STATE OF IOWA
1921

THIRTEENTH BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1920

H. M. HAVNER
Attorney General

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George Cosson.....1911-1917
H. M. Havner.....1917-1921

LETTER OF TRANSMITTAL

HON. W. L. HARDING, Governor of Iowa:

Dear Sir: I have the honor to submit herewith, in accordance with law, my report of the transactions of the Department of Justice for the state of Iowa for the biennial period ending December 31, 1920.

H. M. HAVNER, *Attorney General.*

Des Moines, Iowa, December 31, 1920.

REPORT OF THE ATTORNEY GENERAL

The work of the attorney general's office the last two years has been greatly augmented by reason of the conditions following the world war and the wave of crime which followed in the wake of the war.

The condition of law violations following the war is not new, but the far-reaching effect of such a condition and the burdens which it places upon the law-enforcing department are not generally appreciated by those not directly connected with the task of enforcing the laws.

The range of criminal activities has covered every known crime from petty larceny to murder in the first degree. There has been tremendous activity among the criminal class along the lines of automobile thefts, bank robberies, robbery from the person and arson.

IMPORTANT CASES

State of Iowa v. Quan Sue, from Story county, was one of the most important criminal trials conducted by this department in recent years. This was one of the most diabolically planned and executed murders that has occurred during my term of office. This department has taken special interest in the case because of the fact that it was through the work of the special agents connected with the department that the murderer was apprehended.

The attention of the department was not called to the fact that Sing Lee, the murdered man, had met foul play until the Tuesday following the murder, which occurred on the Wednesday night before, and on Friday night of the same week that the information came to the department, Quan Sue was placed under arrest at Billings, Montana, under orders from this department. Then commenced a long fight in order to secure the return of Quan Sue to this state, and it was only after a difficult legal battle in habeas corpus proceedings that he was finally ordered returned to Iowa.

This department had charge of the work in connection with the grand jury in Story county, and a most thorough investigation was made of all the details of this crime. The department furnished

assistance in the trial in the district court of Story county in the person of Mr. J. W. Kindig. Quan Sue was convicted of murder in the second degree and was sentenced to the penitentiary for life, by Hon. E. H. McCall, the presiding judge.

An appeal was taken and the case was vigorously contested in the supreme court. The supreme court has recently handed down an opinion, affirming the conviction.

The case of *State of Iowa v. George Gibson,* from Union county for seditious utterances, was the first case to come to the supreme court of Iowa involving chapter 372, acts of the 37th General Assembly. This conviction was affirmed by the supreme court.

This case is an especially interesting one on account of the fact that the conviction occurred under chapter 372, acts of the 37th General Assembly, which chapter was the first legistative enactment by this state providing for the punishment of "any person who shall in public or private, by speech, writing, printing or by any other mode or means, advocate the subversion and destruction by force of the government of the state of Iowa or of the United States."

The case of *State of Iowa v. P. H. Konsen,* from Cerro Gordo county, is of interest because of the far-reaching influence which it must have upon the kind of criminality which was indulged in by the defendant Konsen.

It has been a common practice for many years for men who are professional feigners to pretend serious illness or injury and to collect damages therefor from corporations, and especially from public service corporations for their pretended injuries. Konsen had acquired great skill along this line and had defrauded many railroads in this and other states. He was indicted by the grand jury of Cerro Gordo county for obtaining money under false pretenses, was tried and convicted, and his conviction was affirmed by the supreme court.

State of Iowa v. Ernest Rathbun and *State of Iowa v. Ray O'Meara.*

The history of these cases is in a general way known to the legislature and to the people of Iowa.

The two defendants were charged with the crime of rape committed in Ida county against one Elsie Hargens. Indictments were returned against them late in the fall of 1917. Ernest Rathbun demanded an immediate trial and was tried and convicted of

the crime of rape in December, 1917, and was sentenced to the penitentiary for life.

This department had charge of the collection of the evidence through the state agents and had charge of the grand jury proceedings through one of its assistants, Mr. J. W. Kindig, and had charge of the trial in the district court, Mr. Kindig representing the department.

In the February following, 1918, in the Martin Hotel, Sioux City, in the presence of his father Bill Rathbun, his brother Fred Rathbun, A. C. Johnson, Beryl A. Steele, a disinterested stenographer who took the dictation, and one of the state agents, Ernest Rathbun signed a written confession admitting his guilt and implicating Ray O'Meara, and verified the story of Elsie Hargens with reference to the way the rape occurred as she had testified in the trial of Ernest Rathbun in December of 1917.

The following is a copy of his signed confession:

State of Iowa, Woodbury County, ss:

I, Ernest Rathbun, being first duly sworn, on oath depose and say that I came to Sioux City on this date, and that here in Sioux City, in a room at the Martin hotel, in the presence of my father and brother, Fred Rathbun, A. C. Johnston and Beryl A. Steele, Shorthand Reporter, desire to state on oath and of my own free will and accord that on the 4th day of November, 1917, in the evening thereof, I was in Ida Grove and I was in a Ford car with one Ray O'Meara, and that while in said car, at about nine o'clock in the evening, we invited one Elsie Hargins and Ida Knutson to go for an automobile ride; that we first drove towards Ida Grove cemetery and afterwards towards Moorehead's grove, where we turned off the bridge towards the rendering works, when Ida Knutson jumped out of the car and ran, and that then Ray O'Meara and myself took Elsie Hargins from the car, and against her will and by force we each of us had sexual intercourse with her; and that all of the above is true, so help me God.

ERNEST RATHBUN.

Subscribed in my presence and sworn to before me by the above named Ernest Rathbun this 19th day of February, A. D. 1918.

BERYL A. STEELE,
Notary Public in and for Woodbury County, Iowa.

The O'Meara case did not come on for trial on account of continuances for one cause or another until the following October, and in October, 1918, Ray O'Meara was tried, Mr. J. W. Kindig having charge of the case for the state. O'Meara was convicted of the crime of rape and was sentenced to the penitentiary for life.

Rathbun took the stand in the trial of the O'Meara case and testified, implicating himself and also implicating O'Meara in the

rape of Elsie Hargens. The material part of Rathbun's testimony is as follows:

"We saw Elsie Hargens and Ida Knudson the night that this crime was committed up by the postoffice. We spoke to them. O'Meara asked them to go for a ride. THE GIRLS HAD NOT SPOKEN TO US UNTIL AFTER WE SPOKE TO THEM, AND THEY MADE NO MOTION OR SIGN TO US. After O'Meara asked them to go for the ride, the girls said they would go, but that they could not be gone very long. They said they did not want to go off the pavement.

"The girls got into the car. Up to that time I had been riding in the front seat with O'Meara, who was driving. I got out and got into the rear seat, and Miss Knudson got into the rear seat with me, and Miss Hargens got into the front seat with O'Meara. * * * *We finally drove off of the pavement. The girls wanted to go back They said we were off the pavement.* * * *

"The car stopped. One of the girls got out and tried to crank the car, and the other got out. After they tried to crank the car, they started back to town. *We then started the car and when we overtook the girls about* 200 *yards away, we told them to get in and we would take them back to town. They got in.* * * *

"When we stopped the next time, the defendant O'Meara was in the car. He was driving. When the car stopped, Ida Knudson got out. Elsie Hargens started to get out, but Ray O'Meara got hold of her and held her in. I do not know just how he did that. *He took hold of her shoulders. Elsie yelled.* When Ida Knudson was leaving, she said: 'Elsie, come on, let's go back to town.' *Elsie said, she couldn't. Ray held her in the car.* I then got out of the car and helped O'Meara to take Elsie Hargens out of the car. O'Meara had hold of her shoulders and helped take her out. The girl was placed on the ground near the car. Ray O'Meara went through the motions of having sexual intercourse with her, and while he was doing this, Elsie was kicking around. Neither of us asked Elsie Hargens if we could have sexual intercourse with her, nor did she tell either of us we might have sexual intercourse with her. After O'Meara had unbuttoned his clothes and pulled up her clothes and laid down and went through the motions of having sexual intercourse, O'Meara got up and stayed right there. He held her arms and then when he was holding her arms, I had sexual intercourse with her. SHE WAS STRUGGLING AND TRYING TO GET AWAY ALL THE TIME.* * *

"All that Risden or Rock or Kindig or Peter Van Wagonener ever promised me was that they would not go down there (referring to the penitentiary) and try to keep me in longer than—

that they would not try to stop my parole. All that they ever promised us was that they would not go and fight against me, and that is all I ever heard from my father or any one else."

For verification of this record see defendant's abstract of the record, filed with the clerk of the supreme court in the case of State of Iowa v. Ray O'Meara, pages 29 to 49, inclusive.

After Rathbun testified, the appeal which he took to the supreme court was dismissed.

On November 16, 1918, Rathbun was given a complete pardon by Governor W. L. Harding. This was done without any knowledge upon the part of the attorney general, or any one connected with the department that an application for pardon by Rathbun had been filed, or was to be granted.

Suit was then instituted by the State of Iowa, ex rel H. M. Havner, attorney general, and ex rel Charles S. Macomber, county attorney for Ida county, to annul and cancel the pardon. Ernest Rathbun was indicted for perjury committed by him in connection with the securing of the pardon. He plead guilty to the charge of perjury and was sentenced to ten years in the penitentiary for this offense, this sentence being ordered to run concurrent with his life sentence.

On the morning he plead guilty in the district court of Ida county to the crime of perjury and received his second sentence of ten years, he was examined in court in connection with the petition to revoke his pardon, this making the third time he had made statements concerning his and O'Meara's connection with the rape of Elsie Hargens, twice in open court under oath, and once in his confession.

His testimony under oath as taken on the morning of February 25, 1919, in open court was as follows:

"My name is Ernest Rathbun, and I am the same Ernest Rathbun who was tried for the crime of rape upon Elsie Hargens. When the car was stopped down by the rendering plant on the night this rape occurred just as Ida Knudson got out, Ray O'Meara took hold of Elsie Hargens by the shoulders. At the time he took hold of her, Elsie yelled and started to fight him. I then helped Ray O'Meara take Elsie Hargens out of the car. We both then put her on the ground. Both of us took hold of her as she was put down on the ground. Ray O'Meara got down on her at that time and I held her arms

while he was on top of her. He then unbuttoned his clothes and pulled her clothes up. Ray O'Meara then went through the motions of having sexual intercourse with Elsie Hargens, after he had done that he got up. He then held her while I had sexual intercourse with her. So far as I know there was not any time Elsie Hargens was not struggling and trying to get away. *So far as I know, Elsie Hargens was a good girl, and I want to tell the court I am sorry for the part I played in connection with this matter.''*

Upon the taking of this testimony, the court entered a judgment in the application to cancel the pardon, and the pardon was cancelled and revoked by the court, and Ernest Rathbun was taken to the state penitentiary at Anamosa to commence serving a life sentence.

This was the first time Ernest Rathbun had ever been inside the penitentiary, as he was pardoned before the warrant of commitment had been served upon him, he having been out on bail at all times after the commission of the crime.

Ray O'Meara appealed his case to the supreme court and the conviction was affirmed. He then filed a petition for rehearing, which was overruled in the supreme court, and now Ray O'Meara has been taken to the penitentiary to begin the service of his life sentence.

I think in view of the numerous inquiries that have been made of this department as to why George Clark, attorney for Ernest Rathbun, was not indicted at Ida Grove in February, 1919, that some explanation should, in fairness, be made.

The reason an indictment was not returned against George Clark was because there was not sufficient competent evidence to warrant the returning of an indictment.

I called attention to the fact that a statute was passed, laying open all the proceedings of the grand jury in Ida county, and making them public property. The legislature in its investigation with reference to the impeachment proceedings instituted and made of record all of the testimony taken by the grand jury. A commission was appointed by the court of Ida county to institute disbarment proceedings against George Clark for his conduct in connection with the securing of the pardon of Ernest Rathbun. *Hon. F. F. Dawley, of Cedar Rapids, a judge who had received his appoint-*

ment to the bench from Governor W. L. Harding, was chosen by the District Court of Ida County as the judge to try this case.

This department turned over to the committee on disbarment appointed by the District Court of Ida County all of the evidence it had at its command, the same as it had done with the legislative committee. This committee had access to all of the record made in connection with the legislative investigation and made an independent investigation also. The court, after having heard all of the testimony in the case, refused to disbar George Clark.

I call attention to this for the reason that if George Clark had done anything for which he should have been indicted in the proceedings there is no question but that under the sections of the statute governing the action of an attorney at law he would have been disbarred.

Thus we have the judgment of the court vindicating this department in its refusal to recommend the indictment of George Clark, and in saying there was not sufficient testimony to warrant his indictment by the grand jury in February, 1919.

As a result of these cases, the following has been accomplished:

(1) Ernest Rathbun was convicted of rape and sentenced to the penitentiary for life.

(2) The pardon granted him November 16, 1918, has been revoked and cancelled.

(3) He was indicted and plead guilty to the crime of perjury committed in connection with the securing of the pardon, and was sentenced to a term of ten years in the penitentiary.

(4) Ray O'Meara was tried and convicted of the crime of rape committed against the body of Elsie Hargens and was sentenced to the penitentiary for life.

We have set out more in detail than usual the facts in these cases. I feel the importance of the litigation as affecting the whole state, warrants the particularity with which I have made this report.

I feel it but just to say, for what may occur in the future, that this department has never had reason to believe that Elsie Hargens was anything other than a clean, virtuous girl, both before this incident occurred and since that time.

The case of the *State of Iowa v. Joseph Ohman* is of importance to the general public, in view of the fact that it stated that intoxicating liquor could not be manufactured in a private home for home consumption. This question has been one that has been asked a great many times during the last two or three years. The rule announced in this case clearly decides the point.

There were several appeals taken to the supreme court, growing out of prosecutions instituted against various members of the "Red" Burzette gang which operated in the vicinity of Sioux City. The men who were in this gang were engaged in stealing automobiles, transporting liquor, and in various other crimes. One of the members of the gang has taken three appeals to the supreme court, two of them from convictions for stealing automobiles and one for robbery. Another member of the gang was convicted for murder in the first degree and given a life sentence; he has taken an appeal to the supreme court. In this connection, it might be stated that every member of the gang, with the exception of one who has not been apprehended, has been convicted of some offense. The leader, "Red" Burzette, was killed by an officer while resisting arrest. The character of this gang is well indicated by the current report that "Red" Burzette was responsible for the death of five or six men. The evidence used in convicting the members of this gang was largely secured by the special peace officers of this department.

One of the important cases still before the supreme court is that of the *State of Iowa v. August Bartels.* The defendant was convicted under a statute passed by the 38th General Assembly forbidding the use of a foreign language in the teaching of secular subjects below the eighth grade in any public, parochial or private school of the state. The defendant was convicted of teaching German in a parochial school, and a very able argument was made by his counsel, alleging that the statute was unconstitutional for various reasons. It is impossible to forecast what the decision will be, but this department feels that the statute should be sustained. (Later: The conviction was affirmed).

The case of the *State of Iowa v. Edward Jenkins,* from Davis county, is a case that was appealed by the state after Judge Cornell had directed a verdict in favor of the defendant upon the theory that the defendant would not be guilty of wife desertion when the parties were living in Missouri at the time the defendant induced

his wife to return to Iowa by promising to come back to this state also and to live with her, which he never did. The parties were married as the result of an action for seduction which had been brought against the defendant, and a few days after the marriage the defendant induced his wife to go to Missouri, where they lived but a few days, when he sent her back to Iowa under the promise stated. The supreme court has reversed the case on the appeal by the state, holding that this constituted desertion.

The case of the *State of Iowa v. Irvin Seitz* is important, because of the closeness of the decision on the question of the sufficiency of the evidence in a case where a junk dealer was charged with being an accessory before the fact in larceny of certain brass from the Burlington railroad at Ottumwa. The case was first affirmed by divided court and then, on rehearing, was reargued, and the court having granted the rehearing it has been again argued, but thus far no decision has been announced.

The case of *State of Iowa v. Louis Nagel* was affirmed in the supreme court after three trials in the district court of Guthrie county. The defeandant was charged with perjury, and on the last trial evidence was used by the state of a witness who was at Camp Grant, Illinois, in the army, by the introduction of a transcript of his evidence at one of the former trials. The defendant raised the question that he was not confronted by this witness as required by the state and federal constitutions. The supreme court of Iowa affirmed the conviction, and the case has been carried to the United States Supreme Court, where it has been fully argued upon both sides, but is awaiting submission. It will probably be submitted to the court early in January, 1921.

ARSON CASES

On account of the importance of what is known to this department as the arson cases from New Sharon, Iowa, special mention should be made of them in this report.

There had been occurring in the vicinity of New Sharon incendiary fires for a long period of time. The attention of this department had been directed to the matter, but no evidence was submitted which would connect anyone with the crime. The department took charge of the matter and assigned special men to the case, and for almost eighteen months were in constant touch with the situation. One of the state men devoted almost six months entire time to this

case. Finally, under an arrangement with the special agents, one of the men suspectd in connection with the matter came to Des Moines, and through the use of a dictaphone his conversation detailing the crimes and his connection with the same was taken down, and when he was confronted with the same, confessed to the crime and gave full information with reference to all the other parties connected with the crimes. His story was verified by the department, the various men implicated were confronted with his statement and the confessions of six men were secured, showing there had been a conspiracy to burn the property of those who were of Holland descent in the community. The conspiracy to burn the property of these Hollanders was made between men, not of the ordinary criminal class, but men who are the owners of farms and who live neighbors to the men they were planning to burn out. A church, two school houses, dwelling house, barn and other property were burned by the man hired by the conspirators.

The men connected with the conspiracy were indicted by the grand jury of Mahaska county at Oskaloosa.

One of the defendants by the name of Roy Elfin plead guilty and was sentenced to the pentiteniary for a period of ten years. One, Tom Davis, escaped punishment by a plea of insanity. The other cases will be tried as soon as possible.

It is an interesting thing to note, however, in connection with the prosecution, not a single fire has since occurred. I believe the testimony will show that this was one of the most diabolical plots to destroy the property of men by fire that has ever been perpetrated in this state. It was only through the efficient work of the state agents that more serious fires were averted, as the confessions of the men show it was the intention to burn out every man of Holland descent in that community.

I wish to acknowledge the very competent service of Mr. H. M. Long, state agent, from Bedford in connection with this investigation.

ASSOCIATED PACKING COMPANY

This was an action commenced in the name of the state of Iowa upon relation of the attorney general to dissolve the Associated Packing Company, which was an Iowa corporation--

(1) Because of the fraud practiced upon the state in the organization of the corporation:

(2) Because of the fraudulent acts of the officers and managers and their acts in violation of the corporate laws of the state of Iowa.

(3) Because of the fraud practiced and being practiced upon the citizenship of Iowa, and especially upon all of those who were stockholders and subscribers for stock in the corporation.

The petition asked for the appointment of a receiver to take immediate charge of the assets of the corporation.

The application for the appointment of a temporary receiver for the Associated Packing Company and the Associated Finance Company was made on the 27th of February, 1919. On the 16th of March a permanent receiver was appointed for Packing Company, and on the same day, on the application of the attorney general, a temporary receiver was appointed for the Des Moines Union Stock Yards Company.

The Associated Packing Company was incorporated in the first instance for two millions of dollars, which was increased later to five million dollars. $3,800,000 of stock was sold to about 1100 different people scattered all over the state of Iowa. This organization started upon a general stock-selling campaign throughout the state, using what is known among stock salesmen as high pressure methods.

Complaints began to reach this department some time before we moved in the matter, and finally the complaints were so numerous and so general that it became apparent to the department that a wholesale fraud was being perpetrated upon the citizens of Iowa and wholesale misrepresentations were being made with reference to the people in charge of the company's affairs in order to sell stock. It became apparent also upon investigation that the sole object and purpose of the organization of the corporation itself was not in good faith to build a packing plant, but for the purpose of defrauding the people and securing the commissions which would come from the sale of the stock and unlawful contracts in connection with the purchase of property for the corporation.

The seriousness of the fraud was intensified by reason of the fact that some of those connected with the state banking department were rendering assistance to the furtherance of this fraudulent scheme, and not only was the state banking department implicated in connection with the matter, but the investigation showed that numerous banks throughout the state had been rendering their assistance in effecting the sale of this stock to their customers.

The investigation .revealed the fact that the secretary to the governor, Charles E. Witt, had accepted employment and was rendering assistance in the furtherance of this fraudulent, even getting letters from the governor recommending certain stock salesmen who were in the employ of the Associated Packing Company.

Following the appointment of a receiver for these concerns the grand jury of Polk county spent ten days in investigating the affairs of these corporations and they returned an indictment charging Woolf Teitel, Sam Landswick, Garry Haynes, R. H. Frisby, W. G. McDougal and J. A. Priestly with conspiracy, and another indictment was returned charging W. G. McDougal with making and publishing a false statement with intent to give to the stock of a corporation a greater value than it in fact possessed, and H. L. Bump, an attorney, was also indicted for the same offense growing out of issuance of an alleged false statement to the secretary of state with reference to the financial condition of the Des Moines Union Stock Yards Company.

The grand jury of Ringgold county returned an indictment against R. H. Frisby, E. A. Hoovel and Mark Packard, charging them with conspiracy to defraud, growing out of the sale of certain stock of the Packing Company in that county. H. W. Bentley and Fred W. Wood were indicted in Wayne county on conspiracy and on two charges of obtaining property under false pretenses and growing out of the sale of the stock of the Associated Packing Company and of the Des Moines Union Stock Yards Company in that county.

C. H. Lewis and C. D. Foster were indicted for conspiracy by the grand jury of Appanoose county on account of certain transactions of the sale of stock in that county.

The grand jury at Boone returned an indictment against J. C. Huntington, et al, growing out of the sale of stock in the Des Moines Union Stock Yards Company.

The case of *State of Iowa v. ex rel, H. M. Havner, Attorney General v. Associated Packing Company, et al,* in connection with the receivership proceedings started on trial on the 23rd day of August and was completed on the 14th day of October, 1920. One of the assistants in this department, Mr. B. J. Powers, devoted almost six months of his entire time to the preparation of this case. A large amount of work was done by others in the department toward the preparation of the case.

When the case was reached for trial, there was such a mass of testimony and such a large number of witnesses to be examined, that I made application to the executive council for power to employ counsel to assist in the trial. I desire in this connection to acknowledge the very efficient assistance rendered the department by Mr. R. J. Bannnister, who was employed as special counsel in the case. I sat in the trial of the case during the entire period of the trial, which was eight weeks.

The case was tried to Hon. Edward M. McCall of Nevada, a copy of the judgment in the case being a sfollows:

JUDGE McCALL'S OPINION

The court—I would say, gentlemen, that during the seven or eight weeks that this case has been tried, I, like the counsel, have tried to pay mighty close attention to the record as it went in here. And I have not been able to go through this trial, the trial of this case, without arriving at some convictions about what the facts are, and coming to some conclusions during this argument as to what the law is.

I think it is just as well to dispose of this case right now as any time, gentlemen. It is fresh in my mind now. You may mark the case submitted, Mr. Walrath.

The court—I need not say to counsel that the determination of the matters in this case have been a very serious matter for this court, and the responsibility is one that I assure you is appreciated by the court, because I can see the far-reaching effect of a determination of this case, no matter how it is decided, on the large number of people who are interested in it financially. And for that reason, it makes the court hesitate and go over the matter again and again to be careful in it.

When we started out on this hearing, it was by virtue of an order of Judge DeGraff, setting down for hearing and trial the petition and application of the Associated Packing Company to have the receiver discharged or removed and the assets and property in this corporation turned over to the stockholders, and at the beginning of this hearing it was stated by the court that that was the issue that would be tried. The pleadings have changed somewhat, and in my opinion, the issues have changed since that time. The statement in the answer of the state of Iowa to the petition and application filed by the Associated Packing Company for the removal of the receiver made the original petition filed by the attorney general, a part of their answer, and all the allegations therein, and before the final submission in this case, the Associated Packing Company and the intervenors, joining with the Associated Packing Company, by stipulation of counsel made the original answer which was filed to the first petition of the attorney general in this case, and all amendments thereto, a part of their pleadings in this application for the removal of the receiver.

In view of that situation, gentlemen, it strikes me that the whole matter in this case is for final determination by this court and I cannot side step responsibility by determining only the matter of the removal of this particular receiver, or the application at this time, to turn the assets and property back to the Associated Packing Company, but that all the issues will have to be determined at this time.

The evidence as it has gone in here during these weeks, has convinced me and struck me as showing a stupendous fraud perpetrated on the citizens of Iowa; a fraud that was planned in cold blood at its inception; a scheme planned and concocted not for the purpose of building a packing plant here at first, but a proposition of selling stock and getting a certain amount of money out of the stock sales, and the question of building a packing house, if it was ever considered at all, was a mere afterthought, perhaps occurred to them after they had got well into it.

The law of this state under those circumstances makes the money that has been accumulated by such a process, a trust fund which really belongs to the men who paid it in there. It is like the money that is found in the purse of the thief, it still belongs to the man from whom it was filched and taken, and that is the way, gentlemen, it strikes me with regard to the assets on hand in this alleged corporation.

There is not any question in my judgment but what the attorney general was justified in bringing the suit, and that the allegations of his original petition and his answer to the applicaton for the renewal of the receiver have been abundantly substantiated and proved.

The question that is raised by counsel here on the question of estoppel is one that is entitled to serious consideration. There is not any doubt about the line of authorities that counsel presents here that warrant them in taking the position that they have in his case on that question. But the question that strikes me, gentlemen, is this: Do the facts here in this case bring this case within this line of authorities, and I am constrained to believe that they do not. You take the Nebraska case where a corporation, acting illegally, in violation of the law, and continued to do so for a series of years with knowledge of the attorney general, or the authorities, and they hold that the question of laches could be properly weighed in that case, but the situation is a little different in this case. Whatever was done after the appointment of the receiver in this case when this whole corporation was in the hands of the court, is a little different proposition than where the authorities have permitted a corporation to run on with its ordinary business, and the mere fact that the attorney general consented to a decree which permitted the receiver to do these things, I do not believe warrants this court in finding that he was guilty of laches to such an extent as to make that line of cases applicable.

It is a heart rending proposition to decide this case. I realize the force of the statement made by counsel. What Mr. Gillespie said about poor people in this state appeals to me, there is not a doubt about it, it is a hard proposition. And yet the law of this state is that a corporation

founded in fraud, a corporation that has violated the laws of the state, not merely in one instance or technically with regard to a day or two in filing their reports, but flagrantly and in many cases as disclosed by this evidence, the law provides that in that sort of case the assets shall be divided among the poor people as far as they will go who have paid their money in there. It strikes me that is what this court has got to do. Can I say here we will take the money that is found in the purse of the thief, using another illustration, and start into some other business venture with it? I don't think I can do that. It may be that they are losing the large amount that it cost to promote this company, but in my judgment that is lost anyway, I believe that asset or benefit from that has gone because even if this plan were adopted I do not believe it would be feasible without again starting into the stock selling business or in some other manner raising funds. These people who want to go ahead with a packing house can buy at receiver's sale this property with a new corporation and do all that could be done under this proposed reorganization plan.

At any rate, gentlemen, I am of the opinion that I cannot set aside this statute which provides for an action of the attorney general under circumstances of this kind on behalf of the state to ask to have the affairs of this corporation wound up and its assets distributed among the stockholders, nor I cannot bend the law as I see it, and under my oath I have to follow it. I am under constraint the same as any other officer and holding that opinion I will have to render a decree in this case in accordance with it.

I am inclined to think they are entitled to some of the specific findings that they are asking for on the application which was filed in this case on the 11th day of October, 1920, by the attorney general.

The first finding will be found by the court, that is, that the corporation, the Associated Packing Company did issue its shares of capital stock without having received the full par value therefor in money or property submitted to and approved by the executive council.

The second finding will be made by the court that the officers or agents of the Associated Packing Company did make or issue to its stockholders, or to others, a written report or statement of its affairs or pecuniary condition containing materially false statements or wilfully exaggerated statements of the value of its property, affairs, business or prospects, intended or having a tendency to produce or give its shares of stock a greater value than they really possess.

The fourth finding will be granted by the court that there was intentional fraud in failing to comply substantially with the articles of incorporation through having no good faith intention to engage in the packing business or in deceiving the public in relation to the means or liabilities of the Associated Packing Company by the officers or promoters of said company.

The fifth finding will be granted that the corporation was organized

for the purpose of making promotion profits and without the good faith intention of entering into the business of operating a packing plant.

The sixth finding will be granted that there was fraud practiced upon the state of Iowa in the application made for a charter by the persons making the same on behalf of the defendant corporation.

The seventh finding will be granted that there was a conspiracy between the officers and those interested in the Associated Finance Company and the officers of the defendant corporation Associated Packing Company to defraud the purchasers of stock in the Associated Packing Company.

And to each and every finding and order and decree rendered thereon an exception will be granted to each and every party to this case.

The matter of costs, gentlemen, will have to be taken care of later, and I am not prepared at this time to make an order with regard to the costs. I would like to have time to think about that matter a little longer.

I will leave the matter in that situation and ask counsel to prepare a decree in accordance with this finding and submit it to counsel on the other side and send it to me and I will sign it.

You may adjourn court, Mr. Bailiff.

MIDLAND PACKING COMPANY

This was an action commenced in the name of the state of Iowa upon relation of the attorney general to dissolve the Midand Packing Company, which was an Iowa corporation—

(1) Because of the fraud practiced upon the state in organization of the corporation:

(2) Because of the fraudulent act of the officers and managers and their acts in violation of the corporate laws of the state of Iowa:

(3) Because of the fraud practiced and being practiced upon the citizenship of Iowa, and especially upon all of those who were stockholders and subscribers for stock in the corporation.

The petition asked for the appointment of a receiver to take immediate charge of the assets of the corporation.

The application for the appointment of a receiver was made on the 7th day of May, 1920.

The petition charged the officers and managers with having violated the incorporation laws of the state, and asked for a dissolution of the corporation, and the appointment of a temporary receiver. The order was granted and a temporary receiver was appointed to take charge of the property. A case was pending at that time in the federal court asking for the cancellation of a sub-

scription of one Peter Hegnes. An injunction was then secured out of the federal court, enjoining me, as attorney general, from proceeding with the prosecution and enjoining the district court of Woodbury county from making any further orders in the case, or from hearing the case, and enjoining the receiver from taking any further steps with reference to the property.

A response was filed to the appeal of Peter Hegnes, and the federal court continued the temporary injunction. The state appealed from the judgment of the United States District Court to the United States Circuit Court of Appeals. The United States Circuit Court of Appeals dissolved the injunction as to the attorney general and the district court of Woodbury county, but continued the injunction as to the receiver appointed by the district court of Woodbury county.

Application is now being made to the United States Supreme Court for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals.

STATUTES WHICH SHOULD BE AMENDED AND NEW LAWS WHICH SHOULD BE PASSED.

(1) *Amendment to Removal Law.*

Section 1258-c, as amended by chapter 391, acts of the 37th General Assembly, should be amended so that all police officers, and all county, city and town officers shall be subject to removal upon the grounds stated in section 1258-c of the code of 1913.

The statute should also be amended, making any man who is removed from office or who resigns after removal proceedings are commenced against him, ineligible to any office for a period of five years.

(2) *Change of Place of Trial by the State Authorized, and Change of Place of Trial Upon the Application of the State.*

The experience of this department in the last four years has demonstrated the fact that conditions arise which make necessary a statute authorizing a change of place of trial upon application by the state.

In at least two instances there have been gross miscarriages of justice because in the communities where the crimes were committed, those opposed to the prosecution have gone out and deliberately worked up sentiment to prevent the conviction of persons

guilty of crime. There is no valid reason why, when a situation of that kind exists, the state should be compelled to draw a jury from a body of men whose minds have been prejudiced by those friendly to the defense.

In the case of *State v. Kelly,* approximately 150 veniremen were examined before a jury was secured, and it was perfectly apparent to every man connected with the court that notwithstanding the large number of men examined, the minds of the jurors selected were poisoned and fixed by reason of the discussion that had gone on in the community.

If a change of place of trial is allowed to the defendant, as it now is under the statute, there is no valid reason why there should not be a provision made for granting the state the right to a change of place of trial. By way of example, we might state that in Montgomery county 25 public meetings were held condemning the prosecution of the defendant Kelly in the case of *State v. Kelly,* all of the officers connected with the prosecution being condemned in these various meetings.

(3) *The Law With Reference to Transporting Into the State Any Intoxicating Liquor Should Be Amended.*

Under our present statute, no common carrier can lawfully bring into the state any intoxicating liquors unless it is being transferred to a permit-holder. This has generally been observed by the railroad companies in Iowa. I think it should be said to the credit of the general counsel and managing officers of the railway corporations operating in the state of Iowa that they have tried to observe this law and have generally given to this department full co-operation with reference to the enforcement of this statute, but there exists a condition which is intolerable. Men who have been engaged in the bootlegging business have driven outside the state with automobiles and are transporting into the state daily hundreds of gallons of intoxicating liquors. The law should make all of the costs in connection with any prosecution for transportation, or the parties connected therewith, a lien upon the vehicle in which the goods are being transportated, and provide that the vehicle may be held and sold for the payment of such costs.

COMMENDATIONS.

I wish to acknowledge the very efficient and loyal work rendered to this department by the assistant attorneys general, Mr. F. C.

Davidson of Emmetsburg, Mr. W. R. C. Kendrick of Keokuk, Mr. B. J. Powers of Des Moines and Mr. J. W. Sandusky of New Hampton, and of the secretary to the attorney general, Mrs. Jessie H. Courtney of Des Moines.

The efficient work of law enforcement could not have been accomplished without the loyal support given the Department of Justice by the special agents. I desire especially to commend the work of Mr. O. O. Rock of Logan, Mr. H. M. Long of Bedford, Mr. J. E. Risden of Cedar Rapids, Mr. H. W. Terrell of Mt. Ayr, Mr J. B. Hammond of Des Moines, Mr. Jack Ferrand of Marshalltown, Mr. Philo Van Wagoner of Ida Grove, Mr. W. A. Size of Postville, Mr. Ed. Crawford of Des Moines and Mr. Charles E. Smith of Council Bluffs.

I submit herewith a partial list of the things accomplished by the department in connection with the work of the special agents.

WORK OF DEPARTMENT AND SPECIAL AGENTS.

CRIMES RELATING TO INTOXICATING LIQUOR

Nature of Violation	Penalty	No. Convictions
Maintaining liquor nuisance	$29,401.00	80
Bootlegging	12,437.95	95
Bootlegging, jail sentences		5
Contempt	5,135.00	9
Contempt, U. S. Court	1,000.00	1
Violation of Reed Amendment	1,800.00	10
Violation of Reed Amendment		12
Injunctions granted		52
Illegal transportation of liquor	7,468.86	71
Orders of abatement issued		3
Stills seized and destroyed		9
Whiskey seized, qts.		4,916
Cider seized, gals.		3,444
Wine seized, qts.		13,289
Bitters seized, cases		242
Mash seized, gals.		488
Alchohol seized, qts.		276
Gin and Brandy, qts.		52
Beer seized, qts.		1,576
Temp brew, bbls.		144
Liquor seized from Churchill Drug Co.:		
Alcohol, gals.		266
Brandy, gals.		22
Blackberry Cordial, gals.		21¾

Wine, gals. 2½
Bitters, bottles 12,631
Liquor seized from Elks Club, Des Moines:
Beer, cases 76
Hops, cartons 17
Complete outfit for making home brew.

VIOLATIONS OF LAW RELATING TO MORALITY

Nature of Violation	Penalty Assessed	No. Convictions
Prostitution (5 yrs. Rockwell City)		2
Lewdness	$100.00	1
Adultery (3 yrs. Anamosa)		1
Keeping house of ill fame (forfeited bonds, $1500)	576.75	
Incest (25 years)		1

MISCELLANEOUS CRIMES

Nature of Violation	Penalty Assessed	No. Convictions
Allowing minors in pool hall	$ 137.50	4
Arson (1 year in Anamosa)		1
Assault	50.00	1
Assault with intent to commit murder (5 years)	1,000.00	1
Assuming to be an officer		1
Burglary (10 years)		3
Conspiracy (2 forfeited bonds of $3,000.00)		3
Carrying concealed weapons	250.00	5
Gambling	13,732.60	221
Larceny of automobiles		33
Larceny of hogs		1
Manslaughter (8 yrs. Rockwell City)		1
Murder (life sentence)		7
Murder (30 years)		1
Murder (25 years)		1
Perjury		1
Receiving stolen property (5 yrs. Ft. Madison)	2,500.00	6
Receiving stolen property (5 yrs. Anamosa)		2
Receiving stolen property (1 yr. county jail)	400.00	2
Receiving stolen property (1 yr. county jail)	500.00	1
Robbery (20 yrs. Ft. Madison)		1
Robbery (20 yrs. Anamosa)		3
Robbery (10 yrs. Anamosa)		3
Robbery (5 yrs. Anamosa)		1
Running car without license	25.00	1
Vagrancy		8
Larceny from buildings (5 yrs. Ft. Madison)		1
Larceny from buildings (5 yrs. Anamosa)		1
Uttering forged instruments (7 yrs. Ft. Madison)		1
Uttering forged instruments (1 yr. Ft. Madison)		1

Unlawful possession of dynamite (6 mo. county jail)		1
Unlawful assembly	455.00	30
Disorderly conduct	1,668.00	81
Disposing of mortgaged property (5 yrs.)		1
Failing to keep garage records	44.75	5
Violation Blue Sky Law	200.00	2

INDICTED, CASES PENDING

Nature of Violation	No. Cases
Arson	6
Conspiracy	6
Disposing of mortgaged property	1
Enticing female child for prostitution	1
Failure to report auto accident	1
Indecent exposure	1
Larceny of automobiles	4
Liquor nuisance	10
Manslaughter	4
Murder	2
Obstructing justice	3
Receiving stolen property	3
Robbery	1
Running house of ill fame	2
Note: There are five injunctions pending.	
Removal of officers	2
Gambling devices seized and destroyed, value $15,320	260
Confessions	35
Automobiles recovered, value $71,695	83
Value of other stolen property recovered, $7,100.	
Permits cancelled	19

We assisted in policing the Interstate Fair at Sioux City and the Iowa State Fair in 1919 and 1920, and also assisted local officers in Page county in protecting parochial school against mob violence.
Mulct tax assessed, $24,250.

A large amount of other work accomplished by the special agents is not mentioned in this report, such as assisting local officers in connection with investigations and helping county prosecutors to secure needed evidence to close up the gap in criminal prosecutions.

I call attention to the fact that sufficient funds have not been provided so that a vigorous campaign against law violators could be carried on during the last two years. During six months of the fiscal year 1919-1920 this department was unable to keep its special agents on account of the lack of funds. While there was $37,500 appropriated for law enforcement, about $17,600 was expended by the governor, and this department has no record of the work of his agents.

It should be further noted in connection with the report of the work of the state agents that this report represents what was accomplished in eighteen months instead of a period of two years covering the full biennial period.

I desire also to call attention to the fact that the $37,500 appropriation did not become effective until April 29, 1919. The amount under this new appropriation allowed for the total work of law enforcement by special agents averaged $3,125.00 per month. This department has operated only twenty months by its special agents, the balance of the time they having to be laid off for want of funds. The governor has used approximately one-half of the entire amount, leaving as the total amount expended by this department out of this fund approximately $31,250 for twenty months.

The actual fines assessed as a result of the work of the agents of this department amounted to $78,281.41. The amount of stolen property recovered by them was of the value of $78,695.00, they having recovered 83 automobiles, and no special bureau was maintained for the purpose of recovering stolen automobiles, the recoveries of these 83 stolen automobiles being only incidental to the other work of law enforcement. There was to the value of $7,100.00 of other stolen property recovered, making a total of fines and penalties assessed and stolen property recovered as a result of the special agents' work from this department alone, $157,076.41.

The amount expended was $31,250.00, or in other words, the department produced in fines and penalties and property recovered more than five times its cost to the state.

RECAPITULATION

1919-1920

Number of Convictions:	
In violation of liquor laws	338
In violation of laws relating to morality	11
Gambling	221
Murder	9
Larceny of automobiles	33
All other offenses	172
Total	784
Total fines assessed	$78,281.41

RECAPITULATION
1919-1920

SPECIAL AGENTS OF ATTORNEY GENERAL'S DEPARTMENT

in account with

STATE OF IOWA, for years of 1919 and 1920.

Amount expended through Special Agent Fund....	$ 31,250.00	
Fines and penalties assessed		$ 78,281.41
Stolen property recovered		78,695.00
Balance	$125,722.41	
	156,976.41	156,976.41

The above shows the profit derived to the state of Iowa and her citizenship in actual dollars and cents by the operation of the special agents out of the attorney General's office during the last two year's to be $125,722.41.

RECAPITULATION

of the four years of the work of the Special Agents and of the department, 1917 to 1920 inclusive.

Number of convictions, 1,521.	
Fines and mulct tax assessed	$286,258.56
Stolen property recovered	89,320.00
Total value of fines assessed and property recovered	375,578.56
Estimated value of liquor seized	423,477.50
(A large proportion of these liquors were given to hospitals, federal government and to the state institutions.)	
Value of gambling devices destroyed	30,720.00

RECORD OF CRIMINAL APPEALS for 1919-1920

Affirmed	55
Reversed	17
Reversed on appeal of state	3
Affirmed on appeal of state	1
Submitted but no opinion rendered	5
Total	81

CRIMINAL CASES SUBMITTED TO THE SUPREME COURT OF IOWA

JANUARY TERM, 1919

Title of Case	County	Decision	Nature of Case.
State v. John Butler and William Butler	Hamilton	Affirmed	Bootlegging.
State v. Art Dolson	Pottawattamie	Reversed	Breaking and entering railroad car.
State v. J. E. Easter	Mahaska	Reversed	Perjury.
State v. George Gibson	Union	Affirmed	Seditious utterance.
State v. Gust Kellgren	Winneshiek	Affirmed	Bootlegging.
State v. P. H. Konzen	Cerro Gordo	Affirmed	Obtaining money under false pretenses.
State v. Louis Nagel	Guthrie	Affirmed	Perjury.
State v. Floyd Smith	Delaware	Affirmed	Seduction.
State v. C. H. Snyder	Polk	Affirmed	Liquor nuisance.
State v. Quan Sue	Story	Affirmed	Murder.
*State v. Hugh Taggart	Black Hawk	Reversed	Liquor condemnation.
State v. George Anders	Polk	Affirmed	Larceny.
State v. H. R. Biddleman	Polk	Affirmed	Liquor nuisance.

*State appealed.

MAY TERM, 1919.

Title of Case	County	Decision	Nature of Case.
State v. John Alderman	Story	Affirmed	Bootlegging.
State v. Jeff Haner	Harrison	Reversed	Rape.
State v. D. H. Harris	Lyon	Reversed	Assault with intent to commit great bodily injury.
State v. Frank Kappen	Story	Affirmed	Having burglar tools in possession.

