January 6, 1958

Mr. David A. Dancer, Secretary
State Board of Regents
L o c a l

Dear Sir:

This will acknowledge yours of the 2nd inst. which has been referred to me for answer and in which you state:

> "The 56th General Assembly appropriated $130,000.00 'to the University Hospital for the purpose of improving buildings to provide necessary equipment and facilities for observation, diagnosis, care and treatment of emotionally disturbed or mentally retarded children' (Section 9, H. F. 588, 56th G. A.)
>
> "After extended conferences and planning the State Board of Regents has approved a plan consisting of the construction of a building for the above purpose to be built in an area to the west of the State Psychopathic Hospital, Iowa City, Iowa, as a separate structure, attached to the Psychopathic Hospital by a short connecting passageway.
>
> "Before continuing any further with this project, the State Board of Regents respectfully requests your opinion as to whether the $130,000.00 provided by Section 9, H. F. 588, 56th G. A. can be used to construct a separate structure attached to the Psychopathic Hospital by a short connecting passageway."

In reply thereto we advise you that in our opinion the money appropriated by Section 9, House File 588, Acts of the 56th General Assembly, may not be used to construct a separate structure for the observation, diagnosis, care and treatment of

mentally retarded children and for the purposes of research, study and training of professional workers in respect to the care, treatment of training of such children. Justification for this opinion is found in the legislative history of this Bill. The Journal of the House for April 26, 1955, at page 1460 shows the introduction of the following amendment to the above numbered House File:

"Amend House File 588 as follows:

"1. By adding the following new section:

"'Sec. 9. There is hereby appropriated from the general fund of the state to the university hospital for the purpose of erecting, constructing, or improving buildings to provide necessary equipment and facilities for observation, diagnosis, care and treatment of mentally retarded children and for the purpose of research, study, training of professional workers in respect to the care, treatment and training of such children . . . . . $ 130,000.00
For salaries, support and maintenance 30,000.00
For the purpose of erecting, constructing, or improving buildings to provide necessary equipment and facilities for observation, diagnosis, care and treatment of emotionally disturbed children and for the purpose of research, study training of professional workers in respect to the care, treatment and training of such children 250,000.00
For salaries, support and maintenance 200,000.00

"2. By striking from lines two (2) and three (3) of section one (1) the words and figures 'four million eight hundred sixty thousand seven hundren fifty dollars ($4,860,750.00) and inserting in lieu thereof the correct words and figures to include the appropriation made in section nine (9).'"

The same Journal on April 27, 1955 at page 1475 shows the foregoing exhibited amendment which amendment was upon motion adopted by a vote of 68 ayes to 15 nays with 25 absent or not voting. Thereupon the Journal further shows the passage of the Bill as so amended by a vote of 94-0 with 14 absent or not voting. Subsequent to this adoption by the House the Bill was taken up by the Senate and the Journal of the Senate for April 29, 1955 at page 1177 shows the following Committee amendments were considered:

> "Amend House File 588, section 9, lines 2 and 3, by striking the words, 'erecting, constructing, or'.
>
> "Further amend section 9 by striking all of lines 9 through 15.
>
> "Amend section 1, lines 2, 3 and 4, by striking the words and figures 'five million four hundred seventy thousand seven hundred fifty dollars ($5,470,750.00)' and insert in lieu thereof 'five million twenty thousand, seven hundred fifty dollars ($5,020,750)'."

The amendments were adopted. The Senate Journal subsequently on page 1177 shows the Senate passed the Bill as so amended by the vote of 46 ayes to 0 nays with 4 absent or not voting. Subsequent thereto, the Journal of the House on April 29, 1955 shows the House calling up for consideration the numbered bill hereunder consideration as amended by the Senate and the amendments were concurred in. The Journal of the House of the 56th General Assembly at page 1579 shows passage of H. F. 588 as amended by the Senate and concurred in by the House by a vote of 74 ayes, 0 nays, 34 absent or not voting.

The foregoing history appears to conclude the legislative intent. Such intent is disclosed by the elimination of the words "erecting" and "constructing" from the authorized use of the money appropriated for the designated purpose. That intention to remove from its authorized use the power to erect and construct is confirmed by the further fact that the same amendment that restricted the use of the money to improving reduced the general appropriation to the Board of Regents from $5,470,750.00 to the sum of $5,020,750.00, making a reduction in the amount of $450,000.00. Undoubtedly this reduction so provided for in the amendment that restricted the use of the money is a consistent inference of the intent that no power to erect or construct a building was intended. We are of the opinion, therefore, that the act of the Legislature in removing from the appropriation the power to use the money for construction and erection and the retention therein of the word "improving" evidenced the fixed intention of the Legislature to authorize the use of the money for additions to already existing buildings and therefore your question as to whether the $130,000.00 appropriation provided by House File 588, Acts of the Fifty-sixth General Assembly, can be used to construct a separate structure attached to the Psychopathic Hospital by

a short connecting passageway is in the negative.

Very truly yours,

NORMAN A. ERBE
Attorney General of Iowa

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

January 2, 1958

Mr. Ray J. Kauffman, Administrator
World War II Bonus Division
L o c a l

Dear Sir:

You write respecting claim No. 233256 of Frank Eugene LaRue whose claim was filed November 10, 1949:

"Enclosed herewith is World War II Service Compensation Claim No. 233256.

"Frank Eugene LaRue, a Marine veteran from Dows, Iowa filed this claim November 10, 1949.

"He was given a 'Bad Conduct Discharge' from the Marine Corp on March 20, 1946. (His statement shown as answer to Question #19, of Form No. 1, enclosed herewith.)

"The above veteran received Form No. 1-L11, disallowal notice from our office, on February 21, 1950. Reason for denial stated within reason #4 of Form 1-L11. The veteran, by law, was allowed thirty (30) days right of appeal, which he did not use.

"On September 19, 1956, the Department of The Navy, Board For Correction of Naval Records, Washington 25, D. C., mailed Mr. LaRue a correction letter, same of which is also inclosed herewith. A 'General Discharge' - 'Under Honorable Conditions' as stated, was issued the veteran March 20, 1946. This is also inclosed herewith.

"At your convenience, a decision as to whether or not our department should honor this veteran for payment of World Ward II Service Compensation, same would be most appreciated."

In reference to the foregoing I advise you that in my opinion disallowance of the claim is justified and confirmed. Chapter 59, Section 7, Acts of the 52nd G. A. provides:

> "Sec. 7. Duties. It shall be the duty of the said board to administer the provisions of this act, to examine all applications and approve or disapprove the same and make any investigation necessary to establish facts. In the event an application is disapproved by the board, the claimant shall have the right of appeal to the district court of the state of Iowa in and for the county of his legal residence within a period of thirty days from date of mailing by registered mail of notice of such disapproval. The appeal shall be perfected by filing in the office of the board, a written notice of appeal setting forth the order or finding appealed from and the grounds of the appeal. Within thirty (30) days after the filing of such notice of appeal the board shall make, certify and file in the office of the clerk of the district court to which the appeal is taken, a full and complete transcript of all documents in the proceeding, including any depositions, a transcript or certifications of the evidence, if reported, including the notice of appeal. The clerk shall forthwith docket such appeal. The appeal shall be heard in such district court as in equity de novo. Appeal may be taken to the Supreme Court from any final order or judgment or decree of the district court. When any application has been approved by the board, payment shall be made to the applicant in accordance with the provisions of this act. It shall be the duty of the board to prepare vouchers and transmit the same to the state comptroller in payment of the bonus claims provided for herein and other necessary administrative expenses; said state comptroller shall issue a warrant for the amount stated therein and the state treasurer shall pay such warrants out of said bonus fund. The board is hereby empowered to employ such assistants and incur such other expenses as may

> be necessary for such administration and carrying out of the provisions of this act, and the funds necessary for such administration and carrying out the provisions of this act shall be expended from said compensation fund; such assistants as said board may determine shall give bond in such amount as may be fixed by said board, and shall, whenever practicable, be persons within the classes as defined in section four (4) of this act. The board is hereby empowered to make, adopt and promulgate such rules and regulations for the carrying out of the provisions of this act as it deems necessary and expedient and which are not inconsistent with any provisions of this act."

In addition to the foregoing, Chapter 55 of the Acts of the 55th G. A., being Section 35A.7, Code 1954, transferred the powers of the Bonus Board to the State Auditor. However, where application had been considered by the Bonus Board prior to its abolishment and disapproved by it and thirty days appeal time expired, there is nothing left for the Auditor to consider. He is without power to approve or disapprove and the application cannot survive failure to appeal from the disapproval by the Bonus Board within thirty days thereof.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

January 2, 1958

Mr. Ray J. Kauffman, Administrator
World War II Bonus Division
L o c a l

Dear Sir:

You write respecting claim No. 211750 of Kenneth V. Mohr whose claim was filed August 7, 1950:

> "Enclosed herewith is Claim Number 211750, same of which was permanently disallowed by this office on August 7, 1950.
>
> "The applicant stated, by letter, which is a part of the file - quote: 'I wish to withdraw my claim with Iowa Compensation Board pending acceptance or rejection by North Dakota Board.' Unquote. He was allowed thirty days to right of appeal, which never was requested.
>
> "It is the opinion of this office that your department review the file, after which our request to you for an opinion of eligibility rights would be most appreciated."

In reference to the foregoing I advise you that in my opinion disallowance of the claim is justified and confirmed.

Chapter 59, Section 7, Acts of the 52nd G. A. provides:

> "Sec. 7. Duties. It shall be the duty of the said board to administer the provisions of this act, to examine all applications and approve or disapprove the same and make any investigation necessary to establish facts. In the event an application is disapproved by the board, the claimant shall have the right of appeal to the district court of the state of Iowa in and for the county of his legal residence within a period of thirty days from date of mailing by registered mail of notice of such disapproval.

> The appeal shall be perfected by filing in the office of the board, a written notice of appeal setting forth the order or finding appealed from and the grounds of the appeal. Within thirty (30) days after the filing of such notice of appeal the board shall make, certify and file in the office of the clerk of the district court to which the appeal is taken, a full and complete transcript of all documents in the proceeding, including any depositions, a transcript or certification of the evidence, if reported, including the notice of appeal. The clerk shall forthwith docket such appeal. The appeal shall be heard in such district court as in equity de novo. Appeal may be taken to the Supreme Court from any final order or judgment or decree of the district court. When any application has been approved by the board, payment shall be made to the applicant in accordance with the provisions of this act. It shall be the duty of the board to prepare vouchers and transmit the same to the state comptroller in payment of the bonus claims provided for herein and other necessary administrative expenses; said state comptroller shall issue a warrant for the amount stated therein and the state treasurer shall pay such warrants out of said bonus fund. The board is hereby empowered to employ such assistants and incur such other expenses as may be necessary for such administration and carrying out of the provisions of this act, and the funds necessary for such administration and carrying out the provisions of this act shall be expended from said compensation fund; such assistants as said board may determine shall give bond in such amount as may be fixed by said board, and shall, whenever practicable, be persons within the classes as defined in section four (4) of this act. The board is hereby empowered to make, adopt and promulgate such rules and regulations for the carrying out of the provisions of this act as it deems necessary and expedient and which are not inconsistent with any provisions of this act."

In additions to the foregoing, Chapter 55 of the Acts of the 55th G. A., being Section 35A.7, Code 1954, transferred the powers of the Bonus Board to the State Auditor. However, where

application had been considered by the Bonus Board prior to its abolishment and disapproved by it and thirty days appeal time expired, there is nothing left for the Auditor to consider. He is without power to approve or disapprove and the application cannot survive failure to appeal from the disapproval by the Bonus Board within thirty days thereof.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

[illegible] of these states were used in that portion of the [illegible] The [illegible] intent of the statute is that all sales and use taxes [illegible] to the [illegible] subdivision [illegible] refunds pursuant to section 422.45 (6).

January 3, 1958

[illegible], Supervisor
[illegible] Contract Refunds,
[illegible] Tax Division,
State Tax Commission,
Building.

Re: Construction Contract Refund of Sales and Use Tax; rehabilitation MacArthur Bridge spanning Mississippi River; bridge owned by City of Burlington, Iowa.

Dear Mr. Bane:

This is to acknowledge receipt of your letter of January 3, 1958, regarding the above matter.

In your letter you wish to know whether the City of Burlington should be allowed to obtain a sales and use tax refund from the State of Iowa of that amount of the sales and use tax paid on materials used in the rehabilitation of that portion of the above referred to bridge which extends beyond the boundaries of the State of Iowa into the State of Illinois. There is a line of U. S. and state cases which indicates that, where a state owns real property beyond its borders, it is to be treated as an ordinary proprietor of this property. In other words, a subdivision of a municipal corporation of the state does not carry with it any of its sovereign attributes beyond the boundaries of the state.

In the case that we have involved here, it is clear that tax was paid to the State of Iowa on all of the materials used in construction of the bridge, even that portion of the bridge which extends beyond the state line. The statute governing refunds on sales and use taxes paid on contracts with tax levying or tax certifying bodies is section six of Section 422.45, Code of Iowa, 1954. The applicable portions of this statute read as follows:

> "There are hereby specifically exempted from the provisions of this division and from the computation of the amount of tax imposed by it, the following:
>
> " * * * *
>
> "6. Any tax certifying or tax levying body of the state of Iowa or governmental subdivision thereof may make application to the state tax commission for the refund of any sales or use tax upon the gross receipts of all sales of goods, wares or merchandise to any contractor, used in the fulfillment of any written contract with the state of Iowa or any political subdivision thereof, which property becomes an integral part of the project under contract and at the completion thereof becomes public property, except goods,

#58V12

> ...ures or merchandise used in the performance of any contract in connection with the operation of any municipal utility engaged in selling gas, electricity, or heat to the general public. * * *

It is very clear that if we did not have the question of extra territorial construction there could be no question of the refund. The statute is very clear in requiring the state to refund its sales and use tax on contracts such as the one involved herein to the political subdivision of the state entitled to the refund. It is my opinion that the statute is sufficiently clear and mandatory so that the Iowa Supreme Court would compel the State Tax Commission to refund to the City of Burlington all of the sales and use tax on material used on this project even though a portion of the bridge extends beyond the boundaries of the state. Where a statute is clear the Supreme Court may not construe it and derive a meaning from it clearly contrary to the expressed intent of the legislature. There would be no public policy against making this refund to the City of Burlington.

Consequently, it is my opinion that the refund of all of the sales and use tax to the City of Burlington should be made upon receipt of your office of a proper application, together with required proof of payment of the taxes.

Yours very truly,

Francis J. Pruss
Special Assistant Attorney General.

FJP:er

COUNTY BOARD OF EDUCATION: Fifty-seventh G. A., Ch. 126 requires county boards to list (not lump) bills and claims for publication.

January 3, 1958

Mr. Loren H. Brown
Mitchell County Attorney
Osage, Iowa

Dear Sir:

Receipt is acknowledged of a letter addressed to you by your County Superintendent and by your pen-and-ink "endorsement" forwarded to this office. As you know, opinions of this office are limited by statute to questions submitted by state departments, members of the legislature and state officers in connection with the duties of their respective offices. Ordinarily this office does not express opinions on questions submitted directly by county or local officers and, as a general rule you should give us the benefit of your research and conclusions when submitting to us a question on which your opinion has been requested by one of your county officers.

However, the first question stated in your superintendent's letter has also been the subject of oral inquiry by the Department of Public Instruction and the second and third questions therein have been the subject of an opinion rendered by this office at the request of the State Superintendent of Printing.

You are accordingly advised as follows:

1. The statute quoted in your letter refers to a "list" of bills and claims. Since the statute says bills and claims are to be listed rather than lumped, and presumably means what it says, the lumping or summarization stated in the five examples hypothesticated in your letter would not be in compliance with the statute. The same appears true for mileage and expenses. As for salaries, the answer depends upon whether salaries are fixed on a monthly or annual basis. If authorized in terms of a given figure per year, one entry is sufficient.

58-1-4

2. The answer to your second question is furnished by the enclosed opinion.

3. The answer to your third question is furnished by the enclosed opinion.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md
Enc. Abels to Needham
11/14/57, #77, Bk. 9

INCOME TAX: State of Iowa has no authority under sections 422.16(1) and 422.4(14) Code of Iowa, 1954, to require federal agencies to withhold tax on the earnings of nonresidents.

January 6, 1958

Mr. George J. Eischeid
Director Income Tax
BUILDING

Dear Mr. Eischeid:

This is to acknowledge receipt of your letter of December 30, 1957, wherein you ask whether or not the State Tax Commission, under the authority of sections 422.16(1) and 422.4(14), Code of Iowa, 1954, may require federal agencies to withhold tax from the earnings of nonresident taxpayers.

Section 422.4 (14), Code of Iowa 1954, provides:

"422.4 Definition controlling division. For the purpose of this division and unless otherwise required by the context: * * *

"14. The term 'withholding agent' means any individual, fiduciary, corporation, association, or partnership in whatever capacity acting, including all officers and employees of the state or of any municipal corporation or political subdivision of the state, that is obligated to pay or has control of paying to any nonresident any 'gross income', within the meaning of section 422.8 in excess of fifteen hundred dollars in any calendar year."

Section 422.16 (1), Code of Iowa, 1954, provides:

"422.16 Withholding agents and nonresidents.

"1. Excepting as provided herein and in section 422.17, every withholding agent shall deduct and withhold in each calendar year five percent of all gross income, in excess of fifteen hundred dollars, which such withholding agent pays, including the five percent so withheld, to any nonresident during such calendar year, provided, however, that on incomes derived entirely from salaries not exceeding four thousand dollars, the amount withheld shall be two percent. In case the nonresident files with the state commission a verified statement, in such form and containing such information as the commission shall prescribe, showing that any income described therein is derived from a source upon which the net income will be less than twenty percent of the gross income, the commission, if satisfied that such statement is correct, shall give to such nonresident a certificate

directing the withholding agent to withhold only one percent of the described income. Upon receipt of such certificate, the withholding agent shall withhold only one percent of the income described in such certificate in excess of seventy-five hundred dollars and no part of the first seventy-five hundred dollars shall be withheld. * * *

In an opinion to the U. S. Attorney General, dated January 6, 1948, the U.S. Comptroller General stated:

> "There has been brought to my attention a letter dated January 2, 1948, from your Administrative Assistant to the Division of Investigation of this Office, as follows:
>
> > 'This office is in receipt of the following telegram from the United States marshal for the District of Oregon:
> >
> > "New Oregon state law effective January 1st. 1948 required one per cent state income tax deduction on all payrolls kindly instruct whether these deductions should be made on federal payrolls for benefit of the state."
> >
> > 'A copy of the legislation is not available at this time and it is understood that your office is endeavoring to secure a copy. Kindly advise as to what action, if any, should be taken in respect to the handling of payrolls involving employees located in the State of Oregon.'
>
> "The provisions of the Oregon income tax law here involved – section 110-1620(a), Oregon Compiled Laws Annotated – stipulate, so far as here material, that:
>
> > 'Every employer at the time of the payment of wages, salary, bonus or other emolument to any employee shall deduct and retain therefrom an amount equal to 1 per cent of the total amount of such wages, salary, bonus or other emolument computed without deduction for any amount withheld, and shall, quarterly, on or before the thirtieth day of April, July, October and January pay over to the State tax commission the amount so deducted and retained from wages, salary, bonus or other emolument paid to any employee during the preceding three months.'
>
> "In view of the well settled constitutional principle which precludes the regulation or control by a State, or political subdivision thereof, of the United States in the exercise of its governmental function (see Mayo, et al. v. United States, 319 U. S. 441; Johnson v. Maryland, 254 U. S. 51; Ohio v. Thomas, 173

U. S. 276), and since it is obvious that the effect of the provisions of the Oregon tax law here involved, so far as the matter of the withholding and payment by the Federal Government of the tax in question is concerned, is such as to impose a direct burden upon the United States, it must be concluded that the withholding feature of the Oregon income tax law is not for application in the case of payments of salary or wages to Federal employees. Consequently, payment should be made of the salary or wages due to employees of your Department without the deduction of an amount representing the Oregon income tax."

Subsequent to the above-quoted opinion, however, the 82nd Congress enacted Title 5, section 84 b and c of the U.S. Code which provides as follows:

"84b Withholding State Income taxes of Federal employees by Federal agencies

Where–

"(1) the law of any State or Territory provides for the collection of a tax by imposing upon employers generally the duty of withholding sums from the compensation and making returns of such sums to the authorities of such State or Territory, and

"(2) such duty to withhold is imposed generally with respect to the compensation of employees who are residents of such State or Territory, then the Secretary of the Treasury, pursuant to regulations promulgated by the President, is authorized and directed to enter into an agreement with such State or Territory within one hundred and twenty days of the request for agreement from the proper official of such State or Territory. Such agreement shall provide that the head of each department or agency of the United States shall comply with the requirements of such law in the case of employees of such agency or department who are subject to such tax and whose regular place of Federal employment is within the State or Territory with which such agreement is entered into. No such agreement shall apply with respect to compensation or service as a member of the Armed Forces of the United States."

"84c. Same, limitation of burden on United States

"Nothing in section 84b of this title shall be deemed to consent to the application of any provision of law which has the effect of imposing more burden–some requirements upon the United States than it imposes upon other employers or which has the effect of subjecting the United States or any of its officers or employees to any penalty or liability by reason of the provisions of

section 84b of this title. July 17, 1952, c. 940, § 2, 66 Stat. 766."

In view of the Comptroller General's Opinion, supra, it is evident that if sections 422.16(1) and 422.4(14), Code of Iowa, 1954, were construed to include within their mandates, agencies of the Federal Government, they would of necessity be rendered unconstitutional. It is true that under the provisions of Title 5, section 84b, U.S. Code, supra, the federal government acting through the Secretary of the Treasury, has the authority to forego its constitutional rights and enter into agreements with the various states under which taxes may be withheld. This authority exists, however, only if the duty to withhold is imposed generally with respect to the compensation of employees who are residents of the particular state. As section 422.16, Code of Iowa, 1954, does not impose the duty to withhold generally with respect to resident employees, Iowa does not come within this legislative exception. Consequently, sections 422.16(1) and 422.4(14), Code of Iowa, 1954, must be given a construction which will be in harmony with the constitutional principles set forth in the Comptroller General's Opinion, and as stated above, such a construction precludes the state from requiring federal agencies to withhold tax from the earnings of nonresidents.

Very truly yours,

Francis J. Pruss,
Special Assistant Attorney General

Joseph C. Piper,
Special Counsel, Iowa State Tax Commission

FIRE DISTRICTS: Inclusion or taxation of cities and towns for benefited fire districts is not contemplated by 57th G.A., Chapter 178.

January 8, 1958

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

Dear Sir:

Receipt is acknowledged of your letter of January 2 in which you submit the following:

> "In order to avoid confusion, perhaps I should restate the question in a different way. Can a fire district be established under Chapter 178 of the Acts of the 57th General Assembly so as to include a municipality? The problem anticipated in regard to doing such is the question of whether or not the fire district trustees (not township trustees) can effectively and legally levy a tax on all of the property within the fire district including the municipality. I can visualize the possibility of a municipality overwhelmingly disapproving the establishing of a fire district, but the rural area might be able to carry the question of the establishment of the district."

Reference to Chapter 178, 57th G.A. reveals that it speaks of "all or portions of one township and any adjoining townships or portions thereof" (sec. 2). It further refers to establishment of districts by boards of supervisors but makes no reference in any way to city or town councils. It also provides in section 13, 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

58-1-7

fire district. Any property in the township purchased for dual purposes shall be held jointly."

No provision similar to section 13 is made with respect to city or town assets, indebtedness or equipment.

Thus, although some degree of ambiguity exists in the language of Chapter 178, it is my impression from reading the Act as a whole, that the legislature did not intend to include cities and towns within or tax property within their limits for purposes of the benefited fire districts authorized to be created by the terms of said Act.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md:kvr

Re: Moneys and Credits

Dear Mr. Nelson:

This is to acknowledge receipt of your letter dated December 30, 1957.

In your letter you request to know whether an offer and acceptance agreement constitutes such a contract which would be subject to the moneys and credits tax. I suggest that you have correctly advised your assessor that the offer and acceptance agreement is a noninterest-bearing contract and could come within the exception noted in Chapter 213, Laws of the 41st General Assembly. Clearly this is a noninterest-bearing contract.

Also, I wish to refer you to the official opinion of the Attorney General dated July 25, 1957, addressed to Mr. Ray Herndon, Polk County Attorney, which deals exhaustively with this new legislation.

If you have any further questions, please let me know.

58.1-9

OSTEOPATHS: May serve as physician-member of the County Insanity Commission.

January 8, 1958

Dr. W. S. Edmund, Secretary
Board of Osteopathic Examiners
621 Third Street
Red Oak, Iowa

Dear Doctor Edmund:

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

"I wish to submit to you the following question concerning the composition "Commission of Insanity, under Chapter 228; under section 228.2 the Code provides for a three-member commission, one being a physician.

"Can doctors of osteopathy serve on Commission of Insanity?"

Section 228.2, Code 1954, to which you refer provides as follows:

"Personnel of commission. Said commission shall consist of the clerk of the district court, one reputable physician in actual practice, and one reputable attorney in actual practice. Said two latter members shall reside as near as may be convenient to the place where the district court is held. In the absence or inability of the clerk to act in any case, his deputy may act."

Section 150.6, Code 1954, prescribes the course of study for approved colleges of osteopathy. It provides in pertinent parts:

". . . Such professional course shall require a specific and published schedule of study and clinical practice for the entire school period and this schedule shall include a study of: . . .

". . . 3. Practice of osteopathy as applied to the diagnosis and treatment of human diseases, including . . . neurology and psychiatry. . ." (Emphasis ours)

Section 150.4, Code 1954, provides:

". . . 2. Present a diploma issued by an accredited college of osteopathy approved by the osteopathic examiners of Iowa. . ."

58-1-10

In view of the prescribed content of the course required of colleges of osteopathy prerequisite to accreditation and the further requirement that applicants for license as osteopathic physicians or osteopathic physicians and surgeons present a diploma issued by such an accredited college, I am of the opinion that one duly licensed to practice osteopathy in Iowa and regularly engaged in such practice meets the qualifications of physician-member of the County Insanity Commission under Section 228.2, Code 1954.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

January 9, 1958

Honorable Jack Wormley
The Maytag Farms
Newton, Iowa

Dear Senator Wormley:

Your letter of the 8th inst. addressed to the Attorney General with copy of letter dated June 20, 1957, has been handed to me for answer. In reply thereto I would advise you that at the time of answer by the Attorney General advising you that the questions you submitted were the subject of litigation appears subsequently to have been erroneous. Absent litigation that provides clarification of the statute inquired about, an opinion of this department was issued November 20, 1957, to Sen. George E. O'Malley. The questions which you submit are these:

> "1. The law states: ' . . . that no creditor may garnish for more than one hundred fifty (150) dollars plus his cost of garnishment.' Does this constitute a lifetime maximum for garnishment of any particular creditor against any particular debtor or is it something less than this?
>
> "2. After payroll deductions in the form of taxes an employee is entitled to claim his exemptions by filing an affidavit with his employer. Frequently the employee may have authorized other payroll deductions such as health insurance, war bonds, etc., and my question is whether a previous consent to such deductions is valid in view of the language of the statute or whether the employer must pay over the entire amount of the exemptions unless additional consent to deductions is obtained."

58-1-11

Insofar as your question #1 is concerned, the opinion of the Department referred to provides answer. Copy of this opinion is enclosed.

Insofar as your question #2 is concerned, I would advise that according to Section 1, Chapter 268, Acts of the 57th General Assembly, which is the legislative act designated as House File 113, provides 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.'"

According to this statute, the only deduction authorized that would have any effect upon the amount of the exemption and the amount subject to garnishment is the amount deducted for taxes. While other deductions may be made they will have no effect upon the earnings of an employee subject to garnishment. In view of the foregoing, the question whether additional consent to a previous consent must be obtained in view of the terms of the statute, would have no bearing upon the problem which is submitted.

Very truly yours,

OSCAR STRAUSS
Second Assistant Attorney General

OS:FCB

HEADNOTE: COUNTY OFFICERS: CONSERVATION:

1. County Attorney is required to render to county conservation board such assistance as shall not interfere with his regular employment.

2. Expenditures by the board are not subject to the prior approval of the county board of supervisors.

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

Attention: Mr. Edward N. Wehr, Asst. County Attorney

Dear Sir:

In your letter of December 19, 1957, you submit the following questions:

> "(1) Has the County Conservation Board power to employ legal counsel to handle the various facets of legal work which are contemplated by Chapter 12 of the Laws of the 56 G. A.?
>
> (2) Assuming that the County Conservation Board has authority to employ legal counsel, is there any prohibition against employing the county attorney to represent the Board in connection with its legal work?
>
> (3) Is it necessary that the acts of the County Conservation Board be approved by the Board of Supervisors and specifically would all expenditures made by the Conservation Board be subject to the prior approval of the County Board of Supervisors?"

1. The pertinent part of Section 10, Chapter 12, 56th G. A., is as follows:

> "Sec. 10. . . . . The state conservation commission, county engineer, county agricultural agent, and other county officials shall render such assistance as shall not interfere with their regular employment. . . . ."

58-1-18

I am of the opinion that the quoted provision above clearly contemplated that the county attorney shall render such assistance as shall not interfere with his regular employment.

I am further of the opinion that the members of the county conservation board are county officers, based mainly upon the authority and power conferred in sections 7 and 8 of Chapter 12, 56th G. A. As county officers the members are entitled to require of the county attorney the applicable duties prescribed in Chapter 336, Code of Iowa, 1954.

2. In view of the answer given to your first question, no answer to your second question is required.

3. Section 9, Chapter 12, 56th G. A., provides in pertinent part as follows:

> "Sec. 9 . . . . . 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 money in the hands of the county treasurer immediately available for such purposes. . . . . ".

In the case of Phinney v. Montgomery, 218 Iowa 1240, 1243, the Iowa Supreme Court said:

> "(1) The foregoing provisions are set out at length to show the intent of the legislature in

> respect to the control and management of the hospital. It seems clear, from the language of these statutes, that it was the intention of the legislature to place the entire control and management of the county hospital in the hands of the hospital trustees. The purchase of the grounds, the construction and equipment of buildings, the making of the contracts therefor, the supervision of the grounds and buildings, the employment of the necessary employees, and the fixing of their compensation, are, by the foregoing statutes, fully intrusted to the board of hospital trustees. It would seem impossible for the trustees to enter into contracts for such expenditures, if the board of supervisors has the authority to pass upon expenses incurred therefor, after the work has been completed and the contracts fully performed.
>
> There is no provision in these statutes authorizing the board of supervisors to pass upon claims for expenses incurred by the trustees in the management and operation of the hospital. This duty, by the clear implication of the statutes, is placed entirely in the hands of the hospital trustees."

Applying the same reasoning as contained in the above quotation to the powers, duties, and operation of the county conservation board as contained in Chapter 12, 56th G. A., I am of the opinion that it is not necessary that expenditures made by the board be subject to the prior approval of the county board of supervisors.

Very truly yours,

JNG/fm

JAMES H. GRITTON
Assistant Attorney General

TAXATION:

~~HEADNOTE~~: TAX COMMISSION PUBLICATIONS--Pursuant to House File 139, Acts of the 57th General Assembly, distribution of certain publications by the Tax Commission can be made gratis only to public officers; public officers include persons who are officers of not only the State of Iowa or its political subdivisions but of the U.S. and other states.

Mr. Lewis Lint, Secretary
State Tax Commission
State Office Building
Des Moines, Iowa

Dear Mr. Lint:

Your letter of November 22, 1957, addressed to Mr. Francis J. Pruss, has been referred to the writer for answer. In this letter you ask for an interpretation of the term "public officer" as found in Section 17.27, Code of Iowa, 1954, as amended by House File 139, Acts of the 57th General Assembly. This particular Code section provides:

> "Distribution of such publications shall be made by the superintendent of printing gratis to public officers, * * *."

You ask which of the following would be classed as public officers, and thereby be entitled to receive publications without cost:

"1. State owned universities and colleges.
2. Public libraries.
3. Tax Commissions and/or other officials of other states.
4. City managers.
5. Mayors.
6. Federal offices.
7. Universities and colleges other than state owned.
8. State institutions other than educational.
9. Associations of tax administrators."

The general rule is that "public officer" includes all individuals holding public office by election or appointment for a definite period, whether the office

58-1-19

be federal, state, county or municipal. This rule is well stated in Poorman v. State Board of Equalization, 99 Montana 543, 45 Pac.2nd 307. I believe that this general rule will be of help to you in determining who are public officers in future matters that might arise in your office.

I will answer your examples as follows:

Tax Commissions and/or other officials of other states (3) would qualify under our statute as "public officers", inasmuch as the statute does not limit to public officers of Iowa only.

City managers (4) and Mayors (5) are "public officers" under the statute.

State owned universities and colleges (1) and State institutions other than education (8) are not "public officers", but being agencies of the government may proceed through public officers to obtain the printed matter in question. For instance, State owned universities and colleges could have requests for printed material made by a member of the State Board of Education, and state institutions could have such requests made by members of the Board of Control.

Public libraries (2) or a representative thereof are not "public officers", but, since they are operated by a branch of the government, they could have a public officer, such as a mayor, clerk, city councilman or city manager make the request.

Federal offices (6) are not "public officers", but, since they are agencies of the federal government, they may make requests through appointive or elected federal public officers. For instance, an internal revenue office might have the Director of Internal Revenue for the state request such printed matter as is desired.

Universities and colleges other than state owned (7) and Associations of tax administrators (9) are private institutions, and do not come under the provision of the Code giving printed materials gratis to "public officers".

In such matters as these it might be well to remember that there is a definite distinction between a public officer and an employee of a public institution (see Wiley v. Board of Education of City of Detroit, 225 Michigan 237, 196 N.W. 417; State in rel Newman v. Skinner, 128 Ohio 325; Borden v. City of Goldsboro, 173 N.C. 661, 92 S.E. 694; Farley v. Board of Education of City of Perry, 62 Oklahoma 181, 162 Pac. 797). If in each case the requesting person was appointed or elected to a federal, state, county or municipal office for a definite period, then it would seem that the request emanates from a public officer.

Yours very truly,

Francis J. Pruss,
Special Assistant Attorney General

James R. Brodie, Special Counsel,
State Tax Commission

FJP:JRB:fs

TAXATION:

~~HEADNOTE~~: SALES TAX--Request for names and amounts of sales of taxpayers in a particular area by research assistant of Iowa State College; a research assistant is not a state officer as provided by Section 422.65, but said request could be made by a member of the Board of Education; it is for the State Tax Commission to decide whether this information will be disclosed upon receipt of a request by a state officer.

Mr. Lewis E. Lint
Secretary
State Tax Commission
Building

Dear Mr. Lint:

This is to acknowledge receipt of your letter dated December 23, 1957.

In your letter you request to know whether the State Tax Commission is authorized to disclose the names and addresses of certain business concerns in Iowa together with sales reported to the State Tax Commission by the respective concerns, to a research assistant with the Department of Economics and Sociology of Iowa State College, at Ames, for research purposes.

Section 422.65 Code of Iowa 1954 entitled "INFORMATION DEEMED CONFIDENTIAL" provides:

> "1. It shall be unlawful for the commission, or any person having an administrative duty under this chapter, to divulge or to make known in any manner whatever, the business affairs, operations, or information obtained by an investigation of records and equipment of any person or corporation visited or examined in the discharge of official duty, or the amount or source of income, profits, losses, expenditures or any particulars thereof to be seen or examined by any person; provided, however, that the commission may authorize examination of such returns by other state officers, or, if a reciprocal arrangement exists, by tax officers of another state, or the federal government."

58-1-20

The above section prohibits the disclosure of information obtained by the State Tax Commission "except as provided by law; provided, however that the Commission may authorize examination of such returns by other state officers". There appears to be no provision of the law which authorizes research people of our colleges and universities to obtain confidential information from state agencies. Your letter indicates that the research department desires to have both the names and addresses of the taxpayers and the amounts of their sales. It would seem that the research assistant is not a state officer but that if the request were made by a member of the State Board of Education of Iowa, it would be a request by a state officer. In that event, it would be for the Tax Commission to decide whether this information should be given for the requested purpose. I suggest that giving to a research assistant both the names and the amounts of sales, gives to the recipient of this information a substantial amount of information around which safeguards of confidentiality should be placed. Consequently, I suggest that if this information be disclosed, then the recipient thereof be required to file an oath to maintain this information confidential and unavailable to other persons.

If you have any further questions, please let me know.

Very truly yours,

Francis J. Truss

SCHOOLS: County School System.
Where facts determining proper county school system for administration of a new district are in doubt by reason of operation of school by such district in both counties and a dispute over which county contained the greater number of electors of the proposed school district, an action for Declaratory Judgment brought by the new school district may furnish a final determination of its administrative status.

January 15, 1958

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

Dear Jay:

Receipt is acknowledged of your letter of January 14 further relative to the difficulties of ascertaining the proper county school system for administration of a certain joint community school district where schools are operated by the district on both sides of the county line and where the number of electors residing within the district in the respective counties is in doubt. It appears from our prior correspondence and from my prior correspondence with Mr. Williamson that we are in agreement that the statutes fail to clearly resolve the problem or to provide a method for its solution.

The statutes clearly indicate that the district in question, being a community school district, is a part of a county school system. A presumption probably exists under Section 275.12 (as a corollary to or offshoot of the rule that acts of official boards are presumed regular and proper), that the greater number of electors reside in the county where the reorganization petition was filed. This, of course, is a rebuttable presumption if in fact it can be shown that the greater number of electors actually resided in the other county. However, no method for determining such fact is shown by the statute. It would seem that some sort of count should have been made at the time the petition was originally circulated for the purpose of showing the required percentage of signers had been obtained but from prior correspondence and conversation on the subject, I get the impression such was not the case. If the proper percentage of signers was not obtained or the petition was filed in the wrong county, the validity of the organization of the district might have been challenged on such grounds and the instant problem disposed of in the same proceedings. However, the period of limitation on actions questioning the legality of the organization would appear to have run under Section 274.5 thus precluding such action.

58-1-21

Although an action testing the validity of organization is now barred by Section 274.5, an action to determine the proper county of administration for such existing organization may still be possible. It seems clear that the question of the proper county school system to administer a school district is a question relating to its rights and status under a statute. I, therefore, invite your attention to Rules of Civil Procedure 261 to 269 and suggest that it may be possible for the reorganized district, through its Board of Directors, to maintain a Declaratory Judgment action against both county boards of education and their respective county superintendents for the purpose of obtaining a declaration of status determining the proper county of administration.

Very truly yours,

LEONARD C. ABLES
Assistant Attorney General

LCA:md

TAXATION!

~~HEADNOTE:~~ INCOME TAX: Taxability of trust income of children to the parent and inclusion of trust income in the parent's return and dependency credit to the parent; trust income need not be included in the individual income tax return of the parent, and the parent is entitled to claim children as dependents where he provides one-half of their support, and the children must pay the tax on their trust income.

Mr. George J. Elscheid, Director
Income Tax Division
State Tax Commission
State Office Building
Des Moines, Iowa

Re: Richard H. Young,
1953 and 1954 Iowa Income Tax Returns.

Dear Mr. Elscheid:

I have reviewed the file and correspondence in the above matter.

The question appears to be whether the taxpayer, Richard Y. Young of Waterloo, Iowa, is entitled to claim his four children as dependents on his 1953 and 1954 Iowa income tax returns even though the children had separate income from a trust. Then, further, if the taxpayer is entitled to claim his children as dependents, the question is whether he must include the trust income received by the children in his own individual tax returns for the years in question.

The tax return for the year 1954 is governed by Code of Iowa, 1954. Section 422.12, entitled "Deductions from Computed Tax" provides as follows:

> "There shall be deducted from the tax after the same shall have been computed as set forth in this division, a personal exemption as follows:
>
> " * * *.

58-1-22

"3. For each child under the age of twenty-one years who is actually supported by and dependent upon the taxpayer for his support, an additional seven dollars fifty cents.

" * * *.

"As used in this chapter, the term 'dependent' means any of the following persons over one-half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer:

"a. A son or daughter of the taxpayer, or a descendant of either,

" * * *."

Regulations 9, (1954), Article 202, entitled "Credit for Dependents", provides as follows:

"A taxpayer, other than one who qualifies as the head of a household, may deduct from his computed tax an exemption of seven dollars fifty cents ($7.50) for each child under twenty-one years of age who would actually depend upon and receive major support from the taxpayer during his taxable year. He also may deduct an exemption of seven dollars fifty cents ($7.50) for each other person (other than husband or wife) actually dependent upon and receiving major support from the taxpayer during the taxable year, but any such dependent must be included under the definition of 'dependent,' as included in sec. 422.12, Code 1954.

" * * *."

Also, Article 208, entitled "Returns of Minors", provides as follows:

"1. In the absence of proof to the contrary, the father (or the mother, if head of the family) is presumed to have legal right to the earnings of his minor children, and, except as provided herein, such earnings must be included in the gross income of the parent.

"2. A minor who has been emancipated, or is entirely self-supporting, must file his own return, if his gross income or net income comes within the requirements for filing a return, and he cannot be classed

as a dependent for the purpose of credit for dependency. Income of a minor, derived from sources other than personal earnings, is not to be included in gross income of his parent."

It is clear that since the federal people allowed the taxpayer to claim these children as dependents that the parents provided over one-half the support of these children, although in each case the children derived a substantial amount of income from the trust that was not used for their support. It is my understanding that these children have filed returns for the trust income and paid the tax thereon. It would appear from the last sentence of Subsection 2 of Article 208 that since the income from the trust is not derived from personal earnings then it would not have to be included in the return of the parent. Also, it appears that over one-half of the support of these children was provided by the parents so that the father was able to claim them in his tax return.

If you have any further questions, please let me know.

Yours very truly,

Francis J. Pruss,
Special Assistant Attorney General

FJP:fs
cc: Dolores Musselman

Motor Vehicles: Commercial haulers of water not entitled to 25% overload on their registration (Section 321.466, Code of 1954)

Lyman - January 21, 1958

Ames, Iowa

January 21, 1958

Mr. Carl Schaeh
Safety and Traffic Engineer
Iowa State Highway Commission
Ames, Iowa

Dear Sir:

I have your letter of January 13, in which you request an opinion on the following:

> "Recently one of our weight officers issued an overweight summons to a commercial hauler of water in northwest Iowa. This is to request that your office give us a ruling on whether or not the haulers of water are entitled to a 25% overload allowance on their registration similar to that which is allowed for raw agricultural products."

From the facts stated in your letter, the situation is covered by the last paragraph of Section 321.466, Code of Iowa, 1954, which reads as follows:

> "It shall be unlawful for any person to operate a motor truck, trailer, truck tractor, road tractor, semitrailer or combination thereof on the public highways with a gross weight exceeding that for which it is registered by more than five percent of the gross weight for which it is registered, provided, however, that any vehicle or vehicle combination referred to herein, while carrying a load of raw farm products, soil fertilizers, including ground limestone, raw dairy products or livestock, live poultry, eggs, may be operated with a gross weight of twenty-five percent in excess of the gross weight for which it is registered."

58-1-23

As a commercial hauler of water does not fall within the exceptions in the above quoted paragraph, they are not entitled to a twenty-five percent overload allowance on their registration.

Very truly yours,

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

CJL:ms

TAXATION

SALES AND USE TAX : Supporting statement for obtaining sales tax refund by a tax levying or tax certifying body, must be supplied by the contractor pursuant to section 422.45 (6) (a); alterations in this statement may not be made by tax levying or tax certifying bodies.

January 22, 1958

Mr. Roscoe P. Bane, Supervisor
Construction Contract Refunds
State Tax Commission
BUILDING

Dear Mr. Bane:

This is to acknowledge receipt of your letter dated January 22, 1958, in which you desire to know whether tax levying or tax certifying bodies are authorized to correct the statement supplied by a contractor, who has performed a contract with the taxing body, wherein the contractor has stated under oath the total amount of goods, wares or merchandise which he has used in the performance of a contract with the tax certifying or tax levying body of the State of Iowa. This correction is made in those cases where the amount of goods, wares or merchandise used in the performance of the contract is incorrectly stated in the statement submitted by the contractor.

Section 422.45 entitled "Exemptions", provides in subsection 6 as follows:

> "Any tax certifying or tax levying body of the state of Iowa or governmental subdivision thereof may make application to the state tax commission for the refund of any sales or use tax upon the gross receipts of all sales of goods, wares or merchandise to any contractor, used in the fulfillment of any written contract with the state of Iowa or any political subdivision thereof, which property becomes an integral part of the project under contract and at the completion thereof becomes public property, except goods, wares or merchandise used in the performance of any contract in connection with the operation of any municipal utility engaged in selling gas, electricity, or heat to the general public.

58-1-24

"a. Such contractor shall state under oath, on forms provided by the state tax commission, the amount of such sales of goods, wares or merchandise used in the performance of such contract, and upon which sales or use tax has been paid, and shall file such forms with the governmental unit which has made any written contract for performance by said contractor. Such forms shall be filed by the contractor with the governmental unit before final settlement is made.

" * * *"

The above quoted statute requires the contractor's statement to be under oath. Should the provisions of paragraph (a) under subsection 6 be waived and the correction be made by the tax certifying or tax levying body, then one of the main methods of sales tax enforcement will be lost.

Subsection 3 of section 422.58 provides, that a person required to sign a document such as is provided in this case, who signs a false or fraudulent return with intent to defeat or evade the assessment required by law commits a felony, and subjects himself to a fine of not less than $500.00 and not more than $5000.00, or imprisonment not exceeding one year, or to both such fine and imprisonment. Of course, when the tax certifying or tax levying body corrects the statement, then the taxpayer cannot be subjected to these penalties. Consequently, the taxpayer should be advised in all such cases to file an amended statement and care should be exercised to see that the amounts stated therein are correct.

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.

COUNTIES: Board of Supervisors; Zoning & Planning
Under chapter 358A, Code 1954, County supervisors have no power to impose a schedule of fees for building permits, moving permits, trailer parks etc.

January 22, 1958

Mr. William Pappas
Cerro Gordo County Attorney
Mason City, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 14th inst. in which you submitted the following:

> "Cerro Gordo County, Iowa has appointed a zoning commission and the commission has submitted a proposed zoning regulation for the entire county. One section of the zoning regulation imposes an annual license fee for every trailer park in the county in the amount of $15.00 per year and also imposes an additional fee of 50¢ per month for each trailer in the trailer park.
>
> "In addition, the zoning regulation sets up a schedule of fees for building permits, moving permits and certificates of occupancy. It is my understanding that a few other counties have enacted a zoning ordinance which also contain these fees. It is my opinion that Chapter 358A of the 1954 Code of Iowa does not permit the Board of Supervisors to impose any fees in a zoning ordinance. Could I have your opinion as to whether or not the power granted by Chapter 358A give to the Board of Supervisors the power to impose fees such as described above."

In reply thereto I would advise you that in my opinion no authority contained in Chapter 358A, Code 1954, invests the Board of Supervisors with power to impose the foregoing fees. The Chapter makes no provision whatsoever for the imposition of any fees and in that situation the provisions of Section 79.3,

58-1-25

Code 1954, are applicable. This Section provides:

> "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.
>
> "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."

Applying the rule of expressio unius est exclusio alterius results in the exclusion of the power to charge a fee by public officers for services other than designated in the foregoing Section.

In this connection I call your attention to Chapter 135D, Code 1954, concerning licenses for mobile homes and parks.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

NURSE EXAMINERS: "Three years course of study" as used in Section 152.1 refers to quantitative content of the course rather than elapsed time for its completion and may be considered to mean academic years rather than calendar years if the prescribed subjects can be adequately treated or mastered in such time.

January 22, 1958

Vera M. Sage, R. N.
Executive Secretary
Iowa Board of Nurse Examiners
L o c a l

Dear Madam:

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

> "The law of Iowa as it pertains to the practice of nursing provides:
>
> "'152.4 Approval of training schools. No school of nursing for registered nurses shall be approved by the board of nurse examiners as a school of recognized standing unless said school is affiliated with a hospital and requires for graduation or any degree the completion of at least a three years course of study in subjects prescribed by the board.'
>
> "Will you, therefore, give us your written opinion as to whether or not three years can be interpreted as academic years?"

In view of the fact that the statute quoted in your letter refers to a "three years course of study" rather than to attendance at a school for three years or any other given calendar period, it is my impression that what the statute actually requires is graduation from the course"in subjects prescribed by the board" and considered by the board to comprise a three-year course irrespective of whether the actual time in residence at the school from enrollment to graduation is three calendar years, three academic years

58-1-26

or a greater or lesser time. In other words, I am of the opinion that the requirement imposed by the statute is mastery of an area of subject matter rather than physical presence at an institution for a given calendar period, the "three years" being a measure of scope rather than time. I would, therefore, advise you that the board may, at its discretion, consider a course consisting of three academic years as meeting the requirements of the statute if the "subjects prescribed by the board" are, in fact, capable of adequate treatment in that time.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

STATE COMPTROLLER - BUDGET AND FINANCIAL CONTROL COMMITTEE:

1. State Comptroller held not subject to personal liability for funds disbursed by him upon receipt of proper authorization from the Budget an Financial Control Committee.

2. It is the sole province of the Budget and Financial Control Committee to determine from facts presented to it whether or not the reques constitutes an "emergency" or "contingency".

January 24, 1958

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

Dear Sir:

This will acknowledge receipt of your letter of January 17 in connection with the activities of the Budget and Financial Control Committee, provided by Chapter 39, Acts of the Fifty-seventh General Assembly, in which you state:

> "The Budget and Financial Control Committee at its meetings on January 8th and 9th, 1958, have made various allocations from the General Contingent Fund to certain departments for certain purposes. They have generally used in their minutes regarding these specific allocations the following motion:
>
> "'The finding of the Budget and Financial Control Committee is that an emergency and/or contingency exists, and it is moved by _____, seconded by _____, that this Committee allocate the sum of $_____, from the General Contingent Fund of the State to the _____ Department, for * * * * * *'.
>
> "I respectfully request an opinion as to the following:
>
> "In the event that the Committee uses the above wording in their minutes for allocation of funds from the General Contingent Fund, is such finding by the Committee sufficient authority for the Comptroller to recognize such allocations, and not be personally liable, even though it might be the Comptroller's opinion that such allocations might not conform to the Attorney General opinions issued June 17th and 28th, 1957?"

58-1-27

In response thereto I would advise as follows:

In an opinion of June 17, 1957 this office considered an oral request from the Honorable George Paul, Chairman of the Budget and Financial Control Committee, regarding the authority for the Budget and Financial Control Committee to make an expenditure of a certain sum of money to the State University of Iowa for improving buildings for emotionally disturbed and mentally retarded children. That opinion reviewed the powers and duties of the Budget and Financial Control Committee; discussed the definition of the words "emergency" and "contingency"; applied these definitions to the fact situation presented in the request and reached the conclusion that no contingency existed within the definitions. The application of these definitions was made at the request of the Committee and prior to any exercise by it of its discretionary power to make a finding on the fact question of "emergency" or "contingency".

This office received another oral request as to the power of the Budget and Financial Control Committee as applied to supplementing the appropriation to the Superintendent of Buildings and Grounds for "salaries of regular employees of his department during the ensuing biennium beginning July 1, 1957". The subject was again reviewed in an opinion issued June 28, 1957 and another application of the terms "contingency" and "emergency" prior to exercise of discretion by the Committee in regard to the situation presented was made as per the request, with the conclusion that the request related to routine and ordinary anticipated expenditures of the department and therefore could not fall into the category of an emergency or contingency.

On September 27, 1957 this office issued another opinion in response to a written request from you concerning the authority of the committee to disburse funds to combat a Japanese beetle infestation of Iowa. On the basis of the previous opinionsof this office, this opinion held that a contingency existed and payment of the amount was authorized.

On December 9, 1957 this office had for consideration a request for an opinion from your office concerning appropriation by the Committee to the State Bacteriological Laboratory of a sum of money "for the purpose of carrying out their routine program". In accordance with the previous opinions of this office we held that no contingency or emergency existed. The allocation in this instance showed upon its face that it was "for the purpose of carrying out their routine program for the biennium ending June 30, 1959".

On December 9, 1957, this office was also requested to give our opinion on the authority of the Committee to make an appropriation to Iowa State College for an extension to the wing of a building to provide space to house an electronic computer. The finding of an emergency was made by the Committee and the opinion of this office directed payment.

These opinions concerning the powers and duties of the Budget and Financial Control Committee are in accord with prior opinions of this office dated July 26, 1943, addressed to the Commissioner of Public Health, Walter R. Bierring, and found in the 1944 Report of the Attorney General, at page 75; and an opinion dated September 15, 1937, addressed to the Committee on Retrenchment and Reform and found in 1938 Report of the Attorney General, page 530.

The right of such committee to determine the facts upon which their authority to allocate funds is based is found in an opinion of this office addressed to Honorable Roy E. Stevens, Chairman, Committee on Retrenchment and Reform, dated August 31, 1937 and found in 1938 Report of the Attorney General, page 496. That opinion states in part as follows:

> "Whether or not an emergency or contingency, by reason of the above facts or other facts, has now arisen, is, in our opinion, a question of fact. Such a question of fact must be determined by the committee on retrenchment and reform. . .
>
> "The members of the committee on retrenchment and reform all served as members of the General Assembly, which enacted the law creating the Iowa State Planning Board. The committee, therefore, is peculiarly well qualified to make a determination as to the general intent of the legislature in creating the State Planning Board, and the committee likewise is particularly competent to weigh the present urgency of the board's request for funds.
>
> "We see no legal objection to action on the part of the committee on retrenchment and reform which would make available funds to the State Planning Board provided the committee first officially determine as a matter of fact that a contingency has arisen with respect to the Planning Board's activities, which makes committee action expedient. This determination must be made by, and rests wholly with the discretion of the committee on retrenchment and reform." (Emphasis ours)

As pointed out in this opinion and previously cited opinions, "It is solely the province of the Committee. . .to determine from facts presented to it whether or not the request constitutes a contingency" and "such Committee is well qualified to make this determination of fact".

With reference to the question of your personal liability in disbursing funds authorized by the Budget and Financial Control Committee, the general powers and duties of your office are found in Section 8.5 of the Code. The specific powers and duties are set out in Section 8.6 of the Code of Iowa and subsection 2 thereof states as follows:

> "Collection and payment of funds. To control the payment of all moneys into the treasury, and all payments from the treasury by the preparation of appropriate warrants, or warrant checks, directing such collections and payment."

Insofar as your powers generally are concerned, it is to be said that they have been held to embrace the exercise of legislative, judicial and executive powers and the intermingling thereof. See State v. Manning, 220 Iowa 525, 259 N.W. 213. However, in the situation to which address is here made, in my opinion your power and duty is executive and ministerial only. The legislative finding of fact and authorization for the disbursement of funds is made by the Budget and Financial Control Committee under authority granted them in Chapter 39, Acts of the Fifty-seventh General Assembly. The text writers have said with reference to this question, "An officer cannot be subjected to liability for obeying the lawful command of his government." 43 Am. Jur. 96, §282.

Considering the liability of a public officer for improper disbursement of public funds, it is said at 43 Am. Jur. 112, §306.

> "It is in general held that officers are not liable for paying out public money in reliance on an unconstitutional statute where the payment was made in good faith before the law was held unconstitutional. Obviously, in respect of many expenditures of public funds, the legislature must leave much to the discretion and judgment of public agencies in determining the purpose for which such money will be spent, within the limits of the authority granted, and courts will not interfere unless there is a clear departure from the legislative authority." Gordon v. Conner, 183 Okla. 82, 80 P.2d 322, 118 ALR 783; Nohl v. Board of Education, 27 N.M. 232, 199 P. 373, 16 ALR 1085.

You are advised that in our opinion, under the circumstances described herein, you would not be subjected to personal liability if funds were disbursed by you upon receipt of proper authorization from the Budget and Financial Control Committee.

Youre very truly,

NORMAN A. ERBE
Attorney General of Iowa

OSCAR STRAUSS
First Assistant Attorney General

NAE:md

ELECTIONS: Notice of submission of special question. In the absence of express statutory prescription, the common law standard of "reasonableness" applies.

January 27, 1958

Mr. Bert A. Bandstra
Marion County Attorney
Court House
Knoxville, Iowa

Dear Sir:

Receipt is acknowledged of your letter of January 21 as follows:

"I would like to have an opinion on the following question:

"'Section 368.12 of the 1954 Code provides that cities and towns have the power to own, use or operate jointly with any other city, etc. fire apparatus equipment, etc. when authorized by a majority vote of the electors at a regular or special election called for that purpose, upon notice as required by law.'

"My precise and simple question is:

"'What notice is required by law, assuming that a special election is called by the city council for the submission of this question to the voters?'

"I note that where provision is made in the Code for special elections the notice to be given is usually set out in the same section or sections of the Code.

58-1-28

"Section 618.14 might possibly cover this situation, however, this section does not designate the number of publications required.

"Chapters 363, 39 and 49 do not seem to contain anything regarding the notice to be given at a special election.

"I would very much appreciate your opinion on the above matter."

Review of the various Code sections pertaining to elections confirms your finding as to lack of express provision answering your question. Neither are there any helpful annotations under Section 368.12, Code 1954, or its identical predecessor, Section 368.31, Codes 1946 and 1950. The situation would thus seem to fall under the rule that when a statute specifies a result but fails to prescribe the method for reaching it, any reasonable method will suffice. A general rule stated in Volume 2 of Merrill on Notice, p. 242, §665, is as follows:

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

Thus, the "familiar common law standard of reasonableness" appears to govern the answer to your question. It is my impression that a useful guide to what is reasonable may be discovered in the numerous sections throughout Title XV of the Code which do prescribe the time and manner of giving notice. At least such provisions show what the legislature considered reasonable in similar circumstances. The most common form seems to be "once each week for three consecutive weeks in the manner provided by Chapter 618". See Sections 362.5, 362.7, 362.11, 362.16, 362.19, 363.27, 366.7(5), 368.10(2), 368.19, etc. It will be noted that some of the examples cited provide for two rather than three publications and that still other provisions may be found in Title XV specifying only one publication. However, three would appear to furnish an abundance of caution in the interests of "reasonableness".

Although the foregoing does not specifically answer your question, no apparent fool-proof answer presents itself. I trust it will be of some assistance to you.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

Motor Vehicles – Signal Devices –

A reconstructed vehicle, if materially altered within the meaning of subsections 13 and 14, § 321.1, Code 1954, must be equipped with directional signal devices under § 321.317(3), Code 1954, since it would then never have been registered prior to January 1, 1954.

January 27, 1958

Mr. Robert N. Johnson
Lee County Attorney
615½ Seventh Street
Fort Madison, Iowa

Dear Sir:

In your letter of January 8, 1958, the following question is posed:

> "Our Highway Patrolman has asked for an opinion on the following: when an old car is rebuilt it must be registered as a new vehicle. Is that vehicle required to have turn signals. This office will appreciate receiving your opinion."

Section 321.1(13), Code of 1954, defines a "reconstructed vehicle" as follows:

> "'Reconstructed vehicle' means every vehicle of a type required to be registered hereunder materially altered from its original construction by the removal, addition, or substitution of essential parts, new or used."

Registration requirements of a reconstructed vehicle are set out in Section 321.23, Code of 1954. Your question presupposes that such reconstructed vehicle is subject to registration, thus that point will not be covered in this opinion.

Under subsection 3 of Section 321.317, Code of 1954, the requirement with respect to turn signals is set out. In part, subsection 3 appears below:

> "3. After the thirty-first day of December, 1953, it shall be unlawful for any person to sell or offer for sale or operate on the highways of the state of Iowa any vehicle subject to registration under the provisions of this chapter which has never been registered in this or any other state prior to January 1, 1954,

58-1-29

unless such vehicle is equipped with a directional signal device of a type approved by the department and is in compliance with the provisions of subsection 2 of this section.***"

The question then is whether or not the reconstructed vehicle has ever been registered in any state prior to January 1, 1954. This in turn becomes a question of whether the reconstructed vehicle, for purposes of registration, is the same vehicle as before reconstruction. In your letter you state that when "an old car is rebuilt it must be registered as a new vehicle." That statement assumes that the reconstructed unit is "materially altered" to no longer be identifiable as the prior existing unit. Therefore, if that fact be true, then the reconstructed vehicle has never been registered prior to January 1, 1954, and, under Section 321.317(3), such a vehicle is required to have directional turn signals. This, of course, supposes that material alteration from the original construction has occurred as is pointed out in subsections 13 and 14, Section 321.1, Code of 1954.

Very truly yours,

DON C. SWANSON
Assistant Attorney General

HUGH V. FAULKNER
Assistant Attorney General

DCS:MKB

January 28, 1958

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

Dear Sir:

For the purpose of presenting your question, the contents of your letter are set out below:

> "A truck licensed in the State of Illinois, which is generally used for the farming operations for the growing of produce on leased land in the State of Illinois and occasionally used to deliver produce raised on the leased land in Illinois to his own privately owned outlets in the State of Iowa, which are outlets which sell this produce. Is it mandatory that such a truck be licensed in the State of Iowa as well as the State of Illinois?
>
> "For purposes of further clarification, the individual owns a farm in the State of Iowa, which he receives homestead exemption upon and therefore I would assume he is a resident of the State of Iowa, whereas in Illinois all he has is leased land, which he operates."

It appears that the person about whom you inquire may have either falsely obtained the homestead tax exemption or, if not, is required to have his truck licensed in Iowa.

Under Section 425.11(1a), Code of 1954, the homestead tax credit is based on a declaration of intention to occupy the dwelling house as a home for six months or more in the year for which the credit is claimed. At the time of such declaration of intention the claimant or applicant must then be living in such dwelling house. Certainly this would seem to contemplate residency in Iowa.

58-1-30

Section 321.18, Code of 1954, is set forth in part below:

> "Every motor vehicle, trailer, and semitrailer when driven or moved upon a highway shall be subject to the registration provisions of this chapter except:
>
> "1. Any such vehicle driven or moved upon a highway in conformance with the provisions of this chapter relating to manufacturers, transporters, dealers, or nonresidents as contemplated by sections 321.53 and 321.56, or under a temporary registration permit issued by the department as hereinafter authorized." (Emphasis supplied)

Section 321.56 is a grant of authority for making reciprocal agreements with other states. That section has been repealed and re-enacted by Section 2, Chapter 167, Acts of the 57th General Assembly. To be benefited by any reciprocal agreement with Illinois the person subject to your inquiry would have to be a nonresident of Iowa.

Assuming that the person subject to your inquiry is a nonresident of the State of Iowa, it then becomes necessary to consider Section 321.55, Code of 1954, which is as follows:

> "Registration required of other nonresidents. Every nonresident, in addition to those mentioned in section 321.54, but not including a person commuting from his residence in another state or whose employment is seasonal or temporary, engaged in remunerative employment or carrying on business within this state and owning and operating any motor vehicle, trailer, or semitrailer within this state, shall be required to register each such vehicle and pay the same fees therefor as is required with reference to like vehicles owned by residents of this state."

In your letter you mention the fact that the truck in question is used occasionally to deliver produce raised in Illinois to privately owned outlets in Iowa for the purpose of selling such produce. If this is not seasonal or temporary within the meaning of those words as used in the above quoted section, it certainly appears that the truck is engaged in "carrying on the business" of this individual. If so, such nonresident must comply with the Iowa registration requirements.

In any event, whether the truck owner is a resident or nonresident is a fact question. The facts given are insufficient to determine such fact question.

Therefore, if this truck owner is a resident he must comply with the registration and licensing requirements of this state. If a nonresident "carrying on business" within this state, which does not constitute seasonal or temporary employment, then such nonresident is subject to the registration and licensing requirements of this state under Section 321.55, Code of 1954.

Very truly yours,

DON C. SWANSON
Assistant Attorney General

HUGH V. FAULKNER
Assistant Attorney General

DCS:MKB

January 28, 1958

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

Dear Sir:

In your letter of inquiry you have asked for an interpretation of Section 321.457, Code of 1954, as amended by Section 2 of Chapter 167, Acts of the 56th General Assembly. This amendment appears as subsection 4 of Section 321.457. The question is this:

> "There has been a charge filed in this county for violation of this section involving a pickup truck 20 feet in length hauling a portable chute in the total length of 14 feet six inches. This portable chute is mounted on rubber tires and is licensed as a trailer.
>
> "The point of interpretation is as to whether or not, where the truck and chute combined are less than the 35 feet authorized in subsection 1 and less than the 50 feet in subsection 3, this would constitute a violation. Accordingly, would you please advise as to this inquiry."

The wording of Section 2, Chapter 167, Acts of the 56th General Assembly, is stated in part below:

> "Sec. 2. * * * Further provided that a portable livestock loading chute not in excess of a length of thirteen feet including its hitch or tongue may be drawn by any vehicle or combination of vehicles, provided that such vehicle or combination of vehicles drawing such loading chute is not in excess of the legal length provided for such vehicles or combination."

The violation about which you inquire is hauling a portable livestock loading chute the length of which is in excess of thirteen feet. It is assumed that your question is with regard to a portable chute being drawn rather than hauled.

58-1-31

Section 321.457, Code of 1954, establishes the maximum length of any motor vehicle or combination of vehicles. Under subsection 3, Section 321.457, as amended by Section 1, Chapter 157, Acts of the 57th General Assembly, the maximum length of a combination of vehicles is fifty feet.

The above quoted proviso pertaining to portable livestock loading chutes is an exception to the maximum length provisions. In accordance with the exception a combination of vehicles not in excess of fifty feet may draw a portable livestock loading chute not in excess of thirteen feet. In effect, this means that the overall maximum length of a combination of vehicles drawing such a portable chute is sixty three feet.

By the terms of the definition of a "combination of vehicles" set out in Section 321.1(23) a single truck drawing a portable livestock loading chute is a "combination of vehicles". As such, it comes within the maximum length provision of fifty feet enumerated in Section 321.457(3), as amended.

Under the facts given, the truck about which you inquire is twenty feet in length, and the portable chute fourteen and one-half feet in length. That means that the total length of the combination of vehicles is thirty-four and one-half feet. As noted under Section 321.457(3), as amended, the maximum length is fifty feet.

It is, therefore, the opinion of this office that there is no violation inasmuch as the exception, appearing as Section 321.457(4), applies only to portable livestock loading chutes of thirteen feet or less. It is further the opinion of this office that this exception applies only to such portable chutes which are being drawn by a vehicle or combination of vehicles as a combination. The exception does not establish the maximum length of a portable chute as a single unit.

Very truly yours,

DON C. SWANSON
Assistant Attorney General

HUGH V. FAULKNER
Assistant Attorney General

DCS:MKB

AGRICULTURE: STATE OFFICERS & DEPARTMENTS: Under code section 159.2 (1 and 2) the power of the secretary of agriculture to create departments divisions is confined to such divisions as are necessary for law enforcement.

January 30, 1958

Mr. Loyd VanPatten
Assistant Secretary of Agriculture
Department of Agriculture
B u i l d i n g

Dear Mr. Van Patten:

Receipt is acknowledged of your recent inquiry as follows:

"Subsections 1 and 2, section 159.2, Title IX, of the 1954 Code of Iowa, read as follows: (Object of Department)

"'1. To encourage, promote, and advance the interests of agriculture, including horticulture, livestock industry, dairying, cheese making, poultry raising, beekeeping, production of wool, and other kindred and allied industries.

"2. To promote and devise methods of conducting said industries with the view of increasing production and facilitating an adequate distribution of the same at the least cost to the producer.'

"In your opinion, under the above subsections or any other authority granted to the Department or Secretary of Agriculture, does the Secretary have the power to establish a Division of Marketing within the department for the purpose of promoting and developing, for the public welfare, improved marketing methods and procedures including proper handling, harvesting, grading, processing, packing, transporting, storage, distribution, inspection and sale of farm products produced within the state?"

Your attention is directed to Section 159.5(2), 1954 Code of Iowa, which states as follows:

58-1-32

"Powers and duties. The secretary of agriculture shall be the head of the department of agriculture which shall:

" * * *

"2. Establish and maintain such divisions in the department as are necessary for the proper enforcement of the laws administered by it."

Section 159.5 delimits the establishment of divisions within the Department of Agriculture. The only discretion granted the Secretary in the establishment of divisions is under subsection 2 thereof as set out above.

It is the opinion of this office that subsection 2 delimits the discretion of the establishment of divisions within the Department of Agriculture and confines that discretion to divisions necessary to the proper enforcement of laws administered by the Department.

If the activities of the "Division of Marketing" to which your letter refers fall within this delineation then the Secretary may establish such a division.

Trusting this has answered your inquiry, I am

Very truly yours,

FREEMAN H. FORREST
Assistant Attorney General

FHF:MKB

STATE OFFICERS AND DEPARTMENTS: CONSERVATION
Reversion to the general fund of certain monies appropriated to the Conservation Commission discussed.

January 31, 1958

Mr. Bruce F. Stiles, Director
State Conservation Commission
L o c a l

Dear Sir:

This will acknowledge receipt of yours of the 20th ult. in which you submitted the following:

"On or about November 25th, 1957 the State Comptroller telephoned this office advising that he intended to revert to the general fund certain funds that had been appropriated and allocated to this Commission.

"On November 26th, 1957, Mr. H. W. Freed, Chief of Division of Administration for the Conservation Commission, wrote the following letter to the Comptroller:

"'November 26, 1957

"Mr. Glen D. Sarsffeld
State Comptroller
State House
Des Moines, Iowa

"Dear Mr. Sarsfield:

"Referring to our recent telephone conversation concerning the reversion of our Conservation Works Fund 34-1-49 back to the State's General Fund.

"In reading over the Acts of the 49th General Assembly under Chapter 34, Section 1, setting up the appropriation for the State Conservation Commission, we cannot find any time limit specified during which these funds have to be spent. We realize that this fund is an old fund and should be cleared up as rapidly as possible.

58-1-33

"In discussing this with Mr. Rush, Chief of the Lands and Waters Division, he informed me that he is planning on submitting a request to the Budget and Financial Control Committee asking them to retain the project balance of $123.70 under authorization A29-2, the Wildcat Den Parking Area and Road and Miscellaneous Items, and then to transfer the balance of the fund under this Conservation Works Fund to the Lake Macbride and Palisades Project Authorization A7-2. This would make a project balance at Lake Macbride of $327.01.

"Mr. Rush informed me that he has planned on doing this before but due to the fact that the Corps of Engineers was doing work in the Lake Macbride area at the present time we were delayed in getting started at Lake Macbride. Mr. Rush feels that these funds should be used at the Lake Macbride area to aid the state in the work that is being done there at the present time.

"In our telephone conversation we also discussed the reversion of the funds set up by the Budget and Financial Control Committee Number 5-55 for the Rock Creek Road. This balance is $505.96. I have discussed this with Mr. Rush and he informed me that the road at Rock Creek when it was constructed we were right in the midst of the drought years and this past summer is the first time that the lake has been full. He informed me that this new park road has settled considerably on the approaches to the bridge and that there will be some work necessary on this road this coming spring. He is planning on using this balance of funds that were set up by the Budget and Financial Control Committee for surfacing material and some fill that will be necessary on this road.

"We are writing you at this time requesting that you do not revert the funds mentioned in this letter back to the State's General Fund.

"Very truly yours,

H. W. Freed, Chief
Division of Administration'

"Under date of November 27th, 1957 the Conservation Commission received the following letter from the State Comptroller:

"'November 27, 1957

"Conservation Commission
Local

"Attention: H. W. Freed, Chief
Division of Administration

"Gentlemen:

"In reply to your letter of November 26, 1957, the accounts to which you refer have been reverted to the General Fund by this office on November 21, 1957, for the reason that the fiscal period to which this appropriation and allocation were applicable has long since passed.

"Shown below are the account numbers and amounts:

"Conservation Commission:
34-1-49 C. C. C. Progress $450.08
B. F. C. C. 5-55, Rock Creek. . . 505.96

"Very truly yours,

"Glenn D. Sarsfield
State Comptroller'

"(A photostatic copy of the above letter is attached)

"A review of Chapter 34, Acts of the 49th General Assembly, shows no provision in the law for reversion of funds designated at 34-1-49 C. C. C. Progress.

"The fund designated as B. F. C. C. 5-55 Rock Creek was allocated to the State Conservation Commission from the General Contingent Fund for expenditure. (Chapter 39, Acts of the 55th General Assembly) The work for which this fund was allocated has not been completed to date.

> "Your opinion is requested to ascertain the legality of the reversion by the State Comptroller of the two funds listed in the Comptroller's letter of November 27, 1957."

In reply thereto I advise as follows. In making the reversions which you write about, the Comptroller acts under the following statute, Section 8.34, Code 1954:

> "Charging off unexpended appropriations. Except as otherwise provided by law, the comptroller shall transfer to the fund from which any appropriation was made, any unexpended or unencumbered balance of such appropriation remaining at the expiration of three months after the close of the biennial fiscal term for which the appropriation was made. At the time the transfer is made on the books of his office he shall certify such fact to the treasurer of state, who shall make corresponding entries on the books of the treasurer's office."

In exercising this power granted to the Comptroller in pursuance of his general supervisory over the State's finances, he may use certain discretion under a liberal view of the intention of this statute, and applying this to the reversions in question I am of the opinion as follows:

1. With respect to the reversion of the balance of the fund which was appropriated by Chapter 34, Acts of the 49th General Assembly, whereby the use thereof was described as follows:

> "Section 1. There is hereby appropriated out of any funds in the state treasury not otherwise appropriated, for each year of the biennium ending June 30, 1943, the sum of one hundred twenty-five thousand dollars ($125,000.00), or so much thereof as may be needed, for the

> use of the state conservation commission, subject to the approval of the executive council and the joint legislative committee on retrenchment and reform, which sum is to be used to enable the state of Iowa to participate in the program of the civilian conservation corps, the works progress administration, with federal and other agencies, and in making available and/or improving conservation areas.

Obviously, such an appropriation was made in 1941 in aid of the war effort and impliedly the use to be made thereof within the two years stated therein and the suspense period provided by statute thereafter. This period has long expired and reversion seems proper.

2. Insofar as the fund set up by the Budget and Financial Control Committee is concerned, it is to be observed that this money is an allocation by that Committee of funds appropriated to it. Obviously this allocation could give to this allocated money no preferred status in its use by the Conservation Commission as between that money and funds directedly appropriated by the Legislature. I am of the opinion that the foregoing statute applies to this allocation and under the rule as set forth the reversion was properly made.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

January 13, 1958

Major General Fred C. Tandy
The Adjutant General
B u i l d i n g

Sir:

Your letter of 9 January is set out in part as follows:

"Building #21 at Camp Dodge Military Reservation was destroyed by fire Sunday, 5 January 1958.

"This building was a frame, one story structure that has been utilized partly for storage and, as * * * * a headquarters for National Guard units conducting training, the Highway Patrol training school, Boys' State activities, other agencies that have utilized Camp Dodge.

"Section 19.7, Code of Iowa, 1954, provides that a contingent fund set apart for the use of the Executive Council may be expended for the purpose of repair, replacing, or restoring any State property injured, destroyed, or lost by fire.

"An opinion is respectfully requested with reference to the authority of the Executive Council to provide funds for replacement of the destroyed building in accordance with the provisions of the indicated statute.

In response thereto, your attention is first directed to the language of Section 19.7, 1954 Code of Iowa, set out hereunder:

"Contingent fund. A contingent fund set apart for the use of the executive council may be expended for the purpose of paying the expenses of suppressing any insurrection or riot, actual or threatened, when state aid has been rendered by order of the governor, and for repairing, rebuilding or

58-1-34

> restoring any state property injured, destroyed or lost by fire, storm, theft, or unavoidable cause, and for no other purpose whatever. Any such project for repair, rebuilding or restoration of state property for which no specific appropriation has been made, which when completed will cost more than one hundred thousand dollars, shall, before work is begun thereon, be subject to approval or rejection by the budget and financial control committee." (Emphasis ours)

It is the opinion of this office that the above quoted section places in the Executive Council authority to repair, rebuild or restore State property lost by fire and that such authority would encompass the loss your letter describes.

It should, of course, be further noted that if the expenditure for such repairing, rebuilding or restoration exceeds the sum of $100,000 that approval by the Budget and Financial Control Committee is a prerequisite to such expenditure.

Trusting this has answered your inquiry, we are

Very truly yours,

NORMAN A. ERBE
Attorney General of Iowa

FREEMAN H. FORREST
Assistant Attorney General

FHF:MKB

SCHOOL REORGANIZATION: Joint Districts:

Where a valid plan embracing territory in four counties has been adopted and filed by the boards of said counties, a petition for a district involving part of the same territory in two of the counties cannot be acted upon until amendment of the said plan has been accomplished by the same boards, acting jointly, by whose authority it was originally adopted.

January 31, 1958

Mr. Lynn W. Morrow
Allamakee County Attorney
Waukon, Iowa

Dear Sir:

Receipt is acknowledged of your letter of January 27 as follows:

"I would like an opinion based upon the following facts.

"FACTS: The Allamakee County school plan for reorganization as provided for in Chapter 275 of the 1954 Code of Iowa was adopted at a joint meeting of the Boards of the following four counties - Allamakee, Clayton, Winneshiek and Fayette. There is now a petition filed with the County Superintendent asking for the reorganization of a district affecting land located only in Allamakee and Winneshiek County. There is also in this proposed area some land which was designated by the County plan as belonging to a Clayton School.

"QUESTION: Should the hearing required by Sec. 276.16 of the 1954 Code of Iowa, as amended, be a joint hearing of only the two boards whose land is affected by this proposed district or must the Boards of the other two counties be included at the hearing even though their land is not affected?

"An opinion at your earliest convenience is requested as the County Board has set February 5th as the date for hearing on the petition now on file."

In answer thereto, I would refer you to the definition of "joint planning" contained in Section 275.8, Code 1958, (57th G.A., Ch. 129, §11) which states in pertinent part:

58-1-3

"For purposes of this chapter the planning of joint districts is defined to include all of the following acts:

"1. Preparation of a written joint plan in which contiguous territory in two or more counties is considered a part of the potential school district in the county on behalf of which such county plan is filed with the state department of public instruction by the county board of education in and for such county.

"2. Adoption of such plan at a joint session of the several county boards of education in whose counties such territory is situated. . ."

Thus, a joint plan is one actually adopted by the county boards of education of the several counties within the boundaries of which territory proposed to comprise a reorganized school district is situated.

Section 275.12, Code 1958, (Section 275.12, Code 1954, as amended by 57th G.A., Ch. 129, §§2, 12; Ch. 130, §1) provides in pertinent part:

"A petition describing the boundaries, or accurately describing the area included therein by legal description, of the proposed district, which boundaries or area described shall conform to county plan or the petition shall request change of the county plan, shall be filed with the superintendent of schools of the county in which the greatest number of electors reside. . ."

Thus, before a county board or boards can approve a proposed district it must conform to the existing plan or the existing plan must be amended. According to the facts stated in your letter, the existing plan was the joint act of four county boards of education. To consider an analagous situation, an enactment of the legislature cannot be repealed by the Senate without the House or by the House without the Senate. Similarly, it is my impression, that a plan of the type in question cannot be rescinded or amended by some of the county boards whose members constituted the joint body that originally adopted it.

I would, therefore, advise you that, in my opinion, a petition to create a joint school district comprised of territory situated in two counties cannot be acted upon at a joint session

of the boards of those counties when the territory to be included in the petitioned-for district has previously been included in a duly adopted plan for a four-county district unless such plan first be so amended at a joint session of the four boards originally adopting the said four-county plan. In other words, under Section 275.9, Code 1958, (57th G.A., Ch. 129, §1) there must be a plan before there can be a district and it follows that when a plan exists it cannot be rescinded or amended except by the same body by whose act under authority of law it was originally adopted.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

Feb. 11, 1958

Under Ch. 53, 1954 Code, concerning absentee voting, held: 1) Application for an absentee ballot sought by reason of expected illness or physical disability may be made personally by mail; 2) the ballot issued by the Auditor in response to application must be delivered by mail to the voter and not by an agent of the voter; 3) the ballot and application must be delivered to the Auditor by mail and not by personal agent of the voter and must reach the Auditor prior to election day; 4) the limited power of administering oaths and taking affirmations bestowed on county officers may be exercised by the deputy county auditor.

Mr. Vincent E. Johnson
Poweshiek County Attorney
Montezuma, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 27th ult.

in which you submitted the following:

> "I would like to request an opinion on the following matters having to do with the authority and duties of the County Auditor in regard to election procedures:
>
> "1) Under Section 53.10, if a voter is absent from the county and requests an application for ballot by letter, the auditor may send him both the application and ballot at the same time. Is it permissible to extend this same procedure to a voter within the county and who requests an absent ballot for any of the reasons stated in Section 53.1, or must the application be made in the office of the Auditor personally where the voter is within the County and not absent therefrom?
>
> "2) After the application has been delivered to the voter by the Auditor and such voter is within the county, may the ballot be delivered to an agent of the voter personally by the auditor, or must such ballot be mailed to the voter by the auditor?
>
> "3) May the ballot and application be returned to the Auditor by the personal agent of the voter to the office of the County Auditor after proper affirmation and oath properly subscribed to, or must the voter mail said ballot and application back to the Auditor in order to arrive in his hands not later than the day of election?

> "4) I believe that you have rendered a previous opinion wherein it has been stated that it was within the authority of the County Auditor to subscribe to oaths and take affirmations within his office, but that this authority did not extend to the performance of such duties outside his office. If this is true, may the legally constituted deputy auditor also subscribe to oaths and take affirmations within the office of the county auditor?"

In reply thereto we advise as follows. Answers to your questions #1, #2, and #3 are found in opinion of the Attorney General appearing in the Report for 1934 at page 533, copy of which is hereto attached. On the authority of that opinion interpreting statutes currently the same as here interpreted we advise as follows:

A. 1) In answer to your question #1 we would advise that the application of the voter where the absentee ballot is sought by reason of expected illness or physical disability may be personally made at the office of the Auditor or by mail.

2) In answer to your question #2 we would advise you that the ballot issued in response to the application cannot be delivered to an agent of the voter but must be mailed to the voter by the Auditor.

3) In answer to your question #3 the ballot and application therefor may not be returned to the Auditor by personal agent of the voter to the office of the County Auditor but must be mailed by the voter to the Auditor and must reach the Auditor prior to election day or the vote will not be counted.

B. In answer to your question #4 we advise that according to Section 78.2, 1954 Code, the Auditor is a county officer possessing the following limited authority with respect to the administration of votes and taking affirmations:

> "Limited authority. The following officers and persons are empowered to administer oaths and to take affirmations in any matter pertaining to the business of their respective office, position, or appointment:
>
> " * * * *
>
> "3. All county officers other than those named in section 78.1."

This same power impliedly by reason of Section 78.3, 1954 Code, exists in the deputy county officers. Section 78.3 provides as follows:

> "Jurat by deputy. In preparing a jurat to an oath or affirmation administered by a deputy, it shall be sufficient for the deputy to affix his own name, together with the designation of his official position, and the seal of his principal, if any."

Under this limited power a deputy county treasurer was authorized to administer oaths to applicants for registration of motor vehicles. 1919-1920 Report of the Attorney General 515. And a deputy sheriff, according to the case of Conable v. Hylton, 10 Iowa 593, has the same power as his principal to administer an oath to his garnishee when required to do so by the plaintiff. Therefore, we are of the opinion that a deputy county auditor

has the same area of authority under this statute as the County Auditor.

Very truly yours,

NORMAN A. ERBE
Attorney General of Iowa

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

February 17, 1958

Mr. Harold G. De Kay
Cass County Attorney
Atlantic, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 12th Inst. In which you submitted the following:

> "With reference to Chapter 332 of the 1954 Code of Iowa, as amended, I have the following question: Does the Board of Supervisors have the power and authority under Section 332.3 to rebate or refund taxes upon application for refund by taxpayer, where the admitted facts show that the assessor in assessing the said property included the value of a building, when, as a matter of fact, there were no buildings located upon the property, and the value of the said building is shown in the assessment? Would your answer still be the same if the taxpayer had noticed the error, and complained in the Auditor's Office and, through some inadvertent error in the Auditor's Office, he failed to notify the Treasurer, and the taxpayer paid the tax statement with the understanding the error had been removed?"

In reply thereto I advise as follows. I find no power or authority under Section 332.3, Code 1954, in the Board of Supervisors to rebate or refund taxes upon the application of the taxpayer. The taxpayer's refund relief is authorized under Section 445.60, Code 1954, providing as follows:

> "Refunding erroneous tax. The board of supervisors shall direct the treasurer to refund to the taxpayer any tax or portion thereof found to have been erroneously or illegally exacted or paid, with all interest and costs actually paid thereon."

Whether relief is available under that statute depends upon further facts. If appeal to the Board of Review to correct this error was not made probably refund would not be authorized.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

February 20, 1958

Mr. Bruce F. Stiles, Director
State Conservation Commission
L o c a l

Dear Sir:

This will acknowledge receipt of yours of the 14th inst. in which you submitted the following:

> "We have been advised by Mr. Wicker of the State Comptroller's Office that according to Chapter 54, Acts of the 57th General Assembly, interest accruing through investments of the Conservation Commission Fish and Game Trust Fund will no longer be credited to the Fish and Game Fund, but will be deposited in the State's General Fund Account. In 1956 this interest amounted to $2,894.47.
>
> "Considering the provisions of Section 107.19, Section 107.27 and Section 107.28 the Conservation Commission respectfully requests your opinion as to whether interest accruing from investment of these funds should be credited to the Fish and Game Trust Fund or to the State's General Fund."

In reply thereto I advise as follows. Subsection 4, Section 7 of Chapter 54, Acts of the 57th General Assembly, which provides as follows:

> "4. Further amend said section by adding the following:
>
> "'Interest or earnings on investments and time deposits made in accordance with the provisions of sections twelve point eight (12.8) as re-

> enacted in section one (1) of this Act, four hundred fifty-two point ten (452.10), four hundred fifty-three point one (453.1), and four hundred fifty-three point six (453.6), shall be credited to the general fund of the governmental body making the investment or deposit, with the exception of specific funds for which investments are otherwise provided by law, constitutional funds, or when legally diverted to the state sinking fund for public deposits. Funds so excepted shall receive credit for interest or earnings derived from such investments or time deposits made from such funds. Such interest or earnings on any fund created by direct vote of the people shall be credited to the fund to retire any such indebtedness after which the fund itself shall be credited.'"

is the authority for the position that the Comptroller takes in the above matter and represents the legislative intent in the disposition of interest on public funds therein designated. Sections 107.27 and 107.28, Code 1954, to which you refer, do not affect the directions of this statute. Both of these sections contain prohibitions against diversion of the <u>funds</u> arising out of described license fees from the purposes stated. Diversion of interest upon such funds was not barred.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

CITIES AND TOWNS - Fire Protection
whether occasion under which an off-duty
fireman is called to duty is a "serious
emergency" under code section 410.19 is
a question of fact.

February 11, 1958

Mr. Arthur H. Johnson
Webster County Attorney
607 Snell Building
Fort Dodge, Iowa

Dear Sir:

Receipt is acknowledged of your letter of February 7 as follows:

"A request is made upon your office for an interpretation of the following:

"The recent session of the legislature amended Section 410.19 in several respects. Most of these amendments are clear in all respects. We have had a question come up with reference to Senate File 34, Section 3. Under the amendment contained in File 34, Section 3, there is added to Section 410.19 the following phrase: 'Firemen called back to duty under this provision shall be duly compensated in accordance with their regular hourly wage.'

"We presume that this matter of calling back is in direct reference to the 'serious emergencies' as set out in the preceding sentence. In our opinion, the phrase 'serious emergencies' contemplates a very large fire or holocaust going on when it would be necessary to retain on duty the working shift at the fire station and perhaps to call back the men who are off to assist in the battling of the fire.

"With reference to our problem it has been the practice in one of the towns for the firemen who are off duty on a certain day to return to duty in case one of the men supposed to be on duty on a certain day is sick. The

58-2-1

men would then adjust the time between themselves. If you worked a day for me while I was sick and supposed to be working, when I returned to duty I would work a day for you, and you would have an extra day off. This practice has existed for many years. On most occasions when this happens, there is no emergency of any kind and the time is spent in the general duty at the fire house or maybe making an occasional small fire run.

"In our opinion, the calling back to duty of a man to take the place for a day when another man might be off sick is not a 'serious emergency' as intended by this Section of the Code. In other words, we feel that the previous policy of the men adjusting the time between themselves in the absence of emergency is all right. There is no question of the department being under manned in the absence of the serious emergency. We fully agree that if men were called back at the time of a serious emergency, that they should be compensated as the amendment states.

"We would like your interpretation of the above matter."

Section 410.19, Code 1958, provides as follows:

"Hours on duty limited. Firemen employed in the fire department of cities of ten thousand population or more, or under civil service, shall not be required to remain on duty for periods of time which will aggregate in each month more than an average of sixty-eight hours per week and no single period of time, or shift, shall exceed twenty-four hours in length, provided that in cases of serious emergencies such firemen may be required to remain on duty until such emergency has passed, when so ordered by the chief of the department or person acting in his place. Firemen called back to duty under this provision shall be duly compensated in accordance with their regular hourly wage."

In essence, the answer to your question requires a determination each time a fireman is "called back to duty" as to whether a "serious emergency" exists. For example, whether absence of one of the regular shift because of sickness or other reason constitutes a serious emergency would depend on such factors as the numerical strength of the shift, the technical specialty of the absentee, the weather, the current incidence of fires, the type of risks from an insurance standpoint in the locality and the like.

In other words, the question is primarily one of fact to be determined by the local governing body and not by this office or your office. I might add that the latter statement would be true with respect to the instant question even were it a question of law rather than fact. Advising city and town officials on local questions not involving a state or county office or department is outside the scope of the statutory provisions with respect to rendition of opinions. See Sections 13.2(4), 336.2(7) and the article by Judge Larsen in 41 Iowa Law Review at pages 351 to 368.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

COUNTIES
Domestic Animal Fund -- Residence not prerequisite to recovery of damages

February 7, 1958

Mr. James L. McDonald
Cherokee County Attorney
Cherokee, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 13th ult. in which you submitted the following:

> "In behalf of the Cherokee County Board of Supervisors I respectfully request an opinion construing Section 352.1 of the 1954 Code of Iowa, in relation to the following facts:
>
> "A large sheep feeder from Texas has shipped a number of sheep into Cherokee County for purposes of fattening for market. They are being fed on a contract basis with the local feeder being paid solely for the amount of gain made by the animals. A number of these sheep were killed by stray dogs.
>
> "An opinion from your office in 1932 indicates that the local feeder would be entitled to recover his damages from the Board of Supervisors. Under Chapter 352, in the event the feeder files a claim for the total loss, which includes the loss to the foreign sheep owner, is the foreign sheep owner entitled to damages under this chapter? Sec. 352.1 indicates any person damaged may file a claim with the Board. Does this in any way limit the applicants to residents of Cherokee County or the State of Iowa?"

In reply thereto I advise as follows. The statute in question, being Section 352.1, Code 1954, provides the following:

> "Claims. Any person damaged by the killing or injury of any domestic animal or fowl by wolves, or by dogs not owned by said person,

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> may, within ten days from the time he or his agent has knowledge of such killing or injury, file with the county auditor of the county in which such killing or injury occurred a claim for such damage."

The statute makes no qualification of residence either in county or state as a prerequisite to recovery of damages claimed under the statute. According to its terms, the benefits of the statute are available to any person. Absent such statutory residence restrictions denial of the benefits thereof to nonresidents would incorporate in the statute provisions not within the legislative intent. The opinion to which you refer appearing in the 1932 Report of the Attorney General at page 283 while not expressly so concluding does no impliedly. There it appeared that sheep owned by a nonresident of Iowa had been shipped into Cherokee County for feeding purposes, but a contract feeder in Cherokee County was deemed to have such an interest in the sheep as to entitle him to compensation for injuries to them.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

COUNTY OFFICERS: Supplies furnished under Section 332.9 and 332.10. Rate of consumption does not alter character of supplies furnished.

February 25, 1958

Mr. Charles H. Scholz
Mahaska County Attorney
Lacey Block Building
115 North Market Street
Oskaloosa, Iowa

Dear Sir:

Receipt is acknowledged of your letter of February 19 acknowledging mine of February 10 by which was transmitted copies of prior opinions of this office relating to proper funds for payment of telephone bills incurred by county offices.

You now request copies of other opinions cited in the opinions previously sent you. In view of the disproportionate amount of secretarial work entailed in preparing copies of the several items you request, I now advise you as follows:

(1) It is the opinion of this office that telephone expense for county offices is properly paid under Sections 332.9 and 332.10 of the Code. See opinions transmitted by letter of February 10.

(2) It is the opinion of this office that expenses relating to matters peculiar to education are payable by the county board of education under Section 273.13(5). See opinions previously furnished.

(3) It is the opinion of this office that telephone expense is an expense properly payable under Sections 332.9 and 332.10 and is not properly payable under Section 273.13(5). In other words, that the character of telephone expense as telephone expense is not altered by the subject matter of official conversations transmitted through the telephone instrument located in any of the offices named in Sections 332.9 and 332.10. Neither is the fact that some of the calls are toll calls significant. See enclosed opinion dated July 12, 1957.

From your previous letter and enclosures therewith it appears the specific point in controversy between the county superintendent and the board of supervisors is the number of calls made by the county superintendent. The amount of use or rate of consumption of a given commodity does not change its nature.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md
Enc. 57-7-14

58-2-4

Informal Opinion

County Officers -- Board of Social Welfare:

~~HEADNOTE:~~ Under the provisions of Chapter 93, Laws of the 57th G.A. (H.F. 572) in the matter of inspections by county boards of "custodial homes", the County Board is a fact finding body, and the ultimate decision is for the Department of Health as to whether or not a license shall be issued, denied or revoked.

February 4, 1958.

Mrs. Eleanor Carris, Director,
Division of Standards and Procedures
State Office Bldg.
Des Moines, Iowa

Dear Mrs. Carris:

Reference is made to your verbal request for an opinion with respect to the duties and responsibilities of a County Board of Social Welfare under the provisions of Chapter 93, Laws of the 57th G.A. (H.F. 572), in the matter of inspections by county boards of "custodial homes", and we beg to advise you as follows:

Accompanying your request were copies of "rules and regulations setting minimum standards for custodial homes" and "custodial home inspection blank" as issued and promulgated by the Iowa State Department of Health under the provisions of said law.

It is our understanding that the inspection blank is to be used by the person assigned by the county board to make the inspection, for collecting the necessary data, which will be used to assist personnel in classifying and evaluating the home according to the rules and regulations setting minimum standards for custodial homes.

We are primarily concerned with the following sections of the Act, in determining your question:

> Sec. 7. Licenses shall be obtained from the state department of health. Applications shall be upon such forms and shall require such information as the said department may reasonably require, which may include affirmative evidence of compliance with such other statutes and local ordinances as may be applicable. Each application for license shall be accompanied by the license fee, which shall be refunded to the applicant if the license is denied, which fee shall be paid over into the state treasury and credited to the general fund if the license is issued.

58-2-5

> Sec. 9. Upon receipt of the license fee and the application for license as a nursing home or custodial home the department shall:
> ***
> 2. If the application is for a custodial home, forward the application to the county board of social welfare of the county in which the premises are located. The county board shall make, or cause to be made, an inspection of the premises. After making such inspection the county board shall return the application to the board of health together with its findings from said inspection as to whether the proposed custodial home meets the standards for such homes as prescribed in the published regulations of the state department of health.
>
> Sec. 10. The state department of health shall have the authority to deny, suspend, or revoke a license in any case where the department finds that there has been a failure to comply with the provisions of this Act or the rules, regulations or minimum standards promulgated hereunder, or for any of the following reasons:
>
> Sec. 17. It shall be the duty of the state department of social welfare, state fire marshal, and the officers and agents of other governmental units to assist the state department of health in carrying out the provisions of this Act, in so far as the functions of these respective offices and departments are concerned with the health, welfare, and safety of any person or persons cared for in nursing homes or custodial homes.

In the construction of statutes, effect must be given, if possible, to whole statute and every part thereof. Hickson v. Fidelity & Casualty Co. of N.Y., 223 Ia. 518, 273 N.W. 102. Words used in statutes should generally be given their ordinary meaning. Des Moines City Ry. Co. v. City of D.M., 205 Ia. 495, 216 N.W. 284. The intent of Legislature, in absence of previous construction of enactments, must be determined both from language used and purpose of legislation. Long v. Northrup, 279 N.W. 104, 225 Ia. 132, 116 A.L.R. 14-15. Statutes must be given reasonable and not arbitrary, interpretation. Brutsche v. Inc. Town of Coon Rapids, 272 N.W. 624, 223 Ia. 487.

It will be noted that licenses for the operation of a custodial home shall be obtained from the State Department of Health. A person desiring to operate such a home presents an application upon such form and information as the department may reasonably require. This application is then required to be forwarded to the

county board of social welfare of the county where the premises are located, which board shall then make, or cause to be made, an inspection of the premises and then return the application to the Board of Health together with its findings from said inspection as to whether the proposed custodial home meets the standards prescribed in published regulations of the Department of Health.

To comply with these provisions of the law, the Department of Health has issued a set of minimum standards and prepared an inspection blank, setting out desired information, ekeyed to the statute and the rules and regulations of minimum standards prescribed by the department.

After the inspection is completed, with the aid of the rules and inspection blank, it is then the duty of the County Board, or person designated by said board to make its findings and return the same with the application to the Department of Health.

Findings are the result of an examination or inquiry into some matter of fact. In this instance, it would be the result of an examination of the premises or questioning of the applicant to elicit "such information as the Department of Health may reasonably require."

These findings may be summarized and forwarded with the application and data secured as a result of the inspection, when the application is returned to the department as specified in the statute.

It then becomes the duty of the Department of Health from this information before, and within the sole discretion of the Department of Health, whether or not it will deny, suspend or revoke a license in any case where the department finds that there has been a failure to comply with the provisions of the law or the rules, regulations or minimum standards promulgated.

If the Department of Health finds that the application meets the requirement of the law and its rules, it is, of course, within its sole discretion in the matter of the issuance of a license to such custodial home.

In short, the County Board is a fact finding body whereas

the ultimate decision is for the Department of Health as to whether or not a license shall be issued, denied or revoked.

Yours very truly,

Frank D. Bianco
Assistant Attorney General

FDB/sp

County officers -- County Attorney -- Compensation of Assistant. Sections 340.2, 340.10 distinguished

February 25, 1958

Mr. Robert L. Oeth
Dubuque County Attorney
Dubuque, Iowa

Dear Sir:

Pertinent to my telephone conversation this morning with Mr. Timmons with respect to his statutory compensation as Assistant County Attorney, I would advise that this compensation is determined by the provisions of Section 340.10, Code 1958, which Code is not yet in circulation but which provides as follows:

> "Assistant county attorney. Assistant county attorneys shall receive as their annual salary in counties have a population of:
>
> "1. Less than thirty-six thousand, no compensation.
>
> "2. Thirty-six thousand and over, where an assistant county attorney is required, the first assistant shall receive seventy-five percent of the amount of the salary of the county attorney.
>
> "3. Thirty-six thousand and over, where assistants in addition to the first assistant county attorney are required, fifty percent to sixty-five percent of the amount of the salary of the county attorney, as fixed by the board of supervisors.
>
> "4. In counties having a population of fifty-seven thousand or over, in which counties there is a city of less than fifteen

58.2-6

> thousand population other than the county seat of said county, which city has a population of six thousand or over, the board of supervisors may fix the salary of an assistant county attorney residing in such city, not the county seat, making said salary in any sum which the board of supervisors may determine, not in excess of two thousand dollars per annum."

and not by the provisions of Section 340.2 of that Code. Section 340.2 concerns only the compensation of the first deputy auditor, treasurer, recorder and clerk and the second such deputy if required. The specific provisions of Section 340.10 clearly control the compensation of Assistant County Attorney. Payment thereof under the provisions of Section 340.2 would constitute plain legislation. Any previous opinion concerning the compensation of Assistant County Attorney Timmons is withdrawn.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

County Officers - -

COUNTY ENGINEER: A COUNTY ENGINEER MUST BE A REGISTERED CIVIL ENGINEER.

Book

Ames, Iowa

Charles H. Scholz
Mahaska County Attorney
115 North Market Street
Oskaloosa, Iowa

Re: County Engineer

Dear Mr. Scholz:

I have your letter of January 28, 1958, in which you ask our opinion as to whether the duties of the county engineer, specifically the signing of construction vouchers in accordance with Section 314.3, 1954 Code of Iowa, can be undertaken by a person who is not a registered civil engineer.

It is our opinion that these duties must be performed by a registered civil engineer. Section 309.17 of the Iowa Code is quite specific in stating that the board of supervisors shall employ registered civil engineers. Attorney General's Opinions, 1934, page 58, after setting out Section 309.17 states:

> "This section I have quoted makes it mandatory on the board to employ a registered civil engineer. They have no other choice in the matter. The last one and one-half lines of said section apply only to the tenure of office of the particular person employed by the board. It does not provide for discontinuing the office. If the board terminates the contract with any particular engineer employed by them, they must employ another."

It is clear, both from the statutes and this opinion, that the duties of county engineer must be performed by a regis-

58.2.1

tered civil engineer. The only procedure that we could suggest would be for the board of supervisors to employ a registered civil engineer, even though it would be on a temporary basis, until the services of a permanent county engineer can be obtained.

Very truly yours,

John L. McKinney
General Counsel for
Iowa State Highway Commission

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

JLM:MS

Elections -- Judges and clerks have no power to disclose names of persons who have voted. (Strauss to Coffman, State Rep. 2/17/58)

February 17, 1958

Hon. William J. Coffman
State Representative
North English, Iowa

My dear Mr. Coffman:

I have yours of the 11th inst. in which you have submitted the following:

> "I'd like an Attorney General's opinion on the following: Is it legal to have one of the Judges or a Clerk at an election make a list of all those who have voted so that all of those who have not voted can be contacted by phone or otherwise and urged to vote. In case this isn't legal what would you suggest as a legal procedure."

In reply thereto I would advise you that the duties and powers of election judges are set forth in Chapter 49, Code 1954. There appears to be neither express or implied power or duty in the election judges or clerks to disclose to anyone the names of those persons who have voted at the election. In addition there appears to be no statutory authorization in anyone to secure this information. Section 49.104, Code 1954, describes the persons that are permitted at the polling places. This statute follows:

> "Persons permitted at polling places. The following persons shall be permitted to be present at and in the immediate vicinity of the polling places, provided they do not solicit votes:

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"1. Any person who is by law authorized to perform or is charged with the performance of official duties at the election.

"2. Any number of persons, not exceeding three from each political party having candidates to be voted for at such election, to act as challenging committees, who are appointed and accredited by the executive or central committee of such political party or organization.

"3. Any number of persons not exceeding three from each of such political parties, appointed and accredited in the same manner as above prescribed for challenging committees, to witness the counting of ballots."

In connection with the performance of their statutory duties, this Department has issued an opinion appearing in the Report of the Attorney General for 1940 at page 588, copy of which is enclosed.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

Employment Security Commission -- I.P.E.R.S.
Selection of depositories by State Treasurer
not controlled by Commission.

February 27, 1958

GC7-NCQ-d1

Mr. Don G. Allen, Chief
Legal Services Division
Employment Security Commission
L o c a l

Dear Sir:

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

> "The Commission has instructed this department to request an Attorney General's opinion concerning the general powers of the Commission with respect to the holding, investing and disbursing of money in the Iowa Public Employees' Retirement Fund, and, in particular, whether or not the Commission may direct in which bank any part of the Fund may be deposited or held.
>
> "As you know, Code Section 97B.3 provides that the Commission shall administer the Iowa Public Employees' Retirement System, while Section 97B.4 outlines the general powers of the Commission.
>
> "Section 97B.7 creates the Retirement Fund, makes the Treasurer of the State of Iowa the custodian and trustee of the Fund, and requires him to administer the Fund in accordance with the directions of the Commission.
>
> "Chapter 453 is, of course, the general chapter pertaining to the deposit of public funds. This Chapter, which was amended as late as the 57th G. A., may be of some consequence in relation to the above-mentioned sections of Chapter 97B.
>
> "The matter is respectfully submitted for your consideration."

58-2-9

In reply thereto I advise as follows. The statute under which this situation arises is Section 97B.7, Code 1958, not yet distributed, which provides as follows:

> "Fund created. 1. There is hereby created as a special fund, separate and apart from all other public moneys or funds of this state, the 'Iowa Public Employees' Retirement Fund', hereafter called the 'retirement fund'. This fund shall consist of all moneys collected under this chapter, together with all interest, dividends and rents thereon, and shall also include all securities or investment income and other assets acquired by and through the use of the moneys belonging to this fund and any other moneys that have been paid into this fund.
>
> "2. The treasurer of the state of Iowa is hereby made the custodian and trustee of this fund and shall administer the same in accordance with the directions of the commission. It shall be the duty of the trustee:
>
> "a. To hold said trust funds.
>
> "b. Invest such portion of said trust funds as in the judgment of the commission are not needed for current payment of benefits under this chapter in interest-bearing securities issued by the United States, or interest-bearing bonds issued by the state of Iowa, or bonds issued by counties, school districts and/or general obligations or limited levy bonds issued by municipal corporations in this state as authorized by law, or other investments authorized by insurance companies in this state.
>
> "c. Disburse such trust funds upon warrants drawn by the comptroller pursuant to the order of the commission.
>
> "3. All moneys which are paid or deposited into this fund are hereby appropriated and made available to the commission to be used only for the purposes herein provided:

> "a. To be used by the commission for the payment of retirement claims for benefits under this chapter, or such other purposes as may be authorized by the general assembly.
>
> "b. To be used by the commission to pay refunds provided for in this chapter."

Attention is directed to the following language of that Section, to-wit: "There is hereby created as a special fund, separate and apart from all other public moneys or funds of this state, the 'Iowa Public Employees' Retirement Fund',". Such language including the use of the word "other" is descriptive of the character of this fund and identifies it as public moneys and segregated therefrom pursuant to the terms of the statute. As such public money, deposit thereof in a banking institution is controlled by the provisions of Chapters 453 and 454, Code 1958, not yet distributed. According to Section 453.1, Code 1958, when making a deposit of public moneys inclusive of this fund, the Treasurer is bound by the following statute, Section 453.1:

> "Deposits in general. The treasurer of state, and of each county, city, town, and school corporation, and each township clerk and each county recorder, auditor, sheriff, each clerk and bailiff of the municipal court, and clerk of the district court, and each secretary of a school board shall deposit all funds in their hands in such banks as are first approved by the executive council, board of supervisors, city or town council, board of school directors, or township trustees, respectively. However, the treasurer of state shall invest or deposit as provided in section 452.10 any of the public funds not currently needed for operating ex-

> penses. The term 'bank' shall embrace any corporation, firm, or individual engaged in a general banking business."

In other words, it is the prerogative of the Treasurer to select the depository of these funds when such bank of deposit bears the approval of the Executive Council. Such designation by the Treasurer and approval thereof by the Executive Council is a prerequisite to the sharing in the State sinking fund created by Chapter 454 in the event of loss. Section 454.2 provides as follows:

> "Purpose of fund. The purpose of said fund shall be to secure the payment of their deposits to state, county, township, municipal, and school corporations having public funds deposited in any bank in this state, when such deposits have been made by authority of and in conformity with the direction of the local governing council or board which is by law charged with the duty of selecting depository banks for said funds."

The Treasurer is absolved of personal liability from loss of such fund by insolvency when this procedure is pursued. Section 453.8. In view of the foregoing, control of the Treasurer in the selection of a depository of this fund by the Employment Security Commission under its power and direction could result in liability upon the Treasurer for violation of his trust. See Hunt v. Hopley, 120 Iowa 695; 54 Am. Jur., paragraph 367, title Trusts.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

Highways -

Vacation of ~~Highways~~: Boards of supervisors may not simply abandon a county road which has been lawfully a part of the public highways of the county but must go through formal vacation procedures.

FORM 13

GHWAY COMMISSION

ES, IOWA

Ames, Iowa

February 5, 1958

William Q. Norelius
Crawford County Attorney
Courthouse
Denison, Iowa

Dear Mr. Norelius:

I have your letter of February 1, in which you ask for our opinion as to whether the county can simply abandon secondary roads or refuse to maintain it simply because there is a better and shorter route established or because the road in question serves only one farmstead.

The answer to both of these questions must be in the negative. It appears that your county officials may have the idea that the public can abandon a road from having heard of situations where a landowner has brought suit to quiet title or where someone may have fenced off or obstructed a road which has fallen into disuse. It is an entirely different problem from the standpoint of the public. While an individual may, in certain cases, claim rights against the public by alleging that a highway has been abandoned by the public, the public may not do so against an owner. The reason for this is that if the public body in charge of a road fails to maintain it, or attempts to "abandon" it, or goes through the formal procedure of vacating it, it may be that a property right of the plaintiff will be taken. That property right, of course, is access from an individual's property to a public way.

The board in your county may be in hopes that it can avoid going through the formal procedure so that it can avoid the payment of damages. This cannot be accomplished even if it were possible for the board to informally abandon a road. Access is a private property right, the loss of which must be compensated.

58.2-10

IOWA STATE HIGHWAY COMMISSION
AMES, IOWA

There have been, in the past, cases where the county abandoned informally a road, merely allowing it to fall into disuse and failing to maintain it, and where damages were still recoverable in spite of the fact that no formal abandonment procedure had been followed. I refer you to the case of Ferguson vs Woodbury County, 212 Ia 814. Of course, that case tacitly recognizes that a highway can be informally abandoned. However, the only value of informally abandoning a highway would be to escape the payment of damages, and in the Ferguson case such payment could not be avoided.

However, it is important to realize that in 1935 and previous years, the Code of Iowa did contain an abandonment statute which did not call for the formalized procedure required in the vacation law. In substance, a road could be abandoned by merely mailing notice to the affected landowners. This provision does not appear in the Code of 1939 and those following it.

From the fact that the legislature has stricken said provisions from the Code, leaving only the formal vacation laws, we can reasonably assume the intention of the legislature would be that only the formalized procedure will be followed.

It is the opinion of this office that there is no way to vacate a road other than by the prescribed procedures in Section 306.4, et seq., Code of 1954, and that damages can not be avoided by mere failure to maintain a highway if, in effect, it has been vacated, for the result is to deprive the landowner of access to a public highway, and just compensation must be made.

We trust that this letter will be of assistance to you.

Very truly yours,

Daniel T. Flores
General Counsel for
Iowa State Highway Commission

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

DTF:MS

INSURANCE. Application fees for licensing agents under Code section 522.3.

February 25, 1958

Mr. Samuel E. Orebaugh
Deputy Commissioner
Insurance Department of Iowa
L o c a l

Dear Sir:

Receipt is acknowledged of your letter of February 21 as follows:

"Chapter 248, Acts of the 57th General Assembly, otherwise known as the 'Insurance Agents Qualification Law', requires the Commissioner of Insurance to determine the character of each first-time applicant and his competency with respect to the type and kind of insurance he proposes to write.

"For the purpose of examinations, the 'types and kinds' of insurance referred to in the Act will be divided into seven general classifications, such as life, fire, automobile, etc., and a separate examination will be given for each.

"The Act further provides, 'The Commissioner shall require of each first-time applicant an application fee of $5.00.'

"In the portion of the Act requiring a 'first time applicant' to prove competency, he is required to do so with respect to each 'type and kind' of insurance he proposes to write. A reasonable inference appears to be that he is a 'first-time applicant' for each type and kind of insurance for which he seeks to qualify. Many states with similar statutes require a $5.00 application fee for each separate examination.

"We, therefore, wish to request your opinion as to whether or not the Commissioner should require a $5.00 application fee of a first-time applicant for each of the seven examinations which he may desire to take."

Section 522.3, Code 1958, is which is incorporated the act of the Fifty-seventh General Assembly to which your letter refers, provides as follows:

"Issuance and revocation. The commissioner shall require of each first-time applicant such reasonable proof of character and competency with

58-2-11

respect to the type and kind of insurance the applicant proposes to sell as will protect public interest, before issuing such license and may, for good cause, after hearing held within sixty days from the date of application, decline to issue such license or may, for like cause, after hearing, revoke the same. The commissioner is authorized and directed to establish and publish reasonable rules and regulations setting forth the required qualifications for such license. Competency for any applicant not previously licensed shall be established in accordance with the rules and regulations established by the commissioner as provided herein. The commissioner may issue a temporary license for a period of not to exceed six months and for such temporary license may waive the requirements established herein.

"Nothing contained herein shall preclude the licensee from engaging in any other lawful business, occupation or profession. Nothing contained herein shall be applicable to duly licensed attorneys providing surety bonds incident to their practice or to persons selling transportation tickets of a common carrier of persons or property who shall act as such agents only as to transportation ticket policies of health and accident insurance or baggage insurance on personal effects.

"The commissioner shall require of each first-time applicant an application fee of five dollars."

It appears from your letter that your department has concluded that the "reasonable proof of. . .competency" required of each "first-time applicant" shall be furnished by passing an examination. It further appears that your department has administratively classified insurance as to "type and kind" for the purpose of such examinations. However, the question you submit pertains to neither of said matters but rather to the application fee to be charged each "first-time applicant".

Since the statutory provision is new, the answer must be derived from its face. The first question to be answered in construing the statute is: What is the "first-time applicant" an applicant for? The answer from the face of the statute is that he is an applicant for a license to sell insurance. "First-time" signifies that he has no such license from the State of Iowa and that he has not previously applied for one. But further, and most significant with respect to your question, he is an applicant for a license to sell a type or kind of insurance and the statute expresses the words "type" and "kind" in the singular.

Therefore, in answer to your question, and assuming but not deciding that the classification of types and kinds administratively arrived at by your department is reasonable and proper, you are advised that the five-dollar application fee provided in the statute is payable for each application for a license to sell one such type or kind of insurance when the applicant neither holds a prior license authorizing him to sell such type or kind of insurance nor has previously made application for a license to sell that particular type or kind of insurance. In other words, an applicant who wishes to be licensed to sell several types and kinds of insurance and who has neither been previously licensed nor has previously applied for a license to sell any of such types or kinds, must submit an application and pay the

said application fee for each type or kind of insurance he wishes to be licensed to sell. It should, however, be noted that such fees are for "application" and that no "examination" fee as such is provided. The examination is merely the proof of competence your department has administratively determined to recognize.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

MINORS -- Change of name -- effect of marriage and divorce. Also see # 58-3-1.

February 7, 1958

Mr. Bert A. Bandstra
Marion County Attorney
Knoxville, Iowa

Dear Sir:

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

> "I would very much appreciate receiving from your office an opinion on the following questions:
>
> "'Can a male citizen who has been married but is now divorced and is under the age of 21 years, have his name changed as provided in Chapter 674 of the Code or is he barred from so doing until he reaches 21 years of age?'
>
> "My opinion is that Section 599.1 of the Code would cover this situation and the disability of minority would be removed by the marriage even though the applicant is not married at the present time. There seems to be some question about this matter and an opinion from your office would undoubtedly resolve the question in this particular case."

In reply thereto I advise as follows. The statute to which you refer, being Section 674.1, Code 1954, provides as follows:

> "Who authorized. Any person, under no civil disabilities, who has attained his or her majority and is unmarried, if a female, desiring to change his or her name, may do so as provided in this chapter."

58-2-12

The question which you propound in connection with that statute seems not to have been determined in Iowa. It is true that Section 599.1, Code 1954, to which you refer and providing 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."

confers the status of majority upon a minor who has contracted a marriage. However, a divorce thereafter according to authority operates to change this status resulting in converting the marriage status to that of a single person. The authorities so hold. Sections 549 and 550, 17 Am. Jur., title Divorce and Separation, provide as follows:

> §549 - Status of Parties - A final decree granting an absolute divorce determines conclusively, as between the parties, that they were legally married prior to the decree; and, of course, a valid final decree establishes conclusively that the marriage is dissolved and that the status of the parties, from the time of the entry of the decree, is that of single persons. As to the mere status of the parties from the entry of the decree as that of single persons, a valid, final decree is conclusive as to all the world.
>
> "It follows from the doctrine of conclusiveness of a divorce decree as to status, that where, in an action for a judicial separation, the court finds that the parties are validly married, one of the parties cannot later obtain an annulment on the ground that the other was, at all times during the alleged marriage, validly married to a prior spouse. Indeed, where the wife has previously been married and was not validly divorced when she married again, and she later obtained a

> divorce from her second husband at a time when he did not know the facts rendering his marriage void, it was held, in a proceeding to avoid a property settlement or transfers of property on the ground of such fraudulent concealment, that the divorce decree was res judicata on the issue of valid marriage."
>
> "§550 - Persons Affected by Adjudication. - The doctrine of res judicata as a bar or as an estoppel applies between the parties and their privies; but it does not ordinarily operate so as to affect strangers who are not in privity with a party. This principle applies in divorce actions, but there is one exception: a proceeding in rem with respect to a status is conclusive upon all the world; and so a judicial dissolution of marriage in a proceeding for an absolute divorce binds strangers in so far as it determines that from the entry of the decree whatever marriage there may have been between the parties is dissolved and that the parties are single persons as to each other."

The rule is stated in the following terms in 20 A. L. R. 2d 1164:

> "Rule that divorce decree is not res judicata. By the great weight of authority and according to the better considered cases, a decree of divorce, as between persons not parties to the divorce action or as between a party and a non-party, merely adjudicates the subsequent single status of the parties thereto, that is, it adjudicates that from the date of the decree they are single and no longer married to each other, and it does not adjudicate as to strangers or as between a party and a stranger, that previously thereto the marital status existed between them, although as between the parties thereto it is a conclusive adjudication as to such previous marital status.

In such state of authorities I am of the opinion that the male who while under the age of twenty-one, married and subse-

quently still being under the age of twenty-one was divorced may not avail himself of the provisions of Section 674.1.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

SCHOOLS AND SCHOOL DISTRICTS--
1. Chapter 284, Code of Iowa, applies to land removed from taxation both before and after the effective date of the Act.
2. Reasonable proof of the fact of "removal" may be required by the claim-processing agency.

February 19, 1958

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

Dear Sir:

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

"Claims of school corporations for reimbursement of taxes for tax-free land are covered by Section 284, Code of Iowa, 1954.

"Under this law, we honor claims certified to this office by the county auditor from school districts having state or government owned land within their boundaries.

"We would like an opinion on the following questions:

"(1) Are the provisions of Chapter 284 limited to lands acquired subsequent to the enactment of that law?

"(2) If the answer to #1 is negative, is proof of ownership sufficient or must the secretary of the Executive Council require proof that land prior to being acquired was subject to taxation?"

Section 284.1, Code of Iowa, provides as follows:

"Reimbursement--by whom computed. When unplatted lands within the boundaries of a school district are owned by the government of the United States, by the state, by a county, or by a municipal corporation located wholly outside said school district, and such lands have been

58-2-13

removed from taxation for school purposes, said school district shall be reimbursed, as hereinafter provided, in an amount which shall be computed by the county board of supervisors in the county in which such lands are located, which computation shall be made on or before the first day of September in the year in which said deductions are to be made." (Emphasis ours)

Thus, the statute, on its face, predicates present ownership of land removed from taxation as the basis of eligibility for reimbursement. In answer to your first question, you are therefore advised that so long as land which was removed from taxation is owned by one of the units of government named in the statute at the time claim for reimbursement is received and has been removed from taxation, it is immaterial whether or not the land was removed from taxation before or after the date of enactment of Chapter 284.

