

Senate of Iowa
1946

TWENTY-SIXTH BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1946

JOHN M. RANKIN
Attorney General

Published by
THE STATE OF IOWA
Des Moines, Iowa



JOHN M. RANKIN
Attorney General

ATTORNEY GENERAL'S DEPARTMENT

JOHN M. RANKIN, Keokuk.....Attorney General
R. G. YODER, Sigourney.....First Assistant Attorney General
ROBERT L. LARSON, Iowa City.....Assistant Attorney General
OSCAR STRAUSS, Des Moines.....Assistant Attorney General
CHARLES H. SCHOLZ, New Hampton.....
.....Assistant Attorney General
HENRY W. WORMLEY, Kingsley.....
.....Special Assistant Attorney General
 —State Tax Commission
DON HISE, Ames.....Special Assistant Attorney General
 —State Highway Commission
T. S. HERRICK, Humboldt....Special Assistant Attorney General
 —State Board of Social Welfare
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 —Claims
IRA A. BUCKLES, Lake City.....
.....Executive Secretary to Attorney General
DOTTIE M. CUMMINGS, Spencer.....Secretary
WINIFRED FOLEY, Anamosa.....Secretary
AGNES E. KERR, Sigourney.....Secretary
HAZEL L. VIGARS, Eldora.....Secretary

ATTORNEYS GENERAL OF IOWA

1853-1947

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

REPORT OF THE ATTORNEY GENERAL

HONORABLE ROBERT D. BLUE,
Governor of Iowa.

Dear Governor:

Agreeably with Section 17.6 of the 1946 Code of Iowa, I have the honor to submit herewith the biennial report of the Attorney General, covering the period of his regular term beginning January 1, 1945, and ending December 31, 1946.

Chapter 13 of the 1946 Code of Iowa provides:

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

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

During the biennium, the department has participated in sixty-eight criminal appeals in the Supreme Court. Two cases were appeals by the State and in both instances reversals resulted. The balance, or sixty-six cases, were appeals taken by defendants from convictions obtained against them in the lower courts. Of these sixty-six cases, forty-nine affirmances were obtained, thirteen were dismissed upon motion of the State, and four were reversed and remanded to the trial court. Not included in the foregoing compilation are two appeals which were submitted to the Supreme Court during the biennium but in which no disposition had been made prior to January 1, 1947.

At the present time there are now eleven criminal cases pending before the Supreme Court in process of submission to the Court. As usual, some of these pending cases may probably be disposed of on Clerk's Transcript. However, in most instances briefs and arguments will have to be prepared and filed. It has been the policy of this department to file briefs and arguments promptly after they become due under the rules of Court so as to avoid undue delay in the final disposition of all criminal appeals, and consistent with that policy it is anticipated that briefs and arguments due in the pending criminal cases in which this department is interested will be filed promptly from time to time.

In addition to criminal cases in the Supreme Court, this department has participated in six habeas corpus cases instituted in the Federal Courts by inmates of our several state penal institutions, and has successfully resisted all efforts by the petitioners to obtain their discharge from custody therein. The department has also directly participated in the trial of two criminal prosecutions in the lower courts, obtaining conviction in one of the cases.

During the two years covered by this report the department has handled several criminal cases where the legal questions involved were novel and the decisions rendered therefor were of far reaching importance in the administration of criminal law in this state. Of particular interest is the case of *State v. Machovec*. The case arose in Humboldt County on a prosecution of the defendant for first degree murder. Defendant entered a plea of guilty, was found guilty of first degree murder, and was sentenced by the court to life imprisonment. Immediately thereafter, but before the judgment was entered of record, counsel for defendant attempted to withdraw defendant's plea of guilty, but the trial court refused to permit defendant's plea of guilty to be withdrawn. Defendant then appealed to the Supreme Court, which latter court affirmed the trial court, and held that Section 777.15, Code of 1946, is permissive only and does not give the defendant the

absolute right to withdraw a plea of guilty, and that the matter of withdrawal of a plea is a matter resting within the trial court's discretion. The Court expressly overruled eight of its own decisions which were contrary in result and principle to the *Machovec* case, and in so doing adopted the rule which is in force in the majority of the other states.

Other cases of interest are *State v. Critelli* and *State v. DeMarce*. In the *Critelli* case the Supreme Court did much to clarify the status of the law of Iowa with reference to "double jeopardy" and "former jeopardy". The Attorney General urged on appeal that under the provisions of our State Constitution and statutes, jeopardy did not attach in a criminal case when a jury had been impaneled and sworn to try a defendant, until that jury had returned a verdict, either of acquittal or guilty. The Supreme Court adopted the views of the Attorney General, thus doing much to clarify the law in this state on that subject.

In the *DeMarce* case, which was an appeal brought by the State at the instance of the Attorney General, our Supreme Court was induced for the first time to depart from its strict application of the "physical location" rule in the interpretation of criminal statutes. In that case the Court held that the presence of a proviso or exception in the enacting clause of a statute creating a criminal offense does not necessarily mean that the State must both allege and offer proof as part of its case that the person accused, or the act he was accused of committing, was not within the exception. The decision does much to clarify the law in this state with reference to the interpretation of the criminal statutes as related to the matter of determining the burden or negating exceptions contained in the enacting clauses of such statutes, and is in line with the tendency of courts generally to depart from a strict application of the "physical location" rule.

During the biennium the department has continued its policy of strict enforcement of the Practice Acts. During that period twelve actions were brought at the request of the State Department of Health, either to revoke licenses to practice one of the several professions licensed by that department, or to restrain practice of those professions without the license required by law. Five of said actions are still pending, two have been dismissed at the request of the State Department of Health, and five have been disposed of resulting in the suspension of two licenses to practice medicine for the period of one year, and the entry of two injunctions against persons practicing medicine and osteopathy without the license required by law. Of the twelve actions brought, two were appealed to the Supreme Court. In one of those cases, *State, ex rel Bierring v. Robinson*, our Court reversed its holding in

State v. Miller, 216 Iowa 806, and ruled that "faith healing" as a method of healing constituted the practice of medicine for which a license was required. In the other case, *State, ex rel Bierring v. Swearingen*, the Supreme Court laid down the rule that renewal of a license to practice one of the professions governed by the Practice Acts could not be denied without giving the applicant for renewal thereof, due notice and an opportunity to be heard, and that renewal could not be denied solely on the ground that the application for renewal had not been made within the period provided therefor by law.

Under the statutes this department is charged with the duty of supervising admissions to the Bar and the prosecution of disbarment actions which have been properly commenced. In one instance, through the cooperation of this department, a voluntary surrender of a certificate to practice law was obtained. The number of applications for admission to the bar upon motion have increased materially during the period covered by this report, largely due to the shift of population occurring during the prosecution and upon the termination of World War II, adding materially to the work of this department with reference to that phase of its activities.

It is a matter of common knowledge that crime is on the increase and will continue to increase during the ensuing biennium. Improvement in methods of transportation has facilitated the rapid movement of criminals from one jurisdiction to another. As a result the number of extraditions sought by this state and requested of this state have and will continue to increase. Our present extradition statutes are not entirely satisfactory, particularly with reference to the type of crime where some overt act is committed by the fugitive outside of the boundaries of the state which seeks extradition. Adoption of the Uniform Extradition Act has been accomplished in the great majority of other states, and it is recommended and urged that such act should be adopted as part of the statutory law of this state. Its adoption would remove many of the problems which this office encounters in advising the Governor upon extradition matters.

This department has handled several compensation claims brought against the state, all of which have been denied under existing statutes. None have been appealed from the decision of the commissioner.

The District Court of Cerro Gordo County in the case of *Schloemer v. State Conservation Commission, et al*, found for the State Conservation Commission and that case is now awaiting hearing before the Supreme Court. The question involved is the right of a non-abutting property owner to enjoin the Conservation Commission from closing a road through

one of its parks near Clear Lake, Iowa. Other cases handled and pending for the Conservation Commission are a damage action for destruction of a bridge, two quiet title actions and one condemnation appeal. One especially important matter was handled for the Commission regarding its right at the Arnold's Park pier and beach resulting in an equitable and agreeable solution to the problem of pier rights for commercial boat operators.

This department completed two pending cases for the Department of Agriculture resulting in the first declaratory judgment decision in Iowa in the case of *Ostrander v. Linn*, in which the high court determined that a declaratory judgment could be rendered on matters involving the same parties, the same subject matter in a case pending before a Justice of the Peace Court. Also the case of the *State of Iowa v. Frank A. Reickenbach*, in which the Court held a seller of baby chicks must comply to the labeling requirements of the baby chick act by attaching the required labels to the containers before sale. On behalf of the Department of Agriculture this office also defended successfully attacks upon the constitutionality of the cream grading law as amended by the last legislature, the matters being dismissed in the District Court.

Several actions were commenced, tried and settled for the Board of Control in disputed cases of legal settlement resulting in the collection of large sums then held up due to said disputes. This office further assisted the Board of Control in removing the difficulties occurring at the Training School for Boys and prosecuted successfully three important cases involving commitments or transfers to institutions under the Board's jurisdiction. In the case of *Maxine Murphy v. Thomas B. Lacey*, the high court held in an action in habeas corpus by a juvenile who had been committed by the juvenile court to the Iowa Soldiers' Orphans Home at Davenport could thereafter be transferred by the Board of Control to the Glenwood State School. In the case of *Geraldine Jacobsen v. The State Institution for Feeble-minded at Woodward, Iowa, and Buena Vista County, Iowa*, the high court held that an action for habeas corpus could not be maintained on behalf of an inmate at a state institution in a county other than that in which said institution is located and granted a writ of certiorari applied for by this department questioning the jurisdiction of the District Court in and for Buena Vista County. In the case of *State of Iowa v. James P. Gaffney*, the high court granted a writ of certiorari questioning the authority of the District Court to permit a commission for insane to commit a person indicted and arraigned on a criminal charge to a state hospital for insane, holding that the question of the accused's insanity must be submitted to a jury and if found insane accused

must be committed to the criminal insane ward at the Men's Reformatory.

This department assisted the Department of Public Safety in the negotiations and execution of reciprocity with many neighboring states, including Arkansas and Oklahoma and successfully joined with the attorney generals' offices of other midwest states in blocking the federal government's attempt to operate trucking concerns within this state without paying the usual state taxes including licenses upon those vehicles while the government was operating said truck lines under the O. D. T. Many minor cases involving the licensing of vehicles, dealers and drivers were handled for this department during the past two years, none of which reached the District Courts. At the present time there is one case pending in the District Court involving reciprocity and a Nebraska corporation. In this case the states of Nebraska and Iowa are cooperating and the results should secure for this state a fair portion of the truck licenses for operation of the truck lines through Iowa.

In addition to these activities this office has cooperated with the Highway Safety Patrol, the Department of Agriculture, the State Conservation Commission and the State Fire Marshal in appearing at their schools of instruction to clarify and explain the requirements of the Iowa statutes relative to their activities.

During the biennium this office has handled a number of cases for the State Tax Commission. These cases involved appeals of income tax, sales and use tax and inheritance tax in the District Courts of Iowa and some of these cases were appealed to the Supreme Court of Iowa. One of the chief matters in controversy was an interpretation of the use tax law and especially the meaning of the words "readily obtainable in Iowa". One case has been decided by the Supreme Court and is known as the *Dain* case. This case, however, did not settle all of the questions which have arisen concerning the administration of the use tax law, and at the present time there is pending in the Supreme Court the *Peoples Gas & Electric Company* case which will undoubtedly clarify the administration of the use tax law and establish fixed rules for guidance, in the operation of the act, in so far as "readily obtainable in Iowa" is concerned. There is pending in the District Court at the present time a suit by the State Tax Commission to collect taxes due and owing from freight car and equipment companies in Iowa. Settlement has been negotiated in this cause and it may be disposed of in that manner.

Another case which has some significance is one of the *United States Government v. State Tax Commission* in which

the claim is asserted by the United States Government that the treaty relating to the taxation of property of aliens was not abrogated by virtue of the fact that the United States entered into and successfully completed a war with Germany.

This office, through its counsel, has aided the county attorneys in the several counties in the matters of appeals from assessments, and a good deal of work was done and much time spent in endeavoring to work out a uniform assessment basis in the various taxing districts of the state. This office has furnished the assistance required in all cases, and has made definite recommendations to iron out some of the tax problems of the districts throughout the State of Iowa which suggestions have been followed and successfully terminated.

At the close of the war and the issuance of discharges it became necessary under the Iowa law to determine the necessary qualifications for receiving soldiers' credits. The administration of this tax credit and the service tax credit relating to discharge of soldiers, sailors and marines falls upon the Tax Commission.

The department has tried many cases in the District Courts and disposed of many inheritance tax questions in old estates which have been pending for some time. In addition to the litigated matters the department handed down numerous tax opinions, and in many other ways assisted the Tax Commission in the performance of its duties, the preparation of its orders and the conduct of its hearings, together with the preparation of the necessary findings and records required to be made in each instance.

The work of the Attorney General in looking after the interests of the State Department of Social Welfare has increased during the last biennium. This department has charge of the state programs of old age assistance, blind assistance, child welfare, emergency relief, and aid to dependent children.

A number of old age assistance recipients passing away has greatly increased during this period. This has increased the work of the Attorney General. Many recipients leave an estate wherein real estate is sold to pay debts and in each such estate, an answer was filed setting out the rights of the State Board of Social Welfare, the amount of assistance granted and paid, and asserting the Board's statutory lien and other rights in proper instances. A copy of each order authorizing sale of real estate was obtained and checked. This was done in several hundred estates each year. This was necessary in order that the State Board receive the maximum reimbursement of old age assistance which has been paid. The amount of recoveries has been considerably greater during the last biennium for the reason that the prices of real estate have

been high and real estate has sold in such estates for good prices.

A number of cases have been handled with reference to the election or failure to elect to take a life estate on the part of a surviving spouse of an old age assistance recipient.

In each of the last two years, the Attorney General has appeared and filed answer in a great many foreclosure, partition and quieting title actions wherein the lien or rights of the State Board were involved. Contested trials were had in a number. The decree was checked and approved in most instances.

A large number of promissory notes belonging to the State Board have been collected by correspondence. Suits were instituted on several notes and most of these have been settled.

A number of actions for the foreclosure of the statutory lien for old age assistance have been commenced, some of which have gone to decree, or have been settled, and some of which are still pending.

Considerable time has been devoted to the interest of the Child Welfare Department. Many perplexing problems have arisen which necessitate the giving of advice and the writing of unofficial and official opinions.

Likewise, subsequent to the adjournment of the 51st General Assembly, its enactment known as the Public Employees Old Age and Survivor Insurance System, being Chapter 91 of the Acts of that Assembly, and now designated as Chapter 97 of the Code of 1946, became the subject of dispute, particularly as to whether school teachers who enjoyed the benefits of their pension system were entitled also to the benefits of the State System, established by the 51st General Assembly. This also eventuated in litigation in the Polk County District Court, wherein six of the seven schools concerned, that had established and maintained school teachers pension systems, also invoked the powers of the court to declare whether or not the school teacher beneficiaries of the school pension system were also entitled to the benefits of the State System. The plaintiffs claim, to the benefits of both systems, for the members of the teachers pension system was sustained by the lower court and the decree of the lower court was affirmed by the Supreme Court.

There was also instituted and is still undetermined, an action brought by the Independent School District of Des Moines in the Polk County District Court for a declaratory judgment to test whether such Independent School District is entitled to estimate the amount required for its general fund on the basis of a sum not exceeding seventy-five dollars

for each person of school age, or not exceeding one hundred dollars for each such person.

Since the adjournment of the 51st General Assembly this department has been called upon to defend the constitutionality of several enactments of said legislative body.

Perhaps the case of most general interest was *Carlton v. Grimes*, instituted in the District Court of Johnson County, Iowa, wherein it was claimed by the plaintiff that Chapter 136, Acts of the 51st General Assembly (extra one cent per gallon motor vehicle fuel tax) was violative of section 29, Article III of the Iowa Constitution, and also that said law was not properly enacted by the legislature. The trial court upheld the act as against the attacks so made, and the action of the trial court in so doing was affirmed by unanimous decision of the Supreme Court of Iowa. (See *Carlton v. Grimes*, 23 N. W. (2d) 883).

An attack was also made as against chapters 133 (State aid for pupil transportation) and 134 (supplemental aid to schools) of the Acts of the 51st General Assembly, as being violative of sections 3 and 7, Division 2 of Article IX of the State Constitution. This action was entitled *Kleen v. Porter, et al.*, and was brought in the District Court of Pocahontas County, Iowa. The two acts in question were upheld by the trial court and the Supreme Court. (See *Kleen v. Porter*, 23 N. W. (2d) 904).

The case of *Dickinson v. Porter* was brought in the District Court of Dubuque County, Iowa, challenging the constitutionality of Chapter 192 (Agricultural Land Tax Credit), Acts of the 51st General Assembly. This case has been tried in the District Court, but has not as yet been decided by said court.

Another action entitled *Plank v. Grimes*, was brought in the District Court of Johnson County, Iowa, involving the validity of the motor vehicle fuel tax law as now amended, it being claimed that both the basic three cent per gallon tax law and the amendments made thereto by the 51st General Assembly are violative of the State and Federal Constitution. The trial court again upheld the act and dismissed plaintiff's petition. Plaintiff has appealed to the Supreme Court of Iowa.

The *Silver Lake Consolidated School District*, as plaintiff, brought an action in the District Court of Palo Alto County, Iowa, against *Jessie M. Parker*, as State Superintendent of Public Instruction, and others, asking that Chapter 133, Acts of the 51st General Assembly (State aid for pupil transportation) be so construed as to permit state reimbursement to school districts for the transportation of private school pupils as well as public school pupils. The trial court held that

public school busses could be used only for the transportation of public school pupils, and that no reimbursement could be allowed for the transportation of private school pupils. This case has been appealed to the Supreme Court of Iowa.

The foregoing is only a small part of the civil litigation which has occupied this department. One further matter should be mentioned: During the session of the 51st General Assembly the services of this department were made available to the legislature and its members for counsel in connection with the legislative session.

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

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

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

Respectfully submitted,

JOHN M. RANKIN,
Attorney General of Iowa.

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

January 1, 1945 to December 31, 1946, inclusive

Appeals from Condemnation

Appeals pending January 1, 1945.....	8
Appeals instituted during above period.....	8
Old appeals tried or settled during above period.....	6
New appeals tried or settled during above period.....	6
Condemnation appeals pending December 31, 1946.....	4

Miscellaneous Cases

(Injunctions, Foreclosures, Mandamus, Damage, Workmen's
Compensation, Drainage and Guardianships.)

Misc. cases pending January 1, 1945.....	13
Misc. cases instituted during above period.....	12
Old misc. cases disposed of during above period.....	11
New misc. cases disposed of during above period.....	7
Miscellaneous cases pending December 31, 1946.....	7

Retained Percentage Cases

(On contractor's contracts)

Percentage Cases pending January 1, 1945.....	0
Instituted during above period.....	1
Disposed of during above period.....	1
Percentage cases pending December 31, 1946.....	0
Total number of all Cases Pending December 31, 1946.....	11

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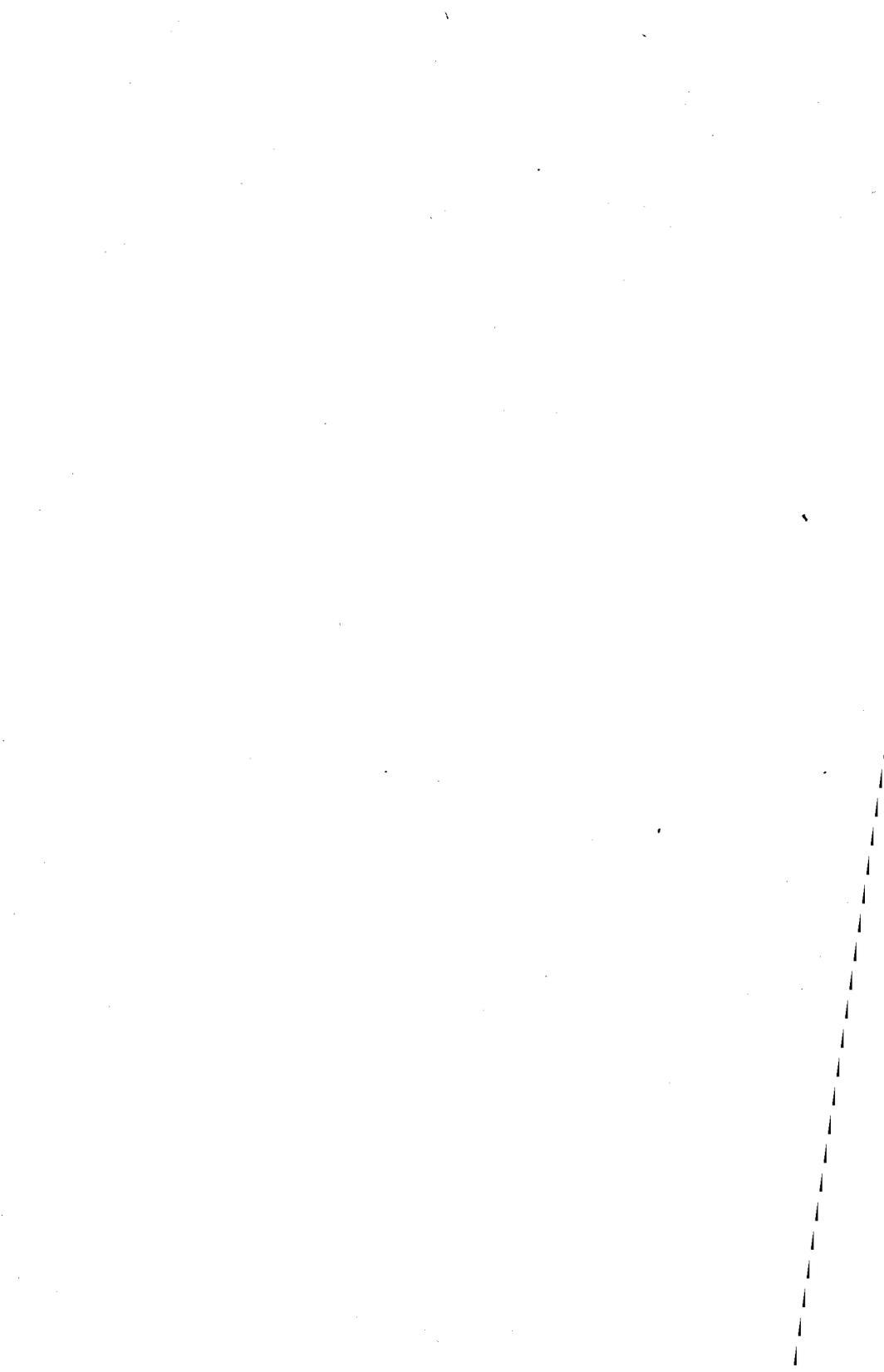
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John Fletcher.....	Polk	1927-1933
Edward L. O'Connor.....	Johnson	1933-1937
John H. Mitchell.....	Webster	1937-1939
Fred D. Everett.....	Monroe	1939-1940
John M. Rankin.....	Lee	1940-

**SOME OF THE
IMPORTANT OPINIONS
OF THE
ATTORNEY GENERAL
FOR
Biennial Period
1945-1946**



OPINIONS OF THE ATTORNEY GENERAL

PUBLIC OFFICER: CLERK OF COURT: RESIGNATION AND LEAVE OF ABSENCE: AUTHORITY OF DEPUTY CLERK.
Deputy clerk of court may perform all duties of clerk during his absence. Clerk of Court need not resign from office for temporary duty with Red Cross if he does not change residence.

January 31, 1945. *Mr. Woodford E. Byington, County Attorney, Malvern, Iowa:* Your letter addressed to the Attorney General has been handed to me for reply. Your request for an opinion is stated as follows:

"The Clerk of the District Court is leaving to accept a position with the Red Cross as a Field Representative and has asked the Board of Supervisors for a leave of absence for a period of six months or more. I told the Board of Supervisors that there was no necessity of them granting the Clerk any leave of absence because being an elective officer they had no control over the duties of his office and that if the Clerk made arrangements to have the work properly performed in his office by his deputy and someone else that is all that need be done. However, the question has arisen in my mind as to whether or not the deputy Clerk could legally perform all of the duties required of the Clerk as it seems to run in my mind that there are a few things that can only be performed by the clerk and not by the deputy and as this is a very important office I am writing to you to be advised as to whether or not the deputy Clerk could perform all of the duties of the Clerk during his absence or whether it would be better for the Clerk to resign and to have a new Clerk appointed."

Chapter 479, Code of Iowa 1939, defines the duties of the clerk of the District Court and generally outlines the law with respect to deputy officers, assistants and clerks.

Section 5238 of that chapter provides as follows:

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

Section 5242 of the same chapter defines the powers and duties of the deputy officers, assistants and clerks.

In the case of *Abrams v. Ervin*, 9 Iowa 87, there is said the following:

"Where the duties of a public officer are of a ministerial character, they may be discharged by deputy. Duties of a judicial character, cannot be so discharged. The clerk is a ministerial officer. When the law gives him power to appoint a deputy, such deputy, when created, may do any act that the principal might do. He cannot have less power than his principal; and the act of the deputy, in the name of the principal, within the scope of his authority, is the act of his principal. *Parker v. Kent*, 1 Lord Raymond, 658; *Ellison v. Stevenson*, 6 B. Mon. 275; *Troplett v. Gill*, 7 J. J. Mar. 444; *Corrith v. Arnold*, 3 Littell 316; *Hope v. Sawyer*, 14 Ill. 254."

The above case was cited with approval in *Moore v. McKinley, et al.*, 60 Iowa 367, and on page 371 the court said:

"The provision above quoted was designed, we think, rather to devolve upon and make imperative by the deputy clerk the performance of the duties of the clerk, in the absence or disability of the latter, and not to withhold from him all power to perform such duties, except in the absence or disability of his principal. Such, we think, has not been the construction adopted in practice. To adopt it now by a judicial decision would manifestly unsettle many and very important interests.
* * * "

Again in *Sanxey, Trustee, v. Iowa City Glass Company*, 68 Iowa 542, at page 545, the court had the following to state:

"We think both of these questions should be answered in the affirmative. It is provided by section 767 that 'in the absence or disability of the principal, the deputy shall perform the duty of his principal pertaining to his own office.' Under this provision the deputy may, under the circumstances prescribed, perform any of the duties pertaining to the office. During the absence or disability of the principal, he stands in the place of the principal, and any official duty performed by him is regarded as having been performed by the principal. It must often happen that, owing to the absence or disability of the clerk, it would be impracticable to serve the notice on him personally within the time allowed by the statute for taking the appeal, and, if the service may not be made on the deputy, it would follow in such cases that the right of appeal would be defeated by circumstances over which the party could have no control. The right is conferred by statute, and is regarded as an important and valuable right, and we cannot think that it was the intention of the legislature, when it created the provision making the service of the notice on the clerk an essential step in perfecting the appeal, that it should be defeated by his absence or disability to perform the duties of his office, and we prefer to accept a construction of the statute which will secure the right, rather than the one which, in many cases would defeat it."

Your attention is further invited to an opinion given by this office, dated September 21, 1936, copy of which is enclosed and in which this matter is further discussed. We are in accord with this opinion.

Chapter 59 of the Code, Vacancies in Office, section 1146, provides that an incumbent ceasing to be a resident of the state, district, county, township, city, town, or ward by or for which he was elected or appointed, or in which the duties of his office are to be exercised, creates a vacancy in that office.

From the statement in your letter we do not feel that this section has application since the clerk is not expected to change his residence.

It is therefore the opinion of this office:

(1) That the deputy clerk can perform all the duties of the clerk during his absence.

(2) It would not be necessary, from the situation stated in your letter, for the clerk to resign and have a new clerk appointed. The future may develop a situation which might require the resignation of the clerk but such situation cannot be anticipated at this time; neither are we passing upon the advisability of the clerk absenting himself from his office for a long period and being able to insist on holding the office.

LEGAL SETTLEMENT: ASSISTANCE GRANTED UNDER AID TO DEPENDENT CHILDREN'S ACT. Legal settlement of divorcee after remarriage to service husband who has settlement in other state, may be acquired as if she were unmarried. Minor children take legal settlement by derivation and take that of mother if she receives custody in divorce decree. Residence is important factor rather than legal settlement under the "Aid to Dependent Children's Act."

February 8, 1945. *Mr. Don Savery, County Attorney, Atlantic, Iowa:*
I wish to acknowledge receipt of your recent letter asking an opinion upon the following facts, to-wit:

"A" and "B" were married and had five children. "A" was committed to Fort Madison on July 22, 1939, and at that time had a legal settlement in Cass County. "B" obtained a divorce in August, 1944. The decree gave "B" the care, custody and control of the five minor children. "B" and the children moved to Taylor County shortly thereafter and were immediately served with a statutory notice to depart. Application was made to Taylor County for assistance for the five children under the Aid to Dependent Children Act and the same was granted. Later, "B" married "C" who was a private in the army. "C" is a resident of Indiana and has a legal settlement there. He has refused to assume responsibility for the children and has only made application for an allotment for "B".

Questions:

1. Where is the legal settlement of "B"?
2. Where is the legal settlement of the children?
3. Which county or state is responsible for assistance to the children under the Aid to Dependent Children's Act?

We will answer these questions in the order asked.

1. The material parts of section 3828.088 Code, 1939, as amended, are as follows:

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

1. Any person continuously residing in any one county of this state for a period of two years without being warned to depart as provided in this chapter acquires a settlement in that county, but if such person has been warned to depart as provided in this chapter, then such settlement can only be acquired after such person has resided in any one county without being warned to depart as provided in this chapter for a continuous period of two years from and after such time as such persons shall have filed with the board of supervisors of such county an affidavit stating that such person is no longer a pauper and intends to acquire a settlement in that county.

2. Any person having acquired a settlement in any county of this state shall not acquire a settlement in any other county until such person shall have continuously resided in said county for a period of two years without being warned to depart as provided in this chapter.

* * * * *

4. A married woman has the settlement of her husband, if he has one in this state; if not, or if she lives apart from or is abandoned by him, she may acquire a settlement as if she were unmarried. * * *

5. Legitimate minor children take the settlement of their father, if there be one, if not, than that the mother. * * *

Since "A" and "B" are divorced, it is apparent that subsection 5, supra, does not apply. There is no other statutory provision with reference to minors. On July 3, 1943, the office of Attorney General held that where the parents of minor children are divorced and the mother is given the care, custody and control of the children, they take the legal settlement of the mother. Therefore, immediately after the divorce decree became effective, the children took the legal settlement of "B", which was Cass County. When "B" and the children moved to Taylor County and had the statutory notice to depart served upon them, they did not thereafter acquire a legal settlement in Taylor County, but it continued in Cass County.

When "C" married "B", "C" did not have a legal settlement in Iowa, it being in Indiana. Therefore, under the provisions of Subsection 4, supra, "B" could acquire a settlement of her own the same as if she were unmarried. Since she already had a settlement in Cass County, it was retained after the marriage. Therefore, the legal settlement of "B" is now in Cass County.

2. Minor children are unable to obtain a settlement in their own right but obtain one only by derivation, which in this case, would be through the mother. See opinion of Attorney General dated July 3, 1943. Since "B's" legal settlement is in Cass County, then it follows that the legal settlement of the children is also in Cass County.

3. Aid to Dependent Children is one of several assistance programs in the State of Iowa. All matters with reference to obtaining each kind of assistance and continuing the same are governed entirely by the provisions of each program. Section 8, Chapter 130, Acts of the 50th General Assembly (Aid to Dependent Children Act) provides that when any child for whose benefit a grant of assistance has been made, removes from the county giving assistance to another county in the state, the county which had been giving assistance shall continue the same for a period of six months after the date of removal. Thereafter assistance can only be granted in the manner provided in the Act and can be only in and from the county in which the child is then living. Under these provisions Taylor County is liable for the assistance of these children as long as they are eligible therefor, reside in the county, and six months after they move to another county in the state. At the expiration of the latter period, the liability of Taylor county ceases. A new application for aid would have to be made to the county in which they then reside. Such county then becomes liable therefor.

We wish to call your attention to the fact that there seems to be considerable confusion among the counties with reference to this question. Sections 1 and 2 of the Aid to Dependent Children's Act sets out the eligibility requirements for receiving assistance under the act. It will be noted that nothing is said about legal settlement being an element of eligibility. Only residence is mentioned. Therefore, it is not necessary for a child to have legal settlement in a county in order for that county to be liable for its statutory share of the assistance.

PRIMARY ROAD FUND: DIVERSION OF FUND FOR PURPOSES OTHER THAN CONSTRUCTION, MAINTENANCE AND SUPERVISION NOT AUTHORIZED. Claims against state sounding in tort do not fall within category of construction, maintenance and supervision and are not payable out of the Primary Road Fund.

February 15, 1945. *Iowa State Highway Commission, Ames, Iowa:* This will acknowledge receipt of your request for an opinion on your question stated as follows:

"We have noted the provisions of Senate File 167 of the 51st General Assembly, which is, 'An Act to make appropriations to certain named persons in settlement of damages sustained by them on account of accidents on primary roads, or on account of collisions with state highway equipment, or on account of acts of commission or omission by the State Highway Commission or its employees.' This act appropriates funds for the payment of such claims not of the Primary Road Fund.

"In the 50th General Assembly, funds for the payment of such claims were appropriated out of the State General Fund. My understanding two years ago was to the effect that such claims could not be paid out of the primary road fund because of the amendment to the State Constitution, adopted at the general election in 1942, which prohibits the use of motor vehicle registration fees and motor vehicle fuel license fees or excise taxes, for any purpose other than the construction and maintenance of public highways or the payment of bonds or interest on bonds issued for the improvement of highways.

"We are writing you this letter in order to ask your opinion as to whether such claims can legally be paid from the primary road fund. In asking for this opinion, neither the State Highway Commission nor I personally have any particular preference as to which funds these claims are paid from. Our purpose in asking for this opinion is to clarify this matter while the 51st General Assembly is still in session, and avoid the possibility of payment of these claims being withheld because of legal inhibition, after the present General Assembly has adjourned and there is no way to make correction in the measure which makes appropriation for these claims, until the 52nd General Assembly convenes."

Pursuant to S. J. R. I., Acts of the 48th and 49th General Assemblies, and following adoption thereof by the electorate at the general election in 1942, Article VII of the Constitution of Iowa was amended by adding thereto Sec. 8, which reads as follows:

"All motor vehicle registration fees and all license and excise taxes on motor vehicle fuel, except cost of administration, shall be used exclusively for the construction, maintenance and supervision of the public highways exclusively within the state or for the payment of bonds issued or to be issued for the construction of such public highways and the payment of interest on such bonds."

It is clear that provisions of this amendment were to prevent a diversion of specified sources of revenue to the Primary Road Fund to other purposes than highway construction, maintenance and supervision, and payment of principal and interest on highway construction bonds.

Sec. 4755.03 of the Code which creates the primary road fund and provides that it embrace all federal aid road funds, funds derived from year to year from acts regulatory of motor vehicles, all gasoline tax funds devoted to the primary road system, and all other funds appropriated for the use of the primary road fund, makes no provision for ear-

marking the sources from which these funds are derived as they are deposited in the primary road fund, nor do we, elsewhere in the Code find any provision by which the separate identity of such sources of revenue may be maintained for the purpose of expenditure or appropriation therefrom.

Under the system by which Federal aid is granted to the State and utilized in the construction of primary roads, the total cost of a project is advanced from the primary road fund, and reimbursement is then made of the amount of the federal contribution to each project. Thus such federal aid funds, which make up a large part of the primary road fund, likewise lose their identity upon being deposited therein.

A very nominal amount of the revenue making up the primary road fund is derived from other miscellaneous sources than motor vehicle registration fees, licenses and excise taxes on motor vehicle fuel, and federal aid, but in the absence of any provision by which they are separately ear-marked and distinguished from those funds specifically pledged by the amendment, we are of the opinion that appropriations for other purposes than those set forth in the amendment should not be made from the primary road fund. Clearly appropriations made for the payment of claims against the state sounding in tort, do not fall within the category of "construction, maintenance and supervision of the public highways" as contemplated by said amendment.

SOLDIER'S RELIEF: LEGAL SETTLEMENT OF SERVICEMAN: COUNTY'S LIABILITY FOR HOSPITALIZATION FURNISHED SERVICEMEN AND FAMILIES. Soldier of World War II must be discharged in order to receive relief under Section 3828.031, 1939 Code, but may receive relief under Chapter 189.4, 1939 Code. Legal settlement of servicemen remains as per time of induction. Hospitalization, medical service and supplies are included in meaning of "medical attendance" as used in Section 3828.099, 1939 Code. County of legal settlement is liable for such "medical attendance" for needy if such service is received in other county.

February 21, 1945. *Mr. Francis J. Kuble, County Attorney, Des Moines, Iowa:* I wish to acknowledge receipt of your letter of January 29 asking for an opinion with reference to the following questions:

1. Are soldiers of World War II and their families entitled to relief under the provisions of Chapter 189.2, Code 1939, prior to the honorable discharge of such soldiers?
2. Does the legal settlement of a soldier change after his induction into the armed forces?
3. Is the county of legal settlement liable for the cost of hospitalization, medical services, medical supplies and nursing furnished to soldiers and their families at Broadlawn's Hospital in Des Moines?

We will answer these questions in the order asked.

1. On February 19, 1942, the office of Attorney General issued an opinion holding that under the provisions of Section 3828.051, Code 1939, a soldier of World War No. II must be discharged in order to come with-

in the provisions of said section and be entitled to relief thereunder. If he is yet in the service and needs relief, he would come under the provisions of Chapter 189.4, Code 1939, and the county in which the soldier had legal settlement would be liable for relief to him and his family.

2. Section 3828.088, Code 1939, was amended by adding the following:

"Any persons with settlement in this state who enlists in or is inducted into the military or naval service of the United States shall retain such settlement during the period of his military or naval service. Any person without settlement in this state who is serving in said military or naval service within the borders of this state shall not acquire a settlement during the period of such service."

Therefore, it will be seen that the legal settlement of a soldier or sailor does not change while he is serving in the armed forces of the United States, but remains in the county where it was at the time of his induction.

3. Section 3828.097, Code 1939, gives township trustees power to provide for relief of poor persons in their township. Section 3828.098 gives overseers of the poor similar power within the county or that portion thereof for which they are appointed.

Under the authority of these statutes, together with others appearing in Chapter 189.4, Code, 1939, it has become the settled practice of the counties in this state to try to give adequate relief to their poor. Such practice was in substance approved by our Supreme Court in *Cass County vs. Audubon County*, 221 Iowa, 1037.

Section 3828. 099, Code 1939, outlines the kinds of relief which can be given and the material portions thereof are as follows:

"The relief may be either in the form of food, rent or clothing, fuel and lights, medical attendance or in money. * * * ."

However, it will be noted that hospitalization, medicines, etc., are not included therein unless they come within the purview of the term, "medical attendance." This term was construed in the case of *Scott vs. Winneshiek County*, 52 Iowa 579, to include nursing, washing and board furnished a pauper upon the order of the township trustees. Therein, the Court said:

"We have no reason to suppose that the legislature used the words 'medical attendance' with the design that any narrow or technical meaning should be put upon them. The statute contemplates that there are persons who need county assistance but who should not be sent to the county poor house. It provides that the township trustees shall determine who such persons are and supply the necessary relief. We think that they should be allowed in all proper cases to furnish attendants other than professional attendants to administer the medicine professionally prescribed, *and do whatever else constitutes a part of the medical treatment.* To hold that they cannot be so allowed under the statute would in our judgment convict the legislature of committing a grave oversight." (The italics are ours.)

Thus, it will be seen that as early as 1879, our Supreme Court stated that the legislature did not use the term "medical attendance" in this statute with a narrow or technical meaning; that to so hold would be an

imputation against the legislature; that the Board of Supervisors should be allowed to furnish attendants other than professional attendants to administer the medicine professionally prescribed and "*do whatever else constitutes a part of the medical treatment.*" Certainly, hospitalization, medical supplies, nursing, etc., would constitute "a part of the medical treatment."

The office of Attorney General handed down an opinion on May 3, 1937, having to do with this subject. After discussing the Winneshiek County case, *supra*, it is stated:

"It may be presumed, therefore, that 'medical attendance' as used in section 5322 could embrace treatment, attendance, hospitalization, surgical assistance, etc.

* * *

"In other words, it is our opinion that under Section 5297, *supra*, the board of supervisors has a discretion to exercise in the first instance as to whether or not the person is a subject for poor relief as therein defined, meaning in the use of such term, relief in the form of medical assistance. Having exercised a wise discretion in a given case, and determined the person to be such and entitled to medical assistance, it would appear that such assistance may be given to be defrayed, from county funds * * *

"Thus showing it to be (1) the board's duty to provide medical services to its poor incident to and as a part of its statutory duty to support its poor, (2) that such relief is part of the poor relief payable from public funds in the county treasury * * *."

Although this opinion cites no authorities, yet it clearly shows that the then office of Attorney General thought it was the law and is at least some authority for such a holding at this time.

Sections 3828.097, 3828.098 and 3828.099, Code 1939, originally appeared in the Code of 1873 in substantially their present form. It is a matter of common knowledge that the Boards of Supervisors of this state for many long years have allowed the cost of hospitalization, medical services, etc., as proper items of poor relief. Such payments must have been approved by the state auditors or such expenditures would have been stopped. These auditors work under the supervision of the Auditor of State. It would, therefore, appear that the Auditor of State has for many long years construed the statute to include such expenditures. During that time, the legislature has met in session many times but has made no change in the statute.

As was said in *State v. Ind. Foresters*, 226 Iowa 1339, 1345:

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

As was also said in this case:

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

“ * * * * *

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

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

It is also proper in interpreting a statute, to consider the effect of the construction to be adopted. See McGraw vs. Siegel, 221 Iowa 127. If we were to hold that these were not proper expenditures for poor relief, it would result in many poor persons being unable to obtain hospitalization, no matter how great the need. The injury resulting therefrom would be incalculable. We are not willing to so hold if it is possible to avoid it.

Summing up the above principles, it is our conclusion that it is the duty of the counties to provide necessary poor relief for needy persons; that the legislature did not intend to give the term “medical attendance” a narrow construction; that the holding in the Winneshiek County case, supra, undoubtedly materially influenced the various counties in making such expenditures and the State Auditor’s office in approving the same for many long years. Such settled practice and such a construction by an administrative department of the State of Iowa should be given great weight, and since the legislature has met a great many times during this period, it is reasonable to presume that it was satisfied with such a construction.

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

Since these items were furnished by Broadlawn’s Hospital of Des Moines, Iowa, and not furnished directly by the Board of Supervisors of Polk County, the question arises as to whether the same can be recovered from another county when the patient has his legal settlement in a county other than Polk. To answer this it is first necessary to examine the statutes. The material portion of Section 3828.096 is as follows:

“When relief as herein provided is furnished by any government agency of the county, township or city, such relief shall be deemed to have been furnished by the county in which such agency is located and the agency furnishing such relief shall certify the correctness of the costs of such relief to the board of supervisors of said county and said county shall collect from the county of such person’s settlement. The amounts herein collected by said county shall be paid to the agency furnishing such relief.”

Does Broadlawn's Hospital constitute a "governmental agency" as defined in this statute? 2 Corpus Juris Secundum 1 (a) Sub-paragraph 2, states that the term "agency" may be used in the sense of instrumentality by which a thing is done. 38 Corpus Juris Secundum, page 969, defines the word "governmental" as follows:

"Made by government; of or pertaining to government. The term is applied particularly to certain functions and powers conferred by the state on local agencies to be employed in administering the affairs of the state and *promoting the public welfare generally*, more specifically to particular duties imposed as * * * preserving * * * the health of citizens * * * in the exercise and performance of which the local agency is sovereignty and governs the people." (Italics are ours.)

It was held in Wood vs. Boone County, 153 Iowa 92, that the furnishing of aid to the poor is a governmental function.

Broadlawn's Hospital is what is known as a "county hospital." It is organized and operated under the provisions of Chapter 269, Code 1939, as amended. In order to establish such a hospital, it is necessary that the question be submitted to a vote of the people. If carried, provision is made for the levying of taxes for the building and maintenance of the hospital, for the election of trustees to operate it, defines the duties and powers of the trustees and provides how the hospital shall be operated. The County Treasurer is authorized to receive and disburse all of its funds, same to be paid only upon warrants drawn by the county auditor by direction of the board of supervisors after the claims have been certified to be correct by the board of trustees. Thus, it will be seen that the county hospital is a local agency or instrumentality created by law with certain functions and powers conferred upon it by the State to be employed in promoting the public welfare, viz.: administering to the sick. The hospital trustees exercise the entire power of governing the hospital and its patients. It is in all ways a creature of the legislature and its funds are under the control of the usual county officers, the same as other county funds.

Therefore, in our judgment, Broadlawn's Hospital is a governmental agency within the purview of Section 3828.096, supra.

Chapter 197, Acts of the 49th General Assembly, strikes Section 5362, Code 1939 and enacts in lieu thereof, the following:

"Hospital Benefits—terms. Any resident of the county who is sick or injured shall be entitled to the benefits of such hospital and shall pay to the Board of Hospital Trustees reasonable compensation for care and treatment according to the rules and regulations established by the Board.

"Free care and treatment in such county public hospitals to any indigent persons shall be furnished only to such residents of the county as defined in section three thousand eight hundred twenty-eight and eighty-eight thousandths (3828.088), Code 1939 and acts mandatory thereto and have been found by the Board of Hospital Trustees to be indigent and entitled to said care.

"To be entitled to hospital benefits, patients shall at all times observe the rules of conduct prescribed by the Board of Hospital Trustees."

Thus, it will be seen that only persons having a legal settlement in the county in question and found by the Board of Hospital Trustees to be indigent, are entitled to receive free care and treatment at such hospital.

It will be noted that the first paragraph of said section states that *any resident of the county* who is sick or injured shall be entitled to the benefits of such hospital. However, since it is a governmental agency created and maintained by taxation for the public good and benefit, it is our judgment that the legislature did not intend to limit its use to only such persons as have legal settlement in the county in question. It frequently happens that a person having legal settlement in another county is in dire need of emergency care and treatment while within the confines of the county in question. It would seem to be highly unreasonable that such person would be barred from the use of this hospital when there are sufficient rooms and facilities available for his immediate care. We do not believe that the legislature intended such a narrow construction.

It is our conclusion that it is proper for the trustees of Broadlawn's Hospital to accept for care and treatment persons, including soldiers and their families, who have legal settlement in a county other than Polk and after proper statutory notice is given, the county of legal settlement of such persons becomes liable to Polk County for this expense.

PUBLIC RECORDS, CERTIFIED COPIES: FREE COPIES OF HONORABLE DISCHARGE. Soldiers, sailors and marines may receive free certified copies of honorable discharge from County Recorder if they are to be used to perfect a claim for a United States Pension or other claim against the United States. Copies for other purposes must be paid for by veteran.

February 27, 1945. *Mr. Craig R. Kennedy, Assistant County Attorney, Waterloo, Iowa:* This will acknowledge receipt of yours, as follows:

"I am enclosing herewith a copy of a letter which I received from the Black Hawk County Recorder in regard to a question she has under the provisions of Sections 5173 and 5175, Chapter 259 of the 1939 Code.

"Apparently there is no uniformity of practice among the various Recorders in the State with reference to the charges for certified copies of soldiers' discharges if they want them for purposes other than establishing a claim upon the government.

"It may be that you have rendered an opinion on this, or would be willing to do so, in which event I would be glad to receive the same and pass the same on to our County Recorder."

and the accompanying letter from your County Recorder, as follows:

"I would like a ruling on the following:

"Is it legal to charge for certified copies of Soldiers' discharges *IF* they want them for a purpose other than establishing a claim?

"Section 5173, Chapter 259 of the 1939 Code says the discharges must be recorded without fee, and Section 5175 of the same chapter states free copies must be given of any document on record requested by a soldier, sailor or marine in the service, or honorably discharged, if the copy is to be used to perfect a claim upon the Government.

"Some recorders are giving one free copy and charging for each additional copy of the soldiers' discharge. This office has been giving a free certified copy when the discharge is recorded and charging for each additional copy. Recently a discharged veteran asked for six copies. We made them and charged him for five and he seemed perfectly willing to pay as he wanted them for no reason in particular except to have them if he did want one for something.

"Some recorders are not charging regardless of how many copies they furnish, going on the theory that the soldier has given enough and should not have to pay for the copies regardless of what he wants them for. I am 100% for the soldiers, but I also feel I have an obligation to the county and want to do the right thing all around. As this is coming up every day will you please give me a ruling at your earliest convenience?"

"You understand we are not charging for the recording of the discharge and the first copy."

Attention is directed to an Opinion of this Department, appearing in the Report of the Attorney General for 1934 at page 161, which states:

"You are advised that, in the opinion of this Department, under Section 5175, there are just two classes of persons to whom you are required to give free certified copies, viz.: soldiers, sailors or marines in service or honorably discharged; and dependents of such soldiers, sailors or marines; and you are required to give such free certified copies to these classes only when they are making claim upon the government of the United States.

"This, of course, excludes mail carriers, postal clerks and other government employees, and it excludes likewise, depositors in postal savings banks, and in fact, everyone who does not come within the limitations above indicated."

The foregoing Opinion is directed more to defining the class of persons who may be entitled to the free copies rather than to the particular question which is propounded by the County Recorder. Insofar as that question is concerned, we are of the opinion that the foregoing classes of persons are entitled to such number of free copies of a public record 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.

CEMETERY ASSOCIATION AND SOCIETIES: TAX EXEMPTION.

Grounds and buildings used by cemetery associations and societies for cemetery purposes and their monies and credits within limitation of subsection 10, section 6944, 1939 Code are exempt from taxation.

March 8, 1945. *Mr. John D. Moon, County Attorney, Ottumwa, Iowa:*

We have received contradictory Opinions of this Department; one of June 28th, 1937, appearing in the Report of the Attorney General for the year 1938, page 329; the other of date June 16, 1931, appearing in the Report of the Attorney General for the year 1932, page 69, respecting the exemption from taxation of the property of cemetery associations under Section 6944, Subsection 7 of the Code of 1939. We now adopt the Opinion of the Attorney General of June 16, 1931, appearing in the Report of the Attorney General for the year 1932 at page 69, as the Opinion of this Department. The adopted Opinion is this:

"This will acknowledge receipt of your request of June 12, 1931, which is as follows:

"We have a cemetery association in this county which is organized for a profit.

"Under the provisions of Paragraph 7 of Section 6944 of the Code no distinction is made between corporations organized for profit and those which are not.

"The old statute Section 1304 of the 1907 Supplement exempted cemetery associations as long as no profit or dividend was derived therefrom. The case of Simcoke vs. Sayre, 148 Iowa 132, was decided under this old law.

"In our opinion, under the new statute even cemeteries which are organized for profit are exempt from taxation, but there are others interested who do not agree with this and we would appreciate very much having your opinion."

"In reply we desire to quote Paragraph 7 of Section 6944, which is as follows:

"7. Property of cemetery associations. All grounds and buildings used by cemetery associations and societies for cemetery purposes."

"It is the opinion of this department that under the particular wording used relative to the exemption of cemetery associations, that all cemetery associations and societies used for cemetery purposes are exempt from taxation."

Pursuant to the foregoing Opinion and the provisions of Section 6944, Subsections 7 and 10, both the grounds and buildings used by cemetery associations and societies for cemetery purposes and their moneys and credits within the limitations of Subsection 10 are exempt from taxation. The Opinion of the Attorney General appearing in the Report of the Attorney General for 1938 at page 329 is now withdrawn.

BONDS: REQUIREMENTS OF COUNTY AUDITOR AS TRUSTEE OF CEMETERY FUND. County Auditor as ex-officio cemetery trustee is not required to furnish a separate bond as trustee of cemetery fund.

March 15, 1945. *Mr. E. B. Shaw, County Attorney, Oelwein, Iowa:* This will acknowledge yours in which you request interpretation of the following:

"Our County Auditor has in her possession as ex-officio Cemetery Trustee, about \$50,000.00 worth of bonds and between \$9,000.00 and \$10,000.00 in cash which she has not yet invested. A previous Auditor furnished a bond as Cemetery Trustee in the amount of \$5,000.00 but the present Auditor at the suggestion of a State Checker increased this bond to \$10,000.00. The cost of such a Surety Company bond is \$50.00 or \$60.00 per year and of course interest rates are down so that the income in the fund is not as large as it once was.

"We do not find anything in Chapter 446 of the Code prescribing the amount of bond to be given, or giving the Court authority to fix the bond where the Auditor acts as Trustee, unless the provisions of Code Section 10204 carry over to Section 10209.

"I would appreciate receiving your interpretation of the law as to whether the County Auditor should furnish a separate bond as Trustee of Cemetery Funds, and if so, what is the criterion for determining the size of the bond, and who has authority to fix it?"

The form of official bond for public officers is exhibited in Section 1059 of the Code of 1939, as amended by Chapter 87 of the 49th General Assembly, to-wit:

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

"That as.....(naming the office), in..... (city, town, township, county, or state of Iowa), he will render a true account of his office and of his doings therein to the proper authority, when required thereby or by law; that he will promptly pay over to the officer or person entitled thereto all moneys which may come into his hands by virtue of his office; that he will promptly account for all balances of money remaining in his hands at the termination of his office; that he will exercise all reasonable diligence and care in the preservation and lawful disposal of all money, books, papers, securities, or other property appertaining to his said office, and deliver them to his successor, or to any other person authorized to receive the same; and that he will faithfully and impartially, without fear, favor, fraud, or oppression, discharge all duties now or hereafter required of his office by law."

The attachment of a renewal certificate to an existing bond shall not constitute compliance with this section.

The general statutory duties of the County Auditor are set forth in Chapter 255 of the Code of 1939. In addition to the foregoing duties, pursuant to the terms of Section 10209 of Chapter 446, Code of 1939, the Auditor is made by operation of law the trustee of cemetery funds in the event no trustee is appointed pursuant to other provisions of that Chapter. Under the following rule stated in Section 406 of "Public Officers", 43 Am. Jur., to-wit:

"Since bonds of public officers are statutory, all the provisions of the statute are written into them, and the sureties are considered as having known the law and as having made their engagements in reference thereto."

the foregoing statutes are part of the provisions of the foregoing official bond the same as if written therein. And the fact that the assumption of the office of trustee of the cemetery funds by the Auditor is contingent upon the fact that no trustee has been appointed or, if so appointed does not qualify, makes no exception to the rule. As so viewed, the duty so imposed, even if contingent, is one of the statutory duties of the Auditor and is within the terms of the official bond for the breach of which the Surety may be liable. While authority is scant, there is support for the principle in *State ex rel. v. Griffith, et al.*, 63 Mo., page 545, where it is said:

"The statute authorizing the appointment of a trustee provides that when a trustee in any deed of trust to secure the payment of a debt shall remove, or has removed out of the State, or neglects or refuses to act, or becomes unable by sickness or other disability to execute the trust, any person interested 'may present his or her affidavit to the circuit court of the county in which the estate conveyed is situated. If such court

shall be satisfied that the facts stated in the affidavit are true, it shall, in the case of a deed of trust to secure the payment of a debt, make an order appointing the sheriff or some suitable person to execute the same, and such sheriff shall be possessed of all the rights, powers and authority of the original trustee, and shall proceed to sell and convey the property and pay the debts and liabilities according to the directions of the deed of trust." (Wagn. Stat. 1347, § 1, 2.)

"The act creating the court of common pleas in Johnson county provides that 'said court shall have concurrent jurisdiction with the circuit court in all civil actions.' (Acts 1867, p. 90, § 10.)

"It is evident that the legislature intended to confer, and did confer, by said act upon said court jurisdiction over any and all civil proceedings of which which the circuit court of said county could entertain jurisdiction, and we therefore conclude that the court of common pleas had the power to appoint the sheriff of said county to execute the deed of trust.

"But it is said by the defendant's counsel that if the court had the power to appoint the sheriff to sell the real estate under said deed and receive the purchase money, he could only be made liable as an individual, and that no suit could be maintained against him on his official bond.

"This petition is untenable. It has been decided by this court that when a sheriff has been appointed in place of a trustee to execute the trust deed in selling the property, he is acting officially, and that in so acting, a sale, though made by his deputy, is valid and binding. (Tatum vs. Holliday, Administrator, 59 Mo. 422.)

And in *Anderson v. Roberts*, 48 S. W. 847, the Supreme Court of Missouri confirmed the foregoing in this language:

"In *Tatum v. Holliday*, 59 Mo. 422, *Wagner, J.*, held that where a sheriff was, by order of court, substituted as trustee in a deed of trust, he acted officially in making a sale, and his bondsmen were liable for a conversion of the proceeds, and that it was only in case some other person was substituted for the trustee that a bond is required. This was followed by *Norton, J.*, in *State v. Griffith*, 63 Mo., 545, and by *Bakewell, J.*, in *State v. Taylor*, 6 Mo. App. 277, and by *Sherwood, J.*, in *State v. Davis*, 88 Mo. 585. The principle underlying this doctrine is that a public officer's bond is liable for all money that comes into his hands in his official capacity. The obligation of a sheriff's bond is 'for the faithful discharge of his duties' (Rev. St. 1889, § 8175), and his duties as prescribed by section 8185 do not expressly include acting as trustee under deeds of trust. The condition of a county treasurer's bond is 'for the faithful performance of the duties of his office' (Rev. St. 1889, § 3162); and by section 3165 he is required to "receive all moneys payable into the treasury thereof, and disburse the same on warrants drawn by order of the county court.' It not unfrequently happens that trust estates and funds get into courts, and in every such instance it is directed by the court that they be turned over to the clerk of the court. The obligation of a clerk's bond is conditioned 'that he will faithfully perform the duties of his office, and pay over all moneys which may come to his hand by virtue of his office,' etc. Rev. St. 1889, § 1966. If a sheriff, substituted as trustee under sections 8683, 8684, Rev. St. 1889, is not required to give a bond because he acts officially, and his sureties are liable for his acts, and if a clerk of a court of record, who receives trust funds placed in his hands by order of the court, is liable on his bond therefor, it follows that a county treasurer who receives trust funds that are under the management of the county court, by order of that court, is likewise liable on his bond therefor. When, therefore, the county court, in 1869, directed the *Rollins* bequest to be received by the county treasurer, it placed the trust funds in the only proper repository for funds that the county court had the management of, and in the hands of a public officer, whose bond was responsible for the safe-keeping of the fund, and such treasurer acted officially in reference thereto.

In view of the foregoing, we are of the opinion that a County Auditor is not required to furnish a separate bond as trustee of cemetery funds, and his official bond is legal coverage for his duties as cemetery trustee.

VACATIONS: EXAMINERS AS EMPLOYEES: DISBURSEMENT OF FUND FOR VACATION PAY. State examiners appointed by Auditor of State under Section 114, 1939 Code are state employees and may receive the designated vacation with pay. Such vacation pay is to be disbursed from the General Fund.

March 16, 1945. *Honorable C. B. Akers, Auditor of State, Building:*
This will acknowledge receipt of yours asking for opinion on the following:

"Chapter 90, Acts of the 49th G. A. provides for salaries, vacations and leave of absence for state officers and employees. We desire your opinion upon the question of whether or not state examiners, who are appointed under the provisions of Section 114 of the 1939 Code are state employees and entitled to vacation as set forth in said chapter. If your answer to this question is in the affirmative, we also desire to know if in your opinion the said vacation pay for the state examiners may be taken from the appropriation provided for by the Legislature for the office of Auditor of State for salaries, support, maintenance and miscellaneous purposes."

The power of the Auditor respecting State Examiners is derived from Section 114 and 115 and 115.1 of the Code of 1939. These Sections are as follows:

Sec. 114. "The auditor of state shall appoint such number of state examiners of accounts as may be necessary to make such examinations. Said examiners shall be of recognized skill and integrity, familiar with the system of accounting in county, school and city offices, and with the laws relating to the county, school and city affairs. Each examiner shall give bond in the sum of two thousand dollars, conditioned as bonds of county officers, which bonds shall be approved and filed as bonds of state officers. Such examiners shall be subject at all times to the direction of said auditor of state."

115. "The auditor of state shall appoint such additional assistants to the examiners as may be necessary, who shall be subject to discharge at any time by the auditor. Such assistants shall receive such reasonable compensation as the auditor may fix and shall be paid in the same manner as examiners. The compensation of such assistants shall be considered as part of the cost of examination."

115.1. "County, municipal, and school examiners, and their assistants, shall be paid a per diem of not to exceed eight dollars (\$8.00) each for each day they actually work, and their actual and necessary expenses. Said payment shall be made from the general fund on the certification of the Auditor of State, and the general fund shall be reimbursed as provided in sections one hundred twenty-five (125) and one hundred twenty-six (126)."

The statutory regulation with respect to vacations of state officers and state employees is Chapter 90 of the Acts of the 49th General Assembly, which follows:

"Section one thousand two hundred eighteen (1218), Code, 1939, is amended, revised and codified to read as follows:

"Salaries specifically provided for in an appropriation act of the General Assembly shall be in lieu of existing statutory salaries, for the positions provided for in any such act, and all salaries shall be paid in equal monthly or semi-monthly installments and shall be in full compensation of all services, except as otherwise expressly provided. All employees of the state including highway maintenance employees of the State Highway Commission are granted one week's vacation after one year's employment and two weeks vacation per year after two or more years' employment, with pay. Leave of absence of thirty days per year with pay may be granted in the discretion of the head of any department to employees of such department when necessary by reason of sickness or injury; unused portions of such leave for any one year may be accumulative for three consecutive years."

In our opinion, the foregoing is divided into three problems:

1. Are the examiners employees within the terms of the statute?
2. How and from what fund may they be paid?
3. The amount of their vacation pay.

1. The principles to determine who are employees is set forth in the case of *Employers' Indemnity Co. v. Kelly Coal Co.*, 149 Ky. 712, 149 S. W. 992, 41 L. R. A. (N. S.) 963. There the Court says:

"Speaking generally, the relation may be said to exist whenever the employer retains the right to direct not only what shall be done, but how it shall be done. *Robinson v. Webb*, 11 Bush. 464; *Central Coal & I Co. v. Grider*, 115 Ky. 755, 65 L. R. A. 455, 74 S. W. 1058; *Jahn v. Wm. H. McKnight & Co.* 117 Ky. 661, 78 S. W. 862. The significant element in the relation of an employee and his employer is personal service. In *Wood on Master & Servant*, § 317, it is said: 'The real test by which to determine whether a person is acting as the servant of another is to ascertain whether, at the time when the injury was inflicted, he was subject to such person's orders and control, and was liable to be discharged by him for disobedience of orders or misconduct.' In other words, an 'employee' is one who works for and under the control of his employer. The mode of payment is a circumstance in solving the question whether the relation of master and servant exists, but it is not decisive of that question. In *Corbin v. American Mills*, 27 Conn. 274, 71 Am. Dec. 63, it was held the manner of paying for the work or thing done, whether by the day or job, though a circumstance to be considered, is not a criterion for determining whether the employee is a contractor or a servant,—that the real test is whether or not the person employed is acting for or in place of his employer, and in the absence in accordance with and representing the latter's will, and not his own."

If an employee is one who works for and under the control of his employer, then the provision of Section 144, to-wit:

"Such examiners shall be subject at all times to the direction of said auditor of state."

is a statutory application of that principle. Language could not be plainer than the foregoing to subject such examiners to the control of the Auditor of the State. And in accordance with the further expression of the foregoing citation that the

"Manner of paying for the work or thing done by day or job, though a circumstance to be considered, is not a criterion for determining whether the employee is contractor or a servant,"

the fact that examiners are paid a per diem would not control a conclusion as to whether the examiners are employees. We are of the opinion, therefore, that State Examiners and their assistants are employees and are entitled to the benefit accorded to the employees of the State under the previously exhibited Chapter 90 of the Acts of the 49th General Assembly.

2. The compensation of the Examiners is fixed pursuant to the terms of Chapter 65 of the Acts of the 49th General Assembly, as amended by Chapter 51 of the Acts of the 50th General Assembly, as follows:

"County, municipal, and school examiners, and their assistants, shall be paid a per diem of not to exceed eight dollars (\$8.00) each for each day they actually work, and their actual and necessary expenses. Said payment shall be made from the general fund on the certification of the Auditor of State, and the general fund shall be reimbursed as provided in sections one hundred twenty-five (125) and one hundred twenty-six (126)."

As will be seen by the foregoing, the Examiners are paid for actual service rendered from the general fund. In the view that we take, that vacation of an employee is part of the actual service period of an employee, or otherwise stated, that during such period he is assumed to be serving the State, results in answer to problems two and three as follows:

That the vacation pay may be disbursed from the general fund in the same amount authorized by Chapter 65 of the Acts of the 49th General Assembly as amended by Chapter 51 of the Acts of the 50th General Assembly.

COOPERATIVE ASSOCIATIONS: MEMBERSHIP OF COOPERATIVE ASSOCIATIONS: DISTRIBUTION OF EARNINGS: Ordinary corporations for profit, partnerships, cities, towns, counties, townships and cooperative associations organized under provisions of Chapter 389 and 390, 1939 Code, are not eligible to membership in a cooperative association organized under Chapter 390.1. Earnings of cooperatives organized under Chapter 390.1, 1939 Code, may be distributed to members only.

March 21, 1945. *Hon. Wayne M. Ropes, Secretary of State, Building:* Acknowledgement is made of your recent letter wherein you phrase your question as follows:

"This office would like an official opinion in regard to the membership of cooperative associations organized under the provisions of Chapter 390.1 of the 1939 Code of Iowa.

It has been our understanding that only individuals or associations organized under the provisions of Chapter 390.1 of the 1939 Code are eligible to membership. Our position on this matter has been questioned, and we would like to know if ordinary corporations for profit or cooperatives organized under the provisions of Chapters 389 and 390 of the Code are eligible to membership, also if partnerships or firms are eligible to membership or if a city, town, county or township is eligible to membership.

We would also like to know if the provisions of Section 8512.30 of the 1939 Code are mandatory and if the earnings of a cooperative association

organized under Chapter 390.1 of the Code must be distributed in accordance with Section 8512.30 or if the revolving fund can be distributed among patrons who are not members of the association.”

Your question may be divided into two separate sub-heads:

I

Membership of cooperative associations organized under Chapter 390.1, Code of Iowa, 1939.

The first section of Chapter 390.1 is section 8512.01 which provides as follows:

“This chapter applies only to cooperative associations as defined in section 8512.02. All such associations hereafter formed must be organized under this chapter.”

Section 8512.02, referred to above, provides as follows:

“*Definitions.* A ‘co-operative association’ is one which, in serving some purpose enumerated in section 8512.06, deals with or functions for its members at least to the extent required by section 8512.03, and which distributes its net earnings among its members in proportion to their dealings with it, except for limited dividends or other items permitted in this chapter; and in which each voting member has one vote and no more.

‘*Association*’ means a corporation formed under this chapter.

* * * * *

‘*Member*’ refers not only to members of non-stock associations but also to common stockholders of stock associations, unless the context of a particular provision otherwise indicates.”

Section 8512.05 has to do with permissible organizers, and provides as follows:

‘*Permissible organizers.*’ Five or more individuals, or two or more associations, may organize an association. All individual incorporators of agricultural associations must be engaged in producing agricultural products, which term shall include landlords and tenants as specified in section 8512.13.”

It will be noted that an association referred to in this chapter by definition applies to “a corporation formed under this chapter”. Also there is a definition of “member” referred to in section 8512.02 above. The whole text of the chapter embodies certain limitation features and the restriction as to permissible organizers and members. From the statutes quoted above, it is our opinion with respect to membership as follows:

1. Ordinary corporations for profit are not eligible to membership in a cooperative organized under Chapter 390.1.
2. Cooperative associations organized under the provisions of Chapters 389 and 390 are not eligible to membership of a cooperative association organized under the provisions of Chapter 390.1.
3. Partnerships are not eligible to membership in cooperative associations organized under the provisions of Chapter 390.1.
4. A city, town, county, or township is not eligible to membership in a cooperative association organized under the provisions of Chapter 390.1.

II

Distribution of Earnings of a Cooperative Association organized under Chapter 390.1.

This matter is governed by section 8512.30, Code, 1939, which provides as follows:

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

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

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

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

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

All remaining net earnings shall be allocated to a revolving fund and shall be credited to the account of each member including subscribers described in section 8512.16 ratably in proportion to the business he has done with the association during such year. Such credits are herein referred to as 'deferred patronage dividends'."

The last paragraph of the statute quoted above refers to the distribution of the revolving fund made the subject of your inquiry. It should be noted that the statute uses the word "shall" in two instances. It is the opinion of this office that the use of such expression in the statute makes the application of the statute mandatory.

57 C. J. 548, Par. 5.

City of Newton v. Board of Supervisors, 135 Iowa, 27, 30.

Vale v. Messinger, 184 Iowa 553, 558.

Jefferson County Farm Bureau v. Sherman, 208 Iowa, 614, 618.

Further, that the distribution of the revolving fund can only be made among members and no distribution can be made among patrons who are not members of the association.

TAX RECEIPTS: TAXES COLLECTED FOR PREVIOUS YEAR: STATUTES APPLICABLE: A tax receipt issued by treasurer in year 1945 should show that the tax payment is for the taxes of 1944, even though Sections 385, 5260.01 and 5260.02 of 1939 Code appear to be otherwise.

March 27, 1945. *Mr. F. E. Van Alstine, County Attorney, Pocahontas, Iowa:* You state and ask for opinion in the following situation:

"This office is presented with a problem of an apparent ambiguity in our tax collection statutes which arises substantially as follows:

"At the present time when taxes are paid to the county treasurer, he issues a receipt for the past year. Section 385, 5260.01, 5260.02 and 7214 of the Code, appear to lend credence to the view that the tax receipts should show taxes paid for the current year.

"Will you kindly review this matter and furnish me with an opinion as to the meaning of the statutes mentioned with reference to our long established custom of collecting taxes for one year during the following year."

We agree with you that there is justification in Sections 385, 5260.01 and 5260.02 for the view, in theory, that taxes when paid are for the year in which paid; in other words, the payment of taxes for the year 1945 would entitle the taxpayer to a receipt for his 1945 taxes. However, the process prescribed by our statutes leading to the actual payment of taxes by the taxpayer in any year, are the true evidences of the Legislative intent.

Section 6956, Code of 1939, is the first step in the process of fixing the amount of the tax payable by the taxpayer in any year. It provides:

"Listing—by whom. Every inhabitant of this state, of full age and sound mind, shall list for the assessor all property subject to taxation in the state, of which he is the owner, or has the control or management, in the manner herein directed: * * * ."

Section 7106 provides as follows:

"Listing and valuation. Each assessor shall enter upon the discharge of the duties of his office immediately after the second Monday in January in each year, and shall, with the assistance of each person assessed, or whom may be required by law to list property belonging to another, enter upon the assessment rolls furnished him for that purpose the several items of property required to be entered for assessment. He shall personally affix values to all property assessed by him."

Chapter 343 of the Code of 1939, as amended by Chapter 202 of the Acts of the 49th General Assembly, provides the method of review by Boards of Review of the assessments as made by the assessor. Such Boards shall exercise their power, and their jurisdiction is exhausted on varying dates according to the terms of the Chapter, not later than the 1st day of August of each year.

Section 7164 provides with respect to the computation of the rate of the levy, as follows:

"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 6985 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 7171 provides for the levying of taxes upon the assessed value of the property in the County in its September Session, as follows:

“Annual levies. The board of supervisors of each county shall, annually, at its September session, levy the following taxes upon the assessed value of the taxable property in the county.

1. For state revenue, such rate of tax as shall be fixed by the state tax commission as hereinafter provided.
2. For ordinary county revenue, not to exceed one and one-half mills on a dollar.”

(Amendments to Section 7171 by the 49th and 50th General Assemblies with respect to details, are not herein exhibited.)

Insofar as school taxes are concerned, Section 4393 of the Code of 1939 provides as follows:

“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 6227 provides with respect to assessments and taxes of cities and towns and their certification to the County Auditor on or before the first day of September, as follows:

“Certification of taxes and assessments—collection. All assessments and taxes of every kind and nature levied by the council, except as otherwise provided by law, shall be certified by the clerk on or before the first day of September to the county auditor, and by him placed upon the tax list for the current year, and the county treasurer shall collect all assessments and taxes so levied in the same manner as other taxes, and when delinquent they shall draw the same interest and penalties.”

Section 7145 provides for the preparation by the County Auditor of the tax list, as follows: (As amended by the 50th General Assembly.)