State v. Everett Vaughn	Appanoose	Reversed	Rape.
State v. Myrtle Lakin	Polk	Affirmed	Lewdness.
State v. Jennie Pinkney	Polk	Affirmed	Lewdness.
State v. Frank Eaton	Polk	Affirmed	Bootlegging.
State v. Edna Luther	Polk	Affirmed	Lewdness.
State v. Marrie Wallace	Polk	Affirmed	Liquor nuisance.
State v. M. Jones	Polk	Affirmed	Liquor nuisance.

SEPTEMBER TERM, 1919.

Title of Case	County	Decision	Nature of Case.
State v. Leon Cartwright	Boone	Affirmed	Malicious threats with intent to extort.
State v. J. B. Gilliland	Ringgold	Affirmed	Resorting to house of ill fame.
State v. Joe Gough	Des Moines	Reversed	Murder.
State v. Carl Herring	Polk	Affirmed	Larceny of automobile.
State v. Florence Huston	Polk	Affirmed	Murder.
State v. Cleo Leete	Woodbury	Affirmed	Robbery.
State v. Harry Newcomber	Woodbury	Affirmed	Robbery.
State v. Pat O'Brien	Pottawattamie	Reversed	Robbery.
State v. Wilhelm Schumann	Calhoun	Affirmed	Assault with intent to commit great bodily injury.
State v. D. Sullivan	Ringgold	Reversed	Resorting to house of ill fame for purpose of prostitution.

JANUARY TERM, 1920.

Title of Case	County	Decision	Nature of Case.
State v. Earl Bogardus and Fred Connell	Jefferson	Affirmed	Robbery.
State v. George E. Brown	Mahaska	Reversed	Assault with intent to commit murder.
State v. Nick Christ	Dubuque	Affirmed	Manslaughter.

Title of Case	County	Decision	Nature of Case.
State v. Major Cook	Monroe	Reversed	Breaking and entering.
State v. Fred H. Cummings	Marshall	Defendant died pending appeal	Assault with intent to commit great bodily injury.
State v. Wilbur John	Mahaska	Reversed	Assault with intent to commit rape.
State v. Kessler	Pottawattamie	Affirmed	Rape.
State v. O'Meara	Ida	Affirmed	Rape.
State v. C. Allen Snyder	Dubuque	Reversed	Murder.
State v. Corvan Vandewater	Madison	Reversed	Burning buildings to secure insurance.
State v. Clyde Clark	Jefferson	Affirmed	Seduction.
State v. Joe Astoria	Polk	Affirmed	Liquor nuisance.
State v. Pete Talerico	Polk	Affirmed	Liquor nuisance.
State v. Hubert Mustin	Polk	Affirmed	Carrying concealed weapons.
State v. Peter Galetis	Linn	Affirmed	Murder.
	MAY TERM, 1920.		
State v. August Bartels	Bremer	Affirmed	Teaching in foreign language.
State v. M. Farris	Woodbury	Reversed	Sodomy.
*State v. Joe T. Law	Polk	Affirmed	Conspiracy to commit adultery.
State v. Andrew Long	Johnson	Affirmed	Obtaining money by false pretenses.
State v. Jim McCray	Woodbury	Affirmed	Burglary.
State v. Joseph Ohman	Mahaska	Affirmed	Manufacturing liquor.
State v. Ward Rebbeke	Marshall	Affirmed	Larceny of automobile.
State v. Robert Caswell	Marion	Affirmed	Desertion.
State v. George Sawyer	Polk	Affirmed	Liquor nuisance.
State v. James Cosgrove	Pottawattamie	None	Larceny.
State v. John Russell	Pottawattamie	Affirmed	Murder.

*Appeal taken by the State.

Title of Case	County	Decision	Nature of Case.
State v. Ray O'Meara	Ida	Petition for rehearing overruled	Rape.
State v. Fern Reynolds	Lee	Reversed and remanded	Manslaughter.
State v. Archie Morrison	Lee	Reversed	Rape.
State v. Fred N. Wilson	Lucas	Affirmed	Embezzlement.
*State v. Edward Jinkens	Davis	Reversed	Desertion.
State v. H. A. Witty	Clarke	Affirmed	Liquor nuisance.
State v. William McClain	Woodbury	None	Larceny.
State v. Jonn Monroe and John Troville	Woodbury	Affirmed	Larceny.
State v. James Davis et al	Woodbury	Affirmed	Larceny.
State v. James McCray	Woodbury	Affirmed	Burglary.
State v. Tony Snyder	Woodbury	Affirmed	Receiving stolen property.
State v. Will Carey	Guthrie	Affirmed	Rape.
State v. Seth M. Smith	Marion	Reversed and remanded	Rape.
State v. William Harvey	Polk	Affirmed	Robbery.
State v. Mrs. Claude Stoner	Polk	Affirmed	Bootlegging.
State v. Pete Norman	Polk	Affirmed	Robbery.
*State v. C. H. Burns	Polk	Affirmed	Breaking and entering.
State v. Otto H. Straub	Clay	None	Assault with intent to commit great bodily injury.
State v. Francis Claire Eaton	Audubon	Reversed and remanded	Adultery.
State v. E. W. Stuart	Shelby	Affirmed	Embezzlement.
State v. Henry Tonn	Linn	Reversed and remanded	Transcript at cost of county.
State v. Louis Deakins	Pottawattamie	Affirmed	Rape.
State v. Irvin Seitz	Wapello	None	Larceny.

*Appeal taken by State.

CRIMINAL CASES PENDING IN SUPREME COURT

Title.	County.	Offense.
†State v. Frank Rolling	Plymouth	Seduction.
State v. Sherman Carter	Guthrie	Forgery.
State v. Frank Roby	Madison	Assault with intent to rape.
†State v. Howard K. Berry	Iowa	Assault with intent to rape.
State v. Lloyd Patton	Polk	Robbery.
State v. Frank Higgins, et al	Polk	Liquor nuisance.
State v. Arthur Robinson, et al	Polk	Larceny.
State v. Brownie Browman	Polk	Murder.
State v. Earl Prentice	Lucas	Larceny.
State v. Hayes Van Gorder	Monroe	Manslaughter.
State v. Hayes Van Gorder	Monroe	Denial of transcript at cost of county.
State v. Wesley Lutz	Wapello	Breaking and entering.
State v. Fred Keller	Woodbury	Larceny.
State v. William McClain	Woodbury	Robbery.
State v. John D. Bowers	Cherokee	Keeping gambling house.
State v. Thomas Howard	Page	Murder.
State v. C. I. Van Hoozer	Pottawattamie	Larceny.
State v. Homer Wright	Greene	Seduction.
State v. Alonzo Brooks	Linn	Murder.
State v. Henry Tonn	Linn	Criminal syndicalism.
*State v. W. G. McDougal	Polk	Making false statements.
State v. James T. Townsend	Dubuque	Murder.
State v. James Davis	Monona	Murder.
State v. M. O. Kingsbury	Audubon	Bootlegging.

†Fully argued by State.
*Appeal taken by State.

CIVIL CASES SUBMITTED TO SUPREME COURT

JANUARY TERM, 1919.

Title.	County.	Decision.	Nature.
*Re Max Peterson Estate	Scott	Affirmed	Inheritance Tax.
Shortwell v. Des Moines Electric Co.	Polk	Affirmed	Construction of Dam in Des Moines River.

*Rehearing.

MAY TERM, 1919.

State ex rel Hoyt v. W. Wyman et al.	Wapello	None	Inheritance Tax.

SEPTEMBER TERM, 1919.

Title.	County.	Decision.	Nature.
State ex rel Saley v. Bokmeyer Bros. et al.	Franklin	Affirmed	Liquor Injunction.
*Re Estate of Hetta A. Sanford	Cass	Affirmed in part Reversed in part	Inheritance Tax.

JANUARY TERM, 1920.

State v. Ray Andrews	Palo Alto	Affirmed	Liquor Injunction.
*Welander v. Akesson, Hoyt, treasurer of state, et al	Montgomery	Reversed	Inheritance Tax.

*State appealed.

SEPTEMBER TERM, 1920.

Title.	County.	Decision.	Nature.
*In the Matter of Continental Casualty Premium Tax Case	Polk	Reversed	Taxation of Insurance Company.
*In Re Right and Authority of Secretary of State to Issue Retail Dealers' Licenses to Second-Hand Dealers	Polk	Reversed	
*Eddy v. Short et al	Allamakee	Reversed in part. Affirmed in part.	Inheritance Tax.

*State appealed.

CIVIL CASES PENDING

Title.	County.	Nature.
Curtis v. Hoyt, treasurer of state	Van Buren	Inheritance Tax.
Eddy v. Short et al (rehearing)	Allamakee	Inheritance Tax.
In Re Maryland Casualty Co, Premium Tax	Polk	Taxation of Insurance Company.
Kinder v. Utterback, Judge, et al	Polk	Contempt.

Cases disposed of in the Supreme Court of the United States:

State of Iowa v. C. C. Taft Company (Constitutionality of cigarette seizure law);

Re Estate of Abraham Slimmer (Re right of State of Iowa to institute original proceedings in Federal courts to collect inheritance tax).

Cases pending in the Supreme Court of the United States:

Louis F. Nagel v. State of Iowa (Writ of error to supreme court following affirmance of conviction for perjury by supreme court of Iowa).

Cases disposed of in the United States Circuit Court of Appeals:

H. M. Havner et al. v. Hegnes (Re jurisdiction over receiver for Midland Packing Company).

Cases pending before the Interstate Commerce Commission:*

C. R. I. & P. Ry. Co. v. R. R. Commissioners et al;
Chicago Great Western R. R. Co. v. R. R. Commissioners et al.;
Great Northern Ry. Co. v. R. R. Commissioners et al.;
Illinois Central R. R. Co. v. R. R. Commissioners et al.;
Minneapolis & St. Louis R. R. Co. v. R. R. Commissioners et al.;
C. B. & Q. R. R. Co. v. R. R. Commissioners et al.;
A. T. & S. F. Ry. Co. v. R. R. Commissioners et al.;
Inter-urban Ry. Co. v. R. R. Commissioners et al.;
C. St. P. & M. & O. Ry. Co. v. R. R. Commissioners et al.;
C. & N. W. Ry. Co. v. R. R. Commissioners et al.;
C. M. & St. P. Ry. Co. v. R. R. Commissioners et al.;
Wabash Ry. Co. v. R. R. Commissioners et al.;
Ft. Dodge, Des Moines & Southern R. R. Co. v. R. R. Commissioners et al.

*These cases have all been fully argued and have been submitted but no decision has been announced at this date. (December 3d, 1920). The question involved is identical in all these cases, namely the two cent rate.

Partial list of important cases disposed of in the district courts of the state:

Carey & Sons v. Iowa State Highway Commission. (Re validity of provision in new highway law granting highway commissions authority to disapprove contracts made by board of supervisors);

Camp Dodge Condemnation Appeals;

Fair Ground Condemnation Appeal;

Capitol Extension Condemnation Appeal;

Re Condemnation of Animal Husbandry Farm at Ames;

State of Iowa v. Best Producing & Refining Company (Violation of blue sky law);

Sioux City Mulct Tax Cases (This involves a hundred and ten cases imposing an intoxicating liquor mulct tax);

Muscatine Liquor Condemnation Cases (Involving a large number seizures);

State of Iowa v. Beryl Kirk (Habeas Corpus proceedings);
McCarthy v. Iowa State Board of Agriculture (Involving the ejection of holder of a concession at State Fair selling seditious books);

Cases involving receivership proceedings:

State of Iowa ex rel Havner v. Associated Packing Company;
State of Iowa ex rel Havner v. Des Moines Union Stock Yards Company;
State of Iowa ex rel Havner v. Associated Finance Company;
State of Iowa ex rel Havner v. Midland Packing Company;
Re Pearl City Oil & Gas Company;
M. V. Henderson, Superintendent of Banking v. Farmers Savings Bank of Braddyville et al.;
Geo. H. Messenger, Superintendent of Banking v. Iowa State Bank of Hartley et al.;
Geo. H. Messenger, Superintendent of Banking v. Carroll Trust & Savings Bank of Carroll.

Important cases pending in the district courts of the state:

Board of Supervisors of Story County v. Iowa State Highway Commission (mandamus proceedings);
Nielson et al. v. Board of Supervisors of Scott County (action to enjoin collection of special taxes levied under new highway law);
Gray v. Thone and Joseph (action for damages for alleged assault committed by employees of the state in eradicating premises of plaintiff of barberry bushes);
State of Iowa ex rel Havner et al v. Churchill Drug Company (case involving liquor injunction);
Re Seizure of Intoxicating Liquors from Churchill Drug Company (involving seizure of about twelve thousand dollars worth of so-called patent medicines);
Re Estate of Harry Higgins (Inheritance tax matter);
Re Estate of Felix O'Carroll, Absentee (Inheritance tax matter);
Re Imposition of inheritance tax on certain transfers of property to Peter F. Olson;
Re Estate of Samuel J. Radley, Jr. (Inheritance tax matter).

The following cases are pending in the United States District Court for the Southern District of Iowa at Des Moines:

Clinton, Davenport & Muscatine Ry. Co. v. Horace M. Havner, Attorney General, et al.;
Iowa Southern Utilities Co. v. Horace M. Havner, Attorney General, et al.;
Iowa Railway & Light Co. v. Horace M. Havner, Attorney General, et al.;
Cedar Rapids & Marion City Ry. Co. v. Horace M. Havner, Attorney General, et al.;
Mason City & Clear Lake Ry. Co. v. Horace M. Havner et al.

The petitions have been filed in all of the above cases by the various railroads mentioned as parties plaintiff, and a temporary

injunction issued against each of the defendants, restraining them from enforcing the two-cent fare law of the state of Iowa.

These cases are of great importance of the state, for they involve the constitutionality of the two-cent fare section of the statutes of the state of Iowa known as section 2077 supplement to the code of Iowa, 1913. Answers have not been filed in these cases on account of an agreement with counsel for the plaintiffs waiving the filing of answers for the present.

Respectfully submitted,

H. M. HAVNER, *Attorney General.*

STATE OF IOWA
1921

THIRTEENTH BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1920

H. M. HAVNER
Attorney General

Published By
THE STATE OF IOWA
Des Moines

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H. M. Havner.....1917-1921

LETTER OF TRANSMITTAL

HON. W. L. HARDING, Governor of Iowa:

Dear Sir: I have the honor to submit herewith, in accordance with law, my report of the transactions of the Department of Justice for the state of Iowa for the biennial period ending December 31, 1920.

H. M. HAVNER, *Attorney General.*

Des Moines, Iowa, December 31, 1920.

SOME OF THE

IMPORTANT OPINIONS

OF THE

ATTORNEY GENERAL

FOR

Biennial Period

1919-1920

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OPINIONS RELATING TO THE GOVERNOR

MARTIAL LAW

General discussion of Power of Governor to declare Martial Law on account of coal strike; also discussion as to right to secure receivership for coal mines.

November 19, 1919.

Hon. W. L. Harding,
Governor of Iowa.

Dear Sir:

I am in receipt of your favor of November 18th requesting an opinion from this department with reference to the following questions:

> First: Do the Iowa statutes confer authority under the state of facts as they are within the state of Iowa at this time for the executive to go into court and require the mines to operate, or to have a receiver appointed and operate the mines?
>
> Second: Is it within the authority of the executive, where a mine is idle, to declare martial law under the great public necessity for coal, and operate the mines and distribute the coal where needed?

It is the opinion of this department that your first question must be answered in the negative; that you do not have the authority, as the governor of the state, to go into the courts and require the mines to operate, or to have a receiver appointed, and operate the mines. This power, if it exists, does not rest in you, and it is very questionable, under the facts as they exist in this state, whether there is any power in any person upon a true allegation of facts to secure the appointment of a receiver. The mine operators have already taken action in which they have declared that they are willing to operate the mines, and that they are willing that the miners shall go back, and that they will agree with the miners that the scale of wages in force at the time the mines were closed shall be reinstated, and that whatever, if any, advance is allowed in the final settlement of the present difficulty shall be retroactive, and shall date from the time the miners shall commence work.

With such a condition existing with reference to the mine oper-

ators, a true allegation of fact would render demurrable any application for the appointment of a receiver.

With reference to your second question:

> "Is it within the authority of the executive, where a mine is idle, to declare martial law under the great public necessity for coal, and operate the mines and distribute the coal where needed?

We find the facts as follows:

There is not enough fuel in the state of Iowa or that is obtainable to meet the requirements of the citizenship of this state for more than one week. Many people are out of fuel altogther. This is more general among the poor classes who have been unable to lay in a supply, and who by reason of their limited means are unable to purchase the higher priced fuel. Instances have been called to our attention where families are already burning their furniture. Some families with small children have only a supply of two or three days' fuel on hand. The hospitals of the state have not to exceed a supply of ten days, and some of the hospitals and schools have already closed down by reason of the want of fuel. The state capitol has a supply of only one or two days' fuel; the other state institutions, including the asylums and penitentiaries, have but a few days' supply. Dire distress is confronting practically the entire state owing to a lack of fuel. In many of the towns of the state water cannot be furnished to the citizenship longer than a day or two by reason of the shortage of fuel to operate the water plants, and fire protection in several towns is already cut off for the same reason. Without a new supply of fuel the water works of the city of Des Moines cannot be operated more than ten days.

The light, power and gas plants of the city of Des Moines will be compelled to shut down by reason of fuel shortage within a few days, and what is true of Des Moines is true of practically every other town in the state. Thousands of pounds of meat and food products will be wasted for want of proper refrigeration on account of the shortage of fuel. By reason of the shortage of fuel and power, thousands of people will be thrown out of employment in the state, and many will have no means with which to support themselves in a very few days.

Calamity and dire disaster are confronting every manufacturing plant and employe thereof. Men have already informed the fuel

administrators of the city of Des Moines and other towns that they are without fuel; that some of the residents have fuel, and these men have stated that they intend to take this fuel regardless of what amount of force is necessary in order to acquire the same.

The whole situation as it confronts you as the chief executive of the state of Iowa, under the facts as they are presented to me, is that of impending disorder, riot and untold suffering of the people from cold and want of food supplies.

Section 2215-f19, *Supplement to the Code,* 1913, provides:

> "The governor shall have the power in cases of insurrection, invasion, or breaches of the peace, *or imminent danger thereof,* to order into the service of the state such of its military force as he may think proper, under the command of the senior officer thereof."

In the recent riot in the city of Omaha, the federal troops were called out and were kept in service in that city for many days, not only for the purpose of quelling the riot itself, but after the riot was entirely quelled, to prevent the threatened recurrence of the same. At the same time this riot was in progress in Omaha, a military guard was placed around the stores in the city of Council Bluffs, where firearms were obtainable, for the purpose of preventing the securing of arms from these stores, to the end that bloodshed and suffering might be avoided and to prevent any further continuance of the riot then in progress in the city of Omaha and any occurance of the same in the city of Council Bluffs. While martial law was not actually declared in the city of Council Bluffs at that time, there can be no question under the circumstances then present that the authority existed in the chief executive to place guards about buildings to prevent the taking of firearms therefrom, or the securing of firearms therefrom—and there can be no question but what it is so lodged—then in order to prevent the suffering and rioting that must follow a condition with which the state of Iowa is now confronted, the same power that warrants the chief executive in preventing the taking of firearms will warrant the chief executive in taking such steps as will prevent the disaster which now faces the citizenship of the state of Iowa.

The case of:

Commonwealth ex rel Wadsworth v. Shortall, 206 Pa. 165,

is an authority in point of this opinion. That case involved the question of the right of the governor of Pennsylvania to declare

martial law during a coal strike in the anthracite coal fields in that state. The court in passing upon the question of the right of the governor to declare martial law, used the following languge:

> "The effect of martial law, therefore, is to put into operation the powers and methods vested in the commanding officer by military law. So far as his powers for the preservation of order and security of life and property are concerned, there is no limit but the necessities and exigency of the situation. And in this respect there is no difference between a public war and domestic insurrection. What has been called the paramount law of self-defense, common to all countries, has established the rule that whatever force is necessary is also lawful.
>
> "Whatever force is necessary for self-defense is also lawful. This law, applied nationally, is the martial law, which is an offshoot of the common law, and, although ordinarily dormant in peace, may be called forth by insurrection or invasion. * * *
>
> "When a riot assumes such proportions that it cannot be quelled by ordinary means, and threatens irreparable injury to life or property, the sheriff may call forth the *posse comitatus* and exercise an authority as their chief which can hardly be distinguished from that of a general engaged in repelling a foreign enemy or subduing a revolt. * * *
>
> "In determining the responsibility for such acts, the courts proceed upon the principle of the common law as applied in issues of false imprisonment, self-defense, etc., *that the acts must be judged by the appearance of things at the time.* 'It is not less clear that, although the justification must be based on necessity, and cannot stand on any other ground, it will be enough if the circumstances induce and justify the belief that an imminent peril exists, and cannot be averted without transcending the usual rules of conduct."

Birkhimer, in his work on *Military Government and Martial Law*, 473, page 445,

speaking with reference to conditions similar to those under consideration, said:

> "Amidst this general consternation, the military commander may be the sole person inspired with confidence. He may encourage the people to pursue their affairs undeterred by fear of the enemy. But it by no means follows that he will be able to reassure those whom he would thus quiet. An undefined dread of evils to come may have paralyzed the usually strong arm of civil authority. Secret enemies, disguised as friends, contribute to the feeling of unrest. The machinery of municipal government stands still or works remittantly.

> This may be unattended by civil commotion, no trace of which may anywhere be discernible. No disposiiton may exist to thwart the ordinary authorities in the performance of their duties. And yet, while attention is fixed upon one object only, and every energy is bent to the one paramount duty—repelling the invasion—the power of effectively carrying on the civil government impereceptibly may pass away. But no community can live without government, which in times of great excitement must needs be active and forceful. And if it become incompetent to perform its functions, not because of opposition, but from mere inanition, nothing remains but to call forth that great reserve power, martial law."

The same thought is expressed in

Winthrop's Martial Law and Precedents,

Vol. 2 (2nd Ed.), pp. 1274-5.

The writer, in speaking with reference to when martial law might be declared, said at page 1275:

> "While therefore the emergency under which martial law is lawfully exercised may be war; while it is in fact during war and because of the exigencies incident to war that such law has most frequently been resorted to; it is not in the judgment of the writer war alone that may call it into existence."

On page 1279, speaking with reference to martial law, the same authority says:

> "The employment of martial law has been likened to the exercise of the right of self-defense by an individual. Its occasion and justification thus is necessity. * * * Martial law is indeed resorted to as much for the protection of the lives and property of peaceable individuals as for the repression of hostile or violent elements."

No lawyer would gainsay the right of the chief executive to declare martial law if a great fire were in progress in order that the ravages of the fire might be stopped and property which was being threatened and damage by fire preserved and protected.

This has been resorted to so many times that no citation of authority upon this proposition is necessary. Suppose, for instance, that a dam, owned by private parties, was intended to protect a great city from the ravages of a flood, and a flood was imminent, and the owners of the dam refused or were unable for any reason to secure help to maintain the dam; the chief executive under such circumstances would be empowered to use the authority of the state to protect this dam and keep it intact in order to prevent loss and

disaster to the inhabitants of the city. No man could successfully question the right of the chief executive to so act under such circumstances.

It is not necessary that the chief executive should wait until the blow falls before he acts.

Section 2215-f19, *Supplement to the Code,* 1913, provides that "the governor shall have the power in cases of insurrection, invasion, or breeches of the peace, or imminent danger thereof, etc., to invoke the military power".

Birkhimer, in his *Military Government and Martial Law,* at page 444, pp. 467, says:

> "Nothing short of necessity can justify a recourse to martial law, but such necessity may exist before the blow falls."

Hare in *American Constitutional Law,* vol. 2, page 964, speaks to the same effect.

> In any city where a riot or disorder is threatened, under our statute the chief executive has the power to declare martial law.

Under the circumstances and facts existing at the present time, an imminent peril exists and cannot be averted without transcending the usual rules of conduct.

It is the opinion, therefore, of this department that under the conditions which are present in the state of Iowa at this time, you have the power to declare martial law; that you have the power to take possession of the coal mines under such declaration and to call for troops and employ men to manage and conduct the coal mines and to remove the coal therefrom; that you have the power to take possession of whatever means of transportation is necessary, either by way of trucks or railways which are intrastate, and to enlist and employ men for the purpose of transporting such fuel from the place where it is produced to the places where it is needed in the state to protect the lives and property of the citizens. You have the power in this connection to secure whatever other kind of fuel is obtainable and to cause it to be transported in the same manner, and to contract the obligations of the state in whatever amount is necessary in order to secure the performance of this work, and you will have this power so long as the exigencies which are now present in this state exist.

This power is a necessary incident of sovereignty. It is neces-

sary to the preservation of the state. Subject to the jurisdiction and powers of the federal government, as delegated or surrendered by the state. Like all other sovereignties, it must have the power to preserve itself. To hold otherwise would be an admission on the part of the sovereign state of its inability to protect the lives and property of its citizenship.

The state must maintain her sovereignty. Under the laws and constitution of this state, and the power vested in its chief executive by them, he is fully warranted in protecting the lives and property of its citizenship, under the conditions such as are presented in the present crisis.

H. M. HAVNER, *Attorney General.*

MARTIAL LAW

General discussion as to the power of the Governor to declare Martial Law on account of coal strike.

November 21, 1919.

Hon. W. L. Harding,
Governor of Iowa.

Dear Sir: Your favor of November eighteenth propounded to me but two questions, which are as follows:

> "First: Do the Iowa Statutes confer authority under the state of facts as they are within the state of Iowa at this time for the executive to go into court and require the mines to operate, or to have a receiver appointed and operate the mines?
>
> Second: Is it within the authority of the executive, where a mine is idle, to declare martial law under the great public necessity for coal, and operate the mines and distribute the coal where needed?"

Your favor of the twentieth contains an entirely distinct proposition, which is as follows:

> "What is the authority of the state to act in reference to coal since the Federal Government has assumed entire charge of the matter and has gone to the extent of fixing the prices of coal at the mouth of the mine, the wage that is to be paid the workmen, and the distribution of the coal up to the time it is delivered to the purchaser on his own side track.
>
> "I will appreciate an early reply in reference to the relationship between state and federal authority on coal at the present time and under all the law and facts in the case."

In your inquiry of the twentieth you have assumed conditions which I am informed do not exist.

Upon receipt of your inquiry I immediately wired officials in Washington to ascertain the facts with reference to what, if any action, had been taken by the President under the powers granted by the Lever Act with reference to coal. The information which I secured was that the only action which had been taken by the President under the powers granted by the Lever Act was that of fixing prices of coal on the track at the mouth of the mine.

The only provision in the federal law with reference to coal in Iowa, its mining, distribution, or price is contained in what is commonly known as the Lever Act passed by Congress August 10, 1917. The Lever Act, in so far as it relates to the questions involved in your letter, is as follows:

> "The Pesident of the United States shall be, and he is hereby authorized and empowered, *whenever and wherever in his judgment necessary for the efficient prosecution of the war, to fix the price of coal and coke,* wherever and whenever sold, either by producer or dealer, *to establish rules for the regulation of and to regulate the method of* production, sale, shipment, *distribution,* apportionment, or storage thereof among dealers and consumers, domestic or foreign: *said authority and power may be exercised by* him in each case through the agency of the Federal Trade Commission during the war or for such part of said time as in his judgment may be necessary.
>
> That if, in the opinion of the President, any such producer or dealer fails or neglects to conform to such prices or regulation, or to conduct his business efficiently under the regulations and control of the President as aforesaid, or conducts it in a manner prejudicial to the public interest, then the President is hereby authorized and empowered in every such *case to requisition and take over the plant, business, and all appurtenances thereof belonging to such producer or dealer as a going concern, and to operate or cause the same to be operated in such manner and through such agency as he may direct during the period of the war or for such part of said time as in his judgment may be necessary.*
>
> That any producer or dealer whose plant, business, and appurtenances shall have been requisitioned or taken over the President shall be paid a just compensation for the use thereof during the period that the same may be requisitioned or taken over as aforesaid, which compensation the President shall fix or cause to be fixed by the Federal Trade Commission.

That if the prices so fixed, or if, in the case of the taking over or requisitioning of the mines or business of any such producer or dealer the compensation therefor as determined by the provisions of this Act be not satisfactory to the person or persons entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation in the manner provided by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

While operating or causing to be operated any such plants or business, the President is authorized to prescribe such regulations as he may deem essential for the employment, control, and compensation of the employees necessary to conduct the same.

Or if the President of the United States shall be of the opinion that he can thereby better provide for the common defense, and *whenever,* in his judgment, it shall be necessary for the *efficient prosecution of the war,* then he is hereby authorized and empowered to require any or all producers of coal and coke, *either in any special area or in any special coal fields,* or in the entire United States, *to sell their products only to the United States* through an agency to be designated by the President, such agency to regulate the resale of such coal and coke, and the prices thereof, and to establish rules for the regulation of and to regulate the methods of production, shipment, distribution, apportionment, or storage thereof among dealers and consumers, domestic or foreign, and to make payment of the purchase price thereof to the producers thereof, or to the person or persons legally entitled to said payment.

That within fifteen days after notice from the agency so designated to any producer of coal and coke that his, or its, output is to be so purchased by the United States as hereinbefore described, such producer shall cease shipments of said product upon his own account and shall transmit to such agency all orders received and unfilled or partially unfilled, showing the exact extent to which shipments have been made thereon, and thereafter all shipments shall be made only on authority of the agency designated by the President, and thereafter no such producer shall sell any of said products except to the United States through such agency, and the said agency alone is hereby authorized and empowered to purchase during the continuance of the requirement the output of such producers.

That the prices to be paid for such products so purchased

shall be based upon a fair and just profit over and above the cost of production, including proper maintenance and depletion charges, the reasonableness of such profits and cost of production to be determined by the Federal Trade Commission, and if the prices fixed by the said commission of any such product purchased by the United States as hereinbefore described be unsatisfactory to the person or persons entitled to the same, such person or persons shall be paid seventy-five per centum of the amount so determined, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation in the manner provided by section twenty-four paragraph twenty, and section one hundred and forty-five of the Judicial Code.

All such products so sold to the United States shall be sold by the United States at such uniform prices, quality considered, as may be practicable and as may be determined by said agency to be just and fair.

Any moneys received by the United States for the sale of any such coal and coke may, in the discretion of the President, be used as a revolving fund for further carrying out the purposes of this section. Any moneys not so used shall be covered into the Treasury as miscellaneous receipts.

That when directed by the President, the Federal Trade Commission is hereby required to proceed to make full inquiry, giving such notice as it may deem practicable, into the cost of producing under reasonably efficient management at the various places of production the following commodities, to wit, coal and coke.

The books, correspondence, records, and papers in any way referring to transactions of any kind relating to the mining, production, sale, or distribution of all mine operators or other persons whose coal and coke have or may become subject to this section, and the books, correspondence, records, and papers of any person applying for the purchase of coal and coke from the United States shall at all times be subject to inspection by the said agency, and such person or persons shall promptly furnish said agency any data or information relating to the business of such person or persons which said agency may call for, and said agency is hereby authorized to procure the information in reference to the business of such coal mine operators and producers of coke and customers therefor to the manner provided for in sections six and nine of the Acts of Congress approved September twenty-sixth, nineteen hundred and fourteen, entitled 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' and said agency is hereby authorized and em-

powered to exercise all the powers granted to the Federal Trade Commission by said Act for the carrying out of the purposes of this section.

Having completed its inquiry respecting any commodity in any locality, it shall, if the President has decided to fix the prices at which any such commodity shall be sold by producers and dealers generally, fix and publish maximum prices for both producers of and dealers in any such commodity, which maximum prices shall be observed by all producers and dealers until further action thereon is taken by the commission.

To fixing maximum prices for producers the commission shall allow the cost of production, including the expense of operation, maintenance, depreciation, and depletion, and shall add thereto a just and reasonable profit.

In fixing such prices for dealers, the commission shall allow the cost to the dealer and shall add thereto a just and reasonable sum for his profit in the transaction.

The maximum price so fixed and published shall not be construed as invalidating any contract in which prices are fixed, made in good faith, prior to the establishment and publication of maximum prices by the commission.

Whoever shall, with knowledge that the prices of any such commodity have been fixed as herein provided, ask, demand, or receive a higher price, or whoever shall, with knowledge that the regulations have been prescribed as herein provided, violate or refuse to conform to any of the same, shall, upon conviction, be punished by fine of not more than $5,000, or by imprisonment for not more than two years, or both. Each independent transaction shall constitute a separate offense.

Nothing in this section shall be construed as restricting or modifying in any manner the right of the Government of the United States may have in its own behalf or in behalf of any other Government at war with Germany to purchase, requisition, or take over any such commodities for the equipment, maintenance, or support of armed forces at any price or upon any terms that may be agreed upon or otherwise lawfully determined."

"The provisions of this Act shall *cease* to be in effect when the existing state of war between the United States and Germany shall have terminated, and the fact and date of such termination shall be *ascertained and proclaimed by the President;* but the termination of this Act shall not affect any act done, or any right or obligation accruing or accrued, or any suit or proceeding had or commenced in any civil case before

> the said termination pursuant to this Act; but all rights and liabilities under this Act arising before its termination shall continue and may be enforced in the same manner as if the Act had not terminated. Any offense committed and all penalties, forfeitures, or liabilities incurred prior to such termination may be prosecuted or punished in the same manner and with the same effect as if this Act had not been terminated."

In order that any of the provisions contained in the Lever Act shall become effective, it is necessary that the President issue his proclamation or order with reference thereto. As I am advised from Washington, the only order or proclamation issued by the President under the provisions of said act is to fix the price of coal on the track at the mouth of the mine. This order is effective and supercedes all state authority to this extent.

Therefore, if this information is correct, in so far as all of the other provisions of said act with reference to the mining, production or distribution of coal in Iowa are concerned, the Lever Act has not been put into operation or effect and will not be effective in any manner until such time or times as the President shall see fit to exercise the power and authority granted him under said act and issue his proclamation or order with reference thereto.

H. M. HAVNER, *Attorney General.*

NEITHER GOVERNOR NOR EXECUTIVE COUNCIL HAVE AUTHORITY TO SELL STATE PROPERTY

Real property owned by the State of Iowa cannot be sold or leased by the Governor, Adjutant General or Executive Council in the absence of express authority. The right to sell or lease Camp Dodge, being property of the state, rests solely in the legislature.

May 8, 1919.

Hon. W. L. Harding, Governor of Iowa.

Dear Sir: I am in receipt of your favor of May 1st with the following inquiry:

> "The Federal Government has indicated that it desires either to purchase or rent from the state of Iowa lands owned by the state and a part of what is now known as Camp Dodge.
>
> "Kindly furnish me with an opinion as to the authority of the governor, adjutant general or executive council to sell or lease the said lands owned by the state."

Upon an examination of the records in this department I find a resolution was adopted by the executive council of the state of Iowa, as follows:

"WHEREAS, in the opinion of the executive council of the state, the public interest requires the taking of the following described real estate, to wit: That part of the south half of the northwest quarter of section thirty-five, township eighty, north, range twenty-five, west of the 5th P. M. Iowa, lying east of Beaver Creek, and also the south half of the northeast quarter of said section thirty-six in said township and range, and also lots sixteen, seventeen, eighteen and nineteen of the official plat of the northeast quarter of section thirty-six in said township and range, and also the northwest quarter of the northwest quarter of section thirty-one in township eighty, north, range twenty-four, west of the 5th P. M. Iowa, as additional grounds for the state military reserve officially known as Camp Grenville M. Dodge:

NOW, THEREFORE, BE IT RESOLVED: that proceedings be instituted in the name of the state for the condemnation of such real estate as provided by law.

"W. L. HARDING,
"W. S. ALLEN,
"FRANK S. SHAW,
"Executive Council.

"Attest:
"R. E. BALES, *Secretary.*"

In accordance with an order signed by you as governor, I was appointed to conduct the above mentioned condemnation proceedings.

Section 2024-d, supplement to the code, 1913, provides, in part, as follows:

> *"Additional grounds for state purposes—Jury selected by chief justice.* Whenever, in the opinion of the executive council of the state, public interest requires the taking of real estate as a site for any state building, or as additional grounds for any existing state building, or for any other state purpose, the state may take and hold, under its right of eminent domain, so much real estate as is necessary for the purpose for which the same is taken;" * * *

The land in question was condemned under and by virtue of the authority furnished by section 2024-d, supplement to the code, 1913. The title to said property was thereby vested in the state of Iowa, and there is no authority for the sale of such property belonging to the state of Iowa except by legislative enactment.

The power to dispose of state property is vested in the legislature, which must make provision for the transfer of same by statute.

The federal government would have the power under section 4-b, supplement to the code, 1913, for the condemnation of such property by the United States government, if said land is desired by the federal government as a site for a customs house, court house, post office, arsenal, or other public building whatever, or for any other purpose of the government.

The same rule would obtain with reference to the matter of the leasing of said land. There would be no power upon the part of any officer of the state to lease said property so acquired as above stated without a legislative enactment.

It is, therefore, the opinion of this department that there is no officer of the state of Iowa who has the power or authority to sell or lease the land so acquired.

H. M. HAVNER, *Attorney General.*

OPINIONS TO SECRETARY OF STATE

PRICE OF HOUSE AND SENATE JOURNALS

The Secretary of State is required to make application for the admittance of the House and Senate Journals to the U. S. Mail. When the Journals are admitted as second class matter the subscription rate is $1.50 for both Journals when mailed to the same address.

January 15, 1919.

Hon. W. S. Allen, Secretary of State.

Dear Sir: We have your letter of January 15th in which you ask for our interpretation of the provisions of chapter 179, Acts of the 36th General Assembly relative to the sum to be charged for subscriptions to the legislative journals.

Section 1 of the Acts in part provides:

> "That the secretary of state cause to be printed for public distribution the senate journal and the house journal during each session of the general assembly in sufficient numbers to supply public demand, and shall cause to be forwarded, by mail, as soon as practicable after the same are printed, such journals upon payment of the subscription price of one dollar ($1.00) for either the senate or the house journal for each legislative session, or that portion thereof after the subscription is received; and the proceeds received by the secretary of state shall be by him covered into the treasury of the state of Iowa. * * * * *"

It is clear from the provisions of this section that the charge for the house journal is $1.00 and for the senate journal, $1.00.

Section 4 of the Acts provides:

> "The secretary of state is directed to make application to the post office department for the admission of these journals to the United States mail as second class matter *and when so admitted*, these additional words shall be printed on the front page of each journal and the subscription price fixed accordingly.
>
> " 'The journals to one address, $1.50.' "

It will be noted that the foregoing section directs the secretary of state to make application to the postoffice department for the admission of these journals to the United States mail as second

class matter *and when so admitted,* the price for both journals sent to one address is fixed at $1.50.

It is the opinion of this department that until these journals are admitted to the United States mail as second class matter, that the secreary of state should charge $1.00 for the house journal and $1.00 for the senate journal, and that it is only in case that the journals are admitted to the United States mail as second class matter that you are authorized to charge $1.50, and then only when both journals are sent to one address.

B. J. POWERS, *Assistant Attorney General.*

CORRECTION OF LAND RECORDS

Original sales entry as well as the patent and certificate of final payment are records and can be corrected by the Secretary of State.

November 24, 1919.

Hon. W. C. Ramsay, Secretary of State.

Dear Sir: Your letter of the 5th inst., addressed to Attorney General H. M. Havner, has been referred to me for reply.

You ask in substance the following:

> When the original sales record of land shows a specific description but the patent and certificate of final payment shows a different description, has the secretary of state the power to correct the description in the certificate of final payment and patent so as to conform to the description as shown in the original sales record?

Code Section 78 not only authorizes you, but requires you

> "to correct all clerical errors in his office in name of grantee and description of tract of land conveyed by the state found upon the records of such office. * * *"

There is no doubt in my mind that the original sales entry, as well as the patent and certificate of final payment are records within the meaning of section 78 above quoted.

I am therefore of the opintion that your question should be answered in the affirmative.

W. R. C. KENDRICK, *Assistant Attorney General.*

TRADE MARKS.

Secretary of state cannot limit the trade mark to a specific form when issuing a certificate under Sec. 5049 of Code.

May 28, 1920.

Hon. W. C. Ramsay, Secretary of State.

Dear Sir: You have requested an opinion from this department upon the following facts:

> This department is being constantly requested to file for record and certify to such filing with forms of trade-mark, labels and forms of advertising.
>
> Frequently these requests are for a word or words in certain forms or color by class and made to use these words in different forms or colors than those submited.
>
> This office has taken the position that the certificate issued from this department only permits the use of the word or words in the form submitted.

In the instant case you have certified as follows:

> "I hereby certify, That in compliance with the provisions of Section 5049, of the Code of Iowa, Fabreeka Belting Company of Boston, Massachusetts, has this day filed in the office of Secretary of State a 'Trade Mark' described substantially as follows: Consisting of the word 'Fabreeka' in the form of and as shown by the fac simile hereto attached and hereby made a part of this registration. To be used as a 'Trade Mark' only under this registration in connection with the manufacture and sale of laminated belting."

You then ask:

> It is requested that you inform this department in an opinion as to its rights in restricting the use of the submitted form of trade-mark to that form as submitted in the application for registration.

The statute under which trade-marks are registered in Iowa provides as follows:

> "Every person, or association or union of working men or others, that has adopted or shall adopt for their protection any label, trade-mark or form of advertisement, may file the same for record in the office of the secretary of state by leaving two copies, counterparts or fac similes thereof with the secretary of state. Said secretary shall thereupon deliver to such person, association or union so filing the same a duly attested certificate of the record of the same, for which he shall receive a fee of one dollar. Such certificate of record shall in all actions and prosecutions under the following six

> sections be sufficient proof of the adoption of such label, trade-mark or form of advertisement, and the right of said person, association or union to adopt the same."

The question is, Shall you omit from your certificate the words "in the form of?"

It will be observed from a reading of Section 5049, supra, that there shall be filed in the office of the secretary of state *fac similes* of the words adopted as a trade-mark. The question as to whether you may legally restrict the use of such words to any particular form is open to very serious doubt. Our Supreme Court has protected a trade-mark composed of certain words, even though they were not always used in the same form.