Since the answer to your first question is in the negative you are advised, with respect to your second question, that the fact of removal from taxation is, by the express terms of the statute, an essential condition which must exist to show eligibility for reimbursement under the statute. The theory of the statute is to reimburse lesser taxing bodies for encroachments upon their tax base. Naturally, such condition could not exist where the lands have never been in taxation at any time in the history of the state. Thus, where the state owns land granted it by the Federal government at the time of admission to statehood, no reimbursement on account of such land could be made under the terms of the quoted statute for there has been no "removal".

As to the matter of proof, it would seem to be the duty of the reimbursing agency to require claimants to satisfactorily establish the validity of their claim. Thus, any claim for reimbursement attributable to a certain parcel of land should be proved the first time claim is made with respect thereto. However, where claim with respect to such parcel is made in subsequent years the original proof should suffice without duplication. Where land is believed to have been in continuous ownership by the state from the time of its admission to the union so as to preclude eligibility for reimbursement under Chapter 284, such fact should be ascertainable from the records kept in the Land Office under the Secretary of State as provided in Chapter 10 of the Code.

In short, the claim-processing agency may require reasonable proof of the fact of "removal".

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

SCHOOL REORGANIZATION:

Appeals by existing districts. Where proposed district is joint, appeal is under Section 275.16; otherwise under 275.15.

February 18, 1958

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

Dear Sir:

Receipt is acknowledged of your letter of February 15 as follows:

> "Where joint county boards have, as a single board, decided that independent rural school districts, which are wholly within one county, should be reorganized--the rural districts having protested (but unsuccessfully), is the appeal direct to the district court, as provided in Section 275.15, as amended, or does 275.16 govern, making the first appeal to the State Board of Education?"

The answer to your question depends upon the situation of the proposed school district into which the protesting districts are to be included by the process of reorganization. If the proposed district will, when effectuated, include land in more than one county, appeal is under Section 275.16. Otherwise, appeal would be under Section 275.15.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

58-2-14

HEADNOTE

Secondary roads--Board of Supervisors can pass resolution extending secondary roads into cities and towns of a population less than 2500.

Ames, Iowa

Feb. 10, 1958

Mr. Donald L.Nelson
County Attorney
Nevada, Iowa

Re: Secondary road extensions

Dear Mr. Nelson:

I have your letter of January 28, 1958 in which you ask our opinion on the following questions:

1. Does a Board of Supervisors have the authority to use secondary road funds to improve a street under the facts set forth above, and under Section 314.5, or is there any other statute or ruling that would give them such authority?

2. If the Board of Supervisors were to adopt a resolution establishing this Main Street as an "extension" of the secondary road coming from the south, would they then have the authority to use secondary funds for the surfacing of said street?

Section 314.5 of the Iowa Code grants the Board of Supervisors the authority to extend secondary roads in to cities and towns of a population less than 2500 and this section grants the authority to the Board to use secondary road funds for the extension. The answer to your first question is yes. There is no other statute that is directly applicable to the situation you state.

The answer to your second question is also in the affirmative. If the Board of Supervisors passes a resolution establishing the Main Street of Collins as an extension of the secondary road coming from the south, they can use secondary road funds for the surfacing of this street.

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

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

JLM:js

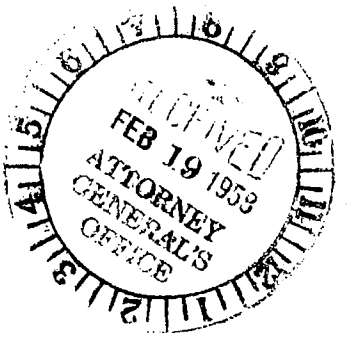
58-2-15

lanes

HEADNOTE: Secondary roads--farm ~~lands~~ cannot be absorbed into the county road system.

Ames, Iowa

Feb. 18, 1958



Mr. J. Leo Martin
County Attorney
State Bank Bldg.
Sigourney, Iowa

Keokuk Co.

Re: Farm lanes

Dear Mr. Martin:

I have your letter of Feb. 14, 1958, in which you ask our opinion as to whether the area described in your letter is a farm lane or a road that can be absorbed into the county road system. This appears to be a question of fact.

The opinion of the Attorney General 1956, page 9, determined that if a road was considered a farm lane, then it could not be taken into the county road system. This opinion is still controlling.

It is our opinion that the road owned by Mr. Cassens is nothing more than a farm lane. The property owners other than the Cassens who abut upon it also abut the public secondary road. The only people to be benefited would be the Cassens family. The fact that they are improving this lane does not elevate the lane into the class of a public road.

For the foregoing reasons, it is our opinion that the road in question is a farm lane and cannot be absorbed into the county road system.

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

58-2-16

Social welfare -- Aid to Dependent Children. Co-operation required of parents. Necessity for referral of applicants to County Attorney discussed.

February 20, 1958.

Mr. Matt Walsh
County Attorney
Pottawattamie County
Council Bluffs, Iowa

Dear Mr. Walsh:

Your letter dated February 5, 1958, addressed to the Attorney General, has been referred to the writer for attention, the pertinent part of said letter reading as follows:

> "Our local department of social welfare is of the opinion, and I feel they have some basis for this opinion after reading the portions of the manual which I have underlined in ink, that the only requirements for a person to receive ADC is to express a willingness for a referral to be made to the County Attorney. If the applicant expresses a willingness that the referral be made, then the department can grant ADC even though no specification has been made by the County Attorney, and the applicant never appears in the office of the County Attorney to cooperate in providing information for filing charges. In my opinion, this is a clear violation of Section 239.5"

The answer thereto wontemplates a mixed problem of departmental policy and law. We must of necessity consider all of the related statutes in the field of social welfare and rehabilitation in order not to do violence to either the law or the policies established by the Board of Social Welfare, for the Department of Social Welfare, under its powers and duties. (See Sec. 234.6, Code of Iowa, 1954)

The rule in this respect is stated in Davis v. Davis, 246 Iowa 266, wherein Justice Garfield, on page 274, spoke as follows:

> "There are other fundamental rules of statutory construction here applicable. We will mention only two. In seeking the meaning of a law the entire Act and other related statutes (such as chapter 252) should be considered. Ahrweiler v. Board of Supervisors, 226 Iowa 229, 231, 283

58-2-17

N.W. 889; Eysink v. Board of Supervisors, 229 Iowa 1240, 1243, 296 N.W. 376, 378; Wood Bros. Thresher Co. v. Eicher, 231 Iowa 550,560, 1 N.W. 2d 655, 660 ('Each section *** must be construed with the act as a whole, and with every other section.'); 82 C.J.S., Statutes, section 345a; 50 Am. Jur., Statutes, Section 352, pages 352 to 354 ('all parts of the act should be considered, compared, and construed together. It is not permissible to rest the construction upon any one part alone *** or to give undue effect thereto.' "

The State legislature must have been cognizant of the provisions of Section 234.6 of the Code (when it enacted Section 3 of Chapter 10, Laws of the 55th G.A., the particular statute with which we are presently concerned,) and particularly, subsection 2 of Section 234.6 which reads as follows:

"Copperate with the federal social security board created by Title VII of the Social Security Act, 42 U.S.C. 901, enacted by the 74th Congress of the United States and approved August 14, 1935, or other agency of the federal government for public welfare assistance, in such reasonable manner as may be necessary to qualify for federal aid, including ***"

Congress as a part of the Social Security program, enacted the following law; (Title IV - Grants to States for Aid to Dependent Children):

"Section 401. For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each state to furnish financial assistance and other services, as far as practicable under the conditions in such state, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this title. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Board, State plans for aid to dependent children. (42 U.S.C. 601)

"Section 402 (a) A State plan for aid to dependent children must

(1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them;

(2) provide for financial participation by the State;

(3) either provide for the establishment or designation of a single State agency to administer the plan, or provide for the establishment or designation of a single State agency to supervise the administration of the plan;

(4) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid to dependent children is denied or is not acted upon with reasonable promptness;

(5) provide such methods of administration,(including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Administrator shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Administrator to be necessary for the proper and efficient operation of the plan; and

(6) provide that the State agency will make such reports, in such form and containing such information, as the Administrator may from time to time require, and comply with such provisions as the Administrator may from time to time find necessary to assure the correctness and verification of such reports;

(7) provide that the State agency shall, in determining need, take into consideration any other income and resources of any child claiming aid to dependent children;

(8) provide safeguards which restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with the administration of aid to dependent children;

(9) provide, effective July 1, 1951, that all individuals wishing to make application for aid to dependent children shall have opportunity to do so, and that aid to dependent children shall be furnished with reasonable promptness to all eligible individuals;

(10) effective July 1, 1952, provide for prompt notice to appropriate law-enforcement officials of the furnishing of aid to dependent children in respect of a child who has been deserted or abandoned by a parent;

(11) provide, effective October 1, 1950, that no aid will be furnished any individual under the plan with respect to any period with respect to which he is receiving old age assistance under the State plan approved under section 2 of this Act; and

(12) (effective July 1, 1957) provide a description of the services (if any) which the State agency makes available to maintain and strengthen family life for children, including a description of the steps taken to assure, in the provision of such services, maximum utilization of other agencies providing similar or related services. (42 U.S.C. 602(a))

(b) The administrator shall approve any plan which fulfills the conditions specified in subsection (2), except that he shall not approve any plans which imposes as a condition of eligibility for aid to dependent children, a residence requirement which denies aid with respect to any child residing in the State

(1) who has resided in the State for one year immediately peeceding the application for such aid, or

(2) (effective prior to July 1, 1952) who was born within the State within one year immediately preceding the application, if its mother has resided in the State for one year immediately preceding the birth.

(3) (effective July 1, 1952) who was born within one year immediately preceding the application, if the parent or other relative with whom the child is living has resided in the State for one year immediately preceding the birth. (42 U.S.C. 602 (b).)"

When the opinion of the Attorney General dated August 5, 1957, was issued construing the statute in question, it brought about an immediate reaction from the federal authorities as to whether or not federal funds would be forthcoming in that said statute raised a question of whether or not there continued to be, in an applicant for ADC an opportunity for a fair hearing before a State agency to any individual whose claim for aid to dependent children is denied, or is not acted upon with reasonable promptness, whether or not by this new statute, requiring certain action by county attorneys, it established more than a single State agency to administer the plan, or provide for the establishment or designation of a single State agency to supervise the administration of the plan, and whether or not all individuals wishing to make application for aid to dependent children have opportunity to do so, and that aid to dependent children shall be furnished with reasonable promptness to all eligible individuals. (See Federal Statute, Sec. 402, supra)

This has been a matter of some concern to both State and Federal authorities because in many cases, County Attorneys have failed to act promptly. The statute requires that such applications shall be acted upon and completed within 30 days of the filing of the application for ADC.

It has been said that from Congress and State Legislatures come the statutes under which we live, and the Courts exhibit a constant reluctance to interfere with matters of policy, once the people have spoken through their duly elected representatives.

As heretofore stated, the federal authorities questioned the construction of the statute by the Attorney General's opinion of

August 5, 1957; and to establish a workable policy which would be acceptable to the federal authorities, so as not to jeopardize federal funds, a conference was arranged with their representatives from the Kansas City office and thereupon, State Department regulation VI-15-1 dated October 2, 1957, which you take exception to, was approved by the federal authorities and promulgated and issued by the State Department.

At this point, we might say that to the extent that a state contracts with the federal government, in these mutual aid programs, to that extent, a State surrenders some part of its sovereignty, and the respective laws of the Congress and the State Legislature should be construed to make them harmonize and workable, if at all possible.

Our Supreme Court has laid down this rule in which it declared, in the case of Brutsche v. Inc. Town of Coon Rapids, 218 Ia. 1073, 256 N.W. 914, the following:

> "All parts of an act are to be construed if possible so as to harmonize various provisions and give force and effect to each and each part of a statute must be preserved if reasonably possible."

Under the rule above stated and the rule in the case of Davis v. Davis, with reference to related statutes, we must, therefore, in determining policy, give force and effect to Section 234.6, in its mandate to cooperate with the federal social security board, and the provisions of Section 239.5 in the matter of referrals, calling for the advice of County Attorneys, so as to harmonize the various provisions if reasonably possible.

The philosophy of the law, both federal and state, is premised upon the needs of the child or children, and their welfare, and aid for the child should not be unduly withheld because of the derelictions of the parent or parents. (Note enclosed recommendations of the federal authorities in this respect)

We realize that the provision in regulation VI-15-1 which reads: "Willingness on the part of the client for the referral to be made to the County Attorney constitutes cooperation, ***" is the very minimal requirement possible in establishing policy as required by the federal authorities. However, we shall endeavor in the near future to have this policy reviewed with the federal authorities and attempt to bring about a closer meeting ground between policy and the laws, both federal and state, to at least require appearance before the County Attorney.

In passing, may we suggest that inasmuch as the applicant for ADC

in question did not appear, we believe that your office could so advise the County Board of Social Welfare of this lack of cooperation.

Yours very truly,

Frank D. Bianco
Assistant Attorney General

FDB/sp
enc.

3422.5 Recommendations

2. Elimination of Requirements for Legal Action Against Parent

It is recommended that State agencies not deprive children of their right to assistance by interposing as an additional eligibility factor a requirement that, before eligibility on a basis of continued absence can be determined, (a) legal action be taken against an absent parent or (b) the missing parent be located and action taken in order to obtain support. The availability of aid to dependent children should not preclude the agency from assisting a parent in initiating and pursuing legal action when such action may be for his or her children's best interest. Agency regulation, however, should not deprive a parent of the prerogative, exercised by other members of the community, to arrive at decisions in accordance with his own best judgment. Conditions requiring that legal action be taken against an absent parent before eligibility can be established deflect agency practice from the objective of the aid to dependent children program. Because these conditions interpose barriers to establishing eligibility, the very need for assistance brings external pressure upon parents to take decisive steps (such as court action against a spouse) before they have had an opportunity to arrive at decisions according to their best judgment. Legal action taken by the parent to meet the agency's conditions may result in additional strains in relationships within the home, or may unwisely force the permanent severance of relationships with the absent parent. It is recommended, therefore, that the decision of one of the parents to assume parental responsibility without seeking support from the absent spouse, not be a barrier to receipt of aid to dependent children, if the children are otherwise eligible.

Soldiers Relief: Veteran whose children receive ADC may qualify under code chapter 250.

February 5, 1958

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

Dear Sir:

This will acknowledge receipt of yours of the 9th ult. which, with accompanying letters, is exhibited as follows:

"Herewith you will find an inquiry which has been addressed to me by Mr. Nugent, the manager of the Veterans Administration Center in Des Moines, after a discussion between one of the representatives of the Veterans Administration and Mr. Level of this office. You will note that it questions the application of the opinion of the attorney general beginning on page 49 of the Report of the Attorney General for 1948 under present conditions.

"Since it seems that this may involve a state wide question I am passing Mr. Nugent's inquiry on to you without comment for such attention as you may think proper."

"Enclosed is a letter addressed to you and signed by a veteran who believes that he is being deprived of some of his rights because of the interpretation of Chapter 250 of the 1954 Code of Iowa.

"The experience of this VA Center indicates that the situation in which this veteran finds himself is not an isolated incident. A considerable number of VA hospital patients, from many different counties, are recipients of assistance from one of the various public assistance categories. Many on ADC rolls, unable to work because of a non-service connected disability, receive no monetary award from the Veterans Administration.

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"We have found in many instances that the patient's return to a normal and effective pattern of living is delayed, sometimes prevented, by economic pressures which could be relieved by supplemental assistance from the Soldiers' Relief Commission.

"We would appreciate your asking the Attorney General for an opinion in this matter."

"Your opinion is respectfully requested concerning my eligibility for assistance from the Polk County Soldiers' Relief Commission. I am an honorably discharged veteran of the Korean Conflict.

"I was a patient at the Des Moines Veterans Administration hospital from September 18 to November 7, 1957, and I am still unable to work. My application for Aid to Dependent Children, approved for November 1957, provided for a reduced grant, anticipating that I would remain a hospital patient. Also, my wife and two children were allowed only 85% of their needs, according to ADC budget standards, because there was not enough money appropriated by the legislature to provide the full amount of assistance needed.

"In spite of the most economical planning, trying to make the reduced grant cover the needs of my family, we ran out of money. When we asked Soldiers' Relief for temporary help we were told that the Commission was prevented by law from supplementing ADC grants. Since ADC cannot meet emergency needs, we had no other place to turn.

"The Attorney General, in a letter to the State Board of Social Welfare on July 10, 1947, stated that ADC recipients are not entitled to additional aid from Soldiers' Relief Commission, 'for it is presumed that the ADC relief as now provided by law would care for all their needs.'

"Since ADC now gives only 85% of what its budget would normally allow, the presumption of the Attorney General in 1947 does not seem to be valid today.

"I solicit your opinion on the question: Am I, and other ADC recipients, entitled to receive additional aid from the Soldiers' Relief Commission

when the ADC grant is less than the needs of the family according to ADC budget standards?

"I feel that I am being discriminated against because I am a veteran. If I were not a veteran, the county welfare department could supplement my ADC grant from general relief funds. I believe the intent of the law creating the Soldiers' Relief Commission is not to deprive veterans of any rights. However, I feel that the present manner in which Soldiers' Relief is administered deprives me of some of the rights I held as an ordinary citizen before I went into military service."

In reply thereto I advise that the opinion of this Department referred to and appearing in the Report of the Attorney General for 1948 at page 49 is not applicable to the situation here presented. In so concluding I assume, as I must, that Ticknor personally and individually was not receiving ADC grants. Such grants are restricted by statute to the following personnel. Section 239.1, subsection 4, Code 1954, defines a dependent child as follows:

"4. A 'dependent child' means a needy child under the age of sixteen years, or under the age of eighteen years found to be regularly attending school, who has been deprived of parental support and care by reason of death, continued absence from home, or physical or mental incapacity or unfitness of either parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle or aunt, in a place of residence maintained by one or more of such relatives as his or their home."

And Section 239.2, Code 1954, describes who is eligible to receive this assistance:

> "Eligibility for aid to dependent children. 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.
>
> "3. Is not in a public institution and because of a physical or mental condition, in need of continued care therein."

Obviously Ticknor is not a person within this class and therefore whatever grant of ADC funds was made obviously was made to the children of Ticknor eligible thereto although the money itself was transmitted to him as a parent. The facts therefore as far as Soldiers' Relief to him is concerned shows no relationship between a purported ADC grant to him and to the proposed Soldiers' Relief, the ADC grants being non-existent. Therefore, Ticknor receiving no ADC grants is entitled to receive Soldiers' Relief under Chapter 250, Code 1954, if he qualifies otherwise therefor.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

TAXATION: INCOME TAX DIVISION; Fraud Penalties; Section 422.25(3) provides that 50% fraud penalty shall be imposed where there has been willful failure to file a tax return; in the first instance, tax employees should assess the fraud penalty in all cases of failure to file; if the failure was not willful, the taxpayer may have the penalty waived.

Mr. George J. Elscheid, Director
Income Tax Division
State Tax Commission
Building

Re: Fraud Penalties

Dear Mr. Elscheid:

This is to confirm our conversation of Tuesday, February 4, 1958.

You desire to know how the audit division should be assessing and billing taxpayers who failed to file Iowa income tax returns for the year 1955 and 1956. The present fraud penalty law of Iowa is set out in subsection 3 of Section 422.25, Code of Iowa, 1954, entitled "Computation of tax, interest, and penalties." The present subsection 3 provides as follows:

> "3. In addition to the tax or additional tax as determined by the commission under the provisions of subsection 1 of this section, the taxpayer shall pay interest on such tax or additional tax so determined at the rate of six percent per annum, computed from the date the return was required by law to be filed. In case of failure to file a return, or to pay the tax required to be paid with the filing of the return, on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure was due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return five percent of the amount of such tax if the failure is for not more than one (1) month, with an additional five percent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five percent in the aggregate. In case of willful failure to file a return with intent to evade tax, in lieu of the five percent monthly penalty above

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provided, there shall be added to the amount required to be shown as tax on such return fifty percent of the amount of such tax, and in case of willful filing of a false return with intent to evade tax, there shall be added to the amount required to be shown as tax on such return fifty percent of the amount of such tax."

The law regarding the 50% fraud penalty has remained the same since 1955. In other words, where there is a willful failure to file a return with intent to evade the tax, there must be added 50% of the tax as a fraud penalty. There may be cases where a failure to file was due to some cause other than an intent to evade the tax, or where said failure to file was not willful. However, that will be a matter to be determined by the Tax Commission and will be a ground for the taxpayer to have the assessment modified. In the first instance, that is, unless proved to the contrary, the failure to file will be presumed to be a willful failure to file with intent to evade tax.

If you have any further questions, please let me know.

Yours very truly,

Francis J. Pruss

FJP:fs

TAXATION: INCOME TAX DIVISION; Fraud Penalties; Section 422.25(3) provides that 50% fraud penalty shall be imposed where there has been willful failure to file a tax return; in the first instance, tax employees should assess the fraud penalty in all cases of failure to file; if the failure was not willful, the taxpayer may have the penalty waived.

Mr. C. R. Stephenson, Auditor
Income Tax Division
State Tax Commission
Building

Re: Imposition of Fraud Penalties

Dear Mr. Stephenson:

This letter is to advise you of the interpretation of my letter to Mr. George J. Eischeid dated February 5, 1958, and to confirm our conversation with the State Tax Commission on Monday, February 10, 1958.

I shall assume that you have in your file a copy of my letter dated February 5, 1958. As stated in that letter, Section 422.25, Code of Iowa, 1954, requires the imposition of the fraud penalty in all cases where there has been a willful failure to file an Iowa income tax return with intent to evade the tax. The State Tax Commissioners indicated that where a taxpayer has a record of having filed a tax return for all years except one, then they request that you write to the taxpayer to have him explain his failure to file. Where this explanation indicates that the failure to file was not a willful failure to file with intent to evade the tax, then you should not impose the fraud penalty in making your assessment. However, there still remains the question whether in those cases you should impose the 25% maximum penalty, since this penalty should be assessed only in those cases where the facts warrant the conclusion that the failure to file was as a result of "willful neglect." However, the Commission desires that at least the 25% penalty be imposed in all cases where the failure to file was for one year, except where there was a willful failure to file with intent to evade the tax. The question of the intent of the taxpayer must be determined as of the time he was required to file the return. Facts which occur subsequent to that time are no indication of the man's intent at that time.

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In all cases where the failure to file an Iowa income tax return occurred for two tax years or more during the last five years, the fraud penalty should be assessed by you. Also, the taxpayer should be notified that if he wishes to appeal from this assessment he may direct his objections to the Director of the Income Tax Division, who will refer the matter to the State Tax Commission for decision. Where the State Tax Commission feels that the fraud penalty should be assessed, the taxpayer will be given an opportunity for a formal hearing before the commission.

In summary then the following points should be adhered to in administering the penalties provisions of Section 422.25, Code of Iowa, 1954:

1. In all cases where there has been a failure to file an Iowa income tax return for two tax years or more during the last five years, you should impose the 50% fraud penalty for the calendar years 1955 and 1956.

2. Where there has been a failure to file an Iowa income tax return for one year only during the last five years, you should first write to the taxpayer to have him explain why he failed to file an Iowa income tax return for the omitted year.

3. Upon receiving the taxpayer's explanation, you will determine in the first instance whether there has been a willful failure to file a return with intent to evade the tax; to be determined by examining the facts as they existed on the last day of the fourth month following the end of the tax year of the taxpayer.

4. If you find that the failure to file was not intentional, then you will impose the 25% penalty. If the failure to file has been for nine months or more after the end of the tax year of the taxpayer, it will be for the Tax Commission to determine whether the 25% penalty shall remain as a part of the assessment.

5. In all cases where the failure to file has been for only one year, then the fraud penalty will be imposed by you if you have reason to believe that the failure to file was a willful failure to file. It should be kept in mind that the important fact for you to look for is the "willful failure to file." You do not have to be concerned with the question as to whether you can find facts indicating an intent to evade the tax. It appears that this intent to evade the tax necessarily follows from a willful failure to file a return.

If you have any further questions, please let me know.

Yours very truly,

Francis J. Pruss

FJP:fs

TAXATION: INCOME TAX DIVISION; Power of the Auditor to Examine Individual and Corporate Income Tax Returns on File with the Tax Commission; Held to have power to do so pursuant to Chapter 11, Code of Iowa, 1954, in spite of Section 422.65 which makes these records confidential.

Honorable Thomas J. Dailey
State Senator
Burlington, Iowa

Dear Senator Dailey:

Your letter dated January 30, 1958, addressed to the Hon. Norman Erbe, has been referred to me for reply.

In your letter you wish to know the authority of the State Auditor to examine and review Iowa corporation, individual and fiduciary income tax returns.

Section 422.65, Code of Iowa, 1954, entitled "Information deemed confidential", provides in subsection 1 as follows:

> "1. It shall be unlawful for the commission, or any person having an administrative duty under this chapter, to divulge or to make known in any manner whatever, the business affairs, operations or information obtained by an investigation of records and equipment of any person or corporation visited or examined in the discharge of official duty, or the amount or source of income, profits, losses, expenditures or any particular thereof, set forth or disclosed in any return, or to permit any return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; provided, however, that the commission may authorize examination of such returns by other state officers, or, if a reciprocal arrangement exists, by tax officers of another state, or the federal government."

The duties of the State Auditor are set out in Chapter 11, Code of Iowa, 1954. Section 11.1, entitled "Definition", provides as follows:

> "The term 'department' shall be construed to mean any authority charged by law with official responsibility for the expenditure of public money of the state and any agency receiving money from the general

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revenues of the state."

Section 11.2, Code of Iowa, 1954, entitled "Annual Settlements", provides as follows:

> "The auditor of state shall annually, and oftener if deemed necessary, make a full settlement between the state and all state officers and departments and all persons receiving or expending state funds, and shall annually make a complete audit of the books and accounts of every department of the state.
>
> "Provided, that the accounts, records, and documents of the treasury department shall be audited daily.
>
> "Provided further, that a preliminary audit of the educational institutions and the state fair board shall be made periodically, at least quarterly, to check the monthly reports submitted to the comptroller's office as required by section 8.6, subsection 7 and that a final audit of such state agencies shall be made at the close of each fiscal year."

Section 11.4, Code of Iowa, 1954, entitled "Report of audits", pertains to the nature of the information which must be obtained by the State Auditor in making his audit, this section provides in part as follows:

> "The auditor of state shall make or cause to be made and filed and kept in his office written reports of all audits and examinations, which reports shall set out in detail the following:
>
> "1. The actual condition of such department found to exist on every examination.
>
> "2. Whether, in his opinion,
>
> a. All funds have been expended for the purpose for which appropriated.
>
> b. The department so audited and examined is efficiently conducted, and if the maximum results for the money expended are obtained.
>
> c. The work of the department so audited or examined needlessly conflicts with or duplicates the work done by any other department.
>
> "3. All illegal or unbusinesslike practices.

"4. Any recommendations for greater simplicity, accuracy, efficiency, or economy in the operation of the business of the several departments and institutions.

"* * * * *."

No written opinion was rendered by the Attorney General's office setting forth the authority of the State Auditor to examine income tax returns on file at the Tax Commission. However, it was a consideration of the foregoing sections together which caused the Attorney General to give his opinion that the auditor has the right and the duty to examine income tax returns on file with the Tax Commission. Under subsection 2, paragraph b, of Section 11.4, the auditor is required to determine whether the department is being efficiently conducted. Also, the economical condition of a state department cannot be determined except upon making a check of the amounts received in the office of the State Tax Commission. Consequently, it becomes necessary to determine the amounts received by the State Tax Commission to determine whether a proper disposition has been made of all funds.

If you have any further questions, please let me know.

Yours very truly,

Francis J. Pruss

FJP:fs

TAXATION

~~HEADNOTE~~: INHERITANCE TAX; listing of shares by savings and loan associations and building and loan associations in the names of two or more persons must contain a power of withdrawal by either of said owners; a failure to include the power to withdraw results in shares being held as tenants in common, and association must obtain release from heirs of deceased owner.

Mr. George T. Carson, Acting Supervisor
Savings and Loan Department
State Auditor's Office
State Capitol Building
L O C A L

Dear Mr. Carson:

Your letter dated February 20, 1958, addressed to Mr. Carl W. Holmes, Jr., Treasurer, Perpetual Savings & Loan Association, Waterloo, Iowa, has been referred to me for comment.

In your letter to Mr. Holmes you answer his question No. 2. I have had furnished to me a copy of the questions as were submitted to you and question No. 2 is as follows:

> "The Iowa Statute on Savings and Loan Associations, Section 534.21, entitled 'Joint issuance of shares' contains therein the Power of Attorney clause allowing either tenant to withdraw funds. If this Power of Attorney clause allowing is omitted in the recitation on the share account, does the signature of only one tenant for the purpose of withdrawing funds release the association from all liability?"

Section 534.21, Code of Iowa, 1954, entitled "Joint issuance of shares--naming beneficiary", provides as follows:

> "Any building and loan association and any federal savings and loan association may issue shares in the joint names of two or more persons with the power of withdrawal in either, or in either or the survivor, and the withdrawal value of such shares may be paid to either of such persons whether the other be living or not, and the receipt or acquittance of the person so paid shall be a sufficient receipt and discharge of such association for the payment [illegible]
>
> "Any such building and loan [illegible]

> and loan association may issue shares in the name of one or more persons with the provision that upon the death of the owner or owners thereof the said shares or the proceeds thereof shall be the property of the person or persons designated by the owner or owners and shown by the records of such association, but such shares or proceeds shall be subject to the debts of the decedent and the payment of Iowa inheritance tax, if any, provided, however, that six months after the date of the death of the owner the receipt or acquittance of the person so designated shall be a valid and sufficient release and discharge of such association for the delivery of such shares or the payment so made."

As stated in the question which was submitted to you, the power of attorney clause allowing either person to withdraw has been omitted. Consequently, the provisions of Section 534.21 have not been followed. It would seem that since the statute has not been followed there would have to be other statutory law or common law principles which would allow this withdrawal by the survivor of two or more owners of such shares. I assume that the ordinary language of joint tenancy was not used in this situation; that is, I assume the the shares were not listed in the names of "A and B as joint tenants and not as tenants in common with the full right of the survivor to take the whole title and right of property of both." Consequently, it would seem that the persons listed on the shares referred to would be owners as tenants in common of these shares and upon the death of one of the tenants in common the undivided interest of the deceased owner would pass to his heirs or beneficiaries as provided by the laws of intestacy or the Last Will and Testament of the decedent. Consequently, I suggest that a building and loan association or savings and loan association will subject itself to claims by the heirs or beneficiaries of the decedent where they allow a surviving owner to withdraw the amount of the entire share. Of course, this property, that is, the undivided interest, will be subject to

Iowa Inheritance tax.

If the shares are issued in the name of one or more persons payable upon death of the owner or owners to another, then it would seem that paragraph two of the above quoted section will control.

If you have any further questions, please let me know.

Yours very truly,

Francis J. Pruss

FJP:fs

TAXATION

~~HEADNOTE~~: PROPERTY TAX: Moneys and credits held by a trustee for a church must be listed for taxation; the trustee is entitled to claim the statutory $5,000.00 exemption.

Mr. J. Leo Martin
County Attorney of Keokuk County
State Bank Building
Sigourney, Iowa

Dear Mr. Martin:

Your letter dated February 5, 1958, addressed to Mr. Norman A. Erbe, has been referred to us for reply. In your letter you ask our opinion on the following questions:

1. Are funds in the hands of a personal trustee, the income from which is payable to a Church, subject to moneys and credits tax when said funds are deposited by the trustee in a savings account at current interest rates?

2. If such funds are taxable, is the trustee entitled to claim the $5,000.00 exemption?

Section 429.2, Code of Iowa, 1954, provides:

"429.2 Moneys -- credits -- annuities -- bank notes -- stock. Moneys, credits, and corporation shares or stocks, except as otherwise provided, cash, circulating notes of national banking associations, and United States legal tender notes, and other notes, and certificates of the United States payable on demand, and circulating or intended to circulate as currency, notes, including those secured by mortgage, accounts, contracts for cash or labor, bills of exchange, judgments, choses in action, liens of any kind, securities, debentures, bonds other than those of the United States, annuities, and corporation shares or stocks 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 429.4, Code of Iowa, 1954, as amended, provides:

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"429.4 Deduction of debts -- exceptions.

"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.

"All noninterest-bearing moneys and credits and accounts receivable shall be tax exempt, but the five thousand dollars exemption as set out in this section, shall not apply in the event such non-interest-bearing moneys and credits and accounts receivable exempted herein shall exceed five thousand dollars and if less than five thousand dollars then only so much thereof as shall amount to five thousand dollars when added to such noninterest-bearing moneys and credits and accounts receivable."

Section 427.1(9), Code of Iowa, 1954, provides that the grounds and buildings used by literary, scientific, charitable, benevolent, agricultural, and religious institutions shall not be taxed, while Section 427.1(10) provides:

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

"* * * * *.

"10. Personal property of institutions and students. Moneys and credits belonging exclusively to the institutions named in subsections 7, 8, and 9 and devoted solely to sustaining them, but not exceeding in amount or income the amount prescribed by their charters or articles of incorporation; and the books, papers, pictures, works of art, apparatus, and other personal property belonging to such institutions and used solely for the purposes contemplated in said subsections and the like property of students in such institutions used for their education."

The Iowa Supreme Court in Samuelson v. Horn, 1936, 221 Iowa 208, 265 N.W. 168, ruled that a personal trustee, under no circumstances, can qualify as an institution as the term is used in Section 427.1(10), supra. Consequently, funds held by such a trustee are not exempt from moneys and credits tax even though the income from the trust is devoted solely to charitable purposes.

In view of the foregoing, it is evident that if the funds in question are to enjoy immunity from taxation, such immunity most stem from Section 429.4, supra; that is, the funds must be noninterest-bearing moneys or credits. Under the facts as set forth in your letter, it is apparent that such is not the case, since the trust funds in question were deposited in a savings account where they drew interest at the current rates.

In answer to your second question, namely, the applicability of the $5,000.00 exemption provided for by Section 429.4, supra, it is our opinion that the trustee is entitled to take such a deduction. In an opinion of the Attorney General, O. A. G., 1949-50, p. 125, it was held that the exemption applied to moneys and credits listed by estates pursuant to the provisions of Section 428.1. For the same reasons we feel the moneys and credits listed by a trustee pursuant to the same section are entitled to like treatment.

Yours very truly,

Francis J. Pruss,
Special Assistant Attorney General

Joseph C. Piper, Special Counsel,
State Tax Commission

FJP:JCP:fs

Minors -- Change of name -- Effect of marriage. Sections 674.1 and 599.1 and Ingalls v Campbell, 24 Pac 904, cited. Marriage held not to remove civil disability. (Also see #58-2-12) March 5, 1958

Mr. Bert A. Bandstra
Marion County Attorney
Knoxville, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 3rd inst. In which you submitted the following:

> "Thank you for your opinion contained in your letter dated February 7, 1958 in which you conclude that a male citizen who has been married but is now divorced and under the age of 21 years is not authorized to have his name changed pursuant to Section 674.1 of the Code.
>
> "I have learned however, that the facts as I gave them to you were not exactly correct. The question which I should have submitted (although your opinion of February 7th will be of great value in the future) is this:
>
> "'Can a male citizen who is married and under the age of 21 years have his name changed as provided in Section 674.1 of the 1954 Code?'
>
> "On the basis of your opinion of February 7th, I presume your answer will be in the affirmative as Section 674.1 uses the term Majority and therefore Section 599.1 would confer the status of majority upon a minor who is now legally married.
>
> "In short the facts are the same as those contained in my letter of February 6th except for the fact the person who desires to have his name changed has not been divorced.
>
> "This oversight was strictly an error on my part and I wish to apologize for putting you to this additional trouble."

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In reply thereto I advise as follows. The answer to your question is in the negative. My reason therefor lies in the statute to which you refer, Section 674.1, Code 1954. This statute provides the following:

> "Who authorized. Any person, under no civil disabilities, who has attained his or her majority and is unmarried, if a female, desiring to change his or her name, may do so as provided in this chapter."

The statute as you will note is available to any person under no civil disability. A civil disability is a disqualification created by law rendering a person incapable of doing certain acts or things. Ingalls v. Campbell, 24 Pac. 904 (Ore.) A married person under twenty-one years of age is under such disability in that he cannot vote. The Constitution restricts voting to citizens who have attained the age of twenty-one. Article II, Section 1, provides the following:

> "Electors. Section 1. Every male citizen of the United States, of the age of twenty-one years, who shall have been a resident of this State six months next preceding the election, and of the County in which he claims his vote sixty days, shall be entitled to vote at all elections which are now or hereafter may be authorised by law."

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

MINORS -- Beer laws -- Effect of marriage. Sections 124.20 and 599.1 and early Iowa decisions re Reisman cited.

See State v. Garman, 250 Iowa 166, 93 N.W. 2d 105 (1958) which holds contra to this opinion.

March 6, 1958

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

Dear Mr. Hendrickson:

Your letter requesting an opinion on the interpretation of Section 599.1 of the 1954 Code of Iowa has been handed to me for answer. More specifically your question is stated in this manner:

> "Does Section 599.1 define majority for purposes of criminal prosecution under Section 124.20, 1954 Code of Iowa?"

You have previously been furnished with copy of an opinion from this office dated May 17, 1957, which discusses this question. I believe you are also familiar with the case of City of Des Moines v. Reisman which considered an ordinance passed by the City of Des Moines prohibiting persons under the age of twenty-one years from frequenting a tavern.

Section 124.20 of the 1954 Code of Iowa uses the word "minor" in at least five places. It would be our opinion that unless there is other legislation by a city or town further limiting the sale of beer, that Section 599.1 would correctly define majority. You must bear in mind, however, that under the Reisman case the Supreme Court of our state upheld the validity of an ordinance which stated, "It shall be unlawful for a person under twenty-one years of age to be in, or for any person to permit a person under the age of twenty-one years to be in, a place where beer is sold unless the major portion of the business conducted by the permit holder is other than the sale of beer and the sale of beer is merely incidental thereto."

It is therefore our opinion that Section 599.1 of the 1954 Code of Iowa defines majority for the purpose of Section

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124.20 unless further limited or modified by municipal legislation.

Very truly yours,

DON C. SWANSON
Assistant Attorney General

DCS:MKB

ATTORNEY GENERAL

Representation of State Departments -- Duty of to represent one department in legal proceedings against another. Duty of Executive Council to furnish legal counsel under Code section 13.3.

March 7, 1958

Hon. 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 17th ult. in which you submitted the following:

> "In your letter of February 3 to Mr. Bruce F. Stiles, Director, State Conservation Commission, you disqualified the Attorney General to represent the Conservation Commission in an appeal of Natural Resources Council's Determinations Nos. 2, 3 and 4, Maple River Irrigation, citing authority of State v. Executive Council, 207 Iowa 923.
>
> "After careful reading of the case cited, I respectfully request an opinion on the following question:
>
> "'Would the appointment of an attorney by the Executive Council to represent one agency of the executive branch against another branch overcome the "conflict of interest" obstacle on the basis of which the Attorney General has disqualified himself?'
>
> "If I read correctly, Section Thirteen Point Seven (13.7), Code of Iowa, 1954, the Executive Council is authorized to employ counsel to protect the interests of the state. Mr. Stiles' request for appointment of counsel is for the purpose of challenging the determinations of another agency of the executive branch. Is there a presumption to be made that one agency of the executive branch of government represents 'state interest', while another does not? In other words, under the generally accepted prin-

58-3-3

> ciple that it is the function of the executive branch to administer the laws of the state, rather than to challenge them, may one agency of that branch (the Executive Council) employ attorneys for another agency (the Conservation Commission) to challenge the determinations of a third agency (the Natural Resources Council)?"

In reply thereto I advise as follows. In view of the situation exhibited following, I find it unnecessary to undertake answer to the specific question asked. A record of the subject matter under discussion discloses the following situation: That application for permits Nos. 2, 3 and 4 for irrigation purposes having been made to the Water Commissioner, the Conservation Commission appeared in opposition to the granting of these permits. The Water Commissioner having granted the said permits, the Conservation Commission appealed the decision to the Natural Resources Council. The hearing of the Natural Resources Council upon these appeals has been postponed upon the application of the Conservation Commission upon the grounds that the Conservation Commission had not had a sufficient opportunity to secure counsel to appear in its behalf.

It will thus be seen that the Conservation Commission not only became a party to this administrative proceeding but also an aggrieved party. In so doing the Conservation Commission was acting under authority of Chapter 455A as amended by Chapter 229, Acts of the 57th General Assembly. Section 455A.1 of

the foregoing Act defines person as follows:

> "'Person' means any natural person, firm, partnership, association, corporation, state of Iowa, any agency of the state, municipal corporation, political subdivision of the state of Iowa, legal entity, drainage district, levee district, public body, or other district or units maintained or to be constructed by assessments, or the petitioners of a proceeding pending in any court of the state effecting the subject matter of this chapter."

The Conservation Commission as an agency of the State is a person authorized to appear and present evidence. See Section 455A.19(4), Code 1958. And having so appeared it became a party and as the record shows a party aggrieved. As such, the Attorney General having declared his disqualification to act in the proceeding (see letter dated February 3, 1958), the statute, Section 13.3, Code 1958, becomes operative and the Executive Council shall properly appoint counsel to appear in the appeal herein involved for the Conservation Commission, an agency of the State of Iowa.

Very truly yours,

NORMAN A. ERBE
Attorney General of Iowa

TOWNSHIPS--ELECTIONS
Polling place outside township. Necessity for new petitions for each election under 57 G.A., Ch. 66.

March 10, 1958

Mr. Richard H. Wright
Davis County Attorney
Bloomfield, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 26th ult. in which you submitted the following:

"I submit herewith request for formal attorney general's opinion with regard to a specific application of Chapter 66 of the Acts of the 57th General Assembly.

"The factual circumstances causing the request for interpretation are as follows:

"Cleveland Township is a voting precinct within Davis County, Iowa. Geographically, Cleveland Township completely surrounds Bloomfield Township within which is located the City of Bloomfield and of course the County Courthouse. There are no towns or suitable voting facilities in or within the territorial limits of Cleveland Township. For a great many years the voters of Cleveland Township have voted in the County Courthouse which of course is outside the territorial limits of Cleveland Township. It is universally agreed among the voters of Cleveland Township that it would be best that if the polling place for Cleveland Township were to be designated outside the territorial limits of Cleveland Township.

"Chapter 66 of the Acts of the 57th General Assembly is as follows:

"Section 1. Chapter forty-nine (49), Code 1954, is amended by adding the following new section:

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"'If a petition be filed with the county supervisors ninety (90) days before any primary, general or special election stating that there is no suitable or adequate polling place within a township constituting a voting precinct and that it is desirable and to the interest of the voters of such township voting precinct that a voting place therefore be designated outside the territorial limits of such township precinct, the board of supervisors shall fix as a polling place for such township precinct, such polling place outside the township precinct as the board deems most convenient to the electors of the township precinct. Such petition must be signed by voters of the precinct exceeding in number one-half (½) the total number of votes cast in the township precinct for the office of governor at the last preceding general election.'

"Approved April 17, 1957.

"A copy of the petition which is presently being circulated is hereto attached, marked Exhibit 'A' and by this reference thereto is hereby incorporated.

"My questions are as follows:

"1. Does Chapter 66, Acts of the 57th General Assembly authorize or permit the voters, by proper petition and by proper designation to have designated a place for voting outside the territorial limits of their township which will continue from one primary, general or special election and until revoked or re-designated?

"In other words, if the voters obtain a designation outside the territorial limits of their township for voting in the June 2nd primary election, will it be necessary that they re-circulate petitions and have a new designation for the general election to be held November 4?

"2. Provided it is lawful to have a designation continue, is the language contained in the within petition sufficient to accomplish that purpose?

"Other considerations involved are the fact that for a great many years Cleveland Township has always voted in Bloomfield Township and it is a matter of convenience, inconvenience or otherwise which would necessarily be required if they were required to vote in their own township. Also there would be considerable expense connected with the obtaining of a place, electricity, heat and other essentials within Cleveland Township to hold the election.

"Pursuant to a telephone conversation with Mr. Strauss of your department, I have recommended to the people concerned that the petition be circulated and signed in order that a designation for the June 2nd primary could be obtained. The 90 day filing requirement requires that this beaccomplished immediately. Also to be considered is the fact that if a new designation would be necessary for the November general election, then that petition should be prepared sufficiently in advance so that signers could be obtained at the time the election is held to avoid the necessity of their contacting each individual separately.

"Your very early consideration of this matter will be very sincerely appreciated."

In reply thereto I advise as follows.

1. The clear language of the statute quoted justifies the conclusion that a polling place fixed outside the township pursuant to a valid petition filed under this statute is a stabilized voting place for the special, primary or general election to be held ninety days or more after the filing of the petition. Such polling place shall exist only for that particular primary, general or special election. Its use for any other primary, general or special election will be dependent

upon a new petition asking for the fixing as a polling place for a subsequent primary, general or special election.

2. In view of the answer to your question #1, the question whether the form of petition submitted is sufficient to justify a continuance of the designated polling place is moot. However, it is to be said that the petition submitted is sufficient to authorize action under the quoted statute by the Board of Supervisors for a polling place for a primary election to be held subsequent and ninety days or more after the filing of the petition. The petition to continue the designated polling place until revoked by subsequent petition having no statutory basis is regarded as surplusage.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

COUNTIES
COUNTY HOME
Admission -- Only "poor persons" may qualify. 1946 OAG 79 cited.

March 12, 1958

Mr. William G. Klotzbach
Buchanan County Attorney
Independence, Iowa

Dear Sir:

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

> "The Board of Supervisors were recently requested by the nephew and brother of a resident of Buchanan County for his admission to the County Home. The person involved had lived with his parents for a number of years, and recently, following the death of both parents, other members of the family desired to have him placed in the County Home for custodial care. The individual is not married and does not have any children. His father's will provided that he was to either get a $2,000.00 lump sum, or to be paid $300.00 a year from the father's estate for his care and keep. Another member of the family offered at one time to pay the cost of maintaining the relative in the County Home. Our particular question, is whether or not a Board of Supervisors must accept a person at the County Home, inasmuch as it would appear that if the relative paid the cost of support at the County Home the County would be competing with local nursing homes. I have tentatively advised our Board not to accept this person, but rather let the applicants establish their rights to have the individual placed in the home. The party in question has never been adjudicated insane by a commission or District Court. Any assistance that you can furnish in regard to whether or not the Board must accept application made on behalf of this man would be greatly appreciated."

58-3-5

In reply thereto I would advise you that under the circumstances set forth in your letter, the following from an opinion of this Department appearing in the Report of the Attorney General for 1946 at page 79 is controlling, to-wit: "This would lead us to believe that in order to be eligible for admission to the County Home, a person must be a 'poor person' as defined by Section 3828.073." A copy of this opinion is enclosed. Section 3828.073 is now Sec. 252.1, Code 1954.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB
Enc.

TOWNSHIPS
Fire protection -- Identification number system for homes and roads. Purchase under Code section 359.42

March 12, 1958

Mr. Robert N. Johnson
Lee County Attorney
615½ Seventh Street
Fort Madison, Iowa

Dear Sir:

Receipt is acknowledged of your letter of March 6 as follows:

"The various fire associations in rural Lee County have asked the question of whether township fire protection funds could be used to purchase road numbers and numbers for residences for the purpose of blocking out their fire protection area for quicker fire service. The cost of the plates would run about $1.25 each. Their plan is to make the numbering of farm dwellings and/or buildings plated in the same manner as towns. Each road or side road would be given a letter identification and each set of buildings along that road would be given consecutive numbers. Then when an alarm came in the one calling could designate his residence by a road letter and house or building number. Both the road letter and number would appear on a metal sign posted along the road in front of the building so that if a fire would be discovered by a stranger he would have no difficulty in informing the fire company of the exact address of the fire.

"Of course, this use of tax monies, if permitted, would come under the authority of Section 359.42. It occurs to me that, and I have given as my temporary opinion, that the trustees of the various townships could allocate their money for that purpose under "maintain. . .equipment" or "furnish service". The quotations are taken from that section. I would appreciate your early opinion."

58-3-6

Section 359.42 to which your letter refers provides as follows:

> "Authorization. The township trustees of any township may purchase, own, rent, or maintain fire apparatus or equipment and provide housing for same and furnish services in the extinguishing of fires in said township, independently or jointly with any adjoining township or townships, likewise authorized as herein provided, or with any city or town."

The answer to your question appears to be primarily one of fact. In other words, if the numbering system is in fact so related to the township fire-protection system as to be essential to the efficient combating of fires, then that relationship could well classify the number plates as "equipment" and the act of furnishing them "services" within the meaning of the statute. Whether such reasonable relationship exists must, however, be determined locally in each case. From your letter it would seem that you have determined it does exist in the specific example under consideration.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

SCHOOLS AND SCHOOL DISTRICTS.
Reorganization elections -- Number of polling places, judges, clerks. Effect of including territory with no resident voters or in which no votes are cast. Voting hours.

March 11, 1958

Mr. Lee R. Watts
Adams County Attorney
407 Seventh Street
Corning, Iowa

Dear Sir:

Receipt is acknowledged of the following questionnaire from your office:

"1. At the election to approve a proposed community school district as above described, how many voting places are required and how many judges are to be appointed by the County Superintendent?

"2. Are clerks also appointed for the election and if so, how many?

"3. What is the form of the ballot to be used?

"4. Where an area included within the boundaries of the proposed new school district is only part of an existing school district and is unimproved and unoccupied land, who is eligible to vote from that district?

"5. If no person is eligible to vote from a particular area, or if no eligible voter from an area appears and votes at the election, how is that district counted in determining whether or not the proposition has carried in 75% of the affected districts?

"6. At the election, is the time of opening and closing the polls, the oath of judges and clerks and other mechanics thereof controlled by Chapter 277, Code of 1954?"

The answers to your questions are furnished in the most part by the statutes and are as follows:

1. Number of voting places--see Section 275.20, Code 1958 (Section 275.20, Code 1954, as amended by 57th G.A., Ch. 128, §5; Ch. 129, §§5, 6; ch. 130, §7.)

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2. There is no statutory provision relating to the appointment of clerks. Presumably one of the judges functions as such.

3. Form of ballot. See Sections 49.43 to 49.48. Also see McLaughlin v. City, 189 Iowa 556, 178 N.W. 540.

4. In general, if there are no qualified voters, it logically follows that no one votes. See, however, Section 275.20, supra, for certain types of districts in which the entire district rather than merely included portions vote on the reorganization proposition.

5. If no votes are cast, it follows that the proposition fails to carry for the obvious reason that there is nothing to carry it.

6. Yes.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

CITIES AND TOWNS
Sewage system trustee

March 11, 1958

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

Dear Sir:

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

"Herman J. Schaefer, attorney for the City of Ottumwa, and Hal P. Beck, attorney for the Municipal Water Works, have requested an attorney general's opinion in regard to the following:

"1. In complying with the requirement of Section 397.29, Code of Iowa 1954, may the question be submitted as provided by Section 297.31, Code of Iowa 1954, read as follows:

"'Shall the City of Ottumwa, Iowa, place the management and control of its sewage disposal plant in the hands of the Water Works Board of Trustees,'

thus enabling one board to carry on both operations?

"2. Assuming the answer to Question 1 is negative, then is there any incompatability in having the Water Works Board members also serve as the sewage disposal plant board members?

"3. Does the statute contemplate a sewage disposal plant board assuming management and control of the entire sanitary system or is their authority limited to the operation of the sewage plant alone?"

The questions submitted do not appear to relate to the duties of your office or that of any member of the legislature or state

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officer and are, therefore, not properly subject to opinion of this office. See Section 13.2(4), Code of Iowa.

However, it appears that the questions you submit are answered directly, without necessity for opinion, by other provisions of the Chapter of the Code containing the two sections to which your letter refers.

1. In connection with your first question your attention is invited to the provisions of Section 397.32, hereinafter set forth and underscored in pertinent part:

> "If the majority of votes cast at such election are in favor of placing the management and control of <u>any or all</u> of the said utilities in the hands of trustees, the mayor shall, within ten days of such election, appoint <u>a</u> board of three trustees. . ." (Emphasis supplied)

2. Assuming Section 397.29 means what it says, with particular reference to the portions hereinabove underscored, your second question is thereby eliminated.

3. Assuming that the word "plant" as used in Section 397.29 carries the same connotation with reference to the words "sewage disposal" as does the word "plant" as used in the same section in connection with the word "heating", then the scope of the word "plant" is defined and the answer to your third question seems furnished by Section 397.1 which appears to include within the terms "plant" or "works":

> ". . .all the necessary reservoirs, mains, filters, streams, trenches, pipes, drains, poles, wires, burners, machinery, apparatus, <u>and other requisites</u> of said works or <u>plants</u>. . ."

The thought occurs that a sewage disposal works would be lacking in "requisites" were it to exist in the absence of a sanitary collection system of pipes, sewers, etc.

Although I expressly refrain from expressing any opinion of this office in connection with the question submitted, I trust the foregoing references and remarks may be of some assistance to your city attorney in formulating his own opinion.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

TAXATION
Estate of Decedents. Property in hands of trustee for use of charitable or religious organization. Trustee not a "Charitable institution" for exemption purposes.

March 10, 1958

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

Dear Sir:

This will acknowledge your letter wherein you request an opinion on the following factual situation:

Mrs. Jennie Boyd of Shell Rock, Iowa, died in the fall of 1954, leaving no spouse or children surviving her. Her will named Lloyd L. Gibson, president of the Shell Rock bank, as trustee for certain purposes.

The pertinent portions of Mrs. Boyd's will are quoted as follows:

> "PAR. III. I give and bequeath unto Lloyd L. Gibson of Shell Rock, Iowa, the sum of five hundred dollars ($500.00) in trust, for the Methodist Episcopal Church of Shell Rock, Iowa, said funds not to be used for minister's salary, but solely for the purpose of decorating the interior of said church when it is needed.
>
> "PAR. V. In the event my said husband, Hudson Boyd, does not survive me, then Paragraph IV hereof is to be void. Then and in that event I direct that all of said rest, residue and remainder of my property, wherever found or located, whether real estate, mixed or personal property, be sold by my executor hereinafter named and the proceeds distributed as follows, to-wit:
>
> "I give and bequeath said funds to Lloyd L. Gibson of Shell Rock, Iowa, in trust nevertheless, for the following uses and purposes, to-wit:

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"I direct that said funds be invested by my said trustee, or his successor, in good and safe interest bearing securities until some public minded group of people of Shell Rock, Iowa, or the Incorporated Town of Shell Rock, Iowa, shall acquire and convey unto Lloyd L. Gibson, or his successor, in trust, a suitable site for the construction of a community building with facilities for a library therein, and upon conveyance of said building site to my said trustee, I authorize, empower and direct my said trustee to cause to be erected a community building with facilities for a library therein, upon said site, in said town of Shell Rock, and to expend said funds for said community building which structure shall be dedicated in the memory of Hudson Boyd and Jennie Boyd and shall be known as the Boyd Building. When said community building is completed I authorize, empower and direct that my trustee shall convey said real estate upon which said building is erected to the incorporated town of Shell Rock, Iowa, subject to the following condition, to-wit:

"The condition of said trust being that in the event the people of the town of Shell Rock, Iowa, or some group thereof, or the incorporated town of Shell Rock, Iowa, shall fail to provide and convey to my said trustee, or his successor, a suitable site for said community building within five years from and after my decease, then and in that event I direct that the proceeds derived from the sale of the property referred to in this paragraph be turned over by my trustee to Butler County, Iowa, for the improvement of its County Home and to the Lutheran Children's Home, Waverly, Iowa, to be divided between them in equal shares. However, said conditional bequests to Butler County, Iowa, and to the Lutheran Children's Home, Waverly, Iowa, are to be void and are to be given no force and effect in the event said building site is acquired as herein provided."

The will was originally executed on August 27, 1942, and on April 7, 1947, Mrs. Boyd executed a codicil to the will, the pertinent parts of which are quoted as follows:

> "Par. I. WHEREAS, Par. VI of my said Will provides as follows, to-wit:
>
> "'In the event I die seized of the Northwest quarter of the Northeast Quarter of Section Twenty-one, Township Ninety-one North, Range Fifteen West of the 5th P. M., in Butler County, Iowa, I request that my executor shall give Elmer Kublank the first option to purchase said real estate at a fair and reasonable price.'
>
> "Now I hereby revoke said Par. VI of my said Will and I give, devise and bequeath said Northwest quarter of the Northeast quarter of Section Twenty-one, Township Ninety-one North, Range Fifteen West of the 5th P. M. in Butler County, Iowa, to Lloyd L. Gibson of Shell Rock, Iowa, in trust for the following uses and purposes, to-wit:
>
> "I direct that my said trustee or his successor manage said real estate and collect the rents and profits therefrom and to pay the net income therefrom annually to the Shell Rock Consolidated School for the benefit of music activities, for a period of twenty-five (25) years after the date of my decease. At the end of said twenty-five year period, I authorize and direct my said trustee or his successor to sell said real estate and deposit the proceeds from said sale in a fund for the benefit of music activities in said Shell Rock Consolidated School to be used as the directors of said school see fit, for said purpose.
>
> "Par. II, WHEREAS, I have accumulated considerable funds since the death of my husband, Hudson Boyd, and now wish to make additional provisions for the Methodist Episcopal Church of Shell Rock,

> Iowa, I therefore authorize and direct Lloyd L. Gibson, the executor appointed in my said Will, to purchase from the estate of my deceased husband, Hudson Boyd, the undivided one-half interest in and to Lots 54, 55, 56 and 57 in Wm. Adair's Addition to the town of Shell Rock, Iowa, which real estate I give and devise unto Lloyd L. Gibson of Shell Rock, Iowa in trust for the following uses and purposes, to-wit:
>
> "I direct that my said trustee shall collect the rents, income and profit therefrom and pay the annual net profit therefrom to the Methodist Episcopal Church of Shell Rock Iowa for the period of twenty years after the date of my decease; at the end of which period of years I direct that my trustee convey said real estate to said Methodist Episcopal Church of Shell Rock, Iowa."

The problem which the County Assessor and County Treasurer face has to do with whether the real and personal property in the hands of Lloyd Gibson, as trustee, is exempt from taxation under the provisions of Section 427.1 of the Code. We should first look to the statutes involved herein:

> "427.1 Exemptions. The following classes of property shall not be taxed: * * *
>
> "9. Property of religious, literary, and charitable societies. All grounds and buildings used by literary, scientific, charitable, benevolent, agricultural, and religious institutions and societies solely for their appropriate objects, not exceeding three hundred twenty acres in extent and not leased or otherwise used with a view to pecuniary profit. All deeds or leases by which such property is held shall be filed for record before the property herein described shall be omitted from the assessment.

> "10 Personal property of institutions and students. Moneys and credits belonging exclusively to the institutions named in subsections 7, 8 and 9 and devoted solely to sustaining them, but not exceeding in amount or income the amount prescribed by their charters or articles of incorporation; and the books, papers, pictures, works of art, apparatus, and other personal property belonging to such institutions and used solely for the purposes contemplated in said subsections and the like property of students in such institutions used for their education."

In the facts as given the property in the hands of the trustee is: (1) $500 to be used to decorate the interior of the Methodist Episcopal Church, (2) Certain land, the rents and profits from which, and after twenty-five years the proceeds from the sale of the land, to a school for the benefit of music activities, (3) Certain lots, the rents and profits from which, and after twenty-five years the proceeds from the sale of the lots, to a certain church, (4) The residue of the estate to go to the town of Shell Rock for a community building, upon the conditions that the people of Shell Rock provide a suitable site for such a building, and if the condition is not fulfilled within five years after the death of the testatrix then to a county home and a children's home.

There is little doubt that that the decoration of the Methodist Episcopal Church interior, music activities in a shcool, the general use of the Methodist Episcopal Church, and a town community building are religious, literary and charitable institutions and societies, and are solely for their appropriate object as contemplated by the statute. There is little doubt but

that the ultimate recipients of the bequest are those institutions granted the exemption by the Legislature.

It is the general rule of construction in Iowa that grants of immunity from taxation and tax exemption statutes are to be strictly construed.

Hale v. Iowa State Board of Assessment and Review, 223 Iowa 321, 271 N. W. 168;
Samuelson v. Horn, 221 Iowa 208, 265 N. W. 168;
Boss v. Polk County, 236 Iowa 398.

Immunity from taxation by the state will not be recognized unless granted in terms too plain to be mistaken.

Davenport National Bank v. Mittelbuscher, 8 Clr. Iowa, 15 F. 225;
Morril,v. Bentley, 150 Iowa 677, 130 N. W. 734.

The rule in Iowa is well established that "taxation is the rule; exemption from taxation, the exception."

Security Savings Bank v. Connell, 198 Iowa 564 and 567, 200 N. W. 8 and 9, 36 A. L. R. 406;
Wagner v. Board of Review, 232 Iowa 60;
1946 Opinion of the Attorney General 211;
1948 Opinion of the Attorney General 16;
1948 Opinion of the Attorney General 17;
1948 Opinion of the Attorney General 20;
1948 Opinion of the Attorney General 183;
1952 Opinion of the Attorney General 79.

In the instant case, we have property given under a will to a trustee to be used for certain charitable purposes. In the case of Rine v. Wagner (1907), 135 Iowa 626, in which property was devised to a bishop in trust to be used for "some charity

according to his judgment", the court held that the exemption statute had no application to a devise to an individual in trust for the benefit of a charitable institution. The court gave for its reasoning the fact that "the bishop is not such an institution as is referred to in the section of the Code quoted * * *".

A later Iowa case, Samuelson v. Horn, (1936) 221 Iowa 208, relying on the Rine v. Wagner case, held that a devise of property to a trustee to be used for the aid and benefit of the deserving poor and needy was not exempt from taxation in the hands of the trustee, since the individual trustee was not an "institution" under the statute.

Both the instant case and the two cases above cited, Rine v. Wagner and Samuelson v. Horn, bring forth the question as to whether or not a trustee qualifies as an institution. It appears well settled that a trustee is not an institution under the statute, and that property held by an individual trustee is not exempt from taxation, even though the beneficiary of the trust is a literary, scientific, charitable, benevolent, agricultural, or religious institution, since the trustee holding the property is not an institution.

The fact that the ultimate use of the property is by specific, existing institutions, rather than at the discretion of the trustee as to the charitable beneficiary, does not alter

the situation as the individual trustee does not qualify for the exemption given to the charitable institutions by the statute, regardless of the specific or general nature of the trust beneficiary.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

Insurance -- Agents Licenses (State)
1. Do not exempt agents from compliance with valid local licensing ordinances.
2. Validity of local licensing ordinances is for the Courts to determine.

March 18, 1958

Mr. Oliver P. Bennett
Insurance Commissioner
Insurance Department of Iowa
L o c a l

Dear Sir:

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

"There have been several instances recently in which itinerant insurance agents licensed by the insurance commissioner have been arrested for violation of town ordinances regulating peddlers and solicitors.

"Although we can readily understand the resentment which might arise in a town when a crew of insurance agents descends upon it for a concentrated solicitation, yet a question arises as to whether or not itinerant peddler ordinances are applicable if these agents are properly licensed by the State.

"We have received inquiries from several companies as to the scope and effect of our agent's license. We, therefore, wish to request your opinion concerning the following interrogation:

"Is an ordinance of a city or town, requiring itinerant merchants, peddlers or solicitors to be licensed by such city or town, applicable to an itinerant insurance agent duly licensed by the insurance Commissioner under the provisions of Chapter 522, Code of Iowa?

58-3-10

"For your information we enclose a brief prepared by an attorney representing one of the companies involved. We would appreciate its return after you are through with it."

In addition to the brief to which your letter refers you enclosed a copy of the "Peddlers, Solicitors, and Transient Merchants" Ordinance of the City of Osage. Both are returned herewith.

Your question actually embodies two questions: First, does the act of obtaining an insurance agent's license from the State Insurance Department exempt the licensee from the requirements of valid city and town ordinances regulating the local transaction of business and particularly from ordinances pertaining to the licensing of peddlers? Second, are peddlers-license ordinances, as applied to door-to-door solicitation for and sale of insurance valid and, specifically, is the ordinance of the City of Osage submitted with your letter valid?

In answer to the first part of your question, as hereinabove analyzed, you are advised that licensing of insurance agents by your department is governed by Sections 522.1 to 522.5, Code 1958. Examination of said sections reveals no provision exempting the holder of such license from anything. You are therefore advised that licensed insurance agents are subject to the provisions of all valid local ordinances in force in cities and towns where such agents carry on their business whether they be building, zoning, traffic, fire, safety-inspection, or other ordinances.

With respect to the second part of your question you are advised that disputes which may arise between an insurance agent licensed by your department (or, for that matter, not licensed by your department) and a city or town in the matter of enforcement of local ordinances is not a matter relating to the duties of your office and, therefore, not proper subject for consideration in an opinion of this office under the provisions of Section 13.2(4), Code 1958. In general, validity of city or town ordinances is subject to the same tests and requirements as rules and regulations of official boards and bodies. The tests are:

1. Constitutionality
2. Statutory authorization
3. Reasonableness.

Determination as to whether a given ordinance providing for a license is reasonable and valid is for the courts. See City of Creston v. Mazyinsky, 213 Iowa 1212, 240 N.W. 676. The proper source of legal advice for a city council in determining the class of persons against whom its license ordinances are enforceable is the city attorney. The proper source of legal advice for an insurance agent against whom a city seeks to enforce such ordinance is an attorney of his choice engaged in the private practice of law. The ultimate decision, as pointed out in the Creston case, supra, is for the courts.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md
Enc.

Minors
Juvenile delinquents - Juvenile Court -
1. Petition may be filed in any county where the child is found, by any reputable citizen, without filing fee, irrespective of where crime was committed, under Code section 232.5.

March 18, 1958

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

Dear Sir:

This is to acknowledge your letter and to confirm past conversations in regard to your inquiry about filing a petition under Section 232.5, 1954 Code of Iowa.

My understanding of this matter is that the question about which you are concerned is filing a petition in the county of residence of the child, as opposed to the county where the crime was committed, in order to have such person declared a delinquent within the definition given in Section 232.3, as amended by Chapter 113, Acts of the Fifty-Seventh General Assembly.

Section 232.5 is set out in part below:

> "Petitions, sworn to on information and belief, setting forth the facts which render a child, found in the county, dependent, neglected, or delinquent within the meaning of this chapter, may be filed, without payment of filing fee, with the clerk of the juvenile court, by any reputable resident of the county, * * * * *." (Underscoring supplied)

On the basis of the above underscored wording the statute, on its face, appears to provide the answer to your question. When the child is found in the county and the petition is filed by a reputable resident of the county, then the statutory requirement is fulfilled.

Further examination shows that the nature of the action renders it not criminal in nature. State v. Reed, 207 Iowa 557,

58-3-11

218 N.W. 609. In fact, a petition brought pursuant to Section 232.5, 1954 Code of Iowa, was in equity in the case of McKay v. Ruffcorn, 247 Iowa 195, 73 N.W. 2d 78.

Thus, the opinion of this office is that basis for jurisdiction in the juvenile court exists when the statutory procedure set out in Chapter 232, 1954 Code of Iowa, is followed, and that the petition may be filed in a county, other than the county where the crime was committed, when the child is found in such other county and a petition is filed by a reputable resident thereof.

Very truly yours,

HVF/fm

HUGH V. FAULKNER
Assistant Attorney General

CONSERVATION
County Conservation Board -- Question submitted to voters. Where petition was submitted too late for submission to voters at November election, "next" election is the June primary.

March 19, 1958

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

Dear Sir:

This will acknowledge receipt of yours of the 12th Inst. in which you submitted:

"Sections 4 to 13 inclusive of Chapter 12 of the 56th G. A. enables a county to create a County Conservation Board. Section 5 sets forth the initial procedure as follows:

"'Upon petition of 200 voters in any county to the board of supervisors thereof, said board shall submit to the people of the county at the next regular (primary or general, 57th G. A.) election the question whether a county conservation board shall be created as provided for in this act.'

"We did, in this county, obtain over 200 signatures on a petition to the board of supervisors as required, which was notarized on or about the 12th day of October, 1956. It was then learned that the election followed too closely to allow publication, as required by law, for four consecutive weeks and the petitions were then returned to the County Chamber of Commerce by the auditor and nothing was done.

"The County Chamber of Commerce has again brought the said petition with the same signatures thereon to the auditor asking for an election on the issue in the coming primary election.

58-3-13

> "Before proceeding, the auditor wishes to know whether or not the petition and signatures thereon are still valid considering the passage of time and the fact that there was a regular election held after the presentation of the petition the first time, although it was impossible to carry out the wishes of the petitioners at that time."

In reply thereto I advise as follows. In my opinion this petition is still valid for submission to the people. It seems that the election at which submission to the people may be had is an election at which the petition may lawfully be submitted. Based on the facts set forth in your letter and the foregoing rule, the 1958 Primary is the next election at which the question may be submitted to the people and the petition referred to is valid for that purpose.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

Elections
Ballots -- Name of candidate for constable who died prior to printing of ballot should not appear on ballot.

March 17, 1958

Mr. Isadore Meyer
Winneshiek County Attorney
Decorah, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 14th inst. in which you submitted the following:

> "A citizen of Winneshiek County filed an affidavit of candidacy for Constable with the County Auditor; then he died. I believe that his name should not go on the ballot at the primary election. Is there any procedure by which his name can be removed? His estate is in probate and an Executor has been, or will be, appointed. Of course, the ballots have not yet been printed.
>
> "Your attention is called to the Report of the Attorney General 1923 and 1924, page 162, which states that, 'There is no provision of the statute authorizing the removal of the name of the deceased candidate from the official ballot at this time'.
>
> "In addition, the County Auditor has requested an opinion as to whether or not a properly executed affidavit of candidacy for the position of Supervisor can be withdrawn by the candidate who filed the same before it is printed on the ballot. If so, how would this be done? On the basis of the above Attorney General's opinion, it does not seem that this can be done.
>
> "Will you and your staff consider this matter and advise?"

In reply thereto I advise as follows.

1. Insofar as the problem arising out of the death of a candidate for constable after the filing of his affidavit is

59-3-11

concerned, I advise as follows. Nomination for the office of constable being one filled by the voters of a subdivision of a county may be made by filing of the affidavit required to be filed by Section 43.18. Section 43.21 (2) provides:

> "Township or precinct office. The name of a candidate for an office to be filled by the voters of any subdivision of a county, including the office of party committeeman, shall be printed on the official primary ballot of his party:
>
> " * * *
>
> "2. If the candidate files with the county auditor, seventy days prior to such primary election, his personal affidavit as provided by section 43.18."

Section 43.18 exhibits the affidavit to be filed by a candidate. Note that the candidate declares therein, "* * * that if I am nominated and elected I will qualify as such officer". Obviously his death denies fulfillment of this pledge. As related to the duty and power of the County Auditor in the preparation of the official ballot it is to be said that the personal knowledge of the death of this candidate when translated to the Auditor in his official capacity, as it may be by certification of the death records of the County Registrar, is properly within the ministerial duties of the Auditor. Such record could be attached to the affidavit of the deceased and marked by the Auditor as rejected. This rejection and subsequent failure to print the deceased candi-

date's name on the ballot would make unnecessary the application of this rule of law. Quoting from the case of State v. Frear, 128 N. W. 1068:

> "There is a third class of cases, in which the votes were cast for a candidate known to be dead or disqualified or for a fictitious person. The great current of authority is to the effect that such ballots are ineffectual for any person, and cannot be counted in determining the result of the election. The English cases almost uniformly so hold. King v. Hawkins, 10 East 211; King v. Parry, 14 East 549; Gosling v. Vely, 7 Q. B. Rep. 406; Trench v. Nolan, 2 Moak 711; Reg. v. Coak, 3 El. & Bl. 249; Rex v. Monday, 2 Cowp. 530; Rex v. Foxcroft, Burr. 1017. * * *"

2. Insofar as the situation arising out of the proposed withdrawal of a properly executed affidavit of a candidate for the position of Supervisor is concerned, I am of the opinion that this is controlled by opinion of this Department appearing in the Report of the Attorney General for 1925, 1926 at page 346. There the question submitted was this: "Can a candidate for a county office such as Board of Supervisors withdraw his name and his candidacy at any time before the Primary Election and his name be left off the ballot?" In answer to this the opinion stated:

> "* * * However, in the foregoing discussion of the question you have submitted we have only considered the right of a candidate to withdraw after the expiration of the time for filing nomination papers. We believe that up to and including the last day of filing the candidate may withdraw his affidavit and thereby forfeit

the right to have his name placed on the primary election ballot. After the expiration of the period for filing petitions, however, a candidate may not withdraw his name from the list of candidates."

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

Cities and Towns
Peddlers Ordinance -- whether applicable to book salesmen is a moot question.

March 20, 1958

Hon. John W. Carlsen
State Representative
Clinton, Iowa

Dear Sir:

This will acknowledge yours of the 24th ult. in which you submitted the following:

> "I have been contacted by constituents with reference to the need of acquiring a Peddlers License in cities and towns in the State of Iowa.
>
> "It would appear there are many nationally known salesmen who sell their wares not from house to house but by appointment only.
>
> "As an illustration:
>
> "An individual is selling the 'American Educator' in the State of Iowa. He first contacts a prospect by telephone and at this time arranges an appointment, when both of the parents are at home. The services are interstate, the salesman does not deliver the merchandise at the time of the purchase order. A down payment is taken by the salesman. The books and services are sent to the parents from the central offices which are in Lake Bluff, Illinois, and all payments other than the down payment are mailed to the central office. All book publishers including the one for the 'American Educator' are members of the National Registry which is associated with the Better Business Bureau's and the Chambers of Commerce throughout the United States. The salesman registers with the Chamber of Commerce in the City of which they are working. This is a must.

58-3-15

"I would appreciate your opinion as to the necessity of acquiring a peddler's license in cities and towns in Iowa for the sale of books as above described."

In reply thereto I advise as follows. Without exhibit of the terms of a city ordinance controlling peddling any conclusion about the matter you submitted would be moot. However, although not exhaustive, research discloses the attached information about the status of the law in the matter of peddlers in Iowa generally. This does not include any study of the transient merchant act, Chapter 77, Acts of the 56th General Assembly. These authorities may be helpful.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB
Enc.

AGRICULTURE
Commercial feeds -- suppliers of feed ingredients for sale in Iowa commonly referred to as "feeding limestone" must comply with registration requirements of Code sections 198.7.

March 21, 1958

Honorable Clyde Spry
Secretary of Agriculture
B u i l d i n g

Dear Sir:

This will acknowledge receipt of your letter of March 11 wherein you request an opinion as follows:

> "Under Chapter 198, Code of Iowa, 1954, Commercial Feeds, we have a supplier of calcium (Ca), known commonly as feeding limestone, who has refused to register his product and pay tonnage tax thereon.
>
> "You will note in Section 198.2, subsection 8, that calcium is included as one of the ingredients in commercial feed mixtures. I am of the opinion that the manufacturer is in error in not registering and paying the tonnage inspection fee thereon because such material is not exempt under Section 11 of Chapter 198.
>
> "My question is: Should the manufacturer be required to register the calcium known in the trade as feeding limestone?"

In response thereto we set out the following pertinent statutes:

> "198.7 Registration fee. Before any commercial feed is offered or exposed for sale, or sold, the person who desires to offer or expose it for sale, or sell it, shall pay the department annually a registration fee of fifty cents accompanied by an affidavit containing the items required by this chapter to be printed on the label of such feed. ***"

58-3-16

"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 concentrated form, and mineral mixtures, intended for feeding to domestic animals, ***"

"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."

Upon a reading of these statutes it appears that commercial feeds must be registered by those offering or exposing the same for sale (§198.7); that commercial feed is "food" as defined in §190.1(32), (§198.1(1)); and that "food" includes any component of any article used by domestic animals for food, drink, confectionery or condiment.

Since it is common as well as statutory (§198.2(8)) knowledge that so-called "feeding limestone" is oftentimes a component of commercial feeds, the manufacturer to which you refer must register the same with your Department in accordance with §198.7 if he is offering or exposing his product for sale in Iowa.

Very truly yours,

FREEMAN H. FORREST
Assistant Attorney General

FHF:MKB

CONSERVATION

STATE CONSERVATION COMMISSION:

Blanket bonds - The State Conservation Commission does not have the authority to enter into a blanket bond contract for employees of the Commission.

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

Attention: Mr. H. W. Freed, Chief
Division of Administration

Dear Sir:

Your letter of March 17, 1958, reads as follows:

"We are hereby requesting an opinion as to whether there is a statute in the Code of Iowa prohibiting the State Conservation Commission from entering into a contract for a Public Employees Honesty Blanket Position Bond and thus eliminate the present procedure of having individual surety bonds for our employees.

"At the present time we have 190 employees bonded with individual bonds which come due at various times throughout the year. These individual bonds causes the Commission considerable paper work and the payment of excessive cost for the individual premiums.

"Attached is a photostat of the positions presented to the Indemnity Insurance Company of America from which they determined the approximate annual premium that a blanket bond would cost us. We are also attaching a photostatic copy of the letter that they submitted to us.

"During the fiscal year ending June 30, 1957, our public employees surety bonds cost the Commission $1200. So far during the present fiscal year ending February 28, 1958, we have expended approximately $1,000 for these employees bonds. As you

58-3-17

> can see by the letter received from the Insurance Company by taking out a blanket bond there would be a considerable monetary saving in the cost of this coverage.
>
> "We would also like to have your opinion as to whether it would be advisable to advertise for this insurance coverage so that all insurance companies would have an equal chance to bid on this insurance policy. We were astounded at the annual premium for a blanket bond that was quoted to us and doubt whether we could get a better rate than the one quoted.
>
> "We would appreciate you giving this your immediate attention and advise us as to whether we may enter into a contract such as this Public Employees Honesty Blanket Position Bond."

The legal problem involved in your letter is not "whether there is a statute in the Code of Iowa prohibiting the State Conservation Commission" but rather, as you state in your closing paragraph, "whether we may enter into a contract such as this Public Employees Honesty Blanket Position Bond." Sections 64.6 (16), 106.1, 107.7, and 107.8, Code 1954, relate to the matter of bonds of employees of the State Conservation Commission.

The position of this office on the question of blanket bonds is set out in an opinion of this office found at page 51 of the 1956 Report of Attorney General. To quote from that opinion:

> "It has been the consistent opinion of this department that, unless otherwise expressly authorized, public officials are required to furnish individual bonds. * * * * *
>
> * * * * *

> "There are some cases where the legislature has expressly provided for a blanket bond; such an instance is that as set forth regarding responsible and accountable officers of the Iowa National Guard under the provisions of Section 29.37, Code 1954. * * * * *
>
> "In the instant case, had the legislature intended to provide for a blanket bond we must assume that a similar clear statement of authority would have been made by them in Senate File 88, Acts of the 56th General Assembly."

Section 107.8, Code 1958, provides as follows:

> "The premium on all the aforesaid fidelity bonds shall be paid from the administration fund of the commission." (Emphasis added)

To quote further from the opinion above cited:

> "We have repeatedly held that the use of the word 'all' in this section (64.2, Code 1954) has the connotation similar to the word 'each' in Section 341.4, Code 1954."

I am of the opinion that the State Conservation Commission does not have the authority to enter into a blanket bond contract such as the contract submitted in your letter. In view of my answer to this question, no answer to the second question is required.

Very truly yours,

JHG/fm

JAMES H. GRITTON
Assistant Attorney General

SCHOOL REORGANIZATION:

1. Only residents of included portions of existing district may sign reorganization petition under Code Sec. 275.12 but in some cases all residents of such districts may vote at election on proposal as provided in Code Sec. 275.20.

2. County boards may specify enrollment in excess of minimum provided Code Sec. 275.3 if their conclusions based on studies and surveys support such planning.

March 20, 1958

Honorable William H. Harbor
State Senator
Henderson, Iowa

Dear Senator Harbor:

Receipt is acknowledged of your letter of March 18 in which you submit the following:

"There seems to be a great difference of opinion as to the interpretation of a law we passed in the last General Assembly. The law in question is House File 158 which has to do with the Reorganization of School Districts. The point in contention has to do with Section 275.12.

"There are those who say that this section says that if a portion of a district is included in a reorganization proposal then only 20% of the eligible voters of that area to be included need be obtained as signers of the petitions. Others say that 20% of the voters in the entire district must be obtained, even though only a portion of the district will be in the new proposal. It is their contention that the whole district is effected by a portion of the district leaving. I will appreciate an opinion from you in regards to this section.

"* * * * * *

"Another opinion is asked regarding schools. In Section 275.3 the minimum standard of 300 was set. It was the intent of the Legislature that if other things being equal this number in ADA would make the proposal eligible for approval for reorganization. The question is can a County Board of Education, by virtue of Section 275.1 and 275.2, assume the position that the Legislature set only a minimum standard and that they can set their standards higher than those set by us. I know that this thinking is contrary to the Legislature's intent, but some are doing it. . . ."

58-3-18

Section 275.12, Code 1958, to which your first question refers, furnishes the answer to said question by its express terms, which provide in pertinent part as follows:

> ". . .Such petition shall be signed by voters in each existing school district affected or portion thereof equal in number to at least twenty percent of the number of eligible voters or four hundred voters, whichever is the smaller number. School districts affected or portion thereof shall be defined to mean that area to be included in the plan of the proposed new school district." (Emphasis supplied)

Thus, by its own terms, Section 275.12 defines for its purposes the word "affected" as being synonymous with "included". By such definition, a petition including only a portion of an existing district need be signed only by twenty percent of the voters residing within such included portion. However, it should be noted that should the petition be granted and should such "portion" be part of "an existing school district operating a high school, or a rural independent school district of eight sections or more formed prior to May 10, 1957", all of the qualified voters of the school district are entitled to vote at the election upon the proposal contained in such petition under the provisions of Section 275.20, Code 1958, even though only those residing in the included portion were eligible to sign the petition under the provisions of Section 275.12, Code 1958.

In answer to your second question, you are advised that the provisions of Section 275.3, Code 1958, to which you refer, states as follows:

> "No new school district shall be planned by a county board of education nor shall any proposal for creation or enlargement of any school district be approved by a county board of education or submitted to electors unless there reside within the proposed limits of such district at least three hundred persons of school age who were enrolled in public schools in the preceding school year. . ."

Section 275.1, Code 1958, to which you also refer, provides in pertinent part:

> ". . .the county board of education in each county of the state shall initiate detailed studies and surveys of the school district within the county and territory

> adjacent thereto for the purpose of promoting such reorganization of districts by unions, mergers, reorganizations or centralization as will effect more economical operation and attainment of higher standards of education in the schools."

Section 275.2, Code 1958, continues the thought of the quoted provision:

> "The scope of such studies and surveys shall include the following matters in various districts of the county: the adequacy of the educational program, average daily attendance of pupils, property valuations, existing buildings and equipment, natural community areas, road conditions, transportation, economic factors, and such other matters that may bear on educational programs meeting minimum standards as required by law."

Thus, it is provided in the express words of the statute that a county board of education may not plan, approve or submit to electors a proposal for reorganization including less than the specified enrollment figure. On the other hand the county board is required to study and survey a variety of other factors in arriving at its county plan. It follows that, if it concludes from a study of other factors districts planned need a greater enrollment in order to achieve "more economical operation" and "higher standards of education", the express required objectives of the act of planning, then it may plan districts having such enrollment as will meet the said objectives. Depending, of course, upon the conclusions arrived at from the said studies and surveys in each county, it is entirely possible that a county board, in the proper exercise of its powers and duties, may arrive at a plan specifying enrollment in excess of the statutory minimum for each proposed district so planned.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

COUNTIES
Hospitals. Publication of schedule of salaries.

March 24, 1958

Jordan, Statton & Jordan
Attorneys at Law
803 Keeler Street
Boone, Iowa

Gentlemen:

This will acknowledge receipt of yours of the 19th inst. in which you submitted the following:

> "A question has arisen in Boone County concerning publishing the names and annual salaries of each person employed at the Boone County Hospital. At the request of the Hospital Board of Directors, I am requesting your office for an opinion construing Section 349.18, Code of Iowa 1954, which provides in substance that a schedule of bills allowed be published; says nothing about salary. The Board takes the position that a salary is not a bill within the meaning of the act, while the State Auditor evidently takes the position that it does. Different counties aren't treated in the same manner on this question, I might add."

In reply thereto I quote to you the following from the pamphlet entitled "Publishing Laws of Iowa, effective November 8, 1956, at page 61 thereof, as follows:

> "The county attorney of Washington county, asked an opinion on 'the question in this county with regard to the publishing of salaries and expenses of the Washington County Hospital and as to the necessity of publishing the salaries of county officials each month.'
>
> "The Attorney General ruled:

58-3-19

"'(1) That the expenditures of the Washington County Hospital for salaries, expenses, etc., are properly matters to be published each month. This has been the holding previously by letters of September 30, 1947 and March 25, 1948.'"

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

COUNTIES
Zoning -- The terms "area" and "district" are defined in sections 358A.4 for purposes of code section 358A.3.

March 24, 1958

Mr. George R. Larson
Assistant County Attorney
Nevada, Iowa

Dear Sir:

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

> "Section 358A.3, Iowa Code Annotated, provides in part, 'no restriction of commercial or industrial enterprise, buildings or structures in unincorporated areas shall become effective until approved by a majority of the real property taxpayers owning real property in the area or district in which such restriction is to be imposed, either (1) at an election held for that purpose, or (2) by their signing an appropriate document indicating their approval.' (Emphasis mine).
>
> "The Story County Zoning Commission would like your opinion as to what is meant by the words, 'area or district', in the quoted provision. Could the county as a whole be considered an area or district within the meaning of said section? If an appropriate document were signed by a majority of the real property taxpayers owning real property in the county, would restriction of commercial or industrial enterprise, buildings or structures in unincorporated areas of the county become effective?"

In reply thereto I advise as follows. It seems to me that according to Sections 358A.3 and 358A.4 the terms "area" and "district" are defined sufficiently to answer this question. Within such definition it is clear that an appropriate

CC-2-20

document approved by a majority of the real property taxpayers owning real property in the county would not justify the imposition of the restrictions mentioned upon the unincorporated areas of the county. Such restrictions can only be imposed by an appropriate or sufficient document signed by a majority of the real property taxpayers owning property in such area.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

TAXATION
Sales Tax -- State Departments collecting sales tax on the distribution of publications for which charge is required to be made under Ch. 55, 57th G.A. are neither eligible nor required to obtain a sales tax permit under code section 422.53(2).

March 20, 1958

Mr. Leon N. Miller, Chairman
State Tax Commission
B u i l d i n g

Dear Mr. Miller:

This will acknowledge yours of the 10th inst. in which you have submitted the following:

> "The State Tax Commission would like to have an opinion as to whether the State Tax Commission can legally require other departments of the State to pay a fifty cent fee for retail sales tax permits.
>
> "Is it legal and right for the Tax Commission to waive this requirement as set forth in Section 422.53(2), 1954 Code of Iowa.
>
> "You understand, of course, this problem never arose until the passage of House File 139 as amended by the 57th G. A. The reason for this opinion is that some of the various departments of State have some question as to whether or not they should pay the fifty cents for the permit and whether they may legally do so. I direct you to the opinion written by your department October 4, 1957 relative to the charge of sales tax on certain publications."

In reply thereto I advise that the following justifies the conclusion that I reach. A retail sales tax permit is authorized and directed to be issued by the following statutes

58-3-21

to the following persons designated as retailers. Section 422.53(1), Code 1958, provides for such applications in terms as follows:

> "1. Sixty days after the effective date of this division, it shall be unlawful for any person to engage in or transact business as a retailer within this state, unless a permit or permits shall have been issued to him as otherwise provided in subsection 7 of this section. Every person desiring to engage in or conduct business as a retailer within this state shall file with the commission an application for a permit or permits. Every application for such a permit shall be made upon a form prescribed by the commission and shall set forth the name under which the applicant transacts or intends to transact business, the location of his place or places of business, and such other information as the commission may require. The application shall be signed by the owner if a natural person; in the case of an association or partnership, by a member or partner thereof; in the case of a corporation, by an executive officer thereof or some person specifically authorized by the corporation to sign the application, to which shall be attached the written evidence of his authority."

And Section 422.42(5) defines the term "retailer" as follows:

> "'Retailer' includes every person engaged in the business of selling tangible goods, wares, or merchandise at retail, or the furnishing of gas, electricity, water, and communication service, and tickets or admissions to places of amusement and athletic events as provided in this division or operating amusement devices or other forms of commercial amusement from which revenues are derived; provided, however, that when in the opinion of the commission it is necessary for the efficient administration of this division to regard any salesmen, representatives, truckers, peddlers, or canvassers, as

> agents of the dealers, distributors, supervisors, employers, or persons under whom they operate or from whom they obtain tangible personal property sold by them irrespective of whether or not they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors, employers, or persons, the commission may so regard them, and may regard such dealers, distributors, supervisors, employers, or persons as retailers for the purposes of this division."

Departments of state are mere agencies of the state designed to perform its sovereign function. A holding that such agencies authorized and directed by Chapter 56, Acts of the Fifty-seventh General Assembly, to sell and distribute certain State publications are retailers within the above definition appears to have no statutory support. Obviously they are not retailers and for that reason alone are neither eligible nor required to operate under a sales permit as defined in Section 422.43, Code 1958, and therefore requiring the fifty cent fee for such permit is unauthorized. Opinion of this Department issued October 29, 1957, is withdrawn. Whether the sale of other State owned property or services is subject to the provisions of Section 422.53(1) and Section 422.42(5) is reserved.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

TAXATION:

~~HEADNOTE:~~ SALES TAX -- Poultry "litter" is not exempt from retail sales tax as a material used in disease control or health promotion of livestock.

March 24, 1958

D. E. Cunningham, Director
Sales and Use Tax Division
Iowa State Tax Commission
BUILDING

Dear Mr. Cunningham:

This will acknowledge receipt of your letter of February 11, 1958, together with the enclosed letter, addressed to you, from Attorney John S. Bauch, dated February 8, 1958. In Mr. Bauch's letter he asked whether or not the sale of poultry "litter", consisting of peanut shells and peat moss, is taxable under our sales tax law.

It appears that the following statute and rule are applicable to this question:

> Section 422.42(3) of the Code of Iowa, 1954, as amended by the 57th General Assembly. " '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 services 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, or electricity or steam when purchased or used in the processing of tangible personal property but intended to be sold ultimately at retail. * * *"

> Rule 102.2 of Retail Sales and Use Tax Rules and Regulations of 1954. "The sale of bedding and poultry litter, except straw, is not exempted from the retail sales tax. Straw because of its dual purpose should be construed as feed and governed by the provisions of Rule No. 102."

58-3-22

The amendment to Section 422.42(3), which exempted from the retail sales tax, materials (but not tools or equipment) used in disease control, insect control, or health promotion of plants or livestock, became effective on the second day of May, 1957, at which time, Rule 102.2 was in effect. Rule 102.2 clearly states that poultry litter is subject to taxation, and the question then arises as to whether or not the amendment to Section 422.42(3) in 1957 abrogated Rule 102.2. We think not.

Section 422.42(3), as amended, exempts material used in disease control or health promotion of livestock. The question must first be answered as to whether or not chickens are included under the term "livestock". For the purpose of a common carried lien in Chapter 575 of the 1954 Code of Iowa, livestock is held to include poultry.

> Section 575.1(2). " 'Livestock' shall include animals, live poultry and birds."

> Restatement, Torts, § 504. "The word 'livestock' is used to denote those kinds of domestic animals and fowls which are normally susceptible under confinement within boundaries without seriously impairing their utility and the instrusion of which upon the land of others normally causes harm to the land or to crops thereon." (Emphasis ours).

It is our opinion that the term "livestock" does include chickens, and that any material used for disease control or health promotion of chickens would be exempt from the retail sales tax. However, we do not believe that poultry litter is "used for" the control of health of domestic fowls, except perhaps, in an insignificant, incidental and secondary manner. Litter is not "used for" the purpose of health promotion, though such might be one of the results of the use of litter.

"Litter" is defined in Webster's New International Dictionary, Second Edition, as: "Straw, hay, etc., used as bedding, formerly for man or beast, but now only for animals, or for other uses, as for a thatch, a covering for plants, or scratch material for poultry".

Poultry raisers advise that litter is used primarily as something for the birds to walk upon. It is better for this purpose than a bare wood, cement or wire floor, since the litter can easily be scraped out, facilitating the cleaning of pens, cages or brooders. It does not pack down as quickly as straw, and, therefore, does not have to be removed as often. Also, the birds, by nature, scratch the ground. On hard surface floors such as wood, cement or wire, this is difficult, so the use of litter for scratch purposes has been found to be advantageous.

The value of litter in poultry raising might have some insulation value to baby chicks and, possibly, some value from the sanitation standpoint, which would have an indirect bearing on the health of the chickens, but litter is not "used for" that purpose. It is "used for" the purpose of bedding and scratch material to make cleaning easier and less frequent for the poultry raiser, and any health promotion resultant therefrom is merely incidental to primary purpose. The verb "use" or "used" is defined in State vs. Gaston-Guay, 105 A. 403, 118 Me. 31, as "to practice customarily". The customary practice of using litter is not for the purpose of health. In Coal and Delivery Co. vs. Howard, C. C. A. Pa., 265 F. 566, "use" is said to mean "the act of employing anything, or of applying it to one's service". Litter is employed by poultry

raisers to give the birds a surface to walk upon which can be easily and readily cleaned.

It is our opinion that the sale of poultry litter is taxable under Chapter 422 of the Code of Iowa, 1954.

Yours very truly,

Francis J. Pruss,
Special Assistant Attorney General

James R. Brodie, Special Counsel,
Iowa State Tax Commission

FJP:JRB:fs

Book

~~HEADNOTE:~~

Secondary Roads--Contracts exceeding $5000 must be advertised and public letting held thereon, including granular materials to be used therein. Lyman to Pappas 3/17/58

Ames, Iowa

March 17, 1958

Mr. William Pappas
County Attorney
Mason City, Iowa

Dear Mr. Pappas:

Your request for an opinion dated Feb. 21, 1958 has been directed to this office. In your letter you indicate that the County has purchased several quantities of gravel for maintenance purposes which is now stock piled. Your County anticipates construction improvements upon certain farm to market roads in the county and you ask whether or not the Board of Supervisors has authority to use this gravel in the construction program.

As you know, the provisions of Section 309.40, Code of 1954, specifically provides that all contracts for road construction work and material therefor of which the engineers estimate exceeds $5,000.00 shall be advertised and let at a public letting. Of course, there is the exception on materials obtained from local pits or quaries.

As the project will exceed $5,000.00 there must be a public letting on the contract and materials therefor which would include the necessary granular products.

Yours very truly,

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

CJL:js

58-3-23

COUNTY OFFICERS -- Social Welfare Board -- Public officers have no capacity to question the constitutionality of statutes.

March 27, 1958

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

Attention: Mr. A. R. Shepherd

Dear Sir:

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

> "Our Polk County Board of Supervisors has passed on to this office for answer a communication from the Polk County Board of Social Welfare reading as follows:
>
> "'The Polk County Board of Social Welfare at their regular meeting February 13, 1958, passed the following resolution.
>
> "'MOVED by LENHART, SECONDED by BAILLIE, that a Polk County Attorney's opinion be asked on the validity of the constitutionality of the present legal settlement law as it pertains to receiving welfare or other Government assistance.
>
> "'VOTE: Aye; Lenhart, Baillie, Armstrong and Witmer. Absent Brown.'
>
> "We have some difficulty in answering this question and we therefore ask that you give us your opinion on the question."

In reply thereto I advise as follows. The Polk County Board of Social Welfare are public officers and as such are not entitled to question the validity or constitutionality of a

58-3-24

State statute and refuse to comply with its provisions. The authorities so hold. Paragraph 117 of 11 Am. Jur., title Constitutional Law, provides:

> "Under the general principle that the constitutionality of a statute cannot be questioned by one whose rights are not affected thereby and who has no interest in defeating it, the question has arisen as to whether a public officer has such interest as would entitle him to question the constitutionality of a statute and refuse to comply with its provisions. It has generally been answered in the negative, since the interest of such officer is official, not personal; and if the rule were otherwise, petty ministerial officers of the state could ignore any law which they deemed to be invalid. This is expecially true of subordinate officials. If the duty to act devolves on a superior officer who directs one of his subordinates to perform the act, the general rule is that such subordinate may not in effect review the decision and order of his superior and refuse to act merely on the ground that the law is unconstitutional. Under such circumstances, the superior, and not the subordinate, is responsible for the official act in question.
>
> "The general principle that ministerial officers have no standing to raise constitutional questions has been applied in various ways. The courts have in general taken the view that a judge, even though it is his duty to interpret the laws, cannot, in a proceeding to compel the performance of some ministerial duty on his part, initiate the objection that a statute is unconstitutional where he has no personal interest involved and his duty does not require him to raise such defense. Under one view, the assessment and collection of taxes are held to be purely ministerial functions,

> so that the assessor or collector may not, in a proceeding to enforce his obedience to a tax statute, question its constitutionality. * * *"

To the same effect is the rule stated in 16 C. J. S. at page 251, title Constitutional Law, in terms as follows:

> "Ordinarily, the mere interest of a public official, as such, is not sufficient to entitle him to question the validity of a statute, and he may do so only where he shows that his rights of person or property are adversely affected by the operation of the statute.
>
> "As a general rule a public official whose rights are not adversely and injuriously affected by the operation of a statute or ordinance, or the particular feature of it complained of, may not raise the question of its constitutionality. Ordinarily, the mere interest of a public official, as such, is not sufficient to entitle him to question the validity of a statute; but, to entitle him to raise such question, he must show that his rights of person or property are adversely affected by the operation of the statute."

The view of this proposition by the Supreme Court of Iowa is shown in the case of Boyd v. Johnson, 212 Iowa 1201, 238 N. W. 61, and quoting from the case of Scott County v. Johnson, 209 Iowa 213, it was said:

> "'If Section 7404 should be deemed to create in the plaintiff a vested right, entitling it to the protection of the constitutional inhibition, then, for the same reason, Section 4319 should be deemed to create a like vested right in a school corporation. We have held definitely that a school corporation cannot challenge the constitutionality of a legislatie act. Waddell v. Board of

Directors, 190 Iowa 400. We have held also indirectly that a county is under the same disability. McSurely v. McGrew, 140 Iowa 163. And later, we have held directly to such effect. Iowa Life Ins. Co. v. Board of Supervisors, 190 Iowa 777. These authorities are quite conclusive against the plaintiff's capacity to challenge this legislation.'"

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

FEES -- Justice of the Peace. Under Code section 601.131 only 50% of excess over $1200 may be retained irrespective of how many justices succeed one another in the office during a given year.

March 27, 1958

Mr. H. T. Lewis
Assistant County Attorney
Scott County
Davenport, Iowa

Dear Sir:

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

> "The opinion of your office is requested as to the meaning of Paragraph 2-A of Section 601.131 of the 1954 Code of Iowa. This portion of the code provides in effect that justices of the peace in townships having a population of 4000 and under 10,000 shall pay into the county treasury all criminal fees collected in each year in excess of $1200 plus an amount equal to 50% of fees collected in excess of said amount.
>
> "The question has arisen as to the meaning of this Section where a justice of the peace resigns during the year and a successor is appointed to take his place. Must the successor in making his remittance to the county treasury take into consideration criminal fees received during the year by his predecessor or may such successor retain for himself the first $1200 of fees collected by him while serving in office and remit to the county treasury only such an amount as is equal to 50% of fees in excess of the first $1200 collected by him? In other words, is the $1200 allowance made to the office or to the person?
>
> "Your opinion in the above matter will be greatly appreciated."

58-3-25

In reply thereto I advise as follows. The statute to which you refer, being Section 601.131(2-a), 1958 Code, provides the following:

> "2. Justices of the peace and constables in townships having a population of under ten thousand shall pay into the county treasury all criminal fees collected in each year in excess of the following sums:
>
> "a. In townships having a population of four thousand and under ten thousand, justices one thousand two hundred dollars plus an amount equal to fifty percent of fees collected in excess of one thousand two hundred dollars; constables eight hundred dollars."

Note that by its terms it is the justice of the peace who is directed to pay into the County Treasury the specific amounts named therein. Clearly the resigned justice of the peace is no longer justice of the peace. Thus the resigned justice of the peace, being no longer a justice of the peace, cannot pay fees into the County Treasury. Therefore, the successor justice of the peace, under the circumstances described, must take into consideration the criminal fees received during the year by his predecessor. See the 1942 Report of the Attorney General at page 42 for a comparable result as respects the collection of civil fees by a successor to a justice whose term had expired. The fees are attached to the office and not to the occupant of the office.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

~~HEADNOTE~~: ~~SECONDARY ROADS~~--Roadways that reach the status of public roads can be absorbed by the county in the county road system.

Ames, Iowa

March 28, 1958

Mr. J. Leo Martin
County Attorney
State Bank Bldg.
Sigourney, Iowa

Re: Private lanes

Dear Mr. Martin:

I have your letter of March 11, 1958 in which you ask our opinion as to whether the roadway described on your enclosed plat can be taken into the county road system.

As was stated in my previous letter to you, the opinion of the Attorney General, 1956, page 9 is the controlling authority. Whether or not a roadway is considered a farm lane, private lane or reaches the status of a public highway is a question of fact.

With reference to the roadway under consideration here, the writer has made an investigation and found that this particular roadway was to be absorbed into the county road system in 1907 but for some reason no formal action was taken. Since that date the county has maintained this roadway and the area has not been taxed by the county. The roadway has been used by the general public for almost 50 years. As can be seen from the plat, the roadway serves more than one family and is a benefit to the public generally.

It is our opinion that this roadway is not a farm or private lane, but has the status of a public road. Therefore, the county can absorb it into their road system.

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

58 3-26

TAXATION: Real property -- building overlooked by assessor. Additional taxes for years prior to actual increase in valuation not collectible.

March 28, 1958

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

Attention: Mr. A. R. Shepherd

Dear Sir:

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

> "We have a problem regarding the assessment of omitted property pursuant to Code Section 443.6 on which we cannot find any specific authority and which may be a matter of state wide interest.
>
> "The property in question consists of land in West Des Moines on which there is a service station erected by a lessee holding a lease for longer than three years. Thence the land and the building should have been assessed as real estate under Code Section 428.4. The original assessment was based only on the assessed valuation of the land. Some three years later our County Assessor learned that a new service station had been erected on this land and he assessed the new building for the taxes for 1954, 1955 and 1956 and demanded payment of these taxes with penalty thereon pursuant to the provisions of Code Section 443.6 authorizing the assessor to list for taxation any omitted property. We understand that this assessment was made after all taxes assessed against the land for the years in question had been paid.
>
> "Will you kindly advise us whether the property in question was assessable as omitted property and if so whether the action to assess it as

58-3-27

> omitted property was taken too late after the taxes in question had been paid on the basis of the original assessment?"

In reply thereto I advise as follows. In my opinion the foregoing does not present a case of assessing omitted property but one of increasing the valuation of property previously assessed. As bearing upon this proposition, Section 428.4 and Section 443.6, Code 1958, provide the following:

> "428.4 Personal property - real estate - buildings. Property shall be taxed each year, and personal property shall be listed and assessed each year in the name of the owner thereof on the first day of January. Real estate shall be listed and valued in 1933 and every four years thereafter, and in each year in which real estate is not regularly assessed, the assessor shall list and assess any real property not included in the previous assessment, and also any buildings erected since the previous assessment, with a minute of the tract or lot of land whereon the same are situated, and the auditor shall thereupon enter the taxable value of such buildings on the tax list as a part of the real estate to be taxed; 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."

> "443.6 Corrections by auditor. The auditor may correct any error in the assessment or tax list, and the assessor or auditor may assess and list for taxation any omitted property."

These statutes contain provisions that are pertinent and persuasive in the situation outlined. Section 428.4 provides

that a lease of longer than three years shall be assessed as real estate and Section 443.6 provides that the Auditor may correct an error in the assessment or tax list and that the assessor or Auditor may assess and list for taxation any omitted property. The parallel of these provisions and of the situation presented in your letter exists in the case of Palmer v. Beadle County, 15 N. W. 2d 6. The opinion supported by two Iowa cases therein mentioned, to-wit: German Savings Bank of Manning v. Trowbridge, 124 Iowa 514, 100 N. W. 333; Woodbury County v. Talley, 153 Iowa 28, 129 N. W. 967, was decided upon these facts. The plaintiffs owned Lots 3 and 4, Block 6, in Black and Sterling's Addition to the city of Huron. Lot 4 was occupied by a house of some size while Lot 3 was vacant. The Assessor returned an assessment on Lot 4 on the basis that it was a vacant lot and the house standing on Lot 4 was assessed as part of Lot 3, this condition having existed for some years without the payment of taxes on Lot 4 and finally was discovered that the assessment on Lot 4 omitted the assessment of a building. The Auditor corrected the assessment on Lot 4 by adding the assessed value of the house standing on that lot. Action was started to enjoin the issuance of a tax deed for failure to pay the amount of the delinquent tax on Lot 4. In holding

that the delinquent tax amounted to the sum of $96.70, being the amount of delinquent tax without allowance for the value of the house standing thereon, the Court stated:

> "But the authority of the auditor to make new assessments is limited to cases of 'omitted property' and Lot 4 was not 'omitted property' for the assessor had assessed it every year from 1931 to 1942, inclusive. The assessor had greatly undervalued the assessment no doubt, but that did not authorize the auditor to make a reassessment of it. It is only property that the assessor has omitted that the auditor can reassess. This is the interpretation applied in a similar case under a similar statute in North Dakota, Marshall Wells Co. v. Foster County, 59 N. D. 599, 231 N. W. 542; and the same interpretation was put upon a similar statute in Indiana, Williams v. Segur, 106 Ind. 368, 1 N. E. 707; and the same ruling is applied in such cases in Iowa, German Sav. Bank of Manning v. Trowbridge, 124 Iowa 514, 100 N. W. 333; Woodbury County v. Talley, 153 Iowa 28, 129 N. W. 967.
>
> "Neither do we believe that there was any error in the 'quantity of real property assessed' within the meaning of the first paragraph of SDC 57.1002. Lot 4 in its entirety was assessed. The assessor undervalued the lot but the entire lot was assessed; there was no error in the quantity of real property assessed, the error was in the valuation. Under the provisions of SDC 57.0312 real property, for the purpose of taxation, shall include the land and all buildings, structures and improvements thereon. The assessment of Lot 4, therefore, included the land and the structures. SDC 57.0334 relates to the method of fixing the valuation of real estate, by providing that the value should be determined by considering the value of the land and also the value of the structure. But this section relates only to valuation and does not make structures on real property a separate class of property for the purpose of taxation. It follows, we believe, that the assessment of Lot 4 necessarily included any structures on the lot,

> and the failure of the assessor to consider the value of the structures in making his assessment, goes only to the valuation of the property assessed and not to the quantity. There is no authority in our law for the county treasurer or auditor to increase the valuation of property."

In view of the conclusion that this is not a case of omitted property there is no necessity to determine the question as to whether the assessment was made too late after the taxes had been paid on the original assessment.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

APPROPRIATIONS -- State Historical Society
Availability under 56th G.A., Ch. 5.

April 1, 1958

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

Dear Sir:

This will acknowledge receipt of yours of the 31st ult. in which you submitted the following:

"Chapter 5, Section 7, Acts of the 56th General Assembly, appropriates the sum of $200,000.00 to the State Historical Society of Iowa, to be used for the erection of a centennial building at Iowa City, and is contingent upon, and to be supplemented by an additional $100,000.00 to be raised by the Society to be used in the construction of said building.

"Under date of March 14, 1958, I am advised by the Superintendent of the State Historical Society that they have raised at least $100,000.00 in compliance with this Act.

"Chapter 5, Section 3, Acts of the 56th General Assembly, makes certain provisions as to the availability of funds appropriated in this Act.

"Section 8.32, Code of Iowa, 1954, provides for conditional availability of appropriations.

"I respectfully request an opinion as to the following:

"1. Is the availability of the appropriation provided by Section 7 subject to any action by the State Board of Regents, or the Budget and Financial Control Committee, as set forth in Section 3?

58-

> "2. Must the State Historical Society use the money it has raised before the appropriation of $200,000.00 is to be made available, and if your reply is to the affirmative, is such participation restricted to the amount of $100,000.00, or must they use all such funds they may have raised before using the $200,000.00 appropriation?"

In reply thereto I advise as follows.

1. In answer to your question #1 I would advise you that Section 7 of Chapter 5, Acts of the 56th General Assembly, with respect to the appropriations to the State Historical Society provides the following:

> "Sec. 7 There is hereby appropriated from the general fund of the state to the state historical society of Iowa the sum of two hundred thousand dollars ($200,000.00) to be used for the erection of a centennial building at Iowa City. Said appropriation shall be contingent upon and be supplemented by an additional one hundred thousand dollars ($100,000.00) raised by the society to be used in the construction of said building."

This appropriation appears to be available without action either by the Budget and Financial Control Committee or by the State Board of Regents. Action on the use of the appropriations provided by Chapter 5 by the State Board of Education and the Budget and Financial Control Committee is restricted to the appropriations made by Section 2 of the designated Chapter 5.

2. In answer to your question #2 I would advise you that the use of the funds appropriated by Section 7 of Chapter 5,

Acts of the 56th General Assembly, is controlled by Section 8.32 as amended by Chapter 131, paragraph 5, Acts of the 56th General Assembly, which provides so far as is pertinent the following:

> "Conditional availability of appropriations. All appropriations made to any department or establishment of the government as receive or collect moneys available for expenditure by them under present laws, are declared to be in addition to such repayment receipts, and such appropriations are to be available as and to the extent that such receipts are insufficient to meet the costs of administration, operation, and maintenance, or public improvements of such departments."

Being an establishment of the government, the availability of the $200,000 appropriated is conditioned upon the prior use of the $100,000 supplementation made by the Society. In the event that the amount raised by the Society exceeds $100,000 the excess is likewise controlled by the provisions of this quoted statute.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

ELECTIONS -- Absentee Ballots. If no application is on file, absentee ballots cannot be voted, opened or counted.

April 1, 1958

Mr. Bert A. Bandstra
Marion County Attorney
Knoxville, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 20th ult. in which you submitted the following:

> "I would like to submit the following two questions to you under the Absent Voters Law and I would particularly like to have an opinion on two questions involving an interpretation of Section 53.23 of the 1954 Code. My questions are these:
>
> "1. May an absentee voter's ballot be counted, under any circumstances, when there is not a valid Application for Ballot on file at the time of the counting of the ballots.
>
> "2. When there is no such Application for Ballot on file with the judges are the judges of the election authorized to open said absentee ballots."

In reply thereto I advise that the right to cast an absentee ballot is conditioned upon the existence of a statutory application. Absent such application an absentee ballot may not be voted, opened or counted.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

58-4-3

April 1, 1958

Mr. Robert D. Parkin
Jefferson County Attorney
Fairfield, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 26th ult. in which you submitted the following:

> "Reference is made to opinion of the Attorney General of the year 1909 at page 319, regards the eligibility for office. It is my understanding without having read the entire opinion, but from a summary the same which is found in the Iowa Code Annotated Volume 4, at page 123 where reference is made to this particular opinion that a candidate for county office is not eligible as a candidate unless he has lived in and been a resident of the county at least 60 days prior to, (1) either the filing of the affidavit, or, (2) 60 days prior to the primary election.
>
> "Would you please be so kind as to tell me whether or not there have been any opinions of the Attorney General since the one above cited which has changed the construction of the qualification of a candidate. If so, would you please so inform me if said qualifications are any different than those in said 1909 opinion wherein he must be a resident of the county 60 days before either (1) the filing of his affidavit, or (2) 60 days prior to the primary election. It is anticipated that this question will very definitely arise in Jefferson County in the very very near future, therefore, the further question is asked: is it not only the duty but the right of the County Auditor to be that individual who disqualifies a candidate for his having failed to either (1) meet the

58-4-2

residence requirements or (2) having failed to obtain the necessary number of signatures on a nomination paper. The County Auditor is desirous of knowing whether or not this is not his duty."

1. Insofar as the question of eligibility of a candidate is concerned, it is the view of the Department that eligibility is determined by the terms of the affidavit at the time the candidate's affidavit is filed. See opinion of the Attorney General issued March 22, 1956, to Honorable Melvin D. Synhorst, copy of which is enclosed.

2. Insofar as the duty and right of the County Auditor is concerned in relation to the residence requirements of a candidate who has failed either to meet the residence requirements of the candidate or of the candidate having failed to obtain the necessary number of signatures on the nomination paper, I refer you to Opinion of the Attorney General appearing in the Report for 1932 at page 197 covering the Auditor's duty with respect to nomination papers. Copy of opinion is hereto attached.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB
Encs.

AGRICULTURE -- BRUCELLOSIS -- QUARANTINE.
Authority to adopt regulations is contained in code section 164.16.

April 10, 1958

Dr. A. L. Sundberg, Chief
Division of Animal Industry
Department of Agriculture
B u i l d i n g

Dear Sir:

Your recent inquiry asks the following question:

"Under the existing laws does the Division of Animal Industry have power to quarantine the entire herd in which brucellosis infection is disclosed by either a positive reactor or a suspicious reactor resulting from a brucellosis blood test applied to the herd?"

In reply you are advised that while unquestionably Section 164.16, Code 1958, supplies ample authority for regulations governing the quarantine of an entire herd in which a brucellosis reactor might be found, your regulations in 1954 I. D. R. do not indicate any previous intention by the Department to quarantine entire herds because of exposure to a reactor or suspect.

Only under Regulation 16, Section IX, dealing with reactors to the tuberculin test does the Department appear to have previously indicated that entire herds should be quarantined where one or more animals in the herd has been determined to be a reactor.

Regulation 2, Section 1, stated that, "* * * the Chief of the Division of Animal Industry * * * is authorized to * * * maintain such quarantine regulations as he may deem necessary * * *", but, Regulation 13, Section 1, defines quarantine "to mean the perfect isolation of all diseased or suspected animals from contact with other animals * * *" which indicates that up to this time the Department has been satisfied to separate diseased or suspect animals from the herd as opposed to quarantining the entire herd when a reactor is found in its midst.

58-4-4

Therefore, it is our conclusion that while Section 164.16 gives ample authority for regulations concerning quarantine sufficiently broad to include entire herds, that there is as yet no regulatory authority in the Department to so isolate entire herds except in the case of herds under State and Federal supervision where tuberculosis reactors are found.

Very truly yours,

FREEMAN H. FORREST
Assistant Attorney General

FHF:MKB

BUDGET AND FINANCIAL CONTROL ACT: Finding of "emergency" by interim committee is binding upon state comptroller.

April 14, 1958

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

Dear Sir:

This will acknowledge receipt of yours of the 9th inst. in which you submitted the following:

> "On December 9, 1957, you issued this office an opinion based on certain facts and conditions to the effect that the Budget and Financial Control Committee could not allocate funds from the General Contingent Fund of the State, provided by Chapter 39, Acts of the 57th General Assembly, to the Bacteriological Laboratory at Iowa City.
>
> "On January 24, 1958, you gave this office a general opinion to the effect that if the Budget and Financial Control Committee, in its judgment, finds that if an emergency and/or contingency exists, it could make allocations from the General Contingent Fund of the State without subjecting the Comptroller to personal liability for disbursing such funds.
>
> "The Budget and Financial Control Committee at its meeting held on March 20, 1958, has determined that an emergency exists for the Bacteriological Laboratory at Iowa City, which incidentally is based upon the same information and facts as was your opinion of December 9, 1957, and has accordingly allocated the amount of $30,580.00 for the period ending March 1, 1959.
>
> "I respectfully request an opinion as to which opinion is to be effective insofar as this office is concerned with regard to the determination of an emergency and allocation of funds to the Bac-

58-4-5

> terlological Laboratory made by the Budget and Financial Control Committee at its meeting held March 20, 1958, namely, your opinion of December 9, 1957, or your opinion of January 24, 1958."

In reply thereto I advise you that the opinion issued January 24, 1958, is the prevailing opinion of the Department. Acting under the authority of that opinion the finding by the Budget and Financial Control Committee that an emergency exists for the Bacteriological Laboratory at Iowa City made March 20, 1958, is conclusive upon you and supplants the advice given to you in the same matter in our communication of December 9, 1957.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

CONSERVATION -- ELECTION TO CREATE COUNTY BOARD may be held on special election on primary election day but separate ballots are required.

April 10, 1958

Mr. Jack W. Frye
Floyd County Attorney
Charles City, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 9th inst. in which you submitted the following:

> "At the request of the County Auditor of Floyd County, Iowa, I am writing to make the following inquiry.
>
> "Upon petition of more than 200 voters, the Floyd County Board of Supervisors are submitting the question as to whether a County Conservation Board shall be created as provided for in Chapter 12 of the Laws of the 56th General Assembly. In view of the Attorney General's opinion dated September 6, 1956, and concerning submission of the Korean Bonus proposition your opinion is respectfully requested as to whether or not the question of creation of a County Conservation Board may be submitted to the voters on voting machines or must same be submitted as a public measure on separate ballots in accordance with Chapter 49 of the 1954 Code of Iowa as amended?
>
> "In view of the date of the primary election in which this question would be submitted, we earnestly request your informal opinion and will appreciate your attention to this request."

In reply thereto I advise you that while the foregoing question may be submitted at a special election to be held at

58-4-7

the primary election, the question cannot be presented to the voters on the voting machines. Separate ballots are required to be used. See opinion dated February 15, 1956, addressed to Bryce M. Fisher, Assistant Linn County Attorney, copy of which is enclosed.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

COUNTIES -- BOND ELECTION -- REPAIR OF COURTHOUSE: 1. May be submitted at primary on separate ballot. 2. Election date for special election may be changed on rescission of original resolution. 3. Vote required and governed by code section 75.1.

April 4, 1958

Mr. Asher E. Schroeder
Jackson County Attorney
Maquoketa, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 25th inst. In which you submitted the following:

> "I wish to submit for answer the following questions regarding a proposed bond issue election to be held at the same time as the primary election on June 2, 1958. It would seem on the basis of an opinion of your office from the year 1938, at page 659 that it would be proper to hold such an election at that time, and perhaps also answers the first question.
>
> "1. As the county uses voting machines exclusively the question arises for providing for the possibility of the voter who wishes to vote on the county proposisiton but does not wish to participate in the election of candidates due to his desire not to declare for any certain party. In this regard there is no registration of voters in the county. If the above results in the requirement of a separate ballot for voting on this proposition, and since the county does not have enough voting machines to provide each voting precinct with an extra machine it is presumed that Australian ballots must be furnished and separate voting booths constructed and furnished each precinct. If this contention is correct will it be necessary to have a separate election board with a separate set of poll books? In affect won't this be deemed a special election?
>
> "2. The Board of Supervisors by resolution last fall, directed that this proposition be placed on the primary ballot. Since that time

58-4-8

a new member has been elected to the Board. Can this present Board amend the earlier Board's resolution, if they decide that complications that may arise depending upon your answers to the above questions, to hold a special election at a later date or await the general election in the fall.