“Tax list. Before the first day of January in each year, the county auditor shall transcribe the assessments of the several townships, towns, or cities into a book or record, to be known as the tax list, properly ruled and headed, with separate columns, in which shall be entered the names of the taxpayers, descriptions of lands, number of acres and value, numbers of town lots and value, value of personal property and each description of tax, with a column for polls and one for payments, and shall complete the same by entering the amount due on each installment, separately, and carrying out the total of both installments. The total of all columns of each page of each book or other record shall balance with the tax totals.”

And then follows the obligation upon the County Auditor of delivering the tax list to the Tax Treasurer on or before the 31st day of December, according to Section 7147, which is as follows:

“Tax list delivered—informality and delay. He shall make an entry upon the tax list showing what it is, for what county and year, and deliver it to the county treasurer on or before the thirty-first day of December, taking his receipt therefor; and such list shall be a sufficient authority for the treasurer to collect the taxes therein levied. No informality therein, and no delay in delivering the same after the time above specified, shall affect the validity of any taxes, sales, or other proceedings for the collection of such taxes.”

Note therefrom that this is the list which is the authority for the Treasurer to collect the taxes therein levied. In other words, the process of making the assessment and levying the taxes and providing the County Treasurer with the authority to collect the taxes so levied, operates from January 1st to December 31st in any year. This process then eventuates into this duty imposed upon the Treasurer by Section 7188, Code of 1939, as follows: (As amended by the 50th General Assembly.)

"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."

It would seem quite conclusive that, taking into account all the foregoing steps in the process of taxation and the details of the receipt to be given by the Treasurer when the taxes are paid, the foregoing leads to the conclusion that the taxes that are paid, for example in 1945, are the taxes for the year 1944. It is obvious that a tender of taxes for 1945 on the third day of January of that year would impose upon the Treasurer the impossible duty of issuing and delivering to the taxpayer a receipt showing the assessed value of land and personal property which had not been made and the amount of tax that had not been levied, and as a matter of law could not legally be made or levied as of that date. There being no statutes providing other machinery for collecting taxes, we are convinced that the tax receipt issued by the Treasurer in the year 1945 should show that the tax payment is for the taxes for the year 1944 and, in so doing, he fulfills the duties imposed on him by Section 7188. Your County Treasurer in issuing such receipt complies with the law.

TAXATION: FEDERAL TAX IS NOT DEBT: MONIES AND CREDITS. Federal Income Taxes, Federal Gift Taxes, and Federal Estate Taxes owing on January 1st are not deemed "debts" so as to be deducted from monies and credits under Section 6988, 1939 Code.

March 28, 1945. *Hon. Fred W. Nelson, Chairman, Iowa State Commission, Des Moines, Iowa:* We wish to acknowledge receipt of your recent letter in which you asked for an opinion on the following matter:

"Federal Income Taxes, Federal Gift Taxes and Federal Estate Taxes owing on January 1st, deductible as a debt under the provisions of Section 6988 in determining the amount of property subject to the moneys and credits tax."

Section 6988 of the 1939 Code of Iowa provides as follows:

"*Deduction of debts.* In making up the amount of money or credits which any person is required to list, or to have listed or assessed, including actual value of any 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."

Section 6989 provides:

"Good-faith debt required. No acknowledgement of indebtedness not founded on actual consideration, and no such acknowledgement made for the purpose of being so deducted, shall be considered a debt within the intent of section 6988."

The matter presented in your letter resolves itself into the question "Are the above mentioned federal taxes a debt within the meaning of Section 6988 and Section 6989?" In 1905 the Supreme Court of Iowa, in the case of *Bailies v. City of Des Moines*, 127 Iowa, had the question before it as to whether or not delinquent real estate taxes could be classified as a debt and deductible in determining the net amount of moneys and credits. The Supreme Court held that, for the purposes of moneys and credits law, real estate taxes were not to be considered a debt and, in reaching this conclusion, the Court stated:

"The general tenor of the authorities is to the effect that a tax in its essential characteristics is not a debt, but an impost levied by authority of government upon its citizens or subjects for the support of the State. It is not founded on contract or agreement, but operates in invitum. Where as a debt is a sum of money due by certain and express agreement, and originates in or is founded upon contracts express or implied. In *Meriwether v. Garrett*, 102 U. S. 472 (26 L. Ed. 197), it is said: 'A tax is a charge imposed by the Legislature for the purpose of revenue. It is not founded upon contract, and does not establish the relation of debtor and creditor. It is an enforced proportional contribution levied by authority of the State.' See, also, the long collection of cases in volume 2, *Words and Phrases*, page 1883. It must be remembered that in the absence of statute there can be no deduction on account of debts, and he who would have such exemption must be able to point out a statute which gives it to him. We are not justified in extending such a statute beyond its express terms. There is nothing in the spirit of the act which suggests a liberal interpretation thereof."

The statute under consideration at that time is not materially different than Section 6988 of the 1939 Code of Iowa.

In March of 1939 the Attorney General ruled that inheritance taxes due the State of Iowa could not be deducted by the executor of an estate in listing moneys and credits for taxation. In reaching that conclusion we could have based our opinion on the proposition that the inheritance tax was actually the debt of the beneficiaries under the will rather than the debt of the executor. However, we chose to determine the question on the broader proposition that taxes are not generally considered to be debts, and cited as authority the case of *Bailies v. City of Des Moines*, 127 Iowa.

Turning now to the definition of a debt, we call attention to only a few of the many cases which hold that taxes are not generally considered to be debts.

"Taxes are not 'debts' in the ordinary sense of the word. *Hecox v. Teller County*, 198 F. 634, 635, 117 C. C. A. 338.

Generally, 'tax' is not 'debt' in ordinary sense of word. *Forest City Mfg. Co. v. Levy (Mo.)* 33 S. W. (2d) 984, 985.

A tax is not a debt founded on contract, but is an impost levied by the government operating in invitum. *State ex rel. George v. Dix*, 141 S. W. 445, 446, 159 Mo. App. 573.

Taxes, being in no sense contractual, are not 'debts' which are obligations for payment of money founded upon contract, express or implied. *St. Joseph Land Co. v. MacLean* (C. C. A. Utah) 32 F. (2d) 984, 987.

A debt is a sum of money due by contract, express or implied, and is thus distinguished from a tax, which is a charge on persons or property to raise money for public purposes and operates in invitum. *Georgia R. & Banking Co. v. Wright*, 53 S. W. 251, 262, 124 Ga. 596.

A tax is generally defined as a burden imposed by legislative authority to raise money for public purposes. In its essential characteristics it is almost universally held not to be a debt or in the nature of a debt; the distinction being that a tax does not rest on contract, while a debt does. *Hanson v. Franklin*, 123 N. W. 386, 388, 19 N. D. 259.

A tax is not a debt, nor in the nature of a debt. It is an impost levied by authority of government, upon its citizens or subjects, for the support of the state. *Peter v. Parkinson*, 93 N. E. 197, 199, 83 Ohio 36, Ann. Cas. 1912A, 751.

"Taxes" are not debts; they are not founded on contract, but stand on a higher plane. They are charges imposed upon the taxpayers in invitum by the exercise of the sovereign power of the state. *Brown v. American Gas. Coal Co.*, 123 S. E. 412, 416, 95 W. Va. 658.

Taxes do not depend upon will or consent, express or implied, of person taxed, and hence, when levied, do not become "debt" within ordinary meaning of word. *State ex rel. Tillman v. District Court of Tenth Judicial Dist. in and for Fergus County*, 53 P. 2d 107, 110, 101 Mont. 176, 103 A. L. R. 376.

"Tax" is not "debt" nor in nature of debt. A "debt" is a sum of money due by contract, express or implied, or arising out of a judgment; while a "tax" is a charge on persons or property to raise money for public purposes and operates in invitum. *People ex rel. Nelson v. Bank of Rushville*, 189 N. E. 299, 355, Ill. 336.

Generally a "tax" is an impost levied for support of government, or for some special purpose, or by some agency having certain governmental functions delegated to it and is not based on an express or implied contract, and is in no sense a "debt" within the ordinary meaning of that term. *Boyd v. Dillman*, Del. Super., 197 A. 830, 834, 835.

General taxes are not "debts", within meaning of such word as commonly used, but they are forced contributions. Federal inheritance tax is not deductible as "debt" under Tax Law, 6, as amended by Laws 1914, c. 277, from tax on decedent's personal property assessed against executors. *People ex rel. Farmers' Loan & Trust Co. v. Goldfogle*, 220 N. Y. S. 337, 338, 219 App. Div. 576.

Federal estate tax does not create a "debt", since "debts" are obligations for the payment of money founded upon a contract, express or implied, while "taxes" are imposts levied for support of the government or for some special purpose authorized by law. *Turner v. Cole*, 179 A. 113, 116, 118 N. J. Eq. 497.

A tax is not strictly a "debt". It lacks the nature of a debt in that, though for a sum certain, it is not founded upon any agreement or assent of the person or persons against whom it is assessed, but is a burden for public purposes imposed in invitum. As an obligation or duty created by statute to pay money, however, it is quasi contractual, although there may be difficulty as to the remedy for its enforcement in a given case. *In re United Button Co.*, 140 F. 495, 502.

Taxes do not come within ordinary meaning of word "debt" which is limited usually to liabilities arising out of contract. *Hickok Oil Corporation v. Evatt*, 49 N. E. 2d 937, 940, 141 Ohio St. 644.

Generally, a tax is not considered to be a "debt" in the ordinary meaning of the word debt. Board of Com'rs of Big Horn County v. Bench Canal Drainage Dist., Wyo., 108 P. 2d 590, 592.

A tax is not a "debt" in the ordinary sense of the term, and liability to pay taxes arises from no contractual relation between the parties. Derry Tp. School Dist. v. Barnett Coal Co., 2 A2d 758, 761 332 Pa. 174.

"Taxes" are imposts levied for support of government or for some special purpose authorized by it, consent of taxpayer being unnecessary to their enforcement, and are not "debts" which are obligations for payment of money founded upon contract, express or implied. Womack v. McCook Bros. Funeral Home, 193 S. 652, 653, 194 La. 296."

For other expressions as to whether a tax is a debt, see volume II of Words and Phrases, page 278.

While it is true that for some purposes taxes may be considered to be a debt, we feel that in view of the Supreme Court's opinion that real estate taxes are not to be considered a debt for the purposes of our moneys and credits tax, there is no reason why the federal taxes above mentioned should be considered to be debts under the moneys and credits tax law. While some of the language in the Bailies case may not be applicable to the taxes that we are now considering, we do not feel that such language gives any indication that our Supreme Court might hold otherwise on the question now before us. The principle reason why the Court reached the conclusion that the taxes in the Bailies case are not a debt was that a tax in its essential characteristics is not a debt but rather an impost levied by authority of the government for the support of the government. It is not founded on contract or agreement but operates in invitum.

We feel that it is significant that the legislature met many times since the Bailies case and has not seen fit to broaden the definition of a debt to include any sort of taxes, including federal taxes under consideration.

It is our conclusion that the above mentioned federal taxes are not to be considered as a debt within the meaning of Section 6988 and Section 6989 of Chapter 332, Iowa Code, relating to the taxation of moneys and credits.

RETAIL SALES TAX: COMMERCIAL FERTILIZER: IOWA RETAIL SALES ACT. Section 6493.074, as amended, allowed exception excluding commercial fertilizer and agricultural limestone from the definition of a retail sale, therefore sales of these products are not subject to Iowa Retail Sales Act.

March 28, 1945. *Hon. Fred W. Nelson, Chairman, Iowa State Tax Commission, Des Moines, Iowa:* We wish to acknowledge receipt of your request for an opinion as to whether or not the sale of commercial fertilizer is subject to the Iowa retail sales tax.

Prior to the enactment of Chapter 181, Acts of the 48th General Assembly, there wasn't any question but what commercial fertilizer was

excluded from the definition of "retail sales." Subparagraph three of Section 6943.074, prior to the amendment of Chapter 181, reads as follows:

"Retail sale" or "sale at retail" means the sale to a consumer or to any person for any purpose, other than for processing or for resale of tangible personal property and the sale of gas, electricity, water, and communication service to retail consumers or users, but does not include commercial fertilizer or agricultural limestone. Tangible personal property is sold for processing within the meaning of this subsection only when it is intended that such property shall by means of fabrication, compounding, manufacturing, or germination become an integral part of other tangible personal property intended to be sold ultimately at retail, or shall be consumed as fuel in creating heat, power or steam for processing or for generating electric current.

We note the following portion of Section 6943.074, 1939 Code of Iowa:

"The following words, terms, and phrases, when used in this division, have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning.

1. * * * * *

2. * * * * *

3. 'Retail sale' or sale at retail' means the sale to a consumer or to any person for any purpose, other than for processing or for resale of tangible personal property and the sale of gas, electricity, water, and communication service to retail consumers or users, but does not include commercial fertilizer or agricultural limestone, or electricity or steam when purchased and used in the processing of tangible personal property intended to be sold ultimately at retail. Tangible personal property is sold for processing within the meaning of this subsection only when it is intended that such property shall by means of fabrication, compounding, manufacturing, or germination become an integral part of other tangible personal property intended to be sold ultimately at retail, or shall be consumed as fuel in creating heat, power or steam for processing or for generating electric current."

4. * * * * *

The amendment contained in Chapter 181 changed the period after the word "limestone" and inserted a comma and added "or electricity or steam when purchased and used in the processing of tangible personal property intended to be sold ultimately at retail." It is significant that the amendment starts with the disjunctive "or", and it is our opinion that the qualifying words of the amendment "when purchased and used in the processing of tangible personal property intended to be sold ultimately at retail" relates only to electricity or steam and does not qualify commercial fertilizer or agricultural limestone. Had the legislature intended to so qualify commercial fertilizer and agricultural limestone, it would not have used the word "or" after the word "agricultural limestone". Furthermore, it takes quite an imaginative mind to earnestly contend that commercial fertilizer or agricultural limestone are "used in the processing of tangible personal property intended to be ultimately sold at retail". We do not think that the chemical reaction of commercial fertilizer or agricultural limestone on the soil, and the resulting effects on the produce of the soil, can fairly be considered to be processing under the provisions of Section 6943.074, 1939 Code of Iowa.

It is our conclusion that the amendment contained in Chapter 181, Acts of the 48th General Assembly, did not alter the exception which excludes commercial fertilizer and agricultural limestone from the definition of a retail sale. Consequently, sales of these products are not subject to the Iowa retail sales act.

SALARY OF PROBATION OFFICER. Probation Officer is an officer of the Juvenile Court appointed by Juvenile Judge and is within the class that may be entitled to the increase in salary.

April 20, 1945. *Senator A. D. Clem, Sioux City, Iowa:* Consideration is given herein to the question as to whether a Probation Officer is within the class who may be entitled to an increase of salary under the provisions of House File 315 of the 51st General Assembly.

The Probation Officer is an officer of the Juvenile Court, established under Chapter 179, Code of 1939. He is an appointee of the Judge, designated as a Juvenile Judge in each County, and his compensation is fixed according to the terms of Section 3612, Code of 1939, as amended by Paragraph One, Chapter 129 of the Acts of the 50th General Assembly, which is as follows:

"The judge designated as juvenile judge in each county, or in cases where there is more than one such judge in any county, the judges so designated acting jointly, shall appoint probation officers, one of whom, if more than one is appointed, shall be a woman, as follows:

1. In and for any county having a population of less than thirty thousand, not more than one probation officer who may serve part time or in special cases only as may be required, who, on approval of the judge of the district court in that county, may be paid the sum of five dollars per day or fifty cents per hour for services actually rendered; in no event more than eighteen hundred dollars per year.

2. In counties which contain an educational institution under the control of the state board of education with a student enrollment of at least six thousand and in counties having a population of more than thirty thousand and less than fifty thousand, a chief probation officer at a salary of not more than fifteen hundred dollars per year; and the court may also appoint one deputy at a salary of not more than twelve hundred per year.

3. In counties having a population of more than fifty thousand and less than one hundred twenty-five thousand, a chief probation officer at a salary of not more than two thousand dollars per year; and the court may appoint two deputies at a salary of not more than fifteen hundred dollars each per year.

4. In counties having a population in excess of one hundred twenty-five thousand, one chief probation officer at a salary not to exceed three thousand dollars per year, and not to exceed ten deputy probation officers. Three of such deputy probation officers may be paid a salary not to exceed twenty-two hundred dollars per year each, and the remainder of such deputy probation officers so employed may be paid a salary not to exceed eighteen hundred dollars per year each."

House File 315 provides in Section 1 thereof, for increase of compensation for assessors. Section 2 provides the increase for county supervisors. Section 3 fixes a stated definite minimum compensation for

full time deputy auditors, deputy recorders, deputy treasurers and deputy clerks. Section 4 provides the compensation of full time deputy sheriffs. For increases of county officers and deputies, generally included in which is the probation officer, Section 5 provides as follows:

"It is hereby provided that from July 1, 1945, to June 30, 1947, except as otherwise provided for herein, the compensation of all county officers and deputies except county attorneys and their assistants, whose compensation is fixed by law, including full time assessors and full time deputy assessors, employed by cities, but whose compensation is paid by the county, shall be increased and granted by the board of supervisors as follows:

In counties having a population of forty-four thousand (44,000) or less a twenty percent (20%) increase in each case, but in no case to exceed four hundred dollars (\$400.00) per annum and in counties having a population in excess of forty-four thousand (44,000) a twenty percent (20%) increase in each case, but in no case to exceed six hundred dollars (\$600.00) per annum."

The terms of this Section impose a duty upon the Board of Supervisors to grant the increases to all who are County Officers, and their Deputies, except County Attorneys and their assistants "whose compensation is fixed by law." While the term "fixed by law" has been held by this Department of Opinion of May 12, 1943, to mean "a compensation at a definite stated amount," as applied to Chapter 168, Acts of the 50th General Assembly, we are of the opinion that, under House File 315 of the 51st General Assembly, the term has now a different meaning. This definition of "fixed by law," as applied to Chapter 168 of the Acts of the 50th General Assembly, is now confirmed. As thus defined, Section 4 of that Act controlled the increases of those officials having statutory definitely stated compensation. Insofar as those officials, the amount of whose compensation was discretionary with the Board of Supervisors within a statutory limitation, Section 5 of Chapter 168, 50th General Assembly, provided the power to increase. Such Section 5 of Chapter 168, Acts of the 50th General Assembly, is this:

"During the period ending June 30, 1945, the compensation of any county officer deputy or employee not otherwise covered by this act, whose compensation is now fixed by the board of supervisors or by order of court, may by action of the board of supervisors be increased over any maximum provided by law, but not in excess of the schedule contained in section four (4) of this act, and in any event any increase in salary granted to any such officer, deputy or employee since January 1, 1943, shall be taken into consideration in increasing salaries under the provision of this section."

In the act under consideration, increase of salary for such officials, the amount of whose compensation was discretionary with the Board of Supervisors within a statutory maximum, is not provided for in any other part of the said House File 315, unless it be under Section 5 of that Act, as hereinbefore exhibited. In truth, the very terms of that Act recites that,

"The compensation of county officers and deputies * * * whose compensation is fixed by law shall be increased and granted by the board of supervisors."

and obviously the legislature, by naming deputies in the foregoing paragraph, intended that their compensation should be determined under the said Section 5. Such interpretation of this Section 5 of House File 315 is supported by the terms of Section 8 thereof, which provides as follows:

“Nothing herein contained shall be construed as a limitation on the powers of Boards of Supervisors as regards salaries not fixed by statute.”

This invests the Board of Supervisors with undiminished power as regards salaries not fixed by statute. If the meaning of the term “fixed by law” as set forth in the Opinion of May 12, 1943, is the meaning of the term as used in House File 315, then the effect thereof would be to exclude the deputy auditors, deputy treasurers, deputy sheriffs and deputy clerks from the benefits of the statute, because under Chapter 261, Code of 1939, the compensations of deputy auditors, deputy treasurers, deputy recorders, deputy clerks and deputy sheriffs are not stated definite amounts, but variables to be fixed, in a stated definite amount, by the Board of Supervisors within the statutory limitations. If they be so covered by Section 8, then specifically including deputies within the terms of Section 5 would have been unnecessary. For that reason, the term “fixed by law” means compensation fixed within a statutory maximum limitation, as well as a statutory definitely stated amount. Under such meaning, Section 5 of House File 315 would be operative as to all such officers appointed under the terms of chapter 179 notwithstanding that under Section 3616 the Judge, in making the appointment of the probation officer is directed to fix the salary of such probation officer at an amount not exceeding the amount authorized by law. Such section follows:

“The judges making the appointment shall fix the salaries of all appointees at not exceeding the amount authorized by law. All appointees shall serve during the pleasure of such judges, and in addition to salaries shall receive their necessary and actual expenses incurred while performing their duties. All salaries and expenses shall be paid by the county.”

Accordingly, a probation officer is within the class who may be entitled to the increase provided by House File 315 of the 51st General Assembly.

TAX EXEMPTION FOR SERVICEMEN: EFFECTIVE DATE. Servicemen entitled to exemption and who comply with law in respect to claiming benefits before levy, will be entitled to the exemption upon 1945 taxes payable in 1946. After once complying with sections 6947 and 6948, respecting steps required to claim exemptions, servicemen are entitled continuously to such amount of exemption as the law provides.

April 26, 1945. *Honorable Wayne M. Ropes, Secretary of State, Building:* This will acknowledge receipt of yours of the 19th, in which you state:

"This Department would like an interpretation of House File 50 of the Acts of the Fifty-first General Assembly relating to exemptions from taxation of property of soldiers, sailors, marines, and nurses, and widows and child or children of soldiers, sailors, marines, and nurses.

"This Act increases the exemption for honorably discharged soldiers, sailors, marines, and nurses of the First World War from \$500.00 to \$750.00 and also provides for \$500.00 exemption for honorably discharged soldiers, sailors, marines, and nurses of the Second World War, and certain other veterans.

"We would first like to know what year this exemption will first apply; that is to say, will it apply to the taxes assessed in the year of 1945 and due and payable in the year of 1946, or will it not apply until the taxes assessed in the year 1946 and due and payable in the year of 1947.

"We would also like to know if it will be necessary for veterans of World War I who have already filed for their exemption of \$500.00 to file anything additional in the office of the County Auditor to entitle them to the increase of \$250.00,"

House File 50 of the Acts of the 51st General Assembly is this:

"AN ACT

TO AMEND SECTION SIX THOUSAND NINE HUNDRED FORTY-SIX (6946), CODE, 1939, RELATING TO EXEMPTIONS FROM TAXATION OF PROPERTY OF SOLDIERS, SAILORS, MARINES, NURSES, AND WIDOWS, AND THE CHILD OR CHILDREN OF SOLDIERS, SAILORS, MARINES, AND NURSES,

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

Section 1. Section six thousand nine hundred forty-six (6946), Code, 1939, as amended by chapter two hundred forty-one (241), Acts of the Forty-ninth (49) General Assembly, is amended by striking all of subsection three (3), four (4), and five (5) and the amendment of chapter two hundred forty-one (241), Acts of the Forty-ninth (49) General Assembly, and inserting in lieu thereof the following:

3. The property, not to exceed seven hundred fifty (\$750.00) dollars in taxable value of any honorably discharged soldier, sailor, marine or nurse of the first World War.

4. The property, not to exceed five hundred (\$500.00) dollars in taxable value of any honorably discharged soldier, sailor, marine or nurse of the second World War, Army of Occupation in Germany November 12, 1918, to July 11, 1923, American Expeditionary Forces in Siberia November 12, 1918, to April 30, 1920, Second Nicaraguan Campaign with the Navy or Marines in Nicaragua or on combatant ships 1926-1933, Second Haitian Suppressions of Insurrections 1919-1920, Navy and Marine Operations in China 1937-1939 and Yantze Service with Navy and Marines in Shanghai or in the Yangtze Valley 1926-1927 and 1930-1932.

In case any person in the foregoing classifications does not claim any such exemption from taxation, it shall be allowed in the name of such person to the same extent on the property of any one of the following persons in the order named:

1. The wife, or widow remaining unmarried, of any such soldier, sailor, marine or nurse, where they are living together or were living together at the time of the death of such person.

2. The widowed mother, remaining unmarried, of any such soldier, sailor, marine or nurse, whether living or deceased where such widowed mother is, or was at the time of death of the soldier, sailor, marine or nurse, dependent on such person for support.

3. The minor child, or children owning property as tenants in common, of any such deceased soldier, sailor, marine or nurse.

No more than one tax exemption shall be allowed under this section in the name of any honorably discharged soldier, sailor, marine or nurse.

Sec. 2. This act, being deemed of immediate importance, shall be in full force and effect from and after its passage and publication in the Cedar Rapids Gazette, a newspaper published at Cedar Rapids, Iowa, and the American Citizen, a newspaper published at Des Moines, Iowa."

And Section 6946, Code of 1939, as amended by such House File 50, is herein exhibited as follows:

"Military Service—Exemptions. The following exemptions from taxation shall be allowed:

1. The property, not to exceed three thousand dollars in taxable value, and poll tax of any honorably discharged union soldier, sailor, or marine of the Mexican war or the war of the rebellion.

2. The property, not to exceed eighteen hundred dollars in taxable value, and poll tax of any honorably discharged soldier, sailor, marine or nurse of the war with Spain, Tyler Rangers, Colorado Volunteers in the war of the rebellion, 1861 to 1865, Indian wars, Chinese relief expedition or the Philippine insurrection.

3. The property, not to exceed seven hundred fifty (\$750.00) dollars in taxable value of any honorably discharged soldier, sailor, marine or nurse of the first World War.

4. The property, not to exceed five hundred (\$500) dollars in taxable value of any honorably discharged soldier, sailor, marine or nurse of the second World War, Army of Occupation in Germany November 12, 1918, to July 11, 1923, American Expeditionary Forces in Siberia November 12, 1918, to April 30, 1920, Second Nicaraguan Campaign with the Navy or Marines in Nicaragua or on combatant ships 1926-1933, Second Haitian Suppressions of Insurrections 1919-1920, Navy and Marine Operations in China 1937-1939 and Yangtze Service with Navy and Marines in Shanghai or in the Yangtze Valley 1926-1927 and 1930-1932.

In case any person in the foregoing classifications does not claim any such exemption from taxation, it shall be allowed in the name of the person to the same extent on the property of any one of the following persons in the order named:

1. The wife, or widow remaining unmarried, of any such soldier, sailor, marine or nurse, where they are living together or were living together at the time of the death of such person.

2. The widowed mother, remaining unmarried, of any such soldier, sailor, marine or nurse, whether living or deceased, where such widowed mother is, or was at the time of death of the soldier, sailor, marine or nurse, dependent on such person for support.

3. The minor child, or children owning property as tenants in common, of any such deceased soldier, sailor, marine or nurse.

No more than one tax exemption shall be allowed under this section in the name of any honorably discharged soldier, sailor, marine or nurse."

1. Insofar as your first question is concerned, and following the principle announced and adhered to by the Department, that where exemption from taxation is authorized, such exemption, (if the right thereto is perfected July 1 in the statutory manner and prior to the levy in September of each year), is effective as against the levy of that year, and resolutely the advantage thereof would be taken in the payment of the taxes for the following year. In other words, House File No. 50, being in force and effect from and after publication, those who are entitled to its exemption benefits and who comply with the law respecting the claiming of the benefits made before levy, will be entitled to the exemption upon taxes for 1945, payable in the year 1946. This is the express intent of Section 6948, amended by Chapter 242 of the Acts of the 49th General Assembly, as amended by Chapter 212, Acts of the 50th General Assembly:

“Said claim for exemption, if filed on or before July 1 of any year and allowed by the board of supervisors, shall be effective to secure an exemption for the year in which such exemption is filed.”

The 51st General Assembly made no changes in the foregoing provision, and it is a fair and reasonable inference that the legislature intended that the provisions thereof should continue applicable to the statute 6946 as amended by it in House File 50.

2. With respect to your second question, Sections 6947 and 6948, as amended by the 49th and 50th General Assemblies, prescribe the method by which the persons named in Section 6946 may effectuate their exemption. These sections as so amended, are as follows:

6947. “Any person named in section 6946, provided he is a resident of and domiciled in the state of Iowa, shall receive a reduction equal to his exemption, to be made from any property owned by such person 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 honorable discharge of the person claiming or through whom is claimed said exemption; in the event said honorable discharge is lost he may record in lieu of said discharge, a certified copy of said discharge. Said person shall file with the county auditor his claim for exemption or reduction in taxes under oath, which claim shall set out the fact that he is a resident of and domiciled in the state of Iowa, and a person within the terms of section 6946, and give the volume and page on which the honorable discharge or certified copy thereof is recorded in the office of the county recorder, and may include the designation of the property from which he desires said exemption or reduction to be made, and shall further state that he is the equitable and legal owner of the property designated therein. No person may claim a reduction or exemption in more than one county of the state of Iowa, and if no designation is made the exemption shall apply to the homestead, if any.”

6948. “Said claim for exemption, if filed on or before July 1 of any year and allowed by the board of supervisors, shall be effective to secure an exemption for the year in which such exemption is filed, and when a claim has once been made and allowed, it shall be effective thereafter during the period of ownership of the property designated or of the homestead, as the case may be, or until the death of all persons named in section 6946 who remain equitable and legal owners of said property.”

It seems quite clear that anyone eligible to the exemption under the provisions of Section 6946 after having once complied with the provisions of Section 6947 and 6948 respecting the steps required to claim the exemption, is then entitled continuously to such amount of exemption as the law prescribes, whatever that may be. The express provision of Section 6948, to-wit:

“and when a claim has once been made and allowed, it shall be effective thereafter during the period of ownership of the property designated or of the homestead, as the case may be, or until the death of all persons named in section 6946 who remain equitable and legal owners of said property.”

remains unchanged. The 51st General Assembly, while making the foregoing changes in 6946, at the same time made no changes in the requirements specified in Sections 6947 and 6948 respecting the method of securing the exemption. In that situation, it must be presumed that the 51st General Assembly intended that the provisions of Section 6948, heretofore stated, should be applicable to Section 6946, as amended by it.

PUBLIC OFFICIALS: POWERS OF BOARD OF SUPERVISORS: POOR RELIEF. The Board of Supervisors has authority under provision of Section 5130, 1939 Code, to compromise a claim for poor relief provided they act in good faith.

April 30, 1945. *Mr. Geo. W. Sturges, Acting County Attorney, LeMars, Iowa:* I wish to acknowledge receipt of your letter of April 26, 1945, wherein you request an opinion of this office upon the following question:

“Can the Board of Supervisors compromise a claim for poor relief granted a poor person?”

In answer thereto, you are advised as follows:

“Section 5130. The board of supervisors at any regular meeting shall have power:

“ * * * * *

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

This statute was construed in the case of *Collins vs. Welch*, 58 Iowa, 72, and it was held that the Board of Supervisors, if acting in good faith in respect thereto, had the authority to compromise a judgment in favor of the county. On page 73, the Court said:

“Suppose, for instance, that the financial condition of the judgment debtor is such that the board is unable to discover any way of collecting any part of the judgment. The board should have the power to accept a part in satisfaction of the whole, if in its judgment the best interests of the county would thereby be promoted. All rules of business conduct by which a prudent person is governed are applicable to a county in the management of its affairs under similar circumstances.”

In *Plymouth County vs. Koehler*, 221 Iowa, 1022, the Court held that the Board of Supervisors had the right to compromise a claim and judg-

ment for the cost of the keep of a person at a state hospital for the insane. On page 1026, the Court said:

"The rule is well established, * * * , that a board of supervisors does have authority to enter into compromise agreements."

It is, therefore, our judgment that the Board of Supervisors can compromise a claim for poor relief provided they act in good faith.

HOMESTEAD CREDIT: PROCEDURE IN MAKING APPLICATION.

Application for Homestead exemption must be in conformity with the statute in one of the following ways: By person benefitted delivering a verified statement of claim to the assessor, by filing statement supported by affidavits with the County Auditor, or in case owner is in service such statement and designation may be delivered or filed by a member of the owner's family.

May 7, 1945. *Mr. John W. Barnes, Director, Property Tax Division, Des Moines, Iowa:* You presented an inquiry relative to the homestead credit application of Dr. H. J. Harris, submitted to you by A. W. Kemmann, Acting County Auditor of Cedar County, Iowa. The proposition, according to correspondence, is as follows:

"Dr. Harris left for the service on February 7, 1944, and did not apply to the assessor for his homestead credit nor did he make application to the county auditor, and no one made application for him as provided in Section 6943.143 wherein the owner of the homestead, if he is in active service, may receive homestead credit under a statement and designation delivered or filed by any member of the owner's family."

Code Section 6943.143 provides:

"*Qualifying for credit.* Any person who desires to avail himself of the benefits provided hereunder shall each year commencing January 1, 1938, deliver to the assessor, on blank forms to be furnished by the assessor, a verified statement and designation of homestead as claimed by him, and the assessor shall return said statement and designation with the assessment roll to the county auditor with his recommendation for allowance or disallowance endorsed thereon; provided, that if the said verified statement and designation of homestead is not delivered to the assessor, the person may, on or before July 1 of any year, file with the county auditor such verified statement and designation, together with the supporting affidavits of at least two disinterested free-holders of the taxing district in which the claimed homestead is located.

In case the owner of the homestead is in active service in the military, naval, or air forces or nurse corps of this State or of the United States, such statement and designation may be delivered or filed by any member of the owner's family.

The county old age assistance investigator shall make application for the benefits of this chapter as the agent for and on behalf of persons receiving assistance under Chapter one hundred eighty-nine and one-tenth (189.1)."

From an examination of this section, one notes that there are three ways of applying for homestead credit:

(1) Any person who desires to avail himself of the benefits provided in said section, shall each year deliver to the assessor, on blank forms to be furnished by the assessor, a verified statement or designation of homestead as claimed by him.

(2) If the verified statement and designation of homestead is not delivered to the assessor the person may, on or before July 1 of any year, file with the county auditor such verified statement and designation, together with the supporting affidavits of at least two disinterested persons.

(3) In case the owner of the homestead is in active service in the military, naval, or air forces or nurse corps of this state or of the United States, such statement and designation may be delivered or filed by any member of the owner's family.

In the instant case, no application was made at all, and the 1944 taxes were placed in the treasurer's hands on January 1, 1945. It is our opinion that this is a special statute and anyone who desires to avail himself of the benefits provided thereby must make an application in one of the three manners enumerated above. A failure to do so precludes him from obtaining the homestead credit, and in support of our opinion we quote Code Section 6943.147:

"Waiver by neglect. If any person fails to make claim for the credits provided for under this chapter as herein required, he shall be deemed to have waived the homestead credit for the year in which he failed to make claim."

We are of the opinion, therefore, that by failing to make any claim he has waived same and cannot obtain it at this time.

CORPORATIONS: PERPETUAL EXISTENCE: 50 YEAR PERMITS.

Foreign Corporations doing business in Iowa are issued charters under the law of this state. Renewal of charter to do business in Iowa must be made in compliance with statutes as they exist at that time.

May 9, 1945. *Hon. Wayne M. Ropes, Secretary of State, Building:*

You have asked for an official opinion from this office on the following matter:

"This office would like an official opinion in regard to the re-qualification of INTER-STATE POWER COMPANY, a Delaware corporation, with its post office address at 1000 Main Street, Dubuque, Iowa. This corporation was granted a permit to transact business in the State of Iowa on April 22, 1925, for a period of twenty years. The Articles of Incorporation of the company show that it has perpetual existence in the state of its incorporation, and the attorneys for the company now insist that the corporation should have been granted a perpetual permit in the State of Iowa at the time it originally qualified, for the reason that it had perpetual existence in the state of its incorporation. This office would like to know if the contention of the company in regard to this matter is correct, or if they were only entitled to the twenty-year permit which was granted to them.

The attorneys for the corporation advise us that the company operated a street railway in the city of Dubuque, Iowa, in connection with its operation of power lines, and they contend that, if the permit was not perpetual in the first instance, they should have had a fifty-year permit for the reason that as a part of their activities they were operating a street railway. Section 8423 of the 1939 Code as amended recites in part as follows:

"in the case of a corporation for the construction and operation, or the operation alone, of steam railways, interurban railways, and street railways—every fifty years from the date of qualification—"

The question raised is whether the foregoing section grants a fifty-year permit to a corporation which, among other things, operates a street railway, or whether the foregoing section is intended to cover only corporations for the construction and operation or the operation *alone* of street railways.

The attorneys for the corporation contend that the amendments made to Chapter 386 of the 1939 Code by the Acts of the Fiftieth General Assembly providing for perpetual permits and the fees to be paid by foreign corporations having perpetual existence do not apply in the case of this corporation, as it is a foreign utility company organized under the provisions of Chapter 387 of the Code. The sections in Chapter 386 which were amended by the Acts of the Fiftieth General Assembly were a part of Section 8433 by reference, said Section 8433 being set out in Chapter 337 of the Code. The contention of the attorneys for the corporation is that, in view of the fact that the amendments made by the Fiftieth General Assembly only refer to certain sections of Chapter 386 and make no mention of Chapter 387, it was not the intention of the Legislature to amend the sections in question insofar as they effect Chapter 387. The sections referred to in Chapter 387 are Sections 8420 to 8428 of the Code. The attorneys for the corporation contend that if the corporation was not entitled to a perpetual permit in the first instance, or was not entitled to a fifty-year permit at the time of its qualification, it cannot now be required to pay the perpetual fee, but should only pay the fee for a twenty-year permit, as the amendments to Chapter 386 in regard to perpetual fees do not apply to foreign utility corporations under the provisions of Chapter 387 of the Code.

We would appreciate having an opinion from you soon in regard to this, as the permit of this corporation expired on April 22, 1945, and they only have three months from that date in which to take action of some kind."

With respect to your first question, namely, that upon qualification as a foreign corporation in this state its charter from the state of Delaware granted such perpetual existence, your attention is invited to section 8432, which is a part of Chapter 386, Code of Iowa, 1939, covering permits to foreign corporations, and provides among other things as follows:

" * * * and all foreign corporations, and the officers and agents thereof, doing business in this state shall be subject to all liabilities, restrictions and duties that are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers."

The State of Iowa has undoubted power to specify the terms and conditions upon which a foreign corporation could be qualified to do business in this commonwealth. The statement is made in 23 *Amer. Juris.*, page 204, as follows:

"Each sovereignty has undoubted power to deny to a foreign corporation * * * the right to do business within its borders and has equal power when consenting to their admission to grant the right subject to any terms or conditions it may deem proper to impose * * *. Moreover this power with respect to foreign corporations is justified as a necessary corollary to the sovereign power to grant or refuse powers of incorporation."

See also *Amer. Fed. Co. v. Bleakley*, 157 Iowa 442-446.

Further in 23 *Amer. Juris.*, page 97, the following statement is made:

"The laws of the state in which a corporation seeks to exercise its powers prevail over a power explicitly conferred by the corporation's charter which is in direct conflict with the local laws."

Citing cases.

Again in 23 *Amer. Juris*, page 108, there is the following statement:

"In the construction of statutes applicable to corporations it is not to be presumed that the legislature intended to grant greater rights to foreign than to domestic corporations and to favor them with rights and privileges greater than those conferred upon domestic corporations."

See also *Ind. Order of Foresters v. Scott*, 223 Iowa 105.

The definite problem involved in this portion of your inquiry is covered in the statement in 20 *Corpus Juris Secundum*, page 43, stating the rule as follows:

"Under the provisions imposing equal liabilities and restrictions on foreign corporations it has been held that the foreign corporation is subject to the laws applicable to domestic corporations as to the period of corporate existence". Citing *Iron Silver Mining Co. v. Cowlo* (Col.) 72 Pac. 1067.

Interstate Power Company will be presumed to have accepted the conditions under which its original permit was issued since it is the general rule that a corporation which engages in business in a state other than the state of its incorporation will be presumed to have accepted the conditions imposed by the laws of that state on the right of the foreign corporation to do business therein, and will be bound by them accordingly.

23 *Am. Jurisprudence*, page 287,

110 A. L. R. 1415.

Miller Brewing Co. v. Council Bluffs Ins. Co., 95 Iowa 31, 35.

A further statement is found in 23 *American Jurisprudence*, page 297 as follows:

"The issuance to a foreign corporation which has qualified to do business in the state of a license to enter therefor, does not confer upon it a permanent right to remain. * * * The position has been taken that a foreign corporation admitted under an annual license acquires no right beyond the right to do business in the state until such license expires." Citing cases.

Also 49 A. L. R. 753.

It is therefore our opinion that the Interstate Power Company has no grounds to insist that perpetual permit should have been issued to it when it originally qualified. There is an old opinion of this office dated the first day of October, 1906, which takes a position in support of the claim of the Interstate Power Company. However, that opinion was given at a time when the statutes of the state relative to qualification of foreign corporations were not as completely understood or interpreted as such statutes are at the present time. Two later opinions dated September 26, 1919, and July 12, 1934, hold contrary to this 1906 opinion.

The second contention of the Interstate Power Company is that it operated a street railway in the city of Dubuque, Iowa, in connection with the operation of its power lines and because of such fact it is now claimed that it should have been granted a permit for 50 years for the

reason that as a part of its activities such street railway was operated, basing its contention upon section 8423 as amended, which reads as follows:

"In the case of a corporation for the construction and operation or the operation alone of steam railways, interurban railways or street railways * * * every fifty years from the date of qualification, and in the case of all other corporations every 20 years from the date of qualification."

As we understand it, this amendment became a part of our law by enactment of Senate File 306 passed by the 50th General Assembly in 1943, and we feel that its application is to corporations which might qualify or make application for permits after the effective date of such amendment. Since the Interstate Power Company was granted its permit on April 22, 1925, the amendment has no application. Further it is our opinion that the statute applies to corporations organized for construction and operation or operation *alone* of street railways—Interstate Power Company cannot contend it is organized for operation of a street railway alone.

The third question embodied in your letter involves the fees to be charged Interstate Power Company on renewal of its charter. Section 8423 of the Code is made applicable to foreign public utility corporations by reference in section 8433. The 50th General Assembly amended section 8423 and added the provisions with respect to perpetual existence and the fees to be paid by a corporation with such existence. You state in your letter that counsel for the Power Company takes the position that the amendment to section 8433 has no application to its renewal at the present time since the amendment was not incorporated by reference at the time section 8423 was adopted as a part of section 8433. However, we wish to call your attention to the language of section 8432 which provides as follows:

"* * * , and all foreign corporations and the officers and agents thereof doing business in this state shall be subject to all the liabilities, restrictions and duties that are or *may be imposed* upon corporations of like character organized under the general laws of this state and shall have no other or greater powers."

The language in italics is of particular significance in our opinion, and since domestic corporations have perpetual existence and are subject to an additional fee provided for by the amendment made by the 50th General Assembly to section 8423, such amendment applied to foreign corporations having perpetual existence also. We also feel it safe to say that when a foreign corporation applies for a renewal of its charter to do business in the State of Iowa it must under the general corporation law comply with the statutes in existence at the time such application for renewal is made and cannot be heard to insist that the renewal shall be made under the same law as was in existence at the time the permit was originally granted. In this connection section 4, chapter 227, Acts of the 50th General Assembly, which reads as follows:

"A foreign corporation which has a permit under this chapter may requalify or renew its permit hereunder by fully completing the proceedings therefor at any time within three months before or after the date

upon which its permit expires by proceeding in the same manner as in obtaining a permit in the first instance under the then existing provisions of this chapter relating to obtaining a permit, including the payment of fees.* * *

It is therefore our opinion that Interstate Power Company should be required to pay the fees charged a corporation having perpetual existence under its articles in the amount set forth in section 8423 as it exists at the present time.

WEIGHING OF MOTOR VEHICLES: PEACE OFFICERS OF HIGHWAY COMMISSION: HIGHWAYS IN CITY LIMITS. Peace officers of the Highway Commission are authorized to conduct operations contemplated in Chapter 177, Acts of the 49th G. A., upon highways throughout the State of Iowa, including streets and highways within cities and towns.

May 9, 1945. *Iowa State Highway Commission, Ames, Iowa:* This will acknowledge receipt of your inquiry of the 7th inst., in which you state that a question has been raised as to the authority of Highway Commission peace officers to stop and weigh vehicles within the corporation limits of cities and towns, and you request the opinion of this office with respect to such authority.

Section 5035.14 of the Code provides as follows:

"5035.14. Weighing vehicles and removal of excess. Any peace officer having reason to believe that the weight of a vehicle and load is unlawful is authorized to require the driver to stop and submit to a weighing of the same either by means of portable or stationary scales and may require that such vehicle be driven to the nearest public scales.

Whenever an officer upon weighing a vehicle and load, as above provided, determines that the weight is unlawful, such officer may require the driver to stop the vehicle in a suitable place and remain standing until such portion of the load is removed as may be necessary to reduce the gross weight of such vehicle to such limit as permitted under this chapter. All material so unloaded shall be cared for by the owner or operator of such vehicle at the risk of such owner or operator.

Any driver of a vehicle who fails or refuses to stop and submit the vehicle and load to a weighing, or who fails or refuses when directed by an officer upon a weighing of the vehicle to stop the vehicle and otherwise comply with the provisions of this section shall be guilty of a misdemeanor and punished as provided in section 5036.01."

Chapter 177, Acts of the 49th General Assembly provides as follows:

"Section 1. Authority is hereby given to the State Highway Commission to stop any motor vehicle or trailer on the highways for the purposes of weighing and inspection, to weigh and inspect the same and to enforce the provisions of the motor vehicle laws relating to the size, weight and load of motor vehicles and trailers.

Sec. 2. The State Highway Commission may designate by resolution certain of its employees upon each of whom there is hereby conferred the authority of a peace officer to control, direct, and weigh traffic on the highways, and to make arrests for violations of the motor vehicle laws relating to the size, weight and load of motor vehicles and trailers.

Sec. 3. Prior to entering upon the discharge of his duties as such peace officer, each of said designated employees shall furnish to the Commission a surety bond to the state in the sum of Five Hundred Dollars (\$500.00), conditioned upon the faithful discharge of his duties.

Sec. 4. The Highway Commission shall supply each of said employees so designated with a badge of authority, bearing a serial number, which shall be conspicuously displayed by the employee while in the performance of his duties as such peace officer.

Sec. 5. For the purposes of this act and the enforcement of the provisions of the motor vehicle laws relating to size, weight and load of motor vehicles and trailers the State Highway Commission is hereby authorized to expend from the Primary Road Fund not more than Eighty-Three Thousand Dollars (\$83,000.00) in any year.

Sec. 6. Nothing in this act shall be construed as to limit or impair the authority or duties of other peace officers in the enforcement of the motor vehicle laws or any portion thereof."

Chapter 164 of the 50th General Assembly, which repealed sections 5037.02, 5037.03 and 5037.04 and reenacted provisions prescribing procedure for making arrests and the issuance of summons for violation of the motor vehicle laws, contains a further provision by way of amendment, as follows:

"Sec. 4, Chapter two hundred fifty-one and one tenth (251.1) Code, 1939, is hereby amended by adding thereto a new section as follows:

"Any peace officer is authorized to stop any vehicle and to require exhibition of the driver's operator or chauffeur license, to serve a summons or memorandum of traffic violation, to inspect the condition of the vehicle, to inspect the vehicle with reference to size, weight, cargo, bills of lading or other manifest of employment, and safety equipment, or to inspect the registration certificate, the compensation certificate, travel order, or permit of such vehicle."

The operations of Highway Commission peace officers are state-wide, particularly with respect to violations of the provisions of the motor vehicle act where the weighing of vehicles is necessary to determine the legality of their operation upon the public highways. For such purpose weighing depots are provided for convenience in stopping and checking weights of motor vehicles outside cities and towns, portable scales are used where necessary, and in addition thereto Sec. 5035.14, above quoted, makes provision for a vehicle to be driven to the nearest public scale, which almost invariably is located within the corporate limits of cities and towns.

The various sections of the statutes, including those above quoted, contain no limitation confining the operations of Highway Commission officers to highways outside cities and towns.

Sec. 5035.15 of the Code falls within the "size, weight and load" provisions of Chap. 251.1 and provides in part as follows:

"5035.15. Loading capacity. An increased gross weight registration may be obtained for any vehicle by payment of the difference between the annual fee for the higher gross weight and the amount of the fee for the gross weight at which it is registered. *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."

It therefore clearly appears that Chap. 177 of the 49th General Assembly specifically authorizes the Highway Commission officers "to control, direct, and weigh traffic on the highways, and to make arrests for violations of the motor vehicle laws relating to the size, weight and load of motor vehicles and trailers", and such authority extends to making of arrests or issuance of summons where the provisions of Sec. 5035.15 are violated. The words "highways" and "public highways" are generic terms when used as they are in the quotations above, and include streets and highways within cities and towns. See *Gobens vs. Akin*, 208 Ia. 1354, 227 N. W. 400; *Sachs vs. City of Sioux City*, 109 Ia. 224, 80 N. W. 336, 337; *Words & Phrases*, Permanent Edition, pages 462-469.

We are, therefore, clearly of the opinion that peace officers of the Highway Commission are fully authorized to conduct the operations contemplated by the sections above quoted upon highways throughout the State of Iowa, including streets and highways within cities and towns.

SALARIES OF COUNTY OFFICERS AND EMPLOYEES. Salary increases allowed under H. F. 168 expired June 30, 1945. The 20% salary raise authorized under H. F. 315 applies to the amount of compensation that was actually paid and not legal maximum, and the increase is based upon the actual compensation allowed and paid on July 1, 1945. The increase authorized by H. F. 315 attaches to the position and not the person. Any increases granted since January 1, 1943, were granted under provisions of H. F. 168 of the 50th G. A.

May 10, 1945. *Mr. E. B. Shaw, County Attorney, Oelwein, Iowa:*
In your letter of April 24th, you state:

"In this County we are already experiencing some difficulties in arriving at the proper interpretation of some of the provisions of the salary increase bill known as House File No. 315, passed by the Fifty-First G. A., and our County Auditor and Board of Supervisors have asked me to get your interpretation thereof as it applies to the following situations now confronting us.

1. As of January 1st, 1943, our Deputy Clerk of Court was receiving a monthly salary of \$115.00, although the maximum salary permitted by law was \$125.00 for this County, for this office. Following the adoption of the first salary increase law, by the 50th G. A., her compensation was raised to \$126.50, a 10% increase. This is the amount she is now receiving. Under the new law, is the mandatory increase of 20% based upon the \$115.00 January 1st, 1943 figure, the \$125.00 legal maximum figure under the old permanent law, or the \$126.50 to which she was raised following the first salary increase law?

2. Under the facts stated in No. 1, if our Deputy Clerk resigns, which appears highly probable at this time, what is the legal maximum which can be paid to her successor. (We are anxious to know this as soon as possible, for it is extremely difficult to fill these positions, under existing conditions.)

3. Where there are several Deputies in the same office, some of whom were receiving the legal maximum of \$125.00 on January 1st, 1943, and were given the permissible increase of 10% to \$137.50, and others were receiving less than the legal maximum, and were given a 10% increase based on their actual salaries of January 1st, 1943, what are the limits of authority of the Supervisors? Do they have any discretion? If not,

is the mandatory increase based on the legal maximum in effect on January 1st, 1943, or on the salaries actually paid on that date, and what happens if there has been a change of incumbents heretofore, or if there is one hereafter?"

House File 315, now in force and effect, is this:

"AN ACT

To provide for increases in compensation for public officers and employees in counties and subdivisions thereof during the period from July 1, 1945 to June 30, 1947 and to authorize a levy of one-half mill to provide funds in counties wherein the county general fund is insufficient to pay such increases.

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

Section 1. It is hereby provided that from July 1, 1945 to June 30, 1947, assessors who are by law compensated on a per diem basis, including assessors employed by cities, but whose compensation is paid by the county, shall receive compensation at the rate of five dollars (\$5.00) per day, provided, however, that in cities having a population of more than sixty thousand (60,000) such compensation shall be at the rate of six dollars (\$6.00) per day.

Sec. 2. It is hereby provided that from July 1, 1945 to June 30, 1947, county supervisors shall receive compensation of six dollars (\$6.00) per day for each day services are rendered as provided by law. However, in counties now having or which may hereafter have a population in excess of sixty thousand (60,000), with boards not exceeding five (5) members in number, these county supervisors shall receive an annual salary of two thousand five hundred dollars (\$2,500.00), and in counties now having or which may hereafter have a population in excess of one hundred fifty thousand (150,000), county supervisors shall receive an annual salary of three thousand dollars (\$3,000.00). These salaries shall be in full payment of all services rendered to the county by said supervisors except statutory mileage while actually engaged in the performance of official duties.

It is further provided that the amounts allowed themselves by supervisors for per diem and mileage shall be subject to review by the District Court if a petition signed by twenty-five (25) electors and freeholders of the county is filed with the Clerk of the District Court within ten (10) days after publication of such allowance or payment.

Sec. 3. It is hereby provided that from July 1, 1945, to June 30, 1947, full time deputy auditors, deputy recorders, deputy treasurers and deputy clerks of the district court shall receive as compensation, payable on an annual basis, not less than one thousand four hundred dollars (\$1,400.00) per annum.

Sec. 4. It is hereby provided that from July 1, 1945 to June 30, 1947, full time deputy sheriffs shall receive as compensation, payable on an annual basis, not less than one thousand four hundred dollars (\$1,400.00) nor more than two thousand one hundred dollars (\$2100.00) except in any county having within its limits a city with a population of thirty-six thousand (36,000) or over, the annual salary shall be not more than two thousand four hundred dollars (\$2400.00), the amount to be fixed by the board of supervisors, provided that where by law a chief deputy is appointed or a deputy other than a chief deputy in charge of an office where court is held outside the county seat, the board of supervisors shall fix the compensation of such chief deputy or deputy in charge of the office where court is held outside the county seat, at not to exceed two thousand four hundred dollars (\$2400.00).

Sec. 5. It is hereby provided that from July 1, 1945 to June 30, 1947, except as otherwise provided for herein, the compensation of all county officers and deputies except county attorneys and their assistants, whose compensation is fixed by law, including full time assessors, and full time deputy assessors, employed by cities, but whose compensation is paid by the county, shall be increased and granted by the board of supervisors as follows:

In counties having a population of forty-four thousand (44,000) or less a twenty percent (20%) increase in each case, but in no case to exceed four hundred dollars (\$400.00) per annum and in counties having a population in excess of forty-four thousand (44,000) a twenty percent (20%) increase in each case, but in no case to exceed six hundred dollars (\$600.00) per annum.

Sec. 6. In those counties wherein the county general fund is insufficient to pay the salaries as provided by this act, the board of supervisors is authorized to levy, if necessary, one-half mill in addition to the one and one-half mill levy as provided in section seven thousand one hundred seventy-one (7171), Code, 1939, for the purpose of this act.

Sec. 7. County officers or deputy as used in this act shall not be construed to include county superintendent of schools and deputy superintendent of schools.

Sec. 8. Nothing herein contained shall be construed as a limitation on the powers of Boards of Supervisors as regards salaries not fixed by statute.

Sec. 9. This act being deemed of immediate importance shall be in full force and effect from and after its passage and publication in *The Tipton Advertiser*, a newspaper published at Tipton, Iowa, and in the *Scranton Journal*, a newspaper published at Scranton, Iowa."

With respect to the foregoing statute and the situations which you set forth, we would advise:

1. The increases allowed and paid under authority of Chapter 168 of the 50th G. A. will terminate by limitation contained in that statute on June 30, 1945. The increases provided by House File 315 exclude any increases allowed and paid under Chapter 168 of the 50th G. A.

2. The 20% increase provided by House File 315 attaches to the amount which is actually paid as compensation and not to the legal maximum. If this were not the true intent of the Legislature in this respect, then there would be no necessity for the Legislature providing in Sec. 3 of House File 315 that full time deputy auditors, deputy recorders, deputy treasurers and deputy clerks shall receive a minimum of \$1400.00 per annum.

3. The increases authorized by House File 315 are based upon the actual compensation allowed and paid on July 1, 1945. The definite manner in which the Legislature fixed the beginning of the increases from July 1, 1945, through the Act, including the title, and there being no other date from which an inference could be drawn that would furnish the base to which the increase would attach, seems to conclude the foregoing date as the time basis of the increase.

4. The increases authorized by House File 315 attach to the position and not to the person who occupies the position. The increases are

mandatory on your board of supervisors and attach to the compensation actually paid on July 1, 1945. Change of incumbent either before or after that date would not affect the application of the provisions of House File 315 or the powers of the board of supervisors thereunder. Concretely, your deputy clerk of court, receiving on July 1, 1945, \$125.00, would be entitled to a 20% increase or \$25.00 per month; or, if such compensation on that date be \$115.00 per month, the increase of 20% will attach to that amount. This aggregates a sum within the maximum of \$400.00 allowed by House File 315.

5. To effectuate the limitations and purposes of House File 168, 50th General Assembly, and the Act under consideration of House File 315, 51st General Assembly, it must be presumed that any increases granted since January 1, 1943, were granted under the provisions of House File 168 of the 50th General Assembly.

FEES FOR TRANSFER OF REAL ESTATE TITLE: TERM "PARCEL" DEFINED. A fee of twenty-five cents shall be charged for transfer of title to real estate on each parcel of land. The term "parcel" means contiguous land, described, assessed and used as a unit at the time of the conveyance.

May 15, 1945. *Mr. L. I. Truax, Supervisor of County Audits, Building:*
I acknowledge receipt of your letter of May 7th, which states as follows:

"Senate File No. 135 passed by the 51st General Assembly provides for a change in fees to be charged by the county auditor. It appears that a charge should be made by the county auditor for each parcel of real estate transferred by him. The question now arises as to what constitutes a parcel of real estate as referred to in said Senate File No. 135. Reference is made in the act to 'separated only by public streets or highways.' No mention is made as to any separation by alleys. For example, a conveyance might cover the East one-third (E1/3) of Lot One (1) and the West one-half (W½) of Lot Two (2) in Block A and be separated by an alley. In making a transfer of this deed on the county auditor's transfer records, should he charge one fee of twenty-five cents or two fees of twenty-five cents each?"

I refer you to Section 4 of Senate File 135, which reads as follows:

"Sec. 4. Section five thousand one hundred fifty-five (5155), Code, 1939, is amended by repealing subsection one (1) thereof and by substituting the following:

'1. For transfers made in the transfer books, twenty-five cents for each separate parcel of real estate described in any deed, or transfer of title certified by clerks of district courts, provided however, if several parcels are described in any one such instrument and the parcels are contiguous or separated only by public streets or highways, the fee shall not exceed two and one-half dollars. A parcel of real estate outside of the limits of cities and towns shall be all the unplatted land described in any deed or transfer of title lying within one numbered section of land.'"

The Legislature apparently intended by this Act to raise the fees collected by the auditor and increase the revenue of that office. It was felt under the old law that in many instances the fee was not commensurate with the work required in that office. You will note that a fee of twenty-five cents shall be charged for each separate parcel of real estate described in any deed or transfer of title.

What is meant by the use of the term "parcel?"

Land included in a parcel should be (1) contiguous, for the Legislature so intended by the use of the words "separate parcel"; (2) be described, used and assessed as a unit in order that the transfer by the auditor may be handled as one act.

It is, therefore, our opinion that the Legislature intended by the use of the term "parcel" contiguous land described, assessed and used as a unit at the time of the conveyance. If the parcel is assessed as a unit, the auditor may presume that it is so used. Under this definition of a parcel, one owning two one-half lots used as a unit as, for example, the East $\frac{1}{2}$ of Lot 1 and the West $\frac{1}{2}$ of Lot 2, Block 6, would, if assessed as one unit and not separated by land owned by another such a street, highway or alley, be one parcel.

It is our further opinion that the Legislature intended to include in the terms "public streets or highways" the term "alleys" as it is used in the same connection when referred to in the Code in chapters pertaining to cities and towns. It is land owned by another, and in most cases by the city or town for the use and benefit of the public. It separates the parcels and they are not contiguous. The Legislature's intent is to waive the separation by streets, highways, and alleys only when counting the parcels that are otherwise contiguous, to determine the *maximum fee* to be charged by the auditor. In the instant case, the question as to whether or not public streets or highways included alleys, would not be pertinent as this reference applies only to the exception, which is, that the fee shall not exceed \$2.50 if the parcels are contiguous or separated only by public streets or highways.

It would, therefore, be our opinion that in the example given, the East $\frac{1}{3}$ of Lot 1 would be a parcel, and the West $\frac{1}{2}$ of Lot 2, in Block A, would be a parcel, they being separated by a parcel owned by another, and the twenty-five cent fee for each should be collected.

BASIC SCIENCES: BOARD OF EXAMINERS OF: CERTIFICATE OF PROFICIENCY. The Board of Examiners may accept joint examination to the strict admonishment of the legislature that the examination covers the subject as exhaustively as that required under the authority of Chapter 114.2, 1939 Code, when issuing proficiency certificates.

May 16, 1945. *Mr. Ben H. Peterson, Secretary, Board of Examiners of Basic Sciences, Cedar Rapids, Iowa:* We acknowledge receipt of your letter of May 8, 1945, stating that on numerous occasions applications for certificates of proficiency in the basic sciences by exemption, show examinations taken in combined subjects such as the following:

"Grades from the Department of Registration and Education, Illinois

Chemistry and Physiology	76
Anatomy and Pathology	85
Bacteriology	75
Hygiene and Medical Jurisprudence	80

This lists only four examinations. Are we correct in assuming that this does not fulfill the requirement of Section 2437.42 of the Code of 1939?"

Section 2437.42 of the 1939 Code reads as follows:

"Waiver of examination. The board may, in its discretion, waive the examination and issue a certificate of proficiency in the basic sciences provided herein and may accept in lieu of examination proof that the applicant has passed before a board of examiners in the basic sciences or by whatsoever name it may be known or before any examining or licensing board in the healing art of any state, territory or other jurisdiction under the United States, or of any foreign country, an examination in anatomy, physiology, chemistry, pathology, bacteriology and hygiene as comprehensive and as exhaustive as that required under authority of this chapter."

It will be noted that the law is silent as to whether or not the examinations are separate, general or joint. The legislature used neither of these legally understood terms. The courts have held that the words "joint" or "general" import unity and that the word "separate" implies division. It is a fair presumption, therefore, that having used neither of these terms, that either method would be acceptable and meet the requirements of the law. The question, therefore, is not whether the examinations are given jointly or separately but how well and comprehensively they cover the subject matter.

It is, therefore, our opinion that the Board of Examiners should not assume that the above example does not fulfill the requirements of the law for that reason alone, but that they may accept joint examinations subject, however, to the strict admonishment of the Legislature that the examination cover the subject as exhaustively as that required under the authority of Chapter 114.2, Code of 1939.

BONDS FOR STATE EMPLOYEES. When State employees and officers are required to post bonds under our present law, the cost of the bond shall be paid by the state.

May 17, 1945. *Honorable C. Fred Porter, State Comptroller, Building:* This will acknowledge receipt of yours of the 2nd, as follows:

"Senate File 400, Acts of the 51st General Assembly, made provision for paying for bonds of certain officials and employees, and amended specifically sections 1063 and 2599 of the Code.

"There are several places in the Code which require heads of departments to have bonds from employees in case they handle property or money, and in certain other cases for faithful performance of duty. The question arises as to whether or not those employees that department heads require to give bond and are not specified in any of the code sections mentioned in Senate File 400 should the state pay for their bond or should they be required to pay for them personally. What I have in mind is the Board of Control employees as provided for in section 3295 of the Code.

"Also, in section 2187 under the Department of Health, and there are other sections in the Code that are not statutory bonds but head of department may, or in many instances shall, require bond if the employee handles property or money. I was under the impression that Senate File 400 would take care of payment of all bonds of officers and employees.

"While I had nothing whatever to do with the writing of the bill or anything to do with its passage, it is going to be very confusing if certain officials bonds, and employees bonds, are to be paid, and others not.

"There are, also, those generally termed as fidelity bonds that are required by the state as in section 114, Code of 1939.

"Will you please give your official opinion as to just how this bond matter should be handled."

and the supplement thereto of May 9th, as follows:

"Supplementing my letter of May 2nd relative to request for an opinion on payment of bond premiums for state officials and employees, will say that every Attorney General from Geo. Cosson on down have always instructed that where the law requires a bond as a part of the qualifications of office, the party securing the bond must make payment unless otherwise provided. Where there was a bond required by the head of the department and not a part of the qualifications of office, it has been customary for the state to make the payment. In other words, where employees handle property or money and there was no provision in the law requiring bond, the state paid the premium.

"You will find no written opinion that I remember of. It was a verbal instruction."

Senate File 400, to which reference is made, is this:

"AN ACT

TO AMEND SECTIONS ONE THOUSAND SIXTY-THREE (1063), TWO THOUSAND FIVE HUNDRED NINETY-NINE (2599) and FOUR HUNDRED THIRTY (430), CODE, 1939, RELATING TO BONDS OF STATE OFFICERS AND PROVIDING FOR THE PAYMENT BY THE STATE OF THE REASONABLE EXPENSE THEREOF.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

Section 1. Amend section one thousand sixty-three (1063), Code 1939, by adding thereto the following:

'The State of Iowa shall pay the reasonable cost of the bonds required in paragraphs one (1) to twenty-six (26), both inclusive, of this section.'

Sec. 2. Amend section two thousand five hundred ninety-nine (2599), Code, 1939, by adding thereto as an additional sentence the following:

'The State of Iowa shall pay the reasonable cost of the bonds required by this section.'

Sec. 3. Amend section four hundred thirty (430), Code, 1939, by adding thereto the following sentence:

'The State of Iowa shall pay the reasonable cost of the bonds required by this section.'

Sec. 4. This act being deemed of immediate importance shall be in full force and effect from and after its publication in the Hawk-Eye Gazette, a newspaper published at Burlington, Iowa, and in the Wapello Republican, a newspaper published at Wapello, Iowa."

Section 1063, Code of 1939, referred to in Section 1 of the foregoing Act, as amended by that Act, is this:

"State officers shall give bonds in the amount as follows:

1. Secretary of state, auditor of state, attorney general, clerk of the supreme court, not less than ten thousand dollars.
2. Treasurer of state, not less than three hundred thousand dollars.
3. Members of board of control of state institutions, twenty-five thousand dollars.
4. Each member of the finance committee of the state board of education, twenty-five thousand dollars.
5. Each treasurer of a state institution under the control of the state board of education, shall furnish a surety bond, the amount thereof to be determined by the said board.
6. Commissioner of public health, secretary of agriculture, and each Iowa state commerce commissioner, not less than five thousand dollars.
7. Superintendent of public instruction, not less than two thousand dollars.
8. Custodian of public buildings and grounds, such amount as the executive council may fix.
9. Commissioner of insurance, fifty thousand dollars.
10. Superintendent of banking, twenty thousand dollars.
11. State fire marshal, five thousand dollars.
12. Mine inspectors, two thousand dollars.
13. Labor commissioner, two thousand dollars.
14. Deputy labor commissioner, one thousand dollars.
15. Members state conservation commission, five thousand dollars.
16. State conservation director, ten thousand dollars.
17. State conservation officers, one thousand dollars.
18. Secretary of executive council, such amount as the executive council may fix.
19. State librarian, five thousand dollars.
20. Law librarian, three thousand dollars.
21. Curator historical department, one thousand dollars.
22. Superintendent of printing, five thousand dollars.
23. Industrial commissioner, one thousand dollars.
24. Members state highway commission, five thousand dollars.
25. Reporter of the supreme court, not less than one thousand dollars.
26. Members of appeal board under chapter 22, five thousand dollars.
27. All other public officers, in the amount provided by law, or as fixed under section 1064.

The State of Iowa shall pay the reasonable cost of the bonds required in paragraphs one to twenty-six, both inclusive, of this section."

Section 2599, Code of 1939, referred to in Section 2 of the foregoing Act, as amended by that Act, is this:

"The secretary shall require every inspector or employee who collects fees or handles funds belonging to the state to give an official bond, properly conditioned and signed by sufficient sureties, in a sum to be fixed by the secretary, which bond shall be approved by him and filed in the office of the secretary of state. This section shall not apply to the deputy secretary of agriculture. The state of Iowa shall pay the reasonable cost of the bonds required by this section."

And Section 430, Code of 1939, referred to in Section 3 of the foregoing Act, as amended by that Act, is this:

"The secretary, auditor, treasurer of state, and secretary of agriculture may each appoint, in writing, any person, except one holding a state office, as deputy, for whose acts the appointing officer shall be responsible, and from whom the appointing officer shall require bond, which appointment and bond must be approved by the officer having the approval of the principal's bond, and such appointment may be revoked in the same manner. The appointment and revocation shall be filed with and kept by the secretary of state. The state of Iowa shall pay the reasonable cost of the bonds required by this section."

Sections 1 and 3 of the foregoing Act, in language and applicability, do not require interpretation. These Sections have application to the cost of bonds required for qualifications of certain named statutory officials. However, Section 2 has applicability to agents and employees of the Department of Agriculture and the performance of their duties. The question of the Legislative intent with respect to extending such benefit to other agents and employees having like duties requires interpretation. The rule in extending application of a statute to persons and situations outside the express provisions of the statute is stated in Volume 3, Paragraph 6005, of Sutherland Statutory Construction, 3d Edition, as follows:

"The limits within which the courts will apply a statute to objects or determinates outside the expression of the statute is incapable of accurate approximation. Broadly speaking, the language of a statute will be extended to include situations which would reasonably have been contemplated by the legislature in light of the background and purposes giving impetus to the legislation."

And in *United States v. Freeman*, 3 How. (44 U. S.) 565, 11 L. Ed. 724 (1845), the rule is supported in this language:

"The limitation of the rule (is) that to extend the meaning to any case not included in the words, the case must be shown to come within the same reason upon which the law-maker proceeded, and not only within a like reason."

The administrative policy of so long standing as this in the payment by the State of premiums on bonds required under statutory authority for agents and employees of the State arises out of this reason, to-wit:

"To secure to the State and the performance by such agents and employees of their duty of accounting to the State for money and property of the State in their hands."

The same reason that moved the Legislature to direct the payment of premium cost for bonds of the employees of the Department of Agriculture applies to agents and employees of the Board of Control, State Board of Health and other administrative Boards authorized or directed by law to require bonds assuring the State of such accounting. To hold them to the payment of premiums on their bonds would be to ascribe to the Legislature an intent to discriminate against employees having a duty to account under the control of other State Agencies than the Department of Agriculture. The Legislature did not intend such an unfair classification and result. We are, therefore, of the opinion that in providing for the payment of the bond premiums to the employees of the Department of Agriculture by express enactment, the Legislature

intended to include therein all other agents and employees having the same obligation to account for money and property of the State in their hands, and to pay the premium on their separate bonds as required of them by the several Boards and Administrative Agencies of the State.

WORKMEN'S COMPENSATION STATUTE. Workmen's Compensation statute should be construed prospective and not retroactive. Injuries sustained before effective date of amendment of statute, shall be compensated as provided at time of injury and injuries sustained after the effective date of amendment will receive the increased compensation.

May 23, 1945. *Mr. Elmer P. Corwin, Iowa Industrial Commissioner, Building:* In reply to your letter of May 21, 1945, for our interpretation of House File 101, recently passed by the 51st General Assembly, as it relates to the maximum compensation which was increased from \$15.00 to \$18.00 per week, we will first refer to the provisions of House File 101. House File 101 of the 51st General Assembly reads as follows:

"AN ACT to amend the law as it appears in Chapters seventy (70) and seventy-one (71), Code, 1939, and sections one thousand three hundred eighty-seven (1387), one thousand three hundred ninety (1390), one thousand three hundred ninety-one (1391), one thousand three hundred ninety-three (1393), one thousand three hundred ninety-four (1394), and one thousand four hundred fifty-seven (1457) thereof, relating to workmen's compensation, fixing the maximum amount of weekly compensation, fixing the time when compensation shall be payable, reducing the waiting period before commencement of payments.

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

"Section 1. Section one thousand three hundred eighty-seven (1387), Code, 1939, is hereby amended by striking from lines one (1), two (2) and three (3) thereof, the following: 'In addition to other compensation hereinafter provided.'

Sec. 2. Section one thousand three hundred ninety (1390), Code, 1939, is hereby amended by striking from lines seven (7) and eight (8) thereof the word 'fifteen' and by substituting in lieu thereof the word 'eighteen'. Code section one thousand three hundred ninety (1390), Code, 1939, is amended by striking from lines 8 and 10 the word 'six', and inserting in lieu thereof the word 'eight'.

"Sec. 3. Section one thousand three hundred ninety-one (1391), Code, 1939, is hereby amended by striking from line three (3) thereof the word 'twenty-second' and by substituting in lieu thereof the word 'fifteenth'.

"Sec. 4. Section one thousand three hundred ninety-three (1393), Code, 1939, is hereby repealed and the following section is enacted in lieu thereof:

'Except as to injuries resulting in permanent partial disability, compensation shall begin on the eighth day of disability after the injury.