In the case of Shaver v. Shaver, 54 Iowa, 208, the plaintiff had been engaged in the manufacture of wagons for many years. The business, for a time, was prosecuted by a co-partnership composed of plaintiff and the defendants, his brothers, and another person. Upon the dissolution of the partnerships, plaintiff continued business and acquired all the property of the firm. Plaintiff adopted as a trade-mark the words, "Shaver Wagon, Eldora", which was at first, *with some variations in form,* painted conspicuously on all wagons manufactured and sold by him. His trade-mark was painted on the wagons *in substantially* the same form and manner, but not always in the *identical* form and manner. After the dissolution of the firm the defendant engaged in the manufacture of wagons and painted thereon the *identical words* used as a trade-mark by plaintiff, but changed the *form.* Plaintiff brought an action to enjoin defendants from the use of the trade-mark, the District Court entered a decree granting the relief sought and in affirming the case on appeal the Supreme Court say:

> "We are clearly of the opinion that the trade-mark of plaintiff is used by defendants with so little variation that their wagons would be readily taken to be of the manufacture of plaintiff. The imitation used by defendants, we have no doubt is calculated to deceive customers, and thus defraud them and injure and defraud plaintiff. Applying the doctrines we have above announced, we are of the opinion plaintiff has made out a case calling for the interposition of the power of equity to enjoin defendants from the further use of his trade-mark."

It will be observed, therefore, that the courts will protect one in the use of his trade-mark, even though it is not always used in

the same form. I can readily see how the occasion might arise wherein the proprietor of a trade-mark might want to use it in a different form. For instance, if he were manufacturing articles in various sizes he would undoubtedly prefer to use a form of his trade-mark that would correspond with the size of the particular article manufactured.

Therefore, I am of the opinion that the applicant for a certificate in the instant case is entitled to a certificate with the words "in the form of" omitted.

W. R. C. KENDRICK, *Assistant Attorney General.*

OPINIONS TO AUDITOR OF STATE

APPROPRIATION TO IOWA POULTRY ASSOCIATION

The appropriation is limited to the actual amount used for premiums, not to exceed $100.

September 6, 1919.

Hon. F. S. Shaw, Auditor of State.

Dear Sir: Your letter of the 4th inst., addressed to Attorney General H. M. Havner, has been referred to me for reply.

You ask in substance whether the county poultry associations referred to in chapter 563, acts of the 37th General Assembly, are entitled to the one hundred dollars appropriated in aid of such associations, or only so much of said appropriation as is actually expended for premiums.

Section 2 of the act appropriates:

> "a sum not to exceed one hundred dollars ($100.00) for such poultry association's work in each county *as hereinafter provided.*"

It is "hereinafter provided" in section 4 of the act that the president and secretary of such associations shall file with the county auditor a sworn statement of the actual amount of cash premiums paid at the exhibition for which state aid is being demanded; and it is further provided in said section that

> "After each exhibition held by any Iowa poultry association or club the president and secretary of such association or club claiming the benefits of any such appropriation shall file with the county auditor a sworn statement of the actual statement of the actual amount of cash premiums paid at the exhibition of the current season, which must correspond with the published offer of premiums, as printed in their premium lists. Such statement shall be accompanied by an itemized list of all premiums which are to be paid from such one hundred dollars ($100.00) as claimed, with the names and addresses of each farmer or poultry breeder entitled to same, and a copy of the published premium list and paid up membership list duly verified by the secretary and president of such association or club."

It is evident that the legislature intended to and did appropriate only so much money as was used by such association in the

way of premiums, not to exceed one hundred dollars, and did not appropriate a flat sum of one hundred dollars to be used by such associations in any manner they deemed fit.

I am therefore of the opinion that the appropriation by the state can be used only in the way of premiums, not to exceed one hundred dollars, and that the auditor of state would not be authorized to draw a warrant for any greater sum than shown by the sworn statement to have been used for premiums.

W. R. C. KENDRICK, *Assistant Attorney General.*

COMPENSATION OF MUNICIPAL ACCOUNTANTS

Municipal accountants are entitled to compensation at the rate of seven dollars per day.

July 10, 1920.

Hon. Frank S. Shaw, Auditor of State.

Dear Sir: Your letter of the 13th inst., addressed to the attorney general has been referred to me for reply.

You ask for an interpretation of the statutes governing the amount of per diem allowed to municipal examiners.

The statutes applicable to your question will be found in section 1056-a11 of the supplement to the code, 1913, as amended by chap- Chapter 301, which increased the per diem to six dollars per day,

Section 1056-a11, so far as material to your question, provides:

> "The compensation of said examiners shall be five dollars for each day actually employed, together with their necessary traveling expenses; the sum so due in any case shall be paid by the auditor of state upon the presentation of proper bills therefor, by warrants on the treasury of state; thereupon the auditor of state shall file a claim for the full amount so allowed with the auditor or clerk of the city or town examined, and the council thereof shall provide for its payment."

The 38th General Assembly amended section 1056-a11 by increasing the per diem of municipal examiners to six dollars per day. Chapter 301, which increased the per diem to six dollars per day, was introduced in the Senate and passed by that body on April 3, 1919.

Later in the session, in fact on the last day thereof, chapter 272, or what is commonly known as the omnibus bill, was passed, to wit, on April 19, 1919.

Chapter 272 increased the per diem of municipal examiners to seven dollars per day. It reads:

> "The accountants in the municipal accounting department and the county accounting department shall receive a per diem of seven dollars to be paid by the county or municipality, together with actual expenses while making examinations."

It is common knowledge that the so-called omnibus bill is one of, if not the last act of the general assembly prior to final adjournment. It is a general practice of the General Assembly in preparing the omnibus bill to equalize and provide for adequate compensation for the state employes and in so doing the compensation previously provided for whether in former acts or by acts of the current session, is frequently increased. In fact the omnibus bill especially provides that:

> "All salaries herein named are in lieu of all statutory salaries for the positions named herein, including such a salaries as are contained in any bills passed by the 38th General Assembly."

The date of the approval of the act by the governor is not controlling, for if it were, the legislative will could be defeated by the governor inadvertently approving an act last which had been repealed or amended by another act of the General Assembly.

Therefore I am of the opinion that chapter 272, supra, being the last expression of the legislative will, should govern and that the per diem allowed municipal accountants should be seven dollars per day.

B. J. POWERS, *Assistant Attorney General.*

TRUSTEES OF CEMETERY FUNDS

Under the provisions of section 740, Supplement, 1913, trustees of cemetery funds are not authorized to invest such funds in securities selling below par.

February 5, 1920.

Hon. Frank S. Shaw, Auditor of State.

Dear Sir: Your request for the opinion of this department on the following question has been referred to me for attention.

You state:

> "Will you kindly give me your opinion as to whether cities under the provisions of section 740 of the supplement to the code, 1913, may invest cemetery trust funds in United States government bonds, when the same are selling below par; or

must the city in making such investment purchase only such bonds as are selling at par or above.

I am asking this question under the provisions of section 209 of the code."

The section referred to, section 740 of the 1913 supplement to the code, provides in part as follows:

> "That the mayor and council of such cities and towns, and the township trustees of civil townships, wholly outside of any city or incorporated town, shall have authority to receive and invest all moneys and property, so donated or bequeathed, in bonds of the United States, or municipal bonds, or certificates, or other evidence of indebtedness issued by authority of and in accordance with the law of this or any other state, when same are at or above par. * * * * *"

Human language is indeed imperfect, and, as has often been said, requires constant interpretation, but this cannot be truthfully said of the part of the section above set out. As I read and understand the portion quoted, it is about as clear and explicit as human language can well be, and while we may doubt the wisdom, as well as the expediency of the part which very properly authorizes the trustees of cemetery funds to purchase United States government bonds, but limits the purchase to "only such bonds as are selling at or above par," yet the legislature is the sole and only judge of that question and it is, therefore, outside the province of the courts, and this department as well, to inquire into or interfere therewith.

The term or phrase "selling at or above par," when applied to the sale of securities, simply means that they are selling on the market or stock exchange at their face value, one hundred cents on the dollar, as applied to the sales at par, and are selling at a premium more than one hundred cents on the dollar when applied to sales above par.

The converse of these conditions exists when securities are selling on the market below par, at a discount, for less than one hundred cents on the dollars. The value of all securities fluctuate on the open market, and, while it is to be regretted that the several issues of so-called liberty bonds could not have been maintained at par, yet it is a matter of common knowledge that nearly, if not quite, all of such issues are now selling at a discount, which, in some instances, has reached as high as eight per cent.

It is the private, personal opinion of the writer that the purchase of United States government bonds, drawing four and one-fourth per cent interest, at the present market price of ninety-two or ninety-three cents on the dollar, is not only a desirable, but a very profitable investment for trust or other funds, but I cannot see my way clear to hold that section 740 of the 1913 supplement to the code authorizes the trustees of cemetery funds to invest such funds in any class of securities selling at a discount and you are, therefore, advised, though I am reluctant to do so, that the city cannot lawfully invest cemetery funds in United States bonds that are selling below par.

J. W. SANDUSKY, *Assistant Attorney General.*

INTEREST ON PUBLIC FUNDS

Any school secretary or other public officer who receives interest on public funds must account for all interest thus received.

A school board has authority to compromise a claim against an officer of the school corporation when it is impossible to recover the full amount due from such officer to the school district.

October 23, 1919.

Hon. Frank S. Shaw, Auditor of State.

Dear Sir: We have your letter of October 17th in which you ask the opinion of this department upon the following proposition:

> "First: In case a secretary of an independent school district fails to report and account for tuitions and other moneys collected by him and belonging to the district, and retains this money and appropriates it to his own personal use by loaning it out and collecting interest on same at rates ranging from six to eight per cent, in settling up the shortage may interest be charged on such shortage from dates that it should have been turned over to the school treasurer? If so, what rate of interest may be charged?
>
> Second: In case that interest may be charged has the school board or anyone else the authority to remit this interest in order to secure a settlement of the principal?"

In answering your first inquiry, permit us to state that there is a decided conflict among the holdings of the supreme courts of the various states upon this proposition. Our own court, however, has repudiated the doctrine followed in Colorado and a number of other states and announced the doctrine that a public officer who receives public funds by virtue of his office is liable for and must account for all interest earned on such funds while in his possession. We refer you to the case of

Rhea v. Brewster, 130 Ia. 729; 107 N. W. 940 wherein a clerk of the district court received certain money by virtue of his office. He deposited this money in the bank in his name and received a written promise from the bank that it would pay him four per cent interest thereon. He paid the principal sum over to the person duly entitled thereto but did not account for interest amounting to $377.20 which he received from said deposit. Our court stated in its opinion that the money came into this clerk's hands by virtue of his office and that it was not his property in any sense of the term even though he had custody of it. Therefore whatever interest was received was the property of the real owner of the funds and not the property of the clerk.

The rule announced in the case of *Rhea v. Brewster,* supra, is the one adhered to in the case of

Eshelby v. Board of Education, ——Ohio, ——; 63 N. E. 586 where an action was brought against a school treasurer for interest received by him on school funds and in which it was held that a school treasurer was bound to account to the school district for all increment following the principal.

The case of

State v. McFetridge, —— Wis. ——; 54 N. W. 1998; 20 L. R. A. 232 is in accord with the holdings of our supreme court. Likewise is the case of

Adams v. Williams, —— Miss. ——; 54 Southern 865; 30 L. R. A. (NS) 855.

In view of these decisions, we beg to inform you that your first inquiry should be answered by stating that the secretary of the school district you refer to should be required to account not only for the principal sum due the school district, but for all interest he has received from funds while in his possession. The rate of interest is to be determined by the rate which the secretary received from the use of such funds.

Your second inquiry may well be answered by stating that since the board of directors of a school corporation are charged with the duties of caring for the property and the business of the corporation and its management, that in case they are unable to recover from an officer of the corporation all of the funds which have passed into his hands that they may enter into an agreement whereby a sum less than the total amount due may be accepted in

full settlement of the claim of the district. It is to be understood that in order to give such an agreement validity in the eyes of the law, it must be one fairly entered into and of a bona fide nature. Thus if the board should find that they cannot collect the interest on a claim due the district and they can collect the principal sum, it is our opinion that such board may enter into an agreement to accept the principal sum in full settlement of the claim of the district.

B. J. POWERS, *Assistant Attorney General.*

WATERWORKS TRUSTEE CANNOT BE INDIRECTLY INTERESTED IN ANY CONTRACT WITH TRUSTEES.

A member of the Board of Waterworks Trustees cannot be interested directly or indirectly in any contract for services, material or labor performed in the improvement of any waterworks under his contract. Construing Section 879-q, Supplement of 1913.

February 7, 1919.

Hon. Frank S. Shaw, Auditor of State.

Dear Sir: We have your request for an opinion regarding the legality of a member of a waterworks board of trustees receiving compensation for services rendered apart from the regular duties of said trustee, and you give the following statement of facts:

> "A member of the board of trustees of Council Bluffs is an architect, and when the proposition of building a new and modern pumping station was brought up and action taken for the said improvement, this member of the board drew up the plans and specifications. They were accepted, and during the period of construction of this building, he supervised and inspected same and saw it through to completion.
>
> This member of the board presented a bill for his services, but it was not paid when the question of the legality of it was brought before the meeting. This architect hired a man (who was under his direction) to draw and prepare these plans and of course was out time and money on them. Now then, I would like to know if this man is entitled to compensation, and if he is not, would it be legal to present a bill for labor that was done by the assistant?"

In answering this inquiry we desire to direct your attention to section 879-q, supplement of 1913, which provides in part as follows:

> "No officer, including members of the city council, shall be interested, directly or indirectly, in any contract or job

of work or material or the profits thereof or services to be furnished or performed for the city or town."

In addition, I desire to direct your further attention to section 1279-c, supplement of 1913, which provides as follows:

"The following provision shall be deemed and held to be a part of every contract hereafter entered into by any person, firm or private corporation with the state of Iowa, or with any county, city, town, city acting under special charter, cities acting commission form of government, school corporation or with any municipal corporation, now or hereafter created, whether said provision be inserted in such contract or not, to-wit:

"The party to whom this contract has been awarded, hereby represents and guarantees that he has not, nor has any other person for or in his behalf, directly or indirectly, entered into any arrangement or agreement with any other bidder, or with any public officer, whereby he has paid or is to pay to any other bidder or public officer any sum of money or anything of value whatever in order to obtain this contract; and that he has not, nor has any other person, for or in his behalf, directly or indirectly, entered into any agreement or arrangement with any other person, firm, corporation or association which tends to or does lessen or destroy free competition in the letting of this contract and agrees that the establishment of the falsity of these representations and guaranties, or any of them, and he hereby agrees that in case it hereafter be established that such representations or guaranties, or any of them, are false, he will forfeit and pay not less than 5 per cent of the contract price, but in no event be less than three hundred dollars, as liquidated damages to the other contracting party."

It is clear that the intent of the legislature is to prohibit any officer from being placed in the position where he may be called upon to decide between the interest of the public and between those of a personal nature.

Our supreme court in the case of *James v. City of Hamburg,* 174 Iowa 301, was called upon to determine the validity of certain conflicting assignments made by a contractor doing work for the city of Hamburg, one assignment having been executed to a bank in which one member of the council was cashier. The other assignee was a material man, who pleaded the invalidity of the bank's assignment because the bank was a partnership and one of the members thereof was a member of the city council. In

holding that the assignment to the bank was invalid and contrary to public policy, the court at page 312 said:

"He (Baldwin, the cashier), had also a duty to the city to see to it that the work was not accepted unless it conformed strictly to the requirements of the contract, and was done in fulfillment of its terms. This duty he owed to the city and its citizens. The acceptance of this assignment created in Baldwin a double character, and invited him into a position where he might be tempted to use the opportunity to secure his own interests, at the expense of the city, whose interest, as a public officer, he was, under the law, bound to serve.

"Some men are big enough and strong enough to waive all personal considerations and discharge fairly and impartially a public duty, but not all men are so constituted. The law would remove from public officers these temptations to which, owing to the weakness of human nature, men do sometimes yield.

" 'One who has power, owing to the frailty of human nature, will be too readily seized with the inclination to use the opportunity for securing his own interest at the expense of that for which he is intrusted.' *Bay v. Davidson,* 133 Iowa 688, 691.

"As said by Judge Dillon, in section 773 in his work on Municipal Corporations, 2d Vol., 5th Ed.:

" 'At common law and generally under statutory enactment, it is now established beyond question that a *contract made by an officer of a municipality with himself,* or in which he is interested, is contrary to public policy, and tainted with illegality; and this rule applies whether such officer acts alone on behalf of the municipality, or as a member of a board of council. * * * The fact that the interest of the offending officer in the invalid contract is indirect and is very small is immaterial. * * * It is impossible to lay down any general rule defining the *nature of the interest of a municipal officer* which comes within the operation of these principles. Any direct or indirect interest in the subject matter is sufficient to taint the contract with illegality, if the interest be such as to affect the judgment and conduct of the officer either in the making of the contract, or in its performance.'

"In section 772 of the same work, Judge Dillon says:

" 'The principle generally applicable to all officers and directors of a corporation is that they cannot enter into contracts with such corporation to do any work for it, nor can they subsequently derive any benefit personally from such contract. To deny the application of the rule to municipal

bodies would * * * be to deprive the rule of much of its value; for the well-working of the municipal system, through which a large portion of the affairs of the country are administered, must depend very much upon the freedom from abuse with which they are conducted. Nothing can more tend to correct the tendency to abuse than to make abuse unprofitable to those who engage in them, and to have them stamped as abuses in courts of justice. * * * It is contrary to good morals and public policy to permit a municipal officer to *enter into contractual relations* with the municipality of which he is an officer. The principles of the common law and of equity are generally supplemented and made more emphatic *by statutory enactments* prohibiting any municipal officer from being *interested, directly or indirectly, in any municipal contract,* or in the rendition of services for the municipality outside of those required from him by virtue of his office.' ''

It must therefore necessarily be held that the contract by this architect to prepare plans and specifications was absolutely void, as being contrary to public policy, and this provision is equally applicable to a situation where an architect who is also a member of a board of waterworks trustees hires his own assistants to draw the plans and specifications. It places the trustee in a position where his own personal interests and those of the city may be in conflict.

Taking our statutes and the decision of the supreme court in the above entitled case of *James v. City of Hamburg,* it is the opinion of this department that under the facts stated, wherein it appears that the assistant who drew the plans was in the employment of a member of the board of waterworks trustees, any contract thus entered into is void, as being contrary to public policy. Such a contract could not be enforced in any court.

B. J. POWERS, *Assistant Attorney General.*

CONTRACTS BETWEEN PUBLIC AND PUBLIC OFFICERS

A member of a city council cannot be interested in any contract with the city. Such a contract is void as being contrary to public policy. Resignation of a member of city council cannot give validity to a contract void when entered into. Contracts so entered into should be cancelled without delay.

March 4, 1919.

Hon. Frank S. Shaw, Auditor of State.

Dear Sir:

We have your letter of February 10th in which you ask the following questions:

"(1) Would the resignation of E. E. Frith from the council automatically cancel the garbage contract of E. T. Frith?

"(2) May the council cancel said contract, if so, how and with what notice, and when?

"(3) If E. E. Frith resigned from the council, might said contract continue as it is?

"(4) Is there anything estopping E. T. Frith or E. E. Frith from entering into another garbage contract immediately after his resignation and this cancellation of the present contract?

"(5) In case of the last above or the situation at No. 3, exist, would the office of the Department of Justice take further notice of the matter?"

The foregoing questions, we take it, relate to the garbage contract existing between the city of Dubuque and E. T. Frith. This contract and the facts relative thereto have been set forth by your examiner, Mr. E. F. Whitney, in his report relative to conditions existing in the city of Dubuque. From this report we have gathered the following facts:

Some years ago a contract was entered into between the city of Dubuque and E. T. Frith, whereby the latter was to collect the garbage in the city of Dubuque for a period of five years, ending May 1, 1918, and Mr. Frith was to receive as compensation for collecting the garbage the sum of $31.49 per day thereof.

Some time in September, 1916, the garbage plant was burned; the real estate on which the same had been situated stood in the name of E. E. Frith, who was a member of the city council of the city of Dubuque and the father of E. T. Frith. After the destruction of this plant by fire a new contract was entered into between the city council and the said E. T. Frith, whereby he was to receive $31.49 per day as compensation for collecting garbage until the first day of May, 1918, and after that date he was to receive $40.00 per day for a period of ten years. It further appears from the examiner's report that there had been some question whether E. T. Frith was the real party in interest in this contract, or whether E. E. Frith, his father, and a member of the city council, was the real party in interest.

It appears from certain affidavits filed in the supreme court of this state in a divorce proceedings between E. T. Frith and his wife, that E. T. Frith states that his salary is $20.00 a week. It

further appears that E. E. Frith filed an affidavit in said cause stating that his son was employed by him at a salary of $20.00 a week. It further appears that M. H. Czizek, attorney for said E. T. Frith, and also city attorney for the city of Dubuque, made a statement which was filed with the clerk of the supreme court, that E. T. Frith had no property other than an equity in a home, amounting to about $500.00, and that his income was limited to a salary received from his father of $20.00 a week.

From these facts, it appears that while the contract between the city of Dubuque and E. T. Frith purports to be for the interest of the latter, yet, in fact, E. E. Frith was the real party in interest, and at the same time the contract was entered into he was a member of the city council of Dubuque.

The city of Dubuque operates under a special charter, and therefore, section 943 of the code is applicable thereto. It in part provides as follows:

> "No member of the council shall, during the time for which he has been elected, or for one year thereafter, be appointed to any municipal office which shall be created, or the emoluments of which shall be increased, during the term for which he was elected, *nor shall he be interested, directly or indirectly, in any contract for work or services to be performed for the corporation.*"

In this same connection we desire to direct your attention to the provisions of section 1279-c, supplement of 1913, which provides in part, as follows:

> "The following provision shall be deemed and held to be a part of every contract hereafter entered into by any person, firm or private corporation with the state of Iowa, or with any county, city, town, *city acting under special charter,* * * * whether said provision be inserted in such contract or not, to-wit:
>
> "The party to whom this contract has been awarded, hereby represents and guarantees that he has not, nor has any other person for or in his behalf, directly or indirectly, entered into any arrangement or agreement with any other bidder, or with any public officer, whereby he has paid or is to pay to any other bidder or public officer any sum of money or anything of value whatever in order to obtain this contract; and that he has not, nor has any other person, for or in his behalf, directly or indirectly, entered into any agreement or arrangement with any other person, firm, corporation or association which tends to or does lessen or destroy free competition in the letting of this contract and agrees that the establishment

of the falsity of these representations and guaranties, or any of them, and he hereby agrees that in case it hereafter be established that such representations or guaranties, or any of them, are false, he will forfeit and pay not less than five per cent of the contract price, but in no event be less than three hundred dollars, as liquidated damages to the other contracting party."

In this same connection we desire to direct your attention to the case of *James v. City of Hamburg,* 174 Ia. 301, in which it was held that a contract in which a member of the city council was interested is void, as being contrary to public policy. Our supreme court has interpreted such legislative enactments to prohibit any officer from being placed in the position where he may be called upon to decide between the interest of the public and those of a personal nature, and when a contract is so entered into it is uniformly held to be void, regardless of whether there is any fraud worked upon the city or not.

With this general statement of facts and of the general rule of law applicable thereto, we desire to state that it is our opinion that the resignation of E. E. Frith from the city council would not automatically cancel the garbage contract with E. T. Frith.

In response to your second question, permit us to state that the contract in our opinion is void, and should be cancelled by the city council without any delay.

In response to your third inquiry, we desire to state that the resignation of E. E. Frith from the city council cannot give validity to a contract wihch was void at the time of its inception. To permit a public officer to enter into a void contract with himself and then resign from the office under pressure and reap the benefits from the contract thus entered, cannot be sustained.

To your fourth question, permit us to state that there is nothing in the law which would prevent the city of Dubuque from entering into a contract with E. T. Frith or E. E. Frith for the disposal of garbage for the city of Dubuque after the resignation of E. E. Frith from the city council.

In response to your fifth question, permit us to state that this department looks with disfavor upon any contract existing between a public officer, or between a board of which he is a member, and himself. The courts are uniform in holding such contracts void as being contrary to public policy, and we certainly cannot sanction any contract which is open to objection of being contrary to the interest and the welfare of the public.

B. J. POWERS, *Assistant Attorney General.*

OPINIONS RELATING TO LEGISLATIVE MATTERS

POWER OF RETRENCHMENT AND REFORM COMMITTEE

Retrenchment and Reform Committee has power to authorize employment of additional help in any department and order it paid out of the general funds in the state treasury.

April 19, 1920.

Hon. F. S. Shaw,
State Auditor.

Dear Sir:

You have submitted to this department an oral request for an opinion upon the following state of facts:

The committee on retrenchment and reform has granted an additional stenographer to the department of the state oil inspector at an annual salary of twelve hundred dollars.

You ask whether or not the salary of said stenographer may be paid out of the general funds in the state treasury not otherwise appropriated, or whether her salary shall be taken from the appropriation of thirty-two thousand dollars given to the department of the state oil inspector.

I am of the opinion that the salary of said stenographer should be paid out of the general funds in the state treasury not otherwise appropriated, and not out of the thirty-two thousand dollars appropriation especially made to the department of the state oil inspector.

Chapter 272, acts of the 38th General Assembly provides as follows:

> "No additional help shall be employed by the head of any department * * * without first having received the approval of the committee on retrenchment and reform."

Under the statutory provision above quoted there can be no doubt that the committee on retrenchment and reform has the power to authorize the employment of additional help by the head of any of the state departments.

Said act further provides:

> "There is hereby appropriated out of any funds in the

treasury, not otherwise appropriated, sufficient funds to pay the salaries as herein provided. Provided, however, that nothing in this section shall be construed as an appropriation of money herein mentioned that is provided for by existing appropriations for any department.''

It will be observed that the legislature has made express provision in the way of a general appropriation of funds in the treasury not otherwise appropriated to take care of additional help granted to any of the state departments. Although an express appropriation of thirty-two thousand dollars annually was made by the legislature for the payment of salaries of employes in the department of the state oil inspector, yet such appropriation was made for the purpose of paying the salaries of employes specifically designated by the legislature for that department; and when the legislature made that appropriation it evidently had in mind the number and character of employes especially provided for the department of the state oil inspector. And when the legislature expressly conferred upon the retrenchment and reform committee the power to authorize additional help in any state department it must have contemplated that an additional appropriation must be made to provide for such additional help. This the legislature expressly did when it provided a general appropriation out of the funds in the treasury not otherwise appropriated, sufficient to pay the salaries provided for in chapter 272 aforesaid.

I am therefore of the opinion that the salary of the additional stenographer allowed to the department of the state oil inspector by the committee on retrenchment and reform, should be paid out of the general funds in the state treasury not otherwise appropriated.

W. R. C. KENDRICK, *Assistant Attorney General.*

RETRENCHMENT AND REFORM COMMITTEE

The Retrenchment and Reform Committee cannot increase salaries and make the increase effective a year back.

October 11, 1920.

Hon. Guilford H. Sumner,
Secretary State Board of Health.

Dear Sir:

You ask for an opinion from this department upon the following question:

"The 38th General Assembly intended to give me an increase in salary by allowing me $3,000 a year for being secretary of the Iowa State Board of Health, and by allowing me the salary of $300 a year for medical examiners, but the wording of the law was such that you ruled from your office that the $3,000 for the Board of Health work was all that I should receive.

"I am writing you to ask your opinion as to the power of the committee on retrenchment and reform being able to correct this error and allow me to receive the salary that was intended to be paid me by the legislature, thereby making my salary $3,600 since April 1, 1919."

If the committee on retrenchment and reform is clothed with power to increase your salary at this time from $3,000 to $3,600 per year and make the increase effective from April 1, 1919, that power must be contained in chapter 272, acts of the 38th General Assembly, and section 182 of the code. From an examination of those statutes, I can find no such authority expressly granted, and if granted, it is by implication.

I am therefore of the opinion that the power of the committee on retrenchment and reform to increase your salary to $3,600 per year and make it effective from April 1, 1919, is extremely doubtful.

W. R. C. KENDRICK, *Assistant Attorney General.*

POWER OF RETRENCHMENT AND REFORM COMMITTEE

Retrenchment and Reform Committee cannot allow claim of Secretary of State Board of Health for increase in salary from May 1, 1919.

October 14, 1920.

Dr. Guilford H. Sumner,
Secretary of State Board of Health.

Dear Sir:

I have the honor to acknowledge your esteemed favor of the 11th inst., addressed to Attorney General H. M. Havner, in which you call attention to sections 2575-a44 and 2583 of the supplement to the code of 1913, pursuant to which you claim the right to draw a salary in addition to the salary of the secretary of the State Board of Health provided for in chapter 272, acts of the 38th General Assembly.

You state that you have filed vouchers each month since May 1, 1919, with the auditor of state covering the additional salaries, that the auditor of state has refused to draw a warrant for the same, and you ask whether or not the committee on retrenchment

and reform may lawfully allow the payment of said claims for such additional salary. Permit me to call your attention to the written opinion of the attorney general himself, bearing the date of January 26, 1920, in which he passed directly upon the interpretation of sections 2575-a44 and 2583, *supra,* and in which opinion he held that the three thousand dollar salary provided for the secretary of the State Board of Health in chapter 272, acts of the 38th General Assembly was in lieu of all other statutory salaries, including those referred to in said sections 2575-a44 and 2583.

While the committee on retrenchment and reform has full power to increase the salaries of any state employe named in chapter 272, acts of the 38th General Assembly, yet the committee has no authority to allow claim against the state in direct conflict with express statutory provisions. If the committee desires to increase your compensation, it has full power to do so, but I am of the opinion that the committee is unauthorized to allow the claims in question.

W. R. C. KENDRICK, *Assistant Attorney General.*

EMPLOYMENT OF MEMBERS OF LEGISLATURE

Members of the 38th General Assembly may accept the employment created by Par. (a) Sec. 13, Ch. 299, Acts 38th General Assembly.

October 20, 1919.

Hon. W. D. Greenell,
Clinton, Iowa.

Dear Sir:

Your letter of the 18th inst., addressed to Attorney General H. M. Havner, has been referred to me for reply.

You ask:

> "By paragraph (a) of section 13 of chapter 299, acts of the 38th General Assembly, the Board of Supervisors are directed to appoint and fix the compensation of a qualified physician and surgeon to provide the proper treatment and care of persons interned from time to time in a detention hospital provided for in said chapter. Would it be a violation of the constitution of Iowa to appoint a present member of the General Assembly of Iowa, as such physician and surgeon, the position having been created by the last General Assembly of which he was a member?"

Section 21, article 3 of the constitution of Iowa declares:

> "No senator or representative shall, during the time for

which he shall have been elected, be appointed to any civil office of profit under this state, which shall have been created, or the emoluments of which shall have been increased during such term, except such offices as may be filled by elections by the people."

If the position provided for in paragraph (a), section 13, chapter 299, acts 38th General Assembly, is a civil office, then a member of the 38th General Assembly would be ineligible to hold that office.

Said paragraph reads:

"The Board of Supervisors shall appoint and fix the compensation of a qualified physician and surgeon and such nurses and other attendants as may be necessary to provide proper treatment and care for persons interned, from time to time, in such detention hospital."

The definition of a civil office is well stated in the case of *State v. Valle,* 41 Mo. 29, wherein it is said:

"A civil office is a grant and possession of the sovereign power, and the exercise of such power within the limits prescribed by the law which creates the office constitutes the discharge of the duties of the office."

In *in re Hathway,* 71 N. Y., 238, it is said:

"Public office, as used in the constitution, has respect to a permanent trust to be exercised in behalf of the government, or of all citizens who may need the intervention of public functionary or officer, and in all matters within the range of the duties pertaining to the character of the trust."

In defining the duty necessary to constitute one a civil or public officer our supreme court has said in the case of *State v. Spaulding,* 102 Iowa, 647:

"To constitute one a public officer, * * * his appointment must not only have been made or authorized as above stated, but his duties must either be prescribed by the constitution or the statutes of the state, or necessarily inhere in and pertain to the administration of the office itself. In any event, the duties of the position must embrace the exercise of public powers or trusts; that is, there must be a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public. The following, among other requirements, are usually, though not necessarily attached to a public office: (a) an oath of office; (b) salary or fees; (c) a fixed term of duration or continuance."

In the light of the foregoing definitions we do not believe that paragraph (a), section 13, chapter 299, creates a civil office within the meaning of section 21, article 3 of the constitution of Iowa, but rather an employment which a member of the 38th General Assembly may lawfully and properly accept and exercise.

W. R. C. KENDRICK, *Assistant Attorney General.*

SUFFRAGE

Section 1 of Article of the Constitution prohibits granting right of suffrage to women at any election of officers.

March 20, 1919.

Hon. J. L. Brookhart.
Senate Chamber.

Dear Sir:

I have your letter of March 20th in which you request my opinion as to the constitutionality of the bill offered by Senator Rule conferring upon women the right to vote at school elections.

I have very grave doubt as to whether this bill, if enacted, would be constitutional. The question has never been directly passed upon by our supreme court and, of course, cases from other states construing constitutional provisions in those states do not have much bearing upon the question because of the phraseology of the various constitutions. However, in the case of *Coggeshall v. The City of Des Moines,* 139 Ia., 730, the supreme court of this state in discussing the meaning of section 1, of article 2 of the constitution, seems to hold that a school election for the election of school officers is an election within the meaning of the constitutional provision above mentioned. The court at page 736 says:

> "Appellees contend that the legislature was without power to confer upon women the privilege of voting on any subject and rely on section 1 of article 2 of the constitution as prescribing the qualification of voters at all elections. That section provides that: 'Every male citizen of the United States of the age of twenty-one years, who shall have been a resident of this state six months next preceding the election, and of the county in which he claims his vote, sixty days, shall be entitled to vote at all elections which are now or may hereafter be authorized by law.' The right to vote is not a natural or inherent right, but exists only as conferred by the constitution of the state or some statute. *Gougar v. Timber Lake,* 148 Ind., 38 (46 N. E. 339, 37 L. R. A. 644, 62 Am. St. Rep. 487). Ours is a representative government, wherein only a limited number express the will of all the people, and the constitu-

tion having declared, by prescribing definite qualifications, the persons who shall represent the interests of all at the polls, it is not competent for the legislature to add or subtract from the qualifications as determined by the fundamental law at any election therein contemplated. *Quinn v. State,* 35 Ind. 485 (9 Am. Rep. 754); *Feibelman v. State,* 98 Ind. 516; *Rison v. Farr,* 24 Ark. 161 (87 Am. Dec. 52); *McCafferty v. Olivar,* 59 Pa. 109; *Davies v. McKeeby,* 5 Nev. 369; *People v. Canaday,* 73 N. C. 193 (21 Am. Rep. 465). (See *Morrison v. Springer,* 15 Iowa 304; *Edmonds v. Banbury,* 28 Iowa 267). Whenever the constitution has prescribed the qualifications of electors, they cannot be changed or added to by the legislature or otherwise than by an amendment to the constitution.' Cooley's Constitutional Limitations, section 599. The right of suffrage is a political right of the highest dignity, abiding at the fountain of government power, and is for the consideration of the people in their capacity as creators of the constitution, save as that instrument may authorize a regulation of its mode of exercise. *Morris v. Powell,* 125 Ind. 281 (25 N. E. 221, 9 L. R. A., 326); *People v. English,* 139 Ill., 622 (29 N. E. 678, 15 L. R. A. 131); *Coffin v. Thompson,* 97 Mich. 188 (56 N. W. 567, 21 L. R. A. 662). The doctrine that, as the constitution of the state is a limitation of power, the legislature may enact laws not prohibited, has no application, for, the section quoted having designated the precise qualifications of electors, it thereby determines who shall exercise the privilege of voting, and necessarily prohibits others or disqualifying those or endowed with that privilege. The decisions are so uniform on these propositions that only a few have been cited. In a number of cases similar constitutional qualifications have been held not to be essential in elections not contemplated in the constitution itself. See *Hanna v. Young,* 84 Md. 179 (35 Atl. 674, 34 L. R. A. 55, 57 Am. St. Rep. 396); *Plummer v. Yost,* 144 Ill. 68 (33 N. E. 191, 19 L. R. A. 110); *Belles v. Burr,* 76 Mich. 1 (43 N. E. 24); *Wheeler v. Brady,* 17 Kan. 26); *State v. Cone,* 86 Wis. 498 (57 N. W. 50). But those decisions are not controlling, for that the qualifications prescribed in this state are not only for 'all elections which are now,' but for all which 'may hereafter be authorized by law.' Clearly this has reference to such elections as the General Assembly, in the exigencies of the future, may deem advisable, and, whether such elections are local or general, sex is made an essential qualification of the elector. The language is so plain that discussion cannot elucidate. As bearing thereon, see *State ex rel. Allison v. Blake,* 57 N. J. Law 6 (29 Atl. 417, 25 L. R. A. 480); *People v. Canaday,* 73 N. C. 198 (21 Am. Rep. 465); *in re Gage,* 141 N. Y. 112 (35 N. E. 1094, 25 L. R. A. 781). See *Edmonds v. Banbury,* 28 Iowa, 267.

"True, as contended by appellants, the only elections re-

ferred to in the constitution are those of the state, district, county and township; but this does not preclude other elections from being authorized by law. For this reason decisions relied on by appellants are not in point. Thus in *State v. Dillon,* 32 Fla. 545 (14 South. 383, 22 L. R. A. 124), the qualifications prescribed for 'all elections under this constitution,' and as the instrument contained no reference to elections in municipal corporations, though the former constitution had done so, it was held that the legislature might fix the qualifications of electors at municipal elections. See, also, *Harris v. Burr,* 32 Ore. 348 (52 Pac. 17, 39 L. R. A. 768). Insome of the cases, provisions for the establishment of a school system are given great weight, but in none has an act of the legislature modifying the qualifications of an elector at an election of an officer been upheld where those found in the constitution are made applicable to all elections of officers authorized by law.''

There are some expressions used in the case of *Seaman v. Baughman,* 82 Ia. 216, and in the case of *Taylor v. Independent School District,* 164 N. W. 878, which lend color to the contention that a school election is not an election within the meaning of the constitutional provision above mentioned. A careful reading of those cases, however, will disclose that neither of them involved the election of school officers, and it has been uniformly held by our supreme court that section 1 of article 2 relates only to the election of officers, and therefore what is said in the two cases just cited in view of the questions involved in those cases, has no particular bearing upon the constitutionality of a law conferring upon women the right to vote for school officers.''

It is therefore the opinion of this department that the bill in question, if enacted, would be in violation of section 1 of article 2 of the constitution.

H. M. HAVNER, *Attorney General.*
January 30, 1919.

Note—This opinion was rendered prior to the adoption of the Suffrage Amendment to the Constitution of the United States which changes the rule announced in this opinion.

LEGALIZING ACTS

Special curative acts relating to business of Schools and School Districts, is not within the prohibition of Section 30, Article 3 of Constitution.

A special curative act to validate acts of a school district is not

unconstitutional under restrictions mentioned in Section 30, Article 3 of Constitution.

January 30, 1919.

Hon. James Peters,
House of Representatives.
Dear Sir:

I am in receipt of your inquiry asking for an opinion with reference as to whether or not an act authorizing the school district, including the town of Bouton, to levy a sufficient tax to cover a deficiency of $2,250.00 would be a local or special law, and in violation of section 30 of article 3 of the constitution of the state of Iowa.

I desire to call your attention to the language of the constitution:

> "The General Assembly shall not pass local or special laws in the following cases:
>
> "For the assessment and collection of taxes for *state,* county or road purposes; * * *
>
> "In all the cases above enumerated and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state. * * *"

The facts submitted with your inquiry are as follows:

The school district, including the town of Bouton, entered into contracts for the current year which required them to pay $5,700.00 in good faith and without knowing their taxes as then levied would only produce the sum of $3,500.00, leaving a deficit of $2,200.00. This act is to enable these parties to issue warrants to pay the deficit, the warrants to be carried by the parties until the coming year, or until such time as sufficient levy may be made to pay the same.

The question propounded is not a new one and in principle is not different from that of a special legalizing act. A case in point upon this proposition is that of

C., R. I. and P. Ry. Co. v. Avoca, 99 Iowa, 556. In that case the railroad company brought suit to recover from the defendant about $2,000.00 with interest for school taxes paid upon the assessments and levies for the years 1889, 1890 and 1891. The taxes were alleged to be void because the board of directors of the district did not pass the resolution levying or assessing the taxes

until after the time fixed by law. It was conceded in the case that the resolution was not passed by the board timely as required by statute. The 25th General Assembly however, passed a special act attempting to legalize these void taxes. The title to the act was as follows:

> "An act to legalize the acts of the Board of Directors of the independent district of Avoca in the levying of the taxes for school purposes."

The body of the act was as follows:

> "The action of said board in making said levy on the * * * 17th day of August, 1888, on the 22nd day of July, 1890, and on the 15th day of August, 1892, instead of on or before the third Monday in May of each of said years, is hereby declared to be legal and valid, the same as if said tax had been levied on or before the third Monday in May aforesaid."

It was claimed that this act was unconstitutional for the reason that it was a local or special law, and that a general law could have been made applicable and operative throughout the state as required by section 30 of article 3 of the constitution of Iowa.

Speaking with reference to this question, the court said:

> "The precise question has been determined by this court in many cases. The fact that the law was retrospective in its effect is no valid objection to its validity. In *Boardman v. Beckwith,* 18 Iowa, 292, it was determined that the legislature may, by retrospective legislation, legalize the levy and assessment of taxes which were assessed and levied when there was no statute in force authorizing the levy. It is said in that case that: "The power to pass acts of this character, conducive as they are to the general welfare, and based upon consideration of controlling public necessity, is, in our opinion, undoubted. It does not interfere with vested rights, nor impair the obligation of any contract.' It is true that was a general law. We cite it for the purpose of showing the extent to which courts go to maintain the acts of the proper authorities in administering the laws pertaining to the assessment and collection of the necessary public revenue. The same doctrine was also announced in the case of *Land Co. v. Soper,* 39 Iowa, 112. The curative act in that case was also general in form. But the same principle has also been applied to local and special acts. In *State v. Squires,* 26 Iowa, 340, it was held that a local and special curative act legalizing the defective organization of a school district was valid. And in *McMillen v. Boyles,* 6 Iowa, 304, is was held that, when the legislature has power to authorize an act to be done, it may, by a retrospective act, legalize

and declare valid any informality or irregularity in the exercise of the power thus conferred. Many other cases to the same effect might be cited. In the late case of *Richman v. Supervisors,* 77 *Iowa,* 513, (42 N. W. Rep. 422), it was held that a special act legalizing the void acts of the Board of Supervisors of Muscatine county in making a special assessment for the construction of a ditch, was valid."