"3. If the proposition is voted on at the primary, is our contention correct that the 60% vote is determined on the number of votes cast on the proposition and not on the total number of votes cast; that is for the candidates in addition to those cast on the Court House issue."

In reply thereto I advise as follows:

1. The submission of a proposition to issue bonds in connection with the construction or repair of a court house may be had at a general or special election. If submitted at the primary election it obviously is submitted at a special election at which the same election board may function and the same polling books be used. Generally speaking, propositions of this character may be submitted on voting machines if fitted to accommodate the terms of the proposition. See Section 52.24, Code 1958. However, in view of the fact that there apparently exists no pertinent authority to permit the use of voting machines at a special election held in the primary election, I am of the opinion that the proposition should be submitted by separate ballot in conformity with the provisions of Section 49.48, et seq, Code 1958.

2. In answer to your question #2 I am of the opinion that your Board could legally change the election at which this

proposition can be submitted. This change could be accomplished by the rescission of the previous resolution or by amendment of the original resolution.

3. In answer to your question #3 I advise that the vote required to adopt this proposition is set forth in Section 75.1, Code 1958, which provides as follows:

> "Bonds - election - vote required. When a proposition to authorize an issuance of bonds by a county, township, school district, city or town, or by any local board or commission, is submitted to the electors, such proposition shall not be deemed carried or adopted, anything in the statutes to the contrary notwithstanding, unless the vote in favor of such authorization is equal to at least sixty per cent of the total vote cast for an against said proposition at said election.
>
> "All ballots cast and not counted as a vote for or against the proposition shall not be used in computing the total vote cast for and against said proposition."

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

April 14, 1958

Board of Control of State Institutions
State Office Building
L o c a l

Attention: Mr. J. R. Hansen, Member

Gentlemen:

In the letter referred to this office on April 8, 1958, the following question is presented:

When a county insanity commission has committed a person to a county home, may such person be legally admitted to a mental health institute for the purpose of psychiatric re-evaluation?

The only provision found for admission is that contained in Section 229.29, 1958 Code of Iowa, set out below:

> "Insane persons who have been under care, either as public or private patients, outside of the hospital by authority of the commission of insanity may, on application, be transferred to the state hospital, whenever they can be admitted thereto. Such admission may be had without another inquest, at any time within six months after the inquest already had, unless the commission shall think further inquest advisable." (Emphasis added)

You will note that such admission is by way of transfer and not for any specific purpose such as psychiatric re-evaluation or review. In order to effect a transfer it is necessary that application be made. Therefore, this code provision does not seem to meet the particular purpose herein considered.

An examination of Chapter 227, 1958 Code of Iowa, shows that county institutions for the insane are under the supervision of the Board of Control. See Section 227.1, 1958 Code of

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Iowa. Authority to inspect such institutions is expressly granted in Section 227.2, 1958 Code of Iowa. Additional authority provided in that code section is as follows:

> "In addition to the aforesaid inspections, the board shall make or cause to be made an inspection of each county home where mental patients are kept at least once each year by a competent psychiatrist employed by the state hospital in the hospital district where the county home is located. Such inspection shall include an examination of each mental patient which shall reveal the patient's condition of health and the likelihood of improvement or discharge and such other recommendations concerning the care of patients as the inspector deems pertinent ....." (Emphasis added)

This power of inspection clearly accomplishes the result sought, i.e., psychiatric review of patients in a county home with a view to their condition in connection with health improvement, discharge possibilities, and recommendations for future care.

It is pointed out that, according to the wording above quoted from Section 227.2, 1958 Code of Iowa, the psychiatrist employed by the state hospital in the hospital district where the county home is located is the proper inspector to conduct this annual inspection.

Very truly yours,

HVF/fm

HUGH V. FAULKNER
Assistant Attorney General

April 17, 1958

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

Dear Sir:

In your letter of February 20, 1958, you present the following problem:

> "During the coming months the Butler County Conservation Board intends to hire a number of day laborers to clean out brush, fell trees, and otherwise make improvements on certain lands in this county in order that they may be converted into parks and recreation grounds. Will these day laborers and their employer, the Butler County Conservation Board, be subject to the compulsory Workmen's Compensation coverage mentioned in Section 85.2, Code of Iowa, 1954?
>
> "Section 85.1(2) of the Code would indicate that perhaps these day laborers would not be covered by Workmen's Compensation, but the Annotations to the Code are of little help. However, the attorney general's opinions mentioned in 5 ICA 244 would indicate, by analogy, that a county conservation board is not within the provisions of the Workmen's Compensation Law."

Section 85.2, Code 1954, provides:

> "Compulsory when. Where the state, county, municipal corporation, school district, or city under any form of government is the employer, the provisions of this chapter for the payment of compensation and amount thereof for an injury sustained by an employee of such employer shall

58-4-13

be exclusive, compulsory, and obligatory upon both employer and employee, except as otherwise provided in section 85.1."

Section 85.61, Code 1954, provides:

"Definitions. In this and chapters 86 and 87, unless the context otherwise requires, the following definitions of terms shall prevail:

1. 'Employer' includes and applies to any person, firm, association, or corporation, state, county, municipal corporation, school district, and the legal representatives of a deceased employer.

* * * * * *."

In reply to your letter we would advise that the County Conservation Board is not an employer under the provisions of Section 85.2, Code 1954, as it is not a county, school district, city, or municipal corporation; nor is it an employer under the provisions of Section 85.61, subsection 1, Code 1954, which defines "employer" to be "any person, firm, association, or corporation, state, county, municipal corporation, school district". See Hop v. Brink, 205 Iowa 74, 217 N.W. 551.

To clarify the position of this office it is necessary to further analyze the problem which you present.

In the case of Hjerleid v. State, 229 Iowa 818, 826, the Supreme Court said:

"It is the contention of the appellant that the principal criteria for determining whether the relationship of employer and employee exists are: (1) the right of selection, or to employ at will; (2) responsibility for the payment of wages by the employer; (3) the right to discharge or terminate the relationship; (4) the right to control the work; and (5) is the party sought

> to be held as the employer the responsible authority in charge of the work or for whose benefit the work is performed. Appellees contend that the four facts to be considered are the first four enumerated above, in order to determine whether the relationship of employer and employee exists. But we are of the opinion that all these matters should be considered."

Section 111A.1, Code of 1958, provides as follows:

> "Purposes. The purposes of this chapter are to create a county conservation board and to authorize counties to acquire, develop, maintain, and make available to the inhabitants of the county, public parks, preserves, parkways, playgrounds, recreational centers, county forests, wildlife and other conservation areas, and to promote and preserve the health and general welfare of the people, to encourage the orderly development and conservation of natural resources, and to cultivate good citizenship by providing adequate programs of public recreation." (Emphasis added)

In regard to requirements 1, 3 and 4 in the Hjerleid case, supra, Section 111A.4(6), Code of 1958, reads as follows:

> "6. To employ and fix the compensation of an executive officer who shall be responsible to the county conservation board for the carrying out of its policies. The said executive officer shall have the power, subject to the approval of said board, to employ and fix the compensation of such assistants and employees as may be deemed necessary for carrying out the purposes and provisions of this chapter, but not in excess of those paid state conservation officers and employees for like services."

Although these (1, 3, and 4 above) are functions generally performed by the board of supervisors for and on behalf of the county, in the case of the workmen under consideration these

functions are performed by the county conservation board for and on behalf of the county. We find no requirement in Section 85.2 or Section 85.61(1), Code of 1958, that these functions must be performed by the board of supervisors to qualify the employees as employees of the county.

The county, as a governmental subdivision of the state, can only act through its various agents and instrumentalities. Section 111A.6 provides the sources of financial revenue of the county conservation board. In a letter opinion of July 18, 1957, addressed to you, this office discussed this section and concluded that the board was not a tax certifying body but was subject to the general provisions for financial operation of county agencies or instrumentalities. The principal control of the revenue of the county conservation board is therefore in the board of supervisors acting for and on behalf of the county. The responsibility for the payment of wages lies, in the final analysis, with the county.

In accordance with the discussion relative to the functions 1, 3, and 4 above, the county is the responsible authority in charge of the work acting by and through the county conservation board. Section 111A.1, Code of Iowa, set out above, clearly states that it is for the benefit of the county that the work is being performed by making available to the inhabitants of the county public parks, preserves, parkways, playgrounds, recreational centers, county forests, wildlife and other conservation

areas.

We are of the opinion that an analysis of the five requirements above shows that the workmen will be employees of the county for the purposes of the Workmen's Compensation Act and therefore Sections 85.2 and 85.61(1), Code of 1958, will be applicable.

Very truly yours,

NORMAN A. ERBE,
Attorney General of Iowa

JHG/fm

JAMES H. GRITTON,
Assistant Attorney General

COUNTIES -- COUNTY HOME. Whether purchase of real estate adjoining County Home is for a County purpose is a matter to be determined by the Board of Supervisors

April 24, 1958

Mr. Isadore Meyer
Winneshiek County Attorney
Decorah, Iowa

My dear Isadore:

This will acknowledge receipt of yours of the 17th inst. in which you submitted the following:

> "The Board of Supervisors of Winneshiek County, Iowa, have requested an opinion as to whether or not they have the right to purchase a farm adjoining the present Winneshiek County Home for less than $10,000.00 for the purpose of operating the County Home farm land now owned by the County in a more efficient and economical manner, and further to use the home on the premises for indigent persons who do not have other lodging or place to live.
>
> "Your attention is called to Section 345.1 of the 1954 Code of Iowa, as amended, which provides that 'nor the purchase of real estate for county purposes exceeding $10,000.00 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 another special election'. Your attention is also called to Conrad vs. Shearer, 197 Iowa 1078, 198 N. W. 633 in which the Court defines 'county purpose' as one exercised by the county acting as a municipal corporation, it results in the use or control to the county by its lawfully constituted agents, such as the erection of a courthouse or county home or other project sui generis.

58-4-10

> "There is no question in this case that the farm can be purchased for less than $10,000.00, and, therefore, the matter would not have to be submitted to the voters of Winneshiek County for approval. The matter that concerns me is whether the purchase of this farm primarily for additional land to make the present farming operation at the Winneshiek County Home more efficient with the added purpose of using the house on the premises for families on pro-relief who have no other housing facilities is sufficient to bring this within the county purpose, and a proper use of county funds.
>
> "I would appreciate an opinion from your office on this matter at your early convenience."

In reply thereto I would advise as follows. In my opinion whether the foregoing proposal is deemed to be a county purpose is a matter to be determined within the sound discretion of the Board of Supervisors within the rule set forth in the Conrad case cited by you.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

April 15, 1958

Mr. Ballard M. Tipton, Director
Property Tax Division
State Tax Commission
Building

Dear Mr. Tipton:

Your letter dated February 28, 1958, wherein you asked our opinion on the legality of a county assessor holding the additional position of clerk of an incorporated town, has been referred to this office for reply.

In answer to your inquiry, we invite your attention to an informal opinion of the Attorney General of Iowa dated January 21, 1957, which provides as follows:

> "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 disignated 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 duties pertaining to the duties of assessor, Section 441.9, Subsection 1, Code of 1954, requires of the assessor the following:
>
> 'Duties of assessor. The County assessor shall:
> 1. Devote his entire time to the duties of his

58-4-11

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".

Although the question at hand pertains to the legality of a county assessor serving as clerk of an incorporated town, it is felt that the rationale of the foregoing opinion applies, and precludes a person from serving simultaneously in both capacities.

Very truly yours,

JOSEPH C. PIPER
Special Counsel

JCP:rh

County Officers - Bd of Supervisors - Primary ballot. Residence in same township as incumbent does not preclude candidacy for nomination, although it may subsequently bear on qualification for office.

April 28, 1958

Hon. W. E. Darrington
State Representative
Persia, Iowa

My dear Mr. Darrington:

Reference is herein made to your request for opinion in the following situation. Brown and Green are now both residents of the same township and Brown being a holdover Supervisor. You refer to Section 39.19, Code 1958, which provides as follows:

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

You query as to whether if Green is ineligible to be elected to the office of Supervisor and cannot qualify even if elected for the reason that he comes within the limitations of the foregoing Section, can he become a candidate for the Board

58-4-12

of Supervisors for the term beginning January 1, 1959, and further your query is as to the duty of the County Auditor in placing upon the ballot the name of a candidate for Supervisor who cannot legally be elected or qualify. In answer thereto I would advise that in order to qualify as a candidate for office in the primary the Constitution does not provide qualifications of a person seeking to be a candidate for office. Section 43.18, Code of 1958, provides with respect thereto the following:

> "Affidavit by candidate. Every candidate shall make and file an affidavit in substantially the following form:
>
> "I, ... , being duly sworn, say that I reside at . . . . . street, (city or town) of . . . . . , county of . . . . . in the state of Iowa; that I am eligible to the office for which I am a candidate, and that the political party with which I affiliate is the . . . . . party; that I am a candidate for nomination to the office of . . . . . to be made at the primary election to be held in June, 19 . . ., and hereby request that my name be printed upon the official primary ballot as provided by law, as a candidate of the . . . . . party. I furthermore declare that if I am nominated and elected I will qualify as such officer.
>
> (Signed) . . . . . .
>
> "Subscribed and sworn to (or affirmed) before me by . . . . . on this . . . . day of . . . . . , 19 . . .
>
> . . . . . .
> (Name)
>
> . . . . . .
> (Official title)"

This appears to be the only statute respecting the eligibility of a person desiring to be a candidate for elective office. The statement therein made by the candidate is that he is "eligible to the office for which I am a candidate". The eligibility consists of his being of constitutional age, that is, 21 years of age, and a resident of the state six months and the county ten days. The fact that Green may not be elected and may not qualify for the office by reason of the prohibition contained in Section 39.19 heretofore quoted deals with the eligibility of the person to be elected to the Board of Supervisors. Section 43.18 deals with the eligibility to be a candidate for the office. These statutes deal with different situations, one with the primary and one with the election. The same situation appeared in the case of Stafford v. State Election Board, 203 Okla. R. 132, 218 P. 2d 617, where it was said:

> "We are not dealing here with the eligibility of petitioner to hold the office if elected thereto. We agree with the contention of petitioner that the provision of the Constitution that members of the House of Representatives must be at least 21 years of age at the time of their election and not the primary election.
>
> "The Constitution does not prescribe the qualifications of a candidate in a primary election. Therefore, it was within the province and right of the Legislature to declare upon what terms and subject to what conditions the right to become a candidate before a primary election shall be conferred. The Legislature has exercised that right and petitioner is bound thereby."

In view of the foregoing I am of the opinion that Green may become a candidate for the Board of Supervisors for the term beginning January 2, 1959, and that the County Auditor has the duty of placing his name upon the ballot as a candidate for the office.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

ELECTIONS -- ABSENTEE BALLOTS
Applications and ballots may not be mailed to voter at same time.

April 15, 1958

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

Dear Sir:

This will acknowledge receipt of yours of the 3rd inst. in which you submitted the following:

> "A question has arisen in our county auditor's mind concerning an absentee voter. I believe that an Attorney General's opinion was issued covering an absentee voter outside of the county and the request for an application for a ballot, but the point was not answered as regards an absentee voter residing within the county but not able to go to the polls. The question is as follows:
>
> "'May the county auditor enclose an application for an absentee ballot and the ballot itself in an envelope to an individual who requests an application and ballot and at the time of requesting same, resides within the county in which he or she votes.'"

In answer to the foregoing I call your attention to the following section, being §53.10, which provides as follows:

> "Application mailed. If the voter is absent from the county and requests said application by letter, the auditor may send him both the application and ballot at the same time."

Absence from the county appears from this statute to be a condition to receiving both the application and ballot at the

58-4-14

same time. Thus, according to your statement, while the absentee voter under the provisions of §53.1(2) is entitled to vote an absentee ballot, application therefor and the ballot may not be sent to him at the same time.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

ELECTIONS -- ELECTION BOARDS. Additional board may be named in precincts with more than 1000 voters. Election counting boards are authorized for primary and general elections by code section 51.

April 3, 1958

Mr. Edward P. Powers
Appanoose County Attorney
Centerville, Iowa

Dear Sir:

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

> "The County Auditor has requested of me a ruling as to whether single election boards can be used in the small precinct with double election boards used in the larger precincts of our county.
>
> "We notice that Section 51.1 of the Code of Iowa states 'In all election precinct the Board of Supervisors may appoint for each primary and general election three additional judges and two additional clerks to be known as the election county board'.
>
> "May the Board of Supervisors under this Section appoint single election boards in the small precinct? We would appreciate an opinion of your office on this question."

In reply thereto I would advise that Section 49.12, Code 1958, provides as follows:

> "Election boards. Election boards shall consist of three judges and two clerks. Not more than two judges and not more than one clerk shall belong to the same political party or organization, if there be one or more electors of another party qualified and willing to act as such judge or clerk. In all election precincts with voters in excess of one thousand an additional election board may be named. Nothing in this chapter shall change or abrogate any of the provisions of law relating to double election boards."

58-4-15

Under this Section a single election board is directed in all precincts, large or small. In the event the precinct contains in excess of 1,000 voters an additional election board may be named.

2. In all precincts for each primary and general election an election counting board is authorized under the provisions of Section 51.1, Code 1958, which provides as follows:

> "Election counting board. In all election precincts the board of supervisors may appoint for each primary and general election three additional judges and two additional clerks to be known as the election counting board."

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

ELECTIONS -- POLLING PLACES (1) Neither County supervisors nor township trustees may purchase site or construct building in absence of statutory authorization.

April 10, 1958

Mr. Grant L. Hayes
Ringgold County Attorney
Mount Ayr, Iowa

My dear Grant:

I have yours of the 3rd inst. in which you submitted the following:

> "May I have an opinion relative to the following situation:
>
> "Due to school consolidation the rural school houses in Riley Township, Ringgold County, will all be sold before the primary election and one of these school houses has been used as a polling place for elections. When these school houses are sold there will be no available place in Riley Township where the election can be held.
>
> "Section 49.21 of the Code provides as follows: '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.'
>
> "Does this permit the Board of Supervisors to buy, out of the General Fund or any other Fund, one of these school houses and the acre of ground for the purpose of providing a suitable place in which to hold elections. The probable cost will not exceed $600 or $700.
>
> "I will appreciate your decision at your early convenience, as I do not find anything to guide our Board of Supervisors other than this section of the law."

58-4-16

In reply thereto I would advise as follows.

1. Under the Section quoted by you which imposes upon Township Trustees the duty to provide at the expense of the County polling places for holding elections, it has been the holding of the Department that this duty does not include either a duty or a power to buy a site or purchase a building for the purpose. There appears to be no statutory duty imposed on the Board of Supervisors comparable to the duty imposed on the Township Trustees in respect to providing a polling place. It would seem to be clear that in any event neither the Board of Trustees nor the Board of Supervisors has the power to buy a site or build a building for use as a polling place without express statutory authority.

2. In addition to the foregoing, on the authority of the attached opinion issued to the Audubon County Attorney on April 13, 1956, the power of a School Board to sell an abandoned school house is controlled by Section 297.15, Code 1958.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB
Enc.

ELECTIONS -- Primary elections, placing candidates for committeemen and committeewomen on ballot, use of pasters.

April 21, 1958

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

Dear Sir:

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

> "This office has been requested to obtain your opinion with reference to the following problem:
>
> "'On April 8, 1958, 12 persons filed affidavits as candidates for precinct committeemen and committeewomen. Candidates for these offices and for delegates have also been selected at the caucuses.
>
> "'In past elections the County Auditor had blank ballots printed with the necessary number of spaces as provided by the ratio adopted by the County Central Committees as provided in Section 43.90, Code of Iowa, which ballots were paid for by the County.
>
> "'Pasters with the names of the candidates selected at the caucuses were given to the voter together with a ballot before he entered the voting booth (Sec. 43.91). The pasters were paid for by the Central Committees.
>
> "'We would like to have an opinion as to whether we must have the names of the 12 candidates mentioned above printed on the ballots (Sec. 43.21) or printed on pasters at our expense, and the names of the candidates selected at the caucuses to be printed on pasters, as before, this expense to be paid by the Central Committees.

58-4-17

"'Also are the pasters on which committeemen, committeewomen and delegates names printed to be handed to the voters by the Judges of Election.

"'We would like to have this ruling at an early date so that the ballots will be printed in time for absent voting.'

"We would appreciate an early opinion on the above questions because, as noted in the last paragraph above, the information is needed before absent voters ballots go out. Thank you."

In reply thereto I would advise you as follows.

1. Insofar as the candidates for precinct committeemen and committeewomen are concerned, I call your attention to Section 43.21 which provides for the printing upon the ballot of the names of candidates for the office of county committeeman. This Section provides the following:

"Township or precinct office. The name of a candidate for an office to be filled by the voters of any subdivision of a county, including the office of party committeeman, shall be printed on the official primary ballot of his party:

"1. If a nomination paper signed by ten qualified voters of said subdivision is filed in his behalf with the county auditor at least seventy days prior to such primary election, or

"2. If the candidate files with the county auditor, seventy days prior to such primary election, his personal affidavit as provided by section 43.18."

2. Names of candidates for the office of committeeman selected at the caucus are not entitled to be printed on the official

ballot. Such names may be printed on pasters to be paid for by the Central Committee or other appropriate agency, but not by the County.

3. Insofar as the delegates are concerned, their names may not be printed on the ballot. However, the names of such delegates chosen by caucus or any other person named for delegate other than by caucus may be placed upon a paster and the paster may be placed upon the ballot on blank lines designated for voting for delegates. Another method of voting for delegates is by writing on the blank lines upon the ballot the name of the person for whom the elector chooses to vote for delegate. Pasters containing the names of delegates selected at caucus or otherwise shall be printed at the expense of the Central Committee or other appropriate agency, but not by the County.

4. The pasters containing the names of either committeemen or delegatesmay not be furnished to the voters by the judges or clerks of the election but must be handed to the voters outside the polling place and more than one hundred feet away.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

FEES:--Jurors in police court.

April 24, 1958

Mr. William N. Dunn
Hardin County Attorney
Hubbard, Iowa

Dear Sir:

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

> "I would appreciate your opinion on the following:
>
> "Section 367.1 of the 1954 Code of Iowa provides for the establishment of Police Courts which shall 'be a court of record'. Section 607.5 provides that petit jurors should receive a fee of $5.00 'on each days service or attendance in court of record'. I would therefore appreciate your opinion as to whether jurors appearing in criminal cases before Police Court would be paid $5.00 for appearing in a court of record or be paid $1.00 for appearing before a Justice of the Peace."

In reply thereto I would advise you that the police court being a court of record, jurors serving in criminal cases in such court are entitled to be paid $5.00 for such services. A Justice of the Peace court is not a court of record.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

58-4-18

FEES -- Police court. Payment where judge on salary

April 1, 1958

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

Dear Sir:

Receipt is acknowledged of your letter of February 15 as follows:

"Wapello County and the City of Ottumwa have had a difference of opinion over a period of more than twenty years in connection with costs in police court where the Police Judge, who is paid by the City of Ottumwa, acts on State cases. I am familiar with an Attorney General's Opinion which appears on page 557 of the Report of Attorney General for 1940, and reference is made to that opinion.

"I am enclosing herewith a copy of the opinion which Herman Schaefer, City Attorney for Ottumwa, has written to the City Manager. Said opinion is self-explanatory. I am not in full accord with the opinion written by Mr. Schaefer. We have agreed to submit his opinion to your office for consideration and then we will proceed to handle matters according to your opinion."

The questions presented by your inquiry arise under Section 367.13 of the Code which provides:

"Fees. Police judges in criminal cases under ordinances or state laws shall receive the same fees as justices of the peace receive in similar cases. In criminal cases under ordinance, said fees shall be payable from the municipal treasury, and in criminal cases under state law, said fees shall be payable from the county treasury. The council may by ordinance provide a salary in lieu of all fees, and thereafter all fees collected shall be paid into the municipal treasury."

58-4-19

The opinion of the City Attorney to which your letter refers, states in pertinent part:

> "It will be noted from reading Section 367.13 that at the present time all fees collected shall be paid into the municipal treasury. At the present time, the Police Judge is receiving a salary in lieu of all fees and it is my opinion that he has a right to assess costs or fees in all cases whether they be under the ordinance or under state law and when these fees are collected from the defendants, all shall be paid into the city treasury and none shall be paid to Wapello County, Iowa.
>
> "The remaining question is, can the city charge the county for fees assessed in a state case when it is impossible to collect the fees from the defendant. The statute is not altogether clear in this matter but it could be logically argued that the city can collect these fees from the county in the event that they are uncollectible from the defendant and if there is going to be an assessment of fees in all cases before the police court, I suggest that the county be billed for the uncollected fees in the state cases and this money paid to the city treasury. . ."

As is pointed out in another part of the City Attorney's opinion, Section 367.13, as it currently appears in the Code of Iowa, was enacted by the Fifty-fourth General Assembly in 1951 as a part of the general municipal statute revision adopted at that session and based upon the report and recommendations of the Municipal Statutes Study Committee. As is further pointed out by the City Attorney, said section differs from prior sections covering similar subject matter. The section in question was enacted in lieu of Section 363.40, Code 1950, which section was repealed by Chapter 149, Section 9, Acts of the Fifty-fourth General Assembly. The repealed section provided:

> "The police judge shall be entitled, in all criminal cases prosecuted before him in behalf of the state, to the same fees, to be collected in the same manner, as a justice of the peace in like cases; in prosecutions before him in behalf of the city, to such fees, not exceeding those for services of a like nature in state prosecutions, as the council may by ordinance provide."

In its deliberations, as a result of which the bill was prepared, introduced, and enacted making the aforesaid changes, the Municipal Statutes Study Committee was aware of the opinion appearing at page 557 of the 1940 Report of the Attorney General. Said opinion and the statutory language therein construed may well be considered the cause for the present language of the statute.

The salary which the statute authorizes to be paid police judges in lieu of fees is, in the express terms of the statute itself, "in lieu of all fees". The consequence of providing such salary is spelled out in the express language of the statute itself as: "thereafter all fees collected shall be paid into the municipal treasury."

Thus, the policy which dictated the present statutory language is revealed. It is summarized in the old saying "the laborer is worthy of his hire". According to Section 367.1 of the Code, the police court "shall always be open for business". Thus, the services of the police judge must be available at all times. Nevertheless, under the fee system which was the exclusive rule under the former statute, in times where a high level of law enforcement, which might be attributable in part to the efficiency of local officials, including the police judge, reduced the incidence of crime, the income of the police judge might drop to nothing. In other words, no crimes, no fees. This in turn might encourage the police judge to impose minimum sentences in all convictions obtained in his court for the purely economic reason of keeping his "regular customers" in business. For this reason the Municipal Statutes Study Committee, pursuant to recommendation of various delegations of local officials appearing before it, proposed an alternative to the fee system which was enacted into law. Because the Committee was also committed to the doctrine of "home rule", it proposed the salary authorization as an optional rather than mandatory feature in the law.

The Committee was also cognizant of the fact that the services of the police judge are not exclusively performed with respect to city ordinance violations. In other words, the salary paid the police judge from funds in the city treasury is in full of services irrespective of whether performed in connection with ordinance violations or statute violations. The effect of establishing such salary is thus simply to change the status of the judge from that of a "commission" man to that of a salaried man. A "guaranteed annual wage" is given in exchange for the fees the police judge would otherwise receive. Since the city provides all of the salary it is only logical it should receive into its treasury all of the fees irrespective of from what source collectible.

I am, therefore, of the opinion that both as a matter of logic and of the plain language of the statute, the quoted portion of the City Attorney's opinion is correct.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

GENERAL ASSEMBLY. Campaign expenditures. Amendment to Code Section 2.11 by 57th G.A. does not affect 1958 campaign.

April 14, 1958

Hon. Edward J. McManus
State Senator
Keokuk, Iowa

My dear Senator:

This will acknowledge receipt of yours of the 27th ult. in which you submitted the following:

> "The 57th General Assembly by Chapter 49, Section 1 amended Section 2.11, Code 1954, to provide as follows:
>
> "'The compensation of the members of the general assembly, except the speaker, shall be: To every member the sum of thirty dollars per day for each regular and each extra session while in session; and in going to and returning from the place where the general assembly is held, seven cents per mile, by the nearest traveled route, for each regular and each extra session.'
>
> "Section 56.8, Code 1954, provides as follows:
>
> "'It shall be unlawful for anyone who is a candidate for the office of state representative or state senator to expend in connection with any primary election campaign, special election campaign, or general election campaign more than fifty per cent of the salary of a member at one regular session of the general assembly.'
>
> "I hereby request your opinion as to the amount that a candidate for the office of state representative or state senator may expend in connection with a primary election campaign and general election campaign in view of Chapter 49, Acts of the 57th General Assembly, Section 1 without violating Section 56.8, Code 1954, there appearing to be no limitation on the length of a regular session."

58-4-20

In reply thereto I advise as follows. Insofar as the primary election and the general election of 1958 are concerned, I am of the opinion that the amount of campaign expenditures for either the primary or general election in such year by a candidate is governed by the provisions of Section 2.11, Code 1954, which provides as follows:

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

Section 56.8, Code 1954, quoted by you providing the amount to be spent campaigning without the chance of incurring the penalties therein provided is applicable to such elections in 1958. Reason for that conclusion is found in the terms of Chapter 49, Acts of the 57th General Assembly, amending Section 2.11, Code 1954. This Act provides the following:

> "Section 1. Section two point eleven (2.11), Code 1954, is hereby amended by striking all after line two (2) and inserting in lieu thereof the following: 'To every member the sum of thirty (30) dollars per day for each regular and each extra session while in session; and in going to

and returning from the place where the general assembly is held, seven (7) cents per mile, by the nearest traveled route, for each regular and each extra session.'

"Sec. 2. Section two point fifteen (2.15), Code 1954, is hereby amended by striking all after line four (4) and inserting in lieu thereof the following: 'be paid the sum of thirty (30) dollars per day during the remainder of such session.'

"Sec. 3. This Act shall be effective beginning with the fifty-eighth general assembly.

"Sec. 4. Section two point sixteen (2.16), Code 1954, is hereby amended by striking all after the word 'certified' in lines nine (9) and ten (10) and inserting in lieu thereof a period.

"Sec. 5. Section two point seventeen (2.17), Code 1954, is hereby amended by striking from line one (1) the words 'extra or adjourned'."

Clearly the foregoing, while amending Section 2.11, Code 1954, its effective and operative date is the first day of the 58th General Assembly, which constitutionally will convene in January, 1959. Opinion as to the amount of campaign expenses that may be spent under the situation outlined in your letter after January, 1959, is reserved.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

HOSPITALS -- CITY HOSPITALS (1) Powers of trustees are limited by Code section 380.6. (2) Power to establish a hospital is vested in city council under code section 368.27 (3) Expenditure of municipal enterprise fund is governed by Code section 404.10

April 10, 1958

Mr. Lynn W. Morrow
Allamakee County Attorney
Waukon, 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 Postville Hospital Trustees to seek an opinion to the following questions based upon the facts set forth below:
>
> "FACTS: By ordinance the City Council of Postville provided for the election of three hospital trustees. Said ordinance said nothing in regard to what powers would be conferred upon said trustees after election. A hospital was acquired and operated many years by the trustees, and there is now in the hospital fund a sum in excess of $100,000 composed of revenue from the operation of the hospital and about $20,000 in bequests. In addition thereto there is about $9000 in tax monies. The State Board of Health has directed Postville to build a new building or terminate their operation. Since then the hospital trustees have secured options on property needed for a new site.
>
> "QUESTIONS: Do City hospital trustees which have been established by City ordinance under provisions of Chapter 380 of the Code, have the same authority as County hospital trustees under Section 347.13 of the Code, or is their authority limited to management, control and government of such hospital as set forth in Section 380.6?

58-4-21

"If the City hospital trustees have only the authority set forth in Section 380.6, then is all power to acquire property and building buildings and additions thereto, solely in the hands of the City Council, with no authority whatsoever in the trustees in such matter?

"Depending on your answers above, can either the trustees of the City Council spend the $100,000 funds on hand, or any part thereof, for the purpose of building a new building, or to acquire property for new hospital site, without the approval of such project by the voters?"

In answer thereto I advise as follows.

1. In answer to your question #1 with respect to whether hospital trustees of a City hospital established by city ordinance have the same authority as County hospital trustees under Section 347.13 or whether their authority is limited to management, control and government of such hospital under the provisions of Section 380.6, I advise that such City hospital trustees have only the authority vested in them by Section 380.6 and not otherwise.

2. In answer to your question #2, in the event the hospital trustees have only the authority vested in them by Section 380.6 as to whether the power to acquire property and build buildings and additions thereto is solely in the hands of the City Council with no authority whatsoever in the trustees, I advise that the authority to establish a city hospital is vested in the City Council by Section 368.27, Code 1958, and no authority is vested in that respect in the hospital trustees.

3. In answer to your question with respect to the disposition of the $100,000 fund on hand, I would advise that this money is available in the municipal enterprises fund under the specific provision of this section to the effect that:

> "404.10 * * *
>
> "6. When a municipal hospital has been established, for the purpose of purchasing sites for hospitals or sites with buildings thereon for hospital purposes, and constructing, reconstructing, rebuilding, remodeling or enlarging buildings to be used for hospitals."

without submission of the matter to the electors.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

HOSPITALS

COUNTY HOSPITALS--Bonds. (1) Code Section 346.11 not applicable. (2) Section 347.1 to 347.8, 407.2, and 75.1 to 76.9 applicable.

April 15, 1958

Mr. Robert D. Parkin
Jefferson County Attorney
Fairfield, Iowa

Dear Sir:

Receipt is acknowledged of your letter of April 9 as follows:

"The Jefferson County Hospital was established under Chapter 347 of the Code of Iowa.

"The Board of Trustees is investigating the possibility of obtaining an additional bond issue, to be paid by a tax levy. They have been informally advised that the issue would be limited by Chapter 346, Section 11, of the Code and that under the above they would be unable to add to the bonded indebtedness.

"As County Attorney, I hereby request a ruling from you relative to the following questions:

"1. Is the sale of bonds for the expansion of the hospital limited by Section 346.11 of the Code?

"2. Does any part of the Code limit the bonding for hospital construction other than that found under 347.5 and 347.7 under County Public Hospitals?"

1. In answer to your first question you are advised that Section 346.11, Code of Iowa, by its express terms applies to "outstanding bonds issued in conformity with this chapter." Reference to Sections 346.1 and 346.2 reveal "this chapter" does not refer to county hospital bonds. Further note that by express provision of Section 347.5, hospital bonds are payable only from the "county public hospital fund" whereas bonds issued under Chapter 346 are payable from a fund "known as the bond fund" under Section 346.12.

58-4-22

2. In answer to your second question you are advised that in addition to the sections to which your question refer, Sections 347.1, 347.2, 347.3, 347.4, 347.6, 347.8, 407.2, and 75.1 to 76.9 limit the time, circumstances, manner and amount of bonds which may be issued.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

ILLEGITIMATE CHILDREN. whether Code section 675.11 extends to foreign nationals is for the Courts to decide.

April 15, 1958

Dr. Karl Wolf
Consul of Austria
116 South Michigan Avenue
Chicago 3, Illinois

Dear Sir:

Receipt is acknowledged of your letter of April 8 in which you inquire whether Section 675.11, Code of Iowa, permits complaint to be brought in the courts of Iowa under Chapter 675, Code of Iowa, by an unmarried mother or an illegitimate child, residing abroad, against a citizen of the State of Iowa, if such mother or child is neither a resident nor a citizen of the State of Iowa.

Section 675.11 provides as follows:

"Nonresident complainant. It is not a bar to the jurisdiction of the court, that the complaining mother or child resides in another state."

Examination of annotations covering the period from the enactment of said provision to the present time reveals no case precedents with respect to the question you ask. Consequently, the applicability of the statute in the circumstances hypotheticated in your letter would be an issue to be decided by the court on appropriate motion were litigation brought in such circumstances.

We regret that we are unable to furnish a conclusive answer to your question.

Very truly yours,

NORMAN A. ERBE
Attorney General of Iowa

NCA:LCA:md

58-4-23

INSURANCE- Group hospital and surgical insurance may be provided on payroll deduction plan by either city or county but only the city may contribute to premium cost.

April 8, 1958

Mr. Evan L. Hultman
Black Hawk County Attorney
Suite 201 First National Bldg.
Waterloo, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 19th ult. in which you submitted the following:

> "My office has been contacted both by employees of the City of Waterloo and employees of the county of Black Hawk concerning the question of the city or county participating in a group hospitalization and surgical insurance program for the employees and their dependents. Mr. Carl Fagerlind, the Superintendent of the Street Department of the City of Waterloo, phoned me to the effect that he asked about this problem at a meeting in Des Moines a few days ago at which time you indicated to him that he should again contact my office.
>
> "The two specific questions with which I am concerned in this matter are as follows:
>
> "1. May the city of Waterloo or Black Hawk County deduct as a payroll deduction a certain fixed amount of money at the request of the employee to procure and pay group hospitalization and surgical insurance for the employees concerned?
>
> "2. Could the City of Waterloo or Black Hawk County participate in a group hospitalization and surgical insurance program for their employees and their dependents by paying part of the premium for such coverage?
>
> "It would seem to me that in the first instance such a payroll deduction would be no different from that of United Services, Community Fund or

58-4-24

> any other payroll deductions which an agency of government withholds at the request of the employees and pays to the agency concerned. The only thing that the agency of government would be doing in the first instance would be a bookkeeping transaction for the betterment and protection of its employees.
>
> "The second question presents an entirely different situation in that the agency of government would be entering into an agreement with the employees to furnish group hospitalization and surgical insurance to the employees on a contributing basis by the agency of government."

In reply thereto I advise as follows.

1. A. In answer to your question #1 insofar as the City of Waterloo is concerned, assuming that you use the word "surgical" in the question the same as "medical", authority is vested therein to deduct from the payroll of city employees a fixed amount to procure and pay group hospitalization and surgical insurance either under Section 365A.1 and Section 365A.3, Code 1958, each providing as follows:

> "365A.1 Authority in cities and towns. The council in any city or town may establish plans for and procure group insurance, hospital or medical service for the employees of such city or town."
>
> "365A.3 Assessment of employees. All employees participating in any such plan the fund of which is created under the provisions of subsections 1 and 2 of section 365A.2 shall be assessed and required to pay an amount to be fixed by the city council not to exceed the two percent which shall be contributed by the city according to the plan adopted, and the amount so assessed shall be deducted and retained out of the wages or salaries of such employees."

or under Section 514.16, Code 1958, which provides as follows:

> "Governmental employees included. An employee or employees of the state, or of any county, city, or town, or of any institution supported in whole or in part by public funds, or any subdivisions thereof, may authorize the deduction from his or their salary or wages of the amount of his or their subscription payments to any corporation operating a non-profit hospital service plan or medical service plan as provided in this chapter. The governing body of the state, or of the county, city, or town, or of any institution supported in whole or in part by public funds, or any subdivisions thereof, may authorize deductions from the salaries or wages of employees subscribing to such non-profit hospital service plan or medical service plan. The authorization by an employee or employees for deductions from his or their salaries or wages shall be evidenced by a written request signed by the employee directed to and filed with the treasurer of the state, county, city, or town, or of any institution supported in whole or in part by public funds, or any subdivisions thereof, and said treasurer is authorized to draw and deliver checks in favor of the hospital service corporation or medical service corporation stipulated in such authorization for the amount covering the sum total of the deductions authorized. The foregoing provisions are not to be deemed an assignment of salaries or wages."

1. B. Insofar as Black Hawk County is concerned, such payroll deduction may be made from the salary or wages of County employees under the provisions of Section 514.16, previously exhibited.

2. A. In answer to your question #2, the City of Waterloo is authorized under the provisions of Chapter 365A to make contributions from its General Fund in payment of group coverage of hospitalization and surgical insurance for City employees.

However, such insurance is not available to the dependents of such employees. See opinion of this Department issued September 25, 1957, copy of which is enclosed.

2. B. Insofar as Black Hawk County is concerned, there is no statutory authorization for contribution by the County in any group hospitalization or surgical insurance program for its employees.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB
Enc.

LEGAL SETTLEMENT -- Mental age is not the statutory test for determining legal settlement.

April 23, 1956

Mr. Lynn W. Morrow
Allamakee County Attorney
Waukon, Iowa

Dear Sir:

Receipt is acknowledged of your letter of April 17 as follows:

"I would like an opinion based upon the following facts:

"Facts: The person in question is 25 years 4 months of age, having an IQ of 52 and a mental age of 7 years 10 months, according to psycological examination conducted by State Department of Public Instruction. The parents of this person were both retarded, her brother is a patient at Woodward and the parents were not able to provide and care for this child and she was taken voluntarily and without court order or action, and raised by a family other than her parents, who knew that this person was retarded. A few years ago this family, with this person, moved to this county. No notice to depart was served upon them by Allamakee County authorities. This person is not now a public charge and is not now receiving support from public funds. However, prior to her 18th birthday assistance was given this family by Winneshiek County for this person. Allamakee County has paid no support or assistance to or for her.

"Question: Would the county of legal settlement remain that of the parents, Winneshiek County in this case, at the time this child was taken to live in the foster home, or would Allamakee County be considered the county of settlement for this person?"

58-4-25

Under the facts stated in your letter there appears nothing to have prevented the person in question from acquiring legal settlement under Section 252.16(1 and 2). There is nothing in the statutes making mental age or I.Q. of a person not an inmate of an institution a relevant test for determining settlement. Irrespective of "mental" age the person is definitely not a "minor" child and can, therefore, acquire settlement by "continuously residing in one county of this state for a period of two years without being warned to depart".

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

MINORS -- CHILD LABOR. Drive-in ice cream and soft-drink establishment is a restaurant within the meaning of Code section 92.11.

April 28, 1958

Mr. Don Lowe
Commissioner
Bureau of Labor
L o c a l

Dear Sir:

In your letter of April 16, 1958, this question was asked:

Under the Child Labor Law, Chapter 92, 1958 Code of Iowa, is a self-service drive-in establishment dispensing only ice cream and soft drinks for consumption in automobiles on the premises a "restaurant" within the meaning of Section 92.11, 1958 Code of Iowa?

Section 92.11, 1958 Code of Iowa, is stated in part below:

> "No person under sixteen years of age shall be employed ..... in or about any ..... restaurant, ...".

The statutory definition of "restaurant" is contained in Section 170.1(4), 1958 Code of Iowa, and is as follows:

> "'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 place where food is served for pay, ...". (Emphasis supplied)

58-4-26

This definition appears broad enough in scope to include the "dairy creme" type establishment herein considered. However, there are no reported Iowa cases interpreting this wording with respect to a drive-in establishment selling only ice cream and soft drinks for consumption in automobiles on the premises.

In construing a zoning ordinance a drive-in, self-service type establishment was held to be a restaurant even though food was consumed in automobiles parked on the premises. Food Corporation v. Zoning Board of Adjustment of the City of Philadelphia, 384 Pa. 288, 121 A 2d 94.

Therefore, you are advised that Section 92.11, 1958 Code of Iowa, applies to establishments where ice cream and soft drinks are sold for consumption in automobiles on the premises.

Very truly yours,

HUGH V. FAULKNER
Assistant Attorney General

HVF/fm

PAROLE

DETAINERS - PRISONERS - PAROLE - EXTRADITION -

1. Section 247.5, 1954 Code of Iowa, as amended by Chapter 117, 57th G. A., does not apply to detainers filed by out-of-state authorities, and such detainers are not therefore invalid when not supported, within six months, by a grand jury indictment or county attorney's information.

2. No right to demand trial out of state exists with regard to charges filed in support of an out-of-state detainer because of the answer to the above question.

3. Where detainer is not invalid parole would not be granted as a matter of policy and question of extradition becomes moot.

April 9, 1958

Board of Control of State Institutions
State Office Building
L o c a l

Attention: Mr. Robert C. Lappen, Chairman

Gentlemen:

In your letter of February 6, 1958, you have, in essence, posed the following questions:

1. Does the amended portion of Section 247.5 apply to out-of-state detainers which are not, within six months, supported by a county attorney's information or a grand jury indictment?

2. May a prisoner demand immediate trial out of state when an out-of-state detainer is filed against him?

3. If so, and the prisoner refuses to return, is it necessary to resort to extradition in order to obtain the prisoner's return to Iowa?

Section 247.5, 1954 Code of Iowa, as amended by Chapter 117, Fifty-Seventh General Assembly, is set out below:

> "247.5 Power to parole after commitment - detainers. 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; provided, however, after any person has served fifteen years of a life term, the board of parole shall review the case and interview personally all such persons and make such recommendations as they see fit to the governor, and shall make similar interviews in each such

58-4-27

case at least every three years thereafter.

"The parole may be to a place outside the state when the board of parole shall determine it to be to the best interest of the state and the prisoner, under such rules and regulations as the board of parole may impose.

"Prisoners against whom detainers have been filed, may, after serving a portion of their sentence, be released by parole to the institution or authorities filing the detainer.

"Any detainer filed against a prisoner must within six months be supported by a grand jury indictment or county attorney's information. In the event such indictment is returned or information is filed, the prisoner shall have the right to demand immediate trial at the next term of court where the charge is filed. The prosecuting agency shall pay all costs of transportation, necessary expenses incurred by the prisoner and such guards and other safety measures as the warden shall deem necessary for the prisoner to appear at his trial.

"In the event a detainer is not supported within six months by a county attorney's information or grand jury indictment, or in the event the prosecuting agency refuses or fails to give the prisoner immediate trial, or refuses or fails to furnish transportation and pay all other necessary and related costs incident to the prisoner appearing at his trial, the detainer shall be held to be invalid and the parole board shall disregard such detainer in considering a prisoner for parole."

With regard to your questions, you are advised as follows:

1. The last two paragraphs of the above section constitute the amendment thereto. Under the amended portion you will note that a detainer must, within six months, be supported by a grand jury indictment or county attorney's information. Not all states refer to the prosecuting attorney as the county attorney.

For instance, in some states this particular officer is titled the "District Attorney". Further, not all states provide for prosecution based on a county attorney's information.

In addition, the explanation attached to House File 457, enacted as Chapter 117, Fifty-Seventh General Assembly, is prefaced by the following remark:

> "This bill will correct a vicious practice that now exists in Iowa." (Emphasis added)

Such wording indicates the intent of tha legislature was that only detainers filed by Iowa authorities were to be considered invalid if not supported within six months by a grand jury indictment or a county attorney's information.

As was stated in Henriksen v. Grandic Stages, 216 Iowa 643, 246 N.W. 913, and Rastede v. Chicago, St. P., M. & O.R. Co., 203 Iowa 430, 212 N.W. 751, the statutory law of a state cannot be given extraterritorial effect. To hold invalid an out-of-state detainer not supported by grand jury indictment or county attorney's information would be giving the Iowa law extra-territorial effect. Therefore, the conclusion is that detainers filed by out-of-state authorities are not within the scope of Section 247.5, as amended.

2. Since Section 247.5, as amended, does not apply to detainers filed by out-of-state authorities the answer to your second question is in the negative.

3. In view of the fact that the third question presupposes an affirmative answer to the second query, an opinion is unnecessary.

Very truly yours,

HVF/fm

NORMAN A. ERBE, Attorney General of Iowa

HUGH V. FAULKNER, Asst. Attorney General

April 8, 1958

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

Attention: Parole Secretary

Dear Sir:

The following questions have been referred to this office for reply:

> "We would appreciate your advising us as to whether or not the state of Iowa is a party to any interstate parole compact with Illinois. We would appreciate your advice as to whether or not, if the state of Illinois were to request the return of a party from Iowa to Illinois as a parole violator, would the Governor or any other state official have any discretion as to whether or not this party should be so returned. We recognize that in an extradition proceeding, the Governor's discretion is controlling. Does this apply to a request for a return of a parole violator?"

You are advised that authority to enter interstate parolee supervision compacts is found in Section 247.10, 1954 Code of Iowa. This provision first appeared as Chapter 85, Forty-Seventh General Assembly; pursuant thereto, Governor Nelson G. Kraschel signed the interstate compact on August 26, 1937. On September 22, 1937, Governor Henry Horner of the state of Illinois, under the authority of similar enabling legislation, entered this interstate compact. Therefore, the states of Iowa and Illinois are members of the reciprocal out-of-state parolee supervision compact.

As to the question regarding discretion of the Governor, or any other state official, it is necessary to first determine the basis for out-of-state parolee supervision. By the terms

58-4-28

of the Interstate compact such a parole may be permitted if:

> "(a) Such person (parolee) is in fact a resident of or has his family residing within the receiving state and can obtain employment there.
> (b) Though not a resident of the receiving state and not having his family residing there, the receiving state consents to such person being sent there."

If the parole is permitted on the basis of either (a) or (b) above stated, then Illinois, as the "sending state", would have the following prerogative under paragraph (3) of the Interstate compact:

> "(3) That duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any person on probation or parole. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived on the part of the states party hereto, as to such persons. The decision of the sending state to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving state: Provided, however, That if at the time when a state seeks to retake a probationer or parolee there should be pending against him within the receiving state any criminal charge, or he should be suspected of having committed within such a state a criminal offense, he shall not be retaken without the consent of the receiving state until discharged from prosecution or from imprisonment for such offense." (Underscoring supplied)

Therefore, if the parolee is in the "receiving state" within the terms of the Interstate compact, there is no discretion in the Governor or any other state official because the extradition procedure is waived as established by the above underscored wording. However, there is this word of caution, should the parolee be in Iowa but not under the provisions of the Interstate compact a different result obtains. In that case, as a parole violator, the only method of effecting return to Illinois, "the sending state", is by the extradition procedure set forth in Chapter 759, 1954 Code of Iowa. Of course, this presumes that the parole violator refuses to waive extradition.

Very truly yours,

NORMAN A. ERBE
Attorney General of Iowa

HVF/fm

HUGH V. FAULKNER
Assistant Attorney General

SCHOOLS:

1. Lease of county fair buildings for use as temporary schoolhouse.
2. Enlargement of boundaries described in reorganization petitio

April 10, 1958

Mr. Leslie P. Turner
Chickasaw County Attorney
Nashua, Iowa

Dear Sir:

Receipt is acknowledged of your letter of April 10 as follows:

"I have several problems that I would like an opinion from your office to clarify differences of opinion as to the law between me, as County Attorney, and other attorneys representing groups interested in these problems:

"The problems are as follows:

"1. The Nashua Community School District was duly organized and the new school board wishes to lease a building on the Nashua Fairgrounds owned by the County and under the control of the incorporated fair association. The building in question could be coverted into temporary school housing at a nominal cost to the school board and could be used for approximately three years until permanent building is available. The building would be available for the fair season during the fair and is not used during the rest of the year.

"My question: Does the fair association have the authority under Section 174.2 to enter into a contract whereby the school board may have the use of this building for a period of three years or until such time as a bond issue will pass and a permanent building be erected. If the Articles of Incorporation of the fair association would not permit such an agreement to be made would it be also possible for these articles to be amended to allow the fair board to enter into this agreement with the school board if the answer to the first question here is yes.

58-4-29

"2. Does the provision of 275.2 requiring 25% of those voting at the last regular school election to sign a petition prior to calling an election on a bond issue in excess of one and one-quarter per cent of the assessed value of the taxable property prevent a newly organized community school district from holding such an election until after the first general school election after the reorganized district has become a legal entity. In other words must the Nashua District wait until after the 1953 election before they can present a bond issue to the voters in excess of the one and one-fourth per cent, or would the election of the original five community school district directors satisfy the requirements of 275.2; even though the district was not in existance at the time the election was held?

"3. A portion of a district of less than four government sections was assigned by the County Board of Education to a new community school district following the reorganization procedure and now certain parties in this portion of a district are seeking to get out of the reorganized district to which they were assigned. My problem is, can the County Board of Education at the final hearing under the provisions of Chapter 275.15, readjust the boundarys of the community school district seeking to reorganize with additional territory, so that the objectors now presently in the community district can be removed and later assigned to another district that is not a reorganized community school district."

1. In answer to your first question, Section 274.2 provides in pertinent part as follows:

"In addition to the powers granted herein the society shall possess the powers of a corporation not for pecuniary profit under the laws of this state and those powers enumerated in its articles of incorporation, such powers to be exercised before and after the holding of such fairs."

With respect to the powers of "a corporation not for pecuniary profit", Section 304.2 provides in pertinent part:

". . .It may have a corporate seal, alterable at its pleasure, and may take by gift, purchase, devise, or bequest real and personal property appropriate to its

creation, and may make bylaws. It may make contracts, borrow money and transfer property, possessing the same powers in such respects as natural persons. . ."

It, therefore, appears that societies owning buildings under Section 174.1 would have authority to lease same out under Sections 174.2 and 504.2 between fairs.

However, it is noted that your letter refers to a building owned by the county rather than by the association. It, therefore, appears that the powers of the association with respect to the building in question are defined in Section 174.15 rather than by the above-quoted sections. Apparently there are two kinds of fair societies, one kind actually owning buildings as provided in Section 174.1(2) with powers in respect thereto defined in Sections 174.2 and 504.2 and the other acting as agent or manager of county-owned buildings and grounds for the county. See Section 174.10 which provides:

". . .The provisions of section 174.1 as to ownership of property shall not apply to societies under this section."

Powers with respect to county-owned buildings appear defined in Section 174.15 as follows:

". . .such society is authorized to act as agent for said county in the creation of buildings, maintenance of grounds and buildings or any improvements constructed on such grounds. Title to new buildings shall be taken in the name of the county but the county shall not be liable for such improvements or expenditures therefor." (Emphasis supplied)

And in Section 174.16 which provides:

"The right of such society to the control and management of said real estate may be terminated by the board of supervisors whenever well conducted agricultural fairs are not annually held thereon by such society."

Thus it appears that with respect to county-owned buildings the power of management and control in the society extends only to matters directly related to conducting annual fairs and does not include the power to lease the county-owned buildings to tenants for purposes not related to the annual fair. The power to lease county-owned buildings seems to exist only in the board of supervisors under the provisions of Section 332.3, subsections 13 and 17. Said subsections provide:

"13. When any real estate, buildings, or other property are no longer needed for the purposes for which the same were acquired by the county, to convert the same to other county purposes* or to sell or lease* the same at a fair valuation.

*Exception as to county hospital organized under ch 269, Code 1939, see 518A, ch 135.23"

"17. To lease or sell real estate owned by the county and not needed for county purposes."

Therefore, I am of the opinion that the only power to lease county-owned fair buildings is that conferred on the board of supervisors by the foregoing provisions and that the board of supervisors can enter into such leases only for the portion of the year during which the buildings are not needed for fair purposes and during which the occupancy under such lease will not interfere with the maintenance or improvement functions of the fair society and will not interfere with preparation for the fair.

2. The answer to your second question is furnished by the enclosed opinion dated August 22, 1955, and directed to Mr. Charles Mather, Jac County Attorney.

3. In answer to your third question, you are advised that provision for an "adjourned hearing" to give residents of territory affected by changes in petitioned-for boundaries notice and an opportunity to be heard was repealed from Chapter 275 by the Fifty-seventh General Assembly. The effect of such repeal would seem to bring the situation described in your letter within the rule in Brooker v. Ludlow, 189 Iowa 760.

Your attention is directed to the enclosed opinion dated June 28, 1955, directed to Walter Willett, Tama County Attorney, which furnishes the answer to your question if in reading same, you bear in mind that the aforesaid repeal now makes true with respect to the first (and only) hearing what was therein said with respect to the second (or adjourned) hearing. In other words, the repeal of Section 275.15, Code 1954, revived the rule in Brooker v. Ludlow.

Very truly yours,

LEONARD C. EBELS
Assistant Attorney General

LCEbels
Enc. Bk. 1, [illegible]
Bk. 1, [illegible]

August 22, 1955

Mr. Charles Mather
Sac County Attorney
Sac City, Iowa

Dear Mr. Mather:

Receipt is hereby acknowledged of your letter of August 19 in which you submit the following:

> "The Odebolt Community School District was organized in July 1955. It will not have its first regular school election until March 1956. The school district would like to contract for indebtedness in excess of 1 1/4% of the assessed value of the taxable property in the district under provisions of Section 296.2 of the Code of Iowa.
>
> "Is it possible for a school district to legally call an election as provided in Section 296.2 for the purpose of authorizing bonded indebtedness in excess of the 1 1/4% of the assessed value of the taxable property in the district before it has held its regular March school election after becoming a district?"

Section 296.2, Code 1954, provides as follows:

> "Before such indebtedness can be contracted in excess of one and one-quarter percent of the assessed value of the taxable property, a petition signed by a number equal to twenty-five percent of those voting at the last regular school election shall be filed with the president of the board of directors, asking that an election be called, stating the amount of bonds proposed to be issued and the purpose for which the indebtedness is to be created, and that the necessary schoolhouse or schoolhouses cannot be built and equipped, or that sufficient land cannot be purchased to add to a site already owned, within the limit of one and one-quarter percent of the valuation."

Note that the number of signers necessary to the petition is determined by reference to the number of votes cast at the last "regular" school election. "Regular" school election is defined in section 277.1, Code 1954, as follows:

> "The regular election shall be held annually on the second Monday in March in each school corporation and in each subdistrict for the purpose of submitting to the voters thereof any matter authorized by law, except that in all independent school districts which embrace a city and which have a population of one hundred twenty-five thousand or more such election shall be held biennially on the second Monday in March of odd-numbered years."

Thus, a school district which came into being on July, 1, 1955, would have no "regular" school election until the second Monday in March 1956. Since it is impossible to determine how many votes will be cast at such election or, for that mater, what number of eligible voters will reside in the district at the time of such election, it is an impossibility for a new school district to satisfy the statutory requirement as to petition for authorizing an election on the question of bonded indebtedness in excess of 1 1/4% of the assessed value of taxable property in such district until the district has held its first "regular" school election as hereinabove defined.

The election at which the first board of directors was elected would not qualify as a "regular" election for two reasons: first; section 275.25, Code 1954, expressly designates the initial election of directors as a "special election" and, second; under the provisions of section 275.21, Code 1954, the new district does not become effective until after the initial election of directors.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

June 28, 1955

Mr. Walter J. Willett
215 West Third Street
Tama, Iowa

Dear Sir:

I am in receipt of your letter of June 24, in which you submit the following;

> "Does the County Board of Education have the power and authority to enlarge a proposed school district area when the same is not included in the original petition on file, and if they have such power by what means and with what restrictions are they to be governed?"

Reorganization of school districts is governed by chapter 275, Code 1954, which was enacted as chapter 117, Acts of the 55th General Assembly. Reference to the historical references which appear as footnotes to each section in the 1954 Code reveals that a substantial part of the new enactment was derived from chapters 274 and 276,Code 1950. Sections 275.1 to 275.9 refer to planning by the County Boards of Education. Sections 275.11 to 275.23 describe the procedures whereby districts so planned or proposed variations thereof may be effectuated. The procedure in section 275.11 to 275.23 is obviously derived from and in many respects identical with the method for formation of a consolidated school district under chapter 276, Code 1950.

The original provision on the power of a county board of education to alter the petitioned-for boundaries of a proposed school corporation appears in chapter 149, Acts of the 38th General Assembly. Under said procedure, the first hearing on the proposed district was held before the county superintendent who was empowered to hear objections and fix the boundaries. (See section 276.5, Code 1950) An appeal from the decision of the county superintendent to the county board of education was provided, and the powers of the county board were as follows:

> "The county board of education shall determine such appeal within five days after the submission thereof which shall be final as to such boundaries." (Sec. 1, Chap. 149, Acts of the 38th G.A.)

In Brooker v. Ludlow, 189 Iowa 760, the power of a county board of education to enlarge petitioned-for boundaries under the foregoing section was ruled on by the Supreme Court as follows:

> "There is no power,– at least no express power, and we think none is implied,– under the statute, authorizing the county superintendent or the board to enlarge the boundary lines by taking in territory not included in the petition, <u>when the residents are not notified, and when they have an opportunity to make objection or be heard</u>." (Underscoring ours)

Thus, under a set of statutory provisions quite similar to those in chapter 275, Code 1954, the Supreme Court ruled that a county board of education had no power to enlarge petitioned-for boundaries to include territory not included in the petition because the residents on such added territory were afforded no notice or opportunity to make objection or be heard. Subsequent to the said ruling of the Supreme Court, the 40th General Assembly, Extra Session provided for notice to and opportunity by such persons to make objections and be heard. Section 21, Chapter 16, 40 Ex. G.A. made the following provision:

> "If such boundaries are neither those petitioned for nor those fixed by the county superintendent, the hearing shall be adjourned, the notice of such adjourned hearing shall be given as for the hearing before the county superintendent, and upon the final hearing the board of education shall fix the boundaries or dismiss the petition, which shall be final."

The above provision was carried over and now appears in section 275.15, Code 1954 as follows:

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

Thus, a county board has power to enlarge petitioned-for boundaries, provided proper notice is given of the adjourned hearing provided by statute, so that persons affected by the charge but who had no objection to the boundaries described in the petition have an opportunity to object and be heard, as required by the decision of the Supreme Court in Brooker v. Ludlow, supra.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

SCHOOL REORGANIZATION. May proceed "progressively" pursuant to "tentative" plans under authorization of Code sections 275.5 and 275.6

April 21, 1958

Mr. William S. Sturges
Plymouth County Attorney
24½ Plymouth Street, S. W.
LeMars, Iowa

Dear Sir:

Receipt is acknowledged of your letter of April 16 as follows:

"On December 10, 1957 you addressed an opinion to Mr. Mark B. Buchheit, Fayette County Attorney, in which you held, inter alia, that under Section 275.6 an election may be held for the formation of a new district before completion of the county plan, assuming that all other procedures for the specific proposal have been completed.

"How do you reconcile this opinion with Section 275.9 of the Code? This section states, in part, that the provisions of Section 275.1-275.5 shall constitute a mandatory prerequisite to the effectuation of <u>any</u> proposal for district boundary change; and, that it shall be the <u>mandatory</u> duty of the County Board, or joint boards, to <u>dismiss</u> the petition if the above provisions are not complied with fully. The words 'above provisions' refer to Sections 275.1-275.5, do they not?

"I have this question presented to me and I would greatly appreciate your opinion on the foregoing."

Reconciliation of the Code Sections to which you refer occurs in the language of Section 275.5, Code 1958, which provides in pertinent part:

"<u>Pending completion of the final plans provided for in sections 275.1 to 275.4 hereof</u>, the county board of education <u>shall</u> prepare and approve <u>tentative</u> plans for

58-4-30

reorganization after consultation with the boards of the various districts in the county and the state department of public instruction. Within ten days after the county board has approved their tentative plan they shall file such plan with the state department of public instruction. . . ." (Emphasis added)

Thus, the statute provides on its face that reorganization may proceed prior to adoption of the final plan based upon the studies and surveys provided in Sections 275.1 to 275.4.

I get the distinct impression from your letter that your information as to the contents of my opinion of December 10 has been gained from some secondary source and not from the opinion itself. I am therefore enclosing a thermo-fax copy for your file. The opinion does not say reorganization may proceed without plan, as you seem to have been informed, but rather states that progressive reorganization may proceed under Section 275.6 "assuming that tentative plans covering all the area of the proposed reorganization have been made and filed as provided in section 275.5."

In other words, completion of studies, surveys, and the final plan for the entire county may be an operation requiring a number of years. In the meantime the mandatory word "shall" in Section 275.5 requires the filing of tentative plans. In the first instance such tentative plans as adopted and filed after consultation with the local boards and state department may consist of nothing more than a plat of the existing school districts in the county. As studies and surveys progress, further tentative plans may be filed showing one or more planned reorganizations covering part of the county, but continuing to picture the status quo for the balance of the county.

Thus, the opinion in question says nothing more than that reorganization may proceed under tentative plans made and filed under the provisions of Section 275.5 and that the authority for so proceeding is contained in Section 275.6. Since this amounts to nothing more than the not-particularly-startling assertion that the statutes mean what they say, I feel there is little, if anything, in it to reconcile. Any other construction would amount to implied repeal of both sections 275.5 and 275.6 and certainly no authority need be cited for the familiar rule that "implied repeals are not favored".

I trust the foregoing answers your question and perhaps goes

to unnecessary length in so doing, as I believe you would have found the opinion of December 10, 1957 self-explanatory had it been shown to you rather than indirectly reported to you, as was apparently the case.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md
Enc. Bk. 9, #93.

SCHOOL REORGANIZATION: A consolidated district not operating a school is not a rural independent district operating a school for purposes of Section 275.20, Code 1958.

April 7, 1958

Honorable William H. Harbor
Henderson
Iowa

Dear Senator Harbor:

Receipt is acknowledged of your letter of April 1 in which you submit the following questions on school reorganization elections:

"The district that I have in mind is involved in a reorganization in which a proposal is seeking a portion of the original district. The involved parent district is a rural district of considerably over eight (8) sections. This rural district was formed many years ago, long before the present laws were thought of. They operated three (3) rural schools, through the eighth grade, for many years. Several years ago they closed the schools but continued functioning as an organized district for the purpose of handling educational matters as regards sending students to other urban schools. At the time of organizing this district they assumed the name of a Consolidated District not a Rural Independent District.

"The point in question is this: Will this district qualify for voting eligibility to allow the portion of their district to leave in favor of another reorganization proposal in accordance with Code Section 275.20 as amended by the 57th General Assembly? Can this Rural Consolidated District be construed as a Rural Independent District? Also does the fact that they operated schools long before the effective date of the act fulfill that portion stating --'or a rural independent school district of eight (8) sections or more operating a school formed prior to the effective date of this act.--'?"

58-4-31

In answer thereto you are advised that a "Consolidated" school district is not an "Independent" school district within the meaning of the statutes. See Cook v. Cons. Sch. Dist., 240 Iowa 744, 38 N. W. 2d 265. This would preclude eligibility of persons residing outside the proposed reorganization boundaries but within the affected consolidated district from voting in the situation you describe. The fact stated in your letter that such district is not presently "operating" a school would likewise preclude such eligibility in the example described in your letter.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

SCHOOL REORGANIZATION: Under Section 274.5, Code 1958, questions pertaining to the validity of the organization of a school district become moot upon the runing of the period of limitations therein prescribed.

April 9, 1958

Honorable Raymond R. Gillespie
Dexter
Iowa

Dear Senator Gillespie:

Receipt is acknowledged of your letter of April 7 as follows:

"I would like to have an opinion of your office, relative to the following matter:

"Early in the spring of 1957, the Casey and Adair School Districts, with the approval of the County Boards of Education of Adair and Guthrie Counties, circulated a petition to merge or consolidate the two districts. The petition was sufficient, but was not filed prior to May 3, 1957, the effective date of Chapter 129, Laws of the Fifty-seventh General Assembly. The voting was afterwards properly held and the plans carried nearly unanimously.

"The question involved is whether the procedure started in good faith under the provisions of the old law, and the petition not being filed prior to May 3, 1957, when Chapter 129 took effect repealing the old law, would be legal, taking into consideration the saving clause in Chapter 129.

"I'm enclosing a copy of the petition, which I do not think would be questioned, and also a copy for your convenience of a letter from the firm of Chapman and Cutler, Chicago, Illinois. . ."

I have examined the enclosures to your letter and noted with considerable interest the reasoning and authorities set forth in the letter of the Chicago law firm. The main questions raised therein appear to be the scope of the phrase "reorganization proposal" as used in the "saving clause" in Chapter 129, Acts of the

58-4-32

Fifty-seventh General Assembly, and the applicability of Section 4.1(1), Code of Iowa, to two-district reorganizations commenced prior to the effective date of the repeal of Section 275.10, Code 1954. Your letter states the petition was filed after May 3, 1957, the enclosures indicate it was filed on or prior to May 3, but that the balance of the procedure was not completed until after May 3. Although it is questionable whether "merger" of two school districts under section 275.10, Code 1954, is a "proceedings" within the technical meaning of that term as used in Section 4.1(1), it appears quite likely that it would be held to be within the meaning of the phrase "right which has accrued", as used in said section, in view of the holding in Grant v. Norris, 85 N.W. 2d 261.

However, facts of greater significance appear from your letter. From the fact that the petition in question was filed on or about May 3, 1957, I deduce that the election which resulted in the "reorganization" or "merger" must have been held prior to July 1, 1957. I also assume that the various filings required by law evidencing the results of such election were duly made. If this be the case, Section 274.5, Code 1958 (56th G.A., Ch. 135, §2) disposes of the problem stated in your letter. It provides as follows:

> "Action to test reorganization. No action shall be brought questioning the legality of the organization, reorganization, enlargment, or change in the boundaries of any school corporation in this state unless brought within six months after the date of the filing of said written description in the office of said county auditor or county auditors."

Your letter does not indicate existence of any action pending before the courts challenging the validity of the district in question. If none exists, then under the terms of Section 274.5, supra, none can be brought. See Swan Lake Cons. Sch. Dist. v. Dolliver, 244 Iowa 1269, 58 N.W. 2d 349. Since the provisions of Section 274.5 appear as part of the school law, it appears to be a statute of limitations of the type operating as a rule of substance as well as a rule of procedure. In view of the foregoing, any questions which might have existed as to the validity of the organization of the said district have become moot with the passage of time and its organization must be presumed valid for all purposes.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

SCHOOL REORGANIZATION: Continuation of Superintendent's contract under Section 275.33, Code of Iowa, 1958.

April 10, 1958

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

Dear Sir:

Receipt is acknowledged of your letter of April 7 as follows:

"I respectfully request your opinion on the following question:

"The Spirit Lake Consolidated Independent School District held a contract with its superintendent of schools, which contract was a three-year contract. In July of 1957 that school district was joined with four other school districts into the Spirit Lake Community School District. The Superintendent of the Spirit Lake Consolidated Independent School District continued to serve as Superintendent of the Spirit Lake Community School District under the original contract from July, 1957 to the present date.

"Section 275.33 states 'The terms of employment of superintendents, principals, and teachers, for any current school year shall not be affected by the formation of a new district.'

"The Board of Directors of the Spirit Lake Community School District have asked whether or not the above mentioned superintendent has a continued contract with the Spirit Lake Community School District after the close of the present school year. By way of clarification, I might point out that the superintendent served one year under his three-year contract with the Spirit Lake Consolidated Independent School District and has served since July, 1957, under that same contract with the Spirit Lake Community School District without any action being taken on the part of the Board of Directors of the Spirit Lake Community School District in connection with said contract.

58-4-33

"My question is primarily whether or not Section 275.33 which was formerly Section 274.31 and which law was in effect at the time of the signing of the original contract does in fact terminate the three-year contract with the predecessor school district which was the Spirit Lake Consolidated Independent School District, after the termination of the present or current school year with the newly reorganized Spirit Lake Community School District."

The authority under which the board of directors of a school district may enter into a three-year contract with a superintendent is contained in Section 279.14 of the Code which provides as follows:

"Superintendent--term. The board of directors of any independent school district or school township where there is a township high school shall have power to employ a superintendent of schools for one year. After serving at least seven months, he may be employed for a term of not to exceed three years, but such re-election or re-employment shall not be prior to the organization of the board of the year during which an existing contract expires. He shall be the executive officer of the board and have such powers and duties as may be prescribed by rules adopted by the board or by law. Boards of directors may jointly exercise the powers conferred by this section."

According to the facts stated in your letter, the board of directors of a certain school district entered into a three-year contract with a superintendent. After the said superintendent had served one year under such contract the school district with which he had contracted ceased to exist and the territory it had formerly served became part of a new school district under the provisions of Chapter 275 of the Code. However, the contract in question was not a contract to serve as superintendent of the new corporation nor was the new corporation a party to the contract. The position which the said superintendent had contracted to fill ceased to exist on the date that the old corporation ceased to exist. The office of superintendent of the consolidated district was abolished by operation of law.

To elaborate, since no privity of contract existed between the superintendent in question and the new community district, it would seem to logically follow that said superintendent had no claim to any right of employment in a similar capacity by the new district by virtue of his employment by the old district unless such right be conferred by statute. Ordinarily, right to public employment, even in a position protected by Civil Service terminates when the position held is abolished. See Wood v. Loveless, 244 Iowa 919, 58 N.W. 2d 360 and cases cited therein. If such be true of a position protected by Civil Service, it must be true to an even greater degree of a position not

protected by Civil Service. It seems quite obvious that when a school corporation ceases to exist, all positions of employment under such corporation ipso facto are abolished by operation of law.

Thus, the problem with which you are confronted is easily disposed of unless the provisions of Section 275.33, to which your letter refers, impose an obstacle. It provides as follows:

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

Reference to annotations contained in both the Annotations to Code of Iowa and in the West Publishing Company's I. C. A. fails to reveal any decision of our Supreme Court or prior staff opinion of this office construing either Section 275.33 of the current code or its identical predecessor which appeared as Section 274.31 in the 1950 and prior codes and prior to that under various section numbers set forth in the historical analysis following the text of the provision appearing in the current code.

Under most fact situations necessitating application of Section 275.33, supra, the meaning of the word "current" would provide a vexatious and troublesome problem. The school year runs from July 1 to June 30. Districts "formed" under Chapter 275 become effective on July 1. Contracts with teachers and superintendents are ordinarily made in April but for the "ensuing" rather than "current" school year. Although the new district becomes "effective" on July 1, all of the procedural steps incident to its "formation" must take place prior to July 1. Thus, the problem arises as to what reference point in chronology one must use in determining whether the word "current" applies to the school year ending June 30 of a given calendar year or July 1 of the same calendar year. It could be plausibly argued that the "formation" took place in the school year ending June 30 although the end product of such formation did not become effective until July 1.

Whichever year be considered "current", one thing appears clear. It is that Section 275.33 applies only to the "current" year. The express provision that the "formation" has no effect upon contracts "for any <u>current</u> school year" implies that the "formation" <u>does</u> affect such contracts with respect to years subsequent to the "current" year. "Inclusio unius est exclusio alterius". The manner in which "formation" affects contracts for such subsequent years would, of course, be the same manner that abolishing a position generally affects such position as hereinabove discussed.

Since the facts of your letter are that the superintendent in question has been permitted to continue to serve as superintendent

for one year beyond the effective date of the new district obviate necessity for resolving the apparent ambiguity surrounding the use of the word "current". Of the possible constructions of that word, the most favorable to the superintendent would permit him only one year of employment beyond the effective date of the new district. In other words, it could delay the automatic abolition of his position by virtue of the cessation of existence of his employer for only one year, the "current" year.

I am, therefore, of the opinion that any employment rights of the superintendent in question in the said new district which may exist in the circumstances you describe under the provisions of Section 275.33, terminate as of June 30, 1958, in the absence of a new contract between said superintendent and the new board.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

SCHOOLS - Transportation. Use of other facilities when bus transportation available

March 28, 1958

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

Dear Sir:

Receipt is acknowledged of your letter of March 20 as follows:

"I respectfully request an opinion upon the following question:

"May a designating school district pay transportation expense to parents for transporting their children to a designated school when said designated school operates a school bus past the farm of the parents?

"It would seem to me that this situation would be covered by Section 285.1, subsection 6, of the 1954 Code of Iowa, as amended by the Acts of the 55th General Assembly, which reads as follows:

"'When the school designated for attendance of pupils is engaged in the transportation of pupils, the sending or designating school shall use these facilities and pay the pro rata cost of transportation, except that a district sending pupils to another school may make other arrangements when it can be shown that such arrangements will be more efficient and economical than to use facilities of the receiving school, providing such arrangements are approved by the County Board of Education.'

"As a matter of fact, the designated school operates a school bus directly past the farm of the parents of this child, and yet the local township school board continues to pay mileage to the parents for bringing the child to school. The other children in the neighborhood use the school bus."

58-4-34

I concur in your view that the mandatory language "shall use these facilities" appearing in the statute quoted in your letter is controlling in the circumstances described in your letter in the absence of a showing that the method of transportation employed is "more efficient and economical" than the available bus transportation.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

HEADNOTE: Secondary roads--cities and towns can maintain and control their own bridge levies. All bridges in cities and towns of less than 8,000 population can be constructed and maintained from the secondary road fund. Book

Ames, Iowa

April 17, 1958

Mr. Howard M. Remley
Jones County Attorney
Anamosa, Iowa

Re: Secondary road fund--bridges

Dear Mr. Remley:

Your letter of April 7, 1958 in which you ask the following questions:

> "1. Does Chapter 139, Section 4, paragraph 3 of the Acts of the 57th General Assembly permit the Board of Supervisors to use the Secondary Road Fund for the purpose of construction and maintenance of bridges in cities and towns having a population of 8,000,or less, if bridges are not on secondary roads?
>
> 2. In the above described paragraph 3 of said Chapter 139, Section 4, does the phrase, 'which lead to state parks' apply to the construction and maintenance of bridges as first referred to in said paragraph?
>
> 3. What acts constitute, or what tests, or test, determine 'cities and towns which control their own bridge levies' within the meaning of the exception contained in Chapter 139, Section 2, paragraph 1 of the Acts of the 57th General Assembly authorizing a levy not to exceed 2¾ mills? (See Op. Atty. Gen. 1932, p. 88)."

has been referred to me.

The answer to your first question, in reference to Section 309.9, sub-section 3, of the 1958 Code of Iowa, is in the affirmative. It is our opinion that the secondary road fund may be used for the construction and maintenance of bridges in cities and towns having a population of 8,000 or less even though the bridges are not located on secondary road extensions. This section is very definite on this point.

In answer to your second question, the phrase, "which lead to state parks" refers to roads within incorporated towns of less than 400

58-4-35

population, Since all bridges in cities and towns of less than 8,000 population may be constructed and maintained by the secondary road fund, this question is rendered moot.

With reference to your third question, Section 407.7(8) of the 1958 Code is the statutory authority that gives incorporated cities and towns the power to make and to control their own bridge levies. You are referred to OAG 1953, page 50 in which this same question was decided, the only change being that former sections 309.6 and 309.11 of the 1950 Code are now consolidated and appear in Section 309.7 of the 1958 Code. All incorporated cities and towns have the power to control their own bridge levies, but whether they do so or not is, of course, a question of fact.

I hope that this will satisfactorily answer your inquiries.

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

HIGHWAYS -- SECONDARY ROADS -- Book
School Roads -- Reversion on abandonment

Ames, Iowa

April 9, 1958

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

Re: School road--independent school district
Fairview #1, Scott County, Iowa (unofficial opinion)

HIGHWAYS--Public highway right of way obtained at expense of a school district under Section 278.1(6) of the present Iowa Code and its derivations reverts upon formal abandonment to the tract from which it was taken.

Dear Sir:

You have requested an opinion based on the following facts: Certain land was conveyed by warranty deed to a school district to be used as a public road. Such transaction took place on October 13, 1903. Such conveyance together with others created a 40 ft. road to a school site. Subsequent thereto on May 24, 1941 on petition of adjoining owners, the County Supervisors widened this road to 66 ft. The school district had no part in this widening.

You put the following questions:

> "1. When land is thus acquired by warranty deed, does it become 'school property' of such nature that if the road is ever abandoned that the adjoining property owners must pay the original cost to the school district to recover the same from their farms?"
>
> "2. Is it an 'easement' title to which upon abandonment would automatically revert to the adjoining owners from whose tracts the land was taken without cost to the owner?"

The answers are: 1. No, 2. Yes.

Pertinent Code sections or excerpts therefrom are:

> 297.1--Location. The Board of each school corporation may fix the site for each schoolhouse which shall be upon some public highway already established or procured by such Board...

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> 278.1--Enumeration. The voters at the regular election shall have power to: (6) authorize the Board to obtain at the expense of the corporation roads for proper access to its schoolhouses.

From the language of the above two sections, it appears that their purpose was to finance the establishment of public highways for proper access by the public to the schoolhouses and to comply with the law that school sites should be located upon public highways. Bogaard, et al vs. Independent School District of Plainview, et al, 93 Iowa 269; 61 NW 859 (1895).

At the time in question, 1903, there appears to be no authority for a school district to acquire real property and hold it in fee for any other purpose than as a school site. Independent School District of Dodds vs. McClure, 136 Iowa 122; 113 NW 554 (1907)

Generally statutes should not be interpreted to convey any more power than is necessary to achieve their purpose. There is no inference in the statutes that the legislature intended to give the power to school districts to acquire a fee simple title as a part of obtaining these public highways. Furthermore, this was at a time when rural roads were considered to be an easement only. The particular conveyance in question interpreted in the light of the facts and the law should convey an easement only.

Since the road must be considered as a secondary road, it is under the jurisdiction of the Board of Supervisors of Scott County. No reversion can take place until there has been a formal abandonment on the part of the Scott County Board of Supervisors. Upon such abandonment the property in question should revert to the tract from which it was taken.

Yours very truly,

James E. Thomson
General Counsel for
Iowa State Highway Commission

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

JET:js

April 3, 1958

Mr. George J. Eischeid
Director of Income Tax Division
State Tax Commission
BUILDING

Dear Mr. Eischeid:

This is to acknowledge receipt of your interdepartmental communication dated March 7, 1958. In this interdepartmental communication you ask the following question:

"Are inheritance tax appraisers fees or special appraisal fees for federal estate tax purposes deductible expenses against income?"

It is my understanding that this question refers specifically to the deductibility of these items on the Iowa fiduciary income tax return.

Section 212 of the U. S. Internal Revenue Code provides as follows:

"SEC. 212. EXPENSES FOR PRODUCTION OF INCOME.

"In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year--

"(1) for the production or collection of income;

"(2) for the management, conservation, or maintenance of property held for the production of income; or

"(3) in connection with the determination, collection, or refund of any tax."

Section 642 of the U. S. Internal Revenue Code provides as follows:

"SEC. 642. SPECIAL RULES FOR CREDITS AND DEDUCTIONS.

"* * *.

"(g) Disallowance of Double Deductions. -- Amounts allowable

58-4-43

under section 2053 or 2054 as a deduction in computing the taxable estate of a decedent shall not be allowed as a deduction in computing the taxable income of the estate, unless there is filed, within the time and in the manner and form prescribed by the Secretary or his delegate, a statement that the amounts have not been allowed as deductions under section 2053 or 2054 and a waiver of the right to have such amounts allowed at any time as deductions under section 2053 or 2054. This subsection shall not apply with respect to deductions allowed under part II (relating to income in respect of decedents)."

Subsections (1) and (2) of Section 212 provide that expenses paid or incurred for the production or collection of income; or for the management, conservation, or maintenance of property held for the production of income, are deductible in the U. S. income tax return of an individual. Pursuant to Section 642(g), these items are also allowed as deductions in the U. S. fiduciary income tax return so long as they have not been claimed in the U. S. estate tax return. Pursuant to Sections 422.5, 422.6 and 422.7, the income of an estate will be computed in like manner, as the income of an individual, for Iowa income tax purposes.

In your interdepartmental communication you refer to appraisal fees. Appraisal fees of the inheritance tax appraisers do not constitute expenditures for the production or collection of income; or for the management, conservation, or maintenance of property held for the production of income. This will also be true of special appraisal fees for federal estate tax purposes. Should the appraisal fees be incurred in connection with the sale of any property, it would seem there would be a valid deduction on the U. S. fiduciary income tax return and, likewise, deductible on the Iowa fiduciary income tax return.

If you have any further questions, please let me know.

Yours very truly,

Francis J. Pruss

FJP:fs

April 3, 1958

Mr. William N. Dunn
Hardin County Attorney
Hubbard, Iowa

Dear Mr. Dunn:

This is to acknowledge receipt of your letter of March 5, 1958, wherein you ask our opinion on the following question:

> " 'A' who is the owner of a farm enters into a contract for its sale to 'B' in August 1957. The contract provides for an earnest payment of 15% with 'A' retaining possession, retaining title and paying the real estate taxes which become due January 1, 1958, and title and possession to be given to 'B' upon his fulfilling the contract, where he has only paid an earnest money payment, on March 1, 1958.
>
> "Question: In view of the fact 'A' is still the owner of the real estate, subject only to such a contract and the legal title to the same rests in him on January 1, 1958, is that contract assessable against 'A' as of January 1, 1958?"

In answer to your question, we invite your attention to Opinions of the Attorney General, 1928, page 370, which provides as follows:

> "May 25, 1928. County Attorney, Clarinda, Iowa: We are in receipt of your letter under date of May 11, 1928, requesting an opinion of this department on the following question:
>
> "The owner of a farm on the first day of November, 1927, sells on contract said farm to another. The contract provided that settlement was to be made March 1, 1928, and deed conveying same to be delivered to new purchaser at that time. The question is, in whose name the real estate should be assessed January 1, 1928, and in whose name the money which the purchaser intends to pay for said farm should be assessed.

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"It would depend upon whether the contract was a contract to sell or a contract of sale. If it was contract of sale the Supreme Court has held that the equitable title passes immediately to the vendee, under said contract, and that the vendor of said contract holds the bare-naked legal title as security for the payment of the purchase price. This being the case we are of the opinion that the real estate, in such a case, should be assessed against the vendee under the contract of sale.

"However, if the contract was a contract to sell and only the deal to be completed March 1, 1928, then the real estate should be assessed against the owner as shown on record January 1, 1928.

"Under the contract of sale the assessor shall assess the contract as against the vendor. The contract to sell, the vendee therein would have to list for assessment purposes the money which he intended to pay as the purchase price of said farm."

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

JOSEPH C. PIPER, Special Counsel,
State Tax Commission

FJP:JCP:fs

April 4, 1958

Mr. Emery L. Goodenberger
Madison County Attorney
Winterset, Iowa

Dear Mr. Goodenberger:

This is to acknowledge receipt of your letter of November 13, 1957, wherein you request our opinion on the following question:

"X railroad corporation is constructing a new railway line from Winterset to Earlham. During 1957, but after January 1, 1957, A conveys by warranty deed a strip of land to X railroad company used by it for a roadbed. X starts construction on the line in 1957.

"Is A, an adjacent property owner, assessed for the year 1957 on the land conveyed to X railroad company, or does the State Tax Commission assess X railroad corporation for the year 1957?"

Section 434.1, Code of Iowa, 1954, provides in part as follows:

"On the second Monday in July of each year, the state tax commission shall assess all the property of each railway corporation in the state, excepting the lands, lots, and other real estate belonging thereto not used in the operation of any railway, and excepting railway bridges across the Mississippi and Missouri rivers, and excepting grain elevators; and for the purpose of making such assessment its president, vice-president, general manager, general superintendent, receiver, or such other officer as the state commission may designate, shall, on or before the first day of April in each year, furnish it a verified statement showing in detail for the year ended December 31 next preceding:

"* * *."

Section 434.2, Code of Iowa, 1954, provides:

"Each railway or other corporation required by law to report to the state tax commission under the provisions of the law as it appears in section 434.1 shall, on or before the first day of April, 1905,

58-4-45

make to the state tax commission a detailed statement showing the amount of real estate owned or used by it on December 31, 1904, for railway purposes, in each county in the state in which said real estate is situated, including the right of way, roadbed, bridges, culverts, depot grounds, station buildings, yards, section and tool houses, roundhouses, machine and repair shops, water tanks, turntables, gravel beds and stone quarries, and for all other purposes, with the estimated actual value thereof, in such manner as may be required by the state tax commission."

Section 434.3, Code of Iowa, 1954, provides:

"Only one such detailed statement by any corporation shall be necessary, and when received by the state commission it shall become the record of railway lands of such corporation, and be deemed as annually thereafter reported for valuation and assessment by the state tax commission."

Section 434.4, Code of Iowa, 1954, provides:

"On or before the first day of April of each subsequent year such corporation shall in like manner report all real estate acquired for any of the railway purposes above named during the preceding calendar year; and also a list of any real estate, previously reported, disposed of during the same period, which disposition shall be noted by the state commission in an appropriate column opposite to the description of said tract in the original report of the same in the record of railway land."

It will be noted that the foregoing statutes require each railroad corporation in the state to list with the Iowa State Tax Commission, for the purpose of assessment, only that real property which is owned by each such railroad on the 31st day of December preceding the date of assessment. In light of this fact, it is evident that the tax commission is not required to assess a railroad for property acquired by it subsequent to such date, as such transfers would not be within the knowledge of the commission.

In view of the foregoing, it is our opinion that such property must be assessed pursuant to the provisions of section 428.4, Code of Iowa, 1954,

which provides:

> "Property shall be taxed each year, and personal property shall be listed and assessed each year in the name of the owner thereof on the first day of January. Real estate shall be listed and valued in 1933 and every four years thereafter, and in each year in which real estate is not regularly assessed, the assessor shall list and assess any real property not included in the previous assessment, and also any buildings erected since the previous assessment, with a minute of the tract or lot of land whereon the same are situated, and the auditor shall thereupon enter the taxable value of such buildings on the tax list as a part of the real estate to be taxed; 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."

Section 434.21, Code of Iowa, 1954, provides:

> "No real estate used by railway corporations for roadbeds shall be included in the assessment to individuals of the adjacent property, but all such real estate shall be the property of such companies for the purpose of taxation."

We do not feel Section 434.21, supra, is in conflict with this opinion, however, as it is well settled that under the provisions of Section 428.4, supra, real estate is listed, assessed and taxed, each year, for the period of a year, as of the first of January of each year, even though the actual listing and valuation occurs only once in four years. Churchill v. Millersburg Sav. Bank, et al, 211 Iowa 1168, 235 N.W. 480.

Under the facts outlined in your letter, the adjacent property owner was in fact the owner of the property on the first of January of the tax year in question. Therefore, it will not be a violation of Section 434.21, supra, to assess such property to him for the year the transfer occurred.

Of course, the burden of the tax will necessarily fall upon the owner

of the property at the time the lien of the tax attaches.

Yours very truly,

FRANCIS J. PRUSS,
Special Assistant Attorney General

JOSEPH C. PIPER, Special Counsel,
State Tax Commission

FJP:JCP:fs

April 4, 1958

Mr. Jack W. Frye
Floyd County Attorney
Charles City, Iowa

Dear Mr. Frye:

Your letter dated December 17, 1957, addressed to the Attorney General of Iowa, has been referred to this office for reply. In your letter you ask whether or not an executor or administrator may deduct as a debt from moneys and credits, listed pursuant to Chapter 429 of the Code of Iowa, 1954, a widow's allowance authorized by the probate court.

The following sections of the Code of Iowa, 1954, are pertinent to the question:

> "Section 429.4 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."

> "Section 429.5 Good-faith debt required. No acknowledgment of indebtedness not founded on actual consideration, and no such acknowledgment made for the purpose of being so deducted, shall be considered a debt within the intent of section 429.4."

> "Section 429.10 Deductions to fiduciary. In listing moneys and credits as provided in this chapter, any administrator, executor, trustee, or agent shall be entitled to deductions, as prescribed in sections 429.4 to 429.9, inclusive, of debts owing by the legatee, devisee, beneficiary, or principal to the same extent as such fund might

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be reduced if it were held by such legatee, devisee, beneficiary, or principal who may be entitled to the income on such trust or fiduciary fund."

"Section 635.12 Allowance to widow and children. The court shall, if necessary, set off to the widow and children of the decedent under fifteen years of age, or to either, sufficient of his property, of such kind as is appropriate, to support them for the period of administration but not to exceed twelve months from the time of his death, and may, on the petition of the widow or other person interested, review such allowance and increase or diminish the same, and make such orders in the premises as shall be right and proper."

Under our statutes if the allowance to the widow for her support during the period of administration constitutes a "debt" of the executor or administrator, then the same will be deductible to him pursuant to Section 429.4.

The cases support the theory that the costs of administration are "debts" of the estate, and are "debts" owing by the executor or administrator.

"Costs connected with the administration of the estate of the decedent and other obligations occurred in that connection are 'debts' of the estate." Harbeson v. Mellinger, 2 Ohio App. 75 (See also Personett v. Johnson, 40 N. J. Eq 173; In re Berry's Estate, 31 Ill. App. 365, 53 N.E.2d 149; In re Howald's Estate, 65 Ohio App. 191, 29 N.E.2d 575).

It is clear that the allowance to decedent's widow for her support is one of the costs of administration, and since the costs of administration are debts, and the widow's allowance is one of the costs of administration, the allowance will also be a "debt" against the estate, and deductible as such from the gross moneys and credits of the estate.

"The allowance to a widow and minor children is a debt of the estate * * *." Watts v. Watts, 38 Ohio St. 480.

"Widow's year's allowance * * * held 'debt' and 'preferred

claim'." Davidson v. Miners & Mechanics Savings and Trust Co., 129 Ohio St. 418, 98 A. L. R. 1318.

The limiting provision in Section 429.5 will not prevent a widow's allowance from qualifying as a debt under this chapter. Section 429.5 provides that "no acknowledgment of indebtedness not founded on actual consideration * * * shall be considered a debt within the intent of Section 429.4." This section refers to acknowledgments of indebtedness, not to the debts themselves. Some debts are evidenced by acknowledgments of indebtedness, such as promissory notes and mortgages, while other debts are not evidenced by acknowledgments of indebtedness, but are evidenced by something else, such as statutes or court orders. The law requires that "acknowledgments" of indebtedness must be founded on actual consideration, but does not require that all debts be founded on actual consideration. A widow's allowance is not evidenced by an acknowledgment of indebtedness. However, this debt will be evidenced by a court order pursuant to Section 635.12, Code of Iowa, 1954, which section authorizes the payment of an allowance to the widow.

It is our opinion that in listing moneys and credits the executor or administrator may deduct the widow's allowance as a valid debt.

Very truly yours,

FRANCIS J. PRUSS,
Special Assistant Attorney General

JAMES R. BRODIE, Special Counsel,
Iowa State Tax Commission

FJP:JRB:fs

Expediting
TAXATION -- Military personnel at
ROTC installations.

April 3, 1958

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

Dear Sir:

This will acknowledge receipt of yours of the 29th ult. in which you submitted the following:

> "Several problems have arisen in this county in connection with the local domicile of the members of the military staffs attached to the R O T C Departments at the State University of Iowa. As you are, I am sure, aware, most of these individuals are transferred into their positions by virtue of military authority and, of course, may be removed at any time by the military department. It is my understanding that the State Tax Commission has always taken the position that these people are not subject to the state income tax. My interpretation of the Iowa law indicates that in order to claim a Veteran's Exemption that the claimant must be a resident of the State of Iowa. However, no such specific requirement is made in connection with the Homestead Tax Credit although the same may be implied. Most of the military personel maintain residences in other states and they do not vote within the State of Iowa though they do own homes here in this area.
>
> "The specific purpose of this inquiry is to request a formal opinion as to whether or not (1) military personnel of the above class who own residences in Iowa City are eligible for Veteran's Exemption under the laws of the state of Iowa; (2) whether or not such military personnel who are local property owners are eligible to claim the Homestead Tax Credit; (3) in the event that the answer to the above question

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is in the affirmative, whether or not then such persons would also be liable for state income tax. Thank you kindly for your co-operation."

In reply thereto I advise as follows.

1. In answer to your question #1 I advise that military personnel of the class mentioned above who own a residence in Iowa City are not eligible for Veteran's property exemption provided in Chapter 427, Code 1958, unless they be residents and domiciled in the state. See Section 427.5, Code 1958.

2. In answer to your question #2 I am of the opinion that such military personnel who are local property owners are not eligible to claim Homestead Tax Credit unless they have a domicile in the state. According to opinion of this Department appearing in the Report for 1940 at page 339 it is stated, "We are of the opinion that no homestead credit should be allowed to any person who has not a legal domicile in this state regardless of whether or not the occupancy of the dwelling continues for more than six months."

3. In view of the foregoing answers, answer to your question #3 is not required.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

April 4, 1958

Mr. James W. Hudson
Pocahontas County Attorney
Pocahontas, Iowa

Dear Mr. Hudson:

Your letter addressed to the Honorable Norman A. Erbe has been referred to this office for reply. In your letter you make inquiry as to the applicability of Sections 445.42, 445.43 and 445.44 of the 1954 Code of Iowa to the following factual situations:

> "1. A resident farmer has a farm sale liquidating all of his farming equipment and livestock. In his sale bill he states that he intends to quit farming and sometime in the future after his sale to move to another state.
>
> "2. A resident farmer has a farm sale completely liquidating his machinery and livestock, and it is common knowledge that he intends to retire from farming after his sale and move to another state in the future.
>
> "3. A resident farmer has a farm sale completely liquidating his farm machinery and livestock to another county in Iowa to take employment or start a new business.
>
> "4. A resident farmer loses a lease on the farm he is operating, and it is common knowledge that on March 1st following that he intends to remove his farm equipment and livestock to another county or to Minnesota to resume farming."

You ask whether or not Section 445.42 applies to any of the above factual situations, and whether or not Section 445.43 may be applied to the above. Your question appears to relate to the proper procedure for the collection of

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taxes against a resident owner of personal property when that person plans to sell the property and move from the state, or take the property with him out of the state.

Section 445.42, Code of Iowa, 1954, entitled "Assessment of Migratory property of nonresident", provides:

> "All personal property, the owner of which is a nonresident of the state, and which property is by the owner thereof intended for sale or consumption at a place, or shipment to a place other than where said property is located, shall be assessed in the owner's name, if the owner is known, and if the owner is unknown or uncertain the same shall be assessed to 'unknown owner', and shall be by the assessor sufficiently described so that said property may be identified."

Section 445.43, Code of Iowa, 1954, entitled "Lien on migratory personal property -- maturity of tax", provides:

> "A lien for the tax upon said property as herein provided shall relate back to and exist from the first day of January of the year for which it is assessed, and if anyone seeks to remove the said property from the county before the tax for said year shall be paid, the tax shall immediately become due and collectible."

Section 445.44, Code of Iowa, 1954, entitled "Enforcement of Lien", provides:

> "It shall be the duty of the assessor to notify the county auditor if said property is being, or is about to be, removed from the county. In such event, or if the knowledge of the removal of or intent to remove said property shall come to him in any other authentic manner, the said auditor shall certify such fact to the county treasurer, with a full description of the property as the same appears on the assessor's books, giving assessment district, where located, and the amount of said assessment, and the county treasurer shall thereupon proceed by distress to restrain the removal of said property and secure the lien of the tax due or to become due."

None of the above three sections of the Code will apply to the four

factual situations as given, for the reason that in the factual situations the taxpayer is a "resident", while in Sections 445.42, 445.43 and 445.44 the procedure refers to "nonresidents" only. The mere fact that the resident farmer intends to leave the county or the state will not change his residence. He will not become a nonresident merely because he intends to move. The taxpayer under the given situations is not a nonresident of either the state of Iowa or of the county. Therefore, it is our conclusion that distress warrants issued under the authority of Section 445.44 will be without authority of law.

In situations involving resident taxpayers who are about to remove personal property which has been assessed, the law provides other procedures for the collection of the personal property taxes.

Section 445.6, Code of Iowa, 1954, entitled "Distress and sale", provides:

> "The treasurer shall collect all delinquent taxes by distress or sale of any personal property belonging to the person to whom such taxes are assessed, and not exempt from taxation, or any real or personal property upon which they are a lien, but he shall continue to receive the same until collected, and any owner or claimant of any real estate advertised for sale may pay to the county treasurer, at any time before the sale thereof, the taxes due thereon, with accrued penalties, interest, and costs to the time of payment."

An Opinion of the Attorney General dated September 16, 1923, at page 164, states:

> " * * * the treasurer may seize any personal property that belongs to a taxpayer for the collections of taxes, with exception of exempt property."

An Opinion of the Attorney General dated July 14, 1925, at page 116,

states:

> "The personal taxes become delinquent * * * on the 1st day of April and the 1st day of October in each year. And if the first half of the taxes due are not paid prior to the 1st day of April, then the taxes are delinquent and it is the duty of the county treasurer to proceed to collect the same by distress or sale, * * *."

Therefore, if the personal property taxes are delinquent the county treasurer has his remedy under Section 445.6, under which distress warrants may be issued. Also, the treasurer may collect taxes by bringing an ordinary suit at law and by attachment.

Section 445.3, Code of Iowa, 1954, entitled "Actions authorized", provides:

> "In addition to all other remedies and proceedings now provided by law for the collection of taxes on personal property, the county treasurer is hereby authorized to bring or cause an ordinary suit at law to be commenced and prosecuted in his name for the use and benefit of the county for the collection of taxes from any person, persons, firm, or corporation as shown by the tax list in his office, and the same shall be in all respects commenced, tried, and prosecuted to final judgment the same as provided by the code for ordinary actions."

Section 445.4, Code of Iowa, 1954, entitled "Statutes applicable -- attachment -- damages", provides:

> "All the provisions of chapters 639 and 642 are hereby made applicable to any proceedings instituted by a county treasurer under section 445.3, and a writ of attachment shall be issued upon the county treasurer complying with the provisions of said chapters, for taxes, whether due or not due, except that no bond shall be required from the treasurer or county in such cases, but the county shall be liable for damages, only, as provided by section 639.14."

Please note that Section 445.4 provides for an attachment to be issued by the county treasurer for taxes, "whether due or not due". The grounds for

attachment by the county treasurer will be the same as the grounds for the plaintiff in any ordinary suit as is provided in Section 639.3, such as that the defendant is about to remove his property out of the state without leaving sufficient remaining for the payment of his debts, that the defendant is about to dispose of his property with intent to defraud his creditors, that he is about to remove permanently out of the county and has property therein not exempt from execution, and that he refuses to pay or secure the plaintiff or that he is about to remove permanently out of the state, and refuses to pay or secure the debt due the plaintiff.

Therefore, it is our opinion that in the case of a resident owner of personal property who is about to sell that property which has been assessed and leave the state, or about to remove the property from the state, the treasurer may proceed by a distress warrant, if the personal property taxes are delinquent. If not delinquent, he may proceed by attachment in an ordinary suit at law.

Very truly yours,

FRANCIS J. PRUSS,
Special Assistant Attorney General

JAMES R. BRODIE, Special Counsel,
State Tax Commission

FJP:JRB:fs

TAXATION -- INCOME TAX. Tax Commission may not publish a list of persons who filed no state income tax returns for the reason that mere failure to file does not itself establish that the state has a duty to file.

April 23, 1958

State Tax Commission
L o c a l

Attention: Hon. Leon N. Miller, Chairman

Gentlemen:

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

> "The State Tax Commission would like to have your opinion as to the following, under the provisions of Section 422.65, Code of Iowa, 1954:
>
> "1. Is the State Tax Commission permitted to divulge or make known the names of individuals who have failed, to date, to file Iowa income tax returns for past years, as required by law?
>
> "2. Is the Commission permitted to divulge or make known the names of individuals who have filed delinquent returns for past years, since February 1st, 1958, i. e. since criminal prosecutions were commenced by the State of Iowa against tax evaders?
>
> "Your opinion at the earliest possible date will be very much appreciated."

In reply thereto I advise as follows. It is conceded that no express statute affirmatively confers power upon the Commission to divulge or make known the names of individuals who have failed to file Iowa income tax returns for past years as required by law or to divulge or make known the names of

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individuals who have filed delinquent returns for past years since February 1, 1958, being the date when criminal prosecutions were commenced by the State of Iowa against tax evaders. So to do may only be exercised by implying this authority from the terms of existing statutes or in accordance with the public policy of the state. Insofar as either or both of these sources are concerned, such authority is lacking. The only statute bearing upon this question is Section 422.13, Code 1958, which provides as follows:

> "Return by Individual.
>
> "1. Every individual having a net income for the tax year from sources taxable under this division, of fifteen hundred dollars or over, if single, or if married and not living with husband or wife, or having a net income for the tax year of two thousand three hundred fifty dollars or over, if married and living with husband or wife, shall make and sign a return.
>
> "2. If husband and wife living together have an aggregate net income of two thousand dollars or over, each shall make such a return, unless the income of each is included in a single joint return.
>
> "3. If the taxpayer is unable to make his own return, the return shall be made by a duly authorized agent or by a guardian or other person charged with the care of the person or property of such taxpayer.
>
> "4. A nonresident taxpayer shall file a copy of his federal income tax return for the current tax year with the return required by this section."

Failure of the individual to perform this duty is not made a matter of record nor is information otherwise officially available to the Commission from which express affirmative power may be implied.

Implying such power from the public policy of the state results in a like conclusion. It is said in Jones v. American Home Finding Association, 191 Iowa 211, "The term 'public policy' is not susceptible of exact definition." But its place in the interpretation of statutes is stated in Sutherland Statutory Construction, 3rd Edition, paragraph 5901, as follows:

> "Public policy retains a place of great importance in the process of statutory interpretation, and the tendency of the courts has always been to favor an interpretation which is consistent with public policy. In fact it may be safely asserted that the basis of all the interpretive rules in regard to strict and liberal interpretation are founded upon public policy in one form or another. Although public policy, in the abstract, is a vague and indefinite term incapable of accurate and precise definition, it often serves as a concise expression for a combination of factors which exercise a tremendous influence in the formation, interpretation, and application of legal principles. Therefore, in so far as public policy affects statutory interpretation, the emphasis properly belongs upon the elements of which it consists.
>
> "In its strict sense public policy reflects the trends and commands of the federal and state constitutions, statutes and judicial decisions. In its broad sense public policy may be traced to the current public sentiment towards public morals, public health, public welfare, and the requirements of modern economic, social and political conditions.
>
> "It will be observed that the principles of strict and liberal statutory construction are founded upon the same or cognate factors. Therefore, public policy has no separate significance in statutory interpretation, but,

> Instead, the rules of strict and liberal interpretation are expressions of public policy. However, it is natural and very common for the courts to regard policy as a separate aid to interpretation, and for that reason it is expedient to consider here the counterparts of public policy and how they affect statutory interpretation."

Insofar as this public policy is concerned, it is developed from the provisions of Section 422.65, providing as follows:

> "Information deemed confidential.
>
> "1. It shall be unlawful for the commission, or any person having an administrative duty under this chapter, to divulge or to make known in any manner whatever, the business affairs, operations, or information obtained by an investigation of records and equipment of any person or corporation visited or examined in the discharge of official duty, or the amount or source of income, profits, losses, expenditures or any particular thereof, set forth or disclosed in any return, or to permit any return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; provided, however, that the commission may authorize examination of such returns by other state officers, or, if a reciprocal arrangement exists, by tax officers of another state, or the federal government.
>
> "2. Any person violating the provisions of subsection 1 of this section shall be guilty of a misdemeanor and punishable by a fine not to exceed one thousand dollars."

and the following from Section 422.25, subsection 2 thereof:

> "* * * In case of failure to file a return, or to pay the tax required to be paid with the filing of the return, on the date prescribed

> therefor (determined with regard to any extension of time for filing), unless it is shown that such failure was due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return five percent of the amount of such tax if the failure is for not more than one month, with an additional five percent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five percent in the aggregate. In case of willful failure to file a return with intent to evade tax, in lieu of the five percent monthly penalty above provided, there shall be added to the amount required to be shown as tax on such return fifty percent of the amount of such tax, and in case of willful filing of a false return with intent to evade tax, there shall be added to the amount required to be shown as tax on such return fifty percent of the amount of such tax."

as well as subsection 6 of the same Section providing as follows:

> "Any person required to supply any information, to pay any tax, or to make, render, or sign any return or supplemental return, who willfully makes any false or fraudulent return, or fails to pay such tax, supply such information, or make, render, or sign such return, with intent to defeat or evade the assessment required by law to be made, shall upon conviction for each such offense be punished by imprisonment in the county jail for a term not exceeding one year or in the state penitentiary for a term not exceeding five years, or by a fine not exceeding five thousand dollars, or both."

While Section 422.65 involves administrative operations of the Commission in connection with its duties imposed in the enforcement of the income tax laws and does not concern itself with any confidential duty respecting the belated filing of a return or a failure to file such return, however, the power of

exposing publicly the names of persons upon whom the penalty of additional tax for these lapses may be imposed as well as the power to subject such individuals to criminal charges is so contrary to our ideas of justice and to our American concept of presumptive innocence as to justify a holding that public policy would require a withholding of such publicity. As bearing the correctness of this view, note that Chapter 250, Code 1958, treating of Soldiers Relief, makes confidential and privileged the application, investigation reports and case records of persons seeking relief subject to certain conditions therein named, and Section 250.12 specifically provides:

> "Relief information confidential. It shall be unlawful for the board of supervisors of any county or the soldiers relief commission of any county to place the administration of the duties of the soldiers relief commission under any other relief agency of any county, or to publish the names of the veterans or their families who receive relief under the provisions of this chapter."

And attention is directed to a letter opinion of this Department dated January 23, 1956, concerning sterilization provisions under Chapter 145, Code 1958, which deemed such proceedings privileged and confidential.

By reason of the foregoing I advise that the Commission is without power to divulge or make known the names of individuals who have failed to file income tax returns for the past

years or to divulge or make known the names of individuals who have filed delinquent returns for the past years since February 1, 1958.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

Motor fuel tax. Code section 324.14 refers to actual load, not capacity

April 24, 1958

Mr. B. G. Marchi, Director
Motor Fuel Tax Division
B u i l d i n g

Dear Sir:

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

> "An opinion is requested of this office for a ruling on Section 324.14 - Penalty for Operating Unregistered Transport; the question, was the intent of the State Legislature or the interpretation of the law that the 4000 gallons stated in this Section means the capacity or the actual gallonage in the load.
>
> "We assume that the intent of the Legislature meant the capacity as the object of this clause was to eliminate the licensing of the thousands of small bulk tanks operated locally in Iowa. If this is not so, our inspectors would then have to stop and measure the contents of every transport before we could ascertain whether they should or should not be licensed and this would make it possible for a vehicle to be classified as a transport one day if they had a load over 4000 gallons and one day not require a license because they had less."

The statute you refer to provides the following:

> "Penalty for operating unregistered transport. It shall be unlawful for any person to transport motor fuel in bulk upon the highways of this state in a conveyance the registration of which is required without the evidence of registration provided for and any person found guilty of the unlaw ful act shall be fined not to exceed one hundred dol-

58-4-55

> lars or imprisoned in the county jail not more than thirty days, and each cargo so transported shall be considered a separate offense. This penalty shall be in addition to penalties imposed under other provisions of this chapter. Persons transporting motor fuel in bulk upon the highways of this state in an amount of not to exceed four thousand gallons shall not be regarded as transporting in bulk."

In my opinion the statute is operative upon actual gallonage and not upon gallonage capacity. This is a statute with criminal penalties and the crime defined is transporting motor fuel in bulk in an unregistered conveyance. While it is true that transporting such fuel in an amount not exceeding 4,000 gallons will not be regarded as transporting such fuel, it is a queston of fact to be determined whether the gallonage transported actually exceeds 4,000 gallons. If capacity be the test of this crime, transporting 1,000 gallons in a 6,000 gallon conveyance would constitute a crime. This would not seem to be the intent of the Legislature.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

VETERANS, Korean Bonus, Procedure for tax levy authorized in 1922 OAG 186.

April 17, 1958

Mr. John F. Gaston
Assistant General Attorney
Iowa Electric Light & Power Co.
Cedar Rapids, Iowa

Dear Sir:

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

> "Our Property Tax Accounting Department has questioned the levy throughout the state for the Korean veterans' bonus.
>
> "It is my understanding that this levy has now been made for two years, i. e., 1956 and 1957, and that the same is by authority of the State Treasurer who issued a departmental order in November of 1956 which was approved by the Attorney General's office. There is also some indication that this ruling of the Treasurer of State was based on precedent of an Attorney General's opinion applying to the World War II veterans' bonus.
>
> "Can you give me further information with reference to this matter, with the possible citation of any such opinion of the Attorney General's office?"

In reply thereto I advise you that the foregoing procedure followed by the State Treasurer is justified under an opinion of this Department appearing in the Report for 1922 at page 186.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

58-4-60

VETERANS -- Inmates of Soldiers Home: Use of U. S. Government pension proceeds for support and maintenance.

April 9, 1958

Board of Control of State Institutions
State Office Building
L o c a l

Attention: Mr. George W. Callenius, Member

Gentlemen:

In the correspondence referred to this office by your letter of April 1, 1958, the following fact situation is posed.

> A member of the Iowa Soldiers Home at Marshalltown, Iowa, receives a United States Government pension of $135.45 per month, and a railroad retirement payment of $81.00 per month. His wife has no independent income and, as stipulated, is dependent upon her husband's pension and retirement benefits. The wife does not reside in the Iowa Soldiers Home.
>
> On March 1, 1958, $94.95 was paid toward the support of the husband in the Soldiers Home for the month of March. An additional $81.00 was requested.

Under Section 219.14, 1958 Code of Iowa, it is provided that a member of this Home shall contribute from a United States Government pension, or any other source of income, toward his support in an amount determined by the Board of Control but not to exceed the actual cost thereof. However, according to Section 219.15, 1958 Code of Iowa, a member of such Home receiving a pension or compensation who has a dependent wife shall deposit with the commandant one-half the amount thereof which is then sent to the dependent wife.

58-4-61

The two sections referred to above are stated below:

"219.14 Contributing to own support. Every member of the home who receives pension, compensation or gratuity from the United States government, or income from any source of more than twenty dollars per month shall contribute to his or her maintenance or support while a member of the home. The amount of such contribution shall be determined by the board of control but in no case to exceed the actual cost of keeping and maintaining such person in said home. The board may require every member of the home to render such assistance in the care of the home and grounds as the physical condition of any such member will permit."

"219.15 Payment to dependents. Each member of the home who receives a pension or compensation and who has a dependent wife or minor children shall deposit with the commandant forthwith on receipt of his pension or compensation check one-half of the amount thereof, which shall be sent at once to the wife if she be dependent upon her own labor or others for support, or, if there be no wife, to the guardian of the minor children if dependent upon others for support. The commandant, if satisfied that the wife has deserted her husband, or is of bad character, or is not dependent upon others for support may pay the money deposited as herein provided to the guardian of the dependent minor children."

Code provisions corresponding to sections 219.14 and 219.15, 1958 Code of Iowa, were first enacted as sections 2602-a, 2606-a, and 2606-c, Supplement, 1913 Code of Iowa. At that time the counterpart of what is now Section 219.14, 1958 Code of Iowa, provided that a United States Government pension of a member in the Iowa Soldiers Home was not to be used for support and maintenance of such member. It is noteworthy to consider that, along with this enactment, there was provision made that a person admitted to the Soldiers Home, who could pay for his own support, would contribute in an amount fixed by the Board of Control from time to time.

In 1913 a provision corresponding to Section 219.15, 1958 Code of Iowa, was enacted. This enactment stated that the one-half the pension of a member of the Iowa Soldiers Home would be deposited with the commandant who in turn sent such amount to the dependent wife.

No statutory revision occurred until 1939 when Section 3384.14 (corresponding to Section 219.14, 1958 Code of Iowa) was codified. That section provided, for the first time, that United States Government pension money was subject to use in support and maintenance of a member of the Soldiers Home in an amount fixed by the Board of Control which was not to the actual cost thereof.

It therefore appears that sections 219.14 and 219.15, 1958 Code of Iowa, are conflicting statutes. If possible, such statutes are to be reconciled. But where this cannot be accomplished the statute passed later in point of time prevails. Curlew Consol. School Dist. v. Palo Alto County Board of Education, 247 Iowa 112, 73 N.W. 2d 20; State v. Blackburn, 237 Iowa 1019, 22 N.W. 2d 821; Lincoln Nat. Life Ins. Co. v. Fischer, 235 Iowa 506, 17 N.W. 2d 273; Fitzgerald v. State, 220 Iowa 547, 260 N.W. 681; State v. Harper, 220 Iowa 515, 258 N.W. 886.

Since Section 219.14, 1958 Code of Iowa, is the later enacted provision having been enacted in 1939, it prevails over Section 219.15, 1958 Code of Iowa, which was enacted in 1913. Therefore, you are advised that where the actual cost of support and maintenance, as fixed by the Board of Control, exceeds one-half the United States Government pension and other compensation or income it shall be applied to the cost of support and maintenance of a member in the Iowa Soldiers Home and shall not be sent to the dependent wife of such member.

Very truly yours,

HUGH V. FAULKNER
Assistant Attorney General

HVF/fm

April 15, 1958

Mr. George R. Larson
Assistant County Attorney
Court House
Nevada, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 29th ult. in which you submitted the following:

> "The Board of Supervisors of Story County, Iowa, respectfully request an opinion from your office with respect to the above captioned section of the code.
>
> "Under said section, it has been the custom of the Board, when recommended by the local Soldiers Relief Commission, to allow claims for rent for soldiers and their families who are indigent and in need.
>
> "Now, the Board's question is this: Does the Board, when recommended by the local Soldiers Relief Commission, have the authority to pay installments on a veteran's mortgage when such veteran and his family are indigent and when the effect of such payment would be to increase such veteran's equity in his home?"

Confirming advice given to you orally that this being Soldiers Relief money, the Board of Supervisors do have authority upon recommendation of the Soldiers Relief Commission to pay installments upon an indigent soldier's mortgage. Shelter is a

58-4-62

proper form of relief under Chapter 250, Code 1958. See opinion of the Attorney General appearing in the Report for 1940 at page 206.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

April 3, 1958

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

Dear Sir:

This will acknowledge receipt of yours of the 12th ult. in which you submitted the following:

> "The County Sheriff is required to serve subpoenas among the other duties. His costs for serving the same are taxed as costs in the case. When the court costs are not paid, the sheriff is not paid.
>
> "How can he protect himself in such a case? Can the clerk be required to pay the sheriff his costs of serving a subpoena out of the court funds?"

In reply thereto I advise that I find no statutory authority for the Clerk to pay the Sheriff his fees for serving subpoenas out of the court expense fund where the costs have not been paid.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

58-4-63

April 3, 1958

Mr. T. C. Strack
Grundy County Attorney
Grundy Center, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 31st ult. in which you submitted the following:

"Would you kindly furnish me with an attorney general's opinion on the following problem:

"In 1949 a taxpayer owned a store building located on his own land. During the year 1949 the store building burned and has never been replaced. The value of the building was assessed prior to the year 1949. This valuation has never been removed from the tax rolls and the taxpayer has paid taxes on the value of the building and the land from and including 1949 through 1957.

"We would like answers specifically to the following questions:

"1. Under the provisions of Sections 445.60 or 445.62 of the 1954 Code, is the County Board of Supervisors authorized to remit or refund any of the taxes which the taxpayer has paid on the building?

"2. In the event that the Board is authorized to remit or refund any of these taxes and a claim is filed during 1958, may the Board remit or refund any taxes which were paid more than five years before thedate which the claim was filed?

"3. In the event that the Board may remit or refund any portion of the taxes paid and the taxpayer received some insurance because of the

loss, would the fact that insurance was received reduce the remission or refund for any year other than the year in which it was received?"

