1954, which prohibits minors from entering a tavern. However, several cities and towns have enacted ordinances prohibiting minors under the age of twenty-one years from entering taverns as, for example, the City of Des Moines, which ordinances have been held valid by our Supreme Court in a recent case. In connection with these observations we also call your attention to Section 599.1 quoted above. Under the provisions of that section a sixteen year old "minor" may attain his majority by

marriage and thus be outside the purview of any statute or ordinance which does not set the specific age limitation.

I trust that this will give you some of the information you seek.

Very truly yours,

RRRD/fm

RAPHAEL R. R. DVORAK
First Assistant Attorney General

June 18, 1957

Honorable Andrew Frommelt
State Representative
Dubuque, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 12th inst. asking for opinion as to the procedure to be followed in selecting candidates to be placed on a ballot at a special election in the event a special session of the Legislature is called and a vacancy will exist by the reason of the appointment of Senator Utzig. The procedure follows:

1. As soon as the Governor is advised of the vacancy according to Section 69.14, Code 1954, he shall call a special election at the earliest practical time, giving ten days notice thereof.

2. This call for a special election by way of proclamation is followed by the Sheriff giving ten days notice of the election by causing a copy of the Governor's proclamation to be published in some newspaper printed in the County. See Sections 39.5 and 39.6, Code 1954.

3. According to Section 43.84 nominations to be voted for at a special election occasioned by a vacancy in the office

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of Senator in the General Assembly for a district composed of one county shall be made by the County Central Committee.

4. Certification of such nominations is made under the authority of Section 43.88, Code 1954.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney

OS:MKB

HEADNOTE: COUNTY TREASURER, REMITTANCE OF ROAD FUNDS UNDER H.F. 28. "Primary road funds" and "motor vehicle funds" in the hands of the County Treasurer are within the meaning of the phrase "money belonging to the state treasury" as used in Sec. 2, H.F. 28, 57th G. A. and subject to report, remittance or deposit thereunder subject to authorized deductions.

June 18, 1957

Honorable M. L. Abrahamson
Treasurer of State
B u i l d i n g

Attention: Mr. Charles Dayton

Dear Sir:

Receipt is acknowledged of your inquiry of May 15 relative to Sec. 2, House File 28, Acts of the 57th General Assembly. Said provision is as follows:

> "Sec. 2. Section three hundred thirty-four point nine (334.9), Code 1954, is hereby repealed and the following enacted in lieu thereof:
>
> "'The treasurer of each county shall on or before the fifteenth day of each month prepare sworn statements of the amount of money in his hands on the last day of the preceding month belonging to the state treasury, and forward by mail one such statement, accompanied by his remittance therefor, to the treasurer of state, and one such statement to the state comptroller. Provided in lieu of such remittance the treasurer of the county may deposit to the credit of the treasurer of state said amount in interest-bearing accounts in a bank, or banks, of said county designated by the treasurer of the state.'" (Emphasis ours)

You inquire whether primary road funds or motor vehicle funds in the hands of the county treasurer are within the meaning of the phrase "money . . . belonging to the state treasury."

Section 334.9, Code 1954, reads as follows:

> "State funds. The treasurer of each county shall, on or before the fifteenth day of each month, prepare sworn statements of the amount of money in his hands on the last day of the preceding month belonging to the state treasury, not including primary road funds or motor vehicle funds, and forward by mail one such statement to the state comptroller, and one such statement to the treasurer of state." (Emphasis ours)

57-6-28

Section 312.1, Code 1954, provides as follows:

"Fund created. There is hereby created, in the state treasury, a road use tax fund. Said road use tax fund shall embrace and include:

"1. All the net proceeds of the registration of motor vehicles under chapter 321.

"2. All the net proceeds of the motor vehicle fuel tax or license fees under chapter 324.

"3. All of the net proceeds of the compensation tax on motor vehicle certificated carriers under chapter 326.

"4. All revenue derived from the use tax, under chapter 423 on motor vehicles, trailers, and motor vehicle accessories and equipment, as same may be collected as provided by section 423.7.

"5. Revenues derived from the sales tax, under chapter 422 in an amount equal to ten percent of the net revenues collected under division IV of said chapter.

"6. Any other funds which may by law be credited to the road use tax fund."

Section 312.7, Code 1954, provides as follows:

"Balance maintained in fund. The treasurer of state shall maintain in the road use tax fund in the state treasury, of the funds collected as provided in chapter 321 or as said chapter may be amended, a cash balance sufficient, when added to the cash balance of receipts in the road use tax fund from other sources, to pay the anticipated expenditures from the road use tax fund for the ensuing month.

"When necessary to restore the balance in the road use tax fund in the state treasury, he shall draw upon the treasurer of each county of the state in proportion to the amounts in their possession, respectively, of the funds collected under the provisions of chapter 321 or as said chapter may be amended, and credited to the road use tax fund, a sum sufficient in the aggregate to restore the cash balance in the road use tax fund. Such drafts shall be honored by the treasurer of each county upon presentation."

The fact that the general assembly felt it necessary to incorporate a specific exception in the former version of Section 334.9, to wit: "not including primary road funds or motor vehicle funds", indicates legislative intent that such money is "money belonging to the state treasury." The fact that the phrase "not including primary road funds or motor vehicle funds" is omitted from the substitute

contained in Sec. 2, House File 28, 57th General Assembly, enacted in lieu of Section 334.9, Code 1954, would seem to manifest legislative intent that "primary road funds" and "motor vehicle funds" in the hands of the county treasurer are to be reported and remitted or deposited by him in the same manner as other "money . . . belonging to the state treasury" under said Sec. 2.

Apart from the proviso relating to deposit in banks "to the credit of the treasurer of state", Sec. 2 of House File 28 is identical with Section 2 of proposed "Bill 28" which appears at page 35 of Part II of the Report of the Iowa Taxation Study Committee. Recourse to reports of legislative interim committees for the purpose of ascertaining the meaning of legislation enacted pursuant thereto is a legitimate aid in determining the meaning of such legislation. See Yarn v. City of Des Moines, 243 Iowa 991, 54 N.W.2d 439. The following pertinent statements appear at pages 34 and 35 of Part II, Report of the Iowa Taxation Study Committee:

"G. STATE FUND INVESTMENTS

"Situation:

"The Committee examined the various fund balances of the State to determine the extent to which such balances could be invested to earn income for the State. Two significant points were revealed. First, substantial inactive balances existed which could be invested either in short term government securities or in certificates of deposit with Iowa banks. For example, inactive balances of approximately $14 million were found to be distributed on deposit among banks of the state but not drawing any interest.

"The second important point was that present law makes investment of funds permissive but not mandatory.

" * * * * * * *

"Vehicle license fees deposited in county treasuries is another state fund balance that deserves attention, as indicated by Table 5. The present law allows these funds to be withdrawn by the state when needed.

"The cash funds of the state are of three types:

"(1) Inactive accounts.

"(2) Active accounts.

"(3) State funds in county treasuries.

" * * * * * * *

"State funds in county treasuries, the third type, consist mainly of vehicle license fees collected by county treasurers for the state. In the past these funds have been drawn upon when needed. On June 30, 1956, the total amount of these state funds in county treasuries was approximately $14 million.

" * * * * * * *

"The Committee Recommends that:

" * * * * * * *

"b. Remittances of state funds in county treasuries into the state treasury be made mandatory.

"Proposed Bills Nos. 28, 29 and 30:

"Bill 28. MANDATORY INVESTMENT OF INACTIVE STATE FUNDS. This bill requires the investment of funds not currently needed in either government securities or in time deposits. It also provides for determination of the time deposit interest rate by a group of three state officers.

"Bill 29. MANDATORY REMITTANCE OF VEHICLE FEES TO THE STATE. This bill requires the county treasurer to send the Treasurer of the State a statement and remittance once a month covering all vehicle fees. Other provisions included pertain to the handling of motor vehicle fees.

"Bill 30. STATE SINKING FUND. This bill covers minor changes to bring the deposits of various state agencies under the sinking fund law and to provide for the handling of certificates of deposit under this law.

" * * * * * * * "

The conclusion that Sec. 2, House File 28, includes motor vehicle funds within its "report, remit, or deposit" provisions is confirmed by the quoted excerpts from the committee report.

It is, however, to be noted that of the three "interlocking" bills to which the committee's report refers, only committee bill 28 (House File 28) was enacted. Committee bill 29 (House File 29), which would have had considerable bearing on the subject of your inquiry had it been enacted, passed the House by a margin of 99 to 3 but died in the Senate. It proposed to repeal Sections 321.129 and 321.153, Code 1954, and make other provision for refunds on registrations.

It further proposed to repeal Section 312.7, Code 1954, hereinabove quoted. Since House File 29 did not become law and Sections 321.129, 321.143, and 312.7 remain law, it is necessary to reconcile the provisions of said statutes with Sec. 2, House File 28, if possible. As has been frequently said by our Supreme Court, "implied repeals are not favored", and it is necessary that the several provisions be construed to give all meaning if such construction can be arrived at. There seems no conflict between the first paragraph of Section 312.7 and Sec. 2, House File 28, for the former requires the state treasurer to keep a "sufficient" balance on hand, and the prompt remittance required by the latter would seem likely to bring about such a result. The second paragraph directs the state treasurer to draw upon county treasurers to the extent of money in their hands "credited to the road use tax fund" in order to maintain the required balance but Sec. 2, House File 28, by its "remittance or deposit" provisions simply makes such "draw" automatic.

Section 321.129, Code 1954, provides something more of a problem. It provides as follows:

> "Reimbursement fund. The county treasurer shall remit to the department one percent of all fees and penalties collected each year, to be used as a fund to cover refunds of motor vehicle fees as provided in sections 321.126 and 321.128."

However, the legislature is presumed, as is every man, to know the law. Consequently, it is presumed to have been aware of the existence of Section 321.129. Since it didn't see fit to repeal 321.129 and implied repeals are not favored, House File 28, Sec. 2, must be construed to intend that the "one percent of all fees and penalties collected each year" be continued to be remitted to the "department" as provided in Section 321.129 with such fact noted on the "report" from the county treasurer to the state treasurer made under House File 28, Sec. 2.

Section 321.153, Code 1954, provides as follows:

> "Treasurer's report to department. The county treasurer shall on the tenth day of each month report under oath to the department, on forms furnished by it, giving a full and complete statement of all fees and penalties so received by him during the preceding calendar month, and shall forward to the treasurer of state a duplicate of such report."

It is apparent on the face of the quoted statute that the time therein specified is in conflict with the time specified in House File 28, Sec. 2. However, the conflict is more apparent than real. The report required by Section 321.153 on the tenth of each month is to the <u>department</u> (of public safety) with a copy to the state treasurer. No remittance or deposit is required. The report required under House File 28, Sec. 2, is accompanied by a remittance (or deposit) and is made to the state <u>treasurer</u> (not the department) with a copy to the state comptroller. It is not impossible to comply with both statutes as all reports are made as of the last day of

the preceding month. Although the number of copies of reports is thereby increased, it remains true that "implied repeals are not favored" and the wisdom or foolishness of the duplication presents primarily a problem for future legislation rather than legal interpretation.

All of the foregoing discussion has gone to the omission of the words "motor vehicle funds" from the new version of Section 334.9 (House File 28, Sec. 2). A word concerning the omission of "primary road funds" also appears desirable to complete answer to your question. Under Section 312.2, Code 1954, credit of the road use tax fund monies to the "primary road fund" and other road funds by the treasurer of state is limited to "road use tax funds which have come into his hands". Since prior to remittance by the county treasurer the motor vehicle funds that go into the road use tax fund for apportionment to the "primary road fund" and other road funds have not "come into" the state treasurer's hands, the county treasurer has no "primary road funds" as such to remit. Consequently, remittance of the motor vehicle funds automatically includes remittance of primary road funds to the full extent that the county treasurer is capable of such remittance.

In summary, "primary road funds" and "motor vehicle funds" in the hands of the county treasurer are within the meaning of the phrase "money belonging to the state treasury" under Sec. 2 of House File 28 and subject to report thereunder and remittance (or deposit) thereunder, less the 1% of fees and penalties remitted directly to the department of public safety under Section 321.129 and less such other deductions as may be expressly authorized by statute.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

June 18, 1957

Mr. Ray W. Beckman, Chief
Division of Fish and Game
State Conservation Commission
L o c a l

Dear Sir:

We have your letter of May 29, 1957, requesting an opinion upon the following question:

> "We will appreciate very much advice from your office as to whether or not bull frogs can be raised by an individual operating a private bull frog hatchery for sale in the state of Iowa."

We are informed that the frogs in question are a species of giant bull frogs, not native to public waters in or bordering upon the State of Iowa. Assuming this to be the facts in the matter, we beg to advise as follows.

Section 109.2, 1954 Code of Iowa, provides as follows:

> "State ownership and title - exceptions. The title and ownership of all fish, mussels, clams, and frogs in any of the public waters of the state, and in all ponds, sloughs, bayous, or other land and waters adjacent to any public waters stocked with fish by overflow of public waters, and of all wild game, animals, and birds, including their nests and eggs, and all other wild life, found in the state, whether game or nongame, native or migratory, except deer in parks and in public and private preserves, the ownership of which was acquired prior to April 19, 1911, are hereby declared to be in the state, except as otherwise in this chapter provided."

This places the title to all game animals, fish, frogs, etc. and birds ferae naturae, or wild by nature in the state, which holds this title in trust for the use and benefit of

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the people, yet when they are re-claimed by the art and power of man they are then the subject of property and a property right may be acquired. (See O. A. G. 1928, p. 362)

In the case of State v. Zellmer, 202 Iowa 638, it was said:

> "While the ownership of fish generally is in the state . . ., persons raising or propagating them under the conditions set out in Sec. 1707 (now Sec. 109.64, Code of Iowa 1954) are the owners."

The Department has ruled that "The owner of a private preserve may sell black bass and may spear fish out of his private preserve." (O. A. G. 1930, p. 128) (See also O. A. G. 1930, p. 343 and O. A. G. 1902, p. 83) There is a specific exception in the fish and game law (Section 109.28) "regarding the possession and transportation of fish . . . done on private fishing preserves." Also Section 109.31 provides It is lawful to have in possession any fish or game lawfully taken outside the state and lawfully brought into the state.

The same exception is stated in Section 109.84 with reference to frogs, as follows:

> "* * *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 private premises for his private use."

All of these provisions of the statutes have reference to fish or frogs, birds, or animals in their natural state, farae naturae. If these creatures of nature are acquired by man legally and he propogates them legally and he secures and tames them they are his property. If he does not tame them, they are still his so long as they are kept confined and under his control. There is no property right in game, animals or birds, until they have been subjected to the control of man. (See O. A. G. 1928, p. 362, 364)

Since it has been held, as stated in the above cited authorities, that persons raising and propagating fish (black bass, etc.) on private preserves are the owners thereof and may sell the same, a fortiori, the same rule should apply to frogs under the said statutes. This would be particularly true if the frogs were a domesticated species and not native to waters of the state of Iowa.

It has been held that fish may not be taken from public water to stock private ponds. State v. Sears, 115 Iowa 28. Nor can private waters be stocked by fish protected under the fish and game laws by overflow into the said private waters from public waters, where there is an outlet or inlet to said private waters. (See O. A. G. 1902, pp. 83 and 110; 1919, 1920, p. 600; 1934, p. 308; 1946, p. 218)

Under the facts as we understand them, it is our opinion that a person who has legally acquired and stocked a private preserve with giant bull frogs that said giant bull frogs belong to the owner of the land and can be legally taken and disposed of in any manner the owner may choose. (See O. A. G. 1919, 1920, pp. 600, 603.)

Yours very truly,

FRANK D. BIANCO
Assistant Attorney General

FDB:MKB

June 19, 1957

Mr. Clinton H. Moyer, Commissioner
Department of Public Safety
L o c a l

Dear Sir:

This will acknowledge receipt of yours of the 14th inst. in which you have submitted the following:

> "This Department has been engaged in preparation of a revised classification and compensation plan for the Highway Patrol Division. The revision is made necessary by the provisions of Senate File 32 of the 57th G. A. As finally enacted S. F. 32 provides in part as follows:
>
> "'The compensation of each member of the Highway Patrol shall at the effective date of this Act be increased in the sum of $50.00 per month with such effective date. In addition, the members of the Highway Patrol shall be paid additional compensation in accordance with the following formula' . . . (The Act then provided for longevity increments of $15.00 with each completed five years of patrol service up to twenty years.)
>
> "This legislation further requires that 'a supervisory officer' be on duty at all times in each of our thirteen District Headquarters. This, of course, requires three shifts. Only one supervisor is assigned to each District as the Patrol is now organized. The plan submitted provides for the establishment of the position of First Sergeant and Sergeant in each District, and changes the title of the position of the District Commander, formerly the Sergeant, to Lieutenant.
>
> "Enclosure No. 1 sets out the plan devised by the Audit Division of this Department in conjunction with the Chief of the Patrol, and

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approved by this office. This plan will increase the salary of each member of the Patrol $50.00 plus $15.00 for each completed five years of service, on the effective date of the Act.

"Your opinion is respectfully requested upon the following questions:

"(1) Does the plan as proposed contravene any provisions of the law of Iowa as it will stand after the effective date of the legislation referred to, and of the Department Appropriations Act, with particular reference to Section 54, S. F. 457.

"(2) If not, what officials or agencies must approve the proposed classification and compensation plan?

"Submitted herewith as enclosure No. 2 for any assistance it may provide is a brief of the law as it appears to this office, which was used as a guide in the preparation of the plan."

In reply thereto I advise as follows.

(1) In answer to your question #1 I am of the opinion that the foregoing plan does not contravene any law of Iowa in force after July 4, 1957, including therein Section 54 of Senate File 457, Acts of the 57th General Assembly.

(2) In answer to your question #2 I am of the opinion that the proposed classification and compensation plan outlined herein must be approved by the Governor and the Executive Council.

The following designated statutes lead to the above conclusions:

Section 80.8, Section 80.5, Section 80.15, Section 8.5, subsection (6) (b), all Code 1954; Section 54 of Senate File 457, Acts of the 57th General Assembly, Senate File 32, Acts of the 57th General Assembly; O. A. G. 1954, page 113.

Very truly yours,

OSCAR STRAUSS

OS:MKB
cc: Mr. Glenn Sarsfield
State Comptroller

June 19, 1957

Mr. J. C. Blodgett, Chairman
Iowa Employment Security Commission
112-116 Eleventh Street
Des Moines 8, Iowa

Re: Your File No. C3-NCQ-dl

Dear Sir:

Receipt is acknowledged of your letter of June 3 as follows:

"This Commission respectfully requests your opinion with respect to the interpretation of certain provisions contained in House File 599 as adopted by the 57th General Assembly.

"This Act provides for retirement allowance payments to individuals meeting certain qualifications, which payments shall be added to the retirement allowance payments, if any, now being received from the State of Iowa, so as to bring their minimum allowance to $75 per month.

"Our questions are as follows:

"1. The applicant must have been an employee, holding a valid teaching certificate, with a record of service of twenty-five years or more. Many individuals who hold valid teachers' certificates are employees of the public schools but do not teach, and instead, work in an accounting or other capacity. Could such non-teaching service be included to make up the twenty-five years' service?

"2. The wording of the Act requires that the twenty-five years' service must include five years' out-of-state service. Would the Commission be correct in assuming that the five years provision was meant to be permissive rather than mandatory and that the twenty-five years' service may or may not include five years' service outside of Iowa?

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"3. Does the phrase, 'the public schools of this state,' include such institutions as the Boys' Training School at Eldora, the Girls' Training School at Mitchellville, Iowa State College, Iowa School for the Deaf, University of Iowa, etc?

"4. If an individual now receiving benefits under the Iowa Old Age and Survivors' Insurance System or the Iowa Public Employees' Retirement System returns to public employment the benefits are reduced or suspended. In the event the individual also receives payments under H. F. 599, would such payments be affected by a return to public or private employment?

"5. Would the payments under H. F. 599 be affected by a return to employment if the recipient had never received Iowa Old Age and Survivors' Insurance or Iowa Public Employees' Retirement System benefits?

"6. H. F. 599 provides that payments thereunder shall be added to the retirement allowance payments, if any, 'now being received' from the State of Iowa. If an individual was entitled to Iowa Public Employees' Retirement System or Iowa Old Age and Survivors' Insurance benefits but as of the effective date of H. F. 599 had never applied for such benefits, could he draw the entire $75.00 under H. F. 599, or would he be required to apply for and receive as much as possible under the Iowa Public Employees' Retirement System or the Iowa Old Age and Survivors' Insurance System?"

1. In answer to your first question, the words of the statute are:

". . .who shall have been an employee, holding a valid teaching certificate, in the public schools of this state. . ." (Emphasis ours)

The words must be taken to mean what they say according to their ordinary usage. Accordingly, any duly certificated teacher employed by a local school board for any purpose for which such board had lawful authority to hire employees is within the scope of the language of the statute if the other requirements therein stated are met.

2. The words of the statute are:

". . .with a record of service of twenty-five years or more, including a maximum of five years of out-of-state service followed by at least ten years service in the state. . ." (Emphasis ours)

I am unable to discover the word "must" anywhere in the statute in question. The word "maximum" means "not more than" five years may be "included". There is no requirement in the language used to indicate that any "out-of-state" employment is required as prerequisite to eligibility under the act. As you suggest, the

Commission would be correct in reading the phrase in question to say "which may include not more than five years out-of-state service".

3. In Silver Lake Cons. School Dist. v. Parker, 238 Iowa 984, at page 989 our Supreme Court said:

> The affairs of the public schools are administered by a school board, and such schools are organized into districts for the purposes of management, control and government."

The "schools" to which your third question refers may be "schools" in the sense that they perform certain educational and training functions but they are not "public schools" within the ordinary sense of that term as hereinabove defined. Such "schools" are more correctly referred to as "state institutions" and perform their functions with reference to certain classes of individuals rather than with respect to the public generally. I am of the opinion House File 599 has no application to personnel at the state institutions named in your third question.

4. In answer to your fourth question, House File 599 expressly provides that the objects of its bounty:

> ". . .shall be entitled to receive retirement allowances from the state of Iowa of not less than seventy-five (75) dollars per month. Such sums as are necessary to meet this minimum requirement shall be added to the retirement allowance payments, if any, now being received. . . ." (Emphasis ours)

The word "now" presents the chief obstacle to construing the statute. Its inherent ambiguity is such that its use in the drafting of statutes is an abomination. There is no satisfactory way of determining whether the word "now" was intended to identify the time the draftsman set down his thoughts on paper, or the time the bill was introduced, or the time the bill completed passage in both houses, or the time the governor signed, or July 4, 1957, or the time thereafter when some interested party happens to read it. However, ambiguous as the word is on its face, certain clues as to its probable intended meaning may be gleaned from perusal of the complete text of the Act. It is significant that the operation of the Act is confined by Section 1 to a closed class determined as of July 4, 1953. It is further significant that under Section 2 of the Act money appropriated for its effectuation is identified with the biennium 1957-59 and that the effective date of the Act falls on July 4, 1957, nearly coincident with the beginning of said biennium. It would, therefore, appear that "now" refers to July 4, 1957, and "sums . . . necessary to meet this minimum requirement" should be computed as of that time. Once so determined such "sums" would remain unchanged without reference to subsequent reduction in the retirement allowance payments upon which such computation was made. The "sums" would not be reduced in proportion to reduction in the basic allowance under the conditions described in your fourth question for the reason that House File 599 makes no provision for such reduction and for the reason that such "sums" are unknown to the

prior-existing statutes under which reduction of the basic allowance occurs. Neither would such sums be increased in order to maintain the seventy-five dollar minimum total under such subsequent reduction of the basic allowance for the reason that the computation based upon seventy-five dollars is made "now" which means July 4, 1957 rather than the time of such subsequent reduction in basic retirement allowance.

5. Under the terms of the answer to your fourth question, payments under House File 599 are not affected by the recipient returning to employment for the reason that House File 599 makes no provision, either directly or by reference to the prior statute, for such reduction and for the further reason that the provisions of House File 599, which is phrased as an independent act and not an amendment to the prior statutes, are unknown to the prior statutes providing for reduction in retirement payments.

6. Since House File 599 is phrased in terms of "allowance payments, if any, now being received", and having concluded that "now" refers to July 4, 1957, it follows that the full entitlement of one not receiving any payments as of "now" would come under House File 599 and be payable entirely from the money appropriated under Sec. 2 thereof. The Act is phrased in terms of "retirement allowance payments . . . now being received". It is not phrased in terms of eligibility for payment not applied for or not received.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

HEADNOTE:
INSANE PERSONS: The lien provided by Section 230.25, Code 1954, applies to property owned by an insane person kept at a County Home.

June 19, 1957

Mr. Norris S. Gould
Delaware County Attorney
Manchester, Iowa

Re: Cecelia Woelert

Dear Sir:

Receipt is acknowledged of your letter of June 5 as follows:

"The above named individual was committed from this County to the Mental Health Institute at Independence, Iowa, in December of 1930. On January 8, 1941, she was transferred to the Delaware County Home, without being fully released and discharged from the Mental Health Institute but simply discharged by transfer.

"Since January 8, 1941, she has been a resident of the Delaware County Home.

"This person owns real estate in this county.

"If we could have your opinion as to whether or not the lien described in Chapter 230 of the 1954 Code of Iowa, covers this situation and creates a statutory lien or not, it would be sincerely appreciated. If the lien is good and any action should be taken by the County to perfect the lien, we would appreciate knowing what these steps might be."

The answer to your question appears to be directly furnished by the provisions of Sections 230.24 and 230.25 as follows:

"230.24 County fund for insane--psychiatric treatment. The board of supervisors shall, annually, levy a tax of three-eighths mill or less, as may be necessary, for the purpose of raising a fund for the support of such insane persons as are cared for and supported by the county in the insane ward of the county home, or elsewhere outside of any state hospital for the insane, which shall be known as the county fund for the insane, and shall be used for no other purpose than the

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support of such insane persons and for the purpose of making such additions and improvements as may be necessary to properly care for such patients as are ordered committed to the county home.

"* * * * * * *." (Emphasis ours)

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

Further, see 1942 Report of the Attorney General at page 27 which states in pertinent part:

"We take up first a discussion of whether or not this section (230.25) applies to insane in county homes or county asylums wherein are treated or confined insane or idiotic persons. We are of the opinion that as to this class of patients the above section creates a lien in favor of the county and against the owners of real estate therein enumerated. . ."

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

HEADNOTE: COUNTY GRAVEL PITS. Use of gravel under Section 309.66, Code 1954. 1. May be used on access roads to city airports. 2. May not be used for runways and taxiways at city airports.

June 19, 1957

Mr. R. T. Smith
O'Brien County Attorney
Primghar, Iowa

Re: Section 309.66 of the Code of Iowa, 1954

Dear Sir:

Receipt is acknowledged of your letter of June 11 as follows:

"Our Board of Supervisors has been asked to permit the City of Hartley, Iowa to take materials from a county acquired gravel pit in order to improve the airport facilities of the airport owned by the City of Hartley, Iowa.

"Query: Under Section 309.66 of the Code, may the Board of Supervisors authorize and permit the City of Hartley to take gravel from a county gravel pit or county gravel stockpile for purposes of resurfacing or improving and maintaining the access road to the airport from the main county road? May such gravel be used for surfacing a taxiway for aircraft? May such gravel be used for surfacing runways for aircraft?"

Section 309.66, Code 1954, to which your letter refers, provides as follows:

"Use of gravel beds. The board of supervisors may permit private parties or municipal corporations to take materials from such acquired lands in order to improve any street or highway in the county, but it shall be a misdemeanor for any person to use or for the board of supervisors to dispose of any such material for any purpose other than for the improvement of such streets or highways."

Section 321.1(48), Code 1954, defines "street" or "highway" as follows:

"'Street' or 'highway' means the entire width between property lines of every way or place of whatever nature when any part thereof is open to the use of the public, as a matter of right, for purposes of vehicular traffic."

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It thus appears that Section 309.66 would permit use of the gravel described for purposes of resurfacing, improving or maintaining the access road to the airport.

In answer to your questions relative to surfacing of runways and taxiways with such gravel, I would advise that although there is some division of authority among the states on the subject, it has been held that an airplane is not a "vehicle" within the ordinary meaning of the word as used in statutes. See Di Guilio v. Rice, (California) 70 P.2d 717, 719. At the same time it is common knowledge that safe operation of an airport necessitates exclusion of vehicles operated by the public generally such as automobiles, bicycles, etc. from runways and taxiways. Thus, since an airplane is not a "vehicle" and since ordinary "vehicles" are excluded, runways and taxiways are not "open to the use of the public, as a matter of right, for purposes of vehicular traffic". It follows that runways and taxiways on a city airport are not "highways" and Section 309.66 does not permit use of the gravel described for surfacing them.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

June 19, 1957

Mr. Wilbur A. Rush, Chief
Division of Lands and Waters
State Conservation Commission
L o c a l

Dear Sir:

Reference is made to your letter dated November 21, 1956, addressed to Mr. George West, in pertinent part reading as follows:

> "In the construction and reconstruction of toilet facilities in the Lake Okoboji region the State Conservation Commission intends to connect to the sewer lines of the Iowa Great Lakes Sanitary District who now own and control the sewage treatment plant and sewer lines that were built with financial aid from the State of Iowa."
>
> "Recently we contacted the superintendent of the Iowa Great Lakes Sanitary District requesting permission to connect our toilet building at Pikes Point State Park on the east shore of Lake Okoboji to the sanitary sewer under the jurisdiction of the Iowa Great Lakes Sanitary District. We were informed that there would be a connection charge of $200.00 and an additional $5.00 inspection charge."

and your letter dated June 17, 1957, to Mr. Erbe, referring to the above letter, and in pertinent part reading as follows:

> "We will appreciate it very much if you can review the laws in connection with appropriations made to the Iowa Great Lakes Sanitary District and advise us whether or not payment of the $200.00 connection charge should be made. An early reply will be greatly appreciated because

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> your ruling will not only affect the work at Pikes Point State Park, but also at the Orleans Beach area at Spirit Lake and Clear Lake State Park and McIntosh Woods State Park in Cerro Gordo County in connection with the Clear Lake Sanitary District."

and after reviewing the pertinent statutes applicable to the situation, we beg to advise you in respect thereto.

It is fundamental that all State property held by the State in its sovereign capacity cannot be made the subject of special assessment, except when specifically made so by legislative Act. (See Sec. 427.1, Code of 1954) Nor can a lien be created against State owned real estate. (Sec. 445.28)

By various acts of the legislature and appropriations in aid thereof, two sanitary districts were created, one in Cerro Gordo County and one in Dickinson County. (See Chap. 100, 47th General Assembly; Chap. 13 and 37, 48th General Assembly; Chap. 308, 50th General Assembly; Chapters 251 and 252, 51st General Assembly; Chap. 13, 54th General Assembly and Chap. 280, 55th General Assembly.)

With reference to said sanitary districts, Chapter 13 of the Acts of the 54th General Assembly provided that all costs of operation of each district were to be paid by the respective district, "except that the State of Iowa shall be liable for sewage disposal rentals from State owned lands lying within such district in the same manner as any other benefited property within the district". Section 3 of said Act also provided, "These appropriations shall be in lieu of any special assessments against any State owned property included within such sanitary districts."

In Chapter 358, Sanitary Districts, we find the following provisions in the law:

> "358.20 Rentals and charges. Any sanitary district may by ordinance establish just and equitable rates or charges or rentals for the utilities and services furnished by it to be paid to such district by every person, firm or corporation whose premises are served by a connection to such utilities and services directly or indirectly. * * * *"

> "358.22 Special assessments. The board of trustees of any sanitary district may provide for payment of all or any portion of the costs and expenses of construction, reconstructing, or extending any drains, sewers, or laterals, and other necessary adjuncts thereto, including pumping stations, by assessing all, or any portion thereof, on abutting and adjacent property according to the benefits derived thereby, and for this purpose said board may define adjacent property as all that included within a designated benefited district or districts to be fixed by the board, which may be all of the property located within the sanitary district or any lesser portion thereof. * * *"

It is quite clear that under the provisions of Section 3 of Chapter 13, Acts of the 54th General Assembly, the State of Iowa is exempt from any special assessments by either of these sanitary districts, and in the event such special assessments are levied against the State payment need not be made therefor.

There remains then the question of whether or not the State is liable for a connection charge or an inspection charge.

We note by the above quoted statute (§358.20) that any sanitary district may by ordinance establish just and equitable rates or charges or rentals, etc. However, under Section 2 of Chapter 13, Acts of the 54th General Assembly, above quoted stated that the State of Iowa is liable only for sewage disposal rentals. A connection charge or an inspection charge are not rentals, but constitute separate and distinct fees for different kinds of utilities and services.

Under the familiar maxim, "Expressio unius est exclusio alterius", the mention of one thing implies the exclusion of another thing. The statute in question specifically provided that the State shall be liable for sewage disposal rentals, and nothing more in the way of rates or charges was expressed in the statute.

In view of the language used by the Legislature, we believe that the State intended that the general exemption law, Sections 427.1 and 445.28 should stand, and its prohibitions should stand except only as to sewage disposal rentals, as may be established by these two sanitary districts.

You are therefore advised that neither the connection charge or inspection charge or any charges, except sewage disposal rentals need be paid to the Sanitary Districts of Clear Lake or Dickinson County.

Very truly yours,

FRANK D. BIANCO
Assistant Attorney General

FDB:MKB
cc: Mr. Charles E. Sayre

June 19, 1957

Mr. B. C. Berge
Attorney at Law
Garner, Iowa

Dear Mr. Berge:

Your letter of June 5, 1957, addressed to Mr. John T. Harper has been referred to the writer for reply. Assuming without conceding that section 558.41 and 558.42 might apply to instruments other than those in the nature of conveyances, it would still be open to question whether or not the cited sections of the Code would apply to the State of Iowa.

It is a rule of law, approved in the decision in Schlesinger v. State, 218 N. W. 440.441, that, "A sovereign is not bound by the words of a statute unless it is expressly named." This is a restatement of the latin maxim, nullum tempis occurrit regi which is the law of Iowa on the authority of The County of De s Moines v. Harker, 34 Iowa, 84, 85, wherein this Court stated:

> "The second question is, whether this action, it being for the recovery of school-fund money, is an action by the State, in such a sense as that the statute of limitations will not apply to it? For, we do not understand counsel upon either side to controvert the propositions that a statute of limitations will not apply to the State unless expressly so stated in it, following the common-law maxim, 'nullum tempus occurrit regi.' ****"

This rule of law is especially well expounded in the case of United States v. Hoar, 2 Mason 311, 26 Fed. Cas. 329, 330, wherein the Circuit Court of Appeals of Massachusetts dealing with a general statute of limitations for filing claims in an estate stated:

> "Where the government is not expressly or by necessary implication included, it ought to be clear, from the nature of the mischiefs to be redressed, or the language used, that the government itself was in contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different, and often contrary, forces to the government itself. It appears to me, therefore, to be a safe rule, founded in the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act."

57-6-35V

Mr. B. C. Berge

Sutherland, Statutory Construction, 3rd Edition, Vol. 3, section 6301 states:

> "General words or language of a statute that tends to injuriously encroach upon the affairs of the government receive a strict interpretation favorable to the public, and, in the absence of express provision or necessary implication, the sovereign remains unaffected. The rule has as its origin the English common-law immunity of the crown, at first attached to the personal character of the King as the sovereign, the later extended to other sources of law-making, and law-enforcing power. With the adoption of the common law in the United States the principle of immunity adhered to the governing authority in the states. ***"

R. G. Patton, in his well documented Monograph "Conveyancing in Iowa," which precedes Chapter 558 in the Iowa Code Annotated, volume 36, at page 392, thereof, writes:

> " After title has passed from the public domain to private ownership, transfers are then made by voluntary or involuntary conveyances of the private owners. It is solely voluntary transfers which are the subject of Chapter 558. For involuntary transfers, see chapters 626, 636, 654, 668. In passing to the forms of deeds in common use in Iowa and the shorter forms authorized by the chapter under consideration, it may be noted that the early settlers of this country brought with them not only the legal doctrines comprising the science of real property law of the countries from which they came, but also the forms of conveyancing then in use in those countries. For instance, the deeds used in Louisiana are usually in the form of a certification by an officer as to a transfer made by grantors who have appeared before him. Such a transfer is known as an "authentic act" and is based upon the forms developed in France and Spain in line with the civil law of those countries. Of less common use is a form resembling an Iowa deed executed directly by the grantors and known as a "private act." But Iowa was settled by people who came from the Eastern states who were in turn largely of English origin. In fact Iowa was at one time a part of Northwest Territory whose first officers came almost exclusively from Pennsylvania. The form of conveyancing used in Iowa at the present time has a direct relationship to the forms employed in Pennsylvania and still earlier in England. The extent to which these English forms are employed and to which the English theories of conveyancing are a part of our law is a matter on which there is some diversity of opinion. Rood, The Statute of Uses and the Modern Deed, 4 Mich. L. Rev. 109. While in England passage of the Statute of Uses and the Statute of Enrollments gave rise to the use of two instruments to effect a transfer of title, first a lease and then a release in the form of a quit claim deed, Patton, Iowa Land Title Examinations § 3; Patton Titles, § 3., the absence of recognition in this country of the Statute of Enrollments made the use of two instruments unnecessary and a single deed has generally been considered sufficient for the creation or transfer of any kind of possessory or non-possessory interests in land. Bryan v. Bradley, 1844, 16 Conn. 474; Thatcher v. Omans,

1872, 3 Pick.,521, 20 Mass. 521.

However, the Statute of Frauds (England, 1677) is in force in all states, as a part of the common law or by local reenactment so that a writing is necessary for all conveyances other than those excepted from the statute. The language of these exceptions varies slightly in different states but in general relates to short term leases and transfers by act and operation of law. I. C. A. § § 622.32, 622.33. The title of chapter 558, "Conveyances," is intimately connected with that of the opening section 558.1 "Instruments affecting real estate." In other words, the conveyances to be considered are solely those which are in the form of instruments. The breadth of the term has already been mentioned. However the instruments most commonly encountered are the voluntary transfers by individuals, partnerships or corporations of interests in land -- either all or some part of the total of the interests held by the executing party. As distinguished from wills, whose operative force is entirely in the future and meanwhile revocable, Prindle v. Iowa Soldiers' Orphans Home, 1911, 153 Iowa 234, 133 N. W. 106; Shaull, 1918, 182 Iowa 770, 166 N. W. 301, 11 A. L. R. 15; Ransom V. Pottawattamie County, 1915, 168 Iowa 570, 150 N. W. 657., deeds of conveyances are those which have the effect of passing a present interest in the property. Dussaume v. Burnett, 1857, 5 Iowa (5 Clarke) 95. Mortgages and security trust deeds carry much the same wording but they merely give a lien upon the property described therin, Eckhardt v. Bankers Trust Co., 1933, 218 Iowa 983, 249 N. W. 244, rehearing denied 218 Iowa 983, 252 N. W. 373. (that is the right to have the property sold for enforcement of the obligation secured Peck v. Jenness, 1849, 7 How. U. S. 612, 12 L. Ed. 841.), and not title to it or to any interest therein. Eaton v. White, 1864, 18 Wis. 517. Deeds thus include not only the instruments commonly designated as such but assignments for benefit of creditors, Prouty v.Clark, 1887, 73 Iowa 55, 57, 34 N. W. 614, deeds made to carry out a trust purpose as well as the collateral contract defining the purpose and the powers of the trustee, Keck v. McKinstry, 1928, 206 Iowa 1121, 221 N. W. 851; Young v. Young-Wishard, 1939, 227 Iowa 431, 288 N. W. 420., and the majority of leases in that they create interests in real property. Hutchinson v. Bramhall, 1887, 42 N. J. Eq. 372, 7 A. 873."

It is apparent from the foregoing that tax liens, while they may give a right to have the property sold for enforcement of the obligation secured, create no title to the property to which the lien attaches and they create no interest in such property. Income, sales and use tax liens are not "conveyances" and the recording thereof is not governed by the provisions of sections 558.41 and 558.42, but by the provisions of sections 422.26, 422.56, 422.57 and 423.17, Code of Iowa 1954, as amended which specifically provide how and where they shall be recorded, and there is no requirement therein that the signature of the authorized official of the Iowa State Tax Commission signing a release of a tax lien bearing the seal of the Iowa State Tax Commission must be acknowledged in order to render their recordation valid.

In Dayton-Oldham Granite Works v. Mason City 196. Iowa 77, 194 N. W. 200, the court said:

> "Counsel strenuously urges that lien for the cost of construction beyond the statutory limitations could not be made effective as to appellant, because the contract entered into between its grantor and the city council was not placed of record as an instrument affecting real estate, as provided by Code Section 2925, which reads:
>
> 'No instrument affecting real estate is of any validity against subsequent purchases for a valuable consideration, without notice, unless recorded in the office of the recorder of the county in which the same lies.' "
>
> We think this statute is not applicable to special taxes for public improvements."

If section 558.41 is not applicable to a tax lien, we think it is also not applicable to the release of a tax lien. If it were held that the lack of acknowledgment as to the satisfaction piece renders it of no validity as an effective release of the lien it would necessarily follow that the "notice of tax lien" itself is invalid for the same reason, inasmuch as it also is signed by the chairman of the State Tax Commission without acknowledgment of his signature, and could therefore, be of no validity against subsequent purchasers.

Very truly yours,

WMW/mod

W. M. WILSON
General Counsel

June 20, 1957

Honorable Clyde Spry
Secretary of Agriculture
B u i l d i n g

Dear Mr. Spry:

This is to acknowledge receipt of your communication of June 17, 1957, together with copies of your correspondence with Doctor R. J. Anderson of the United States Department of Agriculture relating to area testing in Iowa of cattle for Brucellosis.

You inquire as to whether you may, in the preparation of your forms of petition for such testing, ignore the provisions of Section 164.17, Code of Iowa, 1954, as amended by the 57th General Assembly, excepting "herds composed entirely of official vaccinates" by failing to incorporate words stating such exception in the body of the petition.

Our conclusion is that the Legislature intended that "herds composed entirely of official vaccinates" were to be exempt from the provisions relating to area testing had on petition by owners residing in the designated area. The legislative intent, although inaptly worded, seems clear when it unequivocally said in Section 1 of Senate File 65 (amending Section 164.17, Code of Iowa, 1954, relating to cooperative measures for the control and eradication of Brucellosis) that "the provisions of this subsection do not apply to herds composed entirely of official vaccinates". (Emphasis ours). This conclusion on our part is further strengthened by the Legislature's action in Section 1 of Senate File 64 (also passed by the 57th General Assembly and amending Section 164.11, Code of Iowa, 1954) when it inserted a new exception in our "conditions precedent to sale" statute to the effect that "animals from a herd composed entirely of official vaccinates" might be sold or ownership transferred without the necessity of first obtaining a

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negative Brucellosis test report issued by an accredited veterinarian and conducted within thirty (30) days prior thereto.

Considering these enactments by the Legislature, and the circumstances under which the same became a part of our statutory law, we believe that a petition asking that a Brucellosis test be conducted throughout a certain county should contain wording to the effect that "herds composed entirely of official vaccinates" are not to be considered as being included therein, as such herds have been specifically exempt from the necessity of such test by the action of the Legislature. Your department has no authority to repudiate or circumvent the avowed legislative intent by administratively ignoring or failing to recognize the plain wording of the law.

Very truly yours,

RRRD/fm

RAPHAEL R. R. DVORAK
First Assistant Attorney General

June 20, 1957

Mr. Eliot Thomas
County Attorney
Glenwood, Iowa

Dear Mr. Thomas:

This will acknowledge receipt of yours of the 7th inst. in which you submitted the following:

> "The five judges of the Fifteenth Judicial District, Iowa, of which Mills County is a part, have this date entered a General Order in the office of the Clerk of Court in and for Mills County, at Glenwood, Iowa. Acceptance of service of said general order has been made by the Chairman of the Board of Supervisors. The order directs that the Board of Supervisors of Mills County, Iowa, shall on or before September 1, 1957, provide a suitable and safe place for the holding of court in Mills County, Iowa, together with adequate and safe place for the office of the clerk, together with suitable and safe place for the filing of all court records. The full text of said order, together with the transmittal letter, is attached hereto.
>
> "The opinion of your office is respectfully requested as to the legality of said order and the duties of the Board of Supervisors in carrying out said order."

Accompanying your letter is a letter of June 3, 1957, to you from the Honorable Harold E. Davidson, Judge, and also accompanying your letter is a copy of the General Order entered

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and served by the five judges of the Fifteenth Judicial District dated May 31, 1957, both of which are attached to this letter as exhibits. I advise as follows:

To a situation comparable to the one presented herein disclosed, the Court in the case of Board of Commissioners of White County v. Gwin, 22 LRA 402, 136 Ind. 562, 36 NE 237, while considering and deciding the pertinent issue there as to the power of judges in Indiana to compel the building of a court house, stated the following:

> "But, however, overwhelmingly the evidence may establish that an entire new court-house was imperilously demanded, yet if the White circuit court had no power to build one, or had no power to do what it attempted to do, that consideration cannot add to or enlarge the power of the court so as to justify the act. Counsel for appellees ask: 'Must the court remain in a dangerous structure until it falls upon it and destroys the lives of the persons constituting it? Cannot the court anticipate calamities by provident use of human skill? Must a court wait until a judge is killed or maimed before resorting to that highest law, self protection. Is it not within the power of the court to protect itself against . . . . a veritable death trap?' We answer the first of these interrogatories in the negative, the second in the affirmative, the third in the negative and the fourth in the affirmative.
>
> "The court is not bound to remain in a dangerous structure until it falls and destroys the life of judge or officers; it can anticipate such calamities by provident use of human skill; it is within the power of the court to protect itself against such a veritable death trap as the court-house in question seems from the evidence to have been. All these things granted, and it does not follow that that power will enable the court to build additions and extensions to such death trap and thereby and therein expend over $32,000 of the public funds of the county

> to hold up a death trap, the whole value of which does not exceed $7,000 under color of repairs. Under the circumstances disclosed in the evidence, the court could have protected itself precisely as it could and would have done if the old court-house had blown down or burnt up some night. No one would have thought of an attempt on the part of the court to rebuild it but the court would at once have secured another room, as it actually did do, for temporary use in the administration of justice, until the proper authority could rebuild the court-house."

No specific statutory power and duty in the situation here presented appears to exist. However, it is provided by statute, Section 333.1, Code 1954, subsection 8, that the county auditor shall:

> "Have the general custody and control of the court house in each county, respectively, subject to the direction of the board of supervisors."

Specifically with respect to the court and the buildings and equipment necessary for its functioning, it is provided by Section 332.3 (15), Code 1954, that the board of supervisors has the power:

> "To build, equip and keep in repair the necessary buildings for the use of the county and of the courts."

While the above statute does not specifically provide the board of supervisors with duty and power to provide a court house or a place for the holding of court, I am of the opinion that the power to build, in view of the perilous situation disclosed herein, and the inherent power of the court to preserve and maintain its authority and jurisdiction, would include the power

to provide the court with a suitable and safe place for the holding of court in Mills County at the county seat at the expense of the county. Interestingly, in a situation not the parallel hereof, the Supreme Court in the case of Kincaid v. Hardin County, 53 Iowa 430, 434, 435, stated:

> "It will be seen that all counties are required, without their assent and exclusively for public purposes, to provide a room or place for holding the courts. The counties have no option concerning this duty. It is an involuntary duty imposed upon them by the State, and imposed upon all alike."

Insofar as the order of the judges includes a provision for providing an adequate and safe place for the office of clerk, together with a suitable and safe place for the filing of court records, I am of the opinion that the duty to provide the clerk with an office at the county seat, as specified in Section 332.9, Code 1954, which states, "The board of supervisors shall furnish the clerk of the district court, * * * *, with offices at the county seat", would include the duty to furnish such office elsewhere in the county seat when such a suitable and safe office is not available in the court house.

Very truly yours,

OS/fm

OSCAR STRAUSS
Second Assistant Attorney General

June 20, 1957

Mr. Earl E. Hoover
Attorney at Law
Redfield Building
Spencer, Iowa

Dear Earl:

This will acknowledge receipt of your recent letter with which you enclosed forms prepared for the State Tax Commission releasing its levy under a distress warrant for sales taxes as to one certain 1950 Ford automobile belonging to Melvin A. Stief, Peterson, Iowa, by the Sheriff of Clay County, Iowa.

We have examined our file in this matter in connection with pertinent provisions of the Bankruptcy Act and are presently of the opinion that the State Tax Commission cannot voluntarily release such levy. Under the provisions of Section 60 and Section 67 of the National Bankruptcy Act, a preferential transfer is effected only if the effect of such transfer will be to enable the creditor to obtain a greater percentage of his debt than some other creditor of the same class. The provisions of Section 60 are made subject to the provisions of Section 67 and it is our thought and view that the preference under discussion in Section 60 is a preference as to the distribution of the bankrupt's estate rather than the proceeds from the sale of property which might be exempt from all claims other than taxes. In Section 67 of the Bankruptcy Act, we find the following provision:

> "b. The provisions of section 60 of this Act to the contrary notwithstanding, statutory liens in favor of employees, contractors, mechanics, landlords, or other classes of persons, and statutory liens for taxes and debts owing to the United States or any State or subdivision thereof, created or recognized by the laws of the United States or of any State, may be valid against the trustee, even though arising or perfected while the debtor is involvent and within four months prior to the filing of the petition in bankruptcy or of the original petition under chapter X, XI, XII, or XIII of this Act, by or against him. Where by such laws such liens are required to be perfected and arise but are not perfected before bankruptcy, they may nevertheless be valid, if perfected within the time permitted by and in accordance with the requirements of such laws, except that if such laws require the liens to be perfected by the seizure of property, they shall instead be perfected by filing notice thereof with the court."

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By reason of the existing lien of the State of Iowa for the sales taxes against the bankrupt and by reason of the reduction of the bankrupt's car to possession by reason of the sheriff's levy prior to the date of filing of the petition in bankruptcy does in our mind allow the State Tax Commission to assert that its lien for such sales taxes is valid against the trustee. Accordingly, if the trustee would assert rights in such property contrary to the above, we believe it will be incumbent upon the trustee to prove such rights as against the State Tax Commission on due notice and hearing. We must take this position for the reason that, should we follow the alternative procedure evidenced by the suggested release of this levy, the Ford would be turned over to the trustee free of our levy, would be set off to the bankrupt as exempt, and might, in fact, be disposed of by the bankrupt before the State Tax Commission could make a second levy on the car. We cannot afford to run this risk.

We recognize that release of the state's levy on this automobile would somewhat simplify your procedure and regret that we cannot co-operate with you toward that end. We hope that you understand our position in the premises.

Very truly yours,

M. A. Iverson,
Special Assistant Attorney General

MAI:fs

June 21, 1957

H. T. Opsahl, D. C.
Secretary
Board of Chiropractic Examiners
B u i l d i n g

Dear Sir:

Reference is herein made to yours of the 20th inst. in which you stated the following:

> "Your opinion is requested if it is necessary for the secretary of an examining board selected under the provisions of Section 147.22, Code 1954, to obtain approval of the other two members before payment shall be made by the Comptroller for per diem services performed under provisions of Section 147.24, Code 1954?
>
> "Furthermore, when a claim for such services is filed in proper form, can the Comptroller refuse to issue a warrant for the amount claimed?"

In reply thereto I advise you as follows.

1. So far as the necessity for obtaining approval of the other two members of the Examining Board before obtaining payment of your claim for services, I would call your attention to the fact that the appropriation for the support of the Chiropractic Board is made to the Department of Health and therefore certification of your claim under Section 135.11 should be made by the Commissioner of Public Health rather than by the other two members of the Chiropractic Board.

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2. The Comptroller's duty with respect to the approval of claims and the issuance of warrants in payment thereof is controlled by Section 8.14, Code 1954, which provides as follows:

> "Claims - approval. The state comptroller before approving a claim shall determine:
>
> "1. That the creation of the claim is clearly authorized by law.
>
> "2. That the claim has been authorized by an officer or official body having legal authority to so authorize and that the fact of such authorization has been certified to said comptroller by such officer or official body.
>
> "3. That all legal requirements have been observed, including notice and opportunity for competition, if required by law.
>
> "4. That the claim is in proper form and duly verified.
>
> "5. That the charges are reasonable, proper, and correct and no part of said claim has been paid."

If the claim meets the above statutory requirements the Comptroller has no discretion to disapprove it.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

June 21, 1957

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

Dear Mr. Wilson:

Your letter of June 10, 1957 poses the question whether or not moneys and credits tax is payable to Muscatine County on $22,000.00 on deposit in a Washington, D. C. bank in the case of an individual who, being an employee of the federal government, lived in Washington, D. C. from 1945 to the date of his death May 7, 1956, but who maintained his legal residence in Iowa, voting by absentee ballot in the State of Iowa and who filed Iowa state income tax returns for each year while living in Washington, D. C.

Section 427.13 (4), Code of Iowa, 1954, as amended, provides:

"All other property, real or personal, is subject to taxation in the manner prescribed, and this section is also intended to embrace: * * * 4. Money whether in possession or on deposit."

It has been held that bank deposits are taxable to the depositors and not to the bank. Branch v. Town of Marengo, 1876, 43 Iowa 600; Citizens National Bank v. Johnston, 1925, 199 Iowa 461, 463, 202 N. W. 382; First National Bank v. Board of Review, 199 Iowa 1134, 1134, 1135.

Section 428.1 (4) Code, 1954, provides:

"Every inhabitant of this state, of full age and sound mind, shall list for the assessor all property subject to taxation in the state, of which he is the owner, or has the control or management, in the manner

57-6-40

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herein directed:

> "4. The personal property of a decedent by the executor or administrator, or if there is none, by any person interested therein."

Section 428.2 Code, 1954, provides:

> "Any person required to list property belonging to another shall list it in the same county in which he would be required to list it if it were his own, except as herein otherwise directed; but he shall list it separately from his own, giving the assessor the name of the person or estate to which it belongs"

Thus subsection 4 of section 428.1 provides that the personal property of a decedent shall be listed by the executor and section 428.2 provides that the executor shall list it in the same county in which he would be required to list it if it were his own, which follows the general rule that personal property in the hands of an executor or administrator in his official capacity is assessable and taxable at the place of his domicile, as between different states or countries. See 51 Am. Jur. section 483 and cases there cited.

An executor, administrator, or trustee is regarded as the owner, for purposes of property taxation of the personal property which he holds by virtue of his office and is taxable in the state in which he is domiciled. See 67 A. L. R. 393 and cases there cited. Accord, Hunter v. The Board of Supervisors, 93 Iowa 376 in which case it was held that where a resident of Iowa had deposited for safe keeping in Illinois some promissory notes that had never been brought by him into Iowa it was held that they were subject to taxation in Iowa.

Administration of the decedent's estate being in Iowa it would appear that he was a resident of Iowa for purposes of

taxation. This conclusion is further confirmed by the fact that he maintained his legal residence in Iowa by continuing to file Iowa resident income tax returns and voting in Iowa by absentee ballot. These matters are consistent with an intent to continue his Iowa legal residence rather than an intent to relinquish it and adopt Washington, D. C. as his legal residence.

A domicile of choice is the place which a person has elected and chosen for himself to displace his previous domicile and is entirely a question of residence and intention and both must occur in order that the domicile may be established. Farrow v. Farrow, 162 Iowa 87, 143 N. W. 856; in re: Titterington, 130 Iowa 356; Barhydt v. Cross, 156 Iowa 271.

In Collier v. District of Columbia (1947) 161 F. 2d 649 it was held that although the time of return to the former domicile is indefinite and dependent on duration of employment in the District of Columbia, a United States Government employee who has a fixed determination to return to his former domicile is not domiciled in the District of Columbia.

Even though the decedent lived in Washington for some eleven years prior to his death during which time he had no home in Iowa, the fact that he continued to vote by absentee ballot in Iowa, regularly filed Iowa resident individual income tax returns and the fact that his estate is now being administered upon in Iowa are inconsistent with a view that he had changed his domicile and the conclusion follows that the decedent continued a resident of Iowa for purposes of taxation.

It appears probable, although it is not so stated, that the decedent did not pay moneys and credits tax for years prior to 1956, and that he omitted listing this bank account and any other moneys or credits he may have owned for taxation. If such was the case the liability to pay such tax exists for each year since 1952 under the provisions of section 443.12, Code of Iowa, 1954, as amended, and section 682.35, Code, 1954, as amended, reads:

> "No final report of a fiduciary shall be approved by any court unless there is attached thereto and made a part thereof, the certificate of the county treasurer of a county in which the estate is held by the fiduciary that all personal taxes due and to become due the county in such estate matter have been fully paid and satisfied. No charge shall be made by the county treasurer for the issuance of such certificate."

We find full support in the statutes and authorities cited for moneys and credits taxation of the money the decedent had on deposit in a bank in Washington, D. C., as well as any other moneys and credits the decedent may have owned for the period after his death, and before his death for any of the years for which an omitted property assessment can be made within five years of the time the assessment should have been made. The assessment should have been made before May 1st of any tax year. Sections 441.9 (7) and 441.24, Code, 1954, and Thornburg v. Cardell, 123 Iowa 313, 316, 95 N. W. 239. The five year limitation does not, of course, apply to personal property or moneys and credits taxes which were in fact assessed within the time allowed though more than five years has passed since such assessment. 1942 Report of Attorney General, 140, 1944

Report of Attorney General, 140.

Very truly yours,

M. A. IVERSON
Special Assistant Attorney General

WMW/mcd

W. M. WILSON, General Counsel
State Tax Commission.

June 24, 1957

Mr. Frank F. Barker, Manager
Iowa Dairy Industry Commission
L o c a l

Dear Sir:

We acknowledge receipt of your letter dated May 13, 1957, reading as follows:

> "We enclose letter received this morning from Mr. W. A. Slater, Manager of Slater Farm Store, Clarinda, Iowa, relative to the first buyer, Mr. Slater, deducting the 1¢ per lb. butterfat set-aside from the cream purchased from the Page County Farm.
>
> "Mr. Bianco, you will recall the butterfat set-aside law stated that the first buyer of cream or milk from the producer shall make the betterfat set-aside.
>
> "Mr. Slater, of course, is the first buyer, but whether he should make the set-aside from a partially or wholly tax supported institution, is the question at hand.
>
> "We will appreciate your opinion."

and in reply thereto we advise you in the following manner with reference thereto.

The Page County farm, we understand, is the usual type of County institution owned and operated by the County primarily for the purpose of taking care of indigent citizens who are residents of the County.

The statute, Section 179.5, Code of Iowa 1954, involved in this question reads in pertinent part:

> "There is hereby levied and imposed an excise tax of one cent per pound or fraction thereof

57-6-41 ✓

upon all butterfat sold in the state during the period beginning May 1 and terminating June 30, inclusive, annually; * * *"

We must also advert to the definitive sections of the act to see whether counties are included within the purview of the law. These pertinent parts of Section 179.1 (Definitions) read as follows:

" * * * *

"2. The term 'person'shall mean individuals, corporations, partnerships, trusts, associations, co-operatives, and any and all other business units.

"3. The term 'producer' shall mean and include every person who produces milk or cream from cows and thereafter sells the same as milk, cream, or other dairy products.

" * * * *"

The tax in question being an excise tax, there is no statutory exemption from taxation of county property as provided in Section 427.1 (2) which says: "The following classes of property shall not be taxed: * * * The property of a county, township, city, town, school district or military company of the state of Iowa, when devoted to public use and not held for pecuniary profit."

It was so held in the case of State v. City of Des Moines, 221 Iowa 642, 266 N. W. 41, wherein the State of Iowa brought an action against the City of Des Moines, under the "motor vehicle fuel" tax law for an accounting and to determine the amount of license fees or excise tax owing to the State of Iowa. The court also held that the term "person" within the definitive sections of that law (which is almost identical with the definition of person contained in Section 179.1 (2) now under consideration) included a municipal corporation. A county is such a municipal corporation, and a subdivision of the state.

A somewhat identical case was the case of State v. Woodbury County, 222 Iowa 488, involving the same "motor vehicle fuel" tax law, in which the court said on page 491:

> "Aside from the Des Moines case, this question has been discussed by many courts, and the almost universal holding has been that, unless the county, or city is especially exempted from the operation of the law, the fact that it may have used the gasoline as did this county, although it may have been used for governmental purposes, does not excuse it from paying the tax." (Citing cases from many other states.

Therefore, it is our opinion that the Page County farm, or rather Page County, is liable for the said tax and the first dealer should deduct the same from the price charged by the producer, in this case, the Page County farm.

The County can, if it desires, file application for a refund of the tax with the commission within thirty (30) days after the tax is collected. (Section 179.5)

Yours very truly,

FRANK D. BIANCO
Assistant Attorney General

FDB:MKB

HEADNOTE: CITIES AND TOWNS: Section 368A.22, Code 1954, prohibits sale of real estate to city by a council member.

June 25, 1957

Honorable Chet B. Akers
Auditor of State
B u i l d i n g

Attention: Mr. C. W. Ward, Supervisor

Dear Sir:

Receipt is acknowledged of your letter of June 24 as follows:

"I would appreciate your opinion on the following question regarding the City of _____, Iowa with a population of 5,145 and operating under the Council form of government.

"May the City Council purchase real estate from a Council Member for municipal purposes without complying with condemnation proceedings?"

In answer thereto I would refer you to Section 368A.22, Code 1954, which provides as follows:

"Interest in contracts. No officer, including members of the city council, shall be interested, directly or indirectly, in any contract or job of work or material or the profits thereof or services to be furnished or performed for the city or town."

I would further refer you to an official opinion of this office which appears at page 196 of the 1930 Report of the Attorney General, quoted in pertinent part as follows:

"We call your attention to Section 5673, Code of 1927. This section prohibits any officer in any city or town from being directly or indirectly interested in a contract or job of work, etc. Park Commissioners are officers of a city or town and we are, therefore, of the opinion that Section 5673, Code 1927, prohibits a member of a park commission from making contracts with the park commission to sell real estate or any other thing because of the fact that said member is interested directly." (Emphasis ours)

57-6-42

Reference to Section 368A.22, Code 1954, and the historical notes appended thereto reveals it to be a direct descendant of Section 5673, Code 1927. Comparison of the text of the said provisions reveals that the prohibition construed in the quoted opinion survives in Section 368A.22, Code 1954. Reference to House File 427, a bill introduced in the 57th General Assembly, which would have made certain exceptions to Section 368A.22 reveals that it failed of enactment.

Therefore, in answer to your question and to paraphrase the above-quoted opinion:

> ". . .Section 368A.22, Code 1954, prohibits a member of the city council from making contracts with the city to sell real estate or any other thing because of the fact that said member is interested directly."

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mfd

HEADNOTE: CITIES AND TOWNS: Have no statutory authority to conduct or pay for an election on whether to close a municipal swimming pool on Sunday.

June 25, 1957

Honorable Chet B. Akers
Auditor of State
B u i l d i n g

Attention: Mr. C. W. Ward, Supervisor

Dear Sir:

Receipt is acknowledged of your letter of June 24 as follows:

"I would appreciate receiving your opinion on the following question regarding the City of _____, Iowa with a population of 4,227 and operating under the Council form of government.

If a petition has been circulated in said city, receiving the required number of signatures, requesting that the City Council operate a swimming pool on Sunday and requiring the City Council to hold a special election regarding said operation of the swimming pool, is said election legal and may the City use public funds to pay the cost of said election?"

In answer thereto I would advise you that on occasions too numerous to require citation our Supreme Court has held cities and towns to be creatures of statute with only those powers conferred by statute or reasonable and necessarily implied as incident to exercise of an expressly conferred power. I find no statutory provision expressly conferring power on any city or town to conduct or pay for an election on the subject to which your letter refers. Neither does there appear any logical basis for saying power to hold such an election is reasonably and necessarily implied as an incident to operation of a swimming pool.

I would, therefore, advise you that no lawful authority exists in any city or town to conduct or pay for such an election.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

57-6-43

June 26, 1957

Mr. Bruce F. Stiles
State Conservation Director
State Conservation Commission
L o c a l

Dear Sir

We acknowledge receipt of your letter of the 7th instant in which you submit the following:

> "House File 288 enacted by the Fifty-seventh General Assembly provides in part 'provided, however, that all state conservation officers employed at the time of the effective date of this act shall be paid a salary based on prior service and fixed in accordance with the salary schedule herein set forth'.
>
> "The State Conservation Commission would like to have your opinion as to what is meant by prior service. Does this mean prior service as a Conservation Officer, prior service as an employee of the State Conservation Commission, or any prior service in state work even though it might be with some other department?"

Section 107.13, Code 1954, as amended by House File 288, Acts of the 57th General Assembly, now reads as follows:

> "Officers and employees. Said director shall, with the consent of the commission and at such salary as the commission shall fix, employ such assistants, including a professionally trained state forester of recognized standing, as may be necessary to carry out the duties imposed by this chapter on the commission; also and under the same conditions, said director shall appoint such officers as may be necessary to enforce the laws, rules, and regulations, the enforcement of which are herein imposed on said commission. Said officers shall be known as state conservation officers. The salaries of the state conservation officers shall be thirty-four hundred fifty dollars ($3450) per year for the first year of service; thirty-eight hundred dollars ($3800) for the second year

57-6-44 ✓

> of service; and thereafter such salaries shall be increased each year in the sum of one hundred dollars ($100) until a maximum salary of forty-two hundred dollars ($4200) per year is reached. Provided, however, that all state conservation officers employed at the time of the effective date of this Act shall be paid a salary based on prior service and fixed in accordance with the salary schedulre herein set forth."

This statute as amended seems to be clear and unambiguous, in that it speaks only of state conservation officers as employed prior to the amendment and at the time of the effective date of the Act, and it is therefore our opinion that the prior service referred to in the Act, means prior service as a Conservation Officer.

Very truly yours,

FRANK D. BIANCO
Assistant Attorney General

FDB:MKB

HEADNOTE: SCHOOLS: County Attorney's opinion confirmed that resumption of jurisdiction by a school district over part of its territory previously involved in a reorganization procedure declared invalid by the Supreme Court does not make it a "new" school district.

June 27, 1957

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

Dear Sir:

Receipt is acknowledged of your letter of June 25 as follows:

"I have a question from Mr. Ira Larsen, Mitchell County Superintendent of Schools, concerning whether or not there is a necessity for holding an election to elect a new board of directors in the Spring Valley Rural Independent School District, located in Mitchell County, Iowa, soon after July 1, 1957, and before the next regularly scheduled election for board of directors.

"When the St. Ansgar Community School District became effective on July 1, 1954, approximately one-half of the Spring Valley Rural Independent School District was included in the said Community School District of St. Ansgar. The portion included was about four government sections in area, and the part remaining as the Spring Valley Rural Independent School District was approximately 4.1 government sections.

"In a decision of the Iowa Supreme Court dated July 26, 1956, 78 NW 2d 86, the Community School District of St. Ansgar was declared to be without legal basis for existence. In a Supplemental Opinion, dated August 30, 1956, 78 NW 2d 94, the St. Ansgar Community School District was given permission to operate as a de facto corporation for one year, with instructions to the District Court to dissolve the said de facto corporation not later than July 1, 1957.

"On May 6, 1957, in a second reorganization election in the St. Ansgar area, the voters of the Spring Valley District voted as a complete district, or as the Spring Valley Rural Independent School District was originally constituted before July 1, 1954, and the proposition to form a new Community School District of St. Ansgar as of July 1, 1957, was defeated by a tie vote, 27 to 27, although the said proposition to form a Community School District of St. Ansgar did carry by a majority vote in enough of the other school districts and portions of school districts so that a new Community School District of St. Ansgar will be formed as of July 1, 1957. It is assumed that the area shaded in red reverts to the Spring Valley Rural Independent School District as of July 1, 1957, without any formal attachment by the County Board of Education, ie: see map enclosed with this letter.

57-6-45

"The unshaded portion of the Spring Valley District on the enclosed map has had its own board of directors at all times since July 1, 1954, as they did prior to that date, and has operated its own rural independent school.

"Our questions are do we have a new Spring Valley Rural Independent School District, caused by the 'reversion' of that portion of the original Spring Valley District which had been a part of the first Community School District of St. Ansgar, dating from July 1, 1954, and later a part of the de facto corporation, dating from August 30, 1956, said de facto corporation going out of existance not later than July 1, 1957? If so, must there be an election of a new board of directors representing the entire district at some time soon after July 1, 1957, and before the next regularly scheduled school elections for boards of directors?

"My own opinion on the problem is that since the first St. Ansgar Community School District was declared to be without proper legal basis for existence, and the de facto school corporation was only a de facto corporation, that portion of the Spring Valley Rural Independent School District which has been included since July 1, 1954 in the first St. Ansgar Community School District, has technically never been out of the original Spring Valley School District, and that therefore it is not necessary to hold a school election for the election of a new board of directors prior to the next regularly scheduled school elections for that purpose. However we do recognize the fact that we now have a problem in the Spring Valley Rural Independent School District of improper representation on the board of directors, due to the fact that the present board was elected by only that portion of the Spring Valley School District which has continually remained outside of the Community School District of St. Ansgar, said portion being shown on the enclosed map by the unshaded portion of the Spring Valley Rural Independent School District. I do feel there is enough uncertainty on the matter to warrant its submission to you for an opinion, and we would appreciate an early reply."

From the facts stated in your letter it appears that the conclusion reached by you, as stated therein, is correct.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

June 28, 1957

Hon. N. P. Black
Superintendent of Banking
500 Central National Building
Des Moines, Iowa

Dear Sir:

Re: Garage Expansion and Branch Bank

Reference is made to your letter of June 11, 1957, enclosing a proposed set of blueprints for the expansion of a bank to provide for drive-in facilities. The blueprints and accompanying documents set forth that the new addition is adjacent to and directly connected with the existing banking facilities. It is also my understanding that the existing bank and the drive-in facilities will be operated as an integral unit and there will be no separate and distinct banking activities carried on in the expanded portion of the bank. It is also my understanding that the new expansion as set forth in the blueprints will be completely enclosed and will not be in the nature of a parking lot.

Your inquiry is, of course, directed at Section 528.51 of the 1954 Code of Iowa which prohibits branch banking. An examination of the case law of this state and of prior Attorney General's opinions fails to reveal any situation exactly like the one which you have presented.

The term "branch" as used in various cases set forth in "Words and Phrases", Volume 5, indicates that a branch is a subdivision, an agency, or a subsidiary of the parent institution. It is also shown as an "offshoot from the main body".

The facts which you have set forth in your letter do not indicate that the proposed expansion will in any way be a branch but rather will be an integral and basic part of the banking operation. Certainly the law of this state did not intend to prevent expansion and progress when the entire operation remained as one unit.

57-6-49

It is therefore the opinion of this office that the facts set forth in your letter of June 11, 1957, do not constitute branch banking and you may proceed with the other details involved in this expansion program.

Very truly yours,

DON C. SWANSON
Assistant Attorney General

DCS:MKB

July 1, 1957

Mr. Ray Hanrahan
Polk County Attorney
Room 406 Court House
Des Moines, Iowa

Attention: Mr. J. D. McKeon

Dear Sir:

We acknowledge receipt of your letter dated May 10, 1957, reading:

> "The Polk County Conservation Board has asked that our office obtain an opinion from your office in regard to the following questions:
>
> "'1. Where the park or installations is owned and operated by the Conservation Board, what is the legal liability of the Board in regard to claims presented by the public?
>
> "'Where the Park or installation is leased by the Board from a private concern and operated by the Board, what is the legal liability of the Board in regard to claims presented by the public?'"

and in reply thereto beg to advise as follows.

In each of the situations stated in questions 1 and 2, we assume that the park or installations referred to have been acquired by the County Conservation Board in compliance with the provisions of Section 7 of Chapter 12, Laws of the 56th General Assembly. In doing so, such facilities are acquired, developed, maintained and made available to the inhabitants of the County, pursuant to Section 4 of said Act, and said Board as an agency of the County, in providing said facilities for the use and benefit of the public generally, is performing a governmental function.

We are of the opinion that county parks or installations established under the above act come within the rule stated in the leading case of Smith v. City of Iowa City, 213 Iowa 391, wherein it was held that:

57-7-1

> "A city in exercising its governmental power through a park board to acquire and maintain public parks is not liable in damages consequent on the negligent failure to keep the instrumentalities in said parks in repair; nor are the members of the park board individually liable for such nonfeasance on their part."

However, compare the Smith case with the case of Florey v. City of Burlington, (1955) 247 Iowa 516, 73 N. W. 2d 770, wherein our Supreme Court at page 774 said:

> "That the legislature has entrusted to municipalities authority to maintain parks located within their borders is sufficient to make them liable if their failure to perform the duty of safe maintenance results in 'unsafe and dangerous' conditions, causing injury to one exercising due care in availing himself of the facilities offered.'"

By the provisions of Section 4, Chapter 12, Acts of the 56th General Assembly, the Legislature has also authorized counties to acquire, develop, maintain and make available to the inhabitants of the county public parks, etc.

The trend is said to be away from the immunity doctrine. See Florey case, supra, and Anno. 75 A. L. R. 1196, 63 C. J. S. Mun. Corp. Sec. 746, p. 33.

Therefore, we are of the opinion that as to instrumentalities installed in parks, such as equipment and facilities for the use of the public, there is immunity under the rule expressed in Smith v. City of Iowa City, but that if there is a failure to perform a duty of safe maintenance, which results in "unsafe and dangerous" conditions, a county may be held liable in damages therefor. Generally each case turns upon the peculiar facts, circumstances and conditions present at the time.

We further invite your attention to the statute of limitations, Sec. 614.1 (1), Code of Iowa, 1954.

Yours very truly,

FRANK D. BIANCO
Assistant Attorney General

FDB:MKB

July 1, 1957

Mr. Bruce F. Stiles, Director
State Conservation Commission
L o c a l

Dear Mr. Stiles:

Receipt is acknowledged of your favor of June 6, 1957, reading as follows,

> "You will note that Senate File 457 enacted by the Fifty-seventh General Assembly states 'no department or commission of state located in the city of Des Moines shall expend any funds for the publication or distribution of any books or pamphlets or reports unless the publication thereof be expressly required by law or approved by the Budget and Financial Control Committee and the State Printing Board. A violation of this section shall constitute misfeasance in office.'
>
> "Further, House File 139, enacted by the Fifty-seventh General Assembly, amends Section 16.2, Code of 1954, by inserting the following: 'Publications, except premium lists published by the Iowa State Fair Board, containing reprints of statutes or departmental rules, or both, reports of state departments,' and Section 17.27, Code of 1954, is amended as follows: 'When such publications paid for by public funds furnished by the state, contain reprints of statutes or departmental rules, or both, they shall be sold and distributed at cost by the department ordering same. Such publications shall be obtained from the superintendent of printing on requisition by the department and the selling price shall be determined by the printing board by dividing the total cost of printing, paper and binding by the number printed. Said price shall be set at the nearest multiple of ten (10) to the quotient thus obtained. Distribution of such publications shall be made by the superintend-

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> ent of printing gratis to public officers, purchasers of licenses from state departments required by statute, and departments. Funds from the sale of such publications shall be deposited monthly in the general fund of the state.'
>
> "Your attention is further called to Section 107.23, Code of 1954, which in part says '--shall conduct research in improved conservation methods and disseminate information to residents of Iowa in conservation matters.'
>
> "Accompanying this letter is a list and selection of the materials currently distributed by this department.
>
> "The State Conservation Commission respectfully requests advice from the Attorney General as to how we should proceed in our present program of printing and distribution of materials."

together with analytical sheet and enclosures of date and publications issued by the Conservation Commission, and we beg to advise you in reference thereto.

The pertinent Acts of the Legislature and statutes relating to your question are as follows:

> "Senate File 457. No department or commission of state located in the city of Des Moines shall expend any funds for the publication or distribution of books or pamphlets or reports unless the publication thereof be expressly required by law or approved by the budget and financial control committee and the state printing board. A violation of this section shall constitute misfeasance in office."
>
> "Sec. 16.2 (7). Have legal custody of all codes, session laws, books of annotations, tables of corresponding sections, publications, except premium lists published by the Iowa state fair board, containing reprints of statutes or departmental rules, or both, reports of state departments, and reports of the supreme court, and sell, account for, and distribute the same as provided by law."

"Section 17.27 Other necessary publications. There may be published other miscellaneous documents, reports, bulletins, books, and booklets that are needed for the use of the various officials and departments of state, or are of value for the information of the general assembly or the public, in form and number most useful and convenient, to be determined by the printing board. When such publications paid for by public funds furnished by the state, contain reprints of statutes or departmental rules, or both, they shall be sold and distributed at cost by the department ordering same. Such publications shall be obtained from the superintendent of printing on requisition by the department and the selling price shall be determined by the printing board by dividing the total cost of printing, paper and binding by the number printed. Said price shall be set at the nearest multiple of ten (10) to the quotient thus obtained. Distribution of such publications shall be made by the superintendent of printing gratis to public officers, purchasers of licenses from state departments required by statute, and departments. Funds from the sale of such publications shall be deposited monthly in the general fund of the state."

"Sec. 107.23. General duties. It shall be the duty of the commission to protect, propagate, increase and preserve the fish, game, fur-bearing animals and protected birds of the state and to enforce by proper actions and proceedings the laws, rules and regulations relating thereto. The commission shall collect, classify, and preserve all statistics, data, and information as in its opinion shall tend to promote the objects of this chapter; shall conduct research in improved conservation methods and disseminate information to residents of Iowa in conservation matters.

"Upon the issuance of such data and information in printed form to private individuals, groups or clubs, the commission shall be entitled to charge therefor the actual cost of printing and publication as determined by the state printer."

During the biennium, July 1, 1957, to June 30, 1959, under the provisions of Senate File 457, as quoted above, it is clear that unless there is a specific statute authorizing the publication or distribution of books or pamphlets or reports, it is mandatory that before any funds can be expended for such purpose, the expenditures contemplated must be first approved by the Budget and Financial Control Committee and the State Printing Board. Failure to get said approval will make the person responsible guilty of misfeasance in office and subject to penalty therefor. (See Sections 66.26 and 740.19, Code of Iowa 1954)

Section 107.23 imposes upon the Commission the duty to protect, propagate, increase and preserve wild life, conduct researches and disseminate information to the public. In disseminating this information, the Commission is authorized to charge therefor the actual cost of printing and publication as determined by the State printer. This provision is more or less directory and discretionery. However, the 57th General Assembly in the interest of economy in governmental operation in amending Section 17.27 of the Code, enacted House File 139, which makes it mandatory that such publications shall be sold and distributed at cost, if such publications are paid for by public funds furnished by the state, and contain reprints of statutes or departmental rules, or both. It did provide for gratis distribution to public officers, purchasers of licenses from state departments required by statute and to departments.

With these various provisions of the law in mind, we advise you as to the procedure for the printing and distribution of the materials submitted as enclosures with your letter.

Enclosure #2 (Biennial Report) is expressly required by law, (see Sec. 17.3 and Sec. 109.10) and comes within the exception stated in Senate File 457, which requires approval of the Budget and Financial Control Committee and the State Printing Board. We note it contains administrative orders and extracts and parts of statutes and therefor would have to be sold and distributed at cost.

Enclosures #1 (Iowa Conservationist), #4 (Water Safety Folder), #5 (Peek at Iowa Wildlife), #6, (Who's Who in Iowa's Zoo), #7 (Smokey Bear Song Sheet), #13 (Where to go and what to do, etc.), #14 (Iowa's State-owned Fishing Access Areas), #15 (Plans for Fish Smoker), #17 (Iowa Fish and Fishing) and #18 (Waterfowl in Iowa) are all informational data and do not appear to contain statutes or departmental rules and therefore need not be sold or distributed at cost, within the provisions of House File 139, 57th General Assembly. However, under the provisions of Section 107.23, Code of Iowa, 1954, the Commission is authorized to charge for the actual

cost of printing and publication of the same. We note that several of these publications have prices fixed for the sale thereof. It must be remembered also that before any funds can be expended for the publication or distribution of this material, approval must be secured from the Budget and Financial Control Committee and the State Printing Board under the provison of Senate File 457.

Enclosures #3 (Iowa Conservation Law Code Book), #8 (Commercial Fishing Laws), #9 (Iowa Navigation Laws), #10 (Iowa Hunting and Trapping Laws), #11 (Iowa Fishing Laws), #12 (Laws Governing Trout Fishing) and #16 (Regulations and Qualifications for Positions with Conservation Commission), all contain statutes or departmental rules or both and shall be sold and distributed at cost. There is an exception under House File 139 in this case, whereby purchasers of licenses from state departments may receive these publications gratis or free of cost, and public officers and departments may also receive them free of cost. The approval of the Budget and Financial Control Committee and State Printing Board is also required before any funds can be expended for the publication or distribution of the same can be made.

We believe this analysis answers your question, but if you have any further questions, feel free to ask them and we shall be glad to advise you further.

Yours very truly,

FRANK D. BIANCO
Assistant Attorney General

FDB:MKB

July 5, 1957

Mr. Richard F. Branco
Ida County Attorney
Ida Grove, Iowa

Dear Mr. Branco:

This is to acknowledge receipt of your communication of June 10 directed to Attorney General Erbe and relating to the subject of weeds, more particularly to a weed known as "musk thistle". You inquire if our office has ever issued an opinion interpreting the phrase, "new weed appearing in the state", as it appears in Section 317.8, subparagraph 2, Code of Iowa, 1954. The short answer to your inquiry is that up to now we have not.

Under the provisions of subparagraph 2 of Section 317.8, Code of Iowa, 1954, the State Secretary of Agriculture may, upon the recommendation of the state botanist temporarily declare noxious any new weed appearing in this state which possesses the characteristics of a serious pest.