In the case of

Richman v. Supervisors of Muscatine County, 77 Iowa, 513,

the court said, in passing upon a similar question, and construing the same section of the constitution:

"It cannot be questioned that the curative act is both local and special in its application. Its whole tenor and bearing are to that end. It is in aid of a particular and local enterprise. It can only be sustained upon the theory that a general law cannot be made applicable. * * * If the mere wording of the law, without regard to legislative purposes, is to be the guide for constitutional interpretation, we have no doubt that it could be effected. But was such the intention of the framers of the constitution? To so hold is to place ourselves in harmony with the often repeated attempts at legislative invasion, when confronted by constitutional law, which we have no desire to do. It would be difficult to conceive a state of facts that could not be brought within the provisions of a general law, with such a construction. No such purpose was intended by the constitutional enactment, but, on the contrary, it presumes conditions under which general laws are not applicable, and special or local laws are designed. While the legislature might recite the particular facts as to the 'island levee,' including acts done or omitted, and then provide that whenever such a state of facts should exist certain results will follow, it would be done with a view solely to effect a local and special purpose. The fact that the legislature framed the act in question as it did is evidence of its design, and that it believed that the general law could not be made applicable; and we are not justified in disturbing its acts on constitutional grounds, except where the infraction is clear, palpable and plainly inconsistent."

The case of

McSurely v. McCrew, 140, Iowa, 163,

was one in which the legislature, by a special act, exempted the defendant McCrew from the payment of money lost in a bank failure under his treasurer's bond. The court, speaking with reference to the matter, said:

"It is a little difficult to define a curative act. It is necessarily retrospective in character and undertakes to cure or validate errors or irregularities in legal or administrative proceedings, and to give effect to contracts for failure to comply with some technical requirement. *Meigs v. Roberts,* 162 N. Y., 371 (36 N. R. 838, 76 Am. St. Rep. 322). If the defects are jurisdictional or relate to substantive contract rights, they cannot ordinarily be cured by a healing act. Generally speaking, the legislature may by subsequent act validate and confirm previous acts of a corporation otherwise invalid. *Bridgeport v. Railroad,* 15 Conn., 475; *Mattingly v. District of Columbia,* 97 U. S. 687 (24 L. Ed. 1098); *McMillen v. Boyles,* 6 Iowa, 304; Id. 391; *Atchison v. Butcher,* 3 Kan., 104; *San Francisco v. Real Estate,* 42 Cal., 517; *Anderson v. Santa Anna,* 116 U. S., 364. This is in accord with the general rule that a curative act may be passed whenever the irregularity to be healed consists in the doing of some act, or the doing of it in such a manner as the legislature might have made immaterial or have authorized by a prior law. *Boardman v. Beckwith,* 18 Iowa, 292; *Richman v. Board,* 77 Iowa, 517; *Windsor v. Des Moines,* 101 Iowa, 343; *Witter v. Board,* 112 Iowa, 391. Such an act is of necessity special, and cannot be made general, and its nonuniformity is no ground of attack. *Witter v. Board, supra.*

"The difficulty with the act, viewing it from the standpoint of a healing one, is to find the power of the legislature to authorize the Board of Supervisors of Van Buren county to do the acts and pass the resolutions which were attempted to be cured. Within its field the legislature is supreme. The first section of the act now before us is purely legislative in character. It is neither executive nor judicial, and the legislature has plenary power in its field subject only to constitutional limitations or prohibitions. Its power is not a delegated one, but supreme within its proper sphere. Hence it may exercise all powers not forbidden by the constitution of the state, or delegated by the people to the general government or prohibited by the constitution of the United States. *McMillen v. Boyles, supra.* * * * Again it is argued that it confers a special benefit or immunity upon a particular individual, and is therefore invalid. This proposition is fully answered in *State v. Squires,* 26 Iowa, 344. It is not to be assumed that there were other county treasurers in the same situation as McCrew. A general law could not, therefore, be made applicable, for the situation disclosed a novel and most unusual state of facts. The act in question is not bad because special in character."

It will be seen from these authorities that the supreme court of our state, in construing this provision of the constitution, has given great latitude to the legislature, and if the legislature could,

by a curative act, validate the warrants issued by the school district in this case—a question which we do not think is open to debate—they could authorize the school district to issue these warrants for the same reason.

It is, therefore, the opinion of this department that an act could be passed by the legislature giving the town of Bouton the right to issue these warrants and the same would not be in violation of section 30 of article 3 of the constitution of Iowa.

H. M. HAVNER, *Attorney General.*

OPINIONS TO THE EXECUTIVE COUNCIL

ISSUANCE OF SECURITIES OF CERTAIN CORPORATIONS

The Executive Council has authority under Chapter 13-A to refuse approval of issuance of securities of certain corporations.

February 25, 1920.

Hon. F. S. Shaw,
Auditor of State.

Dear Sir:

You have orally requested the opinion of this department with reference to the form of bond proposed to be issued by the Capitol Hill Bank, under the provisions of chapter 13-a, title XX, supplement to the code, 1913.

I am informed that this institution is a corporation conducting a private bank and that it was in existence before the passage of chapter 236, laws of the 38th General Assembly.

The questions submitted do not involve so much a question of law, but rather a question of public policy, which the Executive Council is to determine in connection with the proposed issue of these bonds. What I have to say then is rather in the line of suggestions as to what appear to me objectionable features of this issue.

First: It appears to me that the Executive Council has the right to take into account the protection of the depositors of this bank, although it is a private bank and not under state supervision. They may be affected by the issuance and sale of these securities if the funds which they have deposited in the bank are used in connection with the making of long term mortgage loans which are to be deposited with you, as auditor of state, to secure this bond issue, and they might be further affected if the funds of the depositors could be paid out in the redemption of these bonds.

Second: A part of the obligation of the bank set forth in the bond is the agreement to pay interest at the rate of five per cent semi-annually in April and October of each year "and in addition

thereto agree that after paying a dividend to the bank of five thousand dollars each year, all of the net earnings of the Capitol Hill Bank of Des Moines, Iowa, are to be paid to the registered owner of this and other participating bonds issued and outstanding, in proportion to the amount held by the owner."

The stockholders and directors of this bank, by this clause, limit the dividend of the bank to five thousand dollars each year and pledge all of the net earnings over and above that sum to the holders of these bonds that may be outstanding from time to time. To put it another way, the bank cannot pile up a surplus or an undivided profits account for the benefit of its depositors unless the directors are willing to deprive stockholders of a portion of this dividend of five thousand dollars. All profits in excess of that will belong to these bondholders, and while the depositors are not entitled to the profits that may be earned by the bank, it does seem to me that they might be entitled to the protecion that ought to be given them by allowing some accumulation of undivided profits or surplus.

Third: The proposed bond contains the following:

> "1. STATE SUPERVISION. The Bond Department of the bank is operated under the supervision of the auditor of state of the state of Iowa, and the affairs and securities of such department are at all times subject to inspection and examination by the auditor of state."

There can be but one purpose in the insertion of such clause in the bond, and that is to attempt to convince prospective purchasers of the bonds that they are safe and conservative because operated under the supervision of your department. I think you should insist upon the elimination of this clause.

Fourth: Under the paragraph headed: "2. PROCEEDS OF THIS BOND," it is provided that the proceeds from the sale of this and like bonds are to be invested in such interest-bearing securities as are authorized by the statutes of Iowa, and of the kind designated in subdivision 1, 2, 3, 4, 5 and 6 of section 1006, 1013, supplement to the code, "or such other securities as shall be approved by the Executive Council of the state of Iowa." I think the clause which I have quoted ought to be eliminated, because the Executive Council may or may not pass upon the securities that may be purchased from the proceeds of the sale of these bonds. It is unnecessary to quote section 1930-p, supplement to the code, 1913, to show that the Executive Council in the

first instance in a case a bond is not deposited may approve certain securities which are to be deposited with the auditor of state in the sum of twenty-five thousand dollars; then at the end of the calendar year other securities may be deposited "equal to all its liabilities to persons residing within this state, and shall keep such deposit at all times equal to such liability," and that the amount of such deposit shall not be reduced below the sum of twenty-five thousand dollars at any time except when the business is being wound up. The law does not specifically require the Executive Council to pass upon all securities taken by the company, and the purchaser of the bond should not be given to understand that the Executive Council will pass upon all securities in which the proceeds of those bonds may be invested.

Fifth. Your attention is also called to section 5, which reads as follows:

> "5. BOND REDEEMABLE. If the owner of this Bond so desires, by giving the Bank thirty days written notice before any interest-paying date, he may surrender the Bond to the Bank for cancellation. The Bank will pay to the registered owner the par value plus accumulated interest.
>
> "It is understood and agreed that the cash to be paid out of the Bank for surrender Bonds, during any one month, shall be limited to one-half of the cash received from the sale of like Bonds during that month. The applications for such, that are filed, will be allowed in the order of presentation to the Bank."

This clause is one which needs close reading in order to advise the prospective purchaser of its meaning. A designing broker or salesman would be likely to call the attention of the prospective purchaser to that portion of the quoted clause which apparently allows him to surrender his bond for cancellation by giving thirty days, written notice and to receive par value plus accumulated interest, but it is evident from what follows that the bondholder cannot receive any of his money if the bank does not choose to pay the same, unless the cash to be paid out on bonds to be surrendered during a given month shall not exceed one-half of the cash received from the sale of like bonds during that month. I think this provision should be absolutely eliminated. If the bank does not desire to redeem bonds upon thirty days' written notice, then it should state clearly just upon what terms it will redeem the bonds, but their redemption should not be left to some contingency

which is wholly uncertain and wholly beyond the control of the bondholder.

Sixth: Clause 6, relating to lost bonds, is as follows:

> "6. LOST BOND. In case this Bond should be lost, destroyed or fraudulently obtained from the owner, immediate notice in writing thereof must be given at the office of the Bank. After such notice is given, if a satisfactory explanation be made and a Bond of Indemnity in such form and of such amount as shall be approved by the officers of this Bank, is given, a duplicate Bond thereupon will be issued to the registered owner of this bond."

The expression "in case this bond should be lost, destroyed or fraudulently obtained from the owner," etc., apparently makes the bank determine whether or not a given bond has been "fraudulently obtained from the owner," and that expression should be eliminated.

Seventh: Clause 7 in the bonds is as follows:

> "7. LIABILITY OF THE BANK. The Bank shall not be liable for any written or oral statements made by any of its officers, employes or agents which in any way changes the terms or conditions of the Bond as are printed herein."

In the absence of this provision, the bank is liable for representations made by its agents, though it may or many not be liable for statements which vary or contradict the provisions of the written instrument that it is putting forth. It seems to us that this provision ought to be entirely eliminated, because it is inserted obviously to protect the institution against misrepresentations that may be made by persons selling these bonds. The view of the notorious condition that exists in this state at the present time, it seems to us that no concern should be permitted to hide behind a provision of this kind.

Under the provisions of chapter 13-a, supplement to the code, 1913, it is for the Executive Council to determine "that the business is not in violation of law or public policy and is safe, reliable and entitled to public confidence," etc. I do not wish to be understood as saying that I consider this issue of bonds in violation of law, but I do think it is opposed to public policy and that it is not "safe, reliable and entitled to public confidence," although, as above suggested, that is a matter for the Executive Council to determine.

In determining this question it occurs to me that the question of precedent should be given controlling consideration. I do not know the officers or stockholders in this institution—it may be that these men are abundantly responsible and of the highest integrity, but granting that to be true, they may dispose of their institution at any time, or some other institution may seek to do the same identical thing which is not officered or managed by men of responsibility or integrity.

F. C. DAVIDSON, *Assistant Attorney General.*

ATTORNEY FEES ALLOWABLE FOR TESTING EXISTENCE OF CODE COMMISSION

State shall pay legal services of lawyer retained to test the existence of the commission.

February 24, 1920.

Hon. R. E. Johnson,
Secretary Executive Council.

Dear Sir:

Your letter of the 18th inst., addressed to Attorney General Havner, has been referred to me for reply.

You enclose the claim of George E. Hise, amounting to $350.00 for legal services performed by the Iowa Code Commission in connection with the mandamus proceedings instituted by James H. Trewin, a member of the Iowa Code Commission, to compel the Executive Council of Iowa to admit and allow the per diem of said Trewin as a member of said commission.

You then ask as to the legality of the state of Iowa paying the claim of Mr. Hise.

The claim, if allowed, must come within either section 12, chapter 50, acts of the 38th General Assembly, or section 170-x, supplement to the code, 1913.

Section 12, chapter 50, acts of the 38th General Assembly, provides:

> "The Executive Council shall audit all expense connected with the work of said commission, and when approved, the secretary of state shall draw orders on the auditor of state for the amounts so shown. The auditor in turn shall issue orders on the state treasurer, who shall pay the same out of any funds not otherwise appropriated."

Section 170-i, supplement to the code, 1913, provides:

"The Executive Council of the state of Iowa is hereby authorized to allow and pay any costs taxed to the state of Iowa or other expenses incurred in any suit or proceeding brought by or against any of the state departments or in which the state is a party or interested, to be paid out of any moneys in the state treasury not otherwise appropriated."

Pursuant to the provisions of section 12, *supra,* it will be observed that the Executive Council shall audit all expense

"connected with the work of said commission."

While the question is not altogether free from doubt as to whether the services of a lawyer employed by the individual members of the commission to test the legal existence of said commission is "expense connected with the work of said commission by the legislature, yet we are of the opinon that the legislature never intended that the language used should be given such a broad interpretation, but should be limited to expense created in the actual progress of the commission in editing and codifying the laws of Iowa.

As to whether the payment of the claim of Mr. Hise is authorized under section 170-i, *supra,* in our opinion will depend upon:

First: Whether the Iowa Code Commission is a department of the state;

Second: Whether the state was a party or in any way interested in the mandamus proceedings in which the claimant performed legal services.

The Iowa Code Commission was created by the express act of the 38th General Assembly for the purpose of searching through the various existing codes, supplements and session laws, and carefully sorting out the live legislation and discarding the dead, and to print and bind the live legislation in one volume for the convenience of the citizens of Iowa. Not only were the duties of the commission limited to the codification of the laws of this state, but the General Assembly specifically required the commission to also submit a report

"calling attention to such portions of the laws as may be found to be conflicting or redundant or ambiguous, or such as otherwise require legislative action to make clear; and shall include in such reports the comments and recommendations of the commission or editor upon the subject of any part of said code."

The term "state departments," as used in section 170-i, should

be given a broad construction, and should include any branch or arm of the state government. It would be absurd and ridiculous to hold that the expenses connected with a suit brought by the auditor of state could be paid by the state, but not those in proceedings affecting the commission of pharmacy. Clearly, the code commission is an arm of the state government, and comes within the term "state department" as used in said section.

But even though the code commission cannot be held to strictly come within the term "state departments," yet the simplification of the laws of this state, the separation of the live legislation and the codification of the same into one volume for convenient use, and the information as to what laws are conflicting, redundant or ambiguous, and the recommendations from able lawyers as to how such defects may be corrected, surely are matters in which the state of Iowa is interested. If the code commission ceased to function before such information could be collected and prepared for submission to the next session of the General Assembly, then the state of Iowa would be the party most affected thereby. And when the existence of that commission is attacked and a proceeding in court is necessary to establish its existence, surely the state is interested in that proceeding.

In the mandamus suit of James H. Trewin against the Executive Council, the real parties in interest were two branches of the state government, and the real issue was the existence of one of those branches. The state of Iowa was interested in the result of that proceeding, and therefore the expenses incurred therein are expenses which the Excutive Council is authorized to allow and pay under section 170-i.

We are therefore of the opinion that the Executive Council is legally authorized to allow the payment of the claim in question.

W. R. C. KENDRICK, *Assistant Attorney General.*

ISSUANCE OF STOCK DIVIDENDS

Stock dividends may be issued without the consent of the executive council.

April 9, 1920.

Hon. R. E. Johnson,
Secretary of Executive Council.

Dear Sir:

Your letter of recent date, addressed to the attorney general, has been referred to me for reply.

You ask:

> Is it necessary for a corporation for pecuniary profit organized under the laws of the state of Iowa to apply to the Executive Council for leave to issue its capital stock under the following circumstances?:
>
> First: The corporation records show that the Board of Directors duly and lawfully and unanimously adopted a resolution setting aside a certain stated amount of the cash surplus of the corporation for the payment of a dividend upon its outstanding stock, said dividend to be paid or distributed in stock of the corporation pro rata among the existing stockholders; a stock dividend in other words, based upon the net profits—cash surplus—actually on hand and in the treasury of the corporation as shown by the treasurer's books.
>
> Second: The said records show the due and lawful adoption of a resolution by the Board of Directors setting aside a certain stated amount of the cash assets (not necessarily profits) of the corporation for the payment of certain indebtedness such as salaries of employes, agents or officers of the company, and authorizing the proper officers of the company to liquidate the said indebtedness in whole or in part and to the extent of said fund so set apart from the cash assets by issuing stock against and to the extent of such cash fund to the said parties so indebted by and with their consent, of course.
>
> Would not the stock issued in both instances mentioned be paid for in money and not "in property or in any other thing than money" within section 1641-b of the 1913 supplement to the code? The records show that in both cases the corporation has set aside a certain stated amount of its cash assets (surplus, of course, in the case of the dividend) which constitutes the basis of or payment for the said stock issue.

The law relating to the issuance of shares of stock in a corporation for pecuniary profit for other than cash will be found in section 1641-b, supplement to the code, 1913, which reads as follows:

> "That from and after the passage of this act no corporation organized under the laws of the state of Iowa, except building and loan associations as defined and provided for in chapter 13, title 9 of the code, shall issue any capital stock or any certificate or certificates of shares of capital stock, or any substitute therefor, until the corporation has received the par value thereof. It is proposed to pay for said caid capital stock in property or in any other thing than money, the corporation proposing the same must, before issuing capital

> stock in any form, apply to the Executive Council of the state of Iowa for leave so to do. Such application shall state the amount of capital stock proposed to be issued for a consideration other than money, and set forth specifically the property or other thing to be received in payment for such stock. Thereupon, it shall be the duty of the Executive Council to make investigation, under such rules as it may prescribe, and to ascertain the real value of the property or other thing which the corporation is to receive for the stock; and shall enter its finding, fixing the value at which the corporation may receive the same in payment for capital stock; and no corporation shall issue capital stock for the said property or thing in a greater amount than the value so fixed and determined by the Executive Council. Provided that for the purpose of encouraging the construction of new electric railways, and manufacturing industries within this state, the labor performed in effecting the organization and promotion of such corporation, and the reasonable discount allowed or reasonable commission paid in negotiating and affecting the sale of bonds for the construction and equipment of such railroad or manufacturing plant, shall be taken into consideration as elements of value in fixing the amount of capital stock that may be issued."

It will be observed from the statute above quoted that

> "If it is proposed to pay for said capital stock in property or in any other thing than money, the corporation proposing the same must, before issuing capital stock in any form, apply to the Executive Council of the state of Iowa for leave so to do."

The clear intention of such provision is to protect creditors dealing with the corporation, and to stand as a guarantee that the corporation has actually received the amount of its capital stock in cash or its equivalent. If property is taken in payment of stock, then such property shall actually have a cash value equal to the par value of the stock issued therefor.

If the articles of incorporation provide for an authorized capital in excess of that actually paid up and outstanding, and also authorized the Board of Directors to issue stock at such times and in such manner as the board may determine, and the board formally adopts a resolution declaring a stock dividend among the existing stockholders, and actually sets aside an amount of cash out of the earnings of the company equal to the aggregate par value of the stock to be issued, and the stock is issued and paid up out of that fund, we are of the opinion that the stock

is, in fact, paid for in cash, and it is not necessary to obtain the consent of the Executive Council. To that extent your first question should be answered in the affirmative.

As to your second question, a different situation arises. As hereinbefore stated, the purpose of the law found in section 1641-b, *supra,* is to protect those extending credit to the corporation and to guarantee that it has assets in cash, or its equivalent, equal to the amount of stock issued and outstanding. When the consideration for stock is other than money, then the value of that consideration shall be determined by the Executive Council. Therefore, if stock is issued in payment of an indebtedness against the company, such as compensation for personal services, even though a certain amount of the assets are set aside with which to pay that indebtedness, then and in that event the Board of Directors are fixing the value of such service, and not the Executive Council. The amount agreed upon by the board to be paid such employes might be grossly out of proportion to the value of such services, and to permit stock to be issued in payment of such services would open a rich field for spoliation on the part of greedy, crooked officers. The Executive Council should be the body to determine the value of such services, and for that reason your second question is answered in the negative.

W. R. C. KENDRICK, *Assistant Attorney General.*

LAKES AND LAKE BEDS

Construction of chapter 2-b Supplement to Code 1918 and chapter 165 Acts 37th General Assembly relating to sale of certain lake beds.

May 10, 1920.

Hon. R. E. Johnson,
Secretary Executive Council.

Dear Sir:

Your favor of the 26th ult. asks a number of questions regarding the sale of Keokuk and Odessa Lake beds, and regarding the Muscatine Slough bed. I shall attempt to answer these questions in their order:

Your first question is as follows:

> Has the Executive Council sufficient authority under chapter 165 of the 37th General Assembly to proceed with the sale of the land therein mentioned?

I think this question should be answered in the affirmative.

Chapter 2-b, supplemental supplement to the code, 1913, repealed chapter 2-b, title 14, except as to

> "any lake or lake bed, which, under authority of the Executive Council has been already drained or in the draining of which the sum of five hundred dollars has been in good faith expended or to lakes where the lake bed was, prior to January 1, 1915, sold by the state under the provisions of said chapter, but no such excepted lake bed shall be hereafter sold by the state or leased for more than one year."

As I understand it these two lakes and Muscatine slough were a part of a drainage improvement upon which more than five hundred dollars had been expended at the time of the adoption of chapter 2-b, acts of the 36th General Assembly, as it appears in the supplement to the code, 1915. It therefore follows that the provisions of law with reference to the sale of such lake beds had not been repealed, and under the provisions of chapter 165 of the 37th General Assembly the state may proceed to sell these lake beds.

Your second question is as follows:

> May the Executive Council order a patent issued, without consideration, for the lands (described by lots) used by the ditch right of way? Said patent to be issued to the Drainage District.

I would answer this question in the negative because there is no express provision of law authorizing a conveyance of that kind. The land occupied by the ditch is in the nature of an easement, but the state still holds the fee title.

Your third question is as follows:

> May the Executive Council patent the land to abutting property owners, without consideration, that lies between the present high water mark and the meander lines as found by the original government survey (known as accreted lands)?

I think this question should be answered in the negative because under the law the abutting property owner owns to the actual shore line and in every case the meander line is not the true boundary. This does not entitle him, however, to any conveyance from the state because the land which may lie inside the meander line but outside the actual shore line is not state property but passed under the patent or other conveyance made by the United States. The patent by the state would not convey or give the adjoining owner any greater title than he has at present.

Your fourth question is as follows:

> In an instance where it appears from the survey that two abutting property owners may have privilege of a ninety-day option on one particular lot, within a given forty acres, may one such property owner waive his right of option and the remaining owner avail himself of the right of option to entire tract? If not, how should division be made?

If the property owners who may be entitled to a portion of the same tract of land cannot agree on the particular portion that each may buy at the appraised value within the ninety days in which such owners have the first right to purchase, then in my judgment, each is entitled to such proportion of the lake bed as abutts upon his particular tract as compared with that abutting the tract owned by the other claimant. I do not know of any instance where this question has arisen, but that would appear to be the proper method of deciding a controversy of this sort.

Your fifth question is as follows:

> Taxes levied on land owned by the state, both below high water mark and that which is considered accreted lands, has not been paid by the state when due. Provided the Executive Council has authority to proceed with the sale of these lands, shall penalty attach to and be payable on the tax that is delinquent when assumed by the grantee of said land?

My opinion is that since the state has consented that a drainage tax may be laid upon state lands that it has impliedly consented to pay penalties the same as any other land owner in case any installment of interest or principal is not paid at the time required by law. The state would not be required to pay any tax in the absence of a statute authorizing the same to be levied, but having consented to the levying of the tax, I am of the opinion that the penalties must be paid in the same way they would be exacted from an individual owner. But I would not go so far as to hold that state lands could be sold for non-payment of taxes.

F. C. DAVIDSON, *Assistant Attorney General.*

DAMAGES INCURRED IN RELEASE OF WATER FROM A LAKE

The executive council has no authority to pay a claim for damages to a property owner when crops are destroyed by the release of water in a lake, the outlet of which was obstructed by weeds and debris, which obstruction was, by any means, suddenly removed.

May 22, 1920.

Hon. R. E. Johnson,
Secretary Executive Council.

Dear Sir:

We have your request for the opinion of this department on the following questions:

> You will find enclosed two claims for damages sustained by the sudden opening of overflow pipe at the outlet of Elm lake.
>
> The Executive Council desire an opinion as to whether or not they have authority to pay said claims, taking it for granted the damages were had as claimed.
>
> Another question arises from said claims that the Executive Council desire an opinion on. Such question being: "May the land owners around the lake create a tile drain from their land to a lake, disregarding the natural water course, and if so, what provision should be made for land owners at or below the outlet of the lake, the last mentioned land owners having extra flow of water to contend with?"

As to the first question presented, I have no hesitancy in ruling that the Executive Council has no authority whatever to pay claims of this kind. Express authority must be conferred upon the council to pay claims of any kind, and there is an absolute want of authority in this instance.

As to the second claim, I will call your attention to section 1989-a53 of the 1913 supplement, which provides, in part, as follows:

> "Owners of land may drain the same in the general course of natural drainage, by constructing open or covered drains, discharging the same into any natural water course, or into any natural depression, whereby the water will be carried into some natural water course, and when such drainage is wholly upon the owner's land he shall not be liable in damages therefor to any person or persons or corporation."

From the foregoing it is doubtless lawful and proper for a land owner to drain his land into a lake or other depression.

J. W. SANDUSKY, *Assistant Attorney General.*

PIONEER MONUMENT CANNOT BE MOVED WITHOUT LEGISLATIVE AUTHORITY

The executive council has no authority to move the pioneer monument, fountain, and flower bed at west entrance of capitol grounds without legislative authority.

June 11, 1920.

Mr. O. W. Crowley,
Capitol Extension Department.

Dear Sir:

You have requested an opinion from this department upon the following question:

> I wish you would kindly advise me whether or not the pioneer monument, the fountain and the monumental flower bed, located at the west entrance of the original capitol grounds, were placed there by legislative enactment, and if the Executive Council is vested with authority to remove the fountain and flower bed, and move the pioneer monument to another location in the grounds.

The authority for erecting the pioneer monument, fountain and flower bed referred to in your letter will be found in chapter 59, acts of the 23rd General Assembly. By said act the legislature appropriated $100,000 for improving the capitol grounds. The money thus appropriated was placed under the control of the Executive Council, but the improvements were to be made in accordance with definite plans furnished by an architect by the name of J. Weidenmann.

Section 4 of said chapter provides as follows:

> "The plans adopted by the Board of Capitol Commissioners for the improvement of the ground, made by J. Weidenmann, shall be followed as the general plans for improving the grounds, but the Executive Council may make such changes in the details as they may deem for the best interest of the state."

According to the plans made by Mr. Weidenmann and adopted by a board of capitol commissioners the monument, fountain and flower bed were placed in their present location.

I can find no statute conferring upon the executive council authority to move to another location the improvements herein referred to.

I am therefore of the opinion that the pioneer monument, fountain and flower bed at the west entrance of the original capitol

ground cannot be move to another location without express legislative authority.

W. R. C. KENDRICK, *Assistant Attorney General.*

EXCHANGE OF STATE LANDS

No authority for the executive council to authorize an exchange of lands with land owners whose lands abut on the lake in order to straighten boundary line.

November 17, 1919.

Hon. R. E. Bales,
Secretary Executive Counncil.

Dear Sir:

Under date of October 17, 1919, you wrote as follows:

> "Attorney J. F. Gallup, of Jefferson, appeared before the council recently with a proposition for straightening the boundary lines between the land of two of his clients and the land in Goose Lake bed belonging to the state, the proposition entailing the estate between the state and these property owners. The council has a report on the matter from the State Highway Commission, but the question has arisen as to the legality of such proceedings, I have been directed to request an opinion from your department as to whether such land might be conveyed without legislative enactment."

Under chapter 44, acts of the 38th General Assembly, the Executive Council has been authorized to drain Goose lake in Greene county, but I do not find where the council has been authorized to sell this lake bed.

I do not think the power is reposed in any state official or officials to accept the proposition made by Mr. Gallup no matter how desirable it might be that the boundary lines of certain tracts of land should be straightened. The fact that it might be very beneficial to the state would not supply the want of authority. I think the only possible way which this can be done would be to secure some sort of an enabling act from the legislature authorizing the transfer of certain strips or tracts of land by the state in exchange for certain strips or tracts of land belonging to the other interested parties.

F. C. DAVIDSON, *Assistant Attorney General.*

PRINTING OF PREMIUM LISTS

The cost of printing the "premium list" by the Iowa Corn and Small Grain Growers' Association authorized.

April 21, 1919.

Hon. R. E. Bales,
Secretary Executive Council.

Dear Sir:

I am in receipt of your letter of the 15th inst. in which you state:

> "I have been directed by the Executive Council to request an opinion from your office as to the standing of a claim submitted by the Iowa Corn and Small Grain Growers' Association for the printing of a program and premium list in connection with an exhibition made by that organization. The premium list was used extensively for advertising purposes, and the association desires that the expense of printing same shall be met by the state under the appropriation provided by the legislature. The council desires to know whether the statute is broad enough to cover the expense of this publication and whether it can be legally paid. Mr. Kendrick, of your office, is familiar with the State Board of Audit, and will no doubt be able to inform you in detail as to the matters which you desire to know concerning the situation."

Our attention has been called to the fact that the State Board of Audit refused to allow this claim for the following reasons:

1. Because the Iowa Corn and Small Grain Growers' Association had no legal right to give premiums and issue a premium list.

2. Because the money received from the sale of advertising space would be, in effect, an increase in the authorized appropriation to said association and therefore illegal.

We do not believe that either objection is sound. Section 10, chapter 187, acts of the 37th General Assemblly, provides:

> "The objects of the Iowa Corn and Small Grain Growers' Association shall be:
>
> "1. To advance the interests of the farmers in securing better methods of selecting and caring for seed corn and small grain.
>
> "2. To improve and develop varieties of corn and small grain, especially adapted to Iowa.
>
> "3. To encourage better and more thorough methods of production.

"4. To hold an annual convention for instruction in corn and small grain growing.

"5. To issue certificates of qualification to expert judging of corn and small grain.

"6. To publish an annual report of the exhibition and convention.

"7. To issue a seed directory which will indicate where good seed may be secured.

"8. To help in disseminating good seed, especially adapted to Iowa conditions.

"To attain these objects the association shall conduct an annual state exhibition and convention at the same time as the Farmers' Winter Short Course, and shall publish a seed directory from time to time which will aid those who desire to secure good seed and shall help in what other ways the association may deem necessary to attain the objects already set forth in this act."

Section 11 of said chapter provides that:

"Said association shall act by and through an executive committee."

And section 12 of said chapter provides:

"Said board (executive committee) shall pay all expenses of conducting the annual exhibition."

In section 14 of said chapter the purpose of the state appropriation is declared to be

"For the encouragement of the corn and small grain growers' industry in this state."

It will be seen from the foregoing statutory provisions that one of the objects of the Iowa Corn and Small Grain Growers' Association is

"To encourage better and more thorough methods of production,"

and to attain that object, the association shall conduct an annual state exhibition and pay all expenses incident thereto. If the Executive Committee believes that it will "encourage better and more thorough methods of production" to stimulate competition among the grain growers of the state, by offering premiums at the annual exhibition, then it is entirely within the discretion of the board to do so, and such action on their part is authorized by chapter 187 aforesaid.

As to the second objection of the State Audit Board, namely, that payment of the cost of printing the "Premium List and Seed Directory" is unauthorized because the pamphlet contains advertising matter, we believe that objection is also without merit. It will be remembered that chapter 187 aforesaid requires the Executive Committee to hold an annual state exhibition and pay all expenses incident thereto. If the Executive Committee believes that the giving of premiums will encourage better and more thorough methods of production, then the giving of premiums is solely for the committee to determine, and that expense may be taken from the original appropriation, or the money may be raised by the sale of advertising space. Therefore since the cost of furnishing premiums at the state exhibition is a legitimate expense payable out of the original appropriation, the cost of printing a pamphlet containing a list of the premiums would be an expense incident thereto; and if the Executive Committee paid for the premiums out of the fund raised from the sale of advertising space in the pamphlet containing the premium list, then the cost of printing said pamphlet would be a legitimate expense payable out of the state appropriation to the Iowa Corn and Small Grain Growers' Association.

We are informed that the Iowa Corn and Small Grain Growers' Association used the money received from the sale of advertising space in the purchase of premiums.

Therefore, we are of the opinion that the cost of printing the pamphlet entitled "Premium List and Seed Directory" is a legitimate expense and should be allowed by the state.

H. M. HAVNER, *Attorney General.*

OPINIONS RELATING TO BOARD OF CONTROL

DELINQUENT CHILDREN

District court may send delinquent children over 15 years to State Juvenile Home.

November 18, 1920.

Board of Control of State Institutions,
State House.

Gentlemen:

At the verbal request of Mr. J. H. Strief, I am requested to furnish you a written opinion upon the following question:

> "Has the district court power to commit delinquent children over fifteen years of age to the State Juvenile Home at Toledo, Iowa?"

Section 254-a23 of the supplement to the code, 1913, authorizes the district court to commit delinquent children:

> "To any state institution which may be established for the care of delinquent boys or girls over the age of ten years."

Section 1 of chapter 165, acts of the 38th General Assembly, provides for the creation of a juvenile home:

> "For the reception and care and education of dependent, neglected, delinquent or destitute children residents of Iowa."

Section 4 of said chapter provides that:

> "The district and superior courts of the state shall send to said home all mentally and physically normal resident children who may be by said courts adjudicated to be dependent, neglected, delinquent or destitute children."

Section 5 of said chapter provides:

> "Destitute children, not adjudicated to be such by the juvenile court and who have legal settlement in the state, may be admitted to said home upon application for admission when said application is approved by the Board of Supervisors of the county of legal settlement or a judge of a court of record having jurisdiction in said county."

Section 6 of said chapter provides:

> "Such dependent, neglected or destitute and delinquent

children as are under the age of fifteen years shall be eligible to admission in said home when this act, and other laws of the state of Iowa applying thereto, have been complied with."

Pursuant to the foregoing statutory provisions it is apparent that the district court has the power to commit any delinquent child to any state institution established for the care of delinquent boys and girls over the age of ten years.

Inasmuch as the State Juvenile Home at Toledo is created for the purpose of the treatment and care of delinquent boys and girls, I am of the opinion that the district court is fully empowered to commit delinquent children to that institution regardless of the fact that said children are over the age of fifteen years.

W. R. C. KENDRICK, *Assistant Attorney General.*

LEGAL SETTLEMENT OF PAUPERS

Inmates of the state sanatorium who are bona fide residents of county from which they are admitted, may acquire a legal settlement in such county by the lapse of the statutory period required therefor, notwithstanding a part of such period may have been spent in such institution.

October 29, 1920.

Board of Control of State Institutions,
State House.

Gentlemen:

The letter of the superintendent of the State Sanatorium for the Treatment of Tuberculosis, addressed to you and wherein he requested an opinion from this department, has been referred to me for attention. He states:

"It has been our idea in times past that patients who enter this institution before they have a legal settlement and therefore for whom someone reimburses the county, becomes possessed of a legal settlement at the expiration of a year's residence in Iowa, notwithstanding part of the year had been passed with the patient in the institution.

"It now develops that there is some doubt about the above. I am wondering if we cannot have a ruling from the attorney general's office as to whether a patient can become possessed of a legal settlement by reason of the passage of time after being admitted to the institution, or whether they must wait outside of the institution until the full time has passed in order to become possessed of a legal settlement and therefore eligible to admission here at county expense."

The question presented is not entirely free from doubt, but I

am constrained to the opinion, that where a bona fide resident of a county of this state has been admitted to the sanatorium, prior to the expiration of the time necessary for such person to acquire a legal settlement in the county of his residence, that such admission should not be permitted to interrupt the continuance of his residence in such county, and from and after the expiration of one year from the date said residence began he would acquire, in the absence of proper notice, a legal settlement in such county and the costs of his support would properly be chargeable thereto.

J. W. SANDUSKY, *Assistant Attorney General.*

EXPENSES OF INMATES OF STATE SANATORIUM

The expense of supporting inmates of state sanatorium should be charged to and collected from the counties of which they are bona fide residents.

June 9, 1920.

Board of Control of State Institutions,
State House.

Gentlemen:

We have your request for the opinion of this department on the question as to the expense of inmates of the state sanatorium, and the county to which such expenses should be charged, attached to which you have enclosed the letter of the superintendent to you.

Section 2727-a82 of the 1913 supplement to the code provides in part as follows:

> "No patients shall be received except those afflicted with pulmonary tuberculosis in the incipient stage. * * * Any person wishing to become a patient in the institution shall first make application and if it shall appear * * * that the applicant has been and is a bona fide resident of this state * * * said applicant shall be sent * * * to the examining physician * * *. Said examining physician shall examine said applicant * * * and shall mail the same to the superintendent * * * and who shall examine the same and if he finds that the applicant * * * has been and is a bona fide resident of this state * * * he shall receive the applicant as a patient * * * In case it shall appear from the application itself, of from the report of the examining physician, that the applicant does not come within the provisions of the law, or in case the superintendent shall be in possession of reliable information which convinces him that the applicant is not entitled to the benefits of this act, he shall forthwith notify the applicant that he cannot be admitted as a patient."

Section 2727-a86 further provides that:

> "Each county shall be liable to the state for the support of all persons from that county in the state sanatorium and the amounts due shall be certified by the superintendent to the auditor of state, and by him be collected from the counties liable at the times and in the manner required for the certification and collection of money from the counties for the support of insane patients and patients in the sanatorium, and persons legally bound for their support shall be liable for the maintenance of persons in the sanatorium."

The county from which the person is taken is not the county primarily liable for the expenses of such patient, but it is the county of which he is a bona fide resident. It will be observed that the law makes bona fide residence a pre-requisite to entitle the party to admission to the institution, and the blank application for admission, together with the examination, should show the essential facts necessary to entitle the party to admission to the institution, and if the law was carefully observed in each instance, there would be a proper record made at the time so that the residences of the party would be known, and expenses could be charged to the proper county.

If the foregoing rule is adopted by the superintendent, it seems to me there can be no question arise then as to which county should be properly charged with the expense of the maintenance of any patient.

J. W. SANDUSKY, *Assistant Attorney General.*

USE OF FUNDS

No part of the balance of appropriations of 35th and 36th General Assembly for establishing industries and allotted to penitentiary can be transferred to reformatory.

May 5, 1919.

Board of Control of State Institutions.
Gentlemen:

I have your letter of the 2nd inst. in which you state:

> "It is the purpose of the board to establish a plant for the manufacture of automobile number plates at the Reformatory at Anamosa as provided by law. The 38th General Assembly made no specific appropriation for this purpose and the appropriation for this purpose and the industrial funds on hand at the Reformatory are insufficient. It is our opinion that $40,000 of the balance in the 35th General Assembly appropriation may

be transferred from the State Penitentiary to the Reformatory to establish this plant, for the reason that the Reformatory has received no part of the $100,000 joint appropriation made by the 36th General Assembly and the appropriation acts creating the first two funds heretofore listed provided that the amounts needed at each institution should be determined by the board."

The 35th General Assembly authorized a levy of one-half mill on the dollar upon the assessed valuation of the taxable property of the state for the purpose of creating a fund with which to establish and maintain industries in the several state institutions designated in said act.

Section 1, chapter 17, acts of the 35th General Assembly provides:

"That for the purpose of providing for the erection and improvement of buildings, for appurtenances and connections, for the Iowa Soldiers' Home, Iowa Soldiers' Orphans' Home, School for the Deaf, Institution for Feeble-Minded Children, State Sanitarium for the Treatment of Tuberculosis, State Industrial schools, state hospitals, penitentiary, reformatory, Iowa Industrial Reformatory for Females, District Custodial Farm, and State Colony for Epileptics, for the purchase of land for one or more of said institutions, including a new location for the Iowa Industrial Reformatory for Females, and for establishing and maintaining industries in any or all of said institutions, there shall be levied annually for five (5) years a special tax of one-half mill on the dollar upon the assessed valuation of the taxable property of the state and the proceeds thereof shall be paid into the state treasury to the credit of the institutions specified. Said levy shall first be made in the year 1913, and annually thereafter. The money realized from such levies shall be held by the treasurer of state for the institutions and purposes herein stated and shall be drawn from the state treasury on vouchers and abstracts executed and approved as provided by the law as it appears in sections twenty-seven hundred twenty-seven-a41, twenty-seven hundred twenty-seven-a42, and twenty-seven hundred twenty-seven-a43 of the supplement to the code, 1907, so far as applicable, and when not applicable upon vouchers and abstracts approved by the board of control of state institutions."

Under the statutory provisions above quoted, a levy was made upon the taxable property of the state, and from the fund thus realized the sum of $10,000 was allotted by the Board of Control and credited to the penitentiary at Ft. Madison for the estab-

lishment and maintenance of industries therein. To this original $10,000 fund there have been added the receipts from the sales of products manufactured at the penitentiary and the services of prisoners, and on April 1, 1919, there appeared a balance to the credit of said fund the sum of $47,969.97, as shown by the books in the office of the Board of Control, but not so specifically shown on the books in the state treasurer's office.

Then the 36th General Assembly appropriated the sum of $100,000 to be used at either the penitentiary or the reformatory, as the Board of Control might determine, for the purpose of establishing and maintaining industries at either or both institutions. Section 6, Senate file No. 555.

Section 6 provides:

> "Of the appropriations made by this act the state penitentiary and reformatory shall receive for establishing and maintaining industries the sum of one hundred thousand dollars ($100,000.00), the amound needed at each institution to be determined by the Board of Control."

This entire appropriation was used by the board to establish the chair and furniture industry at the penitentiary.

But the $100,000 appropriated by the 36th General Assembly was not sufficient to establish the chair and furniture industry at the penitentiary, so the 37th General Assembly made an additional appropriation of $100,000 to be used exclusively at the penitentiary for establishing and maintaining industries therein.

Section 16, chapter 27, acts of the 37th General Assembly in part provides:

> "for establishing and maintaining industries, $100,000."

From the $100,000 appropriation made by the 37th General Assembly, the sum of $45,192.76 was taken and used by the board to support and maintain the chair and furniture industry created at the penitentiary out of the $100,000 appropriation made by the 36th General Assembly. Then as the chair and furniture industry prospered, the receipts thereof were credited by the Board of Control to the fund indicated on the books in that office as the fund created by the $100,000 appropriation by the 36th General Assembly, and on April 1, 1919, there appeared a balance in that fund of $43,297.82. While the books in the office of the Board of Control disclose the existence of such a specific

fund, no such specific fund appears on the books in the state treasurer's office. The state treasurer carries all these funds under one head, namely, "Establishing and Creating Industries at Fort Madison," without any reference to the specific appropriations made by the 35th, 36th and 37th General Assemblies.