In reply thereto I advise as follows:

1. Where the building on a piece of real estate is owned by the owner of the real estate, the building has no separate taxable value and assessment of the real estate includes any building situated thereon. A change therefore in the existence or non-existence of a building makes no difference in the matter of assessment. Its existence or non-existence is a matter going to the value of the real estate. Section 428.4, Code 1958, pertinent to the taxation of real estate and buildings provides the following:

"428.4 Personal property - real estate - buildings. Property shall be taxed each year, and personal property shall be listed and assessed each year in the name of the owner thereof on the first day of January. Real estate shall be listed and valued in 1933 and every four years thereafter, and in each year in which real estate is not regularly assessed, the assessor shall list and assess any real property not included in the previous assessment, and also any buildings erected since the previous assessment, with a minute of the tract or lot of land whereon the same are situated, and the auditor shall thereupon enter the taxable value of such buildings on the tax list as a part of the real estate to be taxed; 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 that section an assessment of real estate includes any building or structure thereon and, as stated, such a building is not a separate class of property for the purpose of taxation. In such a situation outlined by you while the assessment previous to 1949 likely included the value of the building the assessment was, however, of real estate. The fact that subsequent assessments remained the same as the assessment made prior to 1949, the assessment legally only concerned the valuation of the real estate with or without a building. The remedy for the correction of a valuation in assessment is by appeal to the Board of Review. Clearly this situation does not involve a tax erroneously or illegally exacted or paid and therefore Section 445.60 has no application insofar as refunding the tax on the real estate is concerned.

2. Nor am I of the opinion that Section 445.62, Code 1958, is available in this situation. That section provides:

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

> the year such stock was assessed for taxation shall be a destruction within the meaning of this section."

According to opinion of this Department appearing in the Report for 1925, 1926 at page 333, it applies to property of the same character as the item of property specifically mentioned therein, such as buildings, crops and stock. In that view the building not being personal property and separately assessed and taxed, and taxes on the building as such being non-existent, remission of such taxes cannot be effected.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

1, Community Recreation ...

SCHOOLS. Districts have authority to participate in community recreational program when school is not in session under the provisions of the manner code chapters 300 and 377. (Robert Wilson, Muscatine Co. Atty.; 5/27/58)

#58-5-1

May 27, 1958

Robert H Wilson
County Attorney
Muscatine, Iowa

Dear Sir:

Receipt is acknowledged of your letter of May 23 as follows:

> The following question has been presented to my office for a ruling and it would appear that the same should be subject to an Opinion by your office.
>
> The question which I am submitting is as follows:
>
> "Does a Public School District have authority under the Statutes of the State of Iowa to finance and operate a Summer Playground baseball program for public and parochial school children, this program to be supervised by properly certified school teachers of the District?"
>
> Your Opinion on this matter would be greatly appreciated.

Perhaps the most fundamental rule of law as well as the most often stated by our Supreme Court with respect to school districts is that they are creatures of statute with only those powers expressly conferred by statute or reasonably and necessarily implied as incident to exercise of an expressly conferred power.

The statutes confer no power upon school districts with express reference to baseball. Because it is stated in your letter that the baseball in question is to be played in the summer there appears no question involved as to whether the same is a course in "physical education" under code sections 280.13 and 280.14.

Examination of the statutes reveals authority for participation by a school district in community-wide recreational activities exists under code chapter 300 or code chapter 377, to which chapters your attention is directed. Unless the said program

58-5-1

is carried on in the manner provided in one of said chapters there appears to be no statutory authority for contribution toward such community-wide program by school districts.

If the program is carried on pursuant to the provisions of code chapters 300 or 377, it then becomes a community project rather than a public school project and the academic pedigree of the children participating in the recreation provided has no bearing on their right to so participate.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA/ed

STATE OFFICERS AND DEPARTMENTS:
Motor vehicle purchase -- Maximum payable under Code section 21.2(4).
(Strauss to Cunningham, Secy., Exec Council, 5/26/58) #58-5-2

May 26, 1958

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 an opinion as to whether or not the Highway Commission has the right to accept a bid on a State vehicle, car or station wagon, over $2,000."

In reply thereto I would advise you that the statute controlling the purchase of cars for State use is Sec. 21.2(4), Code 1958, which provides as follows:

> "The state car dispatcher shall purchase all new motor vehicles for all branches of the state government. Before purchasing any motor vehicle he shall make requests for public bids by advertisement and he shall purchase the vehicles from the lowest responsible bidder for the type and make of car designated. No passenger motor vehicle except ambulances, busses or trucks shall be purchased for an amount in excess of the sum of two thousand dollars retail delivered price."

According to the foregoing, the maximum amount authorized to be paid for a State vehicle excepting an ambulance, bus or

truck is the sum of $2,000. In that aspect I am of the opinion that a car or station wagon does not come within the foregoing exceptions and therefore payment for such vehicles of over $2,000. is contrary to the statute and unauthorized.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

LABOR: Child Labor -- A parent need not obtain a work permit for his own child to work in an establishment listed in code section 92.1 operated by such parent even though the child may be fourteen but less than sixteen years of age.
(Faulkner to Stout, Labor Comm. 5/8/58)
58-5-3)

Memo from: LEONARD ABELS
Assistant Attorney General

May 8, 1958

Mr. Don Lowe
Labor Commissioner
Bureau of Labor
L o c a l

Dear Sir:

The following question was submitted in your letter of April 28, 1958:

> Do the provisions of Section 92.5, 1958 Code of Iowa, require a work permit for a minor who is under sixteen but fourteen or more years of age when such minor is working in an establishment operated by his parents?

Although not expressly stated, by asking for an interpretation of Section 92.5, 1958 Code of Iowa, you have indirectly confined the type establishment to those specifically set out in Section 92.1, 1958 Code of Iowa, inasmuch as the former incorporates the latter by reference.

Section 92.1, 1958 Code of Iowa, provides the key wording and is stated below:

> "Child labor - age limit - exception. No person under fourteen years of age shall be employed with or without compensation in any mine, manufacturing establishment, factory, mill, shop, laundry, slaughter house, or packing house, or in any store or mercantile establishment where more than eight persons are employed, or in any livery stable, garage, place of amusement, or in the distribution or transmission of merchandise or messages, but nothing in this section shall be construed as prohibiting any child from working in any of the above establishments or occupations when operated by his parents."

58-5-3

It is observed that the parent must operate the establishment in which his or her children work. Since your question assumes this fact it is, without further discussion, assumed herein. Also, it should be pointed out that Section 92.1, 1958 Code of Iowa, hereinbefore set out, applies only to the establishments specified therein. 1930 Attorney General Opinion, page 169. And, the wording "where more than eight persons are employed" has been construed to modify only the immediately preceding words "any store or mercantile establishment". 1938 Attorney General Opinion 431; 1938 Attorney General Opinion 852.

The spirit of child labor legislation is enunciated in State v. Erle, 210 Iowa 974, where, at page 979, this language appears:

> "The legislative intent in the enactment of the law under discussion is obvious. It was to prevent a child under 14 years from being employed by the owner or operator of the defined and prohibited establishments, in which, by the nature of the work or the place of employment, his health or moral welfare might be impaired. The legislature did except a child under 14 years when acting in the occupation of his mother, as in the instant case. She had a treasure in the child involved here, and the parent's incentive would naturally be to preserve that treasure. Under the provisions of Section 1526, the legislature recognized the fact that parents generally have sufficient interest in their own child or children to decide what is best for him or them, as defined in the exception, and left the question to be decided by the parent or parents."

When this is considered with the underscored wording of Section 92.1, supra, the intent of the Legislature is clearly that a parent is not an employer in the usual sense of the word. With that in mind, it can be seen that the last paragraph of Section 92.5, 1958 Code of Iowa, means exactly what it states:

> " . . . the permit in no case shall be issued to the child, parent, guardian, or custodian, but to its prospective employer."

Therefore, insofar as the establishments specified in Section 92.1, supra, are concerned, a parent need not acquire a work permit for his own child when such child is working in an establishment operated by the parent though the child may be fourteen but less than sixteen years of age.

Very truly yours,

HUGH V. FAULKNER
Assistant Attorney General

HVF:MKB

May 1, 1958

Mr. Robert W. Burdette
Decatur County Attorney
Leon, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 28th ult. in which you submitted the following:

> "Our County Auditor has requested that I obtain an Attorney General's opinion on the following two questions relative to election laws. Let us assume the following set of facts:
>
> "A one-time resident of our county makes a permanent move, or change or residence to some other state. He moves his household goods, family, etc., to the new location. He has no property remaining in Decatur County and gives no apparent indication of ever returning to our county. However, perhaps for sentimental reasons, he wants to maintain his voting residence as Decatur County and proceeds to vote in our elections by absentee ballot from year to year. My questions are:
>
> "1. Is it proper and legal for such a person to vote in Decatur County elections by absentee ballot?
>
> "If the answer to question one is no, that such voting would not be legal, then the County Auditor has this question:
>
> "2. What would he be required to do when such a person makes application to him for an absentee ballot?"

58-5-4

In reply thereto I advise as follows.

1. Insofar as your question #1 is concerned which involves the question of residence, it is said in the case of State v. Savre, 129 Iowa 122, "The word 'residence,' as employed in the election laws, is synonymous with 'home,' and means a fixed or permanent abode or habitation, to which one, when absent, intends to return." Applying the foregoing, it would appear that the one time resident has neither the intent nor the abode in Decatur County and therefor not entitled to vote in Decatur County elections by absentee ballot.

2. In answer to your question #2 I would advise you that while the County Auditor has statutory duties in connection with the administration of the absentee voters law, he appears to have no power over this situation. Whether the absent vote of this former resident shall be cast may be determined in these ways:

a. By the judges of election under the authority of Section 53.25, which provides as follows:

> "Rejecting ballot. In case such affidavit is found to be insufficient, or that the signatures do not correspond, or that the applicant is not a duly qualified elector in such precinct, or that the ballot envelope is open, or has been opened and resealed, or that the ballot envelope contains more than one ballot of any one kind, or that said voter has voted in person, such vote shall not be accepted or counted."

b. By challenge of the vote under the provisions of Section 53.31, providing as follows:

> "Challenges. The vote of any absent voter may be challenged for cause and the judges of election shall determine the legality of such ballot as in other cases."

See opinion of the Attorney General bearing on this question appearing in the Report for 1928 at page 428, copy of which is enclosed. See also Drennan v. Olmstead, 224 Iowa 85, 275 N. W. 884.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB
Enc.

LEGAL SETTLEMENT: # Institutional inmate married on convalescent leave. (Faulkner to Parsons, Dep. Clerk, Bd. of Control, 5/6/58) #58-5-5

Memo from: LEONARD ABELS
Assistant Attorney General

May 6, 1958

Mrs. Eva Parsons
Deportation Clerk
Board of Control
L o c a l

Dear Mrs. Parsons:

Your inquiries of March 24, 1958, are set out below:

(1) Is a marriage contract legal if the person entering into such a contract, has been legally committed, but is on convalescent leave from a mental institution?

(2) In the event the marriage contract is considered valid, does the legal settlement of the wife change to that of the husband?

(3) If a woman is discharged as "not cured" can she enter into a valid marriage contract and, does her legal settlement change as a result of such marriage?

(4) If the marriage is not a valid contract, is an annulment required?

(5) Does a juvenile attain age of majority through marriage?

(6) If a juvenile does attain such majority through marriage and it becomes necessary that he marry while at the Training School, should he be immediately discharged?

With respect to these questions you are advised as follows:

1. The marriage of a legally committed inmate of a mental institution while such inmate is on convalescent leave from such institution is an evidentiary matter. Such a marriage is not void within the provisions of Chapter 595, 1958 Code of Iowa. If not void it must be considered voidable. As a voidable marriage it is valid until annulled.

58-5-5

Insanity at the time of marriage is basis for an annulment under Section 598.19(4), 1958 Code of Iowa. However, such annulment proceeding is to be initiated in accordance with Section 598.21, 1958 Code of Iowa, which states that "either party" may file a petition of annulment. The annotations to this section refer to a 1918 Attorney General Opinion, page 542, which holds that the superintendent of a state institution for the feeble minded has no authority to bring an annulment proceeding.

Therefore, the status of this marriage is a fact matter insofar as the competency of the mental patient is concerned. Since the marriage is not within the classification of marriages considered void it is valid until annulled.

2. In answer to the second question you are referred to Section 230.1, 1958 Code of Iowa, which states:

" * * *

"The residence of any person found insane who is an inmate of any state institution shall be that existing at the time of admission thereto." (Emphasis supplied)

Supplementing the above wording is an opinion from this Department appearing in 1946 Attorney General Opinion, page 201. In that opinion it was held that where two institution inmates were married, while inmates, the derivative legal settlement of the wife did not change until her discharge. As a part of that opinion it was further held that such legal settlement did not change while on leave therefrom. Cited in support of this proposition was 1938 Attorney General Opinion, page 254.

Therefore, clearly, whether or not the marriage is valid, an insane person on leave of absence from a mental institution retains his or her original legal settlement.

3. As to the third inquiry, you are directed to 1946 Attorney General Opinion, page 121. While an inmate is on parole from a mental institution the presumption of insanity remains. Also, where discharge is in terms labelled 'not cured' this presumption prevails. It is, however, rebuttable.

A prerequisite to obtaining a marriage license is sanity. See Section 595.3(5), 1958 Code of Iowa. Therefore, the presumption of insanity is, until rebutted, in effect and could render the inmate incapable of entering into a valid marriage.

The answer to question 2 above provides the solution with respect to whether legal settlement changes as a result of such marriage.

4. This question is discussed in the answer to your first inquiry. Further elaboration is unnecessary.

5. Section 599.1, 1958 Code of Iowa, specifically provides the answer to attainment of majority through marriage.

6. With regard to jurisdiction over a person who marries while on leave of absence from a state mental institution, your attention is invited to 1938 Attorney General Opinion, page 89.

Very truly yours,

HUGH V. FAULKNER
Assistant Attorney General

HVF:MKB

Memo from: LEONARD ABELS
Assistant Attorney General

STATE INSTITUTIONS: Transfer of inmates -- Juvenile Home to Glenwood. (Faulkner to Parsons, Dep. Clerk, Bd of Control 5/8/58) #58-5-6

May 8, 1958

Mrs. Eva Parsons
Deportation Clerk
Board of Control
L o c a l

Dear Mrs. Parsons:

Your letter of March 24, 1958, poses the following four questions:

> "When a child is committed as dependent or neglected to the Iowa Annie Wittenmyer or the State Juvenile Home and/or, committed as a delinquent to the State Training Schools, they are committed until the age of twenty-one unless otherwise released by the Board of Control after attaining the age of eighteen.
>
> "According to Section 232.29 the Board of Control may transfer these children to either Woodward or Glenwood if they are found to be feeble-minded.
>
> "(1) When the patient reaches the age of twenty-one and continued care is indicated, is it necessary to secure another commitment adjudging the person to be feeble-minded?
>
> "(2) Does the original institution issue a discharge at time of transfer?
>
> "(3) If such discharge is issued, does this end jurisdiction and is recommitment necessary at the time of transfer?
>
> "(4) If discharge is not issued, can the original institution close their records by notifying the county of commitment of such transfer and so indicating on their records?"

From the context of the above it appears that you are confronted with the situation where a dependent, neglected or delinquent person is committed under the provisions of Chapter 232,

58-5-6

1958 Code of Iowa. After such commitment the person is found to be feeble-minded, and thus transferred to a State institution for such persons under authority of Sections 232.29 and 244.5, 1958 Code of Iowa.

You are advised as follows:

1. A thorough discussion of the first inquiry is contained in the case of Murphy v. Lacey, 237 Iowa 318, 21 N. W. 2d 897. In that decision a transfer from the Iowa Soldiers' Orphans Home at Davenport to the Glenwood State School was upheld on a finding of feeble-mindedness by the Board of Control. This finding occurred after commitment to the Davenport home. The finding consisted of a psychological examination conducted by the Board of Control.

It is therefore reasoned that after a finding of feeble-mindedness that forms the basis for control over the person and not the prior basis of commitment, i. e., as a dependent, neglected or delinquent person.

As discussed in the Murphy case, supra, it is not necessary to go through the steps of an original commitment in the instance of a transfer. This is emphasized in the language stated below wherein corresponding code sections are considered:

> "We are of the opinion and hold that section 3405 is not mandatory so that it limits all admissions to the Glenwood School. It obviously relates to original admissions. Section 3648 relates to transfers between institutions and was intended to be in addition to provisions for original admissions. To hold that chapter 171 must be complied with before the board of control could act under section 3648 would render section 3648 meaningless, because the transfer would not be made by the board but by the district court. Also, to hold that the other provisions of section 3405 must be complied with before the board could act under section 3648 would likewise render section 3648 meaningless, because the transfer would not be made by the board but by the desire of the inmate, the parents, guardian, or county attorney."

2. The above quotation is indicative of the fact that a "discharge" is not to be considered a "transfer". Further recog-

nition of this difference is manifest in Section 218.21, 1958 Code of Iowa.

3. In regard to your third question, you are referred to the discussion under number 1 above which provides the answer.

4. Whether or not the transferor institution can close their records is an administrative problem and not a legal matter.

Very truly yours,

HUGH V. FAULKNER
Assistant Attorney General

HVF:MKB

Memo from: LEONARD ABELS
Assistant Attorney General

GENERAL ASSEMBLY: Legislative Research Committee -- Out of state travel not subject to Executive Council Approval. (Strauss to Cunningham, Secy., Exec. Council, 5/5/58)

58-5-7

May 5, 1958

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 2nd inst. in which you submitted the following:

> "We would appreciate an opinion as to whether or not the Executive Council has the authority to approve out of state travel and expenses in connection with Legislative Research Committee members who are also members of our State Legislature."

In reply thereto I advise that in my opinion the members of the Legislative Research Committee may travel with expenses paid outside the State of Iowa without prior authority therefor being granted by the Executive Council. The statute pertaining to the expenses of such committee is Section 2.54, Code 1958, providing as follows:

> "Office and supplies - salaries. The office of the research bureau shall be located in the statehouse. Office space, supplies, postage and equipment shall be furnished by the executive council. All other expenses and salaries shall be paid by the budget and financial control committee from the contingent fund provided for the budget and financial control committee. Expenses of the re-

58-5-7

search committee and research bureau shall be paid upon the approval of the director of the bureau and, if an extraordinary expense, upon the approval of the research committee."

Note that the power of the Executive Council where expenses are concerned is limited to the expense of office space, supplies, postage and equipment. All other expenses of the Committee shall be paid by the Budget and Financial Control Committee from its contingent fund and such payment shall be made upon the approval of the director of the bureau. The plain language of this statute restricting the authority of the Executive Council insofar as expenses are concerned and providing for the payment of all other expenses by the Budget and Financial Control Committee from its funds clearly excludes from the power of the Council approval to expend money on travel outside of the state by the members of the Committee. This authority of the Council contained in Sec. 8.13, subsection 2, has no bearing upon this conclusion. To make this a part of the Council's expense control set up in Sec. 8.13 (2) would be incorporating an exception to the provisions of Section 2.54 that was not incorporated by the Legislature. The use of the words all other expenses contained in Sec. 2.54 includes the expense of travel outside the state by members of the Committee.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

Memo from: LEONARD ABELS
Assistant Attorney General

AGRICULTURE: Egg law--
Produce buyer cannot buy
eggs from a producer for
resale unless he candles
and grades them or causes
them to be candled and
graded. (Forrest to Halling,
St. Rep. 5/8/58) # 58-5-8

May 8, 1958

Mr. Eugene Halling
State Representative
Orient, Iowa

Dear Mr. Halling:

We have your inquiry which states in part as follows:

"Can a produce buyer * * * buy eggs from a producer who signs a waiver giving power of attorney to said produce buyer who in turn buys and resells producers eggs on current receipts basis. The above eggs sold out of state and/or to processor in state?"

Section 196.12, 1958 Code, states in part as follows:

"Candling and grading required. Every person buying eggs from producers for resale shall candle and grade all eggs * * *, or cause to be candled and graded * * *, all eggs offered to him, * * *."

On the basis of the above statute it is the opinion of this office that the produce buyer cannot buy eggs from a producer for resale, irrespective of the ultimate destination of the eggs, unless he candles and grades them or causes them to be candled and graded. This conclusion is further borne out by the provisions of Section 196.14, 1958 Code, which states:

"Grades. All eggs for resale or retail must be candled, graded and labeled, and no eggs shall be sold as * * * 'current receipts', * * *."

Very truly yours,

FREEMAN H. FORREST
Assistant Attorney General

FHF:MKB

58-5-8

TAXATION:

5. USE TAX--CHAPTER 423, CODE OF 1958. - Whether a motor vehicle purchased outside the state was intended for use in Iowa is a question of fact. The burden of proof being on the property owner to establish that such motor vehicle was not purchased for use in Iowa. (Peach to Tucker, Johnson Co. Atty, 5/12/58. # 58-5-9

May 12, 1958

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

Dear Sir:

This will acknowledge receipt of your letter of April 29 in which you submit the following for our opinion:

"The following set of facts have presented themselves to our County Treasurer's Office in connection with the licensing of an automobile for the year of 1958.

"'A' was a resident of North Dakota up until September 1, 1957. During the year of 1957 and prior to September 1, he purchased a new automobile in South Dakota for a total purchase price of $3,620 upon which he received $2,249 on a trade-in and paid cash in the amount of $1,400. The additional $29 was to cover $1 title certificate and $28 in sales tax. He moved to the state of Iowa in September of 1957 and in January of 1958, secured an Iowa license plate for this automobile. In connection with these facts, would you kindly answer the following questions:

"1. Under the above facts, was such motor vehicle subject to use tax in the State of Iowa?

"2. If the answer to the above question is in the affirmative, is such use tax based upon the $3,620 total purchase price or the $1,400 cash consideration paid?"

In answer to your first question we advise as follows:

Section 423.2, Code of 1958, provides that:

58-5-9

"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.* * *." (Emphasis supplied)

In the case of Dain Mfg. Co. v. Iowa State Tax Commission, 237 Iowa 531, 534, 22 N.W. 2d 786, the Court stated:

"The purpose of the use-tax is indirectly to tax sales that cannot be directly taxed under the Iowa sales-tax law. Since sales of property designed for use in Iowa cannot be taxed if consummated outside the state, our legislature has resorted to the plan (not uncommon in recent years) of taxing the use of such property in the state. The tax is on the use but it presupposes a prior sale. The tax serves the double purpose of producing revenue that otherwise might not be available and of furnishing some measure of protection to Iowa dealers from competition with outside vendors not subject to liability for sales tax. * * * * *. The law is at the same time apparently drawn with the purpose of avoiding double taxation. * * * *."

To the above case should be added that of Morrison-Knudsen Co., Inc. v. Iowa State Tax Commission, 242 Iowa 33, 44 N.W. 2d 449, excerpts as follows:

Page 26: "* * *, the statute does not impose a tax on the use in this state of all personal property but only such property as was purchased for use here."

Page 38: "* * *. As before explained, the use in this state of property affords no basis for the tax unless the property was 'purchased * * *for use in this state'.

"* * * * * *.

"Our decisions have been careful to point out that the use-tax law is supplementary to the sales-tax law and protects Iowa dealers who must collect and pay a sales tax by placing them on a tax equality with competing out-of-state vendors whose sales are not subject to the sales tax. Also that the principle purpose of the use-tax law was to remedy the evil of out-of-state buying to escape the sales tax."

The Supreme Court of Iowa has established the test: Was the property (in this case, an automobile purchased in South Dakota) 'purchased * * * for use in this state'?

From the facts you present we cannot determine a concise answer, nor are we in a position to do so.

The burden of proof is not upon the State, however, to prove such purchase was made "for use in Iowa". The burden is on the property owner to establish that the property was not so purchased. Report of the Attorney General, 1951, pages 21, 32.

It is our opinion that whether the automobile was purchased for use in Iowa is a fact question. The burden of proof, however, being on the property owner to rebutt the prima facie case made out by Section 423.5, Code of 1958.

We defer answering the second question you submit until such time as it may be determined that the motor vehicle you describe is subject to the Iowa Use Tax.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:md

~~PUBLIC SAFETY:~~ MOTOR VEHICLES: SECTION 321.134, CODE OF 1958.

An affidavit filed in lieu of the surrender of the registration plates will not bring the owner of a motor vehicle under the provisions of Section 321.134. (Swanson and Pesek to Brown, Comm. Pub. Safety, 5/20/58) # 58-5-10

May 20, 1958

Mr. Russell I. Brown
Commissioner of Public Safety
Department of Public Safety
L o c a l

Dear Sir:

Your letter of January 30 is set out as follows:

"We herewith respectfully submit to you a request for an opinion on the following question:

"Section 321.134 of the Iowa Code sets out procedure to store a vehicle.

"If the license plates are not turned into the County Treasurer before the first of February would a sworn affidavit by the owner that the vehicle had not been operated on the highway after the first of February qualify the owner to come under the provisions of Section 321.134?"

The word "affidavit" does not appear in Section 321.134, Code of 1958, nor is any reference made therein to other sections containing or defining the word.

Section 321.126(4) pertains to storage and reference is made therein to an affidavit but such section is limited to storage by the owner of a motor vehicle upon such owner entering military service.

As you will notice, upon reading these two statutes, the owner is required to surrender the registration plates to the county treasurer in both instances. In once to obtain a refund (321.126(4)) and in the other to avoid paying the penalty prescribed (321.134).

58-5-10

The affidavit required in Section 321.126(4) is in addition to the surrender of the registration plates and would not suffice alone. The legislature did not intend that such an affidavit was the only requirement to be met but required the surrender of the registration plates in addition thereto.

It is therefore the opinion of this office that the registration plates must be surrendered to the county treasurer and that an affidavit filed in lieu thereof will not suffice to bring the owner under the provisions of Section 321.134, Code of 1958.

Very truly yours,

DON C. SWANSON
Assistant Attorney General

CARL H. PESCH
Assistant Attorney General

CHP:md

Memo from: LEONARD ABELS
Assistant Attorney General

COUNTY OFFICERS: Appointed trustee. Code section 347.9 precludes municipal officer from serving as county employee trustee. (Abrams to Greene, Monroe Co. Counties, 5/19/58)

58-5-11

May 19, 1958

Mr. David I. Grimes
Monroe County Auditor
Albia, Iowa

Dear Sir:

Referring to your request for opinion as to the eligibility of a mortician to a trusteeship of your County hospital, as a courtesy I would advise as follows. Section 347.9, Code 1958, provides with respect to the number and method of selection of members of the Board of Trustees in terms as follows:

> "Trustees - appointment - terms of office. When it has been determined by the voters of a county to establish a county public hospital, the board shall appoint seven trustees chosen from among the resident citizens of the county with reference to their fitness for such office, three of whom may be women, and not more than four of such trustees shall be residents of the city, town, or village at which such hospital is located. Such trustees shall hold office until the following general election, at which time their successors shall be elected, two for a term of two years, two for four years, and three for six years, and they shall determine by lot their respective terms, and thereafter their successors shall be elected for regular terms of six years each, none of whom shall be physicians or licensed practitioners."

Note that the foregoing section excepts from the holding of such office physicians and licensed practitioners. Chapter 147

58-5-11

of the 1958 Code includes among others deemed to be a practitioner a funeral director or embalmer. In view of the foregoing I am of the opinion that a mortician is a practitioner and therefore would not be eligible to the office of County hospital trustee.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

~~TAXATION~~: MONEYS AND CREDITS -- ANNUITY -- An agreement which provides that in exchange for a sum of money an annuity is to be paid on an annual basis to the annuitant by a religious institution, subjects the principal amount to moneys and credits tax such not being exempt under 421.1(10), Code of 1958. The payments received by the annuitant are subject also to the moneys and credits tax. (Strauss and Peach to Templeton, Hancock Co. Atty., 5/14/58)
58-5-12

May 14, 1958

Mr. G. W. Templeton
Hancock County Attorney
Garner, Iowa

Dear Sir:

This will acknowledge receipt of your letter of April 26 in which you submit the following for our opinion:

> "An individual gives to a church or a church-supported college a substantial sum of money, the only stipulation being that such religious institution shall pay to the donor and the donor's wife, if she survives him, a fixed sum per year for as long as they or the survivor of them shall live and upon their death all such annual payments cease.
>
> "We desire your opinion on the following questions:
>
> "1. Is the principal amount taxable as monies and credits?
>
> "2. If so, is it taxable to the donor or to the religious institution?
>
> "3. Are the stipulated annual payments received by the donor taxable as monies and credits to him?
>
> "It would seem to me that the principal amount would be monies and credits in the hands of the religious institution with the possibility of the same being exempt, if they voted solely to sustaining their purposes as provided in Section 427.1(10) and the annual fixed sum received by the donor or his spouse, if she survives him, would be taxable as monies and credits under the definition of 'credits' set forth in Section 429.1."

Section 427.1(10), Code of 1958, provides that the following shall not be taxed:

> "Moneys and credits belonging exclusively to the institutions named in subsections 7, 8, and 9 and devoted solely to sustaining them, but not exceeding in amount or income the amount prescribed by their charters or articles of incorporation; * * * *." (Emphasis supplied)

Section 429.1, Code of 1958, defines the word "credit":

> "The term 'credit' as used in this chapter, includes every claim or demand due or to become due for money, labor, or other valuable thing, every annuity or sum of money receivable at stated periods, * * * *." (Emphasis supplied)

Section 429.2, Code of 1958, provides:

> "* * *, annuities, * * *, shall be assessed and, * * *, 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."

The facts you present are indicative of a purchase of an annuity by the donor payable as a fixed sum per year. Upon the death of the survivor the annual payments cease. It is assumed that an agreement was entered into between the donor and the donee, such agreement containing the stipulation you mention.

The party obligated to pay the annuity to the annuitant may be for all practical purposes the owner of the fund, but during the time the annuitants are alive the prime obligation of such owner is the payment of the yearly fixed sum to the annuitant.

Iowa adopts the view that statutes granting exemptions must be strictly construed. Cornell College v. Board of Review of Tama County, 81 N.W. 2d 25, 26; Samuelson v. Horn, 221 Iowa 208, 209, 265 N.W. 168.

It is the opinion of this office that for the purposes of taxation the fund is deemed to be the personal property of the recipient of the gift, in this case a church or religious institution.

The religious institution stands as the person who will eventually benefit from the fund or principal but until such time as the annuitants no longer receive an annual payment such religious institution cannot claim an exemption under Section 427.1(10). The exemption, while it may later exist, has not and will not "ripen" until such time as payments to the annuitants cease. In order to qualify for the exemption under Section 427.1(10) the moneys must be devoted solely to sustaining the institutions named in subsections 7, 8, and 9 of 427.1. Such is not the case here. The term "sustaining" as used in Section 427.1(10) has been held to mean "to support, uphold, or maintain". Report of the Attorney General, 1930, pages 45 and 46.

The principal amount is therefore assessable and taxable as personal property of the religious institution.

It is the further opinion of this office that the annual payments received by the donor are taxable, this opinion being in accord with an opinion of this office, the same appearing in the Report of the Attorney General, 1930, page 315.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

CARL H. PESCH
Assistant Attorney General

CHP:md

Memo from: LEONARD ABELS
Assistant Attorney General

SCHOOLS: Sales/use Tax -- Educ. Code section 27801(7) provides for purchase of playground equipment, (also to Thomas, Mich. Atty.) 5/20/58) # 58-5-13

3 copies

May 20, 1958

Mr. Eliot Thomas
Mills County Attorney
Glenwood, Iowa

Dear Sir:

Receipt is acknowledged of your letter of May 5 as follows:

> "Pursuant to our telephone conversation, I am submitting to you for an opinion of your office the following matter:
>
> "At an election in the Glenwood Independent School District a few years ago a proposition was submitted to the voters to levy a two and one-half mill tax on all property in said district under the provisions of Chapter 278, 1954 Code of Iowa, for a period of ten years.
>
> "Funds have accumulated from the levy of such tax and the Board of the District has asked me for an opinion as to whether or not said funds can be used for the purchase and improvement of a playground and/or athletic field.
>
> "Your opinion is respectfully requested."

Section 278.1(7), Code 1958, provides:

> "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."

Since the word "grounds" is not modified by any limiting

58-5-13

adjective, it follows that the section permits purchase of playgrounds or athletic fields, subject to the limitations imposed in Chapter 297 as well as school sites.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA/fm

Memo from: LEONARD ABELS
Assistant Attorney General

CRIMINAL LAW: Evidence -- Use of fingerprints to establish prior conviction. (Forrest to Thompson, Chief, Bur. Crim. Ident., 5/16/58) # 58-5-14

May 16, 1958

Mr. T. A. Thompson, Chief
Bureau of Criminal Investigation
L o c a l

Dear Chief:

In response to your recent inquiry with respect to the use of fingerprints for the establishing of prior convictions as a basis for subsequent offense penalties, the following procedures are recommended:

1) Admission into evidence of a certification of the judgment of conviction, and,

2) Certification of fingerprint record.

   a) It must be shown that the fingerprint record is required in the regular course of the operation of the office certifying the same and was prepared as a result of the previous trial, and should show the case number, the crime, the sentence, and the date.

   b) A fingerprint expert must certify through comparison the fingerprint certified with the records in the former conviction as being the same as the prints of the accused taken in connection with the instant trial.

   c) If the fingerprint record does not have endorsed on it the result of the conviction of the prior case with reference to case and number in which the judgment was entered, the present keeper of the records could testify that he has examined all of the criminal records in his office and that there was only one person held subject to the charge at the time the prior case was charged and that the name of the person is recorded in the fingerprint records. If the records in the Clerk's

58-5-14

office show an indictment against a named person for the crime charged and there are no similar names of people indicted it would appear to prove that the fingerprints were the fingerprints of the man tried and convicted of the prior offense.

Reference is also made to Sections 126.11 and 622.43, as well as Section 749.2 of the Code pointed out by you in your letter.

Personal regards.

Very truly yours,

FREEMAN H. FORREST
Assistant Attorney General

FHF:MKB

VETERANS:

SOLDIERS RELIEF--Percentage granted cannot be fixed by inflexible rule but must be measured by the merits of each case. (Atcls to Martin, Keokuk Co. Atty.; 5/13/58) # 58-5-15

May 13, 1958

Mr. J. Leo Martin
Keokuk County Attorney
State Bank Building
Sigourney, Iowa

Dear Sir:

Receipt is acknowledged of your letter of May 6 as follows:

"The provisions of Chapter 250 of the 1958 Code of the State of Iowa provide for relief for honorably discharged members of the Armed Services and some other qualified persons, which relief is, as I understand it, under the joint control of the Soldier's Relief Commission and the County Board of Supervisors, as provided by Section 250.2 of the Code.

"The Keokuk County Soldier's Relief Commission has passed a resolution which provides that they will be responsible for only one-half of any hospital bill for any person qualifying under the provisions of the Code referred to above.

"My question is:-

"Does the Soldier's Relief Commission have the power or authority to determine the amount of medical assistance furnished to a person who qualifies under the provisions of Chapter 250 of the 1958 Code of the State of Iowa, or is said Commission responsible for the entire amount of medical assistance furnished to such qualified persons?"

Section 250.1 authorizes a tax "to create a fund for the relief of, and to pay the funeral expenses of honorably discharged indigent men and women of the United States who have served in the military or naval forces of the United States in any war. . ."

58-5-15

Since the announced purpose of the fund is "relief", the question in each case is the need for relief. This may vary from case to case. Section 250.9 provides:

> "Names certified--relief changed. At each regular meeting the commission shall submit to the board of supervisors a certified list of those persons to whom relief has been authorized and the amounts so awarded. The amount awarded to any person may be increased, decreased, or discontinued by the commission at any meeting. New names may be added and certified thereat."

Thus, the commission can be committed to neither of the alternatives expressed in your letter as an inflexible rule. Each application must be considered on its merits as determined by the commission in exercise of sound discretion and relief granted in full or in part or denied accordingly.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

2

TOWNSHIPS--FIRE PROTECTION. The provisions of Section 357A.13, Code 1958, impliedly make applicable to benefited fire districts the limitation of exercise of powers "without the limits of a city or town" as set forth in Sections 359.43 and 359.44.
(Opin to DeKay, Cass Co. Atty., 5/6/58)
58-5-16

May 6, 1958

Mr. Harold G. DeKay
Cass County Attorney
21 West Fifth Street
Atlantic, Iowa

Dear Sir:

Receipt is acknowledged of your letter of May 2 as follows:

"I have the following question which I wish to have answered by your office:

"May a benefited fire district organized under the provisions of Chapter 178 of the laws of the 57th General Assembly include cities and towns located within the respective townships within the boundary line of said benefited fire district?"

The express language of the Act in question does not expressly define the scope of its territorial applicability so as to clearly furnish the answer to your question. Section 13 of the Act, which appears as Section 357A.13, Code 1958, provides as follows:

"Township tax discontinued. When the boundary lines of such benefited fire district shall include an entire township, the township trustees shall no longer levy the tax provided by section 359.43; and any indebtedness incurred for the purposes of sections 359.42 to 359.45, inclusive, shall be assumed by the benefited fire district and all the assets of said township which relate to the fire-fighting operation shall be transferred to the benefited fire district. Any property in the township purchased for dual purposes shall be held jointly."

58-5-16

Thus, the answer to your question appears to be implied in the fact that benefited districts succeed to the assets, liabilities and equipment of township fire fighting operation existing under Chapter 359 whereas no provision is made for succession to city or town assets, liabilities or equipment existing in or held by cities and towns under Chapter 368 and other provisions of the Code title relating to cities and towns.

Since benefited districts thus appear intended to serve only as successors to township operations, it appears to follow that the limitation "without the limits of a city or town" repeatedly set forth in Sections 359.43 and 359.44 apply to benefited districts.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

May 13, 1958

Dr. Edmund G. Zimmerer
Commissioner of Public Health
Iowa State Department of Health
L o c a l

Dear Sir:

This will acknowledge receipt of yours of the 21st ult.

in which you submitted the following:

> "In developing the plan for longevity salary increases for employees of the state agencies operating under the Merit System, a suggestion has been made that there might be a possibility that a constitutional question could be involved in our proposed longevity plan.
>
> "After going into this matter fully and giving due regard to the system of salary increases employed by the Merit System agencies and the State, we arrived at the conclusion that a system of longevity pay raises is merely an extension of the method now in force and effect, however, in view of the suggestion that a constitutional question might be involved, it has been deemed advisable to request from you an opinion on the question.
>
> "We might add that it seems to us that wages and salaries based upon longevity clearly are not in payment of services that have already been rendered, but are in payment of future services, the rate of pay being based in part upon length of service. For that reason it would appear that the constitutional provision as set out in Article III, Legislative Department, Section 31 of the State Constitution, does not apply to the proposed longevity plan which has been approved by the Executive Council.
>
> "We would like to call your attention to the fact that all of the Departments, Boards, and Commissions of the state which are maintained

58-5-17

in whole or in part by federal funds must operate under the Merit System. This System was originally adopted by the federal-aided state departments in 1939, at which time the general regulations for the System were put into force and effect.

"May we also call your attention to the last paragraph of Article IV of the Merit System Regulations which is as follows:

"'Salary advancements shall not be automatic, but shall be based upon quality and length of service and shall be controlled by agency regulations providing for fixed times for consideration of increases, for limitation of increases to a reasonable proportion of employees, for a reasonable distribution of increases among classes, and for the number of increases that an individual employee may receive.' (Underscoring supplied)

"To implement the above-quoted section of the Merit System regulations the state agencies under the System have adopted salary advancement and adjustment regulations.

"Section 3-(a), (e), and (f) of Chapter 4 of the Department of Health Manual provides as follows:

"'(a) All salary advancements shall be based upon quality and quantity of work, giving due consideration to length of service.

"'(e) No employee shall be eligible for a salary advancement who has received an increase in salary during the six-month period immediately preceding the date on which the new salary advancement would become effective, except as provided in paragraph (f) below.

"'(f) In cases of exceptionally meritorious service, salary advancements of one additional step during a six-month interval may be permitted. In each such case, however, the findings of the Commissioner and the facts upon

which they are based shall be recorded before such advancement is made effective, and such record of findings and facts shall be made a part of the permanent record of the agency and of the employee.' (Underscoring supplied)

"The 'Employees' Manual' of the Iowa Department of Social Welfare provides in section 3-(a), (e), and (f), under the title, 'Compensation Plan,' the following:

"'(a) All salary advancements shall be based upon quality and quantity of work as reflected by service ratings and upon other recorded measures of performance, giving due consideration to length of service.

"'(e) No employee shall be eligible for a salary advancement who has received an advancement in salary during the 6-month period immediately preceding the date on which the new salary advancement would become effective, except as provided in paragraph (f) below.

"'(f) In cases of exceptionally meritorious service, salary advancements at less than 6-month intervals may be permitted. In each such case, however, the findings of the county and state board of social welfare and the facts upon which they are based shall be recorded before such advancement is made effective and such record of findings and facts shall be made a part of the permanent record of the State Board of Social Welfare and of the employee.' (Underscoring supplied)

"In Regulation 32 of the Iowa Employment Security Commission, which relates to salary adjustments and advancements, we find in Section III, paragraphs (A), (E), and (F) the following:

"'(A) All salary advancements shall be based upon quality and quantity of work as reflected by service ratings and upon other recorded measures of performance, giving due consideration to length of service.

"'(E) No employee shall be eligible for a salary advancement who has received an increase in salary (as a result of a regular salary ad-

vancement, or promotion in class, equivalent to one step of the new salary range) during the six months period immediately preceding the date on which the salary advancement would become effective, except as provided in paragraph (F) below.

"'(F) In cases of exceptionally meritorious service, salary advancements of one additional step during a six months interval may be permitted. In each such case, however, the findings of the Iowa Employment Security Commission and the facts upon which they are based shall be recorded before such advancement is made effective and such record of findings and facts shall be made a part of the permanent record of the agency and of the employee.' (Underscoring supplied)

"In order to receive federal aid the departments operating under the Merit System must have rules and regulations which meet federal requirements and which are approved by the interested federal departments.

"You will note that the rules and regulations of those various state departments provide for advancements based upon length of service. The longevity plan merely provides additional advancements based on a longer period of service. This method has been carried out and put in force and effect by the state of Iowa in its 'Personnel Rules and Regulations.' Section VI of such Rules and Regulations entitled, 'State Classification and Compensation Plan,' in paragraph 7 (b)-(b-1) and (b-2), reads as follows:

"'(b-1) An employee who renders satisfactory service for the probationary period (first six months of employment in a permanent position) may be recommended for a one-step increase in salary within the established range.

"'(b-2) An employee who renders satisfactory service for any six months' period following the probationary period may be recommended for a one-step increase in the established range.'

"You will note that length of service is taken into consideration in granting salary advancements to all state employees.

"We respectfully solicit your opinion as to

the constitutionality of the proposed longevity plan as approved by the Executive Council, a copy of which is attached."

Subsequent thereto receipt is acknowledged of a letter from Don G. Allen, Chief of the Legal Services Division of the Iowa Employment Security Commission, which states:

"Please permit us to supplement with this letter our request for an opinion in regard to the constitutionality of longevity salary increases which was submitted to you on April 21 by three of the agencies operating under the Merit System.

"The question has been raised in discussion with respect to what effect a longevity plan would have upon promotions and demotions. Our longevity plan does not hinder the employee's opportunity for promotion, nor does it protect him from demotion. The longevity plan, as adopted by the agencies and approved by the Executive Council, provides for the adjustment of longevity increases upon promotion and upon demotion. It in no way interferes with an employee's opportunity to advance by promotion consistent with his education and experience and his ability to pass Merit System examinations in succeedingly higher classifications.

"The nature of the work in the agencies is such, however, that many employees either reach the top of their field through years of service, or, perhaps through lack of education, are unable to meet the specifications for further promotion. These people become increasingly valuable to the agencies as their years of experience increase, and such people would benefit by the longevity plan.

"I wish to emphasize the point which was made in the earlier request, that a longevity plan is not a payment for past services, but merely provides that additional salary increases for

future services may be based upon length of service coupled with satisfactory performance.

"May we also call your attention to the last paragraph of Article IV of the Merit System Regulations which is as follows:

"'Salary advancements shall not be automatic, but shall be based upon quality and length of service and shall be controlled by agency regulations providing for fixed times for consideration of increases, for limitation of increases to a reasonable proportion of employees, for a reasonable distribution of increases among classes, and for the number of increases that an individual employee may receive.' (Underscoring supplied)

"As pointed out on the first page of this letter, and in our letter of April 21, all salary advancements in the agencies operating under the Merit System are based in part upon length of service. This was and is a federal requirement, and without this required provision no federal funds would be forthcoming for administrative expenses.

"If the lengevity plan which has been approved by the Executive Council should be held to be unconstitutional, it would follow that all of the merit plans would be to that extent unconstitutional. If the payment of salaries, the amount of which is based in part on length of service, is unconstitutional, we would be in difficulty with the federal government in regard to its grants for operation of the agencies.

"We would like to respectfully call your attention to the fact that most of the agencies involved face a continuing problem with respect to the retention of trained personnel, and it is certain that the longevity plan, as approved by the Executive Council, will be of assistance in lessening that problem.

"It is hard to conceive that all of the people under the Merit System who are being paid wages every month, the amount of which is based in part on length of service, could be said to be paid for services performed ten years ago.

> "We appreciate the consideration which we know you and your staff are giving to this matter."

In reply thereto I advise as follows. If the foregoing longevity plan be unconstitutional it is because the plan violates the provisions of Article III, Section 31, of the Constitution, which provides as follows:

> "Extra compensation - payment of claims. Sec. 31. No extra compensation shall be made to any officer, public agent, or contractor, after the service shall have been rendered, or the contract entered into; nor, shall any money be paid on any claim, the subject matter of which shall not have been provided for by pre-existing laws, and 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."

The test of constitutionality thereunder is whether the plan provides extra compensation after the service shall have been rendered. Precedent for the view that such longevity plan does not violate the foregoing constitutional provisions is found in the Constitution of the State of New York as interpreted by adjudicated cases. In the case of Mahon v. Board of Education of the City of New York, 63 N. E. 1107, the statute of 1900 empowed the Board of Education to place on the list of retired teachers entitled to receive as an annuity one-half of the salary paid them

prior to the time of their retiring certain teachers who had retired prior to the passage of the act creating the pension fund. In holding this act unconstitutional and that the plaintiff was not entitled to the relief he demanded, it was said:

> " * * *Section 10 of article 8 provides that 'no county, city, town or village shall hereafter give any money or property, or loan its money or credit to or in aid of any individual, association, or corporation,' and section 28 of article 3, 'The legislature shall not, nor shall the common council of any city, nor any board of supervisors, grant any extra compensation to any public officer, servant, agent or contractor.' These amendments eliminated all considerations of gratitude and charity as grounds for the appropriation of public moneys, except so far as by article 8 it is provided that these restrictions shall not prevent the municipalities named from making such provision for the aid and support of their poor as may be authorized by law. The claim of the relator falls in direct terms within the restrictions of section 28 of article 3. The relator was a public servant or employe of the city, and the legislature has sought to grant her extra compensation. The argument of her counsel only emphasizes the conflict between the statute and the Constitution. He contends. 'The act of 1900 is as though the state said to the worn-out and decrepit teachers, "You have not been paid enough for your services, and we will now pay you what you deserve."' It is exactly such action on the part of the legislature that the constitutional amendment was intended to prevent. Extra compensation is compensation over and above that fixed by contract or by law when the services were rendered. No one would assert that as between private individuals there arises any equitable or moral obligation to

> pay for services more than the stipulated compensation, where no services have been rendered additional to those contemplated by the contract. * * *"

This view of the foregoing constitution provision, Section 28 of Article 3, was confirmed in the case of Bergerman v. Gerosa, 144 N. Y. Supp. 2d 95, where it was stated:

> "The first and second objections are really one. The proposed payment is ostensibly compensation and the prohibition, if valid, would be pursuant to Article 9 dealing with extra compensation rather than with Article 8, which has to do with gifts. Extra compensation has been defined in connection with the constitutional provision as compensation over and above that fixed by law when the services were rendered. Mahon v. Board of Education of City of N. Y., 171 N. Y. 263, 63 N. E. 1107. * * *"

Further confirmation is the case of Metropolitan Life Ins. Co. v. Durkin, 91 N. Y. Supp. 2d 26, where it was stated:

> "Sections 213 and 213-a by their language prohibit the payment of 'any compensation greater than that which has been determined by agreement made in advance * * *.' The rulings of the Superintendent of Insurance interpreting this language which are in evidence as part of the record in the Federal case and which the plaintiff urges are persuasive clearly state that the sections hold that no 'added compensation' or 'additional compensation' can be paid after a contract has been made. While we have no judicial construction of these sections we have a reliable guide in the decisions construing the words extra compensation as used in the State Constitution, Art. IX, sec. 10. 'Extra compensation is compensation over and above that fixed by contract or by law when the services were rendered.' Matter of Mahon v. Board of Education of City of New York, 171 N. Y. 263, 266, 267, 63 N. E. 1107, 1108, 89 Am. St. Rep. 810. In Porter v. Fletcher, 153

> App. Div. 470, 138 N. Y. S. 557, 559, affirmed 211 N. Y. 524, 105 N. E. 1096, it was pointed out that the evil sought to be remedied by the constitutional provision seems to be 'an increase of compensation for services theretofore rendered, which would be in the nature of a gratuity'; and in Matter of Bareham v. Board of Sup'rs of Monroe County, 247 App. Div. 534, 538, 288 N. Y. S. 185, 191, the court said: 'The mischief sought to be eradicated was the granting of gratuities, something given voluntarily for nothing.' Similarly in Cole v. State of New York, 102 N. Y. 48, 59, 6 N. E. 277, 282, it was held that where an agreement covering compensation was subsequently found to be invalid under the Federal constitution, the employees who rendered the services were not barred from recovery by the provision in the State Constitution. The court conceded 102 N. Y. at page 59, 6 N. E. at page 282, that a strict reading of the language applied but the payment of such compensation 'does not come within the evils at which the constitutional prohibition is aimed.'"

Plainly by the foregoing adjudications the difference in context between the constitutional provisions of Iowa heretofore quoted and that of the State of New York is this: The Constitution of Iowa expressly prohibits the payment of extra compensation after the services have been rendered. The Constitution of the State of New York prohibits the payment of extra compensation but does not include the words after the service shall have been rendered. This difference between the express provisions of the Iowa Constitution and the New York Constitution is supplied by the foregoing adjudicated cases. The longevity plan submitted insofar as service of previous years is concerned deals with such service as the basis for future compensation and

does not operate as extra compensation for services rendered. In that aspect, I find no unconstitutionality in the plan as tested by the provisions of Article III, Section 31, Constitution of Iowa.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

TAXATION: Income Tax -- Federal Judge and Clerk temporarily assigned to Iowa. (Straus to Lundberg, Clerk & Judge Beck, 5/16/58) #58-5-18

May 16, 1958

Mr. Orvel I. Lundberg
Law Clerk to Judge Beck
United States District Court
Elk Point, South Dakota

Dear Sir:

This will acknowledge receipt of yours of the 13th Inst. In which you presented the following for answer:

> "As you may be aware, District Judge Axel J. Beck along with myself as law clerk and his reporter are temporarily assigned to Iowa. We would like your opinion on the question of whether any one employed by the court and assigned here for a temporary period only might possibly be subject to the provisions of the Iowa State Income Tax law to any extent. If you would send us a copy of your opinion on this subject, we would appreciate it very much."

In reply thereto I advise you that Section 422.5 of the 1958 Code of Iowa provides as follows:

> "Tax imposed - applicable to federal employees. A tax is hereby imposed, beginning the first day of January, 1934, upon every resident of the state, and beginning on the first day of January, 1937, upon that part of the taxable income of any nonresident which is derived from any property, trust, or other source within this state, including any business, trade, profession, or occupation carried on within this state, which tax shall be levied, collected, and paid annually upon and with respect to his entire taxable income as herein defined at rates as follows:

58-5-18

> "1. On the first one thousand dollars of taxable income, or any part thereof, three-fourths of one percent.
>
> "2. On the second thousand dollars of taxable income, or any part thereof, one and one-half percent.
>
> "3. On the third thousand dollars or taxable income, or any part thereof, two and one-fourth percent.
>
> "4. On the fourth thousand dollars of taxable income, or any part thereof, three percent.
>
> "5. On the fifth thousand dollars of taxable income, or any part thereof, three and three-fourths percent, and on all taxable income in excess of five thousand dollars, three and three-fourths percent.
>
> "The tax herein levied shall be computed and collected as hereinafter provided.
>
> "The provisions of this division shall apply to all salaries received by federal officials or employees of the United States government as provided for herein from and after January 1, 1939."

It has been the opinion of the Department and of the Tax Commission that the foregoing is applicable to a United States Judge and his accompanying personnel when temporarily assigned to Iowa. However, I would advise you upon inquiry in the auditor's section of the Tax Commission that in the recollection of the personnel there employed, no return by the District Judge has ever been filed. This condition might arise from the fact that unless the net income arising from services performed in Iowa results in the sum of $1,500.00

for a single man and $2,350.00 for a married man no return need be filed.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

~~TAXATION:~~

6 USE TAX - REFUND: The person paying the use tax to the county treasurer or state motor vehicle department is the proper party to apply for such refund. Whether such refund applied for is due is a question for determination by the Tax Commission.
(Peseh to Tucker, Johnson Co. Atty., 5/19/58)
#58-5-19

May 9, 1958

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

Dear Sir:

This will acknowledge receipt of your letter of May 5 which refers to the answer to your letter of March 28 in which you submitted the following:

"Your opinion is requested in the following facts:

"A local corporation having its principal place of business at Iowa City, Johnson County, Iowa, leases automobiles from General Leasing Corporation which is located in St. Paul, Minnesota. The cars are leased on an annual basis for a certain specified rental. The automobiles are all licensed in the State of Minnesota and have been relicensed in Iowa which means that the Iowa corporation must pay a sales or use tax. At the end of one year the automobiles are returned to Minnesota and new automobiles are obtained from the company.

"The automobiles are used within the State of Iowa in some instances, and some are used within the State of Illinois. One is used in Missouri and one is used in Nebraska and South Dakota. The automobiles are used by salesmen of the Iowa corporation, all of whom reside in Iowa but who have the other states as a selling territory.

"Under the above stated facts, I wish to make inquiry as to whether or not the Iowa corporation or General Leasing Corporation, St. Paul, Minnesota, can apply for a refund of the tax."

58-5-19

The question you submit seems to involve a question of procedure, and in answer to the procedural question we advise as follows:

The Iowa Departmental Rules, 1958, specifically Rule No. 197 (Tax Commission--Use Tax) set out the procedure to be followed in filing a claim for refund of use tax. This rule states:

> "Claims for refund of use tax must be made upon forms provided by the commission for such purposes (Form UT-513). Each claim for refund shall be filed in duplicate with the commission, fully executed and clearly stating the facts and reasons upon which the claim for refund is based and sworn to in the presence of a notary public or clerk of district court.
>
> "The use tax will be refunded only to those persons who have remitted the tax directly to the commission except use tax having been paid to the county treasurer or to the state motor vehicle department with respect to motor vehicles will be refunded, upon proper showing, directly to the person paying the tax to the county treasurer or state motor vehicle department.
>
> "* * * * * *."

Applying this rule to the factual situation you present, it is the opinion of this office that since the Iowa corporation paid the use tax, such corporation would be the proper party or "person" to apply for a refund.

It is the further opinion of this office that whether such a refund is due is a matter for determination by the Tax Commission upon receipt of the claim for such refund in proper form.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:md

TOWNSHIPS:

FIRE PROTECTION - Propositions under Code section 359.43 and 359.44 are submitted to voters outside corporate limits and specified notice should be posted outside corporate limits. The proposition voted on by city and town residents under Code section 368.12 is a separate proposition. (Opels to Klotzbach, Buchanan Co. Atty.; 5/21/58)

May 21, 1958 # 58-5-20

William G. Klotzbach
Buchanan County Attorney
Independence, Iowa

Dear Sir:

Receipt is acknowledged of your letter of May 15 as follows:

> "Township trustees plan on submitting the proposal to levy the fire tax provided by Chapter 359.43 at the June 2 primary election. Several questions have arisen in advising the procedure to be followed by trustees.
>
> "1. Since this is not a special election but will be submitted at the regular June primary, is the notice provided for in Section 359.44 necessary? If notice is necessary, can notice be posted in the one town in the township, or must it be posted in rural intersections in the township in as much as there are no 'public places' outside of the town?
>
> "2. In researching these problems, I ran across your letter opinion # 57-3-48. It brought to my attention Section 368.12. If the proposal carries, the township trustees and the town council of the town located in the township plan on entering into an agreement whereby the township will 'rent' fire protection from the town in consideration of a stated sum. The town presently owns fire equipment believed to be adequate. Is there any necessity in view of 368.12 for this proposal also being submitted to the electors of the town?"

In answer to your first question, you are advised that the last sentence in section 359.44 contains no express language limiting its application to certain elections or election times and therefore presumably applies to all. You are, therefore, advised the prescribed notice should be given.

58-5-20

In further answer to your first question, second part, your attention is invited to the phrase "without the corporate limits" which occurs in section 359.43 and to the phrase "residing without the limits of a city or town in section 359.44. Since the tax, if voted, will be imposed outside the city or town and the proposition is submitted to voters residing outside the city or town, it follows that the notices should be posted outside the city or town.

In answer to your second question, it is pointed out that the proposition submitted is primarily for the purpose of obtaining the authorization of the voters residing in the township but outside the town to levy a tax on property situated outside the town for the fire-protection specified. The subject matter of the proposition would, therefore, be improper for submission to voters inside the town under the provisions of sections 359.43 and 359.44 as they would have no proper interest in levying a tax on someone else's property. However, under section 360.12, it would be necessary to submit a separate proposition to the voters of the town authorizing its council to enter into the arrangement with the township.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA/ed

~~AGRICULTURE~~: Weed Law --
County equipment purchased
from proceeds of levy authorized
by code section 317.20 may not
be used for road maintenance.
(Forrest to Statton, Boone Co. Atty.;
5/23/58) # 58-5-21

Memo from: LEONARD ABELS
Assistant Attorney General

May 23, 1958

Mr. D. M. Statton
Boone County Attorney
Boone, Iowa

Dear Sir:

Your recent inquiry with respect to the weed law states as follows:

> "Chapter 317 Code of Iowa 1958 sets forth the law with relation to the control of noxious weeds and provides for the appointment of a weed commissioner in the county by the Board of Supervisors.
>
> "Section 317.20 provides that an additional one-fourth mill may be levied by the County Board for the purpose of purchasing weed eradicating equipment.
>
> "A question has arisen in Boone County concerning whether or not the Board of Supervisors may use equipment so purchased with (sic) of the weed levy for other purposes, such as road maintenance in the county."

In response thereto we advise that equipment purchased with such funds may not be used for purposes other than the duties of the County Weed Commissioner. This is in accordance with the language of the statute and with our prior opinion, 1948 O. A. G. 207, which states in part as follows:

> "The last sentence of this (statute) would indicate an intent to vest complete discretion in the County Board of Supervisors to authorize the use of such * * * equipment * * * on any land in the County. * * *We are of the opinion, however, that

58-5-21

> the * * * words 'to carry out the duties of the County Weed Commissioner' are words of limitation, * * *."

Therefore, it appears that the only proper use to which such equipment may be put is in the performance of the duties of the County Weed Commissioner.

Very truly yours,

FREEMAN H. FORREST
Assistant Attorney General

FHF:MKB

Memo from: LEONARD ABELS
Assistant Attorney General

TAXATION: Real Property -- Property conveyed to city subject to a term for years is taxable (Strauss & Bandler, Marion O. Atty., 5/21/58) #58-5-22

May 21, 1958

Mr. Bert A. Bandstra
Marion County Attorney
Knoxville, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 15th Inst. In which you submitted the following:

"I would very much appreciate receiving from your office an opinion as to the taxability of certain real estate situated in Marion County, which has been conveyed, and is now owned as follows:

"In 1939 Mattie H. Collins leased to J. L. Collins of Knoxville Lots One (1), Two (2) and Five (5) and the West Three feet (W 3') of Lot Three (3) in Block 23 in the original town of Knoxville, Iowa, for a term of 45 years from the 1st day of August, 1939, to the 1st day of August, 1984 for a total rental of $45.00 payable in advance. Mrs. Collins then conveyed the remainder interest in the property above described to the City of Knoxville, Iowa. The quit-claim deed conveying the property provides as follows:

"1. The grantee (city) shall not place any liens or incumbrances upon the premises and shall pay off and discharge, before the same shall become delinquent, any tax or other lien that may attach thereto.

"2. Upon expiration of the lease the grantee (city) shall permit said premises to be used solely for the purpose of a hospital.

"3. Upon failure of the grantee (city) to do and perform any and all of said conditions

58-5-22

and upon breach thereof, at his or their option title vests in J. L. Collins, his heirs or assigns.

"The above referred to deed was duly recorded and by action of the Council in November, 1939, was accepted by the City of Knoxville.

"Mr. J. L. Collins built a hospital building on the above described real estate and the hospital building is now operated, maintained and utilized by the Mater Clinic as was made to appear in the proceedings in the estate of Hattie Reaver, Deceased. Under the Will of Hattie Reaver the city of Knoxville or Marion County was to receive a substantial sum of money for use in payment of the operating expenses of a hospital if, by April 8, 1958, either the City or the County possessed a Municipal or County Hospital. In an action brought by the trustee of the Hattie Reaver Trust for a construction of the will the District Court in and for Marion County found:

"'9. That the hospital, so erected, on part of the real estate described herein, is operated as a private hospital and the City is not entitled to the possession thereof until August 1, 1984.'

"It was decreed accordingly that:

"'the deed from Mattie H. Collins to the City of Knoxville, Iowa, deeding to the City the property on which a hospital has now been erected and which is being operated as a private hospital, subject to a lease to J. L. Collins which does not expire until August 1, 1984, and on which the rent for the entire term has been paid in advance, does not constitute the City of Knoxville the owner of a City hospital as defined in said will.'

"The real estate above described has never been taxed, presumably on the assumption it was municipally owned property and therefore exempt from taxation.

> "On the facts set out above is the real estate referred to above, and on which the hospital is now situated, subject to taxation by Marion County?
>
> "The City of Knoxville does not have possession of the hospital and will not gain possession of the hospital until August 1, 1984. At the present time, and for several years last past, the Mater Clinic has maintained and operated the hospital without any control or supervision on the part of the City of Knoxville."

In reply thereto I would advise you that in my opinion the foregoing property is subject to taxation by Marion County. My reason therefor is based upon Section 427.1, subsection 2, Code 1958, which sets forth the condition that attends exemption of municipal property from taxation. This Section follows:

> "Exemptions. The following classes of property shall not be taxed:
>
> " * * * *
>
> "2. Municipal and military property. The property of a county, township, city, town, school district or military company of the state of Iowa, when devoted to public use and not held for pecuniary profit."

Clearly from the facts stated, this property is not devoted to a public use. It has been adjudicated by court decree to be operated as a private hospital upon which rent has been paid.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

Memo from: LEONARD ABELS
Assistant Attorney General

PUBLIC HEALTH: dentist examiners -- exemptions on administration of Motorized Board Examination. (Cuba & Pimmeren, Comm. Pub. Health, 5/19/58) # 58-5-23

May 19, 1958

Dr. Edmund G. Zimmerer
Commissioner of Public Health
State Department of Health
State Office Building
L o c a l

Dear Dr. Zimmerer:

Receipt is acknowledged of your letter of May 6 as follows:

"The Board of Dental Examiners has asked me to request that you draw up rules for the procedure in adopting National Board dental examinations in lieu of their own written examinations. I believe this was at your suggestion.

"Two items especially occur to me as requiring legal interpretation.

"The National Board requires the name of the individual. No identification is permitted under our law - how can this be adjusted?

"Secondly, the Board (Page 3) wishes to charge an additional fee to all applicants for a license issued under 'reciprocal agreement.' Reciprocity with whom? The Board is simply using another agency's questions - the examinees are probably mostly from Iowa and certainly are not asking for reciprocal licenses.

"Otherwise, I agree with the Board's regulations as given in the accompanying statement.

"May I hear from you at your convenience?"

You also enclose an outline of the proposed rule change.

58-5-23

With respect to the two matters into which your letter inquires:

1. Section 147.37, Code 1958, provides as follows:

> "Identity of candidate concealed. All examinations in theory shall be in writing, and the identity of the person taking the same shall not be disclosed upon the examination papers in such a way as to enable the members of the examining board to know by whom written until after the papers have been passed upon. In examinations in practice the identity of the candidate shall also be concealed as far as possible."

Notice it is the "members of the examining board" from whom identity of examinees must be concealed. However, under Section 147.39, Code 1958, "the department shall detail some employee to act as clerk of any examining board" upon request of such board. It therefore appears feasible for the examination to be conducted by number and the identity of the examinees could be affixed to the papers by the clerk prior to mailing them to the national board. By such procedure the letter of the law would be complied with in that the identity of the examinee would be disclosed to no member of the examining board. Further, since the protection against disclosure of identity appears designed to prevent partiality in grading it appears the spirit of the law would be complied with for two reasons. (1) It is our understanding the national board rather than the Iowa board does the grading. (2) It is our understanding the examination is of the "objective" rather than "essay" type from which it follows the answers are either right or wrong rather than weighed by quality. Hence they are of a type not easily susceptible to enhancement of weight through partiality. In other words, the act of grading, usually done by I.B.M. template, is a purely mechanical function not involving any discretionary acts on the part of the grader.

2. The additional fee in question appears to comply with the provisions of Section 153.3, Code 1958, which provides as follows:

> "License. Every applicant for a license to practice dentistry shall:
>
> "1. Present a diploma issued by a dental college approved by the dental examiners.

"2. Pass an examination prescribed by the dental examiners in the science of dentistry and the practice of dental surgery.

"The state department of health, with the approval of the dental examiners, may accept in lieu of the requirements in subsections 1 and 2 of this section, certificate of satisfactory examination issued by the national board of dental examiners of the United States of America, but every applicant for a license, upon the basis of such certificate, shall be required to pay the prescribed fee for a license issued under reciprocal agreements."

The language of the last paragraph appears to contemplate payment of a fee measured by the fee prescribed in the case of a reciprocal license rather than such fee actually being paid for a license based on reciprocity. That it is required where a national board certificate is recognized in lieu of the other specified requirement is expressed in the statute. If the Board were to adopt the questions on the national board examination as its own and give the examination as its own examination instead of administering it on behalf of the national board, then it would seem no such fee should be exacted. However, if the board is merely acting for the national board in administering their examination, then the situation comes under the last paragraph of the quoted statute and the additional fee, equal in amount to the fee for a license issued under reciprocal agreements applies for the reason that the statute says it applies.

Whether the board contemplates adoption of the national board examination questions as its own or mere administration of the national board examination for the national board and subsequent recognition of certificates issued by the national board under the quoted section is not altogether clear to me from examination of the suggested outline for new regulations enclosed with your letter.

However, a third course which would also solve both questions raised in your letter appears possible. It is noted that the national board examination is of the objective, multiple-choice, I.B.M. Template-graded type. The answer sheet which the examinee fills out is separate from the examination form containing the questions. If the national board were willing to furnish grading templates to the State Board, it would appear entirely possible that the State Board could simultaneously

administer the examination for the national board and administer the same examination as its own by the simple expedient of having the examinee fill out duplicate answer sheets. The answer sheet for the national board could be identified by name and the sheets collected and mailed to the national board for grading. The answer sheet to be graded by the State Board could be identified by number in the usual manner to avoid identification of the examinee to the grader.

If the State Board adopts the national board examination as its own, as distinguished from waiver of examination on the basis of national board certificate, such adoption should be accomplished by annual resolution of the State Board rather than by permanent rule or regulation. The reason for this is to avoid the possible objection that the State Board be delegating its discretion to another agency under the rule delegatus non potest delegare.

I trust the foregoing will assist the State Board in disposing of its problem, whichever application of the national board examination it may have in mind. I also enclose a copy of suggestions relating to the form for preparing rules and regulations. I also enclose an extra copy of this letter for transmittal to the board.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA/fm
Encs

COUNTIES: Official Newspaper -- Qualifications to be met. (Straume to Winkel, Kossuth Co. Atty., 5/19/58) # 58-5-24

May 19, 1958

Mr. Gordon L. Winkel
Kossuth County Attorney
Algona, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 12th inst. in which you submitted the following:

"Your opinion is requested on the question whether publication of official matters which must be 'published in' Kossuth County are validly published when they appear in a newspaper, specifically the Lakota Review, which is printed and published under the following circumstances: The Lakota Review is a newspaper specifically prepared and edited for the community of Lakota, which is in Kossuth County, Iowa. The paper's masthead reads, 'Lakota Review, Lakota, Iowa,' but the mailing permit recites that it has been placed in the mail as second class matter at Buffalo Center, Iowa, which is in Winnebago County. The editor of the paper is Mr. George Carmen, who also edits and publishes the Buffalo Center Tribune. The editorial offices and printing plant are located at Buffalo Center. The paper hires a full-time employee, who resides in Lakota and has responsibility for collecting news, taking subscriptions, and otherwise representing the newspaper where necessary. She does not maintain an office as such in Lakota. The paper meets all other requirements of 618.3 I. C. A.

"In the past, serious questions have been raised concerning the use of this paper for drainage notices, notices of bond elections, notices of franchise elections and similar

58-5-24

> matters. It is apparent that it is the newspaper which has the greatest circulation in the Town of Lakota, and from a notice standpoint, it is much more effective than any other paper published in the County. For that reason, the official groups making the publication would prefer to use it, if valid. However, sufficient doubt has been raised by these various groups, that I would appreciate receiving your opinion on the matter."

In reply thereto I would advise you that a newspaper distributed in the foregoing manner is not an official paper within the terms of the Iowa statute. Insofar as the mere printing of the paper as controlling its designation as an official paper, it was ruled by this Department February 1, 1944, the following as it appears in the pamphlet designated as "Publishing Laws of Iowa" for 1956, at pages 59 and 60:

> "The Waukee Citizen is printed in a central plant in Des Moines. The Citizen is entered at the post office in Waukee and holds a second class mailing privilege through that post office. Taking these things into consideration, the Attorney General made the following ruling:
>
> "'The actual place of printing the paper - where the mechanical work is done, is beside the point. If this paper is entered as second class mail matter through an arrangement with the Post Office Department, so the second class mail privilege is granted for its distribution through the Post Office of Waukee, then in fact it is a paper of "general circulation, published in said town or city", as the law provides.'"

However, this may be made an official paper by complying with instruction 132.3, subsection 33 c, of the Federal

Postal Manual which provides as follows:

> "If a publisher desires to mail copies at another office in addition to the one where he has second-class mail privileges, he may file a written application stating the approximate number and weight of copies to be mailed at the additional office, and the territory to be served. A form is not provided for this kind of application. The application must be filed at the office where the second-class mail privileges where originally obtained. If the additional entry is authorized, all copies for delivery at the original office must be mailed there, and all copies for delivery at the additional office must be mailed at that office."

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

4* Vacancies on Board - -

SCHOOLS: ✓ Removal of director's residence from part of joint district in one county to another part of same district across a county line creates no automatic vacancy. (Opin. to Buchheit, Fayette Co. Atty., 5/1/58) #58-5-25

May 1, 1958

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

Dear Sir:

Receipt is acknowledged of your letter of April 25 as follows:

"I request an opinion on the following question, to wit:

"If a school district is comprised of land area in two counties, is a member of the board of directors of said school district entitled to remain a member of said board of directors if he changes his residence from one county to another, but remains within the boundaries of said school district."

In answer thereto, I am of the opinion that so long as such director remains a resident of the school district his removal from one part of the district to another creates no automatic vacancy if he was elected at large by the entire district. Reason for the above opinion appears in the underscored portion of Section 277.29, hereinafter set forth:

"Vacancies. Failure to elect at the proper election or to appoint within the time fixed by law or the failure of the officer elected or appointed to qualify within the time prescribed by law; the incumbent ceasing to be a <u>resident of the district</u> or subdistrict; the resignation or death of incumbent or of the officer-elect; the removal of the incumbent from, or forfeiture of, his office, or the decision of a competent tribunal declaring his office vacant; the conviction of incumbent of an infamous crime or of any public offense involving the violation of his oath of office, shall constitute a vacancy." (Emphasis added)

58-5-25

As to whether such removal would create a vacancy when the directors are elected by "director districts" under Chapter 275, Code 1958, no opinion is expressed at this time.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

SCHOOL REORGANIZATION--Whether dismissal by the State Department of an appeal to it under Code Section 275.8 or 275.16 is a "decision" further appealable to District Court is a jurisdictional question for the Court to decide when the event happens. (Ltr to Anderson, Howard Co. Atty., 5/13/58) # 58-5-26

May 13, 1958

Mr. C. J. Anderson
Howard County Attorney
P. O. Box 377
Cresco, Iowa

Dear Sir:

Receipt is acknowledged of your letter of May 6, as follows:

"Recently a proposal was submitted upon petition to the joint boards of Howard and Mitchell County asking for the establishment of the Riceville Community School District. The petition asked for a change in county plans. The joint boards of said counties approved amended county plans. Thereafter there was an appeal taken to the State Department of Public Instruction, which appeal was dismissed by a decision rendered the 3rd day of May, 1958, on the basis that the appealing parties were not proper appealing parties. Section 275.18 Code of Iowa 1954, as amended, provides as follows:

"'. . .in the case of joint districts, no notice for an election shall be published until the time for appeal, which shall be the same as that provided in section 285.12, has expired; and in the event of an appeal, not until the same has been disposed of. . .'

"In view of the above set forth facts and the quoted portion of section 275.18 this question arises:

"When may the county superintendent publish notice of the election? That is, must the county superintendent wait until the thirty (30) days time has expired for the appeal to the district court or may the county superintendent publish after five (5) days as might be construed from the provisions of 285.12 or may the county superintendent publish immediately after the decision of the State Board or State Superintendent?"

58-5-26

As has undoubtedly come to your attention, there exists an apparent conflict between the reference to Section 285.12 and the appeal time which is provided in certain amendments to Chapter 275 of the Code made by the Fifty-seventh General Assembly. However, for purposes of the fact situation you describe, such conflict appears of no importance for your letter states "there was an appeal taken to the State Department. . ." It, therefore, appears, under the provision "in the event of appeal not until the same has been disposed of", the appeal will not be "disposed of" until the time within which further appeal to the District Court may be attempted has expired.

Whether or not a "dismissal" by the State Department amounts to a "decision" which can be further appealed to the District Court under Section 275.8 and Section 275.16 is a question properly left for the Court to decide should such appeal be attempted.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

~~TAXATION~~ : Personal Property

HEADNOTE: (1) Wagon boxes are subject to personal property tax even though attached to a licensed trailer; (2) grain handling tax applies only to the receiving of grain and not to the loading out of grain; (3) grain which is owned by the owner of an elevator and which is received at that elevator is subject to the grain handling tax; (4) after grain is processed, other than hulling, cleaning, drying, grading or polishing, it is subject to personal property tax; (5) grain which is handled is defined in section 428.33 (1), Code of Iowa, 1958, is not subject to the personal property tax even though such grain is stored for more than one year. (Brinkman to Drahein, Wright Co Atty 5/19/58)
58-5-27

May 19, 1958

A. F. Draheim, Jr.
County Attorney
Wright County Court House
Clarion, Iowa

Dear Mr. Draheim:

Your letter addressed to the Attorney General of Iowa, together with the enclosed letter to you from Mr. F. Ross Henry, Wright County Assessor, have been referred to this office for reply. Mr. Ballard B. Tipton, Director, Property Tax Division, State Tax Commission has also made written request for an opinion concerning the grain handling tax, (see #6 below), and the writer feels that these matters can best be handled in one opinion.

The questions propounded in these letters appear to be as follows:

1. Are wagon boxes subject to personal property tax even though used on licensed trailers?

2. Are wagon boxes subject to personal property tax if permanently attached to licensed trailers in such a manner that they cannot readily be removed or transferred?

3. Does the grain handling tax apply to both the receiving and the loading out of grain, regardless of the time element?

4. If an operator of an elevator receives grain which he actually owns by virtue of a production contract is the transaction taxable under the grain handling tax?

5. When grain handling tax has been paid, should personal property tax be paid on produce made therefrom, such as ground feed or oil?

6. If grain handling tax is paid, then grain is stored for several years, is such grain exempt from property tax each year that it is in storage?

58-5-27

#2
A. F. Draheim, Jr.
May 19, 1958

The first two questions refer to the taxation of wagon boxes and the statutes applicable thereto are as follows:

Section 321.123, Code of Iowa, 1958, provides:

> Trailers. All trailers except those defined as semitrailers shall be subject to a registration fee to be fixed in accordance with the following schedule, provided, however, trailers subject to a registration fee of ten dollars or less shall be exempt from the certificate of title and lien provisions of this chapter:
>
> "1. When equipped with pneumatic tires:
>
> "Wagon box trailers used by a farmer in transporting produce, farm products or supplies hauled to and from market, five dollars.
>
> "* * *."

Section 321.130, Code of Iowa, 1958, provides:

> "Fees in lieu of taxes. The registration fees imposed by this chapter upon private passenger motor vehicles or house trailers or semitrailers shall be in lieu of all taxes, general or local, to which motor vehicles or house trailers or semitrailers may be subject, and if a motor vehicle or house trailer or semitrailer shall have been registered at any time under this chapter it shall not thereafter be subject to a personal property tax unless such motor vehicle or house trailer or semitrailer shall have been in storage continuously as an unregistered motor vehicle or house trailer or semitrailer during the preceding registration year or unless the same is actually being used for dwelling purposes for more than six months during each calendar year. This section shall not apply to occupied mobile homes."

Section 321.123, provides for the registration of certain types of trailers, including "wagon box trailers". Section 321.130 exempts certain types of trailers upon which registration fees have been paid from all other taxes, including personal property taxes. It is well settled that taxation is the rule and exemption is the exception, and that tax exemption statutes must be strictly construed. In Crown Concrete Company vs. Conkling, 56, 247 Iowa 609, 75 N. W. 2d, 351, the Court said:

> "A tax exempt statute is strictly construed and a claim for exemption under it must be clearly shown to be within the letter and spirit of the law."

The exempt statute, Section 321.130, supra, exempts, "private passenger motor vehicles, or house trailers or semitrailers". It does not exempt wagon box trailers and the same are subject to taxation, whether they be permanently or temporarily attached to a licensed trailer. The attachment by any means to a licensed trailer does not make either the wagon box or the trailer a private passenger motor vehicle, a house trailer, or a semitrailer, so the same would not be within the purview of the exemption statute.

Your remaining questions are all in reference to the "grain handling tax". The statutes applicable to these questions are as follows:

Section 428.35, Code of Iowa, 1958, provides:

> "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.
>
> "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; andon demand the assessor shall have the right to inspect all such person's 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 rule 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 allother officers with respect to the assessment, collection and enforcement of personal property taxes shall apply to the assessment, collection and enforcement of the tax imposed by this section."

Section 427.1, Code of Iowa, 1958, provides:

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

"* * *.

"22. Grain, Grain handled, as defined under Section 428.35."

The tax imposed by Section 428.35, supra, is an excise tax on the handling of grain. Under Section 428.35, subsection 1, handling is defined as:

"The receiving of grain at or in such elevator, warehouse, mill, processing plant or other facilities in this state in which it is received for storage, accumulation, sale, processing, or for any purpose whatsoever."

The tax then is on the "receiving" and not upon the "loading out" of grain, but there is nothing in the statute which exempts grain received more than once at the elevator from tax upon each such receipt. Grain received at the elevator is taxable. If it then leaves the elevator for storage in government bins or elsewhere, this "loading out" is not taxable. If the grain is again received by the elevator it is again taxable, regardless of how long the grain was away from the elevator or where the grain might have been kept during the interim.

The excise tax herein is a duty or license upon the grain handling business. The tax imposed is upon the handling and not upon the property itself. The tax is upon the privilege of receiving grain, but the property involved, i.e., the grain, is used merely to measure the amount of tax due. The ownership of the property is completely immaterial. The situation is analogous to retail sales made in the State of Iowa. The retail sales tax is not a tax on property, but is an excise tax on the privilege of selling property, with the amount of property sold being used to measure the tax. The fact that the merchant does or does not own the goods sold, or that he does nor does not himself purchase the goods does not affect the tax. Similarly, the grain tax is measured by the amount of grain received at the elevator and the ownership of such grain is immaterial. If the owner of the elevator owns the grain which is received at the elevator, he must still pay the tax upon the handling of the grain.

In Section 428.35, (1), Supra, grain is defined as:

> "Wheat, corn, barley, oats, rye, flaxseed, field peas, soybeans, grain sorghums, spelts and such other products as are usually stored in grain elevators."

You ask if ground seed and oil made from grain is still considered grain, and thereby exempt from personal property tax. The statute itself is explicit as to this question in

that it provides:

> "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."

Oil could in no way be considered "grain", being merely a by-product of grain, and it would be subject to property tax. The term "processing", as used in the statute, is said to exclude hulling, cleaning, drying, grading or polishing. If grain were hulled, cleaned, dried, graded, or polished, it would still be grain and would be exempt from assessment as personal property. If the grain were ground, it would have undergone a process not excluded and it would, therefore, be subject to property tax. Merely putting the grain into sacks, as seed corn, without any processing, would not be enough to subject it to assessment, since the statute exempts "the product of such processing when packaged or sacked". By "the product of such processing", we understand the statute to mean processing other than hulling, cleaning, etc. Consequently, if seed corn were merely sacked, or if it were hulled, cleaned, dried, graded or polished and then sacked, such corn would not be considered to have been processed; it would still be "grain", and would be exempt from the property tax. However, if it were ground or otherwise processed, (other than the excluded processes), it would then be subject to assessment and personal property tax.

Subsection 2 of Section 428.35, supra, provides for an annual excise tax on the handling of grain. Subsection 3 of the same section states that persons engaged in handling grain 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 part thereof, ***." Subsection 4 declares that the assessor "shall ascertain the number of bushels of grain handled by each person handling grain in his district during the preceding year, or part thereof, ***".

The above might lead one to believe that since the grain handling tax is an annual tax on grain handled in the taxing district the exemption provided in Section 428.35 (2) and 427.1 (2) exempts only grain handled during the preceding year. This, however, is not the case. The above only provides a convenient means for the assessment and collection of this tax.

Section 428.35 (2), supra, provides that "all grain so handled shall be exempt from all taxation as property under the laws of this state.". Section 427.1 (22), supra, provides that grain handled, as defined under Section 428.35, shall not be taxed as property. There is nothing in the exemption provision to the effect that the grain handling must occur within any particular year to qualify for the exemption. The exemption provisions make no distinction between grain handled in the year that the grain handling tax is paid and any subsequent year. In construing the provision of this Act an Opinion of the Attorney General dated July 14, 1949, states:

> "The intent and purpose of this specific Act was to place a fair tax on grain handled and removed it from the field of property taxation, ***."

In answer to the question propounded, grain handled as defined in Section 428.35 (1) is not subject to the personal property tax and the mere fact that the grain so handled is stored for several years does not render such grain subject to the personal property tax.

Yours very truly,

Richard J. Brinkman
Special Assistant Attorney General

RJB/bjf

MOTOR VEHICLES - Sec. 321.354, Code of 1958.

1. Parking a motor vehicle on a highway which results in leaving less than the prescribed twenty feet unobstructed roadway for the free passage or flow of traffic constitutes a violation of the statute unless, of course, such parking is legally excused under Section 321.355 Code of 1958.

2. This opinion is limited in its application in that it does not answer the question as to whether such a parking would constitute a prima facie case of contributory negligence, such question not being raised by the inquiry submitted.

3. The word "highway" as used in the statute includes a secondary road, and applies to the same, since the statute applies to "any highway outside of a business or residence district".

(Swanson and Peach to Elgin, Warren Co Atty.) 5/28/58)

II 58-5-28

May 28, 1958

Mr. P. F. Elgin
Warren County Attorney
Indianola, Iowa

Dear Sir:

This will acknowledge receipt of your letter of April 22 in which you submit the following for our opinion.

> "Does Section 321.354 of the Code apply to secondary roads if, as a practical matter, it is impossible to park a vehicle and leave 20 feet of the roadway opposite the standing vehicle for the free passage of other vehicles. In the particular instance, the travel portion of the roadway is 24 feet in width. There are no shoulders upon which a vehicle may be parked."

Section 321.354, Code of 1958, provides in part as follows:

> "Upon any highway outside of a business or residence district no person shall stop, park, or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled part of the highway when it is practical to stop, park, or so leave such vehicle off such part of said highway, but in every event a clear and unobstructed width of at least twenty feet of such part of the highway opposite such standing vehicle shall be left for the free passage of other vehicles. . ." (Emphasis supplied)

Section 321.354 is primarily a parking restriction statute, Jesse v. Wemer and Wemer Company, _____ Iowa _____, 82 N.W. 2d 82, 84.

58-5-28

To the Wemer case should be added that of Reed v. Willison, 245 Iowa 1066, 65 N.W. 2d 440, wherein our Supreme Court stated at page 1069 of the official report:

> "Section 321.354, quoted above so far as material, is not an absolute prohibition. It forbids stopping upon the paved part of a highway only when it is practical to stop off such part of the highway. * * * * * *. Section 321.355 provides a statutory legal excuse for one who violates 321.354 where the vehicle is disabled while on the paved portion of the highway in such manner and to such extent that it is impossible to avoid stopping thereon."

The obvious purpose of a statute such as Section 321.354 is to provide for the free flow of traffic. The legislature in enacting this statute determined that anything less than twenty feet of unobstructed roadway would not permit such free flow.

The language as it appears in Section 321.354:

> "* * *, but in every event a clear and unobstructed width of at least twenty feet* * *shall be left for the free passage of other vehicles* * *.",

contemplates a situation such as the one you describe, providing, of course, the vehicle is not disabled so that Section 321.355 would apply and legally excuse such stopping. Assuming that 321.355 does not apply to the situation you describe, then parking a vehicle on the roadway, such parking leaving less than twenty feet of roadway for passage of traffic, would violate the provisions of the statute.

Whether such parking constitutes a prima facie case of contributory negligence is a question seemingly not raised by the inquiry you submit. Iowa cases relevant to this point, however, include: Clark v. Umbarger, 247 Iowa 933, 75 N.W. 2d 243; Reed v. Willison, supra; Kisling v. Tierman, 214 Iowa 911, 243 N.W. 552. And in Marts v. John, 240 Iowa 180, 35 N.W. 2d 844, the Court said that: "Under this record, the question of whether the violation of the statute, assuming such, but not determining, contributed directly to the injury was clearly one for the jury to decide".

It is therefore the opinion of this office that parking a motor vehicle on a highway which results in leaving less than the prescribed twenty feet of unobstructed roadway for the free passage of traffic constitutes a violation of the statute unless, of course, such stopping or parking is legally excused under Section 321.355. This opinion does not answer the question as to whether such parking would constitute a prima facie case of contributory negligence.

Your inquiry seems to raise a question as to whether Section 321.354 applies to secondary roads. Section 321.354 applies to "any highway outside of a business or residence district". (Emphasis supplied) The word "highway" is an all inclusive term even though the highways of the state are classified into several systems. See Section 306.1, Code of 1958. Further, under Section 306.2(3), a secondary road includes a public highway which is not a primary road, a state park road, or an institutional road, and which is outside a city or town.

Very truly yours,

DON C. SWANSON
Assistant Attorney General

CARL H. PESCH
Assistant Attorney General

CHPsmd

ELECTIONS: Nominations - Candidate deceased prior to primary. (Strauss to Synhorst 5/28/58) # 58-5-29

May 28, 1958

Hon. Melvin D. Synhorst
Secretary of State
B u i l d i n g

Dear Sir:

Reference is herein made to the request made to you by Jake More, Chairman, Democratic State Central Committee, in which is stated:

> "Mr. John J. Kelly of Woodbine, Iowa, the Democratic candidate for State Representative - Harrison County, was killed Saturday, May 24. Will you please advise us the proper procedure to follow in filling the vacancy in this office occasioned by Mr. Kelly's death."

In reference thereto I advise as follows.

1. A primary vote for a candidate whose name is printed upon the primary ballot but thereafter deceased is nugatory, cannot be counted, and should be regarded as blank paper. State v. Frear, 128 N. W. 1068 (Wis.) states:

> "The following propositions are decided in this case:
>
> " * * * *
>
> "(3) Votes which are in form cast for a deceased person by voters who know the fact of his decease cannot be considered as votes for or against any person, but must be regarded as so much blank paper."

And see Patton v. Haselton, 164 Iowa 645, 146 N. W. 477, 51 L. R. A. (N. S.) 226.

K-5-29

In that situation legally no name appears as a candidate upon the printed ballot.

2. In order to be nominated in the foregoing situation the following statute prescribes who shall be the nominee by write-in vote. Section 43.66, Code 1958, provides as follows:

> "Minimum requirement for nomination. A candidate whose name is not printed on the official ballot, must, in order to be nominated, receive such number of votes as will equal at least ten percent of the whole number of votes cast for governor at the last general election in the state, or district of the state, as the case may be, on the ticket of the party with which such candidate affiliates."

3. In the event no candidate receives such 10% of the vote then the County Convention may nominate if a write-in candidate receives not less than 5% of such vote. Sec. 43.98, Code 1958, provides:

> "Nominations prohibited. In no case shall the county convention make a nomination for an office unless in the primary election of that party a person has received for such office at least one-half of the number of votes required for nomination by section 43.66, except nominations to fill vacancies in office when such vacancies occurred too late for the filing of nomination papers."

4. The power of the County Convention to nominate generally is provided by Section 43.52, which provides as follows:

> "Who nominated for county office. The candidate or candidates of each political party for each office to be filled by the voters of the county having received the highest number of votes, and not less than thirty-five percent of all the votes cast

> by the party for such office, shall be duly and legally nominated as the candidate of his party for such office, except that no candidate whose name is not printed on the official ballot who receives less than ten percent of the whole number of votes cast in the county for governor on the party ticket with which he affiliates, at the last general election, shall be declared to have been nominated to any such office."

5. At the November election the office may be filled by write-in votes, if no nomination is made by primary or convention.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

Cities and Towns: Libraries -- Power to rent quarters belongs to council. (Erbe to Grafton, Dir. Trav. Lib., 6/3/58)
#58-6-1

June 3, 1958

Miss Ernestine Grafton
Director
Iowa State Traveling Library
L o c a l

Re: Hartley Library Board

Dear Miss Grafton:

You inquire of this office as to whether a library board organized under the provisions of Chapter 378 has the authority to rent library facilities or whether this power is in the city council.

Reference to Section 378.1, Code of Iowa 1958, shows that the legislature specifically gave to the city the power to rent facilities for the benefit of the library board and specifically exempted from the powers and duties of the library board the authority to rent facilities for their use.

Yours very truly,

NORMAN A. ERBE
Attorney General of Iowa

NAE:md

58-6-1

VETERANS: Soldiers Relief -- How granted to members of County Board of Supervisors. (Strauss to Patterson, Exec. Secy., Bonus Bd., 6/5/58) # 58-6-2

June 5, 1958

Mr. Frost P. Patterson
Executive Secretary
Iowa Bonus Board
L o c a l

Dear Sir:

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

> "Our question is, can the County Board of Supervisors approve a claim in behalf of one of its members for assistance when such claim has been given the approval of the County Board of Soldiers' Relief Commissioners?
>
> "We cite you the following case: John Jones is a member of the Board of Supervisors of Emmet County having taken office on January 1, 1958. Mr. Jones was stricken with a severe heart attack about the middle of April 1958 and was hospitalized for several weeks. His doctor and hospital bills amount to approximately $450.00. He is an honorably discharged World War II veteran and is indigent. The Soldiers' Relief Commission of Emmet County feels that they are justified in allowing the bill for they are positive that this veteran cannot pay the bill himself, however, they are not sure that their Board of Supervisors have a legal right to pay this bill from county funds for the reason it would be paying something which is of a direct benefit to one of its members.
>
> "The Soldiers' Relief Commission is a group who are appointed by the County Board of Supervisors. It is their duty to investigate and establish whether or not and how much assistance a veteran needs. After this has

58-6-2

been established the claim is then presented to the Board of Supervisors for approval and payment.

"We call your attention to an opinion in the 1938 Report of Attorney General on page 219. While this does not exactly cover this case it may have some bearing on it. Also we call your attention to page 114 of the 1956 Report of the Attorney General where it explains the duty of the Board of Supervisors in reviewing all claims for assistance as has been approved by the Soldiers' Relief Commission.

"Enclosed is a copy of an opinion written by you under date of July 13, 1945 which may be of some assistance to you.

"We would appreciate a reply at your earliest convenience for this medical and hospital bill is being held up for payment by the Soldiers' Relief Commission and the Board of Supervisors until such time as they have approval or disapproval from your office."

In reply thereto I incorporate as part hereof opinion issued July 13, 1945, which states the following:

"This will acknowledge receipt of yours of the 9th in which you state:

"'I am desirous of a legal opinion as to whether County Soldiers' Relief Commissioners can issue to themselves or their families County Soldiers' Relief.'

"The rule of law controlling the foregoing is set forth in Security Nat. Bank v. Bagley, 202 Iowa 701, 709, as follows:

"'It is the general and well established rule that it is improper and illegal for a member of a municipal council or other similar body to vote upon any question properly before such body in which he is personally interested, and where his personal rights will be affected by the vote. 28 Cyc. 337, James v. City of Ham-

> burg, 174 Iowa 301; Harrison County v. Ogden, 133 Iowa 677, Peet v. Leinbaugh, 180 Iowa 937; Town of Hartley v. Floete Lbr. Co., 185 Iowa 861; Krueger v. Ramsey, 188 Iowa 861. These, and other similar cases where the action has been rendered illegal because of the vote of one personally interested, are cases where such personal interest existed at the time of the action, and the party was pecuniarily affected by the action in which he participated.'
>
> "Application of that rule to this situation results in barring a member of the Soldiers' Relief Commission from voting upon the problem of granting relief to such commissioner or his family. The determination of the problem of relief to such commissioner, or his family, rests in the other two members of the Commission."

This precedent applied to this situation results in the remaining members of the Board of Supervisors acting upon this action of the Soldiers' Relief Commission.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

CITIES AND TOWNS: Taxation -- Cancellation of taxes due on land purchased by city. (Strauss to Tucker, Johnson Co. Atty., 6/4/58) # 58-6-3

June 4, 1958

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

Dear Sir:

This will acknowledge receipt of yours of the 29th ult. in which you submitted the following:

> "A question has arisen here in this county in connection with a request made by the City of Iowa City to the Board of Supervisors of Johnson County that they cancel the taxes on a piece of real estate just purchased by the city for the advertised purpose of erecting a metered municipally owned parking lot.
>
> "Section 427.1(2) as the statute shows, states that the following property shall not be taxed:
>
> "'2. Municipal and military property. The property of a county, township, city, town, school district or military company of the state of Iowa, when devoted to public use and not held for pecuniary profit.'
>
> "The establishment of a municipal parking lot is, without question, a matter devoted to public use but it would also appear that by placing parking meters in such parking lot, the sole purpose thereof is to gain pecuniary profit. The establishment of off-street parking areas, it would further appear, is not a mandatory duty or function required of cities or towns and, therefore, this question arises.

58-6-3

> "Accordingly, will you kindly advise as to whether or not a metered, municipally owned parking lot is exempt from taxation within the meaning of the provisions of Section 427.1(2) of the 1958 Code of Iowa. Thank you for your kind cooperation in this matter."

In reply thereto I would advise you that in my opinion the foregoing described property of the city is entitled to exemption and cancellation of any taxes. My reason therefor is that the use to which the real estate is to be put under Chapter 390, Code 1958, that is, for the erection and maintenance of a parking lot, is a public use. According to opinion of this Department appearing in the 1952 Report at page 93, such action of the city is an exercise of the police power. It is true that according to the statute in addition to the property being devoted to public use in order to secure this exemption it also is required not to be held for pecuniary profit. The fact that there may be a surplus or pecuniary profit incidental to the operation thereof does not convert this to a holding for pecuniary profit. According to Spratt v. Helena Power Co., 94 Pac. 631, that the use of property sought to be condemned may bring about private profit, does not prevent the use from being a public one.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

SCHOOLS: Taxation -- Taxes assessed against land purchased by school district not collectible. (Stramer to Akers, State Auditor, 6/9/58)

June 9, 1958 # 58-6-4

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 yours of the 19th ult. in which you submitted the following:

> "We have received a letter from Mr. Paul T. Eastland, Clinton county treasurer, who would like to obtain an opinion on the following matter:
>
> "'The Clinton Independent School district purchased an entire city block, made up of some thirty individual lots this past November and December. They are going to use the ground as either a parking area, or a practice filed for athletic purposes as it is adjacent to the football field and track, and the stadium.
>
> "'About twelve of the lots are, or rather, were in the name of Clinton County. The county acquired them through the delinquent tax sale some nineteen or twenty years ago. The Board of Supervisors sold the lots to the School board after they, the school, had acquired title to the other lots from the individual owners. As a provision of the sale by the County to the school board we required the school to pay the 1957 taxes due in 1958.'
>
> "There is no question about the tax on the county lots as that has been settled by the school board and the county.

58-6-4

"'The remainder of the lots had been assessed by the assessor and the tax entered in the tax lists. The first half is now delinquent and the school claims they do not have to pay the taxes as it is publicly owned property and now exempt.'

"The question is, should the school district pay these taxes on property lawfully assessed, inasmuch as they did not receive title to same until after the date of the levy was made by the supervisors. These lots were all owned by private parties.

"We have found the following opinions which might have a bearing on the above question.

"1940 Report, Page 604
"1948 Report, Page 3
"1948 Report, Page 196"

In reply thereto I advise you that according to the case of Independent School District of Oakland v. Hewitt, 105 Iowa 663, based upon Chapter 101, Acts of the 17th General Assembly, it was held that lands of any school district shall not be affected by any sale for taxes, nor shall such sale or any conveyance thereof affect or prejudice the public right therein or confer any adverse title or interest on the purchaser, a school site cannot be sold for taxes, or title by tax sale acquired thereto, though the lien of the taxes attach before the acquisition of the property for school purposes. The foregoing numbered statute appears in substantially like form as Sec. 446.34, Code 1958.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

COUNTIES: Courthouse - Power to erect includes power to purchase existing building. (Strauss to Pappas, Cerro Gordo Co. Atty, 6/10/58)

June 10, 1958 #58-6-5

Mr. William Pappas
Cerro Gordo County Attorney
Mason City, Iowa

Dear Sir:

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

> "Could I have your opinion on the following matter?
>
> "Recently the Standard Oil Company abandoned a large office building here in Mason City. The Cerro Gordo County Board of Supervisors has determined that the building could be adapted as a court house at a very reasonable price. The Board of Supervisors now proposes to enter into a contract with the Standard Oil Company to purchase the building, the contract to be contingent upon a special election pursuant to Section 345.1 Code of Iowa. The contract calls for the purchase of the building by Cerro Gordo County, Iowa at a price of $159,400.00, contingent of course upon a favorable vote of the electorate. If the proposition carries, bonds will be issued to finance the purchase and the present court house will be sold and the proceeds of the sale will be used to remodel the new building.
>
> "The question now arises as to the authority of Cerro Gordo County, Iowa to purchase a court house under Section 345.1, and it is especially important since there will be a bond issue. I also call your attention to Section 332.3, subsection 12 of the Code of Iowa which gives the Board of Supervisors the power to purchase, for the use of the county, any real estate necessary for county purposes.

> "Could I have your opinion as to whether or not we have the power to submit the proposition above described for the purchase of the Standard Oil Building at a special election, and then issue bonds in payment therefor.
>
> "This question bothers me no little as you will note that Section 345.1 is entirely silent as to the purchase of a court house, but very carefully details the situation with regard to court houses and then goes on to grant the power to purchase other real estate for county purposes. As a matter of statutory construction it seems to me that we do not have the power to proceed as the Board wishes to proceed. We are very anxious to get going on this project inasmuch as it is a means of obtaining an unusually large and adaptable building for a court house at a very reasonable price. At any rate, we need this opinion as soon as possible as the Standard Oil Company wants to enter into the contract within the next week or two."

In reply thereto I would advise you as follows. Section 345.1, Code 1958, provides:

> "Expenditures - when vote necessary. The board of supervisors shall not order the erection of, or the building of an addition or extension to, or the remodeling or reconstruction of a courthouse, jail, county hospital, or county home when the probable cost will exceed ten thousand dollars, or any other building, except as otherwise provided, when the probable cost will exceed then 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 and against such proposition at a general or special election, notice of the same being given as in other special elections."

In my opinion the authority vested in the Board to erect a courthouse is sufficient to include therein authority to pur-

chase an existing building. Precedent for such conclusion is found in an opinion of this Department issued June 5, 1946, appearing in the Report for 1946 at page 185, copy of which is hereto attached. The conclusion there was that the Legislature in authorizing a school corporation to become indebted for the purpose of building and furnishing a house for the superintendent intended to include therein authority to purchase an existing building.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney

OS:MKB

MINORS: Adoption records -- May not be opened except on court order. (Abels to Jensen, Taylor Co. Atty.) 6/12/58)
58-6-6

June 12, 1958

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

Dear Sir:

Receipt is acknowledged of your letter of June 7 as follows:

> "May a Clerk of the Court without Order of Court supply certified copies of a Decree of Adoption to adopting parents after the adoption records have been sealed and not be in violation of Section 600.9 of the Code of Iowa?
>
> "The copy of the Decree was supplied at the time of the adoption years ago in compliance with Section 600.5."

Section 600.9 to which your letter refers provides as follows:

> "Sealing record - order of court to open. The complete record in adoption proceedings, after filing with the clerk of the court, shall be sealed by said clerk, and the record shall not thereafter be opened except on order of the court."

I cannot imagine a more unequivocal or less ambiguous phrase than "shall not be opened except on order of the court." The word "shall" has been held mandatory and cases so holding may be found annotated under Section 4.1 in either the Official Annotations or the I. C. A. Only one exception to "shall not" is listed and that is "on order of the court". The well known rule "expressio unius est exclusio alterius" appears to preclude any other exception.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:MKB

ELECTIONS: Nominations -- Under Code Chapter 43 County Central Committee Cannot nominate candidate where no candidate received statutory minimum vote at primary. (Strauss to Kellogg, June 9, 1958 Harrison Co. Atty.; 6/9/58) #58-6-7

Mr. John W. Kellogg
Harrison County Attorney
Missouri Valley, Iowa

Dear Sir:

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

> "Relative to our telephone conversation of this date the following is my request for an official opinion on the following matter:
>
> "The facts are that one John J. Kelly was the Democratic candidate for the office of State Representative for Harrison County. Mr. Kelly died. Two days before the election the Chairman of the Democratic Central Committee caused to be served on the Auditor of Harrison County, the attached Notice.
>
> "Thereafter, the Auditor on Monday morning (election day) contacted fifteen of the twenty-six precincts and advised the election judges in these fifteen precincts to write in the name--K. C. Acrea--before handing out the ballots for those persons calling for Democratic ballots.
>
> "My questions are these:
>
> "1. May the Board of Supervisors as the official canvassing board, certify the votes received by the said K. C. Acrea to the Secretary of State as provided in Section 43.49 and Section 43.60?
>
> "2. If the Board of Supervisors acting as the canvassing board is required to certify the vote for K. C. Acrea to the Secretary of State with

the Secretary of State then be required to certify Mr. Acrea's name back to the County Auditor?

"3. In the event that the Secretary of State certifies the name--K. C. Acrea--to the County Auditor of Harrison County, would there be grounds for the said County Auditor to refuse to place the said name on the ballot for the general election?"

Accompanying your letter is a certificate from the Harrison County Democratic Central Committee addressed to Gladys Woody, Harrison County Auditor, which stated:

"We hereby certify that upon receipt of a copy of an Attorney General's ruling declaring that 'legally no name appears as a candidate' for the office of State Representative - Harrison County, because of the death of John J. Kelly whose name is printed on the ballot that the Harrison County Democratic Central Committee gathered upon this 31st day of May, 1958, for the purpose of filling the vacancy so created and that we did by unanimous vote of a quorum present at said meeting nominate K. C. Acrea of 113 North 8th Street, Missouri Valley, Harrison County, Iowa, to fill said vacancy and to be the nominee for the office of State Representative - Harrison County, Iowa, of the Democratic Party.

"You are requested to strictly comply with the provisions of Section 49.61 and 49.62 of the Code of Iowa, 1958 requiring you to place his name as such nominee on each ballot."

In reply thereto I advise as follows.

1. The primary law, being Chapter 43 of the 1958 Code, was enacted to provide nominees for all offices to be filled at the regular biennial election by direct vote of the people restricting the nomination therefor with the exception noted.

Section 43.3, Code 1958. provides as follows:

> "Offices affected by primary. Candidates of all political parties for all offices which are filled at a regular biennial election by direct vote of the people, except the office of judge of the supreme and district courts, shall be nominated at a primary election at the time and in the manner hereinafter directed."

No method in such chapter is provided whereby the name of a candidate for nomination may be placed upon the printed ballot except through the primary law. Sections 49.61 and 49.62, Code 1958, are not part of the primary law and are pertinent only to the laws controlling the general election. By the terms thereof they are so limited. These Sections provide the following:

> "Furnishing judges name of vacancy nominee--pasters. If said ballots have been delivered to the judges of election before a vacancy has been certified, said auditor or clerk shall immediately furnish the name of such substituted nominee to all judges of election within the territory in which said nominee may be a candidate.
>
> "Pasters with the name of the substituted nominee thereon shall likewise be furnished the voter with his ballot when possible to do so."
>
> "49.62 Filling in name of vacancy nominee. Judges of election having charge of the ballots shall, in the case contemplated in section 49.61, place the name supplied for the vacancy upon each ballot issued before delivering it to the voter, by affixing a paster, or by writing or stamping the name thereon."

All provisions thereof are fitted to the election process and not to the primary process. There is no such situation as a vacancy in a candidacy for a primary nomination. Section 49.61 by its specific terms is directed to the use of pasters with the name of the substituted nominee thereon. In the case of Anderson v. Cook, 130 P. 2d 278, 143 A. L. R. 987, 993, quoting from the case of State ex rel. Chamberlin v. Tyler, 100 Fla. 1112, 130 So. 721, it is stated:

> "'The general purpose of the Legislature in enacting mandatory primary laws was to preclude the making of nominations by convention, party committees, and the like, and to require that the people themselves, by their direct votes, should name party nominees. The only vacancies contemplated by section 14 of chapter 13761, supra, to be filed by executive committees, are such as may occur after the people themselves have made nominations, and vacancies therein have occurred by death, resignation, or ohther incapacity, which might perhaps include forfeiture to be determined by resolution of the proper executive committee on proper and sufficient cause shown.
>
> "'The statutory provision now before us should not be interpreted so as to allow a political party to ignore the mandatory requirement to nominate candidates by primaries, and to substitute some other method of selecting original party nominees.
>
> " . . . . .
>
> "'A "vacancy in nomination" is to be distinguished from a failure or omission to nominate at the primaries. There can be no "vacancy in a nomination" until there has first been a nomination. When no nomination has been made, there may be a vacancy on the party ticket for the general election, but there is no vacancy

> "In any nomination," for there has been no nomination. The statute does not provide that that, "If for any cause there is a failure or omission by any political party to designate a nominee in the primary," then the executive committee may designate a nominee. If such had been the legislative intent, it would have been easy to so provide.'"

And distinguishing therein between a vacancy in nomination and a failure or omission to nominate at the primaries it was stated that there can be no vacancy in a nomination until there has first been a nomination. The deceased was a candidate for nomination and not a nominee and it is significant that the primary law makes provision for the filling of a vacancy in a nomination but no provision is made for substituting the name of a candidate upon the primary ticket. In view of the foregoing the request made to the County Auditor to place the name supplied by the Democratic Central Committee upon the ballot is not done under statutory authority and is a nullity.

2. Insofar as the duties of the several public officers are concerned as stated by you I would advise (1) Insofar as the Board of Supervisors is concerned it is the view of the Department that in acting as a canvassing board the Board of Supervisors act ministerially. In that view the legality of the voting procedure by which K. C. Acrea became the substitute candidate and received write-in votes therefor is not a matter for decision by the Board and they may, if otherwise in statutory form, certify

the result to the Secretary of State. (2) Insofar as the duty of the Secretary of State is concerned, opinion upon certification is withheld in view of the following conclusion in respect to your question #3.

3. Insofar as your question #3 is concerned, I call your attention to opinion of this Department appearing in the Report for 1923, 1924 at page 167 where under the situation outlined therein it was stated:

> "Your third proposition is in effect whether or not the fact that the board of supervisors certified the names of these two candidates who were written in, to the chairman of the democratic central committee, would alter the situation. As we have heretofore pointed out, the statute is plain, and its provisions cannot be changed by any action on the part of the board of canvassers or any other public official. The mere fact that a mistake was made in certifying these names or that they were certified with full knowledge of the situation, is immaterial in determining whether or not there was a nomination or a vacancy.
>
> "There being no nomination, it necessarily follows that there could be no vacancy, within the meaning of our statutes. The county convention of any political party may only nominate to fill vacancies. It is, therefore, apparent that the democratic convention of your county in nominating one of the men whose name was written in for the office of supervisor, acted without authority and such action is of not legal force or effect. Nor does the fact that no objections have been filed with the county auditor alter the situation, or change the fact that no nomination was made, no vacancy resulted, and that the county convention had no authority to make a nomination for the office in which there was no vacancy.

> "The foregoing opinion is perhaps more elaborate than the situation warrants, owing to the fact that this department has repeatedly passed upon the propositions here presented, and this opinion merely follows the opinions of this department found in the Reports of Attorney General of 1917-1918, page 376; Reports of Attorney General, 1919-1920, page 471; Reports of Attorney General, 1922, page 73."

In ivew of the foregoing I am of the opinion that there is sufficient ground for you to advise your County Auditor to refuse to place the name supplied by the Central Committee on the ballot for the general election.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

HEADNOTE

HIGHWAYS--Secondary Roads, 1. Board of Supervisors can prohibit operation of trucks or other commercial vehicles on secondary roads for a period exceeding 90 days under Section 321.473, Code of 1958. 2. Board of Supervisors may not close secondary road except by reason of deterioration or climatic conditions as set out in Section 321.471, Code of 1958. (Lyman and McKinney to Kellogg, Harrison Co Atty., 6/3/58) # 58-6-8

June 3, 1958

Mr. John W. Kellogg
Harrison County Attorney
Peoples State Bank Bldg.
Missouri Valley, Iowa

Dear Mr. Kellogg:

Your letter of May 8, 1958, requested an opinion on the following questions:

> 1. "May the Board of Supervisors close a secondary road in excess of ninety days under Section 321.473 or does the ninety day limitation under Section 321.471 also apply to Section 321.473?"
>
> 2. "May the Board of Supervisors close a secondary road for reasons other than those set out in Section 321.471 or upon the complaint of land owners because of dust, excessive traffic, and danger to small children who walk the road to and from school?"

It is our opinion that the Board of Supervisors may restrict the truck traffic or other commercial vehicles on a particular secondary road for more than ninety days under Section 321.473. We refer you to the Attorney General's opinion March 24, 1958 on page 173. Part of that opinion quotes: "The next succeeding Section 321.473 confers generally the right to prohibit the operation of trucks or other commercial vehicles". In answer to your first question the Board of Supervisors can, in excess of ninety days, "prohibit the operation of trucks or other commercial vehicles, or may impose limitations as to the weight thereof" under Section 321.473.

It is our opinion that Section 321.473 and Section 321.471 of the 1958 Code should be read together and that Section 321.473 is in fact an extension of 321.471; that Section 321.471 deals primarily with all vehicles and the closing down of a road completely for a period of time. Section 321.473, of course, deals primarily with

58-6-8

trucks and commercial vehicles. However, it is felt that the same reasons must exist for the action taken by the Board of Supervisors, that is, the reasons set out under 321.471 must also apply to Section 321.473. Thus, in answer to your second question the Board of Supervisors may not close a secondary road for reasons other than those set out in Section 321.471, Code of 1958.

Very truly yours,

John L. McKinney
General Counsel for
Iowa State Highway Commission

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

JLM:js

FIRE PROTECTION: Multi-County Districts -- County attorney does not represent private groups promoting such districts. (Abels to Garretson, Henry Co. Atty.; 6/17/58) # 58-6-9

June 17, 1958

Charles O. Garretson
Henry County Attorney
Mt. Pleasant, Iowa

Dear Sir:

Receipt is acknowledged of your letter of June 13 as follows:

> "I would like an opinion from your office on the following questions.
>
> Under Chapter 357A of the 1958 Code of Iowa is it possible for a proposed fire district to include areas in three counties and, if so, does each county, in setting up the proposed district, follow the procedure set forth in 357A.
>
> Further, is it the duty of the County Attorneys in the three respective counties to represent the petitioners or should they hire counsel."

In view of the paucity of direction contained in the statute it is impossible to elaborate on the opinion dated July 22, 1957, a thermofax copy of which is enclosed.

Since the formation of fire districts under chapter 357A appears to depend upon action by the county board or boards of supervisors, the answer to your second question appears directly furnished by Code section 336.2 which does not include groups of individuals among those enumerated as entitled to the free services of the county attorney. Further, it appears the county attorney should avoid identification of interest with any such group in order that he may impartially advise his board of supervisors with respect to questions which may arise out of such petitions presented to it.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA/ed

58-6-9

SCHOOLS:
SCHOOL REORGANIZATION -- Description in notices is sufficient when made in terms of existing school districts. 179 Iowa 500 cited. (Ades to Cahill, Des Moines County Atty., 6/17/58)

June 17, 1958

#58-6-10

Mr. William S. Cahill
Des Moines County Attorney
Burlington, Iowa

Dear Sir:

Receipt is acknowledged of your letter of June 13 as follows:

> "On Tuesday, June 17, 1958, an election will be held in this county to determine whether or not Mediapolis, Huron Consolidated, Kingston, Jackson Township and Benton Township sub-districts numbers 1, 2 and 3 will merge. A notice of this election has been published in the prescribed number of papers in Des Moines County and because of the lengthy legal descriptions, the cost of publishing the notices was between $400.00 and $500.00.
>
> "If the proposal is approved, an election will be held under Section 275.25 of the 1958 Code to elect the necessary directors on June 30. The notice of this election will be published on June 19.
>
> "To cut down on the expenses of publishing the notice of the election of directors, would you please advise me if we may, instead of publishing the lengthy legal description of the areas involved, describe the election areas by naming all school districts involved.
>
> "Because of the fact that this notice must be published on June 19 and the election is to be held on June 30 as presently scheduled,

58-6-10

It is necessary that we have this information by no later than noon Tuesday, June 17, 1958. If you desire, you may phone me collect."

In answer to your question you are advised that such method of description was held sufficient under prior similar statutes. See Smith v. Blairsburg Ind. Dist., 179 Iowa 500 at pages 502 and 503, 159 N. W. 1027, cited with approval in Wall v. County Board of Education of Johnson County, 86 N. W. 2d 231 at page 239. Although the Wall case goes to a somewhat different question with respect to descriptions in reorganization notices, it appears probable the Court would follow the Smith case under the present statutes and that the method of description you propose would be held sufficient.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:MKB

TAXATION: Refund -- May not be made for eight preceding years (Strauss to Branstad, Winnebago Co. Atty., 6/12/58) # 58-6-11

June 12, 1958

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

Dear Sir:

This will acknowledge receipt of yours of the 10th Inst. In which you state:

> "I received your reply under date of May 22 to my letter dated the 19th of May. Thank you very much for your prompt reply. However, Mr. Strauss, I call your attention to the fact that this property was assessed on a footage basis at the rate of $9.00 per foot and it was assessed on a footage of 123 feet when as a matter of fact the lot was 99 feet in width. An elderly lady is the owner and the taxes were paid.
>
> "Our question to you did not request an opinion as to whether the assessment was erroneous or illegal. I refer you to both my letter of the 19th and your reply of the 22nd and to the second paragraph thereof which states as follows:
>
> "'The only question that has arisen is whether or not a statute of limitations prevents us from going back the full eight years to make the refund. Will you please advise me as to whether or not there is a limitation period on making refund of taxes erroneously assessed.'
>
> "We here have determined that the tax was erroneously assessed and I have been able to find no authority limiting the Board of Supervisors on making a refund in the event they choose to do so. Is there a period of limitations?"

58-6-11

In reply thereto I would advise that I am confirming my letter to you of May 22 including therein the rule of law stated in the cases mentioned as to the limitation of actions for a refund of illegal taxes. If you proceed under the assumption that this assessment is illegal and the exaction illegal, obviously eight years of refund is unauthorized.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

DRAINAGE DISTRICTS: Assessments against State property -- Not authorized except as provided in Code Section 455.50. (Strauss to Dancer, Secy., Bd of Regents, 6/12/58)

June 12, 1958

#58-6-12

Mr. David A. Dancer, Secretary
State Board of Regents
L o c a l

Dear Sir:

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

> "Enclosed is a copy of an assessment sheet, received from the County Treasurer of Pottawattamie County, Iowa, claiming $259.66 from the Iowa School for the Deaf, to cover its share of the cost for maintenance and repair of Mosquito Drainage District #22.
>
> "This levy is against property owned by the State of Iowa for the use and benefit of the Iowa School for the Deaf.
>
> "It will be appreciated if you will advise me as to whether this is an appropriate claim against state funds and if so, is it to be paid out of funds belonging to the Iowa School for the Deaf and directly out of the General Fund of the State."

In reply thereto I would advise you there does not appear to be any statutory authority for assessment for the cost of maintenance and repair against State owned land in a drainage district, except State lands described in Section 455.50, Code 1958, to-wit: Primary roads and land under the jurisdiction of the Conservation Commission. Payment of

the assessment should therefore be refused.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

TAXATION

~~HEADNOTE:~~ Property Tax Assessment of Electric Generating Plants and Transmission Lines: (1) the word "apportion" in 428.25, Iowa Code, means that each district should be assigned that portion of the value of the property in question which is located in that district. (2) the words "other construction" appearing in 437.2 (2), Iowa Code, does not refer to power plants. (3) (a) Generating plant located wholly outside city or town limits should be assessed under provisions of 428.24 (b) Poles, towers, wires, substation equipment and other construction located within city and town limits should be assessed under provisions of 428.24 (c) Poles, towers, wires, substation equipment and other construction located outside city and town limits should be assessed under provisions of 437.6. (Brunkerman to Tipton, Dir, Prop Tax Div St. Tax. Comm., 6/10/58) # 58-6-13

June 10, 1958

Mr. Ballard B. Tipton, Director
Property Tax Division
State Tax Commission
B U I L D I N G

Dear Mr. Tipton:

This is to acknowledge receipt of your letter of May 15, 1958, wherein you request an opinion on the following questions:

"1. What is the correct interpretation to be given to the word "apportion" appearing in Iowa Code, Subsection 428.25 (1958).

"2. Do the words "and other construction" appearing in Iowa Code, Subsection 437.2 (2) include a power plant?

"3. 'In the near future a large plant for generating electricity will be constructed in the Everly Community School District. The plant will be constructed in the rural area outside of the city limits. This plant will furnish electricity to surrounding communities.

'My question is, "will the generating plant be assessed in this one district and the taxes paid to the Everly Community School District":

or

'"Will the total value of the generating plant and transmission lines be assessed as one unit and the tax be distributed to the many districts that the lines pass through"?

'Please inform me.'"