It is to be noted from the specific wording of the statute that the Secretary of Agriculture must first have the recommendation of the state botanist before acting in the premises and temporarily declaring "any new weed" noxious. It does not appear in your specific case that such a recommendation as to the weed "musk thistle" has ever been made to the Secretary.

Furthermore, the language of the statute, "any new weed appearing in the state", seems to be clear and unequivocal. "Musk thistle" is not a "new weed" appearing for the first time in this state. It was prevalent in my home county when I was a small boy, forty years ago, and, I might add, considered as a pest. However, our Legislature has not seen fit to denominate it as either a primary or secondary noxious weed at any time. If it has in fact become so obnoxious as to constitute a serious problem, the matter should be brought to the Legis-

57-7-3

lature's attention for legislative action.

Under the factual situation you present, the Secretary of Agriculture would have no authority under Section 317.8 of our Code to temporarily declare "musk thistle" a noxious weed.

Very truly yours,

RRRD/fm

RAPHAEL R. R. DVORAK
First Assistant Attorney General

HEADNOTE: House File 285 applies not only to divorce actions, but to all pending divorce actions.

July 5, 1957

Honorable George H. Sackett
Judge of the Fifth Judicial District
Perry, Iowa

Dear Judge Sackett:

In our telephone conversation of July 2, 1957 you submitted the following inquiry:

"Does the sixty (60) day waiting period provided for in House File 285, Acts of the 57th General Assembly, in regard to divorce actions apply to those cases presently pending before the Court?"

House File 285, as enacted by the 57th General Assembly, is as follows:

"Section 1. Chapter five hundred ninety-eight (598), Code 1954, is hereby amended by adding the following new section:

"'Any law or rules of procedure to the contrary notwithstanding, no decree of divorce shall be granted in any divorce proceedings before sixty (60) days shall have elapsed from the day the original notice is served, or from the last day of publication of notice, or from the date that waiver or acceptance of original notice is filed. Provided, however, the court may in its discretion, on written motion supported by affidavit setting forth grounds of emergency or necessity and facts which satisfy the court that immediate action is warranted or required to protect the substantive rights or interests of any party or person who might be effected by the decree, hold a hearing and grant a decree of divorce prior to the expiration of the sixty (60) day period, provided that requirements of notice have been complied with. In such case the grounds of emergency or necessity and the facts with respect thereto shall be recited in the decree unless otherwise ordered by the court.'"

The question is determined by the intent, either expressed or implied, of the legislature. The general rule is stated in 82 C.J.S. 993, as follows:

57-7-4 X

> "Where substantive rights would be affected, no statute should be so construed as to give it a retroactive effect so as to affect pending litigation, unless a clear intent to the contrary is plainly manifest, either by express declaration or necessary implication. However, a remedial or procedural statute not impairing or affecting contractual obligations or vested rights applies to proceedings begun after its passage, although it relates to acts done previous thereto, and to pending actions, in the absence of language indicating a legislative intent to the contrary."

We do not feel that it could be seriously argued that one has a vested right to a divorce in twenty (20) days as was formerly provided as opposed to sixty (60) days as now provided by House File 285. It seems equally clear that we are dealing with a procedural or remedial matter rather than a substantive right as the question involves only the time at which a decree of divorce may be entered. A procedural or remedial matter often affects, and in this case does affect, a substantive right but this would not change the nature of the Act.

In the case of Appleby v. Farmers State Bank of Dows, 244 Iowa 288, 295, the Court said:

> "* * *First, for the purpose of determining the legislative intent as to retroactive or prospective application, the court will look at the language of the statute; second, it will consider the evil to be remedied; and third, it is of importance whether there was a previously existing statute governing or limiting the allotted period and so whether if the statute under analysis be held not retroactive, there will be any remedy for past conditions which the legislature has found objectionable."

Very pertinent language of the statute is that which reads:

> "'Any law or rules of procedure to the contrary notwithstanding, no decree of divorce shall be granted in any divorce proceedings. . .'"

In discussing the legislative intent of the provision "any provision in any lease or contract to the contrary notwithstanding", the Court said in the case of Aetna Ins. Co. v. Chicago, G.W.R. Co., 190 Iowa 487, 489.

> "* * *This plainly appears from the last clause of the law, declaring the liability, 'any provision in any lease or contract to the contrary notwithstanding.' To construe this as contended by appellee would exact the addition to the words 'any lease' of the words, 'not executed prior to the enactment of this statute,' or 'not heretofore executed.' The expression 'any provision in any lease or contract' is broad enough to include every release from liability, regardless of form, and every lease or contract, regardless of when made, if existing at the time of the injury or destruction. There is nothing in the language of the statute restricting its meaning to leases or contracts of a subsequent date."

The above case was quoted and followed in the Appleby case, supra.

We feel that the same reasoning must be used in interpreting House File 285. Not to apply House File 285 would require the addition to the words "any divorce proceedings" of the words "commenced subsequent to the date of this act". The Court has twice refused to make a similar addition.

In the case of Nesmith v. Black, 174 Iowa 636, 643, the Court said:

> "It is, of course, true, as has been held repeatedly, that, in construing a statute, it is important to consider the state of the law before it was enacted and the evil it was designed to remedy, and that it is the business of courts to so construe an act as to suppress the mischief and advance the remedy."

The condition or evil which the statute was designed to remedy was that of the "speedy" and often insufficiently considered divorce. The construction that will most nearly "suppress the mischief and advance the remedy" is to apply the sixty (60) day waiting period to both future and pending divorce proceedings.

If the act under analysis be held not retroactive, there will be no remedy for the past conditions which the legislature has found objectionable in those divorce cases pending before the courts. Such a construction is to be avoided. (See quotation from Appleby case, supra.)

According to numerous cases annotated at 34 Words and Phrases, page 81 to page 108 and at pages 27 to 31 of the pocket part thereto, the phrase "a proceeding" is limited in application to matters in court. It could be argued that in using the expression "any divorce proceeding" the legislature has shown an express intent that House File 285 apply to pending divorce cases as such are the only divorce cases "in court".

It is our opinion that House File 285 applies not only to divorce actions commenced in the future, but to all pending divorce actions. It is noted that there is contained in House File 285 a method and exception whereby a divorce decree may be entered within the sixty (60) day period. This exception would also apply to pending divorce actions.

At your request I am taking the liberty of sending a copy of this opinion to Judge Prall and Judge Wilkinson.

Respectfully yours,

JAMES H. GRITTON
Assistant Attorney General

JHG:md
CC: Honorable S. E. Prall
Honorable Phil R. Wilkinson

July 8, 1957

Mr. Carlos P. Romulos
Embassy of the Philippines
Washington, D. C.

Dear Sir:

Your letter of April 17, 1957, has been referred to this office for answer.

You inquire as to the following:

"To assist my Government in implementing the foregoing provisions of the Agreement, I would appreciate it if you could furnish me with the provisions of existing laws in your State affecting the following:

"1. Rights of citizens of the Philippines or corporations or associations controlled by citizens of the Philippines with respect to the disposition, exploitation and utilization of natural resources and with respect to the operation of public utilities.

"2. Rights of Filipino citizens, corporations and associations to acquire or own land; and

"3. Rights of Filipino citizens, corporations and associations to engage in business activities, particularly in importing and exporting."

To the best of our knowledge, the State of Iowa has no laws directed solely toward citizens or corporations of the Philippine Republic.

Citizens and corporations of the Philippines would be subject, however, to the general laws of the State of Iowa relating to aliens. For your information we are enclosing a tear sheet of Chapter 567, Code of Iowa, 1954, relating thereto.

57-7-5 X

We trust that this will answer your inquiries.

Very truly yours,

JAMES H. GRITTON
Assistant Attorney General

JHG:MKB
Encls.

July 9, 1957

Mr. N. S. Gould
Delaware County Attorney
Manchester, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 27th ult. in which you submitted the following:

> "We recently had the situation in which some minors inherited personal property from an estate. The Court appointed a guardian for several of said minors and the Clerk of Court carried the guardianship or guardianships under one file number. The question arose as to whether there would be only one $5,000.00 exemption for the several minors or if there would be a $5,000.00 exemption for each of the minors although there was only one guardianship file set up in the Clerk's office and only one guardian. The exemption to which I refer is covered in Section 429.4 of the 1954 Code of Iowa.
>
> "Your opinion in this matter would be sincerely appreciated. Thank you very much."

In reference thereto I advise you that in my opinion the $5,000.00 exemption authorized under the provisions of Section 429.4, 1954 Code, is allowable to each of the minors. This Section provides as follows:

> "Deduction of debts. In making up the amount of moneys and credits, corporation shares or stocks which any person is required to list, to have listed or assessed, including actual value of building and loan shares, he will be entitled to deduct from the actual value thereof the gross amount of all debts in good faith owing by him, and in addition thereto an amount of five thousand dollars."

57-7-6 X

You will note that the exemption is available to each person. The fact that the guardianship is under one file does not have any effect to override the plain words of this statute.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

July 9, 1957

Mr. C. B. Akers
Auditor of State
B u i l d i n g

Attention: Mr. Earl C. Holloway

Dear Sir:

This will acknowledge receipt of yours of the 5th inst. In which you submitted the following:

> "We have received a request from our examiner, Mr. J. E. Walker, for an opinion regarding the following:
>
> "A federal tax man has asked the recorder for certified copies of deeds and mortgages of parties owing federal tax. There has been a request for possibly ten or twelve different people. We understand the federal man would furnish the names and the number of instruments. Should the recorder charge for this service.
>
> "An early reply would be appreciated."

In reply thereto I advise you that the recorder should charge for this service. He is entitled to make this charge under the provisions of Section 79.3, Code 1954, providing as follows:

> "General fees. Any officer legally called on to perform any of the following services, in cases where no fees have been fixed therefor, shall be entitled to receive:
>
> "1. For drawing and certifying an affidavit, or giving a certificate not attached to any other writing, twenty-five cents.
>
> "2. For affixing his official seal to any paper, whether the certificate be under seal or not, thirty-five cents.

57-7-7 X

"3. For making out a transcript of any public papers or records under his control for the use of a private person or corporation, or recording articles of incorporation, for every one hundred words, ten cents."

No provision appears to exist that would authorize the certification of these instruments without fee or compensation. It is true, according to Sections 335.10 and 335.11, that no fee or compensation is required for certified copies of public records required to perfect the claims of any honorably discharged soldier or other claim upon the government or for the filing or recording of any Federal notice of lien or release of the lien. The fact that these are the only exceptions to the statutory fees would appear to exclude other free services.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

July 9, 1957

Mr. C. B. Akers
Auditor of State
B u i l d i n g

Attention: Mr. Earl C. Holloway

Dear Sir:

This will acknowledge receipt of yours of the 17th ult. in which you submitted the following:

> "The following questions were asked at our recent school of instruction in all the districts in regard to House File No. 159.
>
> "1. Section 607.5-1 was amended to read as follows: 'For each day's service or attendance in court of record--five dollars, and for each mile traveled from his residence to the place of trial, for each day's service and attendance, ten cents.'
>
> "The question is, how much mileage can the petit juror draw. Would it be ten cents a mile from his residence to the place of trial or ten cents for every mile traveled each day.
>
> "2. Section 607-5-3 was amended to read as follows: 'Grand Jurors shall receive for each day's service or attendance seven dollars and for each mile traveled each day from his residence to the place of attendance and in the performance of their duties, seven cents.'
>
> "The question is, can the Grand Juror draw seven cents a mile for each mile traveled for each day from his residence to the place of attendance and returning home.
>
> "We will appreciate an opinion at your earliest convenience."

57-7-8 X

In reply thereto I advise as follows.

1. In answer to your question #1 I advise that plainly mileage allowance for petit jurors as provided by the foregoing Section 607.5-1 is limited to travel from the residence of the juror to the place of trial for each day's service and attendance. The statute makes no provision for payment for travel both ways.

2. In answer to your question #2 with respect to the mileage of grand jurors under the provisions of Section 607-5-3, I would advise that according to the plain terms of this statute the mileage allowance for grand jurors is for travel each day from the place of residence to the place of attendance where he performs his duty. No allowance is authorized for travel from the place of performance of his duties to his residence.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

July 11, 1957

To Co Atty?
Attn.

Mr. H. T. Lewis
Assistant County Attorney
Davenport, Iowa

Dear Sir:

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

> "The Iowa State Highway Commission proposes to construct a road to be known as Interstate Highway No. 01 across certain property in Scott County. As yet, of course, the Highway Commission has not secured the necessary right-of-way for the construction of this highway. In connection with its proposal to construct this road the Highway Commission desires to enter upon certain private property where it is proposed to construct the road. The owners in question of certain of this property have refused to voluntarily let the Highway Commission come on to their property for the purpose of examining and surveying same, and for the taking of soil samples therefrom.
>
> "The Highway Commission has, pursuant to Section 489.14 of the 1954 Code of Iowa, as amended by House File 160 of the 57th General Assembly, made a written statement and request under oath to the Board of Supervisors of Scott County, Iowa, requesting that said Board issue to the Iowa State Highway Commission a permit to allow employees of the Commission to enter upon the real estate in question for the purpose of examining and surveying, and to take and use thereon any vehicle or equipment necessary to make the examination and/or survey.
>
> "The opinion of your office is requested as to whether or not the Board of Supervisors has the power under the above mentioned statute as amended, to issue such a permit for the purposes set forth above.

57-7-10 X

"Inasmuch as the Scott County Board of Supervisors is holding up action on these requests, pending receipt of an opinion from your office, an early reply would be very much appreciated."

In reply thereto I advise as follows. Section 489.14 of the 1954 Code provides the following:

"Eminent domain - procedure. Any person, company, or corporation having secured a franchise as provided in this chapter, shall thereupon be vested with the right of eminent domain to such extent as may be necessary and as prescribed and approved by the board or commission, not exceeding one hundred feet in width for right of way and not exceeding one hundred sixty acres in any one location, in addition to right of way, for the location of electric power generating plants and electric substations to carry out the purposes of said franchise. A homestead site, cemetery, orchard or schoolhouse location shall not be condemned for the purpose of erecting an electric power generating plant or electric substation. If agreement cannot be made with the private owner of lands as to transmission line, electric power generating plants or electric substations, the same proceedings shall be taken as provided for taking private property for works of internal improvement."

Obviously the foregoing provisions do not invest the Highway Commission with authority for its proposals and acts as described in your letter. Such proposals and acts, if they have any basis in law, arise out of the amendment to the foregoing Section 489.14, designated as House File 160, Acts of the 57th General Assembly, and now appearing as Chapter 240, which provides as follows:

"Section 1. Section four hundred eighty-nine point fourteen (489.14), Code 1954, is hereby amended by adding thereto the following:

"'Any person, company or corporation proposing to construct a transmission line or other facility which involves the taking of property under the right of eminent domain and desiring to enter upon the land, which it proposes to appropriate, for the purpose of examining or surveying the same, shall first file with the Iowa state commerce commission or with the county board of supervisors in the county the land is situated, a written statement under oath setting forth the proposed routing of the line or facility including a description of the lands to be crossed, the names and addresses of owners, together with request that a permit be issued by said commission or board of supervisors authorizing said person, company or corporation or its duly appointed representative to enter upon the land for the purpose of examining and surveying and to take and use thereon any vehicle and surveying equipment necessary in making the survey. Said commission or board of supervisors shall within ten (10) days after said request issue a permit, accompanied by such bond in such amount as the commission or board of supervisors shall approve, to the person, company or corporation making said application, if in its opinion the application is made in good faith and not for the purpose of harassing the owner of the land. If the commission or the board of supervisors is of the opinion that the application is not made in good faith or made for the purpose of harassment to the owner of said land it shall set the matter for hearing and it shall be heard not more than twenty (20) days after filing said application. Notice of the time and place of hearing shall be given by said commission, or board of supervisors, to the owner of said land by registered mail with a return receipt requested, not less than ten (10) days preceding date of hearing.

"Any person, company or corporation that has obtained a permit in the manner herein prescribed may enter upon said land or lands, as above provided, and shall be liable for actual damages sustained in connection with such entry. An action in damages shall be the exclusive remedy.

> "Sec. 2. This Act being deemed of immediate importance shall be in full force and effect upon its publication in the Belmond Independent, a newspaper published at Belmond, Iowa, and in the Earlham Echo, a newspaper published at Earlham, Iowa."

In the view that the intention of the Legislature controls the interpretation of its acts, in the situation presented in securing that intention the rule following stated in Sutherland Statutory Construction, 3rd Edition, §5015,

> "One of the most available extrinsic aids to the interpretation of statutes is the action of the legislature on amendments proposed to a bill. Both the state and federal courts will refer to proposed changes in a bill in order to interpret the statute into which it was finally enacted. The journals of the legislature are the usual source for this information. Generally the rejection of an amendment indicates that the legislature does not intend the bill to include the provisions embodied in the rejected amendment. However, such rejection may occur because the bill in substance already includes those provisions. Other interpretive aids may indicate that this is the case.
>
> "Adoption of an amendment is evidence that the legislature intends to change the provisions of the original bill.* * *"

is applicable. When so applied it appears that the original House File 160, Acts of the 57th General Assembly, provided as follows:

> "Section 1. Chapter four hundred eighty-nine (489), Code 1954, is hereby amended by adding thereto the following:
>
> "'Any person, corporation, or other body having the right to exercise the right of eminent domain

> for any public use under any statute, existing or hereafter passed, and desiring to exercise such power, shall do so only in the manner provided herein.
>
> "'Before proceeding to condemn, such person, corporation, or other body may enter upon any land for the purpose of examining or surveying the property sought to be appropriated or acquired and may take and use thereon any vehicle and surveying equipment necessary to make such survey.
>
> "'Any person, corporation, or other body entering upon said land shall be liable for actual damages sustained in connection with such entry. An action for damages shall be the exclusive remedy.'"

Obviously such a legislative act would have bestowed upon the Highway Commission the power it now seeks to exercise. It is a body having control of primary roads, with the power to condemn for the maintenance and establishment thereof. See Section 306.13, Code 1954. This bill failed to pass and the bill adopted in lieu thereof, being now Chapter 240, Acts of the 57th General Assembly, limited the applicability to a person, company or corporation proposing to construct transmission lines or other facilities. Clearly establishing a highway is not a facility within the meaning of this statute.

I am of the opinion, therefore, that your Board of Supervisors does not have the power under the statutes here exhibited to issue the permit applied for.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

July 11, 1957

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

Dear Sir:

This will acknowledge receipt of yours of the 26th ult. in which you submitted the following:

> "House File 573, Section 1, Acts of the 57th General Assembly, appropriates the total amount of $16,000,000.00 to the Board of Control institutions, and Section 8 of the same Act appropriates the amount of $613,082.00 in the wording, and the detail of which totals $613,002.00.
>
> "I respectfully request an opinion as to whether or not the appropriation provided by Section 8 is to be in the amount of $613,082 or $613,002.00, and in the event that you should rule it is to be $613,082.00, which item of the detail is the additional $80.00 to be added to?"

In reply thereto I advise that I am of the opinion that the legislative intent is expressed in the language of the legislative act which provides for the appropriation. Thus the appropriation in question aggregates the sum of $613,082.00 annually. The particularizing of use thereof is not the appropriation and while representing an intention of the Legislature as to how the money may be spent, this does not control the amount of the appropriation. The surplus difference between the

Board of Control
H.F. 573, Sec. 8
Sec. 8, Ch. 262, Acts 57th G.A.

57-7-12 X

appropriation and the specific items of use thereof, being an appropriation, its use is subject to the discretion of the Board of Control within the general purposes of the appropriation.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

July 12, 1957

Honorable Melvin D. Synhorst
Secretary of State
B u i l d i n g

Dear Sir:

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

> "Your opinion is respectfully requested relative to the fees to be charged for the renewal of Domestic and Foreign Corporations under the provisions of House File 240, Acts of the Fifty-seventh General Assembly of Iowa.
>
> "If a Corporation renews subsequently to the effective date of House File 240 for a period of twenty years, will the fees be the same as they were prior to the enactment of House File 240 or will the additional ten per cent charge be applicable? In other words does the ten per cent provision apply only to corporations which renew for a fractional part of twenty years?"

In reply thereto I advise you as follows. Your inquiry arises out of Sections 2 and 3 of the designated House File which provides as follows:

> "Sec. 2. Section four hundred ninety-one point twenty-eight (491.28), Code 1954, is amended by inserting after the first sentence thereof a new sentence as follows: 'The fees for renewal of corporations for a period of years shall be that proportionate part of the fees prescribed by section four hundred ninety-one point eleven (491.11) of the Code for newly organized corporations as the number of years of such renewal bears to the maximum number of years for which such corporation might be renewed pursuant to the provisions of this chapter plus ten percent (10%) of such fee paid.'

HF 240
6L 47, Acts 57th Ga

57-7-13 X

> Sec. 3. Section four hundred ninety-four point eight (494.8), Code 1954, is amended by inserting after the word 'hereunder' in line three (3) thereof the following: 'for the same periods permitted by the provisions of section four hundred ninety-four point seven (494.7) of the Code, or for shorter periods'; and by striking from lines twelve (12) and thirteen (13) thereof the following: 'fees as set forth in section 494.4' and inserting in lieu thereof the following: 'the necessary fees'; and by inserting after the first sentence thereof a new sentence as follows: 'The fees hereunder shall be that proportionate part of the fees prescribed by section four hundred ninety-four point four (494.4) of the Code for the original issuance of a permit as the number of years of such renewal bears to the maximum number of years for which such permit might be renewed pursuant to the provisions of this section plus ten percent (10%) of such fee paid'."

I am of the opinion that the ten per cent provision of the foregoing sections applies only to corporations which renew for a fractional part of the twenty years. I so conclude because the formula prescribed for determining the renewal fee can only be applied to corporations renewing for periods of less than twenty years. Application of the formula for corporations renewing for twenty years would find no proportionate time as between the amount of renewal time and the maximum number of years for which renewal may be had, and therefore no proportionate fee would result.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

July 12, 1957

Mr. C. B. Akers
Auditor of State
B u i l d i n g

Attention: Mr. Earl C. Holloway

Dear Sir:

This will acknowledge receipt of yours of the 14th ult. in which you submitted the following:

> "We have received the following letter from Mr. J. C. Russell, chairman of the board of Hamilton county.
>
> "'You will recall that some time ago we had a question raised as to allowing mileage for our County Attorney from his residence in Jewell, Iowa, to Webster City, Iowa. We were able to get that matter straightened out. However, he has now closed his office in Webster City and has his own office in Jewell.
>
> "'We would appreciate it very much if you would ascertain if:
>
> "'1. We can allow him part of his office rent in Jewell from County Funds.
>
> "'2. If we can allow any part of his stenographic expenses from County Funds.
>
> "'3. We can allow items such as charges for lights, heat, telephone, etc. for his office in Jewell.
>
> "'4. He can legally use County-owned furniture which was provided for him for use in his office in Webster City in his office in Jewell.'
>
> "May we have an opinion on the above at your earliest convenience."

57-7-14 X

In reply thereto I advise as follows. The duty and power of the Board of Supervisors in the furnishing of an office and supplies to county officers, including the County Attorney, is exhibited in Sections 332.9 and 332.10, Code 1954, as follows:

> "332.9 Offices furnished. The board of supervisors shall furnish the clerk of the district court, sheriff, recorder, treasurer, auditor, county attorney, county superintendent, county surveyor or engineer, and county assessor, with offices at the county seat, but in no case shall any such officer, except the county attorney, be permitted to occupy an office also occupied by a practicing attorney."

> "332.10 Supplies. The board of supervisors shall also furnish each of said officers with fuel, lights, blanks, books, and stationery necessary and proper to enable them to discharge the duties of their respective offices, but nothing herein shall be construed to require said board to furnish any county attorney with law books or library."

On the basis of the foregoing statutes and previous interpretive opinions thereof, I advise as follows:

1. The answer to your question #1 is in the negative.

2. The answer to your question #2 is in the affirmative, where employment of the stenographer is approved and the amount of of allowance for the services fixed by the Board of Supervisors.

3. In answer to your question #3 I advise that telephone service at Jewell is allowed. Charges for light, heat, etc. for the office at Jewell are not properly allowed.

4. In answer to your question #4 I find no authority for the use of County owned furniture by a County Attorney where he

operates his office at a place other than the county seat.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

July 13, 1957

Mr. Charles E. Sayre
State Conservation Commission
L o c a l

Dear Sir:

Your letter of June 12, 1957, reads as follows:

"We enclose herewith a statement rendered to us by Clay County, Iowa. While it does not so state we know that it is for improvement by gravelling of the county road adjacent to the lands described which do belong to the state and are under this commission's jurisdiction.

"In the past we have sent such claims to the Executive Council for payment under the provisions of Sec. 308.5 of the Code.

"Chap. 103 of the 54th G. A. amended Chap. 308 (and some others) by a reclassification of roads, but seems not to have repealed Secs. 308.1 and 308.5.

"The lands described were purchased for hunting and are so posted and are certainly not considered by this commission as state park lands even though the proposition has sometimes been argued with us that lands used for recreational purposes are parks.

"We believe that this claim should not be required to be paid out of this commission's funds, but are asking your opinion."

In addition to the amendments of Chapter 103, Acts of the 54th General Assembly, Chapters 306 and 308, Code of 1954, have been again amended by Chapter 137, Acts of the 57th General Assembly. Pertinent parts of Code sections involved with these latest amendments will read as follows:

57-7-15 X

"306.1 Classification of highways. The highways of the state are hereby classified into four systems to wit: the primary road system, the institutional road system, the secondary road system and the state park road system.

"306.2 (2) Institutional roads. The term 'institutional roads' shall include those highways, either inside or outside of cities and towns, upon or adjacent to lands belonging to the state at any state institution.

" * * * *

"(6) State park roads. The term 'state park roads' shall include all those highways and roads, either inside or outside of cities and towns, upon land belonging to the state at any state park.

"308.1 Separate districts. Highways on land of the state and highways on which such lands abut shall constitute a separate road district for each state institution in connection with which such lands are used, and shall be under the jurisdiction of the board in control thereof.

"308.4 Maintenance and improvement. The roads, bridges and culverts within or adjacent to any such district and roads included in the state park system as defined in section three hundred six point two (306.2) of the Code as amended shall be maintained, repaired, and improved under the direction of the board which is in control of said lands, ...

"308.5 Improvement by city or county. When a city, town, or county shall drain, oil, pave, or hard surface a road which extends through or abuts upon lands owned by the state, the state, through the executive council, shall pay such portion of the cost of making said improvement through or along such lands as would be legally assessable against said lands were said lands privately owned, which amount shall be determined by said council, or board. When payments are to be made by the state executive council they shall be from any funds of the state not otherwise appropriated."

A reading of the above statutes, as amended, clearly shows that this section of road is not a part of the "state park road" system as it is not upon land belonging to the State at any state park. The claim, being based upon a section of road not now, if ever, under the jurisdiction of the Commission, is not required to be paid out of the Commission's funds.

Very truly yours,

JAMES H. GRITTON
Assistant Attorney General

JHG:MKB

July 17, 1957

Mr. Arthur H. Johnson
Webster County Attorney
Fort Dodge, Iowa

Dear Sir:

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

"I am requesting an official opinion from your office on the following questions:

"(1) Does a person, firm, corporation, or company which operates an urban transit system necessarily have to own the bus, car, or vehicle used in the transportation of passengers in order to qualify under the recent enactment known as House File #372?

"Section 2 of said Act provides that any person, firm, corporation or company operating such a system must pay a registration fee of $25.00 for each bus, car, or vehicle used in the transportation of passengers. Said Section further provides that no other provision of law providing for the payment of taxes, registration, or license fees for vehicles shall be applicable to any bus, car, or vehicle for the transportation of passengers owned and operated by any urban transit company.

"(2) May the $25.00 fee provided for in said Act be pro-rated according to the time of year the equipment is purchased, or must the $25.00 registration fee be paid regardless of the time of the acquisition of such equipment? If said registration fee may be pro-rated, what circumstances must exist in order to do so?

"(3) For what period is the registration fee applicable?

57-7-16 X

> "The legislation provides that the Act shall be in force and effect for the biennium beginning July 4, 1957, and ending June 30, 1959. Apparently the $25.00 registration fee payable in 1957 would be for the remaining period in 1957 after July 4, 1957, and the registration fee payable in 1959 would be for the period ending June 30, 1959.
>
> "Inasmuch as the problems above are now confronting the officers of this county, we would appreciate your official interpretation at the earliest opportunity."

In reply thereto I enclose herewith copy of opinion issued May 24, 1957, to Mr. Dewey Butterfield which is applicable to the problems you submit. In addition, however, I would advise you as follows.

(1) Insofar as your question #1 is concerned, it is clear that the Act is applicable to any person, firm, corporation or company operating an urban transit system. This is the language of Section 2 of the Act. The second sentence of Section 2 to which you refer does not limit the application of the Act to persons, firms, corporations or companies owning an urban transit line.

(2) In answer to your question #2 I would advise you that there is no provision, express or implied, for prorating the $25.00 fee. Time of purchase or acquisition of equipment has no bearing upon the obligation to pay the fee.

(3) In answer to your question #3 I am of the opinion the fee is applicable for the period July 4, 1957, to June 30, 1959. Thus two annual fees of $25.00 each are payable.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

HEADNOTE: SCHOOLS: A school district has no authority to pay costs of an appeal from the decision of the State Department of Public Instruction when it was not party to the proceedings before the State Department of Public Instruction.

July 17, 1957

Mr. Robert S. Bruner
Carroll County Attorney
118½ West Fifth Street
Carroll, Iowa

Dear Sir:

Receipt is acknowledged of your letter of July 5 as follows:

"A recent decision by the State Superintendent of Public Instruction reversed the action of the County Boards of Education of Carroll, Crawford, Shelby, and Audubon counties in the formation of a school district known as the Manning Community School District.

"The School Board of the Manning Independent School District is very anxious that an appeal be taken from this ruling of the State Superintendent. Of course, such an appeal would have to be taken by the Carroll County Board of Education.

"The County Board of Education is willing to take the appeal if it can be taken at no expense to the county for attorney's fees, court costs and other related expenses.

"The Manning School Board is willing to pay these expenses if it is legal for it to do so. May we please have the opinion of your office as to whether or not the School Board for the Manning Independent School District may legally spend funds of the district for the prosecution of an appeal."

Apparently the local school board was not a party to the appeal heard by the State Superintendent of Public Instruction. I am unable to find any statutory authority, express or implied, whereby a local school district is empowered to underwrite the cost of appealing a matter to which it was not a party.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

57-7-18 X

HEADNOTE: State Plumbing Code fund is not a public fund furnished by the state and therefore the "State Plumbing Code", published at the expense of this fund, need not be sold at cost.

July 17, 1957

Mr. P. J. Houser, Director
Division of Public Health Engineering
Iowa State Department of Health
L o c a l

Dear Sir:

In your letter, dated July 1, 1957, you set out the following facts and ask the following questions:

"Under authority provided in Section 135.11, Code of Iowa, 1954, this Department publishes a code of rules governing the installation of plumbing in cities and towns. The cost of publishing this code is covered by Section 135.15 which provides for a separate fund in the state treasury known as the 'Plumbing Code Fund'.

"House File 139, Acts of the 57th General Assembly, requires certain publications to be sold and distributed at cost when such publications are paid for by public funds furnished by the State and contain reprints of statutes or departmental rules, or both.

"The question now arises whether the State Plumbing Code Fund is a public fund furnished by the State which would require the State Plumbing Code publication to be sold at cost by this Department.

"The second question is, if you find that we are required to sell the State Plumbing Code, should the provisions of House File 139 apply to those pamphlets actually published prior to July 4, 1957, the effective date of House File 139."

The pertinent parts of Section 135.11 and Section 135.15, Code of Iowa, 1954, read as follows:

"135.11 Powers and duties. The commissioner of public health shall be the head of the 'State Department of Health', which shall:

"* * * * * *

"8. Establish, publish, and enforce a code of rules governing the installation of plumbing in cities and towns and amend the same when deemed necessary in the manner prescribed in section 135.12. Said rules and amendments shall be published in the same manner as other rules of the department."

57-7-19 X

"135.15 Plumbing code fund. Cities and towns licensing plumbers shall pay to the treasurer of state one dollar for each license issued and twenty-five cents for each renewal thereof. The fees so received shall be kept by the treasurer of the state in a separate fund to be known as the plumbing code fund. Such fund shall be used in paying the claims arising under section 135.14 and in paying the cost of printing the code of rules governing the installation of plumbing, plumbers' license and application blanks." (Emphasis supplied.)

The pertinent part of Section 2, House File 139, Acts of the 57th General Assembly, is as follows:

"* * * * * *

"'When such publications paid for by public funds furnished by the state, contain reprints of statutes or departmental rules, or both, they shall be sold and distributed at cost by the department ordering same.* * *'" (Emphasis supplied.)

By Section 135.15, Code of Iowa, 1954, the Plumbing Code Fund is furnished through payments by cities and towns and is not furnished by the State. The publication not being paid for by public funds furnished by the state, it is not within the expressed provision of House File 139.

The intent of House File 139 was to relieve the State of the financial burden of "free" distribution of publications containing reprints of statutes or departmental rules, or both, and reports of state departments. This intent is clearly evident from a reading of the Act. The publication, "State Plumbing Code", has not been at the financial expense of the State, but, rather at the expense of cities and towns and ultimately at the expense of those procuring a plumbing license. This publication was therefore not one of those publications within the intent of the legislature in enacting House File 139.

To hold that the publication, "State Plumbing Code", is such a publication as contemplated by House File 139 would require either an implied repeal of Section 135.15 insofar as that section provides for a payment of the cost of printing the code of rules governing the installation of plumbing; or for a double payment, once from the Plumbing Code Fund and once from the purchaser. In regard to the first, implied repeals are to be avoided when two acts can be construed together; and, in regard to the second, it would be unreasonable to demand double payment.

It is, therefore, my opinion that the "State Plumbing Code" publication need not be sold at cost by your Department.

In view of my answer to your first question, an answer to your second question is not necessary.

Very truly yours,

JAMES H. GRITTON
Assistant Attorney General

JHG;md

July 18, 1957

Mr. Claude R. Cook, Curator
State Department of History and Archives
L o c a l

Dear Sir:

You orally inquired of me concerning the possibility of tax exemption for a piece of real estate which would theoretically be leased to the State of Iowa for a nominal consideration (one dollar per year) for a long term of years and following said term of years said property would be conveyed to the State of Iowa.

I have had an opportunity to do some research on this problem and beg to advise you that in my opinion the provisions of Section 427.1 of the Code of Iowa and the case authorities relating thereto hold that before a tax exemption is permitted by our law, title must be held in the State of Iowa as distinguished from a mere leasehold interest.

I cite for your assistance two fairly recent cases concerning the problem where the Federal government took over certain property within the State on a lease basis, the same being Boss v. Polk County, 236 Iowa 304, and National Investment Company v. Harrison, 238 Iowa 197.

It thus appears that before the tax exemption would apply, title rather than a leasehold interest must be in the State of Iowa.

Yours very truly,

NORMAN A. ERBE
Attorney General

NAE:md

57-7-20 X

July 18, 1957

Mr. M. L. Abrahamson
Treasurer of State
B u i l d i n g

Attention: Mr. Charles R. Dayton
Deputy Treasurer

Dear Sir:

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

"Section 39, Chapter 1, Actions of the 57th General Assembly, provides an appropriation from the General Fund for the office of the Treasurer of State for salaries, support, maintenance and miscellaneous purposes for each year of the biennium ending June 30, 1959.

"In past years, this department has been absorbing the costs of redeeming warrants and other administrative costs in connection with services rendered other departments. The principle involved is that the General Fund of the state should not bear the entire cost of major administrative expense where it is permissible for administrative expense to be paid from other funds.

"Section 1, Chapter 13, Acts of the 57th General Assembly, reads as follows:

"'Section 1. There is hereby appropriated from the Iowa public employees retirement system fund of the state to the employment security commission for each year of the biennium beginning July 1, 1957, and ending June 30, 1959, the sum of one hundred forty-eight thousand one hundred twenty dollars ($148,120.00) or so much thereof as may be necessary to pay the costs of the administration of chapter ninety-seven B (97B), Code 1954.'

57-7-21 X

"I respectfully request an opinion as to whether or not it is permissible for this department to charge the Iowa Public Employees' Retirement System Fund for the cost of redeeming warrants, investing expense and other costs incurred by this office in connection with the administration of this Act.

"In recent years, the state comptroller has charged various state departments for the cost of writing state comptroller warrants for that part of such expense which is provided for by federal funds. For the most part this has been applicable to the various programs administered by the Department of Social Welfare and the Employment Security Commission. The various programs are as follows:

Department of Social Welfare
- Old Age Assistance
- Aid to Dependent Children
- Aid to the Blind

Employment Security Commission
- Unemployment Compensation Benefits
- Unemployment Compensation Veterans Benefits
- Unemployment Compensation Federal Employees

"I respectfully request an opinion as to whether or not it is permissible for this department to charge the above accounts for the cost of redeeming warrants in connection with the administration of these programs."

In reply thereto I would advise that in my opinion it is permissible for the State Treasurer to charge the Employment Security Commission and the Department of Social Welfare and other departments who occupy like positions as far as the facts set forth in your letter are concerned for the cost of redeeming warrants in connection with the administration of their several programs. In reply to a similar request from the State Comptroller I stated in a letter of November 30, 1953, the following:

"In reply thereto I would advise you that in my opinion it is permissible for your Department to charge the Iowa Public Employees' Retirement System during the biennium ending June 30, 1955, for the cost of printing and writing State Comptroller warrants, in connection with the administration of that act.

"Chapter 72 of the 55th General Assembly by Section 7 thereof creates the Iowa Public Employees' Retirement Fund, and the fund consists of moneys collected under this Chapter. Such moneys include tax deductions from wages of the employees by the employer which may be the State, county, city and etc. to be matched by the employer and forwarded to the Employment Commission and deposited with the Treasurer of the State and credited to the Public Employees' Retirement Fund. Therefore, consistent with the practice of charging other State Departments for the cost of writing such warrants where part of the expense is provided by federal funds such practice would include charge for writing warrants payable out of the fund which is composed of moneys not only the State, but of other sub-divisions thereof."

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

COUNTY ZONING: Powers of Board of Supervisors are confined to territory outside the limits of cities and towns.

July 18, 1957

Mr. Jack W. Frye
Floyd County Attorney
Charles City, Iowa

Dear Sir:

Receipt is acknowledged of your letter of July 15 as follows:

"At the request of Keith S. Noah, City Attorney of Charles City, Iowa, and Robert Thomson, Executive Secretary of the Charles City Chamber of Commerce, I am writing for your informal opinion concerning the following:

"The Charles City Industrial Development Corporation is desirous of contracting for a Fantus Survey of Charles City, which survey would be similar to the one made for the State of Iowa. This survey would deal with information relative to industrial advantages of Charles City and resources of the city. The anticipated cost of the survey would be approximately $12,000.00 and the Charles City Industrial Development Corporation has requested that the city of Charles City participate in paying for such survey. The Industrial Development Corporation has also inquired as to the possibility of Floyd County participating in the payment for such survey.

"1. Can the City Council of Charles City, under its planning and zoning commission powers, expend money for such a survey and if so, under what powers and under what authorities?

"2. Could Floyd County expend money for such services under county zoning authorities and powers, and if so, under what authorities?

"I am certain that the city attorney and the Charles City Chamber of Commerce will greatly appreciate your informal opinion regarding the above matters. If you need further information, please advise my office."

In view of the express provisions of Section 13.2(4) and 336.2(7), Code 1954, it appears the first question contained in your letter is not a proper one for submission to or opinion by either of our respective offices. The proper official to

57-7-22 X

rule on city questions is the City Attorney. The Council may also seek the advice of the Auditor of State, whose examiners may ultimately have occasion to pass on the expenditures proposed under Chapter 11, Code 1954.

It is assumed that your second question is asked in connection with your duties as advisor to county officers. Your letter indicates the proposed survey "would deal with information relative to industrial advantages of Charles City and resources of the city." The answer to your second question is, therefore, provided directly by Section 358A.3, Code 1954, which states with respect to zoning powers of county boards of supervisors "that such powers shall be exercised only with reference to land and structures located within the county but lying outside the corporate limits of any city or town. . ."

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

DENTISTS: The mere making of X-ray photographs is not of itself practicing dentistry.

July 18, 1957

Edmund G. Zimmerer, M.D., M.P.H.
Commissioner of Public Health
State Department of Health
L o c a l

Dear Sir:

Receipt is acknowledged of your letter of July 5 as follows:

"I am asked by the Board of Dental Examiners to request an opinion in the following matter:

"Is it lawful under the Iowa Dental Practice Act for an assistant or dental hygienist to take dental X-rays in a dental office under the supervision of a dentist?"

The practice of dentistry is defined in Section 153.1, Code 1954, as follows:

"'Practice of dentistry' defined. For the purpose of this title the following classes of persons shall be deemed to be engaged in the practice of dentistry:

"1. Persons publicly professing to be dentists, dental surgeons, or skilled in the science of dentistry, or publicly professing to assume the duties incident to the practice of dentistry.

"2. Persons who treat, or attempt to correct by any medicine, appliance, or method, any disorder, lesion, injury, deformity, or defect of the oral cavity, teeth, gums, or maxillary bones of the human being, or give prophylactic treatment to any of said organs."

The practice of dental hygiene is defined in Section 153.7 as follows:

"'Practice of dental hygiene' defined. Any woman may be licensed as a dental hygienist and such license shall authorize her to remove lime deposits, accretions, and stains upon the exposed surfaces of the teeth and directly beneath the free margins of the gums, but such practice must be carried on in a dental office, a public or private school, or in a public institution, and under the supervision of a licensed dentist. Dental hygienists shall not otherwise engage in the practice of dentistry."

57-7-24

I am unable to discover any authority for the proposition that the mere taking and developing of an X-ray photograph is of itself a part of the practice of any of the healing arts licensed under the Iowa Practice Acts. It is the diagnosis arrived at with the aid of such photographs that constitutes the practice. I am, therefore, of the opinion that an assistant, dental hygienist, or any person who has access to X-ray equipment and has information enabling him to pull the proper switches, set the proper controls and develop the exposed plate may make X-ray photographs.

In other words, it is the use of the X-ray photograph and not the mere act of making it that would constitute the practice of dentistry.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

July 18, 1957

Mr. John Holley
Butler County Attorney
Shell Rock, Iowa

Dear Sir:

In yours of June 19, 1957, you state as follows:

"I request that you furnish an opinion on the following questions concerning the recently established Butler County Conservation Board:

"1. Is the Commission obliged to prepare the estimates and statements required of other county offices and departments by House File 38 of the 57th General Assembly?

"2. May the County Conservation Board accumulate funds from year to year from the monies appropriated to it by the Board of Supervisors under the provisions of Section 9, House File 591, 56th General Assembly. Or, at the end of each fiscal year, must the County Conservation Board turn back to the general fund of the county all funds remaining in the county conservation fund?"

1. House File 38 of the 57th General Assembly is now Chapter 61, Acts of the 57th General Assembly. Section 1 of this Act in pertinent part is as follows:

"Section 1. 1. On or before the first day of July of each year, each elective or appointive officer or board, except tax certifying boards as defined in subsection three (3) of section twenty-four point two (24.2) of the Code, having charge of any county office or department shall prepare and submit to the county auditor the following:

"a. An estimate of the actual expenditure of such office or department during the current year;

"b. A statement of the requested expenditures to be budgeted for such office for the next calendar year;

57-7-25

"c. An estimate of the revenues, except property tax, to be collected for the county by such office during the current year;

"d. An estimate of the revenues, except property tax, to be collected for the county during the next calendar year.

"Such estimates and statements shall be itemized in the same manner as the various expenditures and revenues are itemized in the records of the auditor."

Section 24.2, subsection 3, is as follows:

"e. The words 'certifying board' shall mean any public body which has the power or duty to certify any tax to be levied or sum of money to be collected by taxation."

The power to levy a tax for the expenditures of the County Conservation Board is found in Section 9, Chapter 12, Acts of the 56th General Assembly. This section in pertinent part is as follows:

"Sec. 9. Upon the adoption of any county of the provisions of this Act, the county board of supervisors of such county may by resolution appropriate an amount of money from the general fund of the county for the payment of expenses incurred by the county conservation board in carrying out its powers and duties, and it may levy or cause to be levied an annual tax, in addition to all other taxes, of not less than one-fourth (¼) mill or more than one (1) mill on the dollar of the assessed valuation of all real and personal property subject to taxation within such county, which tax shall be collected by the county treasurer as other taxes are collected, and shall be paid into a separate and distinct fund to be known as the county conservation fund, to be paid out upon the warrants drawn by the county auditor

> upon requisition of the county conservation board for the payment of expenses incurred in carrying out the powers and duties of said conservation board. The county conservation board shall have no power or authority to contract any debt or obligation in any year in excess of the moneys in the hands of the county treasurer immediately available for such purposes. Gifts, contributions and bequests of money and all rent, licenses, fees and charges and other revenue or money received or collected by the board shall be deposited in the county conservation fund to be used for the purchase of land, property and equipment and the payment of expenses incurred in carrying out the activities of the board, except that moneys given, bequeathed, or contributed upon specified trusts shall be held and applied in accordance with the trust specified."

There is no ambiguity in the expression "It may levy or cause to be levied an annual tax". "It" refers to the Board of Supervisors and not the County Conservation Board. If an ambiguity did exist it would necessarily be resolved that "It" refers to the Board of Supervisors since to say that "It" referred to the County Conservation Board would render Section 9 unconstitutional. In the case of State v. Mayor, Etc., of Des Moines, 103 Iowa 76 at page 93 the Court said:

> "* * *However that may be, the principle is wrong, and the power of taxation attempted to be conferred upon the trustees is a long step in the direction of permitting boards not elected by or directly responsible to the people to determine what burden the taxpayers' property shall bear. We hold that no officer and no board not elected by and immediately responsible to the people can be made the repository of such power. If this power was given to the city council, and it was abused, the people could, at least, prevent a recurrence of the wrong at the polls; but if it be reposed in a body not elected by the people the remedy is uncertain, indirect, and likely to be long delayed. The absolutely unlimited power of taxation, as to duration, attempted to be conferred by the act under consideration,

> is of itself a forcible reminder that the power to fix, determine, and levy a tax for local purposes should be conferred on somebody which stands as the direct representative of the people, to the end that an abuse of such power may be speedily and directly corrected by those whose property must bear such burdens. The act in question is unconstitutional in so far as it undertakes to confer the arbitrary power upon the board of library trustees to fix and determine the amount of tax to be levied for the purposes therein mentioned, and the city council cannot be compelled to levy (regardless of any discretion) the amounts fixed by the library board, and certified to said council.***"

It is the opinion of this office that the County Conservation Board is not a "certifying board" and, therefore, the Board, not being within the exception to Chapter 61, Acts of the 57th General Assembly, is required to prepare the estimates and statements required by the said Chapter.

2. In considering a related problem this office said in a letter of May 20, 1957, the following:

> "Your next inquiry is with reference to the provisions of Section 10 of Chapter 12, Acts of the 56th General Assembly as to whether or not the county conservation fund must be used to <u>reimburse</u> any other funds that may be taken from other county funds to help the county conservation program of development. We are of the opinion that the statute is clear and unambiguous and does not require any reimbursement to the county general fund of any money which the board of supervisors may appropriate from the general fund to the use of the conservation board for the purpose of carrying out its powers and duties. The statute clearly provides several sources of revenue for the use of the county conservation board, namely, funds as may be appropriated from the county general fund by resolution of the Board of Supervisors, gifts and fees for the use of such facilities, privileges and conveniences as may be provided and the proceeds of the tax levy authorized of not less than 1/4 mill nor more than 1 mill. Likewise, under the statute, no reimbursement is required in the matter of the allotment

or use of county owned materials deemed advisable, for example, gravel as mentioned in your letter."

The Act provides, clearly and unambiguously, that the "tax shall . . . be paid out upon warrants . . . for the payment of expenses incurred in carrying out the powers and duties of said conservation board." The revenues raised by this tax are solely for the purpose above expressed and cannot be redirected into the general fund for the payment of general obligations of the county. This is the clear, expressed intent of the Legislature. We would point out that this does not necessarily mean that there will be a large accumulation of funds, as the succeeding tax levies can be adjusted within the limits of the Act to compensate for any accumulated funds.

Very truly yours,

JAMES H. GRITTON
Assistant Attorney General

JHG:MKB

FIRE DISTRICTS. Fire districts situated in more than one county and proposed for creation under Chapter 178, 57th G.A. may be formed by any reasonable plan of co-operation agreed upon by the respective boards of supervisors, the said act authorizing creation of such multi-county fire districts, but failing to provide a method of procedure except for proposed districts lying wholly in one county.

July 22, 1957

Honorable W. C. Hendrix
Letts
Iowa

Dear Sir:

Receipt is acknowledged of your letter of June 29 as follows:

"Regarding our conversation of June 26th, I am writing you in regard to H. F. 233, 57th General Assembly.

"How does this apply to local fire district when township or parts thereof are in both Muscatine and Louisa Counties?

"Local demand to establish tax district for local fire protection and under provisions of H. F. 233, what local or county mechanics are necessary?"

House File 233 (Chapter 178, Laws of the 57th G. A.) provides in comprehensive detail the procedure for establishment of a fire protection district in a single county. No procedure or method is provided therein for establishing a district comprised of territory lying in two or more counties. The only indication that the legislature contemplated the possibility of districts involving territory located in more than one county is contained in the two words "or counties" which were inserted in the first line of the original bill by amendment after its introduction.

The fact that the legislature expressly amended H. F. 233 by insertion of the words "or counties" indicates legislative intention to authorize formation of joint districts. The problem arises out of the fact that all of the method and machinery provided in the act is expressed in terms of creation of districts lying wholly within a single county.

Where power to do a certain act has been granted by statute to a governmental subdivision, but the manner of exercising such power has not been spelled out by statute, it has been held that any reasonable procedure may be employed. Keokuk Water Works Co. v. City of Keokuk, 224 Iowa 718, 277 N.W. 291; Lyon v. Civil Service Commission, 203 Iowa 1203, 212 N.W. 579.

57-7-26

It follows that boards of supervisors may co-operate by any reasonable method in creation of fire districts under Chapter 178, Laws of the 57th G. A. (H. F. 233) Insofar as the procedure therein provided for creation of fire districts in a single county is workable it should be followed. Insofar as additional procedure may be necessary where more than one county is involved the respective boards of supervisors must determine what procedure is reasonable in the particular facts and circumstances confronting them to carry out the power conferred on them by Chapter 178, Laws of the 57th G. A. What may be "reasonable" in a given instance is a fact question to be determined locally.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

July 22, 1957

Mr. Warren C. Johnson
Clinton County Attorney
Court House
Clinton, Iowa

Dear Sir:

In your letter of July 2, 1957, the following question is posed:

"Your opinion is requested as to whether or not the underlined segments of the following Code provision is a criminally punishable offense:

"'214.5 The license plate shall be displayed prominently on the front of the scale or pump, and the defacing or wrongful removal of such plate shall be punished as provided in Chapter 189. Absence of such license plate shall be prima-facie evidence that the weighing or measuring device is being operated contrary to law.'"

Section 214.5 when enacted in 1913 as Section 13 of Chapter 266 by the 35th General Assembly read,

". . .The tag shall be displayed prominently on the front of the weighing device. Absence of the license tag shall be prima facie evidence that the weighing device is being operated contrary to law. . . ."

Section 18 of that same chapter was the penalty provision and stated,

"Any person, firm or corporation, or agent thereof, who refuses to comply on demand, with any of the requirements of this act or who shall violate any of its provisions, . . . shall be guilty of a misdemeanor. . . ." (Emphasis supplied)

From this it can be seen that the statute as enacted made absence of display or absence of proper display a violation of a requirement or provision of the act and further, such violation of a requirement or provision was made a misdemeanor

57-7-27 X

hence, criminally punishable. There was not, at the time of enactment, any provision as to defacement or wrongful removal. In 1915 the provision as to defacement and wrongful removal was put in the statute in the following form,

> "The tag shall be displayed prominently on the front of the weighing device and the defacing or wrongful removal of such tag shall be deemed a misdemeanor."

Until 1924 the penalty provision remained in the same chapter with the display provision, now Section 214.5. In 1924 these two provisions were separated and placed in different chapters. However, both chapters were, and still are, under the same title, and all chapters under that particular title are subject to that same penalty provision (now Section 189.19). Therefore, the 1924 codification did not change the scope and effect of the penalty provision as it applies to the display provision.

Gasoline pumps were, in 1924, made subject to licensing the same as weighing devices. The fact that this occurred after the 1915 addition,

> ". . .and the defacing or wrongful removal of such tag shall be deemed a misdemeanor,"

does not remove it from the penalty provision. Gasoline pumps are to be considered as subject to the same licensing provisions as are scales which were, from the time of enactment, within the penalty provision.

Considering the history of Section 214.5 and Section 189.19 of the Iowa Code, 1954, the answer to your question is in the affirmative. That is, failure to display, or properly display, the license plate is a violation of Section 214.5 which is a criminally punishable offense.

Yours very truly,

HUGH V. FAULKNER
Assistant Attorney General

HVF:md

July 23, 1957

Mr. C. J. Lyman
Special Assistant Attorney General
Iowa State Highway Commission
Ames, Iowa

Dear Sir:

I have yours of the 19th inst. in which you submitted the following:

> "I am sending you a copy of a letter from the County Auditor of Lyon County. I think you have done considerable work with House File 42, and before answering the County Auditor, I would appreciate your views.
>
> "My preliminary study of the problem does not seem to indicate that the County must levy 5 mills or more to be eligible to receive farm-to-market funds under Section 312.5."

Attached thereto is a letter from the County Auditor of Lyon County to the Iowa State Highway Commission in which he states:

CC 139-57 #8

> "Recently, I asked the State Comptroller for information regarding HF 42, 57th GA, and concerning the levy thereunder. He referred me to the I S H C for reply.
>
> "Does this mean that a county MUST levy a tax of 5 mills or more in order to be eligible to receive Farm to Market road funds under Sec. 312.5, Code 1954?
>
> "In Lyon County, it is possible that the Board could make substantial cuts in the road levies, and if this can be done, it certainly should be.

57-7-28 X

"The Comptroller seems to feel that the county must levy 5 mills or more, but the law does not seem to be mandatory in this respect, and we therefore need your opinion on this question."

In relation to the foregoing I find that subsection 2 of Section 2, House File 42, now Chapter 139, Acts of the 57th General Assembly, is with the exception (1) of making the levy for both maintenance and construction purposes, (2) increasing the levy to eight and five-eighths mills, and (3) imposing a tax on all the property instead of all the taxable property of the County consists of the same language as this Section appears in Section 309.11, subsection 2, Code 1954. This Section as it appears in both the Code and the Acts of the 57th General Assembly confers authority upon the Board of Supervisors to make a levy not exceeding five mills to make a county eligible to receive farm-to-market funds. It is not mandatory on the Board to make a levy of five mills to enable the County to share in the farm-to-market fund. In other words, the Board in its discretion can make a levy of eight and five-eighths mills or less for maintenance and construction purposes but in order to share in the farm-to-market fund it can levy such millage as it desires but not exceeding five mills.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

July 25, 1957

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

Dear Mr. Jensen:

Your letter dated July 22, 1957, addressed to the office of the Attorney General, has been referred to me for reply.

It seems that one Frank R. Bowen was engaged in business as a partner under the trade name of Central Motors. He then deceased and his wife sold some real estate owned separately by Mr. Bowen, and prior to the sale by her agent, her agent retired a first lien against the property after receiving assurance from the County Treasurer that the only personal taxes which could be a lien against the real estate were assessed in the name of Frank Bowen. However, as a matter of fact, there were spread on the delinquent tax rolls a tax against Central Motors.

It appears from your letter several questions are involved. (1) Does section 445.9 Code of Iowa govern section 445.29? (2) Does the Board of Supervisors have authority to compromise a personal property tax set forth under the facts of your letter of July 22?

I am not sure that problem #1 set out above is really involved in the case with which you are concerned, inasmuch as the deceased taxpayer was doing business under the trade name of Central Motors. The statutes of Iowa provide for the recording of trade names listing the partners as owners

57-7-29 X

of the business conducted under said names. A proper abstract of title to the property involved here would have shown the Central Motors' personal property taxes since a search of trade names would have disclosed that Frank Bowen was one of the owners of this business. Consequently it appears that the Treasurer properly complied with section 445.9 and that the delinquent taxes were alphabetically listed in the name of Central Motors. Consequently it further appears that section 445.29 would be operative and that the taxes in question would constitute a lien against the separate real property of Frank Bowen even though the Treasurer had told the prospective purchaser that there were no taxes due as to Frank R. Bowen.

Section 445.23 provides:

> "The county treasurer, when requested to do so by anyone having an interest therein, shall certify in writing the entire amount of taxes and assessments due upon any parcel of real estate, together with all sales of the same for unpaid taxes or assessments shown by the books or records in his office, with the amount required for redemption from the same, if still redeemable, if he is paid or tendered his fees for such certificate at the rate of one dollar for the first parcel in each township, town or city, and twenty cents for each subsequent parcel in the same township, town or city, and in computing such fees each description in the tax list shall be reckoned a parcel. As amended Acts 1951 (54 G. A.) ch. 137 § 12.

It appears that the agent of Mrs. Bowen did not follow the statutory procedure, and I suggest that he will have no remedy against the Treasurer in this matter.

You also inquired whether section 445.19 could operate in the situation you set forth in your letter to allow the Board of Supervisors to compromise the taxes. This section provides:

"When personal taxes are not a lien upon any real estate* and are delinquent for one or more years, the board may, when it is evident that such tax is not collectible in the usual manner, compromise such tax as provided in sections 445.16 to 445.18, inclusive."

*Emphasis supplied.

There seem to be two problems in applying the quoted section in the situation we have. In the first place it appears that the tax is a lien upon the real estate. Also it does not appear that the tax is not collectible in the usual manner. Therefore, it would seem that Section 445.19 Iowa Code, could have no application to the factual situation set forth in your letter of July 22.

I trust that this will dispose of this matter. If you have any further questions regarding this situation, please feel free to contact me.

Very truly yours,

FJP:mcd

FRANCIS J. FRUHS
Spec. Asst. Attorney General.

HEADNOTE: Sales & Use Tax; contractors' purchases; tax to be collected and remitted by wholesaler or supplier.

July 25, 1957

Honorable Fred L. Johnson
1700 Main Street
Hamburg, Iowa

Dear Mr. Johnson:

Your letter addressed to Mr. Norman A. Erbe, received in our office on June 7, 1957, has been referred to me for reply.

It appears that your question is whether the 2% sales tax should be collected by the wholesaler when he sells to a plumbing contractor or whether the plumbing contractor should collect it and remit tax when he installs the material on the premises of one of his customers.

Section 422.42, Code of Iowa, 1954, (entitled Definitions), provides as follows:

> "The following words, terms, and phrases, when used in this division, have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:
>
> "3. 'Retail sale' or 'sale at retail' means the sale to a consumer or to any person for any purpose, other than for processing or for resale of tangible personal property, * * *. Tangible personal property is sold for processing within the meaning of this subsection only when it is intended that such property shall by means of fabrication, compounding, manufacturing, or germination become an integral part of other tangible personal property intended to be sold ultimately at retail, or shall be consumed as fuel in creating heat, power, or steam for processing or for generating electric current."

The above section of definitions was amended by the 53rd General Assembly and they added the following material which pertains to our problem:

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"10. Sales of building materials, supplies and equipment to owners, contractors, subcontractors or builders, for the erection of buildings or the alteration, repair or improvement of real property, are retail sales in whatever quantity sold.

"11. The use within this state of tangible personal property by the manufacturer thereof, as building materials, supplies or equipment, in the performance of construction contracts or for any other purpose except for resale or processing, shall, for the purpose of this division, be construed as a sale at retail thereof by the manufacturer who shall be deemed to be the consumer of such tangible personal property. The tax shall be computed upon the cost to him of the fabrication or production thereof."

Rule 138.6, Rules and Regulations of the State Tax Commission Relating to Retail Sales and Use Tax (1954), provides for the classification of construction contracts. This rule provides:

"Construction contracts are generally let under one of four classes of contracts, viz:

"* * *.

"Class (D) those in which the contractor or subcontractor agrees to sell the materials and supplies at any agreed price or at the regular retail price and to render the services either for an additional agreed price or on the basis of labor employed."

In 1956 the State Tax Commission issued certain amended rules. As a part of these amendments, Rule No. 168.1 was adopted. This rule is entitled "Sales of Building Materials, Supplies, Equipment, etc. are at Retail and Taxable when sold to Construction Contractors, Subcontractors, Owners or Buildiers." At the beginning of this rule, they set out the portions of Section 422.42, last above quoted. At the bottom of page 3 in the last paragraph thereof they state:

"Beginning January 1, 1957, sales to or purchases by construction contractors or subcontractors, of building materials, supplies or equipment for the erection of building or the alteration, repair or improvement of real property are subject to the sales tax or use tax, whichever applies, even though the class of construction contract being performed is 'Class (D)' as described in Rule No. 138.6, page 475, I.D.R. 1954. In other words, the rules of the Commission shall be applied to construction contractor's or construction subcontractor's purchases, where a 'Class (D)' contract is being fulfilled, in the same manner and to the same extent as though a Class 'A', 'B' or 'C' contract was being fulfilled.

"Iowa suppliers selling such items to such constructors for such purposes shall bill and collect from them the sales tax and report and return same to the state.

"Likewise, out of Iowa suppliers, who are required to collect use tax for the state, shall, when selling such items to such constructors for such purposes, bill and collect from such persons the Iowa use tax and return same to the state quarterly."

It appears very clearly that the regulations of the State Tax Commission provide for the collection of the tax from the wholesaler rather than having the operator of the plumbing job remit the tax to the state. It is also apparent that these regulations are clearly within the scope of Section 422.42, Code of Iowa, 1954, as amended. There would seem to be no other objection to the regulations. Therefore, it appears that your neighbor has been correctly advised by the representative of the Iowa State Tax Commission.

If I can be of any further assistance in this matter, please let me know.

Yours very truly,

Francis J. Pruss,
Special Assistant Attorney General

FJP:fs

July 26, 1957

Mr. Marshall F. Camp
Union County Attorney
Creston, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 22nd inst. In which you submitted the following:

> "We have a county hospital at Creston, Iowa, and the hospital board has requested the board of supervisors to levy one mill for maintenance as provided in Section 347.7 of the Code of Iowa.
>
> "Actually, one mill in Union County raises about $23,000.
>
> "The hospital board now has on hand something like $80,000, spends something like $240,000 to $300,000 a year and is building up a surplus so that it estimates that at the end of the year it will have $100,000 ahead in the hospital fund.
>
> "The board of supervisors thinks that the hospital board will not need the one mill levy in view of the surplus that it has and my thought is that unless the hospital board can show some justification for requesting the one mill levy, the levy should not be made.
>
> "May I have your opinion as to whether the levy of one mill has to be made under Section 347.7 simply upon the request of the hospital board."

In reply thereto I advise you that the Board of Supervisors is required to make the levy as certified to it by the Board of Hospital Trustees. The County Board of Hospital Trustees is a

57-7-31 X

certifying body insofar as the levies for the improvement, maintenance and replacement of the hospital is concerned. See Section 347.7, Code 1954, and the certification is binding on the Board of Supervisors. For confirmation of this view, see Opinion 320 of the Attorney General, 1930 Report, page 220, wherein, commenting on this statute as it existed at that time in substantially the same terms, it was said:

> "Section 369, Chapter 24, Code of 1927, the local budget law, provides that the word 'municipality' shall include such boards as have the power to levy or certify taxes. The board of hospital trustees, therefore, being the certifying board, so far as the improvement and maintenance levies are concerned, is the board which has the control of said fund and any transfer authorized by law would be made upon the resolution of this board with the approval of the Budget Director, and not upon the resolution of the board of supervisors. The board of supervisors, therefore, has nothing to do with a transfer of the improvement and maintenance fund."

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

HEADNOTE: "INCOME TAX" -- Capital gains and losses; basis for valuation of remainder interests where alternate valuation for inheritance tax purposes has been used.

July 26, 1957

Swanson, Swanson & Boeye
Attorneys at Law
305-A Reed Street
Red Oak, Iowa

Attention: R. John Swanson

Re: T. J. Hysham Estate

Dear Mr. Swanson:

Your letter of July 9, 1957 addressed to Mr. Martin Lauterbach of the Iowa State Tax Commission has been referred to me for reply.

The problem which you set forth in your letter has been referred to this office on several previous occasions. At first glance it would appear that the fact that the remaindermen have delayed the determination of Iowa inheritance tax due on their inheritances until the time of the death of the life tenant would entitle them to use a cost basis for their property, the value at the death of the life tenant. However, Section 422.7, Code of Iowa, 1954, entitled "'Net Income'--How Computed", appears to control this situation. This section provides:

> "The term 'net income' means the adjusted gross income as computed for federal income tax purposes under the Internal Revenue Code of 1954 with the following adjustments:
>
> "*****.
>
> "3. Where the adjusted gross income includes capital gains or losses, or gains or losses from property other than capital assets, and such gains or losses have been determined by using a basis

57-7-32 X

> established prior to January 1, 1934, an adjustment may be made, under rules and regulations prescribed by the State Tax Commission, to reflect the difference resulting from the use of a basis of cost on January 1, 1934, fair market value, less depreciation allowed or allowable whichever is higher. Provided that the basis shall be fair market value as of January 1, 1955, less depreciation allowed or allowable, in the case of property acquired prior to that date if use of a prior basis is declared to be invalid."

It appears that the last sentence of the above quoted portion of Section 422.7 constitutes a savings clause in the event the Iowa Supreme Court declares any other basis to be invalid.

Very clearly this section makes it mandatory that the taxpayer use the same basis on his state income tax return as he uses on his federal income tax return. In other words, subsection 3 of the above section does not apply to the case you set forth since the property was in fact acquired by the remaindermen on January 2, 1940. Also, since the sale of this property by the remaindermen will have taken place after January 1, 1955, Section 422.7 will apply.

It is possible that sometime in the near future the office of the Attorney General will issue an official opinion on this question and related questions which have come up under Section 422.7.

If you have any further questions regarding this matter, please contact me.

Yours very truly,

Francis J. Pruss,
Special Assistant Attorney General

FJP:fs

July 29, 1957

Mr. William Q. Norelius
Crawford County Attorney
Denison, Iowa

Dear Sir:

Receipt is acknowledged of your letter of July 22 in which you inquire whether a proposition submitted to voters under Section 359.43, Code 1954, must be phrased in the exact words "not exceeding one and one-half mill" or may name some other express rate less than one and one-half mill.

In answer thereto, I am of the opinion the quoted words merely describe the maximum levy which may be authorized and do not preclude submission of a lesser specific rate to the voters.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

57-7-34 X

July 29, 1957

Mr. Harlyn A. Stoebe
Humboldt County Attorney
429 Sumner Avenue
Humboldt, Iowa

Dear Sir:

Receipt is acknowledged of your letter of July 24 as follows:

"The undersigned requests an opinion from your office on the following question:

"A church in this county has acquired by devise a farm which prior to 1957 was leased with the church collecting the landlord's share of rentals. Commencing March 1, 1957, the church membership began to farm the land with donated labor, equipment and machinery with the entire proceeds of the farming operation to inure to the church. Will the exemptions granted by Section 427.1(9) of the 1954 Code of Iowa render this land tax exempt from local property taxation, or is such operation by the church 'or otherwise used with a view to pecuniary profit' as provided in said statute. Opinion from your office 1923-4 AGO 389 adequately covers the lease part of the past operation but gives no hint on the above question."

The answer to your question is directly furnished by an official opinion appearing at page 40 of the 1956 Report of the Attorney General. A copy of said opinion dated April 1, 1955, and addressed to Mr. Louis H. Cook, Director, Property Tax Division, State Tax Commission, is enclosed herewith. Decisions of our Supreme Court in Kirk v. St. Thomas Church, 70 Iowa 287 and Nugent v. Dilworth, 95 Iowa 49, cited and reviewed in the enclosed opinion appear quite pertinent to your inquiry.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md
Enc.

57-7-35 X

July 30, 1957

Mr. Norris S. Gould
Delaware County Attorney
Manchester, Iowa

Dear Sir:

In the second paragraph of your letter of June 27, 1957, you request an opinion as to the following question:

> "I do have one further question with regard to such a lien and that is whether or not, in your opinion, it is necessary for this office to perfect the lien of the county in some manner. It would appear to me that this is a statutory lien, but I have checked the matter with our abstractor and she advises me that she has been paying no attention to such liens in the past."

To answer this question the following statutory provisions must be set forth:

> "Sec. 230.25 Lien of assistance. Any assistance furnished under this chapter shall be and constitute a lien on any real estate owned by the person committed to such institution or owned by either the husband or the wife of such person."

> "Sec. 230.26 Auditor to keep record. The auditor of each county shall keep an accurate account of the cost of the maintenance of any patient kept in any institution as provided for in this chapter and keep an index of the names of the persons committed from such county and the indexing and the record of the account of such patient in the office of the county auditor shall constitute notice of such lien." (Emphasis supplied)

Before 1939 assistance in the form of support of an insane person was not an automatic lien but had to be perfected by judgment. Thode, Guardian v. Spofford, 65 Iowa 294, 21 N. W. 647 (1884). In 1939, by statute, this assistance was made a lien upon the real estate of the person committed or the spouse of such person.

57-7-36 X

As to when the lien comes into being, you are referred to 1950 Op. Atty. Gen. where, at page 136, an interpretation of the 1946 Code provisions is made. Those Code provisions are the same as the ones now in effect. The following is an excerpt from that opinion.

> ". . .It cannot be said that the county has furnished any assistance until they have in fact paid out funds for such maintenance. In our opinion this payment would be made when the county treasurer entered a transfer of the amount from the county state institution fund to the general state revenue pursuant to the provisions contained in section 230.21, Code 1946. The amount thus authorized to be transferred is based on notice from the county auditor who, pursuant to the provisions of the same section, has entered the same to the credit of the state in his ledger of state accounts and has also entered an accurate account of the cost of maintenance of the patient and indexed the same as required by the provisions of section 230.26, Code 1946. It is our opinion that at this time the statutory lien comes into being. . ." (Emphasis supplied)

Quoting further from that opinion with regard to title to real estate,

> ". . . .it can be determined at any given time from an examination of the abstract on a particular piece of property whether the county has advanced funds for maintenance of an insane owner or spouse which it has not yet recovered from those persons personally liable for the support of the insane as designated in section 230.15 Code 1946. If there be no such debt then a lien does not exist and it is immaterial whether the title to the real estate passes to others by regular conveyance or whether the relationship of husband and wife is terminated by a valid divorce decree."

Based on this opinion, in regard to Section 230.26, Code of 1954, the result is that it is not necessary for your office to do anything to perfect the lien. It is perfected by the County Auditor who keeps an index of names of those committed and a record of the patient's account. This constitutes notice. As notice the lien is perfected with respect to real estate owned by a person committed as provided under Section 230.25, Code of 1954.

Very truly yours,

HUGH V. FAULKNER
Assistant Attorney General

HVF:md

July 31, 1957

Mr. Marshall F. Camp
Union County Attorney
Creston, Iowa

Dear Sir:

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

> "Our present County Auditor, who became auditor on the 1st of January, is faced with the loss of the second of his two deputies by their moving from Creston and is desirous of learning how they can be engaged.
>
> "The first paragraph of Section 340.2 of the Code provides for the appointment of a first deputy and a second deputy if one is required and that they shall receive not more than 80% of the amount of the salary of the principal and it is my opinion that the auditor may engage one or more deputies and arrange with them as to what their salary should be. In this case he has in mind paying them each a salary of 65% of his salary.
>
> "At the present time one of his deputies is designated as a first deputy and the second deputy is designated as a clerk and her salary is fixed by the supervisors.
>
> "Our questions are these:
>
> "May the auditor pay his first and second deputies less than 80% of his salary?
>
> "How may we determine when a second deputy is required?
>
> "May he appoint two deputies and pay them each 65% of his salary or such other amount as they agree upon and does he have to designate one of the deputies as first deputy and the other as second deputy or may he just designate them as deputy auditors?"

57-7-37 X

1. In answer to your question as to whether the Auditor may pay his first and second deputies less than 80% of his salary the answer is in the affirmative. The statute, Section 340.2, Code 1954, as amended, so far as is applicable, provides as follows:

> "Deputy county officers. The first deputy auditor, treasurer, recorder, and clerk, and the second such deputy if a second deputy is required, shall receive an annual salary of not more than eighty per cent of the amount of the salary of his or her principal.
>
> "In any county in which more than two deputies are required, and such additional deputies are of equal ability, such deputies shall receive an annual salary of not more than sixty-five percent of the salary of his or her principal. The board of supervisors shall fix all compensation for extra help and clerks."

2. In answer to your question as to when a second deputy is required, I am of the opinion that whether such an official is required is an administrative matter to be determined by the County Auditor in his sound discretion. Legal principles or statutes do not appear to be involved in that determination.

3. In answer to your question #3 I am of the opinion that under the statute above quoted it is clear that compensation not to exceed 65% of the salary of the Auditor may be paid in situations where more than two deputies are required. This rate of pay is limited to the deputies additional to the deputies designated as first and second. Thus the Auditor may not appoint two

deputies and pay them each 65% of his salary if he does not have a first and second deputy. Where first and second deputies have been appointed and acting, additional deputies may be paid compensation not exceeding 65% of the compensation of the Auditor.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

Henderson
School Reorganization:
1. Territory comprising less than four sections remaining after reorganization may be attached by the County Board of Education to any contiguous school district including the newly reorganized district
2. Section 4, Chapter 129, 57th G.A. has no effect on the power of County Boards to attach such remaining portions of territory
3. Such remaining portions must be attached as they remain without further subdivision.

August 1, 1957

Mr. Leslie P. Turner
Chickasaw County Attorney
Nashua, Iowa

Dear Sir:

Receipt is acknowledged of your letter of July 26 in which you submit the following questions:

"I. Does the language of 275.5 directing the County Board to 'attach such remaining portions of less than four sections to another school district as provided for in their County Plan,' permit the County Board to attach such remaining portion to the newly formed community school district?

"II. Does Section four of Senate File 1 requiring the electors of such existing districts or parts thereof to have an opportunity to vote on the proposition before being attached to a twelve-grade district apply to this problem?

"III. Does Section 17-(2) of House File 158 apply so that the portion of the district would have to be divided, so that one of the parts would be attached to the community school district or to another independent contiguous district and the other part to a different district as provided for in the Original Tentative County Plan?"

1. In answer to your first question you are advised that Section 275.5 provides for attachment of territory as described in your letter to "another" school district. As used in statutes, words are generally construed according to the "approved usage of the language". "Another" is defined by Webster as "any" or "some" different thing. Obviously the new school district fits within such definition. The answer to your first question is, therefore, in the affirmative.

2. In answer to your second question, I would remind you of the frequently announced rule that implied repeals are not favored. Section 4, Chapter 129,

57-8-1

Acts of the 57th G. A. (S. F. 1) neither expressly repeals nor amends the provision of Section 275.5, Code 1954, in question. I am, therefore, of the opinion it has no bearing on the construction or applicability of said section.

3. In answer to your third question, I would refer you to the enclosed opinion dated January 10, 1957, and addressed to Mr. Donald E. Skiver, Osceola County Attorney. Since the amendment to which your letter refers, Section 17(2), Chapter 129, Laws of the 57th G. A. (H. F. 158) merely inserts the words "or districts" and does not change the phrase "remaining portions" by addition of some such words as "or parts or subdivisions thereof", the amendment relates only to situations where more than one isolated portion of territory remains after reorganization and clarifies that each such portion as it remains may be attached as a whole to a contiguous district but that separate remaining portions may be attached to different districts.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md
Enc.

Pharmacy Examiners: Authority to expend certain money appropriated by the 57th G. A. under S.F. 457 is not suspended or delayed by the fact that S.F. 68 conferring additional powers on the Pharmacy Board is not effective until Jan 1, 1958.

August 2, 1957

Mr. J. F. Rabe, Secretary
Iowa Pharmacy Examiners
L o c a l

Dear Sir:

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

"The Iowa Pharmacy Examiners have directed me to obtain an opinion on the following question:

"The 57th General Assembly, under SF 457, Departmental Appropriation, Section 26, appropriated $60,380.00 to the Pharmacy Department, among which was $18,000.00 for salaries, support, maintenance and miscellaneous purposes for enforcement of basic standards and requirements for the distribution of drugs, medicinal chemicals, poisons and proprietary or domestice remedies for human use only and to provide for licensing of such distributors.

"Also the 57th General Assembly passed SF 68 amending Chapter 155, which states the effective date shall be January 1, 1958.

"It will be necessary to make purchase of supplies, equipment and acquire more inspectors to effectuate the licensing act (SF 68). Inspectors will be charged with the enforcement of sales, distribution of drugs and poisons as already under existing laws Chapter 203 'adulteration and labeling of drugs' Chapter 205 'Sale and distribution of poisons', Chapter 203A 'Iowa Drug and Cosmetic Act' and Chapter 155 'Practice of Pharmacy' plus, after January 1, 1958, the checking of licensed drug stores. The inspector will do same type of work as they have in the past, excepting after January 1, 1958 their authority will be broadened by the licensing phase. In view of the fact SF 68 amended Chapter 155, it would appear this would broaden and assign additional duties to the act.

"The first quarter request for allocation for the amount of $4,500.00 appropriation was signed by the Governor and funds available from the $18,000.00.

57-8-2 K

"1. The question arises, can the board expend money from the $18,000.00 appropriation prior to January 1, 1958, in view of the fact Chapter 96 (SF 68) 'Drugs, medicines and poisons' amended Chapter 155, effective January 1, 1958?

"2. Must the effective date of Departmental appropriations to the Pharmacy Examiners be considered entirely separate from the effective date of the amended act, Chapter 96 (SF 68) 'Drugs, medicines and poisons'?"

Chapter 1, Section 26, Laws of the 57th General Assembly (S. F. 457) provides in pertinent part:

"For the pharmacy examining board there is hereby appropriated from the general fund of the state for each year of the biennium beginning July 1, 1957. . .

". . .(2) UNIFORM NARCOTIC DIVISION--LEGAL ENFORCEMENT. . ."

". . .For salaries, support, maintenance, and miscellaneous purposes for enforcement of basic standards and requirements for the distribution of drugs, medicinal chemicals, poisons, and proprietary or domestic remedies for human use only, and to provide for licensing of such distributors. . . $18,000."

Chapter 96, Acts of the 57th General Assembly (S. F. 68) is titled as follows:

"DRUGS, MEDICINES AND POISONS

"AN ACT to amend chapter one hundred fifty-five (155), Code 1954, relating to pharmacy and to provide for the development, establishment and enforcement of basic standards and requirements for the distribution of drugs, medicinal chemicals and poisons for human use only, and to provide for licensing of such distributors, and to provide penalties for violations."

Section 4 of said Act provides:

"This act shall become effective January 1, 1958."

Your first question is whether the purposes named in the specific appropriation hereinabove quoted are identical with the powers and duties conferred by Chapter 96 hereinabove quoted to the end that no lawful purpose for which monies thus appropriated may be expended prior to the effective date prescribed in Section 4 of Chapter 96.

It should first be noted that the quoted appropriation makes no express reference to Chapter 96, 57th General Assembly (S. F. 68) nor does it contain any express clause delaying its availability. It simply lists a number of purposes for which the "money appropriated may be expended on behalf of the uniform narcotics division" of the Pharmacy Board. The list is straightforward, containing a number of items separated by commas or the word "and". The list is as follows:

1. Salaries
2. Support
3. Maintenance
4. Miscellaneous purposes for enforcement of basic standards and requirements for the distribution of drugs, medicinal chemicals, poisons, and proprietary or domestic remedies for human use only
5. Licensing of such distributors,

As is hereinabove pointed out there is no express reference in the quoted appropriation identifying it exclusively with Chapter 96, 57th General Assembly. There is no express reference in said chapter identifying it with the quoted appropriation. Further, as your letter points out, certain basic standards already appear in existing chapters of the Code with reference to the "distribution of drugs and medicinal chemicals" (Chapters 155, 203 and 203A, Code 1954); with reference to the distribution of poisons (Ch. 205, Code 1954); and with reference to the distribution of "proprietary" remedies (Chapters 155 and 205, Code 1954). It is also to be observed that the Narcotic Law, Chapter 204, bears definite relation to the distribution of such "drugs" and "medicinal chemicals" as happen to be classified as "narcotics".

I would, therefore, advise you that although the purposes enumerated in the title of Chapter 96, 57th General Assembly are similar to the purposes enumerated in the quoted appropriation, Chapter 96 is not the exclusive authorization for engaging in said purposes. Therefore, the guide for the expenditure of said appropriation is to be found in the statutes generally conferring authority on the Pharmacy Board with respect to its Narcotics Division and is not confined to authority on like or similar subjects also dealt with in Chapter 96, 57th General Assembly.

Specifically, the answers to your questions are:

1. Yes.
2. Yes.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

The real estate primer, a publication containing reprints of statutes and departmental rules and paid for by public funds, is controled by the provisions of §17.27, Code 1954, as amended by Ch. 56, 57th G. A. Free distribution of such primer is made to public officials, purchasers of licenses from State departments, institutions of higher learning and libraries thereof supported by public money ~~or~~ departments likewise entitled to free distribution of the primer.