Now the question is, Can any part of either the $47,959.97 or the $43,297.82 be transferred to Anamosa and be used in establishing a plant at the reformatory for the manufacture of automobile number plates? I am of the opinion that your question must be answered in the negative.

As to the $47,959.97 balance, shown on your books as representing the appropriation by the 35th General Assembly, that balance represents not only the $10,000 allotment to the penitentiary of the funds raised by the one-half mill levy provided for by the 35th General Assembly, but also the receipts from sales of manufactured products and the services of prisoners. There is no provision in the act of the 35th General Assembly permitting a fund expressly appropriated or allotted to one institution to be transferred to another institution; and I can find no statutory provision conferring that power upon the Board of Control. So that the money appropriated to the penitentiary out of the levy provided for by the 35th General Assembly must remain inviolate for the purpose for which it was appropriated.

Now, as to the $43,297.82 fund and designated on your books as the fund created by section 6, Senate file No. 555, acts of the 36th General Assembly, it will be remembered that the entire amount appropriated by that General Assembly was used by the board to establish the chair and furniture industry at the penitentiary. So nothing remained of that appropriation, unless it can be claimed that the receipts from the chair and furniture industry could be legally turned into a fund and designate and consider that fund a part of the original $100,000 appropriation.

I do not believe there is any legal authority for so doing. After that $100,000 appropriation had been expended there was nothing left of it to be used at the reformatory; and I do not believe that appropriation can be replenished or revived by the receipts from the industry established by that appropriation.

The statute provides that all moneys derived from any source at any of the state institutions must be accounted for and remitted to the state treasurer on the first day of each month.

Section 2727-a40 of the supplement to the code, 1913, provides:

> "All moneys belonging to the state, derived from any source at any of the institutions under the control of this board, shall be by the proper executive officer, named by the board, accounted for and remitted to the state treasurer on the first day of each month, and all funds for the necessary expenditures of such institutions shall be drawn from the state treasurer, as provided in this act."

While the section just quoted does not require the state treasurer to place such monthly receipts to the credit of any particular fund, yet I believe that section contemplates that the receipts shall be placed to the credit of that particular branch of the institution from which the receipts were derived, and such has been the practice of the state treasurer for several years. However, these receipts form no part of the original appropriation, and are to be used solely for the further support and maintenance of industries of that particular institution. This conclusion is supported by the additional provisions found in section 2727-a40, section 2727-a41, section 2727-a42 and section 2727-a43 of the supplement to the code, 1913.

The latter part of section 2727-a40 provides:

> "All funds for the necessary expenditures of such institutions shall be drawn from the state treasury as provided in this act."

Section 2727-a41 provides that the warden of the penitentiary

> "shall on or before the fifteenth day of each month cause to be prepared triplicate estimates in minute detail, including estimated cost of each item, of all the expenditures required for the institution for the ensuing month. Such estimates shall also include a statement of the source and amount of all the revenues received by the said institution and accounted for to the state treasurer on the first day of each month."

It is then provided in said section 2727-a41 that the Board of Control shall examine such estimates, and if approved by the board, copy shall be filed with the warden, which copy shall be sufficient authority to purchase the supplies enumerated in said estimate.

Section 2727-a42 then provides that the officer designated by the board shall prepare

> "a monthly statement showing purchases and expenditures

of every kind for the preceding month, which shall be signed by such officer, approved by the chief executive officer of the institution, and filed with the board on a day certain to be fixed by said board."

Then section 2727-a43 provides in part that

"When the said accounts are audited, the secretary of Board of Control shall, under the seal of the board, prepare in triplicate an abstract showing the name, residence and amount due each claimant, and the institution and the fund thereof on account of which the payment is made, which abstract shall also be certified by at least one member of the board, who shall be so authorized by the board, and the proceedings granting such authority shall be preserved in the records of the board. He shall deliver one copy thereof to the auditor of state, another to the treasurer of state, and the third shall be retained in the office of the board. Upon such certificate the auditor of state shall, if the institution named has sufficient funds, issue his warrant upon the treasurer of state for the gross amount as shown by such certified abstract. Said last named officer, upon being furnished by the board with a certified copy of such abstract as herein provided, shall send checks of the treasurer of state to the several persons for the amounts of their respective claims, as certified by the Board of Control. The treasurer of state shall preserve in his books a record of each check and remittance in the proper manner, showing the date of the issuance of each check, the name of the person to whom it was made payable, and such other data as may be evidence for the state, showing the payment of such indebtedness."

Thus it will be seen that the foregoing statutory provisions contemplate the placing of the foregoing monthly receipts by the state treasurer to the credit of the particular branch of the institution from which they were derived, and to be used in the further support and maintenance of that particular branch of said institution. No part of such receipts form any portion of the original appropriation, and therefore cannot be used for any other purpose than that from which they were derived.

I am therefore of the opinion that no part of the balance of the fund carried on your books as a part of the appropriations made by the 35th and 36th General Assemblies for the purpose of establishing and maintaining industries at the state institutions, and credited by your board to the penitentiary at Ft. Madison, can be transferred to the reformatory at Anamosa and

used at that institution for the purpose of establishing a plant to manufacture automobile plates.

H. M. HAVNER, *Attorney General.*

EMPLOYES OF PRISONS MAY HAVE MEALS AT COST

Officers and employes of the prison who are required to be on duty during the meal hour may be given their meals at the prison mess.

December 1, 1919.

Board of Control of State Institutions.

Gentlemen:

We have your favor of recent date in which you state:

> "At the Penitentiary and Men's Reformatory we have great difficulty in keeping suitable employes, the trouble being in the low wages paid and long hours of service (twelve), with seven days per week, and the early hour at which these men must be on the job (some from 6 a. m. and others 6:30 a. m.) thus compelling their wives to arise at 5 a. m. to prepare their breakfast and dinners, if they carry their lunch, and then later on prepare another breakfast for the family and school children.
>
> "At both institutions there are officers and guards who perform special services in addition to their regular employment, such as the guards at the night school, late farm workers, etc. Those who do not bring a lunch are compelled to rush home for their dinner and then back again to their duties, all to the disadvantage of such officers, guards and their families, and not for the best interest of the institution.
>
> "All of these matters taken together make it almost impossible to keep the proper kind of men required for these positions. Many of our best men have already left us to go to outside work at much larger salary with only eight hours per day service. For the best interests of all concerned we consider it necessary to remedy these conditions as far as it is possible to do so."

You then ask:

> "Now what we desire your opinion on is: Has our board authority to allow such officers and guards their breakfasts and dinners out of the prison mess. To do this would cost the state a very small amount, which would more than be repaid by having the services of these men at all times during the day and would serve to keep better men and remove some of the most serious objections that good men have for acting as guards and officers in these institutions. We believe, if this can be done, it will result in great benefit to the state."

Under the laws of this state it is made the duty of your board to meet in quarterly session with the superintendents, wardens and chief executive officers of the various institutions under the supervision of the Board of Control of state institutions, and at such meetings to consider in detail all questions of management and the methods to be adopted to secure the economical management of the several institutions. Section 2727-a20, code supplement, 1913.

The General Assembly of Iowa has also conferred upon your board the following power:

> "The Board of Control is authorized to make its own rules for the proper execution of its powers, and may require the performance of additional duties by the officers of the several institutions, so as to fully enforce the requirements, intents and purposes of this enactment * * *."

Section 2727-a48, supplement to code, 1913.

While there is no statute expressly authorizing the furnishing of meals under the conditions referred to in your letter, yet under the provisions of sections 2727-a20 and 2727-a48, *supra,* if your board, in conjunction with the wardens in the two penal institutions, determine that it is necessary, "for the economical management of their institutions," to furnish meals out of the prison mess to such officers and employes as are required to be on duty at the institution during the regular meal hour, then I am of the opinion that the Board of Control of state institutions has the power to make rules to that effect.

W. R. C. KENDRICK, *Assistant Attorney General.*

STATE EXEMPT FROM PAYMENT OF WAR TAX

The State is exempt from the payment of the war tax usually known as the luxury tax.

May 29, 1920.

Board of Control of State Institutions.

Dear Sir—You refer to this department the claims of S. Davidson & Bros., Des Moines, Iowa, against the State of Iowa, on account of carpets and rugs sold to the state for use in the Iowa Soldiers' Home at Marshalltown.

A war tax is added to each article sold and you request an opinion from this department as to whether or not the state is required to pay a war tax on property purchased by it.

The right to claim a so-called war tax is based upon the revenue act passed by the Sixty-fourth Congress, approved September 8, 1916, and found in chapter 463, 39 United States statutes at large, page 767, as amended by the act of October 3, 1917. The original act provided a tax on incomes of individuals, corporations and the like. In section 11, subdivision b thereof, is found the following exemption:

> "There shall not be taxed under this section any income derived * * * from the exercise of any essential governmental function accruing to any state * * *."

When the amendatory act of October 3, 1917, was passed it failed to carry an exemption to the states; but the original act carried an express exemption, and as the amendment of October 3, 1917, became a part of the original act, evidently the exemption applies to the entire act as amended.

But even though the war revenue act were absolutely silent as to any exemption to the states, yet the states would be exempted from the payment of such taxes on property bought or sold by the states, for the reason that state agencies and instrumentalities are exempt from national taxation. The federal government is absolutely powerless to tax, in any form, the property of a state, and any attempt so to do is in contravention of the constitution of the United States.

South Carolina v. United States, 199 U. S., 437.

Therefore, I am of the opinion that the state of Iowa is not liable for the payment of the war tax charged in the bill in question, and that the attempt to collect such a tax is wholly unauthorized.

W. R. C. KENDRICK, *Assistant Attorney General.*

PAROLE OF CONVICT TO SECRETARY OF BOARD OF CONTROL

There is no statutory provision for the court to parole to the secretary of the Board of Control a person convicted of a crime.

November 7, 1919.

Board of Control of State Institutions.

Gentlemen—We are in receipt of your request for an opinion as to whether or not there is any authority in the statute for a judge of the district court to parole one convicted of a felony, to the secretary of the Board of Control and require the secretary to assume the responsibility of looking after the person paroled.

There is no express statutory provision authorizing a judge of the district court to parole such a person to the secretary of the Board of Control of state institutions, nor is there any statutory authority authorizing the secretary of the Board of Control of state institutions to accept the responsibilities attached to the person paroled by the judge of the district court.

The statute authorizes the judge of the district court in certain cases to parole a person to a citizen of the state of Iowa, but there is no express provision requiring any person to whom one convicted of a felony has been paroled, to accept the responsibilities accompanying a person so paroled.

Section 5447-a of the supplement to the code, 1913, provides:

> "That whenever any person over the age of sixteen years, and under the age of twenty-five years, shall be convicted of any crime against the laws of this state, excepting treason, murder, rape, robbery and arson, if such conviction shall be the first conviction of the defendant for a felony, the trial judge before whom such conviction is had, and by whom the judgment of the court is pronounced, shall have the power to suspend the execution of the sentence of such person so convicted and place such person in custody and under the care and guardianship of any suitable person a resident and citizen of the state of Iowa, during good behavior of such person so convicted, and the judge so exercising this power of suspension of the execution of sentence shall enter same upon the calendar and cause the same to be journalized and made of record in the court in which such conviction is had, and the person having such custody, care and guardianship of the person, the execution of whose sentence has been suspended, shall make a full and complete report every thirty days, in writing, to the district court wherein such conviction was had, showing the whereabouts and conduct of the person thus placed in his care, custody and guardianship. Such person, however, may be pardoned by the governor at any time after the suspension of execution of the sentence pronounced against him upon such conditions and with such restrictions and limitations as he may think proper."

In the case of the *State of Iowa v. Lillian Planinc,* in which case the defendant plead guilty to the crime of prostitution in the district court of Black Hawk county, Iowa, and wherein the court suspended sentence and paroled the defendant to the secretary of the Iowa Board of Control, I can find no authority in the statute for the court's action in paroling the defendant to the secretary of the Board of Control as such officer, and unless the

person occupying the position of the secretary of the Board of Control accepts the parole of said Lillian Planinc, I can find no authority requiring him to do so.

In that particular case, it would seem to me that the proper place to commit the defendant would be to the reformatory at Rockwell City or at least parole her to some institution that is equipped to take care of her particular condition. From the report of F. B. Newcomb of Waterloo, Iowa, Lillian Planinc is affected with a venereal disease and should be placed in the custody or control of some person or institution who is in a position to give her proper medical treatment. The secretary of the Board of Control is not in a position to give her the treament she requires, nor has he any authority to commit or place her in any institution that can give her the proper treatment, and for that reason it seems to me she should have been committed to the reformatory at Rockwell City or at least some definite arrangement should have been made for her care and treatment by some person or institution prior to entering the order of parole.

W. R. C. KENDRICK, *Assistant Attorney General.*

CANNOT COMPEL BOARD OF CONTROL TO PAY OVER WAGES OF CONVICT AS ALIMONY

Courts cannot compel the board of control to pay wages of prisoners to the wife and children as alimony in divorce cases.

October 17, 1919.

Board of Control of State Institutions.

Gentlemen—Your letter addressed to Attorney General H. M. Havner, enclosing copy of a decree in a divorce procedings between *Edith Juday, v. Horace Juday,* signed by Hon. G. D. Thompson, judge of the district court of Iowa in and for Webster county, has been referred to me for attention.

In the decree above mentioned, the following provision is found relating to alimony:

> "It is further found by the court that said plaintiff, Edith Juday, is entitled to receive, and shall receive, from the state Board of Control such earnings of the defendant, Horace Juday, as he may be entitled to under section 5718-a11a of the code supplement of 1915; said money to be paid to said plaintiff for the support of herself and minor child."

You ask for an opinion from this department as to whether or not that portion of the decree just quoted is binding upon and

can be enforced against the state of Iowa, through the Board of Control.

The defendant in the divorce proceedings is a prisoner at the Men's Reformatory located at Anamosa. The General Assembly of Iowa has provided that the Board of Control of state institutions may allow inmates under its supervision compensation for services performed by such inmates. It has also provided that when money is so earned by such inmates that the Board of Control may deduct therefrom the cost of maintenance of such inmate and the cost taxed against him by reason of his commitment, and then dispose of the balance remaining, if any, in one of the three following methods:

1. Pay all or any thereof direct to the husband or wife or to any member of his family dependent upon him for support.

2. Deposit the amount in a bank to the account of the inmate until released.

3. Allow an inmate a certain per cent for his personal use. Section 5718-a11a, supplemental supplement.

Section 5718-a11a reads:

> "Whenever services are rendered by any inmate at any institution under the supervision and jurisdiction of the Board of Control, the Board of Control may whenever practicable allow such inmate compensation which shall not exceed the amount paid to free labor for a like service or its equivalent, less such amount that the state is put to for maintenance as the Board of Control may deem equitable, and in addition to deducting an amount to defray the cost of maintenance, the Board of Control may also deduct an amount sufficient to pay all or a part of the costs taxed to any inmate by reason of his commitment. Whenever the Board of Control deducts an amount from the earnings of any inmate for the purpose of defraying the costs taxed to such inmate by reason of his commitment, said board shall forward the amount to the clerk of the district court, or proper official, and receive his receipt therefor; provided further that whenever money is earned by an inmate under the provisions of this act, the Board of Control may, whenever deemed advisable, pay all or any part of the same direct to the husband or wife or any other member of the family of such inmate dependent upon him or her for support, or deposit the same to the account of such inmate until released, or allow said inmate a certain per cent thereof for his personal benefit, and make all rules and regulations in relation thereto, including the right to deposit funds in any

bank to the credit of such inmate and require such bank to pay interest on any money so deposited by or for such inmate at rates not to exceed current rate of interest paid for similar deposits.''

It will be seen from the foregoing statutory provision that the allowance of compensation to inmates in state institutions is entirely discretionary with the Board of Control, and when compensation is allowed it shall be disposed of in the manner prescribed by statute.

In no event can the Board of Control send any of the inmate's earnings to his divorced wife; the power exists only as to his lawful wife and members of his family dependent upon him for support.

The purpose of such legislation is to encourage thrift among the inmates. It will be remembered that the allowance of any compensation to inmates is wholly within the discretion of the Board of Control, thereby conferring upon the board the power to extend encouragement to ambitious and thrifty inmates, so that when released they will have a fund with which to commence life anew. The results have proved the wisdom of the law. The inmates of our penal institutions have come to realize that by working diligently and a little overtime they can earn some extra money with which to make a new start when released and to purchase a few small luxuries while confined, and invariably they have become better prisoners. If trial courts in divorce proceedings and the like were disposed to control the disposition of such earnings and order it paid to the divorced wives of the inmates, or even their creditors, the effect would be to destroy the purpose of the act and discourage thrift and application on the part of such inmates, and result in the impairment of the discipline of our penal institutions.

While the district court has the power ordinarily to control the assets of the parties in divorce proceedings, to the extent of assigning to one of the parties an interest in a claim of the other party against third parties and directing the third party to comply with such order of assignment, yet that power does not exist when the state of Iowa is the third party.

In your case the party whose compensation is attempted to be reached is a ward of the state of Iowa. If anyone is indebted to such ward, it is the state of Iowa. The state cannot be sued without its consent. Neither can it be attached nor garnished.

Therefore, no court has jurisdiction to enter a decree in a suit in which the state is not a voluntary party and in that decree control the action of the state in the administration of its own affairs.

I am therefore of the opinion that the decree in question is of no validity so far as it attempts to control the disposition by the Board of Control of the earnings allowed inmates for their services provided for in section 5718-a11-a, supplemental supplement.

It is with considerable reluctance that we express an opinion which seemingly tends to criticize the order of the distinguished trial court, and yet we are forced to do so at this time owing to the fact that the state was not given an opportunity to be heard when the decree was signed.

W. R. C. KENDRICK, *Assistant Attorney General.*

SPUR TRACK AT SOLDIERS' HOME

In re authority to build spur track at Iowa Soldiers' Home.

August 6, 1919.

Board of Control of State Institutions.

Gentlemen—You have asked this department to give you an opinion upon the rights of the state with reference to building a separate track to the Iowa Soldiers' Home, as authorized by chapter 294, acts of the 38th General Assembly. The act in question provided in section 1 thereof is as follows:

> "The Board of Control of state institutions of Iowa is hereby authorized to construct or have constructed a spur track beginning at a point on the Minneapolis and St. Louis Railroad Company track, heretofore called the Iowa Central Railroad Company, where same is crossed by South Twelfth street in the city of Marshalltown, Iowa; running thence west and north to South Thirteenth street; thence north on South Thirteenth street to the intersection of South Thirteenth street with West Main street; there to connect with the Iowa Railway and Light Company track. Then commencing with the north end of said railroad track at the intersection of North Thirteenth street and Summit street and continuing through the grounds of the Iowa Soldiers' Home to the power house of said institution. The said spur track through said grounds to be located as the Board of Control of state institutions may direct."

You will observe that the legislature has provided specifically the course of the proposed spur track, and that in order to make it

of use, it is necessary that connection be made with the tracks of the Iowa Railway and Light Company of Marshalltown, and that cars be transported over the tracks of the latter company for some distance. There is some doubt in my mind as to whether the proposed spur track is not, in fact, a private railway so that authority to build it upon the streets and alleys of the city of Marshalltown cannot be granted by the city council, but in view of matters hereinafter called to your attention, I think it is unnecessary at this time to determine this question, and I will therefore assume that the proposed track is a public railway.

Section 767 of the code provides:

> "Cities and towns shall have the power to authorize or forbid the construction of street railways within their limits and may define the motive power by which the cars thereon shall be propelled; and to authorize or forbid the location and laying down of tracks for railways and street railways on all streets, alleys and public places; but no railway track can thus be located and laid down until after the injury to property abutting upon the street, alley or public place upon which such railway track is proposed to be located and laid down has been ascertained and compensated for in the manner provided with reference to taking private property for work of internal improvement."

You will observe from a reading of this section that before any tracks for railway may be laid down upon any of the streets, alleys or public places of a city, the consent and authorization of the city council must first be obtained, and a consent of the city council of the city of Marshalltown is first required in the instant case before you can commence the construction of any tracks upon the streets or alleys of the city. After the consent of the city council is obtained proceedings must be instituted under the provisions of the code relating to the taking of private property for works of internal improvements to ascertain the damages sustained by persons owning property abutting upon the street over which it is proposed to construct a track, and such damages must be paid before the track is constructed. A consent of the city council may be given by resolution duly passed.

> *Merchants Union Barb Wire Co. v. C., B. and Q. Railway Co.*, 70 Iowa, 105.

The serious question is whether after the track is constructed to connect with the tracks of the Iowa Railway and Light Company

freight may be hauled over the entire line. I have before me the franchise granted to the predecessors of the Iowa Railway and Light Company and under which it is at present operated. That franchise grants authority to construct, reconstruct, maintain and operate systems of street or interurban railway, or both, along or upon any of the alleys, streets and avenues of said city, so as to connect said railway system with electric power plants furnishing current for the operation thereof. The ordinance granting this franchise was passed by the city council of the city of Marshalltown in May, 1912, and was submitted to a vote of the electors of the city, as provided by section 776 of the code and amendments thereto, and adopted. There is nothing in the franchise that grants authority to use the tracks of the company operating under the franchise for the carriage of freight. Authority is granted to construct, maintain and operate systems of streets or interurban railways.

A street railway is a railway operated upon the streets of a city for the carriage of passengers, and a grant of authority to construct and operate street railways does not carry with it the right to use the streets for the carriage of freight, but only for the carriage of passengers, and in the absence of express authority from the city, a street railway cannot use its tracks for the carriage of freight. There is no such authority given in the franchise under consideration, and none can be given except by modification of the franchise in the same manner as the original was granted. Moreover, the articles of incorporation of the company now operating the street railway in Marshalltown provide that "the general nature of the business to be transacted by this corporation shall be the construction and operation of an electric street railway in the city of Marshalltown, Iowa," and I think that this charter provision is a limitation upon the power of the company to do more than operate a street railway as it is ordinarily understood and defined; that is, one for the carriage of passengers only.

An interurban railway is defined to be:

> "Any railway operated upon the streets of a city or town by electric or other power than steam, which extends beyond the corporate limits of such city or town to another city, town or village, or any railway operated by electric or other power than steam, extending from one city, town or village

to another city, town or village, shall be known as an interurban railway, and shall be a work of internal improvement.''

Section 2033-a, supplement to the code, 1913.

By section 2033-b of the supplement to the code, 1913, all laws relating to railroad corporations generally are applied to interurbans. It is therefore plain that an interurban railway company is a company engaged in the general carrying business and may carry both passengers and freight. The franchise under consideration granted to the predecessors of the Iowa Railway and Light Company authority to construct, maintain and operate the streets of the city of Marshalltown an interurban railway.

I am not advised as to whether the interurban railway is conducted by the men to whom the franchise was granted or their successors. If such a railway is being operated, it has authority to use the streets of the city of Marshalltown for the carriage of freight over its lines, and may, with the consent of the city council so extend its tracks as to connect with the spurs proposed to be built by the state of Iowa, but unless the interurban railway, as hereinbefore defined, is, in fact, being operated, the grant of authority to so operate an interurban railway does not confer upon the street railway proper authority to carry freight. In other words, the grant of authority must be exercised in fact by an interurban railway.

As before stated, the articles of incorporation of the Iowa Railway and Light Company provide only for the operation of a street railway, and under such articles the company could not operate an interurban. If an interurban railway is, in fact, being operated, it may connect with the spur proposed by the state of Iowa and use the streets for hauling freight, but if the only railway being operated is a street railway, the tracks of such street railway cannot be used by it for the purpose of hauling freight.

SHELBY CULLISON, *Assistant Attorney General.*

DISCHARGE OF INSANE PATIENTS

When the board of control discharges a patient from a hospital for the insane such patient becomes subject to the jurisdiction of the commissioners of insanity, which body has power to determine whether the patient has regained his mental faculties.

July 30, 1919.

Board of Control of State Institutions.

Gentlemen—We have your letter of July 28th in which you ask for the opinion of this department upon the following:

"A patient regularly committed by the Commissioners of Insanity to a state hospital. The patient after a short time improves and is paroled. One year later the family report that the patient is able to remain out of the institution permanently, though perhaps not entirely cured. The Board of Control issues a discharge as improved.

"Query—Does this remove the patient fron the jurisdiction of the state hospital or can the superintendent pass upon the sanity of the patient and issue a certificate of recovery if conditions warrant, as provided in section 2288 of the code of 1897."

Section 2727-a25 of the supplement to the code, 1913, provides:

"The board shall have the power to investigate the question of the insanity and condition of any person committed to any state hospital, and shall discharge any person so committed or restrained, if, in its opinion, such person is not insane, or can be cared for after such discharge, without danger to others, and with benefit to the patient, but in determining whether such patient shall be discharged, the recommendation of the superintendent of such hospital shall be secured. The granting of this power to the board to serve as a commission for the determination of the insanity of a person is merely permissive, and does not repeal or alter any statute respecting the discharge or commitment of inmates to the state hospitals."

You will notice that you are authorized to discharge patients from the hospital, first, if the patient is not insane, or, second, when such patient can be cared for after such discharge, without danger to others, and with benefit to the patient. If you discharge the patient because he is sane, then the discharge, under such circumstances, is an adjudication of sanity, but if the discharge is on the ground that the patient can be cared for after the discharge without danger to others and with benefit to himself, it is my opinion that he becomes thereupon subject to the jurisdiction of the commissioners of insanity in the county of his origin.

Section 2277 of the code provides:

"Whenever it shall be shown to the satisfaction of the commissioners of insanity of any county that cause no longer exists for the care within the county of any person as an insane patient, they shall order his immediate discharge and shall find if such person is sane or insane at the time of such discharge, which finding shall be entered of record by the clerk of the commission."

I think it is clear that this section has application to patients

discharged by you under section 2727-a25, *supra,* unless the discharge is on the ground that they have regained their sanity and that the commissioners of insanity may determine the question of the recovery of such discharged patient.

SHELBY CULLISON, *Assistant Attorney General.*

USE OF FUNDS BY BOARD OF CONTROL

The Board of Control cannot use the support fund of State institutions for the purchase of additional land.

July 17, 1919.

Board of Control of State Institutions.

Gentlemen—Your letter of July 14th to Mr. Havner has been referred to me for reply. You state:

> "We are desirous of purchasing a small tract of land adjoining the land owned by the state at the Institution for Feeble-Minded Children at Glenwood. We have no special appropriation for this purpose. We are informed, however, that the support fund will allow this purchase to be made from said fund without injury to the welfare of the patients. Inasmuch as the proceeds derived from this land will be used for the support and benefit of the patients, we are wondering if there is any legal objection to the state using a sufficient amount of money from the support fund to pay for this land."

Section 2700 of the supplement to the code, 1913, provides for an appropriation "for the support of the institution" and that appropriation is based upon the average number of inmates in the institution during each month. The ordinary meaning of the word "support" is synonymous with "maintenance" and as used in reference to institutions of the state established for the care of state wards, in our judgment, means maintaining the institutions by continuing the ordinary and regular expenditures so that the support fund cannot be used for the purchase of additional land.

SHELBY CULLISON, *Assistant Attorney General.*

PAVING AT SCHOOL FOR THE DEAF

Under the provisions of Chapter 276 acts of the 37th General Assembly as amended by the 38th General Assembly the board of control has authority to expend $22,000.00 for paving a highway lying through the School for the Deaf. If the sum is insufficient to pave the entire highway the

board of control may expend further sums provided the executive council first approve such expenditure.

June 25, 1919.

Board of Control of State Institutions.

Gentlemen—We have your letter of June 25th in which you state:

> "Under the provisions of chapter 276 of the acts of the 37th General Assembly, as amended by an act of the 38th General Assembly, the Board of Control through the State Highway Commission has received bids for paving at the School for the Deaf at Council Bluffs; and the board has before it for signature, a contract for said paving which at the contract price will slightly exceed the appropriation made by the 38th General Assembly.
>
> "Before signing the said contract, the Board of Control wishes an opinion as to whether or not it may award said contract and proceed with said paving as far as funds are available.
>
> "The board further wishes to know if under the provisions of section 1532 of the supplement to the code of 1913, as amended by chapter 421 of the acts of the 37th General Assembly it has authority to appropriate additional funds necessary to complete this project, with the approval of the state executive council."

In answering your inquiry we first desire to direct your attention to the provisions of chapter 276 of the acts of the 37th General Assembly which appropriated $6,000.00 for the purpose of paving the avenue leading from the city of Council Bluffs to the Iowa School for the Deaf.

Secton 2 of the act provides that:

> "That the said Board of Control is hereby authorized and directed to extend the said concrete paving under the plans and specifications under which the paving constructed by the city of Council Bluffs and the citizens thereof was constructed on the avenue leading to the said grounds and of the same material, provided said pavement shall not extend beyond the main entrance of the grounds of the Iowa School for the Deaf."

This section was amended by the 38th General Assembly, so that it now reads as follows:

> "That the said Board of Control is hereby authorized and directed to extend the said concrete paving upon the highway lying through said grounds under the plans and specifications

under which the paving constructed by the city of Council Bluffs and the citizens thereof was constructed on the avenue leading to the said grounds and of the same material, or such other material as will provide a paving of equal quality and durability."

You will note from the foregoing that under the provisions of the section as it originally stood, the pavement was not to be extended beyond the main entrance of the grounds for the Iowa School for the Deaf.

The 38th General Assembly removed this limitation and merely provided that the improvement should be made "upon the highway leading through said grounds."

Section 1532 of the supplement to the code, 1913, to which you refer, provides among other things, that the Board of Control shall have charge of highways within and adjacent to lands belonging to the state, and in part provides as follows:

"All costs of maintaining, repairing, renewing and improving the roads within the road district containing state lands, except county bridges, after the expenditure of the road poll tax, either in money collected or in labor, shall be paid out of any general funds in the hands of the state treasurer, not otherwise appropriated, upon warrants drawn by the state auditor after certificate of amount due shall have been filed in his office by the Board of Control."

The 37th General Assembly by the provisions of chapter 421 amended the foregoing section by striking out the period following the word "control," and inserting a semi-colon, and the following words, to-wit:

"provided, however, that the expenditure of said funds for paving shall be subject to the approval of the executive council."

The amendment of the 38th General Assembly merely provides an appropriation for improving the highway lying through said grounds. It does not require you to improve all of the highway; it merely provides that the appropriation of $22,000.00 shall be for improving this road. If you cannot improve all of it within the limit provided for by the appropriation of $22,000.00, we are of the opinion that you may expend such other sum as necessary to improve the entire road, provided, you obtain the approval of the executive council to the expenditure of such funds.

B. J. POWERS, *Assistant Attorney General.*

PAVING AT CHEROKEE HOSPITAL

Before the Board of Control can pave the highway adjoining the institution at Cherokee steps must have been taken to assess abutting property with such portion of the cost as may be legally assessed.

August 28, 1919.

Board of Control of State Institutions.

Gentlemen—Your letter of August 23rd to Mr. Havner has been referred to me for reply. You ask the following question:

> "Does chapter 226, acts of the 38th General Assembly, give this board authority to go ahead and order in the proposed paving before proper legal requirements have been complied with, looking to the city of Cherokee and private property owners along said highway, which is proposed to be paved, for the payment of their portion of said paving charge?"

Chapter 226, acts of the 38th General Assembly provides that the Board of Control should grade, curb, and pave the highway running east and west along the south side of the land owned by the state of Iowa in connection with the Hospital for Insane at Cherokee, Iowa.

Section 2 of said act contains the following:

> "Provided that as a prerequisite to the ordering of said improvements the abutting property owners and city of Cherokee shall have taken the proper steps, under the statutes of Iowa, to assure the payment by said property owners and city of Cherokee of that part of the costs of the said improvements which can legally be assessed against said property owners and city."

The words just quoted from the statute plainly mean that before the improvement can be ordered, steps must have been taken under the statutes for the assessment of such part of the cost as may be legally assessable against abutting property, and until that is done the Board of Control has no authority to proceed with the improvement.

SHELBY CULLISON, *Assistant Attorney General.*

WHEN AN ABANDONED CHILD MAY BE ADOPTED OUT

A child is abandoned within the meaning of the adoption statute when its parents have so acted with reference to the child as to evince a settled purpose on their part to forego all parental duties.

June 13, 1919.

Board of Control of State Institutions.

Gentlemen—Your letter of January 9th to Mr. Havner has been given to me for answer.

You ask the opinion of this department upon the following matters:

> "Section 2690-a, supplement to the code, 1913, designates two classes of children that can be adopted out by the superintendent with the approval of the Board of Control without the consent of parents, namely, abandoned children and children who are full orphans.
>
> "1. Please give us your opinion as to what constitutes abandonment.
>
> "2. Is the superintendent of this institution authorized to determine the fact of abandonment, or must this fact be determined by decree in court before the superintendent can consent to the adoption as authorized by this section?
>
> "3. Can a child whose father is dead and whose mother is an inmate of a county home be considered an abandoned child for the purpose of adoption?
>
> 4. Can a child of one surviving parent, who corresponds with the child at more or less irregular intervals and who does not contribute to its support, be considered an abandoned child?"

Corpus Juris, Vol. 1, at page 1387, announces the following doctrines:

> "To constitute such an abandonment by a parent as will deprive him of the right to prevent the adoption of his child, and dispense with the necessity of his consent, there must be some conduct on his part which evinces a settled purpose to forego all parental duties."

The statement above seems to be fully sustained by the adjudicated cases and by other text writers. It is apparent that no definite rule can be given therefor, by which you can determine whether a child in the Soldiers' Orphans' Home has been abandoned so as to permit you to adopt it out.

The question of abandonment is a question of fact which must be determined in each specific case. That is, the facts must show that the parent or parents have left the child under such circumstances as indicates an intent on their part to forego all parental duties. No more definite statement as to what constitutes abandonment can be given.

The superintendent of the institution must determine the fact of abandonment in the first instance from the facts within his knowledge or obtainable by him. There is no provision in the statute

for a judicial determination of the question of abandonment prior to the adoption. If the facts upon which the superintendent acts are insufficient to show an abandonment, the parent may bring an action to recover the possession of the child, regardless of the fact that it has been adopted out by the superintendent of the institution, and the court, upon finding that the child had not in fact been abandoned, would have the right, if for the best interests of the child, to return it to the parent.

In my judgment, the fact that a child's father is dead and its mother is an inmate of a county home is not alone sufficient to show an abandonment. Evidence of such facts is material in determining the question of whether the parent has in fact abandoned the child, but standing alone, it is not sufficient. The fact that a parent does not contribute to the support of a child, and corresponds with the child only at irregular intervals, standing alone, is not sufficient to show an abandonment. Such facts are strong proof of an abandonment, and when taken with other circumstances in connection with the case, might disclose that there had in fact been an abandonment by the parent.

SHELBY CULLISON, *Assistant Attorney General.*

ADOPTION OF CHILDREN FROM SOLDIERS' ORPHANS' HOME

The superintendent of the Iowa Soldiers' Orphans' Home has no authority to adopt out children from that institution to persons who are not citizens of Iowa.

April 11, 1919.

Board of Control of State Institutions.

Gentlemen—We have your inquiry of April 8th, in which you ask:

> "Has the superintendent of the Iowa Soldiers' Orphans' Home authority to adopt a child who is an inmate of that Home to persons who are not citizens of the state of Iowa?"

We desire to direct your attention to the provisions of section 2690-a, supplement of 1913, which provides in part as follows:

> "That any child in the Iowa Soldiers' Orphans' Home who is an orphan or has been abandoned by its parents, and any child in the Home who is not an orphan and who has not been abandoned, with the consent in writing of its parents, or if but one be living, with the consent in writing of the survivor, may be adopted by *any citizen of this state* on the recommendations of the superintendent with the approval of the Board of Control of state institutions."

You will note from the foregoing that it is provided that such child may be adopted "by any citizen of this state, * * *" on the recommendation of the superintendent, etc. The statute clearly limits the adopting of children to citizens of this state, for it is a well established rule that when a statute enumerates the persons or things to be affected by its provisions, there is an implied exclusion of others; there is then a natural inference that its application is not intended to be general.

It is therefore the opinion of this department that the superintendent of the Iowa Soldiers' Orphans' Home has no authority to adopt a child to citizens of another state.

B. J. POWERS, *Assistant Attorney General.*

ADOPTION OF CHILDREN FROM SOLDIERS' ORPHANS' HOME

A citizen of Iowa, even though residing temporarily in another state, is entitled to adopt a child from the Soldiers' Orphans' Home.

February 28, 1919.

Board of Control of State Institutions.

Gentlemen—We have your communication of February 28th, in which you ask for an opinion of this department upon the following proposition:

> "Has the superintendent of the Soldiers' Orphans' Home authority to consent to the adoption of a child under the custody of that institution to a citizen of the state of Iowa who at the present time is temporarily residing in the state of Nebraska; the parties seeking to adopt the child, having received custody of the child under contract while actually residing in the state of Iowa?"

In answer to this proposition, permit us to direct your attention to section 2690-a, supplement of 1913, which provides as follows:

> "That any child in the Iowa Soldiers' Orphans' Home who is an orphan or has been abandoned by its parents, and any child in the home who is not an orphan and who has not been abandoned, with the consent in writing of its parents, or if but one be living, with the consent in writing of the survivor, may be adopted by *any citizen of this state* on the recommendations of the superintendent with the approval of the Board of Control of state institutions. The adoption shall be by an instrument in writing to be signed by the superintendent, subject to the approval, in writing, of the Board of Control, and by the person adopting, and except as herein otherwise provided such instrument shall be signed and recorded as provided by chapter 7 of title 16 of the code as amended and

the adoption shall create the rights and liabilities provided by said chapter as amended."

You will note that the provision is that "any citizen of this state" may adopt any child in the Soldiers' Orphans' Home on the recommendation of the superintendent, with the approval of the Board of Control of state institutions.

If the parties seeking to adopt the child still claim Iowa as their home, and still regard themselves as citizens of this state, then they are entitled to adopt a child, even though they may be residing temporarily in another state.

We suggest that the law of the state of Iowa be observed in the matter of making out the adoption papers, and we would suggest that such papers when completed be filed in the office of the recorder of the county in which the applicants claim their home in this state. Such procedure would make the adoption conform to all of the provisions of the law of this state.

B. J. POWERS, *Assistant Attorney General.*

PENALTY FOR ESCAPING

Girls transferred from training school to reformatory subject to same penalty for escape therefrom as a person originally committed thereto.

February 8, 1919.

Board of Control of State Institutions.

Gentlemen—This communication is in reply to your letter bearing date January 27, 1919, addressed to H. M. Havner, attorney general, in which you make inquiry as to whether or not section 4897-a of the 1913 supplement of the code of Iowa applies to girls, under section 2713-n10 of the 1915 supplemental supplement of the code of Iowa, have been transferred from the training school to the women's reformatory; and in which letter you submit for an opinion the following question:

"Will the five-year additional penalty attach to girls transferred from the training school to the women's reformatory if such person transferred escape from the women's reformatory?"

Said section 4897-a is as follows:

"If any person committed to the penitentiary or reformatory shall break such prison and escape therefrom or shall escape from or leave without due authority any building, camp, farm, garden, city, town, road, street, or any place whatsoever in which he is placed or to which he is directed to go, or in

which he is allowed to be by the warden or any officer or employe of the prison, whether inside or outside of the prison walls, he shall be deemed guilty of an escape from said penitentiary or reformatory and shall be punished by imprisonment in said penitentiary or reformatory for a term not to exceed five years, to commence from and after the expiration of the term of his previous sentence. In order to constitute an escape under the provisions of this act it is not necessary that the prisoner be within any walls or enclosure nor that there shall be any actual breaking nor that he be in the presence or actual custody of any officer or other person. If any person having been paroled from the state penitentiary or state reformatory as provided by law, shall thereafter depart without the written consent of the board of parole from the territory within which by the terms of said parole he is restricted, or if he shall violate any conditions of said board of parole he shall be deemed to have escaped from the custody within the meaning of section one of this act and shall be punished as therein provided."

Said Section 2713-n10 is as follows:

"Any woman or girl over the age of fourteen years who is an inmate of the industrial school for girls, who is unruly and incorrigible, or whose presence is dangerous and detrimental to the school, may, on the recommendation of the superintendent of the school and after an investigation by the board of control of state institutions, be transferred by order of said board of control to the reformatory, and the expenses of the transfer shall be paid from the funds of the school. And the board may, on the recommendation of the superintendent of the reformatory and after an investigation by the board, transfer any inmate of the reformatory to the industrial school for girls, and the expenses of the transfer shall be paid from the funds of the reformatory. And, after a transfer to either institution is made, the person transferred shall be subject to all the provisions of law and regulations of the institution to which she is transferred the same as though she had originally been committed thereto."

And in this connection attention is called to Chapter 34 of the Acts of the 37th General Assembly of Iowa, which is as follows:

"Section 1. That wherever in the code, supplement to the code, 1913, or the supplemental supplement to the code, 1915, or any act of the general assembly, the term "industrial school" is made use of the same shall be and is hereby modified so as to read "training school" instead of "industrial school".

"Sec. 2. That on and after the taking effect of this act

the industrial school for boys located at Eldora shall be known as the Training School for Boys and the Industrial school for girls located at Mitchellville shall be known as the Training School for Girls".

It will be noted that the aforesaid section 2713-n10 specifically provides that the person transferred shall be subject to all of the provisions of law and regulations of the institution to which she is transferred the same as though she had originally been committed thereto; and for that reason it is the opinion of this department that if a person so transferred from the training school to the women's reformatory shall escape therefrom she would be subject to the provisions of aforesaid Section 4897-a the same as any person would be who had originally been committed thereto.

C. W. PIERSOL, *Assistant Attorney General.*

TRANSFERRING PATIENTS FROM ONE INSTITUTION TO ANOTHER

The cost for the support of patients transferred from one institution to another should be charged to county of his residence at rate prevailing at institution to which transferred.

March 4, 1919.

Board of Control of State Institutions,
Gentlemen:

Your letter of the 24th ult., addressed to Attorney General Havner, has been referred to me for attention.

You state that occasion often arises for transferring patients from the Institution for Feeble-Minded Children to the State Hospital and Colony for Epileptics; also, for transferring patients from the various State Hospitals for the Insane to the State Hospital and Colony for Epileptics.

You then ask whether the cost of the support of the patient should be charged to the county of his or her residence at the rate prevailing at the institution to which the said patient has been transferred.

Your action in respect to the foregoing matter will be governed by the following statutory provisions:

"* * * The board (of control) shall have full power to transfer epileptics from any other state hospital or institution under the control of said board to the hospital and colony for epileptics, to transfer insane epileptics from the hospital

and colony to other state institutions, and to re-transfer such epileptics if deemed expedient."