58-6-13

In answer to your first inquiry, you are advised as follows:

Sections 428.24 and 428.25, Code of Iowa (1958), the provisions involved in your first inquiry, read as follows:

> "428.24 Public utility plants. The lands, buildings, machinery, and mains belonging to individuals or corporations operating waterworks or gasworks or pipe lines; the lands, buildings, machinery, tracks, poles, and wires belonging to individuals or corporations furnishing electric light or power; the lands, buildings, machinery, poles, wires, overhead construction, tracks, cables, conduits, and fixtures belonging to individuals or corporations operating railways by cable or electricity, or operating elevated street railways; and the lands, buildings, tracks, and fixtures of street railways operated by animal power, shall be listed and assessed by the state tax commission. In the making of any such assessment of waterworks plants, the value of any interest in the property so assessed, of the municipal corporation wherein the same is situated, shall be deducted, whether such interest be evidenced by stock, bonds, contracts, or otherwise."

> "428.25 Property in different districts. Where any such property except the capital stock is situated partly within and partly without the limits of a city or town, such portions of the said plant shall be assessed separately, and the portion within the said city or town shall be assessed as above provided, and the portion without the said city or town shall be apportioned by the state tax commission to the district or districts in which it is located."

It is to be noted that Section 428.25 provides that the portion outside the limits of a city or town "shall be apportioned by the state tax commission to the district or districts in which it is located."

Prior to 1931 when it was amended by Iowa Laws 1931, 44th G. A., c. 174, §2, the above quoted statute provided in part as follows: "and the portion without the said city or town shall be assessed in the district or districts in which it is located."

The obvious purpose of this amendment was to provide that the property referred to be assessed centrally by the state tax commission rather than locally by the various assessors in the

districts in which each property was located. Once the power was put in the state tax commission to assess provision had to be made for an assignment of an amount for each taxing district upon which a tax could be levied by that district. This was done by stating that the property "shall be apportioned by the state tax commission to the district or districts in which it is located". This amounts to a direction to the state tax commission to make a determination of the proportionate value of the whole located within each taxing district and assign the value so determined to that district.

In answer to your second inquiry, you are advised as follows:

An opinion of the Attorney General, dated May 17, 1927, explains that the term "other construction" contained in what is now Section 437.2 (2), "being words of general character is limited to the same class of equipment as precedes these general terms and, therefor, refers back simply to anything of the character of poles, wire, towers, etc." The opinion goes on to state that the term "other construction" does not refer to power plants. Nothing has transpired since the rendering of this opinion which would indicate that the construction given these words is erroneous.

In answer to your third inquiry, you are advised as follows:

The relevant provisions of the Code of Iowa seem to be Sections 428.24 and 428.25 supra and 437.2.

Section 437.2, Code of Iowa (1958), reads as follows:

> "Statement required. Every company owning or operating a transmission line or lines for the conduct of electric energy and which line or lines are located within the state, and which said line or lines are also located wholly or partly outside cities and towns, shall, on or before the first day

of May in each year, furnish to the state tax commission a verified statement as to its entire line or lines within this state, when all of said line or lines are located outside cities and towns, and as to such portion of its line or lines within this state as are located outside cities and towns, when such line or lines are located partly outside and partly inside cities and towns, showing:

"1. The total number of miles of line owned, operated, or leased, located outside cities and towns within this state, with a separate showing of the number of miles leased.

"2. The location and length of each division within the state and the character of poles, towers, wires, substation equipment, and other construction of each such division, designating the length and portion thereof in each separate county into which each such division extends."

It would seem clear from a reading of the above provisions of the Code of Iowa that the generating plant and transmission lines in question be assessed in the following manner:

1. The generating plant itself, which is located entirely outside any city or town limits, and any other equipment not deemed to be poles, towers, wires, substation equipment and other construction, shall be assessed and apportioned as provided in Sections 428.24, 428.25 and 428.26, Code of Iowa (1958).

2. All poles, towers, wires, substation equipment and other construction located within the limits of cities and towns shall be assessed as provided in Section 428.24, Code of Iowa (1958).

3. All poles, towers, wires, substation equipment and other construction located outside the limits of cities and towns shall be assessed as provided in Section 437.6, Code of Iowa (1958).

Very truly yours,

Richard J. Brinkman,
Special Assistant
Attorney General

RJB:W

AGRICULTURE: County Extension District -- has no power to purchase real estate to provide quarters for itself. (Forrest to Soults, Asst Ext. Dir., I. S. C., 6/4/58)

June 4, 1958 # 58-6-14

Mr. Maurice W. Soults
Assistant Extension Director
Agricultural Extension Service
Iowa State College
Ames, Iowa

Dear Maurice:

Your oral inquiry of May 29, 1958, was as follows:

"May a County Agricultural Extension District purchase real estate to provide quarters for itself?"

The following Code sections are pertinent:

"176A.8 Powers and duties of county agricultural extension council. The extension councils of each extension district of the state shall have, exercise, and perform the following powers and duties:

" * * * *

"3. To serve as an agency of the state and to manage and transact all of the business and affairs of its district and have control of all of the property acquired by it and necessary for the conduct of the business of the district for the purposes of this chapter.

" * * * *

"9. To prepare annually on or before July 31 a budget for the fiscal year beginning January 1 and ending December 31 in accordance with the provisions of chapter 24 and certify the same to the board of supervisors of the county of their extension district as required by law.

58-6-14

" * * * *

"15. To expend the 'county agricultural extension education fund' for salaries and travel, expense of personnel, rental, office supplies, equipment, communications, office facilities and services, and in payment of such other items as shall be necessary to carry out the extension district program; provided, however, it shall be unlawful for the county agricultural extension council to lease any office space which is occupied or used by any other farm organization or farm co-operative, and provided further, that it shall be lawful for the county agricultural extension council to lease space in a building owned and/or occupied by a farm organization or farm co-operative.

"176A.9 Limitation on powers and activities of extension council. 1. 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." (Emphasis ours)

"4.1 Rules. In the construction of the statutes, the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the general assembly, or repugnant to the context of the statute:

" * * * *

"10. Property. The word 'property' includes personal and real property."

Section 176A.8(3) would seem to indicate that real property might be acquired by the district since the word property as set out in the statute is not modified. Under the definition of that word in Sec. 4.1(10) it includes both real and personal

property. However, it is to be further noted that while the statutory definitions in Section 4.1 are to be used in construction of the statutes, such usage must not "be inconsistent with the manifest intent of the general assembly, or repugnant to the context of the statute". In view of this, and considering the provisions in Sec. 176A.8(15) authorizing the district to rent or lease we are of the opinion that Sec. 176A.8(3) refers only to acquisition of chattels and not real property. Familiar rules of statutory interpretation require that powers given to creatures of statute be strictly construed. Dean v. Armstrong, 246 Iowa 412, 415, 68 N. W. 2d 51; Herrick v. Cherokee County, 199 Iowa 510, 513, 202 N. W. 252; Van Eaton v. Town of Sidney, 211 Iowa 986, 231 N. W. 475, 71 A. L. R. 820.

It is to be noted also that Sec. 176A.8(3), while authorizing the acquisition of property, requires that such acquisitions be necessary "for the conduct of the business of the district for the purposes of this chapter." Since the district has been given power to lease or rent, under its primary purpose as described in Sec. 176A.9, supra, i. e., "dissemination of information, the giving of instruction and practical demonstrations on subjects relating to agriculture,, * * *" it would hardly appear to be necessary for the conduct of the district's business within the meaning of this chapter to own rather than to rent or lease its quarters.

For these reasons it is the opinion of this office that a County Agricultural Extension District cannot purchase real estate to furnish quarters for itself.

Very truly yours,

FREEMAN H. FORREST
Assistant Attorney General

FHF:MKB

ELECTIONS: County officers -- Resignation of incumbent - nominee after primary. Where incumbent county officer who has also been nominated at the primary to succeed himself resigns, the County Convention may nominate a candidate for the short-term vacancy but not for the new term. (Strauss to Dunn, Hardin Co. Atty., 6/23/58) # 58-6-16

June 23, 1958

Mr. William N. Dunn
Hardin County Attorney
Hubbard, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 20th inst. in which you submitted the following:

> "I would appreciate your opinion on the following two questions.
>
> "A county officer who was nominated in the primary election on the Republican ticket resigned after the primary election and prior to the County Convention. The nominee was the present incumbent and his resignation is to be effective August 1st and is on file with the County Auditor. The Democrats had no nominee for this office and no write-in votes were cast for the office by the Democrats.
>
> "Question No. 1. I would appreciate your opinion as to whether or not the Democratic Party in the County Convention can nominate a candidate for the short term ending December 31, 1958.
>
> "Question No. 2. Can the Democratic Party in County Convention nominate a candidate for the regular term commencing January 1, 1959?"

1. Insofar as your question #1 is concerned, I am of the opinion that the Democratic party in their County Convention can nominate a candidate for the short term in the office

58-6-16

of County Officer ending December 31, 1958, under the provisions of Section 43.97(3), Code 1958, which provides as follows:

> "Duties performable by county convention. The said county convention shall:
>
> " * * *
>
> "3. Make nominations to fill vacancies in office occurring too late to file nomination papers in the primary election."

2. In answer to your question #2 I would advise that the Democratic party cannot in their County Convention nominate a candidate for County Officer for the regular term commencing January 1, 1959. This opinion is based upon the provisions of Section 43.66, Code 1958, as limited by Section 43.98, Code 1958, which sections provide as follows:

> "43.66 Minimum requirement for nomination. A candidate whose name is not printed on the official ballot, must, in order to be nominated, receive such number of votes as will equal at least ten percent of the whole number of votes cast for governor at the last general election in the state, or district of the state, as the case may be, on the ticket of the party with which such candidate affiliates."
>
> "43.98 Nominations prohibited. In no case shall the county convention make a nomination for an office unless in the primary election of that party a person has receive for such office at least one-half of the number of votes required for nomination by section

43.66, except nominations to fill vacancies in office when such vacancies occurred too late for the filing of nomination papers."

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

SCHOOLS: County Board of Education -- Has no power to employ public health nurse. (Straus to Akers, St. Auditor, 6/27/58)

#58-6-17

June 27, 1958

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

Attention: Mr. Earl C. Holloway

Dear Sir:

I have yours of the 19th inst. in which you submitted the following:

> "We have received a letter from Mr. Harold G. Beam, State Examiner, who inquired about the Board of Education employing a school nurse and paying the expense from the County Board of Education Fund. The county proposes to employ a school nurse in the county at a cost of $4,000.00 per annum, the expense to be prorated three fourths to the schools and one fourth to the county, the county share to be borne by the Board of Education Fund. The plan is to pay the full cost from the Board of Education Fund and this fund to be reimbursed by the various school districts for three fourths of the cost.
>
> "Section 143.1 specifies what agencies may employ a nurse but the County Board of Education is not mentioned:
>
> "The questions are:
>
> "1. Can the County Board of Education employ a school nurse and pay the entire expense from the County Board of Education Fund.
>
> "2. Can the Board of Education employ a nurse under the title of Supervisor of Public Health and pay all expenses from the County Board of Education Fund."

58-6-17

In reply thereto I advise as follows.

1. In answer to your question #1 I would advise you that Section 143.1, Code 1958, in specifying the agencies that may employ a nurse does not include the County Board of Education therein. It is conclusive that the County Board of Education has no authority to employ a school nurse and pay the expense from the County Board of Education Fund.

2. In answer to your question #2 I would advise you that employment of a nurse having the title of Supervisor of Public Health is likewise unauthorized.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

Banks and Banking; School Deposits -- Interest may be paid on proceeds of bond issue voted by electors when invested in certificates of deposit (Straus to Gronstal, Supt. of Banking 6/23/58.

58-6-18

June 23, 1958

Mr. Joe H. Gronstal
Superintendent of Banking
Department of Banking
500 Central National Building
Des Moines, Iowa

Dear Sir:

Reference is herein made to letter dated June 13, 1958, from C. G. Whiting, President, Mapleton Trust & Savings Bank, to Ed B. Wilkinson, Deputy Superintendent, in which he stated the following:

> "Recently the Community School District of Mapleton, Iowa, sold $300,000.00 of school building bonds to the Carleton D. Beh Company of Des Moines, Iowa.
>
> "We are advised by B. H. Morrison, Attorney representing the Board of Education, that the district will have approximately $100,000.00 of these proceeds that will likely not been paid out for about one year and on which they are desirous of receiving some return.
>
> "We have suggested that these funds, which will no doubt be equally divided between the two local banks, be placed in a time certificate of deposit for one year at our current rate of 3%.
>
> "After reading Chapter 453 of the 1958 Code of Iowa and especially Section 453.6 dealing with interest rates on deposits of this character, we are wondering just what

58-6-18

> we can do in this matter. The statutes are confusing here and we would like your interpretation of the bank's position under them and whether or not a bank is limited to two and one-half per cent on public deposits as this would be."

In reference thereto I advise that the foregoing money may be invested under the provisions of Section 453.10, Code 1958, which provides as follows:

> "Investment of funds created by election. 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 deposit therefor. Interest or earnings on such funds shall be credited as provided in subsection 2 of section 453.7."

And I further advise that in the event such funds are invested in certificates of deposit that the interest thereon shall be fixed by the Treasurer of State, Superintendent of Banking and Insurance Commissioner in accordance with the provisions of Section 45.36, which provides as follows:

> "Interest rate. Henceforth public deposits shall be deposited with reasonable promptness and shall except for time certificates of deposit be evidenced by passbook entry by the depository legally designated as depository for such funds. Time certificates of deposit for public funds shall draw interest at rates to be determined January 1 and quarterly thereafter by joint action of the superintendent of banking, insurance commissioner and treas-

urer of state, of which a majority shall control their actions in setting such rates. Said rates shall not be less than one per-cent nor more than two and one-half percent."

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

abels

MOTOR VEHICLES--CHAUFFEUR'S LICENSE:
1. An implement dealer driving a truck owned by such dealers, classified and registered as a Class "J" truck and designed primarily for carrying merchandise or freight of any kind, must secure a chauffeur's license.
2. An owner of a fleet of trucks who drives his own trucks, such truck being used to haul freight must secure a chauffeur's license if such truck is required to be registered at a gross weight classif cation exceeding 5 tons and such truck is designed primarily for carrying freight.

June 26, 1958

(Penah to Timmons, Asst Dubuque Co. Atty, 6/26/58) # 58-6-19

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

Dear Sir:

Your letter of June 12 in which you request an opinion of this office is set out as follows:

"Please give us an opinion as to whether or not an implement dealer driving his own truck with a 'J' license on it hauling parts is required to have a chauffeur's license. The Attorney General's Opinion 1940 Page 153 would not indicate this unless the size of the truck has changed the law. Also whether an owner of a fleet of trucks whose primary business is hauling freight would be required to have a chauffeur's license to drive his own truck?"

1. A "chauffeur" as defined by Section 321.1(43) of the 1950 Code of Iowa was:

"* * *any person who operates a motor vehicle in the transportation of persons or freight, including school busses, and who receives any compensation for such service in wages, commission or otherwise, paid directly or indirectly, or who as owner or employee operates a motor vehicle carrying passengers for hire or freight for hire, commission or resale, including drivers of ambulances, passenger cars, trucks, light delivery, and similar conveyances except when such operation by the owner or operator is occasional and merely incidental to his principal business.

"* * * * * * *."

58-6-19

2. The opinion to which you make reference, the same appearing in the 1940 Report of the Attorney General at page 153, is an interpretation put upon the definition of "chauffeur" as the same appeared in Chapter 134 of the Acts of the Forty-seventh General Assembly. You will notice that this definition is the same as the one appearing in the 1950 Code, cited and set out in paragraph number one (1) of this opinion, except that part pertaining to "school children" and "school busses" which has no material significance as concerns the problem immediately at hand.

3. The definition as it appeared in the 1950 Code of Iowa was changed by Amended Acts 1953 (55 G.A.) Chapter 136, section 1, to read as follows:

> "Section 1. Section three hundred twenty-one point one (321.1), subsection forty-three (43), Code of 1950, is hereby amended by striking therefrom the lines one (1) to thirteen (13) inclusive and substituting in lieu thereof the following:
>
> "'Chauffeur, means any person who operates a motor vehicle in the transportation of persons, including school busses, for wages, compensation or hire, or any person who operates a truck tractor, road tractor or any motor truck which is required to be registered at a gross weight classification exceeding three tons, or any such motor vehicle exempt from registration which would be within such gross weight classification if not so exempt.'"

4. Subsequent amendments changed the word "three" and inserted in lieu thereof the word "five"; and struck the period (.) following the word "exempt" and added the following: "except when such operation by the owner or operator is occasional and merely incidental to his principal business".

5. The definition of "chauffeur" as it now appears in Section 321.1(43), Code of 1958, includes:

> "* * *any person who operates a motor vehicle in the transportation of persons, including school busses, for wages, compensation or hire, or <u>any person who operates a truck tractor, road tractor or motor truck which is required to be registered at a gross weight classification exceeding five tons</u>, or any such motor vehicle exempt from registration which would be within such gross weight classification if not so exempt except when such operation by the owner or operator is occasional and merely incidental to his principal business. (Emphasis supplied).
>
> "* * * * * *."

6. Those motor vehicles "exempt from registration which would be within such gross weight classification if not so exempt" are set out in Section 321.18, Code of 1958. As you will notice the motor truck of which you speak is not included under Section 321.18 and the subsections appearing thereunder.

7. You will notice, however, that, for example, "special mobile equipment" does appear therein. This type of equipment is defined in Section 321.1(17) to mean "every vehicle not designed or used primarily for the transportation of persons or property and incidentally operated or moved over the highways, including road construction or maintenance machinery and ditchdigging apparatus". We are not contending here that the vehicle of which you speak comes under this definition but use it merely to establish that the amendment which added the words "except when such operation by the owner or operator is occasional and merely incidental to his principal business", was to be applicable only to those vehicles "exempt from registration which would be within such gross weight classification if not so exempt".

8. So, it thus becomes apparent to this office that a person who operates (1) a truck tractor, (2) a road tractor, or (3) a motor truck "which is required to be registered at a gross weight classification exceeding five tons", is required to secure a chauffeur's license.

A motor truck equipped with pneumatic tires having a gross weight or tonnage exceeding nine (9) tons and not exceeding ten (10) tons is, according to the established commercial unit rating scale, a class "J" truck. Such a motor truck is required to be registered at a gross weight classification exceeding five (5) tons and falls clearly within the purview of Section 321.1(43).

9. From an examination of the definitions appearing in Section 321.1 it is apparent from the facts you present that the truck used to haul implement parts defies definition as a "truck tractor" or a "road tractor". A "motor truck", however, is defined to include "every motor vehicle designed primarily for carrying livestock, merchandise, freight of any kind, or over seven persons as passengers". (Emphasis supplied)

10. Under the ordinary meaning and use of the word "merchandise", since the word is not defined by statute under Chapter 321, implement parts are clearly items of merchandise.

11. Further interpretation, however, requires a determination as to whether the truck in question is of such primary design as set out within the definition of "motor truck". The facts you present do not establish such either in the negative or affirmative. Such, however, is a question, not of law, but one of fact.

It is, therefore, the opinion of this office that an implement dealer driving a truck, owned by such dealer, classified and registered as a Class "J" truck and designed primarily for carrying merchandise or freight of any kind, must secure a chauffeur's license.

In regard to your second question, we are of the further opinion, based on a substantial part of the reasoning employed to answer the first question submitted, that an owner of a fleet of trucks, who drives his own truck, used to haul freight must secure a chauffeur's license if such truck is required to be registered at a gross weight classification exceeding five (5) tons and such truck is designed primarily for carrying freight of any kind. It would seem that a truck used in the business of hauling freight would be a motor truck designed primarily for such use.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:md

Judges: Municipal -- Salary of substitute judge. (Strauss to Shaff, Atty. Gen. 6/17/58)
58-6-20

June 17, 1958

Honorable David O. Shaff
305 Weston Building
Clinton, Iowa

My dear Senator:

This will acknowledge receipt of yours of the 12th inst. In which you submitted the following:

> "I have been contacted by Hon. W. A. McCullough, Judge of the Municipal Court in Clinton, relative to securing an interpretation of the provisions of Code Section 602.22 of the 1958 Code of Iowa, insofar as said Code Section provides for the salary to be paid to the alternate judge.
>
> "Will you please furnish us an opinion as to whether our interpretation is correct that the yearly salary of $7,700 would be divided by twelve and the resultant monthly salary divided by thirty, or a per diem salary of $21.38. In addition, we should appreciate being advised as to whether Saturday will constitute a full day for purposes of salary computation."

In reply thereto I advise that my view of this compensation problem follows. Section 602.22, Code 1958, provides:

> "Sessions to be continuous--absence of judge--alternate. There shall be no terms of court, and the court shall be open for business twelve months of the year. There shall always be one judge present each day to hold court and issue such writs and orders as are required. In case of inability of any judge to act, any other judge of any munici-

> pal or district court may hold court during such inability; or the governor may appoint a judge to hold court during such inability, who shall have the same qualifications and shall be paid the same salary and in the same manner as the regular judge.
>
> "The words, 'inability of any judge to act' as herein used shall include any absence from court duties for reasonable cause, including a reasonable vacation period. In any municipal court having only one judge, the governor shall upon request of the duly elected judge of said court appoint an alternate judge for a term expiring at the same time as the term of the regular judge. The appointment of such alternate judge shall in no way affect the position, rights, or salary of the regular judge. Such alternate judge shall act as judge only in case of the inability of the regular judge to act. The alternate judge shall have the same qualifications as the regular judge and shall subscribe to the same oath which shall be filed with the city clerk. Such alternate judge may practice as an attorney or counselor except at such time as he is acting as judge and holding court for the regular judge. While acting as a judge he shall not act in any manner with respect to any case in which he is interested as an attorney.
>
> "The alternate judge shall for such times as he shall act as judge be paid a salary in the same amount and manner as the regular judge. The salary of such alternate judge shall be paid equally from the city treasury and from the court expense fund of the county."

I note that insofar as compensation of the alternate judge is concerned the statute provides that he shall be paid "the same salary and in the same manner as the regular judge" and also he shall be paid "a salary in the same amount and manner as the regular judge". While not so stating it is ob-

vious that the legislative intent was that the compensation of such alternate judge be at the rate of the compensation of the regular judge. In that aspect, the Chapter provides for an annual salary in cities having a population of 30,000 or less than 70,000 of $7200 annually plus $500 for services in the juvenile court. According to the provisions of the statute quoted, the court shall be in session twelve months of the year and a judge shall be present each day to hold court and issue writs and orders. In the view that the term twelve months and the term one year are used interchangeably, U. S. for use of Strona v. Bussey, 51 F. Supp. 996, and that there shall be a judge present each day, it is apparent that the regular judge functions 365 days. The compensation of the alternate judge being the same as the regular judge, it follows that for each day of such service the rate of pay for the regular judge shall be $7700 for serving 365 days. The pay of the alternate judge, therefore, shall be computed on that formula. In that view, the compensation of the alternate judge shall be $21.10 per day.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

Schools -- Investment of bond proceeds pending construction of building (Strauss to Fishbaugh, Shenandoah Iowa, 6/23/58) (also see # 58-6-18) 58-6-21

June 23, 1958

Mr. C. W. Fishbaugh, Treasurer
Shenandoah Independent School District
Shenandoah, Iowa

Dear Sir:

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

> "I am school treasurer for the Independent School District of Shenandoah. A bond issue of $373,000. was approved by the voters this spring. They were sold to the Iowa-Des Moines National Bank, Des Moines, Iowa.
>
> "We have now delivered the bonds and have received payment for same. I understand that one building will be started soon, but the other one will be delayed somewhat. The board has brought up the question of investing part of the funds in some government obligation until such time as they will need this money. They have considered ninety day certificates or a similar issue.
>
> "My question is, is it legal for the district to invest funds raised by a bond issue in government issues."

In reply thereto I advise you that the foregoing funds may be invested under the provisions of Section 453.10, Code 1958, which provides as follows:

58-6-21

"Investment of funds created by election. 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 deposit therefor. Interest or earnings on such funds shall be credited as provided in subsection 2 of section 453.7."

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

Cemeteries: Mausoleums owned by individual proprietor on private lots in municipal cemetery not subject to provisions of Chapter 566A, Code of Iowa.

June 20, 1958 (Strauss to Werling, Cedar Co. Atty 6/20/58)

58-6-22

Mr. Max R. Werling
Cedar County Attorney
Tipton, Iowa

Dear Sir:

Replying to yours of the 9th inst. in which you state the following:

> "I respectfully request an Attorney General's opinion on the following question.
>
> "'If a municipally owned cemetery sells lots to a private individual, and that individual erects a mausoleum thereon and sells crypts therein to private persons, do the provisions of Chapter 566A of the 1958 Code apply, and more particularly, is the private individual "operating a cemetery" and does he have to comply with the requirements concerning the amount of money set aside for perpetual care?'
>
> "Your considered opinon on the above question is requested. I believe that the opinion will have far reaching effect in Iowa, since I am informed that a good many firms are now promoting mausoleums throughout the state."

I advise: The particular portion of Chapter 566A of the 1958 Code which appears to be controlling in this situation is Section 1 which provides as follows:

> "Applicability of chapter. Any corporation or other form of organization organized or engaging in the business under the laws of the state of Iowa, or wheresoever organized

> and engaging in the business in the state of Iowa, of the ownership, maintenance or operation of a cemetery, providing lots or other interment space therein for the remains of human bodies except such organizations which are churches or religious or established fraternal societies, or incorporated cities or towns or other political subdivisions of the state of Iowa owning, maintaining or operating cemeteries, shall be subject to the provisions of this chapter."

A private individual is not expressly in those terms included in the class of persons to whom this chapter is applicable. It is applicable to any corporation or other form of organization. That a private individual is not a form of organization intended to be included within the terms of this chapter seems quite clear. It appears that the Legislature in this respect is its own lexicographer in this: Section 1 of the chapter excepts from its applicability "such organizations which are churches or religious or established fraternal societies, or incorporated cities or towns or other political subdivisions of the state of Iowa". Clearly, such organizations so named in the exception are not individuals and without the exception would be organizations to which the chapter is applicable. While it appears to be true that interment by mausoleum is providing "other interment space" and therefore a cemetery, yet where operated as a business by an indi-

vidual, Chapter 566A is not applicable and therefore such cemetery when so operated is not one required to comply with the regulations of the chapter.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

Veterans: Discharge ~~papers~~ -- County Recorder need furnish free copies only in connection with claims against the United States. (Strauss to TePaske, 6/20/58.

June 20, 1958 # 58-6-23

Mr. Henry J. TePaske
Sioux County Attorney
Orange City, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 3rd inst. in which you submitted the following:

> "Should the County Recorder make a charge for a certified copy of the discharge or separation record of a soldier for the purpose of enabling him to make application and prove his qualification to receive the Korean Veterans' Bonus under Chapter 35 of the 1958 Code.
>
> "The applicable section seems to be 335.10, and it seems to be limited to claims for pension or benefits from the Government of the United States.
>
> "I was quite surprised that I was not able to turn to a specific provision or ruling, in view of the question which must have been raised thousands of times in connection with previous bonus legislation. The most recent opinion from your office appears to be in the 1946 report on page 13, which indicates that soldiers and their dependents are entitled to free copies 'as may be required to perfect any claims that such persons may make for a United States pension or other claims. Certified copies of public records to such persons for any use other than designated in the statute must be paid for.'
>
> "It seems to me that under the wording of the statute, the underscored wording 'or other claims' would be limited to claims

> against the United States Government, and that the Recorder should charge the regular fee for copies to make a claim against the State of Iowa. But it seems to me probable, also, that if the issue has been raised, the legislature would not be disposed to charge a veteran a fee for getting a copy in order to claim some money which the State of Iowa is giving to him."

In reply thereto I advise that the 1946 opinion to which you refer seems to be the controlling opinion in this matter. In addition, I am of the opinion that if the Legislature intended to make these copies of such recorded instruments available for other purposes than claims for United States pension it would have so provided. It seems to me that the use of the words "or other claims" has reference to other claims against the United States.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

County Officers:

[redacted] County Board of Social Welfare - Power to use subpoena.

County Boards of Social Welfare are granted power and authority to issue subpoenas and compel witnesses to testify and produce books and papers relevant to investigations conducted by such boards under Chapter 249, Old Age Assistance Law. (Braisco to Caffery, Chmn. St. Bd. Soc. Welfare, 6/30/58)

58-6-24

June 30, 1958.

Mr. L. L. Caffrey, Chairman
State Board of Social Welfare
State Office Bldg.
Des Moines, Iowa

Dear Mr. Caffrey:

Reference is made to intra-office communication of date, April 23, 1958, copy of which is hereto attached, requesting an opinion as to the authority of a County Board of Social Welfare with respect to subpoena. In reply thereto, please be advised as follows:

The pertinent statutes relating to the use of the subpoena by such boards are the following, from the 1958 Code of Iowa:

> 249.12 Witnesses. For the purpose of any such investigation, the State Board and the County Board shall have the power to compel, by subpoena, the attendance and testimony of witnesses and the production of books and papers. All witnesses shall be examined on oath, and any member of the state board or of the county board may administer said oath. The costs incurred in connection with any such hearing or examination shall be paid by the state board or county board, whichever issues the subpoenas; and the witnesses shall be entitled to claim a two-dollar fee and mileage expense at a rate of five cents per mile, except that responsible relatives as defined in sections 252.2, 252.5 and 600.6 shall not be entitled to claim witness fees and mileage expense.
>
> 622.81 Authority to subpoena. Any officer or board authorized to hear evidence shall have authority to subpoena witnesses and compel them to attend and testify, in the same manner as officers authorized to take depositions.
>
> 622.84 Subpoenas - enforcing obedience. When, by the laws of this or any other state or country, testimony may be taken in the form of depositions to be used in any of the courts thereof, the person authorized to

58-6-24

> take such depositions may issue subpoenas for witnesses, which must be served by the same officers and returned in the same manner as is required in a justice's court, and obedience thereto may be enforced in the same way and to the same extent a justice of the peace might do, or he may report the matter to the district court or a judge thereof, who may enforce obedience as though the action was pending in said court.
>
> 622.102 Refusal to appear or testify. Any witness who refuses to obey such subpoena or after appearance refuses to testify shall be reported by the officer or commissioner to the district court of the county where the subpoena was issued or to a judge thereof who shall thereupon proceed as if the refusal had occurred in the district court.

It has long since been established that by proper statutes, such power may validly be vested in administrative authorities, and obedience is due to its proper exercise. (See 42 Am. Jur., Sections 33 and 91, pp. 326 and 419)

Specific power to issue subpoenas to compel the attendance and testimony of witnesses and the production of books and papers has been granted county boards by the provisions of Section 249.12, supra.

To enforce obedience to such subpoenas, we must then advert to the provisions of Sections 622.81, 622.84 and 622.102. We note that in addition to the specific authority to subpoena witnesses granted by Section 249.12, there is additional authority granted under the general authority proscribed to all boards under the provisions of Section 622.81, and setting forth the procedure by which attendance may be compelled under the provisions of Sections 622.84 and 622.102.

In the event there is a recalcitrant witness who refuses to obey the subpoena, or refuses to produce material and relevant books and papers, or refuses to testify after appearing, such witness shall be reported by the officer or commissioner to the district court. It thereupon becomes the duty of the county attorney to appear in said proceedings on behalf of the county board in the further proceedings necessary in the district court to compel the witness to attend and testify in the investigation being conducted by the county board or state board.

It is therefore, our opinion that under the specific provisions of the law heretofore set out, county boards have the power and authority to issue subpoenas and compel the attendance of witnesses to testify and produce books and papers relevant to the investigation being conducted by such boards as required under Chapter 249, Old Age Assistance Law.

Respectfully submitted,

Frank D. Bianco
Assistant Attorney General

FDB/sp
enc.

Counties: Employees insurance -- County has no authority to act as withholding agent except as provided in Code sections 5.14.16 nor does it have power to make contributions. (Strauss to Gray, Calhoun Co. Atty., 6/27/58)

June 27, 1958

#58-6-25

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

Dear Sir:

This will acknowledge receipt of yours of the 24th inst. in which you stated the following:

> "The Board of Supervisors of Calhoun County, Iowa, having been approached by some insurance men on the enclosed insurance plan for county employees on a voluntary basis have requested an opinion on the legality of such a program.
>
> "They have informed me that they feel that such an insurance program would be beneficial both to the individual and also to the tax payers of Calhoun County, Iowa. For example, if an employee is insurable and voluntarily desires the annuity program, the county would raise the pay of all the employees $10.00 a month, which $10.00 would be agreed to between the employee and employer that the $10.00 would be the employer's contribution of 50% and the other 50% of the premium would be furnished by the employee. Thus, if the employee desires insurance or is uninsurable and desires insurance or annuity, it would work as follows:
>
> Base pay - $300.00 a month at the present time. Employer's 50% contribution: raise pay $10.00. Employee's 50% contribution: $10.00. Total to be deducted from wages: $20.00
>
> "This $20.00 then would be used to buy as much insurance as could be bought for $20.00, depending upon the age of the employee. If

> not insurable, then the amount of $20.00 would be held out of the wages for annuity. The whole program is based strictly on whether or not the employee volunteered for the insurance or the annuity.
>
> "Would you, therefore, look over the enclosed insurance plan and advise the undersigned whether or not it would be legal for the Board of Supervisors in their discretion to O. K. such a program on the proposed basis. Your prompt attention to this would be appreciated."

and accompanied your request with a copy of the proposed County Employees Insurance Plan. In reference thereto I would advise after examination and review thereof the following:

1. I know of no statutory authority vested in the Board of Supervisors to deduct from County employees' wages for the payment of any employees' group life or other insurance except that authorized by Section 514.16, Code 1958, authorizing such a deduction from wages for payments made to any non-profit corporation operating a hospital or medical plan.

2. I know of no statute vesting in the Board of Supervisors authority to make contributions out of a public fund for any group insurance for County employees.

Therefore, by reason of the foregoing, the institution of the County employees' plan would be an unauthorized act

by the Board of Supervisors.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

TOWNSHIPS--

1. Public park - Tax : Land must be "acquired" by the township prior to the levying of the tax provided in 359.30, Code of Iowa.

2. Public park - Shelter house: A shelter house is a "necessary improvement" within the meaning of Section 359.30, Code of Iowa.

(Hilton to Cooper, Buena Vista Co. Atty., 7/28/58)
58-7-2

July 28, 1958

Mr. Richard W. Cooper
Buena Vista County Attorney
Porath Building
Storm Lake, Iowa

Dear Sir:

Your letter of May 10, 1958 is as follows:

"The following facts are submitted relative to the authority of a township to participate in the maintenance and control of a public park located within a town in the township and for authority to participate in the building of a shelter house to be located in said park.

"The town of Albert City is located near the center of Fairfield Township, Buena Vista County, Iowa, and said town over a period of the last five or six years has been continually improving and developing a public park located within the town limits. The town at this time has legal title to the real estate and the people of the community have built a swimming pool within the park by popular subscriptions. The town water supply is also drawn from several wells located in the park area. It is the belief of the township trustees of Fairfield Township that the people in the township who also derive a direct benefit from this park and the swimming pool would be agreeable to a tax levy to aid and assist the park's development and maintenance costs of the pool. It is also presently being considered by the town council that a shelter house, costing approximately $5,000, should be built in the park.

"From my examination of Sections 359.29 and 359.30 of the Code of Iowa, it would appear that the Township would have clear authority to levy a tax for improvement and maintenance of the public park if the town would convey legal title jointly to the township and the Town of Albert City.

"The question which arises is whether or not the township could levy a tax for maintenance and improvement without accepting legal title to the real estate and whether or not the term 'necessary improvement' found in line 6 of Section 359.30 would include authority for the construction of a shelter house in the park. I can find no other statutory authority for the township participating in a building program other than Chapter 360 on Township Halls which I doubt would be applicable to this situation."

Sections 359.29 and 359.30, Code of Iowa are as follows:

359.29. "Gifts and donations. Civil townships are hereby authorized and empowered to receive by gift, devise, or bequest, money or property for the purpose of establishing and maintaining libraries, township halls, cemeteries, or for any other public purpose. All such gifts, devises, or bequests shall be effectual only when accepted by resolution of the board of trustees of such township.

359.30. "Cemetery and park tax. They shall, at the regular meeting in April, levy a tax sufficient to pay for any lands so condemned or purchased, or for the necessary improvement and maintenance of cemeteries thus established, and for the necessary improvement and the maintenance of public parks acquired by gift, devise, or bequest under section 359.29, or for the maintenance and improvement of cemeteries so established in adjoining townships, in case they deem such action advisable." (Emphasis supplied)

I am of the opinion that until the park has been "acquired" by the township that the tax provided for in Section 359.30 cannot be levied. (Before any attempted transfer of an interest in this land, you may wish to review the case of Gritton v. City of Des Moines, 247 Iowa 326, 73 N.W. 2d 813.)

I am of the opinion that necessary as used in 359.30, Code of Iowa, means existing from the nature of the case. (Webster's New International Dictionary) There are few improvements in public parks that are "indispensable" and therefore this cannot be the usage of the word intended by the Legislature. A shelter house is therefore a "necessary improvement" within the meaning of Section 359.30, Code of Iowa.

Very truly yours,

JAMES H. GRITTON
Assistant Attorney General

JHG/ed

MOTOR VEHICLES: Bottled gas carriers --
1. Driver must be 21 or over.
2. Chauffeurs license required if vehicle exceeds 5 tons gross weight. (Forrest to Herrick, Chief, Highway Patrol, 7/9/58) #58-7-3

July 9, 1958

Chief David G. Herrick
Highway Safety Patrol
Department of Public Safety
L o c a l

Dear Sir:

Your recent oral inquiries were as follows:

1. Does Section 321.179, 1958 Code of Iowa, preclude persons under the age of 21 years from operating carriers which are hauling bottled gas?

2. Is a chauffeur's license required by such operators when the gross weight of their vehicle is less than five tons?

Your attention is directed to the following Code sections:

"321.1(32) 'Flammable liquid' means any liquid which has a flash point of seventy degrees F. or less, as determined by a Tagliabue or equivalent closed cup test device.

"321.1(43) 'Chauffeur' means any person who operates a motor vehicle in the transportation of persons, including school busses, for wages, compensation or hire, or any person who operates a truck tractor, road tractor or any motor truck which is required to be registered at a gross weight classification exceeding five tons, or any such motor vehicle exempt from registration which would be within such gross weight classification if not so exempt except when such operation by the owner or operator is occasional and merely incidental to his principal business.

58-7-3

> "Subject to the provisions of section 321.179, a farmer or his hired help shall not be deemed a chauffeur, when operating a truck owned by him, and used exclusively in connection with the transportation of his own products or property.
>
> "321.179 SPECIAL RESTRICTIONS ON CHAUFFEURS. No person who is under the age of twenty-one years shall drive any motor vehicle while in use as a carrier of flammables or combustibles, or as a public or common carrier of persons, except a school bus."

Under the provisions of Section 321.179, drivers of motor vehicles in use as carriers of flammables or combustibles must be twenty-one years of age or over. Under the provisions of Section 321.1(32), flammable liquids are described as those with a flash point of 70° or less. There being no question that a "flammable liquid" (321.1(32)) is a "flammable" (321.179), the answer to your first question then turns on whether or not bottled gas is a flammable liquid within the statutory definition.

A check with the Iowa Department of Agriculture reveals that the bottled gas most generally used in Iowa for purposes of cooking and heating is propane. According to the Handbook of Chemistry and Physics, 26th Ed., at sea level, propane is a liquid between 310° F below zero and 42° below zero. At temperatures higher than 42° F below zero, at sea level, propane is a gas.

However, even at higher temperatures, when gaseous propane is compressed sufficiently it will liquefy. At 0° F the vaporized liquid in the bottle exerts a pressure of 28 pounds per square inch, while at 100° F this pressure is 190 pounds per square inch. Only a relatively small portion of the liquid is vaporized to exert the pressures mentioned above. Thus, it is in a liquid state when in "bottles". Chemical authority establishes that the flash point is at least at, and probably lower than, the vaporization temperature (42° F below zero). Since liquid propane must have a flash point considerably below the 70° F maximum required by the statute, it is our opinion that it falls within the comprehension of the statutory definition of a "flammable liquid".

The necessary conclusion then is that trucks used as carriers for hauling propane gas may only be operated by persons twenty-one years of age or older.

In response to your second inquiry, the requirement for a chauffeur's license is set out in Section 321.1(43) which indicates that any person operating a motor truck, properly registered at a gross weight classification exceeding five tons, would require a chauffeur's license. It is to be noted that this section is further qualified by reference to Section 321.179. However, the qualification seems to reinforce the latter provision in that it refers specifically to farmers and their hired help and indicates that there is no exemption for this special class from the provisions of Section 321.179, either.

For this reason it is our opinion that a chauffeur's license is required of those operators of carriers in use for the purpose of hauling propane only if the motor truck they drive has a gross weight classification in excess of five tons.

Very truly yours,

FREEMAN H. FORREST
Assistant Attorney General

FHF:MKB

CITIES AND TOWNS; Mayor's court -- Fines for violation of ordinances allocated to general fund. (Strauss to Akers, St. Auditor, 7/8/58)
#58-7-4

July 8, 1958

Hon. Chet B. Akers
Auditor of State
B u i l d i n g

Attention: Mr. C. W. Ward

Dear Sir:

This will acknowledge receipt of yours of the 2nd inst. in which you submitted the following:

> "I would appreciate receiving an official opinion to be used by municipal examiners from this department in conducting an audit of municipal records and accounts.
>
> "With regard to the deposition of fines collected in the mayor's court for violation of town ordinances, should said fines be deposited to the town's general functional fund or to the public safety fund?"

In reply thereto I advise as follows. The imposition of fines for the violation of city ordinances is authorized under the provisions of Section 366.1, Code 1958, providing as follows:

> "Power to pass. Municipal corporations shall have power to make and publish, from time to time, ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the powers and duties conferred by this title, and such as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort, and convenience of such

58-7-4

> corporations and the inhabitants thereof, and to enforce obedience to such ordinances by fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days."

The disposition of the proceeds of such fines is not prescribed by the foregoing section. However, municipal corporations are not without power to make disposition thereof. Authority to make disposition thereof is contained in Section 404.4, Code 1958, which provides as follows:

> "Allocation of revenue. Municipal corporations shall, at the first meeting of the council after January 1, allocate by resolution the estimated revenue from all levies to the purposes authorized by law and shall allocate sufficient revenue to the debt service fund to pay all bonds and interest thereon as they become due. Said allocations shall also include receipts from sources other than taxation, estimated unincumbered balances from the previous year, and any contemplated transfers of funds. The books of the corporation shall reflect at all times.
>
> "1. The nature and amount of each sum received and expended in each functional fund.
>
> "2. The total amount appropriated in each functional fund.
>
> "3. The total amount appropriated in each of the divisions or accounts within each functional fund as set forth in sections 404.6 through 404.12.
>
> "4. The unexpended balance remaining in each functional fund and in each division or account within such functional fund.
>
> "5. All financial records of the corporation shall be a public record and open to public inspection during business hours."

Note that the foregoing section provides, "Said allocations shall also include receipts from sources other than taxation," and doubtless such proceeds of fines would be deemed receipts from sources other than taxation and subject to allocation under the provisions of the foregoing designated section. The fund to which the allocation should be made would be a matter within the discretion of the city council. However, insofar as the fund under consideration is concerned, it would seem that it properly should be allocated to the city general fund.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

SCHOOLS

SCHOOL REORGANIZATION: When a district is absorbed in its entirely in a new district the new district assumes all of the liabilities of the district so absorbed. (Opinion to TePaske, Sioux County Atty.; 7/2/58) #58-7-5

July 2, 1958

Henry J. TePaske
Sioux County Attorney
Orange City, Iowa

Dear Sir:

Receipt is acknowledged of your letter of June 27 in which you inquire whether a tax for bonded indebtedness existing in certain school districts which were merged in their entirety in a new community school district may continue to be levied on on the territory of the new district which formerly comprise former districts in which such bonds were voted. Your lett indicates provision for such restriction on levy was made petition whereby the new district was proposed to the coun board of education under section 275.12.

I am of the opinion such restriction cannot be made and that the entire new district is subject to the bond tax. The reasons for my conclusion are as follows:

1. The items which may be included in a reorganization petition are expressly set forth in section 275.12 of the code and do not include alteration in county plans except as respects boundaries. No provision is made for financial adjustments in section 275.12. Therefore, the rule expressio unius est exclusio alterius appears applicable.

2. Provision for adjustment of assets and liabilities is made in section 275.28 of the code in the following terms:

> "Plan of division of assets and liabilities. A plan of reorganization in addition to setting up the territory to comprise the reorganized districts may provide for a division of assets and liabilities of the old districrs between reorganized districts. If no provision is made in the plan for division of assets and liabilities, such division shall be made under the provisions of sections 275.29 to 275.31, inclusive, hereof."

58-7-5

However, under the facts set forth in your letter, the proposed levy restriction was made in the petition filed under section 275.12 and not in the plan made under sections 275.1 to 275.9.

3. Section 275.28 provides for a "division of the assets and liabilities of the old districts between reorganized districts." Under the facts of your letter you have but one reorganized district and it absorbed the old districts in their entirety. There do not exist the two or more entities necessary for a division "between" under the statute. The statute does not provide for division of liabilities between a reorganized district and part of itself.

4. Sections 275.29 to 279.31 also provide for a method of dividing assets and liabilities after reorganization but they have no application to the facts of your letter for the reason that they were not followed. Further, it appears they are not available for the reason that the old districts in question were absorbed in their entirety and again provision is made for distribution "among the new school corporations."

The matter of distribution of assets and liabilities is not a new problem in the school law. Sections 275.29 to 275.31 of the present code have appeared for a considerable number of years in prior codes in connection with the various methods of district boundary change that have been tried and discarded by the Legislature over the years. It is my impression that the decision in Peterson v. Swan 231 Iowa 745, 2 N.W. 2d 70, at page 750, answers your question by quoting from 37 American Jurisprudence 656, §40, as follows:

> ". . .When two or more municipalities are combined the resulting municipal corporation includes the persons and places of the several municipalities; it has the same property and owes the same debts which they all had and owed, and the identity of the component elements is lost and absorbed in the new creation. . ."

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA/ed

VETERANS: Certification of copies of discharge.
(Strauss to Roggensack, Clayton Co. Atty., 7/25/58)
58-7-6

July 25, 1958

Mr. H. K. Roggensack
Clayton County Attorney
Elkader, Iowa

Attention: Mr. F. E. Sharp, Assistant

Dear Sir:

This will acknowledge receipt of yours of the 24th inst. in which you submitted the following:

> "Can a County Recorder certify that a copy of the discharge or separation record DD-214 is a true copy of the original if the original is not recorded in the Recorder's office? Or, are Clerks, Notaries and Justices of the Peace the only ones who can do this. The seal that is used by County Recorders is not a legal seal.
>
> "The above question has arisen in connection with making certifications of copies of DD-214s for the Korean Bonus."

In reply thereto I would advise you that the County Recorder can only certify copies of discharges or separation of record in his office. However, Clerks, Notaries and Justices of the Peace can certify from originals recorded or not.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

SCHOOLS: Reorganization --

Until a new school district actually becomes effective under the provisions of code section 275.24, the territory proposed for inclusion therein remains taxable in the old districts. There cannot be an effective and present attachment of territory to a purely speculative entity which may or may not exist at some future time. (Ltr to Van Ginkel, Asst Cass Co. Atty. 7/31/58)

58-7-7

July 31, 1958

Mr. James Van Ginkel
Atlantic State Bank Bldg.
Atlantic, Iowa

Dear Sir:

Receipt is acknowledged of your letter of July 29 as follows:

> "Harold DeKay, the regularly elected County Attorney of Cass County is away on vacation for the next three weeks and in his absence I am acting as assistant County Attorney.
>
> "I have a school problem which I would like to present to you and also present my answer to the problem. If my answer does not agree with your opinion please advise.
>
> "The enclosed map shows several school districts which are labeled as such. The area in question is that shaded in red which has the black question mark in it. That area containing the question mark is now included in a proposed Lewis Community School District which proposal has been dismissed by the local board of education and the State Board and the proposal is now in District Court here in Cass County, Iowa.
>
> "Our problem is where should that area which contains the question mark be assigned for tax purposes?
>
> "Mr. Ralph Marrow, Cass County Superintendent of Schools is concerned because the code provides that any area left over in the school reorganizations which is less than 4 government sections must be assigned to some district by the County Superintendent. As you can see the area in question is a part of Cass Township Rural Independent but has been separated into parts by the Griswold Community School District and the proposed Lewis School District. Since the questioned area is not contiguous with the Cass Township Rural Independent Dis-

trict of which it is still a part the Superintendent feels that it should be assigned to either the Griswold Community School or the Lewis Proposed District.

"My answer is that the questioned area should remain a part of Cass Township Rural Independent for taxing purposes even though it is not contiguous so long as the area is included in the proposed Lewis Community School District which is in litigation. I cannot see how it can be assigned to any community school district so long as it is included in a proposed district which is in litigation.

"I would appreciate your opinion as to whether or not the questioned area of less than 4 sections should be assigned to a school district or whether it should remain a part of Cass Township Rural Independent for the purposes of taxation."

"* * * "

From the map enclosed with your letter interpreted in the light of the facts stated in your letter it appears the portion of Cass Township Rural Independent School District in question will be physically isolated from the balance of said district only if the proposed Lewis Community School District becomes a reality as distinguished from a mere proposal. However, your letter indicates this is far from being the case and that, in fact, the petition has been rejected by the county board of education and the State Board of Public Instruction. If this be the case, the question in the petition cannot be submitted to the electors unless so ordered by the court in the litigation now pending.

However, section 275.24, Code 1958, provides no such district can become effective until July 1, after the election of its new board.

Obviously, the proposed district cannot become a reality until it has been approved by the electors and a new board is elected. Therefore, until the thing proposed becomes a reality, no change can take place in the tax status of territory merely proposed to be taken. If we correctly understand the facts stated in your letter as meaning the complete physical separation of the rural independent district will not be accomplished until the Lewis District becomes a reality, your conclusion that the territory in question remains subject to taxation in the rural independent district is a correct statement of the status of said territory pending actual effectuation of the new district.

However, if your letter intends to state that the Griswold District has already physically separated the rural independent district irrespective of whether or not the proposed Lewis District ever becomes a reality, then the territory in question should be attached to the Griswold District or a contiguous presently existing (not proposed) district as provided in section 275.5, Code 1958.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA/ed

CITIES AND TOWNS: Airport levy -- Is made as part of levy for Municipal Enterprise fund and allocated at discretion of Council. (Strauss to Carlsen, St. Rep., 7/14/58)

July 14, 1958

#. 58-7-8

Hon. John W. Carlsen
State Representative
408 Howes Building
Clinton, Iowa

My dear John:

I have yours of the 9th inst. in which you submitted the following:

> "In checking through the laws of the State of Iowa I find that no maximum is set for the amount Airport Commissions may levy for their operation.
>
> "Clinton has an Airport Commission and they annually levy a tax for the maintenance of the Airport. Section 330.21 gives them the power to levy this tax 'within the limitations of this Chapter.' What is the limitation which the Airport Commission may levy for the operation of an airport?
>
> "In checking the law it would appear in the 1950 Code of Iowa that Section 330.16 gave a specific levy, but the 55th General Assembly, Chapter 149, repealed Section 330.16, and I am unable to see any limitation except on the general powers of the city.
>
> "Under Section 404.10 a 10-mill levy may be made for municipal enterprises. Could the airport under subsection 8 take all 10 mills in view of the fact that the Council must levy what the Airport Commission certifies as stated in Section 330.21?"

In reference to the foregoing the situation described in your letter appears to be the following.

58-7-8

1. The maintenance levy authorized by Sections 330.7 and 330.16, Code 1950, was repealed by Chapter 149 of the Acts of the 55th General Assembly and substituted therefor the provisions now existing as Sections 330.7 and 330.16, Code 1948. This substitute enactment provides for the levy of taxes for the payment of bonds authorized under those sections.

2. The only State tax money now available for airport maintenance purposes is that authorized by Section 404.10(8), Code 1958, being designated as the municipal enterprises fund for which an annual tax not to exceed ten mills is authorized. Such money as required under the municipal enterprises levy under the authority of Section 404.10(8), Code 1950, was in lieu of the taxes provided by Sections 330.7 and 330.16 as they existed at the time Chapter 404 was enacted by the 54th General Assembly.

3. There appears to be no money available by separate levy or otherwise for maintenance purposes except such as is provided by the municipal enterprises fund. The authority to levy taxes is provided by Section 330.21 as follows:

> "Powers - funds. Said commission shall have and exercise all of the powers granted to cities and towns under this chapter except powers to sell said airport or airports. The commission shall annually certify the amount of tax within the limitations of this chapter to be levied for airport purposes, and upon such certification the city council shall include said amount in its budget.

> "All funds derived from taxation or otherwise for airport purposes shall be under the full and absolute control of said commission for the purposes prescribed by law, and shall be deposited with the city treasurer to the credit of the airport commission, including the payment of all indebtedness arising from the acquisition and construction of airports and the maintenance, operation, and extension thereof."

and is confined to moneys derived from taxation for the purpose of servicing bonds issued under the authority of Chapter 330.

4. In view of the foregoing, answer to your question with respect to the ten mill levy made for municipal enterprises is not required, except to state that the avails of the ten mill levy authorized under Section 404.10 could be allocated in such manner as the Council would find discreet. The allocation of that fund is the exercise of authority by the Council and not a direction by the statute.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

HEADNOTE: CIGARETTE TAX: PERMITS: Persons acting in dual capacity of distributor and distributing agent. A person acting in capacity as distributor and distributing agent must purchase both a distributor's permit and a distributing agent's permit as those permits are required in Chapter 98 of the Code of Iowa (1958). (Brinkman to Keleher, Dir., Cig. & Beer Rev. Dep., 7/30/58) # 58-7-9

July 30, 1958

Thomas J. Keleher
Director
Cigarette & Beer Revenue Dept.
Building

Dear Mr. Keleher:

Receipt is acknowledged of your recent request for an opinion from this office regarding whether it is necessary for a person acting both as a distributor and as a distributing agent to purchase both the distributor's permit and the distributing agent's permit, as those permits are required by Chapter 98 of the Code of Iowa (1958).

It is the opinion of this office that it is necessary for a person who acts in the dual capacity of distributor and distributing agent to purchase a separate license for each function.

Section 98.1 (12), Code of Iowa (1958), defines a distributor as follows:

> "Definition of words, terms, and phrases. The following words, terms, and phrases, when used in this chapter, shall, for the purpose of this chapter, have the meanings respectively ascribed to them.
>
> "* * *.
>
> "12. 'Distributor' shall mean and include every person in this state who manufactures or produces cigarettes or who ships, transports, or imports into this state or in any manner acquires or possesses cigarettes without stamps affixed for the purpose of making a 'first sale' of the same within the state."

Section 98.1 (15), Code of Iowa (1958), defines a distributing agent in the following terms:

> "15. 'Distributing agent' shall mean and include every person in this state who acts as an agent of any manufacturer outside of the state by storing

cigarettes received in interstate commerce from such manufacturer subject to distribution or delivery to distributors upon orders received by said manufacturer in interstate commerce and transmitted to such distributing agent for fulfillment from such place of storage."

Section 98.13, Code of Iowa (1958), requires every distributor, wholesaler and retailer in this state now engaged or desiring to become engaged in such sale or use of cigarettes upon which a tax is required to be paid, to obtain a cigarette permit.

It is significant to note that in this same section is included a provision (98.13 (8)) whereby only one permit is required of a person who acts in the capacity of both a distributor and wholesaler in one place of business, and two permits are required of a person who acts as both a retailer and wholesaler.

No similar provision is found in Section 98.17, Code of Iowa (1958), which requires the distributing agent to secure a permit. If the legislature had intended a person acting as both distributor and distributing agent to purchase only one permit it would have so indicated as was done in Section 98.13. By failing to so state, the implication fairly arises that it intended separate permits to be purchased.

It should also be noted that the state in issuing permits to distributors is thereby extending to the distributor the privilege of dealing with cigarettes for purposes of making a first sale within the State of Iowa.

The permit required of the distributing agent is issued for a different purpose, that is the privilege of storing unstamped cigarettes within this state for distribution or delivery in intrastate or interstate commerce.

Since the permits are issued to allow persons to engage in certain specified enterprises, and since the two enterprises herein differ in their nature, the mere fact that

one person carries on both functions will not relieve him from the requirement of purchasing both permits.

Very truly yours,

Richard J. Brinkman
Special Assistant Attorney General

WWR/bjf

COUNTIES: Hospitals--
1. Power to own jointly with city confined to population brackets specified in Code Chapter 348.
2. County may purchase existing hospital.
3. City cannot give away city hospital.
(Strauss to Frye, Floyd Co. Atty., 7/22/58) # 58-7-10

July 22, 1958

Mr. Jack W. Frye
Floyd County Attorney
Charles City, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 17th inst. In which you submitted the following:

> "The city of Charles City has operated a municipal hospital known as Cedar Valley Hospital for many years. The hospital is debt-free, but is, according to its medical staff, in need of considerable more and improved space and facilities. The hospital staff, Charles City City Council and Floyd County Board of Supervisors have met in conference to explore the possibilities of formation of a county public hospital or, if possible, a joint ownership and operation.
>
> "The Floyd County Board of Supervisors has directed me to make the following inquiry:
>
> "1. Is it possible for a city and county, pursuant to section 368.19 to own, control and manage a hospital by contractual agreement entered into by the county Board of Supervisors and the city's council?
>
> "2. If a county public hospital is created in accordance with a statute, can the county upon authorization by the voters purchase for a nominal amount or receive without consideration an existing hospital plant owned by a city? Can the city owning such hospital plant, <u>if authorized by its voters</u>, give the hospital plant to its county or sell same for other than appraised value.

"Because there is considerable interest in submitting a proposition to the voters enabling immediate hospital expansion, I am directed to request as early a reply as possible. With this in mind, I am therefore requesting your informal opinion."

In reply thereto I would advise you as follows.

1. In answer to your question #1 I am of the opinion that no express provision exists in the described section authorizing a joint city and county ownership, control and management of a hospital. It seems sufficient to justify this conclusion that even if inference could be drawn of the power to own and control such hospital, no provision is made whatsoever for its management and operation. This omission to provide for such operation is significant in view of Chapter 348, Code 1958, authorizing the consolidation of hospital facilities in counties having a population of 135,000 or over in which there are cities having a population of 125,000 or over. The fact that a provision for such operation is limited to such cities and counties would exclude an intent of its authorization to other cities and counties.

2. In answer to your question #2 as to whether a County upon authorization by the voters can purchase for a nominal amount or receive without consideration an existing hospital plant owned by the city, I would advise that it has been the holding of the Department that under the authority for erecting a building, public officials would have authority to purchase an

existing building. The rule would be applicable to the purchase or gift of a hospital. See opinion of the Attorney General appearing in the Report for 1946 at page 185.

3. In answer to your question #3 as to whether a city if authorized by its voters can give a hospital plant which it owns to the County or sell the same for other than the appraised value, I refer you to the case of Gritton v. City of Des Moines, 247 Iowa 326, 73 N. W. 2d 813, where among other things a transaction between the city and the county of city property was discussed in the following manner:

> "We think our decision is supported by fundamental principles of municipal law as well as by textbooks and precedents. Brockman v. City of Creston, supra, 79 Iowa 587, 589-590, 44 N. W. 822, is quite in point. There the city erected a building on lots owned by it and attempted to convey the property, worth $35,000, with certain restrictions, to the county for a courthouse upon relocation of the county seat at Creston. At the suit of a nonresident taxpayer we enjoined the transaction as beyond the power of the city notwithstanding statutory provisions similar to the present section 368.39. The opinion states:
>
> "'A city may sell its land when its interests require that they be sold; but it possesses no authority to give away, or to convey, without consideration, or for a purpose which it has not authority to advance, any of its property. The city holds its property for the uses and benefits of the people. It is, as it were, a trustee for its citizens, and must use the property it holds for purposes sanctioned by law. There is no statute authorizing a city to erect buildings for the county, or to give to it a house and lands, to induce the relocation of the county-seat. It may probably be to the advantage of the city and its citizens to induce such an act.

It may probably result to the great advantage of the citizens that manufactories, storehouses, hotels, and the like, be constructed. But it is not within the authority of the city to convey its property for such purposes.'"

The foregoing language controls the situation presented.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

GENERAL ASSEMBLY: Member holding other office.
1. State Representative prohibited from holding office as mayor under Const., Art III, § 22.
2. Vacancy occurs in House of Representatives if member elected Mayor during term. (Strauss to McDonald, Cherokee Co. Atty., 7/23/58). # 58-7-11

July 23, 1958

Mr. James L. McDonald
Cherokee County Attorney
Cherokee, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 22nd inst. in which you submitted the following:

> "I have received an inquiry from Mayor George Rapson of the City of Cherokee, Iowa, concerning the possibility of holding two elective offices at the same time. Mayor Rapson has been nominated as the State Representative from Cherokee County, and it is apparent that he will be elected to that office in the fall. He is at present time the Mayor of the City of Cherokee, his term expiring on January 1, 1960. He is interested in retaining his position as Mayor of Cherokee, and the City is interested in retaining him in this capacity.
>
> "A conversation with former Representative Mooty, who was nominated for Lieutenant Governor, revealed that he remained on the City Council of his home town for three years while serving in the House of Representatives. The law is clear that a party cannot hold two elective state offices at the same time, but I was wondering if there is a possibility that a distinction could be drawn when one of the offices is that of a municipal official.
>
> "This bring up three questions:
>
> "1. If elected to the House of Representatives, can the Mayor of an Incorporated Iowa town hold both the office of State Representative and Mayor of the City at the same time?

58-7-11

"2. If the term expires during the time the party is holding a state office, can he run for the municipal office of Mayor before his term as State Representative expires?

"3. If it is possible to hold both offices, does the City Council have authority to extend a leave of absence to the Mayor without pay for the time he is required to be in Des Moines for the session of the legislature, at which time the Mayor Pro Tem would act in the capacity of Mayor?"

In reply thereto I advise as follows.

1. In answer to your question #1 I advise that the holding of the office of mayor of an Iowa incorporated town and the office of State Representative at the same time is violative of Section 22, Article III of the Constitution of Iowa, and one person may not hold those described offices at the same time. See opinion of the Attorney General appearing in the Report for 1922 at page 360 and 1910 Report of the Attorney General at page 91.

2. In answer to your question #2 I would advise that a person may be a candidate for the office of mayor before his term as State Representative expires. However, if he is elected and qualifies it would result in the vacation of his office as State Representative. State v. Huegle, 135 Iowa 100, 112 N. W. 234.

3. In view of the holding above there is no necessity for answering your question #3.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

LABOR: State Boiler Inspector -- Has no duty to inspect liquid petroleum tanks. (Strouse to Cunningham, Secy., Exec. Council, 7/23/58) # 58-7L12

July 23, 1958

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

Dear Mr. Cunningham:

In the letter referred to this office the Labor Commissioner has, in condensed form, asked this question:

> May the boiler inspector, under Chapter 89, and particularly Section 89.7, 1958 Code of Iowa, conduct an inspection of liquid petroleum tanks (capacity 500 to 1000 gallons) for a manufacturer in order that such manufacturer might sell such tanks as complying with the A. S. M. E. Code?

Section 89.2, 1958 Code of Iowa, in part provides:

> "Inspection made - certificate.
>
> "1. It shall be the duty of the state boiler inspector, to inspect or cause to be inspected internally and externally, at least once every twelve months, in order to determine whether all such equipment is in a safe and satisfactory condition, and properly constructed and maintained for the purpose for which the same is used, all steam boilers, tanks, jacket kettles, generators and other appurtenances used in this state for generating or transmitting steam for power, or for using steam under pressure for heating or steaming purposes, in order to determine whether said equipment is in a safe and satisfactory condition, and properly constructed and maintained for the purpose for which the same is used."

The equipment designated above does not specify that liquid petroleum tanks shall be inspected. As pointed out in 1942 Attorney General Opinion, page 89, Section 89.2, supra, is controlling over Section 89.7 whenever any conflict arises between the two provisions. Those Code provisions are the very ones herein considered. Thus, the word "equipment", as used in Section 89.7(6) is referable to Section 89.2. As such, the boiler inspector has no duty to inspect liquid petroleum tanks.

Additionally, the inspection authorized is "in order to determine whether said equipment is in a safe and satisfactory condition, and properly constructed and maintained for the purpose for which the same is used". This wording indicates inspection is based on equipment in use. Equipment manufactured for sale is not in use. Further, such equipment might not be "used in this state" as provided in Section 89.2 above.

Moreover, an examination of Chapter 101, 1958 Code of Iowa, and rules promulgated thereunder, shows that the State Fire Marshal is given jurisdiction over the standards of construction with respect to liquefied petroleum gas containers.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

AGRICULTURE: Rendering works trucks --
1. Operator must be operator or employee of licensed disposal plant. Non-diseased animal carcasses may be transported at a reloading point. (Forrest to Sundberg, Chief, Div. An. Ind., 7/23/58

July 23, 1958

#58-7-13

Dr. A. L. Sundberg, Chief
Division of Animal Industry
Department of Agriculture
B u i l d i n g

Dear Sir:

Your letter of June 11, 1958, states in part as follows:

"Chapter 167, Code of Iowa.

"Question No. 1. Is an individual who owns and operates his own truck for the purpose of transporting on the highways of Iowa scraps and parts of dead animals in violation of this chapter? Kindly refer to the attached letter, also to section XI, regulation 22 under Agriculture Livestock Diseases as it appears in the 1958 Iowa Departmental Rules.

"Question No. 2. Section 167.15 provides that any person holding proper license may transport the bodies of dead animals that have died from disease, except those prohibited by the department, but shall not remove said carcasses from wagonbed or tank, except at the place of final disposal. Does this apply only, to the bodies of animals that have died from disease or does it apply to bodies or parts thereof of any dead animal?"

Chapter 167, Code of 1954, was amended by Acts of the 56th General Assembly, Chapter 104. Section 2 thereof amended Section 167.3, Code of 1954, to read as follows:

"Any person who shall receive from any other person the body of any dead animal for the purpose of obtaining the hide, skin, or grease from such animal, in any way whatsoever, or any part thereof, for the purpose of transporting the same upon the highways of this state, shall be deemed to be engaged in the business

of disposing of the bodies of dead animals, and must be the operator or employee of a licensed disposal plant."

House File 188, the explanation therefor states:

"The purpose of the foregoing amendment is to subject those persons engaged in the collection and disposal of bones, butcher scraps and other types of inedible and unprocessed animal wastes to the same restrictions and regulations as those imposed by chapter 167 of the Code of Iowa, 1954, upon persons engaged in the business of collection and disposal of dead animals."

Section 167.13, Code of 1958, provides that:

"The department shall make such reasonable rules for carrying on and conducting of such business as it may deem advisable, and all persons engaging in such business shall comply therewith."

On the basis of the foregoing the following conclusion is reached with respect to your first question.

An individual who owns and operates his own truck for the purposes set out in the question is violating the statute since such person "must be the operator or employee of a licensed disposal plant".

In response to your second inquiry Section 167.15, Code of 1958, provides that:

"Any person holding a license under the provisions of this chapter may haul and transport the carcasses of animals that have died from disease, except those prohibited by the department, in a covered wagon bed or tank which is watertight, and is so constructed that no drippings or seepings from such carcasses can escape from such wagon bed or tank, and said carcasses shall not be moved from said wagon bed or tank except at the place of final disposal. The department may prescribe additional requirements

> governing the construction of such vehicles and such transportation not inconsistent with the above."

In an opinion of this office appearing in the Report of the Attorney General, 1938, at page 147, 148, the following appears:

> "The license provided for in Chapter 131 (now Chapter 167, Code of 1958) is a license to engage in the business of disposing of bodies of dead animals, which business is defined (by the Code * * *. Section 2758, Code 1935, (now 167.15, Code 1958) additionally provides that any person holding such license may haul and transport the carcasses of animals that have died from disease. It is clear under these sections that the license is to conduct such business and not to haul or transport carcasses of dead animals, the privilege or right to do the latter being derivative only from the license to conduct the business."

In view of the above opinion it becomes apparent that the acts specified under Section 167.3, Code of 1958, constitute "disposing' and require a license as provided, and, by virtue of the license, the business may, if it so desires, transport the carcasses of diseased animals. If such transportation is pursued the carcasses of the diseased animals shall not be removed from the specified wagon bed or tank until arrival at the final point of disposal.

The same type of truck must be used to transport non-diseased animal carcasses as evidenced by Section X, Regulation 22, Department of Agriculture, Departmental Rules 1958. However, it is our further opinion that Chapter 176 contemplates that a non-diseased animal carcass or parts thereof could be transferred at a reloading point.

Therefore, in answer to the inquiry, the restriction as to transfer applies only to diseased animal carcasses or parts thereof.

Very truly yours,

FREEMAN H. FORREST
Assistant Attorney General

FHF:MKB

SCHOOLS:

SALE OF SCHOOL PROPERTY --

Code section 278.1 (2) operates independently from the provisions of code section 297.23. School boards have no power to hire or pay commissions to real estate agents. (Allo to Shaff, St. Sen. 7/24/58) # 58-7-14

July 24, 1958

Hon. David O. Shaff
305 Weston Bldg.
Clinton, Iowa

Dear Senator Shaff:

Receipt is acknowledged of your letter of July 15 as follows:

"Confirming our phone conversation of July 14, 1958, I should like to request an opinion of your office relative to the proper procedure to be followed by the Board of Directors of the Independent School District of Clinton in connection with the sale of certain real estate owned by the School District. Sale of the real estate, which lies entirely within the City of Clinton, Iowa, was authorized by the voters at a regular election, pursuant to the provisions of Code Section 278.1, subsection 2.

"Inasmuch as satisfactory bids have not been received, the Board of Directors should like to be advised by your Department as follows:

"1. Is it necessary under Iowa law that property as aforesaid, the sale of which has been authorized by the voters pursuant to Code Section 278.1, be advertised in the manner set forth in Code Section 297.23.

"2. In the event that it is your opinion that advertisement as contemplated by Code Section 297.23 or other advertisement is required, then and in such event, in the event that either no bids are received or bids are received which are deemed inadequate by the Board, is it necessary that the Board continue to readvertise until such time as satisfactory bids are received.

58-7-14

"3. In the event that the procedures contemplated by Code Section 297 are in no way applicable, and provided that the Board is authorized pursuant to vote authorization under 278.1, subsection 2, to sell said property without appraisal or advertisement for bids, is the Board authorized to employ a realtor in conjunction with such sale.

"We have reached the tentative conclusion that the Clinton School District is authorized to proceed with the sale without either advertisement for bids or appraisal, based on our conclusion that the provisions of Chapter 297 of the Code are independent of the provisions of Chapter 278. This interpretation would appear to be supported by Code Section 297. 25, and for the reason that the subject matter of Chapter 297 seems to embrace the sale of unnecessary school sites to adjoining landowners and the sale of real estate in certain school districts without vote or authorization, where the amount involved is within the specifications set forth in Chapter 297.22.

"It will be greatly appreciated if you can give us an opinion on this matter, and if it appears necessary the School District will request remedial legislation during the next session of the Iowa Legislature."

Section 278.1, Code of Iowa, provides in pertinent part as follows:

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

* * * * *

"2. Direct the sale, lease, or other disposition of any schoolhouse or site or other property belonging to the corporation, and the application to be made of the proceeds thereof, provided, however, that nothing herein shall be construed to prevent the sale or lease of real or other property by the board of directors without an election to the extent authorized in section 297.22."

The provisions of the quoted section have been held to be independent from the provisions of chapter 297 relating to the

disposition of school property. See Maxwell v. Custer, 238 Iowa 1306, 30N.W. 2d 177 at pages 1314 and 1315 of the official report.

1. You are, therefore, advised in answer to your first question that section 297.23 of the Code has no application to the problem you describe.

2. Answer to your first question makes answer to your second question unnecessary.

3. In answer to your third question you are advised that the Board is authorized under section 278.1 (2) to sell the property in whatever manner, short of fraudulent or illegal methods, it sees fit unless the terms of the authorization voted by the electors specify otherwise. In answer to the second part of your question you are advised that school boards are without statutory authority to hire or pay commissions to real estate agents.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA/ed

SCHOOLS: TRANSPORTATION CLAIMS --

Where parent residing beyond statutory walking distance from school voluntarily transported his children to and from school for a number of years without being "required" so to do by the board and without making claim upon the board, his subsequent discovery that he and the board were mutually mistaken as to the applicable law does not entitle him to recover for such past services intended as gratuitous when undertaken. (Ltr to Sturges, Plymouth Co. Atty., 7/29/58) #58-7-15

July 29, 1958

Mr. William S. Sturges
Plymouth County Attorney
24½ Plymouth Street S. W.
Le Mars, Iowa

Dear Sir:

Receipt is acknowledged of your letter of July 24 as follows:

"For a period of 12 years John Doe's children attended X School District, a rural township school district. During this 12 year period these children lived more than 2 miles from the school and were at all times residents of the district. X School District does not operate a High School. Through oversight on the part of both the school board and John Doe, no transportation costs were ever paid to John Doe during the entire 12 year period, which commenced with the 1946-47 school year. John Doe drove his children to and from school during the entire period in his own automobile.

"1. For the school years 1946-47 through 1948-49, the X School District was required to pay the costs of transporting elementary pupils if said pupils lived 2½ miles or more from the school in their district, under Section 279.19, '46 Code - Is this not correct?

"2. From the school year 1949-50 to the present, the X School Board was required to provide the transportation or costs thereof for elementary pupils residing more than 2 miles from the school in their district, under Ch. 116, Sec. 1, Acts 1949 (53 GA), now Section 285.1, '58 Code - Is this not correct?

"3. For how many years can John Doe collect transportation costs from the X School District?

a. Is this a case of a continuous, open, current account under Section 614.5 of the Codes, or is each year a separate contract or liability? (A tuition account by

58-7-15

a school district against a school township was held to come within the meaning of this Section in School Tp. 76 of Muscatine County v. Nicholson, 227 Iowa 290, 288 N.W. 123.

b. Does Section 614.1(4) or Section 614.1(5) of the Codes apply? If not, what Section is applicable?"

1. Section 279.19, Code 1946, provided as follows:

"When children enrolled in an elementary school other than in a consolidated district live two and one-half miles or more from the school in their district or sub-district or when the school in their district or sub-district has been closed and they are thereby placed more than two miles from the school designated for their attendance, the board shall arrange with any person outside the board for the transportation of such children to and from the school and the cost of such transportation shall be paid from the general fund, but the board may provide transportation for a less distance. . ."

According to the facts hypotheticated in your letter, no arrangements were made by the board at any time the quoted statute was in force and the parent voluntarily transported his children without requesting that such arrangements be made. It further appears that nine years have elapsed since the repeal of the quoted statute and that 12 years have elapsed since the time the parent commenced furnishing the transportation in question. If the claim the parent now seeks to advance is based on the theory of some implied contract with the then board, it obviously was not a written contract and hence would be barred by the statute of limitations. If it be based on some other theory, nevertheless, it appears the doctrine of laches would apply.

2. Section 285.1, Code 1958, provides in pertinent part as follows:

". . .In any district where transportation by school bus is impracticable or where school bus service is not available, the board may require the parents or guardian to transport their children to the school designated for attendance. The parent or guardian shall be reimbursed for such transportation service for elementary pupils by the board of resident district

> for the distance one way from the pupils residence to the school designated for attendance at the rate of twenty-eight cents per mile per day irrespective of number of children transported . . ."

The trouble with the above provision as related to the facts hypothetical in your letter is the lack of indication that the board required the parent to do anything. It appears the respective parties proceeded in mutual ignorance and mutual bliss. The children were transported to school. The parent had no intention of collecting payment therefor. The board had no intention of making payment therefor. Then, much later, the parent discovered that the service he had been voluntarily performing without charge was one which he could have been required to perform for pay.

According to the casebooks, equity will sometimes grant recovery in the event of mutual mistake of fact. However, it seems unlikely there was any mistake of fact in the case described. It appears unlikely that one could drive a fixed distance four times a day, one hundred-eighty days per year, for a period of twelve years in a car equipped with a mileage-indicating speedometer without coming to the realization that the said fixed distance exceeded two miles. Therefore, the only mistake involved was one of law. Neither the board nor the parent realized that the parent could be required to furnish transportation and be paid at the statutory rate. Mistake of law has never been recognized as grounds for relief in equity.

3. (a) Subsequent to the Nicholson decision, cited in paragraph a of your third question, numerous amendments have been made in the statutes relating to schools, including those fixing the fiscal year on the basis of July 1 to June 30 and making school designation an annual matter. If there were a continuous open account under section 279.19 of the 1946 Code, the last item in that particular account would have been entered in 1949 when the statute was repealed and either limitations has now run on that claim. In any event, it appears there was no mutual mistake of law in the Nicholson case, but rather a dispute of law. This seems borne out by the fact that tuition claims by one district against another, as in the Nicholson case, involve annual billing and are carried on the account books of the creditor district at all times as an asset of the district. In the Nicholson case, the Muscatine District was aware at all times that money was owed it. However, in the hypothical case you describe

it appears that neither party had any knowledge or intent with respect to such an account until discovery by the parent of a potential and hitherto unsuspected windfall. Since the case you describe appears to be one of mutual mistake of law rather than disputed account, I am of the opinion the situation is similar to that considered in the 1932 Report of this office, at page 73, with the result that no basis for recovery exists at this time.

3. (b) In answer to paragraph (b) of your third question, I am of the opinion that although the equitable doctrine of laches and subsections 4 or 5 of section 614.1 might have been resorted to had there been claims or statements of account submitted to the board over the period of years in question, the general equitable rule that recovery cannot be based upon a mutual mistake of law is controlling in the hypothetical fact situation described in your letter.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA/ed

PRISONERS: Women's Reformatory -- A female committed to the Women's Reformatory for an offense less than a felony does not lose Rights of Citizenship (Peach to Lappen, Chmn., Bd. of Control, 7/28/58) # 58-7-16

July 28, 1958

Mr. Robert C. Lappen, Chairman
Board of Control of State Institutions
L o c a l

Dear Sir:

Your letter of July 16, 1958, addressed to Mr. Hugh V. Faulkner, Assistant Attorney General, has been given to me for reply. This is resultant of a reorganization in the Department of Justice which transfers the Board of Control of State Institutions to me as counsel for said Board.

Said letter is set out as follows:

"It is generally the understanding that a person convicted of a felony loses his citizenship, however, in checking Sections 687.2 and 687.3 of the 1958 Code of Iowa, it says in part:

"'A felony is a public offense which may be punished with death, or which is, or in the discretion of the court may be, punished by imprisonment in the penitentiary or men's reformatory.'

"In the case of females, however, Section 687.3 reads:

"'Prostitution and resorting to houses of ill fame for the purpose of prostitution shall be deemed felonies, and also all other public offenses committed by females if the offense, under Section 687.2, constitutes a felony when committed by a male.'

"In Section 245.4, however, it provides as follows:

"'All females over eighteen years of age, and married females under eighteen years of age,

58-7-16

> who are convicted in the district courtof offenses punishable by imprisonment in excess of thirty days, shall, if imprisonment be imposed, be committed to the women's reformatory.'
>
> "This causes somewhat of a conflict as to when a woman loses her citizenship when committed to the Women's Reformatory.
>
> "Therefore, the question that arises in our mind is - has a female lost her right of citizenship if she is committed to the Reformatory, irrespective of the crime that she has committed?"

In answer to the question submitted you are advised as follows.

1. The Legislature was its own lexicographer in defining the word "felony". Section 687.2, 1958 Code of Iowa.

2. "There are various distinctions between the two grades of offenses. * * * one convicted of a felony (only) loses privileges of citizenship * * *." State of Iowa v. Di Paglia, 247 Iowa 79, 87, 71 N. W. 2d 601.

3. "A public offense will be a felony or a misdemeanor according to the punishment which may be imposed therefor." citing cases). State of Iowa v. Di Paglia, supra, at p. 88 of the official report.

4. In order for a female to lose her privileges of citizenship she must be convicted of a felony. A female convicted of prostitution would lose citizenship privileges; a female convicted of resorting to a house or houses of ill fame for the purpose of prostitution would lose citizenship privileges, since in both instances both offenses are by definition a felony. Section 687.3, 1958 Code of Iowa. Also, if a female is convicted of a public offense which would constitute a felony under Section 687.2, 1958 Code of Iowa, when committed by a male, said female would lose her citizenship privileges.

5. Section 245.4, 1958 Code of Iowa, is not definitive of a felony but is directive. Said section merely provides that all females of the ages described who are convicted in the District Court of public offenses punishable by imprisonment

In excess of thirty (30) days shall be committed to the Women's Reformatory.

6. The test is: Was the female convicted of a felony? If such test is affirmatively met, then the female would lose her privileges of citizenship.

In view of the foregoing, it is my opinion that a female does not lose her rights of citizenship if she is committed to the Women's Reformatory for an offense which does not constitute a felony.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:MKB

TAXATION: ASSESSMENT BY LOCAL BODIES -- City, County and school district have no power to enter into an agreement extending beyond current year for property valuation by outside agency (Strauss to Pike, Woodbury Co.)

July 28, 1958 7/28/58) # 58-7-M

Mr. Robert B. Pike, Counsel
Woodbury County Board of Supervisors
Court House
Sioux City, Iowa

My dear Bob:

I have yours of the 23rd inst. In which you submitted the following:

> "As indicated to you over the telephone, the Board of Supervisors of Woodbury County, Iowa, requests an opinion from your office in reference to the following matter:
>
> "At a joint meeting on July 21, 1958, at the Court House, Sioux City, Iowa, of the three local official taxing bodies; viz. City Council of Sioux City, Iowa, Board of Education Independent District of Sioux City, Iowa, and the Board of Supervisors of Woodbury County, the joint Boards adopted the Consolidated Budget for 1959 year for offices of City Assessor and Board of Assessment and Review, a copy of which consolidated budget is herewith enclosed.
>
> "On page 5 of said consolidated budget there appears the following:
>
> "Estimated amount needed in 1959 for reappraisal of real estate (This is based on approximately 60% completion of $150,000 contract less 10% retainage.) $80,000.00
>
> "The examining committee of the local taxing bodies and the City Assessor are now receiving proposals from concerns outside Sioux City for their services for reappraisal of real estate in the City of Sioux City for tax purposes commencing in the year 1961.
>
> "I enclose copy of the proposal of The J. M. Cleminshaw Co. of Cleveland, Ohio. Said proposal of the Cleveland, Ohio concern is somewhat

58-7-10

similar to other proposals being considered except the total amount of the proposals varies from a minimum of $138,850.00 to a maximum of $180,000.00 with a variance in some of the specifications of the different concerns.

"The Board of Supervisors of Woodbury County now is publishing the estimate budget of Woodbury County for the year 1959. Included is the amount of the budget for the City Assessor as follows:

FUNDS	Cash Balance by Funds Jan. 1, 1958	Expenditures for Year 1956	1957	Proposed Expenditures Estimated 1959
Sioux City Assessor	5240.	43,653	45,976	133,555

	Estimated Income Other than Taxation - 1959	Amount Necessary to be raised by Taxation 1959
Sioux City Assessor	89,036	44,519.

"As set forth above and in the consolidated budget of the City Assessor as adopted by the three taxing bodies, only 60 per cent (less 10% retainage) of the approximately $150,000.00 contract for reappraisal or $80,000.00 was budgeted.

"The Board of Supervisors of Woodbury County desires your opinion as follows:

"Do the three official taxing bodies of the City of Sioux City have the power and authority to enter into a contract with an outside concern for approximately $150,000.00 for services to be rendered in the years 1959 and 1960 for the re-appraisal of real estate in the City of Sioux City, Iowa, for tax purposes commencing in the year 1961 payable in installments at the end of each month during said years equivalent to the value of the performed work, less 10% retainage, which services and payments will extend through the years 1959 and 1960.

"If, in your opinion, the said taxing bodies have the power and authority to enter into a contract with an outside concern for approximately $150,000.00 for services for the reappraisal of real estate in the City of Sioux City for tax purposes for the year 1961 to be paid in installments, was the budget proposed and published for the year 1959 for the City Assessor on the basis of 60% of the proposed expenditure of $150,000.00 less 10% retainage a proper statement for the budget purposes?

"If, in your opinion, the proposed and published budget for the year 1959 in reference to the expenditure by the City Assessor should have included the proposed expenditure of $150,000.00 for the reappraisal of real estate, would you recommend the publication of a supplemental estimate budget to include the proposed full expenditure of $150,000.00?"

In answer thereto I advise the confirmation of oral opinion #1 that the three taxing bodies, the City, the County, and the School District cannot without legislative authority in the exercise of governmental powers enter into a contract of the character proposed that will deprive subsequent such bodies from exercising their full governmental powers; #2 that without legislative authority such taxing bodies would have no power to pledge the income from future levies; and #3, as related to the consolidated budget of the City Assessor such budget is fixed and adopted only for the ensuing year.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

TAXATION: Tax records--

HEADNOTE: The Tax Commission has the power to destroy useless use tax records after they have been in the custody of the Tax Commission for at least five years. (Broadhurst & Lint, Secy., Tax Comm., 7/29/58)
58-7-18

July 29, 1958

Mr. Lewis E. Lint, Secretary
Iowa State Tax Commission
State Office Building
Des Moines, Iowa

Dear Mr. Lint:

This is to acknowledge receipt of your request for an opinion dated June 11, 1958, in which you ask the following:

> "A question has come to our attention with regard to the destruction of some useless county treasurers use tax reports for the years 1950, 1951, and 1952.
>
> "We can find nothing under Chapter 423 (which deals with use tax) that allows for the destruction of such useless records.
>
> "We would like to have an opinion as to whether we have the authority to destroy such useless records and if so, what length of time they must be kept before destruction."

The applicable statutes are as follows:

"422.61(3), Code of Iowa (1958), Powers and duties.

> "3. The commission shall have the power to destroy any and all useless records and all returns, reports, and communications of any taxpayer filed with or kept by the commission after such returns, records, reports, or communications shall have been in the custody of the commission for a period of not less than five years, provided, however, after the accounts of any person shall have been examined by the commission and the amount of tax and penalty due shall have been finally determined, then the commission may, in its discretion, order the destruction of any records previously filed by such taxpayer, notwithstanding the fact that such records shall have been in the custody of the commission for a period less than five years. Such records and documents shall be destroyed in such manner as shall be prescribed by the commission."

"423.23, Code of Iowa (1958), Statutes applicable.

"The commission is hereby charged with the enforcement of the provisions of this chapter, and the commission and its employees shall administer this chapter and the taxes imposed by this chapter in the same manner and subject to all of the provisions of, and all of the powers, duties, authority, and restrictions contained in section 422.30 and sections 422.60 to 422.68, inclusive, or any amendments which may hereafter be made thereto, all of which sections are by this reference incorporated herein."

Since the provisions of 423.23, above quoted, grant to the Tax Commission the same powers with respect to administration of the use tax as are granted with respect to the administration of the income, corporation and sales tax as such powers relate to the destruction of records, your questions are answered as follows:

1. The Tax Commission has the power to destroy useless use tax records.

2. Such records must be in the custody of the Tax Commission for at least five years before they may be destroyed.

Very truly yours,

Richard J. Brinkman,
Special Assistant Attorney General

RJB:fs

PRISONERS: Men's Reformatory -- County jail prisoner incarcerated in reformatory for safe-keeping not entitled to time off for good behavior, or transportation, clothing and money on discharge. (Peach to Bd of Control, July 29, 1958 7/9/58) #58-7-19

Board of Control of State Institutions
L o c a l

Attention: Ray Purcell, Warden
The Men's Reformatory
Anamosa, Iowa

Gentlemen:

Receipt is acknowledged of Warden Purcell's letter set out as follows:

"Enclosed please find copies of Request for Order and Court Order under which the above subject has been incarcerated in this Institution for safekeeping since January 17, 1958.

"Assuming subject will remain here until expiration of sentence, I respectfully request an Attorney General's opinion on the following questions.

"1. Do sections 246.39 and 246.43 apply in this case or are we required to retain custody of subject until October 5, 1958?

"2. Does section 246.44 apply or must we discharge subject without furnishing transportation, clothing or discharge money?

"I would appreciate an opinion on these two questions at your earliest convenience."

You are advised as follows:

1. The applicable statutes are set out as follows:

"246.39 Reduction of sentence. 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

58-7-10

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."

"246.43 Special reduction. Any prisoner in either of said institutions who may be employed in any service outside the walls of the institution, or who may be listed as a trusty, may, with the approval of the board of control, be granted a special reduction of sentence, in addition to the reduction heretofore authorized, at the rate of ten days for each month so served."

"246.44 Discharge - transportation, clothing, and money. When a prisoner is discharged the warden shall furnish him, at the expense of the state, with a railroad ticket to the point in the state nearest his home or to any point of a like distance without the state, a suit of common clothing, and not more than twenty-five dollars, an account of which shall be kept by the warden."

2. The defendant in this case was sentenced to the county jail of Poweshiek county for a period commencing October 5, 1957, and terminating on October 5, 1958.

3. By order of the District Court the defendant was transferred to the Men's Reformatory for commitment at said institution for safekeeping, said order being effective on the 17th day of January, 1958.

4. Although subject to control by the institution, it would not seem that benefits of reduction of sentence and transportation, clothing and money upon discharge would be due the defendant. These benefits would not be forthcoming had the

defendant served his sentence to completion in the county jail.

5. Defendant was transferred to the Men's Reformatory for a special purpose, that of safekeeping. This was the condition of acceptance, and defendant is not a prisoner in the sense of the statutes in question and their applicability.

In view of the foregoing it is my opinion that the Men's Reformatory is required to retain custody of the defendant until October 5, 1958, and upon completion of sentence discharged without transportation being furnished, clothing or discharge money.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:MKB
cc: Warden Purcell

AGRICULTURE: Extension Council -- Budget Certification deals only with money to be raised by taxation. (Strauss to Scholz, Mahaska Co. Atty., 7/29/58) # 58-7-20

July 29, 1958

Mr. Charles H. Scholz
Mahaska County Attorney
115 North Market Street
Oskaloosa, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 29th inst. in which you submitted the following:

> "Section 176A.10 of the 1958 Code of Iowa, in providing that the Extension Council of each extension district shall, at a meeting held in July of each year, estimate the amount of money required to be raised by taxation for financing the county agricultural extension program authorized by Chapter 176A of that Code, directs that the extension council shall in every respect comply with the Local Budget Law contained in Chapter 24 of that Code, and imposes a millage and dollar limitation upon the amount which the extension council shall 'estimate or certify' in any year.
>
> "I desire your opinion as to whether in the adoption of the extension council's annual budget, the dollar limitation referred to applies to the amount of the council's proposed expenditures for the following year, rather than to the amount necessary to be raised by taxation. Specifically, Mahaska County has a population of 16,000 or more, but less than 60,000. The Mahaska County Extension Council is proposing the adoption of an annual budget providing for proposed expenditures of $18,000., which amount is $500.00 in excess of the $17,500. limitation imposed upon Mahaska County by Section 176A.10. However, the extension dis-

58-7-20

> trict's unencumbered balance which it is estimated will be available at the end of the current year amounts to $500., so that the proposed budget, if adopted, will provide for the raising of only $17,500. by taxation.
>
> "Since the budget hearing is scheduled for August 5, 1958, receipt of your opinion by that date will be appreciated."

In reply thereto I advise as follows. The Section to which you refer, being 176A.10 of the 1958 Code neither expressly nor impliedly deals with proposed expenditures of Agricultural Extension Districts. On the other hand, it expressly states, "The extension council of each extension district shall, at a regular or special meeting held in July in each year, estimate the amount of money required to be raised by taxation for financing the county agricultural extension education program authorized in this chapter." and subsequent provisions of the Section correlate the dollar figures therein set forth to the millage rate that will produce the amount of dollars stated therein. It seems clear that this certification deals only with the tax money to be raised. As confirmation of this view of this statute it is to be said that a certifying body deals only with taxation. Section 24.2(3) defines a certifying body as follows:

> "Definition of term . As used in this chapter and unless otherwise required by the context:
>
> " * * *

"3. 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."

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

The power of the mayor to vote in case of tie in councils of municipal corporations authorized by Sec. 268A.2(6) cannot be exercised insofar as a tie exists in a vote on ordinances and resolutions of such municipal corporations except as otherwise specifically provided by law.

July 21, 1958

Hon. Chet B. Akers
Auditor of State
B u i l d i n g

Attention: Mr. C. W. Ward

Dear Sir:

We acknowledge receipt of yours of the 2nd inst. In which you submitted the following:

> "I would appreciate receiving an official opinion to be used by municipal examiners in conducting an audit of municipal accounts on the following: Section 366.4 and Section 368A.2 - The casting vote of a mayor. May the mayor vote on all resolutions and ordinances in case of a tie unless otherwise specifically stated by statute?"

In reference thereto we advise as follows. Prior to the recodification of the municipal statutes by the 51st General Assembly, adjudication of the question submitted existed. At that time Section 366.4, Code 1958, appeared as Section 5717 of the Code of 1935 and provided the following:

> "Majority vote. No resolution or ordinance for any of the purposes hereinafter set forth, except as specifically provided by law, shall be adopted without a concurrence of a majority of the whole number of members elected to the council, by call of the yeas and nays which shall be recorded:
>
> "1. To pass or adopt any by-law or ordinance.
>
> "2. To pass or adopt any resolution or order to enter into a contract.

> "3. To pass or adopt any ordinance or resolution for the appropriation or payment of money. In cities all money shall be appropriated by ordinance, but in towns it may be appropriated by resolution.
>
> "4. To direct the opening, straightening, or widening of any street, avenue, highway, or alley.
>
> "5. To direct the making of any improvement which will require proceedings to condemn private property.
>
> "6. To direct the repair of any street improvement or sewer, the cost of which is to be assessed upon property or against the owners thereof."

Section 368A.2(6), 1958 Code, providing as follows:

> "The mayor. In all municipal corporations, the mayor shall have the following powers and perform the following duties except when otherwise provided by laws relating to specific forms of municipal government.
>
> " * * *
>
> "6. Presiding officer - vote. He shall be the presiding officer of the council with the right to vote only in case of a tie."

was in its same terms and existent at that time as subsection 5 of Section 5639, Code 1935. The relationship between that section and Section 5717, both as here quoted, was considered and decided in the case of Doonan v. City of Winterset, 224 Iowa 365. There, in addressing itself to the question as to whether the mayor has the right to vote upon the passage of an ordinance or resolution to make a contract, the Court stated:

" * * * What is the meaning of the language, 'A concurrence of a majority of the whole number of members elected to the council'? The mayor is not a member of the council. The section provides that 'no resolution or ordinance for any of the purposes hereinafter set forth, except as specifically provided by law, shall be adopted without a concurrence of a majority of the whole number of members elected to the council.' Only four men were elected to that council, in one sense of the word. The mayor was simply the presiding officer; he is not a member of the council.

"Then the question arises, Can an ordinance be adopted, or can a contract be entered into, when the council vote is two and two, and the mayor votes for the passage? Is there a majority of the whole number of the members elected to the council?

"This has never received any construction in this state, that we know of. The mayor's power to vote leaves it somewhat uncertain. He shall be the presiding officer of the council. It does not say on what he shall vote. We are confronted here by the provisions of section 5717, with the requirement of a 'majority of the whole number elected to the council'. The legislature has made it somewhat in doubt as to just what should be said upon this subject. If he were a member of the council there would be no question; he is not a member of the council, however, but the presiding officer of the council, and this is the record and the statutes upon which we have to decide this question.

"A majority of the council can pass a resolution. Can one not a member of the council, not elected to the council, vote on this question then, if there be a tie? Is it reasonable to say that a vote on any of the resolutions or matters coming within the province of section 5717, can be made by the mayor to break a tie vote? Can he do so in face of the language of

> the statute requiring a 'concurrence of a majority of the whole number of members elected to the council'?
>
> "It will be observed that the wording of the statute is made to fit just such a case as this. What is meant by 'No resolution or ordinance for any of the purposes hereinafter set forth, except as specifically provided by law, shall be adopted without a concurrence of the majority of the whole number of members elected to the council'? (Italics ours.)
>
> "True, subsection 5 of section 5639 of the Code says, as to the mayor, 'He shall be the presiding office of the council with the right to vote only in case of a tie.' Is that a specific provision such as is required to authorize him to vote on the passage of an ordinance or resolution entering into a contract, when the language of the statute providing therefor requires that it shall be by the 'concurrence of the majority of the number of members elected to the council'? We think the answer to this proposition must be 'No', and we therefore think the mayor in this case had no right to vote with the two members of the council who voted 'Yes', and thus enter into the contract."

Thus as to the fact situation there presented, the holding was that the vote of the mayor, not being a member of the council, was not available to break a tie vote in a matter concerning the entering into of a contract by the city. Subsequent thereto the 54th General Assembly by Chapter 148, Section 2 thereof, amended Section 366.4 as it existed at the time of the decision of the Doonan case as follows:

> "Sec. 2. Section three hundred sixty-six point four (366.4), Code 1950, is amended by striking from lines two (2) and three (3) the following words: 'for any of the purposes hereinafter set forth'.
>
> "Further amend said section by striking the colon (:) from line seven (7), inserting a period (.) in lieu thereof, and striking the balance of the section."

with the result that Section 366.4, Code 1958, exists now as follows:

> "Majority vote. No resolution or ordinance, except as specifically provided by law, shall be adopted without a concurrence of a majority of the whole number of members elected to the council, by call of the yeas and nays which shall be recorded."

As it so exists the Section requires a majority vote of the whole number of elected members of the council to adopt resolutions or ordinances except as specifically provided by law. This view of the amendment to Section 366.4 heretofore exhibited is confirmed by the following from a special pamphlet treating of the municipal code bills of 1951 by Leonard C. Abels where on page 31 thereof it is stated:

> "Section 2 amends section 366.4 so as to require a majority vote of the whole number of members of the council for all resolutions and ordinances of the council. * * *"

As a result of the foregoing situation we are of the opinion Section 368A.2, Code 1958, heretofore quoted, has no bearing upon the votes of members of the city council insofar as ordinances and resolutions are concerned in all municipal

corporations except those under Council-Manager Plan by Election. Section 363.27, Code 1958, provides:

> "Officers elected at large. In all municipal corporations, except those under the council-manager plan by popular election, the mayor shall be elected by the entire electorate. Members of the council may be elected by wards, or by the entire electorate, as hereinafter provided."

and "A Handbook for Iowa Mayors", a publication of the State University of Iowa, Institute of Public Affairs, concerned with municipalities under Mayor-Council form of government, of which there are more than nine hundred in Iowa, at page 29, states:

> "Even though you are its presiding officer, you are not a member of the council and apparently have no right to vote on matters that come before it. Now in one section of the Code it says that the mayor has the right to vote in case of a tie, but more recent legislation says that all ordinances and resolutions must be approved by a majority of all members elected to the council. In view of this, and a recent decision of the Iowa Supreme Court, it seems that there would never be an occasion when you could vote on an ordinance or resolution."

The mayor possesses no power to break a tie vote on the adoption of any resolution or ordinance in such municipal corporations.

Very truly yours,

NORMAN A. ERBE
Attorney General of Iowa

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

BRIDGES: Cities and Towns

CITIES AND TO IOWA STATE HIGHWAY COMMISSION

Constituting own bridges, Iowa Duty determine size of Culverts in streets and have duty to maintain same. (Lyman to Goodenberger, Madison Co. Atty.; 7/30/58)

Ames, Iowa

July 30, 1958

58-8-14

Mr. Emery L. Goodenberger
Madison County Attorney
Winterset, Iowa

Re: Construction of culverts in cities and towns

Dear Mr. Goodenberger:

This will acknowledge your letter of July 23, 1958 in which you ask the following questions:

> "1. Does a city street come within the meaning of public highway as used in Section 309.3 of the 1958 Code of Iowa and therefore a part of the secondary bridge system or is the city obligated to furnish a culvert under the provisions of Section 381.1 of the Code?
>
> 2. Does the Board of Supervisors or the Town Council decide what size of culvert is needed?"

Section 309.3 of the 1958 Code provides that the County Bridge System will include all bridges and culverts on all public highways within the county except primary roads and highways within cities which control their own bridge levies.

In the hypothetical situation presented in your letter, the city or town maintains its own bridge levy. Therefore, its streets would not come within the purview of Section 309.3 of the 1958 Code. Section 381.1, 1958 Code provides in part that the cities shall construct and keep in repair all public culverts within the limits of the said cities. This section grants the authority and places a duty on the city to provide the necessary culverts.

Since the city is to provide the culverts in the situation presented by your letter, the city has the authority to determine what size culvert is needed. Section 381.1 of the 1958 Code provides in part that "cities shall have the power within their corporate limits to construct, re-construct, repair, enlarge and maintain bridges, culverts..."

Yours very truly,

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

CJL:JLH:js

58-8-14

HEADNOTE: PROPERTY TAX: GRAIN HANDLING TAX: A grain handling tax cannot properly be assessed for a particular year where the grain in question has not been handled during that year.

Press

August 8, 1958

Mr. Ballard B. Tipton, Director
Property Tax Division
State Tax Commission
LOCAL

Dear Mr. Tipton:

This is to acknowledge receipt of your letter of June 13th in which you request a determination as to whether or not the grain handling tax should be applied to grain which was handled in a previous year and simply kept in storage during the year in question.

Section 428.35, Code of Iowa (1958), reads in pertinent part as follows:

"2. Tax imposed. An annual excise tax is hereby levied on such handling of grain in the amount hereinafter provided.

"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 person's records thereof.

"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."

It is specifically provided in subsection 5 of the above-quoted statute that the tax shall be applied to the number of bushels so handled. The words "so handled" refer back to "the number of bushels of grain handled by him in that district during the year immediately preceding" mentioned in subsection 4. The tax imposed by this section is an excise tax upon grain handling and is not a tax on the grain itself. This being the case, if the grain is not "handled" within a particular year, no tax can be assessed under this section for that year.

Very truly yours,

Richard J. Brinkman
Special Assistant Attorney General

RJB:fs

HEADNOTE: BOARD OF REVIEW: Authority to add to assessment rolls buildings not assessed in real estate year. The County board of review has no authority in subsequent years to add to the assessment rolls buildings which were not assessed at the time of the assessment of real estate.

August 5, 1958

Ballard B. Tipton
Director
Property Tax Division
State Tax Commission
Building

Dear Mr. Tipton.

This is to acknowledge the receipt of your letter of May 27, 1958, in which you requested our opinion on the following question:

> "Taxpayer A', as of January 1, 1957, was the owner of a 160-acre farm situated in an Iowa county. The year 1957 was a real estate assessment year. In some manner the county assessor in assessing the property of 'A', apparently by oversight failed to place a value on the farm buildings. The failure to include in the assessment the value of the farm buildings did not come to the attention of the County Assessor until early in the year 1958. Whether the oversight came to the attention of 'A' in the year 1957 is not known. The County Assessor brought the oversight to the attention of his County Board of Review at its regular May, 1958 session, and said Board regarded that it had authority under the provisions of Code Section 442.1 to in the year 1958 add to the assessment rolls the farm buildings belonging to 'A' that had been overlooked in the 1957 assessment, and they proceeded to make such addition to the assessment rolls, and gave 'A' notice of having done so in the course of their May, 1958 session. 'A' raised objections to the County Board of Review adding the farm buildings to the assessment rolls in the year 1958, on the grounds that the County Board of Review had no authority to do so in a year that was not the regular real estate assessment year. The question is whether the County Board of Review did have authority in an 'interim year' to add the farm buildings to the assessment rolls and thus tax 'A' on the value of those buildings commencing with the 1958 taxes payable in 1959, and if said Board of Review did not have such authority, then whether there is any authority for either the County Assessor, County Auditor or County Treasurer to in an interim year add such value of the farm buildings to the assessment rolls or lists for taxation."

Insofar as the authority of the board of review to add the buildings to the assessment rolls in an interim year the following sections of the 1958 Code of Iowa are controlling:

"442.1 County board of review. There is hereby created a county board of review which shall constitute the board of review for all assessments made by the county assessor. The board shall meet on the first Monday of May at the office of the county assessor and shall sit from day to day until its duties are completed, which shall not be later than the first day of June, and shall adjust assessments by raising or lowering the assessments of any person, partnership, corporation or association as to any of the items of their assessments in such manner as to secure the listing of property at taxable value. It shall also add to the assessment rolls any taxable property not included therein, assessing the same in the name of the owner thereof. ***."

"442.2 Revaluation and reassessment of real estate. In any year after the year in which an assessment has been made of all the real estate in any taxing district, it shall be the duty of the board of review to meet at the times provided in section 442.1, and where it finds the same has changed in value, to revalue and reassess any part or all of the real estate contained in such taxing district, and in such case, it shall determine the taxable value thereof, and any aggrieved taxpayer may petition for a revaluation of his property, but no reduction or increase shall be made for prior years. If the assessment of any such property is raised, or any property is added to the tax list by the board, the clerk shall give notice in the manner provided in section 442.4, provided, however, that if the assessment of all property in any taxing district is raised the board may instruct the clerk to give immediate notice by one publication in one of the official newspapers of said county, and such published notice shall take the place of the mailed notice provided for in section 442.4, but all other provisions of said sections shall apply. The decision of the board as to the foregoing matters shall be subject to appeal to the district court within the same time and in the same manner as provided in section 442.6."

Section 442.1 authorizes the board of review to add to the assessment rolls any taxable property not included therein in the year of assessment, whereas section 442.2 authorizes the board, "In any year after the year in which the assessment has been made of all real estate in the taxing district" to revalue and reassess, where it finds a change in value.

Thus the question arises whether the factual situation presented fits under the statutory language.

An analysis of the problem indicates that the assessor undervalued the property in question, but there was no change in value from the time of assessment to the time when the board of review added the value of the buildings to the assessment rolls.

As stated in Simmons Co. vs. Board, 229 Iowa 191, 294 N.W. 286,

> "The obvious purpose of the legislature in enacting the above quoted section (442.2) was for the purpose of permitting a change in an assessment, 'in any year after the year in which the assessment has been made', but the legislature limited the change to a situation 'where it finds the same is changed in value'.
>
> "***.
>
> "In accordance with Code section 7129.1, 1939 Code, a taxpayer after the year 1937 may petition for a change in the assessment, if, and only if, he is able to show that the value has changed since that year. It is a condition precedent to any inquiry that it be shown that the valuations have changed since the assessment year."

Therefore, the board of review has no authority in a non real estate assessment year to add to the assessment roll property which has been assessed but undervalued at such time of assessment. The remaining question is whether the county assessor, county auditor or county treasurer has authority to add the value of the farm buildings to the assessment roll or list.

The pertinent sections of the 1958, Iowa Code are as follows:

> "441.25 Corrected assessments. At any time prior to the submission of the completed assessment rolls to any board of review, the assessor may make corrections in assessments previously made by him and may change assessments when in his judgment the original assessment has been erroneous; provided, however, if the assessor increases any assessment, he shall give notice in writing to the taxpayer, either in person or by mail, prior to the meeting of the board of review."

> "443.6 Corrections by auditor. The auditor may correct any error in the assessment or tax list, and the assessor or auditor may assess and list for taxation any omitted property."

> "443.12 Corrections by treasurer. When property subject to taxation is withheld, overlooked, or from any other cause is not listed and assessed, the county treasurer shall, when apprised thereof, at any time within five years from the date at which such assessment should have been made, demand of the person, firm, corporation, or other party by whom the same should have been listed, or to whom it should have been assessed, or of the administrator thereof, the amount the property should have been taxed in each year the same was so withheld or overlooked and not listed and assessed, together with six percent interest thereon from the time the taxes would have become due and payable had such property been listed and assessed."

> "443.14 Duty of treasurer. The treasurer shall assess any real property subject to taxation which may have been omitted by the assessor, board of review, or county auditor, and collect taxes thereon, and in such cases shall note, opposite the tract or lot assessed, the words 'by treasurer'."

Under Section 441.25, the assessor has no authority to change the assessment after the submission of the completed assessment rolls to the board of review. Under § 441.9 (7) he is required to submit on or before May 1 of each year, the completed assessment rolls to the board of review. Thus it is evident that the assessor cannot change the assessment after he has submitted the assessment roll to the board of review. Nor does he have any authority to change the assessment under Section 443.[illegible], since this is not omitted property, in this connection, I refer you to the opinion of the Assistant Attorney General of March 28, 1958 addressed to Mr. A. R. Shepherd.

The auditor is empowered under section 443.[illegible] to correct any error in the assessment or tax list and may assess or list for taxation any omitted property. This authority is limited to the current year, andthe auditor cannot reach back to correct any assessments of prior years.

Thus, in Mead v. Story County, 119 Iowa 89, 93 N. W. 88, the Court stated:

> "There is nothing in the section of the Code, or in the later act of the general assembly however from which the conclusion may properly be drawn that it was the legislative intention to invest

the auditor with power to thus deal with any assessment or tax list save that of the current year."

Section 443.14, deals solely with the treasurer's authority over omitted property, and thus, as previously indicated is not applicable to the present situation. Section 443.12 uses the following language, "When property * * * is withheld, overlooked, or from any other cause is not listed and assessed * * *".

The Iowa Supreme Court has interpreted this provision to apply only to omitted property. Lighting Co. v. Pitchforth, 214 Iowa 952, 243 N. W. 292:

> "There is but one matter upon which the county treasurer can act under section 7155, (443.12, 1958 Code) and that is 'omitted property'. While three propositions are named in this section, upon final analysis the provision relates in fact to omitted property. When property is withheld from taxation it is omitted therefrom. Likewise when property is overlooked for taxation purposes, it is omitted from taxation. Again when property for any cause is not listed and assessed, it is omitted generally speaking, from taxation."

Therefore, our conclusion on the question submitted is that neither the board of review, assessor, auditor or treasurer have authority to change the assessment.

It should be noted that under section 421.18 (2), Code of Iowa (1958), the State Tax Commission is vested with power to direct the county assessor to reassess any property in his taxing district.

> "421.17 (2) To supervise the activity of all assessors and boards of review in the state of Iowa; to co-operate with them in bringing about a uniform and legal assessment of property as prescribed by law.
>
> "The state tax commission shall have the power to order the reassessment of all or part of the property in any taxing district in any year. Such reassessment shall be made by the local assessor according to law under the direction of the state tax commission and the cost thereof shall be paid in the same manner as the cost of making an original assessment.
>
> "The state tax commission shall determine the degree of uniformity of valuation as between the various taxing districts of the state and shall

have the authority to employ competent personnel for the purpose of performing this duty."

Under this provision the commission has sufficient authority to direct the county assessor to reassess the property in question.

Very truly yours,

Richard J. Brinkman
Special Assistant Attorney General

WWR/bjf

DRAINAGE:- County boards of supervisors may not make gift of obsolete bridge to landowner but may sell it at a fair valuation if no longer needed for county purposes; county boards to supervise any installation of bridge over drainage ditch to protect efficiency of ditch; no expense of installation of a private bridge should be borne by drainage district unless it is as a part of a general settlement of damage due to establishment or enlargement of such district.
8/13/58

August 13, 1958

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

Re: Access problem of private landowner because of establishment of drainage ditch (unofficial opinion)

Dear Sir:

You have requested an opinion based on the following facts:

A drainage ditch so cuts a tract of land as to prevent the owner from having access to one part of said tract. The County has acquired an obsolete bridge which would be suitable for use in crossing the ditch. In order for the owner to have access to the tract, a bridge would need to be constructed. You put the following questions:

1. Does the County Board have the right to give the bridge to the landowner if the landowner paid the expense of installation?

2. Should the Board supervise the installation of the bridge so that obstructions of the drain will not result from the installation of the pilings?

3. What portion, if any, of the expenses of installation should be borne by the drainage district?

The answers to:

Question 1. No. Iowa Code Section 322.3(13) (1958) states:

> "When any real estate, buildings, or other property are no longer needed for the purpose for which the same were acquired by the county to convert the same to other county purposes or to sell or lease the same at a fair valuation."

The bridge necessarily must be "other property". The use of the bridge for a private purpose would not be a "other county purpose". This provision implies that if the Board finds that the bridge would no longer be needed for county purposes it could be disposed of for a fair valuation. Here it would seem a lease would be impractical.

However, if the matter of damages has not been foreclosed by expiration of time for settlement, it would appear that the drainage district could provide for the transference of the bridge from the county to the owner at a fair valuation as a part of a general settlement, including an amount for its installation.

Question 2. The board of supervisors should supervise the installation of any bridge if there is any possibility of the obstruction of the drain. Section 455.135 of the Iowa Code (1958) provides:

> "When any levy or drainage district shall have been established and the improvement constructed, the same shall be at all times under the supervision of the board of supervisors except as otherwise provided for control and management by a board of trustees and it shall be the duty of the board to keep the same in repair ....."

Such statute indicates that the board is under duty to supervise any construction in relation to the drainage districts when any question might arise as to whether or not the proposed construction might interfere with the efficient use of such structures or ditches.

Question 3. If the right of way has been acquired and damages awarded according to law, no expense of any private installation of a bridge should be borne by the drainage district. However, as mentioned in the answer to Question No. 1, if the matter is not past the time for settlement, such provision for installation could be made in a final settlement.

Very truly yours,

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

JET:MS

CRIMINAL LAW
~~BAIL — SHERIFF.~~ JUSTICE OF PEACE: 1. An arresting officer may, according to State v. Benzion, 79 Iowa 467, receive bail from the arrested person charged with a misdemeanor before appearance of such person before magistrate 2. Under §754.6, 1958 Code of Iowa, a justice of the peace is required to complete the indorsement on the warrant which indorsement may in the absence of statutory mandate, require no bail. (Faulkner to Johnson, Lee Co. Atty.; 8/14/58) #(58-8-1

August 14, 1958

Mr. Robert N. Johnson
Lee County Attorney
Fort Madison, Iowa

Dear Sir:

Your letter of May 22, 1958, states the following question:

> "Reference is made to Section 754.6 of the 1958 Code which provides that if the offense stated in the warrant be a misdemeanor the issuing magistrate must endorse thereon: 'Let the defendant, when arrested, be admitted to bail in the sum of - - - dollars' stating the amount in which bail may be taken. We have a new Justice of the Peace who recently issued several misdemeanor warrants to the Sheriff for execution. The Sheriff insisted that for his protection the quoted section should be complied with. Whereupon the Justice of the Peace made the following entry on the reverse of these warrants: 'Let the defendant when arrested be admitted to bail in the sum of dollars - - - none.' * * * It seems to me that an entry of this nature nullifies the execution of the warrant. This office would appreciate your opinion and instructions in relation to the Sheriff's duties and/or the duties of the Justice of the Peace in relation to such warrants."

Section 754.6, 1958 Code of Iowa, provides:

> "Order for bail - indorsed on warrant. If the offense stated in the warrant be a misdemeanor, the magistrate issuing it must make an indorsement thereon as follows: 'Let the defendant, when arrested, be admitted to

58-8-1

> bail in the sum of . . . dollars', stating the amount in which bail may be taken."

As to the duty of the sheriff, the case of State v. Benzion, 79 Iowa 467, 44 N. W. 709, suggests the answer by relying on the Code provision which is verbatim the same as the above quoted section. It is stated:

> "The statute provides that one charged with a misdemeanor may give bail to the officer making the arrest, the magistrate being required to indorse on the warrant the amount of bail, and directions for the enlargement of the accused upon his giving it. Code, sec. 4189. The statute thus provides that the accused may be admitted to bail without appearing before the magistrate. This statute is in accord with the spirit of our law, which was followed by recognizing the validity of the recognizance in this case."

Now, with respect to the duties of the Justice of the Peace, there is no doubt that he must complete the indorsement on the warrant of arrest as required by Section 754.6, supra. The question then is not whether indorsing none or no bail is insufficient bail. Rather, the question is whether a magistrate has authority to indorse the warrant so as to require no bail.

In my research there is but one case involving this issue. McNair's Petition, 324 Pa. 48, 187 A. 498, 106 A. L. R. 1373, contains the discussion set out below taken from page 1377 of the A. L. R. citation:

> " . . . No statute in this state makes it mandatory on a magistrate to require bail even where the defendant is held for the court or the grand jury, although this unquestionably is the universal practice . . . That a magistrate required no bail in this case, without more, constitutes no offense nor violation of his duties of office, though it is a practice not to be recommended or encouraged." (Underscoring added)

This reasoning appears applicable in Iowa. I find no statutory obligation or duty making bail mandatory where a bailable

offense has been committed. Section 754.6, supra, only requires that the magistrate issuing a warrant make the indorsement therein stated. It is not a mandate that he require bail.

An Iowa Law Review note reveals what the practice has been in Iowa. The report of a survey conducted relative to bail shows that 927 persons were required to furnish bail whereas 27 persons were not required to furnish bail. However, this practice must be viewed in sympathy with the caveat expressed in the McNair case, i. e., it is a practice not recommended or encouraged.

Very truly yours,

HUGH V. FAULKNER
Assistant Attorney General

HVF:MKB

SPECIAL ELECTIONS: FIRE DISTRICTS: An election for the appointment of trustees for a fire district and trustees thereof is a special election and absentee voting not authorized for members of the armed forces in such election.

Press

August 22, 1958

Mr. Isadore Meyer
Winneshiek County Attorney
Decorah, Iowa

My dear Isadore:

This will acknowledge receipt of yours of the 19th inst. in which you submitted the following:

> "I have had the following question arise for which I was unable to find an answer. Under Chapter 357A concerning Benefited Fire Districts the question has arisen as to whether there is sufficient time to complete the necessary requirements of said chapter and still place the question of approval of the fire district on the ballot in November.
>
> "The facts are as follows: The Board of Supervisors of this county have received a petition for establishment of a Benefited Fire District and have set August 28 as the day for hearing under Section 357A.3. Assuming that the board on that date passes a resolution allowing the petition and appoints a civil engineer to prepare a plat, it will take until the latter part of October to complete the hearings on the approval of the plat. While the ballot and notices could be prepared prior to the date of the general election, the question is may ballots be mailed to service men on/or after September 25 which would not include the ballot for the Benefited Fire District? In other words, can the Auditor forward ballots which do not include all of the matters to be voted upon to service men and then at a later date give the full ballot to the other voters?
>
> "If this cannot be done it will then be necessary for a special election to be held after the general election to vote on the Benefited Fire District."

In reply thereto I would advise as follows. The statutes with respect to the election process arising out of the proposed creation of a fire district un Chapter 357A, Code 1958, are Sections 357A.9 and 357A.10, which provide as follows:

> "357A.9 Election. When the preliminary report has been approved by the board of supervisors, a date not more than thirty days after such approval shall be set for an election within the district to approve the levy of a tax or not more than one and one-half mills on all the taxable property within the district for the purposes set out in sections 357A.11 and 357A.12, and to choose candidates for the offices of trustee within the district. Notice of the election, including the time and place of holding the same, shall be given in the same manner as for the public hearing heretofore provided for. The vote shall be by ballot which shall state clearly the proposition to be voted upon, and any legal voter residing within the district at the time of the election shall be entitled to vote. Judges shall be appointed to serve without pay by the board of supervisors from among the qualified voters of the district who will have charge of the election. The proposition shall be deemed to have carried if sixty percent of those voting thereon vote in favor of same.
>
> "357A.10 Appointment of trustees. At the election provided for in section 357A.9, the names of the trustees shall be written by the voter on blank ballots without formal nomination and the board of supervisors shall appoint three from among the five receiving the highest number of votes as trustees for the district, one to serve for one year, one for two years, and one for three years, which trustees and their successors shall give bond in the amount the board of supervisors may require, the premium of which shall be paid by the district said trustees represent. Vacancies may thereafter be filled by election, or by appointment by the board of supervisors. The term of succeeding trustees shall be for three years."