'If the period of incapacity extends beyond the twenty-eighth day following the date of injury, then the compensation for the fourth week shall be increased by adding thereto an amount equal to one-third of one week of compensation.

'If the period of incapacity extends beyond the thirty-fifth day following the date of injury, then the compensation for the fifth week shall be increased by adding thereto an amount equal to one third of one week of compensation.

'If the period of incapacity extends beyond the forty-second day following the date of injury, then the compensation for the sixth week shall be increased by adding thereto an amount equal to one-third of one week of compensation.

'If the period of incapacity extends beyond the forty-second day following the date of injury, then the compensation thereafter shall be only the weekly compensation.'

"Sec. 5. Section one thousand three hundred ninety-four (1394), Code, 1939, is hereby amended by striking from line three (3) thereof the word 'fifteenth' and by substituting in lieu thereof the word 'eighth'.

"Sec. 6. Section one thousand four hundred fifty-seven (1457), Code, 1939, is hereby amended by striking from line seven (7) thereof the word 'five' and by substituting in lieu thereof the word 'three'.

You state that you have had several inquiries on the interpretation and particularly one asking, "whether, on July 4, 1945, when the new law takes effect, the amount of weekly benefits will automatically increase from the maximum \$15.00 to \$18.00 in cases on which compensation had been paid prior to that date and on which compensation will continue to be paid such as in the cases of fatal injuries."

A review of Sections 1390, 1391, 1393, 1394 and 1457, Code of 1939, clearly indicates the new statute creates a new obligation or imposes a new duty on the employer.

As we see it, the problem involved is,—What construction shall be placed upon this Act to determine whether or not it is retroactive or prospective in its operation? While to some extent this Act is remedial and the courts have found no difficulty in construing remedial measures as retroactive, the rule was laid down by Judge Story in the case of *System of Propagation of Gospel v. Wheeler*, 2 Gall. 105, 139 Fed. 156, as follows:

"Upon principle every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective; and this doctrine seems fully supported by authorities."

We also find in the case of *Winfree v. Northern Pacific R. Co.*, 44 L. R. A. (New Series) 841, the Court said:

"Courts of justice agree that no statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of action, or with vested rights, unless the intention that it shall so operate is expressly declared or is to be necessarily implied, and pursuant to that rule, courts will apply new statutes only to future cases, unless there is something in the nature of the case or in the language of the new provision which shows that they were intended to have a retroactive operation."

Our own Court in the case of *Gilbertson v. Ballard*, 125 Iowa 421, states the rule as follows:

"Unless retroactive in operation, the property is not subject to inheritance tax. All statutes are to be construed as prospective in their operation unless the contrary is distinctly expressed or is to be clearly implied."

It is clear that House File 101 does change the liability of the employer. The legislature did not specifically make such amendments retroactive and such intention is not necessarily implied.

In view of the strict rule evolved by the courts against construing such laws retrospective in operation and indulging in the presumption that the legislatures intended statutes or amendments thereof to operate prospectively only and not retroactively, it is our opinion that injuries or liabilities incurred prior to July 4, 1945, will continue to receive the compensation provided in the law prior to the effective date of the amendments contained in House File 101, and that only liabilities incurred after July 4, 1945, are affected by the amendments contained in House File 101 of the 51st General Assembly.

TAX EXEMPTION OF SERVICE PERSONNEL: WACS, WAVES, SPARS AND MARINES. Women in World War II who served as Wacs, Waves, Spars, and Marines are entitled to the tax exemption in their own right.

May 24, 1945. *Mr. Blythe C. Conn, County Attorney, Burlington, Iowa:* This will acknowledge receipt of yours of the 9th inst., in which you state:

"I should like an opinion clarifying Section 6946, of the 1939 Code, as amended by House File 50 of the 51st General Assembly, with reference to the tax exemption applying to service men.

"The language of the Section as amended, with particular reference to sub-section 3-A, reads—"The property not to exceed five hundred dollars in taxable value of any soldier, sailor, marine, or nurse in the military service of the United States, during World War II, or any soldier, sailor, marine or nurse, who has been, or is hereafter honorably discharged, from such military service during World War II."

"With reference to the foregoing Section, I should like an interpretation as to whether or not this language extends the exemption specified therein to women's branches of the service, such as WACS, WAVES, SPARS, etc."

House File 50, to which you refer, provides as follows:

"Section 1. Section six thousand nine hundred forty-six (6946), Code 1939, as amended by chapter two hundred forty-one (241), Acts of the Forty-ninth (49) General Assembly, is amended by striking all of sub-section three (3), four (4), and five (5) and the amendment of chapter two hundred forty-one (241), Acts of the Forty-ninth (49) General Assembly, and inserting in lieu thereof the following:

3. The property, not to exceed seven hundred fifty (\$750.00) dollars in taxable value of any honorably discharged soldier, sailor, marine or nurse of the first World War.

4. The property, not to exceed five hundred (\$500) dollars in taxable value of any honorably discharged soldier, sailor, marine or nurse of the second World War, Army of Occupation in Germany November 12, 1918, to July 11, 1923, American Expeditionary Forces in Siberia November 12, 1918, to April 30, 1920, Second Nicaraguan Campaign with the Navy or Marines in Nicaragua or on combatant ships 1926-1933, Second Haitian Suppressions of Insurrections 1919-1920, Navy and Marine Operations in China 1937-1939 and Yangtze Service with Navy and Marines in Shanghai or in the Yangtze Valley 1926-1927 and 1930-1932.

'In case any person in the foregoing classifications does not claim any such exemption from taxation, it shall be allowed in the name of such person to the same extent on the property of any one of the following persons in the order named:

1. The wife, or widow remaining unmarried, of any such soldier, sailor, marine or nurse, where they are living together or were living together at the time of the death of such person.

2. The widowed mother, remaining unmarried, of any such soldier, sailor, marine or nurse, whether living or deceased, where such widowed mother is, or was at the time of death of the soldier, sailor, marine or nurse, dependent on such person for support.

3. The minor child, or children owning property as tenants in common, of any such deceased soldier, sailor, marine or nurse.

'No more than one tax exemption shall be allowed under this section in the name of any honorably discharged soldier, sailor, marine or nurse.'

And Section 6946, Code of 1939, as amended by such House File 50, is herein exhibited, as follows:

"Military Service—Exemptions. The following exemptions from taxation shall be allowed:

1. The property, not to exceed three thousand dollars in taxable value, and poll tax of any honorably discharged union soldier, sailor, or marine of the Mexican war or the war of the rebellion.

2. The property, not to exceed eighteen hundred dollars in taxable value, and poll tax of any honorably discharged soldier, sailor, marine or nurse of the war with Spain, Tyler Rangers, Colorado volunteers in the war of the rebellion, 1861 to 1865, Indian wars, Chinese relief expedition or the Philippine insurrection.

3. The property, not to exceed seven hundred fifty (\$750.00) dollars in taxable value of any honorably discharged soldier, sailor, marine or nurse of the first World War.

4. The property, not to exceed five hundred (\$500) dollars in taxable value of any honorably discharged soldier, sailor, marine or nurse of the second World War, Army of Occupation in Germany November 12, 1918, to July 11, 1923, American Expeditionary Forces in Siberia November 12, 1918, to April 30, 1920, Second Nicaraguan Campaign with the Navy or Marines in Nicaragua or on combatant ships 1926-1933, Second Haitian Suppressions of Insurrections 1919-1920, Navy and Marine Operations in China 1937-1939 and Yangtze Service with Navy and Marines in Shanghai or in the Yangtze Valley 1926-1927 and 1930-1932.

In case any person in the foregoing classifications does not claim any such exemption from taxation, it shall be allowed in the name of the person to the same extent on the property of any one of the following persons in the order named:

1. The wife, or widow remaining unmarried, of any such soldier, sailor, marine or nurse, where they are living together or were living together at the time of the death of such person.

2. The widowed mother, remaining unmarried, of any such soldier, sailor, marine or nurse, whether living or deceased, where such widowed mother is, or was at the time of death of the soldier, sailor, marine or nurse, dependent on such person for support.

3. The minor child, or children owning property as tenants in common, of any such deceased soldier, sailor, marine or nurse.

No more than one tax exemption shall be allowed under this section in the name of any honorably discharged soldier, sailor, marine or nurse."

The foregoing designated women participants in the second World War are not expressly named in the foregoing statute as entitled to the exemption therein provided for. To include them in the class entitled to the exemption must result, therefore, from an implied intent of the Legislature. In using the term "soldier, sailor, marine or nurse" we are of the opinion the term designates those persons who are component parts of the naval and military establishments of the United States.

By Federal enactment, in force and effect at the time of the passage of the foregoing Act, women of the Army, known as the WACS were and are a component part of the Army, (U.S.C.A., Title 50 Appendix, Paragraph 1552; women of the Navy, known as the Waves and Marines (U. S. Code, Title 34, Paragraph 857, et seq. and 853A) and members of the Coast Guard, known as Spars (Public Law 773-77th Congress), are a component part of the Navy and Coast Guard respectively.

We deduce, therefore, that the Legislature, in providing the exemption for soldiers, sailors and marines, intended to include therein those women who are serving in the second World War, and recognized by law, as being component parts of the United States military or naval establishments.

We are of the view, therefore, that women in the second World War, serving as WACS, WAVES, SPARS, and MARINES, are entitled to the exemption, in their own right, provided in Section 4 of House File 50, heretofore exhibited.

TAX EXEMPTION: BENEFITS WHEN SOLDIER KILLED IN ACTION: EVIDENCE OF DEATH OR OF MISSING STATUS. Widowed spouse, widowed mother and minor children of deceased soldiers, sailors, marines and nurses may have benefit of soldiers' exemption. The written report, record or certified copy thereof of death of any soldier, sailor, marine or nurse issued in accordance with Federal Laws are applicable in securing the exemption when other conditions are met.

May 24, 1945. *Honorable C. B. Akers, Auditor of State, Building:*
This will acknowledge receipt of yours of the 4th inst., as follows:

"House File No. 50 which was passed by the 51st General Assembly amends Section 6946 of the 1939 Code of Iowa. Said section provides that certain property of any honorably discharged soldier, sailor, marine or nurse of the War with Germany shall be exempt from taxation. Said act also provides that in case the exemption is not claimed by said soldier, sailor, marine or nurse that the wife or widow remaining unmarried or widowed mother remaining unmarried, etc., shall be entitled to claim the exemption. In the case that the veteran dies in action, there is no honorable discharge issued. We would like your opinion as to what other means of identifying the veteran may be used in lieu of the honorable discharge.

"In accordance with Chapter No. 242, Acts of the 49th General Assembly, said honorable discharge must be filed with the County Recorder in the county in which said exemption is claimed."

In reply thereto:

Death in action is the highest form of honorable discharge. Clearly it was the intention of the Legislature, as disclosed in House File 50, to which you refer, that widowed spouses, widowed mothers and minor children of deceased soldiers, sailors, marines or nurses may have the benefit of the exemption. It is likewise clear that the Legislature, having conferred the benefit of such exemption upon the widows, mothers and minor children of deceased soldiers, sailors, marines or nurses, did not intend to confer the right thereto without prescribing the means of securing it. House File 50 does not expressly contain this prescription. The Legislature did act, however, to effectuate the intention of securing this benefit to the widows, mothers and minor children of deceased soldiers, by the enactment of House File 217, now in force and effect. Section 1, Subsections 1 and 2 of this Act, provide as follows:

"Section 1. Amend chapter four hundred ninety-four (494), Code 1939, by adding thereto a new section as follows:

1. A written finding of presumed death, made by the Secretary of War, the Secretary of the Navy, or other officer or employee of the United States authorized to make such finding, pursuant to the Federal Missing Persons Act (56 Stat. 143, 1092, and P.L. 408, Ch. 371, 2n Sess. 78th Cong; 50 U.S.C. App. Supp. 1001-17), as now or hereafter amended, or a duly certified copy of such finding, shall be received in any court, office or other place in this state, as evidence of the death of the person therein found to be dead, and the date, circumstances and place of his disappearance.

2. An official written report or record, or duly certified copy thereof, that a person is missing, missing in action, interned in a neutral country, or beleaguered, besieged or captured by an enemy, or is dead, or is alive, made by any officer or employee of the United States authorized by the Act referred to in Section one (1) or by any other law of the United States to make same, shall be received in any court, office or other place in this state as evidence that such person is missing, missing in action, interned in a neutral country, or beleaguered, besieged or captured by an enemy, or is dead, or is alive, as the case may be."

We are of the opinion, therefore, that when the foregoing written report, record or duly certified copy thereof of the death of any soldier, sailor, marine or nurse, issued in accordance with the provisions of the foregoing, is tendered to the Recorder for recording, the provisions of Chapter 242, Acts of the 49th General Assembly, and particularly Sections 2 and 3 thereof, are applicable in securing the exemption to the widow, mothers and minor children of deceased soldiers, sailors, marines or nurses, if other conditions of the exemption are met. Sections 2 and 3 of Chapter 242, (amended by Chapter 212, 50th General Assembly), are these:

"Sec. 2. Section six thousand nine hundred forty-seven (6947), Code, 1939, is hereby amended, revised and codified to read as follows:

'Any person named in section six thousand nine hundred forty-six (6946), provided he is a resident of and domiciled in the state of Iowa, shall receive a reduction equal to his exemption, to be made from any property owned by such person 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 honorable discharge of the person claiming or through whom is claimed said exemption; in the event said honorable discharge is lost he may record in lieu of said discharge, a certified copy of said discharge. Said person shall file with the county auditor his claim for exemption or reduction in taxes under oath, which claim shall set out the fact that he is a resident of and domiciled in the state of Iowa, and a person within the terms of section six thousand nine hundred forty-six (6946), and give the volume and page on which the honorable discharge or certified copy thereof is recorded in the office of the county recorder, and may include the designation of the property from which he desires said exemption or reduction to be made, and shall further state that he is the equitable and legal owner of the property designated therein. No person may claim a reduction or exemption in more than one county of the state of Iowa, and if no designation is made the exemption shall apply to the homestead, if any."

"Sec. 3. Section six thousand nine hundred forty-eight (6948), Code, 1939, is amended, revised and codified to read as follows:

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

TAXATION: CONSTRUCTION OF SCHOOL HOUSES. A tax for construction of a school house must be levied each year and not levied for several years at one time.

May 24, 1945. *Mr. John D. Moon, County Attorney, Ottumwa, Iowa:* This will acknowledge receipt of yours of the 2nd inst., in which you state:

"We will appreciate the opinion of your office on the following two propositions:

1. It has become necessary to build a new school house in one of our independent districts due to destruction of the old schoolhouse by fire. By levying a two and one-half mill tax under Section 4217, Sub-section 7, Code of Iowa, 1939, for two successive years, sufficient funds can be obtained for the new building. Does this Section allow the levying of such a tax not exceeding two and one-half mills for several successive years or is it limited merely to a levy for one year?

"I am familiar with the opinion of your office issued April 25, 1930, and appearing at page 304 of the 1930 Volume, O.A.G., in which it was held that the Section allows the levying of a tax in any one year for a period of several years. However, I have gained the impression from Mr. Griffin of the State Department of Public Instruction that this is no longer recognized as the law. He intimated that there is a case decided by our Supreme Court on this point, but I have been unable to discover it so far.

"2. Our second question is somewhat related to the first question submitted above.

"Several weeks ago at the regular school election, the following proposition was voted on by the residents of the Independent School District of Ottumwa:

"Shall the directors of the Independent School District of Ottumwa, Wapello County, levy a schoolhouse tax of not to exceed two and one-half mills a year for a period of not to exceed ten years, for the purchase of grounds, construction of school houses and the payment of debts contracted for the erection of schoolhouses, not including interest on bonds as provided in Chapter 212, Section 4217.7 of the 1939 Code of Iowa?

"I am informed that this proposition was voted on on the assumption that Senate File 333, an act to amend Section 4217 of the 1939 Code, would be passed. Even if it had been passed, I am very doubtful that it would have legalized the earlier election, but as you know, the fact is that the bill was not passed. Therefore, under Section 4217, does the school district have any authority to establish a fund for the future construction of schoolhouses and the payment of debts contracted therefor, and also, the first question submitted in this letter again becomes pertinent. Does the Section authorize the imposition of a tax in any given year for a period of several successive years in the future?

"My own belief is that the statute does not contemplate or authorize the establishment of any such building fund, but that it does authorize the imposition of a tax in a given year for a period of several successive years. Unless this latter is true, it appears to me that the act becomes almost meaningless for the amount which can be raised in most school districts in one year only by a two and one-half mill levy is not large enough to do much construction work.

"We will appreciate a reply to the within questions as soon as possible."

Section 4217, Code of 1939, Subsection 7, under which this tax is proposed, is this:

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

* * * * *

7. Vote a schoolhouse tax, not exceeding two and one-half mills on the dollar in any one year, for the purchase of grounds, construction of schoolhouses, the payment of debts contracted for the erection of school houses, not including interest on bonds, procuring libraries for and opening roads to schoolhouses."

It is to be noted that the authority in the electors, contained in the foregoing, is a direction to the tax levying body, but such direction cannot enlarge the authority vested in the tax levying body by law. The school taxes, according to Section 4393, are levied by the Board of Supervisors pursuant to certification by the Board of each school corporation. This section is as follows:

"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."

The time for levying County taxes, as specified in the foregoing statute, is set forth in Section 7171, fixing the time as annually at the September Session of the Board of Supervisors. This Section is as follows:

"The board of supervisors of each county shall, annually, at its September session, levy the following taxes upon the assessed value of the taxable property in the county: * * * *"

And the Local Budget Law, after defining the word "municipality" in Section 369 as meaning:

"county, city, town, school district and all other public bodies or corporation that have power to levy or certify a tax or sum of money to be collected by taxation, but shall not include any drainage district, township, or road district,"

provides in Section 385 that the levying board shall spread the tax rates necessary to produce the required amount of money for the next succeeding year. Section 385 is this:

"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."

We cannot escape the conclusion that the foregoing statutes authorize the Board of Supervisors as a levying body to make an annual levy at its September Session each year and do not authorize the making of a continuing levy at any tax levying meeting. In that aspect, the Board of Supervisors would be without authority to levy a tax for several successive years. Then power would be limited to levying a tax for the succeeding year. This accords with authority. In *Baltimore, C. & A. Ry. Co. v. Commissioners of Wicomico Co.*, 48 Atl. 853, 858, the Court in addressing itself to this situation reasons thus:

"In the case before us the county commissioners of Wicomico county were the taxing power. They had the power to levy taxes. Did they act in pursuance of that power in levying taxes for the years 1896, 1897, and 1898, so as to impose upon the defendant here a legal obligation to pay, and thereby raise an implied assumpsit to support the action in respect to the claim for taxes for those years? The powers of the county commissioners, the plaintiffs here, in this regard, are the same as those of county commissioners, under the general law, according to which, as has already been said, it is provided that the meeting (of the commissioners) to make the annual levy of taxes shall be held previous to the 1st day of July in each year. Here is defined the power, as far as it is defined at all, of the commissioners to make the levy for taxes. A fair construction of this section would seem to indicate that the power to levy is to be held a power to levy only for the year in which the meeting takes place for the purpose of making 'the annual levy'. There is nothing in the language that contains an implication that the levy is to be made for any other year. The levy is to be made annually, and to be made for 'needful expenses'. Needful expenses for what period? Evidently for the year. It must have been intended that this levy should be made upon the taxable basis for the year of the levy; otherwise, there would be a tendency to confusion and uncertainty in the operation of the system of taxation."

And in explanation of the meaning of "levying a tax," and what constitutes such levying, the Supreme Court of Illinois in *Pettibone v. West Chicago Park Com'rs*, 74 N. E. 387, 392, said this:

"In *Hodges v. Crowley*, 186 Ill. 305, 57 N. E. 889, where a bill was filed by a taxpayer to enjoin the collection of a tax upon the ground

that the warrants authorized thereunder created an indebtedness against the county in excess of the constitutional limitation, this court said (page 312 of 186 Ill., page 892 of 57 N.E.):

"There can be no lawful levy of a tax except upon an assessment, and under our system all assessments are made annually. How can a lawful levy of a tax be made in 1899 for a year ten years in the future? Admittedly, the value of the taxable property of Alexander county for each of the years after 1899 is impossible of ascertainment now. Therefore the mere order of the county commissioners that a levy be made in those future years amounts to nothing as an actual levy of a tax. A tax cannot be said to be levied until it has been extended against assessed taxable property. Moreover, no one can now tell what the amount of the levy will be at the end of ten years, so that warrants may be drawn within that amount. How, then, can it be said that warrants may be drawn upon the taxes for the aggregate amount levied for the whole ten years?' The language thus quoted is precisely applicable to the case at bar. It might here be asked, how can a lawful levy of a tax be made in 1901 or 1903 for a year twenty years in the future? The value of the taxable property in the town of West Chicago for each of the years after 1901 and 1903 is impossible of ascertainment now. In *City of East St. Louis v. Amy*, 120 U. S. 600, 7 Sup. Ct. 739, 30 L. Ed. 798, the Supreme Court of the United States, speaking through Mr. Chief Justice Waite, said of this provision in the Constitution of Illinois: 'The constitutional obligation of the city was not fully met by providing, when the debt was incurred, for the levy and collection of the necessary tax. It required as well the actual levy and collection when needed to pay the debt.' In other words, the levy is not to be made in advance once for all, but when needed; that is to say, when the interest and the principal, or parts thereof, mature."

In reliance upon the foregoing, we are of the opinion:

1. That the levying of such tax not exceeding two and one-half mills for several successive years is unlawful, but such levy must be limited to the year succeeding the levy. The foregoing is a reversal of an Opinion of this Department, appearing in the Report of Attorney General for the year 1930 at page 304, and such Official Opinion is now withdrawn.

2. Your second question is related to the first, and the foregoing discussion of your first question largely answers the second question, i.e., the validity of any tax that might be levied pursuant to the authority of the election referred to. In addition, however, I would call your attention to the case of *Brunk v. City of Des Moines*, 228 Iowa 287, which denies the power of a municipality to pledge its future tax to the payment of municipal bonds for the reason that such bonds are an indebtedness of the municipality and if they exceed the constitutional limit of indebtedness, they are unlawfully issued. This would control the problem of the validity of using a continuing tax for the payment of debts contracted for the erection of schoolhouses.

SERVICE WELFARE CENTER: FUND FOR MAINTENANCE. The Board of Supervisors has no authority to appropriate funds raised by tax pursuant to Chapter 189.2 of 1939 Code, as amended, for purpose of maintaining a general Service Welfare Center.

June 4, 1945. *Mr. Lee W. Elwood, County Attorney, Cresco, Iowa:* Receipt is acknowledged of your letter of May 31, 1945, wherein you

ask the opinion of this office upon a question which, as we understand it, is substantially as follows:

May the board of supervisors appropriate a portion of the funds raised by taxes pursuant to Chapter 189.2 of the 1939 Code of Iowa, as amended, to defray expenses incurred by the County Veterans Service Committee in the maintenance of a Service Welfare Center.

Colonel Ralph Lancaster of State Selective Service informs us that these Service Committees and the Centers maintained by them are for the primary purpose of disseminating to service people information regarding their rights and privileges, and that no element of indigent relief is involved.

Section 3828.051, as amended by Chapter 137 of the Acts of the 50th General Assembly, and by Chapter 124 of the Acts of the 51st General Assembly is as follows:

"3828.051. Tax. A tax not exceeding one mill on the dollar may be levied by the board of supervisors upon all taxable property within the county, to be collected at the same time and in the same manner as other taxes, to create a fund for the relief of, and to pay the funeral expenses of honorably discharged, indigent men and women of the United States who served in the military or naval forces of the United States in any war, and their indigent wives, widows and minor children not over 18 years of age having a legal residence in the county."

It is apparent from a reading of said section that its operation is limited to the *relief of indigent honorably discharged men or women* who have served in the military or naval forces of the United States in any war and their indigent wives, widows and minor children not over 18 years of age having a legal residence in the county. Since the operation of this section is so limited the use of tax funds arising by virtue thereof would likewise be limited, and it would not be proper to appropriate any portion of said funds for a purpose foreign to that specifically provided for. Financial assistance in the maintenance of a General Service Center would, in the judgment of this office, be such a foreign purpose.

We therefore hold that the board of supervisors does not have the authority to appropriate funds raised by taxes pursuant to Chapter 189.2 of the 1939 Code as amended for the purpose of contributing to the maintenance of a general Service Welfare Center.

ROADS AND STREETS: CONSTRUCTION AND MAINTENANCE FUND: Equipment may be purchased by use of construction fund for such maintenance purposes as do not constitute "repairs" for which a contract must be entered into and submitted to competitive bidding.

June 7, 1945. *Iowa State Highway Commission, Ames, Iowa:* This will acknowledge receipt of your inquiry of May 10th, 1945, as to whether or not the fund allotted to the various municipal corporations under Senate File 229 of the 51st G. A., may be used for the purchase of machinery.

That portion of the act above referred to, applicable to this question, amends Sec. 35 of Chap. 165, Acts of the 50th G. A., as follows:

“by adding to said section the following: ‘the net proceeds of one cent per gallon, license fees and penalties collected under the provisions of this chapter shall be distributed as follows:, two-fifths thereof shall be credited to the street construction fund of the several incorporated cities and towns of the state, which fund is hereby created, for the construction, reconstruction, repair and maintenance of roads and streets in such cities and towns’”

Thus, the act creates an additional or special fund denominated “street construction fund” to which the proceeds of two-fifths of the additional gasoline tax allocated to the various municipal corporations “shall be credited,” and enables such fund to be used “for the construction, reconstruction, repair and maintenance of roads and streets” in such municipality. No other restriction is placed upon the purpose for which such fund may be expended under the act, and standing alone there would be no reason for excluding the purchase of machinery or equipment reasonably necessary to accomplish the purposes for which the fund may be used.

However, there are other statutory provisions, in the nature of limitations, with which the provisions of Senate File 229, Sec. 3b must be reconciled. Sec. 6001 provides as follows:

“6001. Contract. When the construction or repair of any such street improvement is ordered, the council shall contract for furnishing labor and material and for the construction or repair either of the entire work in one contract, or for parts thereof in separate and specified sections; but no work shall be done under any such contract until a properly signed contract and a duly executed and approved contractor’s bond shall be filed in the office of the clerk.”

Section 6004 of the Code requires competitive bidding on all contracts for the “construction or repair of street improvements,” and our Supreme Court has held that this provision is not confined to repair of street improvements which are to be paid for from special assessments. *Johnson County Savings Bank vs. Creston*, 212 Ia. 929, 231 N. W. 705, 237 N. W. 507.

Section 5974, sub-section 2 defines the word “repair” as including “reconstruct and resurface.”

Since, therefore, all construction and repair of any street improvement is required to be accomplished by contract submitted to competitive bidding, the purchase by a municipal corporation of machinery and equipment for such purposes would not only be a useless expenditure, but is wholly unauthorized and contrary to the obvious intent of the legislature.

Senate File 229, above referred to, contemplates however, that the funds thereby provided for are “for the construction, reconstruction, repair and maintenance of roads and streets in such city and town.”

The words "repair" and "maintenance" are ordinarily treated as synonymous, but this is not invariably true. (See Words & Phrases, Perm. Ed. Vol. 26, pages 84-85, Supp. page 11; Vol. 36, pages 953-954, Supp. p. 117-118; and cases cited therein). In addition to the statutory definition, "repair" is generally confined to "restoration to original construction," to "replace" or "restore," in the sense that it contemplates a restoration of the constructed portion of the street or highway. "Maintenance," as commonly referred to, has a broader meaning, and, when applied to streets or highways, includes not only "repairs" but also "preservation," cleaning and removal of obstructions, and otherwise clearing the right of way or constructed portion of the street or highway for the convenience of public travel thereon. The fact that both the words "repair" and "maintenance" appear in the language of Senate File 229, 3b, in question, designating the purpose for which the fund may be used, would indicate a legislative intent to treat these terms as not entirely synonymous.

Therefore, as to maintenance of a character other than repairs we are of the opinion that no restriction exists against the expenditure for necessary equipment therefor from the "street construction fund." In other words, equipment may be purchased from the fund for such maintenance purposes as do not constitute "repairs" for which a contract or contracts must be entered into and submitted to competitive bidding as required by the quoted provisions of Chap. 308 of the Code.

BIRTH CERTIFICATES: REGISTRATION. Birth certificate of child born in wedlock must show mother's husband as father. If informant refuses to insert name of mother's husband on certificate, he may leave space blank. Upon presentation of birth certificate for record, with statement of doctor explaining omission and statement of mother and putative father, mother's husband's name should be entered and certificate and statement may be registered in that form.

July 16, 1945. *Mr. L. E. Chancellor, Acting Director Vital Statistics, Department of Health, Local:* Receipt of your recent inquiry, concerning the situation which has arisen with reference to your acceptance of a birth certificate for registration, is acknowledged.

You state that a birth certificate for C, a child born recently in this state to A, a woman who is and has been the wife of B for a number of years, has been presented to you for registration. The certificate is executed by the physician who attended at the child's birth, and states that the information contained therein is based upon information furnished him by the mother. The face of the certificate states that the mother is married but shows that D rather than B is the father of the child. Accompanying the certificate is a written statement signed by A and D stating in substance that B, who is now serving in the armed forces, has been stationed continuously overseas for more than one year prior to the date of the birth of the child, that A and B have been separated continuously since B's departure from the United States, that A and D have had sexual intercourse resulting in the conception of

C, and that D rather than B is the father of the child. You ask specifically whether you are required to accept such a certificate of birth for registration and, if not, how the certificate can be amended so as to permit registration.

Replying, it is our opinion that the certificate as prepared and presented does not meet the requirements of the statute and therefore registration of the same must be refused. Section 2398, of the 1939 Code, prescribes the form and contents of a birth certificate and requires, among other things, that these items be shown:

"5. Legitimacy of birth, whether legitimate or illegitimate.

7. Full name of father. If the child is illegitimate, the name of the putative father shall not be entered without his consent, unless the paternity of the child has been determined in a regular legal proceeding instituted for that purpose, but the other particulars relating to the putative father (items nine to twelve, inclusive) shall be entered, if known, otherwise, as "unknown"."

The meaning generally attributed to the term "legitimacy" or "legitimate" is that of lawful birth, or the condition of being born in wedlock and the opposite of the terms "illegitimate" or "bastard", which latter terms are applied to the birth of a child who not only is begotten but also born out of lawful wedlock. Ordinarily a child born to a mother who is married at the time of birth is presumed to be legitimate, i.e.—the child of the persons who are married, as distinguished from unmarried. This presumption of legitimacy is said, in *Craven vs. Selway*, 216 Iowa 505, to be so strong that it will yield only to clear, satisfactory and practically conclusive proof that the husband was:

1. Impotent, or
2. Entirely absent so as to have no access to the mother, or
3. Entirely absent from the mother at the period during which the child must have been begotten, or
4. Present with the mother under circumstances negating sexual intercourse with her.

It is the further well established rule that the declarations of the mother, or of the putative father, are not admissible to establish the "illegitimacy of a child born in lawful wedlock. Such declarations are competent to establish the *paternity* of the putative father but not to disprove legitimacy of the birth, and are admissible only when the illegitimacy of the birth under one of the four situations mentioned above has first been proven by competent evidence. These rules are based on decency, morality, and public policy, and for the purpose of protecting a child's inheritance and safeguarding him against future humiliation and shame.

The family relationship is thus kept sacred and the peace and harmony thereof preserved. Thus the virtue of the mother is not maligned, the harmony of the family relationship is not interrupted, nor the sanctity of the home undermined. (*Wallace v. Wallace*, 137 Iowa 37).

Applying these precepts to your situation it is apparent that if you registered the tendered certificate you would be ignoring the presumption mentioned, as well as the specific provisions of Section 2398 wherein it is directed that the birth certificate shall show the name of the father. The child in question, having been born in wedlock, must be presumed by you to be the child of the mother's husband until the parentage is otherwise determined by proper judicial proceedings. If you accepted the statements of the mother and putative father as proof of the illegitimacy of the child you would be exercising a judicial rather than an administrative function which has not been granted to you by the Legislature.

Section 2431 provides that a copy of a birth certificate shall be presumptive evidence in all courts of the facts therein stated. If you registered the tendered certificate it would be presumptive evidence that the putative father is the parent of the child in some subsequent action involving the paternity of the child. The embarrassing situation, which would arise should the court take a judicial determination of parentage contrary to the contents of the certificate, can best be avoided by not showing the putative father as parent of the child.

The premise that your function is not to ignore the legal presumption of legitimacy arising from a birth in wedlock, in the absence of a judicial determination to the contrary, is strengthened by the provisions of Section 12667.36 which requires that the registrar of vital statistics shall be notified by the Clerk of the District Court of the entry of a judgment in his court determining the paternity of the child.

The permission granted by Section 2398 to enter the name of the putative father with his consent is limited specifically to the situation where the child is illegitimate, and is not to be extended to the case of a child born in wedlock who, in the eyes of the law, is legitimate and presumed to be the child of the person to whom his mother was married at the time of the child's birth.

By the provisions of Section 2395 (sub-section 5) and Section 2402, no birth certificate is complete which does not supply the items of information called for in the form of certificate, detailed in accordance with the rules of the department, and if incomplete the informant is required to supply the missing items of information and complete the same.

In this case it is our opinion that you should request the preparation of a new birth certificate. If the informant refuses to insert the name of the mother's husband as the father of the child, you may require him to leave the space provided on the certificate blank. Upon presentation of such certificate, with a statement from the Doctor explaining the reason for omission and the statement of the mother and putative father, you should insert the name of the mother's husband as the father of the child in the certificate and register the same in that form together with the accompanying statements, to the end that the certificate and addenda attached thereto clearly set out the facts as they are, and be presumptive evidence of the facts as therein stated, as provided by Section 2431 above quoted.

PUBLIC RECORDS: CERTIFIED COPIES FURNISHED FREE FOR SPECIAL PURPOSES. Certified copies of public records shall be furnished free to service men or women by office having custody of records, if copies are to be used to perfect claim against the United States for pension or otherwise. Section 5175, 1939 Code is applicable to Clerk of District Court.

July 16, 1945. *Honorable C. B. Akers, Auditor of State, Building:* Responding to your query arising out of letter of July 10, 1945, of A. H. Christiansen, Chief Attorney, Veterans Administration, Des Moines, Iowa, describing the following situation:

"The District Court in and for Scott County, Iowa, on March 31, 1931, entered Order declaring Howard M. Cain, a person of unsound mind, and on the same day, to-wit, March 31, 1931, entered Order appointing Edmond M. Cook, permanent guardian of the property of Howard M. Cain. The guardianship over Howard M. Cain is Probate Number 14383 in the District Court of Scott County, Iowa.

"The United States of America issued adjusted Compensation Certificate in the amount of \$315.00 to Howard M. Cain. Edmond M. Cook as permanent guardian of the property of Howard M. Cain, a person of unsound mind, took possession of said Adjusted Compensation Certificate and has regularly accounted to the District Court for Scott County, Iowa, and to this Administration for said certificate.

"The Adjusted Compensation Certificate issued by the United States to Howard M. Cain became due and payable June 15, 1945. Said Adjusted Compensation Certificate and application for payment of same was forwarded by Edmond M. Cook, guardian of Howard M. Cain, a person of unsound mind, to the Director of Finance, Veterans Administration, Washington 25, D. C. Before payment of the amount due under the Adjusted Compensation Certificate can be made to Edmond M. Cook, guardian of Howard M. Cain, it is necessary that this Administration have a certified copy of the Letters of Guardianship issued by the District Court for Scott County, Iowa, evidencing the appointment of Edmond M. Cook as guardian of Howard M. Cain, a person of unsound mind.

"There is submitted herewith copy of our letter of July 5, 1945, to the Clerk of the District Court, Scott County Courthouse, Davenport, Iowa, and copy of letter dated July 6, 1945, addressed to this office by the Clerk of the District Court for Scott County, Iowa.

"The Clerk of the District Court for Scott County, Iowa, has taken the position that since Section 5175, Code of Iowa, appears in the Code Chapter entitled 'County Recorder' that said Section 5175 applies only to the Office of the County Recorder."

and arising out of which the Clerk of the District Court of Scott County, Iowa, has asked the Veterans Administration for a fee of 50c for furnishing a copy of the foregoing letters of guardianship.

Section 5175, Code of Iowa 1939, provides as follows:

"When a certified copy or copies of any public record in the state are required to perfect the claim of any soldier, sailor, or marine, in service or honorably discharged, or any dependent of such soldier, sailor, or marine, for a United States pension, or other claim upon the government of the United States, they shall, upon request, be furnished by the custodian of such records, without requiring any fee or compensation therefor."

and appears under Chapter 257, Code of 1939, entitled "County Recorder." If the position of that Section in that Chapter were to control the

conclusion herein, we would be disposed to uphold contention of the Clerk. However, the placing and arranging by the Code Editor of Legislative Acts does not affect the interpretation and meaning of the Act as passed by the Legislature, unless the Legislature, either expressly or impliedly, requires such codified arrangement. In *Jones v. Mills County*, 224 Iowa 1375, 1379, speaking of the same problem, said this:

“The law was separated into three distinct sections by the editors of the Code of 1924, but there is nothing to indicate that the legislature intended to change the meaning which this court had for many years applied to this provision of the statute.

(3) In the case of *Dennis v. School District*, 166 Iowa 744, at page 750, 148 N.W. 1007, 1009, this court said:

‘It is a rule of construction that changes made by a revision of the statutes will not be construed as altering the law, unless it is clear that such was the intention, and, if the revised statute is ambiguous or susceptible of two constructions, reference may be had to prior statutes for the purpose of ascertaining the intent of the legislature.’

See, also, *In re Will of Evans*, 193 Iowa 1240, 1244, 188 N.W. 774; *Eastwood v. Crane*, 125 Iowa 707, 101 N.W. 481. The law in this state with reference to the construction of statutes that have been changed or divided into different sections by the code commissioners is in accordance with the general rule as stated in section 494, 59 C.J., page 897, as follows:

‘Change in arrangement. In codifying or revising statutes, a mere rearrangement of the sections or parts of a statute or the placing of portions of what was originally a single section in separate sections does not change the purpose, operation, and effect thereof unless an intention to do so already appears.’

See, also, *State v. Gardiner*, 205 Iowa 30, 215 N.W. 758.”

And on page 1386 it was further observed:

“Compilation and codification are not legislation. The intention to accomplish a change in the meaning and effect of a statute by a revision must be clear and unmistakable. We do not find such an intention in the case at bar.”

That the rule is applicable here is evidenced by the Act as enacted by the 38th G. A. It appears there as Chapter 28 and provides as follows:

“AN ACT providing that certified copies of public records be furnished free of charge to any soldier, sailor or marine, in service or honorably discharged, or any dependent of such soldier, sailor or marine.

“Be it enacted by the General Assembly of the State of Iowa:

“Section 1. Free Copies of Records. That whenever a certified copy or copies of any public record in the state of Iowa are required to perfect the claim of any soldier, sailor or marine, in service or honorably discharged, or any dependent of such soldier, sailor or marine, for a United States pension, or other claim upon the government of the United States, they shall, upon request, be furnished by the custodian of such records, without requiring any fee or compensation therefor.”

Plainly the Legislature has expressed no intent of restricting this statute to records of the Recorder's Office, and such intent could not be

effectuated by action of the Code Editor in placing the foregoing Legislative enactment in Chapter 257.

By reason of the foregoing, we are of the opinion that Section 5175, Code 1939, concludes that certified copies of public records for use as therein prescribed from any office which has the custody of such records, shall be provided without charge.

COPY FEES: FILING OF PLEADINGS AND RULES OF PROCEDURE. When copy of petition is attached to original notice before filing petition, no copy fee shall be allowed. Where petition is filed with copy, the clerk should tax a copy fee for one copy. Copies provided to supply appearances, according to rule, may be taxed. After petition is filed and notice served, subsequent pleadings are subject to the same rules.

July 17, 1945. *Mr. Robert E. Frush, County Attorney, Adel, Iowa:* This will acknowledge receipt of yours of the 6th inst., in which you set forth the following situation and ask for opinion thereon:

"The Clerk of the District Court has submitted questions concerning copy fees upon pleadings filed in his office. The three questions under rules 82 and 84 of the New Rules of Civil Procedure have arisen because of certain pleadings filed in the Clerk's Office which he refuses to accept unless there is an appearance. These questions arose on a petition. (a) One of the attorneys filed several copies of a foreclosure action, the copy fee was considerable. (b) The only defendant who answered out of the thirteen or fourteen defendants filed a cross petition and thirteen or fourteen copies which was a long and drawn out cross petition. This was a tremendous copy fee. In other words, a copy fee in this case amounted to more than the attorney fee.

"Now this is the background, and the questions are: (1) Must the Clerk pay a copy fee when copies are filed? (2) Is an attorney entitled to copy fees if he attaches the copy of the petition or pleading to the original notice before his petition has been filed with the Clerk? (3) Under what obligation is the Clerk to pay copy fees after the petition has been filed and after the notices have been served?

"Rules 82 and 84 are not clear on the subject and the mere reading of them will not give either the Clerk or the attorneys an adequate idea of what should be done here. Naturally I feel an attorney is entitled to every copy fee he can get legally. I see no reason why this copy fee business should be questioned, by any County Officer or filing clerk unless there is a show of abuse, and no doubt in this particular case the fee has been abused to some extent. The fellows that attach a copy of the petition to their original notice in order to save ten days, claim absolutely that they are entitled to a copy fee for each of the copies. Those who file their petition first and then serve their notice, claim that if that logic is so, then they should be able to collect a copy fee just so long as each of the defendants is named.

"I can see how this thing can become a racket and this particular case is unusual. I would like to have your opinion."

Rules 82 and 84, Iowa Rules of Civil Procedure, with reference to copies and fees therefor, are these:

"All motions and pleadings, with copy, shall be filed with the clerk, except that no copy of the petition need be filed if a copy was attached

to the original notice served upon each defendant. Sufficient additional copies of all motions and pleadings shall be filed to afford a copy for each adverse party appearing, but if more than one such party appear by the same counsel, only one copy need be filed for such parties. It shall be the duty of the pleader to file the required copies with the original if he then knows of the appearance; otherwise, immediately upon receipt of notice thereof to be given by the clerk. The copies shall be mailed or delivered forthwith by the clerk to the attorney of record for the adverse party or parties, if appearance is by attorney; otherwise to the parties." (Rule 82.)

"A fee of ten cents per hundred words for each copy shall be taxed with the costs, to be the property of the attorney filing the copy." (Rule 84.)

Based upon such rules, I would say in answering that:

1. According to an Opinion of this Department, rendered June 27, 1944, appearing in Report of Attorney General for 1944 at page 159, an attorney who attaches a copy of his petition to his original notice before filing his petition is not entitled to a copy fee.

2. Where a petition is filed with copy in the Clerk's Office, the Clerk should tax a copy fee for one copy of the petition and no more. Fees for additional copies provided to supply appearances, according to the rule, may, however, be taxed.

3. After the petition is filed and the notice served, subsequent pleadings are subject to the same rule whether the filing be by the plaintiff or the defendant; that is, a copy fee charged for one copy of the pleading or motion filed with the Clerk, and thereafter a fee to be charged for copies furnished to appearances according to the rule. This, of course, would rule the situation outlined by you, where the defendant has filed 13 or 14 copies of his cross-petition, and only one appearance is exhibited.

TAX EXEMPTION: VETERAN OF WORLD WARS I AND II. There is only one exemption to veteran applicable where veteran served in both World War I and II, and that, the larger of the two exemptions.

July 17, 1945. *Honorable C. B. Akers, Auditor of State, Building:* This will acknowledge receipt of yours of the 5th in which you ask for opinion on the following situation:

"Chapter 194 of the Acts of the 51st G. A. provides that the property not to exceed \$750.00 of any honorably discharged soldier, sailor, marine or nurse of the first World War shall be exempt from taxation.

"Paragraph 4 of Section 1 of said Chapter 194 provides:

'4. The property, not to exceed five hundred (\$500) dollars in taxable value of any honorably discharged soldier, sailor, marine or nurse of the second World War, Army of Occupation in Germany November 12, 1918, to July 11, 1923, American Expeditionary Forces in Siberia November 12, 1918, to April 30, 1920, Second Nicaraguan Campaign with the Navy or Marines in Nicaragua or on combatant ships 1926-1933, Second Haitian Suppressions of Insurrections 1919-1920, Navy and Marine Operations in China 1937-1939 and Yangtze Service with Navy and Marines in Shanghai or in the Yangtze Valley 1926-1927 and 1930-1932.'

shall also be exempt from taxation. The question upon which we desire your opinion is whether or not a person who served in the first World War and who also has served in the second World War would be entitled to have an exemption on his property to the value of both, \$750.00 and \$500.00, for a total of \$1250.00"

For the reason that the whole of Subsection 4 of Section 1, Chapter 194, Acts of the 51st G. A. has a bearing upon the conclusion herein, I exhibit Subsection 4, as follows:

"4. The property, not to exceed five hundred (\$500) dollars in taxable value of any honorably discharged soldier, sailor, marine or nurse of the second World War, Army of Occupation in Germany November 12, 1918, to July 11, 1923, American Expeditionary Forces in Siberia November 12, 1918, to April 30, 1920, Second Nicaraguan Campaign with the Navy or Marines in Nicaragua or on combatant ships 1926-1933, Second Haitian Suppressions of Insurrections 1919-1920, Navy and Marine Operations in China 1937-1939 and Yangtze Service with Navy and Marines in Shanghai or in the Yangtze Valley 1926-1927 and 1930-1932.

"In case any person in the foregoing classifications does not claim any such exemption from taxation, it shall be allowed in the name of such person to the same extent on the property of any one of the following persons in the order named:

1. The wife, or widow remaining unmarried, of any such soldier, sailor, marine or nurse, where they are living together or were living together at the time of the death of such person.

2. The widowed mother, remaining unmarried, of any such soldier, sailor, marine or nurse, whether living or deceased, where such widowed mother is, or was at the time of death of the soldier, sailor, marine or nurse, dependent on such person for support.

3. The minor child, or children owning property as tenants in common, of any such deceased soldier, sailor, marine or nurse.

No more than one tax exemption shall be allowed under this section in the name of any honorably discharged soldier, sailor, marine or nurse."

We are of the opinion that the Legislature, in using the phrase "under this section" in the foregoing exemption provision, meant Section 6946 of the Code of 1939 as herein shown amended. As so interpreted, and as applied to the situation you outline, for service in World War I and World War II by the same person, one exemption is allowable, and that, the larger of the two exemptions.

SALARIES OF COUNTY OFFICERS AND EMPLOYEES: SUPPLEMENT TO OPINION ISSUED MAY 10, 1945. Increases of salary under Chapter 151, Acts of 51st G. A., operates on actual compensation immediately prior to April 16, 1943. Increases in salary after April 16, 1943 are presumed to have been made under Chapter 168, Acts of 50th G.A. After April 16, 1943 power to increase salary under permanent law is exhausted.

July 17, 1945. *Honorable C. B. Akers, Auditor of State, Building:*

Reference is made herein to the Opinion of this Department of May 10, 1945, addressed to Mr. E. B. Shaw, County Attorney, Oelwein, Iowa, respecting the County Officers' Salary Bill and the applicability of such Bill, now known as Chapter 151, Acts of the 51st G. A., to a situation

where the compensation of officers has, under the authority of the permanent statute, been increased prior to the effective date of the County Officers' Salary Bill passed by the 50th G. A., known as Chapter 168, Acts of the 50th G. A. We would advise as follows:

The foregoing opinion is modified as follows:

1. The base salary upon which the increases of Chapter 151, Acts of the 51st G. A. operate is the salary that was actually paid to such county officers and deputies immediately prior to the effective date of House File 315, being Chapter 168, Acts of the 50th G. A., which was the 16th day of April, 1943.

2. After such effective date, to-wit: April 16, 1943, any increases granted to any officers thereafter is presumed to have been made under the terms of the said Chapter 168, Acts of the 50th G. A.

3. After such date, the power to increase salaries under the permanent law is exhausted.

The Opinion in all other respects is confirmed.

FEE FOR APPROVING BOND OF NOTARY PUBLIC. Clerk of District Court is not entitled to a fee of 50c for approval of notary public bond.

July 17, 1945. *Honorable C. B. Akers, Auditor of State, Building:* This will acknowledge receipt of yours in which you ask for opinion in the following situation:

"We have a question which has come up in connection with our audit of Marshall County in the office of the Clerk of the District Court.

"Paragraph 22 of Section 10837 of the present Code provides that the Clerk of the District Court shall collect a fee of 50c 'for taking and approving a bond and sureties thereon.' Paragraph 2 of Section 1200 of the present code provides that an applicant for a notary public's commission 'shall execute a bond to the State of Iowa in the sum of \$500.00 conditioned for the true and faithful execution of the duties of his office, which bond, when secured by personal surety, shall be approved by the Clerk of the District Court of the county of his residence. All other bonds shall be approved by the Governor.'

"The question on which we desire your opinion is whether the Clerk of the Court shall collect a fee of 50c for approving the bond of a person who is an applicant for a notary's commission and who furnishes a personal bond."

We are impelled to the opinion that the clerk is not entitled to a fee of 50c for the approval of bond furnished pursuant to the terms of Chapter 65 because:

1. The fee provided therein of \$5.00 for the issuance by the Governor of a Notarial Commission impliedly includes the approval of the bond required to be furnished either by the Governor or by the Clerk of Court. The Chapter does not expressly or impliedly authorize the collection of any additional sum than the foregoing sum of \$5.00 for the issuance of such commission.

FEES: INSTRUMENTS RELEASING MORE THAN ONE CHATTEL MORTGAGE. For the filing of each satisfaction piece for mortgage, 25c shall be charged.

August 2, 1945. *Honorable C. B. Akers, Auditor of State, Building:*

I am in receipt of yours in which you ask for opinion in the following situation:

"The question has arisen regarding the amount of the fee that should be charged, where one instrument releasing ten different chattel mortgages by the same parties, has been tendered the County Recorder. We have read sections 10028 and 10031 of the 1939 Code of Iowa, the Attorney General's opinions found in volumes 1940 and 1942, beginning on pages 445 and 103 respectively and Chapter 201 of the Acts of the 51st General Assembly, and are in doubt whether the fee is 25 cents or \$2.50." and we are also in receipt of letter from Ralph L. Kimball, President of the County Recorders' Association of Iowa, in which he asks for opinion in a like situation. His letter is this:

"Since the 25c fee for marginal release of chattel mortgages and conditional sales contracts, we have been receiving some written chattel mortgage releases, setting out several chattel mortgages to be released on the one instrument, and attempting to get these all released for the one fee of 25c. Can we collect a 25c fee for each one of the chattel mortgages listed on a release of this sort, the same as though each one was listed on a separate instrument of release? I feel that it is the intention according to the Code, that we collect a 25c fee for each chattel instrument released, but would like your opinion on this."

In reply thereto, we refer to the provisions of Section 10028, Code of 1939, as amended by Chapter 248, Acts of the 50th G. A., as furnishing the answer to this problem. That Section is this:

"Any mortgage, conditional sales contract, or pledge of personal property may be released of record by filing with the original instrument a duly executed satisfaction piece or release of mortgage or conditional sales contract; or by the mortgagee, vendor, or their authorized agents indorsing a satisfaction of said mortgage or conditional sales contract on the index book under the head of 'remarks' in the same manner as mortgages are now released by marginal satisfaction, and when so released on index book, the recorder shall enter a memorandum thereof on the original instrument or on the record thereof, if recorded."

According to the terms of the foregoing, two ways are provided for releasing of chattel mortgages, conditional sales contracts or pledges:

1. The filing, with the original instrument, of a duly executed satisfaction piece or release of mortgage or conditional sales contract, or
2. By indorsing a satisfaction of the mortgage on conditional sales contract on the index book in the same manner as mortgages are released by marginal satisfaction.

Under the first method prescribed, it is clear that an executed satisfaction or release must be filed with the original chattel mortgage, conditional sales contract or pledge; clearly such satisfaction cannot be affected for five different filed chattel mortgages, conditional sales contracts, by filing with any one of the five mortgages one instrument

which releases all five. Clearly such release can be affected only by conforming with the directions of that Section by filing with each original mortgage, conditional sales contract or pledge a duly executed satisfaction or release. The fee to be collected by the Recorder, then, is controlled by Section 10031, Code of 1939, as amended by Chapter 201, Section 6, Acts of the 51st G. A., in terms as follows:

"The fees to be collected by the county recorder under this chapter shall be as follows:

1. For filing any instrument affecting the title to or incumbrance of personal property, twenty-five cents each.
2. For recording or making certified copies of such instruments, fifty cents for the first four hundred words and ten cents for each one hundred additional words or fraction thereof.
3. For the marginal assignment or release of any instrument, twenty-five cents."

In conformity therewith, for the filing of each satisfaction piece of mortgage, 25c shall be charged.

The Opinion of this Department of October 6, 1941, appearing in the Report of Attorney General for the year 1942 at page 103 is withdrawn.

COLLEGES: REOPENING OF TEMPORARILY CLOSED JUNIOR COLLEGES. Authorization of voters and approval of the State Superintendent of Public Instruction of the establishment by the board is all that is required to reopen a temporarily closed Junior College. An enrollment in freshman class of 70% of that number enrolled in 1940-1941 is no condition precedent to reopen.

August 2, 1945. *Miss Jessie Parker, Supt. of Public Instruction, Building:* We are in receipt of yours of the 21st, in which you ask for opinion on the following situation:

"During the present emergency, a number of junior colleges in the state were closed. Several of them now wish to reopen. Section 4267.1 of the code, as amended, is not specific as to the necessary steps for reopening these closed junior colleges. The department of public instruction would therefore appreciate an official opinion from your office on the following question:

"Does the superintendent of public instruction under section 4267.1 have authority to make a regulation requiring the junior colleges that were closed during the emergency to have an enrollment of approximately 70% of the freshman enrollment at the beginning of the school year 1940-1941 as a condition precedent for their reopening, such regulation to be a part of the standards under which junior colleges are operated?

"Or does the second paragraph of section 4267.1 permit junior colleges that were formerly approved by the department of public instruction but were suspended or closed during the war emergency, to reopen without the approval of the superintendent of public instruction as required under this section?

"In other words, just how far reaching are the powers of the superintendent of public instruction in regard to the making of regulations and establishing standards for the operation of junior colleges or the reopening of junior colleges suspended during the war emergency?"

Section 4267.1, Code of 1939, as amended, is this:

"The board, upon approval of the state superintendent of public instruction, and when duly authorized by the voters, shall have power to establish and maintain in each district one or more schools of higher order than approved four-year high school course. Said schools of higher order shall be known as public junior colleges and may include courses of study covering one or two years of work in advance of that offered by an accredited four-year high school. The state superintendent of public instruction shall prepare and publish from time to time standards for junior colleges, provide adequate inspection for junior colleges, and recommend for accrediting such courses of study offered by junior colleges as may meet the standards determined.

No public junior college shall be established in any school district having a population of less than five thousand.

Nothing in this section shall prohibit any school district that now has a junior college from temporarily discontinuing the same and starting it again at some future time. Provided, however, that when a proposition to authorize the establishment of a junior college 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 and against said proposition at said election."

It is quite plain that the establishment of a junior college is recognized by the Legislature as an exercise of extraordinary power by a school community. The establishment thereof, unlike the establishment of elementary schools and high schools, is effected by the school electorate at an election held therefor, and then only in districts of 5,000 population and more. Obviously, the intent was to accompany the extraordinary power lodged in such community with special duties imposed upon the Superintendent of Public Instruction over the powers when exercised by such community. The State Superintendent of Public Instruction is directed to set up standards, exercise visitorial powers and the duty of recommending or accrediting such courses of study as may meet the predetermined standards. In that view of the foregoing statute, a liberal interpretation of these powers so bestowed is implied. Standards measuring the kind of subjects to be taught in such colleges, and the requirements of instruction of such subjects are requisite. And included in such obligation of establishing standards are synonymously rules that will assure the meeting by such colleges of the standards so fixed. Specifically, therefore, we see no difficulty in concluding that temporary discontinuance of established colleges does not divest the Superintendent of Public Instruction of jurisdiction over colleges upon resuming operation. Immediately posed in the question of what constitutes a temporary discontinuance. Is it a day, a week or a month? If it be any of these, it is obvious that the Legislative purpose would be frustrated if divestment of jurisdiction should result therefrom. Such interpretation would render useless the power and duty imposed upon the Superintendent in supervising such colleges. It seems clear to us that no such intention may be attributed to the Legislature in permitting a temporary closing of such colleges. More reasonably, such permission was granted upon the implied understanding that jurisdiction of the State Superintendent of Public Instruction be retained and we so conclude.

Insofar as a requirement that such colleges have an enrollment of 70% of the freshmen enrollment at the beginning of the school year, 1940-1941, as a conditioned precedent to reopening, and treating generally of any such limitation to be fixed by the Superintendent, it is to be observed that the Legislature placed no limitation upon the number of students to be enrolled as a conditioned precedent to the establishment of the colleges. All that is required then, is the authorization of voters and the approval of the State Superintendent of the establishment by the Board. In our view, there is no more reason to assume that the Legislature intended such a limitation as a prerequisite to the reopening after a temporary discontinuance of such colleges. It did not so expressly provide, and we cannot justify any such implication.

BIRTH CERTIFICATES: ADOPTIONS: PRESUMPTION THAT CHILDREN ARE LEGITIMATE. A child born in wedlock, conceived prior to marriage is presumed to be a child of persons married. A child is presumed to be legitimate even though the mother's husband had been overseas two years prior to date of birth. The mother's husband's name should appear on the birth certificate even though he is not the real father. In adoption proceedings, notice of proceedings should be served upon the mother's husband.

August 7, 1945. *Mr. B. E. Wadsworth, Assistant County Attorney, Cedar Rapids, Iowa:* We wish to acknowledge receipt of your recent letter requesting an opinion upon the following facts, to-wit:

1. The man in question was overseas during most of 1944, was discharged in November of that year and returned to Cedar Rapids. He married the mother of the child in question on December 9, 1944. At that time, he knew she was pregnant and that he was not the father of the child. The baby was born May 23, 1945, approximately six months after the husband's return to this country and five months after the marriage. The question is:

Does the same presumption arise as to the legitimacy of a child thus born that would ordinarily prevail where the child was conceived in lawful wedlock as discussed in the opinion of your office dated June 7, 1944?

2. Where soldiers or sailors have been overseas for two or more years without any opportunity to have access to their wives, are children born to their wives after the lapse of such a period presumed to be legitimate?

3. Should the birth certificate of such child discussed in the preceding cases show the father to be the present husband of the mother, the actual father, or that the name of the father is unknown?

4. In each of the above cases, is it necessary to have the written release of the husband in order to adopt the child, even though he is not the actual father?

We will dispose of these questions in the order in which they are asked:

1. The case of *WALLACE v. WALLACE*, 137 Iowa, 37, involved a similar question. In deciding it, the Court said:

"But precisely the same rules of evidence obtain in such a case as when it is sought to prove that a child conceived during wedlock is not the

offspring of the husband. Born in wedlock the presumption of the legitimacy of the child obtain, even though this happen so soon after marriage as to render it certain that it was the result of coition prior thereto. *State v. Shoemaker*, 62 Iowa, 343. In other words antenuptial conception does not weaken the presumption of legitimacy arising from postnuptial birth. * * * *”

The reason therefor is sound and is set out on page 45 of said case:

“But in *Goodrich v. Hess*, Cowp. 591, Lord Mansfield declared that ‘the law of England is clear that the declarations of a father or mother cannot be admitted to bastardize the issue born after marriage It is a rule founded in decency, morality, and policy that they shall not be permitted to say after marriage that they had no connection, and therefore the offspring is spurious, more especially the mother, who is the offending party.’”

Therefore, it will be seen that a child born in lawful wedlock, although conceived prior to marriage, is presumed to be the lawful child of the persons thus married.

2. This question is answered in our opinion of June 7, 1944. Re-stating the conclusion therein reached, the presumption of legitimacy would yet remain even though the husband had actually been away from the mother for two or three years and had had no access to her. This presumption would prevail until a Court having jurisdiction of the parties in a proper action, rendered a judicial determination to the contrary.

3. Since the husband in each of the cases discussed in Nos. 1 and 2, supra, is presumed to be the father of the child, he must be recorded on the birth certificate as the father. The reasons therefor are fully discussed in an opinion of this department dated July 16, 1945, a copy of which is herewith enclosed. Later, if there should be a judicial determination to the contrary, the Clerk of the District Court, where such judgment is rendered, is required by Section 12667.36 to notify the registrar of vital statistics thereof. This would correct the information contained on the birth certificate and make the record conform with the facts.

4. In adopting the child, the easiest and best procedure would be to obtain a written release from the husband and wife. However, if only the written release of the mother were obtained, notice of the adoption proceedings would need to be served on the husband because of the fact that under the presumption which exists, he has certain rights which cannot be ignored and which cannot be taken from him except in a proper legal proceedings to which he is a party. By way of caution, permit us to say there are certain well established rules which must be observed in order that the proceedings be regular and in accordance with law. Our Supreme Court held in the *Wallace* case, supra, and in the case of *Craven v. Selway*, 216 Iowa, 505, that the presumption of legitimacy is so strong that it can be overcome only by *clear, satisfactory and practically conclusive proof*, as to one or more of the following situations: (1) the husband is impotent; (2) that he was entirely absent so as to have no access to the mother; (3) or entirely absent at the

period during which the child, in the course of nature, must have been begotten; (4) present only under circumstances which afford clear and satisfactory proof that there was no sexual intercourse. The mother, her husband, or the putative father will not be permitted to testify with reference to the facts regarding the alleged illegitimacy of the child until at least one of said four situations has been *clearly established, by other competent evidence*. After this has been done, then the mother, husband or putative father may testify with reference to such claimed facts. If the illegitimacy of the child has been clearly established in accordance with these principles, the Court could then approve the adoption based upon the written release of the mother alone. This procedure would be equally applicable to the cases described in questions No. 1 and No. 2.

LEGAL SETTLEMENT AND ADMISSION TO COUNTY HOMES.

Ordinarily a person must have legal settlement in a county to be admitted to the county home. Where a person has legal settlement in another county, he may enter the county home pending notice to and acceptance by the other county and removal thereto. Where a person has no legal settlement in this state, he may enter the home pending removal to his home state.

August 20, 1945. *Mr. John C. Owen, County Attorney, Washington, Iowa*: I wish to acknowledge receipt of your recent letter requesting an opinion of this department on the following question:

"Is it necessary for a person to have a legal settlement in a county in order to be eligible for admission to its County Home?"

In answer thereto, you are advised as follows:

Chapter 189.5, Code 1939, deals with the subject of "County Home." A careful examination of the same discloses that at no place does it state who is eligible for admission. We have carefully examined the decisions of our Supreme Court and the prior opinions of this office and to our surprise, find no decision or opinion upon the subject.

The first section in this chapter which gives us any help is the following:

"Section 3828.120. Order for admission. No person shall be admitted to the county home except upon the written order of a township trustee or member of the Board of Supervisors, and *relief* shall be furnished in the county home only when the person is able to be taken there, except as hereinbefore otherwise provided."

This statute does not say who is eligible for admission but it does state in substance, that *relief* shall be furnished in the County Home only when the person is able to be taken there. This would tend to show that a person residing in the County Home was being furnished *relief*. "Relief" as such is dealt with in Chapter 189.4, Code 1939, entitled "Support of the Poor," and is furnished only to "poor persons" as therein defined and in accordance with the provisions thereof.

The next section in Chapter 189.5 which gives us any help is the following:

"Section 3828.121. Discharge. When any inmate of the county home becomes *able to support himself*, the board must order his discharge."

Thus, it would appear that when a person who is an inmate of a County Home, becomes able to support himself, he is not eligible to remain therein any longer. When is a person able to support himself? It would seem that a person is able to support himself when he has sufficient property for this purpose or is physically able to perform sufficient labor to do so. These words "able to support himself" have special significance when read in connection with Section 3828.073 found in the chapter on "Support of the Poor." This section reads as follows:

"Section 3828.073. "Poor person" defined. The words "poor" and "poor person" as used in this chapter shall be construed to mean those who have no property, exempt or otherwise, and are unable because of physical or mental disabilities, *to earn a living by labor*: * * * "

Thus, it would appear that the statute defines a poor person as being any person who has no property and is unable because of physical or mental disabilities, to earn a living. This has about the same meaning as the words "able to support himself," as used in Section 3828.121, supra. 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.

This conclusion is supported by the following statute which is found in the chapter "County Homes:"

"Section 3828.124: Letting out. The board is invested with authority to let out *the support of the poor*, with the use and occupancy of the county home and farm, for a period of not exceeding three years."

This authorizes the Board of Supervisors to rent the County Home for the purpose of shifting the *support of the poor* in the County Home during such period.

This conclusion is further supported by Chapter 151, Acts of the 49th General Assembly:

"Chapter one hundred eighty-nine and five-tenths (189.5) Code of 1939, is hereby amended by adding the following section:

"The board may, at its discretion and in the interests of efficiency and economy *in the care of its poor*, enter into an agreement with the board of any adjoining county for the transfer of the inmates of the county home of one of said counties to that of the other and for the mutual support and maintenance of said inmates by said counties * * ."

This authorizes the Board of Supervisors to do certain things in the interests of efficiency and economy *in the care (or support) of its poor*. "The poor" is the only class of persons referred to in this chapter and in Section 3828.124 as being the County Home and who would appear to be effected thereby.

The case of Bremer County vs. Schroeder, 200 Iowa, 1285, was an action brought by Bremer County against a son for the expense of keeping, caring for and burying his father who had been an inmate of the

County Farm. Most of the defenses of the son consisted of objections by reason of the alleged failure of the county authorities to comply with various provisions of Chapter 189.4 on "Support of the Poor." The action was based upon what now appears as Section 3828.085, Code 1939, and was then known as Section 222, Code of 1897. This section is found in Chapter 189.4. The material part thereof reads as follows:

"Section 3828.085. Recovery by county. Any county having expended any money for the relief or support of a poor person, under the provisions of this chapter, may recover the same from any of his kindred mentioned herein, * * * "

The plaintiff county was successful. Thus it will be seen that in an action by a county for money expended for keeping a person at the County Home, such action was sustained under the provisions of Chapter 189.4, "Support of the Poor."

Section 3828.097 found in the chapter on "Support of the Poor" gives the township trustees power to provide for the relief of poor persons in their respective townships by giving them direct relief or by sending them to the County Home.

The support from county funds of any one at the County Home who is able to support himself and therefore, not a "poor person" would be an illegal use of such funds as there is no statutory authorization therefor.

The obligation of the county to support its poor is purely statutory. *Coolledge vs. Mahaska County*, 24 Iowa, 211.

After a careful consideration of the above, it is our judgment that ordinarily a person must have a legal settlement in the county in order to be eligible for admission to its County Home. However, this is subject to the following exceptions:

(1) Where a person has a legal settlement in another county of this state, (a), he may be placed in the county home pending notice to and acceptance by the other county and removal thereto in accordance with the provisions of Section 3828.094, Code 1939, or, pending notice to the other county and determination of his legal settlement and removal thereto in accordance with Sections 3828.094 to 3828.096, inclusive, (b), he may be maintained in the county home at the expense of the other county upon the request of the Auditor or Board of Supervisors of the other county and the acceptance thereof by the Board of Supervisors of the county in question under the provisions of Section 3828.094.

(2) Where a person has no legal settlement in this state, he may be placed in the county home pending his removal in accordance with the provisions of Section 3828.090.

CORPORATION PERMITS: FOREIGN CORPORATIONS DOING BUSINESS IN IOWA. A foreign corporation must have a permit to do retail business in the State of Iowa. Retail selling within this state is intrastate commerce.

August 23, 1945. *Honorable Wayne M. Ropes, Secretary of State, Building*: This is to acknowledge receipt of your letter of August 8, 1945, which is as follows, to-wit:

"This office would like an official opinion as to whether or not NORTHWESTERN ILLINOIS UTILITIES, a foreign corporation, should have a permit to transact business in the state of Iowa.

The corporation has a generating plant in Illinois, across the river from Sabula, Iowa, and furnishes electrical power to the town of Sabula. The power lines in the town of Sabula to the individual users are not owned by the NORTHWESTERN ILLINOIS UTILITIES, but they simply have these wires carrying the power across the Mississippi River to the town of Sabula.

The corporation also supplies electrical power to quite a few farmers and people living in the village of Andover, Iowa. In the case of the power transmitted to the rural users and to the village of Andover, the corporation owns and maintains lines. An agent residing at Savanna, Illinois, reads the meters and in many cases collects the bills for the electricity used. Some of the bills are paid directly to the offices of the corporation in the state of Illinois. The corporation does not maintain an office in the state of Iowa. I believe that the company has a transformer at each place in the country where electricity is sold. The electric light bills in the town of Sabula are collected by the town of Sabula, and the electricity is simply furnished to the town at wholesale.

The attorneys for NORTHWESTERN ILLINOIS UTILITIES contend that all of their activities in the state of Iowa are in Interstate Commerce, and for that reason they should not be required to qualify as a foreign corporation under the provisions of Chapters 386 and 387 of the 1939 Code of Iowa.

We would appreciate getting an official opinion from you at an early date, as this corporation has been operating as above stated for a great many years, and apparently has never been qualified to transact business in Iowa as a foreign corporation."

As indicated above, the provisions of chapters 386 and 387 are involved but your inquiry is limited to the particular question as to whether or not the Northwestern Illinois Utilities should have a permit to transact business in the state of Iowa.

Section 8433 of the Code provides that section 8420 of the Code shall be applicable to any foreign public utility corporation which directly or indirectly carries on electric light or electric power business within the state. Section 8420 of the Code is as follows, to-wit:

"8420. *Application for permit.* Any corporation for pecuniary profit organized under the laws of another state, or of any territory of the United States, or of any foreign country, which has transacted business in the state of Iowa since September 1, 1886, or desires hereafter to transact business in this state, and which has not a permit to do such business, shall file with the secretary of state a certified copy of its articles of incorporation, duly attested by the secretary of state or other state officer in whose office the original articles were filed, accompanied by a resolution of its board of directors or stockholders authorizing the filing thereof, and also authorizing the service of process to be made upon any of its officers or agents in this state engaged in transacting its business, and requesting the issuance to such corporation of a permit to transact business in this state; said application to contain a stipulation that such permit shall be subject to the provisions of this chapter."

Section 8, Article I of the Federal Constitution provides that Congress shall have the power "to regulate commerce with foreign nations and among the several states and with the Indian Tribes."

In 15 C. J. S., page 304, the following appears:

"The transportation of gas or electric energy from one state to another is interstate commerce; and a sale thereof across state borders is a sale in interstate commerce subject to regulation by congress, regardless of whether title passes at the state border or in the state of destination. Thus, a sale and delivery to local distributing companies is a part of such commerce, and is, therefore, not subject to state regulation."

The foregoing quotation is supported by the cases to which attention is directed in the footnotes appearing thereunder, and leads to the conclusion that the sale of electricity at wholesale to the town of Sabula is interstate commerce, the position of the distributing system of the town of Sabula being identical with the local distributing companies referred to in the foregoing quotation.

We now proceed to a consideration of that part of the activity of the subject company involving the retail sale of electric current directly to farmers and residents of the village of Andover, Iowa.

The local distribution of electric current is, in principle, not unlike the local distribution of gas, and apropos such distribution of gas, the following appears in 15 C. J. S. at page 305 and also in *Barrett v. Kansas Mutual Gas Co.*, 44 S. Ct. 544, 265 U. S. 298, 68 L. Ed. 1027:

"The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another state and drawn for distribution directly from interstate mains, and this is so whether the local distribution be made by the *transporting company* or by in dependent distributing companies." (Emphasis supplied.)