Paragraph 1, section 2727-a96, supplemental supplement of 1915:

"* * * All laws relating to the admission of patients to the state hospital for the insane shall apply to admission of patients to the state hospital and colony for epileptics in all cases where such laws may be applicable."

Paragraph 6, section 2727-a96, supplemental supplement of 1915:

"The Board of Control of state institutions shall fix the per capita allowance which may be charged by the said State Hospital and Colony for Epileptics for the care, treatment and maintenance of each patient therein, which shall not exceed the sum of fifteen dollars per capita per month, * * *"

Paragraph 7, section 2727-a96, supplemental supplement of 1915:

"The superintendents of the Hospital for the Insane and Hospital for Inebriates shall certify to the auditor of state on the first days of January, April, July and October the amount not previously certified to him due the state from the several counties having patients chargeable thereto, and the auditor of state shall thereupon charge the same to the county so owing and the Board of Supervisors shall at the time of levying other taxes estimate the amount necessary to meet this expense the coming year, including cost of commitment and transportation of patients and shall levy a tax therefor. * * *"

Section 2292, supplement of 1915:

"The Board of Control of state institutions of Iowa may from time to time fix the monthly sum for the board and care of each patient in the State Hospitals for Insane, which sum for the hospitals at Mt. Pleasant and Clarinda shall not exceed fifteen dollars. * * *"

Section 2291-b, supplement of 1913:

"Every child and youth residing within the state, between the ages of five and twenty-one years, who by reason of deficient intellect is rendered unable to acquire an education in the common schools, is entitled to receive the physical and mental training and care of this institution at the expense of the state. * * *"

Section 2695 of the code:

> "Pupils not otherwise provided with clothing shall be supplied by the superintendent, the cost of which, if any there be, with that of the transportation of the pupil, shall stand as an account against him or his parent or guardian * * *. If it is made to appear by the affidavits of three disinterested persons of such county, not of kin to an inmate, his parents or guardian, that the same ought not to be collected from them or either of them because of their financial condition, then the auditor shall credit the same to the state and report that fact to the Board of Supervisors, which board shall direct its payment to the state out of the county fund."

From all the foregoing statutory provisions it will be found that all the laws applicable to the admission of insane persons to the insane hospitals of the state shall apply to the admission of persons to the Hospital and Colony for Epileptics so far as applicable; that the law govering the admission of patients to insane hospitals provides that the cost of support of a person in the insane hospital shall be charged to and paid by the county of the patient's residence; that the Board of Control is clothed with the power to determine and fix the monthly sum for the support of each patient in the various state hospitals for insane, not to exceed the maximum fixed by law.

Therefore, inasmuch as the Board of Control has the power to fix the monthly sum for the support of patients in the insane hospitals of the state, and whatever sum so fixed is chargeable to the county of patient's residence, and since the law relative to insane hospitals is applicable to the Hospital and Colony for Epileptics, then it is evident that the Board of Control has the power to fix the amount necessary for the support of patients in the Hospital and Colony for Epileptics, up to the maximum fixed by law, regardless of when or how they arrive, and charge the same to the county of the epileptic's residence.

The conclusion reached with reference to the transfer of patients from the State Hospital for the Insane to the State Hospital and Colony for Epileptics will apply equally to the transfer of patients from the Institution for Feeble-Minded Children to the State Colony and Hospital for Epileptics.

W. R. C. KENDRICK, *Assistant Attorney General.*

OPINIONS RELATING TO INSURANCE

CONSOLIDATION OF DOMESTIC AND FOREIGN INSURANCE COMPANIES

A domestic insurance company may consolidate with a foreign insurance company, in which event the consolidated company begins as a new company.

December 20, 1919.

Hon. A. C. Savage,
Commissioner of Insurance.

Dear Sir:

I have your request for an opinion upon the following questions concerning the consolidation of the Chicago Bonding and Insurance Company of Chicago, Illinois, with the American Bonding and Casualty Company of Sioux City, Iowa:

First: Do these companies have the right, under the laws of the state of Iowa and of the state of Illinois, to consolidate?

Second: What steps are necessary to be taken to consolidate, and would there be a new corporation if consolidation is effected?

With reference to your first question, I quote from chapter 58, acts of the 30th General Assembly of the state of Iowa, which is also found in the supplement to the code, 1913, sections 1821-m, 1821-r and 1821-s. The title and the sections application are as follows:

"CONSOLIDATION OR RE-INSURANCE OF THE RISKS OF INSURANCE COMPANIES.

"AN ACT to provide for the consolidation or re-insurance of the risks of insurance companies * * * with * * * other companies * * * authorized to transact business within this state, and providing for such consolidation * * *.

"Section 1. 'Company' defined. The word 'company' or 'companies' when used in this act, shall mean any company or association organized under the provisions of chapters four, five, six, seven or eight, or title nine of the code, except county mutuals.

"Section 6. When any company or companies not named

in section two (section 2 referring to life insurance companies) desire to consolidate or re-insure, it shall only be necessary for such company or companies to submit the plan or consolidation or re-insurance with any other information that may be required to the commissioner of insurance of the state and the attorney general, and have the same by them approved.

"Section 7. No company or companies as defined by section one of this act shall consolidate or re-insure with any other company or companies not authorized to transact business in this state."

You will note by the language of the title to the act, and by the language of section 7, that it was clearly the intent of the legislature of Iowa that any insurance company, other than life, in Iowa would have the power under this act to consolidate with any other company authorized to transact business in this state.

Note the language of the title: "An act to provide for the consolidation of insurance companies with other companies authorized to transact business in this state." Section 7 then follows and provides that "no company or companies, as defined by section 1, shall consolidate or re-insure with any other company or companies not authorized to transact business in this state." In other words, it is clearly saying by the act that any company which is authorized to transact business in this state may consolidate in any insurance company organized under the laws of this state as described in section 1.

It is, therefore, the opinion of this department that inasmuch as the American Bonding and Casualty Company is organized under the laws of the state of Iowa, as defined by section 1 of chapter 58, acts of the 30th General Assembly, and inasmuch as the Chicago Bonding and Insurance Company is now authorized to transact business in the state of Iowa, these companies come within the perview of this act, and are permitted to consolidate under this law.

The laws of the 31st General Assembly of the state of Illinois, as found in the acts of the 51st General Assembly of the state of Illinois, pp. 604-610, clearly authorize the consolidation of both resident and non-resident insurance corporations.

Your second inquiry is whether, after the consolidation is effected, it would be a new corporation.

As stated above, it is the opinion of this department that our statute confers the power to consolidate, without prescribing any mode of effecting the consolidation except section 6, which provides:

> "When any company or companies * * * desire to consolidate, * * * IT SHALL ONLY BE NECESSARY FOR SUCH COMPANY OR COMPANIES TO SUBMIT THE PLAN OF CONSOLIDATION * * * with any other information that may be required, to the commissioner of insurance of the state and the attorney general, and have the same by them approved."

Fletcher, Cyclopedia of Law of Private Corporations, Vol. 7, p. 8334, sec. 4691,

speaking with reference to this matter, says:

> "If the statute merely confers the power of consolidating without prescribing any mode of effecting the consolidation, the consolidating companies may agree upon any terms they may see fit, provided they are not unlawful. The statutory power to consolidate with other companies upon such terms as they may agree upon simply means such terms as may be agreed upon consistent with the law as announced in their charter or otherwise."

In reference to the matter of consolidation, *7 Ruling Case Law,* sec. 127 p. 155, says

> "By consolidation, in its proper and more restricted sense is meant a union, merger, blending or coalescence of two or more corporations *in one corporate body,* whereby, in general, their property, powers, right and privileges inure to, and their duties and obligations devolve upon, *a new corporation thus called into being."*

The statute of Iowa does not provide in detail with reference to the consolidation, excepting the securing of the consent of the commissioner of insurance and the attorney general, and when this has been done, if the plan is not in violation of the law, then all that is required is that the plan shall be approved by the commissioner of insurance and the attorney general, and by the companies themselves.

In a well considered opinion, the supreme court of the state of Illinois held that a consolidation of two corporations brings into existence a new corporation possessed of the property, rights, and franchises, and burdened with the liabilities of those passing out of existence.

Chicago Title and Trust Co. v. Doyle, 259 Ill. 489.

Speaking with reference to the matter of consolidation, this same court, in the case of

W. Scheidel Coil Co. v. Rose, 242 Ill., 484, said:

> "The effect of such consolidation is the dissolution of the constituent companies. They cease to exist as legal entities and a new corporation goes into existence having all the property, rights, powers and franchises and subject to all the duties and obligations of both the constituent companies."

In the case of *Chicago Title and Trust Co. v. Zinser,* 105 Ill. 718, the same court, speaking with reference to the matter of consolidation, says:

> "By the consolidation * * * the original corporation ceased to exist, and the appellee, as the consolidated corporation, acquired and succeeded to all the faculties, property, rights and franchises of all its component parts, and became subject to all duties and obligations and conditions imposed upon them."

It is, therefore, the opinion of this department, that all the steps necessary to be taken to effect the consolidation are:

First: To submit the plan to the commissioner of insurance and attorney general and obtain their approval of the same;

Second: The approval of such plan of consolidation by the companies consolidating;

Third: The adoption in connection with the plan of consolidation of a new set of articles of incorporation.

Upon the foregoing conditions being complied with, it is the opinion of this department that these two companies may and would be consolidated under the law, and that a new corporation would be organized and would assume all the duties and responsibilities held by both of the other corporations.

H. M. HAVNER, *Attorney General.*

HOSPITALS MAY SECURE LIABILITY INSURANCE

Incorporated hospitals come within the provisions of chapter 330, 38th General Assembly, relating to insurance against liability for errors or negligence in the practice of medicine.

December 1, 1919.

Hon. A. C. Savage,
Commissioner of Insurance.

Dear Sir:

Your letter of the 18th ult., addressed to Attorney General H. M. Havner, has been referred to me for attention.

You ask:

> "Are incorporated hospitals within the terms of the Iowa statute—section 1, chapter 330, 38th General Assembly—relative to insurance against liability for errors and negligence in the practice of medicine?"

The legislation to which you refer provides as follows:

> "Insure against liability for loss, damage or expense resulting from personal injury or death caused by error or negligence of the insured in the practice of medicine, surgery or dentistry, including the performance of surgical operations, or in the prescribing or dispensing of drugs or medicines, or for loss by reason of damages in other respects, for which loss, damage or expenses the insured is legally liable; provided, however, that any policy issued by any such company shall contain a provision so that said policy shall inure to the benefit of any person obtaining a judgment against the insured to the extent of the insurance carried and for the purpose for which the insurance was issued."

It will be observed that the act just quoted from covers any person engaged in dispensing drugs or medicines.

Inasmuch as a corporation has been held to be a person by the supreme court of Iowa, we are of the opinion that an incorporated hospital would come within the provision "dispensing drugs or medicines" and therefore a risk which could be insured under the provisions of chapter 330 aforesaid.

W. R. C. KENDRICK, *Assistant Attorney General.*

TITLE GUARANTY INSURANCE

Title guaranty insurance is authorized under paragraph 2, section 1700, supplement 1913.

December 29, 1919.

Hon. A. C. Savage,
Commissioner of Insurance.

Dear Sir:

I have examined the articles of incorporation of the Des Moines Title Guaranty Company submitted to this department for approval.

You express doubt as to whether or not the statutes of Iowa permit a corporation organized under the insurance laws of this state to engage in the class of business provided for in the articles of incorporation of the Des Moines Title Guaranty Company.

The nature of the business to be transacted by said corporation is stated in article 3 of the articles of incorporation, which article provides as follows:

> "The object of this corporation is to engage in the business of issuing bonds and guarantees against loss, injury or damage by reason of failure of, or defect in, the title to real estate or on account of costs or expenses of defending the title to the same, under the provisions of chapter 4 of title 9 of the code of Iowa, and to issue bonds and instruments of guaranty required or permitted by law to be made, given or filed, except bonds required in criminal causes."

Section 1709 of supplement to the code, 1913, defines the class of insurance which may be transacted by corporations organized under chapter 4, title 9 of the code, and paragraph 2 of said section reads as follows:

> "Insure the fidelity of persons holding places of private or public trust, or execute as surety any bond or other obligation required or permitted by law to be made, given or filed, except bonds required in criminal causes. None but stock companies shall engage in fidelity and surety business."

Under the statutory provision above quoted it will be observed that corporations organized under said chapter 4, may:

> "Execute as surety any bond or other obligation required or permitted by law to be made, * * * except bonds required in criminal causes."

There is certainly no illegality in giving by one person of a

guaranty to another person against loss, injury or damage by reason of failure of, or defect in, the title to real estate. Evidently such transactions are permitted under the laws of Iowa. Therefore, the business of executing as surety any bonds or other guaranty against such loss, injury or damage is clearly within the scope of paragraph 2 of said section 1709.

* * * *

W. R. C. KENDRICK, *Assistant Attorney General.*

LIMITING LIABILITY IN FIRE INSURANCE POLICY

A fire insurance policy limiting liability in the proportion that the sum insured bears to 80% of the actual cash value of the property violates Sec. 1746 of the Code prohibiting co-insurance.

February 11, 1920.

Hon. A. C. Savage,
Commissioner of Insurance.

Dear Sir:

You have submitted to this department the following riders to be attached to fire insurance policies, and ask for an opinion as to whether or not they violate any provision of the insurance laws of Iowa:

Average clause:

> This company shall not be liable for a greater proportion of any loss or damage to the property described herein, than the sum hereby insured bears to 80 per centum (80%) of the actual cash value of said property at the time such loss shall happen.
>
> In case of claim for loss on the property described herein, not exceeding five per cent (5%) of the maximum amount named in the policies written thereon and in force at the time such loss shall happen, no special inventory or appraisement of the undamaged property shall be required.
>
> If the insurance under this policy be divided into two or more items, these clauses shall apply to each item separately.

> In consideration of the rate at which this policy is written, it is expressly stipulated and made a condition of this contract that this company shall be liable under this policy for no greater proportion of any loss than the amount hereby insured bears to ninety (90) per cent of the actual cash value of the property described herein at the time when such loss shall happen, nor for more than the proportion which this policy bears to the total contributing insurance

thereon. In case the claim for loss does not exceed 5 per cent of the total amount of insurance upon the property described herein and in force at the time such loss occurs, no special inventory or appraisement of the undamaged property shall be required.

Our statutes provide that all fire insurance policies issued in this state shall be of a certain prescribed standard form. (Section 1758-b, supp. 1913). A penalty is then provided for a violation of that statutory provision. (Section 1758-c, supp. 1913).

Section 1746 of the code then provides:

> "Any provision, contract or stipulation contained in any policy of insurance, issued by any insurance company doing business in the state under the provisions of this chapter, providing or stipulating that the insured shall maintain insurance on any property covered by such policy to any extent, or shall to any extent be an insurer of the property insured in such policy, or shall bear any portion of the loss on the property insured, shall be void; and the auditor of state shall refuse to authorize any such company to do business or to renew the authority or the certificate of any such company when the form of policy issued or proposed to be issued contains any such provision, contract or stipulation. No condition or stipulation in a policy of insurance fixing the amount of liability or recovery under such policy with reference to prorating with other insurance on property insured shall be valid except as to other valid and collectible insurance, any agreement to the contrary notwithstanding."

The question now arising, do the provisions found in the riders herein submitted violate the terms of section 1746 of the code prohibiting coinsurance clauses in fire insurance contracts?

Coinsurance, in theory, is the requirement in a policy that the insured shall carry insurance up to a certain per cent of the actual cash value of the property insured; but coinsurance, in fact, is any provision in a policy which requires, or has the effect of requiring, the insured to carry any portion of his risk.

> *Attorney General v. Commissioner of Insurance,* 148 Mich. 566.
>
> *Richards on Insurance* (3d Ed.), sec. 242.

The legislature of Michigan enacted a law which reads as follows:

> "That it shall be unlawful hereafter for any fire insurance company doing business in the state of Michigan to provide

> by any insurance policy issued by it, or by any clause therein, or by any separate agreement, contract or otherwise, that the liability of said insurance company to the insured shall be limited or restricted by reason of the failure of the said insured to insure the property covered by said policy for any certain amount or proportion of the actual cash value of such property."

The supreme court of Michigan, in the case of *Attorney General v. Commissioner of Insurance, supra,* held that it would be a violation of the statute above quoted for a fire insurance company to provide in its policy a limitation of its liability

> "to such proportion of any loss as the amount of the policy bears to 80 per cent of the cash value of the property insured."

Referring, now, to our own statute, code section 1746, we find that it expressly prohibits any stipulation in a fire insurance policy, whereby the insured

> "shall to any extent be an insurer of the property insured in such policy, or shall bear any portion of loss on the property insured."

Occasionally attempt is made to evade the statutory provisions prohibiting coinsurance clauses in fire insurance policies by designating them "average clauses;" but if the effect of such clauses would be to cause the insured to carry any portion of his risk, then they fell within the inhibition and should be excluded.

Damhs & Sons Co. v. German Insurance Co., 153 Iowa, 168.

In the riders in question the insured is required to carry a certain proportion of his risk, provided he desires insurance to the full value of his property. I am, therefore, of the opinion that the riders in question violate the provisions of section 1746 of the code and should be excluded from all fire insurance policies in this state.

W. R. C. KENDRICK, *Assistant Attorney General.*

REGISTERED BONDS IN HANDS OF COMMISSIONER OF INSURANCE

Commissioner of Insurance should require assignment of registered bonds so that he can transfer them in case of necessity.

Hon. A. C. Savage,

Commissioner of Insurance.

Dear Sir:

Your letter of recent date, addressed to the attorney general, has been referred to me for attention.

You ask:

> "In view of the fact that there are now being deposited with this department a large number of registered Liberty bonds, we would like to know whether or not it would be necessary in order that this department might have the right to negotiate or transfer the title to the same, if necessary to comply with the laws of the state of Iowa, to have the right specifically authorized by declaration of trust or otherwise."

The statutes of Iowa requires insurance companies organized under the laws of this state to deposit certain securities with the commissioner of insurance, and under certain conditions and for a specific purpose.

As relating to stock companies, the statute provides that the amount of capital shall be invested in a certain class of securities, and these securities shall be deposited with the commissioner of insurance, at least to the amount of $100,000.

Code section 1769, as amended by section 1783-c, code supplement, 1913.

As to mutual life insurance companies, before a certificate to do business can be legally issued by the commissioner of insurance, such company shall have at least two hundred fifty applications for an average of $1,000 each, and three-fifths of the whole annual premium shall be deposited with the commissioner of insurance in either cash or lawful securities.

Code, section 1770.

It is also provided by statute that the net cash value of life policies in force, as shown by the annual statement, shall be invested in legal securities and deposited with the commissioner of insurance, except that in the case of stock companies such deposit shall not be required until the cash value of the policies in force exceed the amount deposited by its capital.

Code, section 1771.

It is further expressly provided by statute that the title to securities deposited by a life company, in the event such company becomes insolvent or against which receivership proceedings have been instituted, shall vest in the state for the benefit of the policies on which such deposits were made.

Code, section 1780.

The interest due on such securities may be collected by the

companies, however, if additional security is not deposited when called for by the commissioner of insurance, or pending any proceedings to close up or enjoin the company, the said commissioner shall collect the dividends and interest and add the same to such securities.

Code, section 1780.

Relating to assessment life companies accumulating any moneys to be held in trust for the fulfillment of its policies, the statute further provides that such companies shall invest said accumulation in securities authorized by law and deposit the same with the Commissioner of Insurance.

Code, section 1791.

And the interest on such securities shall be collected and disbursed the same as under ordinary life policies.

Code, section 1793.

From all the foregoing statutory provisions it is apparent that the securities deposited with the commissioner of insurance are deposited for the purpose of protecting the policyholders, and, in the event of insolvency or receivership proceedings, title to such securities is expressly vested in the state.

The question now arises as to whether you, as commissioner of insurance, may legally negotiate or transfer registered United States Liberty bonds in your department as required by law, should occasion arise for such transfer, without some specific authority so to do by the owners of the bonds.

The Treasury Department of the United States has ruled that a state commissioner of insurance may transfer registered United States bonds deposited with him, provided the company make an assignment in the following form:

> "Commissioner of insurance of the state of Iowa, in trust for the policyholders of ..... Insurance Company."

Provided, further, that such assignment is accompanied by a resolution of the Board of Directors authorizing it, and such resolution should be signed by the president and secretary and bear the seal of the corporation.

Therefore, it is the opinion of this department that you should require an assignment of all the registered United States Liberty

bonds deposited with you, in order that you may legally transfer title to the same in the event it becomes necessary so to do.

W. R. C. KENDRICK, *Assistant Attorney General.*

WHEN GROUP POLICIES FORBIDDEN

Health and accident insurance companies cannot write group policies, except under workmen's compensation law.

May 8, 1920.

Hon. A. C. Savage,
Commissioner of Insurance.
Dear Sir:

You request an opinion from this department upon the following question:

> "Can an insurance company, authorized to write health and accident insurance in the state of Iowa, issue in this state a group policy providing indemnity for loss of life, limb, sight or time by accidental means, or for loss of time by sickness?"

The statutes of Iowa prescribe the method of doing business by an insurance company, and all companies transacting such business in this state shall comply therewith.

I am unable to find any statute which authorizes a company to write group health and accident insurance in this state, except as affecting groups of employes and employers working under the workmen's compensation law.

I am therefore of the opinion that your question should be answered in the negative.

W. R. C. KENDRICK, *Assistant Attorney General.*

ANTI-AUTO STEALING ASSOCIATIONS

Certificates issued to members of associations agreeing to pay $100 reward for return of a stolen automobile is not insurance.

July 27, 1920.

Hon. A. C. Savage,
Commissioner of Insurance.
Dear Sir:

Your letter of recent date addressed to the attorney general has been referred to me for reply.

You ask whether or not an organization issuing a certificate as

hereinafter referred to is transacting the business of insurance under the laws of Iowa.

The certificate to which you refer is a certificate issued to members of an organization agreeing to pay a reward of not less than $100 or more than $300 to any party or parties recovering or giving information leading to the recovery of an automobile stolen from the holder of said certificate. Said certificate provides further that in the event the member disposes of his automobile he shall cease to be a member of the association and shall indorse to the purchaser of the car his said certificate. A fee of $10 per year is charged each member.

It is a uniform holding of authorities that insurance, other than life, is primarily a contract of indemnity. Therefore, unless the contract in question partakes of indemnity it cannot be classed as insurance.

In Minnesota there is an express statute defining the term insurance to

> "Do some act of value to the insured in case of such loss or damage."

Pursuant to that statute the supreme court of Minnesota, in the case of

Physicians' Defense Co. v. O'Brien, 100 Minn., 490,

held that contracts to defend physicians against suits for malpractice were contracts for indemnity and insurance.

Under a similar statutory provision of the state of California, the federal court placed the same interpretation upon a like contract, holding that such contract provided indemnity against a contingent liability, namely a liability to lose in addition to the naked judgment that might be obtained against the physician, such as loss of time, court costs and the like, and for that reason the corporation issuing such contracts were amenable to regulation under the state insurance laws.

Physicians' Defense Co. v. Cooper, 188 Fed., 832.

But when the element of indemnity is lacking such contracts are uniformly held to be nothing more than contracts for service.

Vredenburgh v. Physicians' Defense Co., 126 Ill. App., 509.
State v. Laylin, 73 Iowa St., 90.

We have no statute in this state defining the term insurance.

It must therefore be apparent that the contract in question does not possess any substantial element of indemnity. It merely obligates the association to which the member belongs to offer and pay a reward for the return of a stolen automobile, but does not indemnify the owner or agree to pay one cent for the actual loss of the car.

I am therefore of the opinion that the certificate in question is not a certificate of insurance and the association transacting such business is not amenable to the insurance laws of this state.

W. R. C. KENDRICK, *Assistant Attorney General.*

CERTAIN LIMITATIONS IN POLICY PROHIBITED

Workmen's compensation insurance covering farm labors and attempting to limit liability on that class is invalid.

October 27, 1919.

Hon. Thomas Watter, Jr.,
Deputy Commissioner of Insurance.

Dear Sir:

You submit to this department the following question for an official opinion:

> "Is it legal for an insurance company authorized to write workmen's compensation insurance in the state of Iowa, to issue a compensation policy in this state and attach thereto a limited liability endorsement such as hereto attached and marked 'Exhibit A' to cover farm labor?"

"Exhibit A" referred to reads as follows:

EXHIBIT "A"

WORKMEN'S COMPENSATION ENDORSEMENT—IOWA

(Limiting Liability for Farm Labor Only).

In consideration of the premium at which the undermentioned policy is written, it is understood and agreed that under paragraph one-a (1-a) and one-b (1-b) the Company's liability, whether the policy be issued in the name of one assured or more than one assured, for loss from an accident resulting in bodily injuries to or in death of one person (only) is limited to Five Thousand Dollars ($5,000.00) for each person.

Subject otherwise to all conditions, agreements and limitations of the policy as written, except as herein specifically provided.

Attached to and forming a part of Policy No..... issued by the Southern Surety Company of Des Moines, Iowa, to ..... of.....

Countersigned at..... this.....day of.....19..

C. S. COBB, *President.*

.....*Authorized Agent.*

From your letter and the rider marked "Exhibit A" I assume that the Southern Surety Company is attempting to insure farm labor under a workmen's compensation policy and limit the liability of the company in the event of injury to or death of that class of employes.

Insurance companies engaged in workmen's compensation insurance have no authority to issue policies covering farm laborers, for the reason that farm laborers engaged in agricultural pursuits do not come within the provisions of the workmen's compensation act.

Section 2477-m, code supplement, 1913, provides:

> "But this act shall not apply to * * * farm or other labor engaged in agricultural pursuits."

Therefore, if the rider in question is attached to a workmen's compensation policy and limits the liability for injuries to farm laborers engaged in agricultural pursuits, it is without any legal authority and therefore void.

It is to be understood, however, that the scope of this opinion is limited to the question as to whether or not an insurance company may legally insure farm labor under a workmen's compensation policy and limit the liability of the company in the event of injury or death. As to the right of an insurance company to insure farm labor under any other form of policy and limit the company's liability, we express no opinion at this time.

W. R. C. KENDRICK, *Assistant Attorney General.*

MEANING OF TERM "ENGAGED IN MILITARY SERVICE"

The term "engaged in military service" in a policy, means the same as "enlistment."

September 19, 1919.

Hon. A. C. Savage,
Commissioner of Insurance.

Dear Sir:

I have your request for an opinion as to the legal construction to be placed upon the word "engaged" as used in the following provision of a policy issued by the Royal Union Mutual Life Insurance Company of Des Moines, Iowa, to-wit:

> "This policy is absolutely free from restrictions as to residence, travel or occupation from the date of its issue, except engaging at any time in military or naval service during war. Such engagement shall require the written permission of the Company and the payment of an extra premium at the established rate while so engaged. In case of death during such engagement, and without the Company's written permission, the liability of the Company hereunder shall be limited to the amount of the then legal reserve on this policy."

It is generally held by the courts that parties to an insurance contract may stipulate as to what risks shall be covered by the policy. Under this rule insurance companies have the undoubted right to limit their liability, unless the statute expressly forbids it.

Babcock v. Nanselman, 56 Mich., 27.

Following the doctrine above stated, the courts have held that insurance companies are not liable for more than the reserve on the policy, where the policy limited the liability to that amount in the event the insured served in the military service of the United States in time of war without first obtaining the permission of the company and paying an additional premium.

LaRue v. Kansas Mutual Life Co., 68 Kan., 539.

The clause in the policy in question limits the liability of the company to the then legal reserve on the policy, in the event the insured "engages" in the military or naval service in time of war, without previously having obtained from the company a permit therefor.

Webster defines the word "engage" to mean:

> "To embark in a business; to enlist."

In New York it was held that when a fraternal society prohibited a member from engaging in the sale of intoxicating liquors, one of the partners in a laloon was engaged in that business, even though he took no active part in the actual operation of the saloon.

Graves v. Knights of Maccabees, 199 N. Y., 387.

In the Graves case, *supra,* it was held that the word "engaged" means:

> "To take a part; to devote attention and effort; to employ one's self; to enlist."

When a complaint alleged that the plaintiff, a passenger, was thrown down and injured while engaged in alighting from a train, the term "engaged in alighting" was held to include all the acts transpiring from the moment the passenger arose for that purpose until he gets clear of the car.

Birmingham Railway, Light and Power Co. v. Glenn, 60 Mo (Ala.), 111.

When a person enlists in the army and takes the oath of allegiance, he becomes a soldier, and transfers himself from civil to military life, and renders himself amenable to the military jurisdiction. From that time on, and until he is discharged, he is engaged in military services. Such was the holding in the case of *In Re Grimley,* 157 U. S., 147.

Now, as to the meaning of the word "engage" as used in the policy in question, it seems to me it is susceptible of but one meaning, and that is synonymous with "enlist." It will be observed that the language in connection with which the word is used expressly prohibits a policyholder "engaging at any time in military or naval service during war," without the consent of the company. From the language used, it is evident that the company intended to protect itself against one of its policyholders entering the military or naval service when a state of war existed between this country and a foreign nation. The ordinary hazards of the risk are increased at the time the policyholder enters the military or naval service, and he is then subject to any orders of his commanding officer, and he is apt to be sent at once to a position of extraordinary peril near the firing line, as was often the case in the recent war with Germany. In fact, the perils in and about an army camp are often nearly as great

as those of actual battle. This was clearly demonstrated by the influenza epidemic, which proved so fatal in our various cantonments. So that it is unreasonable to assume that the company must wait until the policyholder actually arrives on the firing line before notifying the company.

I am therefore of the opinion that when one enters the army he is then engaged in the military service, and if he enters such service during war, the exception in the policy under consideration unquestionably applies. I can see no other regular conclusion.

W. R. C. KENDRICK, *Assistant Attorney General.*

COMPANIES INSURING AGAINST LOSS BY FIRE MUST DELIVER POLICIES

The laws of this state require that when property is insured against loss by fire that the insurer must execute and deliver to the insured a policy which must comply with the provisions of section 1758-b, Supplement 1913. Any insurance company failing or refusing to comply with this section is guilty of a misdemeanor.

July 31, 1919.

Hon. A. C. Savage,
Commissioner of Insurance.

Dear Sir:

Your letter of the 17th inst. addressed to Attorney General H. M. Havner has been referred to me for attention.

You state:

> "I have the honor of submitting to you for your determination and opinion the following question: Is it lawful, under the Iowa law, for a fire insurance company to issue grain-on-farm certificates which are subject to the terms and conditions of an open policy? By the term 'open policy' it is meant that a policy is issued without naming the insured, but when persons desire insurance on the class of property referred to in said policy, then a certificate is issued and delivered to them stating the amount, rate and premium, and refers therein to the open policy held by the insurer.
>
> "In this transaction the policy itself is never delivered to the insured, but retained by the agent or some other person and only a certificate delivered to the insured.
>
> "For your information, I am transmitting herewith forms of open policy and certificates issued thereunder, as the same are issued by two different fire insurance companies."

With your letter you submit a copy of the certificates which

fire insurance companies desire to use in this state, and which provide in substance the name of the company, the name of the insured, the kind of risk, where located, the amount of insurance, rate, premium and term.

As I understand your inquiry, it is simply this: Can fire insurance companies legally issue and deliver such certificates in lieu of standard form policies?

Our statute describes a standard form of all fire insurance policies in section 1758-b, supplement to the code, 1913.

Section 1758-c of the supplement to the code, 1913, further provides:

> "Any insurance company, its officers or agents, or either of them, violating any of the provisions of this act, by issuing, delivering or offering to issue or deliver any policy of fire insurance on property in this state other or different from the standard form, herein provided for, shall be guilty of a misdemeanor, * * *"

As I understand your inquiry, the company issues a policy without naming any person as the insured, and omitting the amount insured, the rate, premium, term or location of the property. This is called an "open policy," and the company retains possession thereof. Under such policy, one person or a thousand people might be insured. When a person desires insurance on the class of risk named in the open policy, the agent of the company will fill out one of these certificates, refer therein to the number of the open policy deposited in the vaults at the home office, and he will deliver that certificate to the insured. The insured has nothing else than the certificate to show that he is insured. He receives no policy. A thousand different people might hold such certificates and be insured under that single policy.

Such a scheme certainly does not comply with the insurance laws of this state. From the foregoing statutory provisions it is imperative that when a person is insured against loss by fire, the insurer must execute and deliver to the insured a policy which complies with the provisions of section 1758-b, *supra,* and any company issuing, delivering or offering to issue or deliver a substitute therefor, is guilty of a misdemeanor.

I am of the opinion that the issuance of such certificate in

lieu of a policy standard in form, is clearly unauthorized under the laws of Iowa.

W. R. C. KENDRICK, *Assistant Attorney General.*

JOINT CONTRACTS OF INSURANCE PROHIBITED

Insurance companies cannot combine and issue joint contracts of insurance.

July 31, 1919.

Hon. A. C. Savage,
Commissioner of Insurance.

Dear Sir:

Your letter of the 22d inst. addressed to Attorney General H. M. Havner has been referred to me for reply.

You ask:

> "Can a joint policy of the character hereto attached and marked 'Exhibit A' be lawfully issued in this state by a joint organization of insurers?
>
> "As a matter of public policy, if such policy can be lawfully issued, would you deem it advisable to approve such a policy as the attached 'Exhibit A' in view of the possible effect on rates that such a combination of insurers might have?"

The policy in question is a contract insuring an employer as respects personal injuries sustained by his employes, and the policy is the joint contract of nine separate and distinct foreign insurance companies operating on the stock plan.

The question raised is: May several distinct insurance companies combine for the purpose of transacting business in a particular manner?

The statutory provision material to a determination of that question will be found in section 1754 of the code, as amended by chapter 318, acts of the 38th General Assembly, which reads as follows:

> "It shall be unlawful for two or more insurance companies doing business in this state, or for the officers, agents or employes of such companies, to make or enter into any combination or agreement relating to the rates to be charged for insurance, the amount of commissions to be allowed agents for procuring the same, or the manner of transacting the insurance business within this state; and any such company, officer, agent or employe violating this provision shall

be guilty of a misdemeanor, and on conviction thereof shall pay a penalty of not less than one hundred dollars nor more than five hundred dollars for each offense, to be recovered in the name of the state for the use of the permanent school fund."

It will be seen from the foregoing statutory provision that insurance companies are prohibited from combining for the purpose of transacting business in the fixed manner, and it is provided in section 1755 of the code that a violation of the provisions found in section 1754 works a forfeiture of their permit to transact business in this state.

I am therefore of the opinion that it would be unlawful for the joint combination of insurers to issue the policy in question.

W. R. C. KENDRICK, *Assistant Attorney General.*

WHAT FORMS COMMISSIONER OF INSURANCE MUST PASS UPON

It is the duty of the commissioner of insurance to approve of all forms of riders used on insurance policies but he is not required to pass upon forms submitted by persons other than insurance companies, especially before the form has been adopted by any company as a rider.

July 31, 1919.

Hon. A. C. Savage,
Commissioner of Insurance.

Dear Sir:

Your request for an opinion from this department on the following questions have been referred to me for reply, to-wit:

"Is the approval of this department necessary on a rider which is proposed by the insured, printed, prepared and suggested to him by a concern, not an insurance company?

"Also in this connection and in your opinion, can this department lawfully approve a rider form submitted by the Merchants' Trade Journal or any other organization engaging in the business of checking over fire insurance policies, said concern not being an insurance company."

The statutory provisions material to a determination of your question will be found in section 1745 of the supplement to the code, 1913, which reads as follows:

"The form of all policies or permits issued or proposed to be issued by any insurance company doing business in this state under the provisions of this chapter shall first be examined and approved by the commissioner of insurance * * *"

In the rider submitted with your letter, I find the following provision:

"Attached to and forming a part of policy No.....
of the.....company of.....this
.....day of....., 19.....
To be signed in ink by.....Agent"

Undoubtedly before the agent signs his name, he submits the rider to the company for its approval. When the company approves it, the rider then becomes a part of the policy.

The statute provides that the form of all policies shall be approved by the commissioner of insurance.

It is evident, therefore, that the riders referred to in your letter must be first submitted to the commissioner of insurance for his approval. This conclusion is strengthened by the further fact that said riders contain a provision that it is to be substituted in lieu of all prior forms, which, of course, includes all prior forms which may have been approved by the commissioner of insurance.

As to your second proposition, I believe that the statute does not contemplate that the commissioner of insurance shall approve such riders when submitted by a person other than an insurance company, but before an insurance company adopts such riders, they should submit them to the commissioner of insurance for his approval, and after the commissioner has approved a particular form, then there could be no legal objection to adopting exact duplicates to policies without submitting them to the commissioners of insurance for his approval.

W. R. C. KENDRICK, *Assistant Attorney General.*

FOREIGN INSURANCE COMPANIES

A foreign insurance company may transact business through its department in Iowa and print on the filing back the name of such department.

May 26, 1919.

Hon. A. C. Savage, Commissioner of Insurance.

Dear Sir:

We have your letter of the 22nd inst. submitting for examination and approval sample copies of the policy issued by the Great American Insurance Company of New York.

You ask whether or not it would be in violation of section 1758-e

of the supplemental supplement to print on the filing back of said policies the following:

> "Policy issued through Capital and Merchants and Bankers department, Des Moines, Iowa."

You further explain that "Capital and Merchants and Bankers" department was formerly the name of an insurance company existing in this state, but at the present time is out of business as an independent insurance company, said company having been absorbed by the Great American Insurance Company.

The statutory provisions material to a determination of your question will be found in section 1758-e of the supplemental supplement which reads as follows:

> "That every fire insurance company and association authorized to transact business in this state shall conduct its business in the name under which it is incorporated, and the policies issued by it shall be headed or entitled only by such name. There shall not appear on the face of the policy or on its filing back, anything that would indicate that it is the obligation of any other than the company responsible for the payment of losses under the policy, though it will be permissible to stamp or print on the bottom of the filing back, the name or names of the department or general agency issuing the same."

Referring to the sample policy submitted by you for our examination, it will be found that the contract of insurance is the sole obligation of the Great American Insurance Company, and that said company is merely using the "Capital and Merchants and Bankers" as an instrumentality or "department" through which it transacts its business in the state of Iowa.

It is therefore the opinion of this department that the filing back of the said policy forms of the Great American Insurance Company is not in violation of the statutory provision above referred to.

W. R. C. KENDRICK, *Assistant Attorney General.*

POWER OF CERTAIN MUTUAL INSURANCE COMPANIES

Mutual insurance companies organized under Chapter 4 of the Code of 1897, and existing when Chapter 429, acts 37th General Assembly took effect, are authorized to accept fixed cash premiums and reinsure their risks in companies authorized to do business in this state.

May 26, 1919.

Hon. A. C. Savage, Commissioner of Insurance.

Dear Sir:

We have your letter of the 10th inst., in which you state that the Employers Mutual Casualty Association of Iowa is issuing policies of insurance on a fixed premium basis, and also that said association has reinsured its risks in an Alabama corporation, known as the Interstate Casualty Company.

You then ask for an opinion from this department upon the two following questions:

> "1. Do the laws of Iowa authorize the Employers Mutual Casualty Association to issue policies for a fixed premium and without any additional liability?
>
> "2. Do the laws of Iowa authorize the Employers Mutual Casualty Association to reinsure its risks?"

The Employers Mutual Casualty Association of Iowa is a corporation organized under chapter 4, title IX of the code, for the purpose of transacting the class of insurance provided for in subdivision 5, section 1709, supplement to the code, 1913, now section 2, chapter 428, acts of the 37th General Assembly, namely, insuring employers against risks arising out of injuries to their employes.

As to your first question, the statutory provisions applicable thereto will be found in either chapter 4 of the code, or in chapter 429 of the acts of the 37th General Assembly.

The provisions of said chapter 429 material to a proper determination of your first question will be found in section 5 of said chapter, which reads as follows:

> "The maximum premium payable by any member of a mutual company shall be expressed in the policy and in the application for the insurance. Such maximum may be a cash premium and an additional contingent premium, not less than the cash premium, or may be solely a cash premium, which premium may be made payable in installments or regular assessments. No policy shall be issued for a cash premium without an additional contingent premium unless

> the company has a surplus which is not less in amount than the capital stock required of domestic stock insurance companies transacting the same kind of insurance."

It will be seen from section 5 above quoted that mutual insurance companies coming within the provisions of said chapter are expressly prohibited from issuing policies for a cash premium without a contingent premium not less than the cash premium, unless the company has a surplus equal in amount to the capital stock required of domestic stock companies transacting the same kind of insurance.

But the Employers Mutual Casualty Association of Iowa does not come within the provisions of said chapter 429, for the reason that said chapter further provides that the provisions thereof shall not apply to existing associations until said associations, by resolution of its board of directors and amendments of its articles, so elect; and so far as I am able to find the Employers Mutual Casualty Association of Iowa has never so elected.

Section 11, chapter 429, provides:

> "The provisions of this chapter shall not apply to any company or association of this state now doing business whether organized under chapter 4 or chapter 5, title nine of the code, as amended unless such company or association shall so elect by resolution of its board of directors duly certified to by the president and secretary and filed with and approved by the commissioner, and shall further amend its articles, if necessary, to permit full compliance with this chapter and to include such additional kind or kinds of insurance as such company or association intends to transact. On the filing and approval of such resolution and on making such amendment if required, such company may be authorized to transact such kinds of insurance under this chapter."

Therefore, the authority of the Employers Mutual Casualty Association of Iowa to issue policies for a fixed cash premium will be governed solely by chapter 4 of the code. Chapter 4 permits the acceptance of premium notes by mutual insurance companies. code section 1705. And in the event of a loss the directors shall determine the proportion thereof that each member shall pay and notify such member of the amount. Code Section 1706. If such member fails to pay the sum assessed against him within thirty days, then the company may bring suit. Code Section 1707. However, section 1707 further provides that in the event it becomes necessary to bring suit to collect such assessment "no such mem-

ber shall be held liable in the aggregate by assessments in a sum exceeding the amount of his premium note."

Thus, it will be seen, mutual insurance companies operating under chapter 4 of the code may accept premium notes and limit the amount of liability thereunder.

It is further provided in said chapter 4 that cash premiums may be accepted in lieu of premium notes.

Section 1708 provides:

> "Any mutual company organized under the provisions of this chapter may accept cash premiums in place of premium notes for any term of insurance not exceeding one year, the amount of cash to be paid to be determined by the directors of the company.

If a mutual insurance company is authorized under said chapter 4 to issue policies and accept premium notes limiting the liability of the member, the conclusion must be inevitably reached that when cash premiums are accepted in lieu of notes, such cash premiums may be fixed and limited.

Therefore, your first question must be answered in the affirmative.

As to your second question, namely, whether a mutual insurance company, such as the Employers Mutual Casualty Association, is authorized to reinsure its risks, section 1711 of the supplement to the code, 1913, provides:

> "Such company may * * * cause itself to be reinsured in companies only authorized to do business in this state, against any loss or risk it may have incurred in the course of its business."