August 5, 1957

Mr. E. A. Hart, Director
Iowa Real Estate Commission
B u i l d i n g

Dear Mr. Hart:

This will acknowledge receipt of yours of the 23rd ult.

In which you submitted the following:

"Reference is made to Chapter 56 of the LAWS OF THE FIFTY SEVENTH GENERAL ASSEMBLY titled DISTRIBUTION OF STATE PUBLICATIONS.

"Since the early 1930's this department has prepared a booklet known as the Real Estate Primer. This Primer contains a copy of the Real Estate License Law, the Rules and Regulations adopted by the Commission, instructions governing the procedure for making application for a license and other information to be studied by a person so that he may qualify by examination for a real estate license.

"A new edition of this booklet is prepared each two years following the legislative session and any amendments to the law and changes in the Rules and Regulations are shown. Copies are mailed free of charge to all licensees of record and to any citizen on request. Copies are also mailed free to all Free Public Libraries as a text for students.

"We respectfully request an opinion on the following questions:

"1. Would this booklet come under the terms of Chapter 56?

"2. If the answer to the above question is in the affirmative, are we permitted to make free distribution of the booklet to licensees under the jurisdiction ~~of~~ this department?

57-8-4

"3. If we are required to make a charge for this booklet to persons other than licensees, would this include the libraries and the institutions of higher learning in the state such as the University of Iowa?

"The major purpose of this booklet is to acquaint the licensee with the duties and obligations required to hold a license and to assist him in rendering a service to the public according to the law and the rules and regulations promulgated by the Commission. Free distribution has made it possible for us to keep the public advised as to its rights when dealing through a licensed broker or salesman. It is our humble opinion that this procedure has reduced our operating expense far more than any revenue derived from the sale of the booklet.

"Your usual prompt cooperation in rendering an opinion on the foregoing would be appreciated."

I advise as follows.

1. Section 17.27 as amended by Chapter 56, Acts of the 57th General Assembly, provides as follows:

"Section 17.27 Other necessary publications. There may be published other miscellaneous documents, reports, bulletins, books, and booklets that are needed for the use of the various officials and departments of state, or are of value for the information of the general assembly or the public, in form and number most useful and convenient, to be determined by the printing board. When such publications paid for by public funds furnished by the state, contain reprints of statutes or departmental rules, or both, they shall be sold and distributed at cost by the department ordering same. Such publications shall be obtained from the superintendent of printing on requisition by the department and the selling price shall be determined by the printing board by dividing the total cost of printing, paper and binding by the number printed. Said price shall be set at the nearest multiple of ten (10) to the quotient thus obtained. Distribution of

> such publications shall be made by the superintendent of printing gratis to public officers, purchasers of licenses from state departments required by statute, and departments. Funds from the sale of such publications shall be deposited monthly in the general fund of the state."

As applied to the Real Estate Primer, the Primer is a publication controlled by the provisions of Section 17.27 as amended and hereinbefore exhibited. The publication is paid for by public funds and contains reprints of statutes and departmental rules.

2. Insofar as your question #2 is concerned I advise that free distribution of such a publication is authorized and directed to be made to the following:

1. Public officials
2. Purchasers of licenses from State departments required by statute
3. Departments

Insofar as those who are holders of licenses are concerned it is to be said that if they be entitled to free distribution of the Real Estate Primer it is because they are to be regarded as purchasers of licenses. I do not regard them as purchasers of licenses within the meaning of Chapter 56, Acts of the 57th G. A.. I regard the use of the term "purchaser of a license" in connection with the acquisition of a license as the popular and common idea of such acquisition. However, in law a license is not purchased.

> "In its specific sense, to license means to confer on a person the right to do something which otherwise he would not have the right to do. * * * * *
>
> "The term 'license fee' or 'license tax' implies an imposition or exaction on the right to use or dispose of property, to pursue a business, occupation, or calling, or to exercise a privilege. License taxes or fees may be imposed either under the police power or for revenue; and the distinction between licenses under the police power and licenses for revenue is discussed in a later part of this article." 33 Am. Jur., Title Licenses, Paragraph 2.

In the case of State v. Shores-Mueller Company, 182 Iowa 501, 507, the nature of a license fee is stated as follows:

> "* * * * * Ordinarily, the payment of a license fee is not obligatory, except in an alternate sense. The payment is a precedent condition to the exercise of some privilege by the applicant which would be forbidden without a license. If he fails to pay the license fee, he may not lawfully exercise the privilege sought. If he afterwards perform the privileged acts without the license, he becomes criminally liable, and is punishable accordingly. Subsequent payment of the license fee would not purge the criminality; nor would the criminality imply a precedent promise to pay. On the contrary, a precedent promise to pay would tend to negative criminal intent."

However, therefore, one who makes payment of fee conditioned to the exercise of the privilege of being a real estate broker or salesman alone is entitled to a free copy of the Real Estate Primer. Those who already hold such licenses are licensees and are excluded from those entitled to free distribution of that publication.

3. In answer to your question #3 I would advise that in my opinion institutions of higher learning and libraries thereof supported by public money are to be deemed departments of the State

and entitled to free distribution of this Primer. Libraries otherwise are not departments and therefore not entitled to this free distribution.

Very truly yours,

OS/fm

OSCAR STRAUSS
Second Assistant Attorney General

Sec. 17.27, Code 1954, as amended by Ch. 56, 57th G. A., imposes duty on you to distribute publications embraced within the above numbered section gratis to purchasers of licenses from State departments as defined in opinion of this Department issued August 5, 1957, and to the several departments whose publications are covered by the statute. The minimum price of the publication, when payment of the cost thereof is required, shall be ten cents.

August 5, 1957

Mr. S. W. Needham
Superintendent of Printing
L o c a l

Dear Mr. Needham:

This will acknowledge receipt of yours of the 24th ult. in which you submitted the following:

> "As your office is aware, there is plenty of confusion over Chapter 56 of the Laws of the 57th General Assembly.
>
> "In Section 2, starting at line 10, it says: - 'Distribution of such publications shall be made by the superintendent of printing gratis to public officers, purchasers of licenses from state departments required by statute, and departments.'
>
> "Obviously we have neither storage space in our office for such publications, nor the personnel to do the mailing for such requests. We would not know when a request comes in, whether the person making such request holds a license entitling him to such publication free. We could not maintain a duplicate list of such licensees. It would entail unsurmountable difficulties for this office.
>
> "Could this office designate each Department covered by this law, to fulfill such requests as are legitimate and come to them, as our agent in such distribution covered in lines 10 to 15 inclusive as aforementioned? Or is that already covered in line 5, which says 'shall be sold and distributed at cost by the department ordering same.'
>
> "In line 9, in the same chapter, what is meant by the statement 'said price shall be set at the nearest

57-8-5

multiple of 10 to the quotient thus obtained.'? What price specifically, for a pamphlet actually costing .0183¢, and they wish only one copy?"

I advise as follows:

The Act drawn in question by your letter is Section 2 of Chapter 56, Laws of the 57th G. A, which provides as follows:

> "Sec. 2. Section seventeen point twenty-seven (17.27), Code 1954, is hereby amended by adding the following:
>
> "'When such publications paid for by public funds furnished by the state, contain reprints of statutes or departmental rules, or both, they shall be sold and distributed at cost by the department ordering same. Such publications shall be obtained from the superintendent of printing on requisition by the department and the selling price shall be determined by the printing board by dividing the total cost of printing, paper and binding by the number printed. Said price shall be set at the nearest multiple of ten (10) to the quotient thus obtained. Distribution of such publications shall be made by the superintendent of printing gratis to public officers, purchasers of licenses from state departments required by statute, and departments. Funds from the sale of such publications shall be deposited monthly in the general fund of the state.'"

Insofar as your department is concerned, and your questions regarding it, it is to be said:

1. Insofar as the duty imposed on you to distribute the publication embraced within the section gratis to the purchasers of licenses from state departments required by statute, I attach and make a part hereof a copy of opinion issued this day to Earl A. Hart, Director of the Real Estate Commission, defining the term "purchaser of a license" as used in the foregoing section. As so

defined and classified, they are the same persons who would receive the same publication from you gratis under this statute. This would therefore be duplication of service which is neither intended nor required. Actual distribution of publications may be made for you by the several departments whose publications are covered by this statute. You are thus relieved of the duty imposed.

2. You ask the following question:

> "In line 9, in the same chapter, what is meant by the statement 'said price shall be set at the nearest multiple of 10 to the quotient thus obtained.'? What price specifically, for a pamphlet actually costing .0183¢, and they wish only one copy?"

Insofar as the above question is concerned, I am of the opinion that the minimum price of the publication whose cost is stated to be .0183¢ shall be 10¢. This obviously is the lowest quantity from which the sale price of these publications can be reckoned. In that view multiples thereof would result in a publication that costs 16¢ being sold at 20¢; a publication whose cost is 14¢ would be sold at 10¢.

Very truly yours,

OS/fm
Enc

OSCAR STRAUSS
Second Assistant Attorney General

Cosmetology. Schools offering courses in cosmetology not represented as qualifying students for license examination need not obtain a school license.

August 5, 1957

Mr. Ronald V. Saf, Attorney
Executive Secretary
Iowa State Board of Medical Examiners
State Department of Health
L o c a l

Dear Sir:

Receipt is acknowledged of your letter of July 31 with enclosure. Your question appears, from examination of said enclosure, to be whether a college or university establishing a course in "Advanced Cosmetology" would be subject to approval and licensure under Sections 157.4 and 157.9, Code 1954. Your question indicates that the course in question would not be for the purpose of preparing students for licensure as cosmetologists but would rather be an advanced course for persons already qualified as cosmetologists.

Section 157.4, Code 1954, provides as follows:

"Examination. No person shall be eligible to take the examination prescribed by the cosmetology examiners unless and until said person presents a diploma, or other like evidence, issued to the applicant by any school of cosmetology approved by the cosmetology examiners and licensed by the department, showing that said applicant has completed the course of study in said school prescribed by the board of cosmetology examiners."

Section 157.9, Code 1954, provides in pertinent part as follows:

"Accredited schools. No school shall be approved by the board of cosmetology examiners unless and until such school shall have made a verified application to the department for a license to teach cosmetology. Such application shall be accompanied by the annual license fee, shall state the name and location of said school, and such other additional information as the board of cosmetology examiners may require. When such application shall have been approved by the board of cosmetology examiners the department shall issue to the applicant a license to conduct such school of cosmetology for one year. Subject to the approval of the board of cosmetology examiners any such license may be annually renewed upon the receipt of the annual license fee. . ."

57-8-6 X

From Section 157.4, Code 1954, it appears that the purpose of a school of cosmetology in obtaining approval and license from the Board of Cosmetology Examiners is to qualify its applicants for examination and license as cosmetologists by the Board of Cosmetology Examiners. I am unable to discover any provision requiring a school to be licensed as such except for the purpose of qualifying its graduates for examination for license.

If, as your question indicates, the institution in which the course is offered does not purport to qualify the students enrolling therein for examination for licensure, it is my opinion that no license need be obtained by the institution offering such course as legal prerequisite to offering such course.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md
CC: Mr. Robert E. Dreher
Attorney at Law
212 Equitable Building
Des Moines 9, Iowa

An application of a foreign corporation for a permit to transact business in Iowa and an application for a registration of label, trademark or form of advertising, both of which bear reprint of statutes, are not publications and may be distributed without charge notwithstanding provisions of Ch. 56, 57th G. A.

Aug 6, 1957

Honorable Melvin D. Synhorst
Secretary of State
B u i l d i n g

Dear Mr. Synhorst:

This will acknowledge receipt of yours of the 2nd inst. in which you submitted the following:

> "Enclosed are two forms which have heretofore been issued by this Department without charge. One is an application form used by a Foreign Corporation in applying for a permit to transact business in the State of Iowa, and the other is used in applying for a registration, trademark or form of advertising. Code Sections are printed on the back side of each of these forms.
>
> "Do the provisions of Chapter 56, Acts of the Fifty-seventh General Assembly make it mandatory to charge for these forms when they are issued to prospective users?"

In reply thereto I advise that I am of the opinion neither of the attached forms, one being an application of a foreign corporation for a permit to transact business in Iowa and the other an application for registration of a label, trademark or form of advertising, both of which bear reprint of statutes, are publications within the terms of Section 2 of Chapter 56, Acts of the 57th General Assembly.

In the absence of statute definition of publication, I refer

57-8-7 X

to Words and Phrases, Volume 35, pages 31, 32, for common law definitions thereof, among which are the following:

> "Publication means to make known, a notification to the public at large, either by words, writing, or printing, and implies the means of conveying knowledge or notice. Daly v. Beery, 178 N.W. 104, 106, 45 N.D. 287.
>
> "A 'publication' is defined as the act of publishing or making known; notifying or printing; proclamation; divulgation; promulgation; as the publication of the Gospel; the publication of statutes or edicts. State v. Grey, 32 P. 190, 191, 21 Nev. 378, 19 L.R.A. 134; United States v. Comerford, 25 F. 902, 903; Sproul v. Pillsbury, 72 Me. 20, 21.
>
> "In Worcester's Dictionary, 'publication' is defined as the act of publishing or making public, etc. In Webster's Dictionary the same word is defined as the act of publishing or making known; notice to the public at large, either by words, writing, or printing. In Bouvier's Law Dictionary, 'publication' is defined as the act by which a thing is made public. Le Roy v. Jamison, 15 Fed.Cas. 373, 376; State v. Grey, 32 P. 190, 191, 21 Nev. 378, 19 L.R.A. 134."

I am of the opinion therefore that the submitted forms are not publications and may be distributed without charge.

Very truly yours,

OS/fm

OSCAR STRAUSS
Second Assistant Attorney General

Iowa motor vehicle fuel tax imposed under provisions of §324.80, Ch. 164, 57th G. A., is due from contractors on contracts executed prior to July 4, 1957, in accordance with provisions of §324.2 (2), 1954 Code.

August 6, 1957

Honorable M. L. Abrahamson
Treasurer of State
L o c a l

Attention: Mr. B. G. Marchi, Director
Motor Fuel Tax Division

Dear Sir:

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

> "Please issue a ruling in relation to Section 324.80 of the Iowa Motor Vehicle Fuel Tax Law as it would affect the collection of tax due from contractors on bids prior to the effective date of this law and subject to the old law under Section 324.2, Paragraph 2."

In reply thereto I advise as follows:

The so-called old law is designated as Section 324.2 (2), Code 1954, and provides:

> "324.2 Tax imposed. A license fee of four cents per gallon or fraction of a gallon is hereby imposed on the sale or use of all motor fuel sold or used in this state for any purpose whatsoever; and a license fee of six cents per gallon or fraction of a gallon is hereby imposed on the following:
>
> "1. * * * * * * * *
>
> "2. All fuel oil used in any maintenance and construction work which is paid for from public funds.
>
> " * * * * * * * * ."

57-8-8 X

Section 324.80 of Chapter 164, Laws of the 57th General Assembly, provides as follows:

> "All laws in conflict with this chapter are hereby superseded by this chapter, and it is the intention herein to substitute the provisions of this act for chapter 324, Code 1954, and any and all acts amendatory thereof. The repeal effected by the adoption of this chapter shall not be construed as relieving any person whatsoever from the payment of any excise tax, referred to in chapter 324, Code 1954, as 'motor vehicle fuel license fee', penalty or interest due or owing to the state of Iowa under any law hereby repealed, or to affect or terminate any prosecutions or other proceedings pending under such laws or to prevent the commencement or prosecutions of any proceedings, legal or equitable, civil or criminal, for a violation of any such laws or for the collection of any excise tax with interest and penalty or for the obtaining of any refund or the enforcement of any other right accruing under the law as it existed prior to the taking effect of this chapter."

I am of the opinion that under the provisions of the foregoing Section 324.80, the tax due from contractors on contracts executed prior to July 4, 1957, are payable in accordance with the provisions of Section 324.2 (2), Code 1954.

Very truly yours,

OS/fm

OSCAR STRAUSS
Second Assistant Attorney General

Purchasers of hunting and fishing licenses as the word "purchasers" is defined in opinion issued Aug. 5, 1957, are entitled to publications containing reprints of laws and regulations covering hunting and fishing gratis. Purchasers of licenses from other departments under same definition are not entitled to publications of other departments containing reprints of laws and other regulations.

August 6, 1957

Mr. Bruce F. Stiles
State Conservation Director
L o c a l

Dear Mr. Stiles:

This will acknowledge receipt of yours of the 23d ult. in which you submitted the following:

> "Further reference is made to our letter of June 6, 1957 and the answer made by Frank D. Blanco under date of July 1, 1957.
>
> "The State Conservation Commission respectfully requests your opinion as to the exact meaning of the words 'purchasers of licenses' as referred to on page 5 of Mr. Blanco's letter of July 1, 1957.
>
> "Does this mean that the purchaser of a fishing license is entitled to reprints of laws or regulations covering fishing, or would the purchasers of hunting licenses also be entitled to fishing law regulations, or would purchasers of driver's licenses or any other license issued by the State of Iowa be entitled to any of our publications free?"

In reply thereto I enclose copy of opinion issued this date defining the words "purchasers of licenses" as used in Section 2 of Chapter 56, Laws of the 57th General Assembly. Under the definition of that term I am of the opinion that purchasers of hunting licenses are entitled to publications containing reprints of laws and regulations covering hunting and no other gratis;

57-8-9

likewise, purchasers of fishing licenses are entitled to publications containing reprints of laws and regulations covering fishing and no other gratis. Purchasers of licenses from other departments as herein defined are not entitled gratis to the publication of other departments containing reprints of laws and regulations.

Very truly yours,

OS/fm
Enc

OSCAR STRAUSS
Second Assistant Attorney General

TRANSFER OF PATIENTS FROM STATE SANATORIUM: A patient undergoing treatment for tuberculosis, under a "free treatment certificate" at the State Sanatorium at Oakdale is entitled to remain at the sanatorium until discharged by the Superintendent as no longer having tuberculosis in a communicable stage.

August 6, 1957.

Mr. William E. Falk
County Attorney
Page County
Clarinda, Iowa

Dear Mr. Falk:

In your letter of May 16, 1957, you advise:

"Page County has maintained two patients at the State Sanatorium at Oakdale for ten years. The cost is staggering. Both patients, clinically, show recovery but are being retained there at their insistence, -- at least the Sanatoirum's last letter to me indicated this. The Board of Supervisors, not intending to discontinue their free treatment, has asked for their transfer to Sunny Slope Sanatorium at Ottumwa, where the patient's treatment would be $90 per month less than at Oakdale, but Oakdale has refused. They say: "there would, of course, have been no question of transferring Mr. Allumbaugh, had not the patient himself, objected." I had previously written them that it was my impression that the Board of Supervisors, who are paying for the care of these patients, could request their transfer, but still the transfer is refused. Therefore, I am requesting your opinion and answer on the following questions:

"Can the Board of Supervisors, who are maintaining patients in the State Sanatorium at Oakdale, request the transfer of such patients to another tubercular sanatorium, and must such request be granted?"

The problem you present, had been heretofore presented to this office by the Secretary of the Board of Regents, upon a question submitted by the Superintendent of the State Sanatorium at Oakdale, in which the question submitted was whether or not a Free Treatment Certificate may be cancelled in the manner proposed by the Page County Board of Supervisors. The question was answered in the negative and we enclose herewith a copy of the letter opinion made under date of May 9, 1957.

There appears to be a variance in the facts presented in your letter and the correspondence between the Sanatorium

57-8-10 X

and the Chairman of the Board of Supervisors of Page County, and the information now before us with respect to the physical condition of the two patients in question. We quote from a letter received from the Superintendent under date of July 27, 1957:

> "At the request of Mr. David A. Dancer, Secretary of the Board of Regents, I am writing you concerning Mrs. Mildred Snively and Nathan Allumbaugh, both from Page County. Both of these patients have far advanced pulmonary tuberculosis and are in poor general condition.
>
> "Mrs. Snively is potentially active, having had ribs removed on one side and a cavity in the opposite side. She is a pulmonary cripple and is able to take very limited activity.
>
> "Mr. Allumbaugh is also a pulmonary cripple with a positive sputum and he is an open case of tuberculosis. His general condition is poor and he is a bed patient."

The statute is mandatory that Boards of Supervisors of each county shall provide suitable care and treatment for persons suffering from tuberculosis. Sec. 254.1, Code of Iowa, 1954. This was determined and settled when the Page County Board caused the "free treatment certificates" to be issued to the patients in question. It was discretionary at this point to what hospital the free treatment certificate would be issued by the county director of social welfare, or the overseer of the poor, as the board of supervisors may direct. Sec. 254.8, Code of Iowa, 1954.

Having selected the State Sanatorium at Oakdale, and the patients having applied for such treatment - "and agreed to remain under treatment until discharged by the sanatorium as no longer having tuberculosis in a communicable stage * * *" (See Sec. 254.8) we believe that the county cannot control the handling of such patients, until released by the sanatorium that was granted the "free treatment certificate" in the first instance.

We, therefore, are of the opinion that the patients in question under the provisions of the "free treatment certificate" are entitled to remain at Oakdale until the Superintendent discharges them as no longer having tuberculosis in a communicable stage.

Very truly yours,

NORMAN A. ERBE, Attorney General

FDB/sp
enc.

FRANK D. BIANCO,
Assistant Attorney General

August 7, 1957

Mr. W. Grant Cunningham
Secretary, Executive Council
B u i l d i n g

Dear Mr. Cunningham:

This will acknowledge receipt of yours of the 31st ult. in which you submitted the following:

> "We would appreciate an opinion as to the legality of uniforming the Border Patrol from the Motor Vehicle Fuel Tax Division, Office of the Treasurer of State."

In reply thereto I would advise you as follows. The Treasurer of State is authorized by Chapter 164, Section 324.75, Acts of the 57th General Assembly to:

> "Authority is hereby given to the treasurer to enforce the provisions of this chapter and employees of the treasurer designated as enforcement officers shall have the power of peace officers in the performance of such duties."

No provision is made therein for uniforming such employees of the Treasurer as he may have designated to have the power of a peace officer nor does there appear to be any general statute respecting the uniforming of peace officers. The situation presented resolves itself into two phases, (1) the power of the department head to require an employee having the powers of a peace officer to perform his work in a uniform designed to identify him as a peace officer, and (2) the power to purchase such uniform and pay therefor.

57-8-11 X

1. Insofar as the first phase is concerned, it is elementary that any employer has the prerogative to require his employees to present themselves for work attired in clothing proper for the performance of the work as a condition of the employment. It has been held on occasions too numerous to require citation that creatures of statute (which includes state departments) have only those powers conferred by statute. The power to furnish clothing, whether uniform or non-uniform, to its employees does not appear to be mentioned in statutes conferring power upon your department. Therefore, if as a matter of fact, the wearing of a uniform is necessary to proper performance of your employees' duties, it is within the power of the Treasurer as an employer to direct such employee to report for duty attired in such uniform.

2. Insofar as the second phase is concerned, absent express statutory authority the Treasurer of State is without power to purchase or pay for such uniforms. Precedent for that conclusion is found in opinion of this Department appearing in the Report of the Attorney General for 1928 at page 426 wherein was denied the power to purchase uniforms for firemen without express statutory authority therefor. And further support for this conclusion is found in the fact that the Legislature has by statute provided for uniforming members of the Highway Patrol (see Section 80.18, Code 1954) and has provided expressly for the uniforming of both policemen and firemen.

I am of the opinion therefore that under present statutes uniforms of Border Patrol from the Motor Vehicle Fuel Tax Division may be required in the performance of their duties as employees of the State Treasurer but purchase and payment therefor cannot be made by the Treasurer of State.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

BENEFITED DISTRICTS. 1. Ch. 178, Sec. 13, 57th G.A. makes no provision for "compensation" of civil townships included in a benefited district but only for assumption by such district of their indebtedness or assets relating to fire protection. 2. Ch. 178, Sec. 14, 57th G.A., by its express terms, applies only to benefited districts created under Ch. 178 and not to other statutory creatures.

August 7, 1957

Mr. Carl Hendrickson, Jr.
Assistant Linn County Attorney
Cedar Rapids, Iowa

Dear Sir:

Receipt is acknowledged of your letter of August 2 as follows:

"Inquiry has been made of thos office on two points concerning Chapter 178 of the Acts of the 57th General Assembly. The one township owns and operates fire fighting apparatus and said township is desirous of forming a fire district with portions of adjacent townships.

"The first question is whether the township owning the fire fighting apparatus is entitled to compensation for said apparatus from the benefited fire district pursuant to Section 13, Chapter 178 of the Acts of the 57th General Assembly.

"Secondly, assuming the township is entitled to remuneration for its fire fighting apparatus, is it then entitled to a tax credit as provided in Section 14 for the dissolution of a benefited fire district?

"We will appreciate your consideration of the foregoing problems."

Section 13, Chapter 178, Laws of the 57th General Assembly provides as follows:

"When the boundary lines of such benefited fire district shall include an entire township, the township trustees shall no longer levy the tax provided by section three hundred fifty-nine point forty-three (359.43) of the code; and any indebtedness incurred for the purposes of sections three hundred fifty-nine point forty-two (359.42) to three hundred fifty-nine point forty-five (359.45), inclusive of the code, shall be assumed by the benefited fire district and all the assets of said township which relate to the fire-fighting operation shall be transferred to the benefited fire district. Any property in the township purchased for dual purposes shall be held jointly."

57-8-12

The answer to your first question appears from the face of the statute which makes no provision for compensation of included townships but only for assumption of their indebtedness and assets with respect to fire-fighting and fire protection.

Section 14, Chapter 178, Laws of the 57th General Assembly provides as follows:

> "Upon petition of thirty-five percent of resident voters, the board of supervisors may dissolve the benefited fire district and dispose of any remaining property, proceeds of which shall first be applied against outstanding obligations and any balance shall be applied to tax credit of property owners of the district. The board of supervisors shall continue to levy tax after dissolution of district not to exceed one and one-half (1½) mills on all the taxable property of the district until all outstanding obligations of the district are paid."

Since the quoted statute refers only to dissolution of a "benefited district" and since the "benefited districts" to which it refers are a new type of creature of statute authorized for the first time by the act of which the quoted statute is a part, there is no possible way in which said statute might be construed to apply to creatures of statute other than benefited districts such as cities, towns, or civil townships formerly furnishing fire protection under Sections 359.43 to 359.45, Code 1954. The quoted section refers to consequences or advantages attendant upon dissolution of "benefited districts". Since, under the terms of your question there presently exists no "benefited district" as such to be dissolved and, in fact, it is creation rather than dissolution which is contemplated, Chapter 178, Section 14, by its own terms, has no application in the situation described.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

HEADNOTE: Income Tax Division: Taxability of earnings paid by an Iowa employer to a nonresident of Iowa for services performed outside of the state of Iowa. Earnings are not taxable.

August 7, 1957

Mr. George J. Eischeid
Director of Income Tax

Dear Mr. Eischeid:

This is to acknowledge receipt of your request, for an opinion regarding the taxability of the earnings of a nonresident taxpayer paid by an Iowa company for work which he does in the state of Illinois.

This matter is covered by section 422.8 paragraph 2 Code of Iowa, 1954. This section provides:

> "Under rules and regulations prescribed by the state tax commission, net income of individuals shall be allocated as follows: ***
>
> 2. In the case of nonresident taxpayers, if any net income is received from a business, trade, profession, or occupation carried on partly within and partly without the state of Iowa, only such portion of said net income as is fairly and equitably attributable to that part of the business trade, profession or occupation carried on within the state of Iowa shall be allocated to Iowa; ***

The State Tax Commission has promulgated regulations on this subject. Regulation 22.8 (2)-2 (f) provides:

> "If nonresident employees are employed in this state at intervals throughout the year, as would be the case if employed in operating trains, planes, motor busses, trucks, etc., between this state and other states and foreign countries, and are paid on a daily, weekly or monthly basis, the gross income from sources within this state includes that portion of the total compensation for personal services which the total number of working days employed within the state bears to the total number of working days both within and without the state."

Further assistance in arriving at a conclusion in this matter can be derived from regulations 22.8 (2-1), 22.8 (2-2)(c)

57-8-13

(d) and (e), and regulation 22.8 (2-4).

I conclude that if the taxpayer can establish the assertion he has made in his letter of August 2, 1957, he is entitled to a refund for taxes paid in the previous year pursuant to a proper return. I find no regulation which would prohibit the payment to him of the refund to which he may be entitled, or which would prohibit him from allocating his income between Illinois and Iowa on the basis of services performed in the respective states, even though he is paid for his services from within the State of Iowa.

The fact that he is a newspaper reporter should not prohibit him from having the benefit of the regulations.

Very truly yours,

FJP:mcd

FRANCIS J. PRUSS
Spec. Asst. Atty Gen.

August 8, 1957

Mr. Arthur F. Draheim, Jr.
County Attorney
Clarion, Iowa

Dear Mr. Draheim:

This is to acknowledge receipt of your communication of August 5, 1957, in regard to questions relating to the admission and presence of minors in billiard halls.

In answer to your first question, the State of Iowa recognizes no distinction between the games of billiards, pool, or snooker. Webster's New International Dictionary defines "snooker" as "a variety of pool". "Pool" is a game played on a billiard table with six pockets, Century Dictionary; it is one of the various games played on a six-pocket billiard table, Standard Dictionary; and it is treated in Webster's New International Dictionary and in the Encyclopaedia Britannica as a kind of billiards. See State v. Johnson, 108 Iowa 245, 79 N.W. 72. Hence, insofar as the provisions of Section 726.9, Code 1954, as amended, are concerned the terms "billiard", "pool", and "snooker" would be regarded as being synonymous.

You next ask whether recreational centers supervised and maintained by cities would be violating the law if they permitted minors to play on billiard tables in such centers.

Since our opinion of January 22, 1957 (#57-1-28), the provisions of Section 726.9, Code 1954, have been somewhat changed, having been amended by Chapter 273, Acts 57th G. A., (House File 229), and the statute now reads (underlineated portions having been added thereto by said Chapter 273) as follows:

> "No person who keeps a billiard hall <u>where beer is sold</u>, or the agent, clerk, or servant of any such person, or any person having charge or control of any such hall, shall permit any minor to remain in such

57-8-14 X

hall or to take part in any of the games known as billiards.

"The council in any city or town shall have power by ordinance to establish minimum age limits for minors for the purpose of regulating their admittance to billiard halls which do not sell beer and their participation while therein in the games known as pool and billiards."

It is to be noted that the prohibition of the statute is now limited to "billiard halls where beer is sold", where formerly the prohibition extended to "billiard halls" generally. Apparently no restriction now exists as to billiard halls "which do not sell beer" unless such a restriction is imposed by a city ordinance. The statute as now worded grants power to a city or town to establish by ordinance minimum age limits for the admission of minors to billiard halls which do not sell beer and their participation while therein in the games of pool and billiards. There is nothing in the statute to prevent a city council from setting any age limit it might desire. On the other hand, under Section 368.8, subparagraph 2, Code 1954, pertaining to the general licensing powers of cities and towns, a city council might entirely prohibit the operation of a billiard hall within its corporate limits.

It therefore appears that under the statute, as presently worded, (Section 726.9), recreational centers supervised and maintained by a city may be established wherein minors may be permitted to play at the game of billiards, pool, or snooker, provided, however, that no beer is sold at such center. This conclusion is further strengthened by the "Explanation" attached to House File 273, above referred to, which among other things stated that the proposed act "will give communities the right to establish additional desirable inside recreation for minors."

I trust this answers your inquiry.

Very truly yours,

RRRD/fm

RAPHAEL R. R. DVORAK
First Assistant Attorney General

August 8, 1957

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

Dear Mr. Cahill:

This is to acknowledge receipt of your communication of July 26, 1957, relating to the effect of Chapter 119, Acts of the 57th General Assembly (House File 345), which amends Section 247.20, Code of Iowa, 1954.

Generally speaking, the laws, both original and amendatory, are intended to be prospective only and the presumption is that statutes are to operate prospectively and not retrospectively. In Sutherland, Statutory Construction, 3rd Ed., Volume 1, pages 434 et seq., §1936, we find this statement relating to amendatory acts to original legislation:

> "* * * * *. In accordance with the rule applicable to original acts, it is presumed that provisions added by the amendment affecting substantive rights are intended to operate prospectively. Provisions added by the amendment that affect substantive rights will not be construed to apply to transactions and events completed prior to its enactment unless the legislature has expressed its intent to that effect or such intent is clearly implied by the language of the amendment or by the circumstances surrounding its enactment.
>
> "* * * * *, In the absence of a saving clause or statute or some other clear indication that legislative intent is to the contrary, provisions added by the amendment that affect procedural rights - legal remedies - are construed to apply to all cases pending at the time of its enactment and all those commenced subsequent thereto, * * * *. But the new provisions will not affect a proceeding entirely closed before the amendment became effective."

57-8-15 X

Applying the above quoted rules to your situation, it would seem that the amendment to Section 247.20 by the 57th General Assembly would apply only to those sentences imposed and suspended subsequent to July 4, 1957. We realize, of course, that it is desirable to "clear the dockets" of many of these old suspended sentences which have been on record for many years. However, we would also like to point out that in felony cases the mere discharge from suspended sentence by the Court would not in itself restore any of the citizenship rights, privileges, and immunities which were forfeited by reason of the conviction. The defendant's civil rights would still be subject to all the disabilities flowing from such judgment of conviction. Such forfeited rights can only be restored to him by the Governor, and in such a case it seems that time and effort would be conserved if the convicted person would apply for both a final discharge from suspended sentence and a restoration of citizenship to the Governor rather than by applying first to the District Court for a discharge and secondly to the Governor for a restoration of his citizenship rights and privileges.

For your information we are enclosing herewith forms of application presently in use by the Governor's office, together with forms of "Final Discharge From Suspended Sentence" and "Final Discharge From Suspended Sentence and Restoration of Citizenship".

Very truly yours,

RRRD/fm
Encs

RAPHAEL R. R. DVORAK
First Assistant Attorney General

August 8, 1957

Mr. Bruce F. Stiles
State Conservation Director
State Conservation Commission
L o c a l

Dear Sir:

This will acknowledge receipt of yours of the 19th ult. in which you have submitted the following:

"Your attention is called to Section 107.13, Code of 1954, and to Section 3, Chapter 45, Acts of the 54th General Assembly as amended by Acts of the 57th General Assembly, in regard to the requirement of the State Conservation Commission to employ a State Forester.

"For the past twenty years or more this department has employed Professor MacDonald of Iowa State College at a salary of approximately $750.00 a year to represent Iowa in the official capacity of State Forester. At the present and during much of this period of time we have also employed a trained forester to serve in the capacity of Superintendent of Forestry, this position being an active, full-time position.

"The position held by Professor MacDonald has been only part-time and the principal capacity that he has served in has been to represent the State at National and District meetings of foresters.

"In view of the laws passed since the enactment of Section 107.13 we respectfully request your opinion as to whether it would be legal to dispense with the services of Professor MacDonald, who is now on retirement at Iowa State College; and if the requirements of the law would be fulfilled in continuing the employment of our presently employed Superintendent of Forests who would act in the capacity of a State Forester, but whose title would be Superintendent of Forests."

57-8-16 X

Subsequent thereto Mr. C. M. Frudden, a member of the Commission, in a letter to this department directed to the problems submitted in your letter and specifically asking whether the Commission must continue the office of State Forester and, if so, whether the duties of the State Forester and those of the Superintendent of Forestry could be consolidated into one and to one individual. In reply thereto I advise as follows:

1. Section 107.13, 1954 Code, provides as follows:

> "Officers and employees. Said director shall, with the consent of the commission and at such salary as the commission shall fix, employ such assistants, including a professionally trained state forester of recognized standing, as may be necessary to carry out the duties imposed by this chapter on the commission; also and under the same conditions, said director shall appoint such officers as may be necessary to enforce the laws, rules, and regulations, the enforcement of which are herein imposed on said commission. Said officers shall be known as state conservation officers. The salaries of the state conservation officers shall not exceed thirty-six hundred dollars per year."

Note that the director shall, with the consent of the Commission, employ assistants including a professionally trained State Forester to carry out the provisions of Chapter 107. Under the foregoing statute the Director is required among other things to appoint a State Forester, however, such power is exercised with the consent of the Conservation Commission. Withholding by the Commission of its consent to the employment of a State Forester would result in discontinuance of such employment and there would be no designated State Forester.

2. I find no specific statutory office designated as Superintendent of Forestry. I assume this employment arises under the authority of Section 107.21, subsection 2, providing as follows:

> "2. A division of lands and waters which shall include matters relating to state waters, state parks, forests and forestry, and lakes and streames, including matters relating to scenic, scientific, historical, archaeological, and recreational matters."

I am of the opinion that the duties of the State Forester, if no appointment is made, could be assumed by the Superintendent of Forestry.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

JAMES H. GRITTON
Assistant Attorney General

OS:MKB

HEADNOTE: Sales and Use Tax Division: Taxability of drugs and medicines purchased outside of the state of Iowa; decided that H.F. 162 Acts of 57th G. A. gives exemption under the sales tax act to these items, but there is no exemption under the Use Tax Act.

August 8, 1957

State Tax Commission
State Office Bldg.
Des Moines, Iowa

Attention: Mr. Leon N. Miller, Chairman

Dear Mr. Miller:

This is to acknowledge receipt of your letter dated July 10, 1957, addressed to Mr. Wilson, in which you request an opinion on the following questions:

> "Under SF 117 (H. F. 162), passed by the 57th G. A., does this bill exempt the purchase of drugs and medicine by a veterinarian from sales tax and if so, I would inquire if drugs and medicine are exempt from use tax on all out of state purchases."
> ***
> In conclusion, we would like an opinion as to whether or not SF 117 (H.F. 162) has any legal application on the Use Tax Chapter, namely Chapter 423 of the 1954 Code of Iowa."

The Amendment referred to is entitled "Sales Tax Exemption to Farmers." The applicable portion provides:

> "Section 1, Section Four hundred twenty-two point forty-two (422.42) subsection three (3), Code 1954, is hereby amended by inserting in line eight (8) after the word 'limestone' the following words, 'or materials, but not tools or equipment, which are to be used in disease control, weed control, insect control or health promotion of plants or livestock produced, as part of agricultural production for market,"

The statute containing the amendment now provides as follows:

> "422.42 Definitions.
>
> The following words, terms and phrases, when used in this division, have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:
>
> ***

57-8-17Y

> 3. 'Retail sale' or 'sale at retail' means the sale to a consumer or to any person for any purpose, other than for processing or for resale of tangible personal property and the sale of gas, electricity, water, and communication service to retail consumers or users, but does not include commercial fertilizer or agricultural limestone or materials, but not tools or equipment, which are to be used in disease control, weed control, insect control or health promotion of plants or livestock produced as part of agricultural production for market."

Section 423.2 pertaining to use tax, entitled 'Imposition of Tax," provides:

> "An excise tax is hereby imposed on the use in this state of tangible personal property purchased on or after the effective date of this Chapter for use in this state, at the rate of two percent of the purchase price of such property. Said tax is hereby imposed upon every person using such property within this state until such tax has been paid directly to the county treasurer, to a retailer, or to the commission as hereinafter provided."

A review of sections 422.45 and 423.4, the sections of the Code providing for exemptions under the sales tax and use tax acts respectively, are of no assistance in deciding this question.

Section 423.4-6 provides:

> "The use in this state of the following tangible personal property is hereby specifically exempted from the tax imposed by this Chapter:
>
> ***
>
> 6. Tangible personal property, the gross receipts from the sale of which are exempted from the retail sales tax by the terms of section 422.45."

Section 422.45 does not include the exception given in section 423.4.

In construing the sales tax act as amended and section 423.2 of the use tax act, both should be allowed to stand if

violence is not thereby done to the language of either. It is clear that H. F. 162 cannot be construed to be an express amendment of Section 423.2 since this section was not mentioned in the Act.

The purpose of the use tax act is to place Iowa retailers on an equal competing basis with firms outside the borders of the state. The amendment of the sales tax act without amendment of the use tax act gives to Iowa retailers a price advantage in the amount of the tax. There would seem to be no violation of public policy in this result.

Therefore, it would seem that H. F. 162 exempts the purchases of drugs and medicines from the sales tax so long as they are used "in disease control . . . or health promotion of plants or livestock produced as part of agricultural production for market."

Certainly the exclusion refers to "livestock produced as part of agricultural production for market." This would necessarily omit drugs and medicines obtained for animals commonly thought of as pets.

Black's Law Dictionary defines agriculture as,

> "The art or science of cultivating the ground, including the harvesting of crops, and in a broad sense, the science or art of production of plants and animals useful to man, including in a variable degree, the preparation of these products for man's use. ..."

It would seem that the animals referred to in H. F. 162 are those animals ordinarily raised in connection with cultivation of the soil such as poultry, hogs, cattle and sheep. It would seem that someone raising fur bearing animals for market would not be allowed the exemption.

I conclude that the use tax will be payable on all out of state purchases of drugs and medicines for agricultural health promotion and disease control. Except for the policy of the use tax act, this act would also apply to the instate purchases of these items.

I conclude further that H. F. 162 has no application to the use tax act since it appears that no section of the use tax act refers to section 422.42, which is the amended section.

Yours very truly,

FRANCIS J. PRUSS
Special Assistant Attorney General.

FJP:bmc

Public Records: Records of County Boards of social welfare cannot be destroyed or disposed of, except as provided by statute, ie. reproduced by miniature photographic process and then destroyed under order of a District Court judge, or transferred to the archives of the State Curator, with his consent for final disposition.

State Board of Social Welfare — Frank D. Bianco

Destruction of County Board Minutes — August 8, 1957

Reference is hereby made to intra-office communication of date, July 1, 1957, reading as follows:

> "During the years County Boards have been in existence, they have maintained Minutes of the Meeting. In some instances those records have become rather voluminous. Questions have been raised as to whether some of the older volumes might be destroyed.
>
> "Insofar as the State Department is concerned, we are of the opinion that such records could be destroyed only after an audit is completed in the County. Only the records existing prior to the completion date of the audit could be destroyed. However, it has occurred to us that these are public agency records and therefore, there may be a statute covering their preservation or destruction. The Board's opinion would be appreciated."

There is no statutory authority whereby County Boards may destroy any records. We call to your attention the following statutory provisions under which such records may be disposed:

" Sec. 343.13 Minature photographic copies of records. Any county officer may, at his discretion, make photographic, photostatic, microfilm, microcard, or other accurately reproduced copies, on a durable medium for so reproducing the original, of records, reports and other papers either filed or recorded in his office. When such copies have been made and have been properly filed and indexed, the county officer may, on approval of a judge of the district court of the judicial district, destroy the original records, reports or other papers that are more than ten years old or place them in the possession of a museum or historical society willing to accept them."

" Sec. 303.9 Archives.

* * *

2. Custody of archives. The curator shall be the trustee and custodian of the archives of Iowa, except that such custody shall not be construed to include county or municipal archives unless they are voluntarily deposited with the curator and with

57-8-18X

his written consent. The curator shall prescribe such rules and regulations as are necessary to see that such archives are systematically arranged in suitable containers properly labeled to show their contents and order of filing before they may be transferred to his custody."

"Sec. 303.11 Removal of original.
* * *
The curator shall annually submit to the trustees a list of papers and documents which have no further value, and upon approval of said trustees, such items may be destroyed.

It is doubtful that minutes of meetings are of sufficient importance to microfilm as a permanent record.

It would appear, therefore, that such records might be transferred to the State archives with the consent of the curator and eventually might be ordered destroyed.

Yours very truly,

FRANK D. BIANCO
Assistant Attorney General

FDB/sp

August 9, 1957

Miss Ernestine Grafton, Director
State Traveling Library
Historical Building
L o c a l

Dear Madam:

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

> "At the regular quarterly meeting today the Iowa State Traveling Library Board of Trustees instructed me to request of you an opinion concerning the disposition of certain books and materials. Specially the Board wishes to know if the following policy is legal within the responsibilities assigned the Board by law:
>
> "The Board approves the disposition of books, periodicals, serials and other related library materials not needed, or worn out in the judgment of the staff, in the following manner:
>
> "1. Discard.
>
> "2. Transfer to any one of the State supported institutions which want them.
>
> "3. Sale.
>
> "Any financial gain will be credited to the Iowa State Traveling Library in a trust fund."

In reply thereto I advise that I find no express authority in Chapter 147, Acts of the Fifty-sixth General Assembly, establishing the Iowa State Traveling Library to make disposition of certain books and materials as proposed. I therefore advise you

57-8-19

that the policy proposed exceeds the power vested in the Traveling Library by the foregoing chapter. However, there is a general authority vested in the Executive Council to dispose of State owned personal property that is no longer needed or is unfit for use. See Section 19.23, Code 1954, and see Sections 303.9 and 303.10, Code 1954, for use by the several departments of State in the disposition of manuscripts, etc. that you desire discarded or for which storage space is not available.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

August 12, 1957

Mr. Charles W. Wagner
Superintendent of Buildings
and Grounds
B u i l d i n g

Dear Sir:

In answer to yours of the 9th inst. asking for full information on Employees' Retirement Laws and information specifically as to the time of retirement under the Iowa Public Employees' Retirement System, I advise that under the provisions of Section 97B.45, Code 1954, an employee may voluntarily retire on the first day of any month coinciding with or following the date he attains the age of sixty-five. Compulsory retirement of an employee is required no later than the first day of the month coinciding with or next following the date he attains the age of seventy except as otherwise provided in Section 97B.46, Code 1954. Service after attaining the age of seventy is controlled by Section 97B.46, Code 1954, which provides as follows:

> "Service after age seventy. A member may, on the request of the employer, remain in the active employ of the employer beyond the date he attains the age of seventy for such period or periods as the employer from time to time shall approve. The member shall retire from the employment of the employer at the end of the last approved period, on the first day of the month next following or coinciding with such date."

57-5-20 X

The foregoing statutes are unaffected by Chapter 70, Code 1954, being the Soldiers Preference Law.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

A religious institution that has recorded its deed of conveyance but has not filed its claim for exemption before July 1 of the tax year is not entitled to the exemption provided by §427.1(9)(24),(27).

August 13, 1957

Mr. Robert W. Burdette
Decatur County Attorney
Leon, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 31st ult. in which you submitted the following:

> "Mr. Otto B. Akers, Decatur County Assessor, has asked that I write to your office requesting an official Attorney General's Opinion on the following question:
>
> "A church organization acquires a piece of real estate after the date of July 1, 1957, but prior to the date of levy, from a private owner. The church uses the property for religious purposes. The deed was properly recorded as of the date of transfer, but of course, the application for tax exemption would not have been filed prior to July 1, 1957, since the church did not yet own the property on that date.
>
> "Would it be proper to allow a tax exemption on this property for the tax year 1957, since it was being used for religious purposes prior to the date of levy in that year?
>
> "Your early consideration will be appreciated."

In reply thereto I advise as follows. In an opinion dated July 29, 1955, appearing in the Report of the Attorney General for 1956 at page 80 dealing with the question of exemption from taxation under Section 427.1, subsection 9, and referring specifically to Section 427.1, subsection 24, and Section 427.1, subsection 27, it was said:

57-8-21 X

> "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.
>
> "* * * *
>
> "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 prerequisite for recordation of deed or lease, and in addition must meet the prerequisites in sections 427.1 (24)--427.1 (27). * * * *"

While the factual situation submitted appears to be different from any of the situations in the foregoing opinion referred to, the foregoing rule of law bars the allowance of the exemption sought by your letter. It is true that the claimant on the day of levy will have met all of the conditions precedent to exemption except the filing of the claim for exemption. It is a religious institution using its property only for that purpose and has recorded the deed of conveyance but has not filed its claim for exemption before July 1. Lacking that, taxation being the rule and exemption the exception and the burden being upon the claimant, the proposed exemption is unallowable.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

HEADNOTE:
Cigerette Division: Legality of retailers selling cigarettes at regular retail price per carton and giving complementary carton of coca cola; interpretation of Ch. 551A, decided that this violates the "basic cost of cigarettes" provisions of the law since retailer pays the cost of both cigarettes and coca cola.

August 13, 1957

Mr. Thomas J. Keleher, Director
Cigarette and Beer Revenue Dept.,
Building.

Dear Mr. Keleher:

Your letter dated August 8, 1957, addressed to Mr. Leon Miller, requesting an opinion on the legality of certain retailers selling cigarettes at the regular retail price per carton and including therewith a complementary carton of Coca-Cola or some other similar sale inducement, has been referred to me for reply.

Section 551A.4, Code, entitled "Combination sales", provides:

"In all offers for sale or sales involving cigarettes and any other item at a combined price, and in all offers for sale, or sales, involving the giving of any gift or concession of any kind whatsoever (whether it be coupons or otherwise), the wholesaler's or retailer's combined selling price shall not be below the cost to the wholesaler or the cost to the retailer, respectively, of the total of all articles, products, commodities, gifts and concessions included in such transactions; if any such articles, products, commodities, gifts or concessions , shall not be cigarettes, the basic cost thereof shall be determined in like manner as provided in subsection 8 of section 551A.2."

Section 551A.2, entitled "Definitions", provides:

"When used in any part of this chapter, the following words, terms and phrases shall have the meaning ascribed to them except where the context clearly indicates a different meaning: * * *

"8. 'Basic cost of cigarettes' shall mean whichever of the two following amounts is lower, namely, (a) the true invoice cost of cigarettes to the wholesaler or retailer, as the case may be, or (b) the lowest replacement cost of cigarettes to the wholesaler or retailer in the quantity last purchased, less, in either case, all trade discounts and customary discounts for cash, plus the full face value of any stamps which may be required by any cigarette tax act of this state, unless included by the manufacturer in his list price. * * *"

57-8-22 X

#2
Thomas J. Keleher
August 13, 1957

In the example which you have submitted for an opinion, it is my understanding that the retailer purchases both the cigarettes at his wholesale cost and also purchases the Coca-Cola at his wholesale cost, a carton of which Coca-Cola he gives with the purchase of each carton of cigarettes of a particular brand.

It is also my understanding that the cigarette company then reimburses the retailer the full retail price of the Coca-Cola.

Since the retailer, in the first instance, purchases both the Coca-Cola and the cigarettes, then his sale at less than cost becomes a sale in violation of Section 551A.4 of the Code of Iowa, 1954.

If you have any further questions regarding this matter, please let me know.

Yours very truly,

Francis J. Pruss
Special Assistant Attorney General.

FJP:r

August 14, 1957

Iowa Board of Parole
B u i l d i n g

Re: O'Bryan Colvin, 20732-ISR

Attention: Mr. R. W. Bobzin, Secretary and Director of Parole

Gentlemen:

This is to acknowledge receipt of your communication of August 9, 1957, wherein you request an opinion of this department on the following question: A prisoner has been convicted upon two separate offenses (breaking and entering and breaking jail) and has received sentences to run consecutively; application is now made for a parole of the prisoner during the time of his service under the first sentence and before the expiration thereof; does the Board of Parole have jurisdiction to release the prisoner on parole before the commencement of his second sentence?

Please be advised that where a defendant is convicted of two offenses and the order of commitment specifies that the second term shall begin at the expiration of the first, the Board of Parole has jurisdiction to grant a parole if the prisoner is eligible even though none of the second sentence has been served. However, the Board of Parole can not parole such prisoner under the first sentence without paroling him for the second sentence, for the reason that under Section 789.14, Code 1954, both sentences are construed as one continuous term of imprisonment. As authority for this position, see 1934 AGO 728 and 1928 AGO at page 282. See also 1932 AGO 229.

Very truly yours,

RRRD/fm

RAPHAEL R. R. DVORAK
First Assistant Attorney General

57-8-23 X

Under section 321.167 [321.167] 1954 Code of Iowa the Dept. of Public Safe Must furnish certificate containers to county treasurers for approximately the number of vehicles registered in their county.-

Motor Vehicles--

August 14, 1957

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

Attention: Mr. J. F. Carlson

Dear Sir:

Re: Furnishing of Certificate Containers

Reference is made to your recent inquiry as to whether or not your Department can reduce the number of certificate containers to be furnished to County Treasurers below the number of motor vehicles registered in the County the preceding year. This is suggested as a possible economy measure.

Section 321.167 of the 1954 Code of Iowa reads as follows:

"Delivery of plates or emblems. On or before the first day of December of each year, the department shall deliver or cause to be delivered to the county treasurer of each county, approximately as many duplicate number plates and certificate containers as there are motor vehicles registered such county during the preceding year, the plates so delivered to each county treasurer to be in numerical sequence.

"In lieu of plates, the department may furnish the county treasurers appropriate distinguishing emblems as provided in section 321.34."

The language of the statute would appear to be mandatory since the word "shall" is used. The following Code Section, 321.168, sets forth the requirements for additional deliveries in the same language. It is therefore the opinion of this office that the language of the statute must be followed and the certificate containers shall be furnished for approximately the number of vehicles registered in each county during the preceding year. It is suggested, however, that if an individual County Treasurer had a stock on hand or would waive the requirement by stating that he would not need his full quota you might reduce his deliveries to suit his particular needs.

Very truly yours,

DON C. SWANSON
Assistant Attorney General

DCS:MKB

57-8-24 X

To fall within the exception from registration contained in Section 321.18, sub. 5, of the 1954 Code of Iowa a vehicle must be used exclusively for interplant purposes.

Motor Vehicles - Registration.

August 14, 1957

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

Dear Sir:

Reference is made to your letter asking for an opinion on the following question:

> "A truck is engaged in hauling rock from a quarry to a crushing plant and uses a local public road for a distance of about 900 feet, would this vehicle be exempt from registration under the provisions set out in Paragraph 5 of Section 321.18?
>
> "This vehicle is licensed for a Class 'B' registration which was intended to cover its use on the return trip empty, and using another road for a distance which exceeds 1,000 feet. The Class 'B' registration covers the empty weight of the vehicle."

Section 321.18, subsection 5, of the 1954 Code of Iowa, reads as follows:

> "Any vehicle which is used exclusively for interplant purposes in the operation of an industrial or manufacturing plant, consisting of a single unit comprising a group of buildings separated by streets, alleys, or railroad tracks, and which vehicle is solely to transport materials from one part of the plant to another or from an adjacent railroad track to the plant and in so doing incidentally using said streets or alleys for not more than one thousand feet." (Underlining ours)

Such an exception from the registration requirements of this state must be strictly construed. The statute in clear language requires the excepted vehicle to be used "exclusively for interplant purposes" and "solely to transport materials from one part of the plant to another". The plant must consist of a "group of buildings separated by streets, alleys, or railroad tracks".

57-8-2

It is the opinion of this office that under the facts given the vehicle is not used exclusively in the operation suggested since it is admittedly licensed for other purposes. Neither does the crushing plant fall within the statutory definition of an industrial or manufacturing plant. We are therefore of the opinion that this operation does not fall within the exception and full registration should be required.

Very truly yours,

DON C. SWANSON
Assistant Attorney General

DCS:MKB

HEADNOTE: Section 124.6 provides the authority for ~~and~~ the amount of refund upon the voluntary surrender of class "B" beer permits.

August 15, 1957

Mr. A. Elton Jensen
County Attorney
Bedford, Iowa

Dear Sir:

In your letter of August 8, 1957, you set out the following question and problem:

> "May the Board of Supervisors of a County make a prorating or any other reduction of the annual minimum fee for a class "B" beer permit under the provisions of Section 124.24 of the Code of Iowa, 1954?
>
> "The Board of Supervisors of Taylor County is considering the issuance of a Class B beer permit to an applicant for permission to sell beer at the Taylor County Fair and the question is whether a permit for a period of less than a year can be issued for less than the annual minimum fee as set forth by Section 124.24 of the Code."

The permissive procedure in this situation would be controlled by Section 124.6, Code 1954. This section in pertinent part reads as follows:

> "124.6 Tenure - character of permittee - voluntary surrender of permit - refund. All permits provided for in this chapter shall expire at the end of one year from the date of issuance, and may be renewed for a like period upon application being made therefor to the proper authorities as in this chapter provided. * * * * *
>
> "Any class "B" permittee * * * * may voluntarily surrender any permit, issued under this chapter, to the issuing authority and when so surrendered the issuing authority shall refund

57-8-26 X

to the person so surrendering the permit a proportionate amount of the permit fee paid for such permit as follows; If surrendered during the first three months of the period for which said permit was issued the refund shall be three-fourths of the amount of the permit fee; If surrendered more than three months but not more than six months after issuance the refund shall be one-half of the amount of the permit fee; If surrendered more than six months but not more than nine months after issuance the refund shall be one-fourth of the amount of the permit fee. No refund shall be made, however, for any permit surrendered more than nine months after issuance. * * * * * *."

I am of the opinion that, the Legislature having set out the percentage of refunds upon the voluntary surrendering of any permit, the above quoted section is exclusive and binding upon the Board of Supervisors.

Very truly yours,

JHG/fm

JAMES H. GRITTON
Assistant Attorney General

Sales and Use Tax Division : Rate of sales tax on materials furnished under a contract entered into prior to July 1, 1957; the law of sales should be examined to determine when title passes in the purchase of materials which will control rate of tax.

August 15, 1957

State Tax Commission,
Building,
Des Moines, Iowa.

Gentlemen:

This is to acknowledge your request for an opinion as to the legality of Administrative notice designated ST-176A, especially as it applies to construction contracts awarded prior to July 1, 1957.

Section 2 of the notice provides:

> "2. If the sale was made BEFORE July 1, 1957, the 2½% rate of sales tax will apply, even though billing and collection occurred after July 1, 1957.
>
> The Sale will be considered to have been made before July 1, 1957, when the offer to sell and the agreement to buy certain definite goods for a specific price and the passing of title or possession or both to the buyer occurs before July 1, 1957, even though the billing and collection occurs after July 1, 1957. Instructions will be sent in the future by the commission advising the correct preparation of the Retail Sales Tax Return for the quarter ending September 30, 1957."

It appears that the above quoted Section 2 sets up certain requirements to be met to consider that the sale has taken place prior to July 1, 1957. These are: (a) offer to sell; (b) agreement to buy; (c) certain definite goods; (d) specific price; and (e) there must have been a passing of title or possession or both. All of these requirements must have occurred prior to July 1, 1957 for the sale to be considered to have taken place prior to July 1, 1957, and for the 2½% rate to apply.

At the outset, I wish to state that this paragraph 2 appears to be an excellent statement of the law as it applies to sales. It is clear

57-S-27 X

that if the requirements (a) through (d) have been complied with and if possession of the goods has passed to the purchaser prior to July 1, 1957, then certainly the sale in all cases will be considered to have occurred prior to July 1, 1957.

However, the above quoted Section 2 provides that the sale will be considered to have been made when title passes to the purchaser even though possession may not have passed to the purchaser.

I suggest that a statement of certain sections of Chapter 554, the Sales Law, will be sufficient to give to our people the necessary sign posts to administer the law. The hereinafter quoted sections speak of "property" in goods. For our purposes this is to be treated as "title" as used in the administrative notice.

Section 554.18, entitled "When property passes", provides:

> "Where there is a contract to sell unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained, but property in an undivided share of ascertained goods may be transferred as provided in section 554.7."

Section 554.7, referred to in the above section, and entitled "Undivided shares", provides:

> "1. There may be a contract to sell or a sale of an undivided share of goods. If the parties intend to effect a present sale, the buyer by force of the agreement becomes an owner in common with the owner or owners of the remaining shares.
>
> "2. In the case of fungible goods, there may be a sale of an undivided share of a specific mass, though the seller purports to sell and the buyer to buy a definite number, weight, or measure of the goods in the mass and though the number, weight, or measure of the goods in the mass is undetermined. By such a sale the buyer becomes owner in

common of such a share of the mass as the number, weight, or measure bought bears to the number, weight or measure of the mass. If the mass contains less than the number, weight, or measure bought, the buyer becomes the owner of the whole mass and the seller is bound to make good the deficienty from similar goods unless a contrary intent appears."

Section 554.19, entitled "Property in specific goods passes when parties so intend", provides:

"1. Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

"2. For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade, and the circumstances of the case."

There are set out in the Code rather specific rules regarding passage of title as between the buyer and the purchaser. Section 554.20, entitled "Rules for ascertaining intention", provides:

"Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

RULE 1.

Where there is an unconditional contract to sell specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.

RULE 2.

Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such things be done.

RULE 3.

1. When goods are delivered to the buyer 'on sale or return', or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time.

2. When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer:

a. When he signifies his approval or acceptance to the seller or does any other act adopting the transaction.

b. If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then if a time has been fixed for the return of the goods, on the expiration of such time, and if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

RULE 4.

1. Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

2. Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee, whether named by the buyer or not, for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in section 554.21. This presumption is applicable, although by the terms of the contract the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words 'collect on delivery' or their equivalents.

#5
State Tax Commission
August 15, 1957

RULE 5.

If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

In other words, the rules of intention set forth in Section 554.20 will govern in those cases except where a different intention of the parties is indicated.

If you have any further questions regarding this matter, please let me know.

Yours very truly,

Francis J. Pruss,
Special Assistant Attorney General

FJP:r

Township trustees shall provide at the expense of the county suitable places in which to hold elections and such power includes the power to make changes in such places.

August 16, 1957

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

Dear Sir:

This will acknowledge receipt of yours of the 8th inst. in which you submitted the following:

> "I request your opinion on the question of who has the power to change the polling place in a Township which includes a Town from a place outside the Town to a place within the corporate limits of the Town.
>
> "There seems to be no question but what such a change can be made. I cite you sections 49.10, 49.21, and 49.22 of the 1954 Code of Iowa. But these sections do not set out whether the County Board of Supervisors or the Township Trustees or the Mayor and Clerk of the Town have the power to name or change the new polling place.
>
> "My question pertains to Lakeville Township in Dickinson County, Iowa. This Township has been designated as a voting precinct with its polling place in the rural part of the Township in a school house. The Town of Wahpeton, which is within Lakeville Township is willing to provide a polling place within the corporate limits of Wahpeton, but the Lakeville Township Trustees do not want the polling place changed. The Dickinson County Board of Supervisors do not know whether or not they have the power to make such a change, if they so desire, when the Township Trustees do not want a change made."

In reply thereto I advise as follows. Sections 49.21, 49.22 and 49.23, Code 1954, provide as follows:

> "49.21 Polling places. In townships the trustees, except as otherwise provided, shall provide, at the expense of the county, suitable places in which to hold all elections provided for in this chapter, and see that the same are warmed and lighted.

57-8-28

"49.22 Duty of mayor and clerk. In cities and towns, the duties placed upon the trustees by section 49.21 shall be performed by the mayor and clerk.

"49.23 Notice of change. When a change is made from the usual place of holding elections in the township, notice of such change shall be given by posting up notices in three public places in the township, ten days prior to the day on which the election is to be held."

Under the provisions of Section 49.21 I am of the opinion that the Township Trustees may make this change if so advised. The power is given them by this statute to provide suitable polling places for elections. I am of the opinion that this power to provide suitable places embraces an implied power to make changes therein. If this were not so after once selecting a suitable polling place its powers under the statute would have been exhausted. This certainly was not the intent of the Legislature in the foregoing enactment.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

The Conservation Commission may enter into long-term agreements or arrangements under Sec. 111.27 in excess of five years where such agreements or arrangements are for the care and maintenance of a state park under the same terms and conditions that all other state parks are maintained and operated.

August 20, 1957

Mr. Wilbur A. Rush, Chief
Division of Lands and Waters
State Conservation Commission
L o c a l

Dear Sir:

Your letter of August 13, 1957, reads as follows:

"There are occasions when a city or town would like to acquire a state park area within or adjacent to their city limits to be maintained and continued as a public park under city administration.

"An opinion by Mr. Strauss, Second Attorney General, under the date of March 13, 1957, indicates that these areas cannot be deeded to municipalities as a gift or as a sale for an inadequate price. In view of this ruling, this department would like to know if it is legal for the State Conservation Commission to enter into a long-term agreement under Section 111.27 in excess of the five-year limitation on leases as provided in Chapter 111.25 where such agreements are for the care and maintenance of the park for the general public under the same terms and conditions that all other state parks are maintained and operated. It is recognized, of course, that any such agreement would be subject to the approval of the State Executive Council and would reserve to the public all lawful rights now enjoyed under the state laws pertaining to the maintenance and operation of state parks.

"Such agreements would not be in the nature of a lease giving certain proprietary rights to the leasee but it would be in the nature of an agreement to maintain the area as a public park for the general welfare of the public."

57-5-29X

Sections 111.25 and 111.27, to which you refer, are as follows:

> "111.25 Leases. The commission may, with the approval of the executive council, lease for periods not exceeding five years such parts of the property under its jurisdiction as to it may seem advisable. All leases shall reserve to the public of the state the right to enter upon the property leased for any lawful purpose."
>
> "111.27 Management by municipalities. The commission may, subject to the approval of the executive council, enter into an agreement or arrangement with the board of supervisors of any county or the council of any city or town whereby such county, city, or town shall undertake the care and maintenance of any state park. Counties, cities, and towns are authorized to maintain such parks and to pay the expense thereof from the general fund of such county, city, or town as the case may be."

Sutherland Statutory Construction, section 4705, states that:

> "'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."

The above two sections were both part of Chapter 33, Acts of the 40th General Assembly, and therefore clearly fall within the above quoted rule.

There is nothing upon the face of the statutes or in their wording which would require that they be applied together. Rather

the limitations contained with each of the sections would indicate that they are independent of each other.

A lease under Section 111.25, in addition to Executive Council approval, can be for a period not exceeding five years and applies to any "property under its (Conservation Commission) jurisdiction." An agreement or arrangement under Section 111.27, in addition to Executive Council approval, can be made only for the care and maintenance of the land and applies only to "any state park".

I feel the following language quoted from the case of City of Des Moines v. City of West Des Moines, 239 Iowa 1, to be significant:

> "Plaintiff also argues that because of section 6580, Iowa Code, 1924, now section 416.108, Code, 1946) it had no right to lease city property for a term exceeding one year. The ready answer is that this contract is not a lease within the meaning or intention of that statute. A one-year contract for sewage disposal under the conditions prescribed by the 1925 Act would be unthinkable as utterly inadequate and impracticable. We cannot attribute such an intention to the legislature. On the contrary we think the intention was to permit these cities (and others similarly situated) to work out a solution of their water and sewage problems, not a temporary expedient subject to possible yearly change. The purpose of the legislation as applied to the parties here was to make possible a disposition of defendant city's sewage without danger of contaminating plaintiff's water supply. This means a long range program, not limited to the life of a city council or by a statute clearly designed to apply to entirely different situations."

I am of the opinion that the Commission may enter into long-term agreements or arrangements under Section 111.27 in excess of five years where such agreements or arrangements are for the care and maintenance of a state park under the same terms and conditions that all other state parks are maintained and operated.

Very truly yours,

JAMES H. GRITTON
Assistant Attorney General

JHG:MKB

RULES AND REGULATIONS: Repeal of a statute conferring administrative rule-making authority automatically rescinds all rules adopted pursuant to such authority.

August 20, 1957

Honorable Melvin D. Synhorst
Secretary of State
B u i l d i n g

Attention: Code Editor

Dear Sir:

Your attention is hereby invited to new rules and regulations promulgated by the Fire Marshal under authority of Chapter 76, Laws of the 57th G. A., (H.F. 563), and relating to the storage and handling of liquefied petroleum gases.

It is to be noted that the new rules as prepared by the Fire Marshal for filing under Chapter 17A, Code 1954, make no provision for rescission of rules pertaining to the same subject and appearing at pages 322 to 337 inclusive, 1954 I.D.R.. The reason for lack of such provision is to be found in Section 2, Chapter 76, Laws of the 57th G. A. (H.F. 563), which repealed the sections of the 1954 Code by authority of which the said rules and regulations appearing at said pages of the I.D.R. were promulgated.

The repeal of the statutory authority to promulgate automatically rescinded the old rules by operation of law leaving nothing to rescind in connection with the promulgation of the new rules.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA/fm
c:c Code Editor
Fire Marshal

57-8-30 X

MOTOR VEHICLE - The supplies" referred in section 321.149 to be furnished by the State to the County treasurer in connection with motor vehicle registration do not include postage.

August 20, 1957

Motor Vehicle Registration -

Mr. J. F. Carlson, Director
Motor Vehicle Registration Division
Department of Public Safety
L O C A L

Dear Mr. Carlson:

Receipt is acknowledged of your letter of August 7 as follows:

"In reference to the question, 'Is the state authorized to furnish frank envelopes to the County Treasurers,' which Mr. Phil Powers, Assistant Director of the Motor Vehicle Registration Division discussed with you.

"I would appreciate very much a letter from you in reference to the conclusion arrived at, which was that the Motor Vehicle Registration Division is not authorized to furnish 'frank' envelopes to the County Treasurers."

The question to which your letter refers was whether under Section 321.149, Code 1954, your department is required to furnish postpaid envelopes to County Treasurers. Section 321.149 provides as follows:

"Blanks. The department shall not later than November 15 of each year prepare and furnish the treasurer of each county all blank books, blank forms, and all supplies required for the administration of this chapter, including applications for registration and transfer of vehicles, quadruple receipts, and original remittance sheets to be used in remitting fees to the department, in such form as the department may prescribe. Contracts for such blank books, blank forms, and supplies shall be awarded by the state printing board to persons, firms, partnerships, or corporations engaged in the business of printing in Iowa unless, or through them, such persons, firms, partnerships or corporations cannot provide the required printing set forth in this section. In lieu of purchasing under competitive bids the state printing board shall have authority to arrange with the board of control to furnish such supplies as can be made in the state institutions."

57-8-31.X

More specifically your question is whether "blank books, blank forms, and . . .supplies. . .including applications for registration and transfer of vehicles, quadruple receipts, and original remittance sheets. . ." includes postage.

"'Postage' is the fee charged by law for carrying letters, packets, and documents by the public mails. See, 49 Corpus Juris." 33 Words and Phrases 122.

Since Section 321.149 refers to furnishing supplies and not to payment of fees it is my opinion that payment of postage for county treasurers whether by means of "franked" envelopes or otherwise is not an authorized act to be done by your department thereunder.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA/k

SCHOOLS: A school district where school is open it is, in general, unlawful for the local board to designate a school outside the district offering the same grades for instruction.

August 20, 1957

Mr. William M. Tucker
Johnson County Attorney
405 Iowa State Bank Building
Iowa City, Iowa

Dear Mr. Tucker:

Receipt is acknowledged of your letter of August 16 in which you submit the following problem and your conclusion with respect thereto:

> "The direct problem arises under the above section of the 1954 Code of Iowa. Newport Township, a township school district containing six subdistricts. Three of these subdistricts are closed, but the other three subdistricts operate schools of their own. The reorganization efforts have been to include these school districts into the Solon Community school district, and the township is about split on whether they should or should not go to Solon. As a compromise measure, Newport district has designated for attendance at Solon certain children who live within the subdistricts of their township that remain open and operating. Primary designation for the closed subdistricts have been to the Solon community school district, but again certain acceptions have been made and special designations on certain children were made sending certain of such children to the open and operating subdistricts within Newport Township, resulting in a give-and-take attitude insofar as attempting to appease the majority of the residents of the township. The designations when filed with the office of the County Superintendent were stamped "No Jurisdiction" and the same stamp was placed on these by the State Department of Public Instruction.
>
> "Under the above section, I am of the opinion that it is illegal for a township school board to designate children for attendance in outside districts where the school facilities are open and operating in such school districts."

In answer thereto, I would advise you I am of the opinion your conclusion is correct. Such was the holding of our Supreme

57-8-32X

Court in Howell vs. Hubbartt, 246 Iowa 1265, 70 N.W. 2nd 531. Also see opinion appearing at page 8 of the 1954 Report of the Attorney General.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA/k

CLOSING SCHOOLS: Question of payment of excess tuition under Section 274.15 need not arise if local board avails itself of authority conferred in Section 282.7.

August 20, 1957

Mr. Edwin A. Getscher
County Attorney
Hamburg, Iowa

Dear Mr. Getscher:

Receipt is acknowledged of your letter of August 7 as follows:

> "The closing of school. The problem is as follows: Section 274.15 provides that 'a school board may discontinue any or all of its educational facilities and contract with any school district maintaining approved schools to furnish such facilities providing that it is determined by the district and the County Board of Education that the per pupil cost of tuition and transportation to be contracted for does not exceed the per pupil cost of maintaining its own educational facilities. In the event the total per pupil cost of tuition and transportation proposed to be contracted for exceeds the total per pupil cost of maintaining like facilities in its own schools the district may nevertheless contract with another district to furnish such facilities provided the parents, etc. will agree to share the pro rata amount of such excess cost.
>
> "The country school district having voted to discontinue its educational facilities would send them to a district having a high school and individual rooms for each grade as well as opportunities for band, etc. Would the increased facilities offered by the high school district school relieve the discontinuing district of the requirement of compelling the parents of the children involved to share the pro rata amount of the excess cost to the district?"

In answer thereto, I would refer you to Section 282.7, Code 1954, which provides as follows:

> "Attending in another corporation--payment. The board of directors in any school district may by record action discontinue any or all of its school facilities. When such action has been taken, the board shall designate

57-8-33 X

an appropriate approved public school or schools for attendance. Tuition shall be paid by the resident district as required in section 279.18 and section 282.20 for all pupils attending designated school, except that high school pupils may attend school of choice and be entitled to tuition, but must attend school designated for attendance to qualify for transportation. Designations shall be made as provided in chapter 285."

Section 282.7 is a later enactment than Section 274.15 and enables a local school board to perform exactly the same acts with respect to closing a school and payment of tuition or transportation to another school as under Section 274.15 except neither parental consent nor payment by parents of excess tuition is involved.

Since it appears from your letter your question is whether the local board may pay all of the tuition and transportation rather than its willingness to pay, the answer to your question is that it may under the provisions of Section 282.7, Code 1954.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA/k

Pamphlets of Industrial Commission containing reprints of statutes relating thereto are controlled by §17.27, Code 1954, as amended by Ch. 56, 57th G. A. The printing and distribution of the biennial report of the Commission and a pamphlet containing a digest of its laws are controlled by §17.23, Code 1954, as amended by Ch. 56, 57th G. A.

August 21, 1957

Mr. C. H. Greenley
Deputy Industrial Commissioner
Workmen's Compensation Service
L o c a l

Dear Sir:

This will acknowledge receipt of yours of the 20th inst. In which you submitted the following:

"I have been instructed by the industrial commissioner to write you relative to certain questions that have developed in this department.

"We have recently received a communication from the superintendent of printing calling our attention to the passage of an amendment by the 57th General Assembly that would probably effect our mailing of information to the various parties covered by the provisions of the workmen's compensation law and effected accordingly.

"It has always been the custom of this department to mail out a pamphlet containing the code covering the provisions of the workmen's compensation and occupational disease laws in our effort to fulfill the statutory obligation of administering the workmen's compensation and occupational disease acts.

"We have found that a copy of the law itself was very much assistance in explaining to the employees their obligations under the law and the possible benefits that might redound to them in case of injury. We have also experienced a great deal of assistance in keeping the employers of the state posted on their obligations with reference to workmen's compensation liability and the requirements of the statutes that they carry proper insurance as required by the statutes.

"In addition to the above use of the pamphlets we have also found it very beneficial in our dealings with the attorneys of the state who have to do with the workmen's compensation law

57-8-37 X

and occupational disease act, from either the standpoint of the employer or employee, and we feel that there is no doubt but the administration of the law has been simplified and the cost of administering the same has been very greatly reduced by the distribution of these pamphlets containing the law applicable to our administrative obligation.

"If the distribution of these pamphlets will be in violation of our law we would like to be so advised. Also we would appreciate an opinion as to whether we might distribute our biennial report without charge, and whether if it is illegal to distribute the law we might be able to formulate a digest of the same for the benefit of the various persons of interest and mail it without cost to them, either upon request or by way of answering some of the many questions and inquiries that come to us in regard to the obligations on the part of the employer and the potential questions on the part of the employee.

"We might mention that we have been paying in the neighborhood of $500. per year as a printing cost of the law pamphlets."

In reply thereto I advise as follows:

1. Section 17.27, Code 1954, as amended by Chapter 56, Acts of the 57th General Assembly, provides:

"Other necessary publications. There may be published other miscellaneous documents, reports, bulletins, books, and booklets that are needed for the use of the various officials and departments of state, or are of value for the information of the general assembly or the public, in form and number most useful and convenient, to be determined by the printing board.

"When such publications paid for by public funds furnished by the state, contain reprints of statutes or departmental rules, or both, they shall be sold and distributed at cost by the department ordering same. Such publications shall be obtained from the superintendent of printing on requisition by the department and the selling

> price shall be determined by the printing board by dividing the total cost of printing, paper and binding by the number printed. Said price shall be set at the nearest multiple of ten (10) to the quotient thus obtained. Distribution of such publications shall be made by the superintendent of printing gratis to public officers, purchasers of licenses from state departments required by statute, and departments. Funds from the sale of such publications shall be deposited monthly in the general fund of the state."

It would appear that the pamphlets as described by you are a publication within the terms of the foregoing statute, it being a publication paid for by public funds provided by the State and containing a reprint of statutes. Such pamphlet is required to be sold and distributed to the public at a cost determined in accordance with the provisions of the foregoing statute. Distribution thereof to public officers and departments is gratis.

2. Insofar as your biennial report is concerned, Section 17.23 as amended by Section 3 of Chapter 56, Acts of the 57th General Assembly, provides as follows:

> "Price of departmental reports. The state printing board shall establish and fix a selling price for all other state departmental reports and any other state publications it may designate, which price per volume shall be the amount charged any person, other than public officials, who may desire to purchase the same; such price shall cover the cost of printing and distribution. The state printing board may distribute gratis to such state or local public officials, or offices, it may deem necessary, copies of departmental annual reports."

The sale and distribution of your biennial report is controlled by the foregoing statute. The printing board may authorize

distribution thereof gratis to state or local public officials or offices, and as to others it is directed to establish and fix a selling price.

3. A digest of your law may be printed and distributed in accordance with the provisions of the foregoing Section 17.23 as amended by Chapter 56, Acts of the 57th General Assembly.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

August 21, 1957

Mr. J. F. Carlson, Director
Motor Vehicle Registration Division
Department of Public Safety
L o c a l

My dear Mr. Carlson:

This will acknowledge receipt of yours of the 8th inst. in which you submitted the following:

> "We herewith respectively submit to you a request for a letter on the following question:
>
> "Section 321.15 of the 1954 Iowa code states as follows:
>
> "'Publication of law. The department shall issue such parts of this chapter in pamphlet form, together with such rules, instructions, and explanatory matter as may seem advisable. Copies of such pamphlet shall be given as wide distribution as the department shall determine and a supply shall be furnished each county treasurer.'
>
> "Does this provision come within the requirement contained in House File 139, relating to the sale and distribution of state publication?"

To an understanding of this situation, Chapter 56 of the Acts of the 57th General Assembly in its entirety provides as follows:

> "Section 1. Section sixteen point two (16.2), Code 1954, is hereby amended by inserting in line three (3) of subsection seven (7) after the word, 'sections,' the following:
>
> "'publications, except premium lists published by the Iowa state fair board, containing reprints of statutes or departmental rules, or both, reports of state departments,'.

57-8-36 X

"Sec. 2. Section seventeen point twenty-seven (17.27), Code 1954, is hereby amended by adding the following:

"'When such publications paid for by public funds furnished by the state, contain reprints of statutes or departmental rules, or both, they shall be sold and distributed at cost by the department ordering same. Such publications shall be obtained from the superintendent of printing on requisition by the department and the selling price shall be determined by the printing board by dividing the total cost of printing, paper and binding by the number printed. Said price shall be set at the nearest multiple of ten (10) to the quotient thus obtained. Distribution of such publications shall be made by the superintendent of printing gratis to public officers, purchasers of licenses from state departments required by statute, and departments. Funds from the sale of such publications shall be deposited monthly in the general fund of the state.'

"Sec. 3. Section seventeen point twenty-three (17.23), Code 1954, is hereby amended by striking from line two (2) the words, 'is hereby authorized to' and inserting in lieu thereof the word, 'shall'."

Section 17.27, as amended by the foregoing, provides as follows:

"Other necessary publications. There may be published other miscellaneous documents, reports, bulletins, books, and booklets that are needed for the use of the various officials and departments of state, or are of value for the information of the general assembly or the public, in form and number most useful and convenient, to be determined by the printing board.

"When such publications paid for by public funds furnished by the state, contain reprints of statutes or departmental rules, or both, they shall be sold and distributed at cost by the department ordering same. Such publications shall be obtained from the superintendent of printing on requisition by the department and the selling price shall be deter-

> mined by the printing board by dividing the total cost of printing, paper and binding by the number printed. Said price shall be set at the nearest multiple of ten (10) to the quotient thus obtained. Distribution of such publications shall be made by the superintendent of printing gratis to public officers, purchasers of licenses from state departments required by statute, and departments. Funds from the sale of such publications shall be deposited monthly in the general fund of the state."

Pamphlets issued by your Department in accordance with the directions of Section 321.15 quoted by you, that parts of Chapter 321 shall be issued, are publications within the class described in Section 17.27 as amended, and were it not for the following rule of law would be controlled by the foregoing Section as amended. Such pamphlets containing reprints of Chapter 321 would be distributed to the public at the cost to be fixed in accordance with the formula provided in the amendment. Viewing the amendment as a general act and Section 321.15 as a special act concerned only with pamphlets issued by your Department, the applicable rule as to which statute shall prevail is stated in Sutherland Statutory Construction, 3rd Edition, paragraph 5204, as follows:

> "General and special acts. General and special acts may be in pari materia. If so, they should be construed together. Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible; but if there is any conflict, the latter will prevail, regardless of whether it was passed prior to the general statute, unless it appears that the legislature intended to make the general act controlling."