The opinion in the case of *East Ohio Gas Co. v. Tax Commission*, 51 S. Ct. 499, 283 W. 465, 75 L. Ed. 1171, disapproves the case of *Pennsylvania Gas Co. v. Public Service Commission*, 40 S. Ct. 279, 252 U. S. 23, 64 L. Ed. 434, and contains the following:

"The transportation of gas from wells outside Ohio by the lines of the producing companies to the state line and thence by means of appellant's high pressure transmission lines to their connection with its local systems is essentially national—not local—in character and is interstate commerce within as well as without that state. The mere fact that the title or the custody of the gas passes while it is enroute from state to state is not determinative of the question where interstate commerce ends. *Public Utilities Commission v. Landon*, 249 U. S. 239, 245, 63 L. Ed. 577, 586, P.U.R. 1919C, 834, 39 S. Ct. 268; *Missouri ex rel. Barrett v. Kansas Natural Gas Co.* 265 U. S. 298, 307-309, 68 L. ed. 1027, 1029, 1930, 44 S. Ct. 544; *Peoples Natural Gas Co. v. Public Serv. Commission*, 270 U.S. 550, 554, 70 L. ed. 726, 729, 46 S. Ct. 371; *Public Utilities Commission v. Attleboro Steam & Electric Co.* 273 U.S. 83, 89, 71 L. ed. 549, 553, 47 S. Ct. 294. But when the gas passes from the distribution lines into the supply mains, it necessarily is relieved of nearly all the pressure put upon it at the stations of the producing companies, its volume thereby is expanded to many times what it was while in the high pressure interstate transmission lines, and it is divided into the many thousand relatively tiny streams that enter the small service lines connecting such mains with the pipes on the consumers' premises. So segregated the

gas in such service lines and pipes remains in readiness or moves forward to serve as needed. The treatment and division of the large compressed volume of gas is like the breaking of an original package, after shipment in interstate commerce, in order that its contents may be treated, prepared for sale and sold at retail. State ex rel. Caster v. Flannelly, 96 Kan. 372, 383, 384, P.U.R. 1916C, 810, 152 Pac. 22; West Virginia & M. Gas Co. v. Towers, 134 Md. 137, 143-145, P. U. R. 1919D, 332, 106 Atl. 265. Cf. Atlantic Coast Line R. Co. v. Standard Oil Co. 275 U.S. 257, 269, 72 L. Ed. 270, 275, 48 S. Ct. 107; Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678; Leisy v. Hardin, 135 U. S. 100, 34 L. Ed. 128, 3 Inters. Com. Rep. 36, 10 S. Ct. 681. It follows that the furnishing of gas to consumers in Ohio municipalities by means of distribution plants to supply the gas suitably for the service for which it is intended is not interstate commerce but a business of purely local concern exclusively within the jurisdiction of the state"

The following is taken from the opinion in the case of Southern Natural Gas Corporation v. Alabama, 57 S. Ct. 696, 301 U. S. 148, 81 L. Ed. 970:

"From the agreed facts we are unable to conclude that the business thus conducted in Alabama was entirely an interstate business. While the gas which appellant sold was brought into the State from Louisiana, it appears that appellant carried on in Alabama activities of an interstate character. We had occasion in East Ohio Gas Co. v. Tax Commission, 283 U. S. 465, 470, 75 L. ed. 1171, 1174, 51 S. Ct. 499, to consider the distinction between the transportation of gas into a State and the furnishing of the gas so transported to consumers within the State. We observed in that case that 'when the gas passes from the distribution lines into the supply mains, it necessarily is relieved of nearly all the pressure put upon it at the stations of the producing companies,' its volume is expanded, and it is divided into the smaller streams that enter the service lines connecting such mains with the pipes on the consumers' premises. In that case, the Ohio Company furnished gas to consumers in municipalities by means of distribution plants and that activity was held to be not interstate commerce but a business of purely local concern exclusively within the jurisdiction of the State.

* * * * *

While the facts of the two cases are not the same, there is a clear analogy. For here under its contract with the Tennessee Company, which bought for consumption by itself and its subsidiaries in industrial plants, appellant agreed not simply to install metering stations, for measuring the amount of gas delivered, but to establish the requisite service lines running to the described plants in order that the gas might be furnished in a manner suited to the consumers' needs. The gas was supplied through these service lines on the orders received from time to time at the Birmingham office. We perceive no essential distinction in law between the establishment of such a local activity to meet the needs of consumers in industrial plants and the service to consumers in the municipalities which was found in the East Ohio Gas Co. Case to constitute an intrastate business. As was said in that case: 'The treatment and division of the large compressed volume of gas is like the breaking of an original package, after a shipment in interstate commerce, in order that its contents may be treated, prepared for sale and sold at retail.'

In Illinois Natural Gas Co. v. Central Illinois Public Service Company, 62 S. Ct. 384, 314 U. S. 498, 86 L. Ed. 371, the following appears:

"This Court has held that the retail sale of gas at the burner tips by one who pipes the gas into the state * * * * * is a sale in intra-

state commerce since the interstate commerce was said to end upon the introduction of gas into the service pipes of the distributor."

Applying the reasoning of these cases involving the local distribution of gas originating in interstate commerce to the matter at hand, we become committed to the view that the phase of the company's business involving the retail distribution and sale of electric current directly to individual consumers is intrastate in character and we arrive at this conclusion in spite of the somewhat contrary view expressed in *Mill Creek Coal and Coke Co. v. Public Service Commission*, 100 S. E. 557, 84 W. Va. 662, it being our thought that the *East Ohio Gas Co. case*, herein above quoted, in disapproving the *Pennsylvania Gas Co. case*, herein above cited, also disapproved the reasoning of the *Mill Creek Coal and Coke Co. case*.

Since at least a portion of the business conducted by the subject company in Iowa is intrastate in character, the Commerce Clause of the Federal Constitution does not have the effect of excusing the said company from the necessity of obtaining a permit to do business within the State of Iowa.

We, therefore, hold that the **NORTHWESTERN ILLINOIS UTILITIES COMPANY**, a foreign corporation, should have a permit to do business in the State of Iowa.

COMMERCE COMMISSION: FUNDS RECEIVED. Monies coming into hands of Commerce Commission under the statute should be remitted to the treasurer of state as provided by law.

August 23, 1945. *Mr. George L. McCaughan, Secretary, Iowa State Commerce Commission, Des Moines, Iowa:* This will acknowledge receipt of yours asking for an opinion on the following situation:

"Under the provisions of the Iowa Code, 1939, Chapter 252.2 relating to motor carriers; Chapter 252.3 relating to truck operators; Chapter 383.3 relating to pipe lines; and Chapter 426 relating to bonded warehouses, the State Commerce Commission is directed to remit various fees and taxes collected by it to the State Treasurer.

"Chapter 7.1, Code, 1939, provides among other things that it shall be the duty of the State Comptroller, '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 payments'.

"Acting under instruction heretofore given, this Commission has thus far remitted all moneys through the Comptroller's office; that is, checks drawn on the bank where the Commission makes its deposits are sent direct to the Comptroller, who then transmits them, as we understand it, to the State Treasurer.

"The practice outlined in the preceding paragraph has, as stated above, been followed, under instruction, since the enactment of the Budget and Financial Control law. The propriety of the practice has now, however, been called in question. It is contended that under the provisions of the motor carrier, truck operator, pipe line and bonded warehouse laws referred to in the first paragraph of this letter, the

letter of transmittal and check accompanying should be addressed and sent directly to the State Treasurer.

"The Commission desires, of course, to proceed in a lawful manner and therefore respectfully requests your opinion as to whether or not fees and taxes collected by this Department should be sent directly to the State Treasurer or to the State Comptroller."

In reply thereto, we would advise you:

The statute providing for the disposition of moneys paid into the Commerce Commission in the performance of its statutory duties is exhibited in Section 8338.37, contained in Chapter 383.3, Code of 1939, as follows:

"The Commission shall on the last day of each month remit to the treasurer of state all moneys collected under this chapter during such month."

Section 5103.11, as amended by the 49th General Assembly, appearing in Chapter 252.2, Code of 1939, as follows:

"The commission shall remit to the Treasurer of State all moneys collected under this chapter. The commission shall, on or before fifteen (15) days after the close of each quarterly period of each calendar year, remit to the treasurer of state all moneys collected under this chapter during the preceding quarter, except such moneys as shall have been repaid as provided by section five thousand one hundred three and five hundredths (5103.05)."

Section 5105.12, appearing in Chapter 252.3, Code of 1939, as follows:

"The commission shall, on the last day of each month, remit to the treasurer of state all moneys collected under this chapter during such month."

Section 9751.09, appearing in Chapter 426, Code of 1939, as follows:

"The commission shall charge, assess, and cause to be collected ten dollars for every examination or inspection of a warehouse under this chapter when such examination or inspection is made upon application of a warehouseman, and a warehouse license fee not exceeding the rate of one dollar per month for the term of each original warehouse license, and a fee of twelve dollars for each renewal or extension of warehouse license issued under this chapter. All such fees shall be deposited with the treasurer of state as miscellaneous receipts."

The explicit manner in which the Legislature has designated the Treasurer of State as the official to whom payment or deposit of your funds shall be made, furnishes applicability of the maxim, "*Expressio unius est exclusio alterius.*" In *State For Use of Estherville v. Hanson*, 210 Iowa 774, this application is stated in these words:

"The maxim '*expressio unius est exclusio alterius*, is applicable here. Where a statute directs the performance of certain things in a particular manner, it forbids by implication every other manner of performance. *District Twp. of City of Dubuque v. City of Dubuque*, 7 Iowa 262. The statute used the word, 'shall', which is generally construed to be mandatory. *Jefferson County Farm Bureau v. Sherman*, 208 Iowa 614."

The imposition of this statutory duty in making payment or deposit with the Treasurer of State is obviously correlated to the fact that the office of Treasurer of State is created by our Constitution wherein Section 22 of Article IV thereof provides as follows:

"A Secretary of State, Auditor of State and Treasurer of State, shall be elected by the qualified electors, who shall continue in office two years, and until their successors are elected and qualified; and perform such duties as may be required by law."

Such Constitutional creation has significance as attaching to such offices the powers that generally then existed as belonging to the office of Treasurer. He is the keeper of the moneys of the State, and was so assumed to be by the makers of the Constitution. (See 59 C. J. 117, Title "States"; Wright v. Callahan, 99 Pac. 2d, 96; Love v. Baehr, 47 Cal., 364; Tucker v. State, 35 N. E. 270.)

On the other hand, the office of State Comptroller and the powers conferred upon and to be exercised by him are the creations of the Legislature and are exhibited in Chapter 7.1, Code of 1939. This was enacted by Chapter 4 of the the 45th General Assembly. There is contained therein no express power in the Comptroller to collect the funds coming into the hands of the State Commerce Commission or any duty imposed upon the State Commerce Commission to make payment thereof to the Comptroller. If such power exists, it is by implication only, and that from Subsection 2 of Section 84.06, Code of 1939, as follows:

"*Specific powers and duties.* The specific duties of the state comptroller shall be:

* * * * *

2. 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;"

However, we are not disposed to infer that the Legislature intended to confer such power upon the Comptroller in view of the explicit manner in which it has expressly conferred the duty upon the State Commerce Commission to make payment to the Treasurer. We attach to the foregoing language only an intent to confer upon the Comptroller the power of pre-audit and post-audit of these moneys coming into your hands by reason of the foregoing statutory operations.

By reason of the foregoing, we are of the opinion that moneys coming into your hands under the provisions of the statutes hereinbefore exhibited should be remitted to the Treasurer of State as provided in such statutes.

LICENSE FOR REAL ESTATE BROKER: PARTNERSHIPS AND INDIVIDUALS. Co-partnerships, associations or corporations must have a broker's license before transaction of business. Each member of a brokerage firm must take written test unless he is licensed under provision of Section 91.2 of 1939 Code. All fees collected by State Department must be paid into the General Fund of the state treasury and no refund is contemplated.

August 28, 1945. *Honorable Wayne M. Ropes, Secretary of State, Building:* Receipt is acknowledged of your letter of August 8, 1945, as follows:

"Senate File 39, Chapter 96, Acts of the Fifty-first (51st) General Assembly, amended, revised and codified chapter ninety-one and two tenths (91.2), Code 1939, relating to the licensing and regulation of real estate brokers and salesmen.

"From the provisions of the act (section 45) it will be effective from and after January 1, 1946.

"In the administration of this law it is necessary to have the application blanks for renewal of license and the blank licenses printed prior to January 1 of the license year. It is also necessary to process the applications and issue the licenses prior to January 1, that the licensee shall have his renewal license on January 1. In view of this fact we respectfully ask an opinion at this time on the following questions:

"1. Does section two (2) of the act require a broker's license be issued to a copartnership, association or corporation? If so, is a written examination required as provided by section twenty (20) and must fee of \$10.00 be collected as provided by section twenty-seven (27)?

"2. Does section twenty (20) require each member of a copartnership or association and each officer of a corporation, actively engaged in the brokerage business, to take a written examination to act as a broker in the event they do not now have or have not had a broker's license under the provisions of the law now in effect?

"3. May section fourteen (14) be construed to provide an appropriation for the operation of the department taking into consideration section twenty-four (24), Article three (3) of the Constitution of Iowa? In the event said section fourteen (14) is construed to appropriate funds for the operation of the department, what period of time is contemplated by the term 'fiscal year' as used in the last sentence of said section? If the term 'fiscal year' is construed as a year beginning January 1 and ending December 31, may fees received in November and December of a given year for license fee for the ensuing year, be carried over into the next year for the operation of the department?

"4. May fees received with an application for license in the first instance be refunded in the event that applicant fails to pass the written examination?"

We will proceed to answer your questions in the order propounded.

1. Your question as to whether the Act requires that a broker's license be issued to a copartnership, association or corporation is answered more directly by Section 1 of Chapter 96, Acts of the 51st General Assembly, than by Section 2 thereof. Section 1 provides:

"No person shall act as a real estate broker or real estate salesman, without first obtaining a license as provided in this chapter. The word 'person' as provided in said chapter shall mean and include partnership, association or corporation."

It seems clear therefrom that since no "person" can act without first obtaining a license and since the word "person" is defined to "mean and include partnership, association or corporation", there is no escape from the proposition that if a partnership, association or corporation desires to engage in a brokerage business it must obtain a broker's license. Since, however, it would be a physical impossibility for a partnership, association or corporation as distinguished from its members or officers to take an examination, such a partnership, association or corporation

would be entitled to a license when every member or officer who actively participates in the brokerage business is qualified for a broker's license and all salemen are qualified for a salesman's license. We believe that a license fee of \$10.00 must be collected from each partnership, association or corporation to which a broker's license is issued, and this for the reason that Section 27 of the Act, which provides the amount of the license fee, contains no exemptions.

2. Section 20 of the Act requires each member of a partnership or association and each officer of a corporation actively engaged in the brokerage business to take a written examination to act as a broker unless such member or officer is licensed under the provisions of Section 91.2 of the 1939 Code of Iowa at the time Chapter 96, Acts of the 51st General Assembly, becomes effective, and makes application for a similar license within sixty (60) days thereafter.

3. You ask as to whether or not Section 14 of the Act constitutes an appropriation as contemplated by Section 24, Article III of the State Constitution. Section 14 of the Act provides:

"All fees and charges collected by the commission under the provisions of this chapter shall be paid into the general fund in the state treasury. All expenses incurred by the commission under the provisions of this chapter, including compensation to the director, clerks and assistants shall be paid out of the general fund in the state treasury. No expenditure shall be made in excess of the license fee and receipts under the provisions of this chapter during any fiscal year of its operation."

Section 24, Article III, of the Constitution provides:

"*Appropriations.* Sec. 24. No money shall be drawn from the treasury but in consequence of appropriations made by law."

We also deem material Section 135 of the 1939 Code of Iowa, which is as follows:

"He' (state treasurer) 'shall pay no money from the treasury but upon the warrants of the comptroller, * * *'"

and also subsection 2 of Section 84.06 of the Code, prescribing the duties of the comptroller, as follows:

"To control * * * all payments from the treasury by the preparation of appropriate warrants, or warrant checks, directing * * * such payments."

In *O'Connor v. Murtagh*, 225 Iowa 782, the following appears:

"The comptroller was bound to observe the constitutional provision that no money be drawn from the treasury but in consequence of appropriations made by law."

To answer your question we must necessarily determine what constitutes an appropriation. In *Prime v. McCarthy*, 92 Iowa 569, at 577 the following appears:

"Appropriations, as applied to the general fund in the treasury, may perhaps be defined to be authority from the legislature, given at the proper time, and in legal form, to the proper officers, to apply sums of

money out of that which may be in the treasury, in a given year, to specified objects or demands against the state." (Citing *Ristine v. State*, 20 Ind. 338).

The following is taken from 59 Corpus Juris, at pages 245 and 246:

"In general, to an appropriation, within the meaning of the constitution, nothing more is requisite than a designation of the amount and the fund out of which it shall be paid, and any action of the state legislature setting apart or assigning to a particular use a certain sum or fund of money for a particular purpose so that public officials are authorized to draw and use the money so set apart, and no more, for the specified purpose only, is sufficient to constitute an appropriation."

In *Himbert v. Dunn*, 84 Calif., 57, 24 Pac. 111, the court said:

"Has the legislature fixed the amount of the claim, and designated its payment out of a certain fund? These are the only things necessary to the validity of an appropriation."

and in *People v. Brooks*, 16 Calif. 11, quoted and approved in *Ingram v. Colgan*, 106 Calif. 113, 38 Pac. 315, 39 Pac. 437, 28 L. R. A. 187, is the following:

"To an appropriation, within the meaning of the constitution, nothing more is requisite than a designation of the amount, and the fund out of which it shall be paid."

The following quotation is taken from 42 American Jurisprudence, at page 749:

"It is sufficient if an intention to make an appropriation is clearly evinced by the language of the statute, or that no effect can be given to the statute unless it is considered as making an appropriation."

When we apply the foregoing authorities to the language of Section 14 of the Act, there can be no question but that the legislature intended to make an appropriation. And it is further apparent that the provisions of the entire enactment will fail unless said section be considered as making an appropriation. It is equally clear that the language used meets the requirement that the fund out of which payment shall be made be designated for the following appears therein:

"shall be paid out of the general fund in the state treasury."

It is true that the section in question does not specify a definite amount in dollars that can be used for the intended purpose, but it does provide that "no expenditure shall be made in excess of the license fees and receipts under the provisions of this chapter during any fiscal year." This quoted language has the effect of fixing the maximum expenditures for any fiscal year, at the amount of charges and fees collected in such fiscal year, and this is a sufficient designation of amount as evidenced by the rule announced in *State v. Moore*, 50 Nebraska 88, 69 N. W. 373 as follows:

"An appropriation may be specific, according to any of the definitions heretofore given, when its amount is to be ascertained in the future from the collection of revenue."

and in 42 American Jurisprudence, page 749, as follows:

"It has been held that an appropriation bill is not void for uncertainty in not specifying a stated amount, if it fixes the extent to which the treasury will be drawn upon."

and in 59 C. J. 250, where the following appears:

"An appropriation may be valid when its amount is to be ascertained in the future from the collection of the revenue."

In the light of the foregoing we hold that the language employed in Section 14 of the Act is sufficient to constitute an appropriation as contemplated by Section 24, Article III of the State Constitution. It follows therefore that the Comptroller may issue warrants within the limitations expressed in the Act and for the purposes indicated therein, and that the treasurer may pay the warrants so issued for, as stated in *Ristine v. State*, 20 Ind. 328,

"An appropriation of money to a specified object would be an authority to the proper officers to pay the money, because the auditor is authorized to draw his warrant upon an appropriation, and the treasurer is authorized to pay such warrant if he has sufficient money in the treasury."

The term "fiscal year", as used in the last sentence of Section 14, is controlled by the definition set out as Section 84.29 of the 1939 Code, which is as follows:

"The fiscal year of the government shall commence on the first day of July and end on the thirtieth day of June. This fiscal year shall be used for purposes of making appropriations and of financial reporting and shall be uniformly adopted by all departments and establishments of the government."

4. All fees collected by the commission "shall be paid into the general fund of the state treasury", and no refund of any kind or character is contemplated.

TAX SALE: PAYMENT OF SUBSEQUENT TAXES. A tax sale purchaser must pay subsequent taxes before October 1st following the levy. After October 1st following the levy, the purchaser has a right to pay delinquency and forestall second tax sale. If tax sale purchaser does not pay the delinquency, there is preserved to him the right of redemption from a sale for the unpaid taxes.

Sept. 7, 1945. *Honorable C. B. Akers, Auditor of State, Building:*
You submit, for opinion, the following:

"Section 7266 of the present Code relates to the payment of subsequent taxes by purchaser of property at tax sale. The question has arisen as to what time after the first of January each year subsequent taxes may be paid by said purchases. It is our observation that in some counties payment of the first one-half is accepted after April 1, and payment of the second one-half is accepted after October 1. In some counties the total tax is accepted after April 1. We would be glad to have your opinion on this matter."

Section 7266, Code of 1939, is as follows:

"The treasurer shall also prepare, sign, and deliver to the purchaser of any real estate sold for taxes duplicate receipts for taxes, interest, and costs paid by him after the date of his purchase for any subsequent

year or years, one of which receipts shall be filed in the office of the auditor and noted on the register of sales therein."

The foregoing statute only imposes a duty upon the Treasurer to sign and deliver to the purchaser "duplicate receipts for any taxes, interest and costs paid by him after the date of the purchase for any subsequent year or years." It expressly confers no right upon the holder of the tax certificate to pay any taxes subsequent to the taxes for which the sale was had. However, impliedly, the tax purchaser possesses the right so to pay. This right, according to the statute 7266, extends to the payment of taxes, interest and costs after the date of the purchase for any subsequent year or years.

Insofar as the person who owes the tax is concerned, Sections 7210 and 7211, Code 1939, as follows:

"7210. *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."

"7211. *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."

impose the duty upon the person subject to taxation to pay either the whole tax between the first Monday in January and the first day of March following the levy or accords him the privilege of paying one-half thereof before the first day of April and the remaining one-half before the first day of October following the levy.

There is Legislative significance in the foregoing separate rights of the person subject to taxation and of the purchaser at tax sale. This is displayed by the Legislative history of the statutes. Section 7266, Code of 1939, as follows:

"*Payment of subsequent taxes by purchaser.* The treasurer shall also prepare, sign, and deliver to the purchaser of any real estate sold for taxes duplicate receipts for taxes, interest, and costs paid by him after the date of his purchase for any subsequent year or years, one of which receipts shall be filed in the office of the auditor and noted on the register of sales therein."

first appeared in the statutes of Iowa in the Code of 1873 as Section 889, which Section is this:

"The county treasurer shall also make out, sign, and deliver to the purchaser of any real property sold for taxes aforesaid, duplicate receipts for any taxes, interest, and costs, paid by said purchaser, after the date of said purchase for any subsequent year or years, one of which receipts said purchaser shall present to the county auditor, to be by him filed in his office, and a memorandum thereof entered on the register of sales. And if he neglect to file such duplicate receipt with the auditor before the redemption, such tax shall not be a lien upon the land, and the person paying such tax shall not be entitled to recover the same of the owner of such real estate."

This was enacted by the 10th General Assembly, Chapter 100, Paragraph 1. Thus the Section implying the payment of taxes by prior purchaser at tax sale, except for unimportant changes in diction, has remained unchanged from the time of this enactment to the present.

At the time it was enacted, there was also enacted and in force Section 857, Code of 1873, which is the forerunner of Sections 7210 and 7211, Code of 1939. Section 857 is this:

"No demand of taxes shall be necessary, but it is the duty of every person subject to taxation to attend at the office of the treasurer, unless otherwise provided, at some time between the second Monday of November and the first day of February, and pay his taxes; and if any one neglects to pay them before the first day of February following the levy of the tax, the treasurer is directed to make the same by distress and sale of his personal property, not exempt from taxation, and the tax-list alone shall be sufficient warrant for such distress."

Note the provision there, is that the whole of the tax shall be paid by the obligated taxpayer between the second Monday of November and the first day of February, and neglect to pay the tax before the first day of February following the levy of the tax, imposed the duty on the Treasurer to collect the same by distress and sale of personal property.

And, likewise, the forerunner of Section 7210, Code 1939, appeared in the Revision of 1860 as Section 756, as follows:

"No demand of taxes shall be necessary, but it is the duty of every person subject to taxation to attend at the office of the treasurer (unless otherwise provided) at some time during the time mentioned in a previous section of this act, and pay his or her taxes, and if any one neglects to pay them before the first day of February following the levy of the tax, the treasurer is directed to make the same by distress and sale of his or her personal property, excepting such as is exempt from taxation, and the tax list alone shall be sufficient warrant for such distress."

Again, the forerunner of Sections 7210 and 7211, Code 1939, was Section 492, Code of 1851, which follows:

"No demand of taxes shall be necessary, but it is the duty of every person subject to taxation to attend at the office of the treasurer at some time during the four months named and after the fifteenth day of September and pay his taxes; and if any one neglects to pay it before the first day of January following the levy of the tax the treasurer is directed to make the same by distress and sale of his personal property excepting such as is exempt from taxation, and the tax list alone will be a sufficient warrant for such distress."

These statutes likewise provided for the payment of the whole tax during a period of four months after the 15th day of September and during the months of October, November and December. If the payment was not made before the 1st day of January following the levy, upon the Treasurer was imposed the duty of making distress and sale of personal property.

The right accorded to a taxpayer to make payments of taxes in installments first appeared in the Code of 1897. Section 1403 thereof provides as follows:

"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; but in all cases where the half of any taxes has not been paid before the first day of April succeeding the levy, the whole amount charged against such entry shall become delinquent from the first day of March 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 September after due. In all cases where taxes are paid by installment, each of such payments, except road taxes, shall be apportioned among the several funds for which taxes have been assessed in their proper proportions."

Such change exhibited by Section 1403 with respect to permitting the payment of taxes in installments, was made by the 20th General Assembly, Chapter 194, as follows:

"TAXES

AN ACT to Repeal Section 857, 865, and 866 of the Code and Enact Substitutes Therefor Providing for Semi-annual Collection of Taxes; Also to Amend Sections 871, 873, 883 and 914 of the Code, and Section 1, of Chapter 79 of the Acts of the Sixteenth General Assembly."

Be it enacted by the General Assembly of the State of Iowa:

Section 1. That sections 857, 865 and 866 of the code be repealed, and the following enacted in lieu thereof, to-wit:

Sec. 857. 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, unless otherwise provided, at some time between the first Monday in January and the first day of March following, and pay his taxes in full; or, he may pay the one-half thereof before the first day of March succeeding the levy and the remaining half thereof before the first day of September following; *provided*, that in all cases where the half of any taxes has not been paid before the first day of April succeeding the levy thereof, the whole amount of taxes charged against such entry shall become delinquent from the first day of March following such levy; and in case the second installment of any taxes be not paid before the first day of October succeeding its maturity, penalty shall be computed on such installment from the first day of September designating the maturity of such installment; *provided also*, that in all cases where taxes are paid by installment as herein provided, each of such payments, except road taxes, shall be apportioned among the several funds for which taxes have been assessed, in their proper proportions. And if any one neglect to pay his taxes at or before maturity, as herein provided, the treasurer may make the same by distress and sale of his personal property not exempt from taxation, and the tax-list alone shall be sufficient warrant therefor. * * * "

Thus since 1873 a tax sale purchaser has possessed the right to pay taxes to the Treasurer for "a year or years" accruing subsequent to his tax purchase. The right of the person obligated, to pay the taxes in in-

stallments has existed since the year 1884. With the Legislative knowledge that prior to said date of 1884 and from 1851 to such time, the taxpayer had only the right to pay the whole tax in one payment, the Legislative intent to limit the right to pay subsequent taxes annually by the tax purchaser seems clear. And the Legislative intent to confer upon the obligated taxpayer the right to make payment of his statutory taxes until October 1st of the year following its levy seems likewise clear. After such date the purchaser may exercise his right to pay the delinquency then existing, and thus forestall a second tax sale for the subsequent taxes. And, of course, even if the tax purchaser does not pay the subsequent taxes, there is preserved to him the right of redemption from a sale for the unpaid subsequent taxes. (See Section 7267, Code of 1939; also, *White v. Hammerstron*, 224 Iowa 1041, 1046.)

AUDIT REPORTS: AUDITOR OF STATE: CITIES AND POLITICAL SUBDIVISIONS. Reports of examinations of cities and political subdivisions made by a Certified Public Accountant must include transactions of municipal utilities. These reports should be filed in entirety in the office of Auditor of State.

Sept. 11, 1945. *Honorable C. B. Akers, Auditor of State, Building:* This will acknowledge receipt of yours in which you set forth the following:

"We would like to have an official opinion regarding the following question: Under the present audit law, as set out by Section 124 of the 1939 Code, it is optional whether the cities are examined by examiners from this office or by certified or registered accountants, and during the past few years in a number of cases, where certain utilities are owned by cities and towns, the private accountants have made a separate report on these utilities and a copy has not been filed with this office. We feel that these utilities are a part of the city and such reports should be filed with us the same as other reports on the general city government.

Also, it has come to our attention that in some cases separate reports are issued to the city setting out certain recommendations and suggestions, and these reports are not filed with this office. To quote from one report received, we find the following: 'Under separate cover we are issuing a report containing suggestions and recommendations based on our examination for the year ended March 31, 1945. This special report is dated July 3, 1945.'

We believe that this is a dangerous practice and that these audits are made for the benefit of the taxpayers and not the city council, and any recommendations or suggestions should be included in the report and should also be filed with this office. We would appreciate your opinion regarding this."

Sections 5738, 6127 and 6130, Code of 1939, are as follows:

"5738. Cities and towns are bodies politic and corporate, under such name and style as may be selected at the time of their organization, with the authority vested in the mayor and a common council, together with such officers as are in this title mentioned or may be created under its authority, and shall have the general powers and privileges granted, and such others as are incident to municipal corporations of like character, not inconsistent with the statutes of the state, for the protection

of their property and good order therein, and they may sue and be sued, contract and be contracted with, acquire and hold real and personal property, and have a common seal."

"6127. Cities and towns shall have the power to purchase, establish, erect, maintain, and operate within or without their corporate limits, heating plants, waterworks, gasworks, or electric light or power plants, with all the necessary reservoirs, mains, filters, streams, trenches, pipes, drains, poles, wires, burners, machinery, apparatus, and other requisites of said works or plants, and lease or sell the same."

"6130. They may enter into contracts with persons, corporations, or municipalities for the purchase of heat, gas, water, or electric current for either light or power purposes, for the purpose of selling the same either to residents of the municipality or to others, including corporations, and shall have power to erect and maintain the necessary transmission lines therefor, either within or without their corporate limits, to the same extent, in the same manner, and under the same regulations, and with the same power to establish rates and collect rents, as is provided by law for cities having municipally owned plants."

The foregoing powers are functions of municipalities. The Supreme Court of Iowa so said in *Miller v. Inc. Town of Milford*, 224 Iowa 753, 767, in these words:

"The functions of a municipality are twofold; one is governmental and the other proprietary and quasi private. In exercising the powers granted under sections 6127 and 6130, a municipality is acting in its proprietary capacity. *Incorporated Town v. Ocheyedan Electric Company*, 194 Iowa 950, 187 N.W. 560. In exercising its powers to light streets, a town is acting in its governmental capacity and provides for the safety and protection of its citizens and their property and preservation of good order. Code section 5783 states that cities and towns 'shall have the general powers and privileges granted, and such others as are incident to municipal corporations of like character * * * * for the protection of their property and inhabitants, and the preservation of peace and good order therein, and they may sue and be sued, contract and be contracted with,' etc."

Being functions of cities, they require transactions in their fulfillment. As such they are within the power and duty imposed upon the Auditor of State according to Section 124, Code of 1939, as amended by Chapter 52, Par. 1 of the 50th G. A., as follows:

"The financial condition and transactions of all cities and city offices,* and all school offices, other than those in rural and village independent districts and school townships and all consolidated school districts and independent school districts in cities and towns of less than five thousand population, shall be examined at least once each year and such examination may be made by the auditor of state, or in lieu of the examination by state accountants the local governing body whose accounts are to be examined, in case it elects so to do, may contract with, or employ, certified or registered public accountants, certified and registered in the state of Iowa, and pay the same from the proper public funds. If the city or school district elect to have the audit made by certified or registered public accountants, they must so notify the auditor of state within sixty days after the close of the fiscal year to be examined. If any city or school district does not file such notification with the auditor of state within the required period, the auditor of state is authorized to make the examination and cover any period which has not been previously examined.

Any township or municipal corporation not embraced within the foregoing provisions of this chapter and any school corporation in which an

annual examination is not required may, on application to the auditor of state, secure an examination of its financial transactions and condition of its funds, or a like examination shall be had on application of one hundred or more taxpayers, or if there are fewer than five hundred taxpayers, then by five percent thereof. The examination in any such school district may be had upon the written request of the county superintendent of schools. In lieu of such examination by state accountants, the local governing body may contract with, or employ, certified or registered public accountants and pay the same from the proper public funds."

In the event the foregoing statutory examination is not made by the Auditor of State, but made by certified or registered Public Accountants pursuant to contract made by the local governing body, the powers and duties of such contract certified or registered Public Accountants is set forth in Section 124.1, Code of 1939, as amended by Chapter 52, Paragraph 2, Acts of the 50th G. A., as follows:

"Where an examination is made under contract with, or employment of, certified or registered public accountants, the examiner shall, in all matters pertaining to an authorized examination, have all of the powers and be vested with all the authority of state examiners employed by the auditor of state, and the cost and expense of the examination shall be paid by the city, town, school district, or township procuring the examination. An itemized sworn statement of the per diem and expense of the examiner shall be filed with the clerk of the city, town, township, or school district, before payment thereof. Upon completion of such examination, a signed copy thereof shall be filed by the accountant employed, with the auditor of state within sixty days from the time that the report is filed with the city or school district. If any report is not filed within the specified time, the auditor of state shall make a demand upon the accountant employed. Failure to file the report within ten days after such demand is made shall bar such accountant from making any city or school audits thereafter under the provisions of section one hundred and twenty-four (124)."

Such section 124.1, as so amended, is as much a part of the contract made with such certified or registered Public Accountants to make the examination as if set forth in terms in such contract. These contract examiners, acting under the foregoing statutes, are performing public duties and are as answerable for their faithful fulfillment as are the Auditor's statutory examiners provided by Sections 114 and 115, Code of 1939. It would be anomalous to permit municipalities to contract away by this alternative method the statutory supervisory powers of the Auditor of State over these examinations. The statutory examiner cannot lawfully withhold his examination or any part thereof from the Auditor. That obligation is provided in Section 120, Code of 1939, as follows:

"A report of such examination shall be made in triplicate, signed and verified by the officers making the examination; one copy to be filed with the auditor of state, one copy with the officer under investigation, and one copy to the county auditor who shall transmit same to the board of supervisors if a county office is under investigation, or with the president of the school board if a school is under investigation, or with the mayor of the city council if a city is under examination. All reports shall be open to public inspection."

And the contract examiner is bound to the same duty.

We are of the opinion, therefore, that the reports of examinations of cities and political subdivisions named in Section 124, Code of 1939, made by certified or registered accountants under contracts with such cities and political subdivisions include transactions of municipal utilities. These reports are public documents and should be filed in their entirety with the Auditor of State, as provided by statute.

STATE PROPERTY: SALE: MINING CAMP SCHOOL. The Executive Council may issue a patent on state property in accordance with sections 93 and 94 of 1939 Code. State property used as Mining Camp School cannot be sold by Executive Council because it has received no such authorization from the legislature.

Sept. 28, 1945. *Honorable Wayne M. Ropes, Secretary of State, Building:* Acknowledging receipt of yours in which you ask for opinion in the following situation:

"This office would like an official opinion in regard to the following matter:

On September 28, 1925, William T. Bass deeded to the State of Iowa the following land, to-wit:

Commencing at the Southeast corner, of the Northeast Quarter ($\frac{1}{4}$) of Section Twenty-seven (27), Township Seventy-nine (79) North, of Range Twenty-six (26) West, of the 5th P. M. Iowa; Thence West One Hundred Eighty One and one-half ($181\frac{1}{2}$) Feet; Thence North Two Hundred Forty (240) Feet; Thence East One Eighty One and one-half ($181\frac{1}{2}$) Feet, to the East line of said Section, thence south on the east line of said section twenty-seven (27) Two Hundred Forty Feet, to the point of beginning, equal to One (1) Acres, all located in the Northeast Quarter ($\frac{1}{4}$) of Section Twenty-seven (27), Township Seventy-nine (79) North, of Range Twenty-Six (26) West, of the 5th P. M. Iowa.

This land was purchased through the office of the Superintendent of Public Instruction for use as a site for a Mining Camp School in the Independent Consolidated School District of Waukee in Dallas County, Iowa. The money for the purchase of the above land was taken from the general appropriation made to the Superintendent of Public Instruction for Mining Camp Schools, and must have been made under the general appropriation Act of the 41st General Assembly in the year 1925. A school house was built and equipped by the State from the general appropriation for Mining Camp Schools.

The school house has not been used for school purposes now for several years, and the heirs of the grantor in the deed to the State of Iowa wish to purchase the land back. The deed to the State of Iowa, among other things, had the following provision, 'I, my heirs, or assigns shall have the first option to buy same back at a price to be fixed by an arbitration board, selected the usual way.'

The question which we would like answered is whether or not this land and the improvements upon it really belong to the State of Iowa, or whether the State of Iowa merely holds the legal title to the land and improvements in trust for the Independent Consolidated School District of Waukee.

We would like also to know whether or not the building and improvements on the land belong to the above named School District and can be sold and removed by it, or whether the improvements are a part of the real estate and belong to the State of Iowa or to the above named School District.

The school board of the School District has indicated that the District does not intend to use the building for school purposes, so the real question involved is whether the State of Iowa should receive the money from the sale of the land and building, or whether the proceeds of the sale should go to the School District.

In either case, I believe that the State of Iowa will have to execute a Patent, either to the purchaser, or to the School District, and if such is the case, can the Executive Council of the State of Iowa authorize the issuance of such a Patent?"

We would advise:

Section 40 of Chapter 218, Laws of 41st G. A., to which reference is made in your letter and under the authority of which this land was purchased is this:

"For the superintendent of public instruction for state aid to public schools there is hereby appropriated for the biennium beginning July 1, 1925, and ending June 30, 1927, the sum of nine hundred nine thousand nine hundred dollars (\$909,900.00), or so much thereof as may be necessary, to be available as required during the biennium, for the following purposes:

For state aid to public schools:

Normal training schools	\$300,000.00
Consolidated schools	300,000.00
Standard schools	200,000.00
Rural mining camp schools	100,000.00
Normal institutes	9,900.00
	\$909,900.00

If any of the appropriations provided in lines 9, 10 and 11 of this section are insufficient to pay the amount provided by statute for each school, the funds shall be pro-rated among all schools meeting the requirements.

The appropriation for mining camp schools shall be used by the state superintendent of public instruction, with the approval of the executive council and under its direction, but not until there is submitted to the executive council by the state superintendent of public instruction a comprehensive program showing the entire proposed expenditure of the appropriation for the year under consideration, and not until all of the mining camp schools applying for funds from said appropriation have been notified of said contemplated division and of the time and place when the proposed division of such funds is to be passed upon by the executive council. Notice of the hearing by the executive council shall be given by registered mail addressed to the secretary of said mining camp school boards and mailed at least ten (10) days prior to the time fixed for the hearing.

Section forty-one hundred eighty-seven (4187) of the code, 1924, is hereby repealed."

It will be noted that this is not a specific aid to any particular school or school corporation, but is contained in the general appropriation act of the 41st G. A. and provides the money from which state aid is paid. The Legislature segregated the appropriation for mining camp schools and particularized the method for expenditure of the appropriation therefor. This was to be used and expended by the State Superintendent

of Public Instruction with the approval and under the direction of the Executive Council, and was authorized without distinction as to where the mining camp school may be located, whether part of a consolidated school system, an independent school system, or otherwise. The distribution of this fund by the State Superintendent of Public Instruction, with the approval of the Executive Council, is a distribution by them as agents of the State of Iowa. And having designated those officials as the channel of distribution, the Legislature impliedly denied to any other official or administrative body power over such appropriation. They purchased the foregoing described property and paid therefor from this fund. It was acquired by the State of Iowa. Such being the policy and intent of the Legislature, we are of the view that:

1. The State of Iowa is the owner in fee of the foregoing described land and any improvements placed on them; that the proceeds of any sale, therefore, belongs to the State of Iowa; that the Executive Council may authorize the issuance of a Patent in accordance with the provisions of Sections 93 and 94, Code of 1939.

2. However, all of the foregoing observations and opinion is subject to the further opinion that the Executive Council has no power of sale of State property without specific authorization therefor bestowed upon it by the Legislature. It is true that the Legislature has conferred upon the Council by specific legislation, power to sell certain and sundry State property, but no authorization seems to have been made for the sale by the Executive Council of property acquired by the State under the foregoing circumstances.

Therefore,

3. While of the view that the foregoing property is State property in fee, we are of the further view that the same cannot be sold without Legislative authority.

RETIREMENT AND PENSION: FIREMEN. Fireman shall receive benefits under retirement system if injuries were received while off duty when he has completed five or more years service. If fireman is injured before completion of five years service, he must prove disability was contracted while in performance of duties as a fireman to receive benefits.

Sept. 28, 1945. *Honorable C. B. Akers, Auditor of State, Building:*
This will acknowledge receipt of your letter of the 19th inst., as follows:

"Under date of February 9, 1943, you rendered this office an opinion regarding the rights of members of the police and fire department who were injured while members of the armed services and while on leave of absence from their department. This opinion covered the liability of the city in such cases. We would like an official opinion covering a slightly different set of conditions. In this case, would the city be liable and be required to pay a pension to a city fireman who was injured and permanently disabled for duties as a fireman while working for someone else on his day off?

In this connection, I wish to advise you that in most city fire departments the members work one day and are then off one day, and it has been a somewhat common practice for these men to do other work for private individuals or companies on their off day. The question involved here, as previously stated, is whether the city would be liable for a pension to a fireman who was permanently disabled under the conditions as set out above.

with accompanying explanatory letter of Mr. Charles E. Wittenmeyer, City Attorney of Davenport, Iowa, as follows:

"We are confronted with the problem of interpreting Section 6315 of the Code of Iowa under the following facts:

A fireman of the city of Davenport, on his off day, with permission of the City, worked for a private employer and while so engaged in work, suffered injuries making him physically permanently disabled for duties as a fireman. He is now making application to the Fireman's Pension Board for retirement under the aforesaid section and we are wondering what attitude we should take and what would be the attitude of the Auditor's Office with respect to this type of claim.

I have referred to the Attorney General's opinion addressed to you on February 9, 1943, which is a similar case. However, I wondered whether or not you could get the Attorney General's office to write an opinion covering the above facts. You will undoubtedly have other cases of a similar kind because I believe it was customary for most cities to permit firemen to do outside work because of the manpower shortage."

In reply thereto, we would advise you that this question arises under what is known as the old pension law and is determined by the terms of Sections 6315 and 6316 of Chapter 322, Code of 1939. These Sections are as follows:

"6315. Any member of said departments who shall have served twenty-two years or more in such department, and shall have reached the age of fifty years; or who shall while a member of such department become mentally or physically permanently disabled from discharging his duties, shall be entitled to be retired, and upon retirement shall be paid out of the pension fund of such department a monthly pension equal to one-half the amount of salary received by him monthly at the date he actually retires from said department. If any member shall have served twenty-two years in said department, but shall not have reached the age of fifty years, he shall be entitled to retirement, but no pension shall be paid while he lives until he reaches the age of fifty years."

"6316. No member who has not served five years or more in said department shall be entitled to be retired and paid a pension under the provisions of this chapter, unless such disability was contracted while engaged in the performance of his duties, or by reason of following such occupation. The question of disability shall be determined by the trustees upon the concurring report of at least two out of three physicians designated by the board of trustees to make a complete physical examination of the member. After any member shall become entitled to be retired, such right shall not be lost or forfeited by discharge or for any other reason except conviction for felony."

However, insofar as members of a fire department are concerned, the Legislative intent can be more clearly discerned by an exhibit of Sec. 932-e, Code Supplement of 1913, now codified as part of Sections 6315 and 6316, as follows:

"932-e. That section five of chapter sixty-one of the acts of the thirty-third general assembly as amended by chapter fifty of the acts of the thirty-fourth general assembly be repealed and the following is enacted in lieu thereof:

"Any member of any organized paid fire department within the provisions of this act who shall have served twenty-two years or more in such department and shall have reached the age of fifty years, or who shall while a member of such department, become mentally or physically permanently disabled from performing the duties of a fireman, shall be entitled to be retired, and upon retirement he shall be paid out of the firemen's pension fund of the city in which such department is located, a monthly pension equal to one-half the amount of salary received by him monthly at the date he became entitled to retirement. Provided, however, that no member who has not served five years or more in such department shall be entitled to be retired and paid a pension under the provisions of this act on account of being mentally or physically permanently disabled, unless such disability was contracted while engaged in the performance of his duties or by reason of following the occupation of such fireman. Provided, further, that the chief officer of any fire department shall have the power to assign any member of the department, retired or drawing pensions under this act, to the performance of light duties in such fire department. The question of disability shall be determined by the trustees upon the advice of a physician appointed by the board of trustees for that purpose. * * *"

In our view, the foregoing statute is clear and unambiguous. Such a statute, according to Sutherland Statutory Construction, 3d Ed., Vol. 2, Section 4502, needs no interpretation:

"The most common rule of statutory interpretation is the rule that a statute clear and unambiguous on its fact need not and cannot be interpreted by a court and only those statutes which are ambiguous and of doubtful meaning are subject to the process of statutory interpretation."

Or, as stated by Supreme Court of the United States in *Caminetti v. United States*, 242 U. S., 470, 61 L. Ed. 442, 37 S. Ct. 192:

"Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion."

Clearly the Legislature intended and did by plain language provide that a member of a Fire Department who has not served 5 years or more in the Department is not entitled to a pension by reason of disability unless the disability was incurred while such member was engaged in the performance of his duties or by reason of following the occupation. But after the period of 5 years has expired, a member who becomes mentally or physically permanently disabled from discharging his duties as a fireman is entitled to the pension without regard as to whether the disability was contracted while he was engaged in the performance of his duties or by reason of following his occupation. Or, in other words, a member who suffers a disability at any time within five years of the beginning of his service, must, as a condition to receiving the benefits of the Chapter, prove such disability to have been contracted while he was engaged in the performance of his duties or by reason of following the occupation of fireman. After such period of 5 years, however, the benefits of the statute are awarded to the member for disability without regard as to whether it was incurred in the discharge of his duties or by reason of following the occupation of fireman.

In that view, the fireman referred to in your letter, if he has served in the Department more than 5 years, would be entitled to retirement under Section 6315, notwithstanding the fact that his injuries resulting in a permanent physical incapacity to serve as fireman were suffered on a day upon which he was not engaged in the discharge of his duties. On the other hand, if he has not served 5 years as a member of the Department, then his retirement, under Section 6315, is conditioned upon proof that the disability for which retirement is claimed was contracted while he was engaged in the performance of his duties as fireman or by reason of following the occupation of fireman.

SCHOOL DISTRICTS: TUITION OF TRANSFERRED STUDENTS.

Transfer of students from district to district for attendance after July 4, 1945 obligates the transferring district to pay tuition to receiving district. The Amendment of 51st G. A. does not justify postponement of operative effect of statute until July 1, 1946.

October 4, 1945. *Miss Jessie M. Parker, Supt. of Public Instruction, Building*: I have yours of the 26th inst., in which you ask for opinion in the following situation:

"The 51st General Assembly amended Sections 4233.3 and 4277, Code 1939, as follows:

(Chapter 130, laws of the 51st General Assembly.)

Section 1. Section four thousand two hundred thirty three and three tenths (4233.3), Code 1939, is amended by striking out the words 'except that the rate shall not be in excess of six dollars a month' in lines three (3), four (4), and five (5), and substituting in lieu thereof the following: 'and shall be equal to the average cost per elementary child (including both resident and tuition students) in average daily attendance in the tuition-receiving district for the preceding year. Such tuition rate shall include a pro rata charge for capital as well as for operating costs, but not exceeding ten dollars per month. Capital costs shall include expenditures from the general fund under the headings: 'capital outlay' and 'debt service' and the amount of any tax levied for the school house fund.'

"Section 2. Section four thousand two hundred seventy-seven (4277), Code, 1939, is amended by striking out that part beginning with the words 'of not to exceed' in line five (5) and ending with the words 'in such district' in line twenty-nine (29), and substituting in lieu thereof the following: 'sufficient to cover the average cost per high school child (including both resident and tuition students) in average daily attendance in the tuition-receiving district in the preceding year. Such tuition rate shall include a pro-rata charge for capital as well as for operating costs, as defined above, but shall not exceed seventeen dollars per month'; also by striking that part beginning with the word 'to' in line thirty-two (32), and ending with the word 'or' in line thirty-five (35); also by striking the word 'such' in line thirty-five (35) and substituting in lieu thereof the word 'any'.

Your particular attention is directed to lines 9 to 12 in Section 1 and lines 8 to 10 in Section 2, referring to the inclusion of 'Capital outlay and debt service including the amount of any tax levied for the school house fund,' in the computation of tuition charges.

Under the authority of Section 3832.1 Uniform Finance Records, Code 1939, this department has prepared and mailed out Administration and Finance Bulletin No. 2, August 1939, entitled 'How to Compute Tuition

Rates.' In this bulletin we have held that capital outlay and debt service including taxes levied for the school house fund cannot properly be included in tuition charges for the current school year 1945-46. Our line of reasoning is as follows: The law as amended, states that the rate 'shall be equal to the average cost per elementary child (including both resident and tuition students) in average daily attendance in the tuition-receiving district for the preceding year.'

Now the preceding year to the current school year began July 1, 1944 and ended June 30, 1945. Capital outlay and debts service were not legal tuition charges in that year, otherwise there would have been no necessity for including them as new material in the amendment passed by the 51st General Assembly. The law making them a legal charge did not go into effect until July 4, 1945, four days after the close of the 'preceding year' to the current school year. Therefore, in spite of the fact that the amendment which no doubt intended to make these charges legal, states that they shall be included, they cannot properly be included until after a year has elapsed so that there will be a legal charge for these items to be included in the computation of such charges. To reason any other way would appear to this office to make the law retroactive which in general is not done.

We have had numerous requests for a change of interpretation in this matter and we are attaching samples of the correspondence from some of our schools.

Will you give us a written opinion on this matter at your earliest convenience so that we can answer these requests."

In reply thereto, I would advise you that the foregoing Chapter 130, Acts of the 51st General Assembly, was approved March 14, 1945, and became effective July 4, 1945. Sections 4233.3 and 4277, Code of 1939, prior to the foregoing amendments by Chapter 130 are these:

"4233.3. The tuition cost to be mutually agreed upon by the respective boards shall be paid by the home district except that the rate shall not be in excess of six dollars per month."

"4277. The school corporation in which such student resides shall pay from the general fund to the secretary of the corporation in which he shall be permitted to enter a tuition fee of not to exceed nine dollars per month during the time he so attends, not exceeding a total period of four school years. The tuition rate chargeable to the home district of such nonresident high school pupil shall not exceed the pro rata cost and shall be computed solely upon the basis of the average daily attendance of all resident and non-resident pupils enrolled in such high school, but it shall not include the cost of transportation to high school or any part thereof, unless the actual pro rata cost of such tuition is less than the maximum rate authorized by law, in which case the board of the district that is responsible for the payment of such tuition may, by resolution, authorize the payment of such portion of transportation costs as does not exceed the difference between the actual pro rata cost of high school tuition and the maximum rate authorized by law, provided the creditor district collects any balance of such transportation cost from the parents whose children are transported. Transportation costs shall, in all cases, be based upon the pro rata cost of all pupils transported to school in such district.

It shall be unlawful for any school district maintaining a high school course of instruction to provide nonresident high school pupils with transportation to high school or normal college unless the district is fully reimbursed therefor, as provided in this section, or to rebate to such pupils or their parents, directly or indirectly, any portion of the high school tuition collected or to be collected from the home district of such

pupils, or to authorize or permit such pupils to receive at the expense of the district, directly or indirectly, any special compensation, benefit, privilege, or other thing of value that is not and cannot legally be made available to all other pupils enrolled in such high school. Any superintendent or board members responsible for such unlawful act shall each be personally liable to a fine of not to exceed one hundred dollars. Action to recover such penalty or action to enjoin such unlawful act may be instituted by the board of any school district or by a taxpayer in any school district.

On or before February 15 and June 15 of each year the secretary of the creditor district shall deliver to the secretary of the debtor district an itemized statement of such tuition fees."

These Sections, both before July 4, 1945, the time the amendment went into effect, and thereafter created obligations upon the districts and were enforceable by proper action. This is the view of the Supreme Court of Minnesota under a similar statutory situation where in the case of *Associated Schools of Independent District No. 63 v. School District No. 85*, 142 N. W. 325, 328, the Court said:

"But it is clear that the act of 1911 creates an obligation on the part of defendant. The creation of the obligation carries with it by necessary implication the right to its enforcement."

The Legislature provided for enforcement of such tuition fees by Section 4278, Code of 1939, as follows:

"4278. If payment is not made, the board of the creditor corporation shall file with the auditor of the county of the pupil's residence a statement certified by its president specifying the amount due for tuition, and the time for which the same is claimed. The auditor shall transmit to the county treasurer an order directing him to transfer the amount of such account from the funds of the debtor corporation to the creditor corporation, and he shall pay the same accordingly."

The amendment of the 51st G. A. specified the items to be included in reckoning tuition cost by the receiving district, however, measuring the cost to the district of the residence of the pupil under either statute by the costs of the preceding year. The preceding year, according to Section 4226, Code 1939, as follows:

"The school year shall begin on the first of July and each school regularly established shall continue for at least thirty-six weeks of five school days each and may be maintained during the entire calendar year." means the school year preceding July 4, 1945, and was the year beginning July 1, 1944, and ending June 30, 1945. School corporations availing themselves of the privilege of sending, on the one hand, and accepting on the other, of students from one district to another, do so under the terms of the statute in existence at the time of the transfer of students from one district to another. And the statutory obligations attendant upon such transfer existent at such time are the obligations which a sending school district undertakes to perform. Resultantly, the transfer of students from one district to another for attendance therein after July 4, 1945, obligate the transferring district to pay the tuition to the receiving district provided by the statute then in existence and in force. And such statutes, being Sections 4233.3 and 4277, as amended by Chap-

ter 130 of the 51st G. A. are the statutes that fix the obligation of the transferring district respecting the amount of the tuition payable by it to the tuition receiving district.

If the view that is set forth in your letter is adhered to, the transfer of a student after July 4, 1945, would be made under the obligations of the law prior to July 4, 1945, which, at that time, was no longer the law. The amendment of the 51st General Assembly does not expressly or impliedly justify the postponement of the operative effect of the statute until July 1, 1946.

HUNTING AND FISHING LICENSE: TERMINATION OF EXEMPTION TO SERVICEMEN: EMERGENCY LEGISLATION. Until Congress declares a state of war no longer exists, or until the legislature of Iowa repeals exemption, members of United States Military or Naval Forces are not required to have a license to hunt or fish in this state.

October 11, 1945. *Mr. F. T. Schwob, Director, Iowa State Conservation Commission, Des Moines, Iowa:* In reply to your letter of September 11, 1945, which follows:

Section 1794.098 of the Code of Iowa provides, "nor shall any person during the time the United States of America is engaged in war who is a member of the military or naval forces of the United States be required to have a license to hunt or fish in this state." This department interpreted the wording *engaged in war* to mean active warfare, that this engagement ceased at the time the Japanese government signed the document of unconditional surrender, also that such duration would be entirely unrelated to a protracted period of years that might elapse before a formal treaty of peace was signed.

We, therefore, respectfully request your opinion as to whether or not we are still engaged in war under the meaning and understanding of the legislature at the time of the enactment of this legislation. I advise:

Section 1794.098 of the 1939 Code of Iowa, as amended, reads as follows:

"License 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.

"No female resident of the state, except when fishing in state-owned lakes, shall be required to have a fishing license, nor shall a resident of the state under sixteen years of age be required to have a license to fish in the waters of the state, nor shall any person during the time the United States of America is engaged in war who is a member of the military or naval forces of the United States be required to have a license to hunt or fish in this state."

Without question this section of the Code is an exemption or exception statute. It is a well-known rule that exemptions or exceptions in statutes shall be strictly construed and ambiguities shall be determined against the exemption. However, in our opinion, this statute is not ambiguous to that extent and it is not possible to read into it the term "active warfare," in order to now terminate the exemption for service personnel.

How then may we find out whether or not a state of war still exists? In 67 Corpus Juris, page 429, we find the general rule stated as to the period of war in a legal sense. It states as follows:

“War in the legal sense continues until, and terminates at the time of, some formal proclamation of peace by an authority to proclaim it.
* * * * * In the United States the power to establish peace, like that to declare war, rests exclusively with Congress, and the President has no such authority except as has been given him by Congress.”

The statute in question clearly refers to the time the United States of America is engaged in war, and therefore the authority is squarely placed in Congress, the competent body to proclaim the end of the war, or in the President should he receive such power from Congress. This does not mean that a formal declaration of peace is needed, for a properly passed resolution or proclamation of the President that a state of war no longer exists will terminate the war and remove the exemption provided in this statute. However, by the better authority the act of surrender of an enemy is not enough. From all Federal activities it is quite apparent that in both the minds of Congress and the mind of the President it is not desirable at this time to terminate the war by such a resolution or proclamation and that they consider the state of war to still exist.

This does not bind the State of Iowa for an indeterminate period. This method of terminating the exemption is not the only one available, for the State of Iowa can terminate it by action of the Iowa Legislature at its next session. It may repeal that part of Section 1794.098 which became law in Chapter 99 of the 50th General Assembly, and which extends the exemption to members of the military or naval forces of the United States. Should the Legislature of the State of Iowa feel that the Congress of the United States and the President prefer to extend the war period for some time, as is evident at present by all Federal activities, and that this exemption proves detrimental to your department and the State, you may present the matter to the 52nd General Assembly for proper action.

Therefore, until one of these contingencies occurs, members of the military or naval forces of the United States are not required to have a license to hunt or fish in this state.

OLD AGE ASSISTANCE FUNDS: SALE OF SECURITY. State Board of Social Welfare must hold proceeds from liquidation of securities assigned that department until after death of assignor. The proceeds of sale of assigned security must be applied upon indebtedness and not returned to recipient.

October 11, 1945. *Mr. H. C. Beard, Chairman, State Board of Social Welfare, Des Moines, Iowa:* I wish to acknowledge receipt of your recent letter requesting an opinion as follows:

Section 3828.012, Code 1939, as amended provides in part as follows:

“* * *

“No person shall receive old age assistance if he has more than three hundred dollars, or if married and not separated from the spouse, if he

and his spouse have more than four hundred fifty dollars in cash, on deposit in a bank, in postal savings, or if the immediate cash value, as determined by the board and subject to review by the state department, of his holdings of bonds, stocks, mortgages, other securities or investments, except real estate, exceeds three hundred dollars, or if married and not separated from the spouse, if he and his spouse have more than four hundred fifty dollars. At the discretion of the State Department, however, where such immediate sale, for cash, of such securities or investments necessitates an undue financial sacrifice, the applicant, when in immediate need of assistance, shall assign such securities and investments to the state to be held in trust by the state board to reimburse the old age assistance revolving fund for the amount paid from the old age assistance fund and the old age assistance revolving fund in assistance or other benefits in behalf of said applicant. * * * ."

"The State Board of Social Welfare was created and came into being during the latter part of 1934. This was during a bad financial depression which wiped out the assets of a large number of people. Many had to make application for old age assistance who had notes and securities with a large face value but with little or no market value. In order to become eligible, they were permitted to assign such notes and securities to the State Board under the authority of the above statute and receive immediate assistance. Now, with the improvement in financial conditions, many of these notes and securities have sizeable values and are being liquidated by the State Board in accordance with law.

"The State Board felt it was important to try to rehabilitate these old people, restore their self respect and to make good, substantial citizens of them. It felt that the old age assistance act gave the Board considerable discretion in the administration thereof. It felt that if some of this money could be restored to these old people to be used for a nest egg, that it would be decidedly beneficial and help to restore their morale. Therefore, the Board adopted the policy of returning to the recipient the difference between the value of the other personal property the recipient had at the time of the assignment and the statutory limitation of \$300 or \$450 as the case might be, provided that the amount released to them together with the value of personal property they now owned, did not exceed \$300 or \$450 as the case might be. This placed them in the same position as their neighbors who had applied for old age assistance at about the same time and who had had \$300 or \$450 as the case might be, in cash, and were permitted by law to retain it and yet receive old age assistance. The State Board felt that such policy effected equity and justice and made it possible to treat all recipients alike, which was very desirable.

"The State Auditor's office is now questioning the procedure by reason of the provisions in the last sentence in the above quoted portion of Section 3828.012.

"Will you please give us your opinion about this and if we are proceeding wrongly, will you advise us what should be done to correct it?"

In answer thereto, you are advised as follows:

We have given your question careful consideration. We believe that an opinion of this office dated June 24, 1943, addressed to Mrs. Mary Huncke, Chairman of the State Board of Social Welfare, and found in the 1944 bound volume of the Opinions of this office on pages 56, 57 and 58, is determinative thereof.

You will observe that the last sentence of the above quoted portion of Section 3828.012 is set out on page 57 and immediately thereafter in interpreting the same, it is said:

"This, of course, contemplates the sale of those securities and investments by the State Board whenever it can be done advantageously. It takes place in most cases before the death of the assignor. This means that the State Board must hold the proceeds therefrom 'in trust' until after the death of the assignor and until it is definitely ascertained that the complete amount of old age assistance and other benefits are which have been advanced.

"From the plain wording of this portion of the statute, it would seem to indicate that the legislature intended that the proceeds from the sale of such property should be placed in a "trust fund" and held until the contingency above set out happens and then that the revolving fund be reimbursed for all money advanced to the assignor before that time."

It will be noted that this states that the State Board must hold the proceeds until the death of the assignor. This does not provide for the instance where the recipient is cancelled or taken off the rolls prior to death. We believe this opinion should be modified to include this. Therefore, the third sentence of the first paragraph of the above quotation from this opinion is modified to read as follows:

"This means that the State Board must hold the proceeds therefrom in trust "until assistance is terminated by death or otherwise and until it is definitely ascertained that the complete amount of old age assistance and other benefits are which have to be advanced."

This makes no change in the fundamental principles involved and with this modification, the opinion is affirmed.

Since the issuance of this opinion, a legislature has not made no change in the statute as thus interpreted. As was said in *State v. Ind. Foresters*, 226 Ia., 1339, 1345:

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

Therefore, it would appear that the legislature is satisfied with this interpretation.

CITIES: INVESTMENT OF INACTIVE FUNDS BY MUNICIPALITIES. Investment by city in its own bonds of earnings from its water works and held in sinking fund, cannot legally be made.

October 12, 1945. *Hon. C. Fred Porter, State Comptroller, Building:*

We have your letter of October 3, 1945, requesting an official opinion upon the following question:

"Is it legally permissible for a city to invest its inactive surplus funds, which were derived solely from earnings of its waterworks, where an adequate sinking fund has been provided for retirement of revenue bonds outstanding, in its own bonds issued under the provisions of Chapter 308.3 of the Code of Iowa, 1939?"

We assume that the inactive funds to which you refer are being held in the nature of a sinking fund by the Waterworks trustees, and this opinion is predicated upon such assumption.

Section 7420.43 of the Code provides for the investment of inactive funds, and is in the following language, to-wit:

"Investment of sinking fund. The governing council or board who by law are authorized to direct the depositing of funds shall be authorized to direct the treasurer to invest any fund not an active fund needed for current use and which is being accumulated as a sinking fund for a definite purpose, the interest of which is used for the same purpose, in the Certificates provided by section 7420.27, or in United States government bonds, or in local certificates or warrants issued by any municipality or school district within the county, or in municipal bonds which constitute a general liability, and the treasurer when so directed shall so invest such fund."

While this section now appears as a part of Chapter 352.2 of the Code, which chapter is denominated "State Sinking Fund for Public Deposits" an opinion of this department which appears in 1938 A. G. O. at page 209, points out that said section was enacted as a part of House File 42 of the Acts of the 42nd General Assembly, which file dealt directly with the Brookhart-Lovrien law, and that it is therefore generally "applicable to public deposits, and that such public depositors many invest non-active funds not needed for current use, and which are being accumulated as sinking funds for definite purposes", in the securities specified in said section.

Further reference to said section shows that the only kind of municipal bonds in which investment may be made are those which "constitute a general liability" of the municipality.

The bonds for the subject swimming pool were issued under the provisions of Section 308.3 of the 1939 Code relative to "self-liquidating improvements" and therefore do not constitute a general liability of the municipality.

We therefore hold that the proposed investment contemplated by your question can not be legally made.

LEGAL SETTLEMENT: HOSPITALIZATION. In event a patient has legal settlement in a county, that county is liable for support at Oakdale Sanitarium. If no legal settlement in a county can be determined, the liability for support is upon the state.

October 25, 1945. *Mr. Edwin H. Curtis, Executive Secretary, State of Iowa Bonus Board, Local:* This will acknowledge receipt of yours in which you ask for opinion in the following situation:

"Mr. X is a veteran of World War I, and has established his residence within the state and has resided in the state ten months. His wife is a bad tubercular case and needs treatment. Many rulings have been issued that pauper laws do not hold on a veteran in Iowa and they become residents of the state when they have shown good proof that a residence is established. Is the wife of this veteran entitled to care at Oakdale at County expense?"

In reply thereto, I would advise you that relief by way of hospitalization at the state sanitarium at Oakdale is assured solely by virtue of the terms of Chapter 169, Code of 1939. Such hospitalization relief is not dependent upon military status or upon any of the conditions for relief provided for honorably discharged veterans under the terms of Chapter 189.2, Code, 1939. The only facts that condition relief of this character are that the applicant be a bona fide resident of this state, and be otherwise eligible within the terms of Sections 3390 and 3391, Code of 1939, both of which follow:

"3390. An applicant for admission to the sanatorium shall first secure a thorough examination of his condition by a physician licensed to practice medicine in this state, for the purpose of determining whether said applicant is afflicted with pulmonary tuberculosis. Said examining physician shall, as accurately as possible, fill out the blanks furnished for that purpose, and at once mail the same to the superintendent."

"3391. The superintendent, in addition to the record of said examination, may demand of the applicant further showing as to his eligibility for admission. In case of doubt, the superintendent shall personally examine said applicant in case the applicant presents himself at the institution. If the applicant appears to be a bona fide resident of this state and is otherwise eligible for admission, he shall be received at the institution, provided there is room for him."

It would appear therefore, that the wife of the foregoing World War I veteran being a bona fide resident is entitled to admission to the state sanatorium, provided she meets the other requirements for admission.

The expense of treatment therein is likewise not determined by the military status of her husband or by any of the provisions of Chapter 189.2, Code, 1939, including therein liability of the Soldiers' Relief Fund for this expense. The liability for this support at the sanatorium is likewise controlled by Chapter 169, Code of 1939, Section 3399 thereof, as amended by Chapter 127, Par. 1, Acts of the 50th General Assembly, in terms as follows:

"Each county shall be liable to the state for the support in the state sanatorium of all patients having a legal settlement in that county, and the state shall be liable for such support when such patients have no legal settlement in this state, or when such settlement is unknown. The amounts due shall be certified by the superintendent to the state comptroller, who shall collect the same from the counties liable, at the times and in the manner required for the certification and collection of money from counties for the support of insane patients."

According to the foregoing, in the event that the patient has a legal settlement, the County of that settlement is liable for the support at this sanatorium. But, in the event that the patient has no legal settlement in the State or the settlement is unknown, then the liability for the support is in the State. Under the statement made to us, the husband and wife have not acquired a legal settlement in this State although they are bona fide residents. Therefore, in accordance with the foregoing provisions, the support of the wife at the Oakdale sanatorium is a liability of the State and payable according to the terms of Section 3399, as amended, and heretofore exhibited.

SOLDIERS' RELIEF FUND: RELIEF COMMISSION. Cost of equipping an office for Soldiers' Relief should come out of the county general fund. Soldiers' relief fund should be disbursed by Soldiers' Relief Commission. If clerks or administrative assistants have control over Soldiers' Relief Fund they should post bond. Premium for such bond cannot be paid from public funds.

October 25, 1945. *Mr. Edwin H. Curtis, Executive Secretary, Iowa State Bonus Board, Local:* I have yours of the 13th inst., asking for opinion in the following situation:

"I have at hand a request from the Soldiers' Relief Commission of Ida County on the following questions pertaining to their office.

1. Should the cost of equipping the office as well as the administrative expense be charged to and paid for out of the Soldiers' Relief Fund or is the equipment a county project?

2. Should the Soldiers' Relief Funds be handled exclusively by the commissioners and the administrator or clerk of the commission?

And if the funds are kept in the name of the commission in a separate account will the money still come under the Deposit Insurance Law protecting county funds from bank failures? Then should the clerk or secretary be bonded?"

1. In reply to your question No. 1, I would advise you that the cost of equipping an office for the administration of soldiers' relief should be paid out of the County general fund. Authority for this conclusion is found in Section 5130, Subsection 15, Code of 1939, as follows:

"The board of supervisors at any regular meeting shall have power:

* * * * *

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

And further support is found in an opinion of this Department, rendered December 11, 1940, wherein with respect to expense of current office supplies and cost of equipment for administration of poor relief it is said:

"It is our opinion that the expense of current office supplies used by the relief office in administering direct relief is properly classified as an 'expense of supporting the poor' and may be paid out of the poor fund.

Your other question deals with the purchase of equipment for use in the relief office. It is our opinion that the equipment purchased which is of a permanent character and which is subject to transfer from the relief office to any other department in the county, is not an 'expense for supporting the poor' and should be paid from the county general fund."

2. In answer to your second question, I would advise you that under an opinion of this Department rendered January 7, 1937, it was held that the soldiers' relief fund should be disbursed by the Soldiers' Relief Commission. The language of the opinion follows:

"The enactment of Chapter 273, supra, was for the purpose of providing a fund for the relief of those who served in the military or naval forces of the United States, their indigent wives, widows, and minor children of certain age, and to create a commission to determine the

eligibility of applicants, and to disburse the funds raised by taxation for such purpose. The pertinent provisions of Chapter 273, supra, are as follows:

'5386. Control of fund. Said fund shall be expended for the purposes aforesaid by the joint action and control of the board of supervisors and the relief commission hereinafter provided for.'

'5387. Relief commission. Said fund shall be disbursed by the soldiers' relief commission, which shall consist of three persons, all of whom shall be honorably discharged soldiers, sailors, marines or nurses of the United States who served in the military or naval forces of the United States in any war. Said membership shall at all times, as near as possible, be equally divided between the soldiers, sailors, marines and nurses of the civil war, Spanish-American war, and world war.'

In addition, the statute requires that the commission meet annually at the office of the county auditor and at such other times as may be necessary to determine who are entitled to relief, and the probable amount to be expended therefor. After this determination is made, the commission is required to certify to the board of supervisors, together with the list of those determined entitled to relief, the sum to be paid in each case. Upon the filing of this list, it becomes the duty of the county auditor to submit to the township clerks in the county, the names of those, if any, to whom relief has been awarded, and the amount. Section 5392 of Chapter 273, supra, then goes on to provide:

'5392. Disbursements. On the first Monday of each month after the fund is ready for distribution, the auditor shall issue his warrant to the commission for the sums thus awarded, and it shall proceed to disburse the same to the parties named in the list, or disbursements may be made in any other manner the commission may direct.

Receipts will be taken for all payments.

It is clear from the foregoing quoted sections that the disbursement of funds raised by taxation for the purposes contemplated by the legislature in the enactment of said chapter, is to be made under the direct supervision of the soldiers' relief commission. Throughout the statute, the word 'shall' is used, and in the opinion of this department is employed in its mandatory connotation."

Section 5392 therein referred to is now Section 3828.059 of the Code of 1939, and Chapter 124, Acts of the 51st G. A., amending Chapter 189.2 of the 1939 Code, does not have any effect to modify the foregoing holding.

3. In answer to your question with respect to whether the funds, being kept in the name of the Commission in a separate account, will entitle the money so kept to come under the Deposit Insurance Law protecting county funds from bank failure, I advise:

The soldiers' relief fund provided by Chapter 189.2, Section 3828.051 thereof, is a county fund and is entitled to the benefits of Chapter 352.2, known as the State Sinking Fund for Public Deposit, provided the Board of Supervisors has selected the depository for such fund in accordance with the provisions of Section 7420.01 and Section 7420.04, both of which follow:

"The treasurer of state, and of each county, city, town, and school corporation, of 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. The term 'bank' shall embrace any corporation, firm or individual engaged in a general banking business."

"Deposits by the treasurer of state shall be in banks located in this state; by a county officer, in banks located in his county or in an adjoining county within this state; by a city or town treasurer, in banks located in the city or town, but in the event there is no bank in such city or town then in any other bank located in this state which shall be selected as such depository by the city or town council; by a school treasurer or by a school secretary in a bank within this state which shall be selected by such township clerk and approved by the trustees of such township. Provided, that deposits may be made in banks outside of Iowa for the purpose of paying principal and interest on bonded indebtedness of any municipality when such deposit is made not more than ten days before the date such principal or interest becomes due."