The foregoing election is not a part of the general election to be held in November, 1958. At whatever time such election is held it is a special election whether it be held on a general election day, which may be done, or any other time. In either situation the election directed by Section 357A.9 shall require separate judges and separate poll books even if such election be held at the general election. Insofar as your question with respect to absentee ballots for servicemen is concerned, such question at this special election is not present because absentee voting for servicemen under Chapter 53, Code 1958, is limited to voting at primary and general elections. Section 53.51, Code 1958, provides as follows:

> "Rule of construction. This division shall be liberally construed in order to provide means and opportunity for qualified voters of the state of Iowa serving in the armed forces of the United States to vote at the primary and general elections."

And see pamphlet "Voting in Iowa", page 40. In addressing itself to the special servicemen's ballot it is said:

> "This special system of absent voting applies only for statewide primary and general elections; it doesn't apply to city or county elections, school elections, or special elections."

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

COUNTY OFFICERS: FIRE PROTECTION:

~~BOARD OF SUPERVISORS: FIRE DISTRICTS~~

No authority, either express or implied, under Chapter 357A for Board of Supervisors to separate a township or a part of a township from the benefited fire district petitioned for. (Strausser to Meyer, Winneshiek Co. Atty., 8/25/58) #58-8-3

August 25, 1958

Mr. Isadore Meyer
Winneshiek County Attorney
1041-2 Washington Street
Decorah, Iowa

Dear Sir:

This will acknowledge yours of the 23inst. in which you set out the following:

> "Chapter 357A provides for benefited fire districts consisting of more than one township, or parts or townships. Section 357A.3 provides for notice of hearing and Section 357A.4 provides that the Board of Supervisors shall by resolution establish the benefited fire district or disallow the petition. Nothing is said in the statutes about the Board after hearing taking out a township or part of a township where the people do not desire to go into the benefited fire district. Can the Board of Supervisors under Section 357A.4 take out a township or part of a township, and approve the balance of the benefited fire district, or do they have to either approve or disallow the entire petition?
>
> "Hearing will be held under this Chapter on August 28, and I am sure this question will come up. May I hear from you on this at your very earliest convenience."

In reply thereto I advise as follows:

Section 357A.1, Code of 1958, provides for hearing by the Board of Supervisors upon the petition, which, among other things, shall describe the "approximate district to be served".

58-8-3

Section 357A.2 provides that the district may include all or portions of one township and any adjoining townships or portions thereof.

Section 357A.3 provides for a hearing upon the petition and Section 357A.4 provides in terms the following action of the board:

> "On the day fixed for such hearing, the board of supervisors shall by resolution establish the benefited fire district or disallow the petition. For adequate reasons the board of supervisors may defer action on such petition for not to exceed ten days after the day first set for a hearing."

It will be noted that the board has authority to establish the benefited fire district or disallow the petition. The action of the board is operative upon the benefited district and the only such district before the board is the district described in the petition. Its authority, according to the foregoing section, is to establish that benefited fire district or disallow the petition. This view of that statute is confirmed by the language of Section 357A.5, which states:

> "When the board of supervisors shall have established the benefited fire district, they shall appoint a competent disinterested civil engineer, who shall prepare a preliminary plat showing the proper design in general outline of the district, and shall show the lots and parcels of land within the proposed district as they appear on the county auditor's plat books, together with the names of the owners, and the assessed valuation of said lots and parcels."

The engineer's report on the day set for hearing thereon before the board may be, according to the statute, Section 357A.8, approved or disapproved. The extent of the board's authority over the plan is to make changes in boundaries as they appear on the engineer's report.

Thus, the several powers of the board and of the engineer are described and clearly the engineer's report is made upon the benefited fire district established by the board. I am of the opinion, therefore, that there is neither express nor implied power in the board to separate a township or a part of a township from the benefited district petitioned for.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:md

TAXATION; COUNTY OFFICERS; PUBLIC UTILITIES:
The Board of Supervisors has authority under §445.19, Code 1958, to compromise delinquent taxes upon telephone companies provided that the conditions specified in such statute are met.
(Strauss to Elgin, Warren Co. Atty., 8/28/58) # 58-8-4

August 28, 1958

Mr. P. F. Elgin
Warren County Attorney
Indianola, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 11th inst. in which you request our opinion on the following question:

> "May the Board of Supervisors compromise delinquent taxes assessed under the provisions of Chapter 433 against a telephone company?"

The relevant sections of the 1958 Code of Iowa are as follows:

> "433.4 Assessment. The state tax commission shall, at its meeting on the second Monday in July of each year, proceed to find the actual value of the property of such companies in this state, taking into consideration the information obtained from the statements above required, and any further information it can obtain, using the same as a means for determining the actual cash value of the property of such companies within this state; also taking into consideration the valuation of all property of such companies, including franchises and the use of the property in connection with lines outside the state, and making such deductions as may be necessary on account of extra value of property outside the state as compared with the value of property in the state, in order that the actual cash value of the property of the company within this state may be ascertained. Said assessment shall include all property of every kind and character whatsoever, real, personal, or mixed, used by said companies in the transaction of telegraph and telephone business; and the property so included in said assessment shall not be taxed

in any other manner than as provided in this chapter and section 427.1, subsection 20."

"433.10 Rate of taxation--collection. All telegraph and telephone property shall be taxable upon said assessment at the same rates, by the same officers, and for the same purposes as the property of individuals within such counties, cities, towns, townships, or lesser taxing districts, and the county treasurer shall collect such taxes at the same time and in the same manner as other taxes, and the same penalties for the nonpayment shall be due and collectible as for the nonpayment of individual taxes."

"445.16 Compromising tax. When any property in this state has been offered by the county treasurer for sale for taxes for two consecutive years and not sold, or sold for only a portion of the delinquent taxes, then and in that event the board of supervisors of the county is hereby authorized to compromise the delinquent taxes against said property antedating any tax sale certificate; or being a part of the taxes due for the year for which such property was sold for taxes, and may enter into a written agreement with the owner of the legal title or with any lien holder for the payment of a stipulated sum in full liquidation of all delinquent taxes included in such agreement."

"445.19 Compromising tax on personal property. When personal property 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."

It is the opinion of this Department that if the requisites found in Sections 445.16 or 445.19 are met, the County Board of Supervisors have authority to compromise this tax.

The function of the State Tax Commission in this matter is to act in capacity of an assessor. Once this function is completed, the tax is to be treated as any other property tax assessed by the local assessor. This is evidenced by Section 433.10, supra, which states that the tax shall be collected at the same time and in the same manner as other taxes.

Chapter 445 of the Code of Iowa entitled Collection of Taxes, gives the County Board of Supervisors authority to compromise taxes in certain instances. No indication is found in Section 445.16 and 445.19 limiting the County Board's authority to compromise taxes to those situations where the assessment was made by the local assessor, indeed the language applies to all delinquent taxes.

The connection with the Board's authority to compromise under Section 445.16, I refer you to the O. A. G. 1938, p. 699 which indicates that the effect of 445.16 was nullified by Section 446.19 which provides that the County, through its Board of Supervisors, shall purchase the property for the full amount of all delinquent general taxes, interest, penalties, and costs. Section 446.31 gives the Board of Supervisors authority to compromise after its purchase under Section 446.19.

Section 445.19, supra, gives the Board of Supervisors authority to compromise personal property taxes if the following conditions are met:

1. That such personal taxes are not a lien upon any real estate.

2. That said personal taxes are delinquent for one or more years.

3. That such taxes are not collectible in the usual manner.

We do not have sufficient facts to give a clear answer to the particular situation raised in your question. However, if the steps taken with regard to the taxes on this property conform to the requirements laid down by the above mentioned statutes, the Board of Supervisors has authority to compromise this tax.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

HEADNOTE: PROPERTY TAX: SAVINGS AND LOAN ASSOCIATIONS: (1) A federal savings and loan association is subject to Iowa taxation. (2) Sections 431.7 - 431.16, Code of Iowa (1958) are the proper sections under which federal savings and loan associations are taxed. (3) The value of U. S. Government obligations held by a federal savings and loan association is not to be deducted in arriving at the value of such association shares.

August 13, 1958

Reading file

Mr. Leon N. Miller
Chairman
Iowa State Tax Commission
Local

Dear Mr. Miller:

Receipt is hereby acknowledged of your letter of June 20, 1958, in which you request the opinion of the undersigned upon the following matters:

"1. Is the Clear Lake Federal Savings and Loan Association, Clear Lake, Iowa, as organized under Federal Charter subject to taxation in Iowa?

"2. If said Association is subject to taxation in Iowa, does the provisions of Sections 431.7 to 431.16 inclusive, of the Code of Iowa, prevail?

"3. If said Association is assessable in Iowa under the provisions of said Sections 431.7 to 431.16 of the Iowa Code, is the value of U. S. Government obligations in the sum of $332,814.00 as set out in schedule "F" of said financial statement, deductible from the net value of shares, $523,756.00, as set out in Schedule "B" of said financial statement?"

The Clear Lake Federal Savings and Loan Association is organized under the provisions of the Home Owners Loan Act of 1933 now appearing at 12 U. S. C. Sections 1461 - 1468. 12 U. S. C. Section 1464 (h) reads in pertinent part as follows: " * * *; and no State, Territorial, county, municipal or local taxing authority shall impose any tax on such association or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions."

Section 427.1 (1), Code of Iowa (1958), provides for exemption of the property of the United States and its corporate agencies or instrumentalities, including

machinery or equipment, unless such taxation is authorized by Federal statute.

Thus, we see that by Federal statute the taxation of Federal Savings and Loan Associations is permitted. Therefore, under the applicable provisions of both State and Federal law such associations are subject to taxation by the State of Iowa.

Your second question is answered in the affirmative. Since the organization in question is a savings and loan association and the tax imposed upon Federal savings and loan associations by these sections is no greater than the tax imposed on local savings and loan associations the provisions of Sections 431.7 to 431.16, Code of Iowa (1958), are applicable.

Section 431.10, Code of Iowa (1958), levies a tax on savings and loan associations to the extent of one mill on the dollar of the value of the shares of each association. This value is determined by including among other things the actual value of all bonds owned by the association. The tax then, is not levied on tax exempt securities but rather upon the value of the shares of the savings and loan association. No deduction for United States Government obligations in arriving at the value of such shares is provided in Section 431.7 to 431.16, Code of Iowa (1958). Therefore, following the reasoning set forth in Des Moines National Bank v. Fairweather, 191 Iowa 1240, 181 N. W. 459 (1921) and an opinion of the Attorney General found at page 184, 1922 Report of the Attorney General, no deduction should be allowed for the value of tax exempt government obligations in arriving at the value of the shares of a savings and loan association.

Very truly yours,

Richard J. Brinkman
Special Assistant Attorney General

RJB/bjf

BOARD OF HOSPITAL TRUSTEES: A Board of Hospital Trustees is an agency of express powers as set forth in §347.13 and §347.14, Code 1958; and no authority appears therein for such Board to operate a nursing home for elderly people.

August 19, 1958

Press

Mr. Gifford Morrison
Washington County Attorney
Washington, Iowa

Dear Sir:

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

"A couple of questions have come up in connection with the Nurses Home at the Washington County Hospital at Washington County, Iowa, which require an opinion from your office.

"Washington County has a three story brick veneer building which was built for the purpose of a nurses home sometime prior to 1930. This building is in very good condition and could easily be converted into a nursing home, meeting the requirements of the nursing home laws of the state of Iowa.

"The Trustees of the Washington County Hospital feel that a need in the community could be served if they could use this building as a nursing home, but they do not wish to take such steps until they find out the answers to the following two questions:

"1. Can this building be used by the Washington County Hospital, managed and operated by the Trustees of the Washington County Hospital, as a nursing home for elderly people?

"2. Assuming your answer to question 1. is in the affirmative, will this nursing home be able to receive, and will the State Board of Social Welfare be authorized to pay to said nursing home, payments from the Old Age Assistance fund.

"Since the Washington County Hospital Trustees feel that the answers to the above questions are necessary before going any further with this matter, we would appreciate your answers to the above at your earliest convenience."

In reply thereto I advise as follows.

1. In answer to your question #1, I would advise that a Board of Hospital Trustees is an agency of express powers and these are set forth in Sections 347.13 and 347.14, Code 1958. No authority appears therein for a Board of Hospital Trustees to operate a nursing home for elderly people.

2. In view of the negative answer to your question #1, answer to your question #2 is not required.

In this connection the Department realizes the dire need throughout the state for statutory authorization for facilities devoted to the needs and care of the aged and suggest that you and other interested parties contact your legislators to initiate and cooperate in the enactment of enabling legislation.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

MUNICIPAL CORPORATIONS: POWER TO LEASE MUNICIPAL PROPERTY: Under the provisions of the statute, Section 368.18, Municipal Corporations do not have any power to purchase land with intent to lease the land to a private industry.

August 18, 1958.

Mr. E. B. Storey, Director
Iowa Development Commission
200 Jewett Building
Des Moines 9, Iowa

Dear Mr. Storey:

Reference is made to your letter of August 14th which reads as follows:

> "We would like to have an official opinion or ruling on the following situation and the code that applies:
>
> "The town of Hawarden has worked closely with one of its manufacturers to finance a new building for the company. The building previously used is not conducive to good production methods, therefore, the company must have a new building that is suitable or move elsewhere.
>
> "The Hawarden Industrial Development Corporation has raised nearly the amount needed but lacks the amount to purchase the land. The town council being desirous of helping in this matter would like to complete the arrangement by purchase of land to be leased to the industry.
>
> "The town is definitely unified in their desire to help but must know as to the legality of the matter. The two legal advisors working with Hawarden feel that they need further assistance in clarifying the matter. In view of the following facts we would like to know 'Can a municipal Power Company purchase land with the intent of leasing the land to an industry?' If so, what code would set this forth? We have brought to their attention the 1958 code of Iowa, Section 368.35."

With reference to the pertinent question, "Can a municipal Power Company purchase land with the intent of leasing the land to an industry?", we beg to advise as follows:

The answer to your question will depend entirely upon the powers conferred by statute upon municipalities with reference to municipal property. Section 368.18, Code of Iowa, 1958, spells

out such powers:

> "Municipal buildings and property.
> "1. They shall have power by a three-fourths majority vote of the council to acquire, erect, or purchase buildings and building sites to the extent necessary to house and carry on authorized governmental functions or purposes of the municipal corporation.
> "2. They shall have power to maintain and keep in repair all municipally owned buildings and property. Acts 1951 (54 G.A.) ch. 151, Sec. 13, as amended Acts 1953 (55 G.A.) ch. 170, Sec. 3."

In the interpretation of the powers granted to a municipal corporation, we invite your attention to the case of EARL GRITTON vs. CITY OF DES MOINES, found in 247 Iowa 326, in which the Court, in discussing the question of the right of a City to transfer land to a non-profit corporation, stated:

> "It is fundamental that municipal corporations are wholly creatures of the state legislature. They have no inherent power to do what was done here. They possess and can exercise only the powers (1) expressly granted by the legislature (2) necessarily or fairly implied in or incident to the powers expressly granted, and (3) those indispensably essential - not merely convenient - to the declared objects and purposes of the municipality."
> "***
> "The powers conferred upon municipalities are to be strictly construed and when there is uncertainty or reasonable doubt as to the existence of power it will be denied."
> "***
> "63 C.J.S., Municipal Corporations, section 965, states: '*** a power of use and disposal of municipal property does not include the power of donation or gratuitous disposition, ***."
> "***
> "It is thoroughly settled that the state, through its legislature, may take full control of the public property of municipalities and place it under more direct state supervision. It may, at its pleasure, withdraw the power of municipal corporations to hold such property or take it without compensation, hold it itself or vest it in other agencies, with or without consent of the citizens."

The same principles of law would be applicable in the case of the lease of municipal property. It will be noted that under the statute, Section 368.18, real estate can be acquired only to carry on authorized governmental functions of the municipal corporation.

The general principles of the law relating to the lease of municipal property are stated in Section 28.42 of McQuillin on Municipal Corporations, 3rd Edition, to which we have appended two citations from other jurisdictions, as follows:

> "Sec. 28.42
>
> "***Unconditional private uses are not always favored; ***
>
> "however, judicial approval of the use and the conditions thereof will depend upon the grant of power to the municipality and the nature of the particular transaction considered mainly from the standpoint of public requirements, especially the need of the property involved, for public purposes. ***
>
> "But, ordinarily, a municipality cannot, by lease or license, permit its property acquired or held for public use, to be wholly or partly diverted to a possession or use exclusively private, without specific legislative authority."

Municipality cannot without specific legislative authority, lease part of a public wharf unconditionally to be used for a private business.

> Juneau Ferry & Nav. Co. v. Morgan
> 236 Fed. 204, 206 (Citing McQuillin text)

City, at least, where not authorized, cannot erect office building for private use of doctors.

> Hamilton v. City of Anniston,
> 248 Ala. 396, 27 S.2d,857, (Citing McQuillin text)

In answer to the question, we are therefore, of the opinion that a municipally owned power company cannot purchase land with the intent of leasing the land to a private industry.

Respectfully submitted,

Oscar Strauss
First Assistant Attorney General

OS/FDB/sp

MOTOR VEHICLES - FOUR WHEEL TRAILER - §321.310, 1958 Code of Iowa. The Legislature succeeded in exempting commercial fertilizer operations of the type described herein from the prohibition of §321.310, supra, by allowing four-wheel trailers to be towed or pulled by either a Class "A" truck or a farm tractor.

August 15, 1958

Mr. Warren C. Johnson
Clinton County Attorney
Clinton, Iowa

Attention: Mr. R. W. Joy
Assistant Clinton County Attorney

Dear Sir:

Your letter of July 28 is set out as follows:

"This office requests an Attorney General's opinion as to the force and effect of Section 321.310 of the 1958 Code of Iowa, entitled - 'Four Wheel Trailers Behind Trucks Prohibited', concerning the following situation, to-wit:

"An Iowa Highway patrolman on July 1st, 1958, stopped a two-ton truck which was towing an anhydrous ammonia tank which was permanently mounted on a four-wheel trailer on the highways of the State of Iowa. The patrolman charged the driver with violation of said section 321.310 as it was his belief that the truck trailer did not come within any of the exceptions of that section.

"The attorneys for McArthur Chemical of Davenport, Iowa, have vigorously protested the filing of this charge against their client and state that such an arrangement for trucks and trailers in the business of transporting commercial fertilizers is legal on the highways of Iowa. They point to the recent amendment to Section 321.1(16) which is the definition of an implement of husbandry. They claim that this four-wheel trailer thereby being an implement of husbandry is outside the force and effect of Section 321.310. They further point to Section 321.453 entitled - Exceptions - in which provisions of this chapter governing size, weight and load do not apply to

implements of husbandry temporarily moved upon a highway. This writer fails to see what light this section throws on the situation for the benefit of defendant's case as this is a matter of towing a trailer behind a two-ton truck and not a temporary but the general practice of the McArthur Chemical business operation.

"The writer believes that it might be possible under the definition of farm tractor as set out in Section 321.1(7) to technically classify this two-ton truck as a farm tractor and thus bring the operation of McArthur Chemical into the exceptions set out in Section 321.310. This writer feels sure that it was the intent of the last legislature to exempt the commercial fertilizer operation from the force and effect of said section 321.310 but our question is: Did the Legislature succeed in removing the operation as set out from being a violation of Section 321.310?"

Section 321.310, 1958 Code of Iowa, provides in pertinent part that:

"No truck shall, after January 1, 1939, pull or tow any four-wheeled trailer, * * *.

" * * *.

"This section shall not be applicable to a truck operating under an "A" registration commonly known as a pickup truck or light delivery truck hauling less than two thousand pounds on said truck nor to a farm tractor pulling or towing a four-wheeled trailer."

Section 321.1(16) supr , defines "Implement of husbandry" to mean:

"every vehicle which is designed for agricultural purposes and exclusively used by the owner thereof in the conduct of his agricultural operations * * *. It shall also include equipment of any kind for the storage, transportation, application, or any combination thereof, of anhydrous ammonia or other liquid commercial fertilizer used by owners of agricultural operations or dealers and distributors in

delivering to, and supplying such owners."

Section 321.453, supra, provides that:

"The provisions of this chapter governing size, weight, and load shall not apply to fire apparatus, road machinery, or to implements of husbandry temporarily moved upon a highway, * * *."

In an official opinion of this office appearing in the 1940 Report of the Attorney General at page 190, Section 339-a1, Chapter 134 of the Acts of the 47th General Assembly (now appearing in Section 321.310, 1958 Code of Iowa) was construed as follows:

"It is to be observed that the statute in question is one designed not only as a police regulation but for the additional purpose of protecting the highways from unusual and exceptional wear. * * *"

The foregoing reasoning is strengthened by the last paragraph of Section 321.310, supra, which provides that Section 321.310 shall not apply to a truck licensed or registered under an "A" classification,, nor to a farm tractor, pulling a four-wheel trailer.

The premise advanced in your letter that it was the intent of the Legislature to exempt commercial fertilizer operations from Section 321.310, supra, is well taken, and in answer to the question submitted we would advise you that in our opinion the Legislature did succeed in removing the commercial fertilizer operations involving the towing or pulling of a four-wheel trailer from being or constituting a violation of Section 321.310, supra. This the Legislature did by enacting into law the last paragraph of Section 321.310, supra, and heretofore referred to, permitting a four-wheel trailer to be pulled or towed by either a class "A" truck or a farm tractor.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:MKB

ELECTIONS: Candidate's expense statement --

§56.1, Code 1958, requiring candidates for office in any primary, municipal, special or general election to file a statement of disbursements and expenditures in seeking such a nomination or election does not include within its terms a statement if such candidate made no disbursements nor incurred expense for such purpose. (Strauss to Synhorst, Secy of State, 8/15/58)

58-8-10

August 15, 1958

Hon. Melvin D. Synhorst
Secretary of State
B u i l d i n g

Dear Sir:

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

"We have examined the records in this office pertaining to statements of expenses which were required by Chapter 56, Code of Iowa, 1958, to be filed in the office of Secretary of State subsequently to the June 2, 1958, Primary Election and call the following situation to your attention.

"A search of our records shows that the following named candidates for State office in the June 2, 1958 Primary Election have not filed statements of expenses:

"Attorney General

William H. Welch (D)	Logan

"State Senators

Virgil F. Trabert (D) - 10th District	Mt. Pleasant
Sam Burton (D) - 13th District	Ottumwa
Bernard Buckley (D) - 21st District	Davenport

"State Representatives

Jim Metcalf (D) - Fayette County	Oelwein
Martin E. Sar (R) - Floyd	Charles City
B. E. Hunter (R) - Grundy	Reinbeck
Wayne L. Schwartz (D) - Hardin	Buckeye
Casey Loss (D) - Kossuth	Algona
Alvin P. Meyer (D) - Madison	Winterset
Roy M. Kerr (D) - Marion	Harvey
Edward Hopp (D) - Mills	Glenwood
William E. Reed (D) - Poweshiek	Grinnell
Fred R. McLain (D) - Story	Nevada
Walter E. Farrell (D) - Washington	Washington

58-8-10

> "The names of two candidates who have died are not included in the above list. The report filed by Mr. Ken Stringer, candidate for State Representative for Scott County, was returned to him July 31st because it had not been notarized and we have not received it in completed form. Mrs. Bert Hanson, candidate for State Representative for Iowa County, reported by letter that she had no expense so nothing to file.
>
> "If the above named candidates had no receipts or expenditures as those terms are defined by Chapter 56 for the purpose of aiding or securing their nomination, are they required to file statements to that effect?
>
> "Several of the June 2, 1958 Primary statements of expenses showing either receipts or expenditures or both were filed subsequently to the thirty day period allowed by Section 56.1. A list of those who would appear to have filed late is available on request."

In reply thereto I advise as follows. The section controlling the conclusion herein is this, 56.1, Code 1958, providing as follows:

> "Statement. Every candidate for any office voted for at any primary, municipal, special or general election, shall, within thirty days after the holding of such election, file a true, detailed, and sworn statement showing all sums of money or other things of value disbursed, expended, or promised, directly or indirectly, by him, and to the best of his knowledge and belief by any other person or persons in his behalf, for the purpose of aiding or securing his nomination or election."

According to its plain terms, the obligation of the statute is affirmatively specific in its terms. It imposes a duty upon a candidate to "file a true, detailed, and sworn statement showing all sums of money or other things of value disbursed,

expended, or promised, directly or indirectly, by him, to the best of his knowledge and belief by any other person or persons in his behalf, for the purpose of aiding or securing his nomination or election." There is no express provision requiring a sworn statement of the negative fact that no sums of money or other things of value were disbursed, expended or promised. This being a criminal statute for which a misdemeanor charge lies for its violation (see Section 56.9), it requires the application of the following rule of law stated in State v. Andrews, 167 Iowa 273, 277:

> "It is the rule that criminal statutes are to be strictly construed, and cannot be made to embrace cases not within the letter of the law, even though they come within the reason and policy of the law. State v. Lovell, 23 Iowa 304. In re Estate of Kuhn, 125 Iowa 449. In the last case cited, the court quotes with approval from Chief Justice Marshall, speaking of the construction of statutes, the following language:
>
> "The rule that penal laws are to be construed strictly is perhaps not less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the Legislature, not in the judicial department. It is the Legislature, not the court, which is to define crime and ordain its punishment. It is said that, notwithstanding this rule, the intention of the lawmakers must govern in the construction of penal as well as other statutes. This is true, but this is not a new, independent, rule which subverts the old. It is a modification of the ancient maxim, and amounts to this: That, though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious in-

> tention of the Legislature . . . . The intention of the Legislature is to be collected from the words they employ. . . . The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of the words, especially in a penal act, in search of intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity or of kindred character with those which are enumerated."

By reason of the foregoing I am of the opinion that those candidates who have not disbursed and expended or promised, directly or indirectly, sums of money or other things of value for the purpose of aiding or securing their nomination or election are not required to file a statement.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

BOARD OF SUPERVISORS: The Board of Supervisors have only such power over the highways of the state as is delegated by the Legislature and the power to enter into an agreement with a privately owned company to remove rock located under a secondary road and assume other powers with respect thereto is in excess of the power delegated.

August 18, 1958

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

Dear Sir:

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

> "I am writing you at the request of the Board of Supervisors of Adair County, Iowa, for an opinion on the following situation.
>
> "A privately owned company that operates a limestone quarry located in this County has requested the Board of Supervisors to permit the company to remove the rock located under a secondary road. This is an unsurfaced dirt road and is located on the north side of the present operating quarry. The Company also owned or has leases on the land to the north of the road which contains limestone rock. The company has offered to provide a detour or run around road which will angle toward the northwest and then west to a highway so that this road will enter the highway about one-eighth of a mile north of the place the present secondary road enters the highway. Approximately one-fourth of a mile of the present secondary road will be physically closed for about three years if this plan is adopted.
>
> "The company has agreed that it will provide the building, all maintenance and will rock the detour road. The company also agrees that at the end of approximately a three year period it will fill and grade and return the secondary road to its present location and that it will rock this road at no expense to the county for approximately a half mile.

> "It is the understanding of the Board of Supervisors that the owners of the land adjoining the road desire to have this plan adopted since they will obtain the royalty from the company for the rock which is removed. The benefit to the county is the rocking of about a half mile of the road after it is returned to its present location and this is worth approximately $800.00.
>
> "1. Does the Board of Supervisors of this county have legal authority to enter into this agreement?
>
> "2. Does the present secondary road have to be formally closed and vacated for the three year period and then formally reopened as provided in Chapter 306 or may the board merely temporarily close road and authorize the detour on its own motion?"

In reply thereto I would advise you that in my opinion your Board does not have legal power, express or implied, to enter into the foregoing described agreement. Lacking such power, the superior right of the public generally over the highways of the state is a sovereign right and unless this power in part or in whole is delegated such power remains in the state. This is the view of the Supreme Court in the case of Dickinson County v. Fouse, 112 Iowa 21, 22, where it is stated:

> " * * *It is not in the people of the county that this privilege or easement vests, but in the public generally. It is true that, by special provisions of the Code, boards of supervisors have power to establish, maintain, and discontinue highways; and that for the purpose of keeping them in repair certain authority is given to township officers. Chapter 2, title 8, Code. Nevertheless these powers are attributes of sovereignty. For convenience, they are delegated; but nothing goes with them, not expressed or necessary to the performance of the duties named. Were it not for the

statutes mentioned, the power to lay out, discontinue, and improve highways would be in the state, which is the representative of the general public. It follows, therefore, that, when such an easement is created, the ownership thereof, if we may use the expression, is in the state. Even where the fee of a street is in the city, we have said such street, so far, at least, as concerns the right to permit its use by other than ordinary travel, is under the exclusive control of the general assembly. Stanley v. City of Davenport, 54 Iowa 463. The establishment of highways is an exercise of the right of eminent domain, which is always a sovereign power. This power may be delegated, and, as we have seen, is to some extent delegated, as to highways; but in any such case the delegated authority is to be strictly construed. 2 Dillon Municipal Corporation, 604. Nowhere under our Code do we find the ownership or supreme control of such easement taken from the state. * * *"

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

AGRICULTURE; TAXATION;

1. All agricultural produce is subject to personal property taxation with the exception of the crops and products described in §427.1(13) and grain received at elevators, etc. within this state for storage, accumulation, etc. provided by §428.35, Code 1958. 2. Taxable agricultural produce becomes subject to personal property tax lien on April 1 after the due date of the first half of the unpaid taxes and the second half on October 1 after due date of the last half. (Strauss to Glenn, U.S. Dept. Ag., 8/15/58)

August 15, 1958 — 58-8-12

Mr. C. C. Glenn, Administrative Officer
United States Department of Agriculture
Iowa State ASC Office
Room 411, Iowa Building
Des Moines 7, Iowa

Dear Sir:

This will acknowledge receipt of yours of May 16, 1958, in which you submitted the following:

> "We want to thank you for your letter of May 7, 1958, and the attachment giving an opinion on the third question asked in our letter of February 25, 1958.
>
> "We are very anxious to have your opinion on the other two questions in order that we will know what effect, if any, county treasurer liens have on Government price support loans to producers whose names appear on the lists prepared each year by county treasurers.
>
> "The two remaining questions on which we would like your opinion are:
>
> "1. When is a farmer required to list agricultural products of his farm for tax purposes, or in other words, when, under Iowa law, do agricultural products of the farm become subject to personal property taxes?
>
> "2. When do the agricultural products of the farm become subject to the lien for delinquent personal property taxes afforded by the amendment to Section 445.29, Code of Iowa?"

In reply thereto I advise as follows.

Section 427.1(13), Code of Iowa 1958, exempts the following from property taxation:

> "427.1 Exemptions. The following classes of property shall not be taxes:
>
> " * * *
>
> "13. Agricultural produce. Growing agricultural and horticultural crops and products, except commercial orchards and vineyards, and all horticultural and agricultural produce harvested by or for the person assessed within one year previous to the listing, all wool shorn from his sheep within such time, all poultry, ten stands of bees, honey and beeswax produced during that time and remaining in the possession of the producer, all swine and sheep under nine months of age, and all other livestock and fur-bearing animals under one year of age."

All other agricultural produce is subject to property taxation with the further exception of grain received in elevators, warehouse, mill, processing plant or other facility within this state in which it is received for storage, accumulation, sale, processing or for any purpose whatsoever, as provided in Section 428.35, Code of Iowa, 1958.

Section 428.4, Code of Iowa, 1958, provides in part as follows:

> "Property shall be taxed each year, and personal property shall be listed and assessed each year in the name of the owner thereof on the first day of January. * * *"

Thus it is seen that all taxable agricultural products must be listed on January 1 of each year.

You also ask when agricultural products of the farm become subject to the lien for delinquent personal property taxes

afforded by amendment to Section 445.29, Code of Iowa, 1958. Pertinent sections of the 1958 Code of Iowa read as follows:

> "445.29 Lien of personal taxes. All poll taxes and taxes due from any person upon personal property shall, for a period of one year following December 31 of the year of levy, be a lien upon any and all real estate owned by such person or to which he may acquire title and situated in the county in which the tax is levied. From and after the expiration of said one year said taxes shall be a lien on all such real estate for an additional period of nine years provided said taxes are entered upon the delinquent personal tax list as provided by law. But in no instance shall said taxes be a lien after the expiration of ten years from December 31 of the year in which levied. This section shall apply to all poll taxes and to all taxes on personal property whether levied prior or subsequent to the time this section takes effect. Personal property taxes, together with any interest, penalty, or costs, shall be a lien in favor of the county upon all the taxable personal property and rights to property belonging to the taxpayer whose personal property tax is delinquent."

> "445.37 When delinquent. In all cases where the half of any taxes has not been paid before the first day of April succeeding the levy, the amount thereof shall become delinquent from the first day of April after due; and in case the second installment is not paid before the first day of October succeeding its maturity, it shall become delinquent from the first day of October after due."

Applying these two statutes to the question propounded, we arrive at the conclusion that nonexempt agricultural produce becomes subject to the lien for personal property taxes on April 1, after the due date on the first half of the unpaid tax, and on October 1, after due date for the last half.

It should be noted also that Section 445.29, as amended by the 56th General Assembly, has a retroactive as well as prospective effect. Thus the personal property tax lien will attach to taxable personal property, even though the lien existed prior to the addition of the amendment to Section 445.29.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

COUNTY OFFICERS: INSURANCE: Auditor cannot deduct health and accident premiums from salaries of County employees as collection agent for profit-making insurance company (Strauss to Roggensack, Clayton Co. Atty., 8/13/58) # 58-8-13

August 13, 1958

Mr. H. K. Roggensack
Clayton County Attorney
Elkader, Iowa

My dear Horace:

This will acknowledge receipt of yours of the 12th inst. In which you submitted the following:

> "An energetic insurance agent for White Cross sold the Clayton County employees on health and accident policies and all of these employees signed a written authorization, authorizing the County Auditor to deduct the premiums from their checks. A Blue Cross insurance representative was in this morning and tells me that White Cross is a profit making Company and Blue Cross is a non-profit making company. The Auditor wants to do the right thing, whatever that might be.
>
> "1. Does he have to recognize the authorization for a profit making insurance company? Is it optional?
>
> "2. Would he be required to recognize such authorization if it were a non-profit making insurance company? Is it optional?
>
> "There is a statute, 514.16, to which you may want to refer. The Blue Cross representative thought there may have been a ruling in 1953. Our problem is, if the deductions are made other insurance men get sore, the employees may switch to other companies, all of which make for endless record keeping. If the Auditor must deduct and remit and does not and someone gets hurt, it may be his personal responsibility.

"The first deduction under the authorization would be August 19th. I would therefore like to hear from you before August 17th, if possible.

"With the best of personal regards."

In reply thereto I would advise as follows.

1. In answer to your question #1 I enclose copy of opinion issued to Mr. Jack R. Gray, Calhoun County Attorney, June 27, 1958, in which a like question is answered.

2. In answer to yo r question #2 I am of the opinion that your County Auditor is required to recognize the authorization under Section 514.16 insorfar as it pertains to non-profit making insurance companies. To make this an optional recognition by the Auditor would confer power on the Auditor to deprive a public employee of a benefit clearly intended to be conferred upon him by the Legislature.

Thanks for your kind wishes.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB
Enc.

ELECTIONS: Absentee ballot applications -- Except for school and municipal elections and applications by armed forces members, only applications forms furnished by the County Auditor may be used. (Strauss to Leir, Scott Co. Atty., 8/5/58)

August 5, 1958 #58-8-15

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

Dear Sir:

This will acknowledge receipt of yours of the 12th ult. In which you renew your previous request for opinion in the following situation:

> "You willperhaps recall that sometime during the month of May I had a telephone conversation with you relative to the request of our County Auditor for an opinion with reference to the matter set out in my letter of May 13, 1958, as follows:
>
> "'If the County Auditor received an application in the mail from a voter residing within the County which is in the form prescribed in Section 53.5 of the Code of Iowa and is properly signed and notarized, even though the actual blank has not been furnished to the voter by the Auditor's office as provided in Section 53.4 of the Code of Iowa, would the Auditor not be required to immediately send a ballot to the voter?
>
> "'The reason for this question is that we understand blanks are available elsewhere, and also a voter could obtain the wording for the form from the Code of Iowa and make his own application form.'
>
> "In explanation of the problem, the Auditor has received some information to the effect that applications for ballots may be privately printed to circumvent the necessity of obtaining the applications from the Auditor in person. Under such circumstances, is not the Auditor required to accept the application and mail the ballot?"

58-8-15

In reply thereto I advise you as follows. The sections bearing upon the problem submitted are 53.2, 53.3 and 53.4, Code 1958, each providing as follows:

> "53.2 Application for ballot. Any voter, under the circumstances specified in section 53.1, may, on any day not Sunday, election day, or a holiday and not more than twenty days prior to the date of election, make application to the county auditor, or to the city or town clerk, as the case may be, for an official ballot to be voted at such election.
>
> "53.3 School secretary. In the application of this chapter to elections held in independent city, town, and consolidated school districts, the secretary of the school board shall perform the duty herein imposed on the county auditor or clerk of the city or town.
>
> "53.4 Application blanks. Said officers shall furnish to any qualified voter of the county, city, or town of which they are such officers, blanks on which to make application for such ballot."

No other person, official or otherwise, has express or implied statutory authority to provide such blanks. This therefore appears to be the proper place for the application of the maxim expressio unius est exclusio alterius. In Sutherland Statutory Construction, Vol. 2, §4915, it is said:

> "As the maxim is applied to statutory interpretation, where a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are affirmatively or negatively designated, there is an inference that all omissions were intended by the legislature. * * *"

Legislative policy in matters of this character is found in Section 43.10, Code 1958, where express provision is made for the use of nomination papers furnished by other than the Secretary of State or County Auditor. This section follows:

> "Blanks furnished by others. Blank nomination papers which are in form substantially as provided by this chapter may be used even though not furnished by the secretary of state or county auditor."

And also in Section 53.49, Code 1958, which provides as follows:

> "Applicable to armed forces only. The provisions of this division as to absent voting shall apply only to absent voters in the armed forces of the United States as defined for the purpose of absentee voting in section 53.37. The provisions of sections 53.1 to 53.36, conclusive, shall apply to all other qualified voters not members of the armed forces of the United States."

In other words, absentee voting statutes for the armed forces including the obligation of the named officers in furnishing blanks for making application for ballot is the only exception to Section 53.4 designating the officers who have authority to provide applications for a ballot. I am of the opinion that the County Auditor is the only official legally authorized to provide such application.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

CITIES AND TOWNS: Libraries -- Library supplies may not be purchased from Library trustees. (5th Assist to Grafton, Dir. St. Trav. Lib., 8/1/58) # 58-8-16

August 1, 1958

Miss Ernestine Grafton, Director
State Traveling Library
Historical Building
L o c a l

Dear Madam:

This will acknowledge receipt of yours of the 31st ult. in which you submitted the following:

> "We have had a request from the Cedar Falls Public Library board of trustees concerning the purchasing of library supplies and equipment from library board members. Is there anything in the law that makes this practice illegal? They are, of course, abiding by the bid provisions which calls for bid letting on purchases over $5,000."

In reply thereto I advise as follows. If the members of the foregoing public library board of trustees are city officers then they are prohibited from purchasing library supplies and equipment from board members under the provisions of Section 368A.22, Code 1958, 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."

That they are city officers appears clear from the provisions of Section 378.4, Code 1958, which provides the following:

58-8-16

"Term of office. Of said trustees so appointed on boards to consist of nine members, three shall hold office for two years, three for four years, and three for six years; on boards to consist of seven members, two shall hold office for two years, two for four years, and three for six years; and on boards to consist of five members, one shall hold office for two years, two for four years and two for six years, from the first day of July following their appointment in each case, and at their first meeting they shall cast lots for their respective terms, reporting the result of such lot to the council. All subsequent appointments, whatever the size of the board, shall be for terms of six years each, except to fill vacancies."

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

STATE INSTITUTIONS: Prison industries--
1. Salaries, travel allowance, and maintenance, equipment, construction of buildings payable from revolving fund. 2. Fund from which salaries are paid depends on whether employee has general relations to Board of Control or institution employee or is exclusively employed by the industries. (Faulkner to Hansen, Bd. of Control, 8/5/58) # 58-8-17

August 5, 1958

Mr. J. R. Hansen, Member
Board of Control of State Institutions
Local

Dear Mr. Hansen:

In your letter of May 21, 1958, an interpretation of Section 246.27, 1958 Code of Iowa, has been requested with respect to the following questions:

1. Shall such items as civilian salaries, civilian travel allowance, new or replacement equipment, remodeling of available buildings, and cost of new buildings be included as a "maintaining industries" expenditure.

2. If civilian salaries are to be included - shall it be for only those civilian employees engaged in supervising and directing inmate employees, or shall it include administrative or clerical employees at the institution, shall it include administrative employees in the Des Moines office of the Industries Division of the Board of Control authorized under Section 218.82?

3. If it is established strictly to provide employment of the inmates of the respective institutions then shall Administrative, clerical, sales supervisory and custodial employees be considered as institutional employees and be handled as part of the cost of the operation of the respective institutions?

In answer thereto you are advised as follows:

1. Sections 246.26, 246.27, and 246.28, 1958 Code of Iowa provide:

246.26 INDUSTRY REVOLVING FUNDS§ There shall be created and established at the state penitentiary at Fort Madison and also at the state reformatory at Anamosa,

58-8-17

> respectively, an establishing and maintaining industries revolving fund, which fund shall be permanent and composed of the receipts from the sales of articles and products manufactured and produced, from the sale of obsolete and discarded property belonging to the various industrial departments, and from the funds now in the establishing and maintaining industry funds for each of said institutions.
>
> 246.27 USE OF FUNDS. The funds created and described in section 246.26 shall be used only for establishing and maintaining industries for the employment of the inmates at the respective institutions named, and payments from said funds shall be made in the same manner as are payments from the appropriations, salaries, support and maintenance of the institutions under the jurisdiction of the board of control.
>
> 246.28 FUNDS PERMANENT. The funds provided in sections 246.26 and 246.27 shall not revert to the general fund at the end of any annual or biennial period.

It is noted that Sections 246.2 and 246.3, 1958 Code of Iowa, set out how certain salaries are determined. These particular salaries are payable from funds in the State Treasury not otherwise appropriated. See Section 246.5, 1958 Code of Iowa. It is further noted that salaries, other than those specified, are payable from funds appropriated to each of the institutions under the jurisdiction of the board of control. As to the penal institutions, the penitentiary and men's reformatory, the appropriation for each institution is allocated for payment of salaries, support and maintenance, repairs, replacements or alterations, and equipment.

Significantly, there is no appropriation for the industries established in connection with either the penitentiary or men's reformatory. Sections 246.26, 246.27, and 246.28, supra, were enacted as Chapter 79, Forty Second General Assembly and were prefaced by this preamble:

> "An act to create at each of the state penal institutions at Fort Madison and Anamosa establishing and maintaining industries revolving funds for the use of said institutions in supporting and maintaining the respective industries at each of said institutions." (underscoring added).

While not controlling, the preamble to a statute may properly be referred to for assistance in ascertaining legislative intent of a statute which is susceptible of different constructions. In Re Wiley's Guardianship, 239 Iowa 1225, 34 NW 2nd 593; State v. Linsig, 178 Iowa 484, 159 NW 995. Since a liberal construction of the word "maintaining" might lead to a different result, the statute is subject to construction, but a liberal construction does not ordinarily prevail over the spirit of the statute. State ex rel Pieper V. Patterson, 246 Iowa 1129, 70 NW 2nd 359.

The words used in Section 246.27, supra, are "establishing and maintaining." In the case of Rosecrans V. Pacific Electric Ry. Co., 21 Cal 2nd 602, 134 R 2nd 245, it was held that the words "establish and maintain" mean:

"To maintain means 'to hold or keep in any particular state or condition, *** not to suffer or fail to decline; The word 'establish' carries with it the implication of originating with a view to its permanent existance. To establish and maintain embraces a continuing obligation."

Standing alone, "maintain" is defined in the case of Drucker v. State Board of Medical Examiners, 143 C.A. 2nd 702, 300 P 2nd 197, as follows:

"...Black's Law Dictionary defines the word as, 'to keep up, preserve, bear the cost of, keep unimpaired, keep in good order, repair, *** to support, to supply with means of support, provide for, sustain'..."

Thus, by definition, the wording "establishing and maintaining", as used in Section 246.27, supra, appears broad enough to uphold the conclusion that the industries revolving fund was provided for the purpose of rendering the Iowa State industries a self sustaining operation. As such, salaries, travel allowance, equipment costs, remodeling buildings, and constructing new buildings are to be paid from the industries permanent revolving fund.

2. If employees engaged in supervising and directing inmate labor at the industries are employees of the said industries then their salary payments would be from the industry revolving fund. On the other hand, if personnel are employees of the Iowa State Penitentiary or the men's reformatory, salaries are payable from the appropriated

funds allocated to the respective institutions, Or, if employees of the board of control, then salary payments would be disbursed from your appropriation. Therefore, as a fact question, you must determine by whom they are employed and act accordingly. This same reasoning is applicable to administrative and clerical employees of these institutions, as well as administrative employees in the industries division to the board of control located in Des Moines.

3. Answer to your third question is contained in the response to question 2 above. If, in fact, administrative, clerical, sales supervisory, and custodial personnel are employees of the respective institutions herein considered, then the cost of operation as to them is a matter of appropriated funds. However, if employed by the industries, as opposed to the respective institutions, payments would be from the industries revolving fund.

Very truly yours

HUGH V. FAULKNER
Assistant Attorney General

HVF:js

: Vending machines--

~~HEADNOTE~~: CIGARETTE ~~VENDING MACHINES~~ - What constitutes vending machines. Where machine is so constructed as to require the seller or clerk to do some material act thereby keeping control of the dispensing process the machines do not violate Section 98.36 (6), of the Code of Iowa (1958). (Brinkmeyer to Keleher, Cig. Dir. Jan. Comm. 8/19/58) # 58-8-17

August 8, 1958

Thomas J. Keleher
Director
Cigarette and Beer Revenue Dept.
Building

Dear Mr. Keleher:

This is to acknowledge the receipt of your letter requesting an opinion in which you ask whether certain cigarette dispensing machines are in violation of Section 98.36 (6), Code of Iowa (1958) which reads as follows:

> "It shall be unlawful to sell or vend cigarettes by means of a device known as a vending machine."

The machines in question operate in the following manner:

Machine number 1 is a coin operated machine insofar as it is necessary to insert a coin before a package of cigarettes is dispensed. Attached by means of a wire to the dispensing case, is a coin box which has a push button next to the coin slot. The customer hands the coin to the clerk or seller who deposits it into the slot and pushes the button. This sends an electric current to the dispensing case allowing the customer to pull a lever opposite the brand of his choice and the package is thereby dispensed.

Machine number 2 is much the same as machine number 1, except the "coin box" has no coin slot, but merely a button or lever. The customer hands the clerk the purchase price, and the clerk in turn pushes the button or lever which permits the customer to pull a lever selecting the brand of cigarettes desired.

The only authority available in Iowa on the question of what constitutes a cigarette vending machine is the case of State of Iowa vs. Stockman's Inn No. 2, decided in the

Municipal Court of the City of Waterloo on June 24, 1958.

In this case the court held that a vending machine is a completely automatic machine, which would receive the purchase price and hold the same for the seller, and then deliver the merchandise to the customer without the element of human control on the part of the seller.

Applying this criterion to the above described machines, it is our opinion that since both machines require human intervention or control on the part of the seller, the machines should not be classified as vending machines.

It is quite conceivable,however, that these machines can be set up in such a manner as to allow the customer to operate the machine completely without the aid, control or intervention of the seller. In such event the machines would fall into the vending machine class.

Therefore, so long as the machines are used properly, that is in such a way as to require the seller to exercise the control required by the above cited case, the machines are not in violation of the Iowa statute prohibiting vending machines. As soon as that control is relinquished to the customer it becomes a vending machine.

Very truly yours,

Richard J. Brinkman
Special Assistant Attorney General

WWR/bjf

TOWNSHIPS: Cemeteries, Polling places--
1. Election not required for sale of surplus unused Cemetery site. 2. Electorate is required to purchase schoolhouse for polling place. (Strauss & Gray, Calhoun Co. Atty., 8/8/58

August 8, 1958 58-8-19

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

My dear Jack:

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

> "This letter is a follow-up to a letter dated May 14, 1958, wherein I requested an opinion concerning the interpretation of Section 359.37. A copy of the letter dated May 14, 1958 is enclosed for your aid.
>
> "The same trustees of Twin Lakes Township have again consulted with me concerning the letter of May 14, 1958 and also whether or not the trustees of Twin Lakes Township have to have an election before they are authorized to levy funds for the purpose of buying a school building and site which will be used as a voting center and also other township business.
>
> "Would you please give these two matters your immediate attention and issue an opinion concerning the interpretation of Section 359.37 and also whether or not the trustees of Twin Lakes Township will have to have an election before they are authorized to spend money to purchase a school site and building as a township asset."

together with your previous letter in which you stated the following:

> "The Trustees of Twin Lakes Township have requested that I write to you to determine the procedure they should follow in selling part of their township cemetery which has heretofore been

58-8-19

dedicated for cemetery purposes and which is no longer necessary for such purpose.

"Under Section 359.37, the Trustees or Board of Directors have the power, subject to their by-laws, to sell and dispose of any parcel of land that is no longer necessary for cemetery purposes, as long as no burial has been made in such parcel.

"In my opinion by reading said section, the Trustees do not have to have an election to obtain authority to sell said parcel, but have the power to do so and may proceed to advertise the same and to accept sealed bids, and may provide that they could reject any and all bids.

"Would you please let us know whether or not this is the correct interpretation of the same. There are no records of any by-laws of the township cemetery."

In reply thereto I advise as follows.

1. Insofar as your question #1 concerns the sale of cemeteries I would advise that I am of the opinion that if the sale otherwise qualifies within the provisions of Section 359.37 the sale may be effected without submitting the matter to the electors.

2. In answer to your question #2 I would advise you that according to Sec. 360.1, Code 1958, the purchase of a school site and building as a township asset requires the authority of the electors.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

SCHOOLS: TAXATION: COUNTY OFFICERS:

1. County auditor may eliminate illegal site levy
2. Schoolhouse levies voted prior to reorganization terminate on effective date of new district
3. Library tax terminates on reorganization in absence of contract
4. Emergen y tax may be eliminated by Auditor where not approved by State Board
5. Tax certified without statutory authority may be eliminated by Auditor. (Strauss to Sarsfield, At. Comp. 8/6/58) #58-8-20

Press

August 8, 1958

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

Dear Sir:

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

"We respectfully request your opinion on the following legal questions:

"Section 298.8, Code of Iowa, 1958, reads as follows:

"'298.8 Levy by Board of Supervisors. The board of supervisors shall at the time of levying taxes for county purposes levy the taxes necessary to raise the various funds authorized by law and certified to it by law, but if the amount certified for any such fund is in excess of the amount authorized by law, it shall levy only so much thereof as is authorized by law.'

"Section 444.3, Code of Iowa, 1958, reads as follows:

"'444.3 Computation of rate. When the valuations for the several taxing districts shall have been adjusted by the several boards for the current year, the county auditor shall thereupon apply such a rate, not exceeding the rate authorized by law, as will raise the amount required for such taxing district, and no larger amount.

"'Provided that the county auditor shall, in computing the tax rate for any taxing district, deduct from the total budget requirements certified by any such district all of the tax to be derived from the moneys and credits and other moneyed capital taxed at a flat rate as provided

in section 429.2 and shall then apply such rate to the adjusted taxable value of the property in the district, necessary to raise the amount required after the deductions herein provided have been made.'

"Section 444.7, Code of Iowa, 1958, reads as follows:

"'444.7 Excessive tax prohibited. It is hereby made a misdemeanor for the board of supervisors to authorize, or the county auditor to carry upon the tax lists for any year, an amount of tax for any public purpose in excess of the amount certified or authorized as provided by law. The state comptroller shall prescribe and furnish the county auditors forms and instructions to aid them in determining the legality and authorized amount of tax levies. In the case of an excessive levy, it shall be the duty of the county auditor to reduce it to the maximum amount authorized by law, and in any event not in excess of the amount certified; and in case of an illegal levy the county auditor shall not enter or carry any tax on the tax lists for such levy.'

"An Attorney General's opinion issued November 29, 1957, held that no site tax may be levied by a consolidated or community school district.

"Taking into consideration Section 24.15, Code of Iowa, 1958, which reads as follows: (including prior quoted sections)

"'24.15 Further tax limitation. No tax shall be levied by any municipality in excess of the estimates published, except such taxes as are approved by a vote of the people, but in no case shall any tax levy be in excess of any limitation imposed thereon now or hereafter by the constitution and laws of the state.'

"who has the authority, if anyone, to reduce or eliminate a tax levy certified to the levying board in the following manner:

"1. School Site Tax under the provisions of Sec. 297.5 when the district certifying the tax does not contain a city, or where the district certifying contains a city, but is a community school district;

"2. School House (Voted 2-1/2 mills) and /or Playground tax, under the provisions of Sec. 278.1, and Sec. 300.2, where the tax was voted prior to reorganization into a community district by which the taxes are certified.

"3. Library tax under the provisions of Sec. 298.7, when the district certifying same does not have a contract for use of Library as required by this particular section;

"4. Emergency Tax under the provisions of Sec. 24.6 when the municipality certifying same does not have the approval of the State Board; or

"5. In the case where a certifying board certifies a tax wherein there is no statutory authority."

In reference thereto I advise as follows. In addition to the foregoing exhibited statutes I exhibit the following statutes pertinent to the certifying bodies in certifying their budget requirements to the Board of Supervisors. These are Sections 24.17, 24.18 and 24.19, providing as follows:

"24.17 Budgets certified. The local budgets of the various municipalities shall be certified by the chairman of the certifying board or the levying board, as the case may be, in duplicate to the county auditor not later than the fifteenth day of August each year on blanks prescribed by the state board, and according to rules and instructions which shall be furnished all certifying and levying boards in printed form by said state board.

"One copy of said budget shall be retained on file in his office by the county auditor, and the other shall be certified by him to the state board.

"24.18 Summary of budget. Before forwarding copies of local budgets to the state board, the county auditor shall prepare a summary of each

budget, showing the condition of the various funds for the fiscal year, including the budgets adopted as herein provided. Said summary shall be printed as a part of the annual financial report of the county auditor, and one copy shall be certified by him to the state board.

"24.19 Levying board to spread tax. At the time required by law the levying board shall spread the tax rates necessary to produce the amount required for the various funds of the municipality as certified by the certifying board, for the next succeeding year, as shown in the approved budget in the manner provided by law. One copy of said rates shall be certified to the state board."

These several statutes constitute the authority vested in taxing officials concerning the administering of certified budgets and levies by the Board of Supervisors as the levying body. They confer neither power nor prohibition upon the Board of Supervisors to eliminate or reduce a tax levy certified to the Board. It appears that the maximum of power vested in the Board is a negative prohibition upon levying an amount in excess of the certification or statutory limitations. On the other hand, in addition to the prohibition placed upon the Board, the Auditor has had imposed upon him this official duty contained in Section 444.7, to-wit: "and in case of an illegal levy the county auditor shall not enter or carry any tax on the tax lists for such levy." In the performance of this mandatory duty, that is the determination of what levies are illegal and barred of existence on the tax list, the Auditor shall have the aid and advice of the Comptroller in determining the legality and authorized

amount of taxes and levies. In the aspect of the foregoing I advise, therefore, as follows:

1. In answer to your question #1 I am of the opinion that the County Auditor could eliminate as illegal such certified levy. See official opinion of the Attorney General issued November 29, 1957.

2. In answer to your question #2 I am of the opinion that levies voted prior to reorganization into community districts terminate upon the reorganization. See opinion of the Attorney General dated December 11, 1957, addressed to the State Comptroller, opinion dated September 8, 1955, addressed to Martin Leir, Scott County Attorney, opinion issued March 6, 1958 to John J. Wilkinson, Iowa County Attorney, and opinion issued May 15, 957, to G. A. Cady, Franklin County Attorney.

3. In answer to your question #3 I am of the opinion that in the absence of the existence of a contract the County Auditor has the power to eliminate the certified taxes.

4. In answer to your question #4 I am of the opinion that the County Auditor could eliminate the certification for an emergency tax that does not have the approval of the State Board.

5. In answer to your question #5 I am of the opinion that where there is no statutory authority for certifying the

tax certified, the Auditor may elliminate the tax as illegal.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

COUNTIES: County Home -- Proposition to expend more than $10,000 for equipment need not be submitted to electors. (Strauss to Boeye, Montgomery Co. Atty.; 8/13/58)
#58-8-21

August 13, 1958

Mr. John F. Boeye
Montgomery County Attorney
Red Oak, Iowa

Dear Sir:

Reference is herein made to your request for opinion as to whether installation of a sprinkler system in the County Home at a cost exceeding $10,000 can be made without submission of the proposition to the electors. I would advise you that Section 345.1, Code 1958, requires the submission of such a proposition which involves additions to the County Home and other buildings. However, expenditures for equipping and furnishing a county building may be made without the submission of the proposition to the electors and having their consent. Support for this view is found in the Report of the Attorney General for 1923, 1924 at page 328 wherein, in interpreting the statute under consideration, Sec. 345.1, it states:

> " * * *This statute, however, applies only to the erection of the building and does not place a limitation upon the authority of the Board to equip and furnish the building with what is necessary to fit it for occupancy for the purposes for which it is erected."

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

#58-8-21

MOTOR VEHICLES: SCHOOLS: Private school bus -- Not exempt from registration. (Pesek to Meyer, 8/13/58) # 58-8-22

August 13, 1958

Mr. Isadore Meyer
Winneshiek County Attorney
Decorah, Iowa

Dear Sir:

Receipt is acknowledged of your letter of August 7, 1958, set out as follows:

> "St. Benedict's School at Decorah, Iowa, just purchased a seven-ton school bus for transportation of students to and from school. No charge is made to the students for transportation, and, of course, St. Benedict's School is not for a pecuniary profit. The pastor of St. Benedict's Church has asked me to determine whether or not it would be exempt from registration fees described in Chapter 321 of the 1958 Code of Iowa, the same as a public school district. Your specific attention is called to Section 321.19 of the 1958 Code.
>
> "It would seem to me that since this is a private school that this Section would not apply, but the pastor of this churchhas asked me to request an official opinion from you on this matter. Your immediate attention to this is requested."

In view of an opinion of this office appearing in the 1934 Report of the Attorney General at page 329, and the holding of our Supreme Court in Silver Lake Con-

58-8-22

solidated School District v. Parker, 238 Iowa 984, 29 N. W. 2d 214, that the word "school" used alone without further express qualification includes public schools only, we would advise you that we concur with your opinion that Section 321.19, supra, is not applicable to a private school.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:MKB

TAXATION: CITIES AND TOWNS:

~~HEADNOTE: PROPERTY TAX~~: ASSESSORS: A City Assessor is required to furnish an official bond for the performance of his duties as such. (Brunkenhoefer to Miller, Chmn. St. Tax Comm'n., 8/8/58) # 58-8-23

August 8, 1958

Mr. Leon N. Miller
Chairman
Iowa State Tax Commission
Building

Dear Mr. Miller:

Receipt is acknowledged of your recent request for an opinion as to whether a City Assessor is required by law to furnish an official bond for the performance of his duties as such.

The applicable statutes are as follows:

Section 441.6, Code of Iowa (1958):

"Bond and salary. The county assessor shall be required to furnish such bond for performance of his duties as the board of supervisors may require, and the county shall pay for such bond.

"***."

Section 441.29, Code of Iowa (1958):

"Construction. Whenever in the laws of this state the words 'assessor' or 'assessors' appear, singly or in combination with other words, they shall be deemed to mean and refer to the county or city assessor, as the case may be."

Section 64.1, Code of Iowa (1958):

"Bond not required. Bonds shall not be required of the following public officers:

1. Governor.
2. Lieutenant governor.
3. Members of the general assembly.
4. Judges of the supreme, district, superior, and municipal courts.
5. Township trustees.
6. Aldermen, councilmen, and commissioners of cities and towns."

58-8-23

#2
Leon N. Miller
August 8, 1958

Section 64.2, Code of Iowa (1958):

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

"* * * *."

The first question presented is whether the provisions of Section 441.6, Code of Iowa (1958), when interpreted in light of the provisions of Section 441.29 require a City Assessor to procure a bond. It is noted that the provision requiring the County Assessor to procure a bond also states that the county shall pay for the bond and that the Board of Supervisors sets the amount of same. To apply the provisions of Section 441.29, Code of Iowa (1958) to this section would lead to the result that the approval of and payment for the bond of a City Assessor would be in the hands of county authorities. The primary concern in the interpretation of statutes is to arrive at the intent of the legislature. The obvious intention of the legislature in enacting Section 441.29, Code of Iowa (1958), was to, as nearly as possible, make the same provision for County Assessors as for City Assessors. Thus, if it is possible to find provision whereby the City Assessor is required to procure a bond the purpose of the legislature will be served.

A reading of Sections 64.1 and 64.2, Code of Iowa (1958), discloses that all public officers, with specifically enumerated exceptions, must provide a bond. The only determination left to be made is whether or not the City Assessor is a public official.

A definition of public officer is found in many Iowa Supreme Court decisions. The following elements are ascribed to a public office by the Iowa Supreme Court in Hutton v. State of Iowa, 235 Iowa 52, 16 N. W. 2nd 18 (1944):

"* * *.

"(1) It must be created by the constitution or legislature or through authority conferred by the legislature. (2) It must possess a delegation of a portion of the sovereign power of government. (3) The duties and powers must be defined, directly or impliedly, by the legislature or through legislative authority. (4) The duties must be performed independently and without control of a superior power other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature, and by it placed under the general control of a superior officer or body. (5) The office must have some permanency and continuity, and not be only temporary and occasional.

"* * *."

It would seem clear from this definition that the City Assessor is a public official. Therefore, it follows that a City Assessor must procure a bond by virtue of the provisions of 64.2, Code of Iowa (1958).

Very truly yours,

Richard J. Brinkman
Assistant Attorney General

RJB/bjf

CITIES AND TOWNS: RETIREMENT PLANS:
Under Code Section 411.6 a policeman seeking retirement benefits must attain the age of 55 at the time of retirement. (Strauss to Duffy, St Rep, 8/13/58) #58-8-24

August 13, 1958

Hon. John L. Duffy
State Representative
202 Bank & Insurance Building
Dubuque, Iowa

My dear John:

This will acknowledge receipt of yours of the 1st inst. in which you submitted the following:

> "I have received the following communication from which I would like to receive your opinion from the Dubuque Policeman's Protective Association. Your opinion as to the following question and communication would be appreciated.
>
> "'We would like to seek your aid in securing an interpretation from State of Iowa Attorney General Norman Erbe concerning the following. Under 411.6 of the Code of Iowa, may a policeman under 55 years of age retire after 22 years of service as a policeman, and then draw his pension when he becomes 55 years of age?
>
> "'We would deeply appreciate a clarification of this particular section of the Code of Iowa in order to gain an evaluation of the consequent effect it may have upon members of our own Police Department here in Dubuque, as well as the various other departments in Iowa and their respective members whom I represent for our Association.'"

In reply thereto it seems to me that the statute referred to does not permit the securing of the benefits of Chapter 411 unless the member seeking such benefits shall be fifty-

58-8-24

five years of age at the time of retirement. Otherwise stated, the service benefit becomes available at the time of retirement which is fixed by statute at fifty-five years. Retirement and retirement allowance appear to be concurrent acts. This seems to be expressly provided by Section 411.6(1)(a), which provides:

> "1. Service retirement benefit. Retirement of a member on a service retirement allowance shall be made by each board of trustees as follows:
>
> "a. Any member in service may retire upon his written application to the board of police or 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."

According to this statute a member in service may retire by giving notice "that he desires to be retired" provided that at that time he shall have attained the age of fifty-five. There is confirmation of this view in that provision is made that within the period of notification separation from the service has taken place. This period would not exceed ninety days and would imply no recognition of any other separation prior to the member attaining the age of fifty-five years.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

TAXATION

~~PROPERTY TAX~~: HOMESTEAD TAX CREDIT:

The homestead tax credit cannot be granted to property when one occupies under a contract of purchase and has not as yet actually paid one-tenth of the contract price. (Brinkman to Walsh, Pottawattamie Co. Atty.; 8/18/58) # 58-8-25

August 18, 1958

Mr. Matt Walsh
County Attorney
Pottawattamie County
Council Bluffs, Iowa

Dear Mr. Walsh:

This is to acknowledge receipt of your letter of June 30, 1958, in which you request an opinion from this office upon the following question:

> "There have been considerable building projects in this city under Federal financing methods and the sales of properties are being accomplished on a long term real estate contract. The purchaser of the property normally pays a small sum not in excess of $100.00 as a down payment and the property is then sold on a contract of sale for periods from thirty to thirty-five years. The purchaser then makes application for homestead credit and must, of course, be denied under Subsection Two of Section 425.11.
>
> "We should like an opinion from your office as to whether or not the ruling of the Iowa Supreme Court in Cummings vs. First National Bank, 199 Iowa 667, 202 N. W. 556, would perhaps entitle the contract purchaser to the homestead credit?
>
> "I call specifically the apparent hold of the court that the equitable title to the property passes to the vendee and that all the vendor holds is a naked legal title as security for a debt."

The word "owner" for the purposes of the homestead tax credit has been defined by the Legislature in Section 425.11(2), Code of Iowa (1958). This section reads as follows:

> "425.11 Definitions. For the purpose of this chapter:
>
> "* * *.

> "2. The word, 'owner', shall mean the person who holds the fee simple title to the homestead, and in addition shall mean the person occupying as a surviving spouse or the person occupying under a contract of purchase where it is shown that not less than one-tenth of the purchase price named in the contract actually has been paid and which contract has been recorded in the office of the county recorder of the county in which the property is located, or the person occupying the homestead under devise or by operation of the inheritance laws where the whole interest passes or where the divided interest is shared only by blood relatives, or by legally adopted children, or where a deed which conveys a divided interest where the other interests are owned by blood relatives or by legally adopted children."

Initially the definition assumes that a person occupying under a contract of purchase does not hold fee simple title to the property in question. The definition states that an owner is one who "holds the fee simple title to the homestead." Later in the definition we see that certain persons who do not hold "fee simple title" are also entitled to the credit. Included in this class are those "occupying under a contract of purchase where it is shown that not less than one-tenth of the purchase price named in the contract actually has been paid * * *."

In construing the word "owner" for the purposes of the homestead tax credit, one is compelled to use the definition contained in the above-quoted section. As was stated in Eysink v. Board of Supervisors of Jasper County, 229 Iowa 1240, 296 N.W. 376 (1941),: "In construing this statute we are bound by the definition of terms made use of by the legislature. * * * 'the legislature is its own lexicographer.'"

Therefore, even though the case which you cite apparently holds that a

purchaser under a real estate contract is the owner of the property, the Legislature has seen fit to grant the homestead tax credit only to those occupying under a contract of purchase who have actually paid not less than one-tenth of the contract price.

The persons described in your question do not fall within the definition of "owner" and thus are not entitled to the homestead tax credit.

Very truly yours,

Richard J. Brinkman,
Special Assistant Attorney General

RJB:fs

BRIDGES: CITIES AND TOWNS:
Culverts larger than 36 inches in diameter must be paid for by the city when that city controls its own bridge levy. (Lyman to Goodenberger, Madison Co. Atty., 8/15/58)

Ames, Iowa # 58-8-26

August 15, 1958

Emery L. Goodenberger
Madison County Attorney
Winterset, Iowa

Re: Construction of Culverts in Cities and Towns

Dear Mr. Goodenberger:

Your letter of July 30, has been referred to this office for reply. You ask substantially the following question:

> Where a city does not maintain its own bridge levy, is the city obligated to provide culverts that are larger than thirty-six inches in diameter?

Section 309.3 of the 1958 Code excludes from the secondary bridge system primary roads and highways within cities which control their own bridge levies. Section 404.7(8) of the 1958 Code grants authority to a municipal corporation to maintain and control its own bridge levy. Section 404.7 has been interpreted in Attorney General's Opinions, 1954, page 59 and page 156, to the effect that all incorporated cities and towns have the power to control their own bridge levies. Thus, in the situation you present, the city will have to provide the necessary culvert. The city at the present time might not be maintaining or making a bridge levy, but Section 404.7 grants it the power to do so and to control the same. Section 309.3 specifically excepts from the secondary bridge system highways within cities which control their own bridge levies.

Very truly yours,

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

JLM:MS

58-8-26

STATE OFFICERS AND DEPARTMENTS; PUBLIC HEALTH; Nursing home regulations -- Enforcement of Code Chapter 413 does not depend upon the existence of departmental regulations (Akin to Gemmer, Health Comm., 8/1/58) # 58-8-27

Memo from: LEONARD ABELS
Assistant Attorney General

August 1, 1958

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 July 29 as follows:

"May we have a formal opinion on Chapter 135C as it relates to regulations and minimum standards for nursing homes and custodial homes.

"Chapter 135C - Section 14 - 1.

"'Location and construction of the home, including plumbing, heating, lighting, ventilation, and other housing conditions, which shall ensure the health and safety and comfort of residents and protection from fire hazards. Such rules, regulations and standards regarding location and construction of the home may impose requirements in excess of those provided in chapter four hundred thirteen (413) of the Code but shall not impose requirements less than those provided by such chapter. . .',

"Are the regulations to be enforced if comparable or stated exactly from the Chapter 413 as to location, construction, plumbing, lighting, ventilation and other housing conditions which shall ensure the health and safety and comfort of the residents of the homes? Particularly, we are concerned with accident hazards which exist, such as winders in stairways - (Rules and Regulations Setting Minimum Standards for Nursing Homes, Section 12.2)"

In answer thereto you are referred to the enclosed opinion dated September 6, 1957. The authority to enforce Departmental Rules and Regulations <u>as such</u> is the same as therein set forth

with respect to other rules and regulations adopted under Chapter 135C of the Code. The power to enforce the provisions of Chapter 413 as such, as well as who may enforce them, is set forth in Chapter 413 and exists irrespective of the existence of similar departmental rules.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

COURTS: JUSTICE OF THE PEACE: Jurisdiction Co-extensive with County boundaries. (Peach to Stewart, J. P., 8/18/58) # 58-8-27

August 18, 1958

Mr. Donald Stewart
Justice of the Peace
Bevington, Iowa

Dear Sir:

Your letter received by this Department on August 13 is as follows:

> "I have a question and would like some information.
>
> "Sometime ago, while reading in my Code books, I came across where it said that a J. P. had jurisdiction 500 yards beyond his county line, but to save me, I don't seem to be able to find it again. The County Attorney would know but I wanted some information from your office, that is why I am asking you about it.
>
> "Is there any way that I could have jurisdiction pertaining to the super highway which lies about 1/2 mile east of my county line. There is a J. P. at Osceola, one at Indianola, one at Norwalk and one at Martinsdale. The one at Martinsdale is 3 miles east of Highway 35. The one at Indianola is 12 miles east, and the one at Norwalk is 5 miles east. So you can see, sir, that my office would be helpful to the patrol and the violators."

I am sorry we cannot give you the opinion you seek since the services of this office are limited to serving State legislators, heads of State departments, and County Attorneys, with respect to the duties of their offices.

In view of the problem presented, I would suggest you submit the same to your County Attorney.

I would, however, refer you to Section 601.1, 1958 Code of Iowa, which provides that the jurisdiction of Justices of the

58-8-27

peace is coextensive with their respective counties, and Section 762.1, supra, which provides the justices of the peace have jurisdiction of all public offense less than felony committed within their respective counties.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:MKB

BOARD OF SUPERVISORS - FIRE DISTRICTS

Reading

No authority, either express or implied, under Chapter 357A for Board of Supervisors to separate a township or a part of a township from the benefited fire district petitioned for.

August 25, 1958

Mr. Isadore Meyer
Winneshiek County Attorney
1041-2 Washington Street
Decorah, Iowa

Dear Sir:

This will acknowledge yours of the 23inst. in which you set out the following:

> "Chapter 357A provides for benefited fire districts consisting of more than one township, or parts or townships. Section 357A.3 provides for notice of hearing and Section 357A.4 provides that the Board of Supervisors shall by resolution establish the benefited fire district or disallow the petition. Nothing is said in the statutes about the Board after hearing taking out a township or part of a township where the people do not desire to go into the benefited fire district. Can the Board of Supervisors under Section 357A.4 take out a township or part of a township, and approve the balance of the benefited fire district, or do they have to either approve or disallow the entire petition?
>
> "Hearing will be held under this Chapter on August 28, and I am sure this question will come up. May I hear from you on this at your very earliest convenience."

In reply thereto I advise as follows:

Section 357A.1, Code of 1958, provides for hearing by the Board of Supervisors upon the petition, which, among other things, shall describe the "approximate district to be served".

Section 357A.2 provides that the district may include all or portions of one township and any adjoining townships or portions thereof.

Section 357A.3 provides for a hearing upon the petition and Section 357A.4 provides in terms the following action of the board:

> "On the day fixed for such hearing, the board of supervisors shall by resolution establish the benefited fire district or disallow the petition. For adequate reasons the board of supervisors may defer action on such petition for not to exceed ten days after the day first set for a hearing."

It will be noted that the board has authority to establish the benefited fire district or disallow the petition. The action of the board is operative upon the benefited district and the only such district before the board is the district described in the petition. Its authority, according to the foregoing section, is to establish that benefited fire district or disallow the petition. This view of that statute is confirmed by the language of Section 357A.5, which states:

> "When the board of supervisors shall have established the benefited fire district, they shall appoint a competent disinterested civil engineer, who shall prepare a preliminary plat showing the proper design in general outline of the district, and shall show the lots and parcels of land within the proposed district as they appear on the county auditor's plat books, together with the names of the owners, and the assessed valuation of said lots and parcels."

The engineer's report on the day set for hearing thereon before the board may be, according to the statute, Section 357A.8, approved or disapproved. The extent of the board's authority over the plan is to make changes in boundaries as they appear on the engineer's report.

Thus, the several powers of the board and of the engineer are described and clearly the engineer's report is made upon the benefited fire district established by the board. I am of the opinion, therefore, that there is neither express nor implied power in the board to separate a township or a part of a township from the benefited district petitioned for.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:md

COUNTIES--MEMORIAL BUILDINGS: Under Code Chapter 37 only one memorial per governmental unit is contemplated except as provided in Section 37.22. #58-8-28

Reading file

August 8, 1958

Mr. T. C. Strack
Grundy County Attorney
Grundy Center, Iowa

Dear Sir:

Receipt is acknowledged of your letter of recent date as follows:

"Under the provisions of Chapter 37 of the Iowa Code relating to the construction of Memorial Halls, etc., Grundy County issued bonds pursuant to an election for the construction of a County Memorial Hospital. The date of the bond issue being some time in 1948. After issuance of the bonds the hospital was built and it has been operated since that time as the 'Grundy County Memorial Hospital.'

"At the present time there is considerable interest in building and operating a convalescent nursing home in Grundy County.

"We should like an opinion from your office on the following questions.

"1. Under the provisions of Chapter 37 of the Code, could the commissioners construct and operate an addition to the present hospital building or a separate building to be used as a convalescent nursing home?

"2. In the event that the commissioners could construct and operate such a home, could the construction be financed by the issuance of additional bonds under Chapter 37 for all or a part of the cost?"

Your first question is in essence whether Chapter 37 of the Code authorizes erection of more than one memorial. Chapter 37 is basically similar to Chapter 347 of the Code. In answer to a parallel problem arising under Chapter 347 it is stated in an opinion dated August 28, 1956, a copy of which is enclosed herewith, that Chapter 347 confers authority to build only one county hospital. Because of the basic similarity of the authority conferred and procedure prescribed in Chapter 37, I am of the opinion that Chapter 37 does not authorize construction or operation of an addition to an existing memorial or an additional memorial except as provided in Section 37.22. As long as original bonded indebtedness remains outstanding, Section 37.22, by its express terms, is not available in the situation you describe.

Further, even were it available, consideration would need to be given to the exact terms of the proposition originally voted on by the electors. If it were phrased as a general authorization to build any type of memorial permissible under the law, then the change in purpose or additional purpose you describe might be authorized were funds available under Section 37.22. On the other hand, if the proposition specified a memorial hospital, no authority would exist to erect another type of memorial.

Answer to your first question makes answer to your second question unnecessary.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md
Enc. Strauss to Hoover
(Clay Co. Atty.)
8/28/56

STATE INSTITUTIONS: Woodward State Hospital--No fee is authorized where a sterilization under Code Chapter 145 is performed by a surgeon on the staff of the state institution.

HS 8-8-58 Correct

August 8, 1958

Mrs. L. Joanne Kain
Executive Secretary
State Board of Eugenics
L o c a l

Dear Mrs. Kain:

Receipt is acknowledged or your letter of August 4 in which you inquire whether a fee may be paid to the Woodward State Hospital and School in sterilization cases where the operation is performed by a surgeon on the staff of the Woodward State Hospital and School.

In answer thereto you are advised that the payment of fees in sterilization cases is governed by statute, the pertinent statutes being contained in Chapter 145, Code of Iowa. Specifically you are referred to Section 145.22, which provides as follows:

> "A physician or surgeon, who is not in the employ of the state, shall receive a reasonable compensation for an operation performed hereunder, which compensation shall be paid from any funds in the state treasury not otherwise appropriated."

Applying the well-known maxim "expressio unius est exclusio alterius", you are advised no payment of fee for the type of operation made the subject of your letter is authorized where the operation is performed by a surgeon on the staff of the Woodward State Hospital.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:md

AERONAUTICS -
Failure to register as airman -- An indictable misdemeanor.

#58-8-29

August 20, 1958

Mr. L. W. Wolverton
Iowa Aeronautics Commission
State Capitol

Dear Sir:

Receipt is acknowledged of your letter of August 8, 1958, as follows:

"I have been requested by one of our commission members to ascertain if failure to register as an airman is or is not an indictable misdemeanor.

This question arose as a result of a recent case.

Your opinion in this matter is appreciated."

I assume the registration to which you refer is that required by chapter 328, Code of Iowa, and particularly in setions 328.19 and 328.37 thereof. Section 328.19 provides in portinent part:

"Every airman ... shall register annually with the aeronautics commission..."

Section 328.37 provides in portinent part:

"Except as provided in section 328.35, it shall be unlawful for any person to operate ...any civil aircraft... or to engage in aeronautics as an airman ... unless there has been issued therefor or thereto an appropriate certificate of registration..."

The penalty for violation of the above and other provisions of Chapter 328 is prescribed in section 328.40 which provices in pertinent part:

> "Any person who violates any of the provisions of this chapter ... shall be guilty of a misdemeanor and upon conviction shall be punished accordingly."

At this point, it might be well to interject the comment with respect to the precise terms of your question that "failure to register as an airman" is of itself no offense unless the party so failing is, in fact, an airman and engages in aeronautics as such. An "airman" is defined in section 328.1(5) as follows:

> " 'Airman' means any individual who engages, as the person in command, or as pilot, mechanic, or member of the crew, in the navigation of aircraft while under way and any individual who is directly in charge of the inspection, maintenance, overhauling, or repair of aircraft, aircraft engines, propellers, aircraft appliances, or parachutes; and any individual who serves in the capacity of aircraft dispatcher or air-traffic control tower operator. It shall not include individuals engaged in aeronautics as an employee of the United States or any state or foreign country and any individuals employed by a manufacturer of aircraft, aircraft engines, propellers, or appliances to perform duties as inspector or mechanic in connection therewith, and any individual performing inspection or mechanical duties in connection with aircraft owned or operated by him."

Thus, one who falls within the quoted statutory definition of "airman" and fails to procure a certificate of license commits a misdemeanor. However, you inquire whether it is an indictable misdemeanor. For answer we turn to the criminal law sections of the Code. Section 687.1 informs us that crimes are divided into felonies and misdemeanors. Section 687.2 defines "felony" as any crime punishable by imprisonment in the reformatory or penitentiary. Section 687.4 defines "misdemeanor" as encompassing

all other crimes. Section 687.7 provides misdemeanors for which no specific penalty is prescribed shall be punished by imprisonment in the County jail of not more than one year or fine of not more than $500. Since chapter 328 does not provide any specific penalty it follows that section 687.7 prescribes the penalty for violation of the provisions in question.

Section 762.1 provides that justices of the peace may try offenses less than felony for which the prescribed punishment does not exceed a fine of $100.00 or imprisonment for thirty days. Since the prescribed punishment for the offense in question exceeds those limits, the offense is an indictable misdemeanor.

Very truly yours

LEONARD G. ABELS

LGA: js

SCHOOLS -

Bond elections -- Submission as special questions at general election

#58-8-30.

August 21, 1958

Mr. Robert L. Oeth
Dubuque County Attorney
Dubuque, Iowa

Attention: Mr. Frank D. Gilloon

Dear Sir:

Receipt is acknowledged of your letter of August 15, 1958, as follows:

"An Opinion from your office on the following question will be appreciated:

"Whether Dubuque Community School District can legally submit a question to the voters on a day of general election relative to a school bond issue?"

I am mindful of the following Sections of the 1958 Code of Iowa:

Sec. 274.2, requiring that bond questions be authorized by the voters of the school corporation;

Sec. 75.1, requiring sixty per cent of total vote case;

Sec. 277.1, et sequi date of regular school election;

Chapter 296 on Indebtedness of School Districts.

The Dubuque Community School District embraces territory outside the territorial limits of the City of Dubuque, Iowa, and for that reason, as

well as the Sections above cited, I advised the School Superintendent of Dubuque that he should hold a special election as the law provides and not confound the general election. However, he desires a Opinion from your office stating whether it is legal to offer such a question at the general election if he can time it right.

Section 296.3, Code of Iowa, provides for submitting the question of school bonds to the voters and provides as follows:

> 296.3 ELECTION CALLED§ The president of the board of directors on receipt of such petition shall, within ten days, call a meeting of the board which shall call such election, fixing the time and place thereof, which may be at the time and place of holding the regular school election.

Also pertinent to your question is section 296.5, Code of Iowa, which provides as follows:

> 296.5 DATE OF ELECTION. The election shall be held on a day not less than five nor more than twenty days after the last publication of notice.

In advising you that the advice you have given your Superintendent appears legally sound, I quote from the 1930 Reprot of the Attorney General at page 121 where it is said:

> "We are therefore of the opinion that where the term ' general election' is used in connection with a school statute, it refers to the regular school election and not the biennial state election. The board of a school corporation would have no authority to submit a proposition at the biennial state election and the only way it could be submitted at that time would be for the board to call a special election on that date."

Very truly yours

LEONARD C. ABELS
Assistant Attorney General

LCA:js

TREASURER -- MOTOR FUEL TAX: Whether a project is a public fund drainage project is a question of fact

Read

August 29, 1958

Honorable M. L. Abrahamson
Tressurer of State
L O C A L

Attention: Mr. B. G. Marchi
Director, Motor Fuel Tax Division

Dear Sir:

Your letter of August 11, is as follows:

"Our records, which are substantiated by Standard Oil, show that the J. D. Armstrong Co. of Ames, Iowa purchased as follows:

July, 1957	44,805 gallons		$3,136.35 tax
August	61,661 gallons		$4,316.27 tax
September	52,744 gallons		$3,692.08 tax
October	22,127 gallons		$1,548.89 tax
The Total purchased	181,337 gallons	and	$12,693.79 tax
		+ 10% penalty	$1,269.38

"These purchases are made for work performed on the Little Sioux Project and deliveries made at Onawa, Iowa. The contract made prior to July 1, 1957, and under the Public Funds Law the tax was payable.

"In completion of the contract, work continued after July 1, 1957 and through the four above stated months. Under Section 324.80, rights and oblibations reserved, of the Iowa Motor Vehicle Fuel Tax Law, our opinion substantiated by your Department is that the tax on such Contracts are due.

"Mr. Armstrong has asked for a specific ruling on this case.

His contention is that the Little Sioux Project is not a drainage project. This is somewhat absurd in that the actual title is the Little Sioux Drainage Project and drainage warrants were issued by the County in payment for surveying and for right of way. The balance was paid out of Federal funds for drainage work.

"By no stretch of imagination could we possibly call this anything but a public fund project which, under the old law, make it tax payable. Section 324.80 very specifically verifies that obligations incurred under the previous law are still valid and obligations payable."

In answer thereto you are advised as follows:

1. It remains the opinion of this office that under the provisions of Section 324.80, Chapter 167, Laws of the 57th General Assembly, "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". (Informal Opinion, Strauss to Abrahamson, Treasurer of State, #57-8-8)

2. Whether the "Little Sioux Project" is a drainage project is a question of fact. Being a question of fact, this office is precluded from rendering an opinion thereon.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:dd

CITIES AND TOWNS: Libraries --

Free public libraries may contract with any city, town, school corporation, township or county for its use by the residents thereof and without distinction as to whether the residents reside within or without the city making the contract. (Strouse to Grafton, St. Insur. Lib., 9/30/58) #58-9-1

September 30, 1958

Miss Ernestine Grafton, Director
State Traveling Library
Historical Building
L o c a l

Dear Madam:

This will acknowledge receipt of yours of the 29th inst. in which you submitted the following:

> "In confirmation of our telephone conversation of this week and the material which you forwarded to this office, I am requesting you for an interpretation of Chapter 378, Section 11 pertaining to the powers of a town library board to contract. This section provides that contracts may be made between the board of trustees of any free public library and any city, town, school corporation, township or with the trustees of any county library district for its use by the respective residents. It also has a limitation clause outside of cities and towns.
>
> "The Villisca Public Library board of trustees would like to know if it is within the law for them to contract with the school board for moneys outside the town of Villisca to bear the expense of children in that incorporated area outside the town who are coming into Villisca for both school and public library service."

In reply thereto I would advise as follows. Section 11, Chapter 378, Code 1958, provides as follows:

> "Power to contract. Contracts may be made between the board of trustees of any free public library and any city, town, school corporation, township, or county or with the trustees of any county library district for its use by their respective residents. Town-

58-9-1

> ships and counties may enter into such contracts, but may only contract for the residents outside of cities and towns. Such contract by a county shall supersede all contracts between the library trustees and townships or school corporations outside of cities and towns."

It will be seen by the terms thereof that the trustees of any free public library may contract with any city, town, school corporation, township or county or with the trustees of any county library district for its use by their respective residents. By its terms any public library board including the Villisca Board would have authority to make a contract with a school corporation as the Villisca Board proposes to do for the use by the school corporation of the Villisca library, such use to be available without distinction between school residents within or without the city making the contract. The contract concerning residents outside of cities and towns is restricted to contracts made with townships and counties.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

HEADNOTE: TAXATION--HOMESTEAD TAX CREDIT--MILITARY SERVICE TAX CREDIT.

1. Where owner within the meaning of Section 425.11, Code of Iowa, (1958), occupys homestead until September 1, he is entitled to Homestead Tax Credit.
2. One who becomes equitable owner of property prior to July 1 and who files for exemption prior to July 1 and who otherwise meets requirements set by statute is entitled to Military Service Tax Credit.
3. Recordation of instrument by which ownership is claimed is not a prerequisite to the granting of the Military Service Tax Credit.
4. Vendee in executory contract to purchase real estate is equitable owner of property and as such is entitled to Military Service Tax Credit if requirements of statute are otherwise met. Option holder in option to purchase real estate is not entitled to Military Service Tax Credit.
5. Owner who is vendor in real estate contract and occupying property as a homestead need not specifically be given the right of occupancy by the terms of the contract in order to qualify for Homestead Tax Credit.

September 25, 1958

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

Dear Mr. Miller.

This is to acknowledge receipt of your letter of July 18, 1958, in which you request an opinion from this office upon the following questions:

> "Taxpayer 'A' made application to his county assessor for a homestead tax credit on his homestead in the month of March, 1958. He was not a war veteran, therefore, did not make any claim for military service tax exemption for 1958. On June 20, 1958, he entered into a contract for the sale of his home property to 'B', and on that same date the latter made a substantial downpayment to 'A'. The contract for sale contained the express provision that 'A' was to have the right to continue in possession of the property until September 1, 1958, on which date 'B' was to get possession thereof. 'B' was a veteran of World War I, and on June 30, 1958, he filed with his county assessor a claim for military service tax exemption for 1958, and designated the home property purchased under contract dated June 20, 1958, from 'A'. 'B' did not have the contract for sale recorded in the county recorder's office until July 10, 1958. Under the contract 'B' is to pay the 1958 taxes due in 1959 on the property. Questions in the matter are: -
>
> > "(1) Is taxpayer 'A' entitled to have the homestead tax credit for 1958, onthe home property sold to 'B'?
> >
> > "(2) Is 'B' entitled to a military service tax exemption for 1958, on the home property purchased under contract from 'A'?
> >
> > "(3) Would it make any difference in the matter whether the contract was not recorded until after July 1, 1958?

#58-7-2

"(4) Would it make any difference if a 'contract to sell' were involved instead of a contract for sale?

"(5) Assuming that 'A' is held to be entitled to a 1958 homestead tax credit on the property, would he have been entitled to such credit had he continued to occupy the premises beyond July 1, 1958, where the contract for sale did not expressly provide for him to retain possession of the property after that date?"

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

"425.11 Definitions. For the purpose of this chapter and wherever used in this chapter:

"1. The word, 'homestead', shall have the following meaning:

"a. The homestead must embrace the dwelling house in which the owner is living at the time of filing the application and said application must contain an affidavit of his intentionto occupy said dwelling house, in good faith, as a home for six months or more in the year for which the credit is claimed, provided further, that when any person is inducted into active service under the selective training and service act of the United States or whose voluntary entry into active service results in a credit on the quota of persons required for service under the selective training and service act, or who, being a member of any component part of the military, naval, or air forces or nurse corps of this state or nation, is called or ordered into active service, such person shall be considered as occupying or living on the homestead during such service, and where equitable or legal title of the homesteadis in the spouse of the person who is a member of or is inducted into the armed services of the United States, the spouse shall be considered as occupying or living on the homestead during such service.

"* * *.

"2. The word, 'owner', shall mean the person who holds the fee simple title to the homestead, and in addition shall mean the person occupying as a surviving spouse or the person occupying

> under a contract of purchase where it is shown that not less than one-tenth of the purchase price named in the contract actually has been paid and which contract has been recorded in the office of the county recorder of the county in which the property is located, or the person occupying the homestead under devise or by operation of the inheritance laws where the whole interest passes or where the divided interest is shared only by blood relatives, or by legally adopted children, or where the person is occupying the homestead under a deed which conveys a divided interest where the other interests are owned by blood relatives or by legally adopted children.
>
> "***."

It has been held by the Supreme Court of Iowa that the homestead tax credit is a credit to the property as distinguished from a credit to the owner. Ahrweiler v. Board of Supervisors of Mahaska County, 226 Iowa 229, 283 N. W. 889 (1939). The Supreme Court has further stated that the credit is not to be determined by the liability of the claimant to pay the tax. Eysink v. Board of Supervisors of Jasper County, 229 Iowa 1240, 296 N. W. 376 (1941). Therefore, the fact that "B" is to pay the 1958 taxes on this property is immaterial. A copy of the contract in question has not been provided. Therefore, it is assumed that fee simple title to the property was retained in the seller as is the normal situation. This being the case, "A" would be an "owner" within the meaning of Section 425.11 (2), Code of Iowa (1958), for the entire year. It further appears from the fact situation presented that "A" occupied the property in a dwelling house for six months or more and was living in the house at the time of filing the application. It appearing that all the requirements of the Homestead Tax Credit Act have been met, it would follow that a homestead tax credit should be allowed on this property for the year 1958.

The following sections of the Code of Iowa (1958) are pertinent to your second question:

"427.5 Reduction--discharge of record--oath. Any person named in section 427.3, provided he is a resident of and domiciled in the state of Iowa, shall receive a reduction equal to his exemption, to be made from any property owned by such person and designated by him by proceeding as hereafter provided. In order to be eligible to receive said exemption or reduction the person claiming same shall have had recorded in the office of the county recorder of the county in which he shall claim exemption or reduction, the military certificate of satisfactory service, order transferring to inactive status, reserve, retirement, or order of separation from service, or honorable discharge of the person claiming or through whom is claimed said exemption; in the event said evidence of satisfactory service, separation, retirement, furlough to reserve, inactive status, or honorable discharge is lost he may record in lieu of the same, a certified copy thereof. Said person shall file with the city or county assessor, as the case may be his claim for exemption or reduction in taxes under oath, which claim shall set out the fact that he is a resident of and domiciled in the state of Iowa, and a person within the terms of section 427.3, and give the volume and page on which the certificate of satisfactory service, order of separation, retirement, furlough to reserve, inactive status, or honorable discharge or certified copy thereof is recorded in the office of the county recorder, and may include the designation of the property from which he desires said exemption or reduction to be made, and shall further state that he is the equitable and legal owner of the property designated therein. The assessor shall tabulate and deliver or file said claims with the county auditor, having his recommendations for allowance or disallowance indorsed thereon. In case the owner of the property is in active service in any of the armed forces of the United States or of this state, including the nurses' corps of the state or of the United States, said claim may be executed and delivered or filed by the owner's spouse, parent, child, brother, or sister, or by any person who may represent him under power of attorney. No person may claim a reduction or exemption in more than one county of the state, and if no designation is made the exemption shall apply to the homestead, if any."

"427.6 Allowance--continuing effectiveness. Said claim for exemption, if filed on or before July 1 of any year and allowed by the board of supervisors, shall be effective to secure an exemption only for the year in which such exemption is filed.

"* * *."

The statutes prescribe certain requirements which must be met before a military service tax credit is properly allowed. The claimant must file his claim for exemption prior to July 1 each year. The claimant must be a person described in 427.3, Code of Iowa (1958). The person claiming the exemption must be a resident of and domiciled in Iowa. In addition he must own property and state that he is the legal and equitable owner of the property on which the exemption is to be applied. He must have a military service certificate or discharge or certified copy thereof filed for record. The claim must also be allowed by the Board of Supervisors. With respect to the statutory requirement that the claimant be thelegal and equitable owner of the property the Attorney General has ruled in an opinion contained on page 44 of the 1942 Report of the Attorney General that the word "and" must be construed as if used in a disjunctive sense and as such gives the meaning of the word "or". Thus, the owner need only be the legal or equitable owner of the property for which claim is made. It is well recognized that equitable title passes immediately to the contract purchaser who is to be considered the equitable owner of the property. As pointed out in a letter opinion of the Attorney General dated March 28, 1958, the claimant must ownthe property at the time the claim is filed and also at the time the claim is passed upon by the Board of Supervisors. Under the first situation presented the allowance of a Military Service Tax Exemption to "B" would be proper.

In answer to your third question, you are advised that nowhere within the provisions of Section 427.3, et seq. is recordation of evidence of the claimant's ownership of the property made a prerequisite to the allowance of the Military Service Tax Exemption. Recordation has no effect on the claimant's ownership of the property but rather only insures that his claim to the property is not subject to being cut off by certain third

persons. To require that the claimant record the instrument from which he claims ownership would be to require something not specified as a condition to the allowance of the Military Service Tax Exemption.

With respect to the fourth question presented both executory contracts and options to purchase real estate are sometimes referred to as contracts to sell. If an executory contract to convey real property is involved, it has been held that equitable title passes to the vendee immediately upon the signing of the contract. In McCreary v. Mc Gregor, 183 Iowa 732, 167 N. W. 633, (1918), the Iowa Supreme Court said: "It is well settled in this state that the purchaser under a contract to convey upon payment of t purchase price becomes at once the holder of the equitable title to the property * * *". In Larson v. Metcalf, 201 Iowa 1208, 207 N. W. 382, (1926), the following statement is contained: "The title in equity passed to the vendee. It is not dependent upon a conveyance nor the payment of the purchase money; nor is possession or delivery of possession a necessary incident." Thus, in the case of an executory contract the vendee would be the equitable owner and may be allowed the Military Service Tax Credit.

In some situations, the granting of an option to purchase real property has been termed a contract to sell. In Sheehy v. Scott, 128 Iowa 556, 104 N. W. 1139, (1905), it was held by the Iowa Supreme Court that the granting of an option to purchase real estate in no way vested in the person to whom the option was given an interest in the land. In that event, the claimant would not hold either equitable or legal title to the land and a Military Service Tax Exemption could not properly be allowed.

In answer to your fifth question you are advised that occupancy by what is defined as an owner in Section 425.11, Code of Iowa (1958) is the basis for granting a

Homestead Tax Credit. There is no requirement in the Homestead Tax Credit Law which requires a person to justify his presence on the homestead. So long as a person meets the requirements of the statute with respect to ownership and occupancy, a Homestead Tax Credit should be allowed. The fact that a contract for sale which an owner may have executed does not expressly give to him the right to occupy the premises is not sufficient grounds in and of itself to deny the Homestead Tax Credit.

Very truly yours,

Richard J. Brinkman
Special Assistant Attorney General

RJB/bjf

COUNTY OFFICERS : Sale of Courthouse by Supervisors--

The Board of Supervisors has no power to grant an option to sell the court house premises at a time in the future under its power to sell when the property is no longer needed to fulfil the purpose of its acquisition. (Seymour Hultman, Blackhawk Co. Atty., 9/22/58) #58-9-3

September 22, 1958

Mr. Evan L. Hultman
Black Hawk County Attorney
201 First National Building
Waterloo, Iowa

Dear Sir:

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

> "Black Hawk County will submit this November at the general election a general question concerning a bond issue as to whether or not this county is to spend the sum of $1,800,000.00 for a new court house. This court house, if the bond issue passes, will be constructed on a new location. A civic group of Waterloo businessmen own the proposed new location and are in the process of giving Black Hawk County an option to said property. In the course of negotiations, this group is requesting an option from Black Hawk County to purchase the present court house location in the event the bond issue should pass and Black Hawk County did exercise an option on the new property.
>
> "The Black Hawk County Board of Supervisors has specifically asked for an opinion as to the following question:
>
> "'Can the Board of Supervisors of Black Hawk County give an option to this civic group of the present court house real property at a value to be fixed by an independent group of appraisers?'
>
> "It is urgent that we get an early answer to this question in that negotiations must be completed within the next ten days concerning these two real properties in order to complete matters for the printing of ballots for absentee voters. The

58-9-3

> only provision which we have been able to find concerning this issue is Section 332.3(13) which sets out the general power concerning the sale of real estate by the Board of Supervisors at any regular meeting."

In reply thereto I advise as follows. There does not appear to be any specific power vested in the Board of Supervisors respecting the sale of the court house property. The power of the Board over such property is included in the power of sale of county real estate. Section 332.3(13) vests this power in the Board of Supervisors in terms as follows:

> "General powers. The board of supervisors at any regular meeting shall have power:
>
> " * * *.
>
> "When any real estate, buildings, or other property are no longer needed for the purposes for which the same were acquired by the county, to convert the same to other county purposes or to sell or lease the same at a fair valuation."

It will be noted that the exercise of the foregoing power is conditioned upon the fact that the property and building are no longer needed for the purposes for which the same were acquired by the County. That this property is at this time and at all times from the execution of the option until the exercise thereof needed for general county purposes, including the operation of the courts, will be conceded. Whether such property is no longer needed at the time of the exercise of the option or thereafter presents a proposition for the future. It

could well be that at the time of the exercise of the option the described property would be needed for some of the purposes for which it was acquired. To contract away its power to determine the necessity for use of these premises for court house purposes exceeds the power of the Board. "A county cannot by contract embarrass or surrender its ability to function in the future." 20 C. J. S., page 1006, title Counties. Cited in support thereof is the case of Harris v. Cope, 183 So. 407, 410, where it is said:

> "The theory is that a county, city or state cannot by contract embarrass or surrender its ability to function in the future. 44 Corpus Juris 72, section 2129; 43 Corpus Juris 211, section 213."

Support for that rule laid down by the Court is found in 43 C. J., page 211, title Municipal Corporations, where it is stated:

> "As the state may not, by any law or contract, surrender or restrict any portion of the sovereignty which it holds in sacred trust for the public weal, so a municipal corporation, as a governmental agency, cannot surrender or contract away its governmental functions and powers, nor such functions as are regarded as mandatory, and any attempt to barter or surrender them is invalid. * * *."

And 44 C. J., page 73, title Municipal Corporations likewise relied upon by the Court states this same rule in the following language:

> "Since it cannot surrender its governmental or legislative functions, a municipality cannot make contracts which will embarrass or control its legislative powers and duties, or which amount to an abrogation of its governmental function or of its police power; * * *."

And the rule is further supported by the case of Garrett v. Colbert County Board of Education, 50 So. 2d 275, where it is stated:

> "The principle is well established that neither the State or any inferior legislative body can alienate, surrender or abridge its right or ability to function in the future. Harris v. Cope, 236 Ala. 415(7), 183 So. 407; 12 C. J. 912, section 423, 16 C. J. S., Constitutional Law, §179; 43 C. J. 211, 62 C. J. S., Municipal Corporations, §139; Alabama Water Co. v. City of Attalla, 211 Ala. 301 (7), 100 So. 490; Board of Education of Jefferson County v. State ex rel., 237 Ala. 434(4), 187 So. 414; Johnson v. City of Sheffield, supra."

And finally more general support of the rule is found in the case of Mart & Son v. City of Grinnell, 194 Iowa 499, 503, 187 N. W. 471, where it is said:

> "It is further contended by appellants that an agreement or understanding was had with the members of the city council of the defendant city, and that in conformity to said understanding the council passed a resolution in August 1919 that plaintiffs might operate their moving picture theaters on Sunday. For this reason it is urged that the defendant city is now estopped from exercising its police power by virtue of the ordinance in question. It is quite evident that a city may not bargain away its police power. * * *."

Based upon the foregoing I am of the opinion that your Board of Supervisors is without power to grant the proposed option.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

Minors--

CRIMINAL LAW: ~~CHILDREN~~: A child past his or her sixteenth birthday, who has not reached his or her seventeenth birthday, is not "of the age of sixteen years" as provided in Sec. 725.2, 1958 Code of Iowa. (Faulkner to Winkel, Kossuth Co. Atty.; 9/24/58) # 58-9-4

September 24, 1958

Mr. Gordon Winkel
Kossuth County Attorney
Algona, Iowa

Dear Sir:

Your request for an opinion dated September 19, 1958, poses this question:

> "Under Section 725.2, 1958 Code of Iowa, is it a crime when the child, in whose presence, upon whom, or with the body or any part or any member thereof, is past the sixteenth birthday but has not reached the seventeenth birthday?"

Section 725.2, supra, states:

> "Lascivious acts with children. Any person over eighteen years of age who shall willfully commit any lewd, immoral, or lascivious act in the presence, or upon or with the body or any part or member thereof, of a child of the age of sixteen years, or under, with the intent of arousing, appealing to, or gratifying the lusts or passions or sexual desires of such person, or of such child, or of corrupting the morals of such child, shall be punished by imprisonment in the penitentiary not more than three years, or by imprisonment in the county jail not more than six months, or by fine not exceeding five hundred dollars." (Emphasis supplied)

There appears to be no Iowa authority bearing on this proposition. However, a Colorado case was directly concerned with this issue as established by the quotation from Gibson v. People, 44 Colo. 600, 99 P. 333:

58-9-4

> " * * * Section 1 of the delinquent children law says that the act shall apply only to children 'sixteen (16) years of age or under.' 'The words "delinquent child" shall include any child sixteen (16) years of age or under such age who violates any law,' etc. Any child 'sixteen (16) years of age or under such age' may, therefore, become a delinquent child or a juvenile delinquent person. The Attorney General contends that these italicized words include children during their entire sixteenth year and up to the seventeenth anniversay of their birth, while defendant maintains that it excludes children who have passed beyond the first day of their sixteenth year. * * * In one sense a child is 16 years of age until it is 17; so also it is 16 when it is 18; but, in the true sense, it is 16 and over whenever it has passed beyond the first day of the sixteenth anniversary of its birth. Had it been the intention to include children up to the time they reach their seventeenth birthday, the General Assembly would naturally have said 'children under seventeen years of age.' But, when only those 'sixteen (16) years of age or under' were mentioned, it obviously meant what it said, namely, children 'sixteen years of age and over.' If a statute prescribing the age limit read, 'over the age of fourteen years,' one 14 years and 6 months old would not come within its provisions if the Attorney General's contention is correct, because he would be only 14 years of age, and not over 14, until he reached the fifteenth anniversary of his birth. And yet we apprehend no such construction would be put upon a statute so reading. A child is 16 years of age on the sixteenth anniversary of his birth, and thereafter is over 16 years of age. The alleged delinquent juvenile, being 16 years and 4 months old at the time defendant is said to have contributed to his delinquency, was 'sixteen years and over,' not 'sixteen years or under'; hence was not a juvenile delinquent person within the meaning of the statute.

A line of insurance cases holds that an insured is not over the attained age until his next birthday. These cases

are clearly distinguishable on the basis of canons of construction. As you know, criminal statutes are strictly construed in favor of the defendant and against the state, whereas insurance policies are construed in favor of the insured and the beneficiaries.

Thus, it appears that a child who has attained the age of 16 and has passed that birthday is not "of the age of sixteen years" as used in Section 725.2, supra.

Very truly yours,

HUGH V. FAULKNER
Assistant Attorney General

HVF:MKB

INTERSTATE WATERSHED DISTRICT - EASEMENTS
1. Where structure erected in Missouri impounds and backs up water in Iov the Missouri district being the "person" wishing to use the land of anothe must obtain the easements to the Iowa land under water. 2. The necessary easements may be obtained direct from the landowner or from an intermediar party, as in this case, the Decatur County Soil Conservation District.

September 18, 1958

Mr. William H. Greiner, Secretary
State Soil Conservation Committee
B u i l d i n g

Dear Mr. Greiner:

Your letter of August 6, 1958 is as follows:

"The question has been raised by the Decatur County Soil Conservation District regarding the watershed program under Public Law 566.

"The Big Creek watershed, which is located in Decatur County, has as its southern boundary the Missouri Iowa State Line. It is my understanding that the people in Missouri plan on continuing this watershed downstream in the Missouri area.

"The question which has been raised is this. The Missouri people plan on a structure that will impound water close to the Missouri Iowa line. This structure will back up water and impound it in parts of Iowa. For that section in Iowa that will be under water, who would obtain the easements? How will they be obtained, and who are the easements given to? In most cases here in Iowa, easements are given to the soil conservation district."

Your last question, "Who are the easements given to?" will be considered first.

At 17A Am.Jur., Easements, Sec. 1, page 617, is found the following language:

"An easement has been asserted to be a right which one person has to use the land of another for a specific purpose, or a servitude imposed as a burden upon land."

It appears clear from your letter that it is the State of Missouri that wishes to use the land of another. It, therefore, follows that the State of Missouri is the "person" that needs the easement and to whom it should be given.

Your other two questions, "Who would obtain the easements and how will they be obtained" are questions of procedure and policy and not legal questions requiring an opinion of this office.

Yours very truly,

JAMES H. GRITTON
Assistant Attorney General

JHG:md

SHERIFF: BOARD OF SUPERVISORS: COUNTY GENERAL. 1. Medical aid expenses of a prisoner maintained in the county jail are payable from the county general fund and not the poor fund or the Soldier's Relief Fund. 2. It is not necessary for the sheriff to obtain permission of the Board of Supervisors before removing a prisoner from the county jail to receive medical aid.

September 22, 1958

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

Dear Sir:

The following questions were submitted in your letter of September 4, 1958:

> "(a) If it becomes necessary to furnish to an inmate of the county jail hospital and medical treatment, and expenses are incurred thereby, should the county pay such expenses from the general fund or the poor fund?
>
> "(b) In the same situation as sub-paragraph (a) above, if the prisoner is a veteran who would qualify for soldier's relief, should such medical or hospital expenses incurred by the county be paid from one of the two above funds or should it be paid from the soldier's relief fund in the county?
>
> "(c) Is it necessary for the sheriff in the county involved to first obtain permission from the county Board of Supervisors before removing a prisoner or inmate from the county jail to a hospital for medical treatment?"

In answer thereto you are advised:

1. Under the following authorities the County is responsible for expenses incurred in furnishing a county jail inmate medical aid.

Sec. 356.5(2), 1958 Code of Iowa;
Sec. 356.15, 1958 Code of Iowa;
Miller v. Dickenson, 68 Iowa 102;
Feldenheimer v. County of Woodbury, 56 Iowa 379;
1940 OAG, page 428;
1938 OAG, page 411;
1922 OAG, page 334.

As to whether such expenses are payable from the County general fund or the poor fund, you are referred to Section 356.15, supra, which states:

> "All charges and expenses for the safekeeping and maintenance of prisoners shall be allowed by the board of supervisors, * * *."

It is noted that no provision has been enacted with regard to the fund from which payments must be made. At no place in Chapter 252, 1958 Code of Iowa, is reference made to subjecting poor funds for this purpose. Therefore, in the absence of statutory direction, payments for medical aid to county prisoners must be paid from the County general fund.

Furthermore, the County Board of Supervisors has only such authority as is expressly conferred by statute or implied therefrom. See 1956 Attorney General Opinion, page 202, and 1958 Attorney General Opinion dated August 11. In this instance, there is no statutory authority for the Board of Supervisors to allow such medical aid as a poor fund expense.

2. The reasoning above is applicable to this question and the answer is that not the Soldier's Relief Fund in the County, but the General Fund is the source of payment for medical aid expenses in behalf of county prisoners maintained in the county jail.

3. Under Section 356.5, supra:

> "The keeper of each jail shall:
>
> " * * *.
>
> "2. Furnish each prisoner with * * * medical aid."

Sections 356.1 and 356.2, 1958 Code of Iowa, provide that the sheriff is the keeper of the jail inasumuch as he has charge of the jail and custody of the prisoners in the jail.

Since there is no statute requiring permission of the Board of Supervisors in removing county prisoners to a hospital for medical aid such permission is deemed unnecessary.

Very truly yours,

HUGH V. FAULKNER
Assistant Attorney General

HVF:MKB

HEADNOTE: PROPERTY TAX: Where qualified organization holds property as a contract purchaser, which contract is recorded, and use of property is solely for appropriate object, the property qualifies for an exemption under the provisions of Section 427.1(9), Code of Iowa (1958).

September 22, 1958

Mr. Howard M. Remley
Jones County Attorney
Anamosa, Iowa

Dear Mr. Remley:

This is to acknowledge receipt of your letter of August 23, 1958, wherein you request an opinion of this office upon the question of whether the property of an agricultural society used solely for that purpose is entitled to exemption from taxation where such society holds the property in question under a recorded contract of purchase wherein legal title is retained in the seller until such time as the purchase price is paid in full.

The applicable section of the Code of Iowa (1958) is 427.1(9), which reads as follows:

> "427.1 Exemptions. The following classes of property shall not be taxed:
>
> "* * *.
>
> "9. Property of religious, literary, and charitable societies. All grounds and buildings used by literary, scientific, charitable, benevolent, agricultural, and religious institutions and societies solely for their appropriate objects, not exceeding three hundred twenty acres in extent and not leased or otherwise used with a view to pecuniary profit. All deeds or leases by which such property is held shall be filed for record before the property herein described shall be omitted from the assessment."

It is noted that the above section requires that the deed or lease by which the property is held must be recorded before the property is omitted

from the assessment. It is further noted that the section providing the exemption does not require absolute ownership by the agricultural society, but rather an exemption is granted where such property is solely used for the purposes therein mentioned. The use to which the property is put is what determines whether property is to be exempt under the provisions of Section 427.1(9), Code of Iowa (1958). Theta Xi Building Association v. Board of Review of Iowa City, 217 Iowa 1181, 251 N.W. 76, (1933); Lutheran Mutual Aid Society v. Murphy, 223 Iowa 1151, 274 N.W. 907, (1937). The exemption statute recognizes that a leasehold interest held by one of the enumerated exempt class may give rise to an exemption if the use of the property is solely for the appropriate objects. If a leasehold interest by a group enumerated in Section 427.1(9), Code of Iowa (1958), is a sufficient interest to give rise to an exemption to the property, there would seem to be no valid legal reason why a qualified society holding the property in question as a contract purchaser should be denied an exemption on their property so long as the property is used solely for the appropriate objects, and so long as the recordation requirements are met.

It is, therefore, our opinion that a qualified organization within the meaning of Section 427.1(9), Code of Iowa (1958), may claim an exemption on property solely used for the appropriate objects where the interest of such organization is as a contract purchaser if such contract of purchase is duly recorded.

Very truly yours,

Richard J. Brinkman
Special Assistant Attorney General

RJB:fs

HEADNOTE: Federal income and estate taxes are not deductible under the provisions of Section 429.4, Code of Iowa (1958), in determining the assessable value of moneys and credits.

September 22, 1958

Mr. James W. Hudson
Pocahontas County Attorney
Pocahontas, Iowa

Dear Mr. Hudson:

This is to acknowledge receipt of your letter of August 19, 1958, in which you request an opinion relative to the deductibility of federal income and estate taxes as debts within the meaning of Section 429.4, Code of Iowa (1958), in determining the assessable value of moneys and credits.

You state in your letter that an Opinion of the Attorney General dated July 16, 1947, apparently takes a contrary position to former opinions and an Iowa Supreme Court decision (Bailies v. City of Des Moines, 127 Iowa 124, 102 N.W. 813, (1905), concerning this question.

Another opinion upon this point was written on March 10, 1948, and is found at page 171 of the 1948 Report of the Attorney General. In this opinion it was noted that taxes are not a debt within the meaning of Section 429.4. This opinion distinguished the opinion to which you refer in these words:

> "The opinion of July 29, 1947 stated that the federal court had held that an income tax was a debt but this opinion did not hold and is not to be construed as being authority for the proposition that a federal income tax is such a debt as is contemplated by the provisions of section 429.4, Code 1946, relating to deduction of debts in determining the actual value of moneys and credits for taxation

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> purposes. The opinion stated that if a bank had a bona fide indebtedness for income tax on January 1, 1947, they were entitled to deduct the same as a valid liability of the bank. Such deduction was permitted as a liability in the statement of assets and liabilities in order to arrive at the value of the shares of stock and the deduction in this instance is not a deduction of a debt from moneys and credits, but is a deduction allowable as a liability of the corporation in fixing the value of the shares of stock for the purpose of taxation."

It appears that the 1947 opinion was considering the true of shares of stock of a corporation for purposes of assessing them under the provisions of Chapter 430, Code of Iowa, and did not hold that taxes are a "debt" within the meaning of Section 429.4. In fact the 1948 opinion reaffirmed the opinion of 1945 that they were not. The Bailies case has not been overruled.

It is, therefore, the opinion of this office that Federal Income and Estate Tax are not deductible in arriving at the assessable value of moneys and credits.

Very truly yours,

Richard J. Brinkman
Special Assistant Attorney General

RJB:fs

COUNTY OFFICERS: Compatibility of office --
~~HELD~~ The offices of Deputy or Assistant Assessor and members of the County Board of Education are incompatible. (Brickman to Cooper, Buena Vista Co. Atty., 9/22/58) # 58-9-8

September 22, 1958

Mr. Richard W. Cooper
County Attorney
Buena Vista County
Porath Building
Storm Lake, Iowa

Dear Mr. Cooper:

This is to acknowledge receipt of your letter of August 26, 1958, in which you request an opinion of this office as follows:

> "I need a ruling on a situation which we now have in Buena Vista County, the facts of which are as follows: An elector whom I will later refer to as A has been serving as a field man appointed by the County Assessor. A vacancy occurred on the County Board of Education and A was appointed to fill the vacancy. The question is whether or not a member of the County Board of Education can also serve as a field assessor?"

A field assessor who makes appraisals and who otherwise performs duties with which the assessor is charged is within the meaning of Section 441.4, Code of Iowa (1958), a deputy assessor who is charged with the responsibility of assuming the duties of the assessor in his absence or in the event of his disability.

The assessor must devote his entire time to the duties of his office and may not engage in any business or occupation interfering or inconsistant with those duties (Section 441.9(1), Code of Iowa (1958)).

As stated in your question, A is now occupying the position of field assessor and member of the County Board of Education. Section 442.1, Code of Iowa (1958), provides that the County Conference shall be comprised

58-9-8

of the Mayors of the various towns in the county, Members of the County Boards of Education and the Members of the Board of Supervisors. The County Conference, among other things, may appoint and reappoint the county assessor and full-time deputy assessors and fix the salaries of deputies and full-time assistant assessors. Sections 441.4 and 442.3, Code of Iowa (1958).

The first reason that a person may not serve as Deputy Assessor and Member of the County Board of Education is that he is a potential County Assessor, in that he serves in that capacity upon the Assessor's absence or disability. As County Assessor, he is charged with the duty to devote his entire time to the duties of his office.

As to incompatibility, the Iowa Supreme Court has said in State v. Anderson, 155 Iowa 271, 136 N.W. 128, (1912),

> "(T)he test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other 'and subject in some degree to its revisory power,' or where the duties of the two offices 'are inherently inconsistent and repugnant.' "

Here we have a situation where the deputy or assistant is serving at the will of the County Conference. If one holds the position of Member of the County Board of Education and Deputy or Assistant Assessor, he is placed in the enviable position of passing on his own salary and also deciding whether he should be retained as an assistant or deputy.

It is, therefore, the opinion of this office that a person who is both Deputy or Assistant Assessor and Member of the County Board of Education is holding incompatible offices.

Very truly yours,

Richard J. Brinkman
Special Assistant Attorney General

RJBsfs

JUSTICE OF THE PEACE: Nomination--

Where a township is entitled to a nomination and election of two Justices of the Peace and the names of two candidates for that officer were printed on the primary ballot for one ward of the City of Bloomfield and not on the primary ballots for the whole township, no nomination is made notwithstanding candidates' certification by the canvassing board. The Auditor would be justified in recognizing these as illegal nominations and declining to place the names on the ballot. (Strauss to Wright, Davis Co. Atty.; 9/17/58) #58-9-9

September 17, 1958

Mr. Richard H. Wright
Davis County Attorney
Bloomfield, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 15th Inst. In which you submitted the following:

> "Pursuant to our telephone conversation of this date I am writing to request an opinion, either formal or informal, with regard to an election matter. Time is of the essence and we must have reply within the next few days in order that the ballots may be printed within the time limit.
>
> "To describe the factual circumstances, would like to advise that the territorial limits of the city of Bloomfield and Bloomfield township are identical. The city/township of Bloomfield is divided into three wards for voting purposes.
>
> "Under section 39.21 the city-township of Bloomfield is entitled to two Justices of the Peace.
>
> "The nomination paper nominating Republican delegates to the County convention for third ward of the city/township of Bloomfield also nominated two persons for the office of Justice of the Peace, this paper had the requisite (10) signatures. Republican nomination papers for delegates to the county convention for the first and second wards of the city-township of Bloomfield failed to nominate any person for the office of Justice of the Peace.