There is plainly a conflict between these two statutes, one requiring a charge be made for pamphlets issued by your Department, the other providing for distribution thereof gratis.

In view of the foregoing I advise you that pamphlets issued by your Department under the direction of Section 321.15 are not pamphlets covered by the amendment to Section 17.27, 57th General Assembly, and therefore may continue to be distributed under the provisions of Section 321.15.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

INSANE PERSONS: Private institutions for the insane are not among the "facilities for psychiatric examination and treatment" referred to in section 230.24 of the Code.
2. The purposes for which funds may be expended under section 230.24 are expressly named therein.

August 22, 1957

Mr. Donald Nelson
Story County Attorney
Nevada, Iowa

Dear Mr. Nelson:

Receipt is acknowledged of your letter of August 15 as follows:

> "Section 230.24 of the 1954 Code authorizes the County Board of Supervisors to expend from the County Insane fund, funds for psychiatric examination and treatment for persons in need thereof in each County where they have facilities available for such treatment, and further provides that any County not having such facilities may contract, through its Board of Supervisors, with any other County which has facilities for psychiatric examination and treatment, for the use thereof.
>
> "Chapter 112 of the Session Laws for the 57th General Assembly authorizes the Board of Supervisors to levy an additional tax for the purpose of providing psychiatric examination and treatment.
>
> "My questions are as follows: (1) What is meant by 'facilities for psychiatric examination and treatment'? In our County there is a group which is planning to incorporate for the purpose of establishing a Mental Health Clinic. They hope to rent or perhaps purchase a house and procure the services of a psychiatrist. Would these facilities meet the requirements of Section 230.24 and thus allow the expenditure of tax money for the treatment of persons in this proposed mental health clinic. (2) Under the provisions of Section 230.24 as amended, how is the money to be expended? Can the tax money be used to purchase a building or residence to be used as a health clinic. Can the money be used to directly pay the salary of the personnel, including a psychiatrist? Or, does the County have only the authority to pay the bill of persons who are sent to the Health Clinic for treatment, in the same way that the County is billed by the various State Institutions."

57-8-34 X

Section 230.24, Code 1954, provides as follows:

"The board of supervisors shall, annually, levy a tax of three-eighths mill or less, as may be necessary, for the purpose of raising a fund for the support of such insane persons as are cared for and supported by the county in the insane ward of the county home, or elsewhere outside of any state hospital for the insane, which shall be known as the county fund for the insane, and shall be used for no other purpose than the support of such insane persons and for the purpose of making such additions and improvements as may be necessary to properly care for such patients as are ordered committed to the county home.

"The county board of supervisors are authorized to expend from the county insane fund as provided in this section funds for psychiatric examination and treatment of persons in need thereof in each county where they have facilities available for such treatment, and any county not having such facilities may contract through its board of supervisors with any other county, which has facilities for psychiatric examination and treatment, for the use thereof."

Section 230.24 was amended by Chapter 112, Laws of the 57th General Assembly by addition of the following sentence:

"Any county now or hereafter expending funds from the county insane fund for the psychiatric examination and treatment of persons in a community mental health center may levy an additional tax of not to exceed three-eighths (3/8) Mill."

From Section 230.24, as it appeared prior to the quoted amendment the meaning of "facilities for psychiatric examination or treatment" is revealed by the language of the second paragraph. Said paragraph describes the places where treatment is authorized by the phrases ". . .county where they <u>have</u> facilities available . . .", ". . .county not <u>having</u> such facilities . . .", ". . .county which <u>has</u> facilities . . .". The question then arises as to when a county "has" facilities and how does it go about "having" them. This is answered by the first paragraph of Section 230.24 which refers to the "insane ward of the county home" and by Section 347.14, Code 1954, as amended by Chapter 176, Laws of the 57th General

Assembly which authorizes establishment of a psychiatric ward at the county hospital in certain counties.

You are therefore advised that Section 230.24 prior to the quoted amendment contains no authorization for the expenditure described in your first question.

As to the effect of the amendment, I have searched the Code and the Session Laws including the joint resolutions of past general assemblies and can find no reference to the "community mental health centers" in terms of which the quoted amendment is phrased. I therefore conclude that "community mental health centers" must be something that H.F. 181 or one of the interlocking bills introduced at but not passed by the 57th General Assembly would have authorized or defined had it passed. Thus the said amendment would not have the effect of authorizing payment by counties to private clinics under Section 230.24 as amended.

The attitude of the law toward payment of expenses for the indigent insane at private institutions or facilities is reflected by Section 229.25, Code 1954, as follows:

> "Such patients may be cared for as private patients when relatives or friends will obligate themselves to provide such care without public charge. In such case the commission shall in writing appoint some suitable person special custodian who shall have authority and shall in all suitable ways restrain, protect, and care for such patient, in such manner as to best secure his safety and comfort, and to best protect the persons and property of others."

In answer to your second question, you are advised that the express language of Section 230.24 authorizes expenditure of funds for only three purposes. They are, in the words of the statute:

1. "psychiatric examination"
2. "treatment"
3. "additions and improvement...to the county home".

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA/k

June 27, 1957

Mr. Bruce F. Stiles
State Conservation Director
State Conservation Commission
B u i l d i n g

Dear Mr. Stiles:

Reference is made to your letter of June 3rd, enclosing a letter dated May 26, 1957, from Whicher and Davis, attorneys at Sioux City, Iowa, which letter we are returning herewith, and beg to advise you as follows:

We believe that the answers to questions 1, 2 and 3 can be found in the Attorney General's opinion dated May 8, 1957, of which we enclose two copies and suggest you forward one to said attorneys. The underlying principle which controls in these matters is whether or not the Federal Government, under its powers to regulate interstate commerce, has assumed jurisdiction over any navigable waters, and if there is any conflict between the Federal statutes and the Iowa statutes, then in that event, Federal laws and regulations are paramount.

This same principle holds true in the matter of lighting regulations and equipment. Where a vessel has been licensed by the Coast Guard or other Federal agency under Federal law on navigable waters, the regulations prescribed by the Federal laws as to lights and equipment on such vessels take precedence over any State laws in conflict therewith. On the other hand, if the Federal Government has not entered the field of regulation, then of course our statutes take precedence. This answers question four of Mr. Whicher's letter.

If there are other questions do not hesitate to ask us.

Very truly yours,

FRANK D. BIANCO
Assistant Attorney General

FDB:MKB
Encs.

57-6-48

HORSES: REQUIREMENT OF ENROLLMENT AND REGISTRATION OF STALLIONS PREREQUISITE TO PUBLIC SERVICE: Iowa law requires that before a stallion may be offered for public service it must be enrolled with agriculture department as registered and have certificate of soundness.

August 21, 1957

Honorable Clyde Spry
Secretary of Agriculture
B u i l d i n g

Attention: Mr. A. L. Sundberg, Chief
Division of Animal Industry

Dear Sir:

In your letter of August 20, 1957, you state:

"We would appreciate it very much if you will . . . . . give us an opinion as to whether we can, according to Chapter 162 of the 1954 Code of Iowa, register grade stallions for public service.

"According to the information we have been able to obtain, this has never been done, nor is there a form for such registry other than the purebred stallions."

In answer thereto I would state:

In connection with this inquiry I would call your attention to the provisions of the following sections:

"162.1 Services of stallion. No person shall offer for public service any stallion unless he shall have had said animal enrolled with the department of agriculture as a registered animal, and shall have procured from the department a certificate of soundness."

"162.5 Certificate for purebred. Every application for enrollment as a registered animal shall set forth, under oath, the name, age, color, and ownership of the animal, and be accompanied by a certificate of registry and an affidavit of an Iowa licensed veterinarian that such animal has been examined by him and is free from any unsound-

ness or any hereditary, infectious, or contagious disease."

"162.7 Animals subject to enrollment. No animal shall be subject to enrollment as a registered animal unless he has been recorded in some stud book recognized by the department."

The provisions of Section 162.1, Code of Iowa, 1954, expressly prohibits the offering for public service of a stallion unless it shall be "enrolled with the department of agriculture as a registered animal". The application for such enrollment must contain the information specified in Section 162.5, Code of Iowa, 1954, which includes a certificate of registry. This certificate of registry is further amplified in Section 162.7, Code of Iowa, 1954, which requires that such registration shall have been recorded "in some stud book recognized by the department". The case of Howard v. National French Draft Horse Association (1915), 169 Iowa 719, 151 N.W. 1056, described a certificate of registry as follows:

"A certificate of registry in a herd book of recognized authority is a proclamation to the world. It is intended to be passed to each successive purchaser of the registered animal, giving to it a character, reputation and substantial value which it would not have except for its admission to registry. So long as it remains uncancelled, the association which issued it stands in the position of saying to every buyer, 'This is the pedigree and breeding of the animal here described.' "

In conclusion and in specific answer to your inquiry, I would advise that there is a specific prohibition in Section 162.1, Code of Iowa, 1954, against offering for public service a stallion unless such stallion shall be enrolled with the Department of Agriculture as a registered animal and such stallion shall have from the Department of Agriculture a certificate of soundness.

Yours very truly,

NAE/fm

NORMAN A. ERBE,
Attorney General of Iowa

August 22, 1957

Mr. Don Lowe, Commissioner
Bureau of Labor
L o c a l

My dear Mr. Lowe:

Reference is herein made to yours of the 12th inst. with enclosure of the following described pamphlets, the following containing reprints of statutes; to-wit: Child Labor Law, Health and Safety Appliance Laws, Law Relating to Employment Agencies, Labor Laws of Iowa, and the Iowa Boiler Rules and Regulations, and asking whether they are controlled by Chapter 56, Acts of the 57th General Assembly. Section 17.27 as amended by Section 2 of Chapter 56, Laws of the 57th General Assembly, provides as follows:

> "Other necessary publications. There may be published other miscellaneous documents, reports, bulletins, books, and booklets that are needed for the use of the various officials and departments of state, or are of value for the information of the general assembly or the public, in form and number most useful and convenient, to be determined by the printing board.
>
> "When such publications paid for by public funds furnished by the state, contain reprints of statutes or departmental rules, or both, they shall be sold and distributed at cost by the department ordering same. Such publications shall be obtained from the superintendent of printing on requisition by the department and the selling price shall be determined by the printing board by dividing the total cost of printing, paper and binding by the number printed. Said price shall be set at the nearest multiple of ten (10) to the quotient thus obtained. Distribution of such publications shall be made by

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> the superintendent of printing gratis to public officers, purchasers of licenses from state departments required by statute, and departments. Funds from the sale of such publications shall be deposited monthly in the general fund of the state."

It appears that the pamphlets referred to above are publications within the terms of Section 17.27 as amended by Chapter 56, Laws of the 57th General Assembly, each being a publication containing reprints of statutes or departmental rules and paid for by public funds furnished by the State and are therefore controlled by that statute. I reach this conclusion notwithstanding the provisions of Section 91.4, subsection 5, which bestows upon the Labor Commissioner the duty:

> "5. To issue from time to time, with the consent of the executive council, bulletins containing information of importance to the industries of the state and to the safety of wage earners."

As a matter of fact, such publications issued under the authority of that section would be controlled by Section 17.23 as amended by Section 3, Chapter 56, Acts of the 57th General Assembly, which provides:

> "Price of departmental reports. The state printing board shall establish and fix a selling price for all other state departmental reports and any other state publications it may designate, which price per volume shall be the amount charged any person, other than public officials, who may desire to purchase the same; such price shall cover the cost of printing and distribution. The state printing board may distribute gratis to such state or local public officials, or offices, it may deem necessary, copies of departmental annual reports."

Therefore, with the exception of distribution to public officers and departments, sale and distribution of publications

shall be made at a cost determined by the formula provided in the foregoing described section.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

The printing and distribution of named publications of the Iowa Highway Commission are controlled by the provisions of §17.23, Code 1954, As amended by Ch. 56, 57th G. A.

August 22, 1957

Mr. C. J. Lyman
Special Assistant Attorney General
Iowa Highway Commission
Ames, Iowa

Dear Sir:

Reference is herein made to your request respecting the following publications of the Iowa Highway Commission as related to the provisions of Chapter 56, Laws of the 57th General Assembly. The publications are these:

The Hydraulics of a Storm-Drain System for Sediment-Transporting Flow

Scour Around Bridge Piers and Abutments

Culvert Diameters in Relation to Upstream Channel Storage for Small Watersheds in Iowa

Iowa Floods Magnitude and Frequency

By-Pass for Thru-traffic

Safety Controlled Access Highways

Iowa Highway Map

Report of Highway Investigation Committee created by Chapter 351, Laws of the 52nd General Assembly, 1948

Report of the State Highway Commission for the period July 1, 1954 to June 30, 1955

Reprint of Part I, Standard Specifications of 1956

Reprint of Part IV, Standard Specifications of 1956

Standard Specifications for Construction on Primary, Farm to Market and Secondary Roads

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Construction Field Manual of Primary Road and Bridge Work

Pamphlet entitled "Progress"

In reference thereto I advise as follows. Chapter 56, Laws of the 57th General Assembly, provides the following:

"Section 1. Section sixteen point two (16.2), Code 1954, is hereby amended by inserting in line three (3) of subsection seven (7) after the word, 'sections,' the following:

"'publications, except premium lists published by the Iowa state fair board, containing reprints of statutes or departmental rules, or both, reports of state departments,'.

"Sec. 2. Section seventeen point twenty-seven (17.27), Code 1954, is hereby amended by adding the following:

"'When such publications paid for by public funds furnished by the state, contain reprints of statutes or departmental rules, or both, they shall be sold and distributed at cost by the department ordering same. Such publications shall be obtained from the superintendent of printing on requisition by the department and the selling price shall be determined by the printing board by dividing the total cost of printing, paper and binding by the number printed. Said price shall be set at the nearest multiple of ten (10) to the quotient thus obtained. Distribution of such publications shall be made by the superintendent of printing gratis to public officers, purchasers of licenses from state departments required by statute, and departments. Funds from the sale of such publications shall be deposited monthly in the general fund of the state.'

"Sec. 3 Section seventeen point twenty-three (17.23), Code 1954, is hereby amended by striking from line two (2) the words, 'is hereby authorized to' and inserting in lieu thereof the word, 'shall'."

None of the aforementioned publications appear to contain reprints of statutes or departmental rules and therefore the amendment insofar as Section 2 of Chapter 56 is concerned has no bearing on the situation. However, Section 17.23, Code 1954, as amended by Chapter 56, provides as follows:

> "Price of departmental reports. The state printing board shall establish and fix a selling price for all other state departmental reports and any other state publications it may designate, which price per volume shall be the amount charged any person, other than public officials, who may desire to purchase the same; such price shall cover the cost of printing and distribution. The state printing board may distribute gratis to such state or local public officials, or offices, it may deem necessary, copies of departmental annual reports."

The publications submitted by you and named above are controlled by this statute.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

HEADNOTE: Inheritance Tax Division: Taxability of devise "to Cerro Gordo County to apply upon the care given by Cerro Gordo County for expenses of Ruth Story"; held to be tax exempt under section 450.4 since the property passed to a charitable organization; no legal liability on the part of the testatrix to pay the expenses of the indigent Ruth Story.

August 22, 1957

Mr. William Pappas
Cerro Gordo County Attorney
15 Second St., N.E.
Mason City, Iowa

Dear Mr. Pappas:

Your letters dated August 10, 1957 and August 20, 1957, addressed to Mr. Norman Erbe and the Department of Justice, respectively, have been referred to me for reply.

Your question is whether a devise by a resident of Cerro Gordo County is taxable pursuant to Sections 450.3 and 450.4, Code of Iowa, 1954. The devise is as follows:

> "One Thousand Dollars ($1000.00) to Cerro Gordo County, Iowa to apply upon the care given by Cerro Gordo County for the expenses of Ruth Story."

The exemptions from the Iowa inheritance tax are set out in Section 450.4. The applicable portion of Section 450.4, entitled "Exemptions," provides:

> "The tax imposed by this chapter shall not be collected:
>
> * * *.
>
> 2. When the property passes in any manner to societies, institutions or associations incorporated or organized under the laws of this state for charitable, educational or religious purposes, and which are not operated for pecuniary profit, or to cemetery associations, including humane societies or to resident trustees for such uses within this state, * * *."

In the case of In re Estate of Spangler, 148 Iowa 333, the Iowa Supreme Court was confronted with the question as to whether a devise to the board of supervisors "in perpetuity to the dependent poor persons of Delaware County who are maintained wholly or in part at the expense of said county,". The Court stated on page 336, "Under the law of this state each county acting through its board of supervisors is expressly charged with the duty of

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relieving the necessities of destitute persons and the several counties are required or authorized to provide farms, homes, hospitals, and other appropriate places and institutions in which and by means of which these unfortunate ones are supplied with the necessities of life. * * *. The county, being thus charged with the duty of relieving and supporting the poor, is to that extent a charitable organization, and a gift made specifically in aid of this feature of its work is to all reasonable intents and purposes a gift to or for a charitable institution. * * *."

Under the reasoning of the Court in the above case, the bequest which you have set out in your letter would be a bequest to a charitable organization, or certainly it would be a bequest to the board of supervisors as trustees to apply the funds to the expense the county has incurred on behalf of the indigent, Ruth Story. Consequently, the bequest to the county should not be taxable.

Yours very truly,

Francis J. Pruss,
Special Assistant Attorney General

FJP:fs

August 28, 1957

Mr. Eugene R. Melson
Greene County Attorney
County Courthouse
Jefferson, Iowa

Dear Mr. Melson:

This is to acknowledge receipt of your letter dated August 21, 1957, addressed to Mr. Erbe.

You request an opinion on the following set of facts:

> "A stock of merchandise owned by A was assessed as of January 1, 1957, A sold the stock and the equipment to B in March, 1957, and complied with the bulk sales law, and gave a bill of sale free of all liens. B immediately auctioned off the stock of merchandise and B now takes the position that the tax is collectible only from A, the owner on the date of assessment.
>
> "Under the provisions of Section 445.31 of the Code of Iowa, 1954, is the tax collectible for 1957 from B, regardless of the contract between B and A?"

It would seem that the above set of facts comes within the rule of the opinion of the Attorney General, 1919-20, p. 375.

It would seem that B will not be liable for the personal property tax on the stock of merchandise since the taxes were not a lien upon the property at the time of either the date of purchase or the date of sale.

In your question you refer to "equipment." The above refers only to the stock of merchandise since not sufficient facts are set forth to show that the equipment comes within the statute.

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The Supreme Court was faced with this problem in Larson v. Hamilton County, 123 Iowa 485. In that case the facts were identical with those set out above, except that in that case the purchaser did not resell the goods. At pages 486 and 487 the Court stated:

> "The theory of the statute seems to be that such property is so far permanent in character that, in the matter of taxation, it may be treated like real estate. The taxes are against the property as such as well as against the owner. A sale in bulk does not avoid the tax. If the stock continues such, the lien attaches in whosoever hands the stock may be found. It may not attach until the levy and this is doubtless true with respect to real estate. But the lien is as inevitable as against real estate, save when the stock is disposed of at retail, and cannot be obviated so long as the stock remains intact and can be identified as such."

In the Larson case, the statute differs from the one presently in effect. However, the difference will not distinguish the two cases since it is clear there must first be a lien to bind a subsequent purchaser, and the lien does not arise until levy.

If you have any further question regarding this matter, please contact me.

Yours very truly,

Francis J. Pruss,
Special Assistant Attorney General

FJP:fs

August 29, 1957

Honorable Herschel C. Loveless
Governor of the State of Iowa
L o c a l

Dear Sir:

Receipt is acknowledged of your inquiry of August 26 in which you inquire as follows:

"Section three hundred twenty-one, point four hundred sixty-seven (321.467) Code of Iowa, 1954, empowers the state highway commission and local authorities to issue special permits for the movement of oversize or overweight vehicles on highway under their respective jurisdictions. Beginning at line twenty-seven (27) of the Section noted above, there appears the following sentence:

"'Provided further that, in an emergency, or very special or unusual cases, or as a means of co-operating with national defense officials, the state highway commission may grant permits for moving oversize or overweight vehicles or objects over the highways for a distance exceeding twenty-five miles, if in the judgment of the commission, such special, unusual, emergency or defense movement is essential'.

"Your opinion is respectfully requested on the following question:

"Do the state highway commission and local authorities have power to grant special permits for the movement of mobile homes, ten (10) feet in width from the point of manufacture in Des Moines, Iowa, to points outside the State of Iowa over highways under their respective jurisdictions, subject to such rules and regulations as the state

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highway commission and local authorities may establish and over such routes as the grantor(s) of the permits may specify?"

In answer thereto I would advise that, based upon the wording of the statute, a prerequisite to the right of the Highway Commission to issue such permits is that there either must be (1) an emergency, (2) very special or unusual cases, or (3) as a means of cooperating with national defense officials. If any one of these three conditions is present, then the State Highway Commission has authority to grant the permit if "In the judgment of the Commission such special, unusual, emergency or defense movement is essential".

The writer is not familiar enough with the fact situation in order to express an opinion as to whether any one of the three prerequisites is present which would give to the Highway Commission authority to exercise their discretion and judgment on the basis of essentiality.

Yours very truly,

NAE/fm

NORMAN A. ERBE
Attorney General of Iowa

September 3, 1957

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

My dear Governor:

This will acknowledge receipt of yours of the 27th ult. addressed to the Attorney General which has been handed to me for answer to the following question:

> "May a member of the General Assembly be appointed an alternate judge of a municipal court, as provided for in Section One (1), Chapter two hundred fifty-eight (258), Laws of the Fifty-seventh General Assembly, and retain his position as a member of the General Assembly?"

In reply thereto I advise as follows. I am of the opinion that the problem submitted involves a question of eligibility of a member of the General Assembly to hold other offices of this State. Section 22 of Article III of the Constitution of Iowa provides with respect to this problem the following:

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

Under this Section it was held in an opinion of this Department appearing in the Report for 1922 at page 360 that a member of

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Legislature cannot at the same time hold the office of mayor. Our Supreme Court has made no ruling with reference to the application of this Section of the Constitution but a like provision in the Constitution of California was held in the case of People v. Leonard, 14 P. 853, 73 Cal. 230, quoting from Words and Phrases, Volume 14, page 355, Permanent Edition, the following:

> "'Eligible,' as used in Const. art. 4, § 20, providing that no person holding any lucrative office under the United States or any other power shall be eligible to any civil office of profit under the state, means eligible to hold office as well as to be elected to office, and disqualifies a person from holding an office under the state after he had received and entered on the duties under a lucrative federal appointment."

A lucrative office as used in the foregoing section was defined in the opinion of the Attorney General heretofore referred to as follows:

> "A lucrative office, as will be observed, is an office which yields compensation, is gainful or profitable. The office of mayor of a city or town is a gainful office and does yield compensation, and therefore must be held to be a lucrative office."

What was said in the foregoing opinion with respect to the office of mayor of a city or town as related to that of a member of the Legislature was that:

> "It follows that a member of the general assembly, under the constitution, cannot hold the office of mayor of a city or town for the reason that such office is a lucrative office within the meaning of section 22, of article 3, of the constitution."

and in my opinion is applicable to the situation of a member of

General Assembly and an alternate judge of the municipal court. I am of the opinion, therefore, that a member of the General Assembly may not be appointed and hold the office of alternate judge of a municipal court and retain his position as a member of the General Assembly.

In this connection I call your attention to this further constitutional provision respecting the eligibility of members of the Legislature to an appointment to office whose emoluments have been increased during the term of such a member. Section 21, Article III, provides:

> "No senator or representative shall, during the time for which he shall have been elected, be appointed to any civil office of profit under this State, which shall have been created, or the emoluments of which shall have been increased during such term, except such offices as may be filled by elections by the people."

Respectfully,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

September 3, 1957

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

My dear Governor:

This will acknowledge receipt of yours of the 30th ult. in which you have requested answer to the following question:

> "In a special charter city, operating under the mayor-council form of government, containing all or part of two townships, with the included townships each having over one thousand electors, is it mandatory that one of the two aldermen elected 'at large' be elected from each of the two townships? In addition to the two aldermen to be elected at large, an alderman is elected from each of the various wards of the city."

In reply thereto I exhibit to you Section 363A.2, Code 1954, providing as follows:

> "Councilmen - number and election. Towns operating under the mayor-council form of government shall have a council composed of five councilmen at large, elected by the entire electorate. Cities operating under the mayor-council form of government may have a council composed of five councilmen at large, or may have a council composed of two councilmen or aldermen at large, and one councilman or alderman from each ward; but if any city embraces within its limits the whole or part of two or more townships, two of which parts contain one thousand or more electors, only one councilman at large shall be chosen from any one township. 'Councilmen' as used in this chapter shall include 'aldermen' where members of a city council are elected and have historically been referred to by such title."

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which makes mandatory the election of two aldermen or councilmen at large, one to be elected from each of the two townships, in the situation you describe.

With the assurance of my respects, I am

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

September 3, 1957

Mr. C. E. Borg, Superintendent
Gas Tax Refund Division
Treasurer of State
B u i l d i n g

Dear Sir:

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

> "The writer as Superintendent of the Gas Tax Refund Division would appreciate a ruling from the Attorney General's department on the following questions.
>
> "Are political sub-divisions, such as cities, towns, counties, park commissions, etc. eligible to make application for a refund permit and claim gasoline tax refunds on fuel used in maintenance and construction work, which is paid for from public funds?
>
> "On page 6 of H. F. 440, Section 324.3 and item No. 4 pertaining to exemptions, it states that motor fuel sold to the State of Iowa or any of its agencies, is exempt, but this exemption shall not apply to political subdivisions of this state."

In reply thereto I advise as follows.

1. Section 324.3 provides for the imposition of an excise tax of 4¢ a gallon on all motor fuel used except as otherwise provided in the section. Subsection 4 of Section 324.3, Chapter 164, Acts of the 57th General Assembly, provides the following exemption from the imposition of the tax provided:

> "Motor fuel sold to the state of Iowa or any of its agencies, but this exemption shall not apply to political subdivisions of this state."

57-9-3

2. A like exemption from the imposition of an excise tax levied on special fuel by Section 324.34 is provided by Section 324.35, as follows:

> "No tax is imposed under this division on special fuel used by the state of Iowa or any of its agencies, but this exemption shall not apply to political subdivisions of this state."

By reason of the foregoing I am of the opinion that counties, cities, towns, hospitals, park commissions, and other are political subdivisions of the State within the meaning of these statutes and are not exempt from the excise tax provided. However, its use in mobile machinery and equipment not designated or used for transportation of persons or property on the Iowa highways is not taxable. See Section 324.57, Chapter 164, Acts of the 57th General Assembly.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

September 3, 1957

Mr. B. G. Marchi, Director
Motor Fuel Tax Division
Treasurer of State
B u i l d i n g

Dear Sir:

This will acknowledge receipt of yours of the 25th ult. with accompanying letter addressed to you in respect to the imposition of tax upon motor fuel and special fuel. Upon review of this matter in the light of your letter and the memorandum accompanying it supplied by Attorneys Shull, Marshall, Mayne, Marks & Vizintos, I am of the opinion:

1. Insofar as motor fuel is concerned, on the authority Section 324.3, Chapter 164, Acts of the 57th General Assembly, and the exceptions therein noted, motor fuel placed in fuel tanks presumptively for use in transportation is not motor fuel sold for export.

2. Insofar as special fuel is concerned Section 324.54, first paragraph, provides as follows:

> "Fuel tax liability under this division shall be computed on the total number of gallons of each kind of motor fuel and special fuel consumed in the operation in Iowa of motor vehicles subject to this division at the same rate for each kind of fuel as would be applicable thereto if taxed under Divisions I or II of this chapter. Credit against the tax liability so computed shall be allowed in the amount of fuel taxes paid under

> Divisions I or II of this chapter on motor fuel and special fuel used in motor vehicles the operation of which is subject to this division, but no amount so paid on fuel in excess of that consumed in this state shall be refunded."

Attention is directed to the following specific statement with reference to the payment of tax that "but no amount so paid on fuel in excess of that consumed in this state shall be refunded."

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

September 3, 1957

Honorable J. C. Wright
State Superintendent of Public Instruction
Department of Public Instruction
L o c a l

Dear Sir:

Receipt is acknowledged of your letter of August 21 transmitting certain proposed rules and regulations for approval as to form and legality under the provisions of Section 17A.2, Code 1954. The subject of the proposed rules is standards for approval of schools and Sections 257.10(12) and 257.18(13) are referred to as authority for promulgation of the proposed rules.

Section 257.10(12), Code 1954, empowers the State Board of Public Instruction to:

> "Prescribe such minimum standards and rules and regulations as are required by law or recommended by the state superintendent of public instruction in accordance with law, and as it may find desirable to aid in carrying out the provisions of the Iowa school laws." (Emphasis ours)

Section 257.18(13), Code 1954, directs the State Superintendent of Public Instruction to:

> "Formulate standards, regulations, and rules, subject to the approval of the state board, for the approval of all schools and public junior colleges under his supervision; subject to the approval of the board remove for cause, after due investigation and notice, any such school failing to comply with such approval standards, rules, and regulations from the approved list; which removal shall, during the period of noncompliance, make such school ineligible for participation in the state distributive funds, and the collection of tuition from nonresidents from other districts which do not maintain approved high schools."

In essence, the quoted statutes authorize the State Superintendent to make rules for the approval of schools subject to State Board approval. However, the approval powers of the state board are limited to such rules "as are required by law", are "in accordance with law" and may be "desirable in carrying out the provisions of . . . laws." It is elementary that the power to make law vests

exclusively in the legislature. Article III, Legislative Department, Section 1, Constitution of Iowa. The legislature may not delegate away its power to legislate. The scope of administrative rules and regulations may not lawfully exceed implementation of law. They may not amend, extend, suspend or otherwise change law. State v. Van Trump, 224 Iowa 504, 275 N.W. 269.

Applying the foregoing to the proposed rules or "standards", it is noted that "Standard 7" provides:

"The following standards shall be mandatory:"

Thereunder, paragraphs 17, 20, and 23 list subjects or courses to be offered in certain schools. Paragraph 40 requires certain districts to employ a superintendent. Paragraph 41 limits local school boards in the duties they may assign such superintendent. Paragraph 42 requires boards operating elementary schools to employ a principal for each elementary school. Paragraph 43 requires boards operating junior high schools to employ a principal for each junior high school. Paragraphs 44 to 46 require local school boards to employ a principal for each high school. Paragraph 47 requires school boards operating junior colleges to employ a "dean" for each junior college. Paragraph 50 would regulate the minimum size of classes in given grades and courses. Paragraph 58 is in direct conflict with Section 279.25, Code 1954. (Whether said statute be enforced or not, it can't be repealed by administrative rule.) Paragraph 60 would make some privately published index a rule or regulation by reference. Paragraphs 27, 28, and 70 would require local boards to comply with the law. (Rules requiring compliance with law are superfluous. Compliance with law is expected irrespective of the existence of any rule.) Paragraph 72 again purports to tell the local school boards what their course of study shall be. It in fact duplicates the requirements of Chapter 280 and in part assumes the discretion conferred on local school boards by Section 280.1.

A similar analysis might be made for proposed "Standard 8" but it is noted that its requirements are described as being "evaluative" and it is assumed that something less binding is meant thereby than by the word "mandatory" used with reference to "Standard 7". It should be noted however that "Standard 8" to the extent that it might be relied upon as a basis for disapproval as a school, purports to exercise for the local school boards the rule-making discretion conferred upon them by Section 279.8, Code 1954, and to tell it what its relationship with its officers and employees shall be. The use of the mandatory word "shall" in the several paragraphs of the said "Standard" tend to lessen whatever distinction in favor of legality might exist between the words "mandatory" and "evaluative".

Your attention is directed to the decision of the Supreme Court of Iowa in Howell School Board v. Hubbartt, 246 Iowa 1265, 1272 to 1275, 70 N.W. 2d 531, relating to lawful exercise of power at the local and state levels with respect to a similar school problem. The Court said:

"The important phase of this appeal is whether the state superintendent of public instruction or the county board of education has the legal power or authority to overrule the local school board and order the pupils residing more than two miles from the school to be sent to another school outside the district where the elementary school in that district is open. In other words we must determine, What authority does the local school district have in matters of this character?

"For the reasons hereinafter set forth it is our conclusion and holding the state superintendent of public instruction and the county board of education did not have the legal authority to make a determination such as was done in the respective appeals and hearings. It is stated in 67 C.J.S., Officers, section 103, page 371: 'Powers conferred on a public officer can be exercised only in the manner, and under the circumstances, prescribed by law, and any attempted exercise thereof in any other manner or under different circumstances is a nullity.' And as pertains to the county board of education the statement found in 67 C.J.S., Officers, section 107, page 378, is here applicable: '* * * Boards, commissions, and other public bodies have only such power and authority as are expressly conferred by law or as arise from necessary implication, and any power sought to be exercised must be found within the four corners of the statute under which they proceed.'

"A statement of a similar nature is made in 43 Am. Jur., Public Officers, section 249, pages 68, 69: 'In general, the powers and duties of officers are prescribed by the Constitution or by statute, or both, and they are measured by the terms and necessary implication of the grant * * *. If broader powers are desirable, they must be conferred by the proper authority.'

"And in 42 Am. Jur., Public Administrative Law, section 26, pages 316, 317, it is stated: 'Administrative boards, commissions, and officers have no common-law powers. Their powers are limited by the statutes creating them to those conferred expressly or by necessary or fair implication. General language describing the powers and functions of an administrative body may be construed to extend no further than the specific duties and powers conferred in the same statute.'

"The power of the state superintendent of public instruction as applicable to this appeal is set forth in section 257.17, 1954 Code (Acts 55th G. A., 1953, chapter 114, section 17, effective July 4, 1953): '1. Exercise general supervision over the state system of public education, including the public elementary and secondary schools, the junior colleges, * * *.'

"It will thus be observed the superintendent of public instruction is given no statutory authority to direct and authorize the carrying out of his orders which are not authorized by law. We are unable to find any statute which gives the state superintendent of public instruction authority to determine which school a pupil should attend. In connection with State Aid For Transportation the state superintendent's authority is limited by statute. It is stated in section 285.1(14), 1954 Code, he '* * *may review all transportation arrangements to see that they meet all legal and established uniform standard requirements.' And where a public school is open and is properly operated we do not see why the elected board of the district should not determine where the elementary pupils of the district should attend. And this is particularly true when there is no statute which denies them that right. We are not confronted with a situation such as is anticipated in section 279.16, 1954 Code, where statutory provision is made relative to school privileges when a school is closed.

"The powers of the county board of education are set forth in section 273.12, 1954 Code, and as applicable to the questions here involved are in part as follows: 'The county board shall exercise such powers as are specifically assigned to it by law. In general their powers and duties shall relate to matters affecting the county school system as a whole rather than specific details relating to individual schools or districts.'

"The powers of a school district are set forth in section 274.1, 1954 Code, and are as follows: 'Each school district now existing shall continue a body politic as a school corporation, unless hereafter changed as provided by law, and as such may sue and be sued, hold property, and exercise all the powers granted by law, and shall have exclusive jurisdiction in all school matters over the territory therein contained.' (Emphasis supplied.)

"Inasmuch as the school district by reason of the statute just quoted has '* * *exclusive jurisdiction in all school matters over the territory therein contained', we hold the Howell school district has authority to determine where the elementary pupils within the district shall attend school. It is a discretionary matter for the determination of the board. * * *"

To paraphrase the language of the Court: "We are unable to discover any statute which gives the state department any power to determine what the course of study in a given school shall be, how many employees it shall hire or what rules the local board shall observe in its relationship with its employees or the employees with one another."

Section 280.1 expressly provides:

"The (local) board shall prescribe courses of study for the schools of the corporation."

The balance of Chapter 280 contains express requirements as to teaching of certain subjects. Thus, insofar as the proposed standards specify additional subjects or the form of the curriculum they amount to an attempt to amend Chapter 280 and usurp the powers vested in the local boards. Insofar as they duplicate the provisions of Chapter 280 they are superfluous. The former is basis for disapproval as to "legality"; the latter for disapproval as to "form".

Section 274.1, Code 1954, quoted by the Supreme Court in the Howell School District case, supra, vests "exclusive jurisdiction in all school matters" within the territory of the district in the local school board. Determination of the number of employees to be hired for purposes of operating the schools would certainly appear within the meaning of "school matters" in the same manner and by the same reasoning as which school each child shall attend. It should be noted that the power to contract with teachers is vested in the local board by Section 279.13 and the power to employ a superintendent is vested in the local board by Section 279.14.

As to the matter of rules prescribing the duties, relationships and manner of communication with the local board for employees, Section 279.8 provides:

> "The (local) board shall make rules for its own government and that of the directors, officers, teachers, and pupils, and for the care of the schoolhouse, grounds, and property of the school corporation, and aid in the enforcement of the same, and require the performance of duties by said persons imposed by law and the rules."

Again the reasoning of the Howell School District case, supra, appears applicable.

By reason of the foregoing, the said proposed rules and regulations are hereby disapproved.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

September 4, 1957

Mr. W. Grant Cunningham
Secretary, Executive Council
B u i l d i n g

Dear Mr. Cunningham:

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

> "We would appreciate a written opinion on the following two questions in connection with the Board of Accountancy:
>
> (1) Is the Executive Council obligated to provide office space for this Board.
>
> (2) Does this Board have the right to hire a Secretary."

In reply thereto, based upon an official opinion of this Department issued June 28, 1957, I advise as follows.

1. In answer to your question #1 I advise that the Executive Council is not under obligation to provide office space for this Board. The Board, in its discretion, may provide for office space for the conduct of its official business, the expense and cost thereof being payable out of the fees paid to the Board.

2. In answer to your question #2 I would advise you that the Board of Accountancy have the right and the power to employ a secretary and I might add to compensate him likewise out of

the fees.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

September 4, 1957

Mr. Charles W. Wagner
Superintendent of Buildings & Grounds
B u i l d i n g

Dear Sir:

This will acknowledge receipt of yours of the 27th ult. in which you state the following:

> "Will you please advise this department 'what department has control of cleaning, refurbishing and repairs of the various monuments throughout the Capitol Grounds.'"

In reply thereto I advise you that the following duty in connection with monuments on the Capitol grounds is imposed upon the Curator of the Department of History and Archives by Section 303.6, subsection 7, Code 1954, which provides as follows:

> "Custodian of works of art. Except as otherwise specifically provided, be custodian of and care for and preserve the monuments, memorials, and works of art on the grounds, and in the buildings at the seat of government, and report from time to time to the proper officer or board the condition and his recommendations in respect thereto."

There does not appear to be any specific provision otherwise. I am of the opinion that the Curator under the foregoing power and duty will have control of cleaning, refurbishing and repairs of

the various monuments throughout the Capitol grounds.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

September 4, 1957

Mr. John H. Holley
Butler County Attorney
Shell Rock, Iowa

Dear Sir:

Receipt is acknowledged of yours of June 18 as follows:

"This is a request for an interpretation of Section 340.19, Code of Iowa, 1954, regarding coroner's fees. The fact situation which gives rise to the inquiry is this:

"The coroner conducted an inquest into an auto accident in which four fatalities occurred. He convened a coroner's jury, made use of a court reporter, and questioned two sworn witnesses. He drove 86 miles in this investigation and spent $5.00 for long distance telephone calls. In preparing his coroner's report and claim for fees, the coroner charged the estates of three of the decedents only for viewing the bodies. He charged the estate of the driver of the automobile for the mileage, the telephone calls, the jury fees, the court reporter's fees and the witness fees.

"The attorney representing the estate of the deceased driver of the car takes the position that all of the inquest fees should be prorated among the four decedents killed in the accident. The coroner has replied that it has always been his custom to charge the mileage and other costs against the driver where there is more than one person killed in an auto accident.

"The Annotations do not help much in this case. There is a cross reference to Section 337.11 of the Code, and Subsection 10 of that Code Section speaks of prorating mileage costs in another

57-9-8

matter. If we were to follow that with regard to coroner's fees, the coroner in this case would clearly be required to prorate all of the costs of the inquest among the four persons killed in the auto accident.

"Please advise as to how the costs of a coroner's inquest or investigation are to be prorated and charged against the estates of the various decedents in an instance where more than one person meets death in an auto accident or similar disaster."

As you suggest, the statute does not spell out against whom claim should be made in multiple death cases. Since the expenses apparently would have been the same irrespective of number of bodies viewed it appears your problem is primarily one of administrative discretion rather than law. In other words, recovery may be sought against any or all of the respective estates for all or any part of the total expenses.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

COUNTIES. MAINTENANCE OF VETERANS GRAVES UNDER SECTIONS 250.17, 250.18, CODE 1954:
1. Does not depend on financial status of relatives.
2. In multiple-grave lots extends only to veteran's grave.
3. Section 250.18 applies only to claims for current year.
4. The counties' obligation to pay exists irrespective of budgetary shortcomings.

September 4, 1957

Mr. Harold G. DeKay
Cass County Attorney
21 West Fifth Street
Atlantic, Iowa

Dear Sir:

Receipt is acknowledged of your letter of August 23 as follows:

"I have the following questions with reference to the liability of Cass County, Iowa, under the provisions of Sections 250.17 and 250.18 of the 1954 Code of Iowa:

"1. Is Cass County obligated to pay for the care and maintenance of the grave of a deceased veteran under Section 250.17, regardless of whether or not the surviving kin are possessed of sufficient funds to pay for such upkeep; and, if Cass County is not so obligated, whose duty, or obligation, is it, to determine the ability of such surviving relatives to pay for such upkeep.

"2. Where a deceased veteran lies in a piece of ground including more than one lot, and where his grave is the only lot occupied in the said lot, is Cass County obligated to pay for the care and maintenance of the whole block, even though there may be as many as eleven other lots in the said block, which block was purchased originally by the said deceased veteran?

"3. May Cass County pay, under the provisions of Section 250.18, for the care and maintenance of the lots of deceased veterans for years other than the current year? In other words, if Cass County is presented with a claim for the years 1955, 1956, and 1957, and such claim is filed on July 29, 1957, may the said county pay more than the current year?

"4. May such claims be paid from the general fund, even though, no provision for such claims was made in the budget of the county, and such claim not included in the tax levy?"

57-9-9 X

Sections 250.17 and 250.18, Code 1954, to which your letter refers, provide as follows:

> "250.17 Maintenance of graves. The board of supervisors of the several counties in this state shall each year, out of the general fund of their respective counties, appropriate and pay to the owners of, or to the public board or officers having control of cemeteries within the state in which any such deceased service man or woman of the United States is buried, a sum sufficient to pay for the care and maintenance of the lots on which they are so buried, in any and all cases in which provision for such care is not otherwise made.
>
> "250.18 Payment--how made. Such payment shall be made at the rate charged for like care and maintenance of other lots of similar size in the same cemetery, upon the affidavit of the superintendent or other person in charge of such cemetery, that the same has not been otherwise paid or provided for."

1. Your first question is directly answered by the words of the statute. The duty of the board of supervisors is described in terms of "shall" which is ordinarily construed by the courts as mandatory rather than merely permissive. The circumstances in which such mandatory duty exists are described by the statute as "any and all cases in which provision for such care is not otherwise made". Thus, the test is not the ability of relatives to furnish the care, but rather whether relatives or others are furnishing the care.

2. Your second question turns on the meaning of the word "lot" as used in Section 250.18. As your letter indicates, the term is somewhat elastic and variable when used in connection with burial grounds. However the intent of the statute may be ascertained by considering Sections 250.13 to 250.19 as a whole, all of them relating to the burial or place of burial of veterans. Section 250.13 provides for burial at public expense "not in any cemetery or part thereof used exclusively for the burial of the pauper dead". Section 250.14 provides that the "grave of each soldier, sailor, or marine shall be marked. . .". Section 250.16 provides for furnishing "some suitable and appropriate metal marker. . .for the grave". Section 250.19 provides for a record "by description of location in the cemetery where buried". Thus, the statutes provide for acquisition of cemetery space for the grave, erecting a headstone, providing a marker and describing the location of the grave in the cemetery. It would logically seem to follow that the maintenance described in Section 250.17 in terms of the word "lot" refers to the immediate piece of ground used for the grave rather than to some larger tract containing other graves of non-military deceased persons.

3. In answer to your third question, you are referred to the statutory language pointed out in the answer to your first question. It is the duty of the county to pay when "provision for such care is not otherwise made". If bills for past years

have been permitted to accumulate by the persons or agency performing the maintenance without presenting same to the supervisors as they fell due, it must have been because such persons or agency relied on some source other than the county for payment. In other words that the same was "otherwise. . .provided for" even though such other provision may have failed of payment. It is my impression the county need pay only for current care and need not pay for past care where other provision was made but payment pursuant to such other provision may or may not be forthcoming. The purpose of the statute, is to maintain veterans' graves not to secure payment of defaulted debts. Also it should be noted that the duty imposed by Section 250.17 is to pay "each year" not for several years at a time.

4. In answer to your fourth question, I again call your attention to the mandatory form of the statute--"The board of supervisors shall each year, out of the general fund appropriate and pay. . .". The act of payment is thus one "the performance. . .of which the law enjoins as a duty resulting from an office, trust, or station" within the meaning of Section 661.1, Code 1954, and would appear enforceable thereunder irrespective of budgetary shortcomings.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

229.42 (5)

INSANE PERSONS: Voluntary admission to state hospital.
1. Under Section 242.42 an application directed to the county insanity commission signed by the applicant and containing the information and agreement prescribed in Section 229.41 is necessary in addition to Board of Control Form 1275.
2. No compensation to commission members for services under Section 229.42 is provided by Section 228.9.

September 4, 1957

Mr. Howard M. Remley
Jones County Attorney
Anamosa, Iowa

Dear Sir:

Receipt is acknowledged of your letter of August 26 as follows:

"Enclosed find 'Application For Voluntary Admission To Screening Center With The Consent Of The Insanity Commission', the form of which has been submitted to the County Commissioners of Insanity by the Board of Control for State Institutions. It is noted on the form that the original is to go to the Mental Health Institute, copy to County Auditor and copy for the Clerk of Court.

"Presuming the application is intended in connection with Section 229.42 of the 1954 Code of Iowa:

"1. May Jones County legally pay the costs of 'Voluntary Admission' arising by use of the enclosed form when it is signed by a responsible relative but not by the applicant?

"2. Will the three (3) members of the Commission of Insanity be entitled to be compensated as provided in Section 228.9 of the 1954 Code of Iowa for performing services required by Section 229.42 of the 1954 Code of Iowa?

"3. If the answer to two (2) above is affirmative, would the use of the enclosed form as prescribed by the Board of Control in lieu of one strictly complying with Sections 229.41 and 229.42 of the Iowa Code prevent legal payment to the Commissioners of Insanity?"

Section 229.41, Code 1954, provides in pertinent part as follows:

"Any citizen of the state may make a voluntary personal application for admission to a state hospital for the purpose of securing observation, examination, diagnosis and treatment for mental illness. Such application shall be made in writing on forms prepared under the direction of

57-9 in X

the board of control and shall include an agreement by the applicant that he will abide by the rules and regulations of the hospital and will give three days notice in writing before demanding his discharge. . . ." (Emphasis ours)

Section 229.42, Code 1954, to which your letter refers, provides as follows:

"Costs paid by county. If a person wishing to make application for voluntary admission to the hospital is unable to pay the costs of hospitalization or those responsible for such person are unable to pay such costs, application for voluntary admission must be made to the insane commission of the county in which said person is a resident and the commission, after satisfying itself that the person is in need of observation and treatment in the state hospital, may on forms prescribed by the board of control, authorize such person's admission as a voluntary case, the costs of hospitalization of such case to be paid in the same way as regularly committed cases. Persons admitted under this section shall be released on application in writing to the superintendent in the same way as voluntary patients are released as provided for in section 229.41."

Reference to tables of repealed and amended sections appearing at the back of the Session Laws of the 56th and 57th General Assemblies indicates neither of the quoted provisions has been amended since they appeared in the 1954 Code.

The form enclosed with your letter is labeled "Form No. 1275, APPLICATION FOR VOLUNTARY ADMISSION TO SCREENING CENTER WITH CONSENT OF THE INSANITY COMMISSION". Provision is made for execution of the form by the commission and by a "responsible relative". No provision is made for signature by the applicant on Form 1275.

In answer to your first question, I would advise you that under the quoted statutes, Form 1275 is a sufficient compliance with Section 229.42 if supplemented by an application containing the information and agreement required in the above-quoted provision of Section 229.41, addressed to the commission and signed by the applicant and that upon receipt of such application signed by the applicant together with Form 1275 signed by the "responsible relative" the commission may lawfully proceed.

In answer to your second question, I would call your attention to the fact that Section 228.9, Code 1954, provides for payment to commission members for each "commitment" or "release". Reference to Sections 229.41 and 229.42 reveals that release of persons voluntarily admitted thereunder is by application to the superintendent. Hence the commission will have no "release" problems to consider under Sections 229.41 and 229.42. "Commitment" is involuntary in nature. A "voluntary admission" is not a "commitment". Hence, neither of the services for which compensation is provided in Section 228.9 exist under Sections 229.41 and 229.42.

3. The answer to your first two questions eliminates necessity for answer to your third question.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

CC: Board of Control
L o c a l

September 5, 1957

Mr. K. A. Madigan, Chairman
Iowa Employment Security Commission
L o c a l

Dear Sir:

Reference is herein made to yours of the 26th ult. in' which you submitted the following:

> "This Commission respectfully requests your opinion with respect to the following matter:
>
> "House File 599 makes no provision for the cost of its administration other than the provision in Sec. 2 thereof appropriating $250,000, 'or so much thereof as may be necessary to carry out the provisions of this Act.'
>
> "On the assumption that one of the provisions of the Act is its administration, have we the authority to pay administrative expense out of the funds appropriated in the Act? If not, from what source may administrative costs be paid?"

In reply thereto I advise as follows. House File 599, now being Chapter 135, Acts of the 57th General Assembly, after providing for a minimum retirement allowance to teachers meeting the qualifications provided in the first paragraph of Section 1 of the Act, provides the following:

> "Applications for such retirement allowance payments shall be made to the employment security commission under such rules and regulations as the commission may prescribe. Eligible persons shall be entitled to receive such retirement allowance payments effective from the date of application to the commission, provided such application is approved, and such payments shall be continued on the first day of each month thereafter during the lifetime of any such person.

57-9-11 X

> "Sec. 2. There is hereby appropriated from the general fund of the state of Iowa to the employment security commission an amount of not to exceed two hundred fifty thousand dollars ($250,000.00), or so much thereof as may be necessary to carry out the provisions of this Act.
>
> "Any balance remaining in the funds, to which appropriations are made by this Act, at the end of the ensuing biennium shall revert to the general fund of the state."

It will be noted that no specific provision is made with respect to the payment of expense incident to the administration of the retirement allowance provided in Section 1 of the Act. However, administrative duties are imposed upon the Employment Security Commission in making the allowance payments to eligible persons who qualify in accordance with the provisions of the Act. The performance of such duty by the Employment Security Commission is a necessary condition to carrying out the provisions of the Act. Therefore, the cost to the Employment Security Commission of administering the Act may be paid from the appropriation made by Section 2 of the Act of $250,000.00. A like conclusion appears to have been reached in an opinion appearing in the Report of the Attorney General for 1944 at page 60 where it is said:

> "We note that allocations from the appropriation for state aid to normal training schools have been made in the past for administrative expenses under the authority of an opinion

written by Earl Wisdom on December 31, 1932. We have checked the opinion of Mr. Wisdom and find that the conclusion he arrives at is correct. * * *"

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

September 5, 1957

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

Dear Sir:

Your letters of June 21 and July 12, 1957, state a question which is expressed in the first mentioned letter as follows:

> "I respectfully request your opinion as to the proper interpretation to be placed upon Section 321.118 of the 1954 Code of Iowa, which provides for a $40.00 license fee for trucks on which a corn sheller or portable mill is mounted.
>
> "There is presently operated in Muscatine County several trucks on which are mounted a feed grinder and mixer as two separate units and the question is whether or not these trucks are to be licensed under this section."

Section 321.118, Code of 1954, provides:

> "Corn shellers and feed grinders. For trucks on which a corn sheller is mounted the annual registration fee shall be forty dollars. For trucks on which a portable mill is mounted the annual registration fee shall be forty dollars. The payment of the registration fee herein shall exempt the truck from property tax."

According to Acts of the 53rd General Assembly, Chapter 140, section 3, the provisions of Section 321.123, as thereby amended, were applicable to corn shellers, feed grinders, and "trailers". Specifically, Section 321.118 deals only with "trucks" on which are mounted a corn sheller and portable mill, whereas Section 321.123 presumably applies where a corn sheller or feed grinder is mounted on a "trailer".

Both "motor truck" and "trailer" are defined in Section 321.1. These definitions are exclusive of each other, thus Sections 321.118 and 321.123 are not conflicting.

Before enactment of the provision which is now Section 321.118, all trucks

57-9-19 X

were subject to a registration fee under general statutes which now consist of Sections 321.119 to 321.121 inclusive. That is, the registration fee was paid on the basis of a classification combining gross weight with the type of tires used. In 1939 a specific exception was made with respect to trucks on which a corn sheller or portable mill was mounted. This exception, being a specific statute, prevails over the general statute under the theory advanced in Iowa Mutual Tornado Insurance Association v. Fischer, 245 Iowa 951, 1954.

The conclusion is that the general statute would take into account the additional machine in that it would add to the gross weight but that the specific statute contemplates payment of a flat sum, forty dollars ($40.00), regardless of weight or the number of machines.

Section 321.118 refers to "corn sheller" and "portable mill" in the singular. However, even if the feed grinder and mixer are considered as separate portable mills, the fee is not changed. This reasoning is supported by a rule of statutory construction evidenced by Section 4.1(3), 1954 Code of Iowa, which states:

> "Number and gender. Words importing the singular number may be extended to several persons or things, and words importing the plural number may be applied to one person or thing, and words importing the masculine gender only may be extended to females."

Annotations to this section substantiate the fact that the singular can be extended to mean the plural in order to effect the legislative intent behind the statute. Zilske v. Albers, 238 Iowa 1050, 1947; Sexton v. Lauman, 244 Iowa 670, 1953.

Therefore, you are advised that, as to "trucks" on which are mounted a [illegible] grinder and mixer, the registration fee is in keeping with Section 321.118, 1954 Code of Iowa, wherein a sum of forty dollars ($40.00) is specified. However, this opinion encompasses only the factual situation involving the two pieces of mechanical equipment you mention. It does not treat the situation where a storage tank is also mounted on the same truck.

Very truly yours,

HUGH V. FAULKNER
Assistant Attorney General

HVF:md

GOM 4-57-11072
PB-2-9824

FORM 13

IOWA STATE HIGHWAY COMMISSION

AMES, IOWA

Atty General

Ames, Iowa

September 5, 1957

John W. Kellogg
Harrison County Attorney
Logan, Iowa

Dear Mr. Kellogg:

In re: Speed Zones near Public Schools

This is in reply to your verbal request of August 23. Section 321.249 of the Code of Iowa gives power to the counties to establish school zones and provides for the stopping of all motor vehicles approaching said zones when movable signs have been placed in the roadway. I am unable to find a definition of school zone. School district is defined in Section 321.1(59) as territory contiguous and including a highway for a distance of two hundred feet in either direction from a school house "in a city or town". School zone does not seem to be defined as far as rural areas.

If your county Board of Supervisors desire to place a speed limit lower than those set out in Section 321.285, I feel that they have the authority to enter a resolution declaring that they have reviewed the traffic problems in and around this "school zone" and that they have determined from all the facts considered that a lower speed limit is warranted in this area. They could then place the necessary speed signs to conform with the manual of uniform traffic control devices for streets and highways.

You might look at Section 321.255 in which local authorities have authority to place and maintain traffic control devices upon the highways under their jurisdiction to regulate and guide traffic. The county Board of Super-

57-9-13 X

IOWA STATE HIGHWAY COMMISSION

AMES, IOWA

September 5, 1957

In re: Speed Zones near Public Schools

visors would appear to fall within the definition of local authorities as set out in Section 321.1(46) of the Code.

Trusting this will enable you to take the necessary steps to correct your problems in Harrison County, I remain

Very truly yours,

C. J. Lyman
Special Assistant Attorney General
for Iowa State Highway Commission

CJL:MS

Hospital snack bars and industrial non-profit organizations are within the definition of "restaurant" in Section 170.1 (4), Code 1954, thus subject to the inspection fee provided in Section 170.6, Code 1954. A country club or key club are "restaurants", whether held out to the public as a restaurant, if, as a fact question, they serve food for pay as an enumerated or other like place. Church and fraternal organizations, as a fact question, must serve food "regularly" and "as a business". School hot lunch programs are excluded from the licensing provision, which contains a broader definition than "restaurant", thus construed not subject to the inspection fee provided in Section 170.6.

September 6, 1957

Honorable Clyde Spry
Secretary of Agriculture
L o c a l

Dear Sir:

In your letter of May 7, 1957, you request an interpretation of Section 170.1(4), Iowa Code of 1954. This request is in conjunction with Section 170.6, Iowa Code of 1954. These two sections are quoted below for the purpose of determining whether school hot-lunch programs, churches, fraternal societies, country clubs, key clubs, hospital snack bars, and non-profit organizations are "restaurants", subject to an inspection fee:

> "170.1(4) 'Restaurant' shall mean any building or structure equipped, used, advertised as, or held out to the public to be a restaurant, cafe, cafeteria, dining hall, lunch counter, lunch wagon, or other like place where food is served for pay, except hotels and such places as are used by churches, fraternal societies, and civic organizations which do not regularly engage in the serving of food as a business."

> "170.6 Inspection fee. 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 the management and control of same, pay to the department an inspection fee of fifteen dollars. This section shall not apply to any temporary restaurant."

Section 3 of Chapter 101, Fifty-Seventh General Assembly, repealed Section 170.2, the licensing provision, and specifically excluded school hot-lunch programs from the licensing requirement.

> "This Act shall not be construed to require the licensing of establishments or persons involved in a hot-lunch program in the public or parochial schools of the state of Iowa."

By expressly excluding school hot-lunch programs from the licensing provision, wherein a broader and more all encompassing definition is used, e.g., "food establishment", it is thought that school hot-lunch programs should be excluded from a provision using a more narrow definition, namely "restaurant".

57-9-14 X

This is particularly true considering the wording of the inspection fee provision which is to the effect that the inspection fee is in addition to the license fee. A school hot-lunch program is no longer required to pay the license fee so it would follow that the legislative intent was that it should likewise not be subject to the inspection fee under Section 170.6, Iowa Code of 1954.

Churches and fraternal societies "which do not regularly engage in the serving of food as a business" are an exception to the definition of "restaurant". What constitutes serving food "regularly" and serving food "as a business" within that definition are fact questions. Inasmuch as the particular facts are not before us, we cannot answer the question as to whether either of these organizations are "restaurants" subject to the inspection fee.

For your information you are referred to 36 Words and Phrases, p. 673, wherein "regularly" is given the following definition:

> "'Regular' means steady or uniform in course, practice, or occurrence; not subject to unexplained or irrational variation. 'Regularly' means in a regular manner, methodically, in due order."

An interpretation of "business" is found in Wellesley College v. Attorney General, 227 Mass. 722, 49 N.E. 2d 220, 1948. A college dormatory food service was not serving food regularly to the public "as a business" within the meaning of a statute requiring a tax certificate which was to "remain in effect so long as the taxpayer is engaged in the business of regularly furnishing meals or food to the public".

An interpretation of the wording "or held out to the public to be a restaurant, cafe, cafeteria, dining hall, lunch counter, lunch wagon, or other like place where food is served for pay, . . ." discloses that it is not necessary that a place be held out to the public in order to be classified as a "restaurant". If an enumerated or other like place serves food for pay it is considered a "restaurant". 1944 Op. Atty. Gen., p. 71.

In addition, a place having a loaf of bread and ingredients for sandwiches, when in possession of cooking paraphernalia such as an electric grill or a gas plate on which to prepare sandwiches, is required to have a restaurant permit. 1934 Op. Atty. Gen., p. 558.

Applying these two opinions to a country club and a key club, the conclusion is that they are "restaurants" should they be within the scope of the 1934 opinion even though not held out to the public, as such.

Hospital snack bars, insofar as they serve food for pay, are a place like those enumerated in the definition section, 170.1(4), and are held out to the public to be such place, thus constituting a "restaurant" within the definition.

With reference to a non-profit organization, a cafeteria within an industrial plant operating at cost was required to be licensed as a "restaurant" because food

was being served for pay. This was even though the cafeteria was not held out to the public as a restaurant. 1944 Op. Atty. Gen. 71.

This authority indicates that industrial non-profit organizations are "restaurants" for purposes of the licensing requirement, hence subject to the inspection fee in addition thereto, if an enumerated place or other like place serving food for pay.

The result is that a hospital snack bar and a non-profit organization are within the definition of "restaurant" in Section 170.1(6), Iowa Code of 1954, and subject to the inspection fee provided in Section 170.6, Iowa Code of 1954. A country club or boy club is within that definition if food, as a fact question, is served for pay within the scope of the authority cited pertinent thereto. Church and fraternal organizations, if food is served "regularly" and if food is served "as a business" are "restaurants" and must pay the inspection fee under Section 170.6. School hot-lunch programs are not within the definition of "restaurant" because excluded from the broader definition of "food establishment", thus, by legislative intent, not subject to the inspection fee set out in Section 170.6.

Very truly yours,

[redacted]
Attorney General of Iowa

[redacted]
Assistant Attorney General

[redacted]:rml

A bank may not maintain a regular bank messenger service for receiving deposits from its customers at points other than the established offices of the bank.

September 6, 1957

Mr. Lee Chandler, Superintendent
Department of Banking
500 Central National Building
Des Moines, Iowa

Dear Mr. Chandler:

Re: Bank Messenger Service

Reference is made to your recent question to this office as follows:

> "May a bank maintain a regular bank messenger service for receiving deposits from its customers at points other than the established offices of the bank?"

The only statutory authority in the State of Iowa bearing upon this subject appears to be contained in Section 528.51 of the 1954 Code of Iowa. This reads as follows:

> "Branch banking prohibited - exceptions. No banking institution shall open or maintain any branch bank. However, as may be authorized by and subject to the jurisdiction of the banking department any banking institution may establish an office for the sole and only purpose of receiving deposits and paying checks and performing such other clerical and routine duties not inconsistent with this section. No banking institution may establish any office beyond those counties contiguous to the county in which said banking institution is located nor in a city or town in which there is already an established banking institution. No office shall be continued at any place after a banking institution has actually commenced business at that place. Nothing in this section shall prohibit national banks the privileges of this section whenever they may be so authorized by federal law."

57-9-15

Prior opinions of this office have interpreted this section rather strictly. The intent of this section was to limit banks in their business transactions to their established premises and not to permit them to operate indiscriminately throughout their trade area.

From discussing the matter with you it would appear that the problem comes up in two different forms. The first of these is a situation in which an employee of the bank drives from point to point contacting various customers and receiving deposits. In some cases it is our understanding that a deposit slip is endorsed in the customer's place of business and in other instances it is not delivered to the customer but mailed to the customer after receipt of the funds at the bank.

The second situation arises in which an armored car service is hired by the bank for the purpose of contacting various key customers to receive deposits. These are delivered to the bank and the appropriate deposits made.

In both situations it is the opinion of this office that the person receiving the deposit is an agent of the bank, and by entering into such an agency relationship the bank is conducting branch banking away from its established location. Such a practice is a violation of Section 528.51 of the 1954 Code of Iowa.

Very truly yours,

NORMAN A. ERBE
Attorney General of Iowa

DON C. SWANSON
Assistant Attorney General

DCS:MKB

Two or more banking institutions having certain elements of common ownership and interlocking officers may not be permitted to furnish a blanket fidelity bond covering the officers and employees of said institutions.

September 6, 1957

Mr. Lee Chandler, Superintendent
Department of Banking
500 Central National Building
Des Moines, Iowa

Dear Mr. Chandler:

Re: Blanket Fidelity Bonds

Reference is made to your recent inquiry to this office in which you ask the following question:

> "May two or more banking institutions having certain elements of common ownership and interlocking officers be permitted to furnish a blanket fidelity bond covering the officers and employees of said institutions?"

The pertinent section of the laws of the State of Iowa requiring said bonds reads as follows in Section 528.3 of the 1954 Code of Iowa:

> "Bonds of officers and employees. The officers and employees of any state bank, savings bank, or trust company having the care, custody, or control of any funds or securities for any such bank or trust company, shall give a good and sufficient bond in a company authorized to do business in this state indemnifying the said bank or trust company against all losses, which may be incurred by reason of any act or acts of fraud, dishonesty, forgery, theft, larceny, embezzlement, wrongful abstraction, misapplication, misappropriation, or other criminal act committed by such officer or employee directly or through connivance with others, until all of his accounts with the said bank or trust company shall have been fully settled and satisfied. The amounts and sureties shall be subject to the approval of the board of directors of any such bank or trust company. The premium on said bonds shall be paid by the said bank or trust company."

57-9 11 V

This Code section gives no indication that the State Legislature at any time considered blanket bonds for more than one institution. The intent of the entire statutory enactment indicates that each bank should be treated individually and should be bonded individually.

Section 64.4 of the 1954 Code of Iowa provides as follows:

> "All other bonds required by law, when not otherwise specially provided, shall be conditioned as the bonds of public officers."

This office has consistently held that with regard to the bonds of public officials each must furnish an individual bond unless otherwise expressly authorized by statute. See Attorney General's opinion dated June 9, 1955, re county officers' official bonds. This opinion examines various bonding statutes of the State of Iowa and sets forth several statutes in which blanket bonds have been specifically authorized in the past. Nothing in the banking statutes of this State has been found which in any way indicates that the Legislature intended to provide for blanket bonds covering two or more banking institutions.

It is therefore the opinion of this office that each individual bank under the jurisdiction of your Department should maintain its own individual coverage as required by Section 528.3 of the 1954 Code of Iowa.

Very truly yours,

NORMAN A. ERBE
Attorney General of Iowa

DON C. SWANSON
Assistant Attorney General

DCS:MKB

September 11, 1957

Mr. Ray O. Kuehl, Special Agent
State Permit Board
L o c a l

Dear Sir:

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

> "The State Permit Board respectfully requests an opinion on this matter:
>
> "On date of July 1, 1957 it was requested and approved that beginning July 1, 1957 State Permit Board funds collected under the provisions of Section 124.5, Code of Iowa, 1954, be placed in a special fund for the use of the State Permit Board for the exclusive purpose of carrying out the provisions of this Chapter.
>
> "It was brought to the attention of the board that inasmuch as the State Tax Commission was not involved and not compensated for keeping an account of the disbursements of this department in Central Accounting, that the State Permit Board be given the duty of keeping their own records and to be audited by an auditor from the State Auditor's office. It was also said that inasmuch as the State Permit Board had been separated from the Tax Commission, would it be permissible to turn the fees collected from said permits directly over to the Treasurer of State?"

In reply to your question as to whether it would be permissible to turn the fees collected from permits directly to the Treasurer of State I advise you that such procedure is not permissible under the terms of the following portion of Sec. 124.5:

> " * * * Such fees collected shall be placed in a special fund by the state tax commission to be used by the state permit board for the purpose of enforcing the provisions of this chapter."

According to this statute the fund is and remains a special fund in the possession of the State Tax Commission to which body the fees should be turned over.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

September 11, 1957

Mr. N. S. Gould
Delaware County Attorney
Manchester, Iowa

Dear Sir:

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

> "Our Recorder receives for filing each year a number of farm leases. We would like to know whether or not, in your opinion, Section 556.17 of the 1954 Code of Iowa, as amended, contemplates that our Recorder collect the fee for releasing a lease of real estate which has been filed of record in her office at the time said instrument is handed to her for filing."

The statute in question as amended by Chapter 254 of the Acts of the 57th General Assembly, is exhibited here as follows:

> "Release of mortgages. When the amount due on any chattel mortgage, conditional sales contract, or pledge of personal property is paid, the mortgagee, conditional vendor, pledgee or his personal representative or assignee, or those legally acting for him shall release of record such instrument evidencing the security, at his own expense, by filing with the original instrument a duly executed satisfaction piece or release, or by indorsing a satisfaction on the index book under the heading of 'remarks' in the same manner as mortgages are released by marginal satisfaction, and when so released on index book, the recorder shall enter a memorandum thereof on the original instrument or on the record thereof, if recorded.
>
> "The fee for the release of any of the above instruments shall be paid directly to the county recorder at the time the original instrument is filed of record.

> "Any person who fails to comply with the provisions of this section within thirty days after being requested in writing shall forfeit to the mortgagor, conditional vendee or pledgor the sum of twenty-five dollars."

I am of the opinion that the Recorder has no power to collect the fee for release of a lease of real estate unless the lease is recorded in the chattel mortgage record. If the security of the landlord consists only of the statutory landlord lien, the lease is not a contract pledge of personal property and not within the terms of the quoted statute.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

PRINTING COSTS: Publication of Employment Security Commission containing reprints of statutes paid for by Federal fund is not affected by Ch. 56, 57th G. A. Such publications paid for from the Public Employees' Retirement System fund, not being an appropriated fund, likewise are not affected by that statute. Distribution of other publications of the Commission are controlled by the provisions of Secs. 17.27 and 17.23, both as amended by Ch. 56, 57th G. A.

September 11, 1957

GC7-DGA-dl

Mr. Don G. Allen, Chief
Legal Services Division
Employment Security Commission
L o c a l

My dear Don:

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

> "I have been requested by formal action of the Commission to request from you an opinion in regard to the application of the provisions of Chapter 56 of the Laws of the 57th General Assembly to the Employment Security Commission. This Chapter is found on page 82 of the Acts of the 57th General Assembly and is known as House File 139.
>
> "Under the provisions of the Iowa Employment Security Law the printing and distribution of various matters in regard thereto which contain at least portions of reprints of statutes and departmental rules is paid for from the Employment Security administrative fund which is federal money appropriated in the law to the Employment Security Commission for the purpose of carrying out its provisions.
>
> "The Iowa Employment Security Commission also has printed and distributes matters in regard to the Iowa Public Employees' Retirement System Law. The cost of this printing is paid from a legislative appropriation of money from the Public Employees' Retirement System fund.
>
> "The Employment Security Commission also has received a letter from the State Superintendent of Printing calling attention to this law. Your opinion as to whether or not our expenditures for printing fall within the provisions of the said Chapter 56 is respectfully solicited."

In reply thereto I advise as follows:

1. Insofar as publications of the Commission containing reprints of statutes and departmental rules paid for from the Employment Security administrative fund which is federal appropriated money are concerned, Chapter 56 of the Acts of the 57th General Assembly has no application.

2. Insofar as other publications in regard to the Iowa Public Employees' Retirement System paid for from legislative appropriation from the Public Employees' Retirement System fund containing reprints of statutes or rules and regulations are concerned, I am of the opinion this fund is not an appropriated fund and therefore such publications would not be affected by Chapter 56 of the Acts of the 57th General Assembly. However, other publications, the nature of which has not been disclosed in your letter, are controlled by either Section 17.27 as amended by Chapter 56 of the Acts of the 57th General Assembly which, as amended, provides as follows:

> "Section 17.27 Other necessary publications. There may be published other miscellaneous documents, reports, bulletins, books, and booklets that are needed for the use of the various officials and departments of state, or are of value for the information of the general assembly or the public, in form and number most useful and convenient, to be determined by the printing board. When such publications paid for by public funds furnished by the state, contain reprints of statutes or departmental rules, or both, they shall be sold and distributed at cost by the department ordering same. Such pub-

> lications shall be obtained from the superintendent of printing on requisition by the department and the selling price shall be determined by the printing board by dividing the total cost of printing, paper and binding by the number printed. Said price shall be set at the nearest multiple of ten (10) to the quotient thus obtained. Distribution of such publications shall be made by the superintendent of printing gratis to public officers, purchasers of licenses from state departments required by statute, and departments. Funds from the sale of such publications shall be deposited monthly in the general fund of the state."

or Section 17.23 as amended by Chapter 56 of the Acts of the 57th General Assembly and, as amended, provides as follows:

> "Price of departmental reports. The state printing board shall establish and fix a selling price for all other state departmental reports and any other state publications it may designate, which price per volume shall be the amount charged any person, other than public officials, who may desire to purchase the same; such price shall cover the cost of printing and distribution. The state printing board may distribute gratis to such state or local public officials, or offices, it may deem necessary, copies of departmental annual reports."

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

AUCTIONEERS: The power vested in the Board of Supervisors by Section 546.1 as amended by H. F. 569, 57th G. A., to license auctioneers is not a mandatory power.

September 11, 1957

Mr. Orvey C. Buck
Van Buren County Attorney
Keosauqua, Iowa

Dear Sir:

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

> "I respectfully request an interpretation of Section 546.1 as amended by the House File 569 of our last legislature which reads as follows:
>
> "'The county board of supervisors may license any person in its county as an auctioneer for hire, which license, while unexpired, shall be effective any place in the state of Iowa. Such license shall be issued by the county auditor and shall authorize the licensee to conduct the business of an auctioneer for hire for a period of one (1) year. Before such license is issued the licensee shall pay into the county treasury a fee of ten dollars ($10.00). Provided, that a resident of another state may be licensed as an auctioneer in Iowa upon complying with the laws of the state of Iowa relating to the issuance of auctioneers' licenses.'
>
> "We would like to know whether or not the provision is mandatory, especially after repeal of Section 546.2 which originally provided for a penalty."

In reply thereto I advise you that the foregoing statute confers authority upon the Board of Supervisors to license both residents and non-residents of the state as auctioneers in Iowa who have complied with the laws of the State of Iowa relating to

57-9-20 X

the issuance of auctioneers' licenses. The exercise of the authority granted is not mandatory.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

September 13, 1957

Mr. Mark D. Buchheit
Fayette County Attorney
West Union, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 10th inst. in which you submit the following:

> "Is it permissible for a County Attorney to charge a fee for the setting up of a procedure for the various townships to purchase, own, rent or maintain fire apparatus under section 359.43 and 359.45.
>
> "I have set up a system as outlined herein above and am wondering whether I may charge a fee for same."

In reply thereto I would say I know no statute either express or implied conferring authority on you as County Attorney to make a charge for the performance of the foregoing service. Insofar as townships are concerned, the only statutory authority to pay for legal services is that provided in Section 359.19, Code 1954, in terms as follows:

> "Employment of counsel. When litigation shall arise in any case not covered by section 359.18, involving the right or duty of township trustees with reference to any matter within their jurisdiction, and the trustees become or are made parties to such litigation, they shall have authority to employ attorneys in behalf of said township, and to levy the necessary tax to pay for their services, and to defray the expenses of such litigation."

57-9-21 K

Under well settled principles this authority would exclude the use of township funds for pay for other legal services.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

TOWNSHIPS

1. Have no authority to contract with a private corporation for fire protection.
2. Have no authority to furnish equipment to a private corporation.
3. May rent equipment from a private corporation and enter into a joint arrangement with a town for its operation.
4. May join with another township or townships or a city or town for fire protection.

September 16, 1957

Mr. Howard M. Remley
Jones County Attorney
Anamosa, Iowa

Dear Sir:

Receipt is acknowledged of your letter of August 27 as follows:

"In connection with fire protection for towns and townships in Jones County, the use of joint facilities has become common and the following questions have arisen:

"1. May a city, town or township contract with a privately owned non-profit corporation organized under Chapter 504 of the Iowa Code to furnish fire protection within the city, town or township and use tax raised funds to pay the separate corporation organized under Chapter 504?

"2. May the city, town or townships purchase fire fighting equipment to be installed upon, carried in and used on a fire truck owned and operated by a privately owned corporation organized under Chapter 504 of the Iowa Code when such equipment may be removed from the city, town or townships during the fighting of fires for other persons who may have contracted with such private corporations organized under Chapter 504?

"3. May city, towns or townships legally contract with so called 'rural fire departments' incorporated under Chapter 504 of the Iowa Code with respect to the furnishing of the housing of the rural fire departments equipment and the manning of the equipment by the personnel of the town's voluntary fire department under Section 368.11 of the Iowa Code in exchange for the use of the rural fire department's equipment within the town's limits as available and as needed?

"4. May more than two (2) towns or townships own, use, or operate jointly with other cities, towns or townships or otherwise provide for 'joint facilities' as authorized by Section 368.12 of the 1954 Code of Iowa?

57-9-23

"5. Does Section 368.12 of the Iowa Code permit two (2) or more towns or townships not otherwise maintaining a fire department to contract with an independent rural fire department incorporated under Chapter 504 of the Iowa Code for the furnishing of fire fighting equipment and manpower for the same?"

Insofar as your questions relate to the powers of cities and towns, no opinion is expressed for the reason that the city attorneys are the proper officials to advise their respective councils. Insofar as your questions relate to townships, they are proper for consideration by your office under Section 336.2(7), Code 1954, and you are advised as follows:

1. In answer to your first question, civil townships are creatures of statute with only statutory powers. Powers of township trustees with respect to fire protection are set forth in Section 359.42, Code 1954, as follows:

"Authorization. The township trustees of any township may purchase, own, rent, or maintain fire apparatus or equipment and provide housing for same and furnish services in the extinguishing of fires in said township, independently or jointly with any adjoining township or townships, likewise authorized as herein provided, or with any city or town."

Thus, the answer to your first question is provided in the negative by the statute itself.

2. The answer to your second question is also directly furnished by the statute.

3. The arrangement contemplated by your third question is not clear. However, if it contemplates that the township will "rent" equipment from such "rural fire department" and house the rented equipment, authority for such transaction is expressed by the quoted statute. Since Section 504.1 refers to incorporation "for the acquisition and ownership of rural fire fighting equipment" and is silent as to its use by such corporation, and Section 504.2 provides "it may make contracts", it appears such rental arrangement would be proper both under the authority of the corporation and of the township. If, having rented and housed such equipment, the township were to enter into an arrangement with the town whereby it provided the personnel to operate the equipment, such arrangement would appear to be a proper exercise of the authority to "furnish services. . .jointly with. . .any. . .town."

4. In answer to your fourth and fifth question, I would advise you that Section 368.12 relates only to the authority of cities and towns. The grant of authority to townships to enter into joint agreements is contained in Section 359.42, quoted above, as "jointly with any adjoining township or townships, or with any city or town". Referring to mechanical rules of construction contained in Section 4.1,

Code, 1954, we find in subsection 2 that words and phrases are to be construed according to ordinary usage and context but, in subsection three it is provides that the singular may include the plural and vice versa. Reference to Lahn v. Incorporated Town, 225 Iowa 686, 281 N. W. 214, State v. Brandt, 41 Iowa 593 and State v. Stutsman, 44 Iowa 703, reveals that "or" is generally construed in the disjunctive but may be considered as meaning "and" if necessary to harmonize a statute or prevent absurdity. Your problem is stated in the abstract and, considering it as such, no necessity appears to me for selecting the more extraordinary of said rules of construction. From the context it would appear that use by the legislature of both the plural and singular with respect to townships reveals legislative intent that any two or more adjoining townships might act jointly. That the legislature used "or" indicates that it intended the disjunctive for, considering the problem in the abstract, no absurdity or necessity for "harmonizing" is evident. I would, however, suggest that your closeness to a number of actual examples might reasonably lead you to a different conclusion on that particular point. Similarly, the fact that the legislature used the singular forms, "city" and "town" in the same sentence where they deemed it necessary to refer to townships in both the plural and the singular indicates to me that the singular was actually intended.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

September 16, 1957

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

Dear Sir:

This will acknowledge receipt of yours of the 11th inst. In which you submitted the following:

> "Under date of August 30, 1957, you mailed me an opinion in connection with the legality of making a service charge for mailing out 1958 license plates. The county treasurer has now asked me whether or not she is under obligation to mail plates to applicants where the applicant sends in his check covering the expense of the plates only."

In reply thereto I advise that according to the opinion you referred to the County Treasurer is under no obligation to mail plates to applicants where the applicant sends in his check covering the statutory fee for the plates only. In her discretion she may mail such plates if the plates are paid for and the expense of the service including the postage is paid to the County Treasurer.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

57-9-22 X

September 17, 1957

Honorable Jack Schroeder
609 Kahl Building
Davenport, Iowa

My dear Jack:

This will acknowledge receipt of yours of the 13th inst. in which you submitted the following:

> "A problem has come up in our city which I respectfully request an Attorney General's opinion so that I can make a decision whether Legislative remedies are necessary.
>
> "The Municipal Park Board of the City of Davenport, Iowa, consists of three Park Commissioners who are elected by the people. However, their budget is subject to approval by the City Council and the City Council is the tax levying party for the Park Board. The Park Board has approximately 12 permanent employees, including those in administrative functions. However, excluding the Commissioners themselves. These employees are now desirous of going into Civil Service and the Park Commission is inclined to go along with this feeling. However, a question has arisen on whether they can go in to the City Civil Service Plan.
>
> "Would you please render an opinion as to the eligibility under the present law. This is rather an urgent problem and I would appreciate hearing from you at your earliest convenience. Thank you sincerely."

In reply thereto I advise as follows. I am of the opinion that employees of the Park Board of Davenport are entitled to acquire civil service status if they are not included in the

57-9-24 X

statutory exceptions to the acquisition of such status. The statute fixing the authority by which civil service status is attained is Section 365.6, Code 1954, which provides as follows:

> "Applicability - exceptions.
>
> "1. The provisions of this chapter shall apply to all appointive officers and employees, including deputy clerks and deputy bailiffs of the municipal court, in cities under any form of government having a population of more than fifteen thousand except:
>
> "a. City clerk, city solicitor, assistant solicitor, assessor, treasurer, auditor, civil engineer, health physician, chief of police, market master, city manager and administrative assistants to the manager.
>
> "b. Laborers whose occupation requires no special skill or fitness.
>
> "c. Election officials.
>
> "d. Secretary to the mayor or to any commissioner.
>
> "e. Commissioners of any kind.
>
> "f. Casual employees.
>
> "2. In all other cities under any form of government, the provisions of this chapter shall apply only to members of the police and fire departments, except the following persons connected with such departments:
>
> "a. Chiefs of police.
>
> "b. Janitors, clerks, stenographers, secretaries.
>
> "c. Casual employees."