Therefore, your second question should also be answered in the affirmative, provided the company in which the risks are reinsured is authorized to do business in this state.

W. R. C. KENDRICK, *Assistant Attorney General.*

SURPLUS OF FOREIGN MUTUAL COMPANIES

Foreign mutual insurance companies writing compensation insurance must have surplus of $200,000, except under certain conditions.

March 1, 1919.

Hon. A. C. Savage,
Commissioner of Insurance.

Dear Sir:

Your letter of the 25th inst. addressed to this department has been referred to me for attention.

You state that the Builders' and Manufacturers' Mutual Casualty Company of Chicago, Illinois, has made application for a permit to transact business in this state, and that said company is engaged in the business of writing workmen's compensation insurance.

You then ask for an opinion from this department as to the minimum surplus required of said company prior to issuing a permit to do business in Iowa.

I understand, and so assume in this opinion, that the policies issued by the company in question provide for an additional contingent liability equal to the cash premium. With that fact conceded, the question of issuing a permit will be governed by paragraph 2, section 19, chapter 429, acts of the 37th General Assembly, which reads as follows:

> "In case of any other such mutual company issuing policies for a cash premium or payment with an additional contingent liability equal to or greater than the cash premium or payment, the surplus shall be such an amount as the insurance commissioner of Iowa may require, but in no case less than fifty thousand dollars, provided that the provisions of this section fixing a minimum surplus of fifty thousand dollars shall not apply to companies now admitted to do business in Iowa; provided further, that no such mutual company shall be authorized to transact compensation insurance without a surplus of at least two hundred thousand dollars, unless all liability, shall be provided for by a special deposit, in a trust company of this state, which shall be a trust fund applicable solely and exclusively to the payment of the compensation benefits for which such deposit is made, or shall be re-insured in an authorized stock company, or in an authorized mutual company with a surplus of at least two hundred thousand dollars."

Pursuant to the foregoing statutory provision, before you would

be authorized to grant a permit to a foreign mutual company writing compensation insurance, such company must have a surplus of at least $200,000.00; provided, however, its each adjusted claim of the company in this state, the payment of any part of which is deferred for more than one year, shall be covered by a special deposit in a trust company in this state, or if such risks are re-insured in an authorized stock company, or in an authorized mutual company with a surplus of at least $200,000.00, then and in that event the amount of surplus required of such companies, before admitting them to transact business in this state, is a matter of discretion with the commissioner of insurance.

However, the proviso above referred to is not exactly clear. A foreign mutual company is not supposed to transact any business in this state without first obtaining a permit from the commissioner of insurance, and therefore at the date of applying for a permit the company is not supposed to have any "adjusted claims" in this state for that fact presupposes the transaction of business in Iowa. But the statute was evidently intended to permit foreign mutuals writing compensation insurance to come into Iowa and transact business in this state even though their surplus is less than $200,000.00 provided they in some manner guarantee the payment of adjusted claims, the payment of any part of which is deferred for more than one year.

It therefore occurs to me that you would have authority to issue a permit to such foreign mutuals to transact business in Iowa even though their surplus is less than $200,000.00 but more than $50,000,00, provided they make the provisions indicated in said paragraph to take care of such adjusted claims as they arise, but the amount of the surplus required is discretionary with you.

W. R. C. KENDRICK, *Assistant Attorney General.*

INVESTMENT OF FUNDS OF STOCK LIFE COMPANY

The funds of a stock life insurance company may be loaned to officers on real estate security, except the capital. Sec. 1783-e, Supplement 1913, considered and applied.

February 24, 1919.

Hon. A. C. Savage,
Commissioner of Insurance.

Dear Sir:

Your favor of the 11th inst. addressed to Attorney General Havner has been referred to me for reply.

You submit a copy of the By-Laws of the Royal Union Mutual Life Insurance Company in which provision is made for a "guarantee fund," and you then ask:

First: Should this "guarantee fund" be included in the surplus of the company, or merely mentioned as a notation?

Second: Would the fact that said guarantee fund might be withdrawn at any time at the direction of the directors, provided such withdrawal would not impair the strength and stability of the company, change the status of said fund?

Article IV of the corporate charter of the Royal Union Mutual Life Insurance Company provides in substance that when the directors deem it to be to the best interests of the company to establish a guarantee fund, such a fund may be established not to exceed $100,000.00 in the aggregate, to be divided into shares of one hundred dollars each, at least one-half of the total amount of the fund so established shall be paid in cash within ninety days after the subscribing of such fund, and the balance to be paid in subject to the call of the directors, and that the entire fund shall stand as a guarantee with other assets of the company to meet all the obligations and liabilities of the company.

It is further provided that the portion of the fund paid in shall be invested in the same class of securities as other funds of the company, and when so invested the securities shall become a part of the assets of the company.

It is further provided that all profits, gains or accumulations realized from said guarantee fund shall belong and be paid to the subscribers to said fund.

It is further provided that the Board of Directors shall have the power to declare a dividend upon the unimpaired guarantee fund, not to exceed seven per cent per annum, and pay that dividend from the net surplus earnings of the company.

Then it is finally provided that after twelve years from the date of the establishment of said fund a majority of the Board of Directors may authorize the withdrawal of the same, provided such withdrawal will not impair the strength and stability of the company.

There is no legal objection to the establishment of a guaranty fund by a mutual insurance company, and ordinarily such a fund is considered no part of the assets or working capital of

the company, but more in the nature of a loan. Such is the holding in the following cases:

Berry v. Fire Insurance Co., 94 Iowa, 135.
Corey v. Sherman, 96 Iowa, 114.
Smith v. Sherman, 113 Iowa, 601.

However, article IV, *supra*, is peculiar in its provision. The provisions creating a guaranty fund in the cases above cited declare that the subscribers to said fund shall be liable to assessment on their subscription as the Board of Directors may determine is necessary from time to time to pay losses when the regular assessments against the policyholders are insufficient to pay losses, and, further, that the subscribers may withdraw their subscriptions after a certain period of time. Article IV of the articles of incorporation of the Royal Union Mutual Life Insurance Company declares that the guarantee fund therein provided for shall become a part of the assets of the company and be used to help meet all its obligations. Said article further declares that this fund shall not be withdrawn, except at the discretion of the Board of Directors, and then only when the withdrawal of the fund will not impair the solvency of the company. So that the fund created in article IV becomes a part of the assets of the company and would undoubtedly be considered a part of its surplus, if such a term can be properly given to such a company as the one in question.

Therefore, in answer to your first question above, it is my opinion that such a fund should be included in the surplus of the company.

Your second question should be answered in the negative.

In your letter of the 11th inst. you also ask whether or not section 1783-e of the supplement to the code, 1913, prohibits a stock insurance company from loaning any of its funds to the officers or directors of the company.

You also ask whether said section applies to legal reserve life insurance companies organized on the mutual basis.

Section 1783-e, supplement to the code, 1919, declares:

> "From and after the taking effect of this act, no insurance company shall be incorporated to transact business upon the stock plan, whether life insurance or insurance other than life, with less than one hundred thousand dollars capital, the entire amount of which shall be fully paid up in cash and invested as provided by law. No part of the capital referred

to shall be loaned to any officer or stockholder of the company."

It is evident that the prohibition contained in section 1783-e, *supra,* applies only to the original capital with which the corporation commences business, and forbids the impairment of that fund. As to any other funds of the company, the investment of the same is controlled by section 1806, supplemental supplement, 1915. Paragraph 4 of said section permits the investment of its funds in real estate mortgages; and it would therefore seem that funds other than the original capital (or additional capital when the capital stock is increased) might be loaned to the officers or directors of the company, when the loan is secured by real estate mortgages on real estate owned by said officers or directors and made in accordance with said paragraph number 4.

As to whether section 1783-e, *supra,* applies to legal reserve life insurance companies organized on the mutual basis, I am of the opinion that it does not. Said section expressly limits the provisions thereof to stock companies.

W. R. C. KENDRICK, *Assistant Attorney General.*

MAXIMUM LIABILITY

The maximum liability of members of companies organized under Chapter 5, title 9 of Code, is limited to the amount provided for in Section 1759-g Supplement 1913.

February 12, 1919.

Mr. S. W. DeWolf, Receiver,
Reinbeck, Iowa.

Dear Sir:

Your letter of the 31st ult. addressed to Attorney General Havner, concerning in re *Iowa State Automobile Insurance Association* of Grundy Center, Iowa, has been referred to me for reply.

You state that the commissioner of insurance caused a receiver to be appointed for this company some time ago, and that you were appointed as such. You also state that the assets of said company are insufficient to pay its obligations, and in order to do so, it will be necessary to make an assessment upon its members.

You further state that the question has been raised as to the right of the receiver to levy an assessment for more than one basis or regular assessment, and ask for the opinion of this department as to the correctness of that contention.

The association in question was organized to transact the business provided for in chapter 5, title 9 of the code and amendments thereof; so that what rights the members have and what responsibility they are under are governed by the provisions of said chapter.

Section 1759-h of the supplement to the code, 1913, provides:

> "Such associations may collect a policy and survey fees and such assessments, provided for in their articles of incorporation and by-laws, as are required to pay losses and necessary expenses incurred in the conduct of their business. State mutual fire insurance associations shall provide for and maintain a reinsurance reserve as herinafter designated. No state mutual association shall collect assessments for more than one year in advance where such assessments exceed three mills on each dollar of insurance in force."

Section 1759-i of the supplement to the code, 1913, as amended by section 2, chapter 412, acts of the 37th General Assembly provides:

> "From and after the taking effect of this act, all state mutual fire insurance associations operating under the provisions of this chapter, except such associations as confine their business exclusively to farm, dwelling and personal property, churches and school houses, shall, annually, set aside and maintain as a reinsurance reserve an amount equal to 10 per cent of the receipts from assessments during the year until the total amount thus accumulated shall equal 40 per cent, but not to exceed 50 per cent of the amount of one annual assessment at the basis rate charged for such insurance on all policies in force. The reserve thus accumulated may be used for the payment of losses and expenses and when so used shall be restored and maintained by the collection of assessments as hereinafter provided."

Section 1759-j of the supplement to the code, 1913, provides:

> "Every association contemplated by the preceding section shall provide in its by-laws and specify in its policies the maximum liability of its members to the association. Such liability shall not be less than a sum equal to the basis rate charged by the association for insurance nor greater than a sum equal (to) three times such basis rate. The maximum liability of the member shall be plainly and legibly stated in each policy. Whenever reductions shall be made in the liability of members such reduction shall apply proportionately to all policies in force."

Section 1759-k of the supplement to the code, 1913, provides:

"Whenever the assets of any association required to maintain a reinsurance reserve are insufficient for the payment of losses and expenses, it shall make an assessment for the required amount ratably upon its members liable therefor, and whenever by reason of depreciation, loss or otherwise, the net assets of any association required to maintain a reinsurance reserve, after providing for other debts, are less than the required reserve, the deficiency shall be restored by assessment as above provided."

From the foregoing statutory provisions it will be found:

(1) That the maximum liability of members of such associations is that specified in the by-laws and policy of the association, but in no event to be less than a sum equal to one basis or regular assessment, nor greater than a sum equal to three times the basis rate or regular assessment.

(2) State mutuals shall provide and maintain a reinsurance reserve by setting aside annually an amount equal to 10 per cent of the annual assessment, until the total amount thus accumulated shall equal not to exceed 50 per cent of one annual assessment. This fund shall be used to pay losses and expenses, and when so used shall be restored by an assessment for the required deficiency ratably upon its members liable therefor.

(3) That by the amendment to section 1759-i, *supra,* found in section 2, chapter 412, acts of the 37th General Assembly, the requirement that state mutuals shall maintain a reinsurance reserve has been practically repealed, for the reason that all associations confining their business exclusively to farm, dwelling and personal property, churches and school houses are exempt from the requirement to maintain a reserve. That takes in about every class of property on which insurance policies are written.

Referring now to the by-laws of the Iowa State Mutual Automobile Insurance Association, it will be found that no provision is made therein limiting the liability of its members; however, in the policy issued by said association the following provision is found:

"The maximum liability under this policy cannot exceed basis rate charged for this policy, * * *"

In the articles of incorporation we also find the following provision:

"The private property of each member shall be exempt from all corporate debts of the association, except for the pro rata

share for the assessment levied against such members, but in no case shall any member be liable for more than a just and equitable proportion of each assessment."

From the two provisions just referred to it is not clear as to just what is the limitation, whether merely the annual assessment or an assessment in addition thereto; but, construing the policy and articles of incorporation in connection with section 1759-j of the supplement to the code, 1913, it is evident that the maximum liability of the members is limited to one additional basis assessment, unless there is some other statutory provision enlarging the liability of the members.

There is one other section which provides for the manner of making assessments and the liability of the members therefor when the association is insolvent.

Section 1759-l of the supplement to the code, 1913, provides:

"Whenever the board of directors or the auditor of state shall ascertain that any association is insolvent, such board, or upon its failure to so do, the auditor of state may direct an assessment ratably upon all members liable therefor in such amount as may be necessary as follows:

"1st. It shall be determined what amount each policyholder should pay or receive in case he desires to withdraw from the association.

"2d. What further sum each policyholder should pay to reinsure his policy with some other solvent association.* * *"

But section 1759-l, *supra,* does not enlarge the liability of the members. It will be seen that, when the association is insolvent, in making the assessment it shall be determined what each policyholder shall pay in the event he desires to withdraw from the association, and in the event he does not desire to get out of the association, but prefers to keep his policy in force, then it shall be determined what amount he shall pay to reinsure his policy in some solvent association. However, section 1758-l must be construed in connection with section 1759-j, and in the event the member desires to withdraw from the association his maximum liability will be determined according to the provisions of said section 1759-j, which, in the case in question, would be limited to not to exceed one additional basis or regular assessment.

However, with reference to the insurance reserve, if said association did not maintain the required amount at the date the

amendment by the thirty-seventh general assembly took effect, then the members would be liable to assessment to bring it up to the required amount at that date.

But it appears that you, as receiver, have filed an application for an order authorizing you to levy an assessment of $1.70 for every $100.00 of insurance in force at the time the company went into the hands of a receiver, basing the right to levy an assessment in that amount upon the articles of incorporation, which provide that the assessment for which a member shall be liable must be computed pro rata on an equitable basis. It was alleged in said application that an assessment of eighty-five and one-half cents per one hundred dollars of insurance in force would be sufficient to raise the amount necessary to pay the indebtedness, but to play safe it was advisable that the rate of assessment should be doubled. Therefore the court entered an order authorizing and empowering the receiver to levy an assessment of $1.70 and to collect it by legal procedure if necessary.

Pursuant to the foregoing order you, as receiver, levied an assessment of $1.70 on each one hundred dollars of insurance in force, and a number of the members have paid the assessment. But a few have refused to pay more than one assessment upon the basis rate, and bottom their position on both section 1759-j, of the supplement to the Code, 1913, and the provision in the policy limiting their maximum liability to a sum not to exceed one assessment upon the basis rate.

You are now undecided just how to proceed, whether you should attempt to collect the $1.70 assessment, or to collect only a sum equal to one assessment upon the basis rate.

My opinion is that the liability of the members of the Iowa State Automobile Insurance Association is limited to an amount equal to one assessment upon the basis rate; however, inasmuch as the court has appointed you receiver for said association and has authorized and empowered you to levy an assessment of $1.70 on each one hundred dollars of insurance in force, and directed you to collect it by suit if necessary, that, therefore, you have no other course to pursue than to obey the order of the court and proceed and attempt to collect the assessment authorized in said order. If any of the members have any objection to the amount of the assessment they should present their objections to the court and ask for a modification of his order; otherwise the matter

is res adjudicata. This general doctrine has been announced and adhered to by our supreme court in the following cases:

Stewart v. Lay, 45 Iowa 604;
State v. Union Stock Yards State Bank, 103 Iowa 560;

In the Stewart case, *supra,* it is said at page 612:

> "The jurisdiction of the court and of the receiver being conceded, and the fact of assessment being admitted, it is to be regarded as res adjudicata. All questions as to the indebtedness of the bank and the like, involved in the assessment, or which it was necessary to determine, before making it, must be presumed to have been adjudicated, and defendant is bound thereby. Any errors made by the court, in the proceedings appointing the receiver and controlling and directing his action, must be corrected by proper application to the court or by appeal from its orders or decisions as provided by the law applicable to such cases. * * *"

In *State v. Union Stock Yards State Bank,* supra, it is said at page 560:

> "We understand the rule to be, as to the appointment of a receiver and the making of such an assessment, that all matters that necessarily inhere in the orders by which such results are attained—that is, matters to be considered and determined in making the orders—are adjudicated and conclusively settled, except in so far as they be changed by vacation or modification in the receivership proceedings upon application of parties interested, whether stockholders or others. It is definitely settled in *Stewart v. Lay,* supra, that none of these matters can be set up in an action brought by the receiver under direction of the court. It is urged to us that one of the district courts of the state has held—following the opinion in this case—that in an action on such an assessment the amount of recovery cannot be controverted. Such a holding is correct. It was one of the matters considered and determined in making the order of assessment, and, if erroneous, the error must be cured in the same proceeding. * *"

It is intimated in your application to the court for authority to levy an assessment, it is probable that an assessment in any amount could not be collected from some of the former members of the association, and, in order to close this matter up as expeditiously as possible, we would respectfully urge you to proceed at once under the order the court has heretofore entered and collect all you can and ask the court to permit you to pro rate among the creditors.

W. R. C. KENDRICK, *Assistant Attorney General.*

WHEN EMPLOYES OF A CORPORATION CANNOT ORGANIZE AN ASSESSMENT ASSOCIATION

Assessment associations organized by the employes of a certain occupation, unless organized solely for benevolent purposes, or as a fraternal beneficiary association, are unauthorized.

January 12, 1920.

Hon. A. C. Savage, Commissioner of Insurance.

Dear Sir:

I am in receipt of your request for an opinion as to whether an association of the following character is authorized to transact business in Iowa without complying with the insurance laws of this state:

> "An example of the plan of such association is found in the contemplated plan of an employes association, which is being formed in the Des Moines Hosiery Mills. They contemplate a monthly assessment of ten, twenty or thirty cents per month with sickness or disability benefit of two dollars and fifty cents a month, extending over a period of months less than a year. They also wish to provide a funeral benefit of fifty dollars, which would be paid by special assessment upon the members until the association has five hundred dollars in their treasury. At that time, funeral benefit would be paid from that sum."

I am of the opinion that the business contemplated by the employees of the Des Moines Hosiery Mills is insurance. Under the laws of Iowa an assessment association cannot be legally organized to transact business in this state unless it partakes of the nature of a fraternal beneficiary association.

Section 1798-a of the Supplement to the Code, 1913, provides:

> "No life, health or accident insurance company or association, other than fraternal beneficiary associations, which issues contracts, the performance of which is contingent upon the payment of assessments of call made upon its members, shall do business within this state except such companies or associations as are now authorized to do business within this state and which, if a life insurance company or association, shall value their assessment policies or certificates of membership as yearly renewable term policies according to the standard of valuation of life insurance policies prescribed by the laws of this state."

Section 1798 of the Supplement to the Code, 1913, provides:

> "Nothing in this chapter shall be construed to apply to any association organized solely for benevolent purposes and

composed wholly of members of any one occupation, guild, profession or religious denomination, but any such society may, by complying with the provisions hereof, become entitled to all the privileges thereof, in which event it shall be amenable to the provisions of this chapter so far as they are applicable; provided that if organized under the laws of another state or country, they shall file with the auditor of state an agreement in writing authorizing service or notice of process to be made upon the said auditor of state, and when so made shall be as valid and binding as if served upon the association within this state."

The Supreme Court of Iowa has held that an association organized under a somewhat similar plan to that contemplated by the empoyees of the Des Moines Hosiery Mills was not an association organized solely for benevolent purposes within the provisions of section 1798, *supra.*

Connell v. Iowa State Traveling Men's Asso., 139 Iowa, 444.

I am, therefore, of the opinion that unless the association contemplated by the employees of the Des Moines Hosiery Mills, or similar associations, are organized solely for benevolent purposes or as fraternal beneficiary associations, thy cannot legally operate in the state of Iowa.

W. R. C. KENDRICK, *Assistant Attorney General.*

WHO MAY ISSUE DEATH BENEFIT CERTIFICATES

It is unlawful for an association to issue certificates providing for death benefits raised by assessment upon the members, unless organized as a fraternal beneficiary society.

May 5, 1920.

Mr. F. H. Voigt, 117 East Woodland Avenue, Ottumwa, Iowa.

Dear Sir:

At the request of Thomas Waters, deputy insurance commissioner, I am answering your letter addressed to that official and bearing date of May 1, 1920.

You ask in what respect the plan of transacting business of the Low Twelve Club of Hafed Grotto, of Ottumwa, is in violation of the insurance laws of Iowa.

Article 1, section 1 of your by-laws provides:

"Intents and purposes: The object of this club shall be to extend funeral aid immediately after the death of a member of his family or dependent relatives and to promote a spirit

of fraternal benevolence. A mutual organization not operated for profit but for protection. Its life shall be as long as the same is maintained and supported by its membership. The rules and regulations that shall govern its operation are set below and are binding on each member of the club."

Article 1, section 2, of the by-laws provides:

"Each applicant for membership shall pay the sum of three dollars, two dollars of which shall be placed into the beneficiary fund and one dollar set aside for expenses, with his application. At the death of any member of the club in good standing, the officers shall cause to be paid immediately upon proof of death, to his beneficiary from the beneficiary fund a sum equal to one dollar per capita of the membership of said club in good standing at the date of such death. Orders for such payment must be signed by the secretary-treasurer and countersigned by the president or chairman or some member of the executive committee. Immediately after any such death the secretary-treasurer shall mail to each member of the club a notice of a benevolent call, upon receipt of which, each member shall pay the secretary-treasurer the sum of one dollar and ten cents, one dollar of which shall be placed in the beneficiary fund, and ten cents of which shall be placed in the expense fund."

The supreme court of Iowa has held that if the business of an association is to collect funds from its members in the way of a membership fee, annual dues, and an assessment upon the death of any member in good standing, such an association is a mutual assessment association.

Connell v. Traveling Men's Association, 139 Iowa, 444.

In the Connell case supra the defendant claimed to be an association organized for benevolent purposes only, so as to bring itself within the exception found in section 1796 of the supplement to the code, 1913, which provides that the insurance laws of Iowa shall not apply to an association organized solely for benevolent purposes.

In passing upon this claim the court, at page 488, says:

"It is not perceived on what theory the association can be held to have been 'organized solely for benevolent purposes.' Of course, there is an element of charity in every scheme for the insurance of lives, for the design of the insured is nearly always to provide for others, without valuable consideration to himself; but, as between the insured and the association, the relation is purely that of contract, of '*quid*

pro quo.' 'All that is requisite to constitute such a contract is payment of the consideration by the one, and the promise of the other to pay the amount of the insurance upon the happening of the injury to the subject by a contingency contemplated in the contract.' *Commonwealth v. Wetherbee,* 105 Mass. 149. It is not material what professions are made in the articles or by-laws. Its manner of doing business and the nature thereof necessarily control. *State v. Miller,* 66 Iowa, 26. The business of this association is to collect funds from its members in the way of membership fee of $4, annual dues of $1, and an assessment upon the death of any member in good standing of $2 from each member. The amount in the treasury is not to be reduced below $5,500, and an assessment may be made, when necessary in the course of business, to carry out the aims and objects of the association. The money after meeting the expenses is paid to the members in case of disability, or to their families, heirs or beneficiaries in event of death, one assessment being payable to the beneficiary, not exceeding $5,000 in any case. If the association engages in any charitable work, aside from erroneously designating that outlined above in its articles as such, the record before us does not disclose the fact. It is not other than a mutual assessment association, and its claims to being a charitable institution are little less than preposterous. As supporting these views, see *Insurance Co. v. Gilbertson,* 129 Iowa, 659; *Grimes v. Legion of Honor,* 97 Iowa, 315; *State v. Nichols,* 78 Iowa, 749; *State v. Miller, supra.* It follows that the by-law was void, as contrary to the laws of the State."

The laws of Iowa expressly prohibit the organization of mutual assessment associations for the purpose of transacting life, health, or accident insurance, unless said associations organize as a fraternal beneficiary society.

Section 1798-a, code supplement, 1913, provides:

"No life, health or accident insurance company or association, other than fraternal beneficiary associations, which issue contracts, the performance of which is contingent upon its members, shall do business within this state except such companies or associations as are now authorized to do business within this state and which, if a life insurance company or association, shall value their assessment policies or certificates of membership as yearly renewable term policies according to the standard of valuation of life insurance policies prescribed by the laws of this state."

It will therefore be observed that the character of business proposed to be transacted by the Low Twelve Club of Hafed Grotto is prohibited in this state unless such business is transacted through

a legally organized fraternal beneficiary society under chapter 9, title 9, of the code.

W. R. C. KENDRICK, *Assistant Attorney General.*

SHORT RATE CANCELLATION DOES NOT APPLY TO CONTRACTORS' BONDS

Sec. 1728, Code Supp. 1913, providing for the cancellation of insurance policies and payment of short rates, does not apply to contractors' bonds.

October 23, 1919.

Hon. Thomas Watters, Jr., Deputy Commissioner of Insurance.

Dear Sir:

You have submitted to this department, for an official opinion, the following question:

> "We are asking for an opinion regarding the short rate table which is effective on surety bonds.
>
> "To give an example of what we are wanting: If the company issued a surety bond for a period of two years and charged the assured the two year rate and ninety days from issuance said bond was taken up and cancelled as the work covered under this bond was then completed. Under the Iowa statutes would the party who gave the bond be entitled to a return premium based upon a two year period under the short rate concellation schedule of this statute?"

The short rate cancellation schedule referred to in your inquiry will be found in Section 1728, Supplement to the Code, 1913, which reads as follows:

> "At any time after the maturity of a premium, assessment or installment provided for in the policy, or any note or contract for the payment thereof, or after the suspension, forfeiture or cancellation of any policy or contract of insurance, the insured may pay to the company the customary short rates and costs of action, if one has been commenced or judgment rendered thereon, and may then, if he so elect, have his policy and all contracts or obligations connected therewith, whether in judgment or otherwise, cancelled, and they and each of them thereafter shall be void; and in case of suspension, forfeiture or cancellation of any policy or contract of insurance, the assured shall not be liable for any greater amount than the short rates earned at the date of such suspension, forfeiture or cancellation and the costs herein provided. The policy may be canceled by the insurance company by giving five days' notice of such cancellation, in which event it may retain only the pro rata premium."

The provisions of the statute above quoted were originally found in chapter 210, acts of the 18th General Assembly, and entitled:

> "Act to Secure Policy Holders in Fire Insurance Companies from Unjust Forfeiture of Policies."

The provision of chapter 210, relating to the cancellation of policies, was changed somewhat and carried into the Code of 1897 was section 1728 thereof. The 34th General Assembly then amended section 1728 by adding thereto the following:

> "The policy may be canceled by the insurance company by giving five days' notice of such cancellation, in which event it may retain only the pro rata premium."

So that the provision as it now stands is found in chapter 4, title 9 of the code, relating to insurance other than life, in which chapter is found the provision relating to surety bonds.

The question now is, Does that provision apply to contractor's bonds when issued for a period of two years and a premium is charged at the two year rate, when the work covered by the bond is completed ninety days from the issuance of the bond?

A contractor's bond issued by a surety company is undoubtedly a contract of insurance in the broad sense—that is, it partakes of the nature of insurance. In fact, the similarity in business methods between insurance companies and surety companies has often been noted in the opinion of judges, and for the purpose of legislative control surety companies have been uniformly classed with insurance companies.

Section 1709, Code Supplement, 1913.

G. & M. Lumber and Mfg. Co. v. National Surety Co., 124 Iowa, 599.
Van Buren County v. American Surety Co., 137 Iowa, 490.
Stearns on Suretyship, 2nd Ed. Section 233.
People v. Rose, 174 Ill., 310.
Shakemen v. Credit System Co., 92 Wis., 366.

In the Van Buren county case, *supra*, it is said at page 495:

> "The business of companies organized for the purposes of profit in assuring the performance of contracts of various kinds partakes largely of the nature of insurance and is carried on in much the same manner."

The essential features of an insurance policy are the following: (1) the parties—that is, the contract is between and for the bene-

fit of two parties only, the insurer and the insured; (2) a definite term; (3) a fixed premium.

But a contractor's bond is given for the benefit of a third person and to secure the faithful performance of a certain contract, and all liability of the surety ends when the conditions of the contract have been fully performed, regardless of the time in which it takes to perform the conditions. In other words, the collateral liability of the surety ends with the extinguishment of the original debt.

Ames v. Mac Lay, 14 Iowa, 281.
Webster County v. Nelson, 154 Iowa, 660.
Watkins Medical Company v. Moss, 160 Iowa, 244.

It is true that in corporate suretyship contracts a premium is always charged, but it is less a consideration than in the case of insurance contracts.

Stearns on Suretyship, at page 411, says:

> "It is doubtful whether it is proper to denominate the premium as a consideration at all in a suretyship contract. It certainly is not the sole consideration. In a great majority of the contracts written by surety companies, the premium is paid and contracted for by the principal, while the bond or obligation runs to the creditor. The surety cannot evade the liability to the creditor because the principal fails to pay the premium, neither can the contract be revoked on that account. * * * A premium paid is the bonus or inducement to the surety company, but is not the essential consideration out of which the contract grows."

In insurance contracts the premium is the sole consideration, while in surety contracts no premium is necessary in order to make the contract valid. In the case of corporate sureties the principle reason for charging an annual premium for a continuing bond is to maintain the company in a solvent condition.

In American Surety Company v. Thurber, 166 New York, 244, the reason for corporate surety companies charging an annual premium is well stated in the following language:

> "surety companies are a convenience to the community, and it is important that they should continue sound and able to respond to their obligations. The legislature doubtless intended to promote their stability by extending the same protection to them that it extends to other sureties. The contracts of such companies are usually based upon an annual premium for a continuing bond. If the premium were not

> paid after the first year and the company could not avail itself of the privilege of the statute, its responsibility would continue with no compensation, as the bond would still be in force. No company can do business on such a basis.''

As to what compensation the surety company will charge for assuming the obligations of a surety on a contractor's bond is a matter for the sole determination of the surety company. A state has no power to fix the rates to be charged for surety bonds, and to deprive the company of that right would be in violation of the fourteenth amendment to the constitution of the United States.

American Surety Co. v. Schallenberger, 183 Fed. 636.

Therefore, if the surety company charges a certain premium for assuming the responsibility of a surety, it has that unqualified right.

Unless otherwise provided by statute, it is the general rule that, when an indemnity contract has been issued by a surety company, the premium, in the absence of special provisions in the policy authorizing it, cannot be recovered by the insured upon offering to surrender his policy.

Frost on the Law of Guarantee Insurance, Sec. 29.
McNeely v. Welz, 166 N. Y. 124.

It is also familiar doctrine that in the absence of fraud, collusion, material misrepresentations, or where expressly authorized by statute, an indemnifying bond issued by a surety company cannot be canceled by the company, unless it is accomplished by and with the consent of the parties thereto. Such doctrine is based not only upon sound public policy, but also upon the fact that the bond is a valid contract, founded upon a valuable consideration, and is binding and enforceable between the parties thereto, the same as any other lawful and valid contract.

Frost on the Law of Guarantee Insurance, Sec. 273.

However, the General Assembly of Iowa has declared that the sureties on certain kind of bonds may cancel the same, and the procedure and conditions to accomplish that end have been expressly prescribed. I refer to statutory bonds.

Section 1177-a, supplement to the code, 1913, provides:

> ''When a bond is required by law to be given by or for any public officer, deputy or employe of such public officer,

or by any person holding a fiduciary office or trust, administrator, executor, guardian, trustee, officer or employe of any public or private corporation or association, when not otherwise specifically provided, (it) shall be conditioned as provided in section eleven hundred eighty-three of the code."

Section 1177-b, supplement to the code, 1913, further provides:

"If any surety on said bond shall so elect, his liability thereon may be canceled at any time by giving thirty days' notice in writing to the person or persons authorized to approve said bond, and to the officer or person with whom the same is required to be filed or deposited by law, and refunding the premium paid, if any, less a pro rata part thereof for the time said bond shall have been in force. The liability and indemnity created by said bond shall extend to the date of cancellation as provided by chapter eleven, title six of the code."

But the statutes above quoted apply only to bonds given by those expressly named in section 1177-a, and nowhere in the Iowa statutes can there be found any express provision for cancelling contractor's bonds.

Fed. and Dep. Co. v. Janness, 138 Iowa, 725.

That fact is convincing in determining whether the provisions for cancelling insurance policies other than life, as found in section 1728 of the supplement to the code, 1913, should apply to bonds furnished by contractors for the faithful performance of their contracts. If it was the intention of the legislature that section 1728 should apply to surety bonds in general then there was no necessity for enacting sections 1177-a and 1177-b and limiting the application of those sections to a particular class of surety bonds.

Therefore, pursuant to all the foregoing, we are of the opinion that section 1728 of the supplemnet to the code, 1913, does not apply to contractor's bonds generally, and particularly to the bond in question, for the reason that in this specific instance the purpose for which the bond was given had been fulfilled, the liability under the bond has ceased, and there is no occasion for cancelling the same.

W. R. C. KENDRICK, *Assistant Attorney General.*

OPINIONS RELATING TO BANKING

POWER OF ATTORNEY

Authority to mortgage real estate cannot be implied from authority to sell it under a power of attorney.

January 14, 1919.

Hon. G. H. Messenger, Superintendent of Banking.
Dear Sir:

This communication is in response to your letter of the 8th inst. asking for an opinion as to the authority of Ferdinand Levy to execute a real estate mortgage under the enclosed power of attorney executed by Pauline Levy, the purpose of your inquiry being to determine whether or not such a mortgage, otherwise legal, would be an acceptable asset for a bank under the supervision of your department.

This power of attorney authorizes Ferdinand Levy to collect and receipt for all moneys due or to become due Pauline Levy, and to execute all necessary receipts and acquittances for the same. It also authorizes him to sell and convey all real estate owned by said Pauline Levy at either private or public sale and to execute to the purchaser good and sufficient deeds; and it gives him the right to execute releases and satisfactions of mortgages, and authorizes him to invest any moneys coming into his hands in real estate mortgages; and gives him the general power to do whatever is necessary to carry out the provisions contained in said power of attorney.

This power of attorney does not expressly or by implication give Ferdinand Levy any authority to mortgage real estate. His authority to mortgage the real estate cannot be implied from his authority to sell it.

See *Cyc.*, vol. 3, page 1390, and cases therein cited.

In the case of *Edgerly & Company v. Cover,* 106 Iowa, 670, an action to foreclose a mortgage on personal property, it was held that authority to mortgage cannot be inferred from authority to

sell; and in support thereof cites the case of *Jeffrey v. Hursh,* 12 N. W. (Mich.) 899. In that case the supreme court said:

> "John H. Hursh had power to sell the land, but not to mortgage it. The power is not to be extended by construction. The principal determines for himself what authority he will confer upon his agent, and there can be no implication from his authorizing a sale of his lands that he intends that his agent may at discretion charge him with the responsibilities and duties of a mortgagor."

I am of the opinion that under the power of attorney submitted there is no authority granted to Ferdinand Levy to execute mortgages on land belonging to Pauline Levy and that such a mortgage executed by him would be void.

C. W. PIERSOL, *Assistant Attorney General.*

CAPITAL STOCK

State banks may not have an authorized capital stock.

December 1, 1919.

Hon. G. H. Messenger, Superintendent of Banking.

Dear Sir:

I am in receipt of your letter of the 13th ult. in which you ask the following question:

> "Does the banking law of Iowa permit state banks to provide for an authorized capital stock?"

The law relating to the capital required of a state bank in this state is found in section 1864, supplement to the code, 1913, which reads as follows:

> "No state bank shall be organized under the provisions of this chapter with a less amount of paid up capital than fifty thousand dollars, except in cities or towns having a population not exceeding three thousand, where such association may be organized with a paid up capital of not less than twenty-five thousand dollars. But no such association shall have the right to commence business until its officers or its stockholders shall have furnished to the auditor of state a sworn statement of the paid up capital, and, when the auditor of state is satisfied as to that fact, he shall issue to such association a certificate authorizing it to commence business, and it shall cause said certificate to be published in some newspaper printed in the city or town where the association is located, once each week, for at least four weeks, or, if no newspaper is published in such city or town, then in a newspaper published nearest thereto in the county."

From the foregoing statutory provision it will be seen that no state bank shall be organized in this state in a city exceeding three thousand in population without a paid up capital of fifty thousand dollars, nor in towns having a population of three thousand or less with a paid up capital of not less than twenty-five thousand dollars. If the incorporators of a state bank prefer to have a capital exceeding the minimum prescribed in section 1864, then it was evidently the intention of the legislature that the entire capital stock of such a bank should be entirely paid up before being permitted to transact business in Iowa.

While the question you ask is not altogether free from doubt, yet it has been the uniform holding of this department that banks organized in Iowa under the Iowa statutes must have a fully paid up capital before granted a permit to do business, and we are content to adhere to such former rule.

W. R. C. KENDRICK, *Assistant Attorney General.*

CERTIFICATES OF DEPOSIT

Bank certificates of deposit are negotiable instruments.

December 4, 1919.

Hon. V. W. Miller,
Deputy Superintendent of Banking.

Dear Sir:

I have your letter of the 22d ult. asking for an opinion as to whether a certificate of deposit in the following form is negotiable, to-wit:

\$2,700 No. 822

FARMERS SAVINGS BANK
Livermore, Iowa, November 12, 1918.

This is to certify that The Daniel Hayes Company of Idaho has deposited in this bank Twenty-seven Hundred and no-100 Dollars, payable to the order of themselves in current funds 12 months after date on the return of this certificate properly endorsed, with interest only until maturity at 3 per cent per annum.

EDW. CAPESIUS, *Cashier.*

NOT SUBJECT TO CHECK.

The supreme court of Iowa had held that bank certificates of deposit are negotiable.

Kushner v. Abbott, 156, Iowa, 598.

I am therefore of the opinon that the certificate of deposit in the

form above set out comes within the holding of the case of *Kushner v. Abbott, supra,* and is a negotiable instrument, and the holder before maturity and without notice takes it free from all claims and defense.

W. R. C. KENDRICK, *Assistant Attorney General.*

ISSUANCE OF DEBENTURES BY TRUST COMPANIES

Mortgages upon city and town property are properly classed as real estate mortgages and are proper security for issuance of debentures or bonds. War savings stamps and liberty bonds are proper securities for such purposes, but so called industrial bonds are not.

September 10, 1920.

Hon. M. V. Henderson, Jr.,
Superintendent of Banking.

Dear Sir:

Your request of yesterday for the opinion of this department on the following question has been referred to me for attention.

You state:

> "Attached please find letter from examiner Walsmith in which he asks if city mortgages, war savings stamps, Liberty bonds and industrial bonds can be put up by the trustees as security for debenture bonds.
>
> "Please let us have your opinion on this question, and oblige."

Section 1889-j of the 1913 supplement to the code pertaining to trust companies and state and savings banks provides in part, as follows:

> "But nothing herein contained shall limit the issuance, by trust companies, of debentures or bonds, the actual payment of which shall be secured by an actual transfer of real estate securities."

The phrase "real estate" is defined by paragraph 8 of section 48 of the code, which reads as follows:

> "The word 'land' and the phrases 'real estate' and 'real property' include lands, tenements, hereditaments, and all rights thereto and interests therein, equitable as well as legal."

The term "real estate securities," as used in section 1889-j, should be held to include mortgages upon city and town property, just as much as farm property. While it is true that the build-

ings in many, possibly in most instances, constitute a greater part of the value of property covered by mortgages upon city and town property than they do on farm property, that of itself does not change their character, and, therefore, such securities must be held to be embraced in the section referred to.

It is true that the literal words of the statute do not cover war savings stamps and Liberty bonds, yet these are obligations of the government of the United States and should, I think, be held to be proper securities for the purpose contemplated..

As to the term or phrase "industrial bonds," I must admit that I cannot determine just what class or kind of securities may be embraced in or covered by that term, though I take it that they are railroad bonds, bonds of other public utilities, and possibly bonds of divers industrial organizations, but, however that may be, the reasons which impel me to hold that the obligations of the government may be accepted as security for the performance of an obligation or contract are wholly wanting as to the so-called industrial bonds, and I am of the opinion that they may not be received as security for the issuance of debenture bonds under the section referred to.

J. W. SANDUSKY, *Assistant Attorney General.*

WHAT CONSTITUTES A NEWSPAPER

Rules for determining what constitutes a newspaper that publishes legal notices discussed.

September 24, 1920.

Hon. M. V. Henderson, Jr.,
Superintendent of Banking.

Dear Sir:

We have your request for the opinion of this department on the following question:

> "At different times various publications required by law of banks have been made in the Des Moines Daily Record.
>
> "As this is not a paper of general circulation, the question has arisen as to whether or not the public has had the notice which the law contemplates.
>
> "Will you kindly give us your ruling on this opinion?"

Several sections of the banking law provide for or require the publications of notice, and the publication of the reports of the condition of such institutions is also required, but in no instance

does the law specify that such notices or reports shall be published in a paper of "general circulation." It usually provides for the publication in a newspaper published in the city, town or county where the bank is located, and the real question for determination is whether the Des Moines Daily Record is a "newspaper" within the meaning of that term.

I have no facts before me from which I can even attempt to determine the question presented and, therefore, will content myself with the citation of a few authorities which define the term "newspaper" and which I think are applicable to the term, as used in our statute governing the operation, control and direction of banking institutions incorporated under the laws of this state. From which, if the facts are available in the particular case, a correct conclusion maq be arrived at.

Webster's dictionary defines the term "newspaper" as "a sheet of paper printed and distributed at stated intervals for conveying intelligence of passing events, advocating opinions, etc.; a public print that circulates news, advertisements, proceedings of legislative bodies, public announcements, etc."

Burrill's Law Dictionary gives the following definition: "A printed publication, issued in numbers at stated intervals, conveying intelligence of passing events. The term 'newspaper' is properly applied only to such publications as are issued in a single sheet and at short intervals, as daily or weekly."

In the case of *Hauscomb v. Myre,* decided by the supreme court of Nebraska and reported in 71 N. W., 114, the term "newspaper" is clearly and distinctly defined. The court said:

> "The principal distinguishing feature of a newspaper, in contemplation of the statute, in our opinion, is that it be a publication appearing at regular, or almost regular, intervals, at short periods of time, as daily or weekly, usually in sheet form, and containing news; that is, reports of happenings of recent occurrence of a varied character, such as political, social, moral, religious and other subjects of a similar nature, local or foreign, intended for the information of the general reader. It is the one quality of news which gives it its general interest, and secures for it a general circulation among people of different classes and callings, whom the statute seeks to reach by the requirements of notice by publication in a newspaper."