#58-9-9

"The third ward petition contained the requisite number of signers (10) as provided in 43.21 and their names were included on the primary election ballot for third ward only, and of course were nominated, or received the most votes because there were no other nominees or opponents.

"In preparing the ballot for the November general election the County Auditor has placed the names of the two persons nominated in the third ward in the city/township of Bloomfield, on the ballot for third ward only.

"My question is:

"'Should the names of the two candidates for the office of Justice of the Peace nominated in the third ward appear on the ballots of the November general election for the first and second wards in addition to the third ward, or in view of the fact that the candidates were not voted upon in either the first or second ward at the primary, should the candidates names not appear on any ballot in the city/township of Bloomfield?'

"I am very sorry that this matter was not brought to my attention at an earlier date but received the inquiry just this morning and feel certain that you will appreciate the great need for an immediate answer in view of the time necessary for printing of the ballots and the fact that the ballots must be printed and in the hands of the Auditor on the 25th day of September. The printer has advised that if we can have an answer in their hands by Friday morning that he will be able to complete the printing in order to meet this deadline."

In reference to the foregoing situation, assuming without conceding that the two candidates for Justice of the Peace were entitled to have their names printed on the primary ballot for the whole township as required by law but were in fact printed on the primary election ballot in the third ward only and the voters of that precinct only voted thereon, it

follows that they were not nominated by the whole township and in my opinion were not entitled to be certified as nominated. While canvass and certification by the canvassing board is regarded as an administrative act and the duty of the Auditor is, generally speaking, ministerial, I am of the opinion that where it appears on the record and to the Auditor that these candidates were not legally nominated he would be justified in performing his duty of printing the ballots, to recognize as illegal these nominations, and decline to place their names as candidates upon the ballot.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

STEP-PARENT - RESPONSIBILITY AS TO STEP-CHILD:

A step-parent is not liable for the support, maintenance and education of a step-child, where he has not voluntarily received the step-child into the family and does not treat it as a member thereof. September 19, 1958.

Mr. L. L. Caffrey, Member
State Board of Social Welfare
State Office Building
Des Moines, Iowa

Re: BETTYJANE HOLLADAY
#70-14570-C

Dear Mr. Caffrey:

Reference is made to letter under date of August 19, 1953 addressed to you from the Muscatine County Department of Social Welfare, which reads as follows:

"Referral is made to your letter of August 5 regarding your letter covering responsibility of a step-parent on our ADC program.

"The complexion of the above case has changed a great deal. At the present time the mother who has applied for ADC is still working and now feels she cannot care for the child in question and wishes him placed elsewhere so that it would appear that the application will be rejected.

"We think it might be a good idea to get the legal rulings on this type of a case. This is a reapplication for ADC by Bettyjane Holladay who is living with her spouse at the present time by a common law marriage. Mr. Holladay is not the father of Ora Mathias, Jr., age 9 and did refuse to support him. The mother was working but felt that the work was too strenuous and that she should no longer be employed. It is our understanding she contacted Judge Westrate of the District Court here and that he informed her she should not be employed and should be able to get ADC. We explained the situation to her and took her application and then we talked to Judge Westrate as it would appear that her husband in the home would have sufficient income to take care of the needs of all members of the family.

"Judge Westrate stated that a step-parent had no responsibility for support and that she should be eligible for ADC. The Judge spent some time in checking on this matter and still feels of the same opinion. We would

> appreciate receiving the legal interpretation on what basis the step-parent is actually liable for the support of his wife's children living in their home. We note according to the Manual that step-parents are liable but are unable to find any legal provision for this."

and in reply thereto, we beg to advise you as follows:

We note the factual situation thus: Ora Matthias, Jr., age 9, is the son of Bettyjane Holladay, by a previous marriage, and step-son to Mr. Holladay, present spouse of Bettyjane Holladay under a common law marriage. Mr. Holladay refuses to support the step-son and we must assume, under the meager facts that he has not taken Ora Mathias, Jr. into his family as a member thereof.

The question, therefore, is, is Mr. Holladay liable for the support, maintenance and education of said step-son?

The general rule of law applicable is stated thusly: ***"The obligation of one standing in loco parentis to support and maintain the child is, like that of parents generally, ***" (39 Am. Jur., Section 61, page 698): --*** "However, the voluntary assumption of the obligations of parenthood toward the children of a spouse by another marriage is favored by the law, although, of course, whether there has been such an assumption depends upon the facts of the particular case. ***" (39 Am. Jur., Section 62, page 700.)

In the case of Minor Heirs of Bradford v. Bodfish, 39 Ia. 681, the Court found that the stepfather had an understanding with the mother that the children should be treated as his own, and therefore, stood in loco parentis and responsible for the maintenance and education of his step-children.

In the case of Gerdes v. Weiser, 54 Ia. 591, the facts showed that the minor step-child was three months old when defendant took him into his family and board him, furnished him with his clothing and other necessaries as one of his own children. Under these circumstances, the relation between the parties was that of parent and child, with like obligations, the Court stating on page 593:

> "But we believe it as well settled that he is liable when he takes such children into his family, and keeps them as part thereof. When this relation exists between the parties the child cannot recover for services rendered

> and the step-father cannot ordinarily recover for the support and maintenance of the child. When a man stands in loco parentis, he is entitled to the rights and subject to the liabilities of an actual parent, although he may not have been legally compelled to assume that situation. Williams v. Hutchinson, 3 N.Y., 312; Stone v. Carr, 1 Esp. 1; Cooper v. Martin, 1 East., 82, and see Bradford v. Bodfish, 39 Iowa 681."

This general rule was restated by our Supreme Court in In Re: Adoption of Cheney, 244 Ia. 1180, at pages 1184, 1185, as follows:

> "We said in Gerdes v. Weiser, 54 Iowa 591, 593, 7 N.W. 42, 43, 37 Am. Rep. 229: 'When a man stands in loco parentis, he is entitled to the rights and subject to the liabilities of an actual parent, although he may not have been legally compelled to assume that situation. Williams v. Hutchinson, 3 N.Y. 312; Stone v. Carr, 1 Esp. 1; Cooper v. Martin, 1 East., 82; and see Bradford v. Bodfish, 39 Iowa 681.'
>
> "That such is still the law and is appliaable to stepparents who have assumed the role of in loco parentis, see 67 C.J.S., Parent and Child, Sections 71-73, 78-80; 39 Am. Jur., Parent and Child, sections 61, 62.
>
> "The authorities make clear that the relationship of one in loco parentis does not arise because he is a stepparent but because he lawfully assumes the obligations of a parent: 'A stepparent does not ,merely by reason of the relation, stand in loco parentis to the stepchild ***. However, a stepparent who voluntarily receives the step-child into the family and treats it as a member thereof stands in the place of the natural parent, and the reciprocal rights, duties, and obligations of parent and child subsist, and continue as long as such relation continues.' 67 C.J.S. Parent and Child, section 79; 39 Am. Jur., Parent and Child, section 62.
>
> "It has been said the relationship is favored by the law. Coakley v. Coakley, 216 Mass. 71, 102 N.E. 930, 931, Ann. Cas. 1915A 867; and that a presumption arises that a stepfather who voluntarily assumes the care and custody of the child intends to assume the duties and obligations of a natural parent. Gerber v. Bauerline, 17 Or. 115, 19 P. 849."

However, as we have heretofore stated, under the very meager facts presented to us, it does not appear that Mr. Holladay

has voluntarily received the step-child into his family and does not intend to support him and treat him as a member thereof.

Under this factual situation, we are constrained to hold that Mr. Holladay, the common law husband of Bettyjane Holladay, is not responsible for the maintenance and support of Ora Mathias, Jr., minor.

However, a more complete investigation of the facts and circumstances surrounding this marital relationship, and the arrangements under which the step-child is living in the household, might result in a different ruling.

Respectfully submitted,

Frank D. Bianco
Assistant Attorney General

FDB/sp

CITIES AND TOWNS: Police Subsistence Allowance--
The subsistence allowance authorized by §120, Internal Revenue Code, 1954, to be made to police officials of the State, territory or possession of the U. S. or political subdivisions thereof is not part of gross income for the purpose of taxation of such income nor is it so regarded in making computation of earned compensation for benefits to policemen under either Ch. 410 or Ch. 411, Code 1958. (Strauss to Reppert, St. Rep. 9/18/58)
58-9-11

September 18, 1958

Hon. Howard C. Reppert, Jr.
State Representative
4108 Oak Forest Drive
Des Moines, Iowa

My dear Howard:

This will acknowledge receipt of yours of September 8 in which you ask for opinion in the following situation:

> "Briefly the 83rd Congress passed a law which says in part, that the salary of a police officer, not to exceed $5.00 per day, may be designated as a subsistence allowance and that as such is not taxable. This is Section 120 of the 1954 Internal Revenue Code. The City of Columbia, South Carolina passed an ordinance August 17, 1955 to the effect that $5.00 per day of the police salary was to be subsistence and Officer J. W. Shirral of that city claimed exemption which was denied by the Internal Revenue Service. The exemption was, however, allowed by the District Court of the United States for the Eastern District of South Carolina in the opinion C/A 5816 handed down October 4, 1957.
>
> "The opinion I would appreciate receiving at your earliest convenience is, should the City of Des Moines or other Iowa cities pass an ordinance similar to Columbia, South Carolina's, setting out a statutory subsistence allowance, would this be deducted percentagewise from the Officer's Retirement Benefits."

In reply thereto I advise as follows. The statute to which you refer, being Section 120 of the 1954 Internal Revenue Code, provides the following:

> "120. Statutory Subsistence Allowance Received by Police. (a) General rule. -- Gross income does not include any amount received as a statutory subsistence allowance by an individual who is employed as a police official by a State, a Territory, or a possession of the United States, by any political subdivision of any of the foregoing, or by the District of Columbia.
>
> "(b) Limitations. --
>
> "(1) Amount to which subsection (a) applies shall not exceed $5 per day."

This is the authority under which subsistence allowance may be made to policemen and other state and local law enforcing officers. Insofar as such subsistence allowance being regarded as part of the gross income of a policeman, it would seem that the plain language of the statute would preclude any conclusion that such allowance is part of gross income. However, in addition to the plain language which does not appear to require interpretation, it has been so adjudicated in the case to which you refer in both the United States District Court and the Circuit Court of Appeals. The case is that of Shirah v. United States, the opinion therein in the lower court appearing in 158 F. Supp. 40 and the opinion in the case before the Circuit Court of Appeals appearing in 253 F. 2d 798. There, addressing itself to that particular question as it arises under the ordinance referred to by you, the lower court after referring to the report made to the House

of Representatives with respect to the bill itself and used this language:

> "'§120. Statutory subsistence allowance received by police.
>
> "'This section is new and provides for an exclusion from gross income for any amount received as a statutory subsistence allowance by a taxpayer who is employed as a policeman by any State, Territory, or possession of the United States or any political subdivision thereof or by the District of Columbia.'"

The Court itself stated the following:

> "From the foregoing it is manifest that the Congress of the United States had some feeling for federally over-taxed police officers, who night and day are on duty to protect the lives and property of individual citizens and who run great risks in doing so. As there stated, Section 120 was new and it was intended to grant a new, not an old exclusion from gross income. Plainly what Congress intended was to reduce taxes to be levied on the meager incomes of police officers. No deduction in excess of $5 per day was to be allowed, unless the excess expense should be incurred for services away from the officer's home station, as is demonstrated by the example given in the cited House and Senate Reports."

and concluded in the following language:

> "It is concluded that the amount of $540 received by the plaintiff W. J. Shirah as a statutory subsistence allowance during the calendar year 1955, after August 17, and thus paid to him as a member of the police department of the City of Columbia is not taxable as part of his gross income."

And on the appeal the Court prefaced its opinion by stating:

> "The Government concedes that it could not object to the exclusion from income of the $5 per day received as a statutory subsistence allowance even if the taxpayer's actual expenditure for this purpose was less than this amount. * * *"

and after considering objections made to the ordinance not pertinent here affirmed the order of the lower court. Bearing in mind this judicial definition of this subsistence allowance as not included in gross income it seems clear that where so designated and adjudicated it would be so regarded wherever it has statutory existence. In other words, an officer seeking the benefits of such an ordinance if passed would not be heard to accept its benefits and reject its burdens. In that aspect, it would not be regarded as part of earned compensation either under Chapter 410 or Chapter 411, Code 1958 conferring disability and death benefits on policemen. It would seem therefore that in order to include the subsistence allowance as part of compensation for the basis of computation of disability and death benefits under the foregoing chapters that legislation would be required to so designate the subsistence allowance as compensation.

Cordially yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

ELECTIONS: Pasters on Ballot:
A write-in vote and a vote by sticker will not count unless the square before the written or sticker vote is marked with the usual cross. Stickers can only be handed out at least 100 feet from the polls. (Strauss to Lucken, St. Rep., 9/17/58)
58-9-12

September 17, 1958

Hon. J. Henry Lucken
State Representative
Akron, Iowa

My dear Henry:

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

> "I have been asked to write you for information in regard to write-in voting and the use of stickers.
>
> "If a name is written in and the circle at the top of the ballot is marked in the same column, does the square before the name written in still have to be marked to legally count the vote? Does the same rule apply to sticker voting?
>
> "In the event stickers are used, can they be handed out in any other way than by party workers at least a hundred feet from the polls?"

In reply thereto I advise.

1. A vote by write-in and a vote by sticker will not count unless the square before the written or sticker vote is marked with the usual cross. I am assuming that this vote will be cast in the Independent column and it makes no difference with the rule as to whether there is a circle at the top or not.

2. Stickers can only be handed out by party workers at least one hundred feet from the polls. Stickers used by

party workers cannot be handed to the voters in any other manner or place.

My regards.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

RETIREMENT PLANS: I.P.E.R.S. Investments ---
Treasurer of State, as custodian and trustee of the Iowa Public Employees' Retirement Fund, established by §97B.7(1), Code 1958, is limited to investment of the fund with no power of sale and reinvestment. (Strauss to Madigan, Emp. Sec. Comm., 9/11/58)
58-9-13

September 11, 1958

Iowa Employment Security Commission
L o c a l

Attention: Mr. K. A. Madigan, Chairman

Gentlemen:

This will acknowledge receipt of yours in which you request opinion concerning the power of the Employment Security Commission to direct the practices and procedures of the State Treasurer in certain areas with respect to the holding, investing and disbursing of money in the Iowa Public Employees Retirement System Fund. Specifically, you request opinion on the following points:

> "1. Can the Commission designate the bank in which any part of the Fund may be deposited or held?
>
> "2. Can the Commission direct that forward commitments of funds for investment purposes be made?
>
> "3. Can the Commission direct that payment for securities purchased be made on bank receipt for such securities?
>
> "4. Can the Commission direct the sale of securities held by the Fund for less than purchase price in order that the proceeds may be reinvested for substantial gain?"

In support of your position that the Commission does have the power and authority to direct the Treasurer in all areas of administration set out, your Commission has extensively detailed the situation by statutory and case citation together

with argument thereon. These authorities have been carefully reviewed in light of the argument submitted. However, in the view that I take of this situation I find it unnecessary to analyze and to argue it to a conclusion. The fund in question is created by Section 97B.7(1), Code 1958, which provides as follows:

> "1. There is hereby created as a special fund, separate and apart from all other public moneys or funds of this state, the 'Iowa Public Employees' Retirement Fund', hereafter called the 'retirement fund'. This fund shall consist of all moneys collected under this chapter, together with all interest, dividends and rents thereon, and shall also include all securities or investment income and other assets acquired by and through the use of the moneys belonging to this fund and any other moneys that have been paid into this fund."

And the relationship of the Treasurer to the fund is set forth in Section 97B.7(2) as follows:

> "2. The treasurer of the state of Iowa is hereby made the custodian and trustee of this fund and shall administer the same in accordance with the directions of the commission. It shall be the duty of the trustee:
>
> "a. To hold said trust funds.
>
> "b. Invest such portion of said trust funds as in the judgment of the commission are not needed for current payment of benefits under this chapter in interest-bearing securities issued by the United States, or interest-bearing bonds issued by the state of Iowa, or bonds issued by counties, school districts and/or general obligations or limited levy bonds issued by municipal corporations in this state as authorized by law, or other investments authorized by insurance companies in this state.
>
> "c. Disburse such trust funds upon warrants drawn by the comptroller pursuant to the order of the commission."

Note that the administrative authority of the Treasurer according to subsection 2(b) is to invest such portion of the said trust funds as in the judgment of the Commission is not needed for current payment of benefits. The statute contains no express administrative duty vested in the Treasurer to direct the sale of securities and the reinvestment of the proceeds of the sale for substantial or other gain or loss. In other words, the power of the Treasurer is specifically stated to invest the trust funds with no express direction to reinvest such funds after sale. If the power of sale and reinvestment exists it is only so by interpretation. In so discovering this power by interpretation we are met with this specific provision with reference to the use of such trust fund. Section 97B.7(3) provides the following:

> "3. All moneys which are paid or deposited into this fund are hereby appropriated and made available to the commission to be used only for the purposes herein provided:
>
> "a. To be used by the commission for the payment of retirement claims for benefits under this chapter, or such other purposes as may be authorized by the general assembly.
>
> "b. To be used by the commission to pay refunds provided for in this chapter."

Nowhere therein is there ground for implication of any power to sell and reinvest. It is fair to assume that the Legislature in conferring the express power to invest did not intend to extend its meaning to the power of reinvesting by

interpretation. If its intention had been to invest the power to reinvest in the Commission it would have so expressly provided in specifically providing the uses to be made of the money to "such other purposes as may be authorized by the general assembly". Obviously, the uses of the money in the matter and for the purposes stated in your questions 2, 3 and 4 clearly are not expressly authorized by the General Assembly. The power there described deals directly with the use of the money. It is a public fund possessed by the Treasurer as custodian and trustee but in whatever power or whatever capacity it is so heldhis power over it is prescribed by law. I answer your questions therefore as follows:

1. In answer to your question #1 I would advise that answer thereto is provided by opinion of the Department issued February 27, 1958 to Mr. Don G. Allen, Chief, Legal Services Division, Employment Security Commission, copy of which is hereto attached.

2. In answer to your questions 2, 3 and 4 the answer is in the negative.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB
Enc.

JUDGES: Expenses -- Reimbursement can only come from legislative claims committee when incurred in connection with bar associations or other associations activity. (Strauss to Cullison, District Judge; 9/2/58) #58-9-14

September 2, 1958

Hon. Bennett Cullison
Judge of the District Court
Harlan, Iowa

My dear Judge:

I have your letter of the 21st ult. in which you asked for my views on the following situation:

> "Some of the district judges are called upon from time to time to serve on or act in an advisory capacity to various committees of the State Bar Association, District Judges Association and other official and quasi-official groups in various departments of the state government.
>
> "These services at times require travel and subsistence outside the district of the judge. It is a part of the judge's work in the sense that the person called upon would not be called if he did not hold the office. The services performed are directly related to the administration of the business which the courts deal with.
>
> "At this time Judges Cooney, Hudson and I are doing some work with the parole board and other quasi-official groups to work out plans for more effective use of the parole system. This has required conference with the parole board, prison officials, the governor's committee and others to get the necessary information which we hope will be of benefit to all of the district judges.
>
> "I know that many judges perform services along the lines above mentioned in various activities and that most of them feel that they should do so, but it does impose financial burdens which are onerous in some cases."

58-9-14

In reference thereto I would say that I do not write my views so much as an opinion as a conversational exchange. In this aspect I do not find subsistence and transportation costs are a properly allowable claim. You are familiar with the statute authorizing payment of the expenses of judges, being Section 605.2, Code 1958, which plainly allows the expenses of judges when required to leave their county or city residence in the performance of official duties. While the activities that you describe arise out of your experiences on the bench they are not technically official duties and therefor not properly allowable claims. These activities like others that are performed by public officials arising out of their official duties are deemed voluntary insofar as allowance of expenses is concerned. Such claims for expenses are the proper subject of submission to the Legislature for allowance.

My respects.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

COUNTY OFFICERS: Delegation of Powers---
~~BOARD OF SUPERVISORS: DELEGATION OF POWERS:~~

A County Board of Supervisors cannot delegate its discretionary powers for providing medical attendance to indigent poor to a committee of local doctors. (Branco to Templeton, Hancock Co. Atty., 9/2/58) #58-9-15

September 2, 1958.

Mr. G. W. Templeton
County Attorney
Hancock County
Garner, Iowa

Dear Mr. Templeton:

Reference is made to your letter of recent date reading as follows:

> "Mr. Elwin Hodges, the Director of Social Welfare of Hancock County, Iowa, advises that he recently met with you at which time he submitted a Resolution adopted by the resident physicians of Hancock County respecting the care of indigent patients.
>
> "For the purpose of identifying this Resolution, please be advised that the same was adopted by meeting of the physicians held January 27, 1958. This appears in the first line of the instrument submitted to you by Mr. Hodges.
>
> "You will note that the Resolution in substance provides for a committee of three physicians to assist the Supervisors and the Welfare Director respecting the medical care of indigent persons and provides for a hospitalization at the University of Iowa hospitals and the Hancock County Memorial Hospital except in unusual instances which will be handled by the committee for recommendation and disposition.
>
> "I have examined the chapters on Social Welfare Emergency Relief Administration and the Support of the Poor and do not find anything too helpful in regard to this particular problem. Chapter 252 is somewhat helpful in regard to the payment of claims, contract for support, medical and dental service and supervision.
>
> "I can also advise you that the Board of Supervisors and the Welfare Director wish to approve the setup proposed by the physicians if they have authority to do so.
>
> "There have been instances in the past where indigent medical patients desire to go to physicians located outside of Hancock County, or to be hospitalized in hospitals other

58-9-15

than the hospital at Iowa City or the Hancock County Memorial Hospital. It appears to be the feeling of the Board of Supervisors and the Social Welfare Director that except in unusual circumstances the care offered by the two named institutions is as good or better as out-of-the county facilities. Inasmuch as the Hancock County Memorial Hospital is a county owned hospital they desire to make use of it as much as possible. With reference to the unusual situation, it would appear that this is adequately provided for in Sub-section 3 of Part II of the Resolution.

"Will you please give these matters your attention and give us your opinion at your earliest convenience so that the Board of Supervisors and the Welfare Director may be advised as to whether or not they may proceed to adopt the terms of the instrument in substance as a matter of policy."

The resolution in question reads as follows:

"A meeting was held on January 27, 1958, with a majority of the physicians resident in Hancock County present to discuss and take action on problems of medical care of the Hancock County indigent.

"The purpose of the meeting was to lessen tax money expenditures on the care of county medical cases, the physicians of the county thereby standing forth, insofar as their responsibility is involved, as favoring greater economy and reduction in disbursement of county funds for medical care of the indigent population. This is in no way to detract from the quality of the care now being given.

"The following resolutions were drawn up, approved and submitted, pending acceptance and validation by the Board of Supervisors, the County Attorney, and the Director of the Department of County Welfare.

"Be it resolved, to-wit: (1) that a committee of three physicians be set up to help the Supervisors and the Welfare Director to provide for the medical care of the indigent.

"The committee thenceforth would be empowered to make decisions concerning the hospital disposition of all county cases requiring more than three days institutional care, except in situations of immediate emergency. Specifically, this would be implemented by requiring that

attending physicians consult with the members of the committee prior to hospitalization of all county patients, with the exceptions noted above.

"The committee would also, at the request of the Board of Supervisors, review and make recommendations concerning any fees or charges made by attending physicians in the care of the county indigent.

"Be it resolved (2) that all county indigent patients would be hospitalized exclusively at (1) State University of Iowa Hospitals, or (2) Hancock County Memorial Hospital, or (3) in exceptional instances, elsewhere, as approved by the appointed committee.

"Be it resolved (3) that all county indigent patients would be under the care of Hancock County physicians, excluding non-resident physicians, except as allowed by the authority of the aforementioned committee on indigent medical care. Hancock County physicians will continue to follow the previously existing county medical and surgical fee schedule.

"The foregoing resolutions were unanimously approved by Drs. Eller, Dulmes, Camp, McMahon, Fuller and Enggas, who were the members present at the meeting.

"The committee of three physicians initially will be constituted by Drs. Eller, Dulmes, and Enggas, to serve for a period of one year from an effective date as established by the affirmation of the county governing and departmental bodies to whom these resolutions are submitted.

"Please take action as promptly as possible and notify me of your decision."

John T. Enggas, M.D.
Vice-President
Hancock-Winnebago Co. Med. Soc.

Upon this letter and proposed resolution to be ratified by the Board of Supervisors, we advise as follows:

Section 252.38 authorizes the Board of Supervisors to make contracts for the support of the poor, And in Section 252.39 said boards may make contracts with any reputable and responsible person licensed to practice medicine or dentistry to furnish medical or dental attendance.

The proposed resolution for ratification or adoption by the Board of Supervisors would empower a committee of doctors to exercise the powers enumerated in Section 252.39 as to medical attendance of the indigent poor.

These statutes are permissive and not mandatory and no legal obligation is created on the Board to give relief including medical attendance. (O.A.G. 1940, p. 28)

> "The matter is left within the discretion of the Board of Supervisors to give or deny relief as they find cause." (O.A.G. 1936, p. 345)

Hospitalization, medical supplies, nursing, etc. would constitute a part of the medical treatment. (O.A.G. 1956, p. 168)

Such power as a discretionary power may not be delegated. (See O.A.G. 1923-24, p. 126; 1925, 1926, p. 181; 1948, p. 166, 168)

The rule of law governing this question may be found in 15 C.J. (Counties) par. 16, which reads as follows:

> "The right of a county board to delegate its authority depends on the nature of the duty to be performed. Powers involving the exercise of judgment and discretion are in the nature of public trusts and cannot be delegated to a committee or agent. **"

(See also Gunn v. Mahaska County, 155 Ia., l.c. 535; State v. Kimball, 23 Ia. 531, 535; Coolidge v. Mahaska County, 24 Iowa 211)

We are, therefore, of the opinion that the Board of Supervisors cannot adopt the terms of the resolution in question for the reason that such act would be an unlawful delegation of discretionary powers resting solely in the hands of the Board.

Respectfully submitted,

Frank D. Bianco
Assistant Attorney General

FDB/sp

PHARMACY AND PHARMACISTS: Retail Pharmacy License - - - -
A separate license must be obtained for "each and every place of business" where retail pharmacy is practiced under code section 155.12. (Abels to Rabe, Pharmacy Bd. 9/3/58, #58-9-16

September 3, 1958

Mr. J. F. Rabe, Secretary
Iowa Pharmacy Examiners
Local

Dear Mr. Rabe:

Receipt is acknowledged of your letter of August 22, 1958, as follows:

> "The Iowa Pharmacy Examiners desire an opinion on the following question.
>
> Is it permissable for a person holding either a Wholesale or Retail Pharmacy License issued to a certain address to display this license in another location and address, without purchasing another new license. The situation arises in instances when the holder moves to another location in the same town or another city within the state."

As with your other two inquiries of even date, the answer is furnished directly by the statutes. Code section 155.12 provides in pertinent part:

> "Licenses shall be obtained from the board for each and every place of business..."

Thus, if the owner of a retail pharmacy wishes to conduct his retail business at a different place than where presently located he must obtain a license for such place.

This is further borne out by sections 155.17, 155.18 and 155.24 which refer to inspection and what shall be inspected for at such places. Obviously the fact that premises once occupied and licensed passed inspection has no bearing on whether other premises proposed to be occupied will pass.

Very truly yours

LEONARD C. ABELS
Assistant Attorney General

LCA:js

LICENSES: Engineering--

~~ENGINEERING EXAMINERS~~: If a certificate as an "engineer in training" shall have been issued prior to January 1, 1959, applicant may then take the remaining portion of his examination based on the experience requirements of the statute prior to the amendments. (Swanson to Cunningham, Secy., Eng. Ex'rs.; 9/2/58) #58-9-17

September 2, 1958

Mr. W. Grant Cunningham, Secretary
Board of Engineering Examiners
B u i l d i n g

Dear Sir:

Reference is made to your request for an interpretation of Section 114.14 of the Code of Iowa as amended by the Acts of the 57th General Assembly. You ask:

> "How about Engineer-In-Training who took the fundamentals in engineering examination before January 1, 1959?
>
> "(a) Do they take the branch after January 1, 1959, with only two (2) years experience? (b) Or must they have four (4) years experience?"

Apparently the term "engineer in training" is used in your rules to mean one who has taken and successfully passed your examination in fundamentals. This term has now been used by the Legislature without definition in the Acts of the 57th General Assembly.

Chapter 87, Acts of the 57th General Assembly, sections 2 and 3 read as follows:

> "Section 2. The provisions of this Act shall not apply to any person to whom a certificate as an engineer in training shall have been issued prior to the effective date of this Act.
>
> "Sec. 3. The provisions of this Act shall become effective on January 1, 1959."

These terms would appear to be self-explanatory, but may cause some administrative problems. If a certificate as an "engineer in training" shall have been issued prior to January 1, 1959, your applicant may then take the remaining portion of his examination based on the experience requirements of the statute prior to the amendments.

Very truly yours,

DON C. SWANSON
Assistant Attorney General

DCS:MKB

PHARMACY AND PHARMACISTS : Retail License - - - According to code section 155.13, may be denied for any substantial failure to comply with code chapter 155.

September 3, 1958

Mr. J. F. Rabe, Secretary
Iowa Pharmacy Examiners
Local

Dear Mr. Rabe:

Receipt is acknowledged of your letter of August 22, 1958, as follows:

"The Iowa Pharmacy Examiners request an Attorney General's opinion on the following:

Does the Pharmacy Examiners have the right to refuse a Retail Phramacy License to an applicant who has been found guilty in our courts for violating Chapter 155, Section 155.6."

The answer to your question appears directly furnished by the language of Code section 155.13 which provides in pertinent part:

"... The board shall have the authority to deny ... a license in any case where it finds there has been a substantial failure to comply with the provisions of this chapter ....."
(Emphasis supplied)

Very truly yours

LEONARD C. ABELS
Assistant Attorney General

LCA:js

TAXATION: Motor Fuel Tax

~~MOTOR FUEL TAX LAW -- REFUND OF TAX:~~

A refund cannot be made under chapter 324, 1958 Code of Iowa to a person, other than a licensee, who purchases "special fuel" for operating or propelling a farm tractor, said person having paid the tax thereon.

(Reach to Marchi, Fuel Tax Dir., 9/2/58) #58-9-20

September 2, 1958

Honorable M. L. Abrahamson
Treasurer of State
Local

Attention: Mr. B. G. Marchi, Director
Motor Fuel Tax Division

Dear Sir:

Your letter of August 6, 1958, is set out as follows:

> "I would like to call your attention to Section 324.17 and Section 324.71 which deals specifically with refund of motor fuels. The first mentioned Section deals with gasoline. The second deals with all fuel taxes paid on any type of fuel.
>
> My question is as follows: Is it possible for our refund department to refund the tax on diesel or special fuel, upon which the tax was paid and then the fuel used for nontaxable purposes. May I quote a specific example.
>
> Mr. John Doe purchases his tractor fuel from retail outlet. In error they include the state tax in the cost of the fuel and John Doe pays the entire amount. Later, realizing that the fuel was non-taxable, can he obtain a refund from us?
>
> There has been some contention that, because under the first division it is strictly gasoline, they specifically make provisions for a refund. While under special fuel there is no specific provision. They maintain that refund cannot be made.
>
> I maintain that in either case, if fuel is used for nontaxable purposes the person who paid the tax and that having been remitted to the state, can the purchaser obtain a refund?"

58-9-20

The applicable statutes pertaining to the question submitted are set out as follows:

1. Section 324.17, 1958 Code of Iowa, provides in pertinent part that:

> " Any person other than a licensee who shall use motor fuel for the purpose of operating or propelling farm tractors, stationary gas engines, aircraft or boats, for cleaning or dyeing or for any purpose other than in motor vehicles operated or intended to be operated upon the public highways and having paid the motor fuel tax on the fuel either directly to the treasurer or by having the tax added to the price of the fuel, and who has a refund permit shall, upon presentation to and approval by the treasurer of a claim for refund be reimbursed and repaid the amount of the tax which the claimant has paid on the gallonage so used. *******" (underscoring added)

2. Section 324.18, supra, provides that:

> "no person may claim a refund under section 324.17 until he shall have obtained a refund permit from the treasurer and paid the fee therefor.******"

3. Section 324.71, supra, which appears under Division IV of the Motor Fuel Tax Law, the provisions of which are common to taxes imposed under Divisions I, II and III, provides that:

> "In the event that any fuel taxes, penalties, or interest have been erroneously or illegally collected from a licensee, the treasurer may permit the licensee to take credit against a subsequent tax return for the amount of the erroneous or illegal overpayment or, shall certify the amount thereof to the comptroller of this state, who shall thereupon draw his warrant for the certified amount on the treasurer of state payable to the licensee. The refund shall be paid to the licensee forthwith. (underscoring added). * * * * * * * * * * *"

4. Under Division I (Motor Fuel Tax) of Chapter 324, supra, licensee is defined as follows; in Section 324.2 (3):

"3. 'Licensee' shall mean and include any person holding an uncancelled distributor's license issued by the treasurer under this division or any prior motor fuel tax law."

5. Under Division II (Special Fuel Tax) of Chapter 324, supra, licensee is defined as follows, in Section 324.33 (5):

"5. 'Licensee' shall mean and include any person who holds an uncancelled special fuel dealer license or special fuel user license, issued pursuant to this division."

6. "Special fuel" is defined in Section 324.33 (1), supra:

"1. 'Special fuel' means and includes all combustible gases and liquids suitable for the generation of power for propulsion of motor vehicles also any substance used for that purpose, except that it does not include motor fuel as defined in the motor fuel tax law." (underscoring added).

7. "Motor fuel" is defined in Section 324.2 (1), supra:

"1. 'Motor Fuel' shall mean (a) all products commonly or commercially known or sold as gasoline (including casinghead and absorption or natural gasoline) regardless of their classifications or uses; and (b) any liquid advertised, offered for sale, sold for use as, or commonly or commercially used as a fuel for propelling motor vehicles, **********; provided, that the term 'motor fuel' shall not include liquefied gases which would not exist as liquids at a temperature of sixty degrees Fahrenheit and a pressure of 14.7 pounds per square inch absolute, nor naphthas and solvents as hereinafter defined unless the liquefied gases or nephthas and solvents are used as a component in the manufacture, compounding, or blending of a liquid within (b) above, in which event the resulting product shall be deemed to be motor fuel."

8. A "motor vehicle" is defined in Section 324.57 (2) supra, such definition being applicable to taxes imposed under Divisions I, II and III of Chapter 324, supra:

"2. 'Motor Vehicle' shall mean and include all vehicles (except thos e operated on rails) which are propelled by internal combustion engines and are of such design as to permit their mobile use on public highways for transporting persons or property. A farm tractor while operated on a farm or for the purpose of hauling farm machinery, equipment or produce shall not be deemed to be a motor vehicle. ~~**********~~." (underscoring added).

9. The special Fuel Tax is imposed by Section 324.34, supra, which provides in part as follows:

"For the privilege of operating motor vehicles in this state, there is hereby levied and imposed an excise tax on the use (as defined herein) of special fuel in any motor vehicle. * * * * * * * The tax, with respect to special fuel acquired by a special fuel user in any manner other than by delivery ;by a special fuel dealer into a fuel supply tank of a motor vehicle, shall attach at the time of the use (as herein defined) of the fuel and shall be paid over to the treasurer by the user as hereinafter provided." (underscoring added).

10. "Use" as defined by Section 324.33 (2), supra:

"2. * means the receipt, delivery or placing of special fuels by a special fuel user into a supply fuel tank of a motor vehicle while the vehicle is in this state."

11. The purpose of Division II, Special Fuel Tax, of Chapter 324, supra, is expressed in Section 324.32, supra:

"The purpose of this division is to supplement Division I of this chapter, by imposing an excise tax upon the receipt, delivery or placing into the fuel supply tanks of motor vehicles which are within this state, of all fuels not taxed under Division I." (Underscoring added).

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

1. Diesel or special fuel is excluded by definition as being the same as motor fuel. Section 324.33 (1), supra.

2. If a person purchases motor fuel for the purpose of operating or propelling a farm tractor and has paid the motor fuel tax thereon, such person may apply for a refund of said motor fuel tax. Section 324.17, supra. Such person may not claim said refund until said person shall have obtained a refund permit and paid the fee therefor. Section 324.18, supra.

3. The statutory provision allowing refunds for fuel taxes erroneously or illegally collected is limited to a licensee. Section 324.71, supra. Licensee being defined in Sections 324.2 (3) and 324.33 (5), supra.

4. The special fuel tax is imposed on the use of special fuel in any motor vehicle. Section 324.34, supra. A motor vehicle, by definition, does not include a farm tractor. Section 324.57 (2), supra. Therefore, the special fuel tax, may not be imposed on the use of special fuel by or in a farm tractor.

5. Since the special fuel tax is not imposed on the use by or in a farm tractor, the Legislature, apparently, saw no reason for establishing a refund procedure within Division II of Chapter 324, 1958 Code of Iowa, for any person other than a licensee.

6. There seems to be no question that if a person uses special fuel for propelling or operating a farm tractor and pays the tax thereon, such person is entitled to a refund thereof.

7. The purpose of Division II, Special Fuel Tax, of Chapter 324, supra, is to supplement Division I of said Chapter 324. Supplement is defined in Webster's Collegiate Dictionary, Fifth Edition to mean:

> "1. That which supplies a want or makes an addition to something already organized or set apart. ******* To fill up or supply by additions; to fill the deficiencies of.

Therefore, Division I of Chapter 324, supra, is

relatively complete, save the tax imposed on special fuel. However, the word supplement "does not imply a mutual dependence of the parts". Webster's Collegiate Dictionary, Fifth Edition appearing under the definition of complement.

8. Refund is limited to purchases of motor fuel for purposes of operating or propelling a farm tractor. Section 324.17, supra. And, as defined, special fuel does not include motor fuel. Section 324.33 (1), supra. These mutually exclusive definitions together with the plain meaning of the word "supplement" as used by the Legislature apparently preclude a refund of the nature you propose in your letter heretofore set out.

In view of the foregoing, it is my opinion that a refund cannot be made under chapter 324, 1958 Code of Iowa, to a person, other than a licensee, who purchases "special fuel" for operating or propelling a farm tractor, said person having paid the tax thereon.

Very truly yours

CARL H. PESCH
Assistant Attorney General

CHP:js

COUNTY ASSESSOR: The County Assessor has no express power to a higher assessment upon mineral right property, such as limestone, gravel pits, oil and coal mines which are being worked, than other property. However such power is implied from §441.9(2) and §441.13, Code 1958.

September 3, 1958

Hon. Raymond R. Gillespie
State Senator
Dexter, Iowa

Dear Senator Gillespie:

This is to acknowledge receipt of yours of the 21st ult. in which you present the following question:

> "Does the County Assessor have the power and authority at present, to levy higher assessments on Mineral Right Property, such as limestone, gravel pits, oil and coal mines, which are being worked?"

In reference thereto I advise that there is no statute expressly giving such authority. However, it is implied from the following relevant sections of the 1958 Code of Iowa.

> "44.9(2) Duties of assessor. The county assessor shall:
>
> "2. Cause to be assessed, in accordance with section 441.13, all the property, personal and real, in his county, except such as is exempt from taxation, or the assessment of which is otherwise provided for by law."
>
> "441.13 Actual, assessed, and taxable value.
>
> " * * *.
>
> "In arriving at said actual value the assessor shall take into consideration its productive and earning capacity, if any, past, present, and prospective, its market value, if any, and all other matters that affect the actual value of the property; and the burden of proof shall be upon any complainant attacking such valuations as excessive, inadequate, or inequitable."

In Trustees of Flynn's Estate v. Board of Review of the City of Des Moines, 226 Iowa 1353, 286 N. W. 483 (1939), the Supreme Court of Iowa in construing what is now Section 441.13, 1958 Code, stated:

> "The statute requires that production shall be considered. * * *. While the statute requires that the productive and earning capacity, past, present and prospective, must be taken into consideration, yet this alone, of course, cannot be a true guide. Whether gross or not, such receipts are controlled by many factors."

Since by statute past and present productive and earning capacity is to be taken into consideration, it would follow that mineral right property being worked would present a more favorable earnings picture than would idle mineral rights property in this regard and for that reason may be subjected to a higher assessment. However, productive and earning capacity is only one of many things that the assessor is in duty bound to consider in arriving at the actual value of the property being assessed. The assessor in assessing property is, at all times, striving to arrive at actual value and one of the many things to consider in arriving at this valuation is the past, present and prospective productive and earning capacity of the property.

Your question is, therefore, answered in the affirmative, assuming all other elements of value to be equal.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

Ballots--

ELECTIONS: ~~BALLOTS~~: The names of candidates for county office nominated by petition should be printed on the ballot and a column added to provide for a write-in vote for all county offices as well as those for which candidate's names are printed. The name of a candidate deceased since nomination is not required to be printed upon the ballot. (Strauss to Thomas, Mills Co. Atty., 9/11/58) #58-9-23

September 11, 1958

Mr. Eliot Thomas
Mills County Attorney
Glenwood, Iowa

Dear Sir:

Replying to your telephone request, I advise as follows:

1. Where candidates for county offices have been nominated by petition under the provisions of Chapter 45, their names should be printed on the ballot.

2. The names of these candidates so nominated by petition should appear under one column designated "Independent".

3. Another column should appear on the ballot for a write-in vote also designated "Independent" which should include a place for a write-in vote for candidates for all county offices including the offices appearing in the first "Independent" column.

4. The circle should not appear at the top of an Independent column.

5. The ballots having not been printed, the name of the candidate for township trustee who died should not appear. The power of the Auditor to leave the name of the deceased candidate off the ballot is prescribed in an opinion issued

58-9-23

by this department March 17, 1958, addressed to Isadore Meyer, Winneshiek County Attorney, copy of which is hereto attached.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

ZONING: Counties--

1. Under provisions of Ch. 358A, Code 1958, zoning restrictions and regulations with respect to residential use of buildings and structures become effective immediately upon adoption of an ordinance by the Board of Supervisors, although restrictions on commercial and industrial enterprise would not be effective until approved by the requisite number of real property owners.
2. The entire unincorporated area of the County may by action of the Board be made an undivided area and upon proper petition of the real property owners in the area the restrictions would be effective of such unincorporated areas

(Strauss to Larson, October 6, 1958
Asst Story Co. Atty., 10/6/58) # 58-10-24

Mr. George R. Larson
Assistant County Attorney
Story County Court House
Nevada, Iowa

Dear Sir:

This will acknowledge receipt of yours dated August 26th in which you submitted the following:

> "The Story County Board of Supervisors has asked me to write to you for an opinion with respect to the following questions:
>
> "(1) Section 358A.3 of said chapter provides in part, 'no restriction of industrial or commercial enterprise, buildings or structures in unincorporated areas shall become effective until approved by a majority of the real property taxpayers owning real property in the area or district in which such restriction is to be imposed, either (1) at an election held for that purpose, or (2) by their signing an appropriate document indicating their approval.' Does this contemplate that a zoning ordinance adopted by a board of supervisors pursuant to said chapter would apply to residential uses, buildings and structures immediately upon passage of such an ordinance by a board of supervisors without the approval of a majority of the real property owners?
>
> "(2) What is meant by the words, 'area or district', in the above quoted section? Could the unincorporated area of the whole county be considered an area or district within the meaning of said section and, if an appropriate document were signed by a majority of the real property taxpayers owning real property in the

unincorporated area of the county indicating their approval of restrictions on industrial and commercial enterprise, buildings and structures, would such restrictions be effected?"

Subsequent thereto you submitted a memorandum outlining your view of the situation stated in the foregoing described letter. Your letter and your memorandum propounding answers to the questions submitted have been examined and it now appears that your analysis of the applicable law is substantially correct. Copy of the memorandum submitted by you is enclosed.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB
Enc.

Welfare Dept.--

APPROPRIATIONS: Section 2, Chapter 4, Acts of the 57th G.A.: This Act, being the latest enactment of the Legislature, and irreconcilably in conflict and repugnant to the last paragraph of Section 239.12 and Section 241.21, Code of Iowa, 1958, it prevails and any balance remaining in the funds, to which appropriations are made by said Act, revert to the general fund at the end of the biennium. (Erbe to Welfare Bd., October 7, 1958.

10/7/58) # 58-10-1

Mrs. Irene Smith, Chairman
State Board of Social Welfare
State Office Building
Des Moines, Iowa

Dear Mrs. Smith:

Reference is made to your favor of September 26, 1958, which reads:

> "There seems to be a conflict between the laws of the Fifty-seventh General Assembly, Chapter 4, Section 2, Social Welfare Appropriations, and specific sections in the 1958 Code of Iowa, namely, Section 239.12, Fund for Aid to Dependent Children, reimbursement to State, and Section 241.21, Fund for Aid to the Blind, reimbursement to State.
>
> "Would you please give us an interpretation as to which one of these laws takes precedence?"

and in reply thereto, we advise you as follows:

We here quote the pertinent sections of the statutes with which we are presently concerned:

> 239.12 Fund for aid to dependent children-reimbursement to state.
>
> ***
>
> Any unexpended balance of the fund appropriated or allocated by the state which remains in the fund for aid to dependent children at the end of each biennium shall not revert to the general fund of the state, any law to the contrary not withstanding.
>
> 241.21 Fund for aid to the blind - reimbursement to state.
>
> ***
>
> Any unexpended balance of the funds appropriated or allocated by the state which remains in the fund for aid to the blind at the end of each biennium shall not revert to the general fund of the state, any law to the contrary notwithstanding.

> Section 2, Chapter 4, 57th G.A.
> No more than the amount herein appropriated to each fund plus the unexpended balance in each fund on June 30, 1957, shall be expended from state funds for the purposes of each said fund during the biennium beginning July 1, 1957, and ending June 30, 1959. Any balance remaining in the funds, to which appropriations are made by this Act, at the end of the ensuing biennium shall revert to the general fund of the state.

It is quite obvious that there is a conflict in the provisions above quoted, and that the last sentence of Section 2, of Chapter 4, Acts of the 57th G.A. is repugnant to the provision of Sections 239.12 and 241.21 as quoted with reference to the matter of the reverter of any balance remaining in the funds to which appropriations were made by the Act of the 57th G.A. in question.

Where the language of a statute is plain, clear and unambiguous, there is no room for construction. The language in Section 2 of Chapter 4, Acts of the 57th G.A. is quite clear as to its intent and meaning, and specifically refers to - "the unexpended balance in each fund on June 30, 1957" -

The rule has been well established where statutes are irreconcilable, the later statute will prevail. We cite a few cases so holding:

> "But under an equally familiar rule where two laws are in conflict and cannot be reconciled, the one last enacted must prevail, being the latest expression of legislative will. Casey v. Harned, 5 Iowa 1." McKinney v. Wood, 35 Ia. 189.

> "It will not be presumed that the Legislature intended a repeal of a prior statute by a later one on the same subject, unless the last statute is so broad in its terms, and so clear and explicit in its words, as to show that it was intended to cover the whole subject, and therefore to displace the prior statute. Casey v. Harned, 5 Iowa 1; Sherman v. Des Moines, 100 Iowa 88; Cole v. Supervisors, 11 Iowa, 552; State v. Shaw, 28 Iowa 67; Lambe v. McCormick, 116 Iowa, 169; Phillips v. City, 63 Iowa 578; Arnold v. City, 85 Iowa, 441." Diver v. Savings Bank, 126 Iowa at page 696.

> "STATUTES: Construction - Hopeless Conflict- Later Enactment Given Effect. The irreconcilable con-

flict between Sections 12268 and 12272, on the one hand, Code of 1924, relative to the time of filing petition and the appearance day in actions of forcible entry and detainer in municipal court, requires resort to the principle that, where statutes are repugnant and cannot be reconciled, the one last enacted must be given effect. It follows that, in such actions in municipal courts, Sections 10667 and 10668 (they being the last enactment) must be complied with, notwithstanding the contrary provisions of Sections 12268 and 12272." Owens v. Smith, 200 Ia. 261

"It is well established rule of statutory construction that the last enactment of the legislature upon a given subject must prevail, and a former enactment to which it is repugnant will be deemed to have been repealed by implication. State v. Brandt, 41 Iowa 593; State v. Shaw, 28 Iowa 67; State v. Courtney, 73 Iowa 618; Casey v. Harned, 5 Iowa 1; Serrin v. Grefe, 67 Iowa 196; McKinney v. Wood, 35 Iowa 167." Clear Lake Co-op. L.S.S. Assn. v. Weir, 200 Iowa at page 1301.

"It is manifest that if both sections of the Code apply to the same subject, they are inconsistent with each other. ****

"'It is a familiar rule of statutory construction that, where statutes are repugnant and cannot be reconciled, the one last enacted must be given effect.' Owens v. Smith, 200 Iowa 261, 204 N.W. 439, 441; Clear Lake Co-op. L.S.S. Association v. Weir, 200 Iowa 1293, local citation 1301, 206 N.W. 297. See also Rains v. First National Bank of Fairfield, 201 Iowa, 140, 206 N.W. 821; Way v. Collins Oil Co., 187 Iowa 1375, 173 N.W. 20; Dayton v. Pacific Mutual Life Insurance Co., 202 Iowa 753, 210 N.W. 945; Solberg v. Davenport, 211 Iowa 612, 232 N.W. 477." Waugh v. Shirer, 216 Iowa, at page 471.

In addition thereto, we are confronted with the general rule that each Legislature is an independent body entitled to exercise all legislative power under the limitation of the Constitution of this State and the United States, and no Legislature can pass a law which would be binding on subsequent Legislatures. (See Waugh v. Shiser, 216 Ia. p. 473; State v. Executive Council, 207 Ia. p. 921; and Iowa-Nebraska L & P. Co. v. City, 220 Ia. p. 247.)

Therefore, we are constrained to hold that under the provisions of Section 2, Chapter 4, Acts of the 57th G.A., said Act being repugnant to the provisions of Sections 239.12 and 249.21, as quoted, and being the latest enactment of the Legislature, said Act prevails and any balance remaining in the funds, to which appropriations are made by said Act, must revert to the general fund of the State.

Respectfully submitted,

NORMAN A. KRBK,
Attorney General

NAK/FDB/sp

AGRICULTURE: Butterfat Tax--

The Iowa Dairy Industry Commission under the provisions of Chapter 179, Code 1958, may cause an examination to be made of the books, records, etc., of any person, bearing upon the amount of any butterfat tax collected or to be collected and may enter into a contract for the exercise of such authority and pay the expense thereof. (Strauss to Sarsfield, St. Comp., 10/30/58) ℔ 58-10-2

October 30, 1958

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

Dear Sir:

We are in receipt of your letter of October 21 as follows:

"The Iowa Dairy Industry Commission has filed at this office a claim payable to Ernst and Ernst in the amount of $178.90 for services rendered for examination of records at Red Oak, Elliott, and Murray, Iowa.

"I respectfully request an opinion as to whether this claim and others of similar nature may be paid from the Iowa Dairy Industry Commission fund (in accordance with the provisions of Chapter 179, Code of Iowa, 1958), and is Executive Council approval required."

In response thereto, we advise that payment to a C. P. A. for services rendered in connection with Section 179.9 of the 1958 Code of Iowa is appropriate.

Your attention is directed to the following Code Sections:

"179.3 Powers and duties. The powers and duties of the commission shall include the following:

"* * * *

"2. To administer and enforce this chapter, and do and perform all acts and exercise all powers reasonably necessary to effectuate the purpose of this chapter.

58-10-2

"3. To employ at its pleasure and discharge at its pleasure such attorneys, advertising counsel, advertising agencies, clerks, and employees as it deems necessary, and to prescribe their duties and powers and fix their compensation.

"* * * *

"179.9 Investigations by commission. The commission shall have the power to cause its authorized agents to enter upon the premises of any person charged by this chapter or by agreement with the commission with the collection of the excise tax imposed by this chapter, and to cause to be examined by any such agent any books, records, documents, or other instruments bearing upon the amount of such tax collected or to be collected by such person; provided that the commission has reasonable ground to believe that all the tax herein levied has not been collected, or if it has not been fully accounted for as herein provided."

You are, therefore, advised that in view of the powers shown under Section 179.3, that such an expenditure for services in connection with performing the requirements of Section 179.9 is an appropriate one by the commission and limited only by the provisions of Section 179.8, as follows:

"Payment of expenses. No part of the expense incurred by the commission shall be paid out of any funds in the state treasury except said dairy industry fund which shall be subject at all times to the warrant of the state comptroller, drawn upon written requisition of the chairman of the commission and attested by the secretary for the payment of all salaries, and other expenses necessary, to carry out the provisions of this chapter, but in no event shall the total expenses therefor exceed the total taxes collected and deposited to the credit of said fund."

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:md

SCHOOLS: County System - -
1. County Board cannot appeal budget decision of State Appeal Board to Attorney General.
2. County Superintendent can ask County Attorneys opinion but can't request the County Attorney to obtain him someone else's.
3. Statutory duty to "plan" and "supervise" certain local functions doesn't authorize County Board to hire personnel to perform the planned acts for the local school.

~~October 29, 1958~~

4. County Board cannot circumvent lack of statutory authority to hire nurse by giving the nurse the title "attendance officer".
5. Legally there is only one licensed class of registered nurses. (Ltr to Morrow, Allamakee Co. Atty., 10/29/58)

Mr. Lynn W. Morrow
Allamakee County Attorney
Waukon, Iowa

#58-10-3

Dear Sir:

Receipt is acknowledged of your letter of October 25, 1958, as follows:

> "The County Superintendent of Schools for Allamakee County has handed me the following list of questions and has requested that I obtain an Attorney General's opinion. The County Superintendent in his yearly budget provided for a director of health and safety and hired a registered nurse who however was not qualified under the provisions of Chapter 143 to be a public health nurse. Objections were filed to his budget and the State Appeal Board ruled that the salary of this person could not be included in his budget. For that reason he has submitted the following questions: (Emphasis supplied)
>
> 1. What type of personnel can be hired by a County Board of Education to carry out the provisions of Chapter 273.18, sub-section 10 "Submit to the county board for its approval plans for the proper accounting of all children of school age, for the attendance and control of pupils at school and for the proper attention to health, safety and other matters which will best promote the welfare of the children of the county;" and sub-section 13 "Recommend plans and supervise arrangements for the periodic physical and dental examination of all

children of the county school system and for the general promotion of health throughout the county."?

2. The County Board of Education is given the power in Chapter 273.13, sub-section2, to hire an attendance officer. Can this officer be a registered nurse who is not qualified as a public health nurse?

3. To carry out the provisions in question 1. Can the Board of Education of a County hire a registered nurse who is not a qualified public health nurse to carry out the provisions of question 1 and be called a Director of Health and Safety?

4. Does Chapter 143 pertain to registered nurses who do not have public health training and cannot qualify for jobs requiring public health training?"

Since the third specific question appears to be the culmination of the other three and asks, in effect, whether the County Superintendent may proceed to do what the State Appeal Board has disapproved, the proper advice to your County superintendent is that the office of Attorney General is not an appellate tribunal with power to review decisions of the State Appeal Board.

Further, your County Superintendent, under the statutes, is authorized to request your opinion and advice as County Attorney, but is not authorized to request that you obtain for and provide him with someone else's opinion and advice. Assuming however, that you adopt his questions as yours and request the supervision provided in code section 13.2(7) for the purpose of assisting you in rendering your opinion to him, you are advised:

1. Section 273.18 (10 and 13) authorizes the employment of no personnel.

2. Status as registered nurse has no bearing on the qualifications of an attendance officer. An

attendance officer is simply the equivalent in the county school system of the truancy officer in certain school districts. The duties of such officer are prescribed in code section 2299.11 and do not include nursing. As to the matter of using one title to describe another job see the enclosed opinion dated September 16, 1924.

3. The answer to your third question, as noted above, has been provided by the State Appeal Board.

4. There is only one licensed category of registered nurse. Legally, all registered nurses are qualified for public health service.

Very truly yours

LEONARD C. ABELS
Assistant Attorney General

LCA:js

cc: Paul Johnston
Bd. of Nurse Examiners

Enc.

SCHOOLS: County Board of Education:

Membership on County board incompatible with office of secretary of local board.

October 28, 1958

Mr. Lynn W. Morrow
Allamakee County Attorney
Waukon, Iowa

Dear Sir:

Receipt is acknowledged of your letter of October 25, 1958, as follows:

> "Can a secretary of a community school district be a member of the county board of education?"

In answer thereto you are advised that under chapter 275, Code 1958, community school districts are part of the County School System and, therefore, the office of secretary of the local board is incompatible with membership on the County Board of Education.

Very truly yours

LEONARD C. ABELS
Assistant Attorney General

LCA:js

MINORS; work permits --
~~CHILD LABOR LAW -- WORK PERMITS.~~

1. A hospital as an institution does not come within the prohibited establishments enumerated in §92.1, Code of Iowa, 1958.
2. The definition of work shop appearing in §91.15, Code of Iowa, 1958, has no application to chapter 92, Code of Iowa, 1958.
3. Whether a girl under 16 years of age is prohibited from being employed as a nurse's aid is a fact question.

(Peschta Lowe, Lab. Comm. October 24, 1958 10/28/58) # 58-10-5

Mr. Don Lowe
Bureau of Labor
Local

Dear Sir:

Receipt is acknowledged of your letter under date of October 9, 1958, and the work permits enclosed therewith.

The letter is set out as follows:

"You will find enclosed several Work Permits recently received in this Department concerning hospital work on which I would like an Attorney General's opinion. Such ruling is requested so that we may be guided in the future relative to approval or disapproval of such work Permits.

"After receiving the Attorney General's opinion that public libraries do not come under the scope of our jurisdiction we became concerned as to other types of institutions not being under our jurisdiction. In your opinion please advise whether or not hospitals as an institution would in any way be covered under Sections 92.1 and 92.2. If not covered as an institution should they be doing specific work such as in the diet kitchen, cafeteria (in some hospital cafeterias, nurses doctors and visitors are allowed to eat, as well as hospital help and patients), bakeries laundries as operated by the hospital, or general maintenance work, such as repairing plumbing, washing or painting walls, scrubbing

and waxing floors. Is it possible that some of these listed would come under the definition of a work shop?

"I would also like an opinion as to girls under age 16 being employed as a nurse's aid."

The statutes, applicable to the legal problems submitted as set out as follows:

Section 92.1, Code of Iowa, 1958, provides that:

"No person under fourteen years of age shall be employed with or without compensation in any mine, manufacturing establishment, factory, mill, shop, laundry, slaughter house, or packing house, or in any store or mercantile establishment where more than eight persons are employed, or in any livery stable, garage, place of amusement, or in the distribution or transmission of merchandise ormessages; but nothing in this section shall be construed as prohibiting any child from working in any of the above establishments or occupations when operated by his parents."

Section 92.2, Code of Iowa, 1958, states that:

"No person under sixteen years of age shall be employed at any of the places or in any of the occupations specified in section 92.1 before the hour of seven o'clock in the morning or after the hour of six o'clock in the evening, and if such person is employed exceeding five hours of each day, a noon intermission of not less than thirty minutes shall be given between the hours of eleven and one o'clock, and such person shall not be employed more than eight house in any one day, exclusive of the noon hour intermission; nor shall any such person be employed more than forty-eight hours in any one week."

Section 92.5, Code of Iowa, 1958, provides for permits for child labor as follows:

"No child under sixteen years of age shall be employed, permitted, or suffered to work in or in connection with any of the establishments or occupations mentioned in section 92.1 unless the person, firm, or corporation employing such child procures and keeps on file, assessible to any officer charged with the enforcement of this chapter, a work permit issued as hereinafter provided, and keeps two complete lists of the names and ages of all such children under sixteen years of age employed in or for such establishments of in such occupations, one on file in the office and one conspicuously posted near the principal entrance of the place or establishment in which such children are employed.

On termination of the employment of a child whose permit is on file, such permit shall be returned by the employer within two days to the officer who issued it with a statement of the reasons for the termination of such employment.

A work permit shall be issued for every position obtained by a child between the ages of fourteen and sixteen years. The permit in no case shall be issued to the child, parent, guardian, or custodian, but to its prospective employer."

Section 92.11, Code of Iowa, 1958, states that:

"No person under sixteen years of age shall be employed at any work or occupation which, by reason of its nature or the place of employment, the health of such person may be injured, or morals depraved, or at any work in which the handling or use of gunpowder, dynamite, or other like explosive is required, or in or about any mine during the school term, or in or about any hotel, cafe, restaurant, bowling alley, pool or billiard room, cigar store, barber shop, or in any occupation dangerous to life or limb.

No female under twenty-one years of age

shall be employed in any capacity where the duties of such employment compel her to remain constantly standing."

You are advised as follows:

A hospital is defined in Webster's New International Dictionary, Second Edition, as follows:

"an institution or place in which patients or injured persons are given medical or surgical care, often in whole or in part at public expense or by charity; * * * * *"

26 Am. Jur., Hospitals and Asylums, section 2, page 588, states:

"In its widest sense, a hospital is a place appropriated to the reception of persons sick or infirm in body or in mind. * * * * *."

The Supreme Court of Iowa in Hull Hospital v. John Wheeler, 216 Iowa 1394, loc. cit. 1397; 250 N.W. 637, said:

"On the other hand, a hospital, where the sick and injured are cared for, nurses its patients and gives them medical attention. These are the primary purposes of such hospital. ***** * * * * * * * *."
Obviously the room and board provided by the hospital are merely incidental to the nursing and medical treatment, if not part of it. For instance, a guest goes to a hotel for lodging, shelter, food, and drink. Such is the purpose of the hotel. When a man is sick, however, he goes to the hospital, not merely for food, drink, lodging, and shelter, but rather for nursing and medical care. Thereby, he becomes a patient in the hospital, as distinguished from a guest in a hotel."

and continuing on page 1398, of the Hull Case, supra,:

"So it appears that from a very early time there

> was, and at the present time there is, a marked distinction between the hotel, or inn, and the hospital, when confined to an institution that cares for the sick and injured. The one serves one purpose and the other another. As before said, a guest journeys to the hotel for entertainment, while the patient goes, or is carried, to the hospital for treatment and nursing. Thus, it appears that for centuries past the distinction before indicated always has been, and at the present time continues to be, present."

This construction finds additional support in Pagel v. Trinity Hosp. Ass'n., 72 N. D. 262, 6 N.W. 2d 392.

The attached work permits list the descriptions of work as follows:

1. blue girl
2. cafeteria and chapel
3. helper in diet kitchen
4. work in tray line

and all employers involved are hospitals.

The work described seemingly falls into the category of hospital services. That a hospital is primarily a service organization serving patients, doctors, and the public, see: Cedars of Lebanon Hospital v. Los Angeles County, 206 P. 2d 915, subsequent opinion 221 P. 2d 31, 35 Cal. 2d 729.

Hospital services are necessary for the accomplishment of the purpose for which a hospital is established, and as such constitute an integral part of the hospital. Such services go to the very essence or existence of the hospital.

Therefore, in view of the foregoing it is my opinion that a hospital, as an institution, does not

come within the purview of Section 92.1, Code of Iowa, 1958, and is not included in the list of prohibited establishments appearing therein.

A distinction must be drawn at this point relevant to independent undertakings, within a hospital, existing solely for revenue purposes as distinguished from hospital services deemed, essential to operation of a hospital.

Such an operation, depending of course on the facts, could fall within and be included as a prohibited establishment within the purview of Section 92.1, supra, and Section 92.11, supra. In such event such operations, although carried on within a hospital, would be subject to the jurisdiction of the child labor laws and their administrator, the Bureau of Labor.

In answer to your question as to whether some of the specified occupations as listed in your letter would come under the definition of a work shop, you are advised the "workshop" as defined in Section 91.15, Code of Iowa, 1958, is restricted to Chapter 91, Code of Iowa, 1958, and has no application to chapter 92, Code of Iowa, 1958. Such construction finds support in an opinion of this office directed to Marshall F. Camp, Union County Attorney, under date of August 5, 1958.

Your last question is answered as follows:

Under Section 92.11, supra, employment of a person under sixteen years of age is prohibited if such employment, by reason of its nature or place, results in injury to health, or depraves the morals, of such person. Also, a female under twenty-one years is prohibited from employment in any capacity if such employment compels her to remain constantly standing. Section 92.11, supra. The question as propounded being largely one of fact, we are precluded from rendering an opinion thereon.

Very truly yours

CARL H. PESCH
Assistant Attorney General

CHP:js

IOWA SOLDIERS' HOME, COMMON-LAW MARRIAGE AS BASIS FOR ADMISSION.

1. Common - law marriage exists and is recognized in the State of Iowa.

2. Burden of proving the existence of a common-law marriage is upon the parties seeking admission to the Iowa Soldiers' Home.

3. If the burden is sustained and all other conditions precedent to admission have been met a common-law marriage will qualify an applicant(s) under §219.4, 1958 Code of Iowa.

4. The determination of eligibility to the Iowa Soldiers' Home is for the Board of Control.

Board of Control of State Institutions
Local

Att'n: Mr. George W. Callenius, Member

In Re: White, George A. & wife, Dora; Webb, Aubrey L. & wife, Frances (Applicants for admission to Iowa Soldiers' Home, Marshalltown, Iowa.)

Dear Sir:

Your letter under date of October 23, 1958, relative to the above matter, is set out as follows:

> "Enclosed please find two separate letters covering two different cases from the Iowa Soldiers' Home relative to admittances.
>
> "You will note that one case has to do with common-law marriage and theother has to do with a divorced couple that have since re-married and wish to gain admittance to the Soldiers' Home.
>
> "This presents quite a problem to us, and I would appreciate it very much if you could give me some kind of an opinion on whether or not you have had a similar case come up before."

The applicable statutes are as follows:

Section 219.3, Code of Iowa, 1958, provides that:

"The board of control shall have power to determine the eligibility of applicants for

admission to the home in accordance with the provision of this chapter, and shall adopt all the necessary rules and regulations for the preservation of order and enforcement of discipline, the promotion of health and well-being of all the members and for the management and control of the home and the grounds thereof." (Underscoring added).

Section 219.4, Code of Iowa, 1958, peetaining to married coupies, states:

"When a married man is or becomes a member of the home, his wife, if she has been married to him for ten years and is otherwise elligible under this chapter, may be admitted as a member of the home subject to all the rules and regulations of said home. Husband and wife may be permitted to Oocupy, together, cottages or other quarters on the gcounds of the home."

You are advised as follows:

Common law marriage exists and is recognized in the State of Iowa. In Re Boyington's Estate, 157 Iowa 467, 137 N.W.949; Hoese v. Hoese, 205 Iowa 313, 217 N.W. 860; In re Estate of Stopps, 244 Iowa 931, 57 N.W. 2d 221; Gammelgaard v. Gammelgaard, 247 Iowa 979, 77 N.W. 2d 479.

The Supreme Court of Iowa in In Re Estate of Wittick, 164 Iowa 485, loc. cit. 493, 145 N.W. 913, said:

"As to what constitutes a 'common-law marriage' and what evidence is competent to establish such a relation, is a subject upon which the authorities are in harmony, the difficulties presented in such cases arising under the facts. In re Boyington's Estate, supra, states the rule that: 'while cohabitation and the reputed relation of husband and wife may be shown as tending to give

> color to the relation of the parties and the recognition each by the other of the existence of a marriage between them, the fundamental question is whether their minds have met in mutual consent to the status of marriage which will be sufficiently established if it appears that they have lived together, intending thereby to be husband and wife.' And in determining the question public conduct of the parties, and public repute, if uniform, is entitled to weight. Pegg v. Pegg, 138 Iowa, 576. In the case of McFarland v. McFarland, 51 Iowa, 570, this court held that, while cohabitation does not of itself constitute marriage, yet it is sufficient if the parties so cohabiting intend present marriage; and in the earlier case of Blanchard v. Lambert, 43 Iowa, 228, was quoted and adopted the settled rule of the common law that any mutual agreement between the . . . husband and wife in praesenti, followed by cohabitation, constitutes a valid and binding marriage, if there is no legal disability on the part of either, to contract matrimony.' The rule is also recognized in Leach v. Hall, 95 Iowa, 611, and State v. Rocker, 130 Iowa, 239; 26 Cyc. 872."

Relating to the burden of proving a common law marriage the Supreme Court of Iowa in Gammelgaard v Gammelgaard, supra, at page 980 of the official report said:

> "The major question involved in the case at bar is factual. It concerns an alleged common-law marriage between the parties, the existence of which the plaintiff asserts and defendant denies. No other form of marriage is claimed; so plaintiff's case must rest upon proof of the common-law relationship. The burden to establish the marriage is upon the one who asserts it. Pegg v. Pegg, 138 Iowa 572, 576, 115 N.W. 1027, 1029."

Therefore in view of the foregoing it is my considered opinion that:

1. Common-law marriages do exist and are recognized as valid in the state of Iowa.

2. The burden of proving the existence of a common-law marriage is, in this instance, upon the parties seeking admission to the Iowa Soldiers' Home.

3. Providing the burden is sustained, a common-law marriage for the period of time required by Section 219.4, Code of Iowa, 1958, and providing all other conditions precedent to admission have been satisfied, will qualify a husband and wife for admission to the Iowa Soldiers' Home.

4. The determination of eligibility is for the Board of Control of State Institutions.

Very truly yours

CARL H. PESCH
Assistant Attorney General

CHP:js

SCHOOLS: REORGANIZATION - - Where directors of a district which ceased to exist by reason of reorganization refuse to turn over assets to their corporate successor after a distribution schedule has been made in the manner provided by statute, the proper recourse is by quo warranto under Code Chapter 660. (Ltr to Morrow, Allamakee Co. Atty, 10/28/58) #58-10-7

October 28, 1958

Mr. Lynn W. Morrow
Allamakee County Attorney
Waukon, Iowa

Dear Sir:

Receipt is acknowledged of your three letters dated October 25, 1958. In one of them you submit the following:

> "Allamakee County during the early part of 1953 had two school reorganizations resulting in the East Allamakee Community School District and the Allamakee Community School District. These two school districts completely included a rural independent school district and in pursuance to provisions of Section 275.28 of the 1958 Code of Iowa the two new community school districts agreed upon a plan of division of assets whereby one school district received 85% and the other 15% of this rural independent school district's assets. Some of these assets consisted of a balance in the Kerndt Brothers Savings Bank. The old officers and directors of the rural independent school district for reasons of their own refuse to sign the necessary checks and drafts which will transfer the funds in the Kerndt Brothers Savings Bank to the two new community school districts as agreed upon by them at a joint meeting."

Since the state of facts set forth in your letter

amounts essentially to a statement that officers of a defunct corporation purport to continue themselves in office by retaining control of assets of the corporation as though it still existed and after provision for their distribution has been made, presumably in the manner provided by statute, I am of the opinion the proper method of procedure is by quo warranto under chapter 660 of the code.

Very truly yours

LEONARD C. ABELS
Assistant Attorney General

LCA:js

MOTOR VEHICLES, REGISTRATION OF,
1. Whether motor vehicles are exempt from registration under §321.55, 1958 Code of Iowa, is largely a question of fact.
2. When a statute, §321.55, provides the conditions to be met to afford exemption from registration requirements, a reciprocity agreement not in accord therewith is ineffectual.

October 22, 1958

Mr. Emery L. Goodenberger
County Attorney - Madison County
Winaerset, Iowa

Dear Sir:

This will acknowledge receipt of your request of September 15, 1958, for an opinion of the Attorney General relative to certain legal problems therein, stated as follows:

> "A company located on Omaha, Nebraska engaged in the permastone business contracted for 4 or 5 jobs in Iowa in 1958. It has taken approximately 3 to 4 weeks completing these jobs, no one of which is, or will be done in the winter time. About 90% of the company's business is in Nebraska. Straight trucks, station wagons and cars are used in the business in Iowa.
>
> "My question is whether these vehicles are exempt from Iowa registration for any of the following reasons:
>
> "1. Because the employment is seasonal or temporary under Section 321.55 of the 1958 Code of Iowa, or,
>
> "2. Because of some reciprocal agreement between the State of Iowa and Nebraska as is authorized under Section 321.56."

The applicable statutes pertaining to the questions submitted are set out as follows:

1. Section 321.53, Code of Iowa, 1958, provides:

> "A nonresident owner, except as provided in sections 321.54 to 321.56, inclusive, of a private passenger motor vehicle, not operated for hire, may operate or permit the operation of such vehicle within this state without registering such vehicle in, or paying any fees to, this state subject totthe condition that such vehicle at all times when operated in this state is duly registered in, and displays upon it a valid registration plate or plates issued for such vehicle in the place of residence of such owner. A nonresident who leases a vehicle from a resident owner shall not be considered a nonresident owner of such vehicle for the purpose of exemption under this section. This section shall be operative to the extent that under the laws of the foreign country, state, territory, or federal district of such nonresident owner's residence like exemptions and privileges are granted to vehicles registered under the laws, and owned by residents, of this state."

2. Section 321.55, Code of Iowa, 1958, provides in pertinent part that:

> "Every nonresident, in addition to those mentioned in section 321.54, (which provides for registration of certain nonresident carriers) but not including a person commuting from his residence in another state or whose employment is seasonal or temporary, engaged in remunerative employment or carrying on business within this state and owning and operating any motor vehicle, **** within this state, shall be required to register each such vehicle and pay the same fees therefor as is required with reference to like vehicles owned by residents of this state."

3. Section 321.56, Code of Iowa, 1958, establishes a reciprocity board to be located at the seat of Government. Subdivision two (2) of said section,

in pertinent part provides:

> "2. The motor vehicle reciprocity board shall have authority to make reciprocity agreements with the duly authorized representatives of any county, state, territory or federal district exempting the residents of such county, state, territory or federal district using the highways of this state from the registration requirements of this chapter with such restrictions, conditions, and privileges or lack of them as such board may deem advisable provided the residents of this state when using the highways of such other state shall receive exemption of similar kind to a like degree."

You are advised as follows:

Inasmuch as the motor vehicle law does not define the words "seasonal or temporary", such words are to be used in accordance with the common and ordinary meaning ascribed to them.

Funk and Wagnalls New Standard Dictionary of the English language defines seasonal and temporary as follows:

> (a) seasonal - "of, pertaining to, or characteristic of a season or the seasons; as, seasonal changes. * * * * . Employed for a certain season. Casual: said of certain trades. ***."
>
> (b) temporary - "Lasting for a short time only; * * * * . One holding a position temporarily."

A nonresident is defined in Section 321.1(37), Code of Iowa, 1958, to mean:

> " ** * ** every person who is not a resident of this state."

Your first question thus becomes largely one of fact, the answer to which depends upon all the circumstances attendant upon the instant situation.

Section 321.55, supra, contains a contingency clause, to wit:

> "but not including a person commuting from his residence in another state or whose employment is seasonal or temporary, engaged in remunerative employment or carrying on business within this state and owning and operating any motor vehicle, * * * within this state,"

which gives effect to the registration provisions of Section 321.55, supra, by operation of law upon the non-satisfaction of the above contingencies. Therefore, a reciprocity agreement treating of the same matter, not in accordance therewith would be ineffectual. This construction finds support in an official opinion of this office directed to Mr. John J. Kellogg, Harrison County attorney, under date of July 3, 1958.

Your second question is therefore answered in the negative and registration of the motor vehicles mentioned is not exempted on the basis of reciprocity.

Very truly yours

CARL H. PESCH
Assistant Attorney General

CHP:js

RETIREMENT SYSTEMS: Peace officers -- ~~SECTION 97A.6(8) -- INTERPRETATION OF THE WORD "GUARDIAN" APPEARING THEREIN.~~ Whether the word "guardian" appearing in Section 97A.6(8), Code of Iowa, 1958, includes a surviving spouse who is the natural parent of a child of the deceased and who has re-married depends upon the application of Section 668.3, 1958 Code of Iowa. (Peach to Brown, Pub. Safety. Dept., 10/21/58) # 58-10-9

October 21, 1958

Mr. Russell I. Brown
Acting Commissioner
Department of Public Safety
Local

Dear Sir:

Receipt is acknowledged of your letter of September 10, 1958, wherein you request our opinion as follows:

> "Your opinion is requested as to whether or not the word 'guardian' in line four of paragraph 'd', in Section 97A.6, subsection eight, of the 1958 Code of Iowa, includes a surviving spouse who is (the) natural parent of a child of the deceased, and who has re-married."

To facilitate reference thereto, Section 97A.6 (8), Code of Iowa, 1958, is set out in full, as follows:

> "8. Ordinary death benefit. Upon the receipt of proper proofs of the death of a member in service, there shall be paid to such person having an insurable interest in his life as he shall have nominated by written designation duly executed and filed with the board of trustees:
>
> "a. His accumulated contributions and, if the member has had one or more years of membership

service and no pension is payable under the provisions of subsection 9 of this section, in addition thereto

"b. An amount equal to fifty percent of the compensation earned by him during the year immediately preceding his death; or

If there be no such nomination of beneficiary, the benefits provided in paragraphs "a" and "b" of this subsection 8 shall be paid to his estate; or in lieu thereof, at the option of the following beneficiaries, respectively, even though nominated as such, there shall be paid a pension which, together with the acturial equivalent of his accumulated contributions, shall be equal to one-fourth of the average final compensation of such member, but in no instance less than fifty dollars per month;

"c. To his widow to continue during her widowhood; or

"d. If there be no widow, or if the widow dies or remarries before any child of such deceased member shall have attained the age of eighteen years, then to the guardian of his child or children under said age, divided in such manner as the board of trustees in its discretion shall determine, to continue as a joint and survivor pension until every such child dies or attains the age of eighteen; or

"e. If there be no surviving widow or child under age eighteen, then to his dependent father and/or mother as the board of trustees in its discretion shall determine, to continue until remarriage or death."

(underscoring added)

A further examination of Chapter 97A, Code of Iowa 1958, to wit: Section 97A.1 entitled, Definitions of words and phrases, fails to disclose any definition therein pertaining to the word guardian as used in Chapter 97A, supra.

Neither do the Iowa Departmental Rules, 1958, relevant to Peace Officers' Retirement, Accident and Disability System, afford such a definition therein.

Section 668.1, Code of Iowa, 1958, provides that:

"Parents are the natural guardians of the persons of their minor children, and equally entitled to their care and custody."

Section 668.2, supra, provides as follows:

"The surviving parent becomes such guardian, but, if there is none, the district court shall appoint one, who shall have the same power and control over his ward as the parents would have, if living."

Section 668.3, supra, provides that:

"If a minor owns property, a guardian must be appointed to manage the same. If no guardian has been appointed, money due the minor or other property to which the minor is entitled, not exceeding in the aggregate the sum of five hundred dollars in value, may be paid or delivered to a parent of the minor entitled to the custody of the minor or to the natural guardian, or to the person with whom said minor resides, for such minor, upon written assurance verified by the oath of such person that all of such money or property of the minor does not exceed in the aggregate the sum of five hundred dollars; and the written receipt of such person shall be acquittance of the person making such payment of money or delivery of such property."

In view of the foregoing you are advised as follows:

Inasmuch as chapter 97A, Code of Iowa, 1958, does not define the word guardian appearing in Section 97A.6(8), supra, the legislature was content with the existing statutory provisions relating to guardians and their appointment, the same being sufficient and applicable.

The surviving parent becomes the natural guardian of a minor child or minor children. Sections 668.1 668.2, Code of Iowa, 1958.

Section 668.3, supra, makes mandatory the appointment of a legal guardian to manage property owned by a minor. However, the statute further provides that if a legal guardian has not been appointed, money due the minor may be paid to the natural guardian of said minor subject to the aggregate maximum established in Section 668.3, supra, and upon the written assurances, verified by oath, provided therein. See: 1952 Report of the Attorney General page 27, loc. cit. 28.

It is therefore my opinion that the word guardian appearing in Section 97A.6(8), supra, includes the surviving parent who is the natural parent of a child of a deceased member of the retirement system and who has remarried only in the event a legal guardian has not been appointed as required by Section 668.3, supra, and that such parent may receive benefits only in accordance with the aggregate maximum established in Section 668.3, supra.

Very truly yours

CARL H. PESCH
Assistant Attorney General

CHP:js

GENERAL ASSEMBLY: Office not incompatible with County Board of Education

Membership on the County Board of Education is not a lucrative office and a member of the General Assembly can legally be elected or appointed to such Board. (Shannon & Remley, Jones Co. Atty., 10/10/58) # 58-10-20

October 10, 1958

Mr. Howard M. Remley
Jones County Attorney
Anamosa, Iowa

Dear Sir:

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

> "Your opinion is solicited as to whether or not there is such conflict of interest that a member of the General Assembly could not legally be elected to or appointed to fill a vacancy in a County Board of Education."

In reply thereto I advise you that the Department of Public Instruction, in response to a similar request, stated the following:

> "We are in receipt of your letter of November 30 stating that a member of your County Board of Education has been elected Senator and inquiring whether he may lawfully hold both offices.
>
> "Article III, sections 21 and 22, Constitution of Iowa, seems to be the pertinent law on the matter. Section 21 would seem to have no bearing unless Mr. Hoxie was a member of the legislature at the time chapter 273 of the Code was enacted. I very much doubt whether he would be disqualified under section 22 as it can hardly be said that membership on a county board of education is a 'lucrative' office in view of the provision in section 273.8, Code 1954, that: 'They shall serve without compensation, but shall be paid their actual and necessary expenses including travel, in performance of their duties.'

> "I have examined all of the annotations in I. C. A. and the official annotations and have discovered nothing that appears to prevent simultaneous membership in the General Assembly and on a County Board of Education."

The views therein expressed in my opinion are correct and are now confirmed.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

INSURANCE : - Ambulance service furnished on payment of fixed membership fee is not insurance nor does it amount to "membership sales" under Code chapter 503.
(Ltr to Orebaugh, Ins. Dept., 10/22/58)
58-10-10

October 22, 1958

Mr. Samuel E. Orebaugh
Deputy Commissioner
Insurance Department of Iowa
Local

Dear Sir:

Receipt is acknowledged of your letter of September 22, 1958 as follows:

> "The National Ambulance Association of Waukee, Iowa, proposes to provide ambulance service for its members upon payment of a membership fee of $1.00 and an annual fee of $3.00. The ambulance service would be contracted for with independent operators. We enclose a copy of the proposed plan.
>
> We wish to propound the following questions with respect thereto:
>
> 1. Does such a plan constitute the the sale of insurance.
>
> 2. If not, does it come under the provisions of Chapter 503, Code of Iowa."

As you know, the statutes of Iowa contain no general definition of insurance, but, rather, provide for the regulation of a number of specific kinds of insurance. Since "Ambulance service insurance" is not a type expressly regulated by statute, it becomes necessary to examine the various kinds that are regulated to see whether the proposed plan fits within any existing statutory category. Examination of the statutes reveals only section 515.48(10) Code of Iowa, has even the appearance of sufficient

generality to include ambulance service. It deals with the subject of "insurance other than life" and provides that certain insurance companies may, in addition to specified risks:

> §515.48 sub 10 - Insure any additional risk not specifically included within any of the foregoing classes, which is a proper subject for insurance, is not prohibited by law or contrary to sound public policy, and which, after public notice and hearing, is specifically approved by the commissioner of insurance, except title insurance or insurance against loss or damage by reason of defective title, encumbrances or otherwise. When such additional kind of insurance is approved by the commissioner, he shall designate within which c classification of risks provided for in section 515.49 it shall fall.

The trouble with the above section is a "bootstrap" technique would be necessary to bring the proposed plan within it, i.e.; it would be necessary to assume the proposed plan is insurance in order to determine whether it is a class of insurance defined by the quoted statutory provision. The provision includes "any additional risk". Thus, any risk in addition to the primary risks the company purpots to insure. In the proposed plan there are no other primary risks, hence nothing for the ambulance service to be in addition to. Further, it is doubtful that one's potential need for ambulance service is properly classifiable as a "risk".

Group hospitalization plans are insurance because they are expressly made so by our statutes. In the absence of express statutory provision they have generally been held not insurance. See Butterworth v. Boyd, 12 Cal. 2d 140, 82 P.2d 434; Cal. Physician's Service v. Garrison, 28 Cal 2d 790, 172 P.2d 4; State ex rel Fishback v. Univ. Soc. Agency, 87 Wash 413, 151 P.768, Jordan v. Group Health Assoc. 107 F 2d 239. Also see 25 I. L. R. 169, 35 I. L. R. 220. All of the cited authorities

deal with group health plans, holding the same are not insurance in the absence of a statute expressly making them subject to regulation as insurance. There seem to be no cases directly dealing with ambulance services. However, such plans appear quite cimilar to the group hospitalization plans. Since we have a statute (chapter 514) making the hospital plans subject to regulation as insurance but have no such statute covering ambulance service, I conclude the latter is not subject to the insurance laws. This conclusion is consistant with that reached by the attorneys General of Wisconsin and Colorado which you enclosed with your letter.

You also inquire whether such plans come under the provisions of Code Chapter 503. Chapter 503 is titled "Membership Sales" and, according to section 503.2, applies to various types of business associations "which sell, offer for sale, and/or issue to the gublic generally memberships or certificates of membership entitling the holder thereof to purchase merchandise, materials, equipment, and/or services on a discount or cost-plus basis."

> Quoting from the plan enclosed with your letter " ... Each person becoming a member pays a joining fee of One Dollar, plus annual dues of Three Dollars ..."

It thus appears the charge under the plan proposed is of the "fixed fee" rather than "discount" or "cost plus" variety and, on this basis, I conclude chapter 503 does not apply.

In summary, your questions are answered:
1. No.
2. No.

The enclosures forwarded with your letter are returned herewith.

Very truly yours

LEONARD C. ABELS
Assistant Attorney General

LCA:js

Enc.

Inner cards.

JUSTICE OF PEACE: WARRANT OF ARREST - PRELIMINARY INFORMATION: A justice of the peace, under §§754.3 and 762.6, may in his discretion issue either a warrant of arrest or summons. His discretion does not provide that he may not issue a warrant of arrest. (Faulkner & Hudson, Pocahontas Co. Atty., 10/16/58) # 58-10-11

October 16, 1958

Mr. James W. Hudson
Pocahontas County Attorney
Pocahontas, Iowa

Dear Sir:

This is to acknowledge your letter of October 1, 1958, in which you ask this question:

> "My particular question is as to whether it is mandatory or discretionary with a justice to issue a warrant of arrest after a preliminary information has been filed in his court."

A justice of the peace has authority to issue warrants of arrest as shown by Sections 748.1 and 748.2, 1958 Code of Iowa.

Under Section 754.3, 1958 Code of Iowa, it is stated:

> "* * *.
>
> "Whenever the preliminary information charges a misdemeanor the magistrate may in his discretion issue a summons instead of a warrant of arrest. * * *
>
> " * * *.
>
> " * * * Upon such failure to appear, the magistrate shall issue a warrant of arrest for the offense originally charged, and institute proceedings in contempt as provided by chapter 665."

Additionally, under Section 762.6, 1958 Code of Iowa, it is provided:

> "Warrant of arrest. Immediately upon the filing of such information, the justice may, in his discretion, issue a warrant for the arrest of the defendant, directed in the same manner as a warrant of arrest upon a preliminary information, which may be served in like manner."

58-10-11

When Sections 754.3 and 762.6, supra, are read together there appears a conflict. The discretion provided in Section 754.3, supra, is to issue either a warrant of arrest or a summons, whereas, under Section 762.6, supra, this discretion, at first glance, is to issue or not issue a warrant of arrest. However, further considering Section 754.3, supra, it is noted that when a summons is issued, and a failure of appearance results, it then becomes mandatory that the magistrate issue a warrant of arrest for the offense originally charged.

Clearly, both sections pertain to the same subject matter and are, therefore, in pari materia. As such, the two sections must, if possible, be construed together so as to give effect to both. State v. Kroll, 244 Iowa 173, 55 N. W. 2d 251.

Thus, a justice of the peace has discretion to issue either a summons or a warrant of arrest. But, when a summons is issued and no appearance results, it is then mandatory that the justice of peace issue a warrant of arrest. This, of course, presupposes that the accused does not otherwise appear as discussed in 1940 O. A. G. 155.

Very truly yours,

HUGH V. FAULKNER
Assistant Attorney General

HVF:MKB

ELECTIONS: Ballots--
There is no statutory authority for instructing a voter how a ballot may not be marked. (Strauss & Johnson, Webster Co. Atty., 10/15/58) #58-10-12

October 15, 1958

Mr. Arthur H. Johnson
Webster County Attorney
Fort Dodge, Iowa

Dear Sir:

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

> "In the Eleventh Judicial District the three incumbent Republican Judges were nominated by both the Republican and Democrat Conventions. Each Convention nominated a candidate for the remaining judgeship in the district. The names of three candidates appear on both the Republican and Democrat ballot. Four are to be elected.
>
> "In those areas where voting machines are not in use, or where the machines are used but will not permit the locking out of names, may special instructions to the voters be printed upon and made a part of the ballot, and if so, may the ballot be adjudged spoiled if said instructions are not followed? For example, could the following instruction be used: 'Do not vote for more than four and do not vote for the same candidate more than once'?"

In reply thereto I would advise you that there is no authority for placing on the ballot the described form of instruction to the voter. The statute is quite clear in its provisions of what shall appear on the ballot, and placing thereon something not authorized might result in voiding the

58-10-12

ballot. In connection with writing the name of the same candidate twice, it is to be said that it may or may not have bearing on the validity of the ballot or the counting of this particular vote. You will remember that Section 49.41 permits the name of a candidate for judge to appear in more than one column. Comparable situations which might arise have been considered previously by the Department. See copies of opinion appearing in the Report of the Attorney General for 1923-1924 at pages 159 and 158, and Report of the Attorney General for 1919-1920 at page 463.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

PAUPERS: Hospitalization in another County --

~~POOR RELIEF . . . COUNTY HOSPITALS~~. Where indigents having settlement in one county are hospitalized in the county public hospital of another county:

(1) The statute of limitations applies as the function performed is proprietary.

(2) The claim for each indigent is a separate independent account.

(3) The doctrine of laches also may be applicable.

(Opinion to Burdette, Decatur County Atty.) 10/10/58) # 58-10-13

Oct 10, 1958

Mr. Robert W. Burdette
County Attorney
Leon, Iowa

Dear Mr. Burdette:

Receipt is acknowledged of your letter of August 4, 1958, as follows:

> "I am writing this letter to request a formal Attorney General's Opinion on the following:
>
> Over a period of years, indigent persons from Decatur County have been treated at _____ it being the County hospital. A number of these accounts have not been paid. I have raised the question that any of these accounts that are over five years old would be outlawed by the Statute of Limitations.
>
> Attorney for _____ Hospital takes the position that these accounts should be considered together as a bill of the Decatur County Department of Social Welfare and not as individual accounts. Thus, the individual accounts would not be considered outlawed by the Statute of Limitations.
>
> We would appreciate your opinion as to whether or not these would be considered one account, or whether they would be considered as individual accounts of each indigent patient."

- 1 -

As to the general applicability of the statute of limitations to claims by a county, whether or not such claim may be affected seems to depend on whether

It arose out of a governmental activity or a proprietary activity. See Richardson V. Derry, 226 Iowa 178, 284, NW 82, 85.

On the basis of the recent decision of our Supreme Court in the case of Wittmer V. Letts, 248 Iowa 648, 80 N.W. 2d 561, it would seem that the statute of limitations does apply to the type of claims in question for the reason county public hospitals were therein held to be propeietary in function. At page 652 of 248 Iowa, our Court said:

> "Under chapter 347, Code of 1950 (likewise to chapter 347A), there is no legislative mandate that a county shall provide facilities for the sick and infirm, nor do we find any statute that requires the county to provide care for persons, not indigent, whether or not there shall be a county hospital reste entirely with the residents of the county and any assumption of such power is a purely voluntary assumption. Under said chapters, the powers thus assumed are clearly intended, at least primarily, for the private advantage and benefit of the locality and its inhabitants. There is specific authority to fix and collect reasonable fees for the use of the facilities and thus directly compete with private institutions furnishing like facilities.
>
> "... we think the operation of a hospital by a county under the authority granted by chapter 347 or 347A is e proprietary fundtion, at least so far as a pay patient is concerned, and should be considered in the same light as is a private hospital ..." (Emphasis supplied)

Nevertheless, it might be said that the quoted

decision is limited to the hospitalization of pay patients. That as far as indigent patients are concerned there is statutory mandate to care for them. That as to the hospitalization of indigent patients in the county hospital a governmental function is performed and it is given in your letter that the patients on whose account claim is made were indigent. Precedent exists to the effect that care for the indigent sick is a governmental function -- Calomeris V. District of Columbia, 226 F. 2nd 266, thus, it might be argued that the care in question was given in exercise of governmental function by the creditor county and for that reason the statute of limitations has no application.

We are of the opinion that such argument would be held without merit. Insofar as the creditor county is concerned, the indigents in question are "pay" patients. It is their very status as such that gives rise to your inquiry. They may be indigent in fact but if they do not have settlement in the creditor county it is under no compulsion to accept them as patients in its hospital nor, for that matter, is the board of supervisors of the county of settlement under any

compulsion to send its ailing indigents to the county hospital. In other words, when it comes to hospitalizing indigents having settlement in another county, the county with the hospital enters a competitive market, engages in a proprietary activity, and claims arising out of its business transacted upon such market become subject to the statute of limitations.

- IV -

Having concluded that the statute of Limitations is applicable, there remains the matter of "open account" and its effect upon the running of the statute of limitations with respect to the subject claim or claims. Section 614.5, Code 1958 provides:

> 614.5 OPEN ACCOUNT. When there is a continuous, open, current account, the cause of action shall be deemed to have accrued on the date of the last item therein, as proved on the trial.

Decided cases and existing opinions furnish the answer to this portion of the question. At page 15 of the 1944 Report of this office is an opinion on the question whether or not claims for institutional care of an insane person constitute an open continuing account against his responsible relatives. The opinion states at page 16:

> "The case of Scott County v. Townsley, 174 Iowa 192, 156 N.W. 291, held that an action by a county to recover for quarterly charges paid by a county for the support of an insane wife for which the husband is liable, constitute a continuous open account against the husband, and an action to recover thereon is barred after the

> lapse of five years from the date of the last item of all the series of charges.
>
> "It is our opinion the above named case is controlling and that the same principle should be applied in all recovery matters pertaining to all state institutions."

It is to be noted that accounts of the type in question are considered "continuing, open accounts" in terms of <u>each hospitalized individual</u> rather than for a collective group of hospitalized individuals. Thus, in the case you describe if an indigent person from your county has been continously in the public hospital of the other county for a long period of time, the claim for hospitalization <u>of that patient</u> is a continuous open account and the statute commences running from the last date <u>on that one account</u>.

However, if the last item on the account is more than five years old, the fact that <u>some other</u> indigent party from the same county has been subsequently hospitalized does not give new validity to the barred account. It is a separate account. Claims for hospitalization of indigents are accounted for per indigent rather than per county. See section 252.24, code 1958, which is stated in terms of poor persons individually (as distingulshed from collectively) as made applicable by the final paragraph of section 252.22 hereinabove quoted.

Further viewing the problem presented by your question, we are of the opinion the doctrine of laches would probably be held applicable if there were no statute of limitations. In an action between counties to recover the costs of hospitalization of an indigent, Warren County v. Decatur County, 232 Iowa 613, our Supreme Court said at page 616:

> "...If this question could be raised after nearly four years, as is the case here, the question arises; when could counties be barred from litigating the status of those who at one time lived elsewhere in the state?..."

County revenue is raised by annual taxes and budgeted for various purposes. Apart from those instances where bond issues are authorized, counties have no authority to incur long term indebtedness. Where both parties to a dispute or contested claim are county boards of supervisors, both should be particularly aware of such lack of power. Thus, resurrecting of stale claims in such amount as to disrupt the current budget of the county, as accumulated claims gathered from the remote past would certainly tend to do, appears manifestly repugnant to the public policy inhering in statutes providing for annual budgets, annual levies, and

no long term indebtedness other than bonded. We are of the opinion the doctrine of laches could properly be invoked in the type of case you describe, assuming the creditor was lackadaisical in presenting and pressing its claim.

CONCLUSION

In summary, we are of the opinion:

1. The claim in question is of the class where the statute of limitations applies.

2. The claim in question consists of a series of individual and independent accounts rather than one "open, continous account."

3. Even were the statute of limitations inapplicable in the described situation, the doctrine of laches would apply provided the creditor county failed to exercise due diligence in pressing its claim.

Very truly yours

Leonard C. Abels
NORMAN A. ERBE
Attorney General

assistant

[redacted]:LCA:js

October 13, 1958

SCHOOLS: Reorganization, Division of Assets - - - Where Code section 275.28 is followed, no subsequent approval by districts is necessary but where Code section 275.29 is followed, failure to agree necessitates appointment of arbitrators. (Opelo to Parkin, Jefferson Co. Atty., 10/13/58) #58-10-14

Mr. Robert D. Parkin
Jefferson County Attorney
Fairfield, Iowa

Dear Sir:

Receipt is acknowledged of your letter of October 9, 1958, hereinafter set out in pertinent part as follows:

> "I am desirous of receiving from you a personal letter, to be used relative to school reorganization and transfer of funds under Sections #275.28 and #275.29 with the 1958 Code of Iowa.
>
> The events leading to my query are as follows:
>
> (1) The Fairfield Community School District came into being as a reorganized school district on July 1, 1958.
>
> (2) At a meeting held prior to July 20, under a notice given to all independent school districts affected by said reorganization, there was a division made of assets and property valuations, same being agreed upon by all districts represented at said meeting, said valuations and assets based upon a percentage of assessed valuations between said districts.
>
> (3) All districts were represented except one, known as Round Prairie.
>
> (4) Round Prairie district, not being present at said meeting, notified of the percentage of valuations, with the assets on hand to be paid into the reorganized district on the percentages agreed upon.

58-10-14

(5) Round Prairie School Board at this time refuses to pay the 11% agreed upon at said meeting, said 11% being on the assets, or cash balance which they had on hadd at the close of their fiscal school year on July 1, 1958, for the following reasons, to wit:"

* * * * * * * * * * * * * * * *

"It is my interpretation that the Round Prairie School Board was given notice of the meeting, statutory requirements were made, and that the said Round Prairie Board is obligated to pay into the Fairfield Community School District as reorganized the 11% of the cash proceeds on hand at July 1, 1958.

If this is a correct interpretation, the Round Prairie Board informs me that upon my receipt of a personal letter from your office that they are so obligated, that they will then make said payment into the reorganized Fairfield Community School District."

You letter refers to sections 275.28 and 275.29, Code of Iowa. Section 275.28 deals with the situation where distribution of assets and liabilities is settled in advance of actual reorganization as part of the County plan. Although your letter does not so expressly state, it appears part of the territory of the Round Prairie district was included in the new district, otherwise said district would not have any occasion to be involved in any such division of assets. Assuming such to be the case and, further assuming section 275.28 was the section followed, then your conclusion appears correct. Where section 275.28 is the method adopted, the fact that affected districts did not expressly agree to the plan of division of assets is of no significance for no such agreement is provided for. The matter is settled in advance by county plan.

However, your letter also refers to section 275.29. Sections 275.29 and 275.30 provide a method for dividing assets and liabilities where the matter is not settled in advance by county plan. Now, obviously, the matter must be settled either beforehand under

section 275.28 or afterwards under sections 275.29 and 275.30. It cannot be both. Section 275.29 requires a meeting by the several boards and agreement by them. Your letter states the Round Prairie district did not participate in such a meeting and does not agree with the division arrived at. Therefore, if section 275.29 (rather than section 275.28) was the division procedure followed, then the situation has arrived at the point requiring appointment of arbitrators under section 275.30.

In summary: Your letter refers to both section 275.28 and section 275.29. Both cannot apply because each provides an independent method of accomplishing a given end. If section 275.28 was the method used, the districts are bound by the division of assets for the simple reason that such plan of division, when properly made part of a duly adopted county plan of reorganization, does not require their subsequent approval to uphold its validity. However, if section 275.29 was followed, failure to agree necessitates appointment of arbitrators as provided in section 275.30, for the reason that is what the statute provides.

Very truly yours

LEONARD C. ABELS
Assistant Attorney General

LCA:js

~~AUTHORITY OF JUVENILE JUDGE UNDER §232.20, CODE OF IOWA, 1958.~~
COURTS: Juvenile--
An order of a juvenile court revoking a prior commitment and subsequent transfer by mittimus to another institution is not reviewable by this department, but reviewable only in further judicial proceedings. (Presch. to Bd of Control, 10/9/58) # 58-10-15

October 9, 1958

Board of Control
of State Institutions
Local

Attention: Mrs. Esther Wright, Secretary

In Re: Delbert Holling, - (Pottawattamie County)

Dear Mrs. Wright:

Reference is made to your letter of August 29, 1958, with attached enclosures, and to your letter under date of October 1, 1958, relative to the same matter.

It appears from the above correspondence that the problem centers on an interpretation of the authority of a juvenile judge under Section 232.20, Code of Iowa, 1958, in this instance, to revoke an original order of commitment to the Training School for Boys, Eldora, Iowa, and to transfer to the Men's Reformatory, Anamosa, Iowa. The juvenile judge has made such a transfer, basing his action on Section 232.20, supra, as set forth and specified in the mittimus.

As you are well aware, this department does not possess the power of judicial review. The mittimus appears fair on its face, and, being an order of the court, must be obeyed.

If the mittimus of the juvenile judge is to be questioned, this can only be raised in further judicial proceedings.

In regard to the reference, appearing in the enclosed letter from H. L. Miles, Superintendent, Training School for Boys, made to Judge Ardell's prior request for clarification on a similar matter, a search of our records in this office failed to disclose the aforementioned correspondence.

Very truly yours

CARL H. PESCH
Assistant Attorney General

CHP:js

HEADNOTE: TAXATION: PROPERTY TAX: HOMESTEAD TAX CREDIT: Ward is considered owner of property within the meaning of the Homestead Tax Credit Law.

October 10, 1958

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

Dear Mr. Buchheit:

This is to acknowledge receipt of your request for an opinion of this office dated September 18, 1958, stated as follows:

> "A home is purchased with funds of a ward who was under guardianship at the time of said purchase of said home and the title of said property is given as follows:
>
> " 'John Jones, guardian of Mary Green.'
>
> "Under the above set of facts shall the ward Mary Green be granted a homestead exemption for the year of 1958 on said property in which she has made her home prior to July 1st of said year and applied for said exemption prior July 1st of said year.
>
> "In the event that the ward would not be entitled for the homestead exemption under the above set of facts would the guardian, John Jones be entitled to file for said exemption?"

Section 425.11(2), Code of Iowa (1958), defines the word "owner" for the purposes of the Homestead Tax Credit Law. This section reads as follows:

> "425.11 Definitions. For the purpose of this chapter and wherever used in this chapter:
>
> "1. * * *.
>
> "2. The word, 'owner', shall mean the person who holds the fee simple title to the homestead, and in addition shall mean the person occupying as a surviving spouse or the person occupying under a contract of purchase where it is shown that not less than one-tenth of the

> purchase price named in the contract actually has been paid and which contract has been recorded in the office of the county recorder of the county in which the property is located, or the person occupying the homestead under devise or by operation of the inheritance laws where the whole interest passes or where the divided interest is shared only by blood relatives, or by legally adopted children, or where the person is occupying the homestead under a deed which conveys a divided interest where the other interests are owned by blood relatives or by legally adopted children."

This presents a rather unusual situation since the property of a ward is usually held in the name of the ward alone. The only question is whether a ward can be considered "the person who holds the fee simple title to the homestead" where the property is held in the name of another person as guardian for the ward. If the ward in this situation qualifies as an owner at all, it must be as fee simple title holder since the other provisions defining owner for purposes of the Homestead Tax Credit clearly have no application.

The guardian is the conservator of the property of the ward. The relation between the guardian and the ward is that of trustee and cestui que trust. In re Estate of Stude, 179 Iowa 785, 162 N.W. 10 (1917). "The guardian has no beneficial title in the ward's estate, being merely the custodian and manager or conservator thereof." American Jurisprudence, Guardian and Ward, Section 107. Thus, it can be seen in the situation presented that the ward has at least the entire beneficial interest in the property in question.

In Johnson v. Board of Supervisors of Jefferson County, 237 Iowa 1103, 24 N.W.2d 449 (1946), the Supreme Court of Iowa held that a

person owning the equitable title to property may be deemed "the person who holds the fee simple title to the homestead" within the meaning of the Homestead Tax Credit Law. The Supreme Court said:

> "A 'fee simple' estate is one by which the owner holds lands to himself and his heirs forever, without mentioning what heirs, but referring that to his own pleasure or to the disposition of the law. The estate may be either legal or equitable, since the term 'fee simple' is not used to distinguish between legal and equitable estates but is used to denote the quantity or duration of estates, whether the enjoyment is limited or unlimited in duration."

It is, therefore, my opinion that, as the sole holder of the equitable title, the ward is an owner within the meaning of Section 425.11(2), Code of Iowa (1958), and, assuming all other requirements of Homestead Tax Credit Law have been met, the property in question is entitled to the Homestead Tax Credit.

Very truly yours,

Richard J. Brinkman
Special Assistant Attorney General

RJB:fs

CITIES AND TOWNS: Ordinances -- Posting where no newspaper published. (Opinion to Holley, Butler Co. Atty., 10/8/58) # 58-10-17

October 8, 1958

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

Dear Sir:

Receipt is acknowledged of your letter of September 26, 1958, as follows:

> In several of the smaller towns in this county no newspaper is published. The Town Council of one of these small towns in concerned with the problem of properly publishing newly passed town ordinances. Section 366.7, Code of Iowa, 1958, indicated that : ". . . notice of the passage of ordinances shall be given by posting same in three public places within the city or town limits." This would seem to make it mandatory that there be posting.
>
> On the other hand, the Iowa Code Annotated makes reference to some decided cases and Some Attorney General's opinions which seem to indicate that the town council has a choice between posting and newspaper publication in towns where no newspaper is published. The whole problem centers around the question of what kind of notice (published or posted) is necessary to establish the validity of a newly published town ordinance in a small town which has no newspaper. The purpose of this letter is to request an opinion on that point, because it does not appear that the Attorney General's office has ruled on the matter since the 54th General Assembly Revised, Chapter 366 of the Code.

58-10-17

The pertinent words of the provision appearing in both subsections 1 and 2 of section 366.7, Code 1958, are:

> " . . . but in cities and towns in which no newspaper is published notice . . . shall be given by posting same in three public places within the City of Town limits."

The word "shall" is generally construed as mandatory. See annotations under section 4.1, Vols III and IV, Annotations To Code of Iowa and the same section I.C.A.

Strict compliance with statutes providing the manner of giving notice has been required by our Supreme Coutt. See State ex rel Cox v. Consolidated District, 246 Iowa 566 at page 574, 68 N.W.2d 305.

In view of the explicit instructions given by the statute, I concur in the view stated in the first paragraph of your letter: "This would seem to make it mandatory that there by posting."

Very truly yours

LEONARD C. ABELS
Assistant Attorney General

LCA:js

cc: Mr. Max Conrad, Secy.,
League of Iowa Municipalities

COUNTY OFFICERS: County Attorney--

The duty of the County Attorney in performing official services for the Township trustees does not include services incident to and arising out of anticipatory bonds issued under authority of Ch. 359, Code 1958, and if employed by the Township to perform such services they have a legal right to pay therefor. (Strauss to Winkel, Kossuth Co. Atty., 10/8/58) # 58-10-18

October 8, 1958

Mr. Gordon L. Winkel
Kossuth County Attorney
Algona, Iowa

Dear Sir:

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

> "The Township Trustees of various Townships of Kossuth County, Iowa, have contracted with various cities in the County for fire protection under Chapter 359 of the 1958 Code of Iowa. Because of a lack of funds, Section 359.45 was employed and after a considerable amount of work, anticipatory fire protection bonds were issued, sold and delivered to the purchaser.
>
> "Throughout the entire proceedings I, at their request, fully advised them on the law and performed all of the legal services required in connection with the contracts and the bonds. I think it would be safe and conservative to state that this matter required more than 100 hours of time in connection therewith.
>
> "I would like to request an opinion from your office as to whether or not under these circumstances I am entitled to additional pay for the services rendered the Township Trustees throughout this proceeding. I am familiar with the statute that imposes the duty and responsibility of the County Attorney to perform legal matters and offer advice to and for the County officials and, of course, the Township Trustees are County officials in that they are elected by the voters of their Townships. However, it appears to me there is a limit as to where or how far these services must be rendered and it is my opinion

58-10-18

that this service might very well be extra-ordinary service not required without some type of reasonable remuneration.

"Your consideration of the question raised and opinion on the point will be greatly appreciated."

In reply thereto I enclose herewith copy of opinion issued June 25, 1956 to Mr. James M. Demro, Chickasaw County Attorney, for guidance to you in the foregoing situation.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB
Enc.

SCHOOL REORGANIZATION -- Description of boundaries in notice. (Opelo to Buck, Van Buren Co. Atty.) 10/7/58) # 58-10-19

October 7, 1958

Mr. Orvey C. Buck
Van Buren County Attorney
Keosauqua, Iowa

Dear Sir:

Receipt is acknowledged of your letter of September 26, 1958 as follows:

> " We have the following situation on school reorganization: The Southeastern part of Van Buren County, along with parts of Henry and Lee County, have organized into the proposed Harmony School District, under supervision of a joint board. Just West of this proposed district the center part of Van Buren County has organized into the proposed Van Buren Community School District under the County Board. Vernon School District No. 5 was originally divided between these proposed districts, and appealed the decision of the Joint Board approving the boundaries to the State Department of Public Instruction, and also appealed the decision of the County Board to the District Court, asking in both cases that all of said appellant district be placed in the same plan. By stipulation between all interested parties, it was decided that appellant should all be placed in the Van Buren Community School District. The appeal to the State Department of Education was decided on this stipulation, which was made a part of the decision, with the following finding:
>
> > 'It is our opinion that the stipulation as filed should be accepted and approved.

58-10-19

> The County Board of Education should republish the boundary lines in accordance with the stipulation as agreed upon and subject to statutory time for appeal from this decision'

This constituted all of the findings of said State Department.

The District Court appeal above referred to was also decided by stipulation, and the Van Buren Community District, as amended to include all of Vernon District No. 5.

The stipulation and findings of said State Department deprived the Harmony District of any of the appellant district territory. Our problem is whether, in the light of the above quoted portion of the decision of said State Department of Public Instruction and Section 275.15 and 275.16 of the Code of Iowa, it would be necessary to republish the boundaries of said Harmony District, and in the event that republication is necessary, whether said publication would reopen the time to appeal to said State Department."

Although the fact situation you describe is somewhat complicated, it is my understanding that in effect part of the common boundary between two proposed school districts has been settled by decision of the District Court. Apparently, the decision was silent as to the necessity for re-publication of the boundaries. As to which of the various publications provided in chapter 275 is involved in your problem is not clear. However, it appears the publication prior to hearing of objections by the respective County boards was made and the instant situation results from change of boundaries by means of decision of an appeal from such hearing.

If this be the case, it would seem to follow that correct description in the election notice

and on the ballot should suffice. See Smith v. Ind. Dist. of Blairsburg, 179 Iowa 500, 159 N.W. 1027.

Very truly yours

LEONARD C. ABELS
Assistant Attorney General

LCA:js

lower case

~~HEADNOTE~~: TAXATION: PROPERTY TAX, BOARD OF REVIEW: (1) The Board of Review may not change an assessment in other than a real estate assessment year except where a determination has been made that the property in question has changed in value. (2) The Board of Review may recommend that the State Tax Commission reduce an individual assessment in other than a real estate assessment year. (3) Whether a person is experienced in the building and construction field is a matter of fact. (4) The acts of de facto members of a Board of Review are valid. (Brinkmeyer to Miller, St. Ind. Comm., 10/8/58)

October 8, 1958

58-10-21

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

Dear Mr. Miller:

Receipt is hereby acknowledged of your request for an opinion from this department dated September 18, 1958, which request is based upon an inquiry from the County Assessor of Wright County.

As I understand the request, the Wright County Assessor is interested in an opinion on the following matters:

1. With reference to a letter opinion issued by this office, written by Mr. Joseph C. Piper, dated May 7, 1958, two questions are raised. They are:

   A. Whether the first full paragraph appearing on page 8 of said opinion "seems to say that the gate is 'wide open', and assessments can be recommended and made in any year after the assessment year, even though the individual may have made no protest in the year of assessment."

   B. Whether contradictory statements appear in the paragraph commencing on page 7 of said opinion.

2. "This year the member of our Board of Review who was our building and construction authority, was replaced with a man who does not fit into that classification; he is, in fact, a merchant, and was recommended to the Conference Board as one who is acquainted with inventories; and so I would assume he was appointed on that basis.

"There is no objection to this man personally, but our question is one of whether he can legally serve on the Board of Review, and if he does serve, in what position does that place the Board of Review if any question arises on assessment matters?"

With respect to question 1A above, the paragraph contained in the letter opinion of May 7, 1958, to which reference is made, reads as follows:

"In view of the foregoing, it is evident that under the factual situation set forth in your third inquiry, 'A' could again complain to the board of review, in the interim year 1958, that his assessment was obviously unjust and request that the board recommend to the State Tax Commission that it be reduced. As a practical matter, however, such action would undoubtedly be useless for, as previously pointed out, the tax commission has no authority to act except upon the recommendation of the board, and as the board sustained the assessment in 1957, it is doubtful that, in the absence of additional evidence, it would recommend that its 1957 ruling be reversed."

The third inquiry to which this paragraph refers is as follows:

"Supposing that taxpayer 'A' upon receiving his real estate assessment in April, 1957, regarded same to be excessive and filed a protest thereto with his Board of Review in May, 1957, and said Board after an oral hearing sustained the assessment, and 'A' did not appeal to the District Court in 1957. However, he again files a protest to his real estate assessment for 1957, with his Board of Review at its May, 1958, session, and does not claim or show any change in value of his real property, but merely renews his previous claim that the 1957 assessment was too high. Is that the sort of case that the Board of Review is required to consider in the year 1958, under the provisions of Code Section 442.2? If it is, then further supposing that the Board of Review in 1958, grants 'A' a reduction in his real estate assessment, is it possible for said Board to finally act on the reduction, or must it recommend a reduction to the State Tax Commission, and is that the sort of case that the provisions of subsection 10, Code Section 421.17 contemplate must be acted on by the Commission?

"Said subsection 10 provides in part as follows:-

" 'The state tax commission shall have the power to

> correct errors or obvious injustices in the assessment of any individual property, but it shall not reduce the valuation of any individual property except upon the recommendation of the local board of review and no order of the state tax commission affecting any valuation shall be retroactive as to any reduction or increase in taxes payable prior to January 1 of the year in which such order is issued, or prior to September 1 of the preceding year in cities under special charter which collect their own municipal levies. Any increase in individual valuations ordered by the tax commission shall be subject to right of appeal to the courts under the same procedure as that provided in the case of increases made by local boards of review."

> "The question arises as to just what cases involving a reduction in valuation the Board of Review cannot finally dispose of, and which they can only make a recommendation that the State Tax Commission order the reduction in valuation. It would seem possible under provisions of section 442.2, that even though the Board of Review found that an assessment should be reduced, its action in sustaining the reduction would be final, and such cases would not have to be submitted for final approval of the State Tax Commission under subsection 10, Code Section 421.17."

In answer to the question presented in 1A above, it is quite clear that the Board of Review may not change the assessment previously made. If, however, the Board of Review is of the opinion that the assessment should be reduced, said Board may recommend to the State Tax Commission that the assessment on this property be reduced by the State Tax Commission. If the State Tax Commission is of the opinion that the assessment is an error or results in an obvious injustice, the Commission may reduce the assessed valuation of this individual property. Without the recommendation of the Board of Review, the State Tax Commission is powerless to reduce the assessment of any individual property. The power given to the State Tax Commission to

reduce individual assessments is not by the terms of the statute limited to real estate assessment years.

In answer to the question presented in 1B above, this writer is unable to find contradictory statements in the paragraph in which it is urged that such statements are made. If the statements which are deemed contradictory can be identified, a clarifying opinion will, of course, be issued.

The following provision, found in Section 442.1, Code of Iowa (1958), is relevant to the second inquiry. This provision reads as follows:

> " * * *. 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. * * *."

This section also provides that the members of the Board of Review shall be selected by the County Conference.

In presenting the question, the following statement appears:

> "I would assume that he was appointed on that basis."

Since this statement is based on assumption rather than fact, the question cannot be intelligently answered. The statute provides that at least one person selected to serve on the Board of Review shall be experienced in the building and construction field. Whether a person is so experienced is primarily a matter of fact, and, since the County Conference is charged with the responsibility of appointing members to the Board of Review, this matter of fact should be determined by the County Conference when the appointment

is under consideration. Once this person is appointed by the County Conference to serve on the Board of Review and he enters upon his duties as a member of the Board of Review, the only way the person so selected could be removed, other than for malfeasance, misfeasance or nonfeasance, in office would be by quo warranto proceedings.

It is the function of the appointing body to determine whether the person under consideration is experienced in the building and construction field. Insufficient facts have been presented to determine whether or not, as a matter of law, the person recently appointed to the Wright County Board of Review has no experience in the building and construction field.

In answer to the second part of this question, you are referred to the case of Rich Manufacturing Co. vs. Petty, 241 Iowa 840, 42 N.W.2d 80 (1950), wherein it is held that the actions of de facto officers on a City Board of Review are as valid as acts of de jure officers.

Very truly yours,

Richard J. Brinkman
Special Assistant Attorney General

RJB:fs

TAXATION: Personal property --
~~HEADNOTE~~: A transfer by a mortgagor to a mortgagee of the mortgaged goods in satisfaction of the mortgage debt is not a sale in bulk within the meaning of Section 445.31, Code of Iowa (1958). (Brockmeyer Hudson, Pocahontas Co. Atty.) 10/2/58) # 58-10-22

October 2, 1958

Mr. James W. Hudson
Pocahontas County Attorney
Pocahontas, Iowa

Dear Mr. Hudson:

This is to acknowledge receipt of your letter of August 27, 1958, in which you request an opinion upon the following matter:

> "On January 1, 1957 a stock of merchandise in a grocery store was assessed in the name of A, the owner and operator of said store. On February 27, 1957 a chattel mortgage was executed by A to B securing an indebtedness by the entire stock of merchandise in said grocery store. In December of 1957 A closed his store voluntarily, and B took all of the stock of merchandise in satisfaction of his chattel mortgage above referred to. The personal property tax for the year 1957 due and payable in 1958 has never been paid, which tax includes this stock of merchandise and also the store fixtures. B did not foreclose its chattel mortgage but merely repossessed the stock of merchandise, as B is the supplier of said merchandise.
>
> "From reading the opinion of the Attorney General's Report in the 1940 Report of Attorney General at page 185, it is quite plain that the lien afforded by Section 445.31 does not extend to the fixtures in such grocery store. However, I would like to know if such transaction above referred to would constitute a sale in bulk of this stock of merchandise so as to give Pocahontas County a prior lien on said merchandise under Section 445.31."