By the terms of the foregoing all employees of cities having a population of more than fifteen thousand are entitled

to such status unless they are within the named exceptions. This presents a question of fact which is not before me. The positions that these employees occupy will determine their eligibility for this status.

Sincerely yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

September 18, 1957

Honorable D. C. Nolan
State Senator
Iowa City, Iowa

Dear Cliff:

We have yours of the 13th inst. in which you have submitted the following:

> "The Joint Boundary Committee of Iowa-Nebraska created by the last sessions of the respective legislatures of these states, of which I am a member, respectfully requests your office to advise the Iowa members of such committee on the following question:
>
> "'Does Section 30 of Article 3 of the Constitution of the State of Iowa require the approval of the electors in the counties where the county boundary line may be changed by a change in the state boundary line, the county boundary line and the state boundary line being identical; or does the aforegoing Constitution provision apply only to internal county boundary lines between counties rather than county boundary lines which are also external and between such counties and adjoining states?'
>
> "We would appreciate receiving your opinion on this question as soon as possible because the Committee cannot take any steps in conjunction with the Nebraska Committee in fixing any new boundary line between the states until it is known what legal requirements are to be followed."

In reply thereto we advise as follows. The constitutional provision to which you refer, so far as is pertinent, provides the following:

57-9-2

> "Sec. 30. The General Assembly shall not pass local or special laws in the following cases:
>
> " * * * *
>
> "In all the cases above enumerated, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State, and no law changing the boundary lines of any county shall have effect until upon being submitted to the people of the counties affected by the change, at a general election, it shall be approved by a majority of the votes in each county, cast for and against it."

The right of fixing boundary lines between nations is a right of sovereignty and recognized by the Constitution of the United States. Sec. 18 of 49 Am. Jur., title States, Territories, and Dependencies, provides as follows:

> "Generally. It is a part of the general right of sovereignty belonging to independent nations to establish and fix the disputed boundaries between their respective limits; and the boundaries so established and fixed by compact between nations become conclusive upon all the subjects and citizens thereof, and bind their rights, and are to be treated, to all intents and purposes, as the real boundaries. This right is expressly recognized to exist in the various states of of the Union by the Constitution of the United States, and is guarded in its exercise by a single limitation or restriction - the consent of Congress. A compact between two states establishing the line between them adopted by their commissioners, and to which Congress assents, is binding upon both states and their citizens.
>
> "Congressional assent may be express or implied. It may be implied from its subsequent legislation and proceedings."

and this right is explained more in detail in the case of Poole v. Fleeger, 11 Peters U. S., page 184, 208, where it is said:

> "It cannot be doubted, that it is a part of the general right of sovereignty, belonging to independent nations, to establish and fix the disputed boundaries between their respective territories; and the boundaries, so established and fixed by compact between nations, become conclusive upon all the subjects and citizens thereof, and bind their rights, and are to be treated, to all intents and purposes, as the true and real boundaries. This is a doctrine universally recognised in the law and practice of nations. It is a right equally belonging to the states of the Union, unless it has been surrendered, under the constitution of the United States. So far from there being any pretence of such a general surrender of the right, it is expressly recognised by the constitution, and guarded in its exercise by a single limitation or restriction, requiring the consent of congress. The constitution declares, that 'no state shall, without the consent of congress, enter into any agreement or compact with another state;' thus plainly admitting, that with such consent, it might be done; and in the present instance, that consent has been expressly given. The compact, then, has full validity, and all the terms and conditions of it must be equally obligatory upon the citizens of both states.

On the other hand insofar as fixing boundaries of counties is concerned, it is said in 20 C. J. S., paragraph 17, title Counties, the following:

> "It rests with the legislature of the state not only to define the boundaries of counties, as stated supra §14, but also to provide the means whereby the true location of such boundaries on the ground may be finally determined, and where it has selected one method of fixing a boundary, it must be presumed to have definitely rejected others. While the boundaries of a county, fixed by statute, can be changed only by statute, as stated infra §23, when the position of county lines is not certain, they

> may be made certain in the method prescribed by statute, and the statutory remedy must be first exhausted before resort can be had to the courts."

It is clear therefore from the foregoing rules that insofar as determining the state boundary line which might coincide with the county boundary line is concerned, the constitutional provisions respecting it prevail over legislative enactments with respect to county boundary lines. Specifically conditioning the fixing of a state boundary line subject to the constitutional provisions of Sec. 30 of Article III, to-wit: "no law changing the boundary lines of any county shall have effect until upon being submitted to the people of the counties affected by the change" would result in the electors of a particular county by voting adversely to a constitutional boundary to render the constitutional provision nugatory and of no force and effect.

We are of the opinion therefore that the quoted constitutional provision is not pertinent to the situation outlined and that a change in a state boundary line that is likewise a county boundary line can be made, unaffected by the constitutional provisions of Sec. 30, Article III.

Very truly yours,

NORMAN A. ERBE
Attorney General of Iowa

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

September 18, 1957

Mr. William P. Housel, Chairman
Iowa Liquor Control Commission
L o c a l

Dear Mr. Housel:

We have your letter of June 20, 1957, in which you ask the following questions concerning the interpretation of Section 29.28, 1954 Code of Iowa:

"a. We have a member, 22 years of age, entering military service. Is he entitled to 30 days pay?

"b. Is he entitled to his job back when he returns after completing his military service?

"c. Is there a difference between being inducted through the draft for two years or voluntary enlisting for four years?

"d. Can Section 29.28 be interpreted to include men who are not members of the National Guard?"

Section 29.28 of the 1954 Code of Iowa reads as follows:

"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,

57-9-26 X

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." (Emphasis ours)

With regard to your question "a" you are advised that the employee is entitled to thirty days pay.

You are advised that under your question "b" the employee is entitled to his job after completing his military service.

Under question "c" and the language of the statute we see no difference between being drafted or voluntarily enlisting, the statute using the language "otherwise inducted into the military service".

With regard to your question "d" the statutory language is broad enough to cover 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".

Very truly yours,

DON C. SWANSON
Assistant Attorney General

DCS:MKB

September 18, 1957

Mr. William P. Housel, Chairman
Iowa Liquor Control Commission
L o c a l

Dear Mr. Housel:

You recently requested an opinion from this office as to whether the employees of the Iowa Liquor Control Commission fell under the provisions of Chapter 70 of the 1954 Code of Iowa referred to as the "Soldiers Preference Law". You specifically ask whether the language of Section 123.2 of the 1954 Code excluded the Iowa Liquor Control Commission from the provisions of the Soldiers Preference Law.

Please be advised that it is the opinion of this office that the Soldiers Preference Law is all-inclusive under the language of Section 70.1 of the 1954 Code which reads as follows:

> "Appointments and promotions. In every public department and upon all public works in the state, and of the counties, cities, towns, and school districts thereof, honorably discharged men and women from the military or naval forces of the United States in any war in which the United States was or is now engaged, including the Philippine insurrection and China relief expedition, who are citizens and residents of this state, shall be entitled to preference in appointment, employment, and promotion over other applicants of no greater qualifications."

Very truly yours,

DON C. SWANSON
Assistant Attorney General

DCS:MKB

57-9-27

September 18, 1957

Mr. William P. Housel, Chairman
Iowa Liquor Control Commission
L o c a l

Dear Mr. Housel:

I have your letter of July 10, 1957, in which you ask whether or not it is permissible to prepay for shipments of liquor ordered from Mr. Boston Distillers in exchange for a discount of twenty-five cents per case on orders to be placed.

Section 123.5 of the 1954 Code of Iowa specifically authorizes the Iowa Liquor Control Commission to use funds for the purchase of alcoholic liquors and such other expenses as may be necessary to establish and operate State liquor stores. However, this section is still covered by the provisions of the Budget and Financial Control Act as set forth in Chapter 8 of the Code. Section 8.14 of the Code provides that prior to the approval of a claim the State Comptroller shall "determine that the creation of the claim is clearly authorized by law." This is followed by Section 8.15 which provides as follows:

> "Before a warrant shall be issued for any claim payable from the state treasury, there shall be filed an itemized, sworn voucher which shall show in detail the items of service, expense, thing furnished, or contract upon which payment is sought."

Based upon this language contained in Chapter 8 it is therefore the opinion of this office that delivery must be had prior to payment unless the Legi$lature specifically authorizes prepayment for merchandise ordered. You are therefore advised that the suggested procedure by Mr. Boston Distillers is not permitted under the statutes of this state.

Very truly yours,

DON C. SWANSON
Assistant Attorney General

DCS:MKB

57-9-28X

September 19, 1957

Honorable Jack Miller
State Senator
738 Badgerow Building
Sioux City, Iowa

My dear Senator:

This will acknowledge yours of the 12th inst. in which you enclosed a letter addressed to you by the City Attorney of Sioux City, Mr. George F. Davis, in which he requests through you an opinion of this Department respecting the following situation described in his letter:

> "The City of Sioux City proposes to proceed under the provisions of Chapter 390 of the Code of Iowa 1954 to acquire some off-street parking areas in our business district. The location of these parking areas comply with the requirement of paragraph 4 of Section 390.8 of the Code and a public hearing concerning publicconvenience and necessity has been held as required by Section 390.1 of the Code.
>
> "One of the properties is to be purchased for the sum of $70,000, of which $20,000 will be paid at once from parking meter receipts, $15,000 of the purchase price will be paid in the form of a rental contract or lease of the premises for a period of two years to the seller, and the balance of $35,000 will be paid from funds derived from the operation of parking meters and from revenues from the operation of other off-street parking areas, said balance to bear interest at the rate of 4% per annum for those two years.
>
> "One of the other properties will be purchased for $70,000 of which $35,000 will be paid from funds on hand derived from the operation of parking meters, and the balance will be paid in two equal annual installments

57-9-29 X

of $17,500 each, bearing interest at 4%, from funds to be derived from the operation of parking meters and revenues from the operation of the parking lots, that is to say, from the parking lot fund mentioned in Section 390.4 of the Code.

"Neither revenue bonds nor general obligation bonds as provided for in Section 390.9 and 390.13 of the Code will be issued. No funds created by taxation will be used in the purchase, and the only funds that will be pledged in the contracts of purchase will be those derived from the operation of parking meters and the revenue from the parking lots.

"Section 390.1 of the Code, and paragraph 4 of Section 390.8 both provide that the City shall have the 'authority to purchase, lease or otherwise acquire' off-street parking areas and, as set forth somewhat differently, 'payment of the cost of acquiring by purchase, lease or similar arrangement of off-street parking areas' is also authorized.

"It has been my feeling that if we can purchase land outright from parking meter funds on hand, or enter into a lease of such areas for a number of years, we can also enter into a contract of purchase which will require the City to make payments in future years, particularly because of the use of the words 'otherwise acquire' and 'similar arrangement' in the statute, and the fact that no money derived from taxes or sale of general obligation bonds will be used. However, a question has been raised to the effect that the City can not obligate itself for expenditures in the future.

"If it is necessary to boil down the question, I would suppose it could be stated thusly:

"'May a City, under the provision of Chapter 390 of the Iowa Code, purchase off-street parking areas under contracts which require the City to pledge or make future payments from the funds to be derived from the operation of parking meters and the operation of the lots themselves?'

"Thanking you and the Attorney General in advance for your courtesies and assistance in the matter, I am"

In the foregoing situation I am of the following opinion. Cities and towns are authorized by the foregoing numbered Chapter to incur indebtedness in the acquisition and establishment of off-street parking: (1) Under the provisions of Section 309.9 they are authorized to issue revenue bonds for that purpose payable only from monies received in the operation of parking lots, the operation of parking meters, or from funds derived from a tax levied against the benefited district, and the foregoing designated funds may be pledged as security for the payment of such bonds. (2) Under the provisions of Sec. 390.13, off-street parking facilities may be established and indebtedness incurred therefor by the issuance of general obligation bonds if the authorization therefor has been granted by the electors. No express statutory provision is made authorizing the purchase of off-street parking areas under contract which require the pledging of future payments from funds derived from the operation of parking meters and the operation of off-street parking areas. Such power will not be implied.

Authority for this conclusion exists in the case of Van Eaton v. Town of Sidney, 211 Iowa 986, 231 N. W. 475, 71 A. L. R. 820. There the Town of Sidney entered into a written contract with the Fairbanks Morse Company to purchase certain engines and electric equipment to be paid in 120 pledge

orders payable in consecutive monthly payments. Such orders were not to be a general obligation of the town but a special obligation payable only from the revenue from the light an power plant in which the material was to be installed and used. With respect to the power of the city rising out of the foregoing contract and its contents the Court said:

> (1) "Regardless of what the law may be in other states, it is settled in this state that a municipality has no inherent power to make a contract of this kind. A municipality is wholly a creature of the legislature, and possesses only such powers as are conferred upon it by the legislature: that is (1) such powers as are granted in express words; or (2) those necessarily or fairly implied in or incident to the powers expressly conferred; or (3) those necessarily essential to the identical objects and purposes of the corporation, as by statute provided, and not those which are simply convenient. 1 Dillon on Municipal Corporations (5th Ed.), Section 237; Clark v. City of Des Moines 19 Iowa 199; City of Clinton v. Cedar Rapids & M. R. R. Co., 24 Iowa 455; Heins v. Lincoln, 102 Iowa 69; State ex rel. White v. Barker, 116 Iowa 96; State ex rel. County Attorney v. Des Moines C. R. Co., 159 Iowa 259; Merrill v. Monticello, 138 U. S. 673 (34 L. Ed. 1069)."
>
> " * * * *
>
> (2) "Where a statute confers certain specific powers, those not enumerated are withheld. In other words, enumeration of powers operates to exclude such as are not enumerated. State ex rel. County Attorney v. Des Moines C. R. Co., supra; Scott v. City of La Porte, 162 Ind. 34 (68 N. E. 278, same case on rehearing, 69 N. E. 675); Mayor v. Ray, 19 Wall. (U. S.) 468 (22 L. Ed. 164); People ex rel. Attorney General v. Utica Ins. Co., 15 Johns. (N. Y.) 358 (8 Am. Dec. 243); Wilfong v. Ontario Land Co., 96 C. C. A. 293 (171 Fed. 51); Farmers & Merch. Nat. Bank of Valley City v. School District, 6 Dak. 255 (42 N. W. 767); City of

> Chicago v. M. & M. Hotel Co., supra; City of South Bend v. Chicago S. B. & N. I. R. Co., supra; Barnard & Miller v. City of Chicago, 316 Ill. 519 (147 N. E. 384); People ex rel. Friend v. City of Chicago, 261 Ill. 16 (103 N. E. 609, Ann. Cas. 1915A, 292); 1 McQuillan on Municipal Corporations (2d Ed.) 926, Sec. 370. Neither can it issue bonds under an implied power; it must have express power therefor. Heins v. Lincoln, 102 Iowa 69."

and more definitely and conclusively on the question involved here, the Court stated as follows:

> (3) "Further than this, another question seems to be quite controlling, and that is the question of whether a city has power to pledge the income from its property for a definite period in the future. As to this question, the same general rules of construction apply that have been heretofore stated. There is no statute in this state conferring express power, in terms, upon a city to pledge its property, either personal or real, and we are unable to find any holding that there is inherent or implied power so to do.
>
> "Before we proceed further on this question, it may be wise to state some additional facts. At the inception of this contract, the town of Sidney was not the owner of, nor did it possess, an electric light plant. The town not only needed the engine and electric attachments purchased under this contract from the Fairbanks Morse Company, but it must also acquire a site, a building, and all of the wires, poles, and other equipment necessary to a complete electric light plant; and it was from such a complete electric light plant that the rents, income, and profits were to be used, as a basis or fund with which to pay the pledge warrants provided for. We think this situation is the basis and the controlling question in the case. Had the city the power to thus pledge the income from this property for an indefinite period of time in the future? The general principles and rules of construction heretofore set out are to be applied to this situation.

> There is no statute of the state conferring such power, in terms, upon a city to pledge its property, either personal or real, and we are unable to find any principle or authority holding that such power is inherent or implied."

I am of the opinion therefore by reason of the foregoing that the city is without power to purchase off-street parking in the manner proposed.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

September 19, 1957

Dr. Edmund G. Zimmerer, M. D., M. P. H.
Commissioner of Public Health
L o c a l

Dear Sir:

Receipt is acknowledged of your letter of September 13 as follows:

"I respectfully request an attorney general's letter opinion in answer to the following question:

"When considering Chapter 141, Section 141.5 and other provisions of the 1954 Code of Iowa, is it a violation of the laws of this State for a licensed physician who is the superintendent of a state mental institution to pre-sign death certificates to be used during the superintendent's absence from the institution? The superintendent is the only licensed physician, the others being refugees who may be competent but are not legally qualified to sign such certificates."

In answer thereto I would advise that Section 141.5 as amended, provides:

"Particulars. In the execution of a death certificate, the personal particulars shall be obtained from the person best qualified to supply them. The death and last sickness particulars shall be furnished by the attending physician, or in the absence of such person, or if there be no such person, by the coroner. The burial particulars shall be supplied by the ~~undertaker~~ or person acting as such. Each informant shall certify to the particulars supplied by him by signing his name below the list of items furnished."

I am unable to understand how a physician could certify in advance to matters he cannot possibly know in advance. Under the maxim of construction delegatus non potest delegare I am of the opinion certificates may not be so signed in advance.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

CC: Mrs. Eva Parsons
Board of Control

57-9-30 X

COMMUNITY SCHOOL DISTRICTS

1. Become part of the school system of the county wherein the greatest number of electors reside.
2. The local district board has no discretion to select between county school systems.
3. In a joint district only the county superintendent of the county to the school system of which such district is part has duties to perform.

September 19, 1957

Mr. Clare H. Williamson
Adair County Attorney
Greenfield, Iowa

Dear Sir:

Receipt is acknowledged of your letter of September 13 as follows:

"I am writing you at the request of George S. Bergmann, County Superintendent of Schools of Adair County, Iowa, for an opinion on the following:

"The Adair-Casey Community School District in the Counties of Adair and Guthrie is a newly reorganized community school district which went into effect on the first day of July, 1957. This district was formed by the merger of two reorganized school districts under the provisions of Section 275.10 of the 1954 Code of Iowa. The plan of merger of the two community school districts was filed with and received the approval of the County Boards of Education of both Adair and Guthrie Counties. For the current school year high schools and grade schools are being maintained in both towns within the new district, being Adair, Adair County, Iowa and Casey, Guthrie County, Iowa. The Administrative Superintendent of the merged district resides in Adair, Iowa, and his offices are located in the High School Building in Adair, Iowa. It is the proposed plan of the new district to build a new high school building between the towns of Adair and Casey and if this plan is acted upon, the new high school building will probably be located in Guthrie County. It is planned that grade school buildings will be operated in both Casey and Adair. It is our understanding that the Board of Directors of the new district has passed a resolution that the new district will be a part of the Guthrie County School System.

"Section 275.10 of the 1954 Code of Iowa, the same having been repealed by Chapter 129, Section 2 of the Acts of the 57th General Assembly, was silent as to the question of a merged district located in two counties as to which county school system the same should be attached.

"Section 275.12 of the 1954 Code of Iowa, as substituted by Chapter 129, Section 12 of the Acts of the 57th General Assembly provides in part as follows: 'A petition **, shall be filed with the superintendent of schools of the county in which the greatest number of electors reside.'

57-9-31 X

"Section 273.3 of the 1954 Code of Iowa providing for election areas for County Board members provides in part as follows: 'Where districts have territory in more than one county, the district will belong to the election area of the county where the school buildings are located.'

"Not finding any other provisions of the Code having application herein our questions are as follows:

"1. Should the Adair-Casey Community School District be included within the County School system wherein the greater number of electors reside?

"2. Does the Board of Directors of the new district have the power by Resolution to attach the new district to the County System wherein less than half of the electors of the new district reside?

"3. After it is determined that the new district shall be a part of the County School system of one of the Counties are there any duties or responsibilities on the part of the County Superintendent of the other County in regard to the new school district?"

In answer thereto, I would advise I am of the opinion the answers to your questions are:

1. Yes.
2. No.
3. No.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

September 20, 1957

Mr. Oscar A. Stafford
Lucas County Attorney
Charlton, Iowa

Dear Sir:

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

"I have been requested by the County Conference of Lucas County to seek your official opinion upon the following questions under Code Section 441.6:

"1. Does the conference have the legal right to fix the County Assessor's salary at a figure lower than that of the County Auditor.

"2. Does the County Conference have the legal right to fix the County Assessor's salary at the same figure as the County Auditor's salary and refuse to give him the benefit of the raise in salary given other county officers under Chapter 175 of the 57th General Assembly.

"3. Does the official opinion of June 9, 1955 appearing on pages 54 and 55 of the 1956 report place the County Assessor in the same position as other county officers and therefore make him eligible automatically to the raise in salary as prescribed by Chapter 175.

"I would very much appreciate your official opinion on the above questions."

In reply thereto I advise you as follows:

1. The answer to your question #1 is in the affirmative.

57-9-32X

2. In answer to your question #2 I advise you that the County Conference has the legal right to fix the County Assessor's salary at the same figure as the Auditor's salary and refuse to give the County Assessor the benefit of the raise in salary granted other County officials under Chapter 175, Acts of the 57th General Assembly.

3. In answer to your question #3 I advise that the official opinion referred to does not expressly or impliedly hold that the increase given in the salaries to the County officers automatically attaches to the office of the County Assessor. However, according to the opinion, the Assessor's salary may be reviewed and revamped to reflect increases given to the other County officers and especially to that of the Auditor.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

SCHOOL REORGANIZATION. A provision for a new school building is not proper for inclusion in a reorganization petition.

September 20, 1957

Honorable Fred L. Johnson
1700 Main Street
Hamburg, Iowa

Dear Representative Johnson:

Receipt is acknowledged of your letter of September 17 as follows:

> "Will you kindly answer the following questions asked me at a school organization meeting?
>
> "Two school districts, each containing a small town, wish to unite and reorganize for a better school but they have in their petitions that a new building is to be located on a particular, described place between the two towns. The questions are: Is it legal to name the location of the new school house and if the reorganization gets a favorable vote, is it legally enforceable? An early reply will be greatly appreciated."

In answer thereto you are advised there is no statutory authority for including such question in a school reorganization petition. See Section 275.12, Code 1954, as amended by the Fifty-seventh General Assembly.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

57-9-33

AIRCRAFT: Are not "motor vehicles" under Chapter 163, Acts of the 57th G.A.

September 20, 1957

Mr. L. W. Wolverton
Air Enf. Officer
Iowa Aeronautics Commission
L o c a l

Dear Sir:

Receipt is acknowledged of your letter of September 12 as follows:

"It is the desire of Mr. Frank Berlin, Director for the Iowa Aeronautics Commission, for an opinion as to whether Chapter 163, Acts of the 57th General Assembly; line 3 (322.2) '7. "Motor vehicle" --------' includes or is meant to include aircraft as such.

"Your attention to this matter is greatly appreciated."

In answer thereto, I would advise that I have examined the statute in question and am of the opinion it does not include aircraft inasmuch as aircraft do not ordinarily operate on the highways. See Section 321.1, Code 1954, and particularly the definitions of "vehicle", "motor vehicle" and "highway" therein contained.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

57-9-31 X

MOTOR VEHICLES: EXEMPTIONS: Motor vehicles of a hospital are not exempt from payment of fees under Sec. 321.19 unless owned by a governmental unit or subdivision and, unless in dead storage, such motor vehicles are not exempt as a self-propelling vehicle used neither for conveyance of persons for hire, pleasure, or business nor for the transportation of freight.

Mr. Russell I. Brown, Acting Commissioner
Department of Public Safety
L o c a l

Dear Mr. Brown:

This will acknowledge receipt of your letter of June 24, 1957, wherein you made the following request:

> "In accordance with the provisions of Section 321.19 of the 1954 Code of Iowa, this Department has recently begun the issuance of an 'Official Nonprofit' registration plate at no cost to the recipient. Up to the present time, this Department's approval of applications for this plate has been limited to fire trucks and a few other types of vehicles that were obviously exempt. Now, this Department has received applications from a number of hospitals, including those operated by Catholic organizations, for these plates for their vehicles. Assuming that an applicant is a true nonprofit organization, a question still remains as to their exemption under this statute, inasmuch as these vehicles will be used for the transportation of persons for hire or business, or for the transportation of freight, or both.
>
> "Therefore, your opinion is respectfully requested as to whether motor vehicles owned by a true nonprofit organization operating a hospital, and used in the normal course of their ordinary business as a hospital, are exempt under the provisions of the section cited above."

Section 321.19, Code of 1954, is set out below:

> "General exemptions. All vehicles owned by the government and used in the transaction of official business by the representatives of foreign powers or by officers, boards, or

57-9-35X

> departments of the government of the United States, and by the state of Iowa, counties, municipalities and other subdivisions of government, and such self-propelling vehicles as are used neither for the conveyance of persons for hire, pleasure, or business nor for the transportation of freight, and all fire trucks, providing they are not owned and operated for a pecuniary profit, are hereby exempted from the payment of the fees in this chapter prescribed, but shall not be exempt from the penalties herein provided. The department shall furnish, on application, free of charge, distinguishing plates for vehicles thus exempted, which plates shall bear the word 'official', and the department shall keep a separate record thereof. Provided that the executive council may order the issuance of regular registration plates for any such exempted vehicle, upon a showing of need and necessity therefor."

The exemption from payment of fees applies only to governmental subdivisions. Some hospitals are such subdivisions. However, Catholic hospitals could not be so classified.

As stated in the 1934 Report of the Attorney General at page 329, it is necessary that the governmental subdivision be absolute owner of the motor vehicle involved. In that opinion a school bus, owned by the school district, was held to be within the exemption because the school district was a governmental subdivision. Therefore, a city or county hospital would qualify for the exemption as the motor vehicle would be owned by the city or county or other subdivision thereof. Any privately owned or denominational hospital would not qualify as government owned.

Furthermore, the wording "and such self-propelling vehicles as are used neither for the conveyance of persons for hire, pleasure, or business nor for the transportation of freight, . . . are hereby exempted from the payment of fees in this chapter prescribed," is not applicable to motor vehicles actively in use and operated by an organization. 1930 Report of the Attorney General, page 42. That opinion concerned an automobile owned by the Dubuque Boys' Welfare Association. The car was not one within the first part of section 4867, Code of 1927, (now Section 321.19) as government owned or used in official busines of any governmental unit or subdivision. In construing the above quoted wording that opinion says:

> "The clause above referred to in Section 4867 was included in the exemption statute for the purpose of exempting automobiles that are kept in dead storage. The automobile in question is certainly used in the business incident to the operation of the Dubuque Boys' Welfare Association. We are, therefore, of the opinion that the exemption statute above referred to does not include an automobile used in this manner and owned by such an association."

To thus qualify for the exemption from payment of fees a motor vehicle must be government owned. Hospitals which are government subdivisions owning the motor vehicles used in their operation are entitled to the exemption. All other hospitals are excluded. Self propelling vehicles used neither for conveyance of persons for hire, pleasure, or business nor for the transportation of freight are not entitled to the exemption from fees unless they are in dead storage.

Very truly yours,

DON C. SWANSON
Assistant Attorney General

DCS:MKB

HUGH FAULKNER
Assistant Attorney General

September 23, 1957

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

My dear Governor:

Reference is herein made to the situation in the City of Davenport rising out of the adoption by the City Council of Davenport of two ordinances, one amending an ordinance describing the several wards of the City of Davenport, and the other amending an ordinance describing the voting precincts of that city. Memorandum describing the situation was submitted as follows:

> "Under Section 49.5 and Section 363.7, 1954 Code of Iowa, the City Council of the City of Davenport, Iowa passed an ordinance changing precinct boundaries, changing ward boundaries, and creating two (2) new wards. In compliance with Section 366.3 and Section 366.4, 1954 Code of Iowa, this ordinance was fully and distinctly read before the council on three different days, namely on _____, on _____ and on _____, and concurred in by a majority of the whole number of members of the City Council of the City of Davenport, Iowa. In compliance with section 49.11, 1954 Code of Iowa, the precincts established were numbered and recorded in the records of the City Council of the City of Davenport, Iowa. Notice of this ordinance was published once each week for three consecutive weeks in _____ a newspaper of general circulation published in the City of Davenport, Iowa. Publication was had on _____, on _____ on _____, and on _____. The ordinance is silent relative to an effective date.

57-9-37

"Prior to the passage of this ordinance, the City of Davenport, Iowa, a city operating under a special charter with the Mayor-Council form of government with a council composed of two alderman at large and six alderman, had six wards with an alderman elected from each ward. The new ordinance created two new wards, namely the 7th ward and the 8th ward, with provision for an alderman to be elected from each of said wards.

"Prior to the deadline for filing of candidates on September 7, 1957, candidates of both the Republican party and the Democratic party filed for the office of alderman in both of the two newly created wards for the term commencing January 2, 1958. The primary election is on October 7, 1957 and the city election is on November 5, 1957. It is noted that no candidates filed for the office of alderman for the term ending January 1, 1958 for either of these two newly created wards.

"Section 368A.1 (8), 1954 Code of Iowa, gives the council power to 'elect by ballot persons to fill vacancies in offices not filled by election by the council, and the person receiving a majority of the votes of the whole number of members shall be declared elected to fill the vacancy.'

"Article XI, Section 6, Constitution of the State of Iowa, provides: 'In all cases of elections to fill vacancies in office occuring 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.'

"Your opinion is requested relative to the following questions that have arisen:

"1. On what date is the new ordinance creating the two (2) new wards effective? It is noted that candidates filed for office of alderman in these two wards prior to the deadline on September 7, 1957. It is also noted that the new ward boundaries and the new precinct boundaries are contemplated to be used in the special election on September 23, 1957 (school bond issue), the primary election on October 7, 1957, and in the city election on November 5, 1957. Both political

parties are contemplating issuing their official call for delegates to their respective city conventions to be selected on the basis of the new precinct boundaries.

"2. Assuming that the ordinance is effective now for the new ward boundaries and new precinct boundaries, is the office of alderman vacant in the newly created 7th ward and 8th ward? It is noted that if this ordinance is effective for one purpose (that of new ward boundaries and new precinct boundaries) is it not effective for the creation of two (2) new offices?

"3. In view of the new ordinance being silent relative to an effective date, when does the office of alderman come into existence in the two new wards?

"4. Is the office of alderman in the new 7thward and the new 8th ward now vacant?

"5. Assuming the office of alderman in the new 7th ward and the new 8th ward is now vacant, does the council of the City of Davenport, Iowa, have the power to fill these vacancies at this time under Section 368A.1 (8), 1954 Code of Iowa, or any other provisions of any other Iowa statute?

"6. If the council has power to fill these vacancies at this time, how long will terms of office of the newly appointed alderman continue?

"7. Is there any procedure for either political party to place a candidate on the ballot for the primary election on October 7th, 1957 or the city election on November 5, 1957 for the office of alderman in the newly created wards for the term ending January 1, 1958, in view of the fact that no candidate had filed for the office prior to the filing deadline on September 7, 1957? Is it possible for an independent candidate to file for either of these offices?

"8. Is it possible for the office of alderman for the 7th ward or 8th ward for the term expiring on January 1, 1958 to be set forth on the ballot in blank to give opportunity for write-in votes?

"9. If, at the present time, vacancies exist for office of alderman for the term ending January 1, 1958 in the 7th and 8th wards and it is your opinion that the council does not have the authority to fill these vacancies under section 368A.1 (8), 1954 Code of Iowa, does the Governor of the State of Iowa hve the power to fill these vacancies under the provisions of Article IV, Section 10, Constitution of the State of Iowa."

And a Supplemental Memorandum was supplied containing the following information:

"The Ordinances changing precinct boundaries and changing ward boundaries were fully and completely read on June 5th, June 19th and July 3rd, 1957 and was passed on third reading by a majority vote.

"The Ordinances changing ward boundaries and precinct boundaries were published in the Daily Times, a newspaper of general circulation, on July 24th, July 30th and August 6th, 1957 and in the Davenport Democrat, a newspaper of general circulation, on July 23rd, July 30th and August 6th, 1957.

"Nominations for elective City Offices, by political parties, is conducted according to Section 43.112 of the 1954 Code of Iowa.

"Six (6) aldermen and two (2) aldermen at large were elected in the General Election in November, 1955. In the Spring of 1947, one alderman at large resigned and the council elected a member to fill that vacancy, in accordance with the Provisions of Section 368A.1 (8) of the 1954 Code of Iowa.

"Mayor Beuse died August 26, 1957 and on September 4, 1957, First Ward Alderman Ray O'Brien, who was Mayor Pro Tem, was elected by the Council to fill the vacancy of Mayor, under the Provisions of Section 368A.1 (8) of the 1954 Code of Iowa. Upon his resignation and election as Mayor, the vacancy of First Ward Alderman was filled under the same statutory proceeding. Therefore, of the present Council membership, six (6) were elected in November of 1955 and two (2) have been elected subsequently by the Council.

> "As to the question as to where the present Aldermen live, with respect to the newly established Wards, the present Aldermen of the first four (4) Wards do not, at this time, live within the boundaries of their newly created Wards."

Opinion was requested by the City of Davenport through its Mayor and City Attorney relative to the above questions. In reply thereto I advise as follows:

1. In answer to the question #1 as to when the new ordinance creating the two new wards is effective, I advise that according to the case of Boardman v. Davis, 231 Iowa 1227, 3 N. W. 2d 608, "an ordinance takes effect upon due passage and publication and at least in the absence of specific legislative provision may not be violated by the failure to perform some subsequent ministerial act." Application of the foregoing rule to the fact situation would result in the effective date of this ordinance as August 6, 1957.

2. In answer to the questions #2, #3 and #4, I advise that the rule defining the existence of a vacancy in office is stated in Schaffner v. Shaw, 191 Iowa 1047, 1050, as follows:

> "II. The effect of increasing the number of judges in each of these districts created a vacancy in the office of district judge in each. The word 'vacancy,' as applied to an office, has no technical meaning. 'Vacant' means empty, unoccupied. As applied to an office, it means 'without an incumbent.' Thus an existing office without an incumbent is vacant; and by the great weight of authority there is no difference, in so far as the right to appoint is concerned, whether the vacancy is occasioned by death or resignation of the incumbent, or the office has been created, and no incumbent has been appointed or elected to the office. Any office without

> an incumbent is deemed to be vacant. As said in State v. Mayor of Butte, 41 Mont. 377 (109 Pac. 710):
>
> "'The office, having been newly created, became ipso facto vacant in its creation.'
>
> "See In re Fourth Jud. Dist., 4 Wyo. 133 (32 Pac. 850); State v. Askew, 48 Ark. 82 (2 S. W. 349). As declared in Stocking v. State, 7 Ind. 326:
>
> "'An existing office without an incumbent is vacant, whether it be a new or an old one.'
>
> "Many courts, as said in Knight v. Trigg, 16 Idaho 256 (100 Pac. 1060), hold that:
>
> "'The word "vacancy" as aptly and fitly applies to and describes the condition of a newly created office, and before it is filled with in incumbent, as it does to an office that has been occupied by a duly elected officer who subsequently died or resigned.'
>
> "The Supreme Court of New York remarked, in In re Application of Collins, 16 Misc. Rep. 598 (40 N. Y. Supp. 517), that:
>
> "'A newly created office which is not filled by the tribunal which created it becomes vacant on the instant of its creation.'"

I am of the opinion that the office of alderman in the two wards created came into existence upon the effective date of the ordinance previously set. The offices came into existence on that effective date and they become vacant at the same time.

3. In answer to question #5 I would advise that I am of the opinion that the vacancies in the office of alderman in the new 7th and 8th wards may be filled by the City Council of Davenport under the authority of Section 368A.1 (8), Code 1954, which provides as follows:

> "Election for filling vacancies. Elect by ballot persons to fill vacancies in offices not filled by election by the council, and the person receiving a majority of the votes of the whole number of members shall be declared elected to fill the vacancy."

4. In answer to question #6 I am of the opinion that the terms of office of persons newly appointed aldermen under authority of the preceding mentioned statute will continue until November 5, 1957, being the next regular election at which the vacancies can be filled. Section 69.11, Code 1954, provides as follows:

> "Tenure of vacancy appointee. An officer filling a vacancy in an office which is filled by election of the people shall continue to hold until the next regular election at which such vacancy can be filled, and until a successor is elected and qualified. Appointments to all other offices, made under this chapter, shall continue for the remainder of the term of each office, and until a successor is appointed and qualified."

5. In answer to questions #7 and #8 I would advise that I am of the opinion that neither a candidate of a political party nor an independent candidate may now file for the office of alderman at the coming election for the term that expires January 1, 1958. Such filing is barred by the following portion of Section 43.116, Code 1954:

> "* * *A candidate for ward alderman or ward councilman may have his name printed on the primary ballot by filing in the office of the city clerk at least thirty days prior to the day fixed for holding the primary election, an affidavit as provided in section 43.18."

However, this office of alderman, the term of which expires January 1, 1958, may be filled by write-in votes.

6. In view of the foregoing, answer to question #9 is not required.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

Riding file
Informal op

FORM 13

IOWA STATE HIGHWAY COMMISSION

AMES, IOWA

Ames, Iowa

UNOFFICIAL OPINION: - Secondary Road county has duty to remove excess dirt from side ditches - county may dispose of said dirt by reasonable means.

September 23, 1957

Keith Mossman
Benton County Attorney
Vinton, Iowa

Dear Mr. Mossman:

Re: Removal of Excessive Dirt from Ditches on Secondary Roads

I have your letter of September 9, 1957, in which you ask the following questions:

1. Can the county remove excessive dirt from ditches along county roads and use that dirt for road construction or maintenance anywhere in the county or must it be used in the vicinity from which it was taken?

2. Does the county have the authority to allow a farmer to remove the excessive dirt in the ditches along the road running by his farm and to use the dirt on his own farm?

3. Does the county have the authority to remove the dirt from the ditches along the road and to give it to the adjacent farm providing the farmer pays the cost of hauling the dirt to his farm?

4. Does the use that the county can make of the dirt in a ditch along the road depend upon the type of grant or conveyance by which the county acquired its rights in the county road such as, land grant, prescription, easement or warranty deed?

5. Does the county have the authority to enter into a contract with a farmer promising to deliver to the farmer a certain amount of dirt to be taken as excessive dirt from the ditch along the road in return for said valuable rights from the farmer such as consenting to a change in a water course, change in location of a stream or granting to the county additional land for road purposes.

In answer to your first question, I refer you to Section 309.67 of the 1954 Iowa Code which states in part:

57-9-38X

IOWA STATE HIGHWAY COMMISSION

AMES, IOWA

September 23, 1957

Re: Removal of Excessive Dirt from Ditches on Secondary Roads

> "The county board of supervisors and the engineer are charged with the duty of causing the secondary road system to be so repaired and dragged as to keep same in proper condition .....
>
> "In addition to the above, they shall specifically (1) keep all sluices, culverts, and bridges and the openings thereof and all side ditches of the road free from obstructions."

Thus, the county has the duty to remove excessive dirt from the ditches. With respect to the rights of the public, the general rule is that the acceptance of an easement for a public highway does not include a right on the part of the public to use or dispose of the material found within the lateral limits of the street except so far as it may be reasonably necessary for the full enjoyment of the easement or property incident thereto. 25 Am Jur 140.

A statement by the Minnesota Supreme Court in Viliski vs City of Minneapolis, 41 NW Reporter 1050, at page 1052, sets out a reasonable theory to follow.

> "Whenever it becomes reasonably necessary for purposes connected with the use or improvement of a public street or for the enjoyment of a public easement therein to have earth or rock removed therefrom and where it is impractical in view of the public purposes to be accomplished to commit to the owners of the soil the work of excavation and removal, the public authorities may do this unembarrassed by claims of private ownership and right of disposal. The public may dispose of the material which it is required to remove in such manner as may be most for its interest, without accountability to the owner of the soil therefor."

There is no specific provision in the Code dealing with the disposal of the excess dirt once the county removes it. It is felt that the county can dispose of the excess dirt in any reasonable way that they see fit.

The situation where the county removes excessive dirt from ditches so that the highway can be kept in good order should be distinguished from the situation where the county removes soil or gravel from the right of way to use said soil or gravel in the maintenance or construction of county roads. The case of Overman vs May, 35 Iowa 89, which you referred to in your letter is concerned with the latter point. In that case the court held that the owner of the land over which the city had an easement for a right of way owned the gravel on the land, and that the city could not remove this gravel for

IOWA STATE HIGHWAY COMMISSION

AMES, IOWA

September 23, 1957

Re: Removal of Excessive Dirt from Ditches on Secondary Roads

construction on highways. 25 Am Jur 140 follows the theory of this case. The county may remove the excessive dirt from ditches along county roads and use that dirt for road construction or maintenance anywhere in the county. 25 Am Jur 141.

In answer to question two, since the county has the authority to remove excessive dirt from ditches, the county can delegate this authority to the owners along whose property the ditch runs. Section 309.67 of the Iowa Code only designates the county to remove the excessive dirt. It prescribes no uses for it. The owner may remove this excessive dirt so long as he does not damage the highway. 25 Am Jur 140.

In answer to question three, the county can remove the excessive dirt from the ditches along the road and give it to the adjacent farm owner. The soil that is deposited in the ditches belongs to the owner from whose land it came. Under normal conditions the dirt that fills these ditches comes from the adjacent farm land. 25 Am Jur 140.

Thus, if the owner wishes the excessive dirt, he should notify the county officials, and if he pays the cost of hauling, the dirt may be deposited on his land.

In answer to question four, the county acquires different interests in the land depending upon the type of grant or conveyance by which it acquired the land. However, the county is obligated to clear the ditches no matter what its interest in the land is. I do not think that the uses to which the county puts the excessive dirt is dependent upon the type of grant or conveyance.

In answer to question five, since the county must remove the dirt, I see no reason why they cannot enter into a contract to deliver the dirt to the farmer in return for valuable rights from the farmer. It must be remembered that the parties in interest here are the county and the adjacent land owner. If the adjacent land owner makes a reasonable demand for the dirt, it should be given to him. Whether the county can contract in regard to the dirt will depend in a large extent upon the individual situation.

If we can be of any further assistance on this problem, please let us know.

Very truly yours,

John L. McKinney
General Counsel for
Iowa State Highway Commission

JLM:MS

CODES, ETC., DISTRIBUTION: (1) Under Sec. 16.24(10),Code 1954, each elective member of the State Board of Public Instruction is entitled to the free distribution of Codes, etc., there provided.
(2) Under Sec. 16.24(11),Code 1954, each departmental division created by the State Board of Public Instruction pursuant to authority conferred on it by Sec. 257.20, Code 1954, is entitled to the free distribution provided in Sec. 16.24(11), Code 1954.

September 24, 1957

Mr. Paul F. Johnston
Assistant Superintendent-Administration
Department of Public Instruction
L o c a l

Dear Mr. Johnston:

Receipt is acknowledged of your letter of September 13 as follows:

"We are requesting an opinion concerning the number of copies of the Code, Rules of Civil Procedure, Supreme Court Rules, and the Acts of each General Assembly that the Department and State Board members are entitled to under the provisions of the statutes.

"Section 16.24 states, in part, the following 'The superintendent of printing shall make free distribution of the code, Rules of Civil Procedure and Supreme Court Rules, and of the acts of each general assembly, as follows:

"'10. To each elective state officer.....2 copies
"'11. To the separate departments of principal state offices and each major subdivision thereof.....1 copy'

"Chapter 257.3, Code of Iowa, provides that eight members of the State Board of Public Instruction shall be elected members.

"Chapter 257.5, Code of Iowa, provides, quoting from subsection two in part as follows:

"'. . .At the designated time and place the county superintendent so appointed shall convene the meeting, cause a secretary to be elected, and the convention shall then proceed to the election of a person known to them to be interested in education as a member of the state board from that district by a majority vote of those present. A quorum shall constitute sixty percent of those eligible to attend. The nominations shall be from the floor and voting by ballot. The county superintendent in charge shall certify to the secretary of state the name of the board member elected. The successful candidates for election to the state board shall be issued certificates of election as prescribed in the statutes.'

57-9-39 X

"Chapter 257.20, Code of Iowa, states:

"'The state department of public instruction shall be organized into such divisions, branches or sections as may be found desirable and necessary by the state superintendent, subject to the approval of the state board, . . .'

"Since January 1, 1954, we have had eight members of our State Board of Public Instruction who have been elected as provided by the statute and have been issued certificates of office as provided. The Department has been organized into the following major divisions since 1951:

1. Administration and Finance
2. School Lunch
3. Transportation
4. Special Education
5. Vocational Education
6. Teacher Education and Certification
7. Supervision
8. Veterans Training Program
9. Surplus Property
10. Vocational Rehabilitation

"This was done by Miss Parker, State Superintendent of Public Instruction, when the position of State Superintendent was an elective office. The State Board, which took office January 1, 1954, by Board action on February 12, 1954, approved the organization of the Department into the above divisions pursuant to statutory authority conferred by section 257.20 quoted above. Enclosed is a folder describing the various divisions.

"Our question is now this: according to the statutes are we not entitled to one copy for the Department and ten copies for the major divisions thereof of the Code, Rules of Civil Procedure, Supreme Court Rules, and Acts of each General Assembly according to the provisions of Section 16.24? Also, are not the eight elected members of the State Board elected state officers and by virtue of being elected state officers entitled to two copies each of the aforesaid publications?"

From the plain language of the statutes quoted in your letter it is clear that each elective member of the State Board of Public Instruction is entitled to the free distribution provided in Section 16.24(10), Code 1954, and that each departmental division established by the State Board of Public Instruction pursuant to

authority conferred on it by Section 257.20, Code 1954, is entitled to the free distribution provided in Section 16.24(11), Code 1954.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

FEEBLE-MINDED INDIGENTS - Liability of care follows legal settlement.

September 24, 1957

Mr. H. T. Lewis
Assistant Scott County Attorney
Davenport, Iowa

Dear Sir:

Receipt is acknowledged of your letter of September 10 as follows:

"The opinion of your office is requested as to the liability of Scott County in connection with persons committed to Woodward State Hospital and Glenwood State School under Chapter 223 of the 1954 Code of Iowa and in connection with those persons for whom a charge is imposed under said chapter as amended.

"For Scott County to be liable for said charges must the person so committed be a resident of this County for a period of one year or must said person have attained a legal settlement here in this County. In the event that said person has not met such residence requirements but is still eligible for admission in accordance with Section 223.4 of the 1954 Code of Iowa, upon whom rests the liability for payment for the care of such person.

"It is believed that the pertinent sections of the Code of Iowa in this problem are Sections 223.4, 223.7, 223.13, 223.14, 223.16, 230.1 and 230.2.

"Your opinion as requested above will be greatly appreciated."

Upon review of the statutes referred to in your letter, I am of the opinion the matters in question are controlled by legal settlement.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:nd

CC: Mrs. Eva Parsons
Board of Control

57-9-41

JUNIOR COLLEGES: The $1 rate of payment of state aid applies to aid claims for the year 1956-57.

September 25, 1957

Mr. David A. Dancer, Secretary
State Board of Regents
L o c a l

Dear Sir:

Receipt is acknowledged of your inquiry relating to Chapter 10, Section 4, Acts of the Fifty-seventh General Assembly. Said section provides as follows:

"Section two hundred eighty-six A point three (286A.3), Code 1954, is hereby amended by adding at the end thereof the following:

"'Approval standards for public junior colleges shall be established and approved by the state board of public instruction, and the state board of regents, acting jointly, with said standards to be issued and enforced by the state department of public instruction, subject to the approval of the state board of public instruction. Eligibility for receipt of state aid for public junior colleges shall be determined by the above two (2) boards. Junior college aid will not be paid unless such standards are met. In the development of said standards, the association of public junior colleges shall serve in the advisory capacity to the afore-mentioned boards.'"

You inquire whether adoption of approval standards under said section will be retroactive for the purpose of determining eligibility for payment of aid based on enrollment and days of attendance at junior colleges for the school year which commenced July 1, 1956 and ended June 30, 1957.

In answer thereto you are referred to 42 American Jurisprudence, Public Administrative Law, paragraphs 35, 36 and 39.

Paragraph 35 states in pertinent part:

". . .The distinguishing factors of the powers here considered are that the result of their exercise operates in the future, rather than on past transactions and circumstances. . ." (Emphasis ours)

57-2-42X

Paragraph 36 states in pertinent part:

> "Legislative power is the power to make, alter or repeal. . .rules for the future. . .". (Emphasis ours)

Paragraph 39 states in pertinent part:

> "One of the factors adverted to by the courts in distinguishing legislative from judicial action is the element of futurity in the first and retrospective in the latter. A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws already supposed to exist. Legislation on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or part of those subject to its power. The distinction is noted in rate cases. . .In determining the reasonableness of an existing rate and awarding reparation for exaction of an unreasonable rate, the Interstate Commerce Commission acts in a judicial or quasi-judicial capacity, and in declaring what rate shall be a reasonable rate for the future, the Commission acts in a legislative or administrative capacity. . ."

Thus, since the power to fix standards under the subject act is a legislative or administrative power, such standards may operate prospectively only and cannot affect the entitlement to aid for junior colleges as relates to computation for the school year 1956-57. The "approval" under said act is a judicial function in that it views the "liabilities as they stand on present or past facts" and under rules already in existence. Since no rules exist under the facts of your inquiry with respect to aid claims for the year 1956-1957 no basis or standard for any disposition of such claims other than by approval exists. The rate of payment for such claims is one dollar, rather than 25¢ as the one dollar rate is the one in effect at the time the claims are certified to the Comptroller under Section 284.5, Code 1954, as amended.

Very truly yours,

NORMAN A. ERBE
Attorney General of Iowa

LEONARD C. ABELS
Assistant Attorney General

NAE:LCA:md

September 25, 1957

Mr. Russell I. Brown
Acting Commissioner
Department of Public Safety
L o c a l

Dear Mr. Brown:

In your letter of March 27, 1957, you requested an opinion as to the following questions:

"A question has recently arisen concerning the administration of Chapter 321A of the 1954 Code of Iowa. Inasmuch as the fact situation is important, I will attempt to set it out in detail.

"A, a minor driving a motor vehicle owned by his father B, was involved in an accident with another vehicle owned and operated by C. Neither A nor B carried liability insurance at the time of the accident. B started suit against C, naming only himself as party plaintiff. C filed an answer and a counterclaim in the suit, but did not name A in the counterclaim nor did C ask that A be made a party to the suit. At the trial, evidence was presented by both sides and the cause was submitted; but both parties waived formal findings of fact and conclusions of law. This litigation resulted in the court ruling against both parties on their respective claims.

"Your opinion is respectfully requested upon the following questions:

"1. Does the adjudication under these circumstances constitute a legal defense or bar to any claim which might be asserted by C against the minor operator A?

"2. Does the adjudication under these circumstances constitute a final adjudication of non-liability on the part of A against C, within the contemplation of Sections 321A.6(4) and 321A.7(3), which would relieve A of the neces-

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> sity of complying with the requirements of the Financial and Safety Responsibility Act in regard to this accident?
>
> "3. Would the answer to the above questions be the same if B had been successful in his law suit?
>
> "4. Would the answer to the above questions be the same if A had not been a minor?"

The doctrine of res judicata applies only to parties or their privies. A judgment is conclusive as to those standing in privity with a party. Privies include those related by blood, that is, privies in blood. However, kinship by affinity or consanguinity does not of itself create the privity except where it results in the succession to some right, title, or interest. Betz v. Moore-Shenkberg Grocery Co., 197 Iowa 1348, 199 N. W. 254, is authority for the proposition that privity does not arise from the mere fact that persons as litigants in different actions are interested in proving or disproving the same facts.

Between parent and child the rule is that the child is not concluded by judgment for or against the parent unless they claim under the parents, or were properly represented in the litigation, or are adults and were active in promoting the litigation. 50 C. J. S., Judgments, §804. From the facts given, it cannot be determined whether the father was or was not representing the son. If the son was represented by the father, then the doctrine of res judicata is applicable.

A further extension of the doctrine of res judicata has been made. That application goes beyond parties or privies as stated in 50 C. J. S., Judgments, §757:

> "Persons who, although not parties or privies, were so connected in interest or liability with the plaintiff or defendant in the former action that the judgment may be regarded as virtually recovered for them may avail themselves of such judgment as res judicata in a subsequent suit."

This principle has been applied to negligence cases. Under this theory, a judgment for or against the plaintiff in an action against the principal has been held to bar an action against the agent. See cases cited under 50 C. J. S., Judgments, §757, footnote 21. Another excerpt from this section is still more pointed:

> "While a judgment in a negligence action against either the owner or operator of an automobile has been held not to bar a subsequent action by the same plaintiff against the other under a statute providing that a judgment against one or more of several obligors shall not discharge a co-obligor who was not a party to the proceeding wherein the judgment was rendered, a judgment in favor of either the operator or owner of an automobile in a negligence action may be relied on by the other as a defense in a subsequent action by the adverse party in the prior action against such other."

To support that statement, the case of Sarine v. American Lumberman's Mut. Casualty Co. of Illinois, 17 N. Y. S. 2d 754, 258 App. Div. 653, is cited. Statements in that case are pertinent to the issue herein set forth. They are:

> "Liability of the operator is predicated upon his own negligence; liability of the owner exists solely because of statutory enactment. Section 59, Vehicle and Traffic Law; Gochee v. Wagner, 257 N. Y. 344, 346, 347, 178 N. E. 553. The owner's liability is derivative and is akin to that imposed on a matter for the negligent acts of his servant under the doctrine of respondent superior. Good Health Dairy Products Corp. v. Emery, 275 N. Y. 14, 17, 9 N. E. 2d 758, 759, 112 A. L. R. 401. In an action by or against operator or owner, determination of the issue of negligence favorable to either is res judicata and a bar to the maintenance of an action against the other even though that other was not a party. Good Health Dairy Products Corp. v. Emery, supra; Wolf v. Kenyon, 242 App. Div. 116, 273 N. Y. S. 170. There is merit in the contention that but one day in court should be afforded a plaintiff who may join both operator and owner in a single action, as theirs is a liability which must be considered as that of one tort feasor and is a consolidated or unified one."

According to an Iowa case, Lemke v. Ady, 159 N. W. 1011, and also Collinson v. Cutter, 186 Iowa 276, 170 N. W. 420, a father furnishing an auto for the pleasure and convenience of members of his family makes the purpose of the family, or members

thereof, his purpose, affair, or business. Thus any member of the family driving with his consent, either express or implied, is the father's agent. There is no deviation from the purpose for which the consent was given. Therefore, the son, as agent of the father could avail himself of the doctrine of res judicata as previously mentioned herein with regard to principal and agent.

Since the doctrince of res judicata would apply to an action between A against C, the answer to your second question is that the judgment in the action between A and B is res judicata as to non-liability of A to C. Sections 321A.6(4) and 321A.7(3) both contain wording to the effect that upon adjudication of non-liability then the requirements of security and suspension of license shall not apply. There is this word of caution. While the trial court judgment is res judicata there is always the possibility of appeal in which case that judgment might be set aside, modified or reversed. Shaw v. Addison, 18 N. W. 2d 796 (Iowa case). Therefore, it appears that, while there is no adjudication of non-liability of A to C, there is that effect because of the doctrine of res judicata. It is the opinion of this office that this is sufficient to relieve A of the necessity of complying with the requirements of the Financial and Safety Responsibility Act as to this accident.

As to question number three, if B had been successful in his lawsuit against C, then a suit by C against A would result in no different answer to either question one or two. The judgment in the first action is res judicata since A is an agent, therefore a privy, of B.

With regard to question number four, it would not matter that A was not a minor except had privity been found in a representative capacity through the father representing the son. Such a relationship is not specified in your question. A would nevertheless be an agent of the father if, as assumed, A was operating the vehicle with the consent of the father and within the purview of the purposes for which he was allowed to operate the vehicle. Thus, the fact A was not a minor would not change any of the above answers.

Very truly yours,

DON C. SWANSON
Assistant Attorney General

HUGH FAULKNER
Assistant Attorney General

DCS:MKB

September 25, 1957

Mr. Russell I. Brown
Acting Commissioner
Department of Public Safety
L o c a l

Dear Mr. Brown:

This is an acknowledgment of your request of April 19, 1957, at which time you presented the following question:

> "Section 321.392 of the 1954 Code of Iowa contains certain requirements concerning lighting devices and reflectors on trucks. The rules and regulations of certain federal agencies, so far as such matters are concerned, are in conflict with this section. Assuming that the standards of the federal agency require less equipment than is required under this section, and that the federal agency was not permitted to make expenditures for such equipment, your opinion is respectfully requested as to whether or not vehicles operated by such an agency, which did not meet the requirements of Section 321.392, would be legal in Iowa.
>
> "If the answer to the above question is no, would the operation of these vehicles under such circumstances subject the driver to the criminal penalties provided in Chapter 321?
>
> "Would the answer to these questions be the same if these vehicles were normally operated only during daylight hours?"

Regulation of motor vehicles is attributable to the police power of the State. Bailey v. Smith, 40 F. 2d 958. However, the police power must yield according to Fleming v. Richardson, 237 Iowa 808, in the following instance:

57-9-44 X

> "The courts, both state and federal, are unanimous in holding that the power of Congress to regulate interstate commerce is plenary and without limitation. And that power is unaffected by the police power of the states, and where the two powers come into collision the police power must yield."

The court, quoting from another case, had this to say:

> "'Undoubtedly, Congress in its discretion, may take entire charge of the whole subject of the equipment of interstate cars, and establish such regulations as are necessary and proper for the protection of those engaged in interstate commerce.'"

Since you state that the regulations of the Federal agency are in conflict with the Iowa statutory Section 321.392 that means that the Federal government has acted in this area and thus occupied the field precluding the State from so acting.

As stated in Fleming v. Richardson, supra, wherein the court cited from another case:

> "'In the relation of the State to the regulation of interstate commerce by Congress there are two fields. There is one in which the State cannot interfere at all, even in the silence of Congress. In the other, (and this is the one in which the legitimate exercise of the State's police power brings it into contact with interstate commerce so as to affect that commerce,) the State may exercise its police power until Congress has by affirmative legislation occupied the field by regulating interstate commerce and so necessarily has excluded state action.'"

However, there must be specific action by Congress, or an agency thereunder, before control of a State over matters incidental to interstate commerce will be subject to interference. Fleming v. Richardson, supra. In view of the conflict herein mentioned it appears that such specific action has been taken by the Federal agency as to the subject matter covered by Section 321.392, 1954 Code of Iowa.

A decision upholding this position is that given in Brown v. Chicago R. I. & P. R. Co., 108 F. Supp. 164. This was a 1952 case before Judge Graven in the Northern District of Iowa. In that litigation there was an allegation that the headlight of the locomotive did not comply with the power and brilliancy requirements of Section 477.22, Code of Iowa 1954. The court held that this Iowa statute was superseded and rendered ineffective with respect to locomotives engaged in interstate commerce when the lights met the regulations established by the Interstate Commerce Commission, though those requirements were not as high as the standards of the state statute.

This case is further authority for the proposition that when the field is occupied by the Federal agency the state is excluded from acting therein.

In conclusion, the answer to your first question is that it is legal for the Federal agency to operate trucks in interstate commerce, though those trucks do not meet the standards set forth in Section 321.392, 1954 Code of Iowa, when the lower standards of the Federal agency are met.

In view of this answer, it is not necessary to answer your second question.

As to your third question, the answer is the same whether the trucks were operated during day or night hours.

Very truly yours,

DON C. SWANSON
Assistant Attorney General

HUGH FAULKNER
Assistant Attorney General

DCS:MKB

September 26, 1957

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

Dear Jack:

This will acknowledge receipt of yours of the 20th inst. In which you submitted the following:

"We have the following which we request an Attorney General's opinion:

"At the present time, the Court House at Rockwell City, Iowa is being checked by the State Auditor's Office. I was called yesterday by the examiner, and he made a demand that I should pay back to him the sum of $4.20, which sum was for the expenses of parking my car while in attendance at a County Attorney's meeting called by the Attorney General's Office of Iowa, and that letters were sent out that all expenses incurred in attending this special school of instruction should be allowed by the County.

"The State Checker bases his opinion upon Section 79.9 of the Code of Iowa, which statute limits the allowance for use of the automobile in excess of $.07 per mile.

"My contention is that this section does not apply to me as County Attorney, due to the fact that I think that the expenses in this matter are controlled by Section 340.9 of the Code, which says the County Attorney shall be allowed all of his expenses while attending business outside of his office.

"It is my contention also, that when we are called to a state meeting or are called to places other than the county seat for the transaction of business, that it is in my judgment

57-9-44 X

a necessary expense to pay parking expenses and to use reasonable care and diligence in taking care of the automobile, as it is impossible to park your car anywhere without the payment of these expenses.

"I know that the amount involved is trivial, but it is a question that should be cleared up by the department for all County Attorneys and for future claims that may be filed regarding these matters by the County Attorneys attending meetings which are called by your office.

"There is an Attorney General's opinion in 1940, page 5 which states that the County Attorney must be the judge as to whether official duties justifies him in incurring expenses in traveling to a place outside the county seat. There is also an Attorney General's opinion in 1938, page 780, which states that when the County Attorneys are called to a conference to study legal matters or instructions, they are entitled to reasonable and necessary expenses incurred to them by attending said conference.

"Of course, it is my contention that payment of parking for your automobile is no different for payment of taxi hire, meals or other matters of this kind that are a necessity."

In reply thereto I am of the opinion that according to Sections 79.9 and 79.10, Code 1954, providing as follows:

"79.9 Charge for use of automobile. When a public officer or employee, other than a state officer or employee, is entitled to be paid for expenses in performing a public duty, no charge shall be made, allowed, or paid for the use of an automobile in excess of seven cents per mile of actual and necessary travel except as otherwise provided.

"79.10 Mileage and expenses - prohibition. No law shall be construed to give to a public officer or employee both mileage and expenses for the same transaction."

and opinions of this Department appearing in the Report for 1932 at page 55 and 1934 at page 53, the opinion of the checker in the above situation is correct and is affirmed. The headnote to the 1932 opinion states:

> "PUBLIC OFFICERS: Where mileage is paid to a public officer or employee for the use of his private owned car, said officer or employee cannot also charge expense for gas and oil used in his car and for storage of said car."

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

September 27, 1957

Mr. Russell I. Brown
Acting Commissioner
Department of Public Safety
L o c a l

Dear Mr. Brown:

An opinion was requested in your letter of May 16, 1957, as to the following situation:

> "Your opinion is respectfully requested on a question that has arisen in this Department as to the requirements of Iowa law concerning the joint ownership of a motor vehicle. Assume the following fact situation: One of two joint owners makes application for a certificate of title and registration producing a title or Manufacturers Certificate of Origin showing assignment to himself and another as joint owners.
>
> "May the county treasurer issue the new title showing joint ownership as indicated on the assignment with the signature of only one joint owner on the application; or can such a title be issued only after both owners have signed the application for title and registration?
>
> "Please indicate if the type of joint ownership would be in itself material in this situation."

Section 321.20, as amended by Chapter 157, section 1, Acts of the Fifty-sixth General Assembly is in the following form:

> "Except as otherwise provided in this chapter, every owner of a vehicle subject to registration hereunder shall make application to the county treasurer, of the county of his residence, or to the department, if a non-resident, for the registration and issuance of a certificate of

57-9-50 X

> title thereof upon the appropriate form or forms furnished by the department, accompanied by a fee of seventy-five cents, and every such application shall bear the signature of the owner written with pen and ink and said signature shall be acknowledged by the owner before a person authorized to administer oaths . . . " (Emphasis supplied)

This section is self-explanatory and requires the signature of every owner. There is no exception, implied or otherwise, relative to a joint owner. The wording is broad enough to require that each and every joint owner affix his or her signature to the application

Therefore, the County Treasurer should require the signature of each and every joint owner on the application before issuance of the certificate of title and registration.

Very truly yours,

DON C. SWANSON
Assistant Attorney General

HUGH FAULKNER
Assistant Attorney General

DCS:MKB

September 27, 1957

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

Dear Sir:

This will acknowledge receipt of yours of the 24th inst. in which you submitted the following in connection with a copy of a letter addressed to the members of the Budget and Financial Control Committee dated September 12, 1957:

> "Enclosed is a copy of a letter from the State Entomologist of September 12, 1957, to the Budget and Financial Control Committee, requesting an allocation of $10,000.00 from the State Contingent Fund to be used in an effort to do away with the Japanese beetle infestation in Iowa. The Budget and Financial Control Committee at its meeting of September 17, 1957, did allocate the amount of $10,000.00 from the State Contingent Fund.
>
> "In view of previous opinions issued by your office, I respectfully request an opinion as to whether or not the General Contingent Fund, provided by Chapter 39, Acts of the 57th General Assembly, may be used for the purposes set forth in the letter of the State Entomologist of September 12, 1957, to the Budget and Financial Control Committee."

In reply thereto I advise that in my opinion the situation presented constitutes a contingency within the definitions thereof contained in opinions of this Department issued to the Budget and Financial Control Committee respectively June 17, 1957, and June 28,

57-9-48 K

1957, and therefore under the authority of those opinions which by reference are made a part hereof the General Contingent Fund provided by Chapter 39, Acts of the 57th General Assembly, may be used for the purposes set forth in the letter of the State Entomologist dated September 12, 1957, to the Budget and Financial Control Comittee referred to herein.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

September 27, 1957

Mr. Charles W. Wagner
Superintendent of Buildings and Grounds
Building

My dear Charley:

This will acknowledge yours of the 25th inst. in which you submit the following:

> "It has come to our attention that it is not necessary to advertise openly or in the papers for the taking of bids for work that is handled through our department. In other words, would it be our privilege to ask a certain number of qualified companies, such as plumbing companies, construction companies, and electrical companies to submit their bids under our specifications?
>
> "Also, we are about to ask for bids on the reconditioning of the men's lounge in both the House and the Senate. We find that the principal work comes under the plumbers. There would, of course, be some work to be done by the construction company in the installing of partitions, etc. In order to make it easier for our department, we would like to let the bid to the plumbing contractor and then he can sub-contract it to whoever we approve.
>
> "Please advise."

1. In reference to the problem submitted in the first paragraph of your letter there appears to be no general statutory requirement imposed upon you for making repairs or performing restoration to first submit the cost of doing the work to public bidding and make the contract under such a bid. Whether such public bidding is required where specific projects are involved or projects for which appropriation is made should be

57-9-49X

determined by the terms of the authorization.

2. There appears to be no legal objection to incorporating the obligation to the performance of work being done by construction contractor in a contract with the company that has agreed to do the plumbing work. If the plumbing contractor contracts to perform the work required, both plumbing and construction, whether the work is done by himself or by his own company or by a sub-contractor is no concern of yours and it is permissible.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

September 27, 1957

Mr. Russell I. Brown
Acting Commissioner
Department of Public Safety
L o c a l

Dear Mr. Brown:

You submitted the following request on May 15, 1957:

"A question has arisen in this Department concerning the interpretation of Section 321.126(2) of the 1954 Iowa Code. In the particular case in question, a person turned in plates to this Department on March 30, 1957 when the car was taken out of this state for purposes of a sale. The car was not actually sold until May 9, 1957; and thus application for the refund was not made within the 30 day period provided in this section of the Code. The question arises as to whether this applicant has lost his right to a refund under the provisions of this section.

"If the applicant has not lost these rights, would he be entitled to a refund for the quarter beginning April 1, 1957, or must his refund be limited to the last half of 1957?"

Subsection 2 of Section 321.126 reads as follows:

"2. Such vehicle is sold to a person, either individual, firm or corporation, whose residence or place of business is without the state, the owner who made the sale and gave notice in accordance with the provisions of section 321.52 shall return the plates to the county treasurer and within thirty days thereafter make affidavit of such sale and make claim for refund."

It is thought that this wording means that the affidavit of sale shall be made within thirty days after return of the license plates, and that it does not apply to making claim for a refund. Thus, the claimant or applicant has not lost his right to refund if he has otherwise complied with Sections 321.52, 321.126 and 321.127, 1954 Code of Iowa.

57-9-51X

With reference to your second question, Section 321.52, 1954 Code of Iowa, contains this wording:

> ". . . .The department is not authorized to make a refund of license fees on a vehicle sold out of state unless and until it receives the registration card completed as herein provided."

The return of the plates does not of itself warrant a refund. The refund is authorized on the basis of sale of the vehicle in question to an out of state purchaser. Until that is done no refund can be paid. It then follows that the refund can be paid only for the last two quarters of the year 1957 since the refund was not authorized until the sale which occurred on Mayy 9, 1957, and that is the earliest date the requirements as to the registration card could have been fulfilled pursuant to Section 321.52, 1954 Code of Iowa.

Therefore, the refund is authorized because the claimant has not waived right to the refund inasmuch as the thirty day period specified in Section 321.126(2) does not pertain to the claim for refund. The refund is to be based on the last two quarters of the year 1957 since the sale did not occur until the second quarter.

Very truly yours,

DON C. SWANSON
Assistant Attorney General

HUGH FAULKNER
Assistant Attorney General

DCS:MKB

HEADNOTE: Sales Tax Rule No. 41, transportation charges, exemption from sales tax; Interpretation of the statute and Rule No. 41.

Mr. Leon N. Miller, Chairman
State Tax Commission
Building

In re: Retail Sales and Use Tax Rule No. 41

Dear Mr. Miller:

This is to acknowledge receipt of your letter dated September 11, 1957.

In your letter you request an interpretation of Retail Sales and Use Tax Rule No. 41. This rule arises out of section 422.45 (2) Code of Iowa 1954, entitled "Exemptions". This portion of the law provides: "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 ***.

2. The gross receipts from the sales, furnishing or service of transportation service."

Rule No. 41 entitled "Freight, Delivery and other Transportation Charges", provides as follows:

> Where a seller supplies tangible personal property from stock, the transportation charges for shipment or delivery from the seller to the consumer or user, shall become part of the purchase price on which sales tax is computed, except and unless such delivery or transportation charges are billed separately.
>
> Where a retailer furnishes transportation in his own vehicle the charge for transportation shall be deducted from the gross receipts on which sales tax is computed, provided the transportation is charged separately and the price charged for merchandise at retailer's place of business, exclusive of transportation, is the same price charged a buyer furnishing his own transportation. The transportation charge shall be separated both in the retailers books and on the invoice to the consumer.
>
> Where the goods, wares or merchandise sold are quoted by the seller at a delivered price, no cost of transportation shall be deducted from the gross receipts on which retail sales tax is computed regardless of the manner in which transportation is made and notwithstanding the fact that the purchaser pays the cost of

57-7-52 X

transportation and receives credit therefor.

Charges for transporting tangible personal property from factory, mine or other source of supply to the seller's place of business are not exempt from tax when sold for retail, notwithstanding the fact that such transportation charges from source of supply may be billed separately by the retailer.

Where the seller does not supply tangible personal property from stock, but orders same shipped from the source of supply for and to a specific consumer or user, transportation charges from source of supply to the consumer or user become a part of the purchase price upon which the tax is computed, when the seller quotes and bills at a delivered price, notwithstanding the fact that transportation charges may be paid by the consumer or user and subsequently deducted from the amount of the seller's invoice when remitting in payment of same.

Where tangible personal property is sold at a price f. o. b. the source of supply, transportation charges do not become a part of the purchase price, providing such charges are paid by the consumer or user, or are paid by the seller and are billed separately from the charge for the tangible personal property."

The first three paragraphs of this rule are concerned with transportation charges arising from delivery by the retailer to the consumer.

Paragraph 4 is concerned with transportation charges arising from delivery from the manufacturer or wholesaler to the retailer.

Paragraphs 5 and 6 in reality constitute mocifications of both of the above, in that these two paragraphs are concerned with transportation costs where the tangible personal property is shipped directly from the wholesaler or manufacturer to the consumer. After reading the entire rule it is clear that the Commission in its promulgation has differentiated between transportation charges or costs which have arisen with respect to tangible personal property prior to its arriving at the place of business of the retailer, and those which occur after that time. It appears that the Commission has recognized that in the manufacture and processing of all tangible personal property, a substantial amount of its cost many times is made up of transportation charges. The Commission's interpretation of section 422.45 (2) is that those transportation charges contained in the cost prior to arrival at the retailer's place of business constitute a part of the cost of tangible personal property and are not intended to be exempted under the law.

As noted in the first three paragraphs of Rule No. 41, the Commission has adopted a policy that the exemptions provided in section 422.45(2) will apply only in those cases where the retailer makes a separate charge for transportation charges, setting it out specifically and which charge is an additional charge which a purchaser of the same tangible personal property at the retailer's place of business is not required to pay.

Paragraph 5 of Rule No. 41 again makes the transportation charge from the source of supply to the consumer a part of the purchase price and it is not exempt, "when the seller quotes and bills at a delivered price". Again, this is an instance where the transportation charge arises at a time prior to the time when the tangible personal property reaches the place of business of the retailer.

In paragraph 6, the Commission has made an exception for transportation charges arising prior to the tangible personal property reaching the place of business of the retailer, (actually it never gets to the retailer) where the retailer prices the tangible personal property to the consumer, f. o. b. the source of supply, and in addition the transportation charges must be billed separately to the consumer. In the last case it seems that the retailer in this instance is not in fact a retailer, but is more in the nature of a sales representative of the manufacturer or the source of supply.

It appears that the rule conforms to the section of the Code, that is 422.45 (2). However, I can see where the difficulty with its administration comes in its interpretation, since the language is somewhat difficult. Perhaps some thought should be given to re-writing the Rule. But at the outset it would appear to be difficult to devise more simplified language and at the same time be as all inclusive as the present Rule No. 41.

If you have any further questions regarding this matter, please let me know.

Very truly yours,

FJP:bmc

FRANCIS J. PRUSS
Special Assistant Attorney General.

COSMETOLOGY. No cosmetology license is required to dress the hair of a corpse.

September 30, 1957

Grace M. West
Executive Secretary
Division of Cosmetology
State Department of Health
L o c a l

Dear Madam:

Receipt is acknowledged of your letter of September 24 as follows:

"I respectfully request a letter opinion in answer to the following question:

"Are funeral directors, embalmers or other persons deemed to be engaged in the practice of cosmetology without a license when they perform those practices included within the definition of the practice of cosmetology (section 157.1 of the Code) on or about the body of a deceased person?

Section 157.1 provides as follows:

"Definitions. For the purpose of this chapter the following classes of persons shall be deemed to be engaged in the practice of cosmetology:

"1. Persons who, for compensation, engage in or who hold themselves out to the public as being engaged in any one or any combination of the following practices: Cutting, dressing, curling, waving, bleaching, coloring, and similar work, on the hair of any woman or child by any means whatever.

"2. Persons who, with hands or mechanical or electrical apparatus or appliances, or by the use of cosmetic preparations, antiseptics, tonics, lotions, or creams, engage for compensation in any one or any combination of the following practices: Massaging, cleansing, stimulating, manipulating, exercising, manicuring, beautifying, or similar work, the scalp, face, neck, hands, arms, bust or upper part of the body, or the removing of superfluous hair by the use of electricity or otherwise, on or about the body of any woman or child."

57-7-53 X

In answer to your inquiry you are advised that Section 157.1, by express terms applies to practice "on or about the body of any woman or child" it does not apply to practice on or about a dead body that was a woman or child.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

LEGAL SETTLEMENT OF MINOR: Continues until terminated by happening of one of the events described in Section 252.17.

September 30, 1957

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

Dear Sir:

Receipt is acknowledged of your letter of September 19 in which you make reference to a letter written by you on August 20, 1956, relative to legal settlement of a certain minor.

Your letter of August 20, 1956, was as follows:

"The Board of Supervisors of Calhoun County, Iowa have requested that I write you concerning the legal settlement of the above named minor. The facts are as follows:

"This minor was born September 6, 1944 in North Carolina while the father was in the United States Army, and the child remained in the custody of the parents up until February 11, 1952, when the parents petitioned for the appointment of a Guardian asking that the grandmother, Mrs. C. E. Kingsley, whose residence was Rockwell City, Calhoun County, Iowa, be the Guardian of the said minor child. In the petition to appoint the Guardian, the parents emancipated and freed the said minor from all parental authority and control and relinquished all their rights to the said child as the natural parents, for the reason that the husband, Fred J. Hancock, a Lieutenant Colonel in the United States Army, was being shipped overseas and the mother was planning to join her husband overseas.

"Prior to the Guardianship being opened in Calhoun County, Iowa, the mother and the daughter visited in the home of the grandmother, Mrs. C. E. Kingsley, during part of 1945 and 1946, but no Guardianship was opened at that time; however in September, 1951 when the husband has been shipped overseas, the mother and daughter came to live with the grand-

57-8-54 X

mother here at Rockwell City, Iowa and in November of 1951 said child was put in a school at Red Oak, Iowa known as the Powell School, and has remained in said school until July, 1956, when she was transferred to the school at Woodward, Iowa.

"The question which now confronts the Board of Supervisors, as well as the undersigned, is the question of legal settlement of the minor, since application has been made by the natural mother, Zelda M. Hancock, as to the responsibility of Calhoun County for the minor's keep at Woodward, which application must be approved by the Board of Supervisors.

"We, therefore, would appreciate your opinion as to the legal settlement of this minor child. The father's prior residence before going into the service was a student at a college in Missouri and his home was in the State of Ohio. The mother was formerly from Rockwell City, Iowa and later lived in Washington, D. C. while employed there and where she met her husband, Fred J. Hancock.

"I might add that Mrs. C. E. Kingsley, who was appointed Guardian was discharged after making her Final Report, which was approved on the 3rd day of May, 1955, discharging her as Guardian and terminating said Guardianship.

"If there are any additional facts which you desire to know, we would be glad to furnish them to you in order to receive a legal opinion in regard to this matter."

In answer thereto you are referred to an opinion which appears at page 195 of the 1940 Report of the Attorney General and states at page 197 as follows:

"As will be noted, it has generally been held that a guardian has the right to change the domicile of his ward and we have also learned that when the custody and guardianship of a child is given the mother in case of separation that the general rule is abrogated.

"We reach the conclusion, therefore that the settlement of a child living in your county is in Cherokee County, where he has resided for a number of years with his grandmother, who obtained his custody by judicial decree and who, as a legal consequence of such court decree became the child's legal guardian."

Also see 1946 Report of the Attorney General, page 5, at page 6 where it is stated:

"Minor children are unable to obtain a settlement in their own right but obtain one only by derivation. . ."

Thus, under the 1940 opinion the child in question was able to derive settlement from the grandmother standing in loco parents under the guardianship opened in 1954. Such settlement existed by virtue of the relationship created by the guardianship and by that relationship only as it appears from your letter the child was in a private school at the time the guardianship was opened and did not actually reside with the grandmother. It further appears that said relationship of guardian and ward was terminated on May 3, 1955, but that the child remained at said private school until July, 1956. There is, therefore, nothing in your letter to indicate the grandmother was guardian in fact of the child after termination of legal guardianship.

Since parents are natural guardians of their offspring and legal settlement of minors may be acquired only by derivation, the child in question would have acquired legal settlement from the father or mother under Section 252.16(5) at the instant the guardianship dissolved if either parent had had such settlement. However, it appears that the father had no such settlement in Iowa within the meaning of Chapter 252.

Section 252.16 deals with acquisition of settlement by residence, marriage or derivation. The duration of settlement, irrespective of how acquired is governed by Section 252.17. Section 252.17 provides as follows:

> "Settlement continues. A legal settlement once acquired shall so remain until such person has removed from this state for more than one year or has acquired a legal settlement in some other county or state."

It is clear the child has not lost settlement by absence from the state. Thus, unless one or the other of her parents has acquired a legal settlement in another state, or her mother legal settlement in Iowa, her derived settlement continues.

Your letter indicates the father is presently in New Hampshire. Whether he is actually domiciled there or merely stationed there as a member of the military forces is not clear from your letter. Section 164:1(IV), Revised Statutes of New Hampshire, provides:

> "Any person of the age of twenty-one years who shall have had his domicile in any town in this state for five consecutive years shall thereby gain settlement in such town."

Whether the father has gained such settlement appears to be a question of fact which you will have to determine for yourself. Section 164:1(III), Revised Statutes of New Hampshire, provides:

> "Legitimate children shall have the settlement of their father, if any he has within this state; otherwise the settlement of their mother, if any she has."

It is not clear from your letter where the mother has resided since 1951. Apparently her original settlement terminated by absence from the state but she may have acquired a new one during the time she lived apart from her husband during his absence from the United States. If so, and if she did not again lose it by further absence from the state prior to the termination of guardianship, the child would take that settlement.

I believe the foregoing sufficiently advises you to enable you to arrive at a conclusion with respect to settlement when you have ascertained the requisite missing facts.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

SCHOOL TRANSPORTATION. "Suspended" as used with reference to school bus service under Section 285.1(8), Code 1954, as amended, refers to suspension by official act of local school authorities and not to mere failure of a bus to complete its assigned route.

September 30, 1957

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

Dear Sir:

Receipt is acknowledged of your letter of September 25 as follows:

"I would appreciate your opinion on the following problem:

"Section 285.1(8), Code of Iowa, 1954, as amended provides as follows:

"'Transportation service may be suspended upon any day or days, due to inclemency of weather, conditions of roads, or the existence of other conditions, by the board of the school district operating the busses, when in their judgment it is deemed advisable and when the school or schools are closed to all children.'