It is still a county fund entitled to the Sinking Fund benefit after the Auditor has issued warrant to the commission in accordance with the terms of Section 3828.059 for the money from which to pay benefit allotments. And in view of the fact that members of the Relief Commission are County officers, and, as such, according to the terms of Section 7244, are required to deposit public funds in accordance with the terms of that statute, the fund retains its status as a county fund entitled to the benefit of the State Sinking Fund Act, provided the deposit is made by the Relief Commission in banks located under the terms of Section 7420.04 and made authorized depositories by virtue of Section 7420.10 by the Board of Supervisors.

With respect to the furnishing of a bond by a clerk or administrative assistant to a Soldiers' Relief Commission:

I would advise you that there is no statutory requirement for the furnishing of a bond by such clerks or administrative assistants. If such clerks or administrative assistants have authority from the Commission over the Soldiers Relief Fund, the Commission should, as a matter of protection, require an adequate bond.

Liability to pay the premium of the bond would be a matter of agreement between the Commission and such clerks or administrative assistants. The public funds are not available for the payment of such premium expense.

TAX TITLES AND CERTIFICATES: PUBLIC BIDDER LAW. Where holder of tax sale certificate does not file notice of expiration and right to redeem prior to expiration of ten years from sale, Section 7271, 1939 Code, would be operative and sale would be cancelled. The county or a public corporation does not come within Section 7271 where they are holders of a tax certificate under a scavenger sale.

November 14, 1945. *Honorable C. B. Akers, Auditor of State, Building:*
I am in receipt of yours in which you ask for opinion in the following:

"Section 7271 of the 1939 Code as amended by Chapter 222 of the Acts of the 50th G. A. provides that after ten years have elapsed from the time of any tax sale and no action has been taken to obtain tax deed

by the holder of the certificate, it shall be the duty of the County Auditor and County Treasurer to cancel such sales from the tax sale index and tax sale register. We would very much appreciate your opinion.

1. Where action has been taken to the extent of serving notice of expiration of right to redeem, but where no deed was issued, would the sale be cancelled after elapse of ten years?

2. Where the county has bid in the property under the public bidder statute, does the provisions of Section 7271 operate to cancel the sale the same as where the property is sold to an individual buyer?"

In reply thereto, we would advise you:

1. The question of the action to be taken by the holder of a tax purchase certificate sufficient to except it from the provisions of Section 7271, Code 1939, as amended by Chapter 222, Acts of the 50th G. A., has had the consideration of the Department resulting in the issuance of an Opinion, dated January 13, 1944, appearing in the Report of Attorney General for 1944 at page 130, wherein it was held that the action that will toll this bar statute is limited to action that appears of record in the office of the County Auditor, or the County Treasurer on the authority of that opinion we are advising you that unless this notice of expiration and right to redeem was filed in accordance with the statutes in the office of the County Treasurer prior to the expiration of ten years from the sale, the statute 7271 would be operative and the sale be cancelled.

2. The problem presented by your second question as to whether a purchase under the public bidder statute, also known as the scavenger sale, is within the terms of Section 7271 and its sale cancelled the same as if the holder of a certificate were an individual as opposed to a public corporation, we would advise:

That such foregoing statute 7271 cannot be construed to include within its terms the County as holder of a tax certificate under a scavenger sale. This statute 7271, as amended by Chapter 222, Acts of the 50th G. A., as follows:

"After ten years have elapsed from the time of any tax sale, and no action has been taken by the holder of a certificate to obtain a deed, it shall be the duty of the county auditor and county treasurer to cancel such sales from their tax sale index and tax sale register."

does not expressly include the State, County or other subdivision thereof as holder of a tax certificate, and such public corporations are not generally impliedly bound thereby. The foregoing has the support of 59 Corpus Juris, page 1103, Par. 653, entitled "Statutes" wherein it is said:

"The state and its agencies are not to be considered as within the purview of a statute, however general and comprehensive the language of such act may be, unless an intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication. This general doctrine applies with especial force to statutes by which prerogatives, rights, titles, or interests of the estate would be divested or diminished; or liabilities imposed upon it; but the state may have the benefit of general laws, and the general rule has

been declared not to apply to statutes made for the public good, the advancement of religion and justice, and the prevention of injury and wrong."

The rule was recognized, though not applied, in *State v. City of Des Moines*, 221 Iowa 642, 647, where, in an action by the State to enjoin the City of Des Moines from importing motor vehicle fuel from outside the State for use or resale within the State without first obtaining a distributor's license therefor, and the claim was made that the law did not include within its terms subdivisions of the State, the Court said:

"It appears from the title of this act that the enforcing officers under prior statutes on this subject had been faced with evasions of the law. How this came about does not appear in the record. A comparison of the present law with prior statutes on the same subject reveals a very much more comprehensive plan than that contained in the provisions of former acts relating to this subject. A careful study of the present law discloses the fact that every gallon of motor vehicle fuel received into this state from out the state or produced within the state must be accounted for in the reports required, and is so exhaustive in its provisions that an accountant would be able, from all these reports, to check up and account for the entire output, less shrinkage, within the state, which manifests a plain intent and purpose to include every first receiver of such fuel, whether for use or sale, including the state of Iowa itself, and all governmental subdivisions of the state, as well as all municipalities within the scope or purview of this act, for in no other way could this comprehensive plan to prevent evasion of the tax be made effective. The rule of construction so often quoted and urged by appellant, from the eminent jurist, Judge Story, as set forth in the case of *United States v. Hoar*, Fed. Cas. No. 15,373, 2 Mason, 311, wherein he says:

'Where the government is not expressly or by necessary implication included, it ought to be clear, from the nature of the mischiefs to be redressed, or the language used, that the government itself was in contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different, and often contrary, force to the government itself. It appears to me, therefore, to be a safe rule, founded in the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act.'

is in no sense violated by the construction contended for by appellees and adopted by the trial court, for it is 'clear from the nature of the mischiefs to be redressed,' and 'the language used,' that municipalities were intended to be included within this statute. What is the language used? 'All motor vehicle fuel.' This means every gallon or fraction of a gallon, and the law exempts no one except the United States government and its instrumentalities, and this exception is only a conditional one. The maxim 'expressio unius est exclusio alterius' is applicable; that is, the specific, express inclusion of one of a class of users of motor vehicle fuel within the exception from the tax lends weight to the conclusion that the legislature intended to include within the exception none other, but intended to exclude from the exception all others. The fact that the legislature intended to include municipalities is emphasized further in section 7, relating to the applicants for distributor's license, wherein it is stated that each applicant for distributor's license, *except agencies of the state and municipal corporations in the state or other governmental subdivisions of the state shall file with the treasurer of state a bond' etc.*

And recognition was likewise given to the rule in the case *Umthun v. Day & Zimmerman*, 16 N. W., 2d, 258, (Iowa), where, in a suit by the plaintiff and employee to recover for overtime pay under the Federal Fair Labor Standards Act and the claim was advanced that the Act had no application because the United States was the shipper of certain parts of bombs processed and finished at the Ordnance Plant at Burlington, Iowa, which plant was operated by the defendant under a contract with the Government, the Court said:

"(9) The statement of Justice Story in the Hoar case is by no means a hard and fast rule by which the sovereign is excluded from general terms of a statute: the purpose, subject matter, context, legislative history and executive interpretation are aids to construction which may indicate an intent to bring the sovereign within the scope of the law. *United States v. Cooper Corp.*, 312 U. S. 600, 61 S. Ct. 742, 85 L. Ed. 1071, 1074, 1075, Roberts, J.

Cases in which the doctrine of the Hoar case have been applied are of two classes; (1) Those where the act, if the sovereign were not excluded, would deprive it of a recognized or established prerogative title or interest. A classic example of these cases in *United States v. Hoar* itself, holding the sovereign is exempt from general statutes of limitations. (2) Those where the act would work obvious absurdity if the public or its officers were not held to be impliedly excluded, as, for example, the application of a speed statute to a policeman pursuing a criminal or to a fire department responding to a fire alarm. *Nardone v. United States*, 302 U. S. 379, 58 S. Ct. 275, 82 L. Ed. 314, 317, Roberts, J. Plainly, this case does not fall within either of these classes. The government is not a party to the case. It is not resisting plaintiff's action but on the contrary the Department of Labor has filed an *amicus curiae* brief urging a reversal. Plaintiff was not an employee of the government but of a private corporation.

(10) There is another recognized exception to the rule, if it can be called such, of *United States v. Hoar*. Where a statute is for the public good or to prevent injury and wrong, the sovereign is bound by it although not particularly named therein. *Nardone v. United States*, supra, 302, U. S. 379, 58 S. Ct. 275, 82 L. Ed. 314, 318; *United States v. Herron*, 20 Wall. 251, 22 L. Ed. 275, 276. It would seem that the Act involved here was intended for the public good and to prevent injury and wrong.

It is perhaps worthy of mention that section 203 (d) of the Act specifically excepts from its benefits employees of the United States or political subdivision thereof. It may be assumed that if Congress had intended also to exempt from the statute employees of an independent contractor with the government, such as this defendant, it would have so provided by enlarging the exception. See on this question *State v. City of Des Moines*, 221 Iowa 642, 648, 266 N.W. 41."

And the peculiar prejudice to the County in the event the foregoing statute could operate as a bar against the purchase by a County at a public bidder sale arises out of the nature of the scavenger sale and the title that is acquired by the County thereunder. Purchase by the County at a public bidder sale is a method of collecting the tax. No money is paid, and the transaction is a mere bookkeeping item. (Section 7255.1, Code of 1939). And in acquisition by the County, the County acts as a trustee for all the taxing bodies. To hold, therefore, that this sale to the County is cancelled after elapse of ten years according to the terms of

the statute, would impede the County in the collection of its taxes and affect adversely not only the County, but all taxing bodies by and through the County.

We are, therefore, of the opinion that the provisions of Section 7271 do not operate to cancel a sale to a County under the public bidder act. This Opinion is not to be taken as approving any delay upon the part of the Counties in converting their tax sale certificates secured under the public bidder law into tax titles.

BRIDGE: ACCEPTANCE OF JULIEN-DUBUQUE BRIDGE BY HIGHWAY COMMISSION. Highway Commission may accept the Julien-Dubuque Bridge from Dubuque Bridge Commission without approval of designated local tax levying body.

November 16, 1945. *Iowa State Highway Commission, Ames, Iowa:* This will acknowledge receipt of your request for an opinion on the following question.

A proposal has been received by the Iowa State Highway Commission to enter into an agreement of acceptance of the Julien Dubuque Bridge across the Mississippi River between Iowa and Illinois, as contemplated by Chap. 138, Acts of the 51st General Assembly. Your question is whether or not Sec. "7" of said chapter is applicable to agreements for the acceptance of such a bridge built and operated by the Dubuque Bridge Commission.

The Dubuque Bridge Commission was created by Act of Congress approved July 18, 1939 (Public 189-76th Congress, Ch. 318, 1st Session—S-955), as a body politic and corporate to construct and operate the Julien Dubuque bridge. As such body politic it is a public or quasi-public corporation, similar to municipal and other public corporations from the operations of which no profit is derived.

Without going into detail as to other provisions of the Act of Congress, above referred to, it is sufficient for the purpose of this opinion that it also makes provision for the transfer of said bridge by the bridge commission to an appropriate local agency when its bonded indebtedness is retired.

Sec. 7 of the Iowa act, to which your inquiry is directed, provides in substance that "Before any bridge owned by any *private individual or corporation*" shall be accepted, the proposal and acceptance shall be approved by the designated local tax levying and certifying bodies.

So far as they are pertinent here, other provisions of the act are in substance as follows: Sec. "1" confers authority on the Highway Commission, in its discretion, to accept an offer of such bridge in the name of the State of Iowa, and to enter into a written agreement evidencing such acceptance. Sec. "2" authorizes the Highway Commission to take possession of, operate and maintain any such bridge free of tolls as a part of the primary road system when all outstanding indebtedness

or other obligations against such bridge and approaches thereto have been paid and discharged. Sec. "3" provides that from and after the date of such agreement of acceptance of the bridge the same shall be free from state and local property and income taxes in this state. Sec. "6" of the act provides that after such agreements of acceptance are entered into, the "owner or operator" of any such bridge shall annually file with the Commission a sworn statement of the financial condition of the bridge and approaches, and shall submit its annual budget to the Commission for its approval.

Thus the purpose of the enactment of Chap. 138, Acts of the 51st General Assembly is to hasten the liquidation of indebtedness against interstate bridges which connect primary roads of this and adjoining states over the Missouri and Mississippi Rivers in order that they will be operated as early as possible as free bridges.

The answer to your question involves the interpretation to be placed upon the words "private individual or corporation" as used in Sec. "7". In other words, does this section apply only to a bridge owned by a "private individual" or a "private corporation" or does the "corporation", as therein used, include both "private" and "public corporations".

The courts generally hold that the word "corporation" must be restricted to mean private or ordinary business corporations, and not extended to embrace municipal corporations and bodies politic and corporate.

Emes v. Fowler, 89 N. Y. S. 685, 688; 43 Misc. 603.

Wallace vs. Lawyer, 54 Ind. 501; 23 Am. Rep. 661.

Wilcox vs. City of Idaho Falls, (D. C. Idaho) 23 F., Supp. 626,629.

Kerr vs. City of Louisville, 271 Ky. 335; 111 S. W. (2d) 1046.

Springfield Gas & El. Co. vs. Springfield, 292 Ill. 236; 126 N. E. 739; 18 A. L. R. 929.

Landowners vs. People, 113 Ill. 296, 314.

State vs. Central Power & Lt. Co., 139 Tex. 51, 161 S. W., (2d) 766.

State vs. Executive Council, 207 Iowa 923; 223 N. W. 737, 742; 18 C. J. S. 366.

Furthermore, the use of the word "private", preceding the words "individual or corporation", discloses an evident intent to qualify both of said succeeding words. The qualifying adjective "private" bears no significance whatsoever unless it restricts the word "corporation", since "individual" and "private individual" are indistinguishable and have one and the same meaning. Applying the ordinary rule of construction wherein phrases and sentences are to be construed according to the ordinary rules of grammar it seems clear that the word "private" is a qualification of the word "corporation", by virtue of which Sec. 7 of the act applies only to those cases involving acceptance of a bridge or bridges owned and operated by an individual or private corporation.

We are, therefore, of the opinion that Sec. 7 aforesaid has no application to the acceptance by the Highway Commission of the Julien

Dubuque Bridge, and the approval of designated local taxing bodies is not necessary to the execution of an agreement as contemplated by said Chapter 138 of the 51st G. A.

BANKS: CHANGE OF NAME OF SAVINGS BANK TO STATE BANK.

A bank organized under Chapter 413 of 1939 Code cannot amend its articles and use the word "State" in the name without the use of the word "Saving" being used therein.

December 3, 1945. *Hon. Wayne M. Ropes, Secretary of State, Building:*
Receipt is acknowledged of your communication of November 30, 1945, containing the following request:

This office would like an official opinion as to whether or not a savings bank organized under Chapter 413 of the 1939 Code of Iowa can amend its Articles and use the word "State" in the name without the use of the word "Savings" being used in the name.

Chapter 413 of the Code is denominated "Savings Banks", Chapter 414 is denominated "State Banks", and it is very apparent that under our statutory law a distinction exists between these two classifications. Section 9202 appearing in Chapter 414 is in the following language, to-wit:

"State banks" defined. Associations organized under the general incorporation laws of this state for transacting a banking business, buying or selling exchange, receiving deposits, discounting notes and bills, other than savings banks, shall be designated state banks, and shall have the word "state" incorporated in and made a part of the name of such corporation; and no such corporation shall be authorized to transact business unless the provisions of this code have been complied with.

The quoted section designates the class of banks to be known as "state banks" and requires that the word "state" appear in the name of all banks within that classification. Said section by direct and positive implication also contemplates that no bank organized under the provisions of Chapter 413 of the code shall have the word "state" appearing in the name to the exclusion of the word "savings".

As above suggested under our law the designation "state bank" has a particular significance which we believe is recognized by the public generally as well as by those engaged in the banking business, and to permit the use of the word "state" to the exclusion of the word "savings" in the name of a bank which is in fact a "savings bank" would have the effect of misleading both the public and the banking fraternity as to the true corporate background of the institution in question. Such a situation should, of course, be avoided.

We therefore hold that a savings bank organized pursuant to the provisions of Chapter 413 of the Code should not be permitted to amend its Articles of Incorporation thereby changing its name to include the word "state" to the exclusion of the word "savings".

LEGAL SETTLEMENT: PERSONS DISCHARGED AS "NOT CURED".

A person having legal settlement in one county and being discharged as "not cured" from an institution, keeps legal settlement in first county unless he is declared sane and has intention to establish a new legal settlement.

December 13, 1945. *Board of State Institutions, Building*: In reply to your letter of December 5, 1945, regarding a controversy between Woodbury County and Pottawattamie County as to which county should be liable for the support in the State Hospital for the insane of one Annie Sigal, I will state as follows:

It appears from the information submitted that the patient was originally committed from Pottawattamie County in 1937. She was paroled from the State Hospital at Clarinda, Iowa, in 1939, and discharged as *not cured* in 1942. She then moved to Sioux City with her father although she was over 21 years of age. She has been employed in industries at Sioux City for over two years, and apparently has been providing for herself. She was recently committed to a state insane hospital by Woodbury County, leaving the question of establishing her legal residence to be yet decided.

The question wished to be answered is whether a person found to be insane and, committed to a state institution and later discharged as not cured, may change his residence so as to gain legal settlement in a county other than the one from which he was originally committed.

The county liability for one's care at a state hospital is based upon legal settlement, and is the same as a legal settlement for a poor person under our statutory law. *Scott County vs. Polk County*, 61 Iowa 616. Residence and legal settlement are not anonymous terms, but continuous residence for two years without notice or warning to depart makes the place of residence the place of legal settlement. The mere fact that one is in an asylum in another county does not change his residence during the period of commitment. *Scott County v. Frank C. Townsley*, 174 Iowa 192. In this case there seems to be no question but what the inmate had a residence as well as legal settlement in Pottawattamie County at the time of her original commitment. This residence would not change during the period of her original commitment.

Our courts have consistently held that the establishment of a residence is a matter of intention. This raises the question as to whether or not, after the patient's parole and later discharge from the hospital as not cured, she could have the intention to establish a new residence. This must be based largely upon the question as to whether or not she had regained her sanity, for it is quite apparent that an insane person cannot have the necessary intention to establish a residence. See *Phillips v. City of Boston*, (Mass.) 67 N. E. 250. In the case of *Foy v. Metropolitan Life Insurance Company*, 220 Iowa, at page 632, we find the following statement of the court:

"It has been held by this and many other courts that after an adjudication of insanity such condition is presumed to continue, but if a discharge of the patient from confinement follows later, the presumption changes and there is a new presumption that sanity has returned."

It must, therefore, be clear that while the inmate is on parole, the presumption of insanity remains. Upon full discharge, which is a discharge as cured, the presumption that sanity has returned is also clear. However, where the discharge is a discharge *as not cured*, there is no such presumption of the return of sanity for the contrary is apparent in the discharge. Therefore, it is presumed that insanity continue. Said presumption, however, is rebuttable as stated in *Re Estate of Ost*, 211 1090.

It is, therefore, our opinion that, in the instant case, unless the presumption is overcome, the inmate must be presumed to have remained insane. Being *non compos mentis*, she could not have the intention to establish a new residence for herself, and not being able to establish a new residence, it could not ripen into a legal settlement and her legal settlement would remain in Pottawattamie County.

LEGAL SETTLEMENT: TEMPORARY ABSENCE. A person does not lose legal settlement even though absent from his county for over one year, providing his absence is temporary and he at all times has a present intention to return to his county of legal settlement.

December 20, 1945. *Mr. Howard Brooks, Assistant County Attorney, Des Moines, Iowa:* This will acknowledge receipt of your recent letter wherein you request our opinion on the following question:

Does a family removing from county of legal settlement out of the state for a period of more than one year for the purpose of engaging in war work lose its legal settlement and eligibility for relief under the laws of the State of Iowa?

We state as follows:

This question involves not only war workers but applies as well to those who leave the state for their health, for business or for other reasons. Chapter 189.4 of the 1939 Code is entitled, "Support of the Poor" and provides the laws applicable to this question. Section 3828.089 of Chapter 189.4 of the 1939 Code provides as follows:

"A legal settlement once acquired shall so remain until such person has removed from this state for more than one year or has acquired a legal settlement in some other county or state."

It is apparent that after a legal settlement is once acquired in a county, it shall so remain until (1) a person has removed from this state for more than one year; (2) a person has acquired a legal settlement in some other county; (3) a person has acquired a legal settlement in some other state. In the last two, no question arises.

Iowa's system for providing relief and assistance to the poor and unfortunate is generally founded upon legal settlement in a County, and that County is charged with the payment of necessary expense. In some instances, namely institutional cases where a person has established no legal settlement, the State is required to assume the burden. Counties are given an opportunity to protect themselves and to prevent an undesirable from obtaining legal settlement by the serving of a notice

to depart. In other words, the Legislature did not place the primary burden of caring for the poor, the sick or insane, upon the State at large, but, with some exceptions, placed it upon the County as a unit. Therefore, where at all possible, it is provided that the Counties assume and retain their obligations to those legally residing therein. In the light of this system we must decide just what the Legislature meant by the use of the words in Section 3828.089 "until such person has *removed* from this State for more than one year." Is mere physical absence from the state for over one year sufficient to lose one's legal settlement in the county, or does this refer to a removal of his domicile from the county and state for over a year? It is to be noted that the statute is silent on intention. It cannot be seriously contended that one must remain physically at his domicile to retain it, and there are rather well settled rules as to how one's domicile is determined. It is also clear that one does not acquire either a domicile or legal settlement by mere physical presence. He should not lose them by mere physical absence.

The legislature did not provide that absence alone from the state is sufficient to lose one's legal settlement. "Removal from the state" and absence from the state are not synonymous and we do not believe that they are so used in this statute. The legislature did wish to provide another method of losing one's legal settlement than that of acquiring another, for the reason that the acquiring of another is dependent upon the will of another state. However, the legislature also enacted Section 64 of the 1939 Code of Iowa, which reads as follows:

"Common-law rule of construction. The rule of the common law, statutes in derogation thereof are to be strictly construed, has no application to this code. Its provisions and all proceedings under it shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice."

We are, therefore, of the opinion that mere physical absence is not enough to lose one's settlement but hold that, when one removes his domicile from his county and this state for over one year, he then loses his settlement regardless of his intention to return. This, of course, involves one's intention indirectly at the time of his departure, for his intention to remove his domicile is determined by the surrounding circumstances. One, therefore, intending to retain his domicile in the county of his legal settlement, would not lose his settlement by being absent therefrom for over a year, whether it is while he is engaged in war work or in the recovery of an illness.

Let us consider the court's interpretation in another section of this chapter where there was silence on intention in *obtaining* a legal settlement.

Section 3828.088 was amended in the 45th G. A., Chapter 99, Sec. 2, to provide a method by which a person served with notice to depart could file with the board of supervisors of the concerned county an affidavit stating that such person was no longer a pauper and intended to acquire a settlement in that county. But until that time no mention

was made in this statute of the element of intention in gaining a legal settlement in the state. The statute was silent on this element. Nevertheless, in the case of *County of Cerro Gordo v. County of Wright*, 50 Iowa 440, the court held that *intention was a necessary element* in gaining a legal settlement in a county in this state. This holding has been reaffirmed in the following causes:

In Re Estate of Rowe, 179 Iowa 544 Cass County v. Audubon County, 221 Iowa 1041.

It would, therefore, seem logical that the intention of a person in removing from the state would be a proper element to consider in determining whether he had lost his legal settlement. In *American Jurisprudence*, Vol. 41, Poor and Poor Laws, Par. 24, it is said:

"Temporary absences with the intention of returning do not terminate a settlement. The test is whether the person in question has the animus revertendi. If he departs intending to return, the settlement is not lost."

"When a settlement is once established, the presumption of its continuance follows until a contrary purpose is manifest by an actual removal *with the intention* of remaining permanently away."

41 *American Jurisprudence*, p. 699.

Further examining the meaning of the term "remove", we note *Words & Phrases*, Permanent Edition, Vol. 36, cites the case of *Ware v. Schintz*, 60 N. E. 67, 190 Ill. 189, as holding:

"The word 'removal' contemplates something more. It signifies a permanent absence, or a change of domicile."

Also in 30 N. E. (2d) 46 (Ill.):

"A 'residence' or 'settlement' for poor relief purposes once acquired is not necessarily lost or defeated by a voluntary absence for the purpose of obtaining work."

It has been the constant holding of the Iowa Supreme Court that a necessary element in changing a person's domicile is the intent to make such a change. In interpreting a statute, it is always proper to consider the results of any particular interpretation. Any other interpretation than the one here reached would work considerable hardship upon the families of these war workers, the ill or those called away from the state for business or political reasons. Rights granted in legal settlement statutes are all statutory and are liberally construed. Our system must be considered in its entirety. Thus, when a war worker leaves a county and the state with his family for over a year and returns upon the close of the war plant, or when a person goes to Arizona or Colorado for his health for over a year and, upon recovery, returns, or when a business man leaves for a foreign country to build or install a new business and returns after a year, it is only fair to say that each did not intend to remove permanently from this state or to surrender his legal settlement in the county. To hold otherwise would be to place them in the intended small class dependent upon the state and not the counties for support and aid, as certainly they did not acquire a legal

settlement any place else in the world. It is, therefore, only reasonable to believe that the legislature intended by the use of the word "remove" to include an intention to remove permanently from Iowa.

We wish further to point out that the county would be best able to place the burden on the claimant to establish the fact that he did not intend to abandon his legal settlement in that county. The burden of proof must be placed on the claimant. It is our opinion that when no other showing is made than the removal of a person from this state for more than one year, there is a presumption raised that he intends to remove permanently from this state and, therefore, loses his legal settlement in Iowa. However, it is not more than a presumption and is subject to being rebutted by competent evidence that at the time the person left the state he had no intention to remove permanently from Iowa, but intended at all times to return to the county of his legal settlement. The obvious conclusion is that a person removing from an Iowa county for the purpose of engaging in war work or defense work does not lose his legal settlement even though absent from the county for over a period of one year, providing it is shown that at all times his absence was temporary and that he had at all times a present intention to return to the county of legal settlement.

In view of that fact that there have been other opinions of this office on this subject wherein a contrary conclusion was reached, insofar as they conflict with this opinion, they are hereby withdrawn and overruled.

BASIC SCIENCES: ISSUANCE OF PROFICIENCY CERTIFICATE TO APPLICANTS FROM OTHER STATES. Board of Examiners may waive examination and issue certificate of proficiency to applicant who has "passed" an examination given by Board in other state even though percentage grade is not as high as that required in Iowa.

December 20, 1945. *Mr. Ben H. Peterson, Secretary, Board of Examiners of the Basic Sciences, Cedar Rapids, Iowa:* Receipt of your letter of December 13, 1945, requesting the opinion of this department relative to the matter hereinafter set forth, is acknowledged. Therein you state that the Board of Examiners of the Basic Sciences has pending before it an application for the issuance of a certificate of proficiency in the basic sciences, by waiver of examination, under the provisions of Section 2437.42 of the Code. Proof submitted to you indicates that the applicant has been declared by the board of examiners in the basic sciences of another State to have passed their examination given in all the subjects covered by the code section mentioned above, but that the grade received by the applicant in one or more of those subjects is sixty percent. Your inquiry may be restated as follows:

May the Board of Examiners of the Basic Sciences of this State issue a certificate of proficiency in the Basic Sciences by waiver of examination, to an applicant therefor who has been declared by a board of examiners in the basic sciences, or other board authorized by statute, of another state, to have passed their examination, but who has received as a grade thereon, in one or more of the subjects which he is required to be examined in a grade less than seventy percent?

Section 2437.42 of the 1939 Iowa Code provides:

"The board may, in its discretion, waive the examination and issue a certificate of proficiency in the basic sciences provided for herein and may accept in lieu of examination proof that the applicant has passed before a board of examiners in the basic sciences or by whatsoever name it may be known or before any examining or licensing board in the healing art of any state, territory or other jurisdiction under the United States, or of any foreign country, an examination in anatomy, physiology, chemistry, pathology and hygiene as Comprehensive and as exhaustive as that required under authority of this chapter."

This statute, authorizing the board, in its discretion, to issue a certificate of proficiency in the basic sciences, by waiver of examination, requires as a prerequisite to the exercise of that discretion, proof of the existence of but two facts, to-wit: (1) that the examination in the other state was as comprehensive and as exhaustive as that required with reference to examination in this state; and (2) that the applicant was passed in that examination by the board of that other state.

Unlike Section 2437.38 of the Code, which relates to examinations which are given in this state by your board, and which requires that a grade of not less than seventy percent be earned in each subject covered by that examination, Section 2437.43 is silent as to any such requirement that the passing grade in another state shall be of any certain standard, expressed in terms of percentage. The only standard prescribed is that the applicant shall have been "passed" by the board of that other state. All reference to "grades" is omitted from this statute. Being silent as to any such requirement, it must be presumed that the Legislature intended to and did grant to your board the power to waive examination in any case where the applicant has taken the required examination in another state, and where the applicant has been declared by the board in that other state to have passed that examination, without regard to the particular percentage grade which that board has declared the applicant earned or attained in passing that examination. So far as the grade earned on examination given by the board of another state is concerned you are required only to interest yourself in the question of whether or not the grade was a passing grade or a failing grade according to the standards and declaration of the board of that other state.

This view of it strengthened by the thought that a grade received in an examination is, after all, only a relative indication of proficiency in the subject under examination, dependent upon the scope, extensiveness, comprehensiveness and exhaustiveness of the examination, and upon the standards of grading adopted by the person or agency grading the examination paper. For example, a low percentage grade earned by a person in a difficult examination and under strict standards of grading, may, in fact, be an indication of a higher degree of proficiency and knowledge of the subject under examination than a much higher percentage grade which has been earned on a relatively simple examination that has been graded under liberal grading standards. Therefore, it

must be presumed, when the board of another state sets its standard for determining what percentage grade shall constitute a passing grade in the examination given by it, that such board has taken into consideration the type of examination given by it and the grading standards employed by it in marking or grading such examination.

The plain intent of the Legislature, in enacting Section 2437.38 as part of the Basic Science law, was to make it possible for your board, in its discretion, to give recognition to a person who has taken an examination in the basic sciences in another state and who is there recognized as being proficient in the basic sciences, as evidenced by the declaration of the designated agency of that other state that such person has passed its examination. You are only required, in the exercise of that discretion, to determine that the examination is as comprehensive and exhaustive as the examination provided in this state, and you can accept the declaration of the designated agency of the other state that such person, according to its standards, has passed that examination. In so doing you are carrying out the legislative intent above expressed.

RETIREMENT SYSTEM FOR PUBLIC EMPLOYEES: STATE AND NATIONAL GUARD. Members of the State Guard are classified as public employees and are eligible for retirement benefits providing they are over 21 years of age and meet other requirements of the statute.

December 29, 1945. *Charles H. Grahl, Brig. Gen. AGD, The Adjutant General, Building:* In reply to your request of December 21st for our opinion:

1. As to whether or not members of the State Guard and of the National Guard are included under the provisions of Chapter 91, Laws of the 51st General Assembly, and,

2. As to whether or not those members of said guard under 21 years of age are under the provisions of the act, so as to require them to contribute, we advise as follows:

We agree that, as members of the state military forces, the members may never be able to benefit by participation. However, a close examination of the act seems to indicate that the answer to this problem is determined by the relationship between the guardsmen and the State of Iowa. It is necessary to determine whether or not, under the provisions of this act, state guardsmen have the employer-employee relationship required. Section 20 (b) reads as follows:

“Sec. 20. When used in this act—

(b) The term ‘employment’ means any service performed after December 31, 1945, under an employer employee relationship, under the provisions of this Act, except:

(1) Any service performed in the employ of any employer which has of the effective date of this Act its own retirement plan.

(2) Any service performed in any calendar quarter in which the remuneration for such services does not exceed the sum of fifty dollars (\$50.00), unless there are other calendar year quarters in which such remuneration does exceed the sum of fifty dollars (\$50.00)."

While we find no direct authority classifying state guardsmen as state employees, Section 467.21, Code of 1939, indicates such a relationship. It is also indicated in the official opinion of this office under the date of September 24, 1940. State guardsmen receive their compensation from the state, their relationship is one of voluntary service and they are under a form of workmen's compensation afforded by the state. We are, therefore, of the opinion that they do come within the employer-employee relationship under the provisions of this act. In foreign jurisdictions see *Andrews, et al vs. State*, 90 P. (2d) 995, and *Baker vs. State*, 156 S. E. 917, both holding that national guardsmen while in state service are state employees. It is also our understanding that the relationship of national guardsmen and the state would be the same as state guardsmen until they are inducted into federal service. Of course, most of the members would escape contributions under Sec. 20 (b) (2), as set out above. This section means that unless they receive \$50.00 or over for a quarterly three-month period during the year, they are not included. However, after one such quarter, they are included for the balance of that year and accumulate quarters thereafter for that year. This, we understand, would not occur unless the guard was called into service as they are not paid for their nights of drill.

We understand that this opinion conforms with the ruling of the Iowa Employment Security Commission which has pointed out that, though a member does not remain long in the guard, his earned quarters, providing he is over 21 years of age, are established to his credit. Those earned quarters could be used in accumulating his forty (40) quarters necessary for him to become a fully insured individual, should he be later employed in other departments covered by this act.

In reply to your second question as to whether or not you should withhold the one percent (1%) of the wages of those members who otherwise qualify but are under 21 years of age, we shall answer in the negative. Sec. 20 (f) (1) reads as follows:

"Sec. 20. When used in this act—

(f) The term 'fully insured individual' means any individual with respect to whom it appears to the satisfaction of the Commission that:

(1) He had not less than one quarter of coverage for each two of the quarters elapsing after 1945 and after he was first covered under this Act, or after the quarter in which he attained the age of twenty-one, whichever is later, and up to but excluding the quarter in which he retired after he had attained the age of sixty-five, or died, whichever first occurred, and in no case less than six quarters of coverage, excepting that no employee who has passed his sixtieth birthday prior to January 1, 1946, shall be paid any benefits until he would have been covered for ten full quarters immediately preceding his retirement or death."

This subsection indicates that the quarter after one becomes 21 years of age is the first quarter counted in the requirements to become a fully

insured individual, or to receive the benefits conferred after he attains the age of 65, or dies. While this language is not used in paragraph two of said subsection (f), we believe it is inferred therein as both are a part of subsection (f) of Sec. 20. We further point out that Sec. 20 (c) (2) defines the term "employee" as meaning any individual who is employed as defined in this act. Sec. 20 (b) defines "employment" as follows:

"The term 'employment' means any service performed after December 31, 1945, under an employer employee relationship, under the provisions of this Act. * * *"

While those under 21 years are not specifically mentioned in the exceptions, the reference pointed out in subsection (f) (1) of Sec. 20, indicates they are not "under the provisions of this act." "Under the provisions of this act" we interpret to mean those who are covered under the act as to benefits as well as to the liability to contribute. It would be unfair and could not have been the legislative intent to deny those under 21 years of age the benefits granted to those over 21 years of age and to also obligate them to contribute. As there seems to be no sound reason for the denial, this would amount to unreasonable discrimination. Unreasonable discrimination and unconstitutional interpretations are to be avoided in statutory constructions. Our courts have uniformly so held. Therefore, we are of the opinion that, under the provisions of this act, persons under 21 years of age are not classified as employees; they do not have the employer-employee relationship intended and should not contribute from their wages until the quarter after they become 21 years of age. In other words, this act does not apply to those under 21 years of age and such members need not be considered as employees by the Department in their reports to the Iowa Employment Security Commission.

COUNTY HOSPITAL: PETITION FOR BUILDING: PRIMARY ELECTION. Board of Supervisors should certify petition of a question as to whether or not a county hospital should be erected. Question of erection of a county hospital may be submitted for vote at primary election.

December 31, 1945. *Mr. Ralph M. Kauffman, County Attorney, Maquoketa, Iowa:* This will acknowledge receipt of yours in which you state:

"1. It is necessary that the Petition which must be circulated before the Board of Supervisors of a County may submit to the voters of that County the proposition as to whether a County Hospital should be erected, shall be certified by anyone, and, if such certification is necessary, by whom should the certification be made?"

2. May the proposition as to whether or not a County Hospital should be erected be submitted to the voters of a County at a primary election?"

Insofar as the first problem is concerned, we would advise you that the petition to the Board of Supervisors for the submission of a question

to the electors as to whether a county hospital shall be erected must be certified, and that such certification must be made by the Board of Supervisors whose action is invoked by the terms of the petition.

Section 5348, Code of 1939, which authorizes the establishment of county hospitals upon petition to the Board of Supervisors, contains no provision for certification that such petition is signed by the statutory required 200 or more resident free-holders of the county proposing to erect a county hospital. Absent such provision for certification of the qualification of the petitioners, the rule of law establishing the method for determining such qualification is stated in *Hindman v. Boyd*, 84 Pac., 609, 613, where there was in controversy a petition of more than 1700 qualified voters of the City of Spokane to submit a charter amendment at the next regular municipal election. No provision for certification of the petition was contained in the authorizing statute. The Court there said:

"The statute provides no method for determining the qualification of the petitioners. It must follow, therefore, that it lies with the city council, whose action in the premises is invoked, to determine that question in some reasonable manner, and within a reasonable time. Clearly the statute does not intend that the council shall submit the amendment until the fact exists that the necessary number of qualified voters have petitioned. Some one must determine that fact, and under the statute it must lie with the council to pass upon it in the first instance. It is generally held, under similar statutes, that it is the duty of the body to whom petitions for the submission of questions to the voters are presented to carefully scrutinize, examine, and determine as to the number and qualification of the signers before putting the people to the expense of an election. *Ayres v. Moan* (Neb.) 51 N.W. 830, 15 L.R.A. 501; *La Londe v. Board of Supervisors* (Wis.) 49 N.W. 960; *Dutton v. Village of Hanover*, 42 Ohio St. 215; *State v. Eggleston* (Kan. Sup.) 10 Pac. 3."

In view of the foregoing, the Board of Supervisors being the body to whom the petition is addressed, must determine the qualifications of its signers and so certify.

—2—

In reply to your second problem, we advise you that the question of whether a county hospital shall be erected may be submitted to the voters of your county at a primary election. See Opinion of Attorney General for the year 1938 at page 659.

TAXATION: TREASURER'S CERTIFICATE. A tax must be collected within five years after date of assessment. If taxes are not collected within five years after date of assessment, the treasurer must issue a treasurer's certificate.

January 17, 1946. *Mr. Joseph P. Hand, County Attorney, Emmetsburg, Iowa:* This will acknowledge receipt of yours of the 14th, in which you state:

"In Re: E. J. Foy Estate.

The executrix of the above entitled estate has requested of the County Treasurer, a certificate, under Section 12781.1, showing that all personal taxes due or to become due the county have been fully paid and satisfied. The Treasurer has refused to issue this certificate and his reason therefor and the facts are as follows:

In the probate proceedings, which were commenced in November of 1940, appears an inventory wherein there is listed certain shares of stock and joint bank accounts, \$14,000.00.

The above \$14,000 is the cause of the dispute. It represented the bank account of the decedent and his wife, who is the executrix, and was a joint account. The inventory was filed December 18th, 1940, and in February of 1942 the executrix requested the certificate showing all personal taxes due or to become due paid and the County Treasurer, at that time, refused, stating that this \$14,000 was subject to tax. However, nothing further was done, nor did the County Treasurer go ahead, under Sections 7155 and 7156, and attempt to collect any tax that might be due. Under Section 7155, I am now of the opinion that more than five years have elapsed since the date such assessment should have been made and therefore the Treasurer would be able to collect the tax on this \$14,000, even though he may be able to show that it was on hand January 1, 1940 or January 1, 1941.

The treasurer is going under the presumption that it is the duty of the executrix to show that this money was not on deposit January 1, 1940, or January 1, 1941, and that according to the inventory as filed on December 18th, 1940, there was this amount of money on hand, and therefore it is subject to taxation, until the executrix can show that it was not on deposit at either of such dates."

From the foregoing, it appears without dispute that there are no levied taxes due and to become due which are unpaid, and therefore the fiduciary would be entitled to the County Treasurer's certificate under the provisions of Section 12781.1, Code of 1939, as amended by the 49th G. A., in terms as follows:

"No final report of a fiduciary shall be approved by any court unless there is attached thereto and made a part thereof, the certificate of the county treasurer of a county in which the estate is held by the fiduciary that all personal taxes due and to become due the county in such estate matter have been fully paid and satisfied. No charge shall be made by the county treasurer for the issuance of such certificate."

were it not for the provisions of Section 7155, Code of 1939, with respect to the assessment of taxes upon omitted property, which taxes upon omitted property are within the term "taxes due and to become due"

used in Section 12781.1, Code 1939. (Report of Attorney General for 1940 at page 327). Section 7155, Code of 1939, provides:

"When property subject to taxation is withheld, overlooked, or from any other cause is not listed and assessed, the county treasurer shall, when appraised 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."

While it is the duty of the County Treasurer to collect personal taxes (1942 Report of Attorney General, page 289) and to exercise reasonable diligence in disclosing omitted property to the extent of consulting tax records in the Auditor's Office and estate records in the Clerk's Office, (Report of the Attorney General for 1940, page 327), he must perform the duty within five years from the date at which the assessment should have been made by the person whose obligation it was to list such property, including therein the administrator of any estate. This is in the nature of a statute of non-claim, and unless the demand has been made within the time so limited, the omitted property may not be assessed and the tax levied. Such is the situation disclosed in the foregoing statement. Five years having elapsed from the time when such assessment of \$14,000, claimed to be the subject of taxation, should have been made, the tax cannot be collected.

Therefore, the fiduciary herein is entitled to the Treasurer's certificate provided for in Section 12781.1, Code 1939.

NOMINATION PAPERS: AFFIDAVIT. Affidavits upon nomination papers cannot be sworn to before a county auditor.

January 18, 1946. *Hon. Wayne M. Ropes, Secretary of State, Building:*

Receipt is acknowledged of your communication of January 18, 1946, which is in the following language:

"This office would like an official opinion from your office as to whether the affidavit on nomination papers and the affidavit by candidate required by Section 543 and 544 of the 1939 Code of Iowa may be sworn to before a county auditor in the case of nomination papers which are to be filed in the office of the Secretary of State and also in the case of the affidavits by candidates to be filed in this office."

Your question is limited to such "nomination paper affidavits" and "candidate affidavits" as are to be filed in your office, and this opinion is likewise so limited.

Section 537 of the 1939 Code provides that nomination papers on behalf of a candidate for the office of United States Senator, for an elective state office, for representative in Congress, and for member of the General Assembly, shall be filed in your office. Section 543 provides

for the execution of the affidavit appended to the nomination paper or papers, and section 544 provides the form of affidavit to be executed by the candidate for office.

Chapter 66 of the 1939 Code deals with "administration of oaths". Section 1215 contained in said chapter grants general authority to certain specified officers to administer oaths, but the only county officers designated therein as having such general power are the Clerk of the District Court and the Deputy Clerk of the District Court. Limited authority is granted by section 1216 to all other county officers "to administer oaths and take affirmations in any manner pertaining to the business of their respective office, position or appointment." The county auditor would come within the contemplation of section 1216, and his authority would be specifically limited thereby. Since the affidavits contemplated by your question are those which must be filed in your office, the county auditor would have absolutely nothing to do therewith, and the execution thereof would not "pertain to the business" of his office.

Section 10085 which grants to certain specified officers, including county auditors, the power to acknowledge written instruments authorized or required by law to be acknowledged is not applicable here for the reason that although affidavits are made under oath or affirmation, they are not such instruments as require an acknowledgment.

We therefore hold that affidavits upon such nomination papers as are required by law to be filed in your office, and the candidates' affidavits which must be filed in your office cannot be sworn to before a county auditor.

SIGNATURES: RUBBER STAMPS AS SIGNATURES IN CERTIFYING CLAIMS. Signatures certifying claims may be affixed by stamp or mechanical means as long as instrument used is in possession or control of official and is intended to constitute his signature.

January 21, 1946. *Hon. C. Fred Porter, State Comptroller, Building:*

Receipt is acknowledged of your communication of January 18, 1946, which is in the following language:

Mr. T. B. Nicholson, Supervisor of State Audits for the Honorable C. B. Akers, Auditor of State, has brought up the question of certification of bills to this department for payment. The complaint originated primarily from the Department of Health in which he claimed a rubber stamp is used to place Dr. Bierring's name on the claims as certified.

We have taken the position here that if Dr. Bierring desires the claims certified in that manner, and so instructs the employee in his department to use the rubber stamp, he has that authority; therefore have not questioned the validity of the certifications.

Will you give us your official opinion as to whether or not Dr. Bierring, or the head of any department, has authority to certify claims with a facsimile of his signature by rubber stamp or otherwise.

The question most simply stated is: May Dr. Bierring, as head of the State Department of Health, certify claims from said department to you,

as State Comptroller, by having affixed to said claims a facsimile of his signature impressed by rubber or other mechanical means?

It is clear that the "signature" of Dr. Bierring would give the certificate validity. We must, therefore, inquire as to what constitutes his "signature".

In the case of *Hill vs. United States, C. C. A. (III.)* 288 Fed. 192, it was held that the facsimile signatures of the officers of a Federal Reserve Bank on a circulating note issued by the bank are in law the true and genuine "signatures" of those officers.

In *Loon vs. Wapinitia Irrigation Company*, 243 Pa. 554, 117 Ore. 374, it was held that a printed signature, attached to an interest coupon payable to bearer, is sufficient; "signature including any name, mark, or sign written with intent to authenticate any instrument or writing.

In *Herrick vs. Morrill*, 33 N. W. 849, 37 Minn. 250, it was held that any signature whether written or lithographed, which the party issuing the summons may adopt as his own, will be sufficient.

In *Ardery vs. Smith*, 73 N. E. 840, 33 Ind. App. 94, citing *Hamilton vs. State*, 2 N. E. 299, 103 Ind. 96, it was stated that the word "signature" is defined as "the act of putting down a man's name at the end of an instrument to attest its validity (Bouv. Law Dict. Tit. "signature" and writing, as "words" traced with a pen, or stamped, printed, engraved or made legible by any other device" (Amb. Law Dict. Tit. "writing") and it was held that, an Attorney in Fact being authorized to sign a remonstrance against the issues of a liquor nuisance, it was immaterial that he did so by typewriter.

The following quotation is taken from the case of *Cummings v. Landes*, 140 Iowa 80, where the court was construing the statute requiring that original actions be "signed" by the plaintiff or his attorney":

"Looking at the original meaning of the word (signature), in connection with the usage since the people generally have become able to write their own names, we have no trouble in reaching the conclusion that, as employed in the statute, no more is exacted than that the name of the plaintiff or that of his attorney be attached to the notice by any of the known methods of impressing the name on paper, whether this be in writing, printing, or lithographing, provided it is done with the intention of signing or be adopted in issuing the original notice for service."

The following quotation is taken from the opinion of the Hon. William Wirt, Attorney General of the United States, appearing in 1 Opinions of Attorneys General, at page 673, and involving the signature of the Secretary of the Treasury upon Federal warrants:

"The law requires signing merely as an indication and proof of the parties' assent. It places the Treasury of the United States under guardianship of the Secretary. It requires that no moneys shall be drawn from the treasury without authority. The evidence which it demands of his authority is, that the warrants shall be signed by him; but as to the method of signing, that is left entirely to himself. He may write his name in full, or he may write his initials; or he may print his initials

with pen; that pen may be made of a goose quill, or of metal; and I see no legal objection to its being made in the form of a stamp or copperplate. It is still his act; it flows from his assent and is the evidence of that assent. It is merely directory to the officers who are to act after him . . . to the Comptroller, who is to countersign; the register who is to record; and the treasurer, who is to pay. Being recognized by the secretary himself, and known to the officers who are to act after him, the treasury has all the guards placed over it which the law has provided."

The opinion from which the last quotation is taken goes on to point out that the secretary should keep the stamp or copperplate under his control, but states that it may be applied by another acting under authority granted by the secretary.

In the light of the foregoing authorities we hold that the "signature" of Dr. Bierring on certification of claims may be affixed by stamp or other mechanical means as long as the instrument used is in his general possession and control, is applied by himself or by another with his authority, and is intended by him to constitute his "signature".

CORPORATIONS: RENEWAL FEE. A foreign corporation having a "business situs" or a "commercial situs" within the state and having deposits in banks and accounts receivable outside the state, must include such deposits and accounts receivable as property when renewing their franchise.

January 21, 1946. *Hon. Wayne M. Ropes, Secretary of State, Building:* Receipt is acknowledged of your communication of December 31, 1945, which is in the following language, to-wit:

THE MAYTAG COMPANY, a Delaware corporation, has filed an application for renewal of its permit to transact business in the state of Iowa as a foreign corporation.

They have advised us that they have not included as property within the state of Iowa, bank deposits of the corporations deposited in banks outside of the state of Iowa, and bills and accounts receivable due from customers outside of the state of Iowa. They inform us that the accounts and bank deposits thus excluded total approximately \$2,000,000.00.

THE MAYTAG COMPANY has its principal manufacturing plant and office in the state of Iowa at Newton, although it is a Delaware corporation.

This office would like an official opinion as to whether or not under the provisions of sections 8421 to 8423 inclusive of the 1939 Code of Iowa the corporation should pay a renewal fee on the bank accounts deposited in banks outside of the state of Iowa and on bills receivable due from persons outside of the state of Iowa, or whether such banks accounts and bills receivable should be excluded in determining the fee. We would appreciate an early opinion in regard to this matter, as the application is now pending.

Section 8421 deals with the details of the application which must be filed by a foreign corporation with the Secretary of State incident to the issuance of a permit to do business within this state, and section 8422 provides that the Secretary of State may make independent and further

investigation as to the property owned by such foreign corporation within the state, determine the value thereof and fix the fee to be paid by such company. Section 8423 is the section most vital to your inquiry, and, in so far as material here, provides as follows:

"8423. *Fees.* Before a permit is issued authorizing such corporation to transact business in the state, said corporation shall file with the secretary of state a certified copy of the articles of incorporation, with resolution and statement as previously set forth, and pay a filing fee of twenty-five dollars upon ten thousand dollars or less of money and property of such company actually within the state, and of one dollar for each one thousand dollars of such money or property within this state in excess of ten thousand dollars if said corporation has existence for a period of years."

The question for determination is whether or not deposits in out of state banks, and accounts receivable from customers residing outside the state, are "money or property actually within this state", within the purview of section 8423 quoted above, and to answer this question we must determine the situs or location of said items as applied to said section.

Your communication indicates, and we believe it to be a matter of common knowledge, that the Maytag Company is a foreign corporation organized under the laws of the state of Delaware, but that it has no property there, and does no business there except such as is necessary to maintain its incorporation. Its business is manufacturing, and its main office is at Newton, Iowa. Orders for merchandise are received at Newton, the manufacturing processes are conducted and the finished products of manufacture are dispatched from there. Its principal officers and business managers perform their services for the company in that city. The Newton office is the office in which the business records are kept and the operations of the company are formulated and directed from there. The accounts receivable are payable at Newton and the bank accounts are controlled from that city.

Bank accounts and accounts receivable are classified in the law as intangible personal property (see *Crane Company v. City Council of Des Moines*, 208 Iowa 164,, and *Wheeling Steel Corporation v. Fox*, 298 U. S. 193), and as a general rule the situs of intangible personal property is at the domicile of the owner, and that is true whether the owner be an individual or a corporation. If the general rule were applicable here the situs or location of such property would in this case be within the state of Delaware, which state chartered the corporation. There is, however, an exception to this general rule which has been recognized by the Supreme Court of this state as shown by the following quotation taken from the *Crane* case, supra:

"An exception to this general rule has, however, always been recognized: that, where the property has acquired a business situs in another state, different from the domicile of the owner, this rule moveables follow the person) does not apply; * * * This exception seems to be quite generally recognized in the law of taxation, and it is settled that credits belonging to a non-resident may acquire a business situs so as to be taxable.

"The term 'business situs', while of modern origin, would seem to mean what the words indicate: that is, a situs in a place other than the domicile of the owner, where such owner, through an agent, manager, or the like, is conducting a business out of which credits or open accounts grow and are used as a part of the business of the agency."

and by the Supreme Court of the United States in the *Wheeling* case, supra, where the following appears:

"The corporation established in West Virginia what has aptly been termed a 'commercial domicile'. It maintains its principal business offices at Wheeling, and there keeps its books and accounting records. There its directors hold their meetings, and its officers conduct the affairs of the corporation. * * * The agreed statement shows that 'all moneys are controlled and the expenditures directed by the Wheeling office, and if the immediate expenditure be made elsewhere, such immediate expenditure is made under specific or general direction and control of the Wheeling office'. The so-called 'money in bank' is not cash or physical property of the Corporation but is an indebtedness owing by the bank to the Corporation by virtue of the deposit account. From the Wheeling office proceed the items deposited and there the withdrawals are directed and controlled. In the light of this course of business as shown by the agreed statements of fact, we find no sufficient basis for concluding that the bank accounts thus maintained and controlled were properly attributable to the Corporation at any place other than its general office at Wheeling."

The same reasoning was used by the New York Court in the case of *People ex rel Yellow Pine Company vs. Barker*, 48 N. Y. Sup. 553, where the following language appears:

"It is well settled that the power to tax property of non-residents extends only to such property as is situated within the state exercising the taxing power. * * * But, as to all such property so within the state, the power to tax is ample. The Act of 1855 reaches all sums belonging to foreign corporations invested in any manner in this state. The manner or form of investment is entirely immaterial. The test is: Is the property, in whatever shape it may be, employed in the business of the corporation within this state? Is it something upon which the corporation is doing business in this state? Does it remain for the purposes of the business of the corporation within this state? If it does, whether it is in the shape of a promissory note, or a bank credit, or in any other form, it is substantially invested for the purposes of business as if it were tangible property, such as goods or merchandise of any description. It is entirely true that intangible property, choses in action, and debts as a general rule are regarded by fiction of law as having their situs at the place of residence of a creditor. To them the maxim 'mobilia personam Sequuntur' applies ordinarily; but these things constituting property which are used for the purposes of trade or business in a particular locality, for all purposes of that trade or business have a situs where they are used. A banker engaged in business in the city of New York, but residing in the state of New Jersey, nevertheless has all the assets of his business, whether they consist of credits or of tangible securities, in the city of New York. The statute referred to covers the case of property or sums used in the actual conduct of business within the territory of the state. If promissory notes are physically here, they have a situs here for all the purposes of the business. They are nothing but evidences of indebtedness. Book accounts which merely show the particular status of special assets of a business are records of the then present condition of so much of the sum used or invested in the business as constitutes the items of those accounts. Any other view of such accounts would permit not only of the evasion of taxation, but of the

separation of a going business (which must be considered as an entirety) into component parts, and of taking out some of the assets for one special purpose, although they are retained for all the general purposes of the business. These credits enter into the general business of the corporation transacted in the state of New York."

It is true that the above cited cases deal with property taxes while we are here concerned with what is variously referred to by the courts as a franchise, license or privilege tax imposed upon foreign corporations for the privilege of doing business in a state other than that in which it is chartered, but they are important here because they recognize and approve the exception to the rule as to situs of intangible personality are authority for the proposition that intangibles used in the conduct of the general business of a foreign corporation in the state other than that of its origin acquire a "business situs" or "commercial domicile" in the state where so used.

The New York Court in *People v. Schmer*, 137 N. Y. Sup. 23, in considering the amount of a franchise fee of a foreign corporation chartered in the state of Maine and conducting its business in the state of New York applied to the question of the amount of the franchise fee the same reasoning as set out in the above cases and stated at page 27:

"The business was conducted as an entirety, managed, controlled, and carried on from the New York office, and in our opinion the fact that a large proportion of the claims arising through such business were against nonresidents of the state did not relieve the relator from the imposition of a franchise tax and did not transfer those credits from the state of New York to the domicile of the corporation in the state of Maine."

Following the reasoning of the foregoing cases we conclude that the deposits of the Maytag Company in banks outside the state of Iowa, and accounts receivable from customers located without the state of Iowa, all of which constitute phases of the company's business as conducted at and from Newton, Iowa, have acquired a "business situs" or "commercial domicile" within the state of Iowa, and that as a consequence thereof they constitute, in legal concept "property of such company actually within the state", within the purview of Section 8423 above quoted.

We therefore hold that the bank deposits and accounts receivable referred to in your letter should be included in computing the renewal fee of the Maytag Company.

RETIREMENT SYSTEM: POLICEMEN AND FIREMEN: MILITARY SERVICE. If a member of the police or fire department who had joined the armed forces of the United States returns to the department, he is entitled to same status and efficiency rating as when he left for service and must then be classified as "in service." If a member of police or fire department has over five years service with the department and is physically handicapped while in Armed Forces, he may retire under the benefits provided in Section 6326.08, 1939 Code.

January 23, 1946. Mr. T. E. DeHart, Supervisor, Office of Auditor of State, Building: We acknowledge receipt of your letter of January

7th requesting our opinion upon questions regarding the pension and retirement systems of policemen and firemen in cities and towns, as affected by recent statutes pertaining to the military service of members of such systems. You state as follows:

Suppose that a member of the police or fire department has had more than five years service in the department before entering the armed services and returned and was found not physically fit to resume his duties. Could he then claim an ordinary disability retirement pension from the city as provided by Section 6326.08, paragraph 3 of the 1939 Code? If allowed such retirement would the benefits be computed as of the day he entered service? Also what would be the affect if the council in granting a leave of absence specifically stated in their resolution that any member must return in the same physical condition as he was upon entering the service?

In answering these questions it is necessary for us first to examine certain sections of the Code and Acts of the General Assembly. Section 6326.08 of the 1939 Code relates to benefits under the retirement act for policemen and firemen. Part 1 relates to service retirement benefits, and part 2 the allowance on such service retirement. Part 3 is the ordinary disability retirement benefit and part 4 relates to the allowance on ordinary disability retirement. Part 5 relates to accidental disability benefits, etc. We are particularly interested in parts 3 and 4, which read as follows:

3. "*Ordinary disability retirement benefit.* Upon application of a member in service or of the chief of the police or fire departments, respectively, any member who has had five or more years of membership service shall be retired by the respective board of trustees, not less than thirty and not more than ninety days next following the date of filing such application, on an ordinary disability retirement allowance, provided, that the medical board after a medical examination of such member shall certify that said member is mentally or physically incapacitated for further performance of duty, that such incapacity is likely to be permanent and that such member should be retired.

4. "*Allowance on ordinary disability retirement.* Upon retirement for ordinary disability a member shall receive a service retirement allowance if he has attained the age of sixty, otherwise he shall receive an ordinary disability retirement allowance which shall consist of:

"a. An annuity which shall be the actuarial equivalent of his accumulated contributions at the time of retirement; and

"b. A pension which together with his annuity shall make a total retirement allowance equal to ninety per centum of $1/70$ of his average final compensation multiplied by the number of years of membership service, if such retirement allowance exceeds $1/4$ of his average final compensation, otherwise a pension which together with his annuity shall provide a total retirement allowance equal to $1/4$ of his average final compensation; provided, however, that no such allowance shall exceed ninety per centum of $1/70$ of his average final compensation multiplied by the number of years which would be creditable to him were his service to continue until the attainment of age sixty."

We must also examine Section 467.25 of the Code, as amended by Chapter 73 of the 49th G. A. and which now reads as follows:

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

Let us further examine Chapter 191, Acts of the 50th G. A. which reads as follows:

"AN ACT to amend section six thousand three hundred twenty-six and ten-hundredths (6326.10), code, 1939, to provide for continuation of benefits for members of the policemen's and firemen's retirement system, who are serving in the armed forces of the United States; and to provide for the continuation of contributions for such members by the cities during the period of military service.

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

"Section 1. Section six thousand three hundred twenty-six and ten hundredths (6326.10), Code, 1939, is amended by adding the following:

'Any member who voluntarily or by induction enters the military service and who is serving in any branch of the armed forces of the United States or its allies, shall have the period of such military service included as part of his period of service in the department and shall not be required to continue the contributions required of him under this section during such period of military service, provided that he shall within six months after he has been granted an honorable discharge from such military service, return and resume his duties in the department, and provided further, that such member shall be declared physically capable of resuming such duties upon examination by the medical board.'

"Sec. 2. The cities, including special charter cities, which have a retirement system as provided under this chapter, shall create a fund for the purpose of paying the contributions to this fund of those members who voluntarily or by induction enter the military service or who are serving in the armed forces. Such fund shall be used for the purpose of paying the contributions which are required of the members under this section for a period during which such member is serving in the armed forces and not later than six months after his honorable discharge. Should any member who is physically fit, fail to return to the department within six months after his honorable discharge from the military service, the amount credited to his account in this fund by the city, shall revert back to such city and such member or his representative shall not be entitled to claim any interest in the contribution so made by the city."

A careful reading of parts 3 and 4 of Section 6326.08, as amended, shows clearly that a member in service and who has had five or more years of membership service may be retired upon application by the board of trustees, providing the medical board certifies that said member is mentally or physically incapacitated for further duty, and that such incapacity is likely to be permanent. The amount of the pension generally speaking is an amount equal to $\frac{1}{4}$ of his average final compensation. The important question arising from this section is as to whether or not the member is in service when the application is made.

A close examination of Section 467.25 shows clearly that a member of the police or fire department is entitled, as a matter of law, to a leave of absence for the period of such service in the armed forces of the United States. This being a state law, it cannot be changed or abrogated by any municipal ordinance. This section further provides that the member is also entitled to return without loss of status or efficiency rating at the termination of his service with the armed forces of the United States. It seems clear to us that a municipality has no choice but to place the member back in service upon his return, should he request it. Nothing is said in this section as to the physical or mental capacity of the member, and his capacity in those regards is not a condition precedent to his acceptance back *in service*.

Let us further examine Chapter 191, Acts of the 50th General Assembly. We do not believe that this Act cuts down in any way the rights conferred in Section 467.25. This section merely adds certain rights upon conditions, namely, if the employee returns with an honorable discharge, within six months after his discharge, and passes the physical examination required, the city must then give him credit, on his years of service in the department, for the period he was in the armed forces of the United States and must also pay the contributions which would have been required of him as a member of the police or fire department had he been in the active service of those departments during that period. In other words, this act merely adds certain rights as a gift or bonus if the service man meets certain conditions. The second section simply provides municipalities with the power to use public funds for premium payments when due as provided in Sec. 1. While the language may suggest greater benefits to the veteran, we believe it must be read in connection with Sec. 1 to determine the legislative intent. It does not provide that the member cannot have his position back unless he meets those requirements.

It is, therefore, our opinion that if a member of the police or fire department of a municipality who has joined the armed forces of the United States returns to the department, he is entitled to the same status and efficiency rating as when he left for the service and must then be classified as a member in service; and, if he had over five years service before entering the armed forces and suffers a mental or physical incapacity which the medical board, after a medical examination, finds such as to incapacitate him from further performance of duty and that it is likely to be permanent, he is entitled, upon application to the board of trustees, to retire with the benefits provided in Section 6326.08 of the 1939 Code. His benefits would be figured over the years of membership service and he would not be entitled to credit for the years of service in the armed forces in figuring the amount of his pension. We feel that this conclusion is entirely justified for, if the member had been in good standing and entitled to retire on the date he entered service, that right should not be taken from him because of service to his country in its armed forces.

JURORS: FEES FOR EXCUSED JURORS. A juror appearing and then being excused on the same day is entitled to one day juror's fee and mileage.

January 29, 1946. *Mr. Clark O. Filseth, County Attorney, Davenport, Iowa:* This will acknowledge receipt of yours of the 14th inst., in which you ask for opinion in the following situation:

"Our two local District Court Judges have asked me to write you concerning a matter on which they would like your opinion.

If a citizen selected as a juror appears when ordered to appear and makes an application to be excused from the panel and the Judge sees fit to excuse such juror, is that juror then entitled to a juror's fee for one day's appearance in District Court?

It would seem to me that such juror will be entitled to a day's juror fee as the Statute states that they are entitled to the day's pay for appearance but the Judges' problem enters the picture because of the fact that the juror was excused and they are not sure that a juror appearing and obtaining an excuse comes within the purview of the Statute which provides for one day's pay for their appearance."

In reply thereto, we would advise you that statutory authority for compensation to jurors is found in Section 10846, Code of 1939, as follows:

"Jurors shall receive the following fees:

1. For each day's service or attendance in courts of record, including jurors summoned on special venire, three dollars, and for each mile traveled from his residence to the place of trial, ten cents.
2. For each day's service before a justice of the peace, one dollar.
3. No mileage shall be allowed talesmen or jurors before justices."

Determination of who are jurors within the terms of the foregoing statute will fix the status as jurors of those who are excused or exempt from such service. Examination of the process of selecting jurors is, therefore, pertinent. Petit jurors are selected under the provisions of Chapter 482 of Title XXX, Code 1939. According to that Chapter, the judges of election select the requisite statutory number of persons to serve as grand and petit jurors and return lists thereof of the names so selected to the County Auditor with the return of the election. Such lists, after being certified by the Jury Commissioner, are then deposited with the County Auditor who files and records the same. The lists, so filed, according to Section 10872, Code 1939, shall constitute the grand and petit jury lists for the biennial period commencing the first day of January next after the general election. Five days after such lists are deposited with the County Auditor, ballots are prepared by the Auditor and Clerk of Court upon which the names and places of residence of all persons on the lists shall be written. Thereupon, the ballots, according to Section 10875, are placed in a box which is then sealed by the Auditor and thereafter the petit and grand jury shall be drawn by the ex officio commission of which five days' notice shall be given to other members of the ex officio commission of the time and place of such drawing. At

that point in the process of the selection of petit jurors, the statute, Section 10880, fixes the status of those whose names are upon the lists and whose names are drawn from the box as follows:

"The members of the ex officio jury commission or a majority thereof, shall meet at the time and place fixed and shall draw from the petit jury box the required number of names of persons to serve as petit jurors, and the persons whose names are so drawn shall constitute the petit jurors for the next ensuing term of the court."

These persons are those directed to be summoned by the Sheriff to appear at the Courthouse at 10:00 A. M. on the second day of the Term or at such other time as the Court or Judge may order. On presenting themselves upon that day, they may then claim the exemption from jury service provided by Sections 10843 and 10844, Code of 1939, respectively as follows:

"The following persons are exempt from liability to act as jurors:

1. Persons holding office under the laws of the United States or of this state.
2. Practicing attorneys, physicians, licensed embalmers, registered nurses, chiropractors, osteopaths, veterinarians, registered pharmacists, dentists, and clergymen.
3. Acting professors or teachers of any college, school, or other institution of learning.
4. Persons disabled by bodily infirmity.
5. Persons over sixty-five years of age.
6. Active members of any fire company.
7. Persons conscientiously opposed to acting as a juror because of religious faith."

"Any person may also be excused from serving on a jury when his own interests or those of the public will be materially injured by his attendance, or when the state of his own health, or the death or sickness of a member of his family, requires his absence from court; provided, however, that the court may, in its discretion, excuse any one or more of the jurors for any cause which to the court may seem advisable."

In *Vennett v. Jordan*, Clerk, 111 Iowa 409, the reason for compensating jurors under Section 10846, (then designated as Section 3811, Code 1873), was stated in these words:

"They are to be paid when in actual service, or, if not called in a case, for the time they are in attendance awaiting call." Bearing that reason in mind, and coordinating it with Section 10880 designating the persons summoned as being petit jurors for the term, we are of the opinion that where such persons appear and make application to be excused and are excused by the Court, while such persons may not be in "actual service" as jurors, they are "jurors in attendance awaiting call," and are entitled to the compensation and mileage provided by Section 10846, Code 1939.

TAX EXEMPTIONS: HONORABLE DISCHARGES. An honorably discharged veteran of World War II is entitled to exemption of \$500.00. Honorable Discharge is a formal and final judgment passed by the government upon the military record of any member of Armed Forces.

January 30, 1946. *Mr. John W. Barnes, Director Property Tax Division, Iowa State Tax Commission, Des Moines, Iowa:* This will acknowledge your letter making inquiry as follows:

1. What types of discharge from the armed forces serving in World War Two will entitle the holder thereof to receive veterans' tax exemption provided for in Chapter 194 of the Acts of the Fifty-first General Assembly?

2. Is the term "honorably discharged", as used in the Act, to be construed as including holders of letter forms of discharge, honorable discharges from the Coast Guard and Coast Guard Reserve, honorable discharge given to conscientious objectors and administrative discharges for the convenience of the government?

3. Is an honorable discharged soldier who was inducted following V-J Day and after President Truman's official proclamation, but who was honorably discharged for medical reasons within fifteen days after his induction, entitled to the exemption?

4. Is it the intent of the law that any form of discharge other than dishonorable discharge, implying honorable separation, shall entitle the holder to the benefits of this Act?

In order to answer the foregoing inquiries, we quote from Section four of Chapter 194, Acts of the Fifty-first General Assembly, which section is as follows:

"4. The property, not to exceed five hundred (\$500.00) in taxable value of any honorably discharged soldier, sailor, marine or nurse of the second World War, * * * *".

The object of all interpretations of a statute is to ascertain the intent of the lawmakers. The meaning of words in a statute must be enlarged or restricted according to the object and purpose of the legislation and the verbiage of a statute is secondary to the primary factor of legislative intent.

Disbrow v. Deering Implement Co., et al., 9 N. W. (2d) 378.
Wood Bros. Co. v. Eicher, 231 Iowa 551, 1 N. W. (2d) 655.
State v. City of Des Moines, 221 Iowa 542, 266 N. W. 41.

The statute in question is specific in its terms relative to the amount of exemption and persons entitled to receive same: therefore—the only inquiry is as to the meaning of the term "honorably discharged soldier, sailor, marine or nurse". In *Zearing v. Johnson*, 52 Pacific (2d) 1019, 10 California Appeals (2d) 654, we find the following definition:

"Honorable discharge from the Army is a formal and final judgment passed by the government upon the military record of any member of its armed forces and a declaration that such person has left the service in a status of honor".

This same definition was adopted and followed in the case of *Lamb v. Kroeger*, 233 Iowa 730, 8 N. W. (2d) 405, and therein the Court cited the case of *United States v. Kelly*, 15 Wal. 34, 21 L. Ed. 106, wherein it was

held that an "honorable discharge" is a formal and final judgment passed by the government upon the military record of a member of the armed forces and a declaration that such person has left the Service in a status of honor. The definition is more clearly stated in 36 American Jurisprudence, Section 36, page 208, which is as follows:

"An honorable discharge of a soldier at the end of his service is a formal and final judgment passed by the government upon the entire military record of the soldier and an authoritative declaration by it that he has left the service in a status of honor".

If, as we have herein indicated, the term "honorably discharged" is to be based upon an authoritative declaration by the United States government that a holder of such instrument has left the Service in a status of honor, then we are of necessity compelled to refer specifically to such declarations in order that a uniform rule may be adopted throughout the state. The United States government has adopted certain types of discharge which are deemed "honorable" and it is our conclusion that anyone who holds one of the following enumerated discharges, and has otherwise qualified under the law, is entitled to the exemption. The following enumerated discharges are recognized by the government as being honorable and it is our opinion that such discharges are within the intent and meaning of the Act. The following forms are to be accepted as indicating that a person has been honorably discharged:

The Army issues a white honorable discharge which is numbered WD, AGO Form No. 53-55, and a white certificate of service which is denominated WD, AGO Form No. 53-280. The Navy issues a white honorable discharge Form NavPers 660 and also a white discharge under honorable conditions Form NavPers 661. The Coast Guard issues a white honorable discharge Form NavCG 2510 and also a white certificate of discharge under honorable conditions Form NavCG 2510 A. The Marine Corps issues a white honorable discharge Form Nav MC (70) PD and also a white discharge under honorable condition: Form NavMC 74 PD.

All of the above enumerated forms of discharge which are designated honorable discharge, certificate of service, discharge under honorable conditions or certificate of discharge under honorable conditions are honorable discharges within the meaning of Chapter 194, Acts of the Fifty-First General Assembly.

One of the questions propounded, and one which we deem needs a specific answer, was as to the status of a member of the Coast Guard. The reason for the inquiry was because of the fact that members of the Coast Guard are a part of the Treasury Department in peace time and a part of the Navy in time of war.

The Coast Guard became a part of the United States Navy on November 1, 1941, and was returned to the Treasury Department on January 1, 1946. It is quite obvious that one who served with the Coast Guard while it was attached to the United States Navy should not be excluded from the benefits of the Act and, therefore, we state specifically that anyone who served with the Coast Guard while it was attached to the

United States Navy during the period from November 1, 1941 to January 1, 1946, and who receives one of the discharges herein enumerated, either before the Coast Guard was returned to the Treasury Department or after its return to the Treasury Department is entitled to the benefits of this statute because of service in the Navy during a time when it was attached to the Coast Guard.