In the case of *Brice v. Graves et al,* 142 Iowa, 722, our supreme court was required to pass upon the question of what constitutes

a newspaper, within the meaning of section 3535 of the code, which provides for the publication of an original notice in certain cases. The court said:

> "It will be observed that the provisions of our statute are very general, and the only question for our determination is whether the publication in question is in legal sense a 'newspaper.'
>
> "The question involved has not heretofore been before this court. We find many precedents, however, from other courts, where it has been quite uniformly held that such a publication is a newspaper. (Citing many cases). In the first of the above *contra cases* it was held that the Northwestern Reporter was not a newspaper. In the other two cases the statutes under consideration in the one case for a 'newspaper of general circulation,' and in the other a 'public newspaper.' These cases are therefore of little assistance in the case at bar. By referring to a copy of the publication in question, which is set forth as an exhibit in the record, it must be conceded that its news, as distinguished from mere formal matters of record, is very meager indeed. There is much to be said in favor of requiring a publishing of original notice to be made in a newspaper of more general circulation than the publication in question; but this is an argument to be addressed to the legislature, and not to the court. We feel constrained to fall in line with the authorities already cited, and to hold that this publication answers the call of the statutes as a "newspaper.'"

The section of the code involved in this case relates to the manner of commencing civil actions by publication of the original notice and is addressed to the defendant named, but the object and purpose is to circulate, disseminate and convey the information and knowledge of the pendency of the action, and while the various notices and publications which banks are required to make are primarily designed and intended for the public and people generally, yet the same principle and rules apply to and govern each.

It is worthy of note that the paper in question, in the case above cited, was the *Des Moines Daily Record.*

J. W. SANDUSKY, *Assistant Attorney General.*

NUMBER OF DIRECTORS

Bank under House File 295 may provide for a less number of directors than maximum stated in Articles now in force.

June 4, 1919.

Hon. G. H. Messenger,
Superintendent of Banking.

Dear Sir:

I have your request for an opinion under date of May 29th regarding the following questions:

> "Under House File No. 295, as passed by the 38th General Assembly, is it necessary for savings banks to amend their original Articles of Incorporation to provide for a minimum and a maximum number of directors, or may they take advantage of the provisions of this law without making such change?
>
> "For instance, the original Articles of Incorporation of one of our savings banks provides for nine directors. At their annual meeting may the stockholders pass a resolution to elect but seven directors, under this law, without amending such articles?"

I am assuming that you have submitted a correct copy of the law which becomes effective July 4, 1919, in presenting a copy of House File No. 295.

I think the law means that a bank in which the articles provide for directors in excess of the minimum number may proceed under the law without amendment to the articles. In other words, if a bank is organized under articles of incorporation permitting nine directors the number selected may be less than this, if changed at an annual meeting of the stockholders by resolution in the manner indicated in the act in question. If, however, the articles only provide for five directors, or for some number less than nine, and it is desired to increase the number of directors, then there must be an amendment to the articles raising the maximum number of directors before a resolution could be adopted selecting a number greater than that mentioned in the article.

F. C. DAVIDSON, *Assistant Attorney General.*

DEPOSITING OF SCHOOL FUNDS

It is unlawful for a cashier of a bank who is treasurer of a school district to deposit the funds of the school district in the bank to his own personal account. The statutes grant the superintendent of

banking authority to insist that the cashier place the school funds in a separate account.

May 19, 1919.

Hon. George H. Messenger,
Superintendent of Banking.

Dear Sir:

You have requested us to render an opinion to you upon the following proposition:

> "Is it lawful for a cashier of a bank who is treasurer of a school district to deposit funds of the school district in the bank to his own personal account."

In answering your inquiry we desire to direct your attention to section 2768 of the 1913 supplement, which provides as follows:

> "The treasurer shall receive all moneys belonging to the corporation, pay the same out only upon the order of the president countersigned by the secretary, keeping an accurate account of all receipts and expenditures in a book provided for that purpose. He shall register all orders drawn and reported to him by the secretary, showing the number, date, to whom drawn, the fund upon which drawn, the purpose and account. The money collected by tax for the erection of schoolhouses and the payment of debts contracted therefor shall be called the schoolhouse fund; that collected for the payment of school buildings; bonds shall be called the school building fund; that for rent, fuel, repairs and other contingent expenses necessary for keeping the school in operation, the contingent fund; and that received for the payment of teachers, the teachers' fund; and he shall keep a separate account with each fund, paying no order that fails to state the fund upon which it is drawn and the specific use to which it is to be applied. Whenever an order cannot be paid in full out of the fund upon which it is drawn, partial payment may be made. All school orders shall draw lawful interest after being presented to the treasurer and by him indorsed as not paid for want of funds. *It is hereby made the duty of the treasurer of each school corporation to deposit all funds in his hands as such treasurer in some bank or banks in the state* at interest at the rate of at least two per cent per annum on ninety per cent of the daily balances payable at the end of each month, all of which shall accrue to the benefit of the contingent fund of such school corporation; but before such deposit is made, such bank shall file a bond with sureties to be approved by the treasurer and the board of directors of such corporation in double the amount deposited, conditioned to hold the school corporation harmless from all loss by reason of such deposit

or deposits; provided that in cases where an approved surety company's bond is furnished, said bond may be accepted in an amount equal to ten per cent more than the amount deposited. Said bond shall be filed with the president of the school board and action may be brought thereon either by the treasurer or the school corporation."

You will note from the foregoing section that it is the duty of the treasurer to deposit all funds in his hands "as such treasurer in some bank or banks in the state." By the use of the term "as such treasurer" the legislature clearly indicated the capacity in which he should make his deposit, namely, as treasurer of the school district. The case of *Frost v. State* (Ind.) 99, N. E. 419, 422, is authority for this very proposition; for in that case the appellant was treasurer of a certain organization and "as such treasurer" he had the control and possession of the money of the association. The court stated that "as such" means "in that particular character." Under the Iowa statute the treasurer of the school corporation is authorized to make the deposit "as such treasurer," and we think it clear that he should make that deposit in his official capacity, and not place the same to his personal credit. An additional reason for this belief is found in the further provisions of the same section, which states that the bank where such school funds are deposited shall give a bond in an amount equal to twice the amount of the deposit. The question presents itself as to how can the bank tell whether or not it has put up a sufficient bond when it has no means of knowing the amount of funds belonging to the school corporation in its custody. Furthermore, the section provides that in case a surety company is on the bond of the school treasurer, that the bond shall be 10 per cent more than the amount of the deposit. It would be impossible to tell the amount of funds on deposit with the bank belonging to the school corporation if such funds were not set off in a separate account as contemplated by law.

Again, section 2780 of the 1913 supplement provides that it shall be the duty of the Board of Directors to "audit and allow all just claims against the corporation, and no order shall be drawn upon the treasurer until the claims therefor has been audited and allowed; it shall from to time examine the accounts of the treasurer and make settlement with him. * * *"

These sections disclose that the legislature intended public funds

to be kept on deposit in the name of the officer charged with their custody in his official capacity.

In this same connection we desire to direct your attention to section 4840 of the code with reference to embezzlement by public officres, which provides in part as follows:

> "If any state, county, township, school or other municipal officer, * * * charged with the collection, safekeeping, transfer or distribution of public money or property fails or refuses to keep the same in any place of custody or deposit that may be provided by law for keeping such money or property until the same is withdrawn therefrom as authorized by law, or keeps or deposits such money or proerty in any other place than in such place of custody, or unlawfully converts to his own use in any form whatever, or uses by way of investment in any kind of property, or loans without the authority of law, any portion of the public money intrusted to him for collection, safekeeping, transfer or disbursement, * * * shall be guilty of embezzlement. * * *"

We do not intend to infer that because a public officer merely deposits public funds in his personal account necessarily implies that he is guilty of embezzlement, but we do intend to point out the fact that such acts are on the border line of such offense.

It is therefore the opinion of this department that it is unlawful for a cashier of a bank who is treasurer of a school district to deposit the funds of the school district in a bank and cause the same to be placed in his own personal account.

Under the facts in this case involving the cashier of a bank, we are of the opinion that the superintendent of banking has power, by virtue of section 7, chapter 40 of the acts of the 37th General Assembly and by the provisions of section 1877 of the code, to insist that such funds be entered in a separate account.

B. J. POWERS, *Assistant Attorney General.*

GRANTING OF CHARTERS TO NEW BANKS

The Superintendent of Banking is to determine whether a new bank is necessary or its officers or stockholders proper persons to conduct a bank under the provisions of chapter 236, acts of 38th General Assembly.

April 29, 1919.

Hon. Geo. H. Messenger,
Superintendent of Banking.

Dear Sir:

Under date of the 25th inst. I have your request for an opinion

as to the extent of your authority under section 1 of Senate File No. 476 (chapter 236), 38th General Assembly, with reference to the granting or refusing of charters to new banks. That portion of the section directly relating to your duties in the matter is as follows:

> "Section 1. That the superintendent of banking be, and he is hereby authorized to deny or decline to issue a certificate of authority to commence business, if, after he shall have made, or cause to have been made, an examination and investigation, it shall be his judgment that the town or city or community in which the proposed new bank is to be located, is amply served with banking facilities, and that the public necessity, conveniences and advantage will not be promoted by the opening of the proposed new bank or trust company, or that the character and general fitness of the persons named as officers and stockholders are such as not to command the confidence of the community in which such bank or trust company is proposed to be located. If the superintendent of banking shall not be satisfied with the result of said examination or said investigation, he shall inform the applicants within sixty (60) days after the certified articles of incorporation and application have been presented to him."

It may be that a question will be raised as to the constitutionality of this statute, but for the purpose of this opinion, I assume that the statute is constitutional. Undoubtedly, when an application for permission to organize a bank is presented to you, the assumption would be in favor of those asking the right to transact that business. The business itself being a legal and proper one, the right to engage in it follows, unless it appears as set out in the new statute that "the town or city or community in which the proposed new bank is to be located, is amply served with banking facilities, and that the public necessity, convenience and advantage will not be promoted by the opening of the proposed new bank or trust company, or that character and general fitness of the persons named as officers and stockholders are such as not to command the confidence of the community in which such bank or trust company is proposed to be located."

It would be my judgment from a reading of the foregoing section that you are given a discretion to determine whether a certificate of authority to commence business should or should not be issued in any given case. This is a discretion that is lodged in you in the first instance, subject to a review upon appeal by

the committee on retrenchment and reform. Being a legal discretion, it should not be exercised arbitrarily, but within reasonable limits.

F. C. DAVIDSON, *Assistant Attorney General.*

BILLS AND NOTES—MORTGAGES

(1) Statute of limitations for mortgages.
(2) Effect of assignment of note alone.
(3) Effect of assignment of mortgage alone.
(4) Right to bring separate actions on note and mortgage.
(5) Endorsement of note not necessary.

March 5, 1919.

Hon. George H. Messenger,
Superintendent of Banking.

Dear Sir:

I am in receipt of your favor of the 4th inst. requesting answers to certain questions submitted by Mr. J. M. Conway, examiner of federal banks. I shall take up these questions in their order.

1. Statute of limitations of mortgages.

Section 3447, supplement to the code, 1913, paragraph 7, provides in substance that actions founded upon written contracts are barred in ten years, but, of course, the mortgage is only a portion of the contract between the mortgagor and the mortgagee, and our supreme court has held that the mortgage is not barred so long as the debt secured thereby may be enforced.

Freeburg v. Eksell, 123, Iowa, 464;
Iowa Loan and Trust Co. v. McMurray, 129, Iowa, 65.

In this connection, however, I call attention to section 3447-c, supplement to the code, 1913, which in part provides:

> "No action shall be maintained to foreclose or enforce any real estate mortgage, bond for deed, trust deed or contract for the sale or conveyance of real estate, after twenty years from the date thereof, as shown by the record of such instrument, unless the record of such instrument shows that less than ten years have elapsed since the date of maturity of the indebtedness or part thereof, secured thereby, or since the right of action has accrued thereon, or unless the record shows an extension of the maturity of the instrument or of the debt or a part thereof, and that ten years from the expiration of the time of such extension have not yet expired, etc., * * *"

The balance of the section relates to the method in which extensions of mortgages be shown upon the record, etc.

2. Does the assignment of a mortgage automatically transfer title of mortgage note, or does the endorsement of the note convey the security, i. e., mortgage?

Taking the second clause of the question first, I would say there is no doubt under our law but what the assignment of the note carries with it the security. There are many cases in this state to that effect. One of the most recent being

Robertson v. United States Live Stock Co., 145 N. W. 535.

On the first proposition it is rather more difficult to state the law, because I have not in a rather hurried search found any case that holds directly that the assignment of the mortgage carries with it the assignment of the debts secured thereby. There are cases in which the dicta indicates the contrary. Thus in

Swan v. Yaple, 35 Iowa, 248,

the court said:

> "Now, if as against a mortgagee his interest as such in the mortgaged premises cannot be sold on execution, and a sale by the sheriff purporting to sell such interest would *pass* no interest in the land to the purchaser, or prejudice the lien or rights of the mortgagee thereunder, it would, on the same principle, seem that a conveyance by the mortgagee to a stranger of all the 'estate, title and interest in the mortgaged premises will pass no interest in the land to the purchaser, nor have the effect to assign the mortgage unless the language of the conveyance is such as will manifest such an intention. Even then an express assignment of the mortgage without an assignment of the notes or debt secured by it is the mere transfer of a naked trust, and without meaning or use so far as relates to the debt. *Pope & Slocum v. Jacobus, supra,* The plaintiff being the owner and holder of the notes, would, in case he had assigned the mortgage, remain the real party in interest, and his assignee would be a mere trustee, and an action to foreclose would be maintainable by him. * * *"

The case of *Pope & Slocum v. Jacobus,* 10 Iowa, 262, contains similar language.

We can hardly conceive of a case arising where the mortgage alone would be assigned, unless it be a case where the assignor fraudulently retains the note and transfers it to some other party, notwithstanding his agreement to assign it also. If the note is

actually transferred to the assignee of the mortgage, although the transfer of the note is not evidenced by endorsement, undoubtedly the assignment of the mortgage would be strong evidence of the intention to assign the note; a controversy could hardly arise unless through fraud the note were transferred to some other person, and in that event if the person receiving the note had no knowledge of the prior assignment of the mortgage, I think the holder of the note would be entitled to claim the security as against the assignee thereof, who would surely be negligent in failing to get possession of the note at the time he accepted the assignment of the mortgage. Some light on this question may be obtained by reference to the case of

McKinley-Lanning Loan and Trust Company v. Gordon, 113 Iowa, 481,

and cases cited.

3. Where a mortgage is assigned, is it necessary to have the mortgage note endorsed?

No, it is not necessary if the note is actually delivered to the assignee of the mortgage.

Section 3060-a49, supplement to the code, 1913, is as follows:

> "Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferer had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferer. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made."

4. Can you sue on a mortgage note as if it had no connection with a mortgage?

The statutes answer this question in the following words:

> "An action on a note, together with a mortgage or deed of trust for the foreclosure of the same, shall be by equitable proceedings. An action on the bond or note alone, without regard therein to the mortgage or deed of trust, shall be by ordinary proceedings."

Code, section 3428.

> "If separate actions are brought in the same county on the bond or note, and on the mortgage given to secure it,

the plaintiff must elect which to prosecute. The other will be discontinued at his cost.''

Code, section 4288.

Our supreme court has held that an action may be brought upon a note and the merging of the note in the judgment does not merge the mortgage, but that a later action may be brought to foreclose it.

5. If you can sue on a mortgage note, does the action invalidate the foreclosure of the mortgage?

I have already answered that question, and would cite in support of the conclusion above stated:

Matthews v. Davis, 61 Iowa, 225;
Morrison v. Morrison, 38 Iowa, 73;
Shearer v. Mills, 35 Iowa, 499.

F. C. DAVIDSON, *Assistant Attorney General.*

GUARANTEED DIVIDENDS

Corporations may not guarantee dividends. A bank may not receive trust funds and certify that it holds same to pay guaranteed dividends of a corporation promoting sale of its stock.

March 4, 1919.

Hon. Geo. H. Messenger,
Superintendent of Banking.

Dear Sir:

I have had under consideration your oral request for an opinion as to the validity of a proposed agreement between the Iowa Title Guaranty Company of Des Moines and the American Trust and Savings Bank of Des Moines, the purpose of which, briefly expresed, is as follows: That the American Trust and Savings Bank act as trustees for the purpose of holding ''interest bearing securities purchased with surplus assets and profits or cash in a sufficient amount'' of the company to carry out the purposes of the trust. This purpose is declared in the contract to be that 7 per cent guaranteed dividends shall be paid by the Iowa Title Guaranty Company to its stockholders for a period of two years and after the trustee is satisfied that such dividends have been paid, it shall return to the Iowa Title Guaranty Company all securities and other properties belonging to said company. There is then set out a copy of the proposed arrangement which

we take it is to be delivered to persons purchasing stock in the Iowa Title Guaranty Company:

"To.....
Of....., Iowa.

"THE AMERICAN TRUST AND SAVINGS BANK of Des Moines, Iowa, hereby certified that, under a certain trust agreement, THE IOWA TITLE GUARANTY COMPANY, for the purpose of providing for the prompt payment of dividends during its development period, has created a Trust Fund with this Trust Company and has deposited, and now has on deposit, surplus assets and profits, in the form of interest-bearing securities, in sufficient amount to cover the first and second annual 7 per cent guaranteed dividend on all issued and outstanding Common stock of said Company at this date; the conditions of such deposits and Trust Fund being that such securities are to be held by the AMERICAN TRUST AND SAVINGS BANK until it has been fully satisfied that all such dividends have been paid.

"AMERICAN TRUST AND SAVINGS BANK, (*Trustee*).

"Des Moines, Iowa,

Date.....19.. By.....*Cashier.*"

In the first place, I want it distinctly understood that I am not in any way passing upon the good faith of the Iowa Title Guaranty Company or the financial ability of the company. As a legal proposition, it should make no difference what the company's assets may be at this time, nor who its officers may be; because if this is a proper contract for the American Trust and Savings Bank to make in this case, then it is a proper contract to be made by an institution operating under the banking laws of this state with any corporation engaged in the promotion of a sale of its corporate stock.

There are several reasons that appeal to me as being sufficient to justify you in refusing to permit a contract of this kind to be made by the American Trust and Savings Bank.

First: The American Trust and Savings Bank assumes over its signature to assure the stockholders of the Iowa Title Guaranty Company that it holds of the "surplus assets and profits" of said company a sufficient amount "to cover the first and second annual 7 per cent guaranteed dividend on all issued and outstanding common stock of said company at this date." It is incumbent upon the bank, under this provision, to know that the securities deposited with it actually represent "surplus assets

and profits'' of the company and also to know just what common stock of the company has been sold on the particular date when the quoted agreement is signed. To put it another way, the bank assumes to tell the stockholder in a company, which it in no wise controls, that it holds ''surplus assets and profits'' of that company and also to tell him that only a certain common stock is oustanding. We think the statutes confer no such right on the bank.

Willett v. Farmers Savings Bank, 107 Iowa, 69.

Second: There is also another objection that appears to me fundamental and that is this: That the law does not recognize such a thing as guaranteed dividends.

Section 1621 of the code is as follows:

> ''The diversion of the funds of the corporation to other objects than those mentioned in its articles and in the notice published, if any person be injured thereby, *and the payment of dividends which leaves insufficient funds to meet the liabilities thereof,* shall be such fraud as will subject those guilty thereof to the penalties of the preceding section; and such dividends, or their equivalent, in the hands of stockholders, shall be subject to such liabilities. *If the directors or other officers or agents of any corporation shall declare and pay any dividend when such corporation is known by them to be insolvent, or any dividend the payment of which would render it insolvent, or which would diminish the amount of its capital stock, all directors, officers or agents knowingly consenting thereto shall be jointly and severally liable for all the debts of the corporation then existing,* but dividends made in good faith before knowledge of the occurring of losses shall not come within the provisions of this section.''

You will note that this section makes it a crime for the officers of a corporation knowingly to pay dividends at a time when the remaining funds may be insufficient to meet the liabilities of the concern, or to pay a dividend when the corporation is known to be insolvent or would be made insolvent by the payment of a dividend or when the payment of such dividend would diminish the amount of its capital stock.

This section would be meaningless, it occurs to me, if a corporation may, in effect, declare dividends before they are earned and guarantee to pay them. That is exactly what the Iowa Title Guaranty Company is proposing to do. It is proposing to its stockholders to pay 7 per cent dividends for the first two years, when it

cannot possibly know whether those dividends would be actually earned during that period or not. It therefore seems to me as if the purpose of this contract on the part of the Iowa Title Guaranty Company is illegal and that the bank, by assuming to determine that the company has "surplus assets and profits" is assuming to do something that is entirely illegal.

Third: If an agreement can be made to guarantee dividends for *two* years, why not for *ten* or *twenty* years? If a corporation may guarantee a dividend of *seven* per cent, why not *ten* or *twenty* or *fifty* per cent? The mere stating of such propositions condemns them. Without further discussion, we call attention to

10 Cyc., 568.

Without questioning the good faith of those connected with this enterprise, it must occur to anyone reading a contract of this character that such a scheme would readily lend itself to a fraudulent method of promoting sales of corporate stock by inducing the purchasing stockholder to believe that a bank was back of his guaranty to secure dividends in a concern which might have little, if any, actual assets, and which might never earn an actual profit.

F. C. DAVIDSON, *Assistant Attorney General.*

WHAT CONSTITUTES VALUABLE CONSIDERATION FOR A NOTE

Notes executed by bank directors to keep bank solvent, the cashier having defaulted and worthless notes having been accepted by bank, are based upon valuable consideration.

January 18, 1919.

Hon. Geo. H. Messenger,
Superintendent of Banking.

Dear Sir:

Pursuant to your verbal request, I have examined the letter written to you by R. W. Birdsall, vice-president of the State Bank of Dows relating to the matter of the State Savings Bank of Galt, Iowa.

In Mr. Birdsall's letter he states that the cashier of the State Bank of Galt, Iowa, absconded, and an examination of his books disclosed a shortage of $50,000.00, a portion of which was due to speculations of the cashier, and a part due to worthless notes which were being carried in the bank as assets. That a 100 per cent assessment was levied against the stockholders, but even that

failed to take care of the shortage by $30,000.00. In order to take care of the $30,000.00, six of the directors gave to the bank their individual notes for $5,000.00 each, which notes were discounted by the Iowa National Bank of Des Moines and the proceeds used to cover the balance of said shortage.

You then ask whether or not there was sufficient consideration for the execution of these notes, so that the State Savings Bank of Galt could recover from the makers of the notes in the event they failed to pay them at maturity?

A bank is liable for the default of its officers. This was so held in the case of *Lemon v. Sigourney Savings Bank,* 131 Iowa, 79. The directors who gave their notes were financially interested in the success of the bank in question. If the shortage was not made good, the bank would have been insolvent, probably thrown into the hands of a receiver, or bankruptcy, and these directors would have sustained a substantial loss on their investment. By keeping the bank a going concern, they were afforded an opportunity to recoup their losses. This, I believe, was a sufficient consideration for the execution and delivery of said notes.

Again, under code section 1620, the directors of a banking corporation are liable for willful wrongdoing. Under said section, if the directors willfully mislead either the public or individuals as to the means or liability of the corporation which they represent, then such directors become individualy liable to any person sustaining injury by reason of such fraud. For the directors in question to deliberately mislead the state by listing said notes as valid assets of the bank, when, in fact (if such should be the fact), they were not, would be a willful wrong, making the directors personally liable to anyone injured by reason thereof. In addition to the personal liability, such directors would be guilty of a criminal offense under the penal statutes of the state.

I mention this last proposition merely as an additional reason why the directors in question would probably never contest a suit for the payment of said notes.

W. R. C. KENDRICK, *Assistant Attorney General.*

CERTIFIED CHECKS

When a bank on which a check is drawn certifies the same its act in so doing amounts to an acceptance and collateral put up to secure the bank thus certifying should not be released while liability still exists on the certified check.

February 25, 1919.

Hon. Geo. H. Messenger,
Superintendent of Banking.

Dear Sir:

I have before me the letter of Mr. G. H. Jameson of Dows, under date of February 22, 1919, in which he says:

> "I have been a wondering about the paper that I put up here at the Farmers State Bank about a year and half or two years ago to cover the amount of two checks that I certified for one James Salisbury. The paper has been there on deposit, and the bank has carried it as $10,000.00 for that time, and when the last state bank examiner was here he thought I ought to assign this paper over to the bank so that they could put it on record.
>
> "Is it not possible that you can have the bank release this paper, as there has never been anything done about this check, and there is nothing likely that it ever will be. The bank holds a bond of $20,000.00 indemnifying them, which ought to be security enough.
> "Hoping that I may hear from you by return mail, I am"

In connection with this letter, a number of other papers from your files, to-wit: An indemnifying bond executed to the Farmers State Bank of Dows, an original notice entitled "In the District Court of Wright County, J. H. Salisbury, plaintiff, v. Farmers State Bank of Dows et al." Also a letter from the county auditor of Osceola county addressed to Hon. Frank S. Shaw, auditor, dated July 12, 1917, and what purports to be a copy of a letter from you to the county auditor of Osceola county, dated August 21, 1917. All of this correspondence is herewith returned.

As I understand the situation, one James Salisbury was a bidder at a letting of a drainage contract by the boards of supervisors of Osceola county and Dickinson county, Iowa, and at the time of making his bid, Salisbury put up a certified check for $10,000.00, said check being drawn upon the Farmers State Bank of Dows and certified by Mr. G. H. Jameson, president of the bank. The contract was awarded to Salisbury as the lowest bidder, but apparently he failed to enter into the contract, and on that

account his certified check was turned in as a forfeiture. This check, however, was not paid by the bank at Dows under order from Mr. Jameson.

While this original notice would indicate that some sort of a suit was started, yet so far as I am advised, there has been no judicial determination regarding the liability of Salisbury and certainly no release from any liability that he may have incurred by reason of his failure to enter into the drainage contract.

There can be no question but that when the bank caused this check to be certified, it was an acceptance of the check and as such of an obligation on the part of the bank as if it had issued its draft or a certificate of deposit for $10,000.00. Of course, it might cause the payment of either to be refused just as the payment of this certified clerk was refused, but by its acceptance the bank became primarily liable.

I need not suggest to you that the moment a check is certified by the bank on which it is drawn, that the certification is equivalent to an acceptance. Section 3060-a187, supplement to the code, 1913. If the customer of the bank did not have that amount of funds on hand at the time the check was certified so that it could be charged against his account, it becomes a liability of the bank, and that, I take it, is the exact situation here.

It would seem to me as if you were justified in requiring that Mr. Jameson make good to the bank the amount of this certified check and that, I understand, he has done by depositing with the bank certain notes of Chester Latimer, secured by mortgage, in the amount of $10,000.00. I do not see how the indemnifying bond can take the place of this note and mortgage. As I understand banking, the bank must have credited itself as with an amount advanced at the time of certifying this check. Consequently, there should be something in the assets of the bank to offset this credit. Until the liability occasioned by the certifying of this check has been legally removed, it seems to me as if the $10,000.00 in notes or their equivalent should be kept in the assets of the bank. It would therefore seem to me that you would not be justified in permitting the bank to release the notes and mortgage deposited by Mr. Jameson with the bank unless an equivalent amount is forthcoming in some other form. I would suggest that possibly a bond might be given to these counties or some settlement made with them by which the certified check

would be surrendered, but until it is surrendered, the bank must take care of the liability created thereby by a corresponding addition to its assets.

F. C. DAVIDSON, *Assistant Attorney General.*

LIMITATION OF LOANS

A bank may loan to one individual, corporation or firm an amount equal to one-half its capital stock, when loan is secured by first mortgage on farm land. Bank surplus not included.

July 31, 1920.

Mr. Charles E. Miller, County Attorney, Albia, Iowa.

Dear Sir: Your letter of the twenty-eighth inst., addressed to Attorney General H. M. Havner, has been referred to me for attention.

You state:

> A savings bank with a capital stock of $15,000 and a surplus of $5,000 is located in this county. The bank has made a loan of $8,000 on a first mortgage covering real estate of the value of which is more than twice the amount of the loan.

You then ask:

> The question is, has the bank made an excess loan, it being contended on the one hand that the bank may legally loan one-half of its capital stock plus one-half of its surplus on real estate of the value prescribed by the statute; on the other hand it is contended that in making a real estate loan, the bank is limited in the making thereof, to one-half of its capital stock without taking into consideration its surplus.

The law material to a determination of your question will be found in section 1870 of the supplemental supplement, which provides:

> "The total liabilities to any savings or state bank of any person, corporation, company or firm, for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed twenty per cent. of the actually paid-up capital and surplus of such bank; provided that they may loan not to exceed one-half of their capital stock to any person, corporation, company or firm on notes or bonds secured by mortgage or deed of trust upon unencumbered farm land in this state, worth at least twice the amount loaned thereon: * * *"

The statute above quoted is the only statute relating to the limitation to which a savings bank may loan money to one indi-

vidual, corporation, company or firm. The language of this statute is plain and simple, and the meaning is unmistakable. From it we can reach but one conclusion, that is, in making loans to an individual a savings bank cannot legally make a loan to that individual in excess of one-half of the amount of its capital stock, when such loan is secured by first mortgage upon unencumbered farm land situated in Iowa and worth twice the amount loaned thereon.

Sections 1848 and 1850-a of the supplement to the code, 1913, refer to the character of securities in which the capital and surplus of a savings bank may be legally invested, namely, safe and available securities. That is, said sections deal with the soundness of the securities in which such funds may be invested. Then Section 1850-a of the supplement to the code, 1913, defines what class of securities are considered sound. Section 1870, on the other hand, deals solely with the limit which any one customer may borrow at the bank, namely, if he offers the character of securities named in paragraph four, section 1850-a, supra, then he may borrow an amount equal to one-half the capital stock.

I am, therefore, of the opinion that the bank in the instant case has made an excessive loan.

W. R. C. KENDRICK, *Assistant Attorney General.*

OPINIONS RELATING TO INDUSTRIAL COMMISSIONER

INSURER SHOULD BE MADE DEFENDANT

The insurer shall be made a party defendant in proceedings before a board of arbitration.

February 18, 1920.

Hon. Ralph Young, Deputy Industrial Commissioner.

Dear Sir: I have your esteemed favor of the ninth inst. in which you request an opinion from this department upon the following facts:

> In a case which has been arbitrated, but not decided, the insurer of the employer under the acts is contending that an award of compensation due the injured workman should not be made against the insurance company, but against the employer alone, and that it is improper for the insurance company to be made a party defendant in an arbitration proceeding.

Chapter 8, title 12, supplement to the code, 1913, requires every employer, subject to the provisions of the act, to insure his liability.

Section 2477-m41 provides:

> "Every employer, subject to the provisions of this act, shall insure his liability thereunder in some corporation, association or organization approved by the state department of Insurance."

The act also requires certain policy provisions favorable to the employee.

Section 2477-m47 declares:

> "Every policy issued by any insurance corporation, association or organization to assure the payment of compensation under this act shall contain a clause providing that between any employer and the insurer, notice to and knowledge of the occurrence of injury or death on the part of the insured shall be notice and knowledge on the part of the insurer; and jurisdiction of the insured for the purpose of this act shall be jurisdiction of the insurer and the insurer shall be bound by every agreement, adjudgment, award or judgment rendered against the insured."

From the statutory provisions above quoted it will be observed that the insurer is bound by every "award" rendered against the employer.

Therefore, in order that the insurer may have his day in court, and to avoid any possible objection that section 2477-m47 violates the due process clause of the constitution of Iowa, it is proper to make the insurer a party defendant in arbitration proceedings.

W. R. C. KENDRICK, *Assistant Attorney General.*

WHEN REMARRIAGE DOES NOT AFFECT AWARD

Compensation should not be discontinued to a widow upon her remarriage when the compensation arose prior to the amendment cutting off compensation upon remarriage.

April 6, 1920.

Hon. A. B. Funk, Industrial Commissioner.

Dear Sir: I have your letter of recent date, requesting an opinion from this department as follows:

> Will you please favor me with your opinion as to whether or not the compensation to a widow should be discontinued upon her marriage within the three hundred week period? This is in a case arising before the law was amended to specifically provide that the remarriage of a widow, without dependent children, cut off further compensation to her.

Our supreme court has never passed upon that identical question. However, a similar question was raised in New Jersey, in the case of *Hansen v. Brann & Stewart Co.,* reported in 103 Atlantic Reporter, page 696, under a statute similar to our own, and, in holding that remarriage of the widow did not forfeit her right to compensation, the court at page 697 said:

> "This case must be dealt with under the provisions of the act of 1911. If, under the act, the petitioner, upon the death of her husband, was entitled to compensation during 300 weeks, she acquired a vested right, which could not be legally abridged by subsequent legislation. The amendment of 1913, therefore, which cuts off the widow's right to compensation, upon remarriage during the period covered by weekly payments, can have no bearing upon the construction to be given to the act of 1911, except as evidencing a change of the legislative mind in respect to what shall happen to an award of compensation made after the passage of the amendment to a widow, who subsequently remarried and pending the period of weeks for which compensation was to run."

Therefore, I am of the opinion that your question should be answered in the negative.

W. R. C. KENDRICK, *Assistant Attorney General.*

CITIES NOT UNDER ACT

Cities do not have to insure their liability under the Workmen's Compensation Act.

November 6, 1919.

Hon. A. B. Funk, Industrial Commissioner.

Dear Sir: I have your request for an opinion upon the following question:

> "Is a city required to take out insurance to secure the payment of compensation to its injured employes, and in the event such city fails to take out insurance, may an injured employe sue the city for damages, unless such city has been relieved by the commissioner of insurance of the state of Iowa, and the Iowa industrial commissioner of the provisions relating to insurance as found in section 2477-m41, code supplement, 1913, as amended by section 20, chapter 270, acts of the 37th General Assembly?"

The provisions of the workmen's compensation law, relating to the payment of compensation and the amount thereof, are exclusive, compulsory and obligatory as applying to cities.

Paragraph b, section 2477-m, code supplement 1913, reads:

> "Where the state, county, municipal corporation, school district, cities under special charter or commission form of government is the employer, the terms, conditions and provisions of this act for the payment of compensation and amount thereof for such injury sustained by an employe of such employer shall be exclusive, compulsory and obligatory upon both employer and employe."

Pursuant to the provisions of paragraph b above quoted, the right to elect to come under the workmen's compensation law is not extended to cities, as it is to private corporations and individuals, but cities are compelled to pay compensation to its employes injured in the course of their employment, and the amount, terms and conditions of such payment must be in accordance with the provisions of the act.

However, for the protection of injured employes against insolvent employers, the legislature has required every employer to insure his liability, unless relieved in the manner provided by

law, and, as a penalty for his failure to so insure, the act further provides that the workmen may sue his employer for damages.

Section 2477-m41 of the supplement to the code, 1913, as amended by section 20, chapter 270, acts of the 37th General Assembly, provides:

> "Every employer, subject to the provisions of this act, shall insure his liability thereunder in some corporation, association or organization approved by the state department of insurance. Every such employer shall within thirty days after this act goes into effect exhibit on demand of the state insurance department evidence of his compliance with this section; and if such employer refuses or neglects to comply with this section, he shall be liable in case of injury to any workman in his employ under the common law as modified by statute, and in the same manner and to the same extent as though such employer had legally exercised his right to reject the compensation provisions of chapter eight (8)-a, title XII, supplement to the code, 1913."

From section 2477-m supra, it will be observed that in the event an employer fails or neglects to insure his liability and one of his employes sustains personal injuries, arising out of and in the course of his employment, then the employer is liable

> "in the same manner and to the same extent as though such employer had *legally* exercised his right to reject the compensation provisions of chapter eight (8)-a, title XII, supplement to the code, 1913."

But the penal provisions of section 2477-m supra clearly do not apply to cities, for the reason that the right to reject the compensation provisions of chapter eight-a cannot be *legally* exercised by cities. Cities have no discretion in that matter but must pay compensation in the amount and according to the terms, provisions and conditions of the act.

It could be said that the provisions of section 2477-m41 apply to cities, then the compulsory provisions of paragraph b, supra, could be nullified simply by cities neglecting or refusing to insure their liability. The compulsory provision aforesaid was enacted for the benefit of the employe, not the city, and is binding upon both the city and the employe.

As hereinbefore stated, the paramount reason why employers are required to insure their liability is to protect the insured employe against the insolvency of his employer. If the employer

is solvent, then the necessity of insuring his liability is not so urgent. In fact, the workmen's compensation act itself expressly provides that employers may be relieved of the requirement relating to insurance when the insurance commissioner and industrial commissioner have satisfactory proof of the solvency of such employer. Section 2477-m49, code supplement, 1913.

Section 2477-m49, supra, requires the employer to furnish such proof of his solvency; but I do not believe that cities are required to furnish that proof directly to the said commissioners, for the reason that cities are ordinarily considered solvent, and the amount of indebtedness which a city may legally incur is expressly limited by both the state constitution and the statute.

Therefore, I am of the opinion that your question should be answered in the negative.

W. R. C. KENDRICK, *Assistant Attorney General.*

WHEN COMMISSIONER MAY DEMAND TRANSCRIPT

When testimony before board of arbitration is taken in shorthand, commissioner may demand transcript filed on review.

July 30, 1919.

Hon. A. B. Funk, Industrial Commissioner.

Dear Sir: I have your letter of the 21st inst. in which you ask for an opinion on the following facts:

> "Some time ago a case was submitted in arbitration in which a reporter was called and voluminous testimony was taken. The case involved the claim of a common law wife of the deceased workman. The mother of the deceased appeared as intervenor. The decision of the arbitration committee was for the wife. The insurance company is ready to settle on the basis of this decision.
>
> "The intervenor files notice of review. Counsel for this claimant insists upon the right of review without going to the expense of transcribing the evidence."

You then ask what your duties are, as commissioner, in connection with the review, particularly whether you have the power to order that a transcript of the testimony before the committee on arbitration be filed with you as a prerequisite to said review.

The statutory provisions material to a determination of the question at issue are the following:

Section 2477-m29 of the supplement to the code, 1913, provides that:

"The decision of the committee, together with the statement of evidence submitted before it, its findings of fact, rulings of law and any other matters pertinent to questions arising before it, shall be filed with the industrial commissioner."

It is then provided in section 2477-m32:

"If a claim for review is filed, the industrial commissioner shall hear the parties and may hear evidence in regard to any or all matters pertinent thereto and may revise the decision of the committee in whole or in part, or may refer the matter back to the committee for further findings of fact, and shall file its decision with the records of the proceedings and notify the parties thereof."

If an appeal is taken from the decision of the commissioner to the district court, an application must be filed with the commissioner asking for an appeal, and in that event it is further provided in section 2477-m33 of the code supplement, 1913, that

"In the event such application is filed as hereinbefore provided, the industrial commissioner shall, within thirty days of the filing of same, cause certified copies of all documents and papers then on file in his office in the matter, and a transcript of all testimony taken therein, to be submitted with his findings and order or decree to the clerk of the district court of Iowa in and for that county wherein the injury occurred."

From the foregoing statutory provisions it is evident that the testimony before the committee on arbitration, or at least a statement thereof, shall be filed with the industrial commissioner. If such testimony was taken down in shorthand by agreement of the parties and at their expense, then a transcript of that testimony should be filed and the cost thereof should be equally borne by the parties.

While it is true that on review before the commissioner, the parties may introduce additional evidence and testimony, yet the statute evidently contemplates that the evidence and testimony offered in the hearing before the committee on arbitration shall be filed with the commissioner to aid him in rendering his final decision.

That conclusion it strengthened by the fact that section 2477-m33, when an appeal is taken to the district court from the decision of the commissioner, requires that

> "Certified copies of all documents and papers then on file in his office in the matter, and a transcript of all testimony taken, therein, should be transmitted with his findings."

I am therefore of the opinion that under the facts in this particular case you could rightfully demand that the applicant furnish you a transcript of the testimony before the committee on arbitration, and if he failed to comply with your request, you would be justified in affirming the decision of said committee.

In the event of an appeal from your decision to the district court, it would be impossible for you to comply with the statute, wherein it is provided that you file a transcript of all the testimony taken in the hearing, unless a transcript of the testimony before the committee on arbitration is filed in your office.

W. R. C. KENDRICK, *Assistant Attorney General.*

ALLOWANCE OF INTEREST

Interest shall be allowed on claims for disability partial in character and permanent in quality, if not paid when due.

June 17, 1919.

Hon. A. B. Funk, Industrial Commissioner.

Dear Sir: I have your letter of the 9th inst. in which you state in substance the following:

> "An employe of the Iowa Portland Cement Company by the name of Rish, prior to July 1st, 1917, received an injury partial in character and permanent in quality, to-wit, portions of his thumb and two fingers on his left hand were blown off by the explosion of a dynamite cap. After a hearing before the Iowa industrial commissioner the commissioner found that the injury to said employe did not arise out of his employment and denied his claim to compensation. The district court in and for Polk county sustained the order of the Iowa industrial commissioner, and entered judgment accordingly. Upon appeal to the supreme court of Iowa the judgment of the district court was reversed."

You then ask whether or not the said employe is entitled to interest on his claim for compensation, and if so, from what date?

Section 3038 of the Code, so far as material to a determination of the question in issue, provides:

> "The rate of interest shall be six cents on the one hundred by the year in the following cases, unless the parties shall agree in writing for the payment of interest not exceeding eight cents on the hundred by the year:

"2. Money after the same becomes due;"

Under the foregoing statutory provision interest at the rate of six per cent. is allowed in Iowa on "money after the same becomes due."

Whether the injured employe in this case is entitled to interest on his claim for compensation will depend upon whether such compensation comes within the statutory term "money due."

For injuries such as the one in question our statute creates a fixed liability on the part of the employer, and provides a definite method for ascertaining the amount of such liability.

Thus, it is provided in paragraph j, section 2477-m9, supplement to the code, 1913, being the law in force at the date of the injury, and under which the rights and liabilities of the parties in this case are to be determined, as follows:

> "For disability partial in character and permanent in quality, the compensation shall be based upon the extent of such disability.
>
> "For all cases included in the following schedule, compensation shall be paid as follows, to wit:
>
> "(1) For the loss of a thumb, fifty per cent. of daily wages during forty weeks."

Pursuant to the statutory provision just quoted, an employe is entitled to a fixed amount when his injury is partial in character and permanent in quality, payable at so much per week; and under section 3038 of the code said employe is entitled to interest on that amount as it becomes due. Therefore, I am of the opinion that the employe in question is entitled to