"The underlined portion was added by Chapter 128 of the Laws of the Fifty-seventh General Assembly.

"The Department of Public Instruction has advised our County Superintendent of Schools that under this Section as amended if the school board suspends transportation in the school district because of certain conditions of roads or weather, it shall be closed for those children who could attend school without benefit of transportation. In other words the County Superintendent advises me that the Department of Public Instruction has advised him that if one bus cannot get into the school because of road conditions then the school must be closed to all children. Would you please advise if the Department of Public Instruction as outlined above is correct?"

57-9-55 X

The Department of Public Instruction advises me the restatement of their advice to school boards set forth in the first sentence of the last paragraph of your letter is correct. The conclusions drawn by your County Superintendent from such advice and as expressed in the second sentence of the last paragraph of your letter commencing "In other words", however, are incorrect. The statute relates only to suspension of transportation service by official act of local school authorities. It has no application to failure of one or more busses to complete their routes in the absence of such "suspension". Neither does it apply to situations where bus service is curtailed rather than "suspended" due to conditions making part of a route impossible.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

September 30, 1957

Mr. Russell I. Brown
Acting Commissioner
Department of Public Safety
L o c a l

Dear Mr. Brown:

In your request for an opinion dated April 19, 1957, you have set forth the following fact situation:

> "Consider the following fact situation: a highway patrolman stopped a violator and demanded the violator's drivers license. The violator opened his billfold to where his driver's license was, but refused to take the license out of the plastic container. It should be noted that our patrolman have orders not to take billfolds or purses from violators; but are to request the violator to remove the license.
>
> "Your opinion is respectfully requested whether, under these circumstances, charges filed under Section 321.229 of the 1954 Code of Iowa would have been proper1."

It is our interpretation that Section 321.229, 1954 Code of Iowa, is a general statute. The Iowa Code contains a provision which bears specifically upon the problem you mention. When there is a specific statute it prevails over the general statute. Iowa Mutual Tornado Ins. Ass's. v. Fischer, 245 Iowa 951, 65 N. W. 2d 162.

The specific statute bearing on this problem is Section 321.190 set out below:

> "Carried and exhibited. Every licensee shall have his operator's or chauffeur's license in his immediate possession at all times when operating a motor vehicle and shall display the same, upon demand of a justice of peace, a peace officer,

57-9-57 X

> or a field deputy or examiner of the department. However, no person charged with violating this section shall be convicted if he produces in court, within a reasonable time, an operator's or chauffeur's license theretofore issued to him and valid at the time of his arrest."

The following meaning, in the verb form, is ascribed to "display" in Webster's New International Dictionary, Second Edition (unabridged):

> "To spread before the view, to exhibit, to the sight, or to the mind; to manifest; to show or disclose."

Therefore, it is our opinion that "shall display" means that both sides of the license should be exposed to view. That is, the reverse side of the operator's license, wherein additional license restrictions are made, should be exposed to view. If that necessitates taking the license from the plastic container then that must be done in order to comply with Section 321.190, 1954 Code of Iowa. If both sides can be exposed to view from within the plastic container then no violation can have resulted.

Thus, the proper statute under which to charge a violation is Section 321.190, 1954 Code of Iowa. However, as stated in that section, no conviction will result if the arrested person produces, in court, within a reasonable time, an operator's license or chauffeur's license issued to him and valid at the time of arrest.

Very truly yours,

DON C. SWANSON
Assistant Attorney General

HUGH FAULKNER
Assistant Attorney General

DCS:MKB

September 30, 1957

Mr. M. L. Abrahamson, Vice Chairman
Peace Officers' Retirement, Accident
and Disability System
B u i l d i n g

Dear Mr. Abrahamson:

Reference is made to your letter of September 6, 1957, on behalf of the Peace Officers' Retirement, Accident and Disability System. You inquire whether or not since Mr. Russell I. Brown has been appointed Acting Commissioner of Public Safety he qualifies for membership on the Board of Trustees of the Retirement System. You call attention to the fact that Chapter 97A of the 1954 Code of Iowa makes no provision for an acting official to set as a member of the Board and makes no provision for any deputy or substitute to sit.

The particular question which you ask apparently has not been decided by the Supreme Court of this State. In the case of State Bank of Williams v. Gish, 167 Iowa 526, 149 N. W. 600, the Court examined the right of an acting superintendent to accept service of notice. The Court, in that case, said:

> "The phrase 'acting officer' is used to designate, not an appointed incumbent, but merely a locum tenens, who is performing the duties of an office to which he himself does not claim title. 1 Am. & Eng. Enc. of Law, 577 (2d Ed.); 1 Cyc. 632. Both these authorities cite the same case (Fraser v. U. S., 16 Ct. Cl. 514).
>
> "There is no evidence in the record as to how long this acting superintendent has been so acting, whether he was a deputy acting in the place of the superintendent, whether the superintendent had resigned, or whether he was dead or away on a vacation. All we have is the bare return."

57-9-58 X

> "Section 4902 of the statutes makes it a criminal offense for any person to take upon himself to exercise or officiate in any office or place of authority in this state without being legally authorized. Section 4648 of the Code provides that the proceedings of all officers and courts of limited and inferior jurisdiction within the state shall be presumed regular, except in regard to matters required to be entered of record, and except where otherwise expressly declared. We ought not to presume that Mr. Long would commit a crime by assuming to act as superintendent. He appears to have been in charge of the institution. In the absence of evidence, we think we ought to assume that he was so in charge and acting with authority; that he was in fact, for the time being, the superintendent."

This case was quoted with favor by the Supreme Court of Nebraska in the case of Gossett v. O'Grady, 137 Neb. 824, 291 N. W. 497.

In connection with the appointment of Mr. Brown, he was instructed to perform all of the duties imposed by law upon the office of the Commissioner of Public Safety. It is, therefore, our opinion that he should occupy the office and carry out the duties as member of the Board of Trustees of the Peace Officers' Retirement, Accident and Disability System.

Very truly yours,

DON C. SWANSON
Assistant Attorney General

DCS:MKB

September 30, 1957

Mr. Charles Mather
Sac County Attorney
Sac City, Iowa

Dear Sir:

Your request of June 12, 1957, was submitted in the following form:

> "I am requesting your opinion as to whether the transportation of a corn detasseling machine is permissible on the public highway.
>
> "The machine in question has its front wheels mounted on a two-wheel cart or truck which is specially constructed for this purpose, and they are locked in this position. The vehicle as constituted is pulled by a pickup truck operating under an 'A' registration. The over-all length of the vehicle being towed is less than twenty feet.
>
> "Assuming that a proper type of tow bar is attached to the pickup truck is this type of conveyance legal for being transported from one field of corn to another over the public highway?"

In your letter you have not specified wherein there might be a violation.

If you have reference to some violation having to do with the length of the vehicles coupled together, or the width of the corn detasseling machine, then Section 321.453, along with Section 321.1(16), negative such a violation.

Section 321.1(16) defines an implement of husbandry:

57-9-59 X

"16. 'Implement of husbandry' means every vehicle which is designed for agriculture purposes and exclusively used by the owner thereof in the conduct of his agricultural operations."

Under that definition it would seem that a corn detasseling machine owned by a hybrid seed corn company would be used for an agricultural purpose exclusively in his agricultural operations. Likewise, the same would be true if the machine were owned by an individual. As an implement of husbandry it is excluded from size requirements by Section 321.453. For a discussion of this concept you are referred to the case of Worthington v. McDonald, 246 Iowa 466, and to (1951) 1952 Opinions of Attorney General, page 75.

Furthermore, if your question is in regard to registration of the corn detasseling machine, there is no such requirement as to an implement of husbandry according to Section 321.18. In addition, implements of husbandry are not within the safety standards established by Chapter 321. See Section 321.383.

However, Section 321.398 incorporates the vehicles mentioned in Section 321.383 thus making it necessary for implements of husbandry to comply with that section in conjunction with Section 321.384. In this connection you are directed to an opinion by the Attorney General at page 6 of the 1952 biennial report.

Should this not answer your question please submit a request specifically designating the problem.

Very truly yours,

DON C. SWANSON
Assistant Attorney General

HUGH FAULKNER
Assistant Attorney General

DCS:MKB

October 1, 1957

Honorable Melvin D. Synhorst
Secretary of State
L o c a l

Re: Athletic Publications, Inc.
Minneapolis, Minnesota

Dear Sir:

In your letter to me of this date you state:

"This office is in receipt of an Application by this Minnesota Corporation, namely, Athletic Publications, Inc. in which it requests a Permit to do business in Iowa. Please inform this office if you know of any reason why the Permit should not be granted as it appears to be in proper form."

In reply thereto I would advise that in July of 1957 this office had at hand a report from the Bureau of Investigation concerning the operations of this company. As a result of an investigation made at that time and based upon facts available at that time we wrote as follows to Mr. R. W. Nebergall, Chief of the Division of Criminal Investigation for the Department of Public Safety:

"My staff and I have carefully reviewed the contents of your report. It appears from this examination and a review of the gambling laws of the State of Iowa that the operation of Mr. Hirschfield within the State of Iowa as presently described does not come within the purview of our criminal laws pertaining to gambling now on the books. The enclosures with your report reveal that there is seemingly no violation of federal law involved."

With respect to your particular question posed in your letter of this date, I would call to your attention the provisions of Chapter 494, Code 1954, and especially Section 494.14 which by reference subjects all foreign corporations "to all the liabilities, restrictions and duties that are or may be imposed upon

57-10-1 X

corporations of like character organized under the general laws of this state".

We next refer and call your attention to the provisions of Section 491.6 which would seem to apply in this and other corporate questions arising in the state of Iowa.

> "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 opinion 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."

You will note from a reading of this section that the decision as to whether to file these corporate papers rests with you. If you are satisfied "that their object is a lawful one and not against public policy, that their plan for doing business . . . . is honest and lawful", you may file them but, on the other hand, if you are of the opinion that "their object is an unlawful one, or against public policy, or that their plan for doing business is dishonest or unlawful, he <u>shall</u> refuse to file them."

I am not aware of what has transpired with this business since my letter of July 17, 1957.

Yours very truly,

NAE/fm

NORMAN A. ERBE
Attorney General of Iowa

October 1, 1957

Justice Norman R. Hays
Knoxville,
Iowa

Re: William B. Norton Disbarment Proceedings

Dear Justice Hays:

This office is in receipt of copy of a letter directed to you by Judge S. E. Prall relative to certain questions connected with the above entitled proceedings. Judge Prall, as Chairman of the District Tribunal appointed in said proceedings, set out the following questions:

"1. Who pays the court costs?

"2. Should the reporter make a transcript of all of the proceedings, whether or not an appeal is taken?"

I do not believe the second question poses too much of a problem. Section 610.34, Code 1954, provides in part that, "all of the evidence at such (disbarment) trial shall be reduced to writing, filed and preserved". Your court had this statute before it in State v. Tomlinson, 131 Iowa 617, 109 N.W. 120, and you there held that the sole object of this provision of our law was to enable the accused, if found guilty, to appeal. In comparing the statute to similar statutes such as Section 665.8, Code 1954, (contempts), you said:

"* * * These sections are complied with if the oral testimony is taken down in shorthand, duly certified and filed at the time judgment is entered. * * * The same rule obtains in disbarment proceedings. State v. Mosher, 128 Iowa, 82. * * * . But counsel argue that the evidence is required to be in writing and preserved for another purpose; i.e., that of enabling any one to refer to the testimony at any future time. There is no more occasion for rendering the evidence

57-10-2 X

> accessible in this class of cases than in others of equal importance, and we are of the opinion that it was not the intention of the lawmakers that the evidence be preserved, save for the purposes of appeal."

It would therefore seem that the answer to Judge Prall's second question would be that the reporter need not make a transcript of the proceedings unless an appeal is taken from the District Tribunal's decision.

However, Judge Prall's first question is more difficult to answer. Our Code contains two sections which are apparently in conflict with regard to the manner in which costs in a disbarment proceeding are to be paid. These sections read as follows:

> "610.26 Costs. If an action is commenced by direction of the court, the costs shall be taxed and disposed of as in criminal cases; provided that no allowance shall be made in such case for the payment of attorney fees."

> "610.35 Costs and expenses. The court costs incident to such proceedings, and the reasonable expense of said judges in attending said hearing after being approved by the supreme court shall be paid as court costs by the executive council."

Ordinarily, costs in a judicial proceeding are assessed against the defeated litigant; however, proceedings to revoke or suspend the license of an individual to practice law have always been held to be special proceedings. Prior to 1902 our Code contained no special provision as to the taxation and payment of costs in disbarment proceedings. In that year the present provisions of Section 610.26 were added to Section 325, Code 1897.

The remainder of the chapter on "attorneys and counselors" relating to disbarment proceedings continued virtually unchanged until 1927 when the General Assembly repealed Sections 10933 (compare Section 610.27, Code 1954) and 10934 (compare Section 610.34, Code 1954), Code 1924, and enacted in lieu thereof the provisions of our law now incorporated in Sections 610.27 to 610.35, Code 1954. As a part of the 1927 change and revision the Legislature provided that the "court costs incident to such (disbarment) proceedings, * * * shall be paid out of the fund received under Section 10914 (now Section 610.8, Code 1954)." (Parentheses supplied). This provision was further

changed in 1931 to provide that such costs should be paid "as court costs by the executive council". Apparently Section 10932, Codes 1924, 1927, (now Section 610.26, Code 1954), providing for the taxation and disposition of costs as in criminal cases, was overlooked by both the 1927 and 1931 legislatures when the present provisions of Section 610.35 were enacted and later amended, and Section 10932 was allowed to remain on our statute books although it seems to have been the intent of the legislature not only to change the manner and method of conducting disbarment proceedings but also the manner and method of paying the court costs incident thereto. It would seem that the latest legislative expression, namely, that of the 1927 and 1931 legislatures should prevail and that the prior law (now Section 610.26, Code 1954) should yield to the extent of any conflict between the two statutes.

As much as I would like to see the costs in the instant proceedings assessed against and paid by Mr. Norton, I nevertheless believe that it was the intent of the legislature to provide that these costs are to be paid by the Executive Council and not by the person accused and whose license to practice law might be suspended or revoked. I might add that during my short experience with disbarment proceedings handled by the office of the Attorney General the expenses of the Judges comprising the District Tribunal have been paid in accordance with the provisions of Section 610.35, Code 1954, after approval by the Supreme Court, and that the filing fees, etc. in connection with the case have been generally absorbed by the county in which the action was filed.

Our office would appreciate your comments and thoughts on this matter so that we may be in a position to correctly answer inquiries of a similar nature that might arise in the future.

Sincerely yours,

RRRD/fm

RAPHAEL R. R. DVORAK
First Assistant Attorney General

c:c Judge Prall
Judge McCold
Judge Levis

SCHOOL REORGANIZATION
1. Appeal from State Board to Dist Ct under Sec 275.16 may be dismissed under Sec 275.
2. There is no limitation on number of petitions which may be filed provided no two pending proceedings have the same territory

October 1, 1957

Mr. Harold G. DeKay
Cass County Attorney
21 West Fifth Street
Atlantic, Iowa

Dear Mr. DeKay:

Re: Board of Directors of Lewis Consolidated School,
v. Board of Education in and for Cass County, Warren
R. Morrow, Secretary and Executive Officer, and
State Department of Public Instruction.

Receipt is acknowledged of your letter of September 30 as follows:

"A dismissal of the appeal by the Lewis Consolidated School District was filed in our district court on September 28, 1957. At the same time, a new petition was filed, which included land in both Pottawattamie and Cass counties. We are interested in your comments on the proposition that it would appear from Chapter 275, that petitions may be filed time and time again which, as a matter of fact, have been dismissed. In connection with this, we have some questions which we are not submitting to you as the Attorney General's Office, but simply for discussion:

"1. Can an appeal from the State Board of Public Instruction to the district court be dismissed unilaterally without an order by the district court to be effective? If it cannot be dismissed without an order from the district court, would a petition filed prior to the order dismissing the appeal be untimely filed?

"2. Is there any method whereby repeated filings of petitions in cases where the petitions have been dismissed can be prevented in order to prevent a school district from forcing the Board of Education to spin its wheels?

"Your thought on these matters would be appreciated, and, since a copy of this letter is going to the Pottawattamie County Attorney's office, they may have some thoughts. I will do some checking on my own, and give you my further views."

57-10-3
57-10-3

Without extensively researching the proposition embodied in your first question, it is my impression that the rather inclusive statement of applicability in R.C.P. 1(a) and the lack of provision for other procedure in Chapter 275 would make R.C.P. 215 applicable in the matter at hand.

R.C.P. 215 provides as follows:

> "Voluntary dismissal. A party may, without order of court, dismiss his own petition, counterclaim, cross-petition or petition of intervention, at any time before the trial has begun. Thereafter a party may dismiss his action or his claim therein only by consent of the court which may impose such terms or conditions as it deems proper; and it shall require the consent of any other party asserting a counterclaim against the movant, unless that will still remain for an independent adjudication. A dismissal under this rule shall be without prejudice, unless otherwise stated; but if made by any party who has previously dismissed an action against the same defendant, in any court of any state or of the United States, including or based on the same cause, such dismissal shall operate as an adjudication against him on the merits, unless otherwise ordered by the court, in the interests of justice."

However, it is further my impression that even though such voluntary dismissal would not of itself operate in prejudice of plaintiff starting its action again, the express time limit for bringing such matters before the Court as set forth in Section 15, Chapter 129 (H. F. 158), Acts of the Fifty-seventh General Assembly, would probably preclude plaintiff from refiling.

In answer to your second question, I know of no way of preventing proponents of a reorganization from filing repeated petitions for joint reorganization with a county board of education and thereby necessitating joint board proceedings where the territory described in the petition is not involved in prior pending reorganization proceedings. Of course, if such territory or any of it is involved in another pending reorganization, the holding of our Supreme Court in Harberts v. Klemme Community School District, 247 Iowa 48, 72 N.W. 2d 512, would effectively preclude action upon the later filed petition until the prior reorganization was definitely concluded.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

DRUGS: Whether any given product is a non-poisonous proprietary remedy for purposes of Sections 155.2(4) or 205.8(1), Code 1954, is a question of fact.

October 1, 1957

Mr. William N. Dunn
Hardin County Attorney
Hubbard, Iowa

Dear Sir:

Receipt is acknowledged of your letter of September 27 as follows:

"I was contacted recently by a doctor in regard to a patient of his who has become addicted to Bromo Seltzer. This doctor informed me that he has been able to stop the supply of Bromo Selzer to his patient through the drug stores but was unable to secure any cooperation from the various grocery stores. I have been unable to find anything in the Code dealing with the subject and would appreciate your informal opinion as to whether anything can be done to prevent sales by grocers to this individual."

The problem you present is indeed an interesting one and is similar to one currently involving the State Pharmacy Board in litigation brought by a grocer as to his right to sell Lysol without a license to practice pharmacy.

The statutes having possible bearing on such sales are contained in Sections 155.2(4) and 205.8(1), Code 1954. The instant problem confronting you in the application of said sections is whether or not Bromo Seltzer is in the category of "proprietary medicines or domestic remedies not in themselves poisonous".

Unless it could be shown, as it was in the case of aspirin, in State ex rel. Missildine v. Jewett Market Co., 209 Iowa 567; 228 N. W. 288, that Bromo Seltzer is a drug and is not a proprietary medicine, or that it is poisonous of itself, there appears no way of regulating or preventing its sale in grocery stores. I am advised by the inspector for the Pharmacy Board that they have treated Bromo Seltzer as a non-poisonous proprietary medicine for purposes of their inspections.

Of course, the question is always one of fact as regards application of the two cited statutes to any given product.

Very truly yours,

LEONARD C. A BELS
Assistant Attorney General

LCA:md

57-10-4

HEADNOTE. Property Tax: Authority of a county assessor to employ a town mayor in strictly clerical functions; held to be prohibited by inconsistency of the two offices and contrary to policy established by statute.

Summary?

October 2, 1957

Mr. Ballard B. Tipton, Director
Property Tax Division
State Tax Commission
Building

In re: Authority of a county assessor to employ a town mayor.

Dear Mr. Tipton:

Your letter dated July 22, 1957, addressed to Mr. Leon N. Miller, Chairman, State Tax Commission has been referred to me for reply.

The Attorney General has issued many opinions throughout the history of our state regarding the incompatibility of certain offices. At least one case has been decided by the Supreme Court of Iowa, State v. Anderson, (1912) 155 Iowa 271. The case was presented to the court to determine whether it would be proper for the mayor of a town to serve as a justice of the peace in his county during his term of office as mayor. The court decided that these two offices are inconsistent, and in doing so the court quoted from the case of Bryan v. Cattell, 15 Iowa 538. On page 273, the court stated:

> "But that the test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other 'and subject to some degree to its revisory power,' or where the duties of the two offices 'are inherently inconsistent and repugnant.' "

It appears from your letter that you referred to an unofficial opinion written by Mr. Iverson stating, "that a mayor, who is a member of the county conference board cannot serve as a field assessor." This certainly appears to be a correct

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statement of the position of the Supreme Court of Iowa on this question.

It is a much closer and more difficult question to determine whether a mayor can serve as a clerk in the office of the county assessor. Section 441.8 Code of Iowa 1954, provides:

> "Compensation of deputies and assistants shall be fixed by the county conference and such deputies and assistants shall receive actual necessary expenditures as approved by the county assessor and their appointment shall be subject to the approval of the county conference."

If the mayor serving as a clerk would be designated an assistant of the county assessor, then it would seem that the mayor is fixing his own salary to be operative during the period that he is serving as mayor, and he must pass upon his own appointment. Certainly section 441.8 thereby gives to the county conference authority to pass upon all appointments made by the county assessor and thereby this situation comes within the language of the court as stated above in the case of State v. Anderson.

An additional problem with a mayor being appointed to serve in the office of county assessors arises from section 441.28 Code of Iowa 1954. This section provides:

> "Neither the county assessor nor any employee of his office shall directly or indirectly contribute any money or anything of value to any candidate, his agent or personal representative, for nomination or election to any office, or to any campaign, nor shall any candidate, person, representative, agent or committee solicit such contribution or active political support from any such officer or employee. Any person convicted of violating any provision of this chapter shall immediately be dismissed from office or may be punished as for an indictable misdemeanor. Acts 1947 (52 G.A.) ch. 240, § 14."

The legislature has placed the employees of the county assessor's office in a special position as regards political contributions. It seems that it is the policy of the legislature that the employees of this office be absolutely separated

from pressures which might affect their functions. Since an employee of the assessor's office is prohibited from contributing to a candidate for any office, it would seem that for the same reasons, an employee is prohibited from seeking any office.

Therefore, it is the opinion of this office that the question outlined in your letter dated July 22, 1957, must be answered in the negative.

Very truly yours,

Francis J. Pruss

FJP:bmc

FRANCIS J. PRUSS
Special Assistant Attorney General.

October 3, 1957

Mr. Sherman W. Needham
Superintendent of Printing
B u i l d i n g

Dear Sir:

Reference is herein made to letter of the 1st inst. addressed to you by C. J. Lyman, Special Assistant Attorney General for the Highway Commission, in which he stated the following:

> "I have your letter of September 19, in which you show the cost of printing on the drainage book as $2.11 a volume and on the Iowa Highway Road & Street Laws as $2.94 per volume. I presume that these volumes should be sold for $2.10 and $2.90 respectively as the cost is to be to the nearest multiple of ten. Am I correct in the assumption?
>
> "I am somewhat concerned on the cost of the specification books. These, by incprporation, are made part of our public contracts, and it becomes necessary to furnish the contracters with a copy thereof. I would assume that the standard specifications are governed by Section 17.23 of the Code which states in part 'any other state publications it may designate'. If charges are made for the standard specifications, it would seem that we would be unable to furnish our contracters all the necessary information in order for them to submit bids on the highway work. If this publication is governed by Section 17.23 under the permissive portion of that section, is there any necessity for charging our contracters when we furnish them copies of the standard specifications?"

With reference thereto I advise you that the specifications book appears to be a publication containing specifications comparable to and deemed to be rules and regulations of the Highway Com-

57-10-6

mission used for the guidance of contractors. Thus being a publication and containing regulations or rules, it is within the provisions of both Sections 16.2 and 17.27, as amended by Chapter 56, Acts of the 57th General Assembly, and distributed and sold under the terms of those provisions.

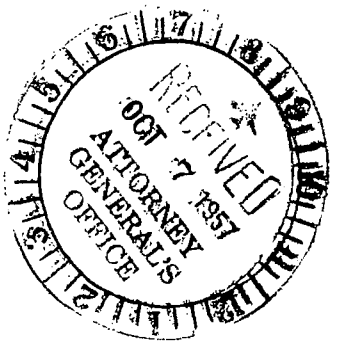
Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

HEADNOTE:

Secondary Roads--cattleways; public funds not to be expended for construction & maintenance thereof.



Ames, Iowa

Oct. 3, 1957

Mr. Charles H. Scholz
Mahaska County Attorney
115 N. Market St.
Oskaloosa, Iowa

Re: Cattleways over secondary highway

Dear Mr. Scholz:

I have your letter of September 20, 1957 in which you asked our opinion on the following question:

> "Where land on both sides of a secondary public highway is owned by the same person, may a County Board of Supervisors expend public funds for the construction of a cattleway for the purpose of facilitating passage of the landowner's livestock from one side of the highway to the other, where such cattleway will not serve as a culvert or bridge and is not needed for water drainage purposes, but will tend to remove a traffic hazard which is caused by the frequent transfer of livestock from one side of the highway to the other?"

We concur in your analysis of this problem. In the situation that is presented by your question, public funds may not be expended by the Board of Supervisors for the construction or maintenance of a cattleway. In scanning the Iowa cases on this subject I find that in the instance where as a part of the taking of a right of way the County agrees to build and maintain a cattleway that public funds can be used, but this, of course, is part of the consideration for the right of way. I refer you to Roberts vs. Madison County 183 Iowa 915 and Licht vs. Ehlers, 234 Iowa 1331.

In the situation that is presented by your question, the Board of Supervisors can issue a permit to the landowner to construct and maintain a cattleway. This, of course, is provided for by Sections 320.4 to 320.7, both inclusive, of the 1954 Code of Iowa.

If we can be of any further assistance to you in this matter, please notify us.

Yours very truly,

John L. McKinney
General Counsel for
Iowa State Highway Commission

JLM:js

57-10-7
57-11-7

October 4, 1957

Mr. Claude R. Cook, Curator
Historical Building
L o c a l

Dear Sir:

This will acknowledge receipt of yours of the 1st inst. In which you submitted the following:

> "Enclosed are samples of the literature which has been circulated by this department in the past. As you have suggested in a personal conversation of a few moments ago, concerning the question of charge for material, I am sending you these for your examination and opinion as to whether they shall be circulated free, as in the past, or whether they are subject to the charge for material outlined by the last General Assembly."

The samples accompanying your letter are publications, the printing of which with the sale price thereof, if distribution by sale is contemplated, and the number and form thereof are subject to prior action by the Printing Board acting under the provisions of Section 16.2, subsection 7, Section 17.23 and Section 17.27, all as amended by Chapter 56, Acts of the 57th General Assembly. These sections, as amended, appear as follows:

> "16.2 (7) Have legal custody of all codes, session laws, books of annotations, tables of corresponding sections, publications, except premium lists published by the Iowa state fair board, containing reprints of statutes or departmental rules, or both, reports of state departments, and reports of the supreme court, and sell, account for, and distribute the same as provided by law."

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"17.23 Price of departmental reports. The state printing board shall establish and fix a selling price for all other state departmental reports and any other state publications it may designate, which price per volume shall be the amount charged any person, other than public officials, who may desire to purchase the same; such price shall cover the cost of printing and distribution. The state printing board may distribute gratis to such state or local public officials, or offices, it may deem necessary, copies of departmental annual reports."

"17.27 Other necessary publications. There may be published other miscellaneous documents, reports, bulletins, books, and booklets that are needed for the use of the various officials and departments of state, or are of value for the information of the general assembly or the public, in form and number most useful and convenient, to be determined by the printing board.

"When such publications paid for by public funds furnished by the state, contain reprints of statutes or departmental rules, or both, they shall be sold and distributed at cost by the department ordering same. Such publications shall be obtained from the superintendent of printing on requisition by the department and the selling price shall be determined by the printing board by dividing the total cost of printing, paper and binding by the number printed. Said price shall be set at the nearest multiple of ten (10) to the quotient thus obtained. Distribution of such publications shall be made by the superintendent of printing gratis to public officers, purchasers of licenses from state departments required by statute, and departments. Funds from the sale of such publications shall be deposited monthly in the general fund of the state."

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

October 4, 1957

Adjutant General Fred C. Tandy
Adjutant General of Iowa
B u i l d i n g

Attention: Colonel Johnson

Sir:

Re: Summary Court Martial
Pvt. N. D. Caldwell
Svc Btry 185th FA Bn
Iowa National Guard

The following is in response to your memorandum to this office dated 3 October 1957 and your conference with the writer on the same date.

The facts of your situation are understood to be as follows: Pvt. Caldwell was tried by Summary Court Martial under Iowa law on 6 July 1957, convicted of being absent without leave and sentenced to confinement for three days, which confinement was suspended, contingent upon satisfactory drill attendance by the offender. The offender was again absent from drill without leave and the convening authority directed that the sentence to confinement then be enforced. A copy of the order of the convening authority to execute confinement on the person of the accused was delivered to the Sheriff of Linn County, who refused to apprehend Pvt. Caldwell, stating that he had no authority to do so. You now request further instructions to enforce incarceration.

Section 29.77, 1954 Code of Iowa, states:

> "Issuance of process. Military courts are empowered to issue all process, including writs and warrants necessary and proper to carry into full effect the powers vested in said courts. Such process may be directed to appropriate military personnel, the sheriff of any county or any other peace officer of the state and shall be in such form as may, from time to time, be prescribed by the adjutant general. It shall be the duty of all persons herein provided to whom such process may be so directed to execute the same and make return of their acts thereunder according to the requirements of the same.

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> "The keepers and wardens of all city or county jails and of all other jails, penitentiaries or prisons, designated by the governor or the adjutant general of the state, shall receive the bodies of persons committed by the process of a military court and confine them in the manner provided by law for civilian offenders.
>
> "No public officer shall demand or be entitled to receive any fees or charges for receiving, executing, returning, or rendering any services in connection with any process of a military court, or for receiving or confining a person in jail or custody under such process."

In view of the above statutory authority, once a judicial determination is made, the court can, and must if its directions are to be carried out, issue all "processes, writs and warrants necessary" to enforcement officials to comply with the latters' obligations under the same statute.

Once the court has determined from the Adjutant General the format for the necessary warrants and writs to be issued, enforcement authorities, I am sure, will be entirely cooperative. As a practical matter it would probably be expeditious for you to recommend adaptation of the forms used by the court with which the Sheriff or other law enforcement officer usually works.

I note that on the enclosed court martial forms the 185th FA Bn is shown as the convening authority. Depending upon the administrative definition in the Iowa National Guard of the designation "separate battalion", it appears that since this battalion is part of the 34th Div Arty, a regimental level organization, in view of Section 29.73 of the Code of Iowa, perhaps Hq 34th Div Arty should be shown as the convening authority. It is well to keep in mind that despite the wording of Sections 29.63 and 29.69, incorporating by reference parts of the federal UCMJ, that wherever the Iowa Code is specific on an item in connection with military courts-martial in the Iowa National Guard while in state service, it will govern, UCMJ to the contrary notwithstanding.

Trusting this is the answer to your inquiry, I am

Very truly yours,

FREEMAN H. FORREST
Assistant Attorney General

FHF:MKB
cc: Major Howard I. Hubby

HEADNOTE: Official Tax Commission Publications, House File 139, Acts of the 57th G. A. Any publication containing reprints of statute or departmental rules must be charged for except to purchasers of licenses or permits; State Department reports must be distributed at costs fixed by Superintendent of Printing. — State Printing Bd

Mr. Lewis E. Lint, Director
State Tax Commission
Building

Dear Mr. Lint:

This is to acknowledge receipt of your letter dated October 2, 1957, wherein you submitted to this department certain publications requesting a ruling as to whether the Tax Commission should charge for these publications at a rate to be determined by the State Printing Board.

Section 17.27, Code of Iowa 1954 as amended by House File 139 Acts 57th G. A. now provides as follows:

> "There may be published other miscellaneous documents, reports, bulletins, books and booklets that are needed for the use of the various officials and departments of state, or are of value for the information of the general assembly or the public, in form and number most useful and convenient, to be determined by the printing board.
>
> When such publications paid for by public funds furnished by the state, contain reprints of statutes or departmental rules, or both, they shall be sold and distributed at cost by the department ordering same. Such publications shall be obtained from the superintendent of printing on requisition by the department and the selling price shall be determined by the printing board, by dividing the total cost of printing, paper and binding by the number printed. Said price shall be set at the nearest multiple of ten (10) to the quotient thus obtained. Distribution of such publications shall be made by the superintendent of printing gratis to public officers, purchasers of licenses from state departments required by statute, and departments. Funds from the sale of such publications shall be deposited monthly in the general fund of the state."

Section 17.25 entitled, "Price of departmental reports" as amended by House File 139 Acts of the 57th G. A., provides:

57-10-10 X

"The state printing board shall establish and fix a selling price for all other state departmental reports and any other state publications it may designate, which price per volume shall be the amount charged any person, other than public officials, who may desire to purchase the same; such price shall cover the cost of printing and distribution. The state printing board may distribute gratis to such state or local public officials, or offices, it may deem necessary, copies of departmental annual reports."

With your above referred to letter you submitted the following publications:

1. Statute laws of Iowa relating to Assessment and Taxation, etc.
2. Income Tax Law Rules and Regulations 10 (1955)
3. Rules and Regulations relating to Retail Sales and Use Tax (1954)
4. 1955 Amendments to the Retail Sales Tax Law and Use Tax Law
5. Laws Regulating the Manufacture and Sale of Beer (1954)
6. Cigarette and Tobacco Law (1956)
7. Sales and Use Tax Rule 168.1 (1956)
8. Homestead Tax Credit Law etc. (mimeographed) (1955)
9. Laws and Opinions Governing Military Service Tax (mimeographed) (1955)
10. Annual Report of the Iowa State Tax Commission (1955)

Pursuant to the two above quoted sections all of the above items should be submitted to the superintendent of printing to have the prices fixed by the State Printing Board. All of the publications will have to be charged for when distributed to persons other than public officials to comply with the two above quoted sections.

At the time that a taxpayer obtains a sales tax permit or use tax permit, it will be permissible for the sales tax division to distribute to said permit purchaser, without cost, items 3, 4, and 7. At the time that a taxpayer purchases a cigarette permit it will be permissible to distribute to said purchaser, without cost, item 6. At the time that a taxpayer purchases from the State of Iowa a beer permit, it will be permissible to distribute to said permit purchaser item 5 without cost to the taxpayer.

It will be necessary to distinguish between persons who are 'holders' of

permits and those who are 'purchasers' of permits. In other words the only time a distribution of said publications can be made to the taxpayer without cost to him is at the time the permit is purchased.

We do have the question as to who will constitute and be considered a purchaser of a license. It seems that our principal situations arising here at the Tax Commission concern holders of cigarette and beer permits. If at the time of obtaining a renewal permit it is necessary for the applicant to do all acts which are necessary to acquire a permit initially, then the obtaining of a renewal of a permit shall constitute the purchase thereof. However, if it is necessary for a person who obtains the renewal of a permit to do something less than what is required to be done to obtain a permit initially, then the renewal of a permit will not be considered a purchase thereof.

If you have any further questions regarding this matter, please contact me.

Very truly yours,

FJP:bmc

Francis J. Pruss,
Special Assistant Attorney General.

October 7, 1957

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

Dear Sir:

This will acknowledge receipt of yours of the 3rd inst. In which you submitted the following:

"Several questions have arisen regarding the Judicial Retirement System, provided by Chapter 605A, Code of Iowa, 1954, as amended.

"Section 605.4 provides that on or before retirement each judge coming within the purview of this chapter shall pay a sum equal to 3% of his basic salary for services as such judge for the total period of service as a judge of a district or supreme court before the date of notice to come under the Act.

"I respectfully request an opinion as to whether or not it is necessary for this payment to be made before leaving the Bench, or if it may be made after a judge has left the Bench, but prior to payment of any annuity under this chapter.

"Section 605A.7 was amended by Chapter 1, Section 14, Acts of the 56th General Assembly, and now reads in part as follows:

"'* * * *Provided, however, that such annuity shall be reduced by the amount of any social security benefit received by such judge.'

"It is foreseen that in some circumstances a former judge eligible for annuity at the age of 67 might be privately employeed between the ages of 67 and 72 in such a manner that he would not be eligible to draw Social Security benefits,

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but would otherwise be qualified for annuity under the Judicial Retirement System.

"I respectfully request an opinion as to whether or not a retired judge otherwise eligible for an annuity under Chapter 605A may draw same, and for any reason not draw Social Security benefits without a reduction of his annuity in the amount to which he would be eligible for Social Security.

"I respectfully request an opinion as to the amount of Social Security benefits to be deducted from the Judicial annuity, as to whether the amount of Social Security deducted is to be based upon the amount received by such Judge, or the amount of Social Security due based on earnings of the Bench only."

In reply thereto I advise as follows.

1. In accordance with previous advices it has been the view of the Department, now confirmed, that payment described above may be paid after the retiring judge has retired but prior to the payment of the annuity provided in Chapter 605, Code 1954.

2 & 3. In answer to questions 2 and 3 arising out of circumstances described in your letter I advise that a judge's annuity provided by Chapter 605, Code 1954, is payable in its full amount to which he may be entitled unless the retired judge is actually receiving Federal Social Security benefits, in which event his annuity shall be reduced by the amount of such benefits. Plainly, the amount of Social Security deductible from the annuity is the amount of Social Security received without distinction

of the source of earnings of the retired judge.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

On authority of opinion appearing in the Report for 1940, page 112, County Attorney may also serve as legal advisor or attorney for local drainage districts.

October 7, 1957

Mr. William Q. Norellus
Crawford County Attorney
Denison, Iowa

Dear Sir:

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

> "The Board of Supervisors of Crawford County, Iowa, have requested that I ask you for an opinion as to whether or not they may legally employ the Crawford County Attorney to serve as Legal Advisor and Attorney for local drainage districts located in Crawford County, which are managed and supervised by the Crawford County Board of Supervisors.
>
> "There are several drainage matters now pending which require the attention of a lawyer and the Board of Supervisors would appreciate it a great deal if you would advise me at your earliest convenience."

In reply thereto I enclose herewith copy of opinion issued March 2, 1939, to Mr. Arthur J. Braginton, Calhoun County Attorney, appearing in the Report of the Attorney General for 1940 at page 112, which answers this request.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB
Enc.

57-10-12

October 7, 1957

Mr. William O. Lewis
Shelby County Attorney
Harlan, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 2nd inst. In which you submitted the following:

"I have been requested by the Shelby County Board of Education to represent them in all matters regarding school reorganization under Chapter 275 of the Code. In this connection, I will aid in drawing lines and legal descriptions, prepare papers and resolutions, attend hearings of study committees, county boards and joint county board meetings. I have been requested to prepare appeals from the joint county board meetings to the State Department of Public Instruction, prepare and present oral and written briefs and arguments before the State Department, and prepare appeal to the court, if necessary, for said County Board.

"Independent school districts and community school districts in my county have requested me to prepare deeds and other papers in regard to the sale of schoolhouses and school land, to prepare papers and settle disputes in regard to fences with adjoining owners, to outline, prepare papers, attend hearings, and represent them in various reorganizations. Some of these districts have offered to pay me for my time. I am frequently consulted by teachers and school boards in regard to disputes between them.

"What are my duties and responsibilities as county attorney in regard to these school matters, when am I entitled to receive compensation for my efforts, and when am I ineligible to act in a private capacity for, or before, these boards?

"I will appreciate any guidance you can give me in regard to these questions."

57-10-13 X

In reply thereto I enclose herewith copies of opinions which will provide answers to the questions you submit. These opinions are: one issued May 4, 1940, to Mr. C. Morse Hoorneman, appearing in the Report of the Attorney General for 1940 at page 516; opinion dated July 3, 1952, to Walter J. Willett, Tama County Attorney; and opinion issued June 1, 1955 to Isadore Meyer, Winneshiek County Attorney.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB
Encls.

HEADNOTE: County not liable for damages sustained by a citizen while crossing a county bridge.

Ames, Iowa

Oct. 8, 1957

Mr. Gordon L. Winkel
Kossuth County Attorney
Algona, Iowa

Re: Liability of the County for its torts

Dear Mr. Winkel:

I have your letter of September 25, 1957 in which you ask our opinion as to whether the Board of Supervisors of Kossuth County are liable for damages sustained by a citizen while driving across a county bridge.

We concur in your analysis of the problem. Post vs. Davis County, 196 Iowa 183, is the controlling case in this area. The reasoning of Post vs. Davis County, Id is re-affirmed in State of Iowa vs. Fitch, 236 Iowa 208 at page 215. Post vs. Davis County, Id is also cited in the Attorney General's opinion 1940 at page 24, 232, 399 and 408.

It is clear from these authorities that in the factual situation presented in your letter, the County would not be liable for damages sustained by a citizen while driving across a county bridge.

If we can be of any further assistance to you in this matter, please contact us.

Yours very truly,

C. J. LYMAN
Special Assistant Attorney General

JOHN L. McKINNEY
General Counsel for
Iowa State Highway Commission

JLM:js

October 9, 1957

Mr. Donald E. O'Brien
Woodbury County Attorney
203 Court House
Sioux City, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 17th ult. in which you state the following:

> "Our Woodbury County Grand Jury is now in session and has propounded the following questions to the Woodbury County Supervisors, and have been informed by the Supervisors that the Attorney General's Office had furnished them with a legal opinion on the following questions, however, we do not have these opinions in our office, nor can we find where they have been reported, and the County Board is unable to locate your copies. The questions were as follows:
>
> "1. Can the Board of Supervisors employ an Attorney for $4600.00 per year to advise them? Can the Board of Supervisors employ an attorney at $4600.00 per year to proceed in under 230.27 of the 1954 Code for support of insane. Can the Board employ an attorney for the Probation Office to handle Uniform Support cases under 252A of the 1954 Code of Iowa.
>
> "2. Can the Sheriff charge 9¢ per miles as mileage of Deputies and receive 2¢ per mile 'kick-back' from each of the Deputies?
>
> "3. Can the sheriff rent the quarters in the Court House which were provided for him, and he does not use for his own purposes?"

In reference to the above we advise as follows.

1. Insofar as the power of your Board of Supervisors is concerned to employ an attorney at $4600.00 per year to advise them, we refer you to opinions appearing in the Reports as follows: 1938 at page 586 and 1928 at page 442, and to opinions issued March 6, 1920 and February 16, 1925, copies of which latter opinions are herewith attached.

2. We find no opinion authorizing your Board of Supervisors to employ an attorney to proceed under Sec. 230.27, Code 1954, to the collection of claims for the support of insane, nor do we find an opinion granting authority to the Board to employ an attorney for the Probation Office to handle Uniform Support cases under Chapter 252A, Code 1954.

3. We find no opinion authorizing the sheriff to charge 9¢ per mile as mileage of deputies and receive 2¢ per mile kickback from each of the deputies. However, the undersigned has recollection of this matter being submitted to the Department some years ago and found an arrangement of that character being permissible under the then existing statute.

4. We find no opinion interpreting a statute to grant the sheriff authority to rent quarters in the court house provided for him but which he does not use.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB
Enc.

Ames, Iowa

Oct. 10, 1957

Mr. Eugene R. Nelson
County Attorney
Jefferson, Iowa

Dear Mr. Nelson:

We have your request for an opinion on the following question:

> "Is the Iowa Highway Commission liable for drainage assessments levied in an established district for a new improvement therein, upon right of way acquired within the corporate limits of a city or town under Section 5 of Chapter 148, of the 56th G. A.?"

There are various statutes which are pertinent to any determination of this matter. They are set out below in their entirety for convenient reference.

> 306.2 Definition of road systems. The following words and phrases when used in this chapter or in any chapter of the code relating to highways shall respectively have the following meaning:
> 1. Primary roads. The term "primary roads" or "primary road system" shall include those main market roads and highways traffic arteries, outside of cities and towns, which have been designated as primary roads under section three hundred thirteen point two (313.2), or which may hereafter be so designated as the law may provide.

> 313.2 "Road systems" defined. The highways of the state are, for the purposes of this chapter, divided into two systems, to wit: the primary road system and the secondary road system. The primary road system shall embrace those main market roads (not including roads within cities and towns) which connect all county seat towns and cities and main market centers, and which have already been designated as primary roads under chapter 241, code of 1924; provided, that the said designation of roads shall be, with the consent of the federal authorities, subject to revision by the state highway commission....

> 389.14. "Roads" as streets. Such portions of all roads as lie within the limits of any city or town shall conform to the direction and grade and be subject to all regulations of other streets in such

57-10-17 X

town or city.

391.1 Definitions. The following words as used in this chapter shall have the meanings as stated:

3. The word "street" shall include highway, avenue, alley and public place.

Previous to the enactment of Ch. 148, Acts of the 56th G. A., commonly known as the controlled access law, that part of any primary highway within a city or town was a primary road extension and, by express enactment of the legislature, not a part of the primary road system. The state Highway Commission, by Sec. 306.3 was vested with jurisdiction and control of primary roads. It has no jurisdiction and control over primary road extensions, which by Sec. 391.1 (3), Sec. 389.14 and Sec. 306.2(1) are designated as city streets and are under the control of the city. In support of this see Smith v. City of Algona 232 Iowa 362. (371).

The State Highway Commission and cities and towns, as well as drainage districts are all creatures of the legislature and are, of course, subject to the laws enacted by the legislature.

The legislature has directed the procedure for payment of special assessments against primary roads by enacting section 455.50, Code of 1954 which reads as follows:

455.50 Public highways. When any public highway extends into or through a levee or drainage district, the commissioners to assess benefits shall ascertain and return in their report the amount of benefits and the apportionment of costs and expenses to such highway, and the board of supervisors shall assess the same against such highway.

Such assessments against primary highways shall be paid by the state highway commission from the primary road fund on due certification of the amount by the county treasurer to said commission, and against all secondary roads, from the secondary road construction fund or from the secondary road maintenance fund, or from both of said funds.

That section is clear in that it directs the State Highway Commission to pay assessments against primary highways. By definition a primary road extension is not a primary road so it could not be intended by Sec. 455.50 that assessments against primary road extensions could so be paid.

In case there is doubt the next section of the Code of 1954 that we resort to is Sec. 459.3 which is set out below:

459.3 Assessments--notice. When the streets,

> alleys, public ways, or parks or lots or parcels including railroad rights of way of any incorporated town or city, or city under special charter, so included within a levee or drainage district, will be beneficially affected by the construction of any improvement in such district, it shall be the duty of the commissioners appointed to classify and assess benefits to estimate and return in their report the percentage and assessment of benefits to such streets, alleys, public ways, and parks, or lots or parcels including railroad rights of way and notice thereof shall be served upon the clerk of such incorporated town or city, irrespective of the form of government, and upon owners of lots, parcels, and railroad rights of ways so assessed.

From the above section it can readily be seen that cities or towns are directed to pay assessments on streets, alleys and public ways. By reference to the code sections cited it can be seen that primary road extensions are city streets. They can be nothing else.

The question we now come to is whether or not acquisition of fee simple title to land inside the corporate limits of a city or town acquired under authority of Ch. 148 Acts of the 56th G. A. has so changed the law as to render the State by and through its agent, the Highway Commission, liable to pay special drainage assessments on right of way.

It must be remembered that the Iowa Highway Commission is an agency, or part of the state and that as such it partakes of the sovereignty of the state and the immunities of the state. The state is not liable for taxes or special assessments except as it may have consented thereto. Section 455.50 is the consent of the state to the assessment of primary roads. There is no such consent found in the code with respect to primary road extensions.

Because of the fact that the state must consent to special assessments it makes no difference whether the state owns an easement or a fee simple title in its primary highways or that it has the fee simple title to real estate within the corporate limits of a city or town. There is nothing to be found in Ch. 148, Acts 56th G. A. which evidences an intent that the state has consented to pay drainage assessments on land it owns in a city or town. Only primary roads are subject to special drainage assessments.

Therefore the answer to your question is in the negative.

Yours very truly,

C. J. Lyman
Special Assistant Attorney General
for Iowa State Highway Commission

CJL:js

AERONAUTICS COMMISSION: PUBLICATIONS;
Various samples of publications examined to determine whether charge must be made therefor under 57th G.A., Ch. 56.

October 11, 1957

Mr. L. W. Wolverton
Air Enforcement Officer
Iowa Aeronautics Commission
L o c a l

Dear Sir:

Receipt is acknowledged of your letter of October 1 in which you submit the following:

"At the most recent meeting in September of the Board of Commissioners of the Iowa Aeronautics Commission, it was voted unanimously by the quorum in attendance to request a written opinion from the office of Attorney General on the necessity of charging for various pieces of printed matter distributed by this Commission and herein described.

"1. Iowa Air Charts, a navigational aid distributed to all duly registered airmen and aircraft owners.

"2. Iowa Airport Directory - listing various registered airports and facilities available. Distributed to all duly registered airmen and aircraft owners.

"3. Notice Posters - setting forth the statutory requirements of various aviation 'people' to comply. For display at registered landing areas.

"4. General information type materials such as sunrise - sunset charts, radio frequency charts, and visual navigation aids, to be distributed to all duly registered airmen and aircraft owners.

"5. Copies of statutes affecting aeronautics in Iowa and rules and regulations of the commission to be distributed to registered landing areas in full and in part to individuals, as particularly concerned.

"With exception of point 5 above, all the printed materials outlined above have been distributed from 8 to 12 years prior to the 57 General Assembly."

Your questions arise under Chapter 56, Sections 2 and 3, Acts of the Fifty-seventh General Assembly. Section 2 provides as follows:

"Section seventeen point twenty-seven (17.27), Code 1954, is hereby amended by adding the following:

"'When such publications paid for by public funds furnished by the state, contain reprints of statutes or departmental rules, or both, they shall be sold and distributed at cost by the department ordering same. Such publications shall be obtained from the superintendent of printing on requisition by the department and the selling price shall be determined by the printing board by dividing the total cost of printing, paper and binding by the number printed. Said price shall be set at the nearest multiple of ten (10) to the quotient thus obtained. Distribution of such publications shall be made by the superintendent of printing gratis to public officers, purchasers of licenses from state departments required by statute, and departments. Funds from the sale of such publications shall be deposited monthly in the general fund of the state.'"

Section 17.23, Code 1954, as amended by Section 3 of said Act provides as follows:

"Price of departmental reports. The state printing board shall establish and fix a selling price for all other state departmental reports and any other state publications it may designate, which price per volume shall be the amount charged any person, other than public officials, who may desire to purchase the same; such price shall cover the cost of printing and distribution. The state printing board may distribute gratis to such state or local public officials, or offices, it may deem necessary, copies of departmental annual reports."

Section 328.12, Code 1954, provides in pertinent part as follows:

"The (aeronautics) commission shall have the following powers and duties:

"* * * * * *

"3. It shall keep on file at the office of the commission, for public inspection, a copy of all its rules and regulations with all amendments thereto, and mail copy thereof to all registered landing areas in this state. All such rules shall take effect thirty days after such mailing.

"4. It shall, insofar as is reasonably possible, make available the engineering and other technical services of the commission, without charge, in connection with aeronautics."

Assuming authority exists for the publication of the five types of items to which your inquiry refers, attention is addressed to the application of the quoted statutes to said items as follows:

1. From an examination of the sample submitted with your letter, it appears that Iowa Air Charts are not reprints of statutes or rules within the meaning of Fifty-seventh G. A., Chapter 56, Section 2, nor are they departmental reports within the meaning of Section 17.23, Code 1954, as amended by Fifty-seventh G. A., Chapter 56, Section 3. It further appears they are "technical services" within the meaning of Section 328.12(4), Code 1954, and may therefore be given free distribution as therein provided.

2. From an examination of the sample submitted with your letter, it appears that the Iowa Airport Directory is not a reprint of statutes or rules nor is it a departmental report within the meaning of quoted statutes. It may, therefore, be given free under Section 328.12(4) for the reason that it contains technical data pertaining to navigation, runway orientation, elevation, and landing obstructions.

3. From an examination of the sample submitted with your letter, it appears that the "Notice Poster" is not a reprint of statutes or rules for the reason that it states the effect of the statute rather than directly quoting the statute. Since it is obviously not a departmental report, you are advised that the amendments of the Fifty-seventh General Assembly do not prevent continuation of free distribution.

4. From an examination of the samples submitted you are advised that sunrise-sunset charts, radio frequency charts, and visual navigation aids are not reprints of statutes or rules nor are they departmental reports and may, therefore, be continued on free distribution under Section 328.12(4).

5. The fifth category of publication described in your letter is subject to the provisions of Fifty-seventh G. A., Chapter 56, Section 2 as it is expressly described by you as consisting of "copies of statutes. . .and rules and regulations". Therefore, under the terms of said section, materials consisting of copies of pertinent statutes may be distributed free to:

(a) Public officers and
(b) Purchasers of licenses

Further, free distribution of materials consisting of copies of rules and regulations may be made to:

(a) Public officers,
(b) Purchasers of licenses, and
(c) Registered landing areas in this state as expressly required in Section 328.12(3), supra, as part of the procedure necessary to make such rules take effect.

Distribution of copies of statutes and rules to any other recipients than specified above must be charged for under the provisions of Fifty-seventh G. A., Chapter 56, Section 2.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

MEDICAL EXAMINERS:
1. A second examination under Sec. 147.81 must conform in scope to the definition of "an examination" contained in Sec. 148.3.

2. "Second examination" may not be given without fee after expiration of the statutory period expressly provided in Sec. 147.81.

October 11, 1957

Mr. Ronald V. Saf
Executive Secretary
Board of Medical Examiners
Department of Health
L o c a l

Dear Mr. Saf:

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

"The board of medical examiners respectfully request a letter opinion in reply to several questions that do not appear to be specifically answered by Section 147.81 of the 1954 Code of Iowa.

"An applicant for licensure failed one subject in his first medical examination before the board and did not request a second examination within 14 months after the first examination.

"1. May the board re-examine the above applicant only in the subject in which he failed in the first examination?

"2. Is the board required by statute to collect an additional $25.00 license examination fee from the above applicant?"

Section 147.81 provides as follows:

"Second examination. Any applicant for a license who fails in his examination shall be entitled to a second examination without further fee at any time within a period of fourteen months after the first examination."

Section 140.3 provides in pertinent part as follows:

"Each applicant for a license to practice medicine shall:

"* * * * * *

"2. Pass an examination prescribed by the medical examiners in the subjects of anatomy, chemistry, physiology, materia medica and

57-10-19 k

> and therapeutics, obstetrics, pathology, theory and practice, and surgery; but in the subjects of materia and therapeutics, and theory and practice, each applicant shall be examined in accordance with the teachings of the school of medicine which he desires to practice. The board of medical examiners may require written, oral and practical examinations of the applicant. . ."

From the quoted sections, it is apparent that what an applicant must do to qualify for license is "Pass an examination". The specific subjects to be covered in the examination are expressly set forth in Section 148.3. It is of considerable significance that the statutes refer to an examination rather than a series of examinations. Since Section 147.81 refers expressly to "a second examination" rather than to "partial examination" or "re-examination in subjects failed" it is my impression that such second examination must be "an examination" of the full scope of subject matter defined in Section 148.3 and not merely a portion or specific subject area constituting part of "an examination" thereunder. If only a partial examination were intended the legislature presumably would have referred to it as such as was done in Section 147.41. If the legislature had intended to require only re-examination in subjects failed it presumably would have so specified as it did in Section 146.16 on Basic Science Examinations.

Thus, in answer to your questions:

1. Second or subsequent examinations should be of sufficient scope to constitute "an examination" as defined in Section 148.3.

2. Since the fourteen-month period prescribed by Section 147.81 has expired in the fact situation you describe the applicant is entitled to no exemption from fee.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

TOWNSHIP POLLING PLACES: Situations in which Section 49.10 on polling places in Courthouses apply analyzed.

October 11, 1957

Mr. James W. Hudson
Pocahontas County Attorney
Pocahontas, Iowa

Dear Sir:

Receipt is acknowledged of your letter of October 3 as follows:

"I would like to have an opinion from your office in regard to the following situation: As of July 1, 1957, the Pocahontas Community School District was organized resulting in the consolidation of considerable territory surrounding the Town of Pocahontas. The new School Board is in the process of disposing of the country schools and school sites no longer needed. In three of the affected townships which surround Pocahontas, the sale of these school sites will deprive said townships of a polling place for elections. The township trustees of the three townships are considering the acquisition of a school house and site as a township hall pursuant to Chapter 360 of the 1954 Code of Iowa. The sole purpose in acquiring these sites would be for a polling place so that the various townships could vote separately as a unit. They do not seem to want to have the Board of Supervisors under Chapter 49 consolidate voting precincts.

"The Town of Pocahontas is located within Center Township, which is an area consisting of approximately five sections of land. The three townships affected by this reorganization all border on Center Township. Of course, voters in Center Township precinct all vote at the Courthouse in Pocahontas. My particular question is whether or not under Section 49.10 of the 1954 Code of Iowa, the Board of Supervisors can provide polling places in separate rooms in the Courthouse for each of the three townships affected so that they would still be voting as a separate precinct. Inasmuch as time is of the essence due to the current sale of school sites by the School Board, I would like at least an informal opinion at your earliest convenience."

57-10-26 V

Section 49.10, Code 1954, provides as follows:

"Polling places for certain precincts. Polling places for precincts outside the limits of a city, but within the township, or originally within and set off as a separate township from the township in which the city is in whole or in part situated, and a polling place for a township which entirely surrounds another township containing a city, may be fixed at some room or rooms in the courthouse or in some other building within the limits of the city as the board of supervisors may provide."

Tables appearing at the back of the Session Laws of the Fifty-Sixth and Fifty-Seventh General Assemblies reveal no amendments to Section 49.10 subsequent to issuance of the 1954 Code.

Prior opinions annotated under Section 49.10 I. A. C. deal only with situations where the city is located in the same township.

It therefore appears that provision of polling places in rooms in the Courthouse under Section 49.10 is limited to the situations specified therein which are:

1. Precincts outside the city but within the same township.
2. Precincts in townships which were at some time in history part of the township in which the city is located.
3. Precincts in a township which entirely surrounds the township in which the city is located.

Under the facts stated in your letter, it appears that only possibility number 2 might effect the desired result. Whether or not it does must be ascertained from your local historical records.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

MINORS: The presumption of legitimacy of a child born in wedlock is theoretically rebuttable but for practical purposes is as nearly conclusive as a presumtion may constitutionally become.

October 11, 1957

Mr. Newt Draheim
Wright County Attorney
Clarion, Iowa

Dear Sir:

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

"This office is requesting your opinion regarding the following matter:

"FACTS: That a woman conceived during June, 1955, and the man responsible terminated the acquaintanceship upon learning the woman was pregnant; that approximately five (5) months after conceiving the woman married a man just released from the Armed Services; that as a result of the conception of June, 1955, a child was born on March 7, 1956, and that the child was never legally adopted.

"QUERIES: (1). Is it possible to distinguish between your opinion of August 7, 1945, whereby, you state in answer to question #3 in said opinion that there is a possibility of judicial determination of parentage and State vs. Shoemaker, 62 Iowa 343, which states on page 344 that no judicial determination is possible because husband conclusively presumed to be father? (2). Could an action be brought against the natural father pursuant to Iowa Code Chapter 675 (1954), notwithstanding the above cited case?"

In answer to your first question, the distinction between the case decision and prior opinion of this office cited in your letter appears to be that the case decision was in a proceedings wherein the State was plaintiff. The later decision in Wallace v. Wallace, 137 Iowa 37, cited in the opinion at page 77 of the 1946 Report of this office (August 7, 1945) was an annulment proceeding brought by the husband under what is now Section 598.19(2) of the Code. It would, therefore, appear that all the decision in the 62 Iowa case stands for is that the State may not question the legitimacy of an offspring born in wedlock.

In answer to your second question, Section 675.8 provides as follows:

> "Who may institute proceedings. The proceedings may be brought by the mother, or other interested person, or if the child is or is likely to be a public charge, by the authorities charged with its support. After the death of the mother or in case of her disability, it may also be brought by the child acting through its guardian or next friend."

Thus, the simplest and most direct answer to your question is that an action under Chapter 675 may be brought because the statute expressly authorizes it. However, in view of the presumption of legitimacy of children born in wedlock the bringing of such action, although authorized, would appear likely to prove in most, if not all, instances a waste of time. The presumption of legitimacy is not conclusive despite the dicta used in some case decisions. Under a constitution providing for due process there can, strictly speaking, be no such thing as a "conclusive" presumption. However, in the type of case at hand the strong presumption coupled with the inherent difficulty in producing proof of the clear convincing nature necessary to rebut it makes the presumption conclusive in effect except for purposes of theoretical discussion. The type and degree of proof necessary to rebut the presumption can be speculated upon for purposes of constructing a hypothetical illustration but will probably never be available in an actual case.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

CONSERVATION COMMISSION: fees received under Act later declared unconstitutional.

1. Persons paying fees with notation on check of 'under protest' are not entitled to a refund.

2. Persons paying fees without protest are not entitled to a refund.

3. No reimbursement should be made by the Conservation Commission. A claim with the Legislature can be made at the option of the claimant.

October 11, 1957

Mr. Bruce F. Stiles
Conservation Director
State Conservation Commission
L o c a l

Dear Sir:

In your letter of March 19, 1957, you set out the following facts and ask the following questions:

> "In March 1954 The State Conservation Commission, after discovering a lack of uniformity in fees charged for commercial dock permits under the authority of Section 111.4 Code 1954, took the following action as shown by this excerpt from the commission meeting of March 22 and 23, 1954:
>
> "'Fees for Boat Docks
>
> "'Mr. Rush explained that in the past in some cases a charge of $25.00 has been made for commercial boat dock permits, and in other instances no charge has been made for such dock permits. Mr. Rush cited the law whereby a maximum of $25.00 and a minimum of $10.00 is to be charged for structures used for commercial purposes. He explained that the Commission has the power to establish the fees within the range of a minimum of $10.00 and a maximum of $25.00 at its own discretion.
>
> "'Mr. Rush further explained that the number of commercial boats operated ranges from 3 to 66, and he felt a graduated scale, depending upon the number of boats involved, should be charged for such docks.
>
> "'After considering the fees to be charged for commercial boat docks at length, it was moved and seconded that a dock permit fee of $10.00 be charged the commercial boat operator with 10 row

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boats or less; and that a dock permit fee of $25.00 be charged commercial operators with more than 10 row boats.

"'AYE: Dinges, Hannan, Pearson, Stanton, Trost

"'NAY:

"'ABSENT: Foster, Reynolds

"'Motion Carried'

"In accordance with the foregoing action of the commission this department proceeded to license commercial docks on the basis of the fees set forth above. This action was immediately challenged by four commercial boat operators, namely, Cecil J. Nelson, Albert Gregerson, Dan Hoeman, and H. C. Beard, and they brought action against the State testing the constitutionality of Section 111.4.

"The case was not tried until June 27, 1956, and at that time Judge Fred M. Hudson ruled parts of Section 111.4 to be unconstitutional. A copy of the courts decision is enclosed herewith.

"During the period of litigation the plaintiffs deposited the amount of their annual dock permit fees with the Clerk of the Court to be returned to them if their plea was sustained or to be paid to the Conservation Commission if they lost their case. Since the ruling of the court sustained the plea of the plaintiffs the Conservation Commission did not collect these fees.

"During the period until June 27, 1956, the Conservation Commission continued to enforce Section 111.4 and to collect fees in accordance with the Commission action of March 22, 1954 from other commercial construction permits. Several commercial operators paid their dock fees 'under protest' and so indicating their protest by a notation on their check.

"The Conservation Commission has now received a request for refund of fees paid for commercial dock permits from Mr. Wally Mendenhall, operator

> of Clements Cottages on Lake Okoboji, who was one of the commercial operators who paid his fee 'under protest'.
>
> "The State Conservation Commission now respectfully requests the opinion of the State Attorney General as to the following:
>
> "1. Are persons who paid fees 'under protest' for commercial dock permits prior to June 27, 1956 entitled to a refund of fees paid to the Conservation Commission?
>
> "2. Are other operators who paid fees for commercial dock permits without protest entitled to a refund?
>
> "3. If the answer to either (1) or (2) above is in the affirmative for what period are they entitled to refunds?
>
> "4. If operators are entitled to refunds are these refunds to be paid through legislative claims or by reimbursement from this department."

In answer to your first question I wish to bring to your attention the following quotation from 48 A. L. R. 1386:

> "Since the recognized rule is that there can be no recovery in the case of a voluntary payment, and that there can be a recovery when the payment is involuntary, the main issue in the cases dealing with the question appears to be whether the payment of the tax was voluntary or involuntary. It has been generally held that a mere protest against paying, in the absence of any fraud or duress, is a voluntary payment, and that one who pays a tax in such a manner cannot recover the amount paid, even though the law is unconstitutional."

The answer to your first question is in the negative.

The answer to your second question is in the negative. In the absence of fraud, deceit, duress or mistake of fact, the money cannot be recovered back (Bailey v. Town of Paulina, 69 Iowa 463, Kraft v. City of Keokuk, 14 Iowa 86, Espy v. Town of Fort Madison, 14 Iowa 226).

No answer is required to your third question as questions (1) and (2) are answered in the negative.

I am of the opinion that no reimbursement from your Department can be made upon the facts outlined in your letter. The filing of a claim with the Legislature is a legal remedy granted by the Legislature and can be pursued at the option of any alleged claimant.

Very truly yours,

JAMES H. GRITTON
Assistant Attorney General

JHG:MKB

CLERK OF GRAND JURY; The [redacted] positions of Clerk of the Grand Jury and secretary to County Attorney are not incompatible and the person occupying both positions may be paid compensation for these separate services; the rate for serving as Clerk of the Grand Jury is fixed by §770.19, Code 1954.

October 14, 1957

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

Dear Sir:

This will acknowledge receipt of yours of the 11th inst. in which you submitted the following:

> "Since I was elected County Attorney of Wayne County in the fall of 1954, I have had a number of cases which I took before the Grand Jury. In each of those cases, my secretary acted as clerk of the Grand Jury. The county hires my secretary and pays her compensation. Each time she acted as clerk of the Grand Jury, I turned in a claim for her compensation as allowed by law, which claims were allowed and paid.
>
> "The last time, however, that I turned in a claim so that she could receive her compensation as the clerk of the Grand Jury the claim was turned down and compensation refused. The reason they gave was that she was already holding the office of Secretary to the County Attorney and that she could not perform the duties as secretary to the County Attorney and also act as clerk of the Grand Jury and receive compensation for both at the same time.
>
> "With the above in mind, I have the following questions:
>
> "1. Are the positions of clerk of the Grand Jury and secretary to the County Attorney, when the latter is paid by the county, incompatible?
>
> "2. If the above question is answered in the negative, then is there anything to prevent the County Board of Supervisors from paying the

57-10-23

> secretary to the County Attorney when she acts as such on any given day and also pay her for acting as clerk of the Grand Jury on the same day?"

In reply thereto I advise as follows:

1. In answer to your question #1, I am of the opinion that the positions of the clerk of the Grand Jury and secretary to the County Attorney are not incompatible. Incompatibility is a rule applicable to offices. The position of the clerk of the Grand Jury is a statutory office. The secretary of the County Attorney is an employee.

2. In answer to your question #2, I would advise you that your County Board may legally pay the secretary to the County Attorney when she acts as such and also pay her for the time that she actually serves the Grand Jury as clerk on the same days. The compensation of the clerk of the Grand Jury is provided by Section 770.19, Code 1954, which states:

> "770.19 Compensation. Such clerk shall receive compensation at the rate of eight dollars per day for time actually and necessarily employed in the performance of the duties prescribed in this chapter."

According to this statute the clerk is paid at the rate of $8.00 per day according to the time that actually and necessarily is given to the performance of the clerk's duties. Her time otherwise may be compensated for services as secretary.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

AGRICULTURE: ANIMAL INDUSTRY AND BRUCELLOSIS. The words "It shall be unlawful" appearing in §164.11 as amended by Ch. 99, Acts 57th G. A., are sufficient to place such amended section within the purview of §687.6 and §687.7, making performance of any act prohibited by statute an indictable misdemeanor where no specific penalty for violation thereof is set out.

October 14, 1957

Mr. A. L. Sundberg, Chief
Division of Animal Industry
Department of Agriculture
B u i l d i n g

Dear Sir:

Receipt of your letter dated September 24, 1957, is acknowledged, the same being set out in part hereunder:

> "It has been called to the attention of this office several times during the past few days that Chapters 98 and 99, Acts of the regular session of the 57th General Assembly referred to as Senate File 64 and 65 carries no penalty clause.
>
> "Please review said chapters and give us your opinion if there is any law on the statute books of Iowa to which this amended section of the brucellosis law can be connected whereby the Department of Agriculture can press charges if a violation should occur."

Since Chapter 98 of the Laws of the Fifty-seventh General Assembly does not contain material of criminal nature, presumably what is meant by your letter is that Section 164.11 of the Code, as amended by Chapter 99 of the Laws of the Fifty-seventh General Assembly, carries no penalty clause and as such is perhaps unenforcible.

In response to your inquiry, your attention is directed to Section 164.11 of the 1954 Code of Iowa, as amended by Section 1 of Chapter 99, Acts of the Fifty-seventh General Assembly, for convenience set out in part hereunder:

> "164.11 Conditions precedent to sale - exceptions. It shall be unlawful for any person to

57-10-24 X

sell or transfer ownership of any bovine animal unless it is accompanied by a negative brucellosis test report issued by an accredited veterinarian, conducted within thirty days. * * * *" (Emphasis ours)

Your attention is further directed to Sections 687.6 and 687.7, 1954 Code of Iowa, reading as follows:

"687.6 Prohibited acts - misdemeanors. When the performance of any act is prohibited by any statute, and no penalty for the violation of such statute is imposed, the doing of such an act is a misdemeanor.

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

It is the opinion of this office that the latter two Code sections provide an enforcible penalty applicable to the laws and regulations made under Chapter 164 to which you refer, and, indeed, it must be presumed that this is the penalty the Legislature intended for the offenses concerned since it did not take specific action in the matter.

This reasoning will, of course, apply with equal force to the similar language set out at Section 7, Chapter 99, Acts of the 57th General Assembly, upon its taking effect July 1, 1960, assuming no legislative changes intervene.

You will note that Section 687.7 requires a punishment in excess of that which may be meted out by a justice of the peace and, hence, enforcement must be by County Attorney Information or Grand Jury Indictment.

Trusting this has answered your inquiry, I am

Very truly yours,

FREEMAN H. FORREST
Assistant Attorney General

FHF:MKB

HEADNOTE: Property Taxes: Right of a taxpayer to obtain refund of real estate taxes paid where real estate listed as containing more acres than was the fact; cannot obtain refund.

October 14, 1957

Mr. Francis Fitzgibbons
County Attorney
602 Central Avenue
Estherville, Iowa

Dear Mr. Fitzgibbons:

This is to acknowledge receipt of your letter dated September 25, 1957, wherein you request an opinion as to whether the Board of Supervisors is required to refund real estate taxes paid by a taxpayer during the years 1951, 1952, 1953, 1954, 1955, and 1956, where the land was listed as containing 143.56 acres and as a matter of fact said tract contained only 129.95 acres.

Section 445.60 entitled: "Refunding erroneous tax," provides:

> "The board of supervisors shall direct the treasurer to refund to the taxpayer any tax or portion thereof found to have been erroneously or illegally exacted or paid, with all interest and costs actually paid thereon."

As stated in your letter there is an opinion by the Attorney General of Iowa regarding this question. This opinion was written on June 28, 1922, and is found at page 123 O. A. G. 1922. Enclosed please find two copies of that opinion.

Of course, the taxes for 1951 are barred by the statute of limitations. See Brown v. Painter, 1876, 44 Iowa 368; Scott v. Chickasaw County 1880, 53 Iowa 47, 3 N.W. 820.

It seems that this property was listed and described pursuant to government surveys. I have not read all of the cases set forth in Iowa Code Annotated section 445.60. I suggest that the rules should be as set forth in the above A. G. O. copy of which is enclosed all to the effect that the taxpayer is not entitled to a refund of taxes paid.

If you have any further questions, please let me know.

Very truly yours,

Francis J. Pruss.

FJP:bmc

57-10-25

AGRICULTURAL EXTENSION COUNCIL: Language contained in §3 and §5, Chap. 107, Acts 56th G. A., preclude use of Agricultural Extension Council as a "society" for Fair management within meaning of Chap. 175, 1954 Code.

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

Dear Sir:

Your letter of September 25, 1957, is set out hereunder:

"The Wayne County Board of Supervisors of this County being dissatisfied with past Fair Management has worked out a plan with the Local Extension Council. They propose to enter into an agreement setting forth the purposes of 174.13 of the 1954 Code of Iowa and lease to the Extension Council the Fair Grounds giving said Council the control and management thereof, subject to the agreement and the laws of Iowa.

"The Extension Council will then sublease the Grounds, from year to year, to the presently existing Fair Association or to some other 'Society' qualified to receive state aid.

174.15 (R'55)?

"Is there anything in Section 175.15 or any other provision of the 1954 Code of Iowa that will render this action illegal? Would the Society qualify for State Aid under those conditions?"

In reply thereto your attention is directed the the following statutory authorities set out in whole or in part hereunder. Chapter 107, Acts of the 56th General Assembly, states:

"Sec. 3. Definition of terms. Whenever used or referred to in this chapter unless a different meaning clearly appears in the context (1) 'county agricultural extension district' hereinafter referred to as 'extension district' means a governmental subdivision of this state, and a public body corporate organized in accordance with the provisions of this chapter for the purposes, with the powers, and subject to the restrictions hereinafter set forth; * * * *"

10-27 X

"Sec. 5. County agricultural extension council. There shall be elected in each extension district and 'extension council' consisting of one elected resident member from each of the townships. * * * *"

"Sec. 11. Limitation on powers and activities of extension council. (a) The extension council shall have for its sole purpose the dissemination of information, the giving of instruction and practical demonstrations on subjects relating to agriculture, home economics, rural and community life and the encouragement of the application of the same to and by all persons in the extension district, and the imparting to such persons of information on said subjects through field demonstrations, publications, or other media.

"(b) The extension district, its council, or a member or an employee as a representative of either one or the other shall not engage in commercial or other private enterprises, * * * *"

"(e) The extension council and its employed personnel may cooperate with, give information and advice to organized and unorganized groups, but shall not promote, sponsor, or engage in the organization of any group for any purpose except the promoting, organization and the development of the programs of 4-H clubs." (Emphasis ours)

In view of the singular purpose set out in Section 11 (a) above and the attendant restrictions upon promotion and any form of commercial activity set out in the statute it is the opinion of this office that the Legislature did not contemplate employment of agricultural extension councils in a manner suggested by the Wayne County Board in your letter above.

The Agricultural Extension Districts are creatures of statute, and as such are subject to the familiar rule that their powers must be strictly construed within the scope of the laws which create them. (Logan v. Pyne, 43 Iowa 522, Van Eaton v. Town of Sidney, 211 Iowa 986, Onawa v. Mona Motor Oil Co., 217 Iowa 1042, ad infinitum.)

Since your first question has been answered in the negative, presumably there is no reason to consider your second.

Trusting this has answered your inquiry, I am

Very truly yours,

FREEMAN H. FORREST
Assistant Attorney General

FHF:MKB

October 18, 1957

Department of Banking
500 Central National Building
Des Moines, Iowa

Gentlemen:

Re: Credit Unions

Reference is made to your recent inquiry to this Department in which you ask the following question:

> "Do credit unions qualified under Chapter 533 of the 1954 Code of Iowa have the authority to purchase real estate and construct improvements thereon for occupancy as an office building?"

In answer to your inquiry, there seems to be no previous decisions by this office or by the Supreme Court of this state concerning this matter. The powers of credit unions are specifically set forth in Chapter 533, and Section 533.4, subsections 10 and 11, are the only ones which may be considered in this regard. They read as follows:

> "533.4 Powers. A credit union shall have the following powers to:
>
> " ******
>
> "10. Purchase, hold, and dispose of property necessary and incidental to its operation provided, however, that any property acquired through foreclosure shall be disposed of within a period not to exceed ten years.
>
> "11. Exercise such incidental powers as may be necessary or requisite to enable it to carry on effectively the business for which it is incorporated."

57-10-28

The language "Purchase, hold and dispose of property necessary and incidental to its operation" is identical with the language contained in the Federal Credit Union Act. The question of the right of Federal credit unions to purchase real estate was considered by the Director of the Credit Union Section of the Farm Credit Administration, and he wrote as follows:

> "Purchase of Real Estate
>
> "It will be noted that by this provision Federal credit unions are not given the general power to invest their funds in such property, but the power granted is limited to the acquisition of property that is necessary and incidental to the operations of the credit union.
>
> "As the purchase of real estate is ordinarily burdensome and unnecessary to the operation of a credit union in rendering adequate service to its members, each transaction of this kind should be carefully considered in order to determine whether it is essential to the operation of the credit union and thereby complies with the limitations placed upon the exercise of this power under the Federal Credit Union Act.
>
> "In order to be of assistance to Federal credit unions in ascertaining whether any proposed purchase of real estate complies with the requirements of the Act, it is requested that Federal credit unions submit to the Farm Credit Adminstration all necessary facts relating to any proposal to purchase real estate before entering into any agreement with regard thereto. (Milton Rygh, Asst. Dir., C. U. Sec., F. C. A., Circular Letter No. 8, dated Oct. 23, 1937)"

The Iowa Credit Union Act as contained in Chapter 533 states as follows: "The superintendent of banking shall be charged with the execution of the laws of this state relating to credit unions." Again, substantially the same duty has been placed by the Congress upon the Governor of the Farm Credit Administration.

You have also submitted to me the prescribed articles of incorporation and bylaws for credit unions, being your form C-896, which I understand is used by all of the credit unions in the state of Iowa. Under these articles and bylaws the board of directors has no authority to purchase real estate or construct improvements for occupancy as an office building. In order to give the board of directors such authority it would be necessary that their articles and bylaws be amended at a regular membership meeting by an affirmative vote of three-fourths of their members and that such amendment must be approved by the Superintendent of Banking.

It is therefore the opinion of this office that before any credit union can purchase real estate and construct improvements thereon for occupancy as an office building it must (1) amend its articles or bylaws with the approval of the Superintendent of Banking to show such authority, (2) it must request said authority and submit to your Department full information concerning the proposed purchase or proposed construction so you can determine whether it would be essential to their operation to purchase and hold such property, and (3) the Department should approve or deny said request.

Very truly yours,

NORMAN A. ERBE
Attorney General of Iowa

DON C. SWANSON
Assistant Attorney General

DCS:MKB

October 21, 1957

Mr. E. P. Tobias
Town Clerk
Dike, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 18th inst. in which you submitted the following:

"We are writing you for information in regard to the time of filing nomination papers.

"Our town has a population of 512.

"Section 363.11 - 1954 Code states that 4 weeks prior to the election file with the clerk etc. I would understand it then that a candidate would have to file before 8 o'clock a. m. of Oct. 8, 1957.

"Am enclosing a copy of nomination papers for Woodrow W. Parker for Mayor and there were four other nomination papers just like this, but for four councilmen.

"They first filed their papers on October 7, 1957 at 10:15 a. m. The affidavit part of the nomination papers were <u>not filled out and notarized</u>, so I gave the nomination papers back to Andy Agena who filed them first and to have them filled out and notarized and they were not brought back to be refiled until 11:00 p. m. on Oct. 8, 1957.

"Our Mayor thinks that the refiling was too late, and they should not be put on the ticket.

"What I would like to know is, if I should put their names on the ticket or not?

"Awaiting an early reply so that I can get the tickets printed up before election."

57-10-29 X

In reply thereto I would advise you that the foregoing nomination paper could legally be filed any time on the 8th day of October and the nominee's name placed upon the ticket.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

SOM 8-57-11202

IOWA STATE HIGHWAY COMMISSION

AMES, IOWA

Ames, Iowa

UNOFFICIAL OPINION:
STOP SIGNS - Redesignation of county roads as through highways since repeal of county trunk system.

October 21, 1957

Robert S. Bruner
Carroll County Attorney
118½ W. 5th Street
Carroll, Iowa

Dear Mr. Bruner: Re: County Trunk Roads

This will acknowledge your letter of October 17, in which you advise that different boards have indicated that under Chapter 159 of the 57th General Assembly, there should be a redesignation of all county roads.

As you note, Section 321.351 which designated county trunk roads as through highways was repealed. However, those stop signs now in place on formerly designated trunk roads or those in place by proper resolution under Section 321.345 are legal stop signs, and under Section 4.1(1) would not have to be redesignated. However, as a practical matter, former trunk roads will sometime in the future lose their identity either because the records in the counties are lost or the records become obsolete. At a meeting of the county officers in Des Moines, on October 3, I suggested to the supervisors that they review their present county road system and, perhaps, redesignate by resolution all those roads which they desire as through highways for proper placement of stop signs. This, of course, they can do under Section 321.345, and I was thinking in particular of those roads formerly designated as trunk roads. It would not be necessary to redesignate those already covered by resolution. To me, this is the only practical solution to eliminate any confusion in the future as to whether or not a road was a trunk road and therefore a through highway by legislative mandate.