In view of the fact that we have set out specifically the types of discharge which will be accepted as evidence that a soldier, sailor, marine or nurse has been honorably discharged under the provisions of the Act, and in order to avoid any misunderstanding, we now set out the following types of discharge as *not* acceptable and *not* within the provisions of the Act:

The blue Army discharge (WD, AGO Form No. 53-56), the yellow Army discharge (dishonorable) WD, AGO Form No. 53-57, the Navy yellow undesirable discharge Form No. NavPers 662, the yellow bad conduct discharge Form NavPers 662A, the yellow dishonorable discharge Form NavPers 662B, the Coast Guard yellow undesirable discharge Form NavCG 2510B, the yellow bad conduct discharge Form NavCG 2510C, the yellow dishonorable discharge Form NavCG 2510 D, the Marine Corps yellow undesirable discharge Form NavMC 75 PD, the yellow bad conduct discharge Form NavMC 76 PD, the yellow dishonorable discharge Form NavMC 77 PD.

It is the opinion of the writer that it is unnecessary to answer the questions in paragraphs three (3) and four (4) of your inquiry inasmuch as any holder of one of the forms of discharge set out in this opinion as acceptable, regardless of the length of time of his or her service or the date of his or her induction, would be entitled to the benefits of the Act.

You are further advised that this opinion is limited to the types of discharge specifically set out therein and is not to be interpreted as being an opinion which purports to pass upon any other types of discharge other than those which are herein specifically set out and referred to.

RETRENCHMENT AND REFORM COMMITTEE: CENTENNIAL EXPENSES. Committee on Retrenchment and Reform may allocate additional funds to the Centennial Committee to pay for stationery, postage, printing, clerks hire, and other miscellaneous expense.

February 11, 1946. *Hon. Irving D. Long, Chairman, Retrenchment and Reform Committee, Manchester, Iowa:* You have asked us for the opinion of this department upon the following question:

Can the Committee on Retrenchment and Reform allot funds from the contingent fund created by section 2, Chapter 8, 51st G.A., to the Centennial Committee appointed by the Governor, for expenses of the committee and expenses of celebration?

The 50th General Assembly by Chapter 310 of the Acts thereof authorized the Governor to appoint a committee of fifteen persons for the

purpose of considering and preparing plans for a celebration of the Centennial of the Iowa statehood during the year 1946, and appropriated the sum of \$500.00 for each year of the biennium July 1, 1943, to July 1, 1945, to be used by said committee "for stationery, postage, printing and clerk hire, and other necessary expenses."

The 51st General Assembly by Chapter 258 of the Acts thereof extended to January 1, 1947, the time for performance of Chapter 310, Acts of the 50th General Assembly, and provided that the appropriation as made for the use of said Centennial Committee by the 50th General Assembly be made available for the purpose of performing and carrying out the unperformed provisions of said Chapter 310. The 51st General Assembly did not in any way enlarge or increase the powers or duties of the Committee authorized by the 50th General Assembly, nor did it provide any funds for its use in addition to those granted by the prior assembly - - - it merely authorized the continued use thereof.

A reading of the chapters above referred to clearly indicates that the legislature intended to authorize only a limited phase of activity in so far as the use of state funds was concerned. While it expected the Committee to make plans and suggest programs for the celebration it did not intend that state funds be used in the actual financing and staging of a celebration or celebrations. Since the financing and staging of such a celebration or celebrations was clearly not within the intendment of the legislature, and since no appropriation was made for said purpose your committee would be violating the provisions of section 2, Chapter 8 of the Acts of the 51st General Assembly if it now allocated funds for said purpose. Funds were, however, originally allocated for the purpose of paying obligations incurred by said committee for stationery, postage, printing, clerk hire, and other miscellaneous expenses, and if additional funds are needed for said designated purpose your committee has the power to make an allocation therefor.

We therefore hold in response to the above question that your committee does not have the right or power to allocate funds for the purpose of paying the expenses of a Centennial celebration or celebrations, but that it does have authority to allocate to the centennial committee such additional funds, if any, as are needed to pay for its stationery, postage, printing, clerk hire, and other miscellaneous expenses.

SCHOOLS: TRANSPORTATION. A school bus owned by a school district may not haul a teacher or other workers with or without compensation. Where parent transports his children to a public school, he may draw pay for such transportation. No pay can be drawn from a public fund for transportation to a private school. There is no statutory authority allowing a public school bus to transport pupils to and from a private school.

February 11, 1946. *Miss Jessie M. Parker, Supt. of Public Instruction, Building:* I have yours of the 24th inst., in which you state and ask for opinion in the following situation:

"Chapter 133, Acts of the 51st G. A., provides for transportation of children to and from public schools in certain circumstances.

The department of public instruction is asked to determine the extent to which school transportation can be provided at public expense in each of the following instances:

1. Where a school district owns its transportation equipment and operates it at public expense:

a. Can its school bus, while transporting pupils to and from school, also haul, either for or without compensation, a teacher to and from her rural school?

(1) Can it haul other persons to and from their work under like conditions?

2. Where schools are closed and a contract is made with a parent to transport his children to a public school, may this parent take a part of his children to the public school and the remainder of them to a private school and draw pay from public funds either from the public school district or the state reimbursement fund?

3. Where school districts and private schools both operate school busses in the same school areas, may they arrange for an even exchange of transportation facilities to accommodate children living on their respective routes to avoid duplication of transportation:

a. Free of charge for equal numbers?

b. For compensation at an agreed figure to be paid from their respective funds?

4. Where a private school bus picks up children along its route and hauls them to the *public* school, can such private school be reimbursed from public funds derived from any source for such service?

5. Is there any way in which a bus owned, leased or operated by a public school district can legally pick up and transport children to and from a private school?

What are the limits of state reimbursement, if any, in each of the above cases?"

It is well to observe the general aspects of the foregoing Act leading to a conclusion of the intention of the Legislature in its enactment. It is an appropriation act providing for reimbursement by the State to school districts for their pupil transportation costs. The Title of the Act confirms this statement: It states:

"AN ACT to provide for reimbursement by the state of Iowa to school districts of pupil transportation costs, providing the manner of computing the amount of reimbursement and making an appropriation for said reimbursements."

And, according to Section 1 of the Act, every school district required by law to furnish free transportation is entitled to be reimbursed by the State for such transportation costs in the amount and manner prescribed in the Act. Such Section 1 is this:

"Every school district required by law to furnish free transportation to pupils shall be reimbursed by the state for transportation costs incurred in the amount and manner as provided in this act."

Following such provision, the several regulatory provisions concerning the amount and the manner and by whom the costs shall be computed are set forth. After such designation, the administration of the pro-

visions of the act is vested in the State Department of Public Instruction, County Boards of Education and the local School Boards, and the powers and duties (Section 7)

“Necessary to assure the state that its transportation moneys will be spent with the best results will be shared by the state department of public instruction, county boards of education and boards of education of the local school districts,” are imposed upon these administrative bodies. Differentiation of these powers and duties among these three administrative bodies is contained in Sections 8, 9 and 10 of the foregoing act, in terms as follows:

“Sec. 8. The powers and duties of the state department shall be to:

- (1) Exercise general supervision over the school transportation system in the state.
- (2) Review and approve bus routes which, when established, are located in more than one county.
- (3) Establish uniform standards for locating and operating bus routes and for the protection of the health and safety of pupils transported.
- (4) Issue temporary certificates for operation of school busses which do not conform to the established requirements of the department, provided that such busses can be operated with safety, and provided further that no such certificate shall be issued for a period in excess of one year and may not be renewed.
- (5) Aid in the enforcement of the motor vehicle laws relating to the transportation of school children.”

“Sec. 9. The powers and duties of the respective county boards of education shall be to:

- (1) Enforce all laws and all rules and regulations of the state department of public instruction relating to transportation.
- (2) Approve all bus routes of school districts, within the county, except bus routes in city, town or village independent districts and consolidated school districts, and review and approve arrangements between school districts for transportation from one district to another district within the county.”

“Sec. 10. The powers and duties of the local school board shall be to:

- (1) Provide transportation for each pupil who attends public school, and who is entitled to transportation under the laws of this state.
- (2) Establish, maintain and operate bus routes for the transportation of pupils so as to provide for the economical and efficient operation thereof without duplication of facilities, and to properly safeguard the health and safety of the pupils transported.
- (3) Purchase or lease busses and other transportation facilities, and maintain same, and to enter into contracts for transportation subject to any provisions of law affecting same.
- (4) Employ such drivers and other employees as may be necessary and prescribe their qualifications and adopt rules for their conduct.
- (5) Exercise any and all powers and duties relating to transportation of pupils enjoined upon them by law.”

It will be noted from examination of the foregoing, that the actual power to provide the transportation is conferred only upon the local school boards. And in that respect, Section 10, Sub-section (1) thereof provides the duty and power upon such local school boards in terms as follows:

“(1) Provide transportation for each pupil who attends public school, and who is entitled to transportation under the laws of this state.”

Significance attaches to the statement that the duties imposed to provide transportation “for each pupil who attends *public school*. “*Public school*” has a statutory meaning. It was defined by the 40th General Assembly, Extra Session, under Chapter 60 of the Unpublished Laws thereof, and converted into Section 4251, Code of 1939, in words as follows:

“The expression ‘public school’ means any school maintained in whole or in part by taxation; the expression ‘private school,’ means any other school.”

Having so determined the persons for whom transportation should be provided, and the clear and explicit manner by which such persons are defined, it is pertinent to examine the strictness with which such directions of the statute shall be complied. We have precedent for such guidance in *Schmidt v. Blair*, 203 Iowa 1016, where the plaintiff taxpayers were successful in enjoining the directors of a consolidated school district from making certain expenditures arising out of the unwarranted use of school busses and unwarranted expenditures of school funds for such purpose, and where it appeared that the busses had been used with the approval and direction of the board for various miscellaneous purposes quite distinct from those specified in the statute, and were likewise used for the transportation of persons other than those described in the statute. Addressing itself to the question of whether the school board had authority to furnish transportation to distant places for such purposes and to apply the funds of the school district to that purpose, the Court said:

“The question before us is not whether the defendant-board is properly exercising its statutory discretion, but whether it is exceeding its statutory power. The question of discretion is not subject to judicial control, but the question of statutory power is subject to judicial control. *Ries v. Hemmer*, 127 Iowa 408.

Indeed, the jurisdiction of the courts necessarily attaches to all cases where public officials are charged with the expenditure of public funds in excess of their statutory power. In *Perkins v. Board of Directors*, 56 Iowa 476, we said:

“The courts of the state are arbiters of all questions involving the construction of the statutes conferring authority upon officers and jurisdiction upon special tribunals. It was certainly never the intention of the legislature to confer upon school boards, superintendents of schools, or other officers discharging quasi judicial functions, exclusive authority to decide questions pertaining to their jurisdiction and the extent of their power. All such questions may be determined by the courts of the state. Hence, when the rights of a citizen are involved in the exercise of authority by a school officer, the courts may determine whether such authority was lawfully exercised.”

The expenditure charged in this case was substantial. The distances from the school district to the various points of transportation varied from 7 miles to 40.

Prior to the enactment of the sections above set forth, there was no statutory power in any board of directors to provide transportation at public expense for school children for any purpose. If, prior to such enactment, an exercise of such power had been attempted, it could without doubt have been enjoined. Does the fact that the foregoing statute confers the power defined therein, open the door of power any wider than the terms of the statute itself? To our minds, the answer is quite self-evident. Section 4179, Code of 1924, provides:

"The board of every consolidated school corporation shall provide suitable transportation to and from school for every child of school age living within said corporation and more than a mile from such school."

Section 4180, Code of 1924, provides:

"The board shall designate the routes to be traveled by each conveyance in transporting children to and from school."

Section 4182, Code 1924, provides:

"The school board of any school corporation maintaining a consolidated school shall contract with as many suitable persons as it deems necessary for the transportation of children of school age to and from school. Such contract shall be in writing and shall state the route, the length of time contracted for, the compensation to be allowed per week of five school days, or per month of four school weeks."

The clear effect of these provisions is to limit the duty and power of the board to the transportation of children living more than one mile from the schoolhouse "to and from school;" and this must be done over routes to be designated by the school board. The contract for such transportation is to be in writing, and is to be specific, and is to be confined to five days in the week.

It is common knowledge that the plan of organizing a consolidated school district extends its territory so as to include remote areas, and thereby imposes corresponding tax burdens upon resident taxpayers who are too remote from the schoolhouse to get its ordinary benefits. The purpose of the statute here under consideration was to equalize or to compensate the disadvantage thus resulting to the remote taxpayer, and to bring him within the benefits of the public enterprise by providing transportation for the children residing in the remote areas. No power is conferred to provide transportation for school children residing within one mile of the schoolhouse. The burden assumed is confined strictly to the transportation "to and from school" of children residing more than one mile distant. No discretion is conferred upon the board to expand this delegation of power. The power actually conferred is extraordinary, from any point of view. It has been carefully hedged about, so as to forbid, rather than to invite, expansion. The transportation complained of involves, necessarily and actually, a direct and substantial expenditure of public funds.

In our judgment, the expenditure under complaint was unwarranted, under the statute, and the district court properly decreed the injunction.

Its decree is, accordingly,—*Affirmed.*"

Subsequent to this holding, and in conformity with the principles therein enacted, the 47th General Assembly by Chapter 120 enacted the following: (now designated as Section 4179.1, Code of 1939)

"Boards in their discretion may permit busses owned by the school district for the purpose of transporting pupils to and from school to be used to transport pupils participating in extra curricular activities sponsored by the school to and from such extra curricular activities, when accompanied by a member of the faculty of said school, and when such activities are made a part of the regular school program by the board."

The plain intent of the Legislature to provide reimbursement for transportation costs to public schools is evidenced by the language of the Act and the imposition of this administration upon officials and bodies who control and administer the public school systems. And to secure the strict compliance with the terms of the Act by such public officials and bodies, the Legislature has provided the following forfeiture provision, being Section 15 of said Chapter, as follows:

"The failure of any local district to comply with the provisions of this act or any other laws relating to the transportation of pupils, or any rules or regulations made by the state department of public instruction under this act or the final decisions of the county board of education, or the final decisions of the state department of public instruction shall cause such district to forfeit any rights to reimbursement for any transportation costs incurred during the period such failure to comply existed."

The foregoing guides us to answer the questions propounded in the following manner:

1. A school bus owned by a school district may not while transporting pupils to and from school, haul a teacher to and from her rural school, or any one else to and from their work, either with or without compensation for such transportation.

2. Where school is closed and contract is made with the parent to transport his children to a public school, such parent may take a part of his children to a public school and others to a private school, and may draw pay from the public funds for the transportation costs of transporting his children to the public school. He may not be reimbursed for the transportation cost of such children as are transported to the private school.

3. Where public school districts and private schools both operate school busses in the same school area, the public school district is without authority to arrange for an even exchange of transportation facilities.

4. Private schools operating busses and picking up children along their routes and hauling them to a public school may not be compensated for such transportation, unless special contract is made prior to undertaking such transportation and then only when it is more economical to make such special provision than to provide the transportation by regular bus routes. This shall not be construed to prohibit the making of special appropriate contracts for the transportation of physically or mentally handicapped children.

5. There is no statutory authority by which a bus owned, leased or operated by a school district can legally transport children to and from a private school.

ELECTIONS: WITHDRAWAL OF NAME FROM BALLOT: VACANCY. If withdrawal is made too late, the party may write in, by sticker or otherwise, a name and secure 5% of vote cast for governor in last general election. Political parties cannot fill a vacancy before the primary election.

February 21, 1946. *Mr. H. K. Roggensack, County Attorney, Elkader, Iowa:* I have your letter addressed to the office of the Attorney General under date of February 18th, asking the following questions:

"I have been asked to secure your opinion on the following proposition. A candidate files his nomination papers to run for office and secures the proper number of signatures thereon. He then withdraws before the primary election. Could a political party by means of a convention fill the vacancy created? If so, must they do so before the primary election or may they do so afterwards? Would it make any difference if the withdrawal occurred before the ballots are printed?"

To qualify as a candidate for nomination in a primary and have one's name printed on the ballot, one must file nomination papers and an affidavit, as provided in Chapter 36 of the 1939 Code of Iowa, and specifically sections 537 and 544. One who files his nomination papers may not withdraw them thereafter. Section 542 is as follows:

"Withdrawals and additions not allowed. A nomination paper, when filed, shall not be withdrawn nor added to, nor any signature thereon revoked."

We have held that this section merely relates to the nomination papers themselves and not to the affidavit. We have also held that a candidate may withdraw his affidavit up to and including the last day for filing. This forfeits his right to have his name on the ballot and is the only way provided in our law that he may withdraw prior to the primary election. See O. A. G., 1926, page 346.

If he withdraws his affidavit before the final filing date, the party may then secure someone else to obtain the nomination by filing nomination papers and an affidavit; or, if this is done too late, the party must write in by sticker or otherwise a name and secure for that person five percent of the votes cast for governor at the last general election in that subdivision, as provided by sections 594 and 625 as amended, which are as follows:

"594. 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.

"625. 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 ($\frac{1}{2}$) of the number of votes required for nomination by section five hundred ninety-four (594), except nominations to fill vacancies in office when such vacancies occurred too late for the filing of nomination papers."

You are, of course, acquainted with the fact that if no one receives the necessary five percent, the party has and can have no candidate in the coming election.

Therefore, the political party concerned may not fill a vacancy before the primary election. It must secure a candidate before the final filing date by having him file nomination papers and an affidavit before that date or reserve the right to choose a candidate after the primary election by seeing that some person receives the required number of votes as above set out by writing or by sticker. It follows that the printing date of the ballot has no bearing on the rights of the candidate or the party as far as the withdrawal or the filling of vacancies are concerned, and it also follows that after the statutory date of filing, a candidate may not withdraw until after the primary election.

TAX EXEMPTION: BOTH HUSBAND AND WIFE VETERANS.

Where husband and wife are both honorably discharged veterans, only one may claim exemption if property is owned by only one. Where husband and wife are both honorably discharged veterans and own property jointly, each may claim his exemption.

February 21, 1946. *Mr. Blythe C. Conn, County Attorney, Burlington, Iowa:* This will acknowledge receipt of yours of the 23rd ult., in which you ask for opinion on the following situation:

"Under date of May 24, 1945, your office returned an opinion in response to a request from me of May 9th, with reference to tax exemptions allowed to soldiers, sailors, marines, or nurses, in which you held that this exemption would be construed to include the Womens' branches of the Service.

A new question seems to arise with respect to this exemption to which I do not find any answer, and on which I should like an opinion. The question presented is this: Where both husband and wife are, or have been members of the armed forces, within the meaning of the statutes, are they both entitled to claim such an exemption on property owned by one, or the other, or both of them?

Presumably the availability of this exemption would depend upon the status of the ownership, whether joint or individual, although Section 6946 as amended, would seem to indicate that the exemption of a service man, or service woman, is available to the spouse, if they are residing together and also available to the widow. I should like therefore a clarification of this question with respect to the application of this exemption to property held jointly or severally by the husband and wife. The variations on this question seem to be:

1. If the property is held exclusively by the husband or wife, and both have been in service, may both husband and wife claim exemption with respect to this property?
2. If the property is held jointly by husband and wife, and both have been in service, may both parties claim the exemption with respect to that property?

If both husband and wife have been in service, must each party own property independently of the other in order to claim the exemption?"

In reply thereto, I would advise you as follows:

This Department has held that women are soldiers, sailors, marines or nurses within the terms of the exemption statute, Section 6946 of the or nurses within the terms of the tax exemption statute, Section 6946 of the 1939 Code of Iowa, as amended by Chapter 194, Acts of the 51st General

Assembly. (See opinion of Attorney General of date May 24, 1945). And ownership upon which to base a claim for exemption may mean fee title owner, equitable owner or beneficial owner. (See Opinion of Attorney General of date February 21, 1946, and Trustees of Iowa College v. Baillee, 17 N. W. 2d., 143). Possession is a most important element of such ownership. (See Opinion of Attorney General of date February 21, 1946; Annotations, 156 A. L. R., 1303). Ownership of property of either character will qualify such owner to be entitled to the exemption if other conditions provided by the statute are complied with. Assuming that ownership of a character justifying exemption is present, we answer your problems as follows:

1. If the property is held exclusively by the husband or wife and both have been in Service and honorably discharged, the husband or wife may claim the exemption provided by Section 6946, as amended by the 51st G. A. in his or her property which he or she owns. Both may not claim in property owned by one by virtue of the provisions of Section 6946, Code 1939, as amended.

2. If property is held jointly by the husband and wife and both are honorably discharged soldiers and otherwise comply with the provisions of the statute, both parties may claim their individual exemptions in such jointly owned property whether the character of ownership be that of joint tenants who hold by unity of title and possession, (See 14 Amer. Juris., Title "CO-TENANTS", Par. 7) or tenants in common who own separate and individual interests. But either, even if honorably discharged, may not claim his or her exemption in property held in joint tenancy unless such husband and wife are the joint tenants. They do not own separate and distinct interests in such property.

3. If both husband and wife have been in service and honorably discharged and otherwise comply with provisions conditioning bestowal of the benefits by Section 6946, each must own property independently of the other in order to claim the exemption. However, the wife, in the event she has not been in Service and does not have an honorable discharge, may claim the exemption of the husband, who is an honorably discharged soldier, in property that she owns, in the event the husband does not make the claim provided by Section 6946, Code 1939, as amended.

TAX EXEMPTION: LEGAL AND BENEFICIAL TITLES. . In order to claim exemption on property, person submitting the claim must have the equitable or beneficial interest as well as legal title. A remainderman without a beneficial interest cannot claim the exemption.

February 21, 1946. *Honorable C. B. Akers, Auditor of State, Building:* This will acknowledge receipt of yours of the 25th, in which you ask for opinion in the following situation:

"A father and mother deeded their home to a son who is an honorably discharged soldier. The parents retained the right to use and occupy said real estate during the period of their natural life, or the survivor of them. The son owns no other property and has filed a petition for a

soldier's exemption as remainder man on this property. Will you please advise if he is entitled to the soldier's exemption? The father and mother, as life tenants, have filed for the homestead exemption and it has been granted to them."

In reply thereto, we advise you as follows:

Under the foregoing situation, the holder of the legal title to the foregoing property is the son who makes the claim to the soldier's exemption. His interest in the property is that of remainderman, and the interest of his father and mother is that of life tenants, and as life tenants having possession of the property, enjoying its use and profits, they are the beneficial owners of it.

Section 6946, Code of 1939, as amended by the 51st General Assembly, establishes the exemption right in the property of honorably discharged soldiers, sailors, marines and nurses. Section 6947, as amended, revised and codified by Section 2 of Chapter 242, Acts of the 49th General Assembly, prescribes the method of obtaining such exemption in these words:

"Any person named in section 6946, provided he is a resident of and domiciled in the state of Iowa, shall receive a reduction equal to his exemption, to be made from any property owned by such person and designated by him by proceeding as hereafter provided."

The term "owned" has a definition varying in its terms as related to the context and subject matter to which it is applied. *Chiesa & Company v. City of Des Moines*, 158 Iowa 343, 138 N. W. 822. With respect to the meaning of the word "owner" as used in an exemption statute, the Court in *Trustees of Iowa College v. Bailie*, 17 N. W. (2d) 143, said:

"(3)II. Was the real estate 'owned' by Grinnell College as a part of its endowment fund, within the meaning of the exemption statute? The word 'owned' as used in said statute means equitable or beneficial ownership rather than legal title. *Ellsworth College v. Emmet County*, 156 Iowa 52, 135 N. W. 594, 598, 42 L.R.A., N.S., 530. In that case which involved property held in trust, the court quoted with approval the following statement: 'If the income from the property or from its proceeds were to go to another during the five years, then it would be very clear that the property or fund should be taxed under that period. When one is the equitable owner of property and is entitled to the income from it, he has the enjoyment of every benefit that could come to any one who might own the property.'"

In the light of the quotation last above, it is clear that our Court has adopted the view that where the fee title to real estate is separated from the equitable or beneficial ownership of said land, the word "owner" as used in the exemption statute applies to the equitable or beneficial owner rather than the holder of the legal title.

In *Catholic Missions v. Missoula County*, 200 U. S. 118, 50 L. Ed. 398, 26 Sup. Ct., 197, the Court defined the term "beneficial ownership" as follows:

"The expression, beneficial use or beneficial ownership or interest, in property is quite frequent in the law, and means in this connection

such a right to its enjoyment as exists where the legal title is in one person and the right to such beneficial use or interest is in another, and where such right is recognized by law, and can be enforced by the courts, at the suit of such owner or of some one in his behalf."

In the case submitted, the interests involved are the life estate in the parents and the remainder in the son, neither of which interests are equitable in nature. They are both legal estates. We are satisfied, however, that an owner of property within the meaning of that term as used in Section 6946, Code 1939, as between the holder of a legal estate without more therein, and the holder of a legal estate to which is attached the beneficial interest, is the latter. We then have left for determination only the question as to who owns the beneficial interest. The parents as life tenants are entitled to the enjoyment, use, occupancy and possession of the real estate or the income arising therefrom throughout the continuance of their life estate and this to the exclusion of the son until said life interest is terminated.

The conclusion therefore becomes inescapable that the beneficial ownership is in the parents and not in the son, and as a consequence thereof, the son is not, during the continuance of the life estate, entitled to the exemption claimed by him as an honorably discharged soldier. This conclusion is fortified by analogous conclusion reached by the Annotator in commenting upon the state of the case law covering the question of who is owner and entitled to exemption as between the vendor and the vendee of property under executory contract and the importance of possession as an incident of ownership of sale of land reported in 156 A. L. R., page 1303. It was there said:

"Although it is well settled that possession is not a necessary prerequisite for equitable ownership under an executory contract for the sale of land, it is submitted that, so far as tax exemption statutes are concerned, possession is, generally speaking, an important factor in determining whether or not the property is exempt. The rule of strict construction against claims of exemption would seem to require, as a basis for granting the exemption, that the equitable ownership has substantially all the qualities of full ownership, which would, if this principle is sound, include possession. Though there is no case exactly in point to support such a conclusion, it seems justifiable to assume that where possession is not in the equitable owner, exemption from taxation should as a rule not be granted except in very extraordinary circumstances."

FIREMEN AND POLICEMEN: PHYSICAL EXAMINATION. The expense of taking a physical examination upon return to work, of a policeman or fireman is an administrative expense and should be paid out of the expense fund of the retirement system.

February 28, 1946. *Mr. T. E. DeHart, Supervisor, Office of Auditor of State, Building:* I have yours of the 12th inst., in which you ask for opinion in the following situation:

"Under Chapter 191 of the Acts of the 50th General Assembly any member of either the police or firemen retirement system is allowed the period of their military service credited to their time in the department,

and also to have their dues for the period of time that they are in the military service paid by the city, provided that they shall return and resume their duties in the department within six months after they have been granted an honorable discharge, and provided further that such members shall be declared physically capable of resuming such duties upon examination of the medical board.

The question involved is whether or not the returning employee must pay for this examination by the medical board, or whether it shall be paid by the city."

In reply thereto, we would advise you that by Opinion of this Department issued January 23, 1946, firemen and policemen who are members of the police or fire retirement systems of municipalities and who have entered the military service, do so without loss of status or efficiency rating, and upon their return from military service, are entitled to return to their employment as policemen or firemen. However, to entitle such policemen or firemen, so returning from military service, to have the time which they have spent in the military service credited upon their years of service in the Police or Fire Departments, they must, according to Chapter 191, Acts of the 50th G. A., within six months after their honorable discharge, return and resume their duties as policemen or firemen and provided further that they shall be declared physically capable of resuming such duties upon examination by the medical board.

The medical board referred to in Chapter 191, Acts of the 51st General Assembly is that created by sub-section 9 of section 6326.05 of the 1939 Code, which board "shall arrange for and pass upon all medical examinations required under the provisions of this chapter."

Sub-section 5 of said section grants to the board of trustees of each retirement system the power "to engage such actuarial and other services as shall be required to transact the business of the retirement systems" which would most certainly include the members of the medical board. Said sub-section also provides in part as follows:

"The compensation of all persons engaged by each board of trustees, and all other expenses of each board necessary for the operation of the retirement system, shall be paid at such rates and in such amounts as each board of trustees shall approve."

Said board is a part and parcel of the retirement system and the examinations made by it constitute a phase of the operation and administration of the system. It would seem to follow, therefore, that the expenses incident to such examinations would be proper administrative expenses.

Section 6326.10 of the 1939 Code designates the various funds to which the assets of each system shall be credited, and one of the funds so designated is the "expense fund." Sub-section 5 of said section deals expressly with the expense fund and provides in part as follows:

"The expense fund shall be the fund to which shall be credited all money provided by the said cities to pay the administration expenses of the retirement system and from which shall be paid all the expenses necessary in connection with the administration and operation of the system."

Since the law provides for payment by the trustees of the compensation of all persons engaged by it, and for the payment of all other expenses necessary to the operation of the system, and since as above indicated it is our view that the expenses incident to the examinations contemplated by your question are proper administrative expenses of the retirement system, we hold that the expenses incident to such examinations should be paid from the expense fund of the system, and not by the returning employees.

CORPORATIONS: INCORPORATION OF COSMETOLOGISTS. Corporations may be organized to conduct a legal business. Practice of cosmetology by a corporation would not be a legal business, and should not be allowed to incorporate.

March 28, 1946. *Hon. Wayne M. Ropes, Secretary of State, Building:* Receipt is acknowledged of your communication of March 22, 1946, which is as follows, to-wit:

"This office would like an official opinion as to whether or not a corporation can be formed to own, operate and/or manage beauty salons. In other words to practice cosmetology.

It occurred to us that a corporation could not get a permit for a license to practice cosmetology under the provisions of chapters 115 and 124.2 of the 1939 Code, and such being the case should a corporation be permitted to incorporate for this very purpose.

We have presented for filing in our office Articles of Incorporation of FRANCOIS SALONS OF IOWA, INC. The main business to be transacted as shown by the Articles is as follows: "to own, operate and/or manage, lease or otherwise sell and otherwise dispose of, Beauty Salons, including machinery, accessories, instruments, devices, supplies, attachments, equipment and cosmetics."

We would appreciate an early opinion, as these people are insisting on filing the Articles."

The proposed Articles indicate that it is intended to incorporate under the provisions of Chapter 384 of the 1939 Code. Section 8339, which is contained within said Chapter, provides in part as follows:

"Any number of persons may become incorporated for the transaction of any lawful business. * * *"

and we must, therefore, determine whether or not a corporation can lawfully practice cosmetology.

Section 2439 of the Code provides:

"No person shall engage in the practice of medicine and surgery, podiatry, osteopathy and surgery, chiropractic, nursing, dentistry, dental hygiene, optometry, pharmacy, cosmetology, barbering, or embalming as defined in the following chapters of this title, unless he shall have obtained from the state department of health a license for that purpose."

Section 2585.10 of the Code provides:

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

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

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

Section 2528 of the Code provides:

"The opening of an office or place of business for the practice of any profession for which a license is required by this title, the announcing to the public in any way the intention to practice any such profession, the use of any professional degree or designation, or of any sign, card, circular, device, or advertisement, as a practitioner of any such profession, or as a person skilled in the same, shall be prima facie evidence of engaging in the practice of such profession."

Section 2585.21 of the Code provides:

"Managers of shops or other places where cosmetology is practiced, who directly or indirectly supervise the work of operators, shall be licensed cosmetologists."

In the case of *State v. Bailey*, 211 Iowa 781, it was sought to enjoin the defendant corporation from practicing dentistry. The corporation defended upon four propositions, two of which are as follows:

"The sole business of defendant is owning and operating offices in which the art of dentistry is practiced by duly licensed dentists, as authorized by its articles.

"The practice of dentistry and the owning and operating of dental offices where dentistry is practiced are two distinct functions, and the provisions of the 'Practice of Dentistry Act' in question are, of necessity, and as contemplated by the law itself, limited to human persons engaged in the practice of dentistry as defined: that is, physically treating the oral cavity."

The trial court granted an injunction and the case was affirmed on appeal. The following quotation is taken from the opinion of the Supreme Court, beginning at the bottom of page 784:

"The appellant lays some stress upon the provisions of its articles of incorporation. The implication of the argument at this point is that the franchise granted to it October 1, 1913, authorized it to transact this very business. The recitals of its articles define the limitations of the business which it proposed to do. They were not effective to confer upon it authority to transact any business in violation of existing law. The business upon which the defendant embarked in October, 1913, was violative of then existing statutes, Section 2599, Code, 1897. Under the existing law, no person had a right to practice dentistry without an examination and license. From the very nature of this statutory requirement, a corporation could not bring itself within the terms of the statute. It could not pass an examination, and would not, therefore,

obtain a license. To say nothing now of the relationship of dentistry to the public health and to the scope of police power in reference thereto, there are still other reasons of public policy why mere corporations might be barred from entering this field. There are certain fields of occupation which are universally recognized as 'learned professions'. Proficiency in these occupations required long years of special study and of special research and training and of learning in the broad field of general education. Without such preparation, proficiency in these professions is impossible. The law recognizes them as a part of the public weal, and protects them against abasement, and encourages the maintenance therein of high standards of education, of ethics, and of ideals. It is for this purpose that rigid examinations are required and conducted as preliminary to the granting of a license. The statute could be completely avoided and rendered nugatory if one or more persons who failed to have the requisite learning to pass the examination might, nevertheless, incorporate themselves formally into a corporation, in whose name they could practice lawfully the profession which was forbidden to them as individuals. A corporation, as such, has neither education nor skill nor ethics. These are *sine qua non* to a learned profession."

And the following from the bottom of page 786:

"Our function in the present case is to apply our own statutes to the facts in this record. We deem it clear, as already stated, that the defendant was practicing dentistry, within the meaning of our statute. It was doing so, therefore, in violation of our statutes. Inasmuch, as a corporation, by its very nature, is incapable of passing an examination for the purpose of a license, and therefore incapable of receiving a license, it cannot lawfully practice dentistry in this state."

In the case *State v. Kindy Optical Company*, 216 Iowa 1157, the defendant corporation was enjoined from practicing optometry. The record disclosed that the defendant corporation opened a place of business and equipped it for the practice of optometry. It employed a licensed optometrist to manage and conduct said business, but the defendant itself did not have (and could not obtain) such a license. The court said at page 1162:

"The defendant company could not conduct a business without a license. It could not obtain a license, and we can conceive of no reason why it should be permitted to continue to conduct a business under the license of an optometrist. We hold therefore that the defendant company was and is engaged in the practice of optometry and that it is so engaged in violation of the statutes of this state."

This department has heretofore held that it would be illegal for an incorporated medical society to contract with a county board of supervisors for the care of indigent sick, (See 1932 O. A. G. page 4) although by virtue of Chapter 209, Acts of the 51st General Assembly, non-profit medical service corporations may be organized.

It is true that the foregoing authorities do not deal specifically with the practice of cosmetology, but they do each deal with other arts which, along with cosmetology are specifically designated in section 2439 above quoted, with the result that the reasoning employed in said authorities relative to the particular act there in question would be equally applicable to the practice of cosmetology. Said authorities and the cases therein cited supply abundant basis for the holding that it is illegal for

a corporation to practice cosmetology, and we do so hold. Since a corporation can be organized only for the conduct of a legal business and since the practice of cosmetology by a corporation would not be a legal business, it follows that the tendered Articles should not be accepted for filing.

LABOR UNIONS: PUBLIC EMPLOYEES. County Board of Supervisors do not have power to enter into collective bargaining agreements with labor unions.

March 29, 1946. *Mr. Robert N. Johnson, Jr., County Attorney, Fort Madison, Iowa:* This will acknowledge receipt of yours of the 16th inst., in which you ask for an opinion in the following situation:

"The other day at a meeting of the Lee County Board of Supervisors, a gentleman appeared before the Board and informed them that he was a representative of the A. F. of L. Union representing municipal employees; that he wanted to enter into a contract with the Lee County Board of Supervisors. The contract calls for exclusive bargaining rights and a provision that all county employees who have been employed for 30 days shall be forced to belong to the Union. In other words amounting to 'closed shop.' The question arises as to whether or not the Board of Supervisors, as a municipal body has the authority to enter into such a contract.

We are particularly anxious to receive an early opinion so that our Board may take the requisite action."

Solution of the foregoing involves consideration of the powers of the Board of Supervisors. The Board of Supervisors is a statutory body having such express powers as are conferred upon it by the Legislature and such implied powers as may be required to effectuate the express powers. These general powers are set forth in Section 5128 of the Code of 1939, in terms as follows:

"Each county is a body corporate for civil and political purposes, may sue and be sued, must have a seal, may acquire and hold property, make all contracts necessary for the control, management, and improvement or disposition thereof, and do such other acts and exercise such other powers as are authorized by law."

More specifically, the Board of Supervisors is endowed by Section 5130, Code 1939, with power respecting the property and business of the County as follows:

"The board of supervisors at any regular meeting shall have power:
* * * * *

4. To make such orders concerning the corporate property of the county as it may deem expedient, and not inconsistent with law.
* * * * *

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

These powers, so bestowed, are general in character. They do not include prescriptions of the method, time or formality under and by which

these powers may be exercised. Such powers, therefore, are necessarily committed to the sound and reasonable discretion of the Board of Supervisors. (*Gaddis v. Cherokee County Road Commission*, 141 S. E. 360). That these statutes confer discretion upon the Board of Supervisors is confirmed by *Sorenson v. Andrews*, 221 Iowa 44, 51, in these words:

“Code Section 5130 confers upon the Board of Supervisors the power to make such orders concerning the corporation property of the county as it may deem expedient, not inconsistent with law. This power the board should exercise with care commensurate with the responsibility and with efficiency and economy, and the legislature has properly clothed the board with a large discretion.

* * * * *

“All these matters considered, we come to the conclusion that here we have two matters of expressed legislative intent—one that in clothing the board of supervisors with the necessary powers to conduct county affairs, which are of very large moment, a wide discretion should be vested;”

and this power includes the power of appointment of employees and agents to perform the functions of government. And when discretionary powers are vested in administrative boards, they may not contract it away. (*People v. Texas*, etc. Drainage District, 168 Illinois Appeals 630; *Gaddis v. Cherokee County Road Commission*, 195 N. C. 107, 141 S. E. 358; 46 C. J., Title “Officers,” Paragraph 296).

In *Gaddis v. Cherokee County Road Commission*, *supra*, the Court said this:

“This court has held that administrative boards, exercising public functions, cannot by contract deprive themselves of the right to exercise the discretion delegated by law in the performance of public duties.”

And in *State v. Apalachicola Northern R. Co.*, 88, So. 311, respecting the powers of administrative boards, it is said:

“(4) Rules and orders made by administrative boards must accord with the authority conferred upon the board by law. An administrative board cannot legally confer upon its employees authority that under the law may be exercised only by the board, or by other officers or tribunals.”

The discretion bestowed in the choice of public employees may not be exercised arbitrarily or capriciously. Equality of opportunity is conclusively implied in public service employment. There are no shades or refinements of such equality. In *Miller v. City of Des Moines*, 143 Iowa 409, the principle which controls appointment to the public service is described. There the City of Des Moines had restricted the letting of a public printing contract to contractors employing only union printers. In holding the contract void and in excess of the power of the City Council, the Court there said:

“Government is instituted for the benefit of all the people and not for the benefit of any class to the exclusion of others. * * * * *”

And directing its attention to the ordinance, the Court continued:

"If, then, as tacitly conceded in argument, the enactment of such an ordinance is beyond the legislative authority of the city council, it follows as a matter of necessity that it can not indulge in such discrimination in its administrative capacity. The citizen may be rich or poor in purse; union or non-union upon the labor question; Catholic, Protestant, Jew, or infidel in matters of religion; Republican, Democrat or Prohibitionist in political affiliation; but, by the standard of constitutional and statutory right, he is neither more nor less than a citizen of the state, entitled to an equal opportunity therein according to the capacity and ability with which nature may have endowed him. In denying him that opportunity a double wrong is perpetrated, first, upon the individual who is entitled to be considered upon his personal merits uninfluenced by these extrinsic considerations; and, secondly, upon the state at large, whose expenses are multiplied, and whose integrity is jeopardized by a system of favoritism, the demoralizing effect of which is patent to every thoughtful student of public affairs. It is not material that the sum of money involved in this controversy is insignificant as compared with the city's revenue or its ability to pay. The mischief is not so much in the particular case under review, as in its tendency and in the far-reaching consequences of legitimizing a system or practice so pregnant with evil possibilities."

And the Court supported its conclusion from the case of *Adams v. Brennan*, 177 Ill. 194, 52 N. E. 314, 42 L. R. A. 718, 69 Am. St. Rep. 222, where it was said:

"It is plain that the rule adopted by the board and included in this contract is a discrimination between different classes of citizens and of such a nature as to restrict competition and to increase the cost of work. It is unquestionable that if the Legislature should enact a statute containing the same provision as this contract in regard to any work to be done for boards of education, or if they should by a statute undertake to require this board as an agency of the state to adopt such a rule or insert such a clause in its contracts, or should undertake to authorize it to do so, the provision would be absolutely null and void as in conflict with the Constitution of the state . . . There seems, however, to be a claim that the board of education, although it could not be lawfully required or authorized to make such a contract may have some sort of discretion so to do, and the only question in the case on the subject is whether the board possesses power beyond that of the Legislature, in which is vested the entire legislative power of the state . . . There can be no greater power of the board to act of its own motion than by virtue of positive law. The results in either case are equally in conflict with organic law, and such legislation, contract or action, whatever form it may take, is void. Nor can the fact, if it be a fact, that an individual might make such a bargain authorize these officers exercising a public trust to do so. The individual may, if he chooses, give his money away, but the public officer acting as a trustee has no such liberty, and no right to surrender to a committee or to any one else the rights of those for whom he acts."

It is therefore clear that whether a person is a member of a labor union or not a member of a labor union has no place in the discretion lodged in the Board of Supervisors. Such membership is neither a requisite nor a bar to public employment. It is therefore quite apparent that the powers granting the Supervisors administrative discretion is limited by the will of the people expressed in laws enacted by the Legislature. This power is subject to curtailment or expansion by the Legislature within its constitutional limitations. They may not abuse or exceed

those powers, express or implied. What the Legislature cannot legally do, the Board, in its administrative capacity, cannot do. Neither can bargain away the discretion vested in the Supervisors.

The foregoing principles would lead, in our opinion, to the conclusion without the support of specific authority that the proposed collective bargaining agreement could not legally be entered into by your Board of Supervisors. But we need not rely upon principles alone. The principles now have case authority. In *Mugford v. Mayor and City Council of Baltimore*, 44 Atl. 2d., 745, decided November 28, 1945, it appeared that the Department of Public Works of the Mayor and City Council of Baltimore had entered into an agreement with the Municipal Chauffeurs Helpers and Garage Employees Local Union, a subordinate Local Union of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, affiliated with the American Federation of Labor. The appellants, as taxpayers, prayed that the agreement be:

1. Null and void.
2. That the defendants be enjoined from extending preferential advantage or privilege to the Union or its officers.
3. That the City be enjoined from making deductions from the wages or salaries of employees for the payment of Union dues to the Union, and
4. For further relief as their case may require. The lower Court held that the City of Baltimore had no power to make an agreement recognizing the Union as a collective bargaining agency for its members, consisting of street-cleaners and other employees of the City of Baltimore. The Court, with respect to this holding of the Chancellor, said this:

"The Chancellor struck down the agreement before him, and in the absence of a cross-appeal his ruling is the law of the case. Moreover, it was admitted by the appellees, in argument, that the Department of Public Works could not bind the City, by contract, in any particular relative to hours, wages, or working conditions, either as to union employees, or as to all employees in the same classification. To the extent that these matters are covered by the provisions of the City Charter, creating a budgetary system and a civil service, those provisions of law are controlling. To the extent that they are left to the discretion of any City department or agency, the City authorities cannot delegate or abdicate their continuing discretion. Any exercise of such discretion by the establishment of hours, wages or working conditions is at all times subject to change or revocation in the exercise of the same discretion. But it by no means follows that employees may not designate a representative or spokesman to present grievances." And the Court continued with respect to the powers of the City as evidenced by the contract entered into with the Union as follows:

"In *Raney v. County Com'rs of Montgomery Co.*, 170 Md. 183, 197, 183 A. 548, 554, this Court, through Judge Offutt, said:

'While it is true that no particular person has any right to governmental employment, yet all persons have a right to apply on equal

terms for such employment, and when terms are prescribed as conditions precedent to such employment, they must be reasonable, and such as have some relation to qualification for the service.'

The city has no right under the law to delegate its governing power to any agency. The power of the City is prescribed in its charter and the City Charter constitutes the measure of power that is possessed by any of its officials. To delegate such power to an independent agency would be a serious violation of the law. To recognize such delegation of power in any City department might lead to the delegation of such power in all departments, and would result in the city government being administered regardless of its charter.

"The matter before us under this appeal is that part of paragraph four of the decree which we have italicized. In other words, the sole and only question for decision on this record is the right of the City to permit members of the Union to have dues deducted from their wages if they individually so request. The injunction which was directed to be issued does 'not forbid the collection and remittance of such dues by the Central Payroll Bureau upon a purely voluntary basis, terminable by any employee at any time in any future contract between the City and the Defendant Union.'"

The foregoing principles and authority require the conclusion that the Board of Supervisors is without power to enter into the proposed collective bargaining agreement.

AERONAUTICS: RULES AND REGULATIONS: AERONAUTICS COMMISSION. Rules as to the minimum requirements for landing areas made by State Aeronautics Commission are without authority and void.

April 1, 1946. *Mr. Lester G. Orcutt, Director, Iowa Aeronautics Commission, Building:* You have asked this department for an official opinion as to whether or not the State Aeronautics Commission has the right and power to prescribe regulations as to safe minimum requirements for privately owned commercially operated landing areas.

Section 19 of Chapter 148, Acts of the 51st General Assembly, requires that every landing area (see exceptions not material here contained in sub-sections 8 and 9 of section 35 of said chapter) shall register annually with the Commission.

Sub-section 2 of section 12 of the act is in the following language:

"It shall have power to make such reasonable rules and regulations, consistent with the provisions of this act, as may be deemed by the commission to be necessary and expedient for the administration of the affairs of the commission, and the administration and enforcement of this act, and to amend said rules and regulations at any time."

Your question necessarily involves the proposition as to whether or not the commission in connection with its registration procedure as applied to landing areas, can formulate valid and enforceable rules and regulations relative to size, shape, construction, etc., of such landing areas. In other words, does sub-section 2 of section 12 of Chapter 148, above quoted, constitute a valid delegation of power by the legislature to the Commission to prescribe rules relative to landing areas?

The rules and powers of your Commission have not as yet been the subject of judicial pronouncement in this state, but our Supreme Court has passed upon the rights and powers of other commissions, and in so doing has enunciated certain propositions of law which are by analogy applicable to the Aeronautics Commission.

The case of *Goodlove v. Logan*, 217 Iowa 98, was an automobile accident case wherein the trial court directed a verdict for the defendant upon the ground that the evidence established that plaintiff's decedent had violated a rule of the road established by the Highway Commission, and as a consequence thereof was guilty of contributory negligence as a matter of law. The Highway Commission had, acting pursuant to section 5066 of the 1939 Code of Iowa which, in so far as material here, was as follows:

"General Regulations—Violations. The state highway commission shall, for the protection of the highways and the safety of the traffic thereon, establish rules and regulations and issue orders relatives to the use of the primary roads or any part thereof and of those portions of extensions of primary roads built and maintained by the state within cities and towns. Such rules and regulations may, where the matter is not otherwise covered by statute, relate to

1. * * *
2. * * *
3. The stopping of vehicles on the paved portion of primary roads for service at wayside markets or filling stations.
4. * * *

Failure to comply with such rules, regulations or orders shall be deemed a misdemeanor and shall be punishable accordingly."

established the following rule:

"XII. Stopping on traveled portion of road. No vehicle shall stop on the traveled portion of any primary road except when such vehicle is disabled and unable to proceed without emergency repairs or change of tires"

and this was the rule which the court held had been violated. Upon appeal it was urged by the plaintiff that said rule was invalid and of no force and effect because the legislature did not have the right under the Constitution to delegate such rule making power to the Highway Commission. The Supreme Court upheld the contention so made and reversed the case. The following quotations are taken from the opinion:

"In *Cooley on Constitutional Limitations* (5th Ed.) on page 139, the rule is expressed as follows:

'One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the state has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power

shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which the people have seen fit to confide this sovereign trust.'

"A similar question was also before the Florida courts, and in the case of *State v. Fowler*, 94 Fla. 752, 114 Sc. 435 (1927) an act creating a state board of examiners of plumbers and purporting to authorize such board to establish, adopt, promulgate, and to put into effect a code governing the installation of plumbing was held an unconstitutional delegation of legislative power. The Florida court said: (page 437)

'It may be stated that the paramount test as to whether or not a particular statute amounts to an invalid delegation of legislative power is the degree of completeness of the statute as it appears when it leaves the hands of the legislative body. The law must be so complete in all its terms and provisions when it leaves the legislative branch of the government that nothing is left to the judgment of the delegate or appointee of the Legislature, and, where a statute passed by the Legislature is not complete as legislation, but authorizes an exclusive board or some other named authority to decide what should and what should not be deemed infringement of the law, it must be held unconstitutional as attempting to make an improper delegation of legislative power.'

"In *Field v. Clark*, 143 U. S. 649, 694, 12 S. Ct. 495, 505, 36 L. Ed. 294, 310, it is said:

'The true distinction, as Judge Ranney, speaking for the Supreme Court of Ohio (*C. W. & Z. Railroad Co. v. Com.*, 1 Ohio St. 77, 88), has well said, 'is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.'

"In *re Mellea* (D. C.) 5F. (2d) 687, 689, it is said:

'Did the making of the departmental regulation here in question come within the power conferred by the last-quoted statutory provision? It is settled law that while an executive tribunal or official may constitutionally be empowered by Congress to make such regulations as are reasonably necessary to the proper execution of a statute, so long as such regulations are merely administrative in character and relate to the enforcement of the statute, yet such an executive tribunal or official cannot constitutionally, either with or without the sanction of Congress, make any rule or regulation the effect of which would be to add to, take from, or otherwise change such statute, for that would be to permit the executive department to encroach upon and usurp the function of the legislative department, to which alone belongs the power to legislate.'

'If the legislature had a right to pass section 5066, granting to the highway commission the authority to adopt rules and regulations regulating the stopping of cars upon a paved highway, the legislature can also empower the highway commission to pass rules and regulations governing the speed and right of way, and all duties of automobile drivers. If the legislature can delegate to the highway commission the right to do these things, then, of course, the legislature can delegate the same power to the board of control, to the insurance commissioner, superintendent of banking, and all other administrative departments of the state may be likewise empowered to enact rules and regulations to be given the force of statutes; which said commission might in their judgment determine to be for the general protection of the public. Once such bureaucracy has fastened itself into the life of a legislative power, little else

need be done by the legislature than to meet and create boards. The legislature has no such right to delegate to the highway commission legislative power to pass rules and regulations concerning the use of the primary highways of this state by the people of this state, such as rule VII. If the legislature, in its wise judgment desires to pass such a statute, it, of course, has the right and authority to do so, for the legislature is composed of the representatives of the people; it is chosen by the people for the purpose of making the laws of the state. The legislature cannot transfer the power of making laws to any one else, or place the right to make laws anywhere but where the people have placed it. The highway commission is appointed by the Governor of the state for the purpose of administering the laws and not for the purpose of making the laws. If the right were given to the highway commission to make the laws governing the highways of this state, how is the individual using the highways to know what rules and regulations the highway commission passes? The highway commission meets at various and different times. It might pass some rule or regulation today and revoke it next week. There is no way that the people throughout this state could know just what were the rules and regulations that the highway commission adopted. About the only way that one could be certain as to what the rules and regulations were—if the highway commission had the right to pass them—would be to telephone to the highway commission every time one started on a journey, and, if that journey were to be a long one, a wise and cautious individual would put in a telephone call before starting on the return journey.

‘Thus, it seems to us that the legislature under Code section 5066 has left to the highway commission first to say whether there shall be any law, and, second, what the law shall be. This is a delegation of legislative power, and same is unconstitutional.’

In the case of *State v. Van Trump*, 224 Iowa 504, the defendant was charged with the violation of certain sections of the ‘Iowa Angling Regulations’. The defendant was convicted and fined in the Justice Court and appealed to the District Court, where he interposed demurrers to the informations for the reason that the crimes charged therein were not in violation of a statute, but of rules and regulations of the State Conservation Commission adopted pursuant to an attempted void and unconstitutional delegation of legislative power in contravention of Article III, section 1, of the Iowa Constitution. There was no statute which by express terms prohibited the doing of the acts complained of, but the state contended that section 1703-d12, sub-section 5 of the Code effectually empowered the Conservation Commission to adopt and promulgate rules and regulations for the protection of fish, etc. The demurrers were sustained in the District Court and on appeal to the Supreme Court the action of the trial court in so doing was affirmed. The following quotation is taken from the opinion beginning at the bottom of page 508:

‘When we come to analyze the language of section 1703-d12, we find that it grants what Justice Cardozo of the United States Supreme Court described in the *Panama Refining Company* case, supra, as a ‘roving commission’ and a ‘vagrant and unconfined’ power to establish and make law. There is no sufficient ‘yardstick’ or statement of legislative policy in the broad grant of power to the conservation commission to ‘adopt rules and regulations—whenever * * * such regulations shall be desirable for the proper use and conservation of the resources of the State.’ Such delegation of power without definition of legislative policy and standard, amounts to surrender by the legislature to the commission of its

duties. This cannot be done in keeping with the spirit and intent of the Constitution, and it is therefore our holding that the rules and regulations so adopted and published by the state conservation commission are without authority and void."

As applied to aeronautics legislation specifically the New Jersey Court in the case of *State v. Larson*, 160 Atl. 556, passed upon an act of the legislature which, among other things, granted to the Aviation Commission the power to "encourage and effect, in so far as is practicable, uniform field rules for airports". In holding the act to be unconstitutional the court in speaking particularly with reference to "field rule" said:

"As seen above, it fixes no criterion whatever to be adhered to by the state aviation commission in establishing its regulations for 'uniform field rules'. In authorizing such regulations, it therefore violates the fundamental concept of our constitutional law as to the separation of the powers."

In the light of the foregoing authorities we need not determine whether or not the legislature intended to grant to your Commission the power to adopt rules as to minimum requirements for landing areas. It is sufficient to say that even though it may have so intended it could not have constitutionally done so. We therefore hold in the language of the *Larson* case, *supra*, that any such rules made by the Commission would be "without authority and void".

Our letter of date February 6, 1946, directed to the attention of Mr. R. C. Boyd, Airport Engineer, is hereby withdrawn.

DEFAULTS: ENTRY BY JUDGE OR CLERK. It is proper for either the Clerk of the District Court or the Judge to enter defaults under rules 230 (a) and 231 of the Rules of Civil Procedure.

April 3, 1946. *Mr. Jack C. White, County Attorney, Iowa City, Iowa:* We acknowledge receipt of your letter of March 26th in which you request an opinion with reference to the following matter:

"Rule 231 of Rules of Civil Procedure specifically provides for the entering of defaults in certain instances and provides for all other defaults to be entered by the Court. It appears that this rule repeals Sections 11587 and 11588 of the Code of Iowa, 1939, wherein the Court was authorized to enter a default."

Your question is as follows:

"Under said rule is the Clerk granted the exclusive authority to enter a default under Rule 230 (a) or may the Court or Judge thereof legally enter a default in these respects?

Iowa Rule 231 provides as follows:

"If a party not under legal disability or not a prisoner in a reformatory or penitentiary is in default under Rule 230 (a), the Clerk, on demand of the adverse party, must forthwith enter such default of record without any order of Court. All other defaults shall be entered by the Court."

Iowa Rule 230 provides as follows:

"A party shall be in default whenever he (a) fails to appear as required in Rule 53 or 54, or, has appeared, without thereafter filing any

motion or pleading as stated in Rule 87; or (b) fails to move or plead further as required in Rule 86, unless judgment has already resulted under Rule 87; or (c) withdraws his pleading without permission to replead, or withdraws his appearance or fails to present himself for trial; or (d) fails to comply with any order of Court or do any act which permits entry of default against him, under any Rule or statute."

Therefore, without question, the Clerk of the District Court has been given the duty to enter defaults on demand when (1) there has been no appearance for the defendant; (2) there has been an appearance but nothing has been filed thereafter, and where the party is not under legal disability nor a prisoner in a reformatory or penitentiary. This act of entering the default must be classified as ministerial, and may be done by anyone properly authorized, without constitutional violation. However, the act of entering defaults has always been one of the proper functions of the Court or Judge, and while this power has now been partially delegated to the Clerk of the District Court, in so doing, we do not believe that it was the intention of the Legislature to deprive the Court of its inherent power, after assuming jurisdiction in the matter, to also enter the default under the provisions of Rule 230 (a). The Court has retained exclusive right in all other cases, namely, (b), (c) and (d) of Rule 230.

As to the repeal of Sections 11587 and 11588, we note that those sections did not specifically grant the power to the Court to enter defaults, for the reason that that power was already inherent in a Court having jurisdiction of the parties and subject-matter; so that the act of repealing those sections, in our opinion, did not in any way deny to the Court any power it might otherwise have legally.

Federal Rule 55 provides as follows:

"Rule 55. Default—(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default."

While the wording of the Federal Rule 55 is slightly different than the Iowa Rule 231, the intention seems to have been the same, and we find the Federal Court interpreting Federal Rule 55 on this point in the case of *United States, for and in behalf of Federal Housing Administration v. Jackson*, 25 F. Supp. 79. The Court, in holding this rule not a limitation upon the power of the Court to enter a default as distinguished from entry by the clerk, said:

"Under Rule 55, Rules of Civil Procedure, 28 U. S. C. A., following section 723c, this default should be entered by the clerk as of course without any application to the court. However, since the court has power to enter an order of default and Rule 55 is not a limitation thereof, the court grants the motion and enters the default."

Also see *Fisher v. Taylor*, 1 F. R. D. 448, D. C. Tenn. 1941.

We also wish to call attention to the comment of the Advisory Committee found in Iowa Rules of Civil Procedure by Cook, page 231, which gives added light on the purpose of this change in our law. It states:

"Only a few of the counties in the state have a judge of the District Court continuously present so that defaults can be promptly entered at all times. Therefore, it was necessary to provide some other method for entering defaults, in order that all counties might be adequately served. It was felt that the Clerk of Court was the logical and proper person to do this."

It is therefore our opinion that, while it is quite proper for either the Clerk of the District Court or the Judge to enter defaults under Rule 231 and 230 (a), it would remain the better practice to present the request to the Judge, if he be present, and to the Clerk in case the Judge is not available in the county at the time of the request.

JUVENILE JURISDICTION AND COMMITMENT: SURGICAL OPERATIONS. If a juvenile court commits a minor to a state institution, the court loses jurisdiction to the Board of Control of State Institutions upon acceptance of the child by the Board. After acceptance of the child, the Board becomes responsible for care of child and may legally consent to necessary operations upon the child until such time as the child is discharged, adopted, or reaches age of 21 years.

April 3, 1946. *Mr. G. L. Gray, County Attorney, Rockwell City, Iowa.*
We acknowledge receipt of your letter of recent date, in which the following is set out in substance:

Does the Juvenile Court after hearing and commitment of a child to the Iowa Juvenile Home or the other State Institutions made under Section 3646 of Code of 1939, where commitment might be made, retain jurisdiction of said cause so that an order could be made upon application *ex parte* or with notice for the performing of surgical operations upon said persons committed; or,

Does the Juvenile Court terminate its jurisdiction with the making of the commitment thereby ending its power to act in the premises unless and until a new proceeding is instituted?

This question has come up upon the application of the Board of Control for an order in an *ex parte* hearing asking the Court to grant the right to said board to perform such operations as are necessary upon a child legally committed to the Iowa Juvenile Home.

Some confusion has resulted from the opinion of this office under date of December 15, 1944, appearing in the 1944 Report of the Attorney General, at page 189, and the same is hereby withdrawn.

Under the date of May 6, 1931, an opinion of this office was rendered on the question of the Juvenile Court's jurisdiction over a minor properly brought before it as a neglected, dependent and delinquent child, and we rendered the opinion that the court would have jurisdiction over that child until it became 21 years of age, unless the child was legally adopted or committed to a state institution. We now reaffirm that opinion. Stating it another way: When a child is found to be neglected, dependent or delinquent, as provided in Chapter 180 of the 1939 Code of Iowa, the court may commit the child under Section 3637 to a suitable family or home, to some recognized, approved private institution, or a state, public or private hospital for special treatment or care, and retain jurisdiction over that child until it becomes 21 years of age. Section 3637 of the 1939 Code of Iowa reads as follows:

“Alternative commitments. The juvenile court in the case of any neglected, dependent, or delinquent child, may:

1. Continue the proceedings from time to time and commit said child to the care and custody of a probation officer or other discreet person.
2. Commit said child to some suitable family home or allow it to remain in its own home.
3. Commit said child to any institution in the state, incorporated and maintained for the purpose of caring for such children.
4. Cause the child to be placed in a public or state hospital for treatment or special care, or in a private hospital which will receive it for such purpose, when such course seems necessary for the welfare of the child.”

The institutions referred to herein are not state institutions, but those approved and licensed under Chapter 181.5, and specifically Section 3661.103 of the Code of 1939.

Section 3639 provides as follows:

“Conditions attending commitment:

In any case contemplated by section 3637, the court may, from time to time, incorporate in its order such conditions and restrictions as it may deem advisable for the welfare of the child, and the jurisdiction of the court over said proceedings and said child shall continue until the child is legally adopted, or until the child is committed to a state institution.”

However, when there is a legal adoption of such child or the Juvenile Court commits the child to a state institution as provided in Section 3646 of the 1939 Code of Iowa, the Juvenile Court loses and surrenders jurisdiction of the child thereafter, until and unless a new proceeding is properly instituted affecting said child. It would, therefore, not be proper for the Juvenile Court to entertain jurisdiction or attempt to retain jurisdiction of said cause so as to order the performance of a surgical operation upon the minor committed to the state institution or legally adopted. Section 3646 of the 1939 Code is as follows:

“Mandatory commitments. If commitment of any child is not made under the foregoing provisions of this chapter, or if made thereunder and the results in the opinion of the court, are not conducive to the welfare of the child, the court shall proceed as follows:

1. If the child is neglected or dependent and not delinquent, it shall be committed either to the soldiers' orphans home or to the state juvenile home.
2. If the child is delinquent and under the age of ten years, it shall be committed to the state juvenile home.
3. If the child is over the age of ten years and, in the opinion of the court or judge is seriously delinquent or so disposed, it shall be committed to the state training school for boys or for girls, as the case may be; but married women, prostitutes, and girls who are pregnant shall not be committed to the training school.
4. If the child is over the age of ten years and, in the opinion of the court or judge, is not seriously delinquent nor so disposed, it shall be committed to the state juvenile home.”

Under the authority pronounced by our Supreme Court in *Stephens v. Treat*, 202 Iowa 1077, the State, represented by the Board of Control, assumes responsibility for the child. The Court states as follows:

"The state by virtue of the statutes, steps in as *parens patriae*. * * * The right of the parents to its custody and control, by virtue of their parenthood, is, by such decree, foreclosed and cut off. The state thenceforth assumes responsibility for the child as its ward."

Therefore, after the commitment to the state institution, the child is no longer the ward of the court but becomes the ward of the State. In the case of *People v. Pierson*, 68 N. E. 243, we find the Court holding as follows:

"There is a duty 'by law imposed' on parents, guardians or others who, by adoption or otherwise, have assumed the relation in *loco parentis* to furnish food, clothing, shelter and medical attention to the child."

And also this statement by the Court:

"The state as *parens patriae* is authorized to legislate for the protection of children."

Certainly we are not disposed to say that these children cannot receive necessary medical or surgical treatment because there appears to be a question as to who should consent to that medical or surgical treatment. In *Re Vasko*, 263 N. Y. Supplement, 552, the Court held a statute constitutional which provided:

"Whenever a child within the jurisdiction of the court and under the provisions of this Act appears to the court to be in need of medical or surgical care * * * a suitable order may be made for the treatment * * * of such child in its home, a hospital or other suitable institution."

In this case the Children's Court ordered an operation to remove the child's eye, in order to save its life, over objections of the parent. While here a statute conferred jurisdiction upon a Children's Court, it would appear that, under our statutes, jurisdiction of the child by statute has been placed, by and through the Juvenile Court, in the Board of Control of the State. It should then assume the same authority that would be properly exercised by the Juvenile Court to see that the child is furnished proper food, clothing and medical and surgical attention. In *Bonner v. Moran*, 126 F. (2d) 122, the Court says:

"* * * generally speaking, the rule has been considered to be that a surgeon has no legal right to operate upon a child without the consent of his parents or guardian."

Regardless of the view taken as to whether the State acts as parent or guardian, it is, therefore, our opinion that, when a Juvenile Court legally commits a minor to one of the state institutions provided in Section 3646 of the 1939 Code, the Juvenile Court loses jurisdiction, and the Board of Control has jurisdiction when the child is accepted at the institution. Thenceforth it assumes the responsibility and care for that child, including medical care, and may legally consent to a necessary operation upon it, until it has been discharged, adopted or reaches the age of 21 years.

MOTOR VEHICLES: CONFISCATION: SALE. Money received from sale of confiscated vehicle should be credited to the general fund of the state.

April 12, 1946. *Mr. Henry Wichman, Secretary, Executive Council, Building:* This will acknowledge receipt of yours of the 6th inst., in which you state:

"I herewith submit a written request for an Attorney General's opinion on the disposition of monies received from the sale of confiscated motor vehicles. The question having been raised as to whether same should be credited to the Bureau of Investigation or to the credit of the General State Fund."

In reply thereto, we would advise you that forfeiture in the foregoing situation is accomplished under Section 2009, et seq., Code of 1939. The information praying for forfeiture against the conveyance is instituted by the State of Iowa, and the judgment of forfeiture consists in a direction that the conveyance be sold by the Sheriff as a chattel under execution and the proceeds of the sale applied, according to the provisions of Section 2014. However, before the sale is affected under the foregoing judgment, the Department of Justice of the State of Iowa may requisition said conveyance for use by said Department. (Section 2013.1, Code 1939). Any other Department of the State Government needing a motor vehicle for official use may make application therefor to the Executive Council, which shall act upon such application in accordance with the provisions of Section 2013.4, Code 1939. And the Bureau of Criminal Investigation, being now attached to the Department of Public Safety (Chapter 120, Acts of the 48th G. A.) is controlled by this Section. The power of the Executive Council according to that Section is this:

"Any department of the state government needing a motor vehicle for official use in said department may make written application therefor to the executive council. The executive council shall, if it determines that said department should have such a motor vehicle, by written application request the department of justice to requisition a suitable motor vehicle for the applicant department whenever one is available, in the manner hereinbefore provided. Whenever any department receives a motor vehicle under the provisions hereof, the head thereof shall cause the court costs and all other costs incurred in connection with the confiscation and forfeiture of said motor vehicle to be paid to the clerk of the court or the sheriff of the proper county, as the case may be."

When the conveyance is requisitioned by the Department of Justice, possession is granted to it pursuant to the terms of Section 2013.2, Code 1939. In securing possession of the forfeited conveyance by the Department of Justice for its use or its use by other Departments of the State Government, the Department of Justice is acting as an agent of the State and not in its own right. And its possession of the conveyance, or possession by any other Department of the State Government, is the possession of the State. In that view, the title to the forfeited conveyance is in the State and upon its sale by the State through the Council, under the provisions of Sec. 300, Code of 1939, the proceeds thereof should be credited to the general fund of the State.

While not pertinent to the situation presented by your letter, we call attention to the privilege accorded to Boards of Supervisors and City Councils to make application to the Department of Justice for allocation to such County or City, as the case may be, for any motor vehicle seized in such County and requisitioned under the provisions of Sections 2013.1 to 2013.4, Code 1939. The power of the Department of Justice where such application is made by Boards of Supervisors or City Councils is contained in Section 2013.5 which follows:

"The board of supervisors of a county or the council of any city or town in such county, including cities under special charter, may apply to the department of justice that any motor vehicle seized in such county and requisitioned under sections 2013.1 to 2013.4, inclusive, be delivered to such board or council for use in performing official duties by officials and officers of the county or city or town. No officer of any county or city shall be allowed mileage for the performance of any official duty wherein he uses a publicly owned car. The department of justice may allow such application whereupon the automobile shall be delivered to the board of supervisors or to the council for use in accord with such application. Should the county and city or town both make application for the same vehicle and the applications be granted, the vehicle shall be delivered to the public body whose officers first seized the vehicle."

STATE PROPERTY: REBUILDING OF BRIDGE The Executive Council may provide funds for rebuilding or restoring a bridge on state owned land. State Board of Education may maintain, repair or improve bridge on Iowa State College campus and pay for same under its appropriation or from such augmentation of appropriation as Interim Committee might make.

April 19, 1946. *Hon. Robert D. Blue, Governor of Iowa, Building:* Receipt is acknowledged of your communication of April 15, 1946, wherein your report that since the adjournment of the 51st General Assembly, the Thirteenth Street Bridge across Squaw Creek upon the college campus at Ames has sustained such damage from the elements as to render it unfit for use and that as a consequence thereof said bridge is now closed, resulting in a serious traffic problem between the city of Ames and the college campus. You further suggest that during the session of the 51st General Assembly and at a time when the bridge was capable of being, and was in fact used by the traveling public, legislation was proposed contemplating the construction of a new bridge to replace the existing one, but that this proposed legislation never became enacted into law. You make inquiry as to the legal possibilities relative to the replacement of this bridge.

The bridge in question is located upon state lands and as such is state property. Section 286 of the 1939 Code deals with the "repairing, rebuilding or restoring" of state-owned property injured or destroyed by "Acts of God" and is in the following language:

"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 restoring any state property injured, destroyed, or lost by fire, theft, or unavoidable cause, and for no other purpose whatever.*"

This section would seem to provide one means of meeting the situation if the executive council was disposed to act in the premises.

We also direct your attention to sections 4631 and 4633 of the 1939 Code of Iowa, which sections are as follows:

"4631. Separate districts. Highways on lands of the state and highways on which such lands abut shall constitute a separate road district for each state institution, or state park, in connection with which such lands are used, and shall be under the jurisdiction of the board in control thereof."

"4633. Maintenance and improvement. The roads, bridges and culverts within or adjacent to any such district 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."

Section 4633 contains a specific authorization to the board in control of the lands in question—in this instance the board of education—to maintain, repair and improve bridges located within the road district involved. The cost, after the filing of a certificate of the detailed amount due by the board with the comptroller and after an audit thereof, would be payable from the departmental appropriation of the board or an augmentation thereof made by the interim committee. Chapter 4 of the Acts of the 51st General Assembly contains an appropriation in the amount of \$200,000.00 to the Board of Education for "repairs, replacements or alterations" at the Iowa State College of Agriculture and Mechanic Arts. We think it well at this point to observe that the authority granted under section 4633 is limited to maintenance, repair and improvement, and does not extend to the replacement of an existing structure—that is, the erection of a new bridge. That portion of section 2 of Chapter 8, Acts of the 51st General Assembly which is in words and figures as follows, to-wit, "nor shall the committee on Retrenchment and Reform allocate any funds for any purpose or project which was or should have been presented to the General Assembly by way of a bill, and which failed to become enacted into law" would not prevent the interim committee from augmenting the appropriations above referred to if such augmentation became necessary for the purpose of reconditioning the existent bridge, and this for the reason that the legislation proposed to the 51st General Assembly relative to the Squaw Creek bridge, and which did not become enacted into law (S. F. 201, H. F. 177) contemplated the construction of a new bridge, and not the reconditioning of the present one. It is also material that at the time the legislature was in session the bridge was usable, while now it is not.

We believe, therefore, that the Executive Council, if it so determined to do, could under the provisions of section 286 of the Code provide funds for the rebuilding or restoring of the bridge in question, or that the board of education under the provisions of section 4633 of the Code could maintain, repair or improve the existent bridge and pay for the same from its appropriation for "repairs, replacements or alterations" or from such augmentation of said appropriation as the interim committee might make.

RETIREMENT FUND FOR PUBLIC EMPLOYEES. The Employer shall pay its tax toward the retirement fund from funds available and not otherwise appropriated. As far as the state is concerned, the legislature has not made available to it funds from which this tax or contribution could be paid.