Section 445.31, Code of Iowa (1958) provides that personal property taxes on stocks of goods or merchandise shall continue a lien on such property "when sold in bulk". The only question here in whether a transfer of the mortgaged property by the mortgagor to the mortgagee in satisfaction of a chattel mortgage is a sale in bulk

so that the personal property tax lien continues on the property after the sale.

An opinion of the Attorney General found on page 185 of the 1940 Report of the Attorney General deals with a situation quite similar to the one at hand. This opinion stated that property taken by the landlord in payment of a landlord's lien did not result in a sale in bulk within the meaning of what is now Section 445.31, Code of Iowa (1958).

The arrangement here is one where the stock had been mortgaged and the mortgagee agreed to take the mortgaged property in satisfaction of the debt. An arrangement of this type has been upheld by the courts. It is merely a transfer in satisfaction of a mortgage and could not be considered a sale in bulk. For this reason the lien created by Section 445.31 does not continue upon a transfer by a mortgagor to a mortgagee in satisfaction of the mortgage debt and in addition thereto the mortgagee would not have any personal liability for the 1957 taxes upon this stock of goods.

Very truly yours,

Richard J. Brinkman
Special Assistant Attorney General

RJB/bjf

~~HEADNOTE:~~ TAXATION: INHERITANCE TAX.--The Treaty between the United States and the Federal Republic of Germany entered into force on July 14, 1956, prevents the State of Iowa from collecting the rate of inheritance tax prescribed by Section 450.11, Code of Iowa (1958), with respect to property passing from persons dying on or after that date to persons who are resident nationals of the Federal Republic of Germany.
(Brunkenau to Miller, St. Tax Comm., 10/6/58)

October 6, 1958 # 58-10-23

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

Dear Mr. Miller:

This is to acknowledge receipt of your letter of August 7, 1958, in which you request an opinion of this office stated as follows:

> "The question in this case has to do with the meaning of a treaty between the Federal Republic of Germany and the United States.
>
> "This treaty became effective July 15, 1956. The question is whether it applies to inheritance tax and whether or not it provides that German residents are subject to the same rate of tax as residents of Iowa. The old treaty gave German residents the same rates on the transfer of real estate, but allowed the double rate on the transfer of property. The attorneys claim that the new treaty provides for the same rate of tax on both real estate and personal property."

The applicable provisions of the Treaty to which you refer are as follows:

> "ARTICLE IX
>
> "1. * * *.
>
> "2. * * *.
>
> "3. Nationals and companies of either Party shall be accorded national treatment, within the territories of the other Party, with respect to acquiring property of all kinds by testate or intestate succession or under judicial sale to satisfy valid claims. Should

they because of their allenage be ineligible to continue to own any such property, they shall be allowed a period of at least five years in which to dispose of it.

"4. Nationals and companies of either Party shall be accorded, within the territories of the other Party, national treatment and most-favored-nation treatment with respect to disposing of property of all kinds."

"ARTICLE XI

"1. Nationals of either Party residing within the territories of the other Party, and nationals and companies of either Party engaged in trade or other gainful pursuit or in scientific, educational, religious or philanthropic activities within the territories of the other Party, shall not be subject to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions, activities or any other object, or to requirements with respect to the levy and collection thereof, within the territories of such other Party, more burdensome than those borne in like situations by nationals and companies of such other Party.

"2. With respect to nationals of either Party who are neither resident nor engaged in trade or other gainful pursuit within the territories of the other Party, and with respect to companies of either Party which are not engaged in trade or other gainful pursuit within the territories of the other Party, it shall be the aim of such other Party to apply in general the principle set forth in paragraph 1 of the present Article.

"3. Nationals and companies of either Party shall in no case be subject, within the territories of the other Party, to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions, activities or any other object, or to requirements with respect to the levy and collection thereof, more burdensome than those borne in like situations by nationals, residents and companies of any third country.

"4. In the case of companies and of nonresident nationals of either Party engaged in trade or other gainful pursuit, within the territories of the other Party, such other Party shall not impose or apply any tax, fee or charge upon any income, capital or other basis in excess of that reasonably allocable or apportionable to its territories,

nor grant deductions and exemptions less than those reasonably allocable or apportionable to its territories. A comparable rule shall apply also in the case of companies organized and operated exclusively for scientific, educational, religious or philanthropic purposes.

"5. Each Party reserves the right to: (a) extend specific tax advantages on the basis of reciprocity; (b) accord special tax advantages by virtue of agreements for the avoidance of double taxation or the mutual protection of revenue; and (c) apply special provisions in allowing, to nonresidents, exemptions of a personal nature in connection with income and inheritance taxes."

Section 450.11, Code of Iowa (1958), reads as follows:

"Alien beneficiaries. When property or any interest therein shall pass to heirs, devisees, or other beneficiaries subject to the tax imposed by this chapter, who are aliens, nonresidents of the United States, the same shall be subject to a tax of twenty percent of its true value except when such foreign beneficiaries are brothers or sisters of the decedent owner or are within the class described in subsection 1 of section 450.10, when the rate of tax to be assessed and collected therefrom shall be ten percent of the value of the property or interest so passing."

The question here is whether the Treaty entered into by the United States and the Federal Republic of Germany is in conflict with Section 450.11, Code of Iowa (1958).

Where the statute of a state of the United States and a treaty entered into between a foreign power and the United States is in conflict, the treaty is paramount law and will suspend or override the conflicting state statute. Welander v. Hoyt, 188 Iowa 972, 176 N.W. 954 (1920). Another principle of law with respect to treaties is that a treaty is to be liberally construed so as to carry the intention and purpose of the parties. Thus, if a treaty is susceptible

of two constructions, one of which restricts certain rights and the other favorable to them, the latter construction is to be preferred. American Jurisprudence, Treaties, Section 34.

With these principles in mind, it is necessary to construe the provisions of the Treaty above-quoted to determine whether the twenty per cent inheritance tax rate prescribed by Section 450.11, Code of Iowa (1958), should apply where the beneficiary is a national and resident of the Federal Republic of Germany.

Article IX, Section 3, of the Treaty evidences that the parties to the treaty had under consideration the acquisition of property by testate or intestate succession. Article XI of the Treaty deals specifically with taxes. Article XI, Section 2, by reference to Article XI, Section 1, provides that nonresident aliens "shall not be subject to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions, activities or any other object" greater than those borne in a like situation by nationals of this country. Article XI, Section 5, refers specifically to inheritance taxes. Thus it is noted that the treaty deals with testate and intestate succession to property and, in an exception clause, the treaty specifically mentions inheritance taxes.

The inheritance tax is a tax on the right to succeed to property. It is not a tax applied to income, capital, transactions or activities. However, keeping in mind that treaties are to be construed liberally, it does come within the term "any other object", that object being the right to succeed to property.

It is, therefore, the opinion of this office that the Treaty between the United States and the Federal Republic of Germany entered into force on July 14, 1956, prevents the State of Iowa from imposing the rate of tax prescribed by Section 450.11, Code of Iowa (1958), and in accordance with Article XI, Section 2, read in conjunction with other applicable provisions of said treaty, the State of Iowa may only impose the same rate of inheritance tax with respect to property passing to persons who are residents and nationals of the Federal Republic of Germany as is imposed with respect to property passing to nationals of the United States. Since the liability for inheritance tax accrues immediately upon the death of the decedent, the favored treatment granted by this treaty only applies to property passing by reason of the death of a person dying on or after July 14, 1956.

Very truly yours,

Richard J. Brinkman
Special Assistant Attorney General

RJB:fs

lower case

~~HEADNOTE~~: TAXATION: PROPERTY TAX, HOMESTEAD TAX CREDIT. Where property is conveyed to daughter subject to payment of $1,200 per year to mother and daughter occupies property, homestead tax credit is allowable assuming all other requirements are met for reason that daughter is an owner within meaning of Section 425.11, Code of Iowa (1958). (Brinkman to Hindt, Lyon Co. Atty., 10/7/58) # 58-10-25

October 7, 1958

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

Dear Wick:

This is to acknowledge receipt of your request for an opinion dated September 16, 1958, stated as follows:

> "I would like an informal opinion upon the following question: 'F. H. died intestate seized of a 160 acre farm and left his surviving spouse M. H. and one child, a married daughter, M. H. S. M. H. S. is living on the farm with her husband, J. S. M. H. lives in town. All parties joined in a deed of the farm to M. H. S. except reserving and conveying to M. H. a life annuity for $1200 per year commencing January 1, 1959 and payable on or before December 31st of each year. Payments unpaid at the death of M. H. are forgiven and avoided and the property shall become the absolute property of M. H. S. Is M. H. S. entitled to a homestead tax credit on this real estate.'"

The definition of owner within the meaning of the Homestead Tax Credit Law is found in Section 425.11, Code of Iowa (1958). Among the various classes of persons described as owners, only two such classes have any possible relevancy to the inquiry. They are "the person who holds the fee simple title to the homestead" and "where the person is occupying the homestead under a deed which conveys a dividend interest where the other interests are owned by blood relatives or by legally adopted children".

A copy of the instrument creating the interest to which you refer has not been provided, however, from the facts stated, it would appear that M. H. S. is the fee simple title holder and that the property is subject to an equitable charge in the amount

of $1200 per year during the lifetime of M. H. This being the case and assuming all other requirements of the Homestead Tax Credit Law have been met, a Homestead Tax Credit should be allowed to the property to which you refer.

If the instrument is worded in such a manner that a legal interest is granted to M. H., I am of the opinion that a Homestead Tax Credit should also be allowed with respect to the property since, in that event, the situation is one where the person occupying is the holder of a part interest where the only other legal interest is owned by a blood relative.

I trust that the above sufficiently answers your inquiry. Personal regards,

Very truly yours,

Richard J. Brinkman
Special Assistant Attorney General

RJB/bjf

October 7, 1958

MOTOR VEHICLES - CHAPTER 321, 1958 Code of Iowa. Combination of vehicles.
1. A "combination of vehicles" cannot exceed 50 feet in overall length. Section 321.457, supra.
2. A "combination of vehicles" must comply with the combined gross weight requirements corresponding to the distance between the extreme axles of the combination. Section 321.463,
3. All other pertinent requirements must be met, in addition to the foregoing as specified.

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

Dear Sir:

This will acknowledge receipt of your request of September 20, 1958, for an official opinion of this office relative to the following question:

"Is it permissible under chapter 321 to pull a four-wheel 'jeep' behind a converted school bus, such school bus having been permanently fitted for sleeping and camping quarters and not used for school purposes in any manner whatsoever, if the over-all length of the converted school bus and four wheel 'jeep' does not exceed 50 feet?"

Section 321.457, 1958, Code of Iowa, in pertinent part provides that:

"The maximum length of any motor vehicle or combination of vehicles, * * * * * * *
* * * * * * * * * * * * * * *
shall be as follows:

3. No combination of truck tractor and semi-trailer, <u>nor any other combination of vehicles coupled together</u>, unladen or with load, shall have an over-all length, inclusive of front and rear bumpers, in excess of fifty feet."(underscoring added)

Section 321.1 (23), Supra, provides as follows:

"The following words and phrases when used in this chapter shall, for the purpose of this chapter, have the meanings respectively ascribed to them.

"23. 'Combination' or 'combination of vehicles' shall be construed to mean a group consisting of two or more motor vehicles, or a group consisting of a motor vehicle and one or more trailers, semi-trailers or vehicles which are coupled or fastened together for the purpose of being moved on the highways as a unit." (underscoring added).

The size or length limitation is not the only consideration relevant to the instant situation. The gross weight limitations as set out in Section 321.463, 1958 Code of Iowa, must also be considered and complied with. The "combination of vehicles" must not be in excess of the amount given in the table set out in Section 321.463, supra, such limitations being based on the basis of the distance in feet between the extreme axles of the said vehicles or bombination of vehicles measured longitudinally to the nearest foot or fraction.

It is therefore my opinion that if the overall length of the "combination of vehicles", to which you make reference, does not exceed 50 feet, and the gross weight of the "combination of vehicles" does not exceed the maximum set forth in Section 321.463, Supra, said maximum appearing opposite the corresponding distance between the extreme axles of said combination, and providing that all other pertinent requirements have been met, to wit: maximum width of eight (8) feet, Section 321.454, Code of Iowa, 1958; and maximum height, Section 321.456, Code of Iowa, 1958, the "combination of vehicles" in the instant case, may be operated upon the highways of the State of Iowa.

Very truly yours

CARL H. PESCH
Assistant Attorney General

CHP:js

ELECTIONS: Vacancy in nomination--

A vacancy in the nomination for county office may be filled by the County Central Committee and the name of the vacancy nominee can be certified by the Committee to the County Auditor any time before election. The name of the vacancy nominee may be placed upon the ballot under the provisions of §§49.58, 49.59, 49.60, 49.61 and 49.62, Code 1958. (Strauss to Sturges, 10/7/58) 58-10-28

October 7, 1958

Mr. William S. Sturges
Plymouth County Attorney
LeMars, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 29th ult. in which you submitted the following:

> "I believe that you have had some correspondence from J. Henry Lucken, State Representative from Plymouth County, and from Henry Dirks, committeeman and candidate for Board of Supervisors, regarding the placing of Mr. Dirks' name on the ballot for this coming election. I have discussed this matter with Mr. Dirks, and I explained to him that your office could not give him an opinion. This matter has been a source of considerable irritation here, and I would like to have an official opinion on the following facts:
>
> "One Cliff Noble was duly nominated at the Primary Election by the Republican Party as a candidate for the office of County Board Supervisor for the term commencing January, 1959. On June 27, 1958 the Republican County Convention was held, and subsequent thereto the said Cliff Noble resigned and filed his requisite affidavit with the County Auditor requesting that his name be withdrawn as a candidate, because of ill health. Mr. Noble has since died. On July 24th the Republican Party Central Committee for Plymouth County, Iowa convened and named one Henry Dirks as its candidate to fill the vacancy created by said Cliff Noble's resignation and withdrawal, in accordance with the provisions of Section 43.78, 1958 Code. However, no certification of said nomination, as required by Section 43.88, 1958 Code, as to this date

58-10-28

ever been filed with the County Auditor. On September 11, 1958 the ballots were submitted to the printers and are now printed.

"I would like to have an official Attorney General's opinion on the following questions based on the above:

"1. Can the Central Committee now certify the said nomination to the County Auditor?

"2. Can the name of Henry Dirks, as candidate for Supervisor, be placed on the ballot under the provisions of Sections 49.59 or 49.60? or any other provision of the Code?"

In reply thereto I advise as follows.

1. In answer to your question #1 I advise that certification of the Central Committee of a nominee can be made any time before election. This is the holding of opinion in the Report of the Attorney General for 1930 at page 350, copy of which is attached. Sections 776 - 780, inclusive, Code 1927, relied upon in that opinion are now numbered Sections 49.58, 49.59, 49.60, 49.61 and 49.62, Code 1958.

2. In answer to your question #2 I would advise you that under the foregoing designated sections the name of Henry Dirks can be placed upon the ballot.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

IOWA STATE HIGHWAY COMMISSION

AMES, IOWA

SECONDARY ROADS: (1) Farm lanes and private roads do not come under code chapter 311. (2) The county need not provide a driveway for every lot in a subdivision. Lyman Ames, Meyer, Winneshiek Co. Atty.: 10/31/58) #58-11-15

October 31, 1958

Mr. Isadore Meyer
Winneshiek County Attorney
Decorah, Iowa

Re: Private roads and driveways

Dear Mr. Meyer:

I have your letter of October 1[illegible], 1958, in which you ask our opinion on whether the roadway described in your letter has to be brought to grade and surfaced by the county under the provisions of Chapter 311 of the 1958 Code.

Chapter 311 is applicable only to the improvement and bringing to grade of secondary roads already in existence. It would appear from your description that the roadway you describe does not have the status of a secondary road. It has never been dedicated to and accepted by the county. It serves only one person. It certainly does not come up to the standards of a public roadway as established in the Attorney General's Opinion, 1956, page 9.

It is our opinion that the described roadway is nothing more than a farm lane and cannot be considered a county road. Therefore, the county is not required to bring this road to grade and Chapter 311 does not apply to it.

You also ask if more than one landowner is affected on such a private road and which has never been dedicated, would Chapter 311 control. My answer to this is no because Chapter 311 does not apply to private roads; only to established secondary roads.

You also ask our opinion as to whether the county is required to put in a driveway for each lot of a subdivision, there being no county zoning or access control in effect at the present time. It is our opinion that the county is not required to build a driveway for each lot of the subdivision mentioned in your letter. Since there is no access control on this road, Chapter 306A does not apply. The owner of the subdivision should construct the driveways in accordance with county specifications, but there is no requirement in the law for the county to build and pay for these driveways.

58-11-15

60M 7-58 11568

IOWA STATE HIGHWAY COMMISSION

AMES, IOWA

Through the years as a matter of public policy the Highway Commission on primary roads, and the counties on secondary roads, have re-constructed driveways when they disrupted the old driveways on construction. The problem you describe is on an established county road and this man is asking the county to pay for part of his subdivision costs by building the driveways.

I hope this satisfactorily answers your questions.

Yours very truly,

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

CJL:js

NOTARIES PUBLIC: A corporate officer ~~and~~ who is also a notary is barred from acknowledging a corporate statement executed by him to any other than the corporation by reason of personal interest in the transaction. (Strauss to Hall, I.C.C., 11/7/58)

58-11-1

November 7, 1958

Mr. John A. Hall
Director of Locomotive Inspection
Interstate Commerce Commission
Bureau of Safety and Service
Washington 25, D. C.

Dear Sir:

Referring to yours of the 30th in which you state the following:

> "Reference is made to the Locomotive Boiler Inspection Act, Title 45, U. S. C., Sections 22-34, inclusive, wherein it is provided that a common carrier engaged in interstate commerce by railraod and subject to the Interstate Commerce Act shall, in accordance with the rules and regulations prescribed by this Commission pursuant to said Act, file under oath, reports of certain inspections and repairs made to its locomotives. Recently we have had occasion to receive from such a carrier operating in Iowa, reports made out by an officer of the carrier who was also the notary public before whom attestation as to their authenticity was made. In other words, the person preparing the reports and the notary are one and the same.
>
> "It is our understanding that a notary is a state officer and that ordinarily such an officer cannot administer an oath to himself in the absence of express statutory authority. Will you therefore kindly advise, if under Iowa law, the person preparing a paper and the notary before the attestation is made may be one and the same person."

I advise. While there is no statute so providing, the Department is committed to the rule that a notary cannot certify to

or act in a matter in which he has a personal interest. Whether an acknowledgment made by a corporate officer of a statement made in his official capacity is within the foregoing rule does not appear to have been previously passed upon in Iowa. However, applying the rule of expressio unius est exclusio alterius to this situation amplified by the provisions of Section 77.10, 1958 Code, providing as follows:

> "Corporation employee as notary. Any employee of a corporation who is a notary public and who is not otherwise financially interested in the subject matter of said instrument, is hereby authorized to take acknowledgments of any person on an instrument running to such corporation, regardless of the title or position that said notary shall hold as an employee of such corporation."

I am of the opinion that such an acknowledgment taken by such a corporate officer of his own statement on an instrument running to any other than the corporation is within the rule that he has a personal interest in the transaction which would bar him from acknowledging his own signature.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

PUBLIC OFFICERS & EMPLOYEES; Qty and County Engineers

~~COUNTY ENGINEERS. CITY ENGINEERS.~~ Whether a person is designated as an "acting" city engineer or an "acting" county engineer, he must still be qualified as a registered engineer under Chapter 114, 1958 Code of Iowa. (Swanson to Dean, Bd. Eng. Exam., 11/25/58) # 58-11-2

November 25, 1958

Mr. Joseph M. Dean, Chairman
State Board of Engineering Examiners
B u i l d i n g

Dear Mr. Dean:

Re: Qualifications of acting city engineers and acting county engineers.

Reference is made to your recent request set forth as follows:

> "Ruling is hereby requested on the following questions which have been propounded as to whether or not a violation of Chapter 114 (1958 Code of Iowa) exists under a set of conditions as follows:
>
> "1. A person (not a registered engineer) appointed to position as ACTING City Engineer.
>
> "2. A person (not a registered engineer) appointed to position as ACTING County Engineer."

Section 114.1 of the 1958 Code of Iowa is quite specific in its requirement that those practicing professional engineering shall be properly registered. This Section reads as follows:

> "Registered engineers and surveyors. No person shall practice professional engineering or land surveying in the state unless he be a registered professional engineer or a registered land surveyor as provided in this chapter, except as permitted by section 114.26."

The duties of a City Engineer are not specifically outlined in any one section of the Code. Section 368A.20 states that the City Engineer shall have such powers and perform such duties as are prescribed by law or ordinance. Various sections of the Code spell out the duties of the City Engineer (see Sections 391.52, 396.17) so that there can be no question but what the City Engineer is practicing professional engineering within the state.

58-11-2

The 1958 Code of Iowa in Section 309.17 specifically states that the County Engineer shall be a registered civil engineer. This office has previously ruled that an acting County Engineer must be registered under the requirements of Chapter 114 of the Code of Iowa. See A. G. O. dated January 20, 1949.

It is therefore the opinion of this office that whether a person is designated as an "acting" City Engineer or an "acting" County Engineer, he must still be qualified as a registered engineer under Chapter 114, 1958 Code of Iowa.

Very truly yours,

DON C. SWANSON
Assistant Attorney General

DCS:MKB

CRIMINAL LAW: JUSTICE OF PEACE: COURTS: Appeal of a non-indictable misdemeanor from justice of peace court to district court is authorized by §§762.35, 762.43, and 762.48, 1958 Code of Iowa.
(Faulkner to Norelius, Crawford Co. Atty., 11/20/58)
58-11-3

November 20, 1958

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

Dear Sir:

As set out in your letter of November 18, 1958, you are confronted with this situation:

> "A defendant charged with a non-indictable offense before the Justice of the Peace residing in our county seat, has applied for a change of venue. Pursuant to the provisions of Section 762.14 of the 1958 Code of Iowa, the Justice of the Peace is directed to transfer all the original papers to the 'next nearest Justice in the county'. Unfortunately, this particular Justice of the Peace is the only acting Justice of the Peace in Crawford County.
>
> "It appears from reading State vs. Jamison, 100 Iowa 342, that the Justice of the Peace cannot send this criminal case to the Mayor of our county seat.
>
> "I respectfully request your opinion advising me what court would have jurisdiction of an appeal of a non-indictable offense from a Justice of the Peace who is the only acting Justice of the Peace in the county.
>
> "I would also like to be advised if the appeal could lawfully be sent to the District Court in and for our county."

Under Sections 761.2 and 761.3, 1958 Code of Iowa, it appears that a justice of peace could transfer a preliminary examination to a mayor. Both sections refer to "magistrate". By statutory definition, Section 748.1(2), 1958 Code of Iowa, both a mayor and a justice of peace are magistrates.

58-11-3

However, Sections 601.35 and 762.14, 1958 Code of Iowa, authorize a transfer of venue of the place of trial only to the next nearest justice in the township or county. And, as pointed out in your letter, State v. Jamison, supra, apparently precludes transfer to a mayor from a justice of peace.

Specifically, your question is what court has jurisdiction of the "appeal" of a non-indictable misdemeanor. Sections 762.35, 762.43, and 762.48, 1958 Code of Iowa, authorize such an appeal to the district court. Thus, you are advised appeal from the justice of peace court to district court is authorized.

Very truly yours,

HUGH V. FAULKNER
Assistant Attorney General

HVF:MKB

BEER AND MALT LIQUORS: Buildings--
Determination of standards for building for Class A beer permit must be made from reading of §§124.8, 124.27 and 124.28, 1958 Code.
(Swanson to McCleary, St. Tax Comm., 11/24/58)
58-11-4

November 24, 1958

Mr. Neal J. McCleary, Director
Cigarette and Beer Revenue Dept.
State Tax Commission
L o c a l

Dear Sir:

Reference is made to your letter of November 5, 1958, in which you state as follows:

> "Would you furnish this Department with an opinion on the requirements of a building for a Class 'A' Beer Permit.
>
> "I personally inspected this building in Ottumwa, Iowa. It is an old ordinary automobile garage, not large enough for a truck to drive into. This building has been approved by the Fire Marshal at Ottumwa.
>
> "This application for a permit is a partnership with the home base in Oskaloosa. They want this base in Ottumwa to leave their truck overnight. They assured me that they will not be handling anything but bottled or can beer."

Chapter 124 of the 1958 Code of Iowa does not specifically set out the requirements for the building of a Class A permittee. Certain standards are set out, however.

Section 124.8 uses the expression "and is a safe and proper building".

Section 124.28 requires a separate license for each place of business "wherein such beer is stored, warehoused, or sold".

Section 124.27 requires the maintenance of books and records which "shall be at all times open to inspection by the state tax commission or its authorized representative."

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Sections 124.25 and 124.26 have been previously interpreted to mean that the beer must actually be warehoused and physically available for inspection and imposition of the barrel tax.

As you can see, it would be impossible for this office to set out to enumerate all possible variations which might arise, but if these standards are met you may proceed with the processing of the application.

Very truly yours,

DON C. SWANSON
Assistant Attorney General

DCS:MKB

STATE INSTITUTIONS: Oakdale Sanatorium --
~~BOARD OF REGENTS: SANATORIUM: TUBERCULOSIS:~~ The superintendent of the Oakdale Sanatorium may, under §254.7, 1958 Code of Iowa, have a tuberculous patient segregated and forcibly detained if such patient has violated state law (see §§139.31 and 139.32), a department of health rule, or an institution rule by filing a complaint and obtaining a court order authorizing such action. (Faulkner to Dancer, Secy., St. Bd. of Regents, 11/19/58) # 58-11-5

November 19, 1958

Mr. David A. Dancer, Secretary
State Board of Regents
L o c a l

Dear Sir:

Your letter of October 30, 1958, to Mr. Erbe has been referred to me for reply. The question is as follows:

> "Dr. W. M. Spear, Superintendent of the State Sanatorium, Oakdale, Iowa, reports that he occasionally has difficulty with patients who are committed by Court Order to the State Sanatorium who violate the Order by leaving the Sanatorium without permission.
>
> "As an example, there is a patient who was committed to the Sanatorium from Polk County. The patient leaves without permission. He generally comes to Des Moines where he is picked up by the County Sheriff who brings the patient back to the Sanatorium.
>
> "Dr. Spear has asked me to present to you the question whether he has legal authority to confine such a patient in order to assure that he will not leave without permission."

Section 254.7, 1958 Code of Iowa, provides:

> "If any patient being treated for tuberculosis at the state sanatorium . . . shall refuse to comply with the laws of the state or rules for the government of the institutions named herein, and shall persistently, or carelessly, or maliciously violate such laws or rules so as to menace the welfare of said institution or to interfere with the administration, order, or peace of said institution, then upon complaint of the superintendent . . . such person may, by order of the district court, be segre-

> gated and forcibly detained in a ward or room, for such purpose, and for such period of time as may be deemed advisable by the court, to the end that such person may be properly treated, and the population of such institution may be protected and the decorum maintained." (Underscoring added)

Under Sections 139.31 and 139.32, 1958 Code of Iowa, it is stated:

> "139.31 Exposing to contagious disease. Any person who knowingly exposes another to infection from any communicable disease, or knowingly subjects another to the danger of contracting such disease from a child or other irresponsible person, shall be liable for all damages resulting therefrom, and be punished as provided in this chapter.
>
> "139.32 Penalty. Any person who knowingly violates any provision of this chapter, or of the rules of the state department or the local board, or any lawful order, written or oral, of said department or board, or of their officers or authorized agents, shall be guilty of a misdemeanor."

Thus, if the tuberculosis is communicable, and the tuberculous patient knowingly exposes another to infection, a misdemeanor results. Likewise, a misdemeanor is committed if a rule of the state health department is violated.

In addition, if a rule for the government of the sanatorium has been violated then there is a further basis under Section 254.7, supra, for Dr. Spear, as superintendent of the institution, to file a complaint after which the district court may order the tuberculous patient segregated and forcibly detained in a ward or room.

Very truly yours,

HUGH V. FAULKNER
Assistant Attorney General

HVF:MKB

SCHOOLS: Tuition for inmates of State Institutions

~~BOARD OF CONTROL OF STATE INSTITUTIONS.~~

The Board of Control has no legal obligation to pay tuition charges for education in a public school of a person committed to a mental health institute.

(Puck to Bd. of Control, 11/13/58) # 58-11-7

November 13, 1958

Board of Control of State Institutions
LOCAL

Attention: Mr. George W. Callenius, Member

Dear Sir:

This will acknowledge receipt of your letter of September 22, 1958, set out as follows:

> "Recently Mr. N. W. Hyland, Legal Advisor of the Department of Public Instruction, contacted me in regard to a letter he had received from the Superintendent of Public Schools at Independence, Iowa, copy of which I am enclosing and which I think is self-explanatory.
>
> "They evidently have a situation which has arisen that is somewhat out of the ordinary and which we have never had occasion to investigate prior to this time.
>
> "I think your office has been called upon in the not too distant past relative to a case in Clarinda which involved the child of an employee. I know that this case is a little different in that this young lady is a patient at the Mental Health Institute rather than an employee's daughter.
>
> "We are at a loss to know just what to do about this matter and whether there are any funds available to pay for the tuition of this student. We, of course, would be happy to further the education of this young lady, but have no way

58-11-7

that we know of to pay the Independence Public Schools for the expense involved.

"We would appreciate your advice on this matter and any help that you can give us."

The letter of September 11, 1958, directed to Mr. N. W. Hyland, then Legal Advisor of the Department of Public Instruction from Mr. Victor O. Draheim, Superintendent, Independence Public Schools, is set out as follows:

"Miss Betty Carlson, age 17, junior in high school, parental home 421 2nd St. S.W., Clarion, and a patient at the Independence Mental Health Institute, would like to enroll in Independence High School while residing at the Mental Health Institute. The Institute is located in Washington Township, a rural district with no high school.

"Who is responsible for tuition?
1. Clarion School District
2. Washington Township
3. State funds
4. Independence Public Schools
5. Other

"Please advise as soon as possible."

After receipt of the above two letters I requested further facts relevant to the problem submitted. Additional facts were submitted in the form of a letter addressed to yourself from the Social Service Department at the Mental Health Institute, Independence, Iowa, under date of October, 20, 1958. It is noted in this letter that the consulting psychiatrist "recommended placement for this girl where she could continue with therapy for at least a year, and where she could receive an education." It is also stated in this letter as follows:

"As you recall, there is a question of who is legally responsible for the tuition of a 17-year old youngster in our hospital who is presently

attending the Independence public high school. This girl was admitted here March 18, 1958, by Order of Admission of Wright County, Iowa. The question of tuition may again arise in the near future. Plans are being made for this girl to be placed in the Iowa Children's Home, Des Moines, Iowa, where she will attend public school."

This opinion is necessarily limited to what, if any, responsibility the Board of Control may have for payment of tuition charges incurred by attendance at a public school of the individual involved in the instant situation.

An exhaustive search of the statutes pertaining to the Board of Control and the institutions under its jurisdiction and control fails to devulge any provision which provides for payment of the tuition, by the board, from state funds or any provision which puts the legal burden for such payment on said board.

Therefore, in view of the foregoing, it is my opinion that the Board of Control is under no legal obligation to pay for the tuition charged by the school district for education of the person heretofore referred to, said person having been commited to the Mental Health Institute at Independence, Iowa.

Very truly yours

CARL H. PESCH
Assistant Attorney General

CHP:js

SCHOOLS: Reorganization.

1. A declaratory judgment obtained by consent is binding on a school district.
2. Such a judgment is binding upon County Auditors who are made parties to the proceedings.
3. Taxes erroneously collected may be considered in a division of assets under code section 275.29.

(Opinion to Scholz, Mahaska Co. Atty., 11/17/58)
#58-11-8

November 17, 1958

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

Dear Sir:

Receipt is acknowledged of your letter of November 13, 1958, as follows:

> "In connection with the proceedings for the organization of the Pella Community School District, which is located in Marion, Jasper and Mahaska Counties, the County Boards of Education of those three counties met in joint session to consider objections to the petition for the organization of the Community School District, which petition included in the proposed Community District 200 acres of land situated in and forming part of the Rural Independent School District of Greeley, described as the Southeast Quarter of the Southeast Quarter of Section 3, and the Northeast Quarter of Section 10, all in Township 75 North, Range 13, Mahaska County, Iowa. Objections to the inclusion of any part of the Greeley School District lands in the Community School District were filed, and the three County Boards, in joint session, orally agreed that the 40-acre tract in Section 3, and the Northeast 80 acres of Section 10 would be left in the petitioned area, but that the remaining portion of Section 10 would be excluded. However, in writing up the minutes of the meeting, the land in Section 10 was described as "the

Northeast Quarter of Section 10', instead of 'the Northeast Quarter of the Northeast Quarter of Section 10'. This same typographical error was contained in the published notice of the election, and appeared throughout the remainder of the proceedings, which resulted in the approval of the proposition for organization of the Community School District and in its establishment, and in the certification of those proceedings to the County Auditors of the three counties involved. The error referred to was not discovered or detected until after the election had been held and the proceedings certified.

"The Directors of the Community School District, and the members of the several County Boards of Education involved, all now agree and freely admit that there was no intention to include in the Community School District the additional 120 acres involved in the erroneous description, and they are agreeable to excluding the same from the Community School District and leaving it as part of the Greeley Independent School District, provided that there is a legal method of accomplishing this result, other than that of holding an election on another reorganization proposal, which would require a vote by the residents of the Community School District, and which from a practical standpoint you will readily recognize is not feasible.

"As a means of resolving the difficulty, it has been suggested that an action to obtain a declaratory judgment resulting in the entry of a decree declaring that the 120-acre area was by mutual mistake, included in the Community School District, and that this area still legally remains a part of Rural Independent School District of Greeley could be instituted by the Greeley School District against the Pella

Community School District and the County Boards of Education of the three counties involved.

"Assuming that the Defendants allow the matter to go by default, and the evidence presented sustains the Greeley School District's claim of mutual mistake, or assuming that all parties to the action proceed on a consent decree basis, do you agree that the error referred to could be rectified in this manner, and that such a decree would be a sufficient basis for the County Auditors of the three counties involved to act upon in computing and spreading their tax levies for the Community School District? It is recognized that such a decree probably could not become an accomplished fact insofar as the tax levy for 1959 is concerned, but it occurs to me that an adjustment for the amount of taxes involved could be made in the settlement of assets and liabilities between the two school districts, which settlement has not been made pending a solution of the problem presented by the foregoing facts. Your early opinion on the matter will be appreciated."

In answer to your inquiry I advise as follows:

1. If a consent decree can be so obtained it will be as binding on parties and privies as it would have been had it been obtained on contest. See Rankin v. City of Charlton, 160 Iowa 265, 141 N.W. 424 at page 563.

2. If the County Auditors of the three counties are made parties-defendant in the declaratory judgment action, such a judgment will be sufficient basis for them to change their record of the school district boundary so as to conform it thereto, and thereafter spread the school tax levies accordingly.

3. Since section 275.29 provides no standard for division of assets other than that it be "equitable" there appears no objection to taking into consideration the factor you describe.

Very truly yours

LEONARD C. ABELS
Assistant Attorney General

LCA:js

SCHOOLS : Transportation - - Transportation under code section 285.1 to bus transfer point in districts containing more than one town and operating more than one school. (Ltr to Cady, Franklin Co. Atty., 11/14/58) #58-11-9

November 14, 1958

Mr. G. A. Cady
Franklin County Attorney
Hampton, Iowa

Dear Sir:

Receipt is acknowledged of your letter of November 12, 1958, as follows:

"I would like an opinion on the following question in order that I may properly advise a school board.

"The school [redacted] consolidated, and some of the grade school pupils are transported to another town. The school runs buses from the schoolhouse to the other town for the transportation of pupils.

"The school has started the practice of picking up some of the pupils in the home town and transporting them to the schoolhouse and from there to the neighboring town. Other children, who have approximately the same distance to walk to school to board the bus for transportation to the other town, have to walk nearly a mile to the schoolhouse and then ride 5 miles to the other town.

"The question is this; If the school elects to pick up part of the pupils in the home town and transport them to the school house and then to the other town, are they under an obligation to pick up all of the children in the home town

SP-11-9

who are bound for the neighboring town and transport them to the home town schoolhouse and from there to the neighboring town."

The feature that complicates your question is that Chapter 285 governing school transportation was enacted at a time when the situation where pupils residing in a town would be transported to a school in another town in the same district was unforseen. Nevertheless, Chapter 285 contains the only statutory law on the subject and subsections 2 and 4 of section 285.1 appear to fit the fact situation described in your letter.

Subsection 2 provides:

"2. Any pupil may be required to meet a school bus on the approved route a distance of not to exceed three-fourths of a mile without re imbursement."

Thus, it appears proper for the school to pick up pupils residing on or near its regularly established routes and transport them to a transfer point at one of the schoolhouses in the district and to require those residing not more than three-fourths of a mile from the transfer point and off the established bus routes to walk to the transfer point.

Subsection 4 provides:

"4. In all districts where unsatisfactory roads or other conditions make it advisable, the board at its discretion may require the parent or guardian to transport their children up to two miles to connect with a vehicle of transportation. The parent or guardian shall be reimbursed for such transportation by the board of resident district at the rate of twenty-eight cents per mile per day, one way, per family for the distance from pupil's residence to the bus route."

Thus, parents of pupils residing between three-fourths of a mile and two miles from the transfer point and off an established bus route may be required to furnish transportation to the transfer point at the statutory rate of reimbursements. It should be noted that subsection 4 is phrased in terms of applicability "in all districts" eliminating complications which might otherwise arise by way of conflict with the specific paragraphs of subsection 1.

It is realized that the foregoing will occasionally result in the ridiculous situation where one of two next-door neighbors can receive reimbursement for transporting his child to the transfer point while the child of the other, residing just inside the three-quarter mile limit walks but such situations appear inevitable wherever fixed-distance limitations exist in the law.

Very truly yours

LEONARD C. ABELS
Assistant Attorney General

LCA:js

~~BUREAU OF~~ LABOR:- ~~BOILER INSPECTION.~~ boiler inspection --

1. An inspection fee is due and payable by the owner or operator of a "Koch Kettle" (jacket kettle) only if the steam pressure exceeds 150 pounds per square inch.

2. The ordinary and common meaning ascribed to the word boiler notwithstanding, a "Koch Kettle" (jacket kettle) by statute, is not a boiler.

3. Jurisdiction to inspect jacket kettles is expressly granted in §89.2, Code of Iowa, 1958.

4. Only such rules and regulations of the A.S.M.E. Code of 1937 as amended that in no wise conflict with Chapter 89, Code of Iowa, 1958, may be adopted by the Commissioner of Labor. (Peach to Lowe, St. Labor Comm'r., 11/12/58) # 58/11/10

November 12, 1958

Mr. Don Lowe, Commissioner
Bureau of Labor
LOCAL

Dear Sir:

Receipt is acknowledged of your letter under date of October 10, 1958, set out as follows:

> We would like an opinion covering several sections of Chapter 89 of the Iowa Code. The circumstance that has brought this about concerns a Koch Kettle owned by Simes Lockers at Rolfe, Iowa. This kettle is jacketed with heat being applied directly to the base of the kettle. Therefore, it becomes a boiler within itself and has a pressure of 41 pounds.
>
> It has been the practice of this Department for many years to inspect these kettles and charge a fee as set out in Section 89.7, Subsections 1 and 2. However, Subsection 5 sets out a fee for steam stills, tanks, jacket kettles and all other reservoirs, fired, or unfired, having a pressure in excess of 150 pounds per square inch. Inasmuch as Subsection 5 sets these out, along with other reservoirs, fired or unfired, it is assumed that at the time this Act was made a part of the Code that they were speaking of tank kettles and reservoirs that were fed from a boiler and in some cases heat applied directly

58/11/10

to the steam kettle to raise it to an extreme temperature and pressure. Perhaps some research could be made to ascertain the intent of this Section at the time it was passed.

It has been a past practice of the Bureau of Labor where we inspect a boiler and there are other jacket kettles or sterilizers that we charge for the boiler only, unless the jacket kettles, reservoirs, sterilizers, etc. carry a pressure in excess of 150 pounds.

The owner of this kettle at Rolfe claims we have no jurisdiction within his plant whatsoever. I am sure we do have jurisdiction and can inspect and condemn, but the question now comes up as to whether we can charge for inspections of this nature. There are many such kettles within the state In the small packing plants and locker plants which are used for rendering purposes.

Inasmuch as our boiler section does not carry a definition of a boiler I wish to quote the one used by the American Society of Mechanical Engineers Boiler and Pressure Vessel Code which reads as follows:

"A pressure vessel in which steam is generated by the application of heat resulting from the combustion of fuel (solid, liquid, or gaseous) shall be classed as a fired steam boiler."

May I also request a ruling on Section 89.4 as to whether or not by its application we can adopt the rules and definitions of the American Society of Mechanical Engineers Boiler Code of 1937 as amended. If Section 89.4 holds that we can adopt the Iowa Boiler rules and regulations (booklet enclosed) then would it supersede Section 89.7, Subsection 5, thereby making a fired jacket kettle a boiler within itself.

The statutes to which you make specific reference are as follows:

Section 89.4, Code of Iowa, 1958, provides as follows:

" 1. The commissioner of labor is hereby authorized and empowered to prescribe rules within the provisions of this chapter, for the purpose of carrying the same into effect including rules for the methods of testing equipment and construction and installation of new equipment covered by this chapter, and said rules and regulations shall, as nearly as possible, conform to the rules formulated by the boiler code committee of the American Society of mechanical engineers and known as the American Society of mechanical engineers boiler code of 1937 as amended.

" 2. The state boiler inspector shall investigate and report to the commissioner the cause of any boiler explosion that may occur in the state, the loss of life, injuries sustained, and estimated loss of property, if any, and such other data as may be of benefit in preventing a recurrence of similar explosions.

" 3. He shall keep in the office of the commissioner a complete and accurate record of the name of the owner or user of each steam boiler or other equipment subject to this chapter, giving a full description of said equipment, including the type, dimensions, age, condition, the amount of pressure allowed, and the date when last inspected."

Section 89.7, Code of Iowa, 1958, pertaining to fees provides:

"An annual inspection fee of each boiler or pressure unit made by the boiler inspector according to the terms of this chapter shall be paid by the owner or user as follows:

" 1. Boilers having a working pressure of fifteen pounds to seventy pounds per square inch, three dollars for one boiler and two dollars for each additional boiler of like size when set in batteries.

" 2. Boilers having a working pressure of seventy-one pounds to and including one hundred fifty pounds per square inch, four dollars for one boiler and three dollars for each additional boiler of like size when set in batteries.

" 3. Boilers having a working pressure of one hundred fifty-one pounds to four hundred fifty pounds per square inch, inclusive, five dollars for one boiler and four dollars for each additional boiler of like size when set in batteries.

" 4. Boilers having a working pressure of four hundred fifty-one pounds and excess per square inch, seven dollars for one boiler and five dollars for each additional boiler of like size when set in batteries.

" 5. Steam stills, tanks, jacket kettles and all other reservoirs, fired or unfired, having pressures in excess of one hundred fifty pounds per square inch, four dollars.

" 6. If at any time the owner, user or agent of the owner of a steam boiler or equipment within the state shall desire a special inspection of any boiler or equipment, it shall be made by the boiler inspection department after due request therefor, and the inspector making the inspection shall collect a fee of ten dollars for each boiler, together with his expenses in connection therewith."

Section 89.2, Code of Iowa, 1958, additionally provides for inspections as follows; such section being germane to the problem at hand:

"1. It shall be the duty of the state boiler

inspector, to inspect or cause to be inspected internally and externally, at least once every twelve months, in order to determine whether all such equipment is in a safe and satisfactory condition, and properly constructed and maintained for the purpose for which the same is used, all steam boilers, tanks, jacket kettles, generators and other appurtenances used in this state for generating or transmitting steam for power, or for using steam under pressure for heating or steaming purposes, in order to determine whether said equipment is in a safe and satisfactory condition, and properly constructed and maintained for the purpose for which the same is used.

" 2. The labor commissioner and the boiler inspectors shall have the right and power to enter any building or structure, public or private, for the purpose of inspecting any equipment covered by this chapter or gathering information with reference thereto.

"3. Upon making an inspection of any equipment covered by this chapter, the inspector shall give to the owner or user thereof a certificate of inspection, upon forms prescribed by the labor commissioner, which certificate shall be posted in a place near the location of said equipment.

" 4. The owner or user of any equipment covered in this chapter, or persons in charge of same, shall not allow or permit a greater pressure in any unit than is stated in the certificate of inspection issued by the inspector."

My understanding of a "Koch Kettle", based on manufacturing and operational data made available to this writer by the manufacturer of the "Koch Kettle" is that the same is a jacketed kettle used in open kettle rendering processes. Being a jacket kettle, sub-paragraph 5 of Section 89.7, supra, is applicable.

Therefore, the inspection fee of four dollars,

provided in sub-paragraph 5 of Section 89.7, supra, may be charged only if the steam pressure in the "Koch Kettle" exceeds 150 pounds per square inch.

The answer as to whether a "Koch Kettle", hereinafter referred to as a jacket kettle, constitutes a boiler, so that inspection fees may be charged under sub-paragraphs 1 through and including 4 of Section 89.7, supra, may be found, not on the basis of the ordinary and common meaning ascribed to the word boiler, but upon a construction of Section 89.7, supra, as follows:

1. A jacket kettle is distinctly enumerated in sub-paragraph 5 of Section 89.7, supra. A like distinct enumeration appears also in Section 89.2, supra.

2. A fee conflict becomes apparent when sub-paragraphs 3 and 4 of Section 89.7, supra, applicable to boilers, are compared with sub-paragraph 5 of the same section applicable to jacket kettles. This conflict is exemplified by the following example:

> (a) A jacket kettle having a pressure exceeding 150 pounds per square inch requires that an inspection fee of four dollars be paid by the owner or user thereof. A boiler having a pressure of 151 pounds to 450 pounds per square inch inclusive requires that an inspection fee of five dollars be paid by the owner or user thereof.
>
> Therefore if a jacket kettle attains a steam pressure of 151 pounds per square inch, it would be untenable to say that the fee due for inspection would be five dollars.

Therefore, the ordinary and common meaning ascribed to the word boiler notwithstanding, a jacket kettle, by statute, is not a boiler.

Your question pertaining to jurisdiction is answered in the affirmative, such jurisdiction being expressly granted in Section 89.2, supra, jacket kettle appearing therein.

Your question as to whether, under Section 89.4,

Code of Iowa, 1958, the Commissioner of Labor may adopt the rules and definitions of the American Society of Mechanical Engineers Boiler Code of 1937 as amended, is answered as follows:

Section 89.4 (1), supra, provides that "the rules and regulations shall, as nearly as possible, conform to the rules formulated by the boiler code committee of the American Society of mechanical engineers and known as the American Society of mechanical engineers boiler code of 1937 as amended". (Underscoring added).

Use of the words "as nearly as possible" require that said rules and regulations heretofore referred to may be adopted only as the same do not conflcit with the provisions of Chapter 89, supra.

Therefore only such rules and regulations of the American society of mechanical engineers boiler code of 1937 as amended that in no wise conflict with the statutory provisions of Chapter 89, supra, may be adopted by the Commissioner of Labor, and then only in the manner prescribed by the Code of Iowa pertaining to the adoption of departmental rules and regulations.

Very truly yours

CARL H. PESCH
Assistant Attorney General

CHP:js

Personal property Tax --

~~HEADNOTE: TAXATION. PENALTIES AND INTEREST ON PERSONAL TAXES.~~ ~~BOARD OF SUPERVISORS:~~ The Board of Supervisors has no authority to compromise interest and penalties on taxes which have become a lien on real estate. (Brickman to McDonald, Cherokee Co. Atty., 11/19/58)
58-11-11

November 19, 1958

Mr. James L. McDonald
Attorney at Law
McDonald Building
Cherokee, Iowa

Dear Mr. McDonald:

This is to acknowledge receipt of your letter of October 30, 1958. As I understand your question, you wish the opinion of this department on whether the County Board of Supervisors has authority to compromise interest and penalties on delinquent personal taxes which are a lien on real estate.

According to the facts submitted, several taxpayers in the year 1951 went to the County Treasurer's office to pay their taxes. The Treasurer collected all taxes, except the personal taxes, leaving the taxpayers under the impression that they had paid all taxes for that year. When the new Treasurer took over, he discovered these delinquent personal taxes and billed the taxpayers for these taxes together with interest and penalties on the unpaid amounts. The taxpayers take the position that they are not at fault since they relied upon the Treasurer's word that they had paid all of their taxes. They agree that they owe the taxes, but object strenuously to the interest and penalties because they feel that they were not at fault. The only evidence available to the effect that the taxpayers acted in good faith is that all taxes prior to and after 1951 have been paid.

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

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"445.36 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."

"445.40 Penalty on personal taxes. On all personal taxes not paid on or before the first Monday in December a penalty of five percent shall be added and collected in addition to the three-fourths of one percent per month penalty herein provided; and the tax with all penalties shall be collected at the same time and in the same manner."

"445.29 Lien of personal taxes. All poll taxes and taxes due from any person upon personal property shall, for a period of one year following December 31 of the year of levy, be a lien upon any and all real estate owned by such person or to which he may acquire title and situated in the county in which the tax is levied. * * *."

"445.19 Compromising tax on personal property. When personal property 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."

An examination of these provisions reveals that under Section 445.36, it is incumbent upon the taxpayer to pay his taxes in full, no demand is required to be made by the Treasurer. The fact that the Treasurer herein failed to demand payment of the personal taxes did not relieve the taxpayers of the duty to pay the taxes.

The penalties and interest lawfully attached when payment was not timely made as provided in Section 445.36.

The specific question, of course, concerns itself with the authority of the Board of Supervisors to compromise the penalties and interest. Section 445.40, supra, provides that the penalties, including interest shall be collected in the same manner as the tax upon which they were imposed. The personal taxes, pursuant to Section 445.29, are made a lien upon real estate on December 31 of the year of levy, and since the penalties and interest are to be treated in like manner with the tax so far as their collection is concerned, they, too, become a lien on realty.

Section 445.19 provides that the County Board of Supervisors may compromise personal taxes only when the following three conditions are met:

1. The personal taxes are not a lien upon real property.
2. The personal taxes are delinquent for more than one year.
3. The personal taxes are not collectible in the usual manner.

In the question submitted the penalties and interest became a lien against the real estate of the taxpayer on December 31 of the year of levy. Therefore, under the facts as submitted, you are advised that the Board of Supervisors is without authority to compromise the penalties and interest.

Very truly yours,

Richard J. Brinkman
Special Assistant Attorney General

RJB:WWR:fs

COUNTY OFFICERS: County Engineer--
No statutory authority, express or implied, authorizing the use of county money to pay the dues of county engineers and assistant county engineers to a professional organization of the character of the Iowa Engineering Society. (Strauss to Shepherd, Asst Polk Co. Atty., 11/20/58) # 58-11-12

November 20, 1958

Mr. A. R. Shepherd
Assistant Polk County Attorney
Room 406 Court House
Des Moines, Iowa

Dear Sir:

This will acknowledge yours of the 28th ult. in which you submitted the following:

> "Our County engineering force are interested in joining the Iowa Engineering Society and feel that participation in the society by them and other county engineers throughout the state would help Polk County and the various other counties by improving the quality of the work of these public engineers.
>
> "The Iowa Engineering Society describes its aims and the scope of its activities as follows:
>
> "'The Iowa Engineering Society endeavors to promote acquaintanceship; a sense of professional brotherhood among engineers in Iowa; to work for a better understanding and appreciation of engineers and engineering by the general public; to foster and furnish a medium through which the engineering profession may express itself on public affairs; to promote the general welfare of engineers; to work for the advancement and dissemination of technical knowledge and the improvement of the standards of engineering practices in Iowa.'
>
> "We therefore ask your opinion on the following question:

EO 11-12

"'Is it permissible for the county to pay the dues of its county engineers and assistant county engineers to professional engineering organizations such as the Iowa Engineering Society?'"

In reply thereto I would advise you I find no statutory authority, express or implied, authorizing the use of county money for the foregoing described purpose. I am of the opinion that it is not permissible for the County to pay the dues of its county engineers and assistant county engineers to a professional organization of the character of the Iowa Engineering Society.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

ELECTIONS: Illegal marks on ballot --
In a recount the following with respect to ballots is pertinent: 1) Ballot marked by ballpoint pen or indelible pencil is legal; 2) ballot perforated by person marking the ballot, whether accidental or not, is probably an identification mark and should be rejected; 3) cartwheel in circle is not authorized and shoud not be counted; 4) check mark not authorized and should not be counted; 5) ballot bearing "X" in party circle and several "X's" in same column is valid and should be counted for all of the persons on ballot whether marked by an "X" before their name or not.

November 12, 1958
(Strauss to Poston, Wayne Co. Atty., 11/12/58) #58-11-13

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

Dear Sir:

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

> "Would you please send me your opinion on the question of whether or not a ballpoint pen is proper marking on a ballot? I believe it is not, but I do not have an annotation on the subject.
>
> "Also, please inform me whether a ballot which was accidentally perforated by the person marking the ballot is a good ballot or not, whether or not indelible pencil is a satisfactory mark on a ballot, whether or not a cartwheel in the circle is satisfactory, whether or not a check mark is satisfactory, whether or not an 'X' in the circle and several 'X's' in the same column down below the party circle spoils the ballot insofar as the persons individually voted are concerned, and any other detailed information that youroffice may have on hand for such a recount as we may have here in this county."

In reply to the foregoing I would advise you as follows.

1. A ballot marked by a ballpoint pen or an indelible pencil is a satisfactory and legal operation.

2. A ballot perforated by a person marking the ballot, whether accidental or not, is probably an identification mark and should be rejected.

3. A cartwheel in the circle is not authorized and should not be counted.

4. A check mark is not authorized and the vote should not be counted.

5. A ballot bearing an "X" in the party circle and several "X's" in the same column is a valid ballot and should be counted for all of the persons on the ballot whether marked by an "X" before their name or not.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

STATE INSTITUTIONS -- Liens for care of feeble-minded:
§223.16, Code 1954, as amended by 56th G. A., insofar as the exemption from lien therein provided for is concerned, is not retroactive. (Strauss to Garretson, Henry Co. Atty., 11/10/58)

58-11-14

November 10, 1958

Mr. Charles D. Garretson
Henry County Attorney
Mount Pleasant, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 30th ult. in which you submitted the following:

> "I would like an opinion of the Attorney General on the following:
>
> "Is a charge for care at the Glenwood State School from June 28, 1943 to June 30, 1945 in the amount of $221.22 entered on the Institutional Records in the Auditor's Office of Henry County, Iowa, a lien on real estate owned by the person legally bound for the support of the patient, in view of Section 223.16 of the 1958 Code of Iowa?
>
> "If you will note, the Section 223.16 was amended by the 56th General Assembly, and as it now stands, exempts from lien property owned by the patient or the person charged with his care. The question is, of course, does that portion of Section 223.16 which exempts the property from lien apply to charges made prior to the effective date of the Act? In other words, if the charge for the care at the Glenwood State School was a lien before the enactment of 223.16 as it now stands, was that lien erased or made void by the enactment of 223.16?"

In reply thereto I would advise you that this problem was the subject of opinion issued August 26, 1955 to T. C. Poston, Wayne County Attorney, in which it was held that the lien existing prior to July 4, 1955, was not extinguished by the amendment.

Copy of this opinion is enclosed.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB
Enc.

SCHOOLS: Reorganization: Code chapter 275 does not authorize a reorganization petition to be filed conditionally, the filing to be perfected at a later date by the happening of some condition subsequent.
(Ltr to Jensen, Taylor Co. Atty., 11/3/58)
#58-11-16

November 3, 1958

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

Dear Sir:

Receipt is acknowledged of your letter of October 30, 1958.

In short, the situation presented by your letter appears to be that a certain petition for creation of a joint school district under chapter 275 of the Code was dismissed by the joint county boards and such dismissal was affirmed on appeal by both the State Department of Public Instruction and the District Court. In the meantime proponents of another proposed school district involving some of the same territory wish to file a petition under chapter 275 before time for appeal to the Supreme Court has expired, such filing to become effective upon the happening of one of two possible conditions subsequent, i.e. the expiration of appeal time without appeal taken or the affirmance of the District Court's ruling upon appeal taken. Apparently the motive for such conditional filing is to win the "race for the record" in the event the proponents in the first matter decide to start over with a new petition.

In State ex rel Harberts v. Klemme Community School District, 72 N. W. 2d 512, 247 Iowa 58, it was held that once jurisdiction is acquired over certain territory in a reorganization proceedings it cannot be ousted unless the attempted organization was abandoned or not completed within the time required by law; that "subsequent-acting school authorities can acquire no jurisdiction of an area included in a prior-pending reorganization".

What the proponents of the second reorganization

58-11-16

appear to contemplate is a filing before a filing. In other words, a sort of filing made at one time but later perfected by operation of law on happening of condition subsequent.

However, the county superintendent is required by Code section 275.14 to fix a final date for hearing of objections within ten days after the petition is filed. The statute is definite that such hearing date must be fixed not left dangling to be later determined by the happening of such condition subsequent. If the prior proceedings remains pending at the date so fixed, the county board has no choice but to dismiss the subsequent proceedings for lack of jurisdiction.

I am, therefore, of the opinion that the proposed procedure, although ingenious, is not possible under chapter 275.

Very truly yours

LEONARD C. ABELS
Assistant Attorney General

LCA:js

DRAINAGE AND DRAINAGE DISTRICTS:

Drainage funds--In drainage district where all work has been completed, may be disposed of under the provisions of §455.68, 1958 Code. (Strauss to Levis, Audubon Co. Atty., 11/10/58)

58-11-17

November 10, 1958

Mr. Dale D. Levis
Audubon County Attorney
Audubon, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 23rd ult. in which you submitted the following:

"I respectfully request an opinion on the following matter:

"Many years ago Audubon County established a drainage district in the south part of the county on the drainage ditch running generally through Exira and Brayton and developed said district by dredges, bridges, etc. All of the work in said district was completed several years ago and there is now in the drainage fund as the result of said drainage district levies the sum of $16,118.56.

"The fund has been dormant for several years, no money coming into said fund and none going out.

"Our County Engineer, Treasurer and Auditor have requested me to write for an opinion as to the following:

"1. Can the Board of Supervisors transfer the said fund to the road fund?

"2. As the result of the flood in July of this year several bridges along the said drainage district were seriously damaged or washed out completely. Can the said fund be used to replace and repair said bridges along said drainage district?

"3. If your answer to Question #2 is yes, is it necessary that there be a separate accounting for the said fund or may it be transferred into

the said road and bridge fund? (The damage along the drainage district is far in excess of the $16,000.00.)"

In reply thereto I would advise you that this fund cannot be transferred. However, it may be disposed of under the provisions of Section 455.68, which provides the following:

"Surplus funds - application of. When one-half or more of all assessments for a drainage or levee district have been paid and it is ascertained that there will be a surplus in the district fund after all assessments have been paid, the board may refund to the owner of each tract of land, not more than fifty per-cent of his proportionate part of such surplus. When all construction work has been completed and all cost paid, and all assessments have been paid in full, the board may refund, to the owner of each tract of land, his proportionate part of any surplus funds except such portion of the surplus as the board considers should be retained for a sinking fund to pay future maintenance and repair costs."

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

TAXATION: Property Tax--

~~HEADNOTE: PROPERTY TAX.~~ The Board of Supervisors may not compromise delinquent real estate taxes without the property having been offered for sale for taxes for two consecutive years and not sold or sold for only a portion of the delinquent taxes. (Brinkman to Morrow, Allamakee Co. Atty., 11/12/58)

#58-11-18

November 12, 1958

Mr. Lynn W. Morrow
Allamakee County Attorney
Waukon, Iowa

Dear Mr. Morrow:

This is to acknowledge receipt of your letter of October 25, 1958, in which you present the following problem:

"Facts

"There is a very small and run down house on a small hillside lot located in the town of Lansing, Iowa on which the taxes have been suspended for many years as the owner was a recipient of old age assistant payments. The owner is no longer living in the house and has signed blank deeds to the State Department of Social Welfare. The accrued and suspended taxes against the property now totals four hundred and twelve dollars ($412). After months of effort to sell this property, the highest bid possible to obtain was three hundred and seventy-five dollars ($375.00). The State Department of Social Welfare has stated that they would release their lien, however, clear title cannot be conveyed until the taxes are shown paid in full. Section 445.16 of the 1958 Code of Iowa provides that a board of supervisors may compromise taxes due on property which has been offered by the County Treasurer for sale for delinquent taxes for two consecutive years and not sold. If these taxes could be compromised at this time, the property could be put again on the tax rolls by being sold to an individual owner.

"Question

"Does the Board of Supervisors have any authority to compromise the taxes in a case such as this?"

You are advised that the Board of Supervisors has no authority to compromise taxes on this property until the property has been offered by the County Treasurer on tax sale for two years and not sold, or sold for only a

58-11-18

portion of the delinquent taxes.

Since the taxes were suspended on the property in question by reason of the fact that the owner was receiving old age assistance payments, the Board of Supervisors would have authority under the provisions of Section 427.10, Code of Iowa (1958), to cancel and remit any part or all of the suspended taxes when the Board of Supervisors deems such action to be in the best interests of the public and the aged person.

Very truly yours,

Richard J. Brinkman
Special Assistant Attorney General

RJB:fs

Trade formulas--
AGRICULTURE: A Word "proprietary" as set out in Section 189.12 of the 1958 Code of Iowa means one which is secret and which formula is owned by a legitimate possessor of such secret. (Formal to Spry, Secy. of Agr., 25/11/58) # 58-12-9

November 25, 1958

Honorable Clyde Spry
Secretary of Agriculture
LOCAL

Dear Sir:

In response to your inquiry as to the meaning of "proprietary" as it appears in the phrase "proprietary trade formula" in section 189.12 of the 1958 Code of Iowa, we advise as follows:

Where the legislature elects not to define the phrase or any of its word components, tenents as well as statutes (4.1(2) 1958 Code of Iowa) of statutory construction require that words and phrases be construed in accordance with the context and the approved usage of the language or be given such technical meaning as shall have been established in law.

In accordance therewith your attention is directed to the case of the State ex rel Missildine v. Jewett Mkt. Co., 209 Iowa at 567. Therein the Iowa Court adopts the dictionary definition accepted by the United States Supreme Court:

> " In Ferguson v. Arthur, 117 U.S. 482 (29 L. Ed. 979), the court said:
>
> > " 'Proprietary' is defined thus: In the Imperial Dictionary, 'belonging to ownership, as, proprietary rights;' 'proprietor' being defined, ' one who has the legal right or exclusive title to anything, whether in possession or not, - an owner;' In Worcester, 'relating to a certain owner or proprietor.'"

and continued in its own language:

58-12-9

"The record shows that aspirin was originally a proprietary medicine. It was discovered in Germany, its formula was secret, and the product was originally made only by the possessor of this secret formula. However, the formula has been discovered, and aspirin is now made by different pharmaceutical and chemical manufacturers, and it has entirely ceased to be a proprietary medicine. Therefore it does not come within the exception noted in the statute referring to proprietary medicines. (Emphasis supplied)

Therefore, you are advised that it is the opinion of this office that a trade formula which is proprietary in nature is one the formula for which is secret or patented or both and, which formula is owned by the legitimate possessor of same.

Very truly yours

FREEMAN H. FORREST
Assistant Attorney General

FHF:js

STATE INSTITUTIONS;
~~BOARD OF CONTROL~~ - Leave of absence for person committed to Woodward State Hospital--
1. To be determined as provided in §222.36, 1958 Code of Iowa. (Porch to Bd of Control, 25/11/58)
#58-12-10

November 25, 1958

Board of Control
of State Institutions
LOCAL

Attention: Esther Wright, Secretary

Dear Mrs. Wright:

This will acknowledge receipt of your letter in behalf of the Board of Control under date of November 13, 1958, set out as follows:

"We are enclosing herewith copy of letter received from Dr. Grace M. Sawyer, Superintendent, of the Woodward State Hospital and School, which is self explanatory.

"You will note she states that several Departments of Social Welfare have corresponded with her advising that the local County Attorney has been called upon to decide the number of days vacation a committed and admitted patient may have.

"It has always been the opinion of the Board in the past that the court loses jurisdiction over the patient upon commitment to the institution, and has no right to dictate to the hospital the number of days the patient may be out of the institution, provided if, in the judgment of the Superintendent, said patient is able to be released for a few days vacation.

"We would appreciate hearing from you on this subject."

58-12-10

Inasmuch as the letter of inquiry directed to the Board of Control and to which you make reference originated from the Superintendent of the Woodward State Hospital and School, Woodward, Iowa, this opinion is necessarily limited in its application thereto.

Your question is expressly answered in Section 222.36, 1958 Code of Iowa, which provides as follows:

> "No leave of absence or parole from any such institution (state or private) shall be granted to any inmate except upon the recommendation of the superintendent and approval of the board of control, who shall take appropriate measures to secure for the feeble-minded person proper supervision, control, and care during such leave of absence or parole. Said parole shall be for a period not to exceed one year under such conditions as are prescribed by the board of control."

Very truly yours

CARL H. PESCH
Assistant Attorney General

CHP:js

LAW: Sexual Psychopaths--

CRIMINAL ~~SEXUAL PSYCHOPATHS, CHAPTER 225A, CODE OF IOWA, 1958~~

A person commited to a state mental institution as a criminal psychopath must be detained therein until released in accordance with §225A.12, Code of Iowa, 1958.

(Resch to Bd of Control, 13/11/58) RE 58-12-11

November 13, 1958

Board of Control of State Institutions
LOCAL

Attention: Mr. J. O. Cromwell, M.D.
Director of Mental Institutions

Dear Sir:

This will acknowledge receipt of your letter under date of November 6, 1958, set out as follows:

"A patient named, George Alfred Loehr, was admitted to the Mental Health Institute at Independence, September 23, 1957, under the provisions of the Criminal Sexual Psychopathic Law, Chapter 225A.

"It seems that the court acted in accordance with paragraph 225A.11. He has been under treatment and apparently shown no improvement. The Medical Staff has indicated that it appears the release of Mr. Loehr is incompatible with the welfare of society.

"Mr. Loehr now raises the question, through his Attorney, that he be returned to the court although the Medical Staff reports no improvement. Can the person be returned to court and tried on the criminal charges pending against him or must such person remain in the hospital indefinitely; perhaps the balance of his life, although he has never been tried for his alleged criminal act? In this particular case there is some question as to whether the man has actually committed the criminal act. While the doctors find evidence for such a possibility they also doubt the actual event that was alleged to have occured.

58-12-11

"From the Medical point of view, he is considered to be an inadequate personality who will continue to make a poor adjustment and probably will have an occasional "run-in" with the law. He is not insane. Apparently, the doctors find in their examination, of him, that he does have sexual tendencies which might legally be considered to come within the meaning of the Criminal Psychopathic Law. Of course, they have no clear cut evidence that he did perform the criminal act for which he was committed to the hospital, even though the sheriff and witnesses claim positive evidence which they would give if case came to trial.

"The Medical Staff would like to discharge this man from the Hospital on the grounds that they cannot help him with further treatment. They consider him relatively harmless but potentially capable of committing harmful act. They would recommend that he be tried for his Criminal Act and dealt with accordingly. Can this be done or must we keep him in the State Hospital indefinitely?"

Section 225A.11, Code of Iowa, 1958, provides that:

"If the person is found to be criminal sexual psychopath the court may commit him to a state hospital for the insane, where he shall be detained and treated until released in accordance with the provisions of this chapter or may order such person to be tried upon the criminal charges against him, as the interests of substantial justice may require. The hospital staff shall make periodic examinations of any such person committed, with the view of determining the progress of treatment, and shall report to the court not less than once a year."

Section 225A.12, Code of Iowa, 1958, provides that:

"At any time after commitment, an application in writing setting forth facts showing that such criminal psychopath has improved to the extent

> that his release will not be incompatible with the welfare of society may be filed with the committing court. Whereupon the court shall issue an order which will return the person to the jurisdiction of said court for a hearing. This hearing shall in all respects be like the original hearing to determine the mental condition of the defendant. Following such hearing, the court shall issue an order which shall cause the defendant either to be (1) placed on probation for a minimum of three years, or (2) returned to the hospital, provided that upon the expiration of said probationary period the said person may be discharged."

Fahr, Iowa's New Sexual Psychopath Law, 41 Iowa Law Review 523, loc. cit. 553, states:

> "One of the large problems is that of release. If it be conceded that the current state of medical science cannot promise 'cures', though it may selectively promise improvement, there is a nice question of when these 'sexual psychopaths' may be returned to society.
> * * * * * * * * * * *
> * * * * In Iowa the new laws specifies that a rehearing shall be held, in all respects like the original hearing, in the court of original commitment, when a written application is presented to that court 'setting forth facts showing that the criminal psychopath has improved to the extent that his release will not be incompatible with the welfare of society.' This is a very loose standard indeed, and far from requiring a 'cure,' as release of two-thirds of those committed abundantly proves.
> * * * * * * * * * * * * *."

In your letter you state that "It seems that the court acted in accordance with paragraph 225A.11", and for purposes of this opinion it will be assumed that the court committed him to the Mental Health Institute at Independence, Iowa. Having been thus commited "he shall be detained and treated until released in accordance

with the provisions of this chapter (225A)," Section 225A.11, supra.

The fact that "the Medical Staff would like to discharge this man from the Hospital on the grounds that they cannot help him with further treatment" is not a sufficient basis for filing an application to the committing court for release for hearing on the matter. The statute is clear in that the application must set "forth facts showing that such criminal psychopath has improved to the extent that his release will not be incompatible with the welfare of society", Section 225A.12, supra.

In view of the foregoing, it is my considered opinion that before a criminal psychopath may be returned to the committing court for a hearing, said person having been committed to a state hospital for the insane, an application must be filed with said court setting out sufficient facts to show that said person has improved to such an extent that said person's release will in no wise be incompatible with the welfare of society.

You additionally ask whether the Medical Staff can recommend that this man be tried for his criminal act and dealt with accordingly? Commitment as a criminal psychopath to a state mental health institute was made, in this case, by the court in lieu of the court ordering said person to be tried upon the criminal charges against him. Such a recommendation by the Medical Staff would be of no avail since once committed, this person shall be there detained and treated until released in accord with the provisions of Section 225A.12, supra, as provided in Section 225A.11, supra.

Very truly yours

CARL H. PESCH
Assistant Attorney General

CHP:js

HIGHWAYS ! Institutional Roads - -

~~Headnote: BOARD OF CONTROL OF STATE INSTITUTIONS:~~

1. The Board of Control is under no legal obligation to direct the maintenance, repair or improvement of bridges unless the same are within or adjacent to the separate road district for each state institution as provided in §308.1, 1958 Code of Iowa. (Pesch to Hansen, Bd. of Control, 31/12/58) # 58-12-1

December 31, 1958

Board of Control of State Institutions
L O C A L

Attention: J. R. Hansen, Member

Dear Sir:

This will acknowledge receipt of your letter under date of December 17, 1958, set out as follows:

> "In response to your letter of December 11, we are enclosing a copy of the correspondence which we have received from Mr. C. J. Lyman, Special Assistant Attorney General for the Iowa State Highway Commission, a copy of our letter to the Glenwood State School, as well as a copy of the engineers' report which was made to the Town of Glenwood.
>
> "While everything than what Mr. Lyman has told has been purely on a verbal basis, we believe that the enclosures will explain the situation and our viewpoint on it quite clearly. If we have erred in any point of law, please let us know.
>
> "There is one other approach that may be possible and which we think should be explored, and that is the provision for Executive Council action which is made in Section 308.5.
>
> "Our reason for taking the position that we took in our message to the Glenwood State School was because of the fact that the bridge under discussion is on a roadway which is not contiguous to the state property at Glenwood, but is a part of a roadway which leads to the Glenwood State School and to the C. B. & Q. Railway Station in Glenwood.
>
> "If you need further information upon which to base a study of this case, please feel free to call for it."

58-12-1

In order that all the facts in the matter may be at hand for reference, I am setting out below the correspondence you enclosed with the above letter.

The letter directed to the Mayor and City Council, Glenwood, Iowa, from Henningson, Durham and Richardson, Omaha, Nebraska, is, in pertinent part, as follows:

> "At your request, two members of our organization inspected the two bridge crossings over Keg Creek at Vine and Green Streets both in Glenwood. Both bridges are old steel truss structures resting on piles, with wood plank floors.
>
> "The crossing at Vine Street needs some work on the floor planking, but most of all the approach at the north end is badly in need of repair. The earth has eroded or fallen away from under the approach paving beyond the end of the bridge itself, resulting in a dangerous situation. The fact that there is a kink in the alignment of the creek at this point may well have contributed to this condition, and makes it certain that unless the corrective measures are rather extensive any repair would be temporary only.
>
> "The bridge is located on a street which is and probably always will be rather heavily used. It also is slightly narrower than the paved street at each end of the bridge, which results in a situation conducive to accidents.
>
> "It appears that the work that needs to be done at this point is considerable, and we do not believe it would be satisfactory to try to reuse the existing structure at this location. We, therefore, recommend that it be replaced with a new structure somewhat wider and a little longer than that now in place. Such new structure could well be of prestressed concrete, with a cast in place floor, all resting on piles. Your County Engineer has recently been responsible for one such new bridge, with a second now under contract. His contract prices reveal that such a structure would be as economical as any at this time. Using his prices as a background, we feel that a structure completely adequate to your needs, both present and future, could be

Installed for $45,000 to $50,000. It is possible that some savings could be realized below these figures, but for preliminary estimation, they should be quite factual.

"The crossing at Green Street is both better and worse than the Vine Street structure. Obviously the floor of the Green Street bridge is in bad shape and should be replaced almost completely. Some caving of the earth at the southeast end is evident, but its extent is not so great as to present an insoluble problem.

"We believe that with a small amount of corrective work to retain the earth at the southeast end and with a completely new plank floor, this bridge should be adequate to provide the more modest service demands made upon it. We have investigated the cost of other types of floor, but their increased cost would not be warranted on a bridge of this type and capacity.

"Naturally if the Vine Street bridge is to be replaced, the repair of the Green Street bridge should be undertaken first so that it may serve as an alternate for traffic while the Vine Street crossing is closed."

The letter directed to you over the signature of C. J. Lyman, Special Assistant Attorney General for the Iowa State Highway Commission, under date of December 2, 1958, is as follows:

"You called sometime ago relative a bridge problem in Mills County, namely the town of Glenwood.

"I was able to talk to Mr. Butter just briefly as he was leaving to go to San Francisco. Mr. Butter felt that we could not interfere in this matter as a primary road extension is not involved.

"I would suggest that under Section 309.9(3), you contact the Board of Supervisors of Mills County as to their possible cooperation in the construction of the bridge."

And, your letter directed to Alfred Sasser, Jr., Superintendent, Glenwood State School, Glenwood, Iowa, under date of December 11, 1958, is as follows:

"The proposition which you put to us by telephone a number of days ago and which is covered in part by the copy of the letter of November 13, written to the Mayor and City Council of Glenwood by R. F. Ferguson of Henningson, Durham and Richardson, Omaha, Nebraska, has had our attention.

"We have been in communication with Mr. John Butter, Chief Engineer for the Iowa State Highway Commission, and the Special Assistant Attorney General, Mr. C. J. Lyman, who is assigned to that department.

"Mr. Butter feels that he cannot interfere in this matter since a primary road extension is not involved.

"They have suggested, as previously reported to you by telephone, that under Section 309.9, you contact the Board of Supervisors of Mills County, because under that Code section the county can legally cooperate in the construction of this facility.

"In addition to obtaining the above information, we also contacted the Attorney General's Office here in Des Moines. It is our understanding that neither the institution nor the central office of the Board of Control can legally expend any of its money, even though they had it on hand, on a project of this type.

"The only way the State can participate would be through an action on the part of the legislature, which would involve a special appropriation for a fixed amount of money to be expended on this specific job. We are sure that this would be relatively difficult to accomplish."

An exhaustive search of the following chapters of the 1958 Code of Iowa, to wit: Chapter 217, Board of Control of State Institutions; Chapter 218, Government of Institutions; Chapter 223, Woodward State Hospital and School and Glenwood State School, fails to disclose any applicable section therein to the immediate problem at hand.

However in the correspondence heretofore referred to and set out in this opinion Section 309.9(3), 1958 Code of Iowa and Section 308.5, 1958 Code of Iowa have been referred to as possibly being applicable. Said sections are set out as follows:

Section 309.9(3) provides:

"The secondary road fund is hereby pledged to and shall be used for any or all of the following purposes at the option of the board of supervisors:

"3. Payment of all or part of the cost of construction and maintenance of bridges in cities and towns having a population of eight thousand, or less and all or part of the cost of construction of roads located within an incorporated town, of less than four hundred, population, which lead to state parks."

Section 308.5, provides:

"When a city, town, or county shall drain, oil, pave, or hard surface a road which extends through or abuts upon lands owned by the state, 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."

Additionally, Section 308.1, 1958 Code of Iowa, provides:

"Highways on lands of the state and highways on which such lands abut shall constitute a separate road district for each state institu-

tion, in connection with which such lands are used, and shall be under the jurisdiction of the board of control thereof."

And, Section 308.4, 1958 Code of Iowa, provides:

"The roads, bridges and culverts within or adjacent to any such district and roads included in the state park system as defined in section 306.2 shall be maintained, repaired, and improved under the direction of the board which is in control of said lands, provided said board shall not pave or hard surface such roads unless authorized so to do by the executive council. The costs shall be paid only after certificate of detailed amount due shall have been filed by the said board with the state comptroller, and duly audited as provided by law. This section shall not be construed as preventing the paving or hard surfacing of any such roads under any other proceeding authorized by law."

It is to be noted that the letter from the engineering firm heretofore referred to and set out above mentions two bridge crossings in the town of Glenwood in need of repair. It is my understanding that the bridge crossing of concern to the Glenwood State School is the bridge crossing over Keg Creek at Vine Street. Therefore, this opinion is applicable only to this particular crossing.

In view of the foregoing you are advised as follows:

1. Section 308.5, supra, is not applicable to the instant situation as construction or repair or both of a bridge crossing in no wise constitutes draining, oiling, paving, or hard surfacing of a road which extends through or abuts upon lands owned by the state. Inasmuch as the operation of which you are directly concerned fails to come within the statutory language above we need not at this time be concerned with the word "abut" as it appears in Section 308.5, supra, and its definition and applicability.

2. The word "adjacent" as it appears in Section 308.4, supra, is relative and has more than one meaning. Its meaning being determined by the context in which it is used, the facts of the particular case and the subject-matter to which the word is applied. See: Words and Phrases, "Adjacent" and the cases cited therein.

Thus we have, not a question of law, but one primarily of fact and this office is precluded from rendering an opinion thereon.

3. Providing that the bridge crossing in the instant case is within the corporate limits of the town of Glenwood, Section 309.9, supra, would be applicable and afford a possible solution to the problem at hand. However, use of the secondary road fund for such purpose is at the option of the board of supervisors, in this case, of Mills County.

Therefore, it is the opinion of this office that the Board of Control of State Institutions is under no legal obligation to direct the maintenance repair or improvement of the bridge crossing at Keg Creek and Vine Street, Glenwood, Iowa, unless and until it has been determined that factually said bridge crossing is adjacent to the institutional road district as provided in Sections 308.1 and 308.4, 1958 Code of Iowa.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

kr

Release of lien on transfer --

MOTOR VEHICLES; ~~CERTIFICATE OF TITLE, LIEN.~~

A lien noted on a certificate of title need not be released and canceled by the lienholder before a transfer can be made by the owner. (Peck to Brown, Pub. Safety Dept., 18/12/58) #58-12-2

December 18, 1958

Mr. Russell I. Brown
Acting Commissioner
Public Safety
LOCAL

Attention: Mr. J. F. Carlson, Director
Motor Vehicle Registration Division

Dear Sir:

Receipt is acknowledged of your request for an opinion dated December 1, 1958, on the following legal problem, to wit:

> "When a vehicle is sold on which a lien is noted, and the new owner on his application for title or transfer acknowledges that he has assumed the lien so noted, does the lienholder whose lien is noted on the title submitted have to release and cancel his lien before the transfer can be made to the new owner?"

The applicable statutes pertaining to the question submitted are as follows:

Section 321.45 (3), 1958 Code of Iowa, provides:

> "3. Upon the transfer of any registered vehicle, the owner, except as otherwise provided in this chapter, shall indorse an assignment and warranty of title upon the certificate of title for such vehicle with a statement of all liens and encumbrances thereon, which statement shall be verified under oath by the owner, and he shall

58-12-2

deliver the certificate of title to the purchaser or transferee at the time of delivering the vehicle except as otherwise provided in this chapter. The owner, except as otherwise provided in this chapter, shall also sign the reverse side of the registration card issued for such vehicle indicating the name and address of the transferee and the date of the transfer."
(Underscoring added).

Section 321.46, 1958 Code of Iowa, provides that:

"The purchaser or transferee shall immediately apply for and obtain from the county treasurer of his residence a transfer of registration and a new certificate of title for such vehicle except as provided in section 321.48. The purchaser or transferee shall present with the application the certificate of title indorsed and assigned by the previous owner and the signed registration card.

"Upon filing the application for a registration transfer and a new title, the applicant shall pay a fee of seventy-five cents. The county treasurer, if satisfied of the genuineness and regularity of the application and that applicant has complied with all the requirements of this chapter, shall forthwith issue a new certificate of title and registration card to the purchaser or transferee and shall forward the necessary copies to the department on the date of issuance, as prescribed in section 321.24."

Section 321.50, 1958 Code of Iowa, in pertinent part provides that:

"* * * * * * * * * *. The county treasurer shall note upon the certificate of title all liens shown in the application for such certificate of title, upon the payment of a fee of one dollar for each lien appearing on such application. * * * * ."

In view of the statutory provisions heretofore set out, your question as submitted is answered in the negative.

Very truly yours

CARL H. PESCH
Assistant Attorney General

CHP:js

Station wagon registration--

MOTOR VEHICLES, ~~REGISTRATION OF.~~

1. A vehicle designated by the manufacturer as a station wagon, notwithstanding the fact that the same vehicle may by definition be a motor truck, is required to be registered on the basis of the fee schedule provided in §321.109, 1958 Code of Iowa. (Peach to Brown, Pub. Safety Dept., 19/12/58) #58-12-3

December 19, 1958

Mr. Russell I. Brown
Acting Commissioner
Department of Public Safety
LOCAL

Attention: Mr. J. F. Carlson, Director
Motor Vehicle Registration Division

Dear Sir:

Receipt is acknowledged of your request for an opinion on the following legal problem, to wit:

> "Paragraph 4 of Section 321.1 states, 'motor truck' means every motor vehicle designed primarily for carrying livestock, merchandise, freight of any kind, or over seven persons as passengers.
>
> "Paragraph 321.109 provides that vehicles designated by manufacturers as station wagons shall be licensed as passenger vehicles.
>
> "A number of station wagons now manufactured provides for the carrying of nine passengers. Under the above quoted provision of the Iowa statute, can the owner have his option of registering a nine passenger station wagon as either a motor truck or a passenger vehicle?"

Motor truck is defined by Section 321.1(4), 1958 Code of Iowa, to mean:

> "every motor vehicle designed primarily for carrying livestock, merchandise, freight of any kind, or over seven persons as passengers."

The foregoing definition of motor truck was

58-12-3

incorporated into the law by amendment. 47 G.A., Ch. 134, §1 (4).

Section 321.109, 1958 Code of Iowa, in pertinent part provides that:

> "The annual fee for all motor vehicles <u>including vehicles designated by manufacturers as station wagons</u>, except motor trucks, * * * *, shall be equal to one percent of the value as fixed by the department plus forty cents for each one hundred pounds or fraction thereof of weight of vehicle, as fixed by the department. * * * *." (Underscoring added).

The language underscored in the foregoing statute, to wit: §321.109, was added by amendment (53 G.A., ch. 135, §4) said amendment being subsequent to the amendment heretofore referred to, the same adding the definition of a motor truck, as it now appears.

Thus we have a specific provision enacted subsequent to a general provision, and by the application of rules of statutory construction it becomes apparent that the specific controls, in this instance: "including vehicles designated by manufacturers as station wagons,".

Therefore, in view of the foregoing it is my opinion that a vehicle designated by the manufacturer as a station wagon, notwithstanding the fact that the same vehicle may by definition be a motor truck, is required to be registered on the basis of the fee schedule provided in Section 321.109, supra.

Very truly yours

CARL H. PESCH
Assistant Attorney General

CHP:js

State aid to counties--

INSANE PERSONS: ~~STATE MENTAL AID FUND--PAYMENT TO COUNTIES~~

Payment made to a claimant county from the state mental aid fund is to be credited to the county fund for the insane. (Presch to Bd of Control, 12/12/58)

58-12-4

December 17, 1958

Board of Control
of State Institutions
LOCAL

Gentlemen:

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

> "Should the payment made to the claimant county from the State Mental Aid fund be credited to each individual patient account or to the County Fund for the Insane?"

Section 227.18, 1958 Code of Iowa, provides that:

> "The state aid herein provided for shall be paid to the claimant county upon a verified claim being filed quarterly with the board of control setting forth the total of weekly patient care furnished to transferees in county or private institutions from the county fund for the insane. Approval of said verified claim by the board of control shall be authority for the state comptroller to issue a warrant upon the state mental aid fund payable to the claimant county which shall be credited by that county to the county fund for the insane levied under the provisions of section 230.24."
> (Underscoring supplied).

The mandate of the Legislature as expressed in the foregoing section is clear. Upon receipt of the

58-12-4

amount of state aid by the claimant county, to which the same is entitled, that amount is to be credited to the county fund for the insane and becomes a part thereof. This construction finds support in an opinion of this office appearing in the 1950 Report of the Attorney General at p. 54.

In view of the foregoing, it is, therefore, my opinion that the paymant made to the claimant county from the state mental aid fund should be credited, not to each individual patient account, but, to the county fund for the insane.

Very truly yours

CARL H. PESCH
Assistant Attorney General

CHP:js

Special Election Boards--

ELECTIONS: ~~BOARD AT SPECIAL ELECTION~~

The provisions of Section 49.19 requiring election boards at special elections to be the same as the last general election is related to Section 49.12, which requires an election board to be composed of three judges and two clerks, shall apply to special election, notwithstanding that election board conducting election of 1958 was compose of three officials as provided by Section 49.17. (Strauss to Bedell, DICKINSON Co. Att'y., 12/12/58) # 58-12-5

December 12, 1958

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

Dear Sir:

This will acknowledge receipt of yours of the 9th inst. in which you submitted the following:

"I request your opinion on the following question:

"At the last general election held in November of 1958 in Dickinson County, election machines were used in the voting in the election. Under authority of Section 49.17 of the 1958 Code of Iowa, the precincts having only one voting machine had election boards made up of only three members.

"There will be a special election called in Dickinson County for the purpose of filling a vacancy in the office of State Senator. Under Section 49.19 of the Code it appears that the same election boards used at the last general election should be used at this special election. However, Section 49.12 provides that election boards shall consist of five members.

"Voting machines will not be used at this special election, and my question is whether or not Section 49.12 or Section 49.19 prevails and how many persons must be named as members of the election boards in the precincts which had only one voting machine in the last general election."

I advise as follows. According to opinion appearing in the

1938 Report of the Attorney General, at page 800, Section 49.19 providing that election boards for special elections shall be the same as the board at the last general election refers solely to the election board provided in Section 49.12 wherein the election board is required to be composed of three judges and two clerks.

Accordingly, I am of the opinion that the election board for the special election shall be a statutory five-man board notwithstanding a three-man board conducted the 1958 election.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:md

TAXATION: Property tax receipts --

When new County Treasurer takes office on Jan. 2, 1959, the receipts for 1958 taxes payable in 1959 shall be signed by the new treasurer. (Stamped to Mather, Sac Co. Atty., 10/12/58) #58-12-6

December 10, 1958

Mr. Charles Mather
Sac County Attorney
Sac City, Iowa

Dear Sir:

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

> "We have a practical problem concerning the tax receipts of the Sac County Treasurer. A new person takes that office on January 2, 1959. The receipts for the 1958 taxes payable in 1959 are printed with the signature of the outgoing treasurer on them. Is it necessary that the signature of the new treasurer be shown on these receipts when they are issued in 1959?
>
> "You can see the practicality of this problem. Prompt reply to this letter will be appreciated."

In reply thereto I would advise you that the provisions of Section 445.5, Code 1958, which follows:

> "Receipt. The treasurer shall in all cases make out and deliver to the taxpayer a receipt, stating the time of payment, the description and assessed value of each parcel of land, and the assessed value of personal property, the amount of each kind of tax, the interest on each and costs, if any, giving a separate receipt for each year; and he shall make the proper entries of such payments on the books or other records approved by the state auditor of his office. Such receipt shall be in full of the first or second half or all of such person's taxes for that year, but the treasurer shall receive the full amount of any county, state, or school tax whenever the same is tendered, and give a separate receipt therefor."

58-12-6

provide answer to your question. According to the foregoing the receipt shall be given by the treasurer. Clearly receipt for 1958 taxes payable in 1959 shall be signed by the new treasurer who takes office January 2, 1959.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

RETIREMENT PLANS: I.P.E.R.S. for part-time employees-
Employees under Iowa Public Employees Retirement System whose remuneration in one quarter of the year is less than $200 and in another quarter of the year is $200 or more are required to pay a tax only on the quarter in which the remuneration aggregates $200 and are entitled to exemption from the tax when remuneration is less than $200 per quarter. (Strauss to Meyer, Winneshiek Co. Atty., 10/12/58) #58-12-7

December 10, 1958

Mr. Isadore Meyer
Winneshiek County Attorney
Decorah, Iowa

Dear Sir:

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

> "The State Tax Commission of the State of Iowa has recently audited the IPERS records of Winneshiek County, Iowa, and have determined that field assessors come under the law beginning after July 4, 1953.
>
> "Under the provisions of Section 405.18 of the 1958 Code of Iowa, the Conference Board provided for therein authorizes the number of deputies, field men, and other personnel of the assessor's office. Then sometime between Christmas and New Years the field men come into Decorah and meet with the County Assessor to discuss the assessment beginning after January 2 of the coming year. At this time they receive their supplies and materials and are told to start work some time after January 2, 1958. The field assessors in Winneshiek County, Iowa, usually then begin sometime after January 1 and usually complete their work in April of year year. These men are paid on the roll basis; that is, so much for each roll filled out.
>
> "Mr. S. J. Patterson, field representative of IPERS, recently audited the Winneshiek County ledger and has filed a claim for $2,932.81, which includes $353.65 interest on delinquent IPERS tax for field assessors since July of 1953.
>
> "Section 97B.42 provides that, 'After July 4, 1953, each employee shall become a member upon the first day of the month following the month in which such employee is employed.' Then this

58-12-7

> Section goes on, 'The term "employee" as used herein shall not include any individual performing any service in any calendar quarter in which the remuneration for such service does not equal or exceed the sum of $200.00 . . .' Some of the field assessors in Winneshiek County file a claim for their entire salary on the roll basis when they have completed their work, and others claim partial payment before they had completed their work. The County Auditor of Winneshiek County had taken the position that the first 30 days, that is the first month, would be exempt, and then the amount paid to the field assessor would be less than $200.00 for each quarter. Some of the assessors, as I said, file a claim for their entire salary when they have completed their work, and others claim partial payment before they have completed their work.
>
> "On the basis that a field assessor begins his work on or about January 2 of a year and then files a claim on or about February of that year for a partial payment for his work done on a roll basis, and then what he receives in a second quarter would be under $200.00, would these field assessors be exempt from paying IPERS under the provisions of Section 97B.42?
>
> "I can find no law, Attorney General opinions or rulings on this matter, and it is a matter that is of public interest, since it may well come up in most, or all, of the counties in the state."

In reply thereto I would advise you as follows. I am of the opinion that answer to your question is found in the following provision contained in Section 97B.42, 1958 Code:

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

In other words, the field assessor whose quarterly remuneration for one quarter of the year aggregates less than $200.00 and

for another quarter aggregates more than $200.00 he would be deemed an employee for IPERS purposes in the quarter in which he was paid $200.00 or more and for the quarter that remuneration aggregated less than $200.00 the field assessor would be exempt from payment of the IPERS contribution.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

CONSERVATION: ~~COMMISSION.~~
Hunting & fishing license - Exemption --The exemption of Sec. 110.17 applies only to lands rented as a tenant. Hired hand is not a tenant. (Edbe to Schroeder, Jackson Co. Atty., 2/12/58) #58-12-8

December 2, 1958

Mr. Asher E. Schroeder
Jackson County Attorney
Maquoketa, Iowa

Dear Sir:

In a recent letter to this office, dated September 9, 1958, you raised the following questions:

> "1. In this county, we have several families now living in houses that were once a part of a farming operation. However, at this time it is merely rented to a family for living quarters only and no part of the land is rented or used by the person living in the houses. The question arises, does this person who occupies the house only have a right to hunt upon the land that forms a part of the farm upon which the house is located and which, of course, is owned by the same person from whom he rents, without obtaining a hunting license? Also to go one step further, would a hired man have the right to hunt upon his landlord's farm without first obtaining a hunting license?

In reply to your first question, the first paragraph of section 110.17, Code of Iowa is as follows:

> "110.17 LICENSES NOT REQUIRED. Owners or tenants of land and their children, may hunt, fish or trap upon such lands and may shoot ground squirrels, gophers or woodchucks upon adjacent roads without securing a license so to do."

In 1922 O. A. G. 357 this office had occasion

58-12-8

to discuss this section. In that opinion it is said:

> "It will be observed that the above exception to the general rule that a person in order to be authorized to hunt animals and game within this state shall secure a license therefor applies only to the owners of farm lands, their children or tenants and that such exception authorizes the owners of farm lands, their children or the tenants to hunt and kill wild animals, birds or game upon the lands owned or occupied by them.
>
> "It was the intent of the legislature as clearly expressed in the provisions above quoted that tenants in order to come within the exception to the hunter's license provision shall actually and in good faith occupy farm lands and that their hunting activities shall be confined to the lands actually and in good faith occupied by them.
>
> "If there is upon the farm lands so leased and occupied by them a lake or pond belonging to the premises they would of course be authorized by the above exception to shoot ducks thereon.
>
> "The leasing of a lake or pond alone for the purpose of shooting ducks thereon without procuring a license would in our opinion be a mere subterfuge and would violate not only the spirit but the letter of the law as well."

This remains the opinion of this office particularly as the rules set out in that opinion are in keeping with the definition of tenant and the discussion of meaning thereof found in 32 Am Jur, Landlord and Tenant Sec 2 p. 27.

The renter may thus hunt without a license only upon the land which he rents. The exemption does not apply to other land owned by his landlord whether separated or adjacent to the land rented.

A hired man is neither a tenant or child of an owner or tenant and therefor is not within the exemption.

Very truly yours

NORMAN A. ERBE
Attorney General of Iowa

NAE:JHG:js

CITIES AND TOWNS: Public Improvements -- assessment against state property. (Strauss to Cunningham, Secy, Exec. Coun. 8/12/58)
#58-12-12

December 8, 1958

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 5th inst. in which you submitted the following:

> "Attached herewith are four (4) requests for the payment of special assessments for paving, street lighting, oiling and sanitary sewer as follows:
>
> "1. Paving - City of Cedar Falls, $2148.02
>
> "2. Street Lighting - Iowa City, $6170.06
>
> "3. Sanitary Lateral Sewer and/or Sewage Treatment Plant - City of Colfax, $807.16
>
> "4. Street oiling - City of Marshalltown, $38.85
>
> "We would appreciate an opinion in regard to the above matters."

In reply thereto I would advise as follows.

1. Insofar as the paving in the City of Cedar Falls and the street oiling in the City of Marshalltown are concerned I would advise this is a legal obligation of the State and may properly be paid.

2. Insofar as the street lighting is concerned in Iowa City I would advise that if this improvement was done under the provisions of Chapter 391A, 1958 Code, an assessment for street

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lighting is authorized including an assessment against State owned property. However, an assessment for street lighting under Chapter 391, 1958 Code, has no statutory authorization.

3. Insofar as the assessment is concerned involving the sanitary lateral sewer and/or sewage treatment plant in the City of Colfax, on the assumption that this assessment is made under Chapter 391A, 1958 Code, this improvement is authorized under that Chapter and the assessment thereunder against State owned property is appropriate.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

Forest and fruit tree reservations - ...

~~HEADNOTE: TAXATION: FOREST AND FRUIT TREE RESERVATIONS~~

In order to qualify for the exemption contained in Section 441.14, Code of Iowa (1958), a showing that some trees have been planted on or before January 1 of the year in which the exemption is claimed must be made, although it is not necessary to show that two hundred trees to the acre have been planted. The fact that the forest trees are considered a crop does not deprive the owner of the forest reservation of the exemption.

(Brinkman to Meyer, Winneshiek Co Atty., 10/12/58)

September 10, 1958

#58-12-13

Mr. Isadore Meyer
Winneshiek County Attorney
Court House
Decorah, Iowa

Dear Mr. Meyer:

This is to acknowledge receipt of your letter of November 21, 1958, in which you request the opinion of this department on the following problem:

"The Winneshiek County Assessor has consulted me with reference to an application for forest reservation under the provisions of Chapter 161 of the 1958 Code of Iowa with the assessed rate provided under Section 441.14 of the 1958 Code of Iowa.

"The Ponderosa Pine Company bought a 160 acre farm located in the northwest corner of our county under a contract which is of record. They claim to have planted at least 100 trees to the acre on the crop land of the farm. Another party in the county has also planted 40 acres to trees, and there is at least one other such planting in our county. This planting comes under the Federal Conservation Program, whereby the government pays $10.00 per acre for a period of ten years, plus part of the planting cost. All of these plantings were done after January 1, 1958. The chairman of the local Soil Conservation office informed the County Assessor that under the federal plan no crop of any kind can be taken off these acres during the ten year period.

" * * * *.

"Our County Assessor asks the following questions:

"1. Who determines if a tract comes under the Forest Reservation exemption law? Is it the Assessor, and must it also be approved by the Board of Review?

"2. In the instance of new planting, can application be made

58-12-13

immediately or is there a waiting period to be sure the trees will grow? Also, what is the meaning of 'during a period of not more than two years', as set out in Section 161.3 of the 1958 Code of Iowa?

"3. If the planting of trees would qualify a tract to the exemption (the $4.00 per acre rate), would such planting have to be done prior to January 1 of the year exemption is claimed?

"4. Would the fact that the trees be considered a crop, such as Christmas trees and the like, change their status?"

The answer to your first inquiry will be found in 1924 Report of Attorney General, p. 387, in which is stated that the local assessor determines what lands constitute forest reservations, and the approval of the County Board of Review is unnecessary unless, of course, the assessor's determination is appealed to it.

In order to answer your second question it is necessary to examine Section 161.3, Code of Iowa (1958), which is as follows:

"Forest reservation. A forest reservation shall contain not less than two hundred growing forest trees on each acre. If the area selected is a forest containing the required number of growing forest trees, it shall be accepted as a forest reservation under the provisions of this chapter. If the area selected is a forest containing less than two hundred forest trees to the acre, or if it is a grove or an area to be planted to trees, the owner or owners thereof shall have planted, cultivated, and otherwise properly cared for the number of forest trees necessary to bring the total number of growing trees to not less than two hundred on each acre, during a period of not more than two years, after it has been accepted as a forest reservation within the meaning of this chapter. No ground upon which any farm buildings stand shall be recognized as part of any such reservation."

The statute provides that if the number of trees is less than two hundred trees per acre, or if it is an area to be planted to trees, the owner or owners shall have a period of two years to bring the number of trees to the required

two hundred per acre. It is, therefore, our opinion that application may be made immediately, so long as some trees are planted at the time the application is made. If at the end of two years the trees have not been increased to two hundred per acre, the exemption as provided by Section 441.14, Code of Iowa (1958), will be thereafter denied.

It should be noted that Chapter 90, § 2, Acts of the 55th General Assembly, amended Section 161.3 to its present form. Under the prior law it appears that before an exemption could be granted the area planted to trees must have contained not less than two hundred trees to the acre, under the present statute the exemption is allowable where there are less than two hundred trees to the acre, so long as there are some planted in the year in which the exemption is claimed and the total is brought up to two hundred within two years.

In response to your third question, you are advised that in order to qualify for the exemption it is the opinion of this office that at least some trees must have been planted on January 1 of the first year in which the exemption is claimed. The statutory language indicates that where there is an area to be planted to trees, the owner shall have planted trees, and thereafter has two years in which to bring the total to two hundred per acre.

As to your fourth question, your attention is directed to the following statutory provisions:

> "161.4 Removal of trees. Not more than one-fifth of the total number of trees in any forest reservation may be removed in any one year, excepting in cases where the trees die naturally."

"161.9 Replacing trees. When any tree or trees on a fruit-tree or forest reservation shall be removed or die, the owner or owners of such reservation shall, within one year, plant and care for other fruit or forest trees, in order that the number of such trees may not fall below that required by this chapter."

We can find no provisions in the laws of this state which would deny the exemption granted by Section 441.14 on the basis that the trees may be used as crops. So long as the trees cut for commercial purposes do not exceed the statutory limit found in Section 161.4, supra, and are replenished pursuant to Section 161.9, supra, the exemption may be granted, provided, of course, all other statutory requirements are met.

Very truly yours,

Richard J. Brinkman
Special Assistant Attorney General

RJB:bWR:fs

TAXATION: Property appraised by private firm -- Ch. 405, Code 1958, does not confer general statutory powers upon the three taxing bodies, the City Council, Board of Supervisors, and School Board, and their specific powers thereunder do not include the power to contract with expert appraisers to check on valuations of Des Moines real estate. (Stamus to Hanrahan, Polk Co. Atty., 4/12/58) #58-12-14

December 4, 1958

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

Attention: Mr. A. R. Shepherd

Dear Sir:

This will acknowledge receipt of yours of the 2nd inst. in which you submitted the following:

> "It has been suggested that the Polk County Board of Supervisors join with the Des Moines City Council and the Des Moines School Board in employing a firm of expert appraisers to check the accuracy of valuation by the Des Moines City Assessor of some 260 parcels of land in the City of Des Moines, apparently to be so selected as to include a variety of units as to use and value. The Supervisors have asked us whether they have the power to do this and we have some difficulty in answering their question.
>
> "We understand that the provisions as to the selection of the Des Moines City Assessor, his powers and duties are set out in Chapter 405 of the 1958 Code, entitled 'Assessors in Cities of 125,000 Population' with the additional inclusion by reference of Chapter 441 mentioned in Code Section 405.19. We have been unable to find any specific authority for the employment of such extra technical help either in Chapter 405 or Chapter 441 of the Code.
>
> "In Chapter 405A entitled 'Assessors in Cities from 10,000 to 125,000 Population', we find Section 405A.6 reading as follows:
>
> "'405A.6 APPRAISERS EMPLOYED -- The taxing bodies by majority vote in any city to which this chapter is or shall become applicable

58-12-14

shall have power to employ appraisers or other technical or expert help to assist in the valuation of property, the cost thereof to be paid in the same manner as other expenses of the assessor's office on a pro rata basis by school districts, cities and counties which constitute the taxing bodies. The county conference as created by section 442.1 may employ similar assistance as for the county assessor and the cost of such shall be paid from the county assessor fund, and provisions for costs of such service shall be made in the preparation of the budget for the county assessor's office.'

"In an opinion appearing on pages 178 to 180 inclusive of the Report of the Attorney General for 1948, the Attorney General advised the County Attorney of Polk County that the section above referred to which first became a law in substantially but not exactly its present form as Section 20 Chapter 240 of the Laws of the 52d General Assembly, gave the Board authority to employ an expert appraiser for the County Assessor and pay the expense from the general levy for the Assessor's office.

"Near the close of this opinion, the Attorney General commented that a contract was entered into in the year 1940 with the Cleminshaw Company for the employment of expert appraisers in connection with the 1941 assessment of property within the City of Des Moines and the cost of this appraisement was paid from the General Fund contributed, in part, by taxpayers outside the corporate limits of Des Moines. The Attorney General noted that by the express provision of Section 5669 of the Code of 1939, the compensation of the City Assessor in a city of more than 125,000 population and his deputies, was ordered paid by the County from its General Fund. The Attorney General then stated:

"'There was no express statutory authorization for the employment by the county, for the assistants to the assessor of extra, technical or expert service.'

"We find but two comments by our Supreme Court which seem to have any bearing on the question

> before us. In Haubrich vs. Johnson, 242 Iowa 1236, 1239, 50 N. W. 2d 19, the Supreme Court commented that Chapter 405 is generally known as the 'Des Moines' Assessor law referring to cities having a population of 125,000 or more and had no application to real estate in the town of Mapleton.
>
> "Again in Daniels vs. Board of Review, 243 Iowa 405, 408, 52 N. W. 2d 1, our Supreme Court held that Section 20 Chapter 240, Acts of the 52d General Assembly now included in Code Section 405A.6 above quoted, specifically authorizes the County Board of Supervisors to employ appraisers to assist the County Assessor in the valuation of property.
>
> "Will you kindly advise us if there is anything that we have overlooked in our research on this question and whether, in your opinion, our County Board of Supervisors may properly join with the Des Moines City Council and the Des Moines School Board in employing these expert appraisers to check the City Assessor's valuation of properties in Des Moines, and authorizing the payment to these appraisers for their service?"

In reply thereto I would advise you as follows. In the view that the Department takes of the foregoing situation we find it unnecessary to answer by opinion the specific question submitted. Insofar as the authority and duties of city assessors in certain cities is concerned, the only cities possessing among their other authority the authority proposed by the City Council and the Des Moines City School Board is that contained in Section 405A.6, Code 1958, which is exhibited in your letter. The authority there provided is available "to any city having a population of 10,000 or more according to the latest Federal census or which shall attain such population in the future but shall not have population in excess of 125,000." The City

of Des Moines according to the latest Federal census, following the holding of Harp v. Abrahamson, 248 Iowa 222, 80 N. W. 2d 505, is that of 1950, and its population then was 177,965, of which courts take judicial notice. State v. Darling, 216 Iowa 553, 246 N. W. 390, 80 L. R. A. 218. But the authority provided by Section 405A.6 is neither expresslynor impliedly provided in Chapter 405 and therefore the employing of a firm of expert appraisers to check the accuracy of valuations by the Des Moines City Assessor is in excess of the powers provided to be exercised under Chapter 405, Code 1958.

The foregoing conclusion has the support of our Supreme Court in Gritton v. City of Des Moines, 247 Iowa 326, 73 N. W. 2d 813, where it is stated:

> "It is fundamental that municipal corporations are wholly creatures of the state legislature. They have no inherent power to do what was done here. They possess and can exercise only the powers (1) expressly granted by the legislature (2) necessarily or fairly implied in or incident to the powers expressly granted, and (3) those indispensably essential - not merely convenient - to the declared objects and purposes of the municipality. Brooks v. Incorporated Town of Brooklyn, 146 Iowa 136, 141, 124 N. W. 868, 26 L. R. A., N. W., 425; Van Easton v. Town of Sidney, 211 Iowa 986, 989, 231 N. W. 475, 476, 71 A. L. R. 820, and citations; Keokuk Water-works Co. v. Keokuk, 224 Iowa 718, 731, 277 N. W. 291; Iowa Electric Co. v. Town of Cascade, 227 Iowa 480, 483, 288 N. W. 633, 634, 129 A. L. R. 758; Cowin v. City of Waterloo, 237 Iowa 202, 210, 21 N. W. 2d 705, 709, 163 A. L. R. 1327; 2 McQuillin, Municipal Corporations, 3d Ed.,

> section 10.09, page 593; 62 C. J. S., Municipal Corporations, section 117a; 37 Am. Jur., Municipal Corporations, section 112.
>
> "Earlier decisions stating the rule substantially as we have expressed it are Heins v. Lincoln, 102 Iowa 69, 77, 71 N. W. 189, and cases cited therein.
>
> "The powers conferred upon municipalities are to be strictly construed and when there is uncertainty or reasonable doubt as to the existence of power it will be denied. City of Onawa v. Mono Motor Oil Co., 217 Iowa 1042, 1045, 252 N. W. 544; Van Eaton v. Town of Sidney, supra, and citations at page 990 of 211 Iowa; Brockman v. City of Creston, 79 Iowa 587, 589-591, 44 N. W. 822; 2 McQuillan, Municipal Corporations, 3d Ed., sections 10.18, 10.19, pages 621-625; 62 C. J. S., Municipal Corporations, section 119a; 37 Am. Jur., Municipal Corporations, section 113. See also Huff v. City of Des Moines, 244 Iowa 89, 92, 56 N. W. 2d 54, 56; Peterson v. Town of Panora, 222 Iowa 1236, 1240, 271 N. W. 317; Ebert v. Short, 199 Iowa 147, 151, 201 N. W. 793."

And insofar as making the provisions of Section 405A.6 applicable to cities within the provisions of Chapter 405, it is to be said that there is no appearance of legislative intent to make that section a general provision applicable to all municipal corporations; on the other hand by its very terms its applicability is clearly limited to cities within the class controlled by Chapter 405A. In Ferguson v. Brick, 248 Iowa 839, 82 N. W. 2d 849, this rule was stated:

> " * * * Relative Municipal Corporations, powers granted by the legislature, are of two kinds: General, being those usually possessed by all such corporations, or powers conferred in general terms; special or particular, which are granted for particular purposes or to particular corpora-

> tions. 62 C. J. S., Municipal Corporations, section 113, 37 Am. Jur., Municipal Corporations, section 97; Eckerson v. City of Des Moines, 137 Iowa 452, 115 N. W. 177, wherein chapter 48 of Acts of 32d G. A. was under consideration, holds that said chapter is limited or particular in that it embraces a particular form of government, i. e., the Commission form."

Bearing in mind that the three taxing bodies, the City Council, the Board of Supervisors and the School Board, possess no general statutory powers under Chapters 405 and 405A, Code 1958, and that those which they do possess are specifically limited, the Department finds that the Polk County Board of Supervisors has no power to enter into the suggested agreement.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

CRIMINAL LAW: Words and Phrases -- "Moral turpitude" discussed. (Faulkner to Wilson, Immigration Service, 8/12/58)

58-12-15

December 8, 1958

Mr. Robert C. Wilson, District Director
United States Department of Justice
Immigration and Naturalization Service
Omaha 2, Nebraska

Dear Sir:

In the enclosures submitted with your letter of December 1, 1958, it is shown that an alien was convicted under a city ordinance which is as follows:

> "Section 1. It shall be unlawful to commit any of the following acts:
>
> " * * *.
>
> "8. Make any indecent exposure of the person, or commit any indecent or lewd act."

The question is stated by this quotation from your letter:

> "We are attempting to establish whether or not the crime involves moral turpitude. It is the opinion of this office that it does not.
>
> "We have been requested by our Chicago office to obtain from your office an opinion based on past decisions or present interpretation as to whether a conviction under this ordinance requires indecent exposure be committed with evil intent."

Initially, you are advised that this office is, by statute, limited as to whom opinions may be rendered. Only State legislators, State officials and County Attorneys may receive opinions. However, as a matter of courtesy, your question is discussed below.

It is necessary to first set out our state statute, Section 725.1, 1958 Code of Iowa, which establishes the offense herein considered.

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> "Lewdness - indecent exposure. If any man and woman not being married to each other, lewdly and viciously associate and cohabit together, or if any man or woman, married or unmarried, is guilty of open and gross lewdness, and designedly makes an open and indecent or obscene exposure of his or her person, or of the person of another, every such person shall be imprisoned in the county jail not exceeding six months, or be fined not exceeding two hundred dollars." (Underscoring ours)

My research discloses no reported Iowa authority as to what constitutes moral turpitude, or whether intent is a necessary constituent thereof. For this reason resort is made to more general authority.

According to 22 C. J. S., Criminal Law, Section 30, where the statute is silent knowledge and criminal intent are generally essential if the crime involves moral turpitude, but not if it is malum prohibitum. In any event it is established that whether intent is an element of the crime is a matter of statutory construction. See State v. Dahnke, 244 Iowa 599, 57 N. W. 2d 553, State v. Schultz, 242 Iowa 1328, 50 N. W. 2d 9, and State v. Dobry, 217 Iowa 838, 250 N. W. 202.

As indicated in the above citation in 22 C. J. S. where the word "knowingly" or other apt words are not employed to indicate knowledge or intent then criminal intent is not an element of the offense. This view has been recognized in Iowa. State v. Striggles, 202 Iowa 1318, 210 N. W. 137, 49 A. L. R. 1270.

You will note that Section 725.1, supra, contains the word "designedly". This word is similar in effect to "knowingly" or "willingly". It is, therefore, the opinion of this office that "designedly" imparts intent. Such intent was recognized in the case of State v. Vance, 119 Iowa 685, 94 N. W. 204. See also Words and Phrases, Vol. 12, page 424.

The city ordinance hereinbefore referred to does not use the word "designedly", or any other word of like nature. Thus, if intent is an element of moral turpitude, the ordinance appears not to involve moral turpitude.

Very truly yours,

HUGH V. FAULKNER
Assistant Attorney General

HVF:MKB

TAXATION: Moneys and Credits -- Foreign Corporation stock taxable. (Strauss to Spies, Palo Alto Co. Atty., 4/12/58) # 58-12-16

December 4, 1958

Mr. Carl L. Spies
Palo Alto County Attorney
Emmetsburg, Iowa

Dear Sir:

I am in receipt of your letter of November 18, 1958, in which you request a clarification of a prior opinion issued by this office, which request is worded as follows:

> 1. "I have been pondering the meaning of your opinion of July 19, 1957 to Ray Hanrahan, Polk County Attorney, relative to the taxation of corporate stock as monies and credits and have concluded that under the provisions of Section 429.2 of the Code the stock of a foreign corporation is taxable for monies and credits and the tax is payable by the stock holder. The tax on an Iowa corporation is payable by the corporation itself if I read the statutes correctly.
>
> 2. "I gather that you have classed the stock of a foreign corporation as an interest bearing credit so that it is not exempt under the amendment to Section 429.4 made by the 57th General Assembly. I can't quite figure out the reasoning in the next to the last paragraph on page 4 of the opinion wherein the Court in the Merril case states that stocks are not a credit even tho the statute says they are unless the statute was amended after this case was decided.
>
> 3. "I would appreciate it very much if you would confirm my understanding on the taxation of foreign corporate stocks. I don't expect any formal opinion on it other than a reply to the effect that I may be right or wrong in my conclusions."

58-12-16

The conclusions reached in the first paragraph of your letter of November 18 are correct with one modification. Section 429.2, Code of Iowa (1958) does not state that corporate stocks are moneys and credits. Such section only provides that certain corporation stocks are to be taxed in the same manner as moneys and credits. The statute begins as follows: "Moneys, credits, and corporation shares or stock * * *." This indicates that corporate stock is in a separate classification. If corporate stock was, in fact, a credit, there would be no need to mention corporate stocks separately, since they would be included by use of the word "credit".

The conclusions stated in your second paragraph are not in accord with the conclusions reached in the opinion of July 19, 1957. Initially, the stock of a foreign corporation is not classed as an interest bearing credit. The reason that it is not exempt under the provisions of the amendment to Section 429.4, effected by the 57th General Assembly, is that the stock of a foreign corporation is not moneys, credits or accounts receivable. Since non-interest bearing moneys, credits and accounts receivable are the only things exempted by the terms of the amendment to Section 429.4, it would follow that the stock of a foreign corporation is not exempted.

You make the further observation in your letter of November 18 that the statute states that stock are credits. A close

scrutiny of the statutes fails to support such a conclusion. This writer is unable to locate in the Code of Iowa (1958) any statutory expression to the effect that corporation stocks are credits.

I trust that the above sufficiently answers your inquiry.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:MKB

COURTS: Change of venue in J.P. Court--

~~JUSTICE OF THE PEACE. CRIMINAL LAW:~~ If there is but one active justice of the peace in a county, it appears he may properly overrule a motion for change of venue, or the parties may, by consenting to personal jurisdiction, have the cause transferred to district court. (Faulkner to Norelius, Crawford Co. Atty.; 1/12/58.

#58-12-17

December 1, 1958

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

Dear Sir:

With regard to your letter of November 26, 1958, this question is submitted:

> "The question which I should like to have answered, if there is any answer, is this. If there is only one active Justice of the Peace in the County and a defendant charged with a nonindictable offense in that particular court applies for a change of venue pursuant to the provisions of Section 762.13 of the 1958 Code of Iowa, to what Court may the Justice of the Peace transmit the original papers as he is compelled to do pursuant to the provisions of Section 762.14. I would also like to be advised if the change of venue could lawfully be sent to the District Court in and for the same county."

In 51. C. J. S., Justices of the Peace, Section 62, it is stated:

> "Where a timely and sufficient affidavit is filed, and the other statutory steps are complied with, it is mandatory on the justice to transfer the cause unless it appears that there is no other justice in the county to whom the transfer can be made; . . ." (Emphasis added)

To support this proposition there is but one decision reported, namely, Huff v. Arnett, 98 Neb. 420, 153 N. W. 496. That case was a civil action. An affidavit for change of venue was filed. There was no other qualified justice in the county. Thus the motion for change of venue was overruled. The Nebraska statute, upon the filing of an affidavit for change of venue, provides:

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> " . . . whereupon it shall be the duty of the justice immediately, to transmit all of the papers in the case, together with a certified transcript of all the proceedings before him, to the next nearest justice in his county."

Overruling the motion for change of venue was held proper where there was no other qualified justice in the county. It was further stated that the defendant should have gone to trial, and if an adverse ruling was received, appealed to the district court.

As noted in Evans v. Phelps, 77 Iowa 526, there is no provision in the statutes for transferring an action from justice of peace court to the district court before final determination after which an appeal to district court is authorized. However, it is pointed out in the Evans case that an action may be dismissed and commenced anew in any other court having jurisdiction.

Another possibility is shown in Telephone Co. v. Howell, 132 Iowa 22, 109 N. W. 294. Where both the justice court and the district court have jurisdiction of the subject matter, and the parties consent or submit to jurisdiction over the person, then a basis for transfer exists.

These words from the Howell case are the essence of the holding:

> "In Davidson v. Wheeler, Morris 238, this court held that, where a court has jurisdiction of the subject matter, it may acquire jurisdiction of the parties by consent, and that a change of venue taken by consent of both parties conferred jurisdiction upon the court to which the change was taken although such change was not authorized by law, the court being one having jurisdiction of the subject matter . . . "

Since the statutes as to change of venue from one justice court to another are the same in substance whether it be a civil or criminal case, the cases above discussed would appear equally applicable to changing the place of trial of a non-indictable misdemeanor.

Thus, it appears that (1) the justice of peace may, under the Nebraska decision hereinbefore mentioned, overrule the request for change of venue, or (2) the parties may, in view of the fact that there is concurrent jurisdiction in the justice and district courts over the subject matter of non-indictable misdemeanors, by stipulation, have the cause transferred to district court.

Very truly yours,

HUGH V. FAULKNER
Assistant Attorney General

HVF:MKB