57-10-30 X

IOWA STATE HIGHWAY COMMISSION

AMES, IOWA

October 21, 1957

Re: County Trunk Roads

Trusting this will aid you, I remain

Very truly yours,

C. J. Lyman
Special Assistant Attorney General
for Iowa State Highway Commission

CJL:MS

IOWA STATE HIGHWAY COMMISSION

AMES, IOWA

Ames, Iowa

UNOFFICIAL OPINION:
BUDGET - Secondary Road Budget
provided by 57th G.A.

October 21, 1957

Gifford Morrison
Washington County Attorney
Washington, Iowa

Dear Mr. Morrison:

I have your letter of September 19, requesting an opinion on the new road budget law, Chapter 141 of the Laws of the 57th General Assembly.

I am enclosing a copy of my memorandum opinion to our secondary road department covering the same subject.

Answering briefly, Mr. Benn's letter to your office, the weed clearing fund, of course, could not be included as part of the secondary road fund. Expenditures for any purpose may not be exceeded by ten per cent (10%) and still comply with provisions of the law. If I correctly understand the second question, the proposed expenditures would be those from the combined sources of revenue under Section 1 of Chapter 141 of the Acts of the 57th General Assembly. In other words, the expenditures would be shown to be those expenditures from the secondary road fund.

Trusting this answers your inquiries, I am

Very truly yours,

C. J. Lyman
Special Assistant Attorney General
for Iowa State Highway Commission

CJL:MS

Encl.

57-10-31 X

H.E. Merrill Sept. 30, 1957

C. J. Lyman

Secondary road budget

You have requested an opinion on the following:

1. Can or should the receipts from the road clearing fund be included with other receipts?

2. Can or should a portion of the general fund be shown in the receipts to cover payments that will be made from the general fund?

3. Can a budget be prepared with certain sums held as balances or reserved for contingencies within limitations prescribed by the Commission to overrun or overexpend certain items in the budget?

I will answer the above in the order given.

1. Section 317.19 of the Code of Iowa allows the Board of Supervisors to make levy for a "road clearing fund", and this fund is to be used for no other purpose except to cut, burn or otherwise destroy weeds, undergrowth brush between the fence rows of county secondary roads.

Section 1 of Chapter 141 of the 57th G.A. sets out what the budget shall contain, including estimates of revenues from all other sources for secondary road purposes. Section 3 of Chapter 139 of the 57th G. A. sets out what the secondary road fund consists of and section 4 of that same chapter sets out the purposes for which the fund shall be used. It would appear to me that the "road clearing fund" is a separate and distinct fund from the secondary road fund and furthermore, the funds collected from the road clearing fund are to be used exclusively for one purpose, and if these funds are mingled with other secondary road funds they lose their identity. Therefore, if they lose their identity in the secondary road budget, they have no place in that budget. This is the only objection that I can see to placing them in the budget.

2. The general fund of the county is governed by the local budget law or Chapter 24 of the Code of Iowa. Any funds so budgeted should appear in the general fund. Section 1 of Chapter 141 of the 57th G. A. specifically refers to "secondary road budget", "secondary road purposes" and "expenditures from each road fund". If a county prepares a budget having its general fund separate and distinct from its secondary road fund, it is my opinion that a portion of the general fund should not be shown in the secondary road fund.

3. Section 4 of Chapter 141 of the 57th G. A. is very specific in that it states in part, "No county shall expend from a secondary road fund for <u>any purpose</u>, funds in excess of the amount provided for <u>such purpose</u>

in the budget or amended budget***".

Section 3 of Chapter 141 allows the Board of Supervisors to amend the budget. I think it is very important to consider Chapter 24 of the Code of Iowa in relation to this problem. The purpose of the budget is to apprise taxpayers of the proposed expenditures. It must be remembered that the taxpayer is the one who furnishes the necessary funds for these expenditures. Chapter 24 of the Code, and in particular Section 24.9, sets out the budget estimates may be amended and increased as the need arises. If the items are reduced the taxpayer is not injured, but if the items are increased, the taxpayer is injured and in order to fully comply with Chapter 24, it would be necessary to have a hearing in the county on the amended items. See OAG 1932 page 115, 262. The budget law gives the taxpayer the right to know in advance the amount that the municipality is going to ask for levies and the purpose for which funds are to be expended. This so called latitude is not provided for in the secondary road budget law or under the local budget law. In both instances it specifically sets out that the budgets may be amended by following certain procedures. Furthermore, any attempt to allow latitude by a certain percentage would be legislation on the part of the county or the Commission, and I am sure that without citing any authorities we are all fully aware that they have no such authority. Furthermore, what would be the latitude, 1%, 5%, 10%?

Under Section 24.5 of the Code the estimates must be fully itemized and classified to show each particular class of proposed expenditure. Under Section 24.6 the County Board may include in its regular budget an estimate for an emergency fund. Transfers of money may be made from this emergency fund upon written approval of the State Appeal Board. Section 6 of Chapter 141 of the 57th G.A. specifically sets out, "Nothing in this act shall contravene or effect the provisions of Chapter 24 of the Code".

For the reasons set out above, it is my opinion that the secondary road budget cannot be prepared so that certain sums are held as balances or reserve for contingencies. The purpose of the budget is to inform the taxpayer and the taxpayer is entitled to know the proposed expenditures without additions of percentages for perhaps greater expenditures.

CJL:js

cc/John Butler

October 22, 1957

Mr. Edwin A. Getscher
Fremont County Attorney
Hamburg, Iowa

Dear Sir:

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

> "Section 69.2 provides that every civil office shall be vacant upon ----- subsection 3 the incumbent ceases to be a resident of the County for which he was elected. In August, 1957, the auditor of Fremont County who is a woman and who resided at Sidney married a county official in Shelby County. Since her marriage she has lived continuously in Fremont County while her husband continues to live in Shelby County. She has a daughter ten years old who is attending school in Fremont County. Her mail address, telephone, and voting residence are all in Fremont County. All of her household goods are in Fremont County; she eats, sleeps and actually lives in Fremont County. While her husband maintains bachelor quarters and lives in Shelby County, she has never been in his home.
>
> "Question: whether her marriage to a man who maintains his home in another county would cause her to cease to be a resident of Fremont County so that she could not serve as auditor of Fremont County, Iowa."

In reply thereto I advise as follows. The statute under which this question arises is Section 69.2, subsection 3, providing:

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

57-10-32 X
57-10-32

> "3. The incumbent ceasing to be a resident of the state, district, county, township, city, town, or ward by or for which he was elected or appointed, or in which the duties of his office are to be exercised."

Residence as so used means a residence entitling one to vote or to hold office. In State v. Moodie, 258 N. W. 558, the Supreme Court of North Dakota defining such term as used in the Constitution of North Dakota qualifying the right of a person to be governor stated:

> "The term 'resided,' as used in the Constitution, means having had a legal residence; that is, a residence entitling one to vote or to hold office in the state of North Dakota. * * * *"

It is the rule in Iowa that the term residence as used in election statutes means domicile. Dodd v. Lorenz, 210 Iowa 513, 231 N. W. 422. And domicile by operation of law is the domicile attributed to a person independent of his own intention. Adams v. Smith, 192 Iowa 78, 182 N. W. 227, 16 A. L. R. 1286. While the husband's residence is in law deemed to be that of his wife, this is a rebuttable presumption. 28 C. J. S., title Domicile, Section 16b states:

> "Domicile of married man where family resides. The domicile of a married man is generally presumed to be at the place where his wife or family resides, provided the family residence is a permanent home, and not a mere temporary residence for transient purposes. This presumption is by no means conclusive and may be rebutted by facts showing a contrary intent; and is not recognized by some authorities. It does not hold where the husband pays only occasional visits to his wife and family, and ceases where a separa-

has taken place.

> "Wife's domicile as husband's. In the absence of affirmative evidence to the contrary, the presumption is that a wife's domicile or legal residence follows that of her husband, and will continue after his death; the domicile of the husband is prima facie the domicile of the wife."

However, under certain circumstances the wife may acquire a domicile of her own separate and apart from her husband. In 28 C. J. S., paragraph 12d, it is stated:

> "As a general rule, the law, following out the theory of an identity of person, fixes the domicile of a wife by that of the husband, and denies to her the power of acquiring a domicile of her own separate and apart from him; the presumption to this effect is stated in §16 b infra. However, it has been declared that, under modern statutes changing the status of married women and departing from the common-law theory of marriage, there is no reason why a wife may not acquire a separate domicile for every purpose known to the law; that a wife may acquire a domicile separate and apart from her husband 'under certain conditions,' and 'in appropriate circumstances,' as in some cases of separation, discussed in succeeding subdivisions of this section; and that she may do so 'whenever it is necessary or proper.' Further, the wife can acquire a new domicile on the termination of the marriage in any way; but until she does so she retains the domicile which she had at the time of such termination."

It appears that the County Auditor is a woman and while occupying that office married a resident of Shelby County, Iowa, and since that time she has lived continuously in Fremont County while her husband continues to live in Shelby County and she maintains a voting residence in Fremont County. While it is said in In re Estate of Jones, 192 Iowa 78, 81, that,

> "Domicile by operation of law is that domicile which the law attributes to a person, independent of his own intention or action of residence. This results generally from the domestic relations of husband and wife, or parent and child. Hindorff v. Sovereign Camp, W. O. W., 150 Iowa 185; In re Guardianship of Benton, 92 Iowa 202; Jenkins v. Clark, 71 Iowa 552."

and while presumptively she acquires the domicile of her husband within the rules of law cited above, it is my opinion she had and retains her own domicile permissible under those rules.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

October 24, 1957

Mr. Charles Mather
Sac County Attorney
Sac City, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 22nd inst. in which you submitted the following:

> "The Sac County Board of Supervisors desire to enter into an agreement with a land owner in Sac County for the purchase of gravel at a stipulated price to be removed at some future time.
>
> "In order to meet competition from private parties the board proposes to make a partial advance payment at this time to the land owner, which shall apply on the purchase price when the gravel is removed.
>
> "Is such a contract within the power of the Board of Supervisors? A prompt reply will be appreciated."

In reply thereto I would advise that I am of the opinion that the execution of the aforedescribed contract is in excess of the power of the Board. The authority of the Board to purchase gravel beds is contained in Section 309.63, Code 1954. This provides for payment to be made from the secondary road

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fund. There appears to be no authority to make an advance payment as proposed. This would be incurring a debt for which there is no statutory authority.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

HEADNOTE:

Sales and use tax: Use tax on construction equipment brought to the state to perform an Iowa construction contract; determination of taxability depends upon question of fact-intent of the contractor indicating "purchase of equipment for use in this state".

October 25, 1957

Mr. Robert L. Bliss
Executive Secretary
Asphalt Paving Association of Iowa
720 Grand Avenue
Des Moines, Iowa

Dear Mr. Bliss:

Your letter dated October 18, 1957, addressed to Mr. C. J. Lyman, Special Assistant Attorney General for Iowa State Highway Commission, has been referred to me for reply.

In your letter you pose the question whether an out-of-state contractor is required to pay a sales tax or use tax on construction equipment which he brings into the state of Iowa to perform an Iowa contract in those instances where the contractor has not paid a sales tax or use tax to another state.

In the case of equipment such as you have referred to, we do not have an Iowa sale within the state so that a sales tax cannot be levied. The question then becomes whether the use tax under Iowa law will be assessed. Section 423.2, Code of Iowa, 1954 "IMPOSITION OF TAX", provides:

> "An excise tax is hereby imposed on the use in this state of tangible personal property purchased on or after the effective date of this date for use in this state, * * * *".

The Supreme Court of Iowa had this question before it in the case of Morrison-Knudson Co. v. Tax Commission, 242 Iowa 34, 44 N.W. 2d 449.

In that case the facts were substantially the same as in your letter referred to above. The Supreme Court decided that a use tax will be applicable where the property was "purchased * * for use in this state". At page 38 of the Iowa report, the Court stated:

57-10-35

> "Whether property is purchased for use here should be determinable at or near the time of its purchase. It should not be necessary to delay determination of that question eight years until the property is first used here. Not until such use in Iowa could any claim possibly be made a use tax was owing. To repeat, the only basis for such claim is the fact of use in Iowa".

At page 36, the Court squarely interpreted the use tax statute as we outlined above:

> "We think section 423.2 does not, in clear and unmistakable terms, impose a tax upon personal property first used in this state for a limited period long after its purchase and use in other states, without prior intent to use it here".

It is clear from the above Supreme Court opinion and other opinions by the Iowa Supreme Court that the use tax law is complementary to the sales tax law and a use tax will not be imposed in situations substantially different from those authorizing the imposition of an Iowa sales tax. In other words, if the construction equipment was purchased prior to the time when the contractor procured an Iowa construction contract and was purchased for use in a state other than Iowa and not for use in Iowa, no use tax will be imposed. However, where any equipment is purchased with the intent that it be used in the performance of an Iowa construction contract then a use tax will be imposed even though the equipment was purchased and used in another state prior to the contractor actually entering the state of Iowa on a construction contract.

Of course, any equipment which is purchased from an Iowa dealer while the contractor is within the state will be subject to an Iowa sales tax. Likewise, any equipment purchased outside Iowa while the contractor is performing a contract in Iowa, the contractor will be subject to the Iowa use tax.

If you have any further questions regarding this matter, please let me know.

Yours very truly,

Francis J. Pruss

FJP:W
CC: C. J. Lyman
Enclosure

C O P Y

June 5, 1951

TAXATION: Use tax - intent at time of purchase controlling. Where tangible personal property is purchased outside the state, the imposition of the tax depends on the intent of the purchaser. Use outside the state prior to its entry in Iowa frees it from tax, if at the time of purchase he had no intent to use it in Iowa. If he intended to use it in Iowa, delivery is not essential and the tax applies. Residence of the buyer is immaterial and in all questions the burden is on the taxpayer.

STATE TAX COMMISSION OF IOWA: This will acknowledge your letter containing four questions which have arisen due to the decision of our Supreme Court in Morrison-Knudsen Company, Inc. v. State Tax Commission which appears in 242 Iowa 33; 44 N.W. (2nd) beginning at page 449. You pose the following questions and ask that you be given an answer to be used as a guide in handling claims for refund or in auditing accounts so that you may proceed correctly in the refund or assessment of use tax.

1. Is it a prerequisite to impose a use tax under Chapter 423, Code of Iowa 1950, that the tangible personal property be sold for delivery in Iowa by the vendor and that the property actually be delivered by the vendor into Iowa, in so far as sections 423.2 and 423.3 are concerned?

Answer. It is not necessary that the property be sold for delivery in Iowa by the vendor and that it actually be delivered by the vendor into Iowa. The Court stated in paragraph three (3) of the opinion that the statute imposed a tax on the use in this state of all personal property purchased for use here. The Court, likewise, stated in paragraph ten (10) of the opinion that if the property was originally sold and used in another state, providing the

same were purchased for use in this state, that it would still be subject to the imposition of the Iowa Use Tax. The controlling factor is "purchased for use in this state" and not delivery.

2. Does the use of tangible personal property by the purchaser in a state other than Iowa, prior to the use of the property in Iowa by said purchaser, free the use of the property in Iowa from use tax under the provisions of sections 423.2 and 423.3, Code of Iowa 1950. If so, of what must the use outside the state of Iowa consist? In other words, is the use in a foreign state, prior to the use in Iowa, to be interpreted as the same type of use as defined in subsection one (1) of Section 423.1 Code of Iowa 1950?

Answer. The use of property in a state other than Iowa, prior to the use of the property in Iowa by said purchaser, frees the use of the property from tax in Iowa unless it was intended to be used in Iowa later. The use outside the state must be the same type of use as is defined in subsection one (1) of Section 423.1, Code of Iowa 1950, and would consist of storage, leasing or any other use within the terms of the statute.

3. In the above propositions, 1 and 2, would your opinion differ if the purchaser was a nonresident person of Iowa from a situation where the purchaser was an Iowa resident?

Answer. "No". The opinion is not based on residence or nonresidence of the purchaser. The Court interprets the taxability as being based on the fact, "Was the property purchased for use in Iowa?"

4. Is the burden of proof upon the state to prove the purchaser purchased the property "for use in Iowa" when the property is found to actually be physically present in the State of Iowa. If upon the state, what would constitute sufficient proof of the purchaser's intention to "purchase for use in Iowa", in order that a tax could legally be imposed, in so far as sections 423.2 and 423.3 are concerned?

Answer. "No". The burden is upon the owner of the property to show it was not purchased for use in Iowa when the property is found to be actually physically present in the State of Iowa. We think this was the intent of the Legislature as is evidenced by Section 423.5 which provides:

> "For the purpose of the proper administration of this chapter and to prevent evasion of the tax, evidence that tangible personal property was sold by any person for delivery in this state shall be prima facie evidence that such tangible personal property was sold for use in this state."

If the fact that property was sold for delivery in this state is to be prima facie evidence that it was sold for use in this state, it is a reasonable interpretation to require that the owner of the property show it was not purchased for use in this state when the property is found to actually be physically present in the State of Iowa.

HEADNOTE: MONEYS & CREDITS TAX - Estates of Decedents - Deductibility of Federal Estate Taxes and Iowa Inheritance Taxes; held not to be deductible as debts pursuant to Section 429.4, Code of Iowa, 1954.

October 28, 1957

Parker & Sindlinger
Attorneys at Law
Cedar Falls Trust & Savings Bank Bldg.
Cedar Falls, Iowa

Attention: Mr. Clarence M. Parker

Re: Maud M. Kuhns Estate

Dear Mr. Parker:

Your letter dated October 24, 1957, addressed to Mr. Norman Erbe, Attorney General of Iowa, has been referred to me for reply.

I am not sure that I understand all of the facts of this case. It seems that the question is whether amounts of money held on January 1, 1957 by the fiduciary of the above-named estate, which amounts of money will be used to pay U. S. Estate Tax and Iowa Inheritance Tax during the course of the year, are subject to the moneys and credits tax.

Specifically, it appears that the question is whether these sums of money owed for U. S. estate taxes and Iowa inheritance taxes constitute debts within the terms of Section 429.4, Code of Iowa, 1954. The Iowa Supreme Court has had this question before it in a very early case, Appeal of Bailies, 1905, 127 Iowa 124, 102 N.W. 813. In that case the Court held that amounts due for taxes to a government body do not constitute debts, for the reason that they are not based upon a contract express or implied. There have been several Attorneys General opinions on this question. The first of these is found in Opinions of the Attorney General, 1899, at page 154, and it was expressly overruled by the Court in the Bailies' case. Since then there have been three Attorneys General opinions; one of which holds that federal income tax due the U. S. government does constitute a debt. This opinion is set out in the Opinions of the Attorney General, 1948, at page 51. However, there are two other opinions; one 1946 at page 25 and the other 1948 at page 171 which hold to the contrary. The latter two opinions appear to be better reason.

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There appears to be an element of unfairness in not allowing these accrued taxes to be deducted, but that is a matter for the legislature to determine. Of course, if you feel that the Supreme Court of Iowa would take a different position on this question, that determination could be had. However, in the present state of the law, it does not appear that the assessor would be justified in allowing the deduction of these taxes from the moneys and credits actually held by the fiduciary on January 1, 1957.

If you have any further questions regarding this matter, please contact me.

Yours very truly,

Francis J. Pruss

FJP:fs

COMMERCE COMMISSION: Costs payable by petitioner under section 489.5, Code of Iowa, in connection with procedure for obtaining transmission line franchise include everything from filing of petition to decision of commission.

October 29, 1957

Iowa State Commerce Commission
L o c a l

Gentlemen:

Receipt is acknowledged of your letter of October 15 in which you resubmit the following inquiry:

> "This Commission proposes to collect certain costs and expenses in connection with the processing of applications for franchises to construct, operate and maintain electric transmission lines in this State, as provided in and under the provisions of Chapter 489, Code of Iowa, 1954.
>
> "Section 489.5 provides in part as follows:
>
> > "'...The petitioner shall pay all costs and expenses of said proceeding, including cost of publishing notice, before such franchise shall become effective.'
>
> "In discussing the matter of assessment and collection of cost and expenses in such a proceeding with State Comptroller Sarsfield he suggested that an opinion be obtained from you concerning the scope and applicability of the above quoted portion of Section 489.5; whether or not the cost and expenses apply only to Section 489.5, or to the entire proceeding essential to the obtaining of a franchise; and the scope of the meaning of 'costs and expenses'.
>
> "Will you, therefore, furnish a copy of your opinion at the earliest consistent date to this Commission with a copy of it to Comptroller Sarsfield?"

Your inquiry refers to Section 489.5, Code 1954, which provides as follows:

> "Objections--hearing. Any person, company, city, town, or corporation whose rights or interests may be affected, shall have the right to file written objections to the proposed improvement or to the granting of such franchise; but all such objections shall be on file

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with the board or commission at least five days before the date fixed for said hearing. The board or commission may allow objections to be filed later in which event the applicant must be given reasonable time to meet such late objections. The board or commission may examine the proposed route or cause any engineer selected by it to do so. It shall consider said petition and any objections filed thereto, and may hear such testimony as may aid it in determining the propriety of granting such franchise. It may grant such franchise in whole or in part upon such terms, conditions, and restrictions, and with such modifications as to location and route as may seem to it just and proper. The petitioners shall pay all costs and expenses of said proceeding, including cost of publishing notice, before such franchise shall become effective."

One of the items of expense made subject of your inquiry and expressly mentioned in Section 489.5 is "cost of publishing notice". The "notice" is described in Section 489.4, as follows:

"Notice of hearing. Upon the filing of such petition, the board or commission shall fix a date for hearing thereon and cause a notice, addressed to the citizens of each county through which the proposed line or lines will extend, to be published in a newspaper located in each such county for two consecutive weeks. Said notice shall contain a general statement of the contents and purpose of the petition, a general description of the lands and highways to be traversed by the proposed line or lines, the date and place fixed for hearing thereon, and that all objections thereto must be filed at least five days before said date. Said hearing shall be not less than ten days from the date of the last publication and at the offices of the board or commission before which said matter is pending, unless a different place in such notice is specified."

Section 489.1 prescribes the conditions under which a franchise must be obtained as follows:

"Franchise. No individual, company, or corporation shall erect, maintain, or operate any transmission line, wire, or cable along, over, or across any public highway or grounds outside of cities and towns for the transmission, distribution, or sale of electric current, without first procuring from the state commerce commission, or from the board of supervisors in the county or each of the respective counties in which such transmission line is to be constructed or operated, a franchise granting authority so to do as in this chapter provided."

Section 489.2 provides the method of application for franchise, that is, by filing a petition and Section 489.2 provides for the form and content of the petition.

By express terms of Section 489.5, what shall be paid by the petitioner is "the costs and expenses of said proceeding, including cost of publishing notice". The scope of the "proceeding" is defined by the word "said" which means "heretofore described". The word "proceeding" has a technical meaning in the law and by frequent judicial definition has been construed to be confined, when no contrary intent is manifested to the context in which used to a "proceeding in court". The statutes under consideration provide for no proceeding in court. Therefore, the word "proceeding", examined in the light of the surrounding context, must be construed to refer to the procedure for obtaining a franchise. Such procedure, as described in the provisions of Chapter 489 preceding the provision for payment of costs and expenses here considered obviously commences with the filing of the petition and ends with the decision of the board or commission whether or not to grant the franchise.

In answer to your question you are, therefore, advised that the costs and expenses referred to in Section 489.5 include the entire procedure for obtaining a franchise as prescribed in Sections 489.1 to 489.5, inclusive, but that the existence of certain items in any given application of such procedure will depend upon whether or not objections are filed.

Very truly yours,

NORMAN A. ERBE
Attorney General of Iowa

LEONARD C. ABELS
Assistant Attorney General

LCA:md
CC: State Comptroller Sarsfield

October 29, 1957

Mr. Richard F. Nazette
Linn County Attorney
Cedar Rapids, Iowa

Dear Dick:

This is to acknowledge receipt of your communication of October 25, 1957, directed to Attorney General Erbe, relating to the possible assessment of the costs of extradition to a convicted defendant in a criminal action.

At common law, costs in criminal prosecutions were unknown and were not recoverable eo nomine; recovery of costs in any criminal case therefore depends wholly on statutory provisions therefor. And it is now quite generally held that the word "costs" has a legal signification, and that it includes only those expenditures which are by statute taxable, and to be included in the judgment. (See Keller v. Harrison, 151 Iowa 320, 332, 128 N.W. 851, 131 N.W. 53).

Under Section 337.11, Code 1954, it is provided that the sheriff shall charge and be entitled to collect, among other fees, a fee of two dollars for each warrant served and "a repayment of necessary expenses incurred in executing such warrant". The only trouble in applying the provisions of this statute to your particular situation is that the sheriff (or other officer), when incurring expense in connection with the extradition of a fugitive, is doing so as the agent of the Governor appointed under the provisions of Chapter 759, Code 1954, (Uniform Criminal Extradition Act), and not in his official capacity as a sheriff (or peace officer).

Section 759.24, Code 1954, provides that the expenses connected with an extradition "shall be paid out of the state treasury, on the certificate of the governor and warrant of the comptroller" in all cases where the punishment of the crime shall be the confinement of the criminal in the penitentiary. Said statute further provides that the expenses shall be the fees paid to the officers of the state on whose governor the requisition is made, "and all

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necessary and actual traveling expenses incurred in returning the prisoner". This is in line with the terms of the federal statute (U.S. Rev. St., §5278, 18 U.S.C.A., §662) which provides that all costs incurred in apprehending, securing and transmitting a fugitive by means of the statute must be paid by the demanding state. Nowhere in Chapter 759 is any provision made for the assessment of such "expenses" against an unsuccessful defendant as a "part of the costs" following the case. Nor do I find at any other place in our Code where any specific provision is made for the assessment of such "expenses" as "costs" in a criminal proceedings. It would therefore seem that since "costs" include "only those expenditures which are by statute taxable" there is no way in which the state may be reimbursed for expenditures incurred in connection with an extradition by assessing such expenditures as "costs" in a given case. I might state, however, that in a number of instances where a man is brought back to Iowa to stand trial and pleads guilty or is convicted, and where the court has extended leniency by means of a bench parole or probation, the judges have, as a part or condition of the parole or probation, required the defendant to reimburse the state in whole or in part for the expenses connected with the extradition proceedings.

I feel like you, that where there is money available the convicted person should pay the expenses of bringing him back to stand trial, but I also feel this is something that must be brought to the legislature's attention for affirmative action thereon before such expenditures can be assessed as costs against a defendant.

Very truly yours,

RRRD/fm

RAPHAEL R. R. DVORAK
First Assistant Attorney General

October 29, 1957

Hon. John J. O'Connor
State Senator
Strawberry Point, Iowa

Dear Senator O'Connor:

This will acknowledge receipt of yours of the 22nd inst. in which you submitted the following:

> "Inasmuch as a controversial question has arisen here concerning the mayor veto power I would appreciate, as soon as possible, an opinion on it.
>
> "The question that arose regards the legality of a mayor's veto given orally instead of being written. The mayor vetoed a bill passed by his council but he did it orally and declined to put that statement in writing. I have been asked by several as to whether or not an oral veto is valid and frankly the answer stumps me for I do not have it.
>
> "I can see where an oral veto would bring up a great many controversies in many cases as it has in this one. Therefore I would appreciate, as soon as possible, your office's opinion on the legality of a mayor's oral veto. A veto in which he simply states that he is opposed but will not sign a written veto to that effect."

In reply thereto I advise as follows.

1. The power and duty of the mayor with reference to approving or disapproving ordinances or resolutions passed by the council is provided by Section 366.5, Code 1954, which states:

> "366.5 Signing - passing over veto. The mayor shall sign every ordinance or resolution passed by the council before the same shall be in force,

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> and, if he refuses to sign any such ordinance or resolution, he shall call a meeting of the council within fourteen days thereafter and return the same, with his reasons therefor. If he fails to call the meeting within the time fixed above, or fails to return the ordinance or resolution with his reasons as herein required, such ordinance or resolution shall become operative without such signature, and the clerk shall record it in the ordinance book, with a minute of the facts making it operative. Upon the return of any such ordinance or resolution by the mayor to the council, it may pass the same over his objections, upon a call of the yeas and nays, by not less than a two-thirds vote of the council, and the clerk shall certify on said ordinance or resolution that the same was passed by a two-thirds vote of the council, and sign it officially as clerk."

According to the above statute the disapproval of an ordinance or resolution by mere declination, oral or written, to sign the ordinance or resolution does not constitute a veto. The mayor's refusal to sign must be accompanied by his reasons therefor. Absent that, the ordinance or resolution will become operative without the mayor's signature.

2. I am of the opinion that an oral veto is not consistent with the provisions of the statute quoted or with the Iowa constitutional provision or the Federal constitutional provision conferring the veto power upon the Governor and the President. These provisions are Article III, § 16 of the Iowa Constitution and Article I, § 7 of the Federal Constitution. While none of these provisions requires expressly a veto to be made in writing it

would seem that the provision for recording the veto with the objections in the official journal of the body to which the veto is returned requires it to be in writing if the purpose of the veto is to be accomplished, to-wit: In order that the Congress, Legislature or City Council shall have suitable opportunity to consider the objections to the ordinance or bills and on such consideration pass them over the veto by the requisite number of votes.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

October 29, 1957

Mr. Lewis E. Lint, Secretary
Iowa State Tax Commission
Building

Dear Mr. Lint:

This is to acknowledge receipt of your letter dated October 2, 1957. In this letter you pose the following question:

> "Pursuant to the law as set forth in Section 17.27 as amended by House File 139, of the 57th General Assembly, we have had a request as to whether state department s who are charging for state publications must also charge sales tax on the materials thus sold. Subsequently, if it is necessary that a sales tax be charged, is it necessary that a sales tax permit be obtained by each of these state departments; and if so, what would be the proper procedure for applications for such permits?

Enclosed herewith please find a copy of an opinion of the Attorney General dated October 30, 1937 appearing on page 592 of Opinions of the Attorney Generals 1938. This appears to be the latest decision by the office of the Attorney General on this question, and I suggest that it will control the question which you pose in your letter, so that it will be necessary for the various state departments to charge a sales tax on the printed materials which they sell. This is further confirmed by the opening provision of 422.43 Code of Iowa 1954 entitled "Tax Imposed", which provides:

> "There is hereby imposed, beginning the first day of April, 1937, a tax of 2% upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise, except as otherwise provided in this division, sold at retail in the state to consumers or users; * * *"

Section 422.42 (3) entitled "Definitions" provides in part as follows:

> " 'retail sale' or ' sale at retail' means the sale to a consumer or to any person for any purpose, other than for processing or for resale of tangible personal property * * *"

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Clearly the state is making sales under the facts set forth in your letter pursuant to portions of section 422.43 and 422.42 set forth above.

As to the question, whether a permit should be obtained by the various departments of the state of Iowa, it appears that a more difficult legal question is involved. However, the answer to that question is inherent in the attached Attorney General's Opinion referred to above. Also, I understand it has been the practices of certain departments of the government to obtain a sales tax permit since administration of the act is thereby greatly facilitated.

Consequently, I wish to advise you that the sales tax act does apply to the sales of state publications and the various departments distributing state publications are required to obtain a sales tax permit from the State Tax Commission.

If you have any further questions regarding this matter, please let me know.

Very truly yours,

FJP:bmc

Francis J. Pruss,
Special Assistant Attorney General.

Taxation: Sales Tax: A state sales tax should be collected by the Printing Board on all sales made at retail to private individuals.

October 30, 1937. Mr. Tom J. White, Superintendent, State Printing Board: This department is in receipt of your request for an opinion upon the following question:

Must the State Printing Board collect sales tax upon its sales at retail in Iowa other than those made to the State or Federal Government?

Chapter 196 of the Acts of the 47th General Assembly imposes a tax of two per cent, except as otherwise provided in the Act, upon the gross receipts from all sales of tangible personal property sold at retail in the State to consumers or users. The Act requires that the retailer add the tax imposed to the price and after collecting the same remit within twenty days of the month following the close of the quarterly period.

The Act provides that the meaning of the terms hereinafter listed shall be as follows: Retailer includes every person engaged in the business of selling tangible goods, wares, or merchandise at retail; retail sale means the sale to a consumer or to any person; person includes any individual, firm, co-partnership, joint adventure, association, corporation, municipal corporation, etc.

The question, therefore, is whether or not the State Printing Board comes within the definition of "retailer" and "person" as defined by the Act. In State v. City of Des Moines, 266 N.W. 41, our Supreme Court held that "the Legislature is its own lexicographer in defining terms as applied to any given statute."

In the case of State of Ohio v. Helvering, 292 U. S. 360, the Supreme Court held that a State is embraced within the meaning of the term "person" as used in a statute imposing an excise tax on persons selling liquor and providing that:

"Where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, the word 'person' as used in this title shall be construed to mean and include a partnership, association, company or corporation, as well as a natural person. Whether the word 'person' or 'corporation' when used in a statute, includes a state or the United States, depends upon the connection in which the word is found." (Citing numerous cases holding that a state is a person or a corporation.)

In State v. City of Des Moines, supra, the Supreme Court of Iowa said:

"Surely, in a sense, all corporations are persons, that is, artificial persons, and all municipalities are bodies corporate, and in a proper case the word 'person' has been held to not only include municipalities but every and any political subdivision, and also the state, and in some cases even the United State Government."

An examination of the entire sales tax act reveals an intention on the part of the Legislature to impose a two per cen t sales tax on all sales at retail, no matter by whom made. In the sale of Codes and Supreme Court Reports to individual attorneys and those wishing to purchase the same, the State Printing Board is acting in a proprietary capacity, engaged in the transaction of business in competition with other private businesses. When engaged in that manner, it is clearly the intention of the Act that a two per cent sales tax be collected and remitted in the same manner as such tax would be collected and remitted by any other retailer.

It is therefore the opinion of this department that sales at retail to private individuals by the State Printing Board are subject to the sales tax.

HEADNOTE: INCOME TAX: Amounts paid to the widow of a deceased officer of a corporation by the corporation recognizing the prior service of the deceased officer: Unless clearly intended to be a gift by the corporation, amounts in excess of $5,000.00 are held to be taxable to the widow.

October 30, 1957

Mr. George Eischeid, Director
Income Tax Division
Iowa State Tax Commission
BUILDING

Dear Mr. Eischeid: In re: Estate of Norman D. Landauer

Your letter of September 12, 1957, raised the question, whether payments by a corporation to the estate of a deceased corporate officer and to his widow constitute taxable income to either or both. This matter is discussed at some length in Prentice-Hall "Federal Taxes", volume #1 at page 7609. The substance of that discussion is as follows:

The intention of the parties and the facts and circumstances surrounding each transaction are obviously the controlling factors in arriving at a determination of the taxability or exclusion from income of voluntary payments made by an employer to the widow of a deceased former employee.

In I. T. 3329, C. B. 1939-2, Page 153, the Commissioner of Internal Revenue ruled that a payment by an employer to the widow of a deceased employee, made without any enforceable obligation, was not taxable to the widow and that such payments were deductible by the employer when paid in recognition of services rendered by the deceased employee.

In I. T. 4027, C. B. 1950-2 Page 9, the Commissioner of Internal Revenue revoked or modified his ruling in I. T. 3329 and now holds that, irrespective

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of a plan, voluntary or involuntary, definite or indefinite, payments made by an employer to the widow of a deceased employee in consideration of services rendered by the employee are taxable to the widow.

It should be noted that the ruling in I. T. 4027, by express provision, does not apply to payments received before January 1, 1951.

As to voluntary payments received after December 31, 1950, the basic test as to taxability remains: whether or not the employer intended to make a gift to the widow. However, if, as a matter of fact, the employer intended to make a gift, it is questionable whether he will be allowed a deduction for the payment, because the deduction is allowable only if the payment was made in consideration of services rendered by the deceased employee. Conversely, if the employer made the payment in consideration of services rendered by the deceased employee, it will be taxable to the widow under the rule of I. T. 4027.

In the first case decided after I. T. 4027 became applicable, the Tax Court held that payments received by a widow were a gift rather than compensation. The Court determined that the employer's intention to make a gift outweighed other evidence such as the deduction of the payment by the employer as salary expense.

Ruth Hahn Paragraph 54, 103 P-H Memo. T. C.;
To the same effect: Est. of Ralph W. Reardon etal., Paragraph 55,154 P-H Memo. T. C.;
Marie G. Haskel, Paragraph 55, 196 P-H Memo T. C.;
dismissed by stipulation 4-Cir. 1-19-56;
Estate of Arthur W. Hellstrom 24 T. C. (101);
Elizabeth Robinson Matthews, Paragraph 56, 046 P-H Memo. T. C.

In the case of Fisher et al. v. U. S. (D. C. Mass. 1955), 129 F. Supp. 759, 47 A. F. T. R. 558 it was held that post mortem payments were compensation rather than gifts.

The Louise K. Aprill case (13 T. C. 707) and the Alice M. Macfarlane case (19 T. C. 9 (No. 2)) involved payments to widows made prior to January 1, 1951 and since I. T. 4027 was not retroactive, the two foregoing cases were determined by the Tax Court at a time when the Internal Revenue Service was making its determinations under the provisions of I. T. 3329, and the employer was certainly justified in relying thereon for the allowability of deduction of the post mortem gifts on the corporation income tax return.

Under the provisions of I. T. 4027, in order to be deductible on the federal income tax return of the corporation the post mortem payment to the widow must be made in consideration of services rendered to the employer by the decedent and if this is so, the payment is taxable income to the widow. However, in the cases determined in the Tax Court, Hahn, Reardon, Haskell, Hellstrom and Matthews, supra the court has found the evidence to warrant a conclusion that the payments were gifts to the widows, even though made in recognition of decedents' services and taken as deductions on the corporate income tax returns.

From all of the foregoing it appears, not only that it is difficult to defeat a widow in court, but that it is hopeless to contend that such payments are income to the widow if corporations make such payments as bona fide gifts, taking no deduction therefor on the corporation returns, and unlikely to be sustained as taxable payments to the widow even though the corporations deduct such payments on the corporation returns, despite the specific wording of I. T. 4027.

In any event, the $5,000 payment to the estate of Norman D. Landuer would not be taxable because of the $5,000 exclusion permitted under section 101 (b) I. R. C.

As to the payments made by the corporation to the widow, such amounts are not taxable income to her if the corporation's intention, in this case, was clearly to make a gift and not to pay compensation for the past services of her late husband. Fisher v. United States, (1955) 129 F. supp. 759, 47 A. F. T. R. 558.

In the Fisher case, supra, the employer had voted $666.66 retirement pay for the period October 1, 1950 to October 1, 1951 to Russell T. Fisher, its former president. He died on April 24, 1951 and on June 15, 1951, at the next meeting of the Board following Mr. Fisher's death the Board adopted the following resolution:

"Voted: That the Treasurer is hereby authorized to pay to Mrs. Russell T. Fisher the sum of $666.66 per month for the months of May through September, inclusive, 1951, this being the balance of the retirement compensation voted by the Board of Government to Mr. Fisher on November 3, 1950."

These payments were made to Mrs. Fisher in the total amount of $3333.36. Mrs. Fisher in the income tax return for 1951 filed jointly with her deceased husband's estate did not report this sum as income, although in an attached statement she gave information as to its receipt.

The court found, from the wording of the above quoted Board resolution, that there was no intention to make a gift to Mrs. Fisher and that the payments made to her were compensation for the past services of her deceased husband; that had the husband survived the payments would have been made to him and would have been taxable as ordinary income. The court made it clear, however, that had it been the intention of the corporation to make a gift to Mrs. Fisher the payments would not constitute taxable income.

It is well established that taxation is the rule and exemption therefrom is the exception and that "Grants of immunity from taxation in derogation of a sovereign power of the State, are strictly construed." Hale v. Iowa Board of Assessment and Review, 223 Iowa 321, 271 N. W. 168, 302 U. S. 95, 82 L. Ed. 72.

And the burden of proof is upon the taxpayer to show his right to an exemption by evidence which leaves the question free from doubt. Jones v. Iowa State Tax Commission, -- Iowa --, 74 N. W. 2d 563.

With respect to the death benefit of $5,000. paid to the estate of the decedent, according to Attorney Edward A. Doerr's letter of September 6, 1957 there was a board resolution whereby it appears clear that the amount so paid is exempt from taxation, being within the $5,000. limitation.

With respect to the amounts paid by the corporation to Julia H. Landauer subsequent to her husband's death, Mr. Doerr's letter states: "Her position is simply that the payments totalling $8,100. were gifts." The position of Mrs. Landauer is, of course, immaterial, and the determination of whether such sums constitute taxable income to her depends entirely upon the intention of the corporation at the time the payments were made.

It is not the position of the Iowa State Tax Commission that corporations cannot make gifts which are exempt from taxation, but that the fact of the gift as distinguished from compensation must be established and unless it is shown by evidence that a gift was intended by Simon and Landauer Company to Julia H. Landauer the amounts paid to her must be treated as ordinary income.

Yours very truly,

Francis J. Pruss
Special Assistant Attorney General.

WMW:bmc

W. M. Wilson, General Counsel,
Iowa State Tax Commission.

HEADNOTE:

Condemnations--County has no authority to acquire land by condemnation for maintenance garages.

Ames, Iowa

Oct. 31, 1957

Mr. James W. Hudson
Attorney at Law
Pocahontas, Iowa

Re: Section 471.4, Subsection 1 of the 1954 Code of Iowa

Dear Mr. Hudson:

I have your letter of October 10 in which you ask our opinion as to whether or not the above mentioned Code section gives the Board of Supervisors of a county authority to acquire ground for the construction of a maintenance garage. I assume that you mean by the word acquire the right to condemn land for said purposes. The Board of Supervisors of a county has the authority to purchase land for the construction of a maintenance garage under the provisions of Chapter 332.3(12) as amended by Chapter 173 Laws of the 57th G.A.

It is our opinion that Section 471.4, subsection 1 of the 1954 Code of Iowa does not provide the Board of Supervisors of a county authority to acquire land for the construction of a maintenance garage. This section does not specifically authorize such a taking, and such a taking is not considered "a necessary taking" for the public welfare. A maintenance garage is of such a nature that it can be located in more than one site in the county. If land cannot be purchased in one area, it can more than likely be purchased somewhere else in the county.

It is significant that the Legislature has given the Board of Supervisors the authority to purchase any real estate necessary for county purposes by Section 332.3(12) as amended, but has not provided the Board of Supervisors with this blanket authority in regard to the power of eminent domain.

If we can be of any further assistance in this matter, please notify us.

Yours very truly,

John L. McKinney
General Counsel for
Iowa State Highway Commission

C. J. Lyman
Special Assistant Attorney General
for Iowa State Highway Commission

JLM.:js

57-10-42

State of Iowa

Department of Justice

Des Moines

57/11/1
for release
9 a.m.
NOV. 1

NORMAN A. ERBE
ATTORNEY GENERAL

November 1, 1957

Mr. D. M. Statton
Boone County Attorney
Boone, Iowa

Dear Mr. Statton:

Your letter of October 18, 1957, states that the Trustees of Boone County Hospital have entered into an agreement with four medical doctors for the performance of all x-ray and laboratory work to be done at the hospital. Although the hospital will bill the patients as the agent of the doctors, a predesignated percentage of the fees collected is retained by the hospital and the balance is remitted to the physicians.

At the present time all money collected on these accounts by the hospital is deposited to the hospital account as county funds. Presumably, this is done in accordance with Section 347.12 of the 1954 Code which provides:

> "County treasurer. The county treasurer shall receive and disburse all funds under the control of said board of trustees, the same to be paid out only upon warrants drawn by the county auditor by direction of the board of supervisors after the claim for which the same is drawn has been certified to be correct by the said board of trustees."

Payment to the doctors is then made by county warrant and such payment is publicized pursuant to Section 349.18 of the 1954 Code which provides:

> "Supervisors' proceedings - each payee listed - publication. All proceedings of each regular, adjourned, or special meeting of boards of supervisors, including the schedule of bills allowed, shall be published immediately after the adjournment of such meeting of said boards, and the publication of the schedule of the bills allowed shall show the name of each individual to whom the allowance is made and for what such bill is filed and the amount allowed thereon. The county auditor shall furnish a copy of such proceedings to be published, within one week following the adjournment of the board."

Your first question is whether Section 349.18 requires the publication of the bills filed and the amount paid to the doctors for the amount due them pursuant to their agreement with the hospital.

This question must be answered affirmatively as to all funds which have been deposited as County Funds. 1940 Report of Attorney General, 363.

You then ask, if the answer to the first question is in the affirmative, can an arrangement be made whereby the amount paid to the doctors would not have to be published. It is the opinion of this office that this can be done by virtue of Chapter 92, Acts of the 57th General Assembly. Section 4 clearly expresses the sense of the legislature that pathology and radiology services performed in hospitals are medical services. Section 5 requires a hospital to enter into a written or oral agreement with a doctor for the direction and supervision of its radiology or pathology department. Sections 9 and 10 are designed to apprise the patient of the fact that laboratory and x-ray fees are for medical services although they may be collected by the hospital on behalf of the doctor. Section 12 reiterates that "fees for radiology and pathology must be paid for as medical and not hospital services".

The hospital, then, serves only as the agent of the doctor for the collection of radiology and pathology fees. As the agent of the doctor, the hospital has an affirmative duty to retain the funds of this principal and pay them over promptly when demanded or as agreed. The agent must also keep and render accounts. American Jurisprudence, Agency, Sections 282, 286. "Only in an exceptional case may the agent treat the funds as his own for as a rule they are to be applied to the purposes of the agency". Id. Section 282.

It is clear that the funds coming into the hands of the hospital in payment of radiology and pathology fees are not "funds under the control of the Board of Trustees" within the meaning of Code Section 347.12, but are in fact funds subject to the control and direction of the hospital's principal, the doctor. These funds need not be deposited in the county treasury unless directed by the principal. With the exception of that portion of the total collected by the hospital which is charged to the doctors for the use of the hospital facilities, they are not public monies which are required to be held, disbursed, and accounted for in accordance with the statute.

Even though publication is not required under the agency relationship described herein the hospital Board of Trustees are not relieved from the requirement of disclosing all relevant facts

pertaining to the operation of these departments in their annual report to the Board of Supervisors required by paragraph 10, Code Section 347.13.

Very truly yours,

NORMAN A. ERBE
Attorney General

NAE/k

57/11/2

COSMETOLOGY BOARD

1. Has no power to refuse a license to a school on the ground there are enough schools.
2. May not adopt a regulation prohibiting night schools.

November 1, 1957

Dr. Edmund G. Zimmerer
Commissioner of Public Health
Department of Health
L o c a l

Dear Doctor Zimmerer:

Receipt is acknowledged of your letter of October 29 as follows:

"We have an application from an existing licensed School of Cosmetology for the establishment of night courses. I should like a letter opinion on the following matters:

"May the Board of Cosmetology Examiners arbitrarily refuse a license for a school on the grounds that it is their belief that we have enough such schools?

"May the Board of Cosmetology Examiners by regulation deny a school the right to establish a night school?

"Is there anything in the law (or regulations) forbidding the establishment of a night school?

"Your early attention and reply will be appreciated."

The answers to your questions are respectively:

1. No.

2. No.

3. No.

In general, see Gilchrist v. Bierring, 234 Iowa 899, 14 N.W. 2d 724 for examples

of limitations on the scope of the rule-making power of the Board of Cosmetology Examiners.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

HEADNOTE: PROPERTY TAX DIVISION - MONEYS & CREDITS: Senate File 453, Acts of the 57th General Assembly; exemption status of promissory note, mortgage, real estate contract, no express provision for interest; Section 535.2 provides for legal rate of interest where no contract to the contrary.

November 1, 1957

57/11/3

Mr. Wm. G. Klotzbach
Buchanan County Attorney
County Court House
Independence, Iowa

Dear Mr. Klotzbach:

Your letter dated October 18, 1957 addressed to the Attorney General of Iowa has been referred to me for reply.

In your letter you request an opinion as to the application of Chapter 213, Laws of the 57th General Assembly, which amended Chapter 429 of the 1954 Code of Iowa, pertaining to moneys and credits tax. Your question is whether a promissory note for a fixed sum with no provision for interest and a real estate sales contract with no provision for interest shall be considered within the exemption provided by Chapter 213.

At the outset, we should distinguish between a promissory note or contract which specifically provides that no interest is payable and a promissory note or contract which simply has omitted to provide for an interest rate.

Section 535.2, Code of Iowa, 1954, entitled "Rate of Interest", provides as follows:

> "The rate of interest shall be five cents on the hundred by the year in the following cases, unless the parties shall agree in

writing for the payment of interest not exceeding seven cents on the hundred by the year:

"1. Money due by express contract.

"2. Money after the same becomes due.

"3. Money loaned.

"4. Money received to the use of another and retained beyond a reasonable time, without the owner's consent, express or implied.

"5. Money due on the settlement of accounts from the day the balance is ascertained.

"6. Money due upon open accounts after six months from the date of the last item.

"7. Money due, or to become due, where there is a contract to pay interest, and no rate is stipulated."

I suggest that these will be considered interest bearing instruments unless, in either case, an express provision is contained in the instrument declaring it to be noninterest bearing. If the question of the rate of interest is omitted from the instrument, then it would seem that Section 535.2 would become operative, and any purchaser or promissor who failed to take account of this section of the law may, in fact, find himself subjected to the legal rate of interest.

In your letter you also raise the question as to whether it would be possible for parties to a contract of sale of real estate to agree upon a principal sum which would include accrued interest to the end of the contract period, with an express provision that the contract was a noninterest bearing contract. Of course, it would seem that this is very unlikely in view of the fact that a contract purchaser may not desire in many cases to continue to make payments

pursuant to the contract but may wish to pay off the contract prior to the due date thereof and receive a deed to the property. Consequently, a purchaser who signed a contract where the principal sum actually included a large element of interest would find himself in a very embarrassing position should he desire to pay off the contract prior to the due date. I might suggest that any attempt to include a savings clause in a contract such as this, giving a purchaser the right to pay a sum less than the actual balance of the purchase price due pursuant to the terms of the contract, would be considered a subterfuge and, in fact, an attempt to circumvent the law of moneys and credits. I do not anticipate any serious attempt to use these evasive tactics.

The questions you presented in your letter of October 18, 1957 were not presented to the Attorney General prior to the issuance of the opinion of that office dated July 18, 1957. I trust that you have in your files a copy of the opinion written by Mr. Strauss.

If you have any further questions regarding this matter, please contact me.

Yours very truly,

Francis J. Pruss

FJP:fs

November 5, 1957

57 11 14

Mr. Park Rinard
Administrative Assistant
to the Governor
B u i l d i n g

Dear Sir:

Receipt is acknowledged of your letter of November 1, as follows:

"I enclose herewith the Resistance of the Roosevelt Hotel Company to the Application of Local Union No. 497, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO for the appointment of a Board of Arbitration and Conciliation under Chapter 90 of the Code of Iowa. Will you kindly give Governor Loveless an opinion on this at your earliest convenience."

Section 90.1, Code 1954, which is the pertinent provision of law, states as follows:

"Petition for appointment. When any dispute arises between any person, firm, corporation, or association of employers and their employees or association of employees, of this state, except employers or employees having trade relations directly or indirectly based upon interstate trade relations operating through or by state or international boards of conciliation, which has or is likely to cause a strike or lockout, involving ten or more wage earners, and which does or is likely to interfer with the due and ordinary course of business, or which menaces the public peace, or which jeopardizes the welfare of the community, and the parties thereto are unable to adjust the same, either or both parties to the dispute, or the mayor of the city, or the chairman of the board of supervisors of the county in which said employment is carried on, or on petition of any twenty-five citizens thereof over the age of twenty-one years, or the labor commissioner, after investigation, may make written application to the governor for the appointment of a board of arbitration and conciliation, to which board such dispute may be referred under the provisions of this chapter; and the manager of

the business of any person, firm, corporation, or association of such employers, or any organization representing such employees, or if such employees are not members of any organization, then a majority of such employees affected may make the application as provided in this chapter, but in no case shall more than twenty employees be required to join in such application."

The points raised in the "resistance" to which your letter refers are summarized as follows:

1. Applicants are neither "employees or association of employees" within the meaning of Section 90.1, but are an international union.

2. The dispute does not affect the public interest or menace the public peace.

3. Intervention under Chapter 90 would pave the way for submission of similar disputes in wholesale lots.

4. The employer is engaged in interstate commerce and, therefore, the dispute is within the express exception stated in Section 90.1.

5. The National Labor Relations Act has pre-empted the field for purposes of settling disputes between labor unions and employers in interstate commerce.

With respect to said points, we advise as follows:

1. Whether a dispute exists between the employer and its employees or with a union and not with its employees is a question of fact to be determined by the governor. If, in fact, no dispute exists between the employer and its employees there is, of course, no basis for proceeding with arbitration for the obvious reason there would be nothing to arbitrate.

2. Whether the dispute is such as to affect the public interest within the express terms of Section 90.1 is also a question of fact. Whether the dispute is such as to "menace the public peace" is a conclusion which the governor must determine by exercise of sound discretion in the light of facts available to him. If neither element is found to be present, Chapter 90 has no application.

3. The number or lack of potential fact situations which might arise within the terms of Chapter 90 has no relevance to the question of whether the instant situation is within Chapter 90. Each application must stand or fall on the basis of its own facts.

4. Whether or not the employer in the instant situation is engaged in interstate commerce is a question of fact to be ascertained by the governor. If the facts reveal such to be true no further procedure under Chapter 90 is authorized under its express terms.

5. Inquiry into the fact questions presented by 1 and 4 will dispose of point 5 under the terms of Section 90.1 without necessity for reference to the federal act.

Thus, all of the matters presented by your letter and the enclosed "resistance" present questions of fact not susceptible to answer by opinion of this office. As was pointed out by letter of this office dated October 28, the "Application" in the instant matter appeared in proper form for purposes of Chapter 90. However, your instant inquiry requires determination of facts and exercise of discretion based upon the existance of facts rather than a problem of law.

Yours very truly,

NORMAN A. ERBE
Attorney General of Iowa

LEONARD C. ABELS
Assistant Attorney General

LCA:md

ASSESSMENT INSURANCE: The language "maximum premium. . .shall be expressed" as used in Section 515.16, Code 1954, means that it shall be express both as to cash premium and contingent assessment and that the sum of such express amounts shall be the maximum.

November 5, 1957

57 11 15

Mr. Oliver P. Bennett
Commissioner
Insurance Department of Iowa
L o c a l

Dear Sir:

Receipt is acknowledged of your letter of October 1 by which you submit the following question:

> ". . .your opinion and suggestions will be appreciated as to the possible effect. . .of Code Section 515.16 which provides that 'the maximum premium payable by any member of a Mutual Company shall be expressed in the policy and in the application for the insurance. Such maximum may be a cash premium and an additional contingent premium not less than the cash premium, or may be solely a cash premium, which premium may be made payable in installments or regular assessments.'
>
> "It occurs to us that it would be proper, in compliance with this section, to issue a policy which would state the annual initial advance assessment charge as we now do and provide further that additional contingent premiums not less than the initial cash premium would thereafter be payable as regular assessments during the term of the policy (we presently issue five year policies with an annual assessment payable at the inception of the policy)."

In answer thereto you are referred to the express language of the statute; "maximum premium. . .shall be expressed". Your attention is invited to the fact that a policy naming a sum certain as cash premium but identifying the additional "contingent premium" merely by the words "not less than the cash premium" would express a minimum rather than a maximum premium where, as stated in the inquiry submitted by you, "additional contingent premiums. . .would thereafter be payable as regular assessments." In other words, policy language of the form submitted would be descriptive neither of an "express" amount nor the maximum amount.

As was said with respect to said section by the Circuit Court of Appeals in Keehn v. Brady Transfer & Storage Co., C.C.A., 1947, 159 F.2d 383:

> "Plaintiff emphasizes that there is no decision construing section 8909 (now section 515.16, Code 1954). We think there is nothing to construe. It states in plain unambiguous language that the maximum premium 'shall be expressed in the policy and in the application.'"

Thus, the language of section 515.16 means exactly what it says; that the "maximum premium. . .shall be expressed. . .".

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

November 5, 1957

51/11/7

Mr. Robert D. Mershon
Attorney at Law
Cedar Falls, Iowa

Dear Mr. Mershon:

This is to acknowledge receipt of your letter dated November 1, 1957, wherein you request an opinion as to whether a resident of Iowa, employed in Washington, D. C., living in the State of Virginia, is liable to pay Iowa income tax.

The only provision of the Iowa income tax law which gives a credit for income tax paid in another state is Section 422.8(1). However, this section expressly excludes "salaries, commissions, fees or other remuneration for personal or professional services."

It would seem that,under the facts set out above, the taxpayer will be liable for both Virginia and Iowa income taxes.

If you have any further questions, please contact me.

Yours very truly,

Francis J. Pruss

FJP:fs

HEADNOTE:

Temporary absence from the State will not disqualify an applicant for A.D.C., if such applicant can qualify as to residence as defined in Section 239.2, Code of Iowa, 1954.

November 5, 1957.

57/11/8

Mr. L. L. Caffrey, Chairman
State Board of Social Welfare
State Office Building
Des Moines, Iowa

Re: LORA LEE,
Application 4647-C

Dear Mr. Caffrey:

Reference is herewith made to memorandum under date of November 4, 1957 from Mr. A. Downing to you in regard to the application of Lora Lee for ADC - please be advised as follows:

We note the following statement of facts in said memorandum with reference to the residence of the applicant, to-wit: that she was born in Iowa and has been a resident of the State of Iowa since birth with the exception that she was out of the State a little over 2½ months and her intentions were to return as soon as able to financially. Although she was at one time separated from her husband and he was working in the State of Oklahoma, their residence in the State of Oklahoma was only temporary for an alleged period for a little over 2½ months. Also, it is stated that she had not established residence in the State of Oklahoma sufficient to be eligible to receive any aid and I assume that she did not receive any aid from the State of Oklahoma.

Section 239.2, Code of Iowa, 1954, states:

> "Assistance shall be granted under this chapter to any needy dependent child who:
> "1. Is living in a suitable family home maintained by one or more of the persons referred to in subsection 4 of section 239.1.
> "2. Has resided in the state for one year immediately preceding the application for such assistance; or was born within the state within one year immediately preceding the application, if the mother has resided in the state for one year immediately preceding the birth of said child, without regard to the residence of the person or persons with whom said child is living.

It is to be noted that residence is the stipulated criteria of this provision of the Code as distinguished from "legal residence."

In the case of In Re: Maintenance of Newhouse, 233 Iowa at page 1013, the Court said: "The distinction between the terms 'residence' and 'legal residence' and the term 'legal settlement' has long been well understood. The terms are not synonymous, and we have held that they are not." InRe: State ex rel Gibson v. Story County, 207 Iowa 1117, 1118, 224 N.W. 232, 233.

Assuming the facts stated in the memorandum would be fully established as the residence and under the authority of the case of In Re: Maintenance of Newhouse, cited above, it is our opinion that the applicant can qualify for the aid requested.

Yours very truly,

Frank D. Bianco
Assistant Attorney General

FDB/sp
cc-Attorney General

HEADNOTE:

Under the provisions of H.F. 344, 57th G.A., old age assistance applicants or recipients may purchase funeral expense contracts, not in excess of $500.00 at any time before death and remain eligible for assistance within the requirements of Chapter 249, OAA law. Said contracts may be formal or informal, subject to the requirements of the Board of Social Welfare as to proof of the terms of such contracts or arrangements.

November 5, 1957.

Mr. L. L. Caffrey, Chairman
State Board of Social Welfare
State Office Building
Des Moines, Iowa

57 11 9

Dear Mr. Caffrey:

Reference is made to intra-office communication under date of November 5, 1957, from Eleanor Carris, to the State Board, in which the following questions were propounded, to-wit:

1. The law states "Provided, however, that no person shall be denied assistance because of the fact that the claimant has made prior arrangements for funeral expenses in an amount not to exceed five hundred dollars." Does the word "claimant" refer to an applicant, a recipient, or both? In short, may a burial contract be purchased following receipt of assistance or only prior to approval of assistance?

2. The law specifically limits the amount which may be used to make "prior funeral arrangements". However, the single recipient is entitled to $300 in personal property and a married couple to $450, therefore could the personalty of the individual be used to increase the value of the prior funeral arrangements to an amount in excess of $500?

and in reply thereto, we beg to advise as follows:

In construing a statute, the first requirement is to ascertain the legislative intent, and in doing so, the subject matter, effect, consequence, and reason of the statute, as well as the language used must be considered. A further rule to be followed is that words used in statutes should generally be given their ordinary meaning, and the meaning of a statute cannot be expanded beyond the legitimate scope of the terms utilized.

1. A "claimant" is one who asserts a right or title. An "applicant" is one who applies for something; one who makes request; a petition. Since Section 249.10 Code of Iowa, 1954 reads "An applicant for assistance shall deliver his claim ***;" and H.F. 344 (Chapter 120, 57th G.A.) which amends Section 249.9, refers

to a "claimant" and paragraph 3 of said section also refers to a "claimant"; it is clear to us that the intent is, that "claimant" and "applicant" refer to one and the same person. We note that under the provisions of Section 249.6 (8), an applicant may earn up to $300.00 per year. It is conceivable that recipients may earn income from which they might purchase a contract for funeral expenses, within this earning limitation.

We hold, therefore, on this question that a "claimant" and an "applicant" within the provisions of Section 249.9 as amended, refers to one and the same person, and further hold that a recipient, as well as an applicant, may purchase a contract for funeral expenses.

2. Webster's International Dictionary defines "arrangement" as used in English law as "An agreement between a debtor and his creditors modifying his obligations to them by a composition or otherwise." In the case of Beckford v. Beckford, 108 N.E. 2d 535, 329 Mass. 389, "An 'arrangement' may be defined as a preparatory agreement or as a transaction whose terms are understood but not yet consummated." The "prior arrangement" referred to in the amendment, by the plain ordinary meaning of the words import such arrangements at any time before death, because we believe the reason for the amending statute was to enable old age recipients to provide for a more decent burial in view of the steadily increasing economic costs for funerals, and at the same time to enable them to qualify for assistance. Therefore, such "prior arrangements" for funeral expenses may be made at any time before death of recipient within all of the qualifying limitations of Chapter 249, Old Age Assistance.

We are further of the opinion that the "arrangements" being a matter of privity between the applicant or recipient and the person contracting to perform under the funeral contract, it is immaterial to the Department whether or not such arrangements are formal written contracts or informal verbal contracts. However, in view of the limitation of $500.00, it is within the province of the Board or Department to require satisfactory proof that the contract value does not exceed the sum of $500.00 as fixed by the amending statute in order that the applicant may qualify for assistance.

It is also conceivable that there may be applicants who have made contractual arrangements for burial benefits in excess of $500.00. In this event, because of constitutional prohibition, that no law impairing the obligation of contracts, shall ever be passed, such contracts must be recognized, if they were incurred or consummated prior to the effect date of H. F. 344, (Chapter 120, 57th G.A.).

Subject to the above limitation, it is our opinion that

personal property allowances cannot be used to increase the value of the prior funeral arrangements to an amount in excess of $500.00.

Yours very truly,

Frank D. Bianco
Assistant Attorney General

FDB/sp
cc-Norman A. Erbe

57/11/10

November 6, 1957

Mr. Matt Walsh
Pottawattamie County Attorney
Pottawattamie County Court House
Council Bluffs, Iowa

Dear Sir:

In a letter received from your office dated October 31 inquiry is made respecting voting in the city primary elections under the provisions of Section 363.16 of the Code of Iowa and particularly referring to the problem, "If there were two offices to be filled and five candidates filed for said offices, should the primary ballot read 'Vote for Two Only', or should it read 'Vote for Four Only'?"

The letter states that Section 363.20 provides that primary elections shall follow the procedure provided for general elections except as therein modified and the rules for the general elections set out at Section 49.93 state that no voter shall vote for more than one candidate for the same office nor for a greater number of candidates for two or more offices of the same class, than there are offices of such class to be filled at such election.

Since the primary election procedure is not modified in Chapter 363 respecting this particular question, it would appear that Section 49.93 confirms the rules for voting and in direct answer to your specific question it is our opinion that the primary ballot should read "Vote for Two Only".

Question No. 2 submitted inquires concerning the placing of a name on a ballot when the name has been changed between the time of filing the petition and affidavit provided in Sections 363.12 and 363.14 and the time of election. I do not have enough facts at hand to express our opinion on this question.

Yours very truly,

NORMAN A. ERBE
Attorney General of Iowa

NAE:md

57/11/12

HEADNOTE: LEGAL SETTLEMENT:

Under the factual situation, to-wit:

"Fred Higgens family moved into MontgomeryCounty in 1937. Within one year, Montgomery County served them with notice to depart in compliance with Section 3828.092. The Higgens family have never filed the affidavit required by Section 3828.088 as a prerequisite to establishing their "legal residence", or "requisite residence" as defined in Section 3828.092. Therefore, the Higgens family remain residents of Page County and Page County is liable for their care."

the said Higgens did not acquire a legal settlement in Montgomery County, the county of his residence, for the reason he was served with notice to depart, and he thereafter failed to file affidavit with Board of Supervisors as required by Sec. 252.16, Code of Iowa, 1954, previously codified as Sec. 3828.088, Code of 1939.

November 7, 1957.

57/11/12

Mr. William E. Falk
County Attorney
Page County
Clarinda, Iowa

Dear Mr. Falk:

Reference is made to your letter of September 5, 1957, requesting opinion of this department, upon the following matter:

> Before 1937, the Fred Higgins family established residence in Page County. In that year they moved to Montgomery County, and have resided there over twenty years. In the years 1938 and 1939, they were served by Montgomery County with Notice to Depart (Non-resident Notice.). None was served thereafter, and no affidavit of intention to establish residence was filed by the Higginses. The family now had applied for assistance in Montgomery County, which has disclaimed liability, maintaining they are residents of Page County. Is Page County liable for the care of this family, which has not resided in Page County for over twenty years?
>
> By Section 3828.092, Code of Iowa 1939, the Higginses would have acquired residence in Montgomery County one year after the 1939 Notice, the last, was served on them. In 1941, by enactment of Chapter 148, Section 5 of the Acts of the Forty-ninth General Assembly, Section 3828.092 was amended so that it was not required that each year a notice to depart be served. But, by that time, 1941, the family had already established their residency in Montgomery County.

and we beg to advise as follows:

The situation which was outlined in your letter arose several times prior to the amendment of Section 3828.092, Iowa Code, 1939, (by the enactment of Chapter 148, Section 5 of the Acts of the 49th General Assembly) because of an apparent inconsistency or ambiguity existing between two sections of the code under the chapter "Support of Poor". Section 3828.088 stated as follows:

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

> a settlement in that county; but if such person has been warned to depart as provided in this chapter, then such settlement can only be acquired after such person has resided in any one county without being warned to depart as provided in this chapter for a continuous period of one year from and after such time as such person shall have filed with the Board of Supervisors of such county an affidavit stating that such person is no longer a pauper and intends to acquire a settlement in that county."

The underlined portion of this statute was amended into law in 1933 (Chapter 99, Section 1, in Laws of the 45th General Assembly). There was no provision in the law for filing an affidavit prior to this amendment so any person could acquire a legal settlement by residing in the county for one year after a notice had been given for them to depart, provided that no subsequent notice was given within that year. This was established by Section 3828.092, Iowa Code, 1939, which stated as follows:

> "Persons coming into the State, or going from one county to another, who are county charges or are likely to become such, may be prevented from acquiring a settlement by the authorities of the county, township, or city in which such persons are found warning them to depart therefrom. After such warning, such persons cannot acquire a settlement except by the requisite residence of one year without further warning."

The apparent conflict came into being between the underlined sections when the amendment requiring the affidavit to establish residency was passed.

In an Attorney General's Opinion 1938, page 869, this apparent inconsistency was found and an attempt was made to harmonize the statutes. They did so by citing the rule of law that a statute must be construed to give effect to all of its provisions, and the different provisions of the statute must be reconciled thus resulting in a sensible and intelligent effect of each. Quinn vs. The First National Bank, 200 Iowa 1384; 206 N.W. 271; Elks v. Conn, 186 Iowa 48, 172 N.W. 173; Des Moines City Railway Company vs. City of Des Moines, 152 Iowa 18, 131 N.W. 43; Coggeshall v. City of Des Moines, 138 Iowa 730, 117 N.W. 309; State v. Coupe, 91 Nebr. 463, 136 N.W. 41; Rohde v. Murfin, 168 Mich. 682, 135 N.W. 457.

Since both provisions appear in the same chapter of the Code, to-wit: Chapter 189.4, Iowa Code 1939, and related to the same such matter, they are in pari materia and must be construed in such a

manner as will make them consistent and harmonious with each other rendering neither section nugatory. The Opinion previously cited determined these sections to be harmonious by establishing that the phrase "requisite residence" is one which commences to run from the time of filing the affidavit required by Section 3828.088. In this way, both sections of the statute can be reconciled without doing violence to the language of either.

Thus, if a person has once been served with a notice and continues to reside in the county which served the notice to depart, whether such residence continues for one year or an indefinite length of time, without filing the required affidavit that he is no longer a pauper and intends to acquire a settlement in that county, he cannot acquire a legal settlement within contemplation of this section.

Applying this construction of the statutes to the factual situation as set out in your letter results as follows:

> "WFred Higgens family moved into Montgomery County in 1937. Within one year, Montgomery County served them with notice to depart in compliance with Section 3828.092. The Higgens family have never filed the affidavit required by Section 3828.088 as a prerequisite to establishing their "legal residence," or "requisite residence" as defined in Section 3828.092. Therefore, the Higgens family remain residents of Page County and Page County is liable for their care.

The amendment in 1941 of Section 3828.092 of the Iowa Code 1939, now Section 252.20 Iowa Code 1954 merely codified the law as it existed prior to the amendment.

It is therefore the opinion of this department that the legal settlement of Fred Higgins remains in Page County and Page County is liable for the care of his family.

Your attention is respectfully invited to Opinion of the Attorney General of 1938, pp. 869 to 883, and particularly to opinions 1, and 7, and to the case of In Re: Newhouse, 233 Iowa, at pages 1014,1015, wherein the Court said: "Such was the view of the Attorney General's office, as stated in opinions 7, 8 and 9 on pages 874-877 of the 1938 "Report of Attorney General. It appears to us to be sound."

Respectfully submitted,

Frank D. Bianco
Assistant Attorney General

FDB/ap
cc- Norman A. Erbe

November 12, 1957

Honorable D. C. Nolan
State Senator
Suite 405 Iowa State Bank Building
Iowa City, Iowa

Dear Senator Nolan:

This is to acknowledge receipt of your communication of recent date in which you request, on behalf of the Iowa members of the Iowa-Nebraska Boundary Commission, an opinion on the following question:

> "May the legislatures of the states of Iowa and Nebraska, with the approval of Congress, fix the boundary line between the states of Iowa and Nebraska in the middle of the Missouri River as the middle of the river exists at the time of such legislation or which may be later determined and fixed by the United States Corps of Engineers?"

It is a part of the general right of sovereignty belonging to individual states to establish and fix disputed boundaries between them, and it is clear from the many court decisions on the subject that states have the right, subject however to the consent of Congress, to enter into compacts relating to the fixing of boundary lines. Likewise, it is well settled in Iowa that the Legislature has the power to delegate to an administrative board or agency broad powers in the working out of details under a legislative act, provided that the power delegated is properly restricted so that it constitutes merely filling up the details after the Legislature has laid down an intelligible and complete declaration of policy which is definite in describing the subject to which it relates or to the field wherein it shall apply. But the delegation of power by the Legislature to an administrative agency of a foreign jurisdiction, such as an agency of another state or of the Federal Government, over which our Legislature has no administrative control, to fix the boundaries of the state, and particularly where the action of such an agency

57-11-13

might adversely affect the citizenship rights and property rights of individuals or where it might result in the ceding of sizable portions of the state's territory to another state or states without further action thereon by the people's chosen representatives, far exceeds the usual powers to "fill up the details" which have been generally recognized as permissible.

Under our Constitution the legislative power of a state is vested in the State Legislature. It is the opinion of this office that our State Legislature can not, in the proposed manner, delegate the sovereign powers of the state and its legislative authority to fix the boundaries of this state to the uncontrolled discretion of such an outside agency as the United States Corps of Engineers whose future decisions as to the location of state boundaries would necessarily be determined by changes in the channel of a river long known to be fickle in its meandering. To allow such a procedure would be to impair the sovereignty of the state itself.

With kind personal regards.

Very truly yours,

NAE/fm

NORMAN A. ERBE
Attorney General of Iowa

HEADNOTE: The institutional lien created by Section 230.25, Code of Iowa, 1954, attaches to all real estate owned by the insane party, including after acquired property and the equitable title of a contract purchaser. The interest of the contract seller of real estate, however, is personal property and would not be subject to such lien. The board of supervisors could in its discretion release an institutional lien on a specific piece of real estate if it deemed it to be in the best interests of the county.

November 12, 1957

57|11|15

Mr. Mark D. Buchheit
Fayette County Attorney
County Court House
West Union, Iowa

Dear Mr. Buchheit:

This is to acknowledge receipt of your letter dated October 22, 1957, wherein you ask our opinion on the following questions:

1. "Whenever an institutional lien is subsequent to a recorded contract for sale of real estate, does the lien attach under Section 230.25 of the 1954 Code of Iowa, or is it dissolved because it is actually personal property after the land has been sold?"

2. "Whether an institutional lien for assistance furnished to a resident of this county under Chapter 230 of the 1954 Code of Iowa against the one-half interest that said resident has in farm real estate may be released by the board of supervisors and said lien attach immediately to another piece of property said resident is purchasing at the present time."

3. "If said lien does attach immediately when transferred, would it remain first as to any subsequent liens, such as old age assistance liens?"

Section 230.25 of the 1954 Code of Iowa provides as follows:

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

In answer to your first question, the above section is explicit in its

terms and reference only to real property. The definition of personal property as set forth in Section 4.1(9), Code of Iowa, 1954, includes "money, goods, chattels, evidences of debt and things in action." (Underscoring added). It is well settled that the interest of the contract seller of real estate is a chose in action and, therefore, comes within the above definition of personal property. Cumming v. First National Bank, 1925, 199 Iowa 667, 202 N.W. 556. It would, therefore, appear that the interest of the contract seller would not be subject to an institutional lien.

In answer to your second question, the Attorney General stated in Opinions of Attorney General, 1950, page 135, payment by county for support of insane person would be made when the county treasurer entered a transfer of the amount from the county state institution fund to the general state revenue fund pursuant to Section 230.21, and an amount thus authorized to be transferred would be based on notice from the county auditor who would enter credit to state in his ledger of state accounts, at which time statutory lien under Section 230.25 would attach to all real property owned by such insane person. In view of this, it would not be necessary for the Board of Supervisors to transfer such lien from one parcel of land to another as such lien attaches automatically to all real estate owned by the insane party, including after acquired property.) Opinion Attorney General, 1940, page 303. Of course, the release of the lien without receiving payment in full will be as to a particular parcel of real estate, only.

There is apparently no authority directly in point as to whether such lien attaches to the equitable title to real estate. It will be noted, however, that

Section 230.25 is similar in import to Section 624.23, which pertains to judgment liens, and there is ample authority to support the proposition that where one holds real estate under a contract to purchase, his equitable title is subject to the lien of a judgment against him. Rand v. Garner, 1888, 75 Iowa 311, 39 N.W. 515.

It is, therefore, our opinion that the same result must follow in the case of institutional liens.

In answer to your question regarding the authority of the Board of Supervisors to release such liens, it will be noted that Section 230.29, Code of Iowa, 1954, makes it mandatory that the board of supervisors release liens in certain enumerated cases. The section does not, however, restrict such action. It would, therefore, appear that the board of supervisors could in its discretion release an institutional lien on a specific piece of real estate if it deemed it to be in the best interests of the county. It is apparent, however, that caution must be used in such cases to secure the amounts owed the county, and an abuse of discretion could subject the board to criticism.

In reply to your question as to whether institutional liens or old age assistance liens would have priority, we refer you to opinion of Attorney General, 1942, page 135, where it is stated:

> "We find nothing in the Code which indicates which lien shall have priority over the other, and it is our conclusion that both liens are of equal weight and effect. The lien for old age assistance accumulates month by month, as does the lien for the support of the insane."

If you have any further questions, please let us know.

Yours very truly,

Francis J. Pruss,
Special Assistant Attorney General

Joseph C. Piper, General Counsel,
Iowa State Tax Commission

FJP:JCP:fs

WEIGHTS AND MEASURES: Where weigh ticket on bulk commodity would show only the net pounds delivered, Department of Agriculture cannot approve delivery in view of Sec. 212.2 requiring that gross, tare and net figures be shown.

November 13, 1957

57 | 11 | 16

Honorable Clyde Spry
Secretary of Agriculture
B u i l d i n g

Sir:

Your recent inquiry is set out hereunder:

"I have a request * * * for permission to use a portable scale of two thousand pounds capacity to weigh feed as it comes from the grinder and then augered into a truck for delivery to the consumer. The weigh ticket would show only the net pounds of feed.

"Chapter 212, Code of 1954, Section 212.2 points out that any such delivery should show the gross tare and net amount in weight of the commodity. I might also call your attention to Section 210.8 of the Weights and Measures Law.

"Our question is, can we approve the delivery of feeds or other materials in the manner described * * * in lieu of the requirements of Section 212.2, or would he have to rely entirely upon the requirements of Section 210.8?" (Emphasis ours)

Section 212.2, 1954 Code of Iowa, states:

"Delivery tickets required. No person shall deliver any bulk commodities, other than liquids, by vehicle unless otherwise provided for without each such delivery being accompanied by duplicate delivery tickets, on each of which shall be written in ink or other indelible substance the actual weight distinctly expressed in pounds, the gross weight of the load, the tare of the delivery vehicle, and the net amount in weight of the commodity, with the names of the purchaser and the dealer from whom purchased." (Emphasis ours)

and Section 210.8 reads as follows:

> "Sales of dry commodities. All dry commodities unless bought or sold in package or wrapped form shall be bought or sold only by the standard weight or measure herein established, or by numerical count, unless the parties otherwise agree in writing, except as provided in sections 210.9 to 210.12, inclusive. (Emphasis ours)

Section 212.2 concerns itself with delivery of bulk commodities. Section 210.8 is directed to the buying or selling of unpackaged dry commodities.

Insofar as delivery is concerned, which is what you inquire about, the requirements of the statute are clear and unambiguous, and, as such, fall within the oft stated rule by the Iowa Court that where a statute directs the performance of certain things it forbids by implication every other manner of performance. (See State v. Hanson, 210 Iowa 773, 231 N. W. 428 at 430.) Since the weigh ticket would show only the net pounds, the answer to your inquiry must be that you could not approve delivery of bulk commodities under the conditions you have described.

Your suggestion that such a device might be operated under the terms of Section 210.8 is, of course, correct. Here only purchase and sale are involved and the portable scale would not be subject to the requirements under the delivery statute. (212.2)

Trusting this has answered your inquiry, I am

Very truly yours,

FREEMAN H. FORREST
Assistant Attorney General

FHF:MKB

CITY HOSPITALS: Section 368A.24, Code 1954, has no application to proceedings of city hospital boards of trustees.

November 14, 1957

57/11/17

Mr. S. W. Needham
Superintendent of Printing
Printing Board
B u i l d i n g

Dear Sir:

Receipt is acknowledged of your letter of November 12 as follows:

"This office has been asked if a municipally owned hospital comes under Section 368A.24, which provides that each municipally owned public utility shall publish a summary of the proceedings together with a list of the warrants drawn, the names of persons, firms, or corporations to whom drawn, the amount thereof, and the reason therefor."

Section 368A.24, Code 1954, provides as follows:

"Utilities boards--proceedings. Immediately following each meeting of the trustees or governing board of each municipally owned public utility, the trustees or board members shall publish by one insertion in at least one newspaper a summary of the proceedings together with a list of warrants drawn, the names of persons, firms, or corporations to whom drawn, the amount thereof, and the reason therefor. Publication shall be made in the manner provided by section 618.14. Failure to make such publication shall constitute a misdemeanor."

It is evident from the express language of the quoted section that it applies to the board of trustees of a city-owned hospital only if such hospital be deemed a "public utility".

In City of Des Moines v. City of West Des Moines, 30 N.W. 2d 500, our Supreme Court said:

"The authorities quite generally refuse to attempt an all-inclusive definition of the term 'public utility'. 43 Am. Jur. Public

> Utilities and Services, §2; 51 C. J. 4. 'As its name indicates, the term * * * implies a public use and service to the public.' 43 Am. Jur., supra.
>
> "It would seem the business of disposing of sewage comes within the classification. . ."

At 43 Am. Jur., Public Utilities, §2, reference is made to cases dealing with the question whether or not canals, cemeteries, electric companies, gas companies, hotels and restaurants, irrigation companies, mining companies, railroads, stockyards, street railways, telegraph and telephone companies, warehouses, coldstorage plants or water companies are public utitilties.

At 35 Words and Phrases, pages 406 to 424 and pocket part supplement thereto numerous cases are annotated on the question whether various specific activities are public utilities.

I have discovered no case where the question has even been raised as respects hospitals.

In view of the lack of any authority or precedent classifying hospitals and particularly city hospitals as "public utilities" you are advised Section 368A.24 does not apply to the proceedings of city hospital boards of trustees.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

HEADNOTE: Section 98.36(6), Code of Iowa, 1954, prohibits the sale of cigarettes and/or cigarette papers by wholesalers to a county home unless such county home holds a state retail cigarette permit.