April 25, 1946. *Mr. Henry Wichman, Secretary, Executive Council, Building:* This will acknowledge receipt of yours of the 9th inst., in which you ask for opinion in the following situation:

"In connection with the Public Employees' Retirement System, being Chapter 91, Acts of the 51st G. A., the Council is desirous of being advised with respect to the fund from which the contribution provided to be made by the employer shall be paid.

"They are particularly concerned as to whether the support and maintenance monies appropriated by the Legislature for the several departments and instrumentalities of the State may be used in making that contribution?"

In reply thereto, I would advise you that the foregoing Act provides, under Section 8 thereof, the following tax imposed upon the employer to make up the contribution of the employer to the retirement fund. This section follows:

"In addition to all other taxes there is hereby levied upon each employer (as defined in section twenty (20) of this Act) and also upon each employee (as defined in section twenty (20) of this Act) a tax equal to the following percentage of the wages paid by the employer to the employee. With respect to such wages paid during the calendar years 1946, 1947 and 1948, the tax shall equal one per centum of such wages to be paid by each employer and each employee. For the calendar year 1949 and each calendar year thereafter the rate of tax shall be two per centum of such wages on both employer and employee."

The term "employer" as used in the foregoing Section, is defined in Section 20, Subsection (c) of the Act as follows:

"The term 'employer' means the State of Iowa, the counties, municipalities and public school districts therein and all of the political subdivisions thereof and all of their departments and instrumentalities, all hereinafter called political sub-divisions excepting only those whose employees are now covered by a retirement plan in which such political sub-division participates in financing. Provided that such excepted political sub-division may by election come under the provisions of this Act in accordance with the regulations prescribed by the Commission."

The fund from which this tax or contribution is paid by the employer is defined by Section 6, Subsection B, as follows:

"The employer shall pay its tax or contribution from funds available and is directed to pay same from tax money or from any other income of the political sub-division."

The intention of the Legislature is determined fundamentally from the terms of the Act under examination. With that principle in mind, it is to be noted that there is no express provision in the Act providing that this tax should be paid from any funds appropriated by the Legislature for the support and maintenance of the several departments and instrumentalities of the State. And we are further of the view that such intent to use such funds will not be implied in view of the express terms of the Act providing the fund from which this contribution should be made.

We note that under Section 6, Subsection B, the employer (in the present instance the State of Iowa) shall pay this tax or contribution from funds available and as far as its political subdivisions are concerned, including counties, etc., the fund for which their contribution is made is from tax money or from any other income of such political subdivisions. Insofar as the State is concerned, the Legislature has not made available to it funds from which this tax or contribution could be paid.

VETERANS: W. A. A. C.: W. A. C. Women formerly serving in W. A. A. C. are not honorably discharged veterans. This does not include any W. A. A. C. member who subsequently became attached to the W. A. C.

April 25, 1946. *Mr. Edwin H. Curtis, Executive Secretary, Iowa State Bonus Board, Local:* You submit the following for opinion:

"The W. A. A. C. was organized May 14, 1942, under Public Law 554. The W. A. A. C. was converted by G. O. 42 War Dept., July 26, 1943, to the W. A. C. Effective date Sept. 1, 1943.

Are the members of the W. A. C. who served between the dates of May 14, 1942, and September 1, 1943, honorably discharged war veterans and entitled to relief as provided for by Sections 3828.051 to 3828.066 inclusive and the Amendments of the 51st General Assembly?"

In reaching conclusion to the foregoing query, we call attention to the provisions of Section 3828.051, Code 1939, as amended by Chapter 137, Acts of the 50th G. A. and Chapter 124, Acts of the 51st G. A. defining the persons who are entitled to relief under Chapter 189.2, Code 1939. This Section is as follows:

"A tax not exceeding one mill on the dollar may be levied by the board of supervisors upon all taxable property within the county, to be collected at the same time and in the same manner as other taxes, to create a fund for the relief of, and to pay the funeral expenses of honorably discharged men and women of the United States who served in the military or naval forces of the United States in any war, and their indigent wives, widows, and minor children not over eighteen years of age, having a legal residence in the county."

Attention is directed to the phrase "men and women of the United States who served in the military or naval forces of the United States in any war."

The W. A. A. C. was established pursuant to an Act of Congress known as Public Law 554, now appearing in United States Statutes at Large, Vol. 56, page 278. The Act itself plainly dissociates this W. A. A. C. from the Army. The preamble of the foregoing Act designates the purpose for which the organization was established in these words:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President is hereby authorized to establish and organize in such units as he may from time to time determine to be necessary a Women's Army Auxiliary Corps for noncombatant service with the Army of the United States for the purpose of making available to the national defense when needed the knowledge, skill, and special training of the women of this Nation. The total number of women enrolled or appointed in the Women's Army Auxiliary Corps shall not exceed the number authorized from time to time by the President, and in no event shall exceed one hundred fifty thousand."

And Section 12 thereof definitely distinguishes the Corps from the Army. The terms of that Section are these:

"The corps shall not be a part of the Army, but it shall be the only women's organization authorized to serve with the Army, exclusive of the Army Nurse Corps. Nurses may be enrolled in the corps but nothing in this Act shall be construed to affect or change the Army Nurse Corps as now established by law."

The Corps therefore not being part of the Army, the members of the Corps are not honorably discharged women who served in the military or naval forces of the United States. According to *Lamb v. Kroeger*, 8 N. W. 2d. 405, 233 Iowa 730, speaking with respect to "honorable discharge" and its meaning, the Court there in adopting language from the California Supreme Court stated:

"It does not appear that he ever served in the army or was ever a part of the army. A person may be subject to military law without being a member of the armed forces of the United States, Bannister v. Soldiers' Bonus Board, 43 R. I. 346, 112 A, 422, 13 A. L. R., 589. An honorable discharge is a formal and final judgment based by the government upon the military record of a member of its armed forces, and a declaration that such person had left the service in a status of honor. United States v. Kelly, 15 Wall. 34, 21 L. Ed. 106."

In our judgment, the foregoing is conclusive that members of the W. A. A. C. are not honorably discharged women who served in the military or naval forces of the United States and they are therefore not entitled to the relief provided by Sections 3828.051 to 3828.066, inclusive, as amended by the 50th and the 51st General Assemblies. This opinion shall not be construed to exclude from the benefits of Chapter 189.2, Code 1939, any member of the W. A. A. C. who subsequently became attached to the W. A. C.

OFFICERS: BAILIFFS: COMPENSATION. The power to fix the reasonable compensation which bailiff's are entitled to rests clearly in the Board of Supervisors.

April 25, 1946. *Honorable C. B. Akers, Auditor of State, Building:* We acknowledge receipt of yours of the 16th inst., in which you ask for opinion in the following situation:

"We have found that there is some misunderstanding among County Officials with regard to the fixing of the compensation for bailiffs of the District Court. The question is, whether the compensation is fixed by the Court or is fixed by the Board of Supervisors under the authority of paragraph 10 of Section 5130 of the 1939 Code of Iowa."

In reply thereto, we advise that provision for the appointment of Bailiffs is contained in Section 5187, Code 1939, as follows:

"The sheriff shall attend upon the district court of his county, and while it remains in session he shall be allowed the assistance of such number of bailiffs as the judge may direct. They shall be appointed by the sheriff and shall be regarded as deputy sheriffs, for whose acts the sheriff shall be responsible."

It will be noted by such provision that the Judge of the District Court may fix the number of Bailiffs who shall attend upon sessions of the Court, but the appointing power rests in the Sheriff of the number of Bailiffs so fixed. When so appointed, they have the status of Deputy Sheriffs. No provision is made, however, for their compensation, either in amount or the source of the payment. This question has had the consideration of the Supreme Court in *Bringolf v. Polk County*, 41 Iowa 554, 562, wherein the plaintiff, is set forth as follows:

"VIII. At the March term, 1874, of the Polk County District Court, an order was made by the court for the appointment, by plaintiff, of six bailiffs. In pursuance of said order plaintiff appointed Isaac Woodrow, Henry Hiller, Clinton Githens, Benjamin Bringolf, Lowry Goode and Clinton Wise. Said persons were employed as follows: Woodrow, at the bar of the court, Henry Hiller, in waiting on the grand jury, Clinton Githens, in attendance at the door of the court room, Benjamin Bringolf, in waiting on trial juries, and other services in the court room; Lowry Goode was employed in the sheriff's office, and occasionally in the court room, in doing such writing and other work as was necessary for the execution of the orders of the court requiring immediate attention and the general business of the sheriff's office, and Clinton Wise was employed in going out through the city after persons required in court without process, such as jurors, attorneys, witnesses under subpoenas, and other processes throughout the county, on persons required forthwith, and in helping to keep the court room in order.

After the term the services of Woodrow, Hiller and Githens, were paid in full by the county. The plaintiff paid Bringolf, Goode and Wise, each for thirty-five days service, at the rate of \$2.00 per day, and this sum he claims of the county.

Section 341 of the Code provides: "The sheriff shall attend upon the District and Circuit Courts of his county, and while either remains in session he shall be allowed the assistance of such number of bailiffs as either may direct. They shall be appointed by the sheriff, and shall be regarded as deputy sheriffs, for whose acts the sheriff shall be responsible.

The number of bailiffs is to be determined by the court. No provision is made for their compensation. But, it would seem, they are not to be paid by the sheriff, for if so, it would be safe to leave the determination of the number to him, without restraint or check upon the part of the

court. The security which the county has is in the supervisory control of the court, and the probability that he will not appoint an unreasonable number. When, however, bailiffs are appointed by the court, they are, we think, entitled to a reasonable allowance from the county. If the sheriff employs them in the service of papers for which a fee is allowed by law, they, and not the sheriff, are entitled to the fees, which must be taken into account in fixing the amount of their compensation. This will prevent the sheriff from performing his duties by bailiffs, paid by the county, and at the same time recovering fees for the services performed by them.

The claim exists in favor of the bailiff against the county. But, as the sheriff has paid three of the bailiffs, thus extinguishing their claim, and entitling himself to an assignment of it, and it is agreed by the parties that such disposition has been made of the cases that the costs legally chargeable are payable by the county, we are of opinion that the plaintiff is entitled to recover of the county on account of these bailiffs a reasonable compensation for their services, less such amount as may be properly chargeable in their behalf as fees, and taxed as costs in the various cases pending."

According to the foregoing holding, bailiffs are entitled to reasonable compensation to be paid by the county. The Board of Supervisors of the County has specific power under Section 5130 Subsection 10 thereof, to fix the compensation of County and Township officers not otherwise provided by law, and provides for the payment thereof. This Section provides as follows:

"The board of supervisors at any regular meeting shall have power:

* * * *

10. To fix the compensation for all services of county and township officers not otherwise provided by law, and to provide for the payment of the same."

Whether a Bailiff be deemed to be a County Officer by virtue of his status as a Deputy Sheriff, or deemed to be an employee of the County, the power to fix the reasonable compensation to which they are entitled clearly rests in the Board of Supervisors.

FEES: COUNTY AUDITOR: COUNTY TREASURER: CERTIFICATES. The County Auditor is entitled to 15c for each certificate issued by the County Treasurer for land sold for nonpayment of taxes and the Treasurer is entitled to 50c for each certificate of purchase.

April 25, 1946. *Honorable C. B. Akers, Auditor of State, Building:* I have yours of the 30th ult., in which you ask for opinion in the following situation:

"Section One of Chapter 201 of the Acts of the 51st G. A. provides, 'the treasurer shall receive 50 cents for each certificate of purchase.' In connection with real estate sold for the non-payment of taxes, Section 5155 of the 1939 Code provides in paragraph 3, that the County Auditor shall be entitled to charge and receive 'for each certificate issued by the Treasurer for land sold for non-payment of taxes, fifteen cents.'

The question upon which we would like your opinion is whether or not the fifteen cents fee, which the Auditor is to receive, is to be considered as part of the fifty cents fee charged by the County Treasurer, or if both a fifty cent fee and a fifteen cent fee, making a total of sixty-five cents, should be collected for each certificate of purchase issued."

In reply thereto, the pertinent statutory provisions covering this situation are Section 5155, Subsection 3 thereof, and Section 7263, as amended by Chapter 201, Acts of the 51st G. A., Code 1939. These Sections are as follows:

"5155. The county auditor shall be entitled to charge and receive the following fees:

* * * *

3. For each certificate issued by the treasurer for lands sold for nonpayment of taxes, fifteen cents."

"7263. The treasurer shall prepare, sign, and deliver to the purchaser of any real estate sold for the nonpayment of taxes a certificate of purchase, describing it as shown in the record of sales, giving the part of each tract or lot sold, the amount of each kind of tax, interest, and costs for each tract or lot as described in such record, and that payment has been made therefor."

Not more than one such parcel or description shall be entered upon each certificate of purchase. The treasurer shall receive fifty cents for each certificate of purchase."

Both of the foregoing statutes are existent. They bestow separate and distinct powers upon the County Auditor and the County Treasurer to make their separate charges for separate services. There is nothing in the Legislative history of these two statutes which either expressly or impliedly coordinate these separate services so as to justify either the County Auditor or the County Treasurer from collecting a smaller sum than the 15c authorized to be collected by the County Auditor or the 50c authorized to be collected by the County Treasurer. Payment to the County Auditor of 15c of the sum of 50c allowed to the Treasurer under Section 7263, Code 1939, would amount to the County Treasurer collecting 35c for each certificate of purchase. For the collection of this sum, there is no statutory authority.

We are, therefore, of the opinion that the County Auditor is entitled to charge 15c for each certificate issued by the Treasurer for land sold for nonpayment of taxes, according to Section 5155, Code 1939, and the Treasurer shall exact the sum of 50c for each certificate of purchase under the terms of Section 7263, as amended by Chapter 201, Acts of the 51st G. A. Thus both statutes are operative and separate duties of the Auditor and Treasurer performed and compensated.

RECORDING FEES: ABSTRACTS AND PLATS. The abstract should be recorded along with the plat. Platting papers operate as deed and as such, should be recorded in the town deed record. Fees for recording plats should be same as statutory fee provided for recording of deeds.

May 24, 1946. *Mr. John J. Henneberry, County Attorney, Eagle Grove, Iowa:* I acknowledge receipt of yours of the 3rd inst., as follows:

"Our County Recorder of Wright County has requested me for an opinion from your office regarding the filing of Plats under Chap. 321, Code of Iowa, 1939.

The Recorder would like to have an opinion on the following items:

1. Under Sec. 6277 of the Code of Iowa, is it necessary for a complete abstract to be filed with the Recorder of this County, on an Addition to the City of Clarion, Iowa?

2. In connection with said Addition, in what Record shall the Recorder record these proceedings?

3. In the same matter, the Recorder would like to know the charges for filing the various papers in connection with the Addition to the City of Clarion?"

1. Insofar as your first query is concerned, I would advise you that in an Opinion rendered August 25, 1902, appearing in the Report of Attorney General for 1904, page 276, this Department held the abstract attached to the plat should be recorded. The Opinion is in these words:

"August 25, 1902,
Hon. S. B. Reed,
Waterloo, Iowa:

I am receiving numerous inquiries from recorders in different counties in the state and other relative to the act of the Twenty-ninth General Assembly requiring an abstract to be attached to a plat before the same is recorded, and asking my opinion as to whether it is the duty of the recorder to record such abstract.

My first thought was that it was not necessary to record the abstract, but upon a further and more careful examination of the statute I am inclined to change that opinion, and to hold that the abstract must be recorded. The language of the act, when taken in connection with the language of section 917 of the Code, indicates that it was the intention of the legislature that the abstract should be made a matter of record in the same manner as the other evidence of the title of the land included in the plat.

Section 915 as amended reads:

"Every such plat shall have a complete abstract of title attached thereto and shall be accompanied by a statement to the effect that the subdivision * * * as appears on this plat is with the free consent and in accordance with the desire of the proprietor, which shall be signed and acknowledged by him before some officer authorized to take acknowledgments of deeds."

It is clear that the statement required by section 915 must be entered of record under section 917, and I think it was the intention of the legislature that the abstract should be treated as a part of the statement attached to the plat."

While the statute as then existent is not as elaborate in its details as the statute providing for the platting of subdivisions and additions contained in Code of 1946, designated as Chapter 409, the statute there under consideration is, as far as the problem to which address is here given, not materially different. Section 6247, Code 1939, now Section 409.9, Code 1946, provides:

"Every plat shall have attached thereto a complete abstract of title accompanied by an opinion from an attorney at law showing that the fee title is in the proprietor * * *".

And Section 6277, Code 1939, now Section 409.12, Code 1946, and being Section 917 of the Code of 1897, as amended, thereafter provides:

"The signed and acknowledged plat, the abstract, and the attorney's opinion, together with the certificate of the clerk, recorder, and treasurer, and the affidavit and bond, if any, together with the certificate of approval of the council, shall be entered of record in the proper record books in the office of the county recorder."

We therefore confirm the foregoing opinion and advise you that the abstract of title attached to the plat should be recorded.

2. In answer to your second and third queries, I would advise you that insofar as platted premises include streets or other public use or the dedication of any part of the platted premises to charitable, religious or educational purposes, such platting operates as a deed. This is the effect of the recording of the plat, according to Section 6278, Code 1939, now Section 409.13, Code 1946, as follows:

"Such acknowledgment and recording shall be equivalent to a deed in fee simple of such portion of the premises platted as is set apart for streets or other public use, or as is dedicated to charitable, religious or educational purposes."

Platting of streets, or other public use, or dedication to charitable, religious or educational purposes being inseparable from platting of the whole premises, it follows that in order to effectuate the statutory result, the platting papers should be recorded in the town deed record. (See Section 558.53, Code 1946). And the fees for such recording should be the statutory fees provided for the recording of deeds.

SCHOOL DISTRICT: PURCHASING HOME FOR SUPERINTENDENT. 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.

June 5, 1946. *Mr. Dana D. Shepard, County Attorney, Allison, Iowa:*
We have yours of the 21st inst., in which you state:

"I have been requested to write for your opinion as to whether or not a school district may become indebted under the section 296.1 of the 1946 Code of Iowa, for the purpose of purchasing a house for the superintendent. I note that the language of the statute authorizes only building and furnishing such a home."

This Section to which you refer, being 296.1, 1946 Code, is this:

"*Indebtedness authorized.* Any school corporation shall be allowed to become indebted for the purpose of building and furnishing a schoolhouse or schoolhouses and additions thereto, gymnasium, teachers' or superintendent's home or homes, and procuring a site or sites therefor, or for the purpose of purchasing land to add to a site already owned, to an amount not to exceed in the aggregate, including all other indebtedness, five percent of the assessed value of the taxable property within such school corporation, such value to be ascertained by the last county tax list previous to the incurring of such indebtedness, anything contained in section 407.1 to the contrary notwithstanding."

Whether the word "building" in a statute of the foregoing character may be interpreted to include the word "purchase" has not apparently

been determined by our Supreme Court. However, it and synonymous words have had the consideration and conclusion of other Courts. In *Verner v. Muller*, 72 S. E., 393, it appeared that the Constitution of South Carolina provided:

"The General Assembly shall not have power to authorize any county or township to levy a tax or issue bonds for any purpose, except for educational purposes, to build and repair public roads, buildings and bridges, etc."

It was contended that an Act of the Legislature of 1908 construed to authorize the purchase of standing bridges, was obnoxious thereto. The Court there said:

"The purpose of the Constitution was to leave the Legislature free to authorize counties and townships to establish and maintain public roads, buildings, and bridges. The word 'build' may be employed in the sense of obtain, secure, or acquire, as well as the ordinary meaning. In *Nebraska Loan & Building Ass'n v. Perkins*, 61 Neb. 254, 85 N. W. 67, 1 Words and Phrases, 887, authority to loan funds for 'building' homesteads was construed to include the idea of purchasing lots and buildings. In *Bascom v. Oconee*, 48 S. C. 55, 25 S. E. 984, authority to the county commissioners to open and establish a public road connecting with a bridge over a stream included power to purchase the bridge already constructed. In *Dick v. Scarborough*, 73 S. C. 153, 56 S. E. 86, it was held that authority to issue bonds for establishing municipal waterworks included the acquirement of waterworks by purchase."

In *Nebraska Loan and Building Association v. Perkins*, 85 N. W. 67, 69, which was referred to in the foregoing case, the Court, addressing itself to the particular question, said this:

"Another phase of the same question may be discussed in this connection. It will be noted that the title of the act provides for the organization of associations for the purpose of 'raising funds to be loaned among their members for building them homesteads.' Section 1 of the act provides that these shall be organized 'for the purpose of raising moneys to be loaned among the members * * * for use in buying lots or houses, or in building or repairing or removing incumbrances from houses, etc.; and it is argued that this portion of the act is much broader than the title, and for that reason violates the constitutional mandate. Doubtless a legislature may make the title to an act as restrictive as it please, and may sometimes so frame it as to preclude many matters being included in the act which might with entire propriety have been embraced in the one enactment, had the title chosen not been too much narrowed. *Cooley, Const., Lim.* (6th Ed.) 178. But a reasonable interpretation of this act will scarcely comport with the argument of counsel to the effect that the title is too restrictive. While the word 'build' is employed in the title, we doubt not it was employed in the sense of 'obtain,' 'secure,' or 'acquire'. The object sought was the obtaining of the home for the family and the method of obtaining it, whether by purchase, by borrowing money from the association with which to buy a tract of land and thereon erect a home, or to repair or to remove incumbrances from a home already purchased, would be immaterial. We are therefore of the opinion that the title does not restrict members to the single method of building a home, but that all the means set out in section 1 are legitimate, and within the meaning and intent of the title."

It will not be controverted that the word "construct" in a statute is synonymous with the word "build". And such word "construct" has

likewise been interpreted in statutes like the statute under consideration to include the word "purchase".

The Supreme Court of Idaho, in *Ostrander v. City of Salmon*, 117 Pac., 692, where there was a controversy over the validity of a proposed bond issue of \$50,000 for the City of Salmon, with respect to objections pertinent to this question under discussion, said:

"4. There is one other question presented in the argument upon this appeal which is relied upon, which we deem proper to dispose of, inasmuch as the same question might be raised in case the proposed bond issue is again submitted. It is contended by the appellant that the municipality had no legal authority to purchase waterworks already constructed, or make the same a part of the municipal water system. This argument is based upon the provisions of subdivision 1, par. 2315. Rev. Codes: 'To provide for the construction and maintenance of necessary waterworks and supplying the same with water.' It is urged that the word 'construction' as used in this subdivision will not authorize a municipality to purchase works already constructed. We think it was not intended by the Legislature, by the language thus used, to prohibit a municipality from purchasing waterworks already constructed, and to make the same all or a part of a general water system for such municipality. The very fact that the municipality is authorized to provide for the construction and maintenance of necessary waterworks implies authority to purchase works already constructed, and to make the same all, or a part of, a general system of waterworks. This construction clearly appears when we take into consideration the provisions of section 2238 of the Revised Code, which prescribes additional powers of cities and villages. Subdivision 36: 'Acquire by purchase or otherwise, waterworks or plants and illuminating plants, to supply the municipalities and the inhabitants thereof with water and light.' A municipality may have a water system owned and operated by private individuals or corporations, and such system may be inadequate to supply the demands of the municipality, or such system may be operated in such a manner as to be oppressive to the inhabitants of such municipality, and at the same time the municipality may be able to purchase such system at a less cost than a new system of equal adequacy could be constructed, and, because of these facts and other facts, the city might conclude that it would be wise to purchase such system and make it all or part of a general water system for the municipality, and it clearly was not intended by subdivision 1 of section 2315 to limit a municipality in its power to purchase a water system.

"In the case of *Seymour v. City of Tacoma*, 6 Wash. 138, 32 Pac. 1077, the Supreme Court of the state of Washington had under consideration the construction of an act of the Legislature, the title of which read, 'An Act authorizing cities and towns to construct internal improvements, and to issue bonds, and pay therefor,' and in the course of the opinion the court holds: 'The real purpose of this act would have been better expressed had the word 'provide' been used, but we think the word 'construct' under all the circumstances may be accorded a similar meaning, rather than defeat the operation of what is probably the most important feature of this law, upon the technical significance of a word, where it can hardly be contended that any one was likely to be deceived'; and in effect holds that the word 'construct' includes the power to purchase in making such improvements. In the case of *Dick v. Scarborough*, 73 S. C. 150, 53 S. E. 86, the Supreme Court of South Carolina had under consideration a statute of that state which empowered the municipal authorities to provide for issuing bonds 'for the purpose of enlarging, extending or establishing waterworks,' and says: 'It is true, power to hold an election to authorize the issuance of bonds to purchase

waterworks is not given in this statute by use of the word 'purchase' but 'establishing' municipal waterworks may be accomplished by purchase as well as by construction. Establishing waterworks obviously here means the acquirement and inauguration of a system of waterworks as a municipal enterprise and as municipal property by either construction or purchase.' *Clark v. City of Los Angeles* (Cal.) 116 Pac. 722. So we conclude that subdivision 1 of section 2315 of the Revised Codes clearly authorizes a municipality to vote bonds for the purpose of constructing and maintaining necessary waterworks, either by construction or purchase."

And in the case of *State ex rel Highway Commission v. Thompson*, 53 S. W. 2d., 273, where in interpreting a constitutional amendment containing the authority to construct bridges but not expressly authorizing the purchase of existing bridges, it was said:

"True, said constitutional amendment does not expressly authorize the state highway commission to purchase existing bridges. But, it had been held in cases involving public improvements that, under some circumstances, the general power to 'construct' includes the power to 'purchase.' See *Seymour v. City of Tacoma*, 6 Wash. 138, 32 P. 1077; *Ostrander v. City of Salmon*, 20 Idaho, 153, 117 P. 692; *Dick v. Scarborough*, 73 S. C. 150, 53 S. E. 86. Immediately after the adoption of the constitutional amendment of 1920 which authorized the expenditure of \$60,000,000 in the construction of a state highway system, a dispute arose between the larger cities and the rural districts over a division of 'the spoils'; that is, a dispute as to what proportion of state road funds should be spent in the construction of higher type roads connecting the population centers of the state. Reflections of this dispute appear in the provisions of section 26 of the Centennial Road Law (now section 8117, R. S. 1929) (Mo. St. Ann. § 8117), relating to the apportionment of state road funds, and in other provisions of said law. However, the provisions of the constitutional amendment of 1928 show that the larger cities and rural districts, with a better appreciation of the value of the state highway system and with the purpose of completing the same as speedily as possible, 'got together' and agreed 'to turn the state highway commission loose' with ample funds and ample authority for the accomplishment of that purpose. So viewing the provisions of said constitutional amendment as a whole, we are led to the conclusion that its framers intended, by the general provision for the construction of 'bridges across the rivers and water of the State, and by the specific provision for the completion of existing state highways, to invest the state highway commission with authority to provide bridges over navigable streams at all points where such streams intersect said highways, either by constructing new bridges or by purchasing existing bridges at such points. and, therefore, we hold that said provisions should be so construed."

The Supreme Court of New Mexico in *Board of Com'rs of Guadalupe County v. State*, 94 Pac. 2d, 515, declared no invalidity of bond issue results from use of words in submitting questions to the voters which necessarily and invariably are the same import as the words employed in the granting of power. It is there said:

"As a starting point it may be said that in the submission of questions as to the issuance of bonds, the use of words which necessarily and invariably are of the same import as words employed in the grant of power or in the limitations on the power will not invalidate the issue although it is not apparent why those who have in charge such matters choose to use synonyms when the words of the statute granting the power are available and preferable."

We are of the opinion, therefore, 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.

REGISTERED NURSES: ADMINISTRATION OF ANESTHETICS.

The administration of anesthesia by a licensed nurse, under the supervision and direction of a licensed physician, constitutes the practice of nursing and not practice of medicine.

June 27, 1946. *Mr. Herman B. Carlson, Director Division of Law Enforcement, State Department of Health, Building:* Receipt of your inquiry of June 19, 1946, is acknowledged, wherein you request our opinion on the following question:

"Is it illegal under the Iowa law for a registered nurse to give anesthesia under the direction of licensed physician and surgeon?"

In answering your inquiry we observe that there is no specific provision in our statutes requiring that a license of any type be held by a person administering anesthesia, and such practice would be illegal only if the same constitutes the practice of one of the several healing arts for which a license is required by the Practice Acts which are contained in Title VIII, Chapters 146 to 158, inclusive, 1946 Code of Iowa.

Assuming that your inquiry is limited to the question whether the indicated act would constitute the practice of medicine, for which a license is required, we note that Section 148.1 of our Code defines who shall be deemed to be engaged in the practice of medicine, and that Section 148.2 provides:

"Section 148.1 shall not be construed to include the following classes of persons:

4. *Licensed podiatrists, osteopaths, osteopaths and surgeons, chiropractors, nurses, dentists, optometrists, and pharmacists who are exclusively engaged in the practice of their respective professions."*

The portion of the statute set out specifically exempts licensed nurses who are exclusively engaged in the practice of nursing from the provisions of our law relating to the practice of medicine, and since your inquiry indicates that the anesthetic is administered by a licensed nurse, we must necessarily first give attention to the question of what acts constitute the practice of nursing.

Our statute defining "nursing", Section 152.1, provides that any person shall be deemed to be engaged in the practice of nursing "who practices nursing as a graduate or registered nurse or publicly professes to be a graduate or registered nurse and to assume the duties incident to such profession," and we must look elsewhere to determine what the duties incident to such profession are.

Scheffel and McGarvah in their treatise entitled "*Jurisprudence for Nurses*" define "nursing" as:

"Any and all acts performed for gain, hire or reward, either direct or indirect, by any person which acts have been their objective the making of any sick, injured, infirm or helpless person either physically or mentally more comfortable, or which keep them in a hygienic condition as a result of their efforts and administrations, or carrying out orders or directions of licensed practitioners of the healing art, or in any way professionally assisting for gain or hire such practitioners. * * *"

Webster's International Dictionary defines the term "nursing" as:

"To attend and take care of a sick or feeble person."

In *Chalmers-Francis v. Nelson*, 57 Pac. (2d) 1312, Supreme Court of California, 1936, the question considered was whether the administration of general anesthetics by a registered nurse, employed by the defendant hospital, constituted the illegal practice of medicine. The court held that it was not because the evidence showed conclusively that everything done by the nurse in the administration of the anesthetic was done under the immediate direction and supervision of the operating surgeon and his assistants. In so holding the court said:

"The findings, which are amply supported by the testimony in this case, show conclusively that everything which was done by the nurse, Dagmar A. Nelson, in the present instance, and by nurses generally, in the administration of anesthetics, was and is done under the immediate direction and supervision of the operating surgeon and his assistants. Such method seems to be the uniform practice in operating rooms. There was much testimony as to the recognized practice of permitting nurses to administer anesthetics and hypodermics. One of the plaintiff's witnesses testified to what seems to be the established and uniformly accepted practice and procedure followed by surgeons and nurses and that is that it is not diagnosing nor prescribing by the nurses within the meaning of the Medical Practice Act. We are led further to accept this practice and procedure as established when we consider the evidence of the many surgeons who supported the contention of the defendant nurse, and whose qualifications to testify concerning the practice of medicine in this community and elsewhere were established beyond dispute * * * ."

Aside from the proposition that nurses in the surgery during the preparation for and progress of an operation are not diagnosing or prescribing within the meaning of the Medical Practice Act, it is the legally established rule that they are but carrying out the orders of the physicians to whose authority they are subject. The surgeon has the power, and therefore the duty, to direct the nurse and her actions during the operation."

In *Frank v. South*, 194 S. W. 375, Kentucky Court of Appeals, 1917, it was likewise held that a nurse administering anesthetics under the personal direction and supervision of a physician was not engaged in the practice of medicine. In so holding the court significantly said:

"It seems that it would be impossible to practice medicine in any sense in which the term could be used without the practitioner making a diagnosis of the symptoms of the patient, and to determine what disease the patient is afflicted with, and then to determine and prescribe what remedy should be used, in attempting to treat the ailment or infirmity with which the patient is suffering. *The mere giving of medicines which are prescribed by a physician in charge who has made a diagnosis and determined the disease, and determined the remedy and directs the manner and time and the character of the medicines to be*

administered, has never been considered engaging in the practice of medicine. The person who administers medicine under such a state of case does not exercise any judgment as to the character of the disease nor the necessary remedy nor the manner in which nor when the medicine should be administered, but merely acts as the hands of the physician in administering the medicines in the quantities and at the times directed by the physician. It having been agreed that (the nurse) has never prescribed for any person, nor treated any human ailment or infirmity—unless the administration of anesthetics to a patient undergoing or preparing to undergo a surgical operation, and in the presence and in accordance with the directions of the surgeon in charge, who prescribed the anesthetic to be administered, it would seem that she is not engaged in the practice of medicine within the meaning of that term and in accordance with its popular sense.”

In a West Virginia case, *Cook v. Coleman*, 11 S. E. 750, it was held in an action for malpractice based on the administration of an anesthetic by a nurse, that it was error to permit an expert witness to testify that in his opinion the administration of ether by a Doctor of Medicine is legally required, because neither the common law nor any of the statutes of that state required such method of administration.

While these cases merely hold that administration of anesthetics by a licensed nurse is not the unlicensed practice of medicine where done under the direction and supervision of a licensed practitioner of medicine, under the particular statutes of the State where the decisions were rendered, they are important in that they seem to incidentally also recognize the principle that the practice of nursing and the practice of medicine occupy overlapping fields of activity, and that while many acts ordinarily performed by a nurse constitute the practice of medicine in the abstract sense, these same acts become the proper functions of a nurse when performed under the supervision and direction of the physician. This is based on the theory that the danger of diagnosis and determination of a proper remedy and prescription therefor are removed where the nurse merely acts as the hands of the physician.

There is an indication in these cases also, that, although there is no unanimity of opinion, a considerable group of practitioners of medicine are of the opinion that the administration of anesthesia by a licensed nurse is a duty incident to the practice of the nursing profession and does not constitute the practice of medicine. Absent any direct authority on the question in this jurisdiction, it revolves itself into a strictly fact question, the answer to which can be supplied accurately only by the testimony of qualified expert witnesses. Assuming that the testimony of such witnesses be as in the cited cases, and absent any prohibitions or limitations in our own statutes, we are inclined to the view that our courts would hold that such administration of anesthesia by a nurse under the provision and direction of a licensed physician would be held to be a duty incident to the practice of nursing within the definition of nursing contained in Section 152.1 of our Code, and as such not illegal when so administered.

The foregoing view of it would seem to render unnecessary any determination as to whether such administration of anesthesia consti-

tutes the practice of medicine. Without so deciding, we are of the view however, that where the anesthesia is administered under the supervision and direction of a licensed physician, the same would not constitute the practice of medicine. Other jurisdictions have so held, as indicated in the authorities cited above, on the theory that there is no diagnosis of ailment or prescribing of a remedy therefor, except by the licensed medical practitioner under whose supervision and direction the anesthesia is administered, and that when one so administers anesthesia he is merely acting as the hands of the physician. The principle that the elements of diagnosis of human ailment and the prescribing of a remedy therefor are matters which must be shown to evidence the practice of medicine. It is recognized by all the cases in our jurisdiction dealing with that question, and the principle is stated in the recent case of *State v. Robinson*, 19 N. W. 2d 214, where our courts held as follows:

"The term 'practice of medicine' is defined by Section 2538. It is not confined to the administering of drugs. Under this statute one who publicly professes to be a physician, and induces others to seek his aid as such, is practicing medicine. Nor is it requisite that he shall profess in terms to be a *physician*. It is enough under the statute if he publicly profess to assume the duties incident to the practice of medicine. What are 'duties incident to the practice of medicine'? Manifestly the first duty of a physician to his patient is to *diagnose* his ailment. Manifestly, also, a duty follows to *prescribe* the proper treatment therefor. *If, therefore, one publicly profess to be able to diagnose human ailments, and to prescribe proper treatments therefor, then he is engaged in the practice of medicine, within the definition of section 2538.*"

To sum it up, it is our opinion that the administration of anesthesia by a licensed nurse under the supervision and direction of a licensed physician constitutes the practice of nursing, thus removing it from the field of the statutes regulating the practice of medicine by virtue of Section 148.2, does not constitute the practice of medicine without a license, and is therefore not illegal. It should of course be recognized that this opinion is intended only as an aid to your department in formulating its policy toward the commencement of civil proceedings or criminal prosecutions where complaints are presented to your department involving the question presented in your inquiry.

Until our Legislature passes specifically upon the proposition one way or another, we recommend that no such actions be instituted. Such a policy would not foreclose persons who deem themselves adversely affected thereby from enforcing their rights, for it should be observed that such persons still have the opportunity to assert those rights by legal proceedings brought in their own name.

SCHOOL DISTRICT: SALE OF SCHOOLHOUSES. Schoolhouses and schoolhouse sites of a school corporation that are no longer necessary by reason of consolidation may be sold with or without the sanction of the electors of the school district.

June 27, 1946. *Miss Jessie M. Parker, Superintendent of Public Instruction, Building*: We acknowledge receipt of your letter in which you ask for opinion in the following situation:

"In view of the increasing number of new consolidated school districts that are being organized in the State of Iowa at the present time, the question of the sale of schoolhouses and schoolhouse sites taken into the consolidated district presents a problem. Heretofore, this office has relied upon the opinion of the attorney general's office found in the 1940 report, page 135.

"In the new consolidations, boards are contending that they have a right to sell unnecessary schoolhouses and schoolhouse sites that have been taken into new consolidated districts without submitting the proposition for their sale to the electors of the district for their determination.

"It is contended that section 4385 creates a different situation for consolidated school districts than is found in other school corporations.

"In order to clarify this matter, the department of public instruction requests an official opinion as to the right of school boards of newly formed consolidated school districts to sell schoolhouses and sites that have been taken into the district on their own initiative.

"If boards have authority to sell these buildings and sites in a different way than that provided in section 4217, under what circumstances, if any, must said buildings and sites be appraised?

"What effect will section 4379 of the Code have upon the sale of these sites and the improvements thereon if made by the board on its own initiative?

"Would this situation be altered if the sale were authorized by the electors of the new consolidated district?"

Pertinent to the foregoing situation, Section 4385, Code of 1939, now Section 297.21 of the Code of 1946, provides as follows:

"297.21. *Sale of unnecessary schoolhouse sites.* Schoolhouses and school sites no longer necessary for school purposes, because of being located in consolidated school districts, may be sold immediately after the organization of such consolidated school districts, in the manner above provided.

"During the use of such premises, no person owning a right of reversion shall have any interest in or control over the premises.

"This and sections 297.15 to 297.20, inclusive, shall not apply to cases where schools have been temporarily closed by law on account of small attendance."

It is clear from the foregoing statute that when a school corporation becomes a part of the consolidated district, its schoolhouses are permanently closed and its sites no longer required for school purposes. It is our opinion, therefore, that, under the clear language of the foregoing statute, such schoolhouses and school sites may be sold by such school corporations so consolidated by pursuing the method prescribed by sections 4379 to 4384, Code of 1939, sections 297.15 to 297.20, Code of 1946. The permanent closing of such schoolhouses creates a different situation from that to which address was made in the opinion of the Attorney General appearing in the Report of the Attorney General for 1940, at page 135, and therefore the reasoning and conclusion of that opinion is not applicable. Nor does Section 4379 of the Code of 1939, Section 297.15, Code of 1946, as follows:

“Reversion of schoolhouse site. Any real estate owned by a school corporation, situated wholly outside of a city or town, and not adjacent thereto, and heretofore used as a schoolhouse site, and which, for a period of two years continuously has not been used for any school purpose, shall revert to the then owner of the tract from which the same was taken, provided that said owner of the tract last aforesaid shall, within the time hereinafter prescribed, pay the value thereof to such school corporation.”

operate to limit the power and authority of the school corporations bestowed by Section 4385, Code of 1939, Section 297.21, Code of 1946.

Section 297.21, where applicable, has the effect of obviating the two-year time element employed in Section 297.15 and authorizes a sale immediately after the consolidation is effective; but the mechanics of sale, including an opportunity for the owner of the tract from which the site was taken to purchase the same (Secs. 297.15 to 297.20), remains the same and the matter need not be submitted to the voters.

Chapter 183 of the Acts of the 39th General Assembly (now codified as Sections 4379 to 4385, both inclusive, Code of 1939, Sections 297.15 to 297.21, both inclusive, Code of 1946) more clearly expresses the foregoing legislative intent and confers upon school corporations where consolidation has taken place a self-executing method of sale of schoolhouses and schoolhouse sites, with the right of reversion as defined in those statutes.

We are of the opinion, therefore, that, in the foregoing situation, schoolhouses and schoolhouse sites of school corporations that are no longer necessary for school purposes because of being located in consolidated districts may be sold either with or without the sanction of the electors of the school district.

TAX REFUND: MOTOR VEHICLE FUEL TAX: HIGHWAY CONSTRUCTION. No fuel tax need be paid in connection with purchase of fuel oil which is used in operation of road building machinery if and where such machinery is used exclusively within area which is not open to use of public as a matter of right for the purpose of vehicular travel.

July 19, 1946. *Hon. J. M. Grimes, Treasurer of State, Building:* Receipt is acknowledged of your letter of June 14, 1946, wherein the following appears:

“In the administration of the Motor Vehicle Fuel Tax Law we have held that the tax should be charged on any fuel oil sold for use in motor vehicles which are used in the construction of new highways even though said highways are not open for public travel or in the construction or repair or maintenance of existing highways whether open or temporarily closed when the cost of such construction, re-construction, repair or maintenance is paid from public funds”,

and wherein you ask to be advised if any exception exists to your method of imposing the tax as outlined in said statement.

Section 324.1 of the 1946 Code contains the legislative definition of several of the terms used in the Motor Vehicle Fuel Tax chapter, and paragraphs 5, 6, 9 and 10 of said section are as follows:

5. "The term 'motor fuel' shall mean those motor vehicle fuels which alone and without being combined with other petroleum products or other substances are capable of successfully operating by combustion an internal combustion engine of the type used in automobiles and trucks such as gasoline or other petroleum products or other substances having similar qualities, which have a flash point less than one hundred degrees Fahrenheit as determined by the Tagliabue closed cup test, or has an initial boiling point of less than three hundred degrees Fahrenheit as determined by the method of the American Society of Testing Materials or has a ninety-five percent distillation point at less than four hundred sixty-four degrees Fahrenheit as determined by the method of the American Society of Testing Materials.

6. "The term 'fuel oil' shall mean those motor vehicular fuels not within the above specifications for motor fuel which either alone or when combined with other petroleum products or other substances are capable of being used as a fuel to propel motor vehicles upon the public highways such as ordinary kerosene, distillate, diesel fuel and gas oil or other petroleum products or other substances having similar qualities.

9. "The term 'highway' shall mean any way or place of whatever nature open to the use of the public as a matter of right for the purpose of vehicular travel.

10. "The term 'motor vehicle' shall mean any mechanical contrivance propelled on the highways by an internal combustion engine, including those contrivances used to transport passengers or freight and those used for the purpose of constructing or repairing said highway."

Section 324.54 of the 1946 Code is in the following language:

"No tax refund shall be paid to any person, firm, or corporation on any motor vehicle fuel used in any construction or maintenance work which is paid for from public funds, but this provision shall not be construed as requiring payment of the tax herein imposed with respect to the sale or use of fuel oil so used unless the same is used as a fuel to propel motor vehicles operated upon the public highways for the purposes of transportation."

It must be borne in mind that there is a statutory distinction between "motor fuel" and "fuel oil", and that we are presently concerned only with "fuel oil".

Paragraph 10 of section 324.1 as herein above set out, defines mechanical contrivances propelled upon the highways by an internal combustion engine, including those contrivances used for the purpose of constructing or repairing said highways as being motor vehicles".

Paragraph 9 of section 324.1 defines "highway" as a place of whatever nature "open to the use of the public as a matter of right for the purpose of vehicular travel." Conversely a place which by reason of construction or reconstruction is not "open to the use of the public as a matter of right for the purpose of vehicular travel" would not be a highway within said definition. A way that is being constructed into what will later be a "highway" or a way that was formerly a "highway" but is currently closed for repairs or reconstruction and will later again become a "highway" is not, while closed, within the definition of "highway". Road building machinery being used in construction, reconstruction or repair of a closed way and entirely within the area from

which the public is excluded, although within the definition of "motor vehicle" is not being propelled upon the public highway as highways are defined in paragraph 9 above.

Section 324.54 of the 1946 Code prohibits the refund of a tax paid upon motor vehicle fuel used in construction and maintenance work which is paid for from public funds, but contains the qualification that "this provision shall not be construed as requiring payment of the tax herein imposed with respect to the sale or use of *fuel oil* so used, unless the same is used as a fuel to propel motor vehicles operated upon the public highways for the purposes of transportation". Again it would appear that when road building machinery is being used entirely within a closed area the fuel oil consumed thereby is not being used "to propel motor vehicles operated upon the public highways for the purposes of transportation".

The Supreme Court of the State of Wisconsin in construing a statutory definition of "highway" identical with the Iowa definition stated in the case of *Payer v. State*, 240 Wis., 337, 3 N. W. 2d., 369:

" * * * The term 'highway' is a broader term than 'roadway' and it includes at least such portions of the space dedicated for use as a public highway as are open to the use by the public as a matter of right for vehicular traffic. *No doubt, where there is an established curb line, and the space between this and the property line is maintained as a lawn or garden, the portion so maintained is not open to the public for vehicular travel.*" (Emphasis supplied).

This case in effect says that if the public is excluded from any portion of the dedicated way such excluded area does not constitute a portion of the "highway" within the definition in question.

We are therefore of the view that no motor vehicle fuel tax need be paid in connection with the purchase of "fuel oil" which is used in the operation of road building machinery if and where such machinery is used exclusively within an area which "is not open to the use of the public as a matter of right for the purpose of vehicular travel", and this even though the project is being financed with public funds.

SCHOOLS: JUVENILE HOME AT TOLEDO. Inmates of the Juvenile Home at Toledo are residents of the Independent School District of Toledo, and as such must be accepted as students in the public schools.

September 3, 1946. *P. F. Hopkins, Chairman, Board of Control of State Institutions, Local:* Your request for our opinion as to whether or not the Independent School District of Toledo, Iowa, may refuse to accept inmates of the Juvenile Home at Toledo as high school students has been received.

In the 1936 opinions of this office will be found an opinion rendered upon this matter at page 567. While all of that opinion need not here be repeated we deem it proper to restate part thereof.

Children under eighteen years of age who are not accused of an offense which is punishable by life imprisonment or death and who are

not feeble-minded and who are not inmates of any state institution or of any institution incorporated under the laws of the State of Iowa, may be admitted or committed by a Juvenile Court to the Juvenile Home at Toledo, Iowa. When so admitted or committed they become wards of the State. This means that the State and the Board of Control have the legal right to determine their residence and their home so long as they remain wards of the State. Unless changed by that authority or other statutory authority the Juvenile Home at Toledo becomes and is their domicile and permanent home. The inmates are clearly, therefore, residents of the Independent School District of Toledo, Iowa, and must be accepted in the public schools under provisions of Section 282.1 of the 1946 Code of Iowa.

In rendering this opinion we are not unmindful of the provisions of Section 282.18 of the 1946 Code, which provides as follows:

"Children who are residents of a charitable institution organized under the laws of this state and who have completed a course of study for the eighth grade as required by section 282.19 shall be permitted to enter any approved public high school in Iowa that will receive them and the tuition shall be paid by the treasurer of state from any money in his hands not otherwise appropriated and upon warrants drawn and signed by the state comptroller on requisition issued by the superintendent of public instruction. The superintendent of public instruction is hereby empowered to require such reports, from such institution and from the high school such pupils attend, as are necessary properly to carry out the provisions of this section."

It must be noted that this section only applies to charitable institutions organized under the laws of the State of Iowa and does not refer to state institutions such as Toledo. Clearly, this section refers to charitable institutions such as are referred to in the laws governing eligibility to the Toledo institution; in other words voluntary institutions and not those in which the inmates become wards of the State of Iowa. While the language used may indicate discretion with a school board as to whether or not they will accept such students, no such discretion exists where the inmates are residents of that district. See O. A. G. 1942, page 93 at page 98. As pointed out above, the inmates of the Juvenile Home are not domiciled elsewhere and we have here no question of tuition or of legal residence at any other place within or without the state.

It is, therefore, our continued opinion that inmates of the Juvenile Home at Toledo, Iowa, must be accepted as students in the public high school at Toledo, Iowa, the same as any other bona fide and eligible resident of that school district.

RESIDENCE: TAX SITUS: TUITION. For the purpose of determining where property should be taxed and to determine residence for school matters when a home is divided by a town or district line, the place in the residence where the occupant performs acts characterizing his home is determinative. If it is impossible to determine which part characterizes his home, then the occupant has the election as to which town or district he chooses for his residence.

September 5, 1946. *Mr. Donald W. Harris, County Attorney, Bloomfield, Iowa:* This will acknowledge receipt of letter of July 12th in which Verne J. Schlegel, then County Attorney, asked for opinion in the following situation:

"A man owns a farm upon which there is a residence. The school district line bisects that residence. In other words, a little more than one-half of the residence is in the independent school district of Bloomfield, Iowa, and about one-third of it is in a rural district in Cleveland Township, Davis County, Iowa.

Where can the children of the tenant attend school without paying tuition?

Also, what about the taxes on this building?"

In reply thereto, we are of the opinion that whether the question concerns the place in a school district where free school facilities may be obtained, or a place where taxes may be imposed, the same rule will control the fixing thereof. So far as making available the free school facilities to the residents of Iowa, Section 4273, Code of 1939; Section 282.6, Code of 1946, provides:

"Every school shall be free of tuition to all actual residents between the ages of five and twenty-one years * * * * *"

Insofar as the place of taxation is concerned, provision is made by Section 6956, Code of 1939; Section 428.1, Code of 1946, as follows:

"Every inhabitant of this state, of full age and sound mind, shall list for the assessor all property subject to taxation in the state, of which he is the owner, or has the control, or management * * * * *"

And Section 6963, Code of 1939; Section 428.8, Code of 1946, provides:

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

Section 7107, Code 1939; Section 441.2, Code 1946, provides as follows:

"The assessor shall list every person in his township and assess all the property therein, personal and real, except such as is heretofore exempted or otherwise assessed. Any person who shall refuse to assist in making out a list of his property, or of any property which he is by law required to assist in listing, or who shall refuse to make either of the oaths or affirmations or combinations thereof required by section 441.3, shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined in a sum not to exceed five hundred dollars."

The rule for determining the place at which the personal property of a person is taxable is stated in 51 Amer. Juris., Par. 447, Title "Taxation", which provides as follows:

"The domicile of a person for purposes of determining the place at which his personal property is taxable is ordinarily fixed by application of the rule which determines the legal domicile of a person for any other purpose, which is generally speaking, the place of his fixed permanent home or residence, to which he has whenever absent the intention of returning, and from which he has no present intention of moving. The place of the imposition of poll taxes, which depends upon the domicile of the person, is determined by the same rule. Generally, although not always, 'residence' and 'domicile' are used interchangeably in this connection.

General rules applicable to other cases also determine whether a taxpayer by choice or by operation of law has changed his domicile or acquired a new or different one so as to subject himself to taxation at the new or changed domicile and relieve himself from taxation at the old one. One may legally and effectively change his domicile and establish a new one for taxation purposes even though his motive is to diminish the amount of his taxes or avoid taxation. The essential factor is the concurrence of the act of living at a different place with the intent of the taxpayer to make it his home, following his abandonment of the old one. A residence for a temporary purpose does not establish domicile for taxation purposes at such places or effect a change of domicile for such purposes; one may have different places of abode, but he can have but one domicile at any given time. While as a general rule one who abandons his original home with intent never to return does not lose his domicile so as to free himself from taxation until he has actually established a new home, it has been held that where a person, intending to acquire a new domicile in another state, departs from the state of his old domicile and journeys to the place of his new domicile, his domicile for purposes of taxation in the old state ceases as soon as he crosses the state line, and does not adhere to him while in transitu without the jurisdiction of the old state."

The problem reduced to the fact situation disclosed in your letter has not apparently had the consideration of our Supreme Court. However, authority, while not abundant, is not lacking. It has had the consideration of the courts of Vermont, Massachusetts, Maine, Pennsylvania and Alabama, and while there is difficulty in defining a fixed rule controlling the situation, we are disposed to accept the following rule as laid down in the case of *Thayer v. Boston*, 124 Mass. 132; 26 Amer. Reports, 650-656, as follows:

"The true rule was plainly recognized in *Cenery v. Waltham*, 8 Cush. 327. The judge was there asked by the plaintiff, who sought to recover back a tax paid to the defendant, to rule that if the true dividing line between the two towns passed through an integral portion of the dwelling-house occupied by him and his family, then he had a right to elect in which town he would be assessed on his personal property and become a citizen. This was refused, and it was ruled that if the house was so divided by the line as to leave that portion of it, in which the occupant mainly and substantially performed those acts and offices which characterized his home, such as sleeping, eating, sitting and receiving visitors in one town, then the occupant would be a citizen of that town, and no right of election would exist; and that, if the house was so divided by the line as to render it impossible to determine in which town the occupant mainly and substantially performed the acts and offices before referred to, then the occupant would have a right of election, and his election would be binding to both towns. The rule thus laid down was declared by the full court to be sufficiently favorable to the plaintiff, on the question of his right to elect."

Cases other than *Thayer v. Boston*, supra, and *Chenery v. Waltham*, supra, which have considered and decided the problem are *Judkins v. Reed*, 48 Maine 386, where it was held that "the residence was deemed to be in that town in which the most necessary and most indispensable part of the house is situated, especially if the outbuildings and other conveniences are in that town.."

And *Abington v. North Bridgewater*, 23 Pick. 179, it was held that "if the line ran through the house in such a manner that either side might afford a habitation, then dwelling in the house would not of itself prove in which town he acquired his domicile and in that case the plaintiff would not discharge the burden resting upon it; but, if the line so ran through the house that the portion of the house which was in North Bridgewater was sufficient in itself to constitute an habitation, while the portion in Randolph was not sufficient for that purpose, the domicile was in the former town." And further, "that, if the line had divided the house somewhat equally, and it could be ascertained where the occupant habitually slept, that would be a prepondering circumstance, and in the absence of other proof, decisive."

And *East Montpelier v. Barre*, 66 Atl. 100, it was held that:

"As a place of residence, the building cannot be divided between the two towns, and must be held to be in one or the other. A man's dwelling house is the building in which he lives, and in a case like this the legal status of the building as a dwelling place must be determined by the location of that part of the structure most closely connected with the primary purposes of a dwelling."

And *Follweiler v. Lutz*, 112 Pa. 107; 2 Atl. 721, a question arose as to which of two counties an occupant of a hotel resided so as to affect a legal recording of an assignment for creditors. It was held that "evidence was admissible to show by his acts, declarations, and intentions in which county he elected to fix and maintain his residence; and a judgment was affirmed which rested upon the finding of the jury that the residence was in the county containing the smaller portion of the house, notwithstanding the contention of counsel that the portion of the house in that county was so small that it must be said, as a matter of law, that the recording in that county was ineffective, and that the assignor must be regarded as a resident of the other county."

And *Danforth v. Nabors*, 120 Ala. 430; 24 So. 891, "the question was whether the defendant was properly sued in Blount County depended on the question whether he was a resident of that county, or of Jefferson county. The uncontroverted evidence showed that the dividing line of the two counties ran through a corner of defendant's dining room and near the center of a storeroom, so dividing the residence that the parlor, all the bedrooms, hall, and all of the dining room except a few feet in one corner, were in Jefferson county; the storeroom, which was connected with the dining room and one of the bedrooms, being so divided by the line that about two-thirds of it was in Jefferson county; the barns, stables, and cook room were entirely located in that county.

Prior to the time the defendant built the house and moved into it, he occupied a rented house located entirely in Jefferson county, and, after his occupancy of the one in question, had registered, voted, worked the public road, and paid taxes on his personal property in that county. The court said that, on that evidence, it was clear that the defendant's residence was in Jefferson county, and that he had a right to insist upon being sued in that county."

Based upon the foregoing authorities, we are of the opinion that for the purpose of determining where property may be assessed and taxes levied, and residence for the purpose of securing the free facilities of the school system of Iowa, the place in the residence where the occupant mainly and substantially performs those acts and offices which characterizes his home, such as sleeping, sitting, eating and receiving visitors is determinative. If, however, it is impossible to determine in which town or school district the occupant performs the foregoing acts and offices, then the occupant would have his election as to which town or school district he would choose as a residence for the purposes of taxation and school attendance, and his election would be binding upon the statutory authorities in those matters.

LEGAL SETTLEMENT: MARRIAGE OF PATIENTS IN SANITARIUM AT OAKDALE. When two patients at a state institution are married, the wife does not take the legal settlement of the husband until the wife is discharged or abandons supervisory care and observation of the institution.

September 13, 1946. *Mr. Herbert H. Hauge, Member of the Board of Control of State Institutions, Local:* In reply to the question submitted through you by the Superintendent of the State Sanitarium at Oakdale, Iowa, under date of September 11, 1946, I refer you to Sections 252.16 and 252.17 of the 1946 Code of Iowa.

The question as stated is as follows: When two inmates of the Sanitarium referred to as H and W, from different counties, marry while in the institution when does the legal settlement of the wife become that of the husband so as to fix the liability for her care on the county of the husband's legal settlement?

Section 252.16 of the 1946 Code of Iowa provides in part as follows:

"A legal settlement in this state may be acquired as follows:

"1. * * *

"2. * * *

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

"4. A married woman has the settlement of her husband, if he has one in this state; if not, or if she lives apart from or is abandoned by

him, she may acquire a settlement as if she were unmarried. Any settlement which the wife had at the time of her marriage may at her election be resumed upon the death of her husband, or if she be divorced or abandoned by him, if both settlements were in this state.

"5. * * * .

"6. * * * .

"7. * * * .

Section 252.17 of the 1946 Code of Iowa provides as follows:

"A legal settlement once acquired shall so remain until such person has removed from this state for more than one year or has acquired a legal settlement in some other county or state."

Reading these sections in reverse order it becomes clear that "the legal settlement once acquired shall so remain until such person has * * * acquired a legal settlement in other county or state." Therefore, when W enters the institution she retains her legal settlement in the county from where she was admitted until something changes that legal settlement. Subsection 4 of Section 252.16 would indicate that upon marriage she would immediately take the legal settlement of her husband and we would so hold were it not for Subsection 3 of Section 252.16, which is a provision of the Legislature making direct disposition of such cases. Persons receiving support by public funds would include patients in the Sanitarium. This section it seems will bar the ordinary rule for the change of legal settlement of any person in the State Sanitarium as an inmate and would prevent the change which would ordinarily occur by the marriage of persons who formerly had legal settlements in different counties.

As to the question of when such liability shifts, we refer you to the opinion of this office of May 24, 1937, which opinion also cites a number of Iowa cases including *Polk County vs. Clarke County*, 171 Iowa 558 at 563, and while not squarely in point clarifies the position of our Courts and our position as to the equities of this holding.

This question may best be answered then in three parts:

Does the change occur when the parties marry? It is our opinion that it does not if the parties remain at the Sanitarium.

Does the change occur when W is discharged from the Sanitarium? It is our opinion that it does because W is no longer supported by public funds, and the bar to her change of legal settlement is removed. She then adopts the legal settlement of her husband, as provided in Subsection 4 of Section 252.16, Code of Iowa 1946.

Does the change occur when W is on leave from the institution, but not discharged? We held in 1938 O. A. G. page 254 that a patient retained her original legal settlement even though she did not occupy patient quarters so long as she remained subject to the surveillance and supervision of the hospital Superintendent and staff, either as a confined patient or as an out-patient.

We, therefore, hold that when H and W marry while inmates of the State Sanitarium in Oakdale and were not from the same county when committed the liability for W's care does not shift to the county of H's legal settlement until W is discharged or until it is shown that she abandons the supervisory care and observation of the institution while on extended leave. Upon discharge W would then take the legal settlement of H, the bar provided in Subsection 3 of Section 252.16 Code of Iowa 1946 having been removed and if she is readmitted the county of H's legal settlement then being that of W's would be liable for her future care at the institution.

DEPARTMENT OF AGRICULTURE: REGULATIONS: QUARANTINE OF POULTRY. The powers of the Department of Agriculture as relating to animals is used in its broad and generic sense and includes poultry. Quarantine of fowl to prevent spread of infectious disease is valid under state law.

September 23, 1946, *Booker Smith, County Attorney, Fairfield, Iowa.* We acknowledge receipt of your letter of September 19, 1946, in which you request our opinion on the question as to whether or not a ruling by C. C. Franks of the Division of Animal Husbandry, Department of Agriculture for the State of Iowa, banning all poultry shows due to the danger of Newcastle disease was valid. You state that this ruling was questioned on the ground that Chapter 163 of the 1946 Code refers to "livestock" and not to poultry. The pertinent question, therefore, appears to be whether or not poultry is included in the term "animals" as used in said Chapter of the Code pertaining to infectious and contagious diseases among "animals".

It is necessary to examine the statutes in this Chapter to determine first, the question of whether or not the Legislature gave any indication as to its intent by the use of the word "animal". Unless we find some language that would show a different meaning was intended it is presumed that the Legislature used it in its broadest sense. See *Reiche v. Smythe*, 80 U. S. 162, 20 L. Ed. 566. Also see for Common Law rule *Tate v. Ogg*, (Va.) 195 S. E. 496, 499. We find in these statutes mention made of cattle and hogs and we find the term "livestock" used but the term "animal" is not defined as such. In Section 163.2 of said Code this language appears "or any other communicable disease so designated by the department" when referring to diseases of animals. This, of course, will broaden the enumerated diseases and no assistance can be received by an application of those diseases as they affect known animals.

Webster in his definition says: "An animal is any member of the group of living beings typically capable of spontaneous movement and rapid motor response to stimulation as distinguished from a plant." It classifies animals as mammals, fowls, reptiles, etc. It further classifies them as wild and domesticated.

Having failed to find any wording in this Chapter which would indicate that the Legislature intended the use of the word "animals" to apply to only mammals and finding no cases in Iowa passing on this question, our search naturally turns to other jurisdictions wherein the courts have passed upon the meaning of the word "animals". In *McPierson v. James*, 69 Ill. App. 337, we find the Court holding that a domestic fowl is an animal". In *Huber v. Mohm*, 37 N. J. Eq. 433, we find "animal" as used in a will devising animals belonging to a testator should be construed to include fowls. In *State v. Bruner*, 12 N. E. 103 (111 Ind. 98), within the meaning of Revised Statute 2101 declaring cruelty to animals to be a misdemeanor, a domestic fowl, i.e., a goose, is an animal. And also in *Holcomb v. Van Zylen*, 140 N. W. 521, 174 Mich. 274, 44 L. R. A. (N. S.) 607, the Court holds:

"Turkeys and other fowls are within Comp Laws 1897 providing that, if any dog shall kill or assist in killing, wounding, or worrying any sheep, etc., or other domestic animal, its owner shall be liable in double the amount of damages sustained since an 'animal' is any animate being, not human, endowed with the power of voluntary motion."

We are therefore, of the opinion that the powers of the Department as outlined in Section 163.1 of Chapter 163 of the 1946 Code of Iowa as it relates to animals is used in its broad and generic sense and includes poultry and fowl. Also that regulations including quarantine determined necessary by the Department to prevent a spread of infectious and contagious diseases among poultry is effective and valid under the law.

VACANCY IN OFFICE: NOMINATIONS: DUTY OF SECRETARY OF STATE. When a vacancy occurs after a party convention and more than 30 days prior to the general election, a nomination made by the respective Central Committees is an authorized nomination and the Secretary of State should certify the nomination to County Auditors.

October 1, 1946. *Hon. Wayne M. Ropes, Secretary of State, Building:* Receipt is acknowledged of your communication wherein you report that the Republican State Central Committee and the Democratic State Central Committee have each certified to your office a nominee to be voted upon at the general election of November 5, 1946, to fill the vacancy on the Supreme Court of Iowa occasioned by the resignation of the Honorable Frederic M. Miller as a member of said court, which resignation became effective as of midnight, September 30, 1946, and wherein you ask relative to your duties in the premises.

Section 46.19 of the 1946 Code makes the general election laws of the state, including "certifying nominations to the officers having charge of the printing of the ballots" applicable to the election of Supreme Court judges.

Section 43.73 of the Code, as temporarily amended by section 6 of Chapter 36, Acts of the 51st General Assembly, provides that the Secretary of State shall certify the names of nominees to the auditors of the respective counties not less than 70 days before the general election. Section 43.74 then provides:

"If, after the foregoing certificate (that provided in section 43.73) has been forwarded, other authorized nominations are certified to the Secretary of State * * * said secretary shall at once, in the form provided in section 43.73, certify said nominations to the county auditors with a statement showing the reason therefor."

Since the vacancy in question occurred after the party conventions (see section 43.82, Code of 1946) and more than 30 days prior to the general election (see section 69.13, Code of 1946) it is our view that the nominations as made by the respective Central Committees are "authorized nominations" within the contemplation of section 43.74 above set out. It necessarily follows, therefore, that you should "at once * * * certify the nominations to the county auditors with a statement showing the reason therefor". It then becomes the mandatory duty of the respective county auditors to include said nominations on the general election ballots.

LEGAL RESIDENCES: UNIVERSITY HOSPITAL. Legal residence as used in Section 255.26, 1946 Code, means actual residence at the time of commitment. Cost of care for patients at the University Hospital should be the burden of the county of commitment rather than the county of legal settlement.

October 2, 1946. *Mr. W. C. Hahle, County Attorney, Waverly, Iowa:*

In reply to your letter of September 30, calling our attention to the provisions of Section 255.26 relating to the County liability for patients at the University Hospital, and asking if we construe the term "legal residence" as used in this chapter, as being identical with the term "actual residence." I will advise you as follows:

The Legislative purpose of this chapter is to see that any legal resident of Iowa who is pregnant or is suffering from a malady or deformity which can probably be improved or cured, or advantageously treated by medical or surgical treatment, shall receive such care and treatment as is necessary at the University Hospital.

Section 255.1 provides that any legal resident of Iowa, residing in the County where the complaint is filed receives the above privilege and service. Section 255.6 provides an investigation to determine the legal residence of the patient. In Section 255.8, we find the meaning of "legal residence" as used in the above Section, for it provides that if the court finds the patient has a legal residence in Iowa, he shall be eligible for such care and treatment and it seems that the investigator's duty is to determine whether or not the party is a legal resident of the State. To this point then, it would seem that a legal resident of Iowa, residing in the County of the complaint shall be eligible to be sent to the University Hospital for care and treatment. Section 255.16 relates to County quotas and if one County could send patients at the expense of another it would possibly destroy this system and result in County disputes over liability, much the same as we now have in legal settlement cases. There are no provisions for settling said disputes such as we find in legal settlement matters.

The only confusion seems to arise due to the use of the term "legal" in connection with residence in Section 255.26. This section relates to the certification by the State Auditor to the County liable for the care of the patient and brings up the question of whether the County of actual residence or legal residence is meant to assume this cost.

We must again turn to Section 255.16 to determine the meaning of "legal residence" as used in Section 255.26, for in this section we find the Legislature definitely fixing the liability upon the County of commitment. Here, we find the following language, "if the number of patients admitted *from any County* is exceeded by more than ten percent of the County quota as fixed and ascertained under the first sentence of this section, the charges and expenses of the care and treatment of such patients in excess of ten percent of the quota *shall be paid from the funds of such County* at actual costs." This, it seems definitely fixes the responsibility for the cost of the patient on the County of commitment, and it is therefore our conclusion that term "legal residence" as used in Section 255.26, means actual residence at the time of the commitment.

This question was passed on by this office on February 13, 1939, and opinion found in O. A. G., page 84, wherein we held that the County of commitment would be liable for the care of the patient at the University Hospital and not the County of the legal settlement.

VEHICLES: REQUISITION OF CONFISCATED CONVEYANCE.

The power of requisition of a forfeited conveyance is lodged solely in the Department of Justice and must be exercised within ten days after notice of judgment of forfeiture has been received by the Bureau of Investigation.

October 2, 1946. *Mr. Jack C. White, County Attorney, Iowa City, Iowa:* I have yours of September 20th in which you ask for opinion on the following situation:

"Some time ago there was arrested in Johnson County one William Lee Thornhill, charged with illegal transportation of intoxicating liquors. Mr. Thornhill was driving a 1940 Ford deluxe coupe bearing 1945 Illinois license plate No. 1140-844.

"After he had been fined on the charge of illegal transportation we instituted proceedings for the condemnation and forfeiture of the automobile. The statutory basis for such proceedings is found in Chapter 127 of the 1946 Code, a default judgment was rendered and the clerk of the District Court, pursuant to Section 127.14, notified the State Bureau of Investigation of the judgment of forfeiture, but the bureau did not exercise the right of requisition which it has under Section 127.15, Code of Iowa 1946. They apparently decided not to exercise their right of requisition after Mr. Buckles of your office had called me for information in regard to the automobile. We were then proceeding on the theory that the car should be sold by the sheriff as chattels under execution, but before the sheriff prepared his notice for publication he was besieged with prospective purchasers..

"The Board of Supervisors then became interested in the matter, and in order to prevent any hard feelings as a result of a sale under execution they have thought that they should try to requisition the car for county

use if this were possible. Section 127.19 of the 1946 Code of Iowa provides that the Board of Supervisors may apply to the Department of Justice that any motor vehicle seized in the county and requisitioned under Sections 127.15 to 127.18 inclusive be delivered to such board for use in performing official duties. They have asked that I prepare such a requisition. However, I am wondering if such a requisition is possible as long the State Bureau of Investigation did not exercise its right of requisition within ten days after notice of forfeiture.

"My reading of Section 127.19, and I expressed this opinion to Mr. Strauss in a telephone conversation today, is to the effect that the Board of Supervisors may only make such application of a requisition has been filed by the Bureau of Investigation, and the allowance of that requisition is discretionary with the Department of Justice. We would like to have the car for the county, but wish to comply strictly with the provisions of the law. Therefore I would appreciate an opinion from your office in regard to this matter and if a requisition is in order I would appreciate it if you could advise me as to what form is used for such a requisition."

The statutes pertinent to this problem are Sections 127.14, 127.15, 127.16, 127.18, 127.19, Code of 1946, each of which is exhibited as follows:

"127.14. Notice. Whenever a judgment of forfeiture has been entered by any court, directing the sale of a conveyance under the provisions of this chapter, the clerk of the district court shall immediately notify the state bureau of investigation of such order, together with full description of the conveyance, and if it be a motor vehicle, the name of the manufacturer thereof, the model, serial number, and description of the condition of said motor vehicle, before said conveyance shall be advertised for sale.

"127.15. Requisition by department. The state department of justice may, if the conveyance is such a one as may be used by said department in connection with its duties and the enforcement of the law, requisition said conveyance for said department and said requisition shall be delivered to the clerk of the district court of the county having jurisdiction of such conveyance, within ten days after the notice of judgment of forfeiture has been received by the bureau of investigation. If said conveyance is not so requisitioned within ten days after the clerk of the district court has notified the department of justice of the judgment of forfeiture, then the conveyance shall be sold by the sheriff as provided in this chapter.

"127.16. Order for delivery. When any such conveyance is requisitioned by the department of justice, the clerk of the district court shall immediately issue to the sheriff of the county or other officer having possession of said conveyance, an order directing that said conveyance be turned over to the state department of justice, or any of its duly commissioned agents directed by the attorney general to receive it.

"127.18. Other state departments. Any department of the state government needing a motor vehicle for official use in said department may make written application therefor to the executive council. The executive council shall, if it determines that said department should have such a motor vehicle, by written application request the department of justice to requisition a suitable motor vehicle for the applicant department whenever one is available, in the manner hereinbefore provided. Whenever any department receives a motor vehicle under the provisions hereof, the head thereof shall cause the court costs and all other costs incurred in connection with the confiscation and forfeiture of said motor vehicle to be paid to the clerk of the court or the sheriff of the proper county, as the case may be.

"127.19. Requisition by county or city. The board of supervisors of a county or the council of any city or town in such county, including cities under special charter, may apply to the department of justice that any motor vehicle seized in such county and requisitioned under sections 127.15 to 127.18, inclusive, be delivered to such board or council for use in performing official duties by officials and officers of the county or city or town. No officer of any county or city shall be allowed mileage for the performance of any official duty wherein he uses a publicly owned car. The department of justice may allow such application whereupon the automobile shall be delivered to the board of supervisors or to the council for use in accord with such application. Should the county and city or town both make application for the same vehicle and the applications be granted, the vehicle shall be delivered to the public body whose officers first seized the vehicle."