November 15, 1957

57 | 11 | 18

Mr. William Renner
Lagomarcino-Grupe Co.
Burlington, Iowa

Dear Mr. Renner:

Your letter of October 31, 1957, wherein you ask our opinion on the legality of your company selling stamped cigarettes and/or stamped cigarette papers to county homes who do not hold state retail cigarette permits, has been referred to me for reply.

Section 98.1(1), Code of Iowa, 1954, provides:

". . . 'cigarettes' shall mean and include cigarettes, cigarette papers or wrappers, and tubes upon which a tax is imposed by section 98.6."

In view of the above section, it is evident that the term cigarettes as used in Chapter 98 of the Code includes cigarette papers.

Section 98.36(6), Code of Iowa, 1954, provides:

". . . No state permit holder should sell or distribute cigarettes at wholesale to any person (underscoring added) in the state of Iowa who does not hold a permit authorizing the retail sale of cigarettes. . . ."

Section 98.1(3) defines person as follows:

"'person' shall mean and include every individual, firm, association, copartnership, corporation, (underscoring added) trustee, agency, or receiver, or respective legal representative."

In view of the foregoing it is evident that if a county is a "person" within

the definition of Section 98.1(3), supra, sales of either cigarettes or cigarette papers to such "person" by your company would be in violation of the law.

Section 332.1, Code of Iowa, 1954, provides:

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

As section 98.1(3) gives counties corporate status, they necessarily come within the definition of "person" as used in section 98.36(6), supra. Consequently, sale of either cigarettes or cigarette papers to such corporations or their agencies, such as county homes, is prohibited unless such corporation holds a state retail cigarette permit. The above sections, however, would not prohibit a county home from acting as an agent for its residents to purchase cigarettes and cigarette papers from retailers.

In reference to your request for a printed copy of the Cigarette and Tobacco Law, please be advised that there is a charge of ten cents (10¢) for this booklet, and same will be forwarded to you promptly upon receipt of this amount.

If we can be of further assistance in this matter, please do not hesitate to call on us.

Very truly yours,

Francis J. Pruss,
Special Assistant Attorney General

Joseph C. Piper, Special Counsel,
Iowa State Tax Commission

FJP:JCP:fs

November 18, 1957

57 11 19

Superintendent of Banking
Department of Banking
L o c a l

Dear Sir:

Address is made to your request for opinion as to the power of public bodies, subdivisions and agencies other than the Treasurer of State to make deposits of such funds or invest them in time certificates of deposit.

The request arises out of the enactment of House File 28, now Chapter 54, Acts of the 57th General Assembly, which was designed to require certain public funds not needed currently for operating expenses and not obligated by appropriation to be invested at interest and enlarging the field of investment for such purpose to include time certificates of deposit. I advise as follows. According to the case of In re Estate of Moylan, 219 Iowa 624, the placing of funds in time deposits at interest constitutes an investment and not a deposit. It was there said:

> "The question as to whether a particular transaction between a fiduciary and a bank by which the fiduciary leaves funds in the bank is a mere deposit or an investment, as distinguished from a mere deposit, has frequently been before this court. If an investment, it is, of course, controlled by the provisions of Code, section 12772. This court has held, however, through a long line of decisions, that the placing of funds in a bank by a fiduciary for convenience to be paid out on the order of the fiduciary or returned to him on demand is not an investment. Officer v.

> Officer, 120 Iowa 389, 94 N. W. 947, 98 Am. St. Rep. 365; In re Estate of Workman, 196 Iowa 1108, 196 N. W. 35; Andrew v. Sac County State Bank, 205 Iowa 1248, 218 N. W. 24. On the other hand, it has held the placing of funds by a fiduciary on time deposit at interest, where the funds cannot be withdrawn until the expiration of a fixed period of time, is an investment and is governed by the abovecited Code section. In re Fahlin's Guardianship, 218 Iowa 121, 254 N. W. 296. The question as to whether the fund is to draw interest is not controlling. The absolute right to withdraw the fund on demand seems to be the controlling consideration. In re Fahlin's Guardianship, supra. The deposit of funds in a savings bank at interest under an arrangement by which the bank could require sixty days' notice, before the fund could be withdrawn, has been held to be an investment and subject to the provisions of the statute. Andrew v. Iowa Savings Bank of Ft. Dodge, 214 Iowa 105, 241 N. W. 412."

Chapter 453 of the Code of 1954, as amended by Chapter 54, Acts of the 57th General Assembly, treating of public funds conforms with this view of such use of public funds. By this view thereof whether it be State money or money of bodies other than the State it may be so used. However, insofar as State funds not currently needed for current expenses are concerned, investment thereof in such certificate may be made by the Treasurer of State in his discretion under the provisions of Chapter 453, Code 1954, as amended by the foregoing Chapter 54, Acts of the 57th General Assembly. Section 4 thereof provides as follows:

"Sec. 4. Section four hundred fifty-two point ten (452.10), Code 1954, is hereby amended by striking all of the last sentence and inserting in lieu thereof the following:

"'However, the treasurer of state shall invest, unless otherwise provided, any of the public funds not currently needed for operating expenses in United States government bonds and certificates, providing suitable issues are available; or make time deposits of such funds in banks as provided in chapter four hundred fifty-three (453) and receive time certificates of deposit therefor. With respect to any time deposits that the state treasurer may place with any depository, it shall be his policy to place with such depository an amount of demand deposits equal to at least ten percent (10%) of such time certificate of deposit money, insofar as he may be able to do.'"

On the other hand, insofar as such certificates are available to other officials for investment purposes they are only available pursuant to and under the authority of Section 9 of Chapter 54, Acts of the 57th General Assembly, which provides as follows:

"Sec. 9. Chapter four hundred fifty-three (453), Code 1954, is hereby amended by adding the following:

"'The governing council or board, who by the law have control of any fund created by direct vote of the people, may invest any portion thereof not currently needed, in United States government bonds or make time deposits of such funds as provided in this chapter and receive time certificates of deposits therefor. Interest or earnings on such funds shall be credited as provided in subsection four (4) of section seven (7) of this Act.'"

In other words, funds in the hands of a governing council or board other than the Treasurer of State may be invested in such certificates only when the fund in their hands is created by a direct vote of the people.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

HEADNOTE: Retail Sales & Use Tax -- Relief agencies; credit on tax; sales tax paid on purchases used in relief work may be refunded to the taxpayer upon filing of proper application.

November 18, 1957

57/11/20

Mr. S. A. Vogl
Acting Chelf Auditor
Retail Sales and Use Tax Division
State Tax Commission
Building

Re: The Workingman's Christmas Party Committee, Ottumwa, Iowa.

Dear Mr. Vogl:

On Friday, November 15, 1957, you submitted to me some correspondence from Mr. Hugh F. Bell, Attorney at Law, Ottumwa, Iowa, regarding the above matter.

This correspondence indicates that this committee in Ottumwa is doing charitable work. Pursuant to Section 422.47, Code of Iowa, 1954, a credit is allowed to relief agencies for "any goods, wares or merchandise used for free distribution to the poor and needy."

The entire Section 422.47 should be read very carefully by your division and the provisions of this section should be followed in future correspondence with the committee.

If you have any further questions, please contact me.

Yours very truly,

Francis J. Pruss

FJP:fs

LEGAL SETTLEMENT: Separate maintenance is not within the meaning of "divorce" as used in Section 252.16(4).

November 19, 1957

57|11|21

Mr. Lynn W. Morrow
Allamakee County Attorney
Waukon, Iowa

Dear Sir:

Receipt is acknowledged of your letter of November 12 as follows:

"I hereby request an opinion on the following facts:

"Husband and wife and five children have legal settlement in Linn County. Wife sues for separate maintenance and is awarded same, and makes her home in Allamakee County.

"Question: Is Linn County the county where she has legal settlement after the separate maintenance decree, or can she elect to return and take the legal settlement which she had prior to her marriage, as in the case of divorce?"

Section 252.16(4), Code 1954, provides as follows:

"A married woman has the settlement of her husband, if he has one in this state; if not, or if she lives apart from or is abandoned by him, she may acquire a settlement as if she were unmarried. Any settlement which the wife had at the time of her marriage may at her election be resumed upon the death of her husband, or if she be divorced or abandoned by him, if both settlements were in this state."

It is assumed that the separate maintenance was awarded on some ground other than abandonment, otherwise your question would be directly answered by the statute. Your question then is whether the word "divorced" as used in Section 252.16(4) is broad enough to include a woman legally separated from her husband under

a decree of separate maintenance. The answer is furnished by reference to 17 American Jurisprudence, Divorce and Separation, 64, as follows:

> "Action for Separate Maintenance Distinguished. Actions for separate maintenance and actions for divorce differ from each other in that the latter is one for the dissolution of the marriage relation, while the former is one in affirmance of it and to enforce the obligations of that relation. They are nevertheless similar in their nature, since the marriage relation constitutes the foundation of the action in each case. Separate maintenance proceedings are distinguishable not only from a proceeding for an absolute divorce, but also from a proceeding for a limited divorce a mensa et thoro, since an action for separate maintenance does not expressly or necessarily authorize the wife to live apart from her husband, while under a decree of limited divorce the refusal of the wife to cohabit with her husband is sanctioned and authorized."

Since the woman in question is not divorced and under the facts stated in your letter has apparently not been abandoned, she cannot elect to resume the settlement she had prior to marriage under the quoted statute.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

LEGAL SETTLEMENT: One who has it retains it until it is lost through the occurrence of one of the events named in the statutes.

November 19, 1957

57 | 11 | 22

Mr. Norris S. Gould
Delaware County Attorney
Manchester, Iowa

Dear Sir:

Receipt is acknowledged of your letter of November 17 as follows:

"We would be grateful for your opinion as to whether or not one Hazel Erickson has acquired legal settlement pursuant to Section 252.16 of the 1954 Code of Iowa, under the following set of circumstances:

"1. Hazel Erickson is about 20 years of age and was born and has resided in Delaware County, Iowa, all of her life, with her parents, until August of 1956.

"2. In August of 1956 she was married in the State of Wisconsin to a resident of Wisconsin, and within a few days after the marriage she and her husband returned to Delaware County, and have resided here in this county continuously until October 15, 1957.

"3. About October 15, 1957, this subject and her husband decided to move to Wisconsin and to take up their residence in that state, and have now moved most of their household goods to Wisconsin, apparently with the intention of making that their permanent residence.

"4. The subject and her husband were each served with notice pursuant to Section 252.19 of the Code of Iowa on October 30, 1957.

"5. (a) Does the subject Hazel Erickson have settlement in Iowa, even though her husband has settlement in Wisconsin, and in spite of the fact that she intends to make her permanent residence in Wisconsin.

"5. (b) We understand that subject's husband does not have settlement in Iowa under any circumstances, in view of the fact that he has resided here less than two years and that he was served with notice prior to the end of the two-year period of residence here.

"May we have your opinion on these points?"

The facts of your question read in the light of the Code section to which you refer furnish their own answer. If you will refer to subsection 4 of Section 252.16 you will observe that:

"A married woman has the settlement of her husband, if he has one in this state. . ."

Under the facts of your letter the husband did not have and has not acquired legal settlement in this state.

Section 252.17 provides as follows:

"Settlement continues. A legal settlement once acquired shall so remain until such person has removed from this state for more than one year or has acquired a legal settlement in some other county or state."

Under the facts stated in your letter, none of the events described in Section 252.17 has yet occurred. Since the married woman in question had settlement (according to the facts of your letter) and since none of the events named in the statute which result in loss of settlement has occurred (also according to the facts stated in your letter) the conclusion is obvious that what she had and has not lost she retains until the happening of some event which can cause its loss.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

November 20, 1957

57/11/23

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

Dear Sir:

Receipt is acknowledged of your letter of November 13 as follows:

"Pursuant to the conversation which we had at the County Attorney Convention I would like a clarification of conflicting information which I have. On October 1, 1957 a 'Directive to County Officials Pertaining to Board of Control Procedures for the Mental Health Institutes, Woodward and Glenwood.' was sent out by the Board of Control of State Institutions to all county officials. Under paragraph five thereof 'Payment for Care' A. 'Committed Cases' sub-paragraph two 'Inebriates and Drug Addicts' sub one:

"'a. Cost paid by county of legal settlement. Sections 229.1 and 230.1. 'Insane Statutes apply. Section 224.2.)

"'1. Responsible relatives are liable for costs of care and such care constitutes a lien on any real estate owned by the person committed to such institution or owned by either the husband or wife of such person. Sections 230.25 and 224.2.

"'2. Any person committed for inebriety or drug addiction, his guardian or others responsible for his care, shall reimburse the county for such care from any resources said inebriate or drug addict may have. Section 230.15.'

"About a year ago a man was committed to the Cherokee State Hospital from this county as an inebriate and was released about six weeks later. He owned a small acreage which he has since sold off a part. At this time an attempt was made to collect the institutional account, as according to provisions of Section 230.25 this care constitutes a lien. However opinion of the Attorney General, 1942, page 27, states that this Section does not create a lien for assistance furnished inebriate. I informed the Board of Supervisors that based upon this opinion of the Attorney General this account could not be collected without court action. However since this directive has come out the question has been raised again. Another factor is that the abstracters have ceased to show these inebriacy commitments on the abstract, based upon the conclusion that they do not constitute a lien. This appears to be an important matter not only in our county, but elsewhere and I would appreciate your consideration thereof."

Upon examination of the opinion at page 27 of the 1942 Report of the Attorney General, it is my impression that your advice to your Board of Supervisors was correct. There appears to have been no change in the provisions in question since the issuance of said opinion that would result in an automatic lien in the circumstances you describe.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md
CC: Mrs. Eva Parsons
Board of Control
L o c a l

November 25, 1957

57/11/24

Mr. Newt Drahelm
Wright County Attorney
Clarion, Iowa

Dear Sir:

Your recent letter is set out below:

"FACTS: A juvenile was found by the Juvenile Court to be a delinquent and was committed to the Iowa Training School for Boys at Eldora, Iowa, however, the juvenile was paroled to the County Probation Officer and no mittimus or writ of commitment to be issued during good behavior.

"QUERY: Does the Juvenile Court have the authority to release a juvenile from probation and terminate the proceedings?

"In view of Iowa Code Section 232.21 (1954) as amended by Acts of the 57th General Assembly of the State of Iowa, Chapter 114, (H. F. 352), it appears that the Juvenile Court has such authority to release a juvenile and terminate the proceedings."

For convenience, Code Section 232.21 as amended by Chapter 114, Acts of the 57th General Assembly, referred to by you is set out in pertinent part hereunder:

"232.21 Alternative commitments. The juvenile court, in the case of any neglected, dependent, or delinquent child, may:

" * * * *

"5. At any time, terminate the proceedings and order the child released from the control of the court."

This, (Sec. 232.21) plainly, is authority for the Juvenile Court to terminate the proceedings referred to by you.

This is not inconsistent with a previous opinion of this office finding similar power in the court, prior to enactment of such provision by the Legislature. See 1938 O. A. G. 421, at 423, stating in part as follows:

> " * * * it is the opinion of this department that where an adjudication has been had that a child is in fact * * * delinquent, and a commitment to that effect has been entered by the court, but the child has not been delivered into the custody of the superintendent of the institution, the court retains jurisdiction until such time as its order is carried out and it could rescind or annul its order until and up to and including such time as the child is delivered into the custody of the superintendent of the institution to which the child is committed. (1925-26, Report of Attorney General, page 487.) This would appear true notwithstanding the fact that the Board of Control has approved the commitment."

It is the opinion of this office that for these reasons and the parallel intent of the Legislature expressed in Section 232.23, similarly amended, that the statute confirms authority in the Juvenile Court to terminate such proceedings, in the event the child is still under its jurisdiction, irrespective of the court's conditional order for commitment.

Trusting this has answered your inquiry, I am

Very truly yours,

FREEMAN H. FORREST
Assistant Attorney General

FHF:MKB

. November 20, 1957

57 11 25

Senator George E. O'Malley
420 Royal Union Building
Des Moines, Iowa

My dear George:

Your letter of the 14th inst. addressed to the Attorney General has been handed to me for answer. Among other things you state and ask for opinion in the following situation:

> "Owing to the great number of inquiries that have been received as to what the legislature meant in the passage of the above named chapter, and owing to the diversity of opinions as to what it means, I feel it my duty to come to the top authority on the matter and ask for an opinion getting your interpretation of the same.
>
> "As you probably know, a minority of attorneys who have secured judgments prior to July 4, 1957, are asserting that there is no protection for a wage earner or head of a family as a result of the above action, and that there is no exemption on a wage earner's earnings on a judgment secured prior to July 4, 1957.
>
> "I can state positively and without qualification that the intent of the last legislature was that this garnishment statute, permitting garnishment over a certain amount, would not permit garnishment of wages on judgments secured before July 4, 1957, the specific questions being as follows:
>
> "1. Can a debtor against whom a judgment was secured before July 4, 1957, and who is the head of a family, have his wages garnished on that old judgment?

"2. Has the old exemption statute been completely repealed as to judgments secured prior to July 4, 1957"

"3. What is your interpretation as to the period which the $150.00 over and above the exemption covers, whether it is $150.00 on each garnishment, once a week, once a month, once a year, or for the whole account?"

In reply thereto I advise as follows.

1. Chapter 268, Acts of the 57th General Assembly, to which you refer, appears as follows:

"Section 1. Section six hundred twenty-seven point ten (627.10), Code 1954, is amended by repealing said section and inserting the following in lieu thereof:

"'The wages or salary for services of an employee who is the head of a family, to the amount of thirty-five (35) dollars per week' and an additional three (3) dollars per week for each dependent under eighteen (18) years of age exclusive of all payroll deductions in the form of taxes, shall be exempt from garnishment. Provided, that when such employee receives no definite or agreed wage or salary but is compensated for his services by commission or profit allowances, such allowances shall be similarly exempt from garnishment to an amount of thirty-five (35) dollars per week and an additional three (3) dollars per week for each dependent under eighteen (18) years of age. All above said exempt amount shall be liable for garnishment, except that no creditor may garnish for more than one hundred fifty (150) dollars plus his costs of garnishment.

"'Every employer shall pay to such employee such exempt wages or salary or commission or profit allowances not to exceed said amount of the wages or salary or commission or profit allowances earned by him, when due, upon such

> employee's making and delivering to his employer, his affidavit that he is such head of a family, notwithstanding the service of any notice of garnishment upon such employer, and the surplus only above such exempt wages or salary or commission or profit allowances shall be held by such employer to abide the event of the garnishment suit. If the amount of wages or salary or commission or profit allowances subject to garnishment shall not equal the costs of the garnishment, whatever remains of costs shall be paid by the person bringing the garnishment proceedings, and judgment shall be entered therefor against him, and no judgment for any such deficiency of costs shall go against the employer or the defendant. No employer so served with garnishment shall in any case be liable to answer for any amount not earned by such employee at the time of the service of the notice of garnishment.
>
> "'The provisions of this Act shall not be applicable to any judgment entered prior to July 4, 1957.'"

Note that Section 1 provides that Section 627.10, Code 1954, is amended by repealing said section. Such repeal of that numbered section which provides as follows:

> "627.10 Personal earnings. The earnings of a debtor, who is a resident of the state and the head of a family, for his personal services, or those of his family, at any time within ninety days next preceding the levy, are exempt from liability for debt."

is clearly one of the provisions of the Act. The following language contained in the Act, "The provisions of this Act shall not be applicable to any judgment entered prior to July 4, 1957." clearly excludes the application of this Act to the repeal of the

designated Section 627.10, Code 1954, insofar as any judgment entered prior to July 4, 1957, is concerned. In other words, based upon the foregoing provisions of the Act, Section 627.10 survives insofar as judgments entered prior to July 4, 1957, are concerned. The exemption contained therein as to such judgments may be asserted by the debtor. Therefore, in answer to your questions 1 and 2, I advise that a debtor against whom a judgment was secured before July 4, 1957, and who was head of a family may have his wages garnished on that judgment subject to his assertion of a claim for exemption granted by Section 627.10, Code 1954.

2. In answer to your question 3, I am of the opinion that the limitation of $150.00 upon a creditor exercising his remedy of garnishment is not by the terms of the statute or by intent a limitation upon the number of garnishments a creditor may pursue. However, the maximum amount that a creditor may recover by the remedy of garnishment is $150.00.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

SCHOOL REORGANIZATION: Where planning has been completed and plans filed for territory comprising part or parts of a county or counties the board or joint boards, as the case may be, may act upon petitions within the area where planning is so completed.

November 21, 1957

57/11/26

Mr. William Pappas
Cerro Gordo County Attorney
15 Second St., N. E.
Mason City, Iowa

Dear Sir:

Receipt is acknowledged of your letter of November 20 as follows:

"I herewith request an Attorney General's opinion on the following situation:

"The Cerro Gordo County Board of Education has started preparatory studies relative to county planning for reorganization and intends to meet with County Boards of adjoining counties in joint session in the very near future. In the meantime, study groups representing the various counties are working on a proposed reorganization in Cerro Gordo, Mitchell and Worth Counties which will involve the high school districts of Rock Falls, Plymouth, Manly and Grafton and some of the surrounding rural area. Another study group is working to reorganize an area consisting of the Mason City School District and some surrounding rural area.

"In view of Code Section 275.9, as amended by the 57th General Assembly, I should like your opinion on the following two questions.

"1. If a reorganization petition with respect to the Rock Falls, Plymouth, Manly and Grafton areas in Cerro Gordo, Worth and Mitchell Counties is presented after joint county planning for this specific area has been completed, but before each of the involved three County Boards of Education has completed all of its joint planning, may the petition be acted upon or must it be dismissed by the joint county board?

"2. If a reorganization petition to form a community school district comprising Mason City and the surrounding rural area is presented (assume for the purpose of your opinion that this area is located entirely within the territorial limits of Cerro Gordo County) before the Cerro Gordo County Board has completed all of its joint county planning, may the Cerro Gordo County Board of Education go ahead with reorganization based on the reorganization petition or must it dismiss the petition."

In answer to both questions submitted you are advised that under the express provisions of Section 275.6, Code 1954, which was not amended or repealed by the Fifty-seventh General Assembly, the said petitions may be acted upon where requisite planning has been completed and filed with the State Department of Public Instruction as to the area described in such petitions. Section 275.6 provides as follows:

"Progressive program. It is the intent of this chapter that the county board shall carry on the program of reorganization progressively and shall, insofar as is possible, authorize submission of proposals to the electors as they are developed and approved."

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

HEADNOTE: Sales and Use Tax: The legal effect of a distributor or wholesaler relying upon the permit of the retailer where the retailer is also a contractor; the State Tax Commission should permit this reliance where the sale is an item within the normal business of the retailer-contractor.

November 22, 1957

Mr. Don Cunningham, Director
Retail Sales and Use Tax Division
Iowa State Tax Commission
BUILDING

57 11 21

Dear Mr. Cunningham:

This is to acknowledge receipt of reference #59 dated October 14, 1957, and reference #30 dated July 29, 1954.

Mr. Neiman, a Des Moines attorney, called me regarding the above matters and stated some of the companies which he represents have complained of our tax auditors attempting to impose a sales tax on distributors where they have sold materials to construction contractors as set forth in rule 168.1 where the construction contractor is also a retailer. The pertinent portion of rule 168.1 provides as follows:

> "In some instances construction contractors or construction subcontractors are in a dual business, which includes substantial reselling on an 'over the counter' basis the same type of building materials, supplies and equipment to others at retail in Iowa, as are used by them in their own construction work. We are in this rule referring to such persons as contractor-retailer. Because of the retail business ('over the counter' sales) such contractor-retailer is required to apply for and hold a retail sales tax permit. For the efficient administration of the Act and to simplify the accounting procedure in reporting and paying the tax in such instances, it is hereby provided that such contractor-retailer will be permitted to purchase all construction materials, supplies and equipment (for both purposes) tax free, only provided he holds a valid retail sales tax permit and certifies in writing to this fact to his supplier, describing the permit number of such permit and certifying to the resale of such merchandise. Such buyers shall furnish such certificates to its suppliers and the suppliers shall secure and maintain such certificates to support the noncollection and nonpayment of tax on such sales."

It is clear from rule #168.1 that holding a sales tax permit is sufficient reason for a distributor selling materials to a contractor-retailer normally sold in the retailer's line of business to rely on this permit when making a sale of materials in the retailer's line of business. In other words our auditors should be instructed that they will not be justified in making an assessment against a distributor or wholesaler where the facts conform to the above statement. Certainly it is true, that should a sale be made to a contractor-retailer of materials unconnect ed to the retailer's line of business, the wholesaler or distributor would not be justified in relying upon the sales tax permit of the contractor-retailer to permit the distributor to refrain from collecting the sales tax.

It would seem that since the State Tax Commission has issued sales tax permits to contractor-retailers and to persons doing only contract work, that the burden should be upon the State Tax Commission to revoke any permits held by persons who are acting only in the capacity of construction contractors, contractors, owners or builders. I do not feel we are being fair to distributors and wholesalers should we attempt to compel them to determine the function of the permit holder.

I shall appreciate your observations regarding this matter.

Yours very truly,

FJP:bmc

Francis J. Pruss,
Special Assistant Attorney General.

c.c. to
Mr. Don E. Neiman
Attorney at Law
700 Walnut Bldg
Des Moines, Iowa

AGRICULTURE: FEED: 1. Dept. of Agriculture has authority to define custom mixed commercial feeds and to restrict use of elements therein which might be deleterious to the health of animals, or, because of tissue deposits in such animals, deleterious to human beings. 2. Persons, firms or corporations making so-called "custom mix" commercial fees are "manufacturers" within the purview of the statute (198.8) requiring payment of tonnage fee.

November 22, 1957

Honorable Clyde Spry
Secretary of Agriculture
B u l l d i n g

57/11/28

Sir:

Your recent letter sets out your questions:

"During the past ten or twelve years a change has come about in the handling of commercial feeds which has accelerated greatly in the past two years due to the price-cost squeeze on farm commodities. It involves most noticeably the change from packaged commercial feeds to the bulk handling of these commodities and mass dissemination to the poultry and livestock producer. * * *

" * * * manufacturers have built concentrates, supplements and pre-mixes to be mixed with either basic formulations and grains to grains alone; and they have furnished to their outlets formulas (as per attached samples) to show to farmers in an attempt to get their business. * * *

"In addition to the stationary mixer, there has sprung into being a segment of the industry known as the 'mobile mixer'. This operation consists of building the mixing equipment on a truck chassis. The equipment goes directly to the farm to do the mixing and grinding. * * *

"The stationary or mobile mixer in most cases furnished the concentrates, supplements and premixes. They also furnish the necessary grain portion or the consumer may furnish all or part of the grain which he has either grown himself or purchased from sources other than the firm or person doing the mixing. ***

"It must also be brought to your attention that many of the drugs being added are highly dangerous from the standpoint of their being transmitted to the consuming public if left in the tissues because they are not properly handled by the mixer and feeder. Some of the drugs if not properly handled are deleterious to the livestock and poultry.

"Would you approve the following regulation:

"Regulation. Custom feeds are a class of commercial feeds formulated, mixed and processed to the specific order of the customer who may or may not supply any of the components of the mixture.

"Would you approve this regulation?

"Regulation. Any drug or chemical additive which the Food and Drug Administration of the United States Department of Health Education and Welfare has indicated may be deleterious to the health of domestic animals or which by reason of tissue deposits in animals may be deleterious to human beings may not be used as components of feeds mixed to the specifications of customers by portable mixers.

"I would like to have your opinion on whether the inspection fee as set forth in Section 198.8 of the 1954 Code of Iowa must be paid by stationary and portable mixers on feeds made according to any single method of operation or any conceivable combination of the methods of operation noted above with the exception of those feeds exempted in Section 198.12 of the 1954 Code of Iowa and with the exception of the grain components which the farmer has produced on his farm and supplies to the portable mixer or which he has produced on his farm and transports and supplies to the stationary mixer."

There is no objection to the first proposed regulation.

The second suggested regulation is within the scope of your authority and is approved subject to a minor alteration.

In arriving at these conclusions the statutes set out hereunder were considered:

"189.2 Duties. The department of agriculture shall:

"1. Execute and enforce the provisions of this title, except chapters 203, 204 and 205, which shall be executed and enforced by the pharmacy examiners.

"2. Make and publish all necessary rules, not inconsistent with law, for enforcing the provisions of this title."

"198.1 Definitions. For the purpose of this chapter:

"1. 'Commercial feed' shall mean 'food' as defined in the chapter relative to the adulteration of foods, except that it shall only include food in concertrated form, and mineral mixtures, intended for feeding to domestic animals, and it shall not include hay, straw, whole seeds, unmixed meals made from entire grains of wheat, rye, barley, oats, Indian corn, buckwheat, or broom corn; nor shall it include wheat flour or other flours fit for human consumption."

"190.3 Food adulterations. For the purposes of this chapter any food shall be deemed to be adulterated:

" * * *

"10. If it does not conform to the standards established by law or by the department.

Under the first cited statute you are directed to execute the provisions of Title X of the 1954 Code, and authorized to make and publish regulations in the enforcement thereof.

Both Section 198.1 (1) and Section 190.1 (32) (set out below) define commercial feed as a "food" within the meaning comprehended under the chapter on adulteration of foods. In considering this chapter and especially Section 190.3 (10)

thereof, it is apparent that violation of any reasonable standards adopted by the Iowa Department of Agriculture would constitute a food adulteration.

Realizing that in the majority of cases custom mixing will involve portable mixers still this is not necessarily true, and for this reason we suggest that the last three words of this second proposed regulation be deleted. Presumably, the desired result is control by the Department over all custom mixes not just those made up in portable mixers, hence, our suggestion.

Your final question concerns itself with payment of inspection fees under Section 198.8. For convenience we set it and other pertinent statutes out hereunder:

> "198.8 Inspection fee - report under oath. For the purpose of defraying the expenses connected with the sampling, inspection, and analysis of commercial feeds sold or offered for sale within this state and for other items incident to carrying out the provisions of this chapter, all corporations, firms or persons engaged in the manufacture of commercial feeds sold in this state shall, on or before the fifteenth day of January and the fifteenth day of July of each year, make statement under oath, in due form of law, which shall be filed with the department and which shall set forth the number of net tons of such commercial feeds sold or distributed in this state during the six preceding calendar months; and upon such statement shall pay to the department the sum of ten cents per net ton of two thousand pounds. Each applicant for a certificate of registration shall include in such application a permit granting to the department permission to verify from applicant's records such applicant's statement of tonnage."

> "190.1 Definitions and standards. For the purpose of this chapter the following definitions and standards of food are established:
>
> " * * *

> "32. Food. Food shall include any article used by man or domestic animals for food, drink, confectionery, or condiment, or which enters into the composition of the same, whether simple, blended, mixed, or compound. The term 'blended' shall be construed to mean a mixture of like substances."

Under the definitions of commercial feeds set out in Section 198.1 (1), and, by reference therefrom, Section 190.1 (32), the feed mixes to which you refer are commercial feeds.

The tonnage fee referred to in Section 198.8 is due from "* * * all corporations, firms or persons engaged in the manufacture of commercial feeds sold in this state * * *". The answer to your question then depends upon whether or not stationary or portable "custom" feed mixers "manufacture" commercial feed.

We think they do. You are referred to the following language from State ex rel. Winterfield v. Hardin County Rural Electric Co-op., 226 Iowa 896, 285 N. W. 219; reading as follows:

> "'Manufacture' means to make by hand, by machinery or by other agency; to work raw materials into forms for use; to produce mechanically; the process of making anything by art or of reducing materials into a form fit for use by the hand or by machinery; the production of articles for use from raw or prepared materials by giving these materials new forms, qualities, properties or combinations, whether by hand labor or by machinery. * * *" (Emphasis ours)

Additionally, you are referred to I. C. C. v. Koblin, Inc., 113 F. Supp. 599 at 607, where Graven, J., said approvingly,

> "'"Manufacture," as well defined by the Century Dictionary, is "the production of articles for use from raw or prepared materials by giving to these materials new forms, qualities, properties, or combinations, whether by hand-labor or by machinery"; also "anything made for use from raw or prepared materials."'" (Emphasis ours)

In a parallel situation the making of ready-mix concrete and its sale has been held to be manufacturing. See Commonwealth v. McCrady-Rodgers Co., 174 A. 395, at 396. For other decisions holding mixing to be manufacturing, see State v. Hennessey, Co., 71 Mont. 301, 230 Pac. 64, State Tax Comm. v. Baltimore Asphalt Block & Tile Co., 180 Md. 620, 26 A. 2d 371, Commonwealth v. Filbert, 229 Pa. 231, 78 A. 104.

Finally, in accordance with the following general language from 55 C. J. S. 680:

> "* * * In determining what constitutes manufacture there is no hard and fast rule which can be applied generally. Each case must be decided under its own facts, having regard for the sense in which the term may be used in the particular instance, and the intent or purpose to be accomplished. * * * What might be a manufacturing industry when defined or construed in connection with an instrument or a statute might not be so held when considered in connection with another instrument or statute having a different purpose or object. * * *
>
> "* * * The courts must consider that the legislatures in employing the word had in mind not only the lexicographical definitions, but also the popular conception of what constitutes manufacturing. * * *"

and the specific language contained in Section 4.1 (2), 1954 Code of Iowa:

> " * * * *
>
> "2. Words and phrases. Words and phrases shall be construed according to the context * * *."

the definition must be read within the context of the statute (198.8) in which it appears. That clearly contemplates that the "commercial" feed mixer, i. e. one marketing one or more "standard" products in package or bulk form, is a manufacturer who must pay tonnage tax. The question then remains can the "custom" mixer be so construed.

He is. The salient fact being that irrespective of whether one makes up a single variety of commercial feed, or 100 different kinds, each processes by mixing and each process results in commercial feed.

Since the Legislature's words (198.8) direct that manufacturers of commercial feeds for sale in Iowa shall pay a tonnage tax it would be untenable to hold that one doing this should be held to be exempt simply because he is doing it in a variety of ways rather than one.

For these reasons the answer to your third inquiry is that custom mixers, portable or stationary, are subject to the tonnage levy set out in the statute, subject to the exceptions set out in your question.

Very truly yours,

FREEMAN H. FORREST
Assistant Attorney General

FHF:MKB

SCHOOL REORGANIZATION; BONDED INDEBTEDNESS:
1. May be apportioned in distribution of assets subject to condition bondholders' security cannot be impaired.
2. Seven mill limit is on what each board may certify not what given property may bear.

November 22, 1957

57 | 11 | 29

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

Att: Mr. Edward N. Wehr
Assistant County Attorney

Dear Sir:

Receipt is acknowledged of your letter of November 20 as follows:

"We have a problem in connection with the levying of a tax for the payment of Schoolhouse Bonds and interest which were issued by the Davenport Township School District.

"The Davenport Township School District has issued schoolhouse bonds totalling approximately $300,000.00, and at the time of issuance of these bonds, filed resolutions in the office of the County Auditor making it mandatory upon the County Auditor to levy a sufficient tax for the payment of all bonds and interest becoming due and payable each year, and that the said tax be levied over the entire district.

"Since these bonds were issued, two of the sub-districts of Davenport Township, namely: Nos. 2 and 7, have voted to become, and are now, a part of the Bettendorf Community School District, the effective date being July 1, 1957.

"My questions are as follows:

"1. Are Sub-districts Nos. 2 and 7 still liable, along

with the remainder of Davenport Township School District for the payment of these bonds which were issued by the said School District prior to the time Sub-Districts Nos. 2 and 7 became a part of the Bettendorf Community School District?

"2. Are Sub-districts Nos. 2 and 7, having become a part of the Bettendorf Community School District, also liable, along with the balance of the Bettendorf District, for the payment of bonds issued by the Bettendorf Community School District?

"3. If the answers to questions 1 and 2 are in the affirmative, then the bond tax rate in Sub-districts 2 and 7 will exceed the maximum tax rate of 7 mills which is permitted by the Iowa law. Is there any solution to this particular problem?

"As we are being pressed for time in completing local tax lists we would appreciate an early reply."

The answer to your first question depends entirely upon what provision, if any, was made by the respective districts in their division of assets and liabilities. See enclosed opinion dated April 17, 1956, attached hereto and by reference made a part hereof. This answers your first two questions.

Your third question apparently arises under Section 298.18, Code 1954, which provides as follows:

"Bond tax. The board of each school corporation shall, when estimating and certifying the amount of money required for general purposes, estimate and certify to the board of supervisors of the proper county for the schoolhouse fund the amount required to pay interest due or that may become due for the year beginning January 1 thereafter, upon lawful bonded indebtedness, and in addition thereto such amount as the board may deem necessary to apply on the principal.

"The amount estimated and certified to apply on principal and interest for any one year shall not exceed seven mills on the dollar of the assessed valuation of the taxable property of the school corporation. Provided that when because of reduced valuation a seven-mill tax

is not sufficient to produce the amount required to pay the interest and one-twentieth of the principal of the original issue of bonds legally issued prior to the year 1934, the board may certify such amount and the county auditor shall compute and apply such tax rate for such purposes as may be necessary to raise the amount so certified and the funds so raised shall be used only for the purpose of paying interest and principal on such bonds and shall not be subject to transfer.

"Provided further that the tax limitation contained in this section shall not operate to restrict or prevent a school district in the issuance of refunding bonds to pay interest or principal of bonds outstanding on March 31, 1934."

If you will examine the language of the section you will note the seven-mill limitation is on what may be certified by the "board of each school corporation". No limitation is stated as to the amount of tax which may be imposed on a given piece of property if subject to levy certified by more than one board.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md
Enc. Abels to Christianson
Hamilton Co. Atty. 4/17/56
(#12, Bk. 4)

NOTE: In connection with your second question also see Grout v. Illingworth, 131 Iowa 281; 108 N.W. 528 and Peterson v. Swan, 231 Iowa 745, 2 N.W. 2d 70.

IOWA STATE HIGHWAY COMMISSION

AMES, IOWA

November 25, 1957

51 11 30

John G. Butter
Chief Engineer
Iowa State Highway Commission
Ames, Iowa

Dear Mr. Butter:

The Commission has requested an opinion as to whether or not the Highway Commission can issue permits to the manufacturers of mobile homes for the movement of house trailers of a size exceeding the maximum specified in Chapter 321 of the Code from the point of manufacture to the state line under the provisions of Section 321.467, Code of 1954, as amended, which provides in part:

> "Provided further that, in an emergency, or very special or unusual cases, or as a means of cooperating with national defense officials, the state highway commission may grant permits for moving oversize or overweight vehicles or objects over the highways for a distance exceeding twenty-five miles, if in the judgment of the commission, such special, unusual, emergency or defense movement is essential."

If such permits were granted by the Commission, they would have to be justified by the words "special, unusual, emergency or defense movement". We can eliminate the issues in the problem at hand in relation to emergency or defense movements as the movement of oversize mobile homes from the point of manufacture to the state line for delivery would not, as a general rule, be considered as an emergency or defense movement. However, the use of the words "emergency", "defense", and "essential" give us some indication as to what the 54th General Assembly had in mind when they passed this particular portion of Section 321.467. Those words emphasize the use of the words "special" and "unusual". The word "unusual" is defined in Webster's Dictionary as "uncommon or rare". The word "special" is defind as "uncommon or extraordinary". In reading the entire paragaph set out above, it would appear that the special or unusual cases would have to be something akin to an emergency or defense movement and not merely a movement from point of manufacture to state line for purposes of delivery which would not come under classification of special or unusual.

The 57th General Assembly also amended Section 321.467, allowing for movements by special permit of certain types of oversize construction machinery, equipment or material or oversize agricultural machinery, equipment or material for a distance exceeding twenty-five miles "on a vehicle or combination of vehicles, not including mobile homes or house trailers, of a size or weight of vehicle or load exceeding the maximum specified in this chapter, or otherwise not in conformity with the provisions of this chapter, upon any highway under the jurisdiction of the party granting such permit, except on any part of the completed interstate highway system, if the gross weight on any axle load as prescribed in section three hundred twenty-one point four hundred sixty-three (321.463) of the Code".

This section had previously allowed for such oversize movements by permit if the machinery, equipment or material was being moved "from construction projects or agricultural projects in this state, or is manufactured or assembled within this state". When the 57th General Assembly enacted the above quoted amendment, they specifically excluded mobile homes or house trailers. When the bill was first introduced as House File 562, it did not contain that exception. This was later added by amendment. An explanation on House File 562 refers only to the movement of construction or agricultural machinery, equipment or materials. Furthermore, House File 590 was introduced by the 57th General Assembly which provided that a mobile home manufacturer or dealer "may, upon application to the state highway commission, be issued a special permit to transport a mobile home of excess size on the highways within the state, except upon any part of the completed interstate highway system". The explanation to House File 590 read as follows:

> "This bill would extend to the mobile home industry and the owners of mobile homes permission for the movement on the highways of the state of mobile homes of excess size, similar to the permission now granted to contractors, heavy-equipment manufacturers and the farm implement industry."

House File 590 passed the House 78 to 10, but did not pass the Senate, and therefore never became law in Iowa. House File 562 did pass, giving the Highway Commission authority to issue special permits for the movement of construction or agricultural machinery, equipment, or materials, of excess size and weight, but very specifically excepted the movement of mobile homes and house trailers of excess size and weight.

As a prerequisite to the right of the Highway Commission to issue permits for the movement of oversized mobile homes from point of manufacture to the state line, or distance exceeding 25 miles, there

IOWA STATE HIGHWAY COMMISSION

AMES, IOWA

either must be (1) an emergency; (2) very special or unusual cases; or (3) as a means of cooperating with national defense officials. Furthermore, the special, unusual, emergency or defense movement must be essential.

I am of the opinion that the movement of mobile homes or house trailers exceeding the maximum specified in Chapter 321 from the point of manufacture to the state line does not come within the provisions of Section 321.467 of the Code of 1954 as amended.

It should be noted that the section is discretionary as to whether or not the Commission shall act, and in my opinion, if the Commission authorized such permits for the movement from point of manufacture to state line, it would be abuse of that discretion unless "such special, unusual, emergency or defense movement is essential". The results may seem unfortunate, and may have a tendancy to delay the growth of certain industry in Iowa, but this is a problem to be answered by the legislature. As pointed out above, they saw fit to deny the manufacturers of mobile homes that relief by refusing to pass House File 590 and including in House File 562 a specific exception as to mobile homes and house trailers.

In summary: (1) The legislature has given the Highway Commission authority to grant permits for movement of oversize and overweight vehicles only if, in the judgment of the Commission, such special, unusual, emergency or defense movement is essential.

(2) The movement of oversize mobile homes or house trailers from the point of manufacture to the state line to allow delivery does not come under the classification of emergency, defense or very special or unusual cases.

Very truly yours,

C. J. Lyman
Special Assistant Attorney General
for Iowa State Highway Commission

CJL:MS

November 27, 1957

57 | 11 | 27 Gradwell

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

Dear Governor:

Receipt is acknowledged of your communication of November 18, 1957, wherein you request an opinion on the following questions:

"First, in relation to statutory classifications of cities and towns, by size of population, how is population determined? In particular, how is population determined for intercensual years?

"Second, in the adoption of a civil service plan for specified employees of cities and towns, as provided for in Chapter 365, Code of Iowa, 1954, can the City Council set a starting date for the pension plan (as provided for in Chapter 411, Code of Iowa, 1954) which antedates the adoption of the civil service plan and the adoption of the mandatory pension plan for firemen and policemen? In other words, can an officer with several years of service in a city without a pension plan secure coverage based on his past employment if both employee and the city make lump-sum payments to cover past premiums?

"Third, in a city or town, establishing a civil service system under the provisions of Chapter 365, Code of Iowa, 1954, must the person appointed to the position of Chief of Police be a resident of the city or town prior to his appointment? During his appointment?

"Fourth, may an officer who has served for a period of several years in a city or town with a

> civil service system and a pension system transfer his rights in the pension system should he accept a similar position in another town or city having a pension system as provided for in Chapter 411, Code of Iowa, 1954?"

Section 26.6, Code 1954, as amended by Chapter 57, Acts of the 56th General Assembly, reads in part as follows:

> "Whenever the population of any county, township, city, or town is referred to in any law of this state, it shall be determined by the last certified, or certified and published, official census unless otherwise provided, * * *."

Section 26.2, Code 1954, as amended by Chapter 57, Acts of the 56th General Assembly, provides that whenever a general census is taken by the Federal Government the Iowa Secretary of State shall procure a copy of said census from the proper Federal official and file the same in his office and certify the same as being the census report furnished to him by said Federal official.

Section 26.3, Code 1954, provides for the publication of such census report by the Secretary of State and states that "from and after the date of such publication said census shall be in full force and effect throughout the state." Our Supreme Court in the case of Harp v. Abrahamson, State Treasurer, et al., 248 Iowa _____, 80 N.W. 2d 505, recently had occasion to consider the above cited code sections in connection with Chapter 312, Code 1954. In that case the Court interpreted the phrase, "latest available federal census", to mean the "general federal census taken in 1950" and not a special federal census taken in the city of Dubuque in the year 1954.

Thus, the answer to your first question would be that, in relation to the statutory classifications of cities and towns by size of population, the population would be determined by the last preceding federal census, namely, the one taken in 1950, and certified and published by the Iowa Secretary of State. Any census taken at any other time would not meet the requirements of sections 26.2, 26.3 and 26.6, Code 1954.

In answer to your second question please be advised that Section 411.2, Code 1954, provides for the creation of two separate retirement systems, one for firemen and the other for policemen, in cities which have adopted the civil service plan. Said statute

further provides that "the retirement systems so created shall begin operation as of the first day of the month in which said systems are there established by this chapter." No provision is made in Chapter 411 nor is any authority given to the city council to inaugurate a pension system which would antedate the adoption of the civil service plan and the beginning of the operation of the pension systems on "the first day of the month in which said system(s) are there established" nor does such chapter now make any provision for any lump-sum payments by an individual or the city to take care of the situation where an officer spent several years in the employ of the city prior to the inauguration of a pension plan.

The answers to your third question are to be found in the statutes themselves. Section 365.17, Code 1954, deals with the qualifications of employees under civil service and provides in part as follows:

> "* * * * * *
>
> "In no case shall any person be appointed or employed in any capacity in the fire or police department, or any department which is governed by civil service, unless such person:
>
> "1. Is a citizen of the United States and has been a resident of the city for more than one year, but such residence in the city shall not be a necessary qualification for appointment as chief of fire department.
>
> "* * * * * *
>
> "Except with respect to appointment or employment in the police or fire department, the civil service commission may waive the residence requirement as set out in subsection 1, * * * * *."

Thus, the statute itself states that a person appointed to the position of chief of police must be a resident of the city for more than one year prior to his appointment.

Section 69.2, Code 1954, in defining what constitutes a vacancy in office states in part as follows:

> "Every civil office shall be vacant upon the happening of either of the following events:
>
> "* * * * * * *

> 3. The incumbent ceasing to be a resident of the state, district, county, township, city, town, or ward by or for which he was elected or appointed, or in which the duties of his office are to be exercised."

In other words, the office of chief of police would become vacant upon the incumbent "ceasing to be a resident of the city"for which he was appointed and in which the duties of his office are to be exercised.

As to your fourth question, please be advised that there is no way under our statutes whereby an officer who has served for a period of several years in a city or town with a civil service system and a pension system may transfer his rights in the pension system should he accept a similar position in another town or city having a pension system under the provisions of Chapter 411. The pension systems established by said chapter for a particular city or town are separate and distinct entities from similar pension systems established by another city or town. Each has its own separate existence, its separate funds and securities and its separate governing body. Each is also partially supported by public funds paid by the taxpayers of the city which has established the system. Furthermore, service creditable in one city would not be creditable in the other toward retirement time and benefits.

I trust this answers your inquiries.

Very truly yours,

NAE/fm

NORMAN A. ERBE
Attorney General of Iowa

November 27, 1957

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

Dear Sir:

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

> "Chapter 249, and particularly Section 249.40; and Chapter 565, and particularly Section 565.3, Code of Iowa, 1954, provide for the acceptance of gifts to the State of Iowa.
>
> "The Social Welfare Department recently received an anonymous $10.00 gift to be used for Old Age Assistance, and I respectfully request an opinion as to whether or not the acceptance of such gifts is subject to the Approval of the Executive Council."

In reply thereto I advise as follows. Section 249.40, Code 1954, provides with respect to the acceptance of gifts as follows:

> "Authority to accept gifts. The state board and state department are authorized to accept in behalf of the state any gifts, deeds, or bequests of money or property the proceeds of which shall accrue to the benefit of the old-age assistance revolving fund. In the making of such gifts or contributions the donor shall attach no conditions, whatsoever. The management and disposition of any property so received will be in the state department but such management and disposition shall be subject to the approval of the state board."

Under the plain terms of this section acceptance of a gift by the State department and the State Board of Social Welfare is sufficient and satisfies the requirements of that section. Section 565.3, Code 1954, provides for the acceptance of gifts to the State of Iowa by the Council. However, this specific provision made with respect to gifts to the Board of Social Welfare is applicable and will prevail over the provisions of Section 565.3, Code 1954.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:MKB

LEGAL SETTLEMENT: Conclusion stated in opinion dated Dec. 11, 1957, to Board of Regents confirmed.

January 2, 1958

Mr. Isadore Meyer
Winneshiek County Attorney
104 1-2 Washington Street
Decorah, Iowa

Dear Sir:

Your letter of December 23 has been referred to me for answer. It states as follows:

"On December 11, 1957, Mr. Leonard C. Abels, Assistant Attorney General, directed a letter to Mr. David A. Dancer, Secretary, State Board of Regents, with reference to the legal residence of Howard Hamlo. This was an answer to a letter and request from Mr. Dancer based on correspondence from Dr. William Spear, Superintendent of the State Sanatorium, Oakdale, Iowa, and correspondence between the Directors of Relief and County Attorneys of Johnson and Winneshiek Counties. Mr. Abels in his letter to Mr. Dancer in the numbered paragraph 2 on the first page set out that from August 11, 1949, to July 5, 1952, subject was an inmate of Oakdale Sanatorium, Johnson County, and in paragraph 3 that from July 6, 1952, to the present the subject had been continuously employed at Oakdale Sanatorium, Johnson County. Mr. Abels concludes that this situation is almost identical to that considered in an opinion of your office which appears at page 254 of the 1938 Report of the Attorney General.

"It seems to me that that opinion was predicated upon the premise that the patient was never discharged and re-admitted as a patient of Johnson County. In that opinion on page 254 the following was said: 'In expressing our opinion on the foregoing question, we assume that the statement the patient was committed the

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second time as an indigent patient is not in the technical sense, that in fact the party was admitted, under the procedures prescribed by law, but once, to-wit, in November, 1930, that she was never discharged from the sanatorium.'

"It seems to me that, since in this case Howard Ramlo was discharged from the sanatorium actually and then readmitted, he lost his legal settlement in Winneshiek County, and that in basing the conclusion in this case on the 1938 Attorney General's Opinion is incorrect for the reason that the facts are different.

"I would appreciate very much your reviewing this Opinion and the facts in this case on the basis of this letter and the file on the subject, and advising whether your opinion is still the same. Your attention to this matter is very much appreciated."

In answer thereto you are referred to an official opinion appearing at page 122 of the 1946 Report of the Attorney General which states at page 123:

"We are, therefore, of the opinion that mere physical absence is not enough to lose one's settlement but hold that, when one removes his domicile from his county and this 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, whether it is while he is engaged in war work or in the recovery of an illness."

Applying the foregoing to the facts at hand (as set forth in the correspondence file submitted to this office by the Board of Regents prior to the letter opinion of December 11), the subject inmate had legal settlement in Winneshiek County prior to his first admission to Oakdale. He did not lose it while a patient there. When he was discharged as a patient and became an employee his wife

and children continued to reside in Decorah where they had continuously resided at all times referred to in the correspondence submitted with the question and where they continue to reside at the present time. Thus, the conclusion appears inescapable that subject inmate never "removed his domicile" from Decorah but only his physical presence.

You are, therefore, advised that the conclusion stated in the letter opinion dated December 11, 1957, remains the same.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

FEEBLE-MINDED (Supplements 12/18/57)
Where Board of Control or its Superintendent indicated to a County in 1949 that maintenance of inmate at Glenwood was adequately covered by inmate's earnings no claim for past maintenance is now collectible from such county.

December 30, 1957

Mr. J. R. Hansen, Member
Board of Control of State Institutions
L o c a l

Dear Sir:

Receipt is acknowledged of your letter of December 19 as follows:

"Thank you for your opinion of December 16.

"There is one point that was raised by Mr. Sasser in his letter of December 12 which we do not believe was covered in your opinion. It is the question which is contained or implied in the fifth paragraph of his letter.

"Briefly, we would like to have your opinion as to whether or not the Board of Control and/or its superintendent can legally waive billing of a county for the maintenance of a patient under the circumstances as outlined in this case.

"The problem which faces us is whether or not we should endeavor to collect for the care and maintenance of Carlton Harron from Dubuque County for the period starting with the Fourth Quarter of 1949, at which time the superintendent at the Glenwood State School issued orders to his business office to discontinue billing Dubuque County for maintenance of the patient, Carlton Harron."

From your prior letter, it appears that the Board of Control as previously constituted accepted services in payment of the cost attending maintenance of the inmate in question. Having accepted such services as payment in full it appears there is no outstanding

#57-12-3

bill for which your Board can now bill Dubuque County for past maintenance. As was pointed out in the answer to your letter of December 12, under Section 218.42 it is entirely discretionary with your Board whether or not to continue the arrangement or whether or not to bill the county for <u>future</u> maintenance. The authority under Section 218.42 is vested in the Board, not the superintendent. In view of the period of time elapsed, it appears probable the Board would be held to have ratified the arrangment by its inaction as to past services even if it was entered into by the superintendent without prior Board approval. However, there is nothing in your letters evidencing such action when initially made in 1949 lacked Board approval.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

MOTOR VEHICLES - SCHOOL BUS. Penalty for violation of Section 321.373(17) is fixed by Section 321.482.

December 30, 1957

Mr. Gordon L. Winkel
Kossuth County Attorney
Algona, Iowa

Dear Sir:

The second question contained in your letter of December 20 has been referred to me for answer. Your question reads as follows:

> "The second question which I would like to submit for an opinion deals with an interpretation of Section 321.373(17) of the 1954 Code of Iowa. This section deals generally with privately owned school busses. This specific question involves a privately owned school bus which is presently used for personal use. The owner of said bus failed to 'cover' the word school bus while said bus was being used privately.
>
> "Under these facts, has the owner of this bus violated said section? Should this factual situation not create a violation of said section, could you refer me to a section which would cover such a situation? I am assuming that somewhere in the law we have a section which prohibits private individuals from operating vehicles for private use that carry the insignia or words of a school bus."

Section 321.373(17), Code of Iowa, to which your letter refers, provides as follows:

> "Vehicles owned by private parties, used as school busses, must reverse or cover the words 'School Bus' when the vehicle is not in use as a school bus and flashing stop warning signals shall be used only as provided in section 321.372."

#57-12-5

The section you seek is Section 321.482 which provides as follows:

> "Penalties for misdemeanor. It is a misdemeanor for any person to do any act forbidden or to fail toperform any act required by any of the provisions of this chapter unless any such violation is by this chapter or other law of this statedeclared to be a felony. Chapter 232 shall have no application in the prosecution of offenses committed in violation of this chapter.
>
> "Every person convicted of a misdemeanor for a violation of any of the provisions of this chapter for which another penalty is not provided shall be punished by a fine of not more than one hundred dollars or by imprisonment for not more than thirty days."

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

LEGAL SETTLEMENT: Where finding by Board of Control as to settlement of institution inmate has been permitted to stand for nearly forty years no occasion exists to inquire into whether or not it was correct when made.

December 30, 1957

Mr. Robert C. Lappen, Chairman
Board of Control
Local

Attention: Angela M. Eckstein
Social Service Director

Dear Sir:

Receipt is acknowledged of the following letter from one of your employees dated December 20. It does not appear form the letter whether or not the inquiry was co-ordinated through the Board or authorized by it. The letter states as follows:

"Russell McMartin was admitted to Glenwood State School November 20, 1918. His application was signed by an aunt and uncle, Mr. and Mrs. I. T. (Anna) McMinds of Cedar Rapids, Iowa. He was listed as a resident of Linn County and since his admission, they have been billed for his maintenance.

"According to the information in our record, it appears that sometime about September 1, 1918, Mr. and Mrs. McMinds visited Russell's home in Indiana. Due to conditions in his home, the McMinds stepped in and removed the child from the home and returned with him to Cedar Rapids. They filed for his admission on October 12, 1918. The application stated that he had been a resident of Linn County for only seven weeks. Between the time of application and admission, there was some correspondence between the Superintendent of Glenwood State School and an attorney in Cedar Rapids. We have a letter from the attorney stating that there was no legal transfer of the custody of the child from his parents to Mr. and Mrs. McMinds.

"We ahve only scanty information concerning the parents, but it is our belief that they both continued to reside in Indiana and died there. We therefore raise the question as to whether or not Russell is legally a resident of Iowa and whether or not he should be cared for in one of our state institutions."

It is assumed that the word "residence" as used in the above letter was intended to refer to legal settlement.

Section 223.7, Code of Iowa, provides as follows:

"Statutes applicable. All laws relating to the commitment of insane persons to the hospitals for the insane, insofar as applicable, shall apply to commitments of epileptices to said hospitals and schools."

Section 223.16, Code of Iowa, provides as follows:

"Support statutes applicable. All laws now existing, or hereafter made, creating liability, pertaining to liens and providing for the collection of amounts paid by counties from patients in the hospital for the insane and those legally bound for their support, and those defining persons legally bound for support, shall apply to this chapter, A patient in these hospitals and those legally bound for his support shall be liable to the county to the same degree and in the same manner as though such patient were an inmate of a hospital for the insane."

Section 230.6, Code of Iowa, which first appeared in the Code Supplement of 1913, authorizes the Board of Control to determine legal settlement of persons admitted to state institutions.

Since the said letter indicates the subject patient has been an inmate for nearly forty years and for all of that time has been treated as having settlement in Linn County, it seems somewhat remarkable the question should be raised at this late date. In considering a somewhat similar question, our Supreme Court said in Warren County v. Decatur County, 232 Iowa 614 at page 616:

"If this question could be raised after nearly four years, as in the case here, the question areises: When would counties be barred from litigation the status of those who at one time lived elsewhere in the state?"

Since the letter implies that the Board made a finding of settlement in 1918 and since it appears from said letter that such finding has been allowed to rest undisturbed for nearly forty years, you are advised that no basis can exist for disturbing it at this late date.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

SCHOOLS: The provisions in Section 282.17, Code 1954, with respect to lack of high school or completion of local course of study, do not carry over into Section 282.8 as amended by the 57th G.A. so as to abridge the discretion of local school boards to designate out-of-state schools under the conditions therein prescribed.

December 30, 1957

Honorable H. H. Sorsland
Decorah
Iowa

Dear Representative Sorsland:

Receipt is acknowledged of your letter of December 16 relative to the effect of the amendment to Section 282.6, Code 1954, contained in 57 G. A., Ch. 128, sec. 2. Said section, as amended, provides as follows: (The amendment is inserted in capital letters).

> "Attending school outside state. The board of directors of school districts located near the state boundaries may designate a school or schools of equivalent standing across the state line for attendance of both elementary and high school pupils when the public school in the adjoining state is nearer than any appropriate public school IN HIS DISTRICT OF RESIDENCE OR in Iowa, as provided in section 282.17. Arrangements shall be subject to reciprocal agreements made between the state superintendent of public instruction of the respective states subject to statutory limitations as to tuition and transportation. A person attending school in another state shall continue to be treated as a pupil of the district of his residence in the apportionment of the current school fund and the payment of state aid."

Your specific question relates to the feasibility or desirability of reorganizing certain rural districts along the Iowa-Minnesota border. From your letter, it appears that pupils in such districts now attend school in Minnesota but were such districts reorganized they would become part of a district maintaining a four-year high school. Apparently, families in the area in question prefer that their children continue to attend school in Minnesota because such schools are situated considerably nearer to their respective residences than would be any school in the proposed reorganized district. Your actual question then, is whether under

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Section 282.8, as amended, pupils residing in a reorganized school district containing and operating a high school may attend a nearer public school in another state with cost of transportation and tuition paid by such reorganized district.

The principal obstacle to such arrangement seems to arise out of the phrase "as provided in section 282.17" which was not deleted from the quoted section. Section 282.17 relates to persons who reside in districts not maintaining high schools. It provides as follows:

> "High school outside home district. Any person of school age who is a resident of a school corporation which does not offer a four-year high school course, and who has completed the course as approved by the department of public instruction for such corporation, shall be permitted to attend any public high school in the state approved in like manner that will receive him, or may attend any public high school of equivalent standing in an adjoining state, if said school in the adjoining state be nearer to the pupil's residence than any approved public high school in the state of Iowa, but no board shall pay tuition to a high school outside the state for pupils whose actual residence is nearer to an approved high school in Iowa when measured by the nearest traveled public road."

One way of resolving the question is by determining the antecedent of the phrase in question. Two possibilities exist. One might read the sentence as "may designate. . .as provided in section 282.17" or one might read it as "is nearer. . .as provided in section 282.17". The latter construction would simply indicate legislative intent that the provisions as to proximity of residence to school were intended to be the same in both sections. This appears to be the more reasonable construction for two reasons: First, section 282.17 does not use the word "designate", hence it is unlikely, at least from a strictly literal standpoint, that "may designate" was intended as the antecedent of "as provided in section 282.17". Second, the phrase itself is "as provided" not "as provided for". The eligibility of pupils who reside in district not maintaining high schools and who have completed the schooling offered locally is what is provided <u>for</u> in Section 282.17. That they may attend out-of-state schools in the event certain relationship of proximity between residence and school exist is what is <u>provided</u> therein.

It should be further noted that Section 282.17 confers rights upon pupils under the conditions therein described without reference

to the wishes of their local board wherein the operation of section 282.8 depends upon the local board's discretion.

Thus, by literal construction the conditions of lack of local school and completion of local course appear not to carry over from Section 282.17 to Section 282.8.

Further, a presumption exists that the legislature by its enactments does not contemplate the doing of meaningless acts. Nevertheless, were the antecedent of the phrase in question found to be "may designate" so that the provisions of Section 282.17 with respect to lack of high school and completion of local curriculum were to carry over, the amendment to Section 282.8 would be meaningless. It has been held that the legislative intent prevails over literal text. See Section 4.1, I.C.A., Note 11 for case citations. However, in the sections under consideration, adoption of the construction that "is nearer" is the antecedent of "as provided in section 282.17" conforms literal text to legislative intent.

You are, therefore, advised that Section 282.8, as amended, authorizes (but does not require) local school boards in a reorganized district to designate high school and elementary pupils residing in such districts and nearer to an out-of-state school than to any school in the district or in Iowa, for attendance at such out-of-state schools with tuition and transportation paid by the reorganized district, provided a reciprocal agreement exists between the state superintendents of public instruction of Iowa and the other state involved.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

December 20, 1957

Mr. Joe H. Gronstal
Superintendent
Department of Banking
500 Central National Building
Des Moines, Iowa

Re: Blanket Fidelity Bonds

Dear Sir:

Reference is made to our opinion of September 6, 1957, concerning blanket fidelity bonds, in which we stated that each individual bank should maintain its own individual coverage as provided by Section 528.3, 1954 Code of Iowa. It was our understanding at the time that the liability of the bonding company under such a bond would be less than the combined totals of the individual banks and we wrote accordingly.

We have now been asked whether our opinion would be the same if the totals of all types of liability contained in the single bond equaled or exceeded the totals of the coverage for all of the individual banks.

If the single fidelity bond furnished you covering two or more banks contains coverage by the bonding company equal to or in excess of the totals of all coverage required of the

#57-12-10

individual banks, and the other provisions of the statute are met, such a bond would be permissible.

Very truly yours,

NORMAN A. ERBE
Attorney General of Iowa

DON C. SWANSON
Assistant Attorney General

DCS/fm

HEADNOTE:
SALES AND USE TAX: Lions Clubs and Chambers of Commerce do not come within the provisions of Section 422.45, Code of Iowa, 1954, since their by-laws do not require that their entire net proceeds be expended for educational, religious or charitable purposes.

December 10, 1957

COPY

Mr. Bert L. Wooldridge, Inspector
Sales & Use Tax Division
State Tax Commission
BUILDING

Dear Mr. Wooldridge:

This is to confirm our conversation this morning regarding the exemption of certain organizations from collecting sales tax on their sales made in the course of raising funds for their activities. The section of the Code which applies in this case, is 422.45, Code of Iowa, 1954, entitled "Exemptions", the applicable portion of which, reads as follows:

> "422.45 Exemptions. There are hereby specifically exempted from the provisions of this division and from the computation of the amount of tax imposed by it, the following:
>
> " * * * * * *
>
> "3. The gross receipts from sales of tickets or admissions to state, county, district and local fairs, and the gross receipts from educational, religious, or charitable activities, where the entire net proceeds therefrom are expended for educational, religious, or charitable purposes."

You will note that the statute speaks in terms of the exemption being applicable "where the entire net proceeds therefrom are expended for educational, religious, or charitable purposes". (Emphasis supplied)

It has been the practice of the tax commission that schools and churches have been exempted under this section. However, charitable organizations, as we know them, would have to be audited each year to determine whether all their net proceeds had been used for charitable purposes. However, pursuant to Section 422.47, a relief agency may obtain refund of the tax paid by it on purchases to be distributed free to the poor.

Consequently, I suggest to you that the Lions Club of Ankeny should be required to collect and pay sales tax on the sales made by it in its fund-raising campaigns.

If you have any further questions, please let me know.

Yours very truly,

FJP:rs
CC: Don Cunningham

Francis J. Pruss,
Special Assistant Attorney General

#57-12-13

December 10, 1957

Mr. Robert N. Johnson
Lee County Attorney
Fort Madison, Iowa

Dear Sir:

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

"In Lee County we have a question that arises on a given set of circumstances and from time to time has arisen inprior circumstances not the same as the imstant set but similar thereto. These questions arise under the interpretation of Cahpters 250, 251 and 252 of the Iowa Code of 1954.

"On February 6, 1957 the writer as County Attorney filed a juvenile complaint alleging the dependency under Chapter 232 of the Iowa Code of four children of a veteran and his wife. Shortly thereafter a hearing was had in juvenile court wherein it was determined that the said children were dependent within the meaning of Chapter 232 in that they were without proper parental care and supervision. The court placed the temporary custody of the children with a Mrs. Merle Willard of Fort Madison who from time to time takes care of children in similar circumstances at the request of the Lee County Welfare Agency. Prior to the juvenile hearing and at the time the juvenile petition was filed, the child wefare wirker in the County Welfare Agency requested of the Soldiers Relief Commissioner that such Commission should take care of the expenses of the children in the Willard home and the Commissioner agreed to do so if it were only for a matter of several days. The court order in the juvenile proceedings [illegible]provided that the expenses of the care and maintenance of the children in the Willard home should in the first instance be paid for by Lee County and be refunded to the

#57-12-14

county by the father of the children. Following the hearing the court from time to time received additional bits of evidence relating to the behavior of the natural parents of the children who at the time of the hearing were separated but who now are reconciled (probably very temporary) and the court so far has not been able to make up his mind as to the final disposition of the children. The result is that a sizeable bill has accumulated for the care and maintenance of the children in the Willard home and in addition to such bill it was necessary that the children be hospitalized in the Sacred Heart Hospital at Fort Madison and that bill together with the bill at the Willard home amounts to about $500.00 to $700.00. The Soldiers Relief Commissioner has taken the position that he will not pay the bill or any part thereof unless it be for the first few days of themaintenance in the Willard home because he was not involved in any manner in the juvenile hearing. The Social Welfare Board contends that it is not the obligation of the Social Welfare Board to pay for such maintenance or the hospital bill because these children are the dependents of a veteran and therefore entitled to have such bills paid under Chapter 250. The Social Welfare Board asked this office for an opinion which was given to the effect that in the first instance it was the obligation of the Soldiers Relief Commission to pay these expenses because the children were dependents of a veteran and entitled thereto but that in the event of the refusal of that commission to pay it then came under the basic duties of the Board of Social Welfare to pay the same. This opinion was based upon the theory that dependents of a veteran are entitled to a preferred treatment under Chapter 250 rather than under the ordinary treatment under Chapters 251 and 252. Following the submission of that opinion and on March 27th a meeting was had between the Soldiers Relief Commissioner, the Board of Social Welfare, the child welfare worker of the County Welfare Agency and the Board of Supervisors. At that meeting it was decided that

> the Board of Social Welfare would place an order with the Board of Supervisors for the amount of the bill at the Willard home deferring action on the Sacred Heart Hospital bill and that the Board of Supervisors would allow the payment of that order subject to having the amount thereof refunded by the Soldiers Relief Commission in the event this office could decide that it is an obligation of the Soldiers Relief Commission.
>
> Therefore, the question arising from the above facts is whether the care and maintenance bill at the Willard home is the obligation of the Soldiers Relief Commissionor, having been disallowed by the Soldiers Relief Commission, thereby becomes the obligation of the Board of Social Welfare. The same question arises as to the Sacred Heart Hospital bill for the required medical care and treatment of the same children.
>
> "In addition to the answering of the above specific questions relating to a specific set of circumstances this office would appreciate receiving from your office an opinion defining the responsibilities of the two agencies, i. e. Soldiers Relief Commission and Social Welfare Board and direction what action should be taken in the case of veterans or their depaendents thought to be entitled to relief by the Board of Social Welfare but determined not to be entitled to relief by the Soldiers Relief Commission."

In answer thereto I advise as follows. It appears from the foregoing statment that the question at issue has been adjudicated in court. It appears that after a court hearing initiated by a filing by you as County Attorney it was determined that the children involved herein were dependent within the meaning of

Chapter 232 and were entitled to relief from the County. That determination appears to still exist. But aside from that determination it would seem that the benefits of Soldiers Relief would not be available to persons committed under Chapter 232. According to Section 250.1, Soldiers Relief is available to the honorable discharged indigent men and women who served in the military or naval forces and to their indigent wives, widows and children not over eighteen years of age. I am of the opinion therefore that between relief (which could include hospitalization, 1940 A. G. O. 206) under the Soldiers Relief chapter and relief otherwise there is no justification for imposing that upon the Soldiers Relief Commission.

Respecting an opinion that would funish a guide for determining responsibility in these kinds of cases, it is to be observed that there appears to be no statute defining such responsibility. Any opinion without such would be of no value. Relief in each case of this kind, it appears to us, depends upon its facts and circumstances.

I enclose herewith copies of two precious opinions that might be helpful.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:mkb
Enc.

December 17, 1957

Mr. Ray Hanrahan
Polk County Attorney
Room 406 Court House
Des Moines, Iowa

Attention: Mr. A. R. Shepherd
Assistant County Attorney

Dear Sir:

This will acknowledge receipt of yours of the 13th inst. in which you submitted the following:

"The fees charged by the Probate Referee on all estates administered in this county are placed by the Clerk of our District Court in a separate account which the Clerk administers in conformity with the instructions of our District Judges. The judges appoint the Probate Referee and his assistant and fix the salaries of the Referee and his assistant. Pursuant to the judges' instructions, the Clerk pays these salaries to the Referee and his assistant monthly through the year. It has been the custom for the Clerk to pay, pursuant to the instructions of the judges, any surplus remaining in the fund at the end of each year, to the county to go into the General Fund.

"Some new shelves and some other expenditures are badly needed for the County Law Library which is maintained in the Court House, pursuant to the provisions of Section 332.6 of the Iowa Code.

"We are asked whether our judges have the power to order the Clerk to spend a part of the surplus which will remain in the Probate Referee Fees Fund at the end of this year, for the needs of the County Law Library.

"We have no question as to the power of the judges to fix the fees of the Probate Referee which the Judges have appointed pursuant to Sec-

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tion 638.1 of the Code and to likewise fix the fees of the Referee's Assistant. Mr. Holloway of the State Auditor's Office has also advised Mr. Sarcone, our County Budget Officer, that the Clerk of our District Court is not accountable for the surplus remaining at the end of each year in the fund derived from fees charged by the Probate Referee.

"As you will note, Code Section 332.6 authorizes the County Board of Superviosrs to maintain the Law Library and provides that the Law Library shall be under the supervision and control of the Judges of the District Court. We have not been able to find any specific statutes or any decisions of the Supreme Court or published opinions of the Attorney General prescribing any disposition of the surplus remaining in the fund derived from the fees charged by the Probate Referee and we do note the general provision of sub-section 6 of Code Section 332.3, that the Board of Supervisors shall have power -

"'to represent its county and have the care and management of the property and business thereof in all cases where no other provision is made.'

"Hence, we wonder whether the power of the judges is sufficiently broad in this instance to enable them to direct the expenditure of the surplus in the Referee Fee Fund for the needs of the law library or whether this suplus should be returned to the General Fund to be controlled by the Supervisors and possibly to be used by them for the needs of the law library in line with the recommendations of the judges.

"Please advise us which of these methods you think proper or give us any other suggestion that may occur to you as to a way to properly dispose of this problem."

In reply thereto I advise as follows. The question submitted appears to have been ruled on by an opinion of this Department appearing in the Report for 1928 at page 252. This opinion states:

"We are in receipt of yours of recent date requesting an opinion of this department on the following questions:

"The court in and for Linn County, Iowa, entered an order on the 3rd day of January, 1927, appointing a referee in probate and specifying the fees that he should receive, said fees being based on the amount of each estate, and also specifying a maximum to be paid said referee for any one year's service in the sum of $2,400.00. On the 1st day of November, 1927, the referee so appointed had been paid the sum of $2,400.

"(1) Shall this office continue to tax the costs as provided for in said order?

"(2) If so, to what fund shall the fees over and above the $2,400 be credited.

I.

"Section 12041 of the Code of 1927, authorizes the court to appoint a referee in probate matters. Section 11639 of the Code, 1927, specified that where a referee is appointed by a court, that the court shall fix the compensation that he shall receive.

"Our Supreme Court has held in the case of Burlingame vs. Hardin County, 180 Iowa 919, that the court acted under the authority of Section 12041, and that under said section the court has authority to appoint a referee in probate to handle all probate matters and that it was not necessary to have a separate order entered for the appointment of a referee for each estate.

II.

"Section 5245, Chapter 263, Code of 1927, provides in substance as follows:

"'That all fees collected by the clerk of the district court, unless otherwise provided for by statute, shall belong to the county.'

"Section 5246 requires that a record be kept of all fees collected and Section 5247 requires that he make a quarterly report, and that he pay

> quarterly into the county treasury all fees collected during the preceding quarter, taking duplicate receipts therefor and filing one of such receipts in the office of the auditor and entering upon the fee book of his office the date and amount of each payment into the county treasury.
>
> "It would, therefore, appear that any and all referee fees over and above $2,400 which are collected by the clerk of the district court in and for Linn County, belong to the county and should be paid by said clerk quarterly into the county treasury.
>
> "In writing this opinion it has not been our intention to question the authority of the court or the legality of the order which was entered by it, but rather to explain and clarify the action of the court."

The sections of the Code therein cited appear currently as follows: Section 12041, Code 1927, with the addition of a provision for the appointment of the Clerk of the District Court to act as referee is now Section 638.1, Code 1954. Section 11630, Code 1927, has been superseded by Rule of Civil Procedure 208 which now provides as follows:

> "Compensation. The court shall fex the master's compensation and order it paid or advanced by such parties, or from such fund or property, as it may deem just. Execution may issue on such order at the master's demand. He shall not retain his reports as security for his compensation."

Section 5245 of Chapter 263, Code 1927, still provides in substance the statement thereof in the foregoing opinion. This section is now Section 342.1, Code 1954. Sections 5246 and 5247 of the 1927 Code appear now as Sections 342.2 and 342.3, Code 1954.

On the authority of the foregoing opinion the judges would have no authority to direct the expenditure of the surplus in the referee fee fund for the needs of the Law Library. This surplus accordingly should be accounted for to the General Fund of the County to be dispensed by the Board of Supervisors in their discretion.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:mkb

BOARD OF CONTROL:
Wages of inmates.
What is "practicable" or "proper" under Section 218.42 is a matter of Board policy in exercise of discretion and not a question of law.

December 18, 1957

Mr. J. R. Hansen, Member
Board of Control of State Institutions
L o c a l

Dear Sir:

Receipt is acknowledged of your letter of December 12 by which you transmit the following inquiry from the Superintendent of the Glenwood State School:

> "I wish to bring to your attention, a situation whereby I would appreciate your advice as to proceeding in the solution of this problem.
>
> "We have a patient at this institution, Carlton Harron, who has been at this institution since 1922, coming from Dubuque, Iowa. He was transferred from the State Juvenile Home to this institution. This patient is a very high functional individual and from a psychological testing standpoint, is far above that which is required for institutionalization in any institution of this kind in the country.
>
> "In 1949, the Business Office was instructed by the Superintendent to cease billing Dubuque County for maintenance as this patient was doing excellent work here and more than earning the amount the county would have been charged for his maintenance.
>
> "At this point I am not particularly arguing as to what was right and what was wrong for some years back, however, I am raising the question of legality as well as discrimination from the standpoint of total patients in the institution. There have been and still are numerous

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patients at this institution, who are of extremely high functional ability, certainly equally, if not surpassing that of this patient in question, but they are not receiving the same consideration as has been extended to the patient, Carlton Harron.

"I feel that there should be a determination made as to how we proceed from this point on, since I now have the responsibility for the institution and its affairs. As an incidental point, though this would not be related to the question I am posing, this patient will leave here sometime in the not too distant future; but nevertheless, it would seem to me that there is an outstanding bill that needs to have appropriate attention given to it."

In answer thereto you are referred to Section 218.42, Code 1954, which provides as follows:

"Wages of inmates. When an inmate performs services for the state at an institution, the board of control may, when it deems such course practicable, pay such inmate such wage as it deems proper in view of the circumstances, and in view of the cost attending the maintenance of such inmate. In no case shall such wage exceed the amount paid to free labor for a like service or its equivalent."

Apparently the Board of Control at some time past deemed it "practicable" to pay the subject of your inquiry a wage based upon the "cost attending the maintenance of such inmate". Whether your Board as now constituted deems the payment of such wage "practicable" or the amount thereof "proper" at the present time presents a question of policy rather than law. Whether such "wage" should be continued, terminated, changed in amount, or granted to other inmates is at the discretion of your Board as provided in the quoted statute.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

GLENWOOD STATE SCHOOL. No authority exists for taking inmates outside the State of Iowa for medical treatment.

December 19,1957

Mr. J. R. Hansen
Board of Control of State Institutions
Local

Dear Sir:

Receipt is acknowledged of your letter of December 12 as follows:

"There has been some discussion between ourselves and our superintendent at Glenwood regarding the question of outside medical help or services for the students and/or patients at Glenwood.

"At the present time they are being taken to the Universit Hospitals at Iowa City at considerable expense and some degree of risk.

"We are exploring the possibility of getting this type of service from one of the medical schools in Omaha.

"Are there any legal road blocks to this proposed procedure, if it is possible for our superintendent at Glenwood to work out a satisfactory arrangement with one of the medical schools in Omaha?

"Your kind consideration of this problem will be appreciated."

Section 255.28, Code 1954, provides for hospitalization at the University Hospital of inmates of State Institutions as follow:

"Transfer of patients from state institutions. The board of control of state instituti;ns, and the board in control of the Iowa braille and sight-saving school, the school for the deaf, the Iowa Annie Wittenmyer Home, and the juvenile home, may, respectively, send any inmate of any of said

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> institutions, or any person committed or applying for admission thereto, to the hospital of the medical college of the state university for treatment and care as provided in this chapter, without securing the order of court required in other cases. Said boards shall respectively pay the traveling expenses of any patient thus committed, and when necessary the traveling expenses of an attendant for such patient, out of funds appropriated for the use of the institution from which he is sent."

It is noted that your inquiry relates to the institution referred to in the statutes as the "Glenwood State School" whereas a similar state institution is named the "Woodward State Hospital and School". If, as the name indicates, superior medical facilities exist at the Woodward institution, the Board might avail itself of the authority contained in Section 223.11, Code 1954, as follows:

> "Transfers. Inmates of the Glenwood state school may be transferred by the board to the hospital and school at Woodward or from the latter institution to the former."

It must be borne in mind that the institution in quiestion exists under the laws of Iowa; that the Board of Control exists under the laws of Iowa; that the powers of the Board are defined and circumscribed by the laws of Iowa, and that the inmates at the said institution are admitted or committed under the laws of Iowa. However, the place of treatment suggested in your letter is located in the State of Nebraska. As was said by our Supreme Court in Rastede v. Chicago, St. P., M. & O. R. Co., 203 Iowa 421 at page 437:

> "To put the subject in a few words, the laws of no state have extraterritorial force."

Thus, if such patient were taken outside the State of Iowa for treatment the status of his custody thereafter would be in considerable doubt.

It should further be noted that the Board of Control, being a creature of statute has only those powers conferred by statute or reasonably and necessarily implied as incident to exercise of an express power. I find no express mention made in the statutes of any power to take inmates of a state institution outside the state. In fact, the power of the Board and its employees to officially go outside the state is definitely regulated by Section 217.10, Code 1954, as follows:

> "Trips to other state. No authority shall be granted to any person to make a trip to another state at the expense of the state, except by resolution, which shall state the purpose of the trip and why the same is necessary, adopted by the board, entered of record, and approved in writing by the governor prior to the making of such trip."

Your are, therefore, advised that no statutory authority exists for taking any inmate of a state institution outside the State of Iowa for purposes of medical treatment or hospitalization.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md