It will be seen in the foregoing, that the power of requisition of a forfeited conveyance under the foregoing sections is lodged solely in the Department of Justice and in no other agency. And the power must be exercised by the Department of Justice within ten days after the notice of judgment of forfeiture has been received by the Bureau of Investigation, and if not requisitioned within ten days after the Clerk of the District Court has notified the Department of Justice of the judgment, then the conveyance shall be sold by the sheriff, as provided in Section 127.11.

The allocation of the forfeited conveyance to any department of the State, other than the Department of Justice, or to a County or City, is effectuated only by and through the requisition provision of Section 127.15, lodged in the Department of Justice. If the power of requisition is not exercised by the Department of Justice in its own behalf or on behalf of other departments of the State government (127.18) or any County or City (127.19), the power expires by statutory limitation within ten days after notification by the Clerk of the District Court to the Department of Justice of the judgment of forfeiture. When that time arrives, and requisition not having been effected, the sheriff is obliged to sell the forfeited conveyance according to the terms of 127.11 which directs that "said conveyance be sold by the sheriff as chattels under execution, and a certified copy of such order shall constitute such execution," and the proceeds of such sale shall be applied pursuant to the terms of 127.20 and 127.21.

The conveyance referred to is controlled by the foregoing rules, and is not entitled to be requisitioned, and should now be sold by the sheriff.

CONSERVATION COMMISSION: TRAPPING PERMIT: BEAVER.

A permit from the Conservation Commission to trap beaver is personal and the permittee cannot legally allow any other person under a permit given to him to trap beaver within this state.

October 10, 1946. *Mr. G. L. Ziemer, State Conservation Director, Local:* We acknowledge receipt of your letter of October 5th asking in our opinion whether or not one Harold Heck may legally trap and for a short period possess beaver on a permit issued to Martin Peterson, assuming that Harold Heck is in the employment of Martin Peterson,

a farmer who has shown satisfactorily that beaver are damaging his premises and should be entitled to a permit under the provisions of Section 109.93 of the 1946 Code.

Section 109.93 provides as follows:

"1. When beaver shall at any time, in any locality, be causing substantial damage to public or private property, the commission may issue to any person, as provided herein, a permit to take and sell beaver. Such permit shall specify the number, the time and the place where and the method by which the beaver may be taken, provided however, that no permit shall be required of any one destroying beaver causing damage to his private property.

"2. The permittee shall report to the commission within ten days after the taking of any beaver, the number taken and submit the skins and such other portions of all such beaver for inspection as may be required by the permit. Thereupon, if all requirements in the permit have been complied with, the commission or its appointed representative shall issue and affix to each beaver skin a distinctive tag, stamp, or seal. Such tag, stamp, or seal must remain affixed to each skin until finally processed. The permittee shall pay the commission a fee of one dollar for each tag, stamp, or seal so issued. It shall be unlawful for any person to buy, sell, or transport any beaver skins which are untagged as provided by this section. The commission shall keep a record of each such tag, stamp, or seal issued, to whom issued, and the date of issue.

"3. Any person who shall unlawfully take, possess, transport, sell, or otherwise dispose of any beaver, or any part thereof, or who shall violate any of the provisions of this section shall be punished as provided in section 109.32."

You state that the State Conservation Commission takes beaver on occasions by its own employees after a proper showing of damage by the farmer or tenant who is not interested in trapping them himself and have pointed out that this permit is in no way a special permit to trap beaver but is a granted opportunity to conserve valuable beaver skin when destroying the animal causing damage to one's own private property.

This section of the Code clearly provides that no permit shall be required of one destroying beaver causing damage to his private property. It must be noticed that this exception to the prohibition against any one taking, possessing, transporting, selling or otherwise disposing of any beaver or part thereof is personal. It is "issued to a person" as distinguished from a firm or corporation. Also "the permittee" is specifically referred to and duties imposed upon him personally. Any other manner of operation is subject to the penalty of Section 109.32. The underlying reason is to prevent the destruction of property plus the desire to not waste valuable beaver skins when the beaver are trapped or destroyed. Section 109.93 then is not meant to provide special permits for trapping beaver and under no circumstances should be used as a commercial enterprise.

Therefore, it is our opinion that unless the farmer or tenant wishes to trap the beaver himself and retain the hides, he should call upon the State Conservation Commission to remove the beaver causing damage

from his premises; the permit provided in Section 109.93 is personal and the permittee cannot legally allow any other person under a permit given to him to trap, possess, transport, sell or otherwise dispose of any beaver or part thereof taken within this state.

TAXATION: EXEMPTIONS: PARTNERSHIP PROPERTY. Tax exemption statutes should be strictly construed and persons claiming under them must show they are entitled to it. The amount of evidence necessary to sustain the burden is addressed to the Board of Supervisors. The Board's determination of a partnership is governed by established rules of partnership law.

October 14, 1946. *Mr. John D. Moon, County Attorney, Ottumwa, Iowa:* We have yours of the 5th inst. in which reference is made by you to a previous letter and to a previous holding of the Department that soldiers' exemption is not allowable in partnership property of which the soldier is a co-partner. You now make inquiry as to the extent of the duty of the Board of Supervisors in determining whether the property is partnership or other property to which soldiers' exemption does not attach.

We advise you as follows: Insofar as claims for tax exemptions, including a claim for soldiers' exemption, under Section 427.3, Code of 1946, is concerned, the claimant must not only point out the express statutory provision granting the exemption (In Re. Assessment of Boyd 138 Ia. 583) but also must make a clear showing that the property claimed to be exempt comes within the scope, operation or contemplation of the statute,—or in other words, that his property falls within the exempted class. 51 Am. Jurisprudence, page 530-531, title "Taxation". Authority supports the rule. In *Producers' Creamery Co. v. United States*, 55 Fed. (2d) 104, 106, the court states:

" * * * It is a universal rule that one who would claim the benefits of a statute must bring himself, at least substantially, within the terms. Especially is this true of claimants under statutes purporting to exempt from taxation. *Bank of Commerce v. State of Tennessee*, 161 U. S. 134, 16 S. Ct. 456, 40 L. Ed. 645; *Heiner v. Colonial Trust Co.*, 275 U. S. 232, 48 S. Ct. 65, 72 L. Ed. 256; *Ins. & Title Guarantee Co. v. Com'r.* (C. C. A.) 36 F., (2d) 842, 843.

And in *Register vs. Commissioner of Internal Revenue*, 69 Fed. (2d) 607, it is stated

" * * * It is a settled doctrine, however that one of a class subject to taxation claiming the benefit of an exemption, whether under law or regulations, or arising out of the want of power to tax, must bring himself exactly within the exception he claims. *Producers' Creamery Co. v. United States* (C. C. A.) 55 F. (2d) 104; *Bank of Commerce v. State of Tennessee*, 161 U. S. 134, 16 So. Ct. 456, 40 L. Ed. 645; *Heiner v. Colonial Trust Co.*, 275 U. S. 232, 48 S. Ct. 65, 72 L. Ed. 256.

And in *National Cemetery Association vs. Benson* 129 SW (2d) 842, 122 A. L. R. 893, 899, wherein the Cemetery Association made claim that certain of its lands were exempt as cemetery property, the Court said:

"The burden is on the property owner clearly to establish that his property falls within the exempted class. As appellants have failed to do so, we must hold that the land here involved is not within the constitutional exemption."

And the Supreme Court of Illinois, in *First Congregational Church vs. Board of Review*, 98 NE 275, 39 LRA NS 437, where was in question whether a parsonage was entitled exemption from taxation, said this:

" * * * In determining whether the parsonage of the appellant is exempt from taxation under the statute now in force, it must be borne in mind that all property in this state is subject to taxation unless it is relieved from taxation by the Constitution, and the statutes which are passed in accordance with the Constitution, and that in determining the question whether property is exempt from taxation all statutes must be strictly construed and resolved against the exemption if there is any doubt upon the subject; that is, the exemption is not to be made by judicial construction, and one claiming benefit under the statute is required to show clearly that the property is exempt within the contemplation of the law. *Montgomery v. Wyman*, 130 Ill. 17, 22 N. E. 845; *People ex rel. Gore v. Peoria Mercantile Library Asso.* 157 Ill. 369, 41 N. E. 557; *People ex rel. Braymeyer v. Watseka Camp Meeting Asso.* 160 Ill. 576, 43 N. E. 716; *Bloomington Cemetery Asso. v. People*, 170 Ill. 377, 48 N. E. 905; *Sanitary Dist. v. Martin*, 173 Ill. 243, 64 Am. St. Rep. 110, 50 N. E. 201; *State Council C. K. v. Effingham County*, 198 Ill. 441, 64 N. E. 1104; *People ex rel. McCullough v. Deutsche Gemeinde*, 249 Ill. 132, 94 N. E. 162."

The Supreme Court of Iowa is committed to the same rule. In *Ahrweiler v. Board*, 226 Iowa 229, 231, 283 N. E. 889, the Court said:

"It is a well-established principle that tax exemption statutes should be strictly construed and that those claiming exemptions must show themselves entitled thereto within the purview of the act. *Theta XI Building Assn. v. Board of Review*, 217 Iowa 1181, 251 N. W. 76; *Samuelson v. Horn*, 221 Iowa 208, 265 N. W. 168; *Grand Lodge A. O. U. W. of Iowa v. Madigan*, 207 Iowa 24, 222 N. W. 545; *Readlyn Hospital v. Hoth*, 223 Iowa 341, 272 N. W. 90."

The amount and kind of evidence that will sustain the burden here placed upon the claimant for exemption, is addressed to the sound administrative discretion of the Board of Supervisors, acting upon the claim pursuant to the provisions of Section 427.6, Code of 1946.

Whether a partnership exists is determined by established rules of partnership law. While such partnership may be evidenced by a formal written contract, it may be shown to exist by other evidence.

JURORS: SELECTION OF ALTERNATE JUROR IN CRIMINAL CASE. Rule 189 of the Civil Rules applies and governs the empaneling of a jury in a criminal case. Selection of an alternate juror is discretionary with the trial court.

October 14, 1946. *Mr. Clemens A. Werner, Assistant County Attorney, Davenport, Iowa:* This will acknowledge receipt of your letter of October 9, 1946, wherein you ask for the opinion of this department, involving the question of selection of alternate jurors in a criminal case. Referring to Section 779.1 of the 1946 Code, which reads as follows:

"The rule for drawing a jury shall be the same as those provided in civil procedure."

and to Civil Rule 189 which provides for two alternate jurors in a civil case, you inquire:

1. Whether Rule 189 would apply in a criminal case.

2. Whether Rule 189 providing for alternate jurors is in the Court's discretion or whether it is mandatory on the Judge.

"The court may impanel one or two alternate jurors whose qualifications, powers, functions, facilities and privileges shall be the same as regular jurors. After the regular jury is selected, the clerk shall draw the names of two more persons than are to serve under this rule, who shall be sworn and subject to examination and challenge for cause as provided in rule 187. Each party must then strike off one such name, and the one or two remaining shall be sworn to try the case with the regular jury, and sit at the trial. Alternate jurors shall, in the order they were drawn, replace any juror who becomes unable to act, or is disqualified, before the jury retires, and if not so needed shall then be discharged."

Answering your first inquiry, it is our opinion that Civil Rule 189 does apply and govern the empaneling of a jury in a criminal case. While the question has not been squarely passed upon, our court of last resort, in the case of *State v. Holder*, 20 N. W. 2d 909, at 915, held that Civil Rule 196, relating to the submission of instructions to a jury in a civil case applied in all criminal cases, because of the provisions of Section 780.4 which provides that: "all the provisions relating to mode and manner of the trial of civil actions" shall apply "to the trial of criminal actions" and Section 780.35 which provides that: "The rules relating to the instruction of juries in civil cases shall be applicable to the trial of criminal prosecutions." Section 779.1 relating to procedure for drawing jurors in a criminal case is identical in form to Section 780.35 relating to submission of instructions in a civil case, and by analogy to the reasoning adopted by our court in the *Holder* case, *supra*, it is a fair conclusion that Civil Rule 189 also is applicable in criminal cases.

Answering your second inquiry, it is our opinion that the selection of alternate jurors is discretionary with the trial court. The rule is phrased in discretionary language in that the term "may" rather than "shall" appears in the text of the rule. We see no reason why the usual meaning attributed to the word "may" should not be applied here. As a cautionary measure, many trial counts in this state have adopted the practice of affording to litigants the opportunity of requesting the selection of alternate jurors, after the regular jury is selected, thus causing the litigants to either affirmatively request the selection of the alternate jurors or to waive the same, and showing such procedure in the record, thereby eliminating from the cause on trial any question of abuse of discretion or loss of rights gained thereunder.

PHYSICAL EXAMINATION; MARRIAGE LICENSE; PHYSICIAN'S CERTIFICATE. In non-resident cases, the physician's certificate only need be filed with the clerk at the time of application for a marriage license.

October 14, 1946. *Blythe C. Conn, County Attorney, Burlington, Iowa:*
We acknowledge receipt of your letter of October 11th asking for our opinion on the following question:

Does Chapter 596 of the 1946 Code require the actual filing of the laboratory analysis with the clerk, or is it sufficient when applying for a marriage license to prevent only the certificate of the physician for filing, which shows the applicant free from syphilis or not so infected as to be able to communicate the same?

Section 596.1 provides for an examination by a physician within twenty days prior to the application for a marriage license and it further provides that it is unlawful for the clerk to issue the license, with exceptions, to any person applying for the same until such a certificate signed by a physician is presented for filing at the time.

Section 596.2 provides upon what basis the physician in Iowa shall determine whether or not the applicant is suffering from syphilis or has it in a communicable stage and provides the form of the certificate be prescribed by the Commissioner of Public Health. It further provides "such certificate of negative findings as to each of the parties to a proposed marriage shall be filed with the clerk of the district court of the county wherein the marriage is to be solemnized at the time application for a license to marry is made."

Section 596.3 provides for the report to the physician by the State Hygienic Laboratory.

Section 596.4 refers to exceptions when the certificate of negative findings cannot be obtained and the affidavit of the physician is in lieu of said certificate.

Section 596.5 reemphasizes the fact that this law does not repeal or conflict with other laws pertaining to the reporting of cases of venereal disease.

Section 596.6 is the penalty clause of this chapter and it is well to note here the following language: "Any person who fails to present and file *the certificate* required," with the exception of the provisions of Section 596.4 shall be guilty of a non-indictable misdemeanor. This section does not refer to a filing of the findings of the laboratory. If any further question should be remaining as to the answer to your question we believe it is cleared up by Section 596.8 which provides in non-resident cases for the filing of only a certificate by an examining physician that the applicant is free from syphilis or does not have it in a communicable stage. No laboratory tests are prescribed outside of the state, unless required by the other state.

It is therefore our opinion that only the physician's certificate need be filed with the clerk at the time of the application for a marriage license and that the provisions of this chapter relating to the laboratory or clinical tests pertain only to the procedure required of an Iowa physician in obtaining the basis for his certificate. Such communications are and should be confidential.

LICENSE: WHOLESALE MARKETING AND JOBBING OF FISH:

A person, firm or corporation who peddles fish or operates a wholesale fish market, jobbing house or other place for wholesale marketing of fish or distribution of fish which are found in waters under jurisdiction of the State of Iowa, must procure a license from the State Conservation Commission.

October 28, 1946. *K. M. Krezek, Chief, Division of Administration, State Conservation Commission, Local:* We acknowledge receipt of your request for a written opinion on the following two questions:

1. Is a wholesale fish market license required for wholesaling or jobbing of ocean fish?
2. Is a wholesale fish market license required for wholesaling or jobbing quick frozen packaged fish fillets that are not ocean fish?

Section 109.117 of the 1946 Code provides as follows:

"It shall be unlawful for any person, firm or corporation to peddle fish or to operate a wholesale fish market, jobbing house, or other place for the wholesale marketing of fish, or distribution of fish, without first procuring a license. The commission shall upon application and the payment of the required fee furnish a license to wholesale fish markets or fish peddlers. The commission may upon application and the payment of the required fee issue a certificate to each person who as a representative of a wholesale fish market is engaged in peddling fish."

And Section 109.118 of the 1946 Code provides as follows:

"Each holder of a wholesale fish-market or fish-peddler's license shall keep an accurate record of the species and quantities of all fish taken from Iowa waters acquired or handled by such licensee during the license year. Such records shall be open at all reasonable times to inspection by the commission. Such licensee shall within thirty days after the expiration of the license make a report upon blanks furnished by the commission of all fish acquired or handled by such licensee. Failure to make such report shall be cause to refuse to issue a new license."

If these sections of the Code were read separately and not in conjunction with other sections of the Code it would appear that any person, firm or corporation peddling fish or operating a wholesale fish market must procure a license. If we refer to Section 110.1 of the 1946 Code which relates to the license fees to be charged by the Commission for various activities we find that the Legislature qualified the power of regulation by the Commission for the purpose of furnishing protection of any wild animal, bird, game or fish which is desirable for the conservation of the resources of the state. In order to determine whether or not the Legislature had that purpose in mind when enacting what are now Sections 109.117 and 109.118 of the 1946 Code, let us examine the legislative history of these sections.

Sections 1752 and 1753 of the 1924 Code contain sections similar to Sections 109.117 and 109.118. They provide as follows:

Sec. 1752:—"It shall be unlawful for any person, firm, or corporation to operate a wholesale fish market, jobbing house, or other place for wholesaling, marketing, or distributing fish, without first procuring a license for such purpose from the state game warden. The license fee shall be ten dollars per year, and the license shall expire on the thirty-first day of December following its issuance."

Sec. 1753:—"Each holder of a wholesale fish market license shall make to the state game warden, within thirty days after the expiration of the license, a report in writing, upon blanks furnished by the state game warden, of all fish caught or taken from waters under the jurisdiction of this state, which are handled by such licensee. Failure on the part of a holder of such license to make report as herein required shall prevent such licensee from securing a subsequent wholesale fish market license."

There is little question but what Section 1752 and Section 1753 provided that wholesale fish markets must procure a license to market or distribute fish from the State Game Warden and pay a ten dollar per year license fee regardless of where he obtained the fish.

While these sections appeared again in the 1927 Code of Iowa they were repealed by the 45th General Assembly, Chapter 30, paragraph 4 and did not appear in the 1935 Code.

The 45th General Assembly provided in Chapter 30, Section 1 a policy which definitely stated the purpose back of our conservation laws as they now appear in the Code, using the following language:

"For the propagation, the protection, the trapping, hunting, pursuing, catching, killing, fishing for, or the taking in any manner of, or the selling or transportation of all, any portion of, or the use or the having possession of any fish, birds, mussels, furbearing, or other animals, the protection of which may be advisable throughout, or in portions of the state, after investigation, such regulations shall be deemed for the proper use and conservation of the resources of the state."

While this section was later repealed the purpose enunciated was reaffirmed by the 47th General Assembly in Chapter 99. This chapter established in the Iowa law by Section 106 and Section 107 the provisions of our law as now stated in Code Sections 109.117 and 109.118. The enacting clause contained these words:

"An Act * * * relating to propagation and protection of fish, game, wild birds and animals, by amending section 1789 thereof relating to violations and to enact laws to be added to said chapter pertaining to the protection of fish, game, wild birds and animals and to the commercial taking or disposition thereof and to provide a penalty for the violation of such laws."

It would, therefore, seem that the Legislature in enacting what is now Sections 109.117 and 109.118 had in mind the protection and regulation of the sale and transportation of such fish as are deemed desirable for the conservation of the resources of the state and intended that the license to peddle fish or operate a wholesale fish market or jobbing house referred only to such fish as are found in waters under the supervision of the State Conservation Commission. It is to be further noted that this Commission is not a Department interested in or designated to enforce laws pertaining to food establishments as such. These duties are usually placed in the Department of Agriculture in Iowa.

We are further advised the Department has adopted the interpretation that licenses are required of only those who deal in fish ordinarily found

in Iowa waters and that that has been the departmental interpretation since the creation of the present State Conservation Commission. The Department interpretation and construction over such a period of time is entitled to considerable weight in determining the meaning of this law.

It is, therefore, our opinion that only a person, firm or corporation who peddles fish or operates a wholesale fish market, jobbing house or other place for the wholesale marketing of fish or distribution of fish which are found or usually found in waters under the jurisdiction of the State of Iowa, must procure a license from the Conservation Commission. Your first question, therefore, is answered in the negative. The answer to question number two is that if the fish fillets are of the kind and type usually found in Iowa waters a license is required.

APIARIST: REGULATIONS AND EFFECT: The State Apiarist is appointed by Board of Education and shall be responsible to and under authority of the Secretary of Agriculture. State Apiarist shall issue regulations and they shall have full force and effect of law insofar as such powers have been delegated by the legislature.

October 28, 1946. *Mr. Harry D. Linn, Secretary of Agriculture, Building:* We acknowledge receipt of your request for our opinion as to the authority and proper procedure to be followed by the state apiarist in the following situation:

A bee-keeper moves into A County with bees and fails to first secure a permit from the State Apiarist though said county has been placed in quarantine in accordance with the provisions of Section 266.17 of the 1946 Code of Iowa.

Section 266.8 of the 1946 Code provides for the appointment of a state apiarist by the board of education and Section 266.9 provides that he "shall be responsible to and under the authority of the secretary of agriculture in the issuance of all rules and regulations, in the establishment of quarantines, and in other official acts."

Section 266.17 of the Code of 1946 provides as follows:

"The state apiarist shall issue regulations prohibiting the transportation without his permit of any bees, combs, or used beekeeping appliances, into any area in which clean-up work is being conducted or which has been declared free of any diseases of bees."

Section 266.19, Code of 1946, provides that said regulations and orders shall have the full effect of law.

Section 266.22 of the 1946 Code provides as follows:

"Anyone who knowingly sells, barter, or gives away, moves or allows to be moved, a diseased colony or colonies of bees, without the consent of the state apiarist, or exposes any infected honey or infected appliances to the bees, or who willfully fails or neglects to give proper treatment to diseased colonies, or who interferes with the state apiarist or his assistants in the performance of their duties or who refuses to permit the examination of bees or their destruction as provided in this act or violates any other provision of the act shall be deemed guilty of a mis-

demeanor, and upon conviction thereof before any justice of the peace of the county shall be fined not exceeding the sum of fifty dollars or imprisoned in the county jail not exceeding thirty days."

If then, as in the example, the state apiarist sets off A county as an area where clean-up work is being conducted or which he has declared is free from any diseases of bees, he can prohibit any one from transporting bees into that area without his permit under the provisions of Section 266.17. The setting off of this area is not the exercise of legislative authority but is rather the exercise of an administrative duty placed upon him by the Legislature to carry out its policy. The Legislature determines what the law should be and gives to the officer discretion within limits and the power to carry out the provisions of the statute. In *State v. Van Tromp*, 224 Iowa 504, it is stated as follows:

"The legislature may not delegate its purely legislative power. The courts throughout the land have held this. Nevertheless, it has been recognized from the very earliest times that this does not prevent the legislature from invoking the aid of other governmental departments in effectuating its policies. This court has endeavored, within constitutional limits, to pursue a 'common sense' policy in determining the extent to which delegation may be permitted, and to give due consideration to the necessities of governmental coordination and the practical difficulty of adapting legislation to complex conditions involving a host of detail."

" * * * * *

"No government, embodying the principles of the separation of power could function if the legislature were prohibited from conferring power or authority of any character upon executive or administrative officials. * * * * * In determining whether a statute authorizing the adoption of rules and regulations involved an unconstitutional delegation of legislative power, the issue is not whether any such authority has been delegated but rather is as to the nature of the authority involved.

"If it is 'strictly and exclusively legislative' in character, it cannot be delegated. If it is not of that restricted character, it may be.

"When the legislature declares a general rule and prescribes the circumstances under which it shall apply but in such general terms as to require that authority be delegated to others 'to fill up the details' by rule or regulation, the weight of authority is that the "strictly and exclusively legislative' power has not been delegated."

It seems clear that the state apiarist by his regulations and orders carried out the legislative purpose and to use the words of the Court the authority delegated to him is "to fill up the detail." Such rules and regulations must be enforced.

It is equally clear that a person who does not obey, but wilfully moves or allows bees to be moved into zones set up as provided in Section 266.17 interferes with the state apiarist or his assistants in the performance of their duties and upon conviction before a justice of the peace is subject to a fine not to exceed fifty dollars or be imprisoned in the county jail not to exceed thirty days.

Alleged violations therefor should be taken up with the county attorney within the affected county. It becomes his duty to prosecute such violations when such information is filed within his county whenever

he is not otherwise engaged in the performance of official duties, all as set forth in subsection 4 of Section 336.2 of the 1946 Code. His duty, like that of the attorney general, is to sustain the constitutionality of all duly enacted laws in this state once they become a part of the Code of Iowa.

FISH AND GAME: FISH IN PRIVATELY OWNED WATERS: POSSESSION: A person, who has a valid fishing license and without permission stocks a privately owned pond or lake with fish taken from state waters, can be charged with illegal possession of fish, provided the number of fish held exceeds the possession limit.

November 7, 1946. *G. L. Ziemer, State Conservation Director, Local:*
We acknowledge receipt of your request for an opinion upon the following question:

Dalton Lake, a state operated, public Fishing area, is stocked yearly with legal sized trout by the Conservation Commission. Since the opening of the trout season last May a person holding a fishing license has been taking the daily legal limit of eight trout and transferring them to a pond located on private property and on which he is a tenant. Obviously many trout are now in the pond on the privately owned land and the question now presented is whether or not this party can be charged with illegal possession of trout under the Fish and Game Laws of the State of Iowa.

Section 109.2 of the 1946 Code of Iowa provides that the title and ownership of all fish in any of the public waters of the State and in all ponds, sloughs, bayous, or other land and waters adjacent to any public waters stocked with fish by overflow of public waters is in the State of Iowa unless specifically excepted.

Section 109.3 of the 1946 Code provides that when any person having in possession any such fish in violation of the provisions of the chapter on fish and game conservation shall be held to consent that the title to the same shall be and remain in the State for the purpose of regulating and controlling the catching, taking or having in possession the same.

Under Section 109.67 it is illegal to possess more than sixteen trout, and under said section it is illegal to possess any trout outside of the open season, unless special permission is obtained from the Director of the Commission as provided in Sections 109.28 and 109.37 of the 1946 Code.

Section 109.1 of the 1946 Code provides the definition of "possession" as follows:

"'Possession': Both active and constructive possession and any control of things referred to."

The obvious question, of course, is whether or not when one legally takes fish from public waters of the state and places them in a pond upon his own land or lands under his possession and control he is likewise in possession and control of said fish.

Webster defines "control" as follows: "The act or fact of controlling; power or authority to control; directing or restraining domination; to exercise restraining or directing influence over; to dominate; regulate; hence, to hold from action; to curb."

Obviously when this person places the trout in the pond he is exercising control over the fish in that they are not permitted to leave the premises over which he has control. He can prohibit others from coming on said land and taking the fish. He is therefore restraining the fish, dominating the same, and under the Iowa law is in possession thereof.

It is our opinion and we hold that anyone without permission of the State Conservation Commission who even though he stock his privately owned pond with fish legally taken can be charged with illegal possession providing the number of said fish exceeds the possession limit allowed under the provisions of the Iowa law.

VETERANS: ADMISSION TO IOWA SOLDIERS' HOME: A veteran receiving an honorable discharge from Armed Forces has earned a right to admission to the Iowa Soldiers' Home and does not lose that right by later receiving a dishonorable discharge, providing other requirements are met.

November 7, 1946. *Mr. Warren L. Huebner, Secretary, Board of Control of State Institutions, Building:* We acknowledge receipt of your request for our opinion upon the following question:

A veteran of World War I submits his honorable discharge from the United States Army with an application for membership in the Soldiers' Home at Marshalltown, Iowa. Upon request for Federal verification it appears that subsequent to that honorable discharge the veteran re-enlisted and later deserted from the United States Forces. Does this later act of desertion make the veteran ineligible for admission to the Home?

The Legislature provided a home at Marshalltown, Iowa, for honorably discharged veterans who served the United States in any of its wars. Section 219.1 of the 1946 Code provides as follows:

"The Iowa soldiers home, located in Marshalltown, shall be maintained for honorably discharged soldiers, sailors, marines and nurses who have served the United States in any of its wars and who do not have sufficient means or ability to support themselves, and for the dependent widows and wives of such soldiers, sailors or marines."

Also in Section 219.2 we find the following:

"All persons named in section 219.1 who do not have sufficient means for their own support, or who are disabled by disease, wounds, old age or otherwise, or who are unable to earn a livelihood, and *who have been residents and citizens of the state of Iowa* for the three years immediately preceding the date of the application and who are residents of the state of Iowa at the time of the application, may be admitted to the home as members thereof under such rules and regulations as may be adopted by the board of control."

The State of Iowa has provided the above reward for services rendered in time of war and in Chapter 427 of the 1946 Code has provided other rewards in the nature of tax exemptions. It is to be noted that in neither Chapter 219 nor Chapter 429 does the law provide for the loss of any of these rewards once earned by a subsequent dishonorable discharge or misdeed of a veteran not depriving him of his citizenship. It would have been an easy matter to have so provided should that have

been the will of the Legislature. Since the Legislature did not see fit to provide a manner of losing those rewards it is presumed they did not care to do so.

It is our opinion that having once earned the right to become a member of the Soldiers' Home by receiving an honorable discharge in the Armed Forces of the United States during a war a veteran does not lose that right by a later dishonorable discharge after re-enlistment or by a desertion and, therefore, if other requirements are met he should be admitted to the Iowa Soldiers' Home as a regular member.

COUNTY HOSPITALS: BONDS ISSUED FOR ERECTING, EQUIPPING AND MAINTENANCE: If bond issue exceeds the limit provided in Constitution, the entire issue is not illegal, only the excess is void above the mandatory maximum amount of hospital bonds which may be used and outstanding.

November 14, 1946. *Walter L. Bierring, M.D., Commissioner State Department of Health, Building:* We have yours of the 4th inst., in which you propound for answer, several questions in connection with the establishment and maintenance of County Hospitals. Your letter follows:

"We have had several questions asked us by parties interested in promoting county hospitals in their community under the above section. An opinion on the following questions will be of great help in furthering our hospital program.

Chapter 269, Section 5348, Code of Iowa, 1939, provides in part, 'Requesting said board (of supervisors) to submit to the electors the proposition to issue bonds for the purpose of procuring a site, and erecting, equipping, and maintaining such hospital, and specifying the amount of bonds proposed to be issued for such purpose, which shall not exceed one hundred thousand dollars.'

Question 1. If the \$100,000 maximum hospital bond issue is voted and the $\frac{1}{2}$ mill levy is insufficient to retire such bonds in 20 years, what method is to be used to determine the amount of such bonds which may be issued?

Question 2. If the \$100,000 maximum hospital bond issue would put the county over the legal limit of 3% of taxable property evaluation would the entire issue be illegal?

Question 3. Is the \$100,000 specified limit for voting hospital bonds the maximum amount of hospital bonds which may be outstanding at any one time?

Question 4. If the \$100,000 maximum hospital bond issue is voted, must this bond issue be retired in its entirety before another hospital bond issue may be voted and sold?

1. In answer to your question number one, we would advise you that there is no method either authorized or practical by which to determine the amount of bonds which may be issued and paid for out of the $\frac{1}{2}$ mill levy within the 20 year statutory limits. The amount that can be produced by fixed tax levy varies from time to time with the assessed value of the property upon which the tax is levied, with the result that the amount to be produced within the 20 year period is indefinite and indeterminate. The statutory method for meeting that situation is Section

76.7, Code of 1946, which provides and prescribes a method of refunding bonds where the voted annual tax is limited, and insufficient to retire the bonds within the statutory period. That section follows:

"Counties, cities, towns, and school corporations may at any time or times extend or renew any legal indebtedness or any part thereof they may have represented by bonds or certificates where such indebtedness is payable from a limited annual tax or from a voted annual tax, and may by resolution fund or refund the same and issue bonds therefor running not more than twenty years to be known as funding or refunding bonds, and make provision for the payment of the principal and interest thereof from the proceeds of an annual tax for the period covered by such bonds similar to the tax authorized by law or by the electors for the payment of the indebtedness so extended or renewed."

2. In answer to your question number 2 we would advise you that if the bond issue exceeds the limit of 5% of taxable property valuation, as prescribed by Article XI, subsection 3 of the Constitution, the entire issue is not illegal,—only the excess is void. It was so held in the case of *Trepp vs. Independent School District*, 213 Ia. 944, 954. There the court said this:

"This court has held that the municipality is liable for indebtedness otherwise valid up to the constitutional limit. It is only the excess that is void. *McPherson vs. Foster Bros.*, 43 Ia. 48, 72."

3. In answer to your third question with respect as to whether the \$100,000 limit specified by Section 347.1, Code of 1946 is the maximum amount of hospital bonds which may be outstanding at any one time. We are of the opinion that that section provides the \$100,000 to be a mandatory maximum amount of hospital bonds which may be issued and outstanding where the voters have authorized the issuance of bonds for the purpose of securing a site, and erecting, equipping and maintaining a county hospital. That section follows:

"When it is proposed to establish in any county a county public hospital, a petition shall be presented to the board of supervisors, signed by two hundred or more residents freeholders of such county, at least one hundred fifty of whom shall not be residents of the city, town, or village where it is proposed to locate such hospital, requesting said board to submit to the electors the proposition to issue bonds for the purpose of procuring a site, and erecting, equipping, and maintaining such hospital, and specifying the amount of bonds proposed to be issued for such purpose, which shall not exceed one hundred thousand dollars."

However, where there is already established and paid for a county public hospital, the foregoing statutory maximum limit of \$100,000 does not apply to the erection and equipment of additions thereto. There is statutory authorization for the exercise of this power in Section 347.2, Code of 1946.

4. In respect to your question as to whether the \$100,000 maximum hospital bond issue must be retired in its entirety before another bond issue may be voted and sold, we answer the question in the affirmative. The reason therefore is found in the provisions of Section 347.7, which directs the Board of Supervisors in the event the hospital be established, to levy a tax at a rate voted, not to exceed $\frac{1}{2}$ mill in any one year, for its erection and equipment, and also a tax not to exceed one mill for its improve-

ment, maintenance and replacement thereof. The levy of such tax for the purpose of retiring the bonds is a mandatory imposition upon the Board of Supervisors under the provisions of Section 76.2, as follows:

"The governing authority of these political subdivisions before issuing bonds shall, by resolution, provide for the assessment of an annual levy upon all the taxable property in such public corporation sufficient to pay the interest and principal of such bonds within a period named not exceeding twenty years. A certified copy of this resolution shall be filed with the county auditor or auditors of the counties, as the case may be, in which such public corporation is located; and the filing thereof shall make it a duty of such officer or officers to enter annually this levy for collection until funds are realized to pay the bonds in full."

If there is already in existence a bond issue authorized by the electors required to be retired in 20 years at a maximum levy of $\frac{1}{2}$ mill, it would follow that the Board of Supervisors could not levy an additional $\frac{1}{2}$ mill tax to retire a second bond issue. When the first $\frac{1}{2}$ mill is voted, the power to tax is then exhausted,—concurrently there is exhausted the power to issue the bonds.

TAX EXEMPTION: VETERANS OWNING PROPERTY IN TWO COUNTIES: A veteran owning property in two counties where value of neither property equals his soldier's exemption, must take his tax exemption in one county only.

November 20, 1946. *Mr. John W. Barnes, Director, Property Tax Division, State Tax Commission, Building:* We have considered your letter and submit herewith our answer to your inquiry which you have stated as follows:

"Section 427.5 of the 1946 Code provides that: 'No person may claim a reduction or exemption in more than one county of the State of Iowa, and if no designation is made the exemption shall apply to the homestead, if any'. The above clause of the statute refers to the designation of property by veterans for the purposes of receiving the veteran's tax exemption provided in section 427.3.

A veteran owns property in two counties, the property in his county of residence being insufficient in terms of assessed value to take full advantage of his \$750.00 World War I tax exemption, to which he is otherwise entitled to qualify. He owns property which is assessed at \$400.00, thus leaving \$350.00 of his soldier's tax exemption unapplied. In order that he may receive the fullest benefit of his tax exemption, may he apply the remaining portion of his tax exemption to property owned by him in another county?

There are many instances of this practice over the state and auditors have been quite careful in the allowance of these claims. The theory upon which veterans have been allowed to divide their tax exemption is one founded in equity, on the basis that the veteran ought to receive the fullest benefit of the exemption provided by law."

We have been unable to find any Attorney General's Opinion or any case in which the question you submit has been decided.

Section 427.4 of the 1946 Code of Iowa provides:

"The following exemptions from taxation shall be allowed. * * * .
 3. The property not to exceed \$750.00 in taxable value of any honorably discharged soldier, sailor, marine or nurse of the First World War.
 * * * * "

Section 427.5 of the 1946 Code provides:

"Any person named in section 427.3 of the 1946 Code 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 hereinafter 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 is claiming exemption or reduction the military honorable discharge of the person claiming or through whom is claimed *said exemption.*"

The above section further provides that said person shall file with the county auditor his claim for exemption or reduction for taxes under oath, etc. It is specifically provided in the same section that *no person may claim reduction or exemption* in more than one county in the State of Iowa and if no designation is made the exemption shall apply to the homestead, if any.

It is to be noted from a reading of code section 427.5 that the soldier is to receive a reduction equal to his exemption and in order to be eligible to receive said exemption or reduction, he must do certain things. The language employed refers to a reduction, and we find this term being used throughout the entire statute. The last paragraph of that section provides that no person may claim a reduction or exemption in more than one county in the State of Iowa, and a reading of the statute leads to the conclusion that the term "reduction or exemption" relates to such reduction or exemption as one indivisible sum, and so when the soldier files and makes claim for reduction or exemption in one county, he is not privileged to split his exemption into many parts and make claim in several counties. He is granted just one reduction or exemption under the law and when he has filed it in one county, he cannot claim any reduction or exemption in any other county even though he does not have taxable property of the total amount of his reduction or exemption in the county in which he claims the reduction or exemption.

It is to be noted further that in addition to the express language in the last paragraph of section 427.5, the Legislature further provided in section 427.7 as follows:

"Penalty. Any person making a false affidavit for the purpose of obtaining the exemption provided for in sections 427.3 to 427.6, inclusive, or who knowingly receives such exemption without being legally entitled thereto, or who makes claim for exemption in more than one county in the state shall be guilty of a misdemeanor and upon conviction thereof fined not more than one hundred dollars or imprisoned in the county jail for not more than thirty days or be both so fined and imprisoned."

We interpret from the language of the sections herein quoted that the soldier is granted but one reduction or exemption in a sum provided by the statute, and the Legislature did not intend that a claimant could receive several reductions or exemptions, which in the aggregate totaled the amount of the exemption or reduction.

TEACHERS' SALARY INCREASES: READJUSTMENT: PERSONAL LIABILITY OF BOARD MEMBERS: It is constitutionally permissible to increase teachers' salaries. If there remains in school general fund in 1946, an excess after the budget requirement fixed in 1945, adjustment of the present teachers' contracts may be allowed to extent of excess. Disregard by administrative body of express positive statutory duty respecting public funds within its control would be basis of personal liability.

December 4, 1946. *Mr. M. J. Carey, County Attorney, Newton, Iowa:* I have yours of the 19th in which you ask for opinion in the following situation:

"The Newton Board of Education desires your opinion on the two following questions:

Teacher organizations are asking a readjustment of their contracts for this year's service to meet unexpected rises in the cost of living. The Board based its budget and tax levies for this year on the costs which these present contracts represented. Seventy-one percent of the entire cost of operation is determined by the provisions of these contracts. If the contracts are revised to adjust for the unexpected rise in living costs but beyond a figure provided in the budget, has the board a legal right to make this adjustment?

If the Board makes a readjustment, do they have any personal liability? For example, can any tax payer sue them personally for the amount by which the new contract will exceed the figures of the old contract that was used in the budget?

Please let me have your opinion on this matter at your earliest convenience and oblige."

In reply to the foregoing situation, it is proper to consider whether adjustment of a teacher's contract, before it is fulfilled, by way of increase of compensation, is permissible under our constitutional provision of Section 31, Article III. This section follows:

"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."

In my opinion, teachers are not officers or public agents, or contractors within the terms of the foregoing constitutional provision. Our own Supreme Court appears not to have determined this exact question. However, it has had the consideration of other courts. A textbook statement from 47 American Jurisprudence, page 372, title "Schools" states that "although employed in a public capacity, their position is generally considered not to be that of public officers, but of employees; there is, however, some authority to the contrary. They are normally subject to selection, dismissal, and control at the hands of the district school directors, who may make and enforce any reasonable rules and regulations in these matters."

Cases there cited to support this conclusion that teachers are employees, are these: *State ex rel Sittler v. Board of Education*, 18 NM 183, 135

P 96, 49 LRA (NS) 62; Mootz v. Belyea, 60 ND 741, 236 NW 358, 75 ALR 1347; Lander v. Seaver, 32 Vt 114, 76 Am Dec 156; Clune v. School Dist. 166 Wis 452, 166 NW 11, 6 ALR 736.

The contrary cases are these: Cottongim v. Stewart, 283 Ky 615, 142 SW (2d) 171, citing RCL; Eason v. Majors, 111 Neb 288, 196 NW 133, 30 ALR 1419.

Teachers in Iowa have no permanent statutory tenure. They are employed by contract, authorized to be made by Boards of School Directors, under Section 279.12, and 279.13, Code of 1946. Provision is made therein requiring the contract to contain agreements of the length of time the school is to be taught, the compensation per week of five days, or month of four weeks, and further provision that the contract of teaching shall remain in force for the period stated in the contract and shall be automatically continued in force except as modified or terminated by mutual agreement of the Board and of the teacher, or terminated before April 15 of each year by action of the teacher or of the Board. Power of dismissal is vested in the Board under Section 279.24. It is clear that the position of teacher in Iowa is held not as a matter of statutory right, but under the terms of a contract made by and between the Board and the teacher. The foregoing are attributes of the relationship of employer and employee between the Board and the teacher.

The existence of teachers contract under the foregoing statute and rule, negatives a holding that a teacher is a public officer within the constitutional sense.

"It is the general rule, however, that the performance of services required by the duties of a public office are not in their nature contractual. *Butler v. Pennsylvania*, 10 How. 402, 13 L. Ed. 472, and other cases hereinabove cited."

This doctrine was recognized by the Supreme Court in *Iowa City v. Foster*, 10 Iowa 189. Therefore, I am of the opinion that a teacher in the public schools is an employee and not an officer. This accords with the holding of *Heath vs. Johnson* 15 SE 980 where the Court of Appeals of West Virginia observed:

"The teacher, on the other hand what ever may be the case in other states, is not in this state a public officer, but is an employee, and his position not a public office, an employment. The teacher is responsible not to the public, nor to the patrons of the school, but to the proper school officers, the trustees, the Board of Education, County Superintendent, and State Superintendent of free schools."

And in *Sieb vs. City of Racine*, 187 NW 989, 992, where was in question whether a City Superintendent of Schools was an officer or an employee, the Court said this:

"A great deal of discussion has been indulged as to whether the character of the employment of the superintendent of schools constitutes him an officer or a mere employee. As a matter of public policy, a city superintendent of schools should not be held to be a public officer, unless such plainly appears to be the legislative intent. * * *

The question whether a given employment constitutes the one selected for its discharge an officer or a mere employee, is often a difficult one.

The line between the two is frequently shadowy and difficult to trace. In examining section 926—115, however, we find an absence of many of the recognized characteristics of an office. There is no definite term; the appointee is not required to take an oath; he exercises none of the functions of sovereignty, unless it be in the matter of licensing teachers. While, possibly, these are not indispensable, they are usual characteristics of an office. Whether the Legislature intended to constitute the position an office, is at least doubtful. In view of the considerations stated, we are disposed to and do hold that the city superintendent of schools was not an officer."

Nor are such teachers public agents in the constitutional sense. The indicia of such a public servant is set forth in the case of *State vs. Bond*, 118 SE 276,270 in words as follows:

"But respondent says that if she is not a public officer she is a public agent, and therefore within the terms of the constitutional provision. 1 Mechem, Agency Par. 25, says that the word 'agency' when used in a broad sense, indicates the relation which exists when one person is employed to act for another. 'In this aspect, it has in our modern law, three chief forms: (1) The relation of principal and agent; (2) the relation of master and servant, or in the more modern phrase, the relation of employer and employee; and (3) the relation of employer or proprietor and independent contractor.' Now in what sense is the term 'agent' used in the constitutional provision? Is it possible that the framers of the Constitution meant to say that the Legislature should prescribe, by general laws, terms of office, powers, duties and compensation of all persons who may do work for the state? Does this word 'agents' include mere employees and independent contractors, those placed by Mechem in his second and third classifications, or is its meaning restricted to the first class? If the second class are included, then every char-woman who cleans the floors of a building belonging to the state or its agencies, every painter, carpenter, bricklayer, hodcarrier, wireman, or workman of any character upon any such building or project of whatever sort, would be a public agent, and the Legislature would be bound by general law, not only to prescribe their powers, duties, and compensation, but also their terms of office. This provision means that the agent fills an office just as clearly as that an officer fills an office. Each has an office whose term must be prescribed by law. Examples might be multiplied indefinitely. But a mere statement of the proposition shows the absurdity of the proposition that every employee of the state is an agent of the state. The words 'public agents' and we use the two together because the context shows that they are to be so used and read, as used in the Constitution, means those persons who are agents in the narrower and proper sense of the term. In that sense they imply the relation of principal and agent. That relation 'is legal relation which exists where one person, called the agent, is authorized usually by the act of the parties, but occasionally perhaps by operation of law, to represent and act for another, called the principal in the contractual dealings of the latter with third persons. The distinguishing features of the agent may briefly be said to be his representative character and his derivative authority.' 1. Mechem, Agency, Par. 26; *Merriman Co. v. Thomas & Co.*, 103 Va. 26, 48 SE 490."

Based upon the case of *Farmer vs. St. Croix Power Co.* 93 NW 830, 833, I am disposed to the view that contracts for "personal services" are excluded from the meaning of the word "contractor" in the constitutional sense. There it is said:

"There is perhaps no better way to demonstrate what is the common signification of a word, the customary use thereof, than to consult stand-

ard dictionaries. Adjudged cases where the word under consideration was used in the same relation as in the case in hand are of greater weight than mere lexical definitions; but it is not common to find such identity of expression and identity of relation as to leave no reasonable doubt that in both instances the words were used in exactly the same sense. Webster defines 'employee' as one who is employed; and 'contractor' as one who contracts to do anything. Those definitions are very general, but they obviously suggest applied specifically, that an employee is one who is employed to perform personal service; and a contractor, one who engages to do a particular thing, the idea of personal service not being a necessary element in the bargain. In the Standard Dictionary it is said, an employee is a person who is employed; one who works for wages or a salary or who is engaged in the service of another; a contractor is one who executes plans under a contract; a sub-contractor is one who contracts with a principal contractor to do work embraced in the latter's contract,—that is, obviously, one who contracts to execute some integral part of the work covered by the scheme of the principal contract. By the Century Dictionary we are informed that an employee is one who works for an employer; a person working for salary or wages, usually clerks, workmen, laborers, etc.; that a contractor is one who contracts to furnish supplies or to construct work or erect buildings, or perform any work or service at a certain price or rate; that a sub-contractor is one who takes a part or whole of the work from the principal contractor. Thus it will be seen, without any extended analysis of the various lexical definitions, that the significant element in the relation of an employee and his employer, specifically considered, is personal service; while the significant element in such relation between a contractor and his principal is the work as an entirety to be performed by him."

The constitutional restrictions, in my opinion therefore, to an increase in the compensation during the period of the teachers' contract, are not applicable.

In my opinion, it being constitutionally permissible to increase the teachers' salaries, insofar as the extent and manner of securing the increase, your attention is directed to the following several statutes defining the duty of public officers insofar as their local budget and tax levies are concerned, and the effect upon them, of disobedience to the statutory provisions. Section 24.14, Code 1946 provides as follows:

"No greater tax than that so entered upon the record shall be levied or collected for the municipality proposing such tax for the purpose or purposes indicated; and thereafter no greater expenditure of public money shall be made for any specific purpose than the amount estimated and appropriated therefor, except as provided in sections 24.6, 24.15 and subsection 4 of section 343.11."

The tax, so limited by the foregoing section, is the result of the requirements of Sections 24.3 to 24.7, respecting the budget estimates of the amount of money that will be required during the ensuing fiscal year.

Sections 24.19 and 24.20 prescribed the duty of the levying board to spread the tax rates necessary to produce the amount required by the various funds as shown by the approved budget, and provide that the tax rates and levies so determined and certified, are a finality. These sections follow."

"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 by the state board."

"The several tax rates and levies of the municipalities thus determined and certified in the manner provided in the preceding sections, except such as are authorized by a vote of the people, shall stand as the tax rates and levies of said municipality for the ensuing year for the purposes set out in the budget."

The penalty imposed upon public officers for failure to perform these duties, is prescribed by Section 24.24 as follows:

"Failure on the part of any public official to perform any of the duties prescribed in Chapters 22, 23, and 24, and sections 8.39 and 11.1 to 11.5, inclusive, shall constitute a misdemeanor, and shall be sufficient ground for the removal from office."

Not only is removal from office one of the penalties, but according to Section 687.7, the punishment for conviction of a misdemeanor is this:

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

The problem with which you are confronted is the present use of tax money for the adjustment of teachers' salaries. It is to be noted that the budget and levy of taxes following, are processes of public officials of the year preceding the collection of the taxes levied. The foregoing penalties therefore, would be incurred by the use and allocation of tax monies in excess of statutory provisions and prohibitions therein set forth. These provisions and prohibitions operate upon the tax monies collected in 1946, based upon the budget and levies of 1945. Therefore, if there remains in the school general fund in 1946, an excess over the budget requirements fixed in 1945, adjustment of the present teachers' contracts may be allowed to the extent of the excess.

The allocation of tax monies resulting from the budget, other than this unused balance, will operate to provoke imposition of the foregoing penalties. The budget and levy of this year, 1946, will control the tax collections of 1947. In that view, whether the adjustments as here described can be affected in 1947, will depend upon a like excess in the money over budgetary requirements. In order to avail yourselves of the present use of monies in excess of the budget requirement, a properly amended budget should be presented and following the usual course, approved. Supplemental aid and tuition collected during the fiscal year outside the budget becomes part of the general fund and may be expended by means of the amended budget. See *Lowden vs. Woods*, 226 Iowa 425.

I would advise you further, that disregard by an administrative body of express positive statutory duty respecting public funds within its control would in our view, be the basis of personal liability of its several members. 43 Am. Jurisprudence, page 93, title "Public Officers"; *Davis vs. Laughlin*, 147 Ia 478; *Newport vs. McLane*, 96 Am. Law Report 655; 77 SW (2d) 27, Kentucky.

SCHOOL FOR BLIND: JURISDICTION: The State School for the Blind located at Vinton, Iowa, is an institution entirely owned and operated by the State of Iowa and the local board of health at Vinton, Iowa, has no jurisdiction over the State School for the Blind.

December 11, 1946. *Mr. Herman B. Carlson, Director Division of Law Enforcement, State Department of Health, Building:* Reference is made to your letter of November 20, 1946, wherein you request the opinion of this department on the following question:

"Will you kindly advise whether the City Board of Health has any jurisdiction or duty in connection with the State School for the Blind in Vinton, Iowa?"

In reply thereto, we point out that the institution for the education of the blind, known as the "State School for the Blind," located at Vinton, Iowa, is an institution entirely owned and operated by the State of Iowa, and supported by its funds, and is an instrumentality of the State. As such, the State alone has the sole power to manage and control it, free from all interference by any inferior governmental unit, except as it can be established that the State has delegated or surrendered the power to so interfere, or has waived its right to immunity from such regulation. As illustrative of this rule of law, it has been held that property of the State is exempt from municipal regulation in the absence of waiver on the part of the State of its right to regulate its own property, and such waiver will not be presumed. 43 C. J. 247, *Municipal Corporations*, Sec. 247; *Fulton v. Sims*, 127 Mo. A. 677, 106 N. W. 1094; *Salt Lake City v. Salt Lake City Board of Education*, 52 Utah 540, 175 P. 654; *Kentucky Inst. for Education of Blind v. Louisville*, 123 Ky. 767, 97 S. W. 402. In the last case cited, the Kentucky court, in holding that a state educational institution was not subject to the provisions of a building Code contained in an ordinance adopted by a municipality in which the state educational institution was situated, clearly stated the reasons for the rule as follows:

"The principle is that the State, when creating municipal governments, does not cede to them any control of the State's property situated within them, nor over any property which the State has authorized another body or power to control. The municipal government is but an agent of the State—not an independent body. It governs in the limited manner and territory that is expressly or by necessary implication granted to it by the State. It is competent for the State to retain to itself some part of the government even within the municipality, which it will exercise directly, or through the medium of other selected and more suitable instrumentalities. How can the city have ever a superior authority to the State over the latter's own property, or in its control and management? From the nature of things it cannot have."

What is there said applies, when the view is taken that the local board of health of Vinton, Iowa, is a municipal agency, exerting municipal authority. Examination of the statutes also discloses that there has been no specific delegation of authority to regulate the sanitary conditions of state institutions to local boards of health, but rather that the state has reserved that power to itself.

By statute the State Board of Education is designated as the agency of the state having the power to govern the institution, and manage

and control the property, both real and personal, of the school (Sections 262.7 and 262.9, Code of Iowa, 1946). The jurisdiction of the state board over the state institution here involved to manage and control its affairs and operation is exclusive except to the extent that power has also been delegated by the state to another one of its agencies, to-wit, the State Department of Health, to "make inspections of the sanitary conditions in the educational, charitable, correctional and penal institutions in the state" (Section 135.11, Par. 5). From these statutes and the principles stated above, it clearly appears that the state has not waived jurisdiction to regulate the sanitary conditions in its own educational institutions, including the State School for the Blind, but has instead expressly reserved such power to itself, through its state agencies, the State Board of Education and the State Department of Health, and we conclude therefrom that the local board of health of Vinton, Iowa, has no jurisdiction over the State School for the Blind and no duties in connection therewith.

In reaching this conclusion we are not unmindful of the provisions of Section 137.10 of the Code which is as follows:

"At least twice each year, and oftener if necessary, the health officer shall personally inspect, or cause to be inspected, the schools, public buildings, and public utilities within the jurisdiction of the local board, and he shall recommend to the local board the necessary measure to be taken by it for the maintenance of such schools, public buildings, and public utilities in a sanitary condition. In case of sickness where no physician is in attendance, the health officer shall investigate the character of such sickness and report his findings to the local board."

We cannot interpret the words "schools" and "public buildings" as employed in Section 137.10, to include state owned and operated schools and public buildings, in the face of the provisions of Section 135.11, referred to above.

HOSPITALS: BONDS ISSUED: CITIES AND TOWNS: There are no limitations on amount of bonds issued under Chapter 37, by a city, town or county other than that contained in Section 37.6 of 1946 Code. A town may vote bonds for a Memorial Hospital and then combine with county, provided the hospital site will be within town limits.

December 11, 1946. *Walter L. Bierring, M.D., Commissioner State Department of Health, Building:* Receipt of your letter of November 18, 1946, is acknowledged wherein you propound for answer several questions in connection with establishment and maintenance of memorial hospitals under the provisions of Chapter 37 of the 1946 Code of Iowa. Your letter follows:

"We have been asked regarding building a memorial hospital under Chapter 38, Code 1946. The main points of concern are:

1. What limit, if any, is there to the amount of bonds which can be issued under this chapter to construct a memorial hospital—by a county, a town, or city?

2. Is it possible for a town, or towns, to vote bonds for a memorial hospital and then combine such funds with those voted for similar purpose by the county in which the town, or towns, are located?

3. Is it possible to construct an addition to any already existing hospital with funds voted under this Act by changing the name to "..... Memorial Hospital"?

4. By naming such addition "..... Memorial Hospital"?

1. In answer to your question number one, we are of the opinion that there is no limitation on the amount of bonds which may be issued under Chapter 37, Code of Iowa, 1946, by a city, town or county, other than the limitation contained in Section 37.6, the pertinent part of which provides:

"In issuing such bonds, such county, city or town may become indebted in an amount which, added to all other indebtedness, shall not exceed five percent of the assessed value of the taxable property in such county, city, or town as determined by the last state and county tax lists."

This provision is identical in purpose and effect with Section 3, Article XI of the Iowa Constitution and Section 407.2 of the 1946 Code, and together they constitute a bar to the issuance of bonds for a memorial hospital acquired under the provisions of Chapter 37 of the Code in excess of the limitation therein contained. Section 407.1 which is a limitation on the incurring of indebtedness by a county or municipal corporation for "general or ordinary purposes" in excess in the aggregate of one and one-fourth percent of the assessed valuation of the taxable property within such corporation is not applicable to issuance of bonds under Chapter 37. Bonds issued under that chapter are issuable only as the result of submission of a special proposition to the electorate, under special authorization of that chapter, for the special and limited purpose of acquiring and maintaining a memorial hospital, and are payable by a special tax levy, and do not constitute indebtedness for "general or ordinary purposes". (See opinion in 1930 A. G. Op. 181, and *France v. City of Des Moines*, 183 Iowa 1311.)

2. In answer to your question number two we are of the opinion that a town may vote bonds for a memorial hospital, and then combine such funds with those voted for similar purpose by the county in which the town is located, under the specific provisions for joint memorials set forth in Section 37.21, as follows:

"Any city or town may join with the county in which such city or town is located in the joint erection or purchase of memorial buildings or monuments and suitable ground and equipment therefor, and the maintenance thereof, providing the council of such city or town and the board of supervisors of such county can so agree, but in cases where commissioners have already been appointed under section 37.9, such agreement shall be between such commissioners, but if only one of such parties has appointed commissioners, then such agreement shall be between the commissioners already appointed and the council of such city or town or the board of supervisors, of such county, as the case may be."

However, we see in Chapter 37 no specific provision empowering a municipality to acquire a memorial situated outside of the territorial confines of the municipality. Therefore the provisions of Section 37.21 would be operative only upon condition that the site for the memorial to be selected be located within the boundaries of the municipality so contracting with the county. This requirement would operate to prevent

a county from contracting for a joint memorial with more than one municipality, for obviously the joint memorial could not be situated in more than one municipality. This view is supported by the language of 37.21 which is in the singular rather than the plural in referring to "any city or town", rather than "cities and towns."

Since it is our opinion that a town and a county may join with a municipality in the erection or purchase, and maintenance of a joint memorial hospital, under Section 37.21, it is to be observed that this section must be read together with the other provisions of Chapter 37 in determining what procedure must be followed by the respective county and municipality in putting Section 37.21 into operation. That section does provide that a municipality and the county may join in the joint erection or purchase of memorial buildings, and equipment therefor and the maintenance thereof, "providing the council of such city or town and the board of supervisors of such county can so agree." However section 37.9 also provides that when a proposition to erect a memorial building has been carried by a majority vote, the board of supervisors or municipal council, as the case may be, shall appoint a commission of five members, which commission shall have charge and supervision of the erection of the building and when erected, the management and control thereof. This statute, being mandatory in language, we construe to be mandatory, requiring the appointment of such commission. Section 37.16 prohibits the disbursement of funds raised under Chapter 37 by the county or city officers except where the commissioners give written order therefor. There is no express provision for the delegation of these powers and duties by one commission to another commission or governmental unit. Therefore we are of the opinion that a municipal council or a board of supervisors, or both, can do no more than contract to join in a memorial, and must leave the matter of designating and purchasing a site, of designating the name and use of the memorial, the erection of the memorial and the management thereof, and the division of the cost of erection and operation thereof to the joint action of the Soldiers' Memorial Commissions of the two governmental subdivisions involved. In other words, the county board of supervisors and the municipal council, by agreeing to erection and maintenance of a joint memorial prior to the formation of the memorial commissions cannot usurp the delegation of power and authority conferred only upon the two memorial commissions, who must take joint action to put section 37.21 into further operation.

3 and 4. In answer to your questions three and four, it is our opinion that a municipality or a county may, with funds voted under Chapter 37, acquire an existing hospital by purchase or otherwise, and construct an addition thereto, provided the entire structure, rather than the addition, is designated by an appropriate name. We deem the name suggested in your inquiry an "appropriate" name within the terms of Section 37.18. The power "to purchase" is expressly conferred in Section 37.6, as is the power "to erect" and "to reconstruct." The power "to erect" includes the power to build an addition to an existing building.

Cotter v. Joint School District No. 3 of Plum City, 158 N. W. 80, 164 Wisc. 13. See also Brown v. Graham, 58 Tex. 254; Carroll v. Lynchburg, 6 S. E. 133, 84 Va. 803; Nelson v. Cornbill, 28 Pa. 156; Herman v. Cummings, 43 Pa. 322; Delinoe v. Long Branch Com'rs. 25 A. 274, 55 J. L. 108.

Memorial buildings, by Section 37.1 are "designed to commemorate the service rendered by soldiers, sailors and marines of the United States." To add a wing or addition to an existing hospital, and bestow an appropriate name to the wing only would defeat the manifest purpose of the statute, for the identity of the memorial wing or addition would soon become merged in that of the original building and its original public purpose lost to public view. The entire act appears to contemplate the creation of one entire and distinct unit or building as a memorial and its operation and management as one unit. The duty of managing and controlling the memorial is imposed upon the memorial commission. It is manifest that a wing or addition to an existing hospital could not be properly managed and controlled by the commission, where management and control is not also held by them over the original existing hospital. Therefore we view it that the commission must have jurisdiction over the entire building to which the wing or addition is attached, and the whole building must be designated as the Memorial by appropriate name. Our answer to question number three is in the affirmative, as herein qualified, and to question number four in the negative.

LICENSE: RESIDENT PHYSICIAN, SURGEON AND INTERNE:

Resident physician, surgeon or interne who has already received license to practice medicine in another jurisdiction and who is studying at a hospital in this state, must obtain a license to practice medicine and surgery in this state.

December 11, 1946. *Mr. Herman B. Carlson, Director Division of Law Enforcement, State Department of Health, Building:* Receipt is acknowledged of your communication of November 26, 1946, requesting the opinion of this Department upon the inquiry therein contained. We quote from your letter as follows:

I would appreciate having an opinion regarding the residents now serving at Iowa Methodist Hospital under the G. I. Bill of Rights as to the necessity of their being licensed by the State of Iowa where they are studying specialties under the supervision of local M. D.'s. Of the nine residents, five now have Iowa licenses but four of them are licensed by other States and intend to return to those States at the end of their course to practice. These residents are permitted no private practice and any service they render is under the instruction of local licensed M. D.'s. Under these circumstances would it be necessary that they take out an Iowa license with the extra \$50 cost to them in order to continue their studies?"

In supplementing your question, you also state:

"It appears that many hospitals in the State and throughout the land employ so called 'resident physicians' or 'resident internes', both being synonymous terms used to designate or name the physician who has already graduated from an approved medical school, served one year of internship as prescribed by law, following which he has been granted

a certificate to practice medicine and surgery in the State from which he came or resided.

These 'resident physicians' or 'resident internes' are, as a general rule, employed by hospitals on the salary basis because the hospital employer desires and can use the services of these physicians. This type of physician, although legally he is a qualified physician and licensed to practice, desires to further his medical education by practical work in a hospital under the supervision of those regular practitioners using the facilities of the hospital."

In reply thereto we quote you the provisions of Section 148.1 of the 1946 Code of Iowa, defining the classes of persons who shall be deemed to be engaged in the practice of medicine and surgery:

"1. Persons who publicly profess to be physicians and surgeons or who publicly profess to assume the duties incident to the practice of medicine or surgery.

2. Persons who prescribe, or prescribe and furnish medicine for human ailments or treat the same by surgery.

3. Persons who act as representatives of any person in doing any of the things mentioned in this section."

Under the statement of facts contained in your letter, it clearly appears that "resident physicians" or "resident internes" are within the classes of persons deemed to be engaged in the practice of medicine and surgery within the provisions of the foregoing statute, for they clearly are persons who publicly profess to be physicians and surgeons, and profess to assume the duties incident to the practice of medicine or surgery. They also prescribe or prescribe and furnish medicine for human ailments or treat the same by surgery; this they either do directly, or as representatives of other persons. Therefore within the provisions of Section 147.2, they must procure the license to practice medicine and surgery therein required, unless some provision of the law excepting them from such requirement can be discovered.

The only persons exempted from the provisions of Section 148.1 are the classes of persons specified in Section 148.2 of the same code. That section provides:

"Section 148.1 shall not be construed to include the following classes of persons:

1. Persons who advertise or sell patent or proprietary medicines.
2. Persons who advertise, sell, or prescribe natural mineral waters flowing from wells or springs.
3. Students of medicine or surgery who have completed at least two years study in a medical school, approved by the medical examiners, and who prescribe medicine under the supervision of a licensed physician and surgeon, or who render gratuitous service to persons in case of emergency.
4. Licensed podiatrists, osteopaths, osteopaths and surgeons, chiropractors, nurses, dentists, optometrists, and pharmacists who are exclusively engaged in the practice of their respective professions.
5. Physicians and surgeons of the United States army, navy, or public health service when acting in the line of duty in this state, or physicians and surgeons licensed in another state, when incidentally called into this state in consultation with a physician and surgeon licensed in this state."

It may be contended that paragraph 3 thereof exempts "resident physicians" and "resident internes" from being required to obtain license to practice medicine and surgery, on the basis that they are "students of medicine and surgery who have completed at least two years study in an approved medical school, and who prescribe medicine under the supervision of a licensed physician or surgeon." However, as we view it, "resident physicians" or "resident internes" who have completed their course of instruction and study in a medical school, and have obtained a diploma from that institution, and who have been licensed to practice medicine and surgery in another jurisdiction, cannot be deemed to be "students" of medicine and surgery within the language of the statutory provisions last mentioned. We are advised that approved schools, in addition to requiring a prescribed amount of instructional work at their institution, also require completion of a term of internship as a prerequisite to granting a diploma to the students of the institution. The statute exempting students of medicine and surgery from the licensure requirements of this state was intended to cover those students who were completing their year of internship preliminary to earning a diploma from a medical school, and was not intended to exempt doctors and surgeons who were possessed of a diploma. The graduates of professional schools who practice their profession always, ordinarily speaking, continue to be students of the matters involved in their particular field of activity, but that does not make them students within the meaning of that term as it is employed in our statute. To come to any other conclusion would be to make it possible to avoid the licensure requirements of this state, for an unlicensed physician and surgeon, by obtaining employment from a hospital or a licensed physician or surgeon and practicing his profession under the supervision of such licensed physician or surgeon, could avoid our licensure requirements. Such we do not believe to be the intent of the Legislature in enacting Section 148.2, and we are therefore of the opinion that the resident physicians or internes mentioned in your letter, must obtain a license to practice medicine and surgery in this state in order to be lawfully qualified to carry on the activities mentioned, insofar as such activities constitute the practice of medicine and surgery.

SALES TAX: AIRCRAFT: No credit for registration fee can be allowed on the sales tax on aircraft. Nothing in the law to exempt aircraft from the sales tax.

December 12, 1946. *Mr. Earle S. Smith, Director Division of Retail Sales and Use Tax, State Tax Commission, Building:* This will acknowledge receipt of your letter of recent date relating to the collection of a sales tax upon the sale of aircraft in the State of Iowa.

Your letter presents two inquiries. First. Are aircraft subject to the sales tax? Second. Is the purchaser of an aircraft entitled to a credit on his sales tax under Code Section 422.46 to the extent of the registration fee paid by him? For the purpose of convenience, we quote herewith the pertinent statutes:

Code Section 328.25:

"Fees in lieu of taxes. The registration fees imposed by this chapter upon aircraft shall be in lieu of all taxes, general or local, to which aircraft may be subject, and if an aircraft shall have been registered at any time under this chapter it shall not thereafter be subject to a personal property tax unless such aircraft shall have been in storage continuously as an unregistered aircraft during the preceding registration year." and Code Section 422.46:

"Credit on tax. A credit shall be allowed against the amount of tax computed to be due and payable on the gross receipts from sales at retail of any tangible personal property upon which the state now imposes a special tax, whether in the form of a license tax, stamp tax or otherwise, to the extent of the amount of such tax imposed and paid."

We answer your inquiry as to the taxability of aircraft under the sales tax law by stating that there is nothing in the law to exempt aircraft from the sales tax and under its provisions they are taxable.

In answer to your second inquiry it is to be noted that Section 328.25 relating to the registration of aircraft provides that the registration fees imposed by this Chapter shall be in lieu of all taxes, general or local, to which aircraft may be subject. This provision specifically states that the registration fee is to be in lieu of all taxes, general or local, and does not make any reference to any special tax or specifically to the sales tax. This Section is patterned after the law relating to motor vehicles and makes the registration fee in lieu of all property taxes, general or local. This statute was intended to exempt aircraft which were properly registered from any property tax.

The Iowa Sales Tax is an excise tax and all sales of property are subject to such tax unless such sales are specifically exempted under the sales tax law. One who claims the exemption must show himself to be within the exemption as provided by law.

Section 422.46 provides that a credit shall be allowed against the amount of tax computed to be due and payable on the gross receipts from sales at retail of any tangible personal property upon which the state now imposes a special tax, whether in the form of a license tax, stamp tax or otherwise, to the extent of the amount of such tax imposed and paid. The credit herein provided is based upon the extent of the amount of such tax imposed and paid. We think that the words *imposed* and *paid* have a particular significance in this statute.

A credit is allowed on sales of oleomargarine, beer, cigarettes and gasoline, and it is to be noted that the tax has been imposed and paid on these items prior to their sale and because of that fact a credit is allowed. No special tax in the form of a license tax, stamp tax, or otherwise, has been imposed and paid at the time of the sale of the aircraft to the purchaser and, therefore, no credit on the sales tax can be allowed under the express provisions of the statute. To hold otherwise would be contrary to the expressed intention of the legislature. They provided specifically in Section 328.25 that the registration fee was to be in lieu of all taxes, general or local, and that express provision

delimits the credit allowable upon the payment of a registration fee and discloses a legislative intent that the registration fee should be in lieu of property taxes only. We, therefore, conclude that no credit for registration fee can be allowed on the sales tax on aircraft.

AGRICULTURAL LAND CREDIT ACT: DISTRIBUTION OF FUNDS: State Comptroller would be running personal risk if he distributed warrants contemplated by Chapter 192, Acts 51st G. A., at this time as case is pending in Supreme Court.

December 12, 1946. *Mr. C. Fred Porter, State Comptroller, Building:*

You have asked our opinion as to whether or not you should now issue unto the county treasurers of the several counties the warrants contemplated by Chapter 192, Acts of the 51st General Assembly, commonly known and referred to as the Agricultural Land Credit Act.

As you are well aware, the constitutionality of this act has been challenged in the District Court of Dubuque County, Iowa, in a cause of action entitled Dickinson versus Porter, et al. The case was, subject to the filing of the briefs, submitted to the trial court in July, 1946, but the case has not as yet been decided by said court. In this case the plaintiff prays for a declaratory judgment to the effect that the act is unconstitutional and void. No injunctive relief was asked and none has been granted. You would, therefore, not be violating any court order if you distributed the money involved at this time, but you would be running serious personal risk and subjecting yourself to an extensive potential liability in so doing, and this for the reason that although there is a presumption of constitutionality of the act in question, and although it is the belief of this department that the act is in fact constitutional, the fact remains that the matter will not be definitely determined until passed upon by the Supreme Court, and if the act is there held to be unconstitutional you would, in our view, be personally liable for at least such of the funds distributed as could not be recovered by the State. This conclusion is predicated upon the theory that an act of the Legislature which is determined by the courts to be unconstitutional is no law at all and affords no protection to anyone purporting to act thereunder. Our Supreme Court has recognized this rule as is apparent from the following quotation taken from *Security Savings Bank vs. Connell*, 198 Iowa 584, at 569:

"It has been often said of an unconstitutional act that it 'is not a law, it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation, as inoperative as though it had never been passed.'" (Citing cases.)

In the present state of the record as outlined above, it is our view that you should not be expected, nor could you be compelled, to distribute the funds involved at this time.

You also ask in the event it should be distributed at this time as to the amount that would be available for such distribution. The answer given to your first question makes the present one immaterial, but we will nev-

ertheless express our view thereon. It is true that section 10 of the Act provides for the transfer of the sum of \$500,000.00 from the 3 point tax fund to the general fund of the state for each year of the biennium beginning July 1, 1945, but section 1 of the act, which section creates the Agricultural Land Credit fund, appropriates thereto from the general fund of the state the sum of \$500,000.00, for each fiscal year beginning July 1, 1946. We are still within the fiscal year beginning July 1, 1946, and it necessarily follows that the distribution if presently made could not exceed the amount appropriated for this fiscal year—that is the sum of \$500,000.00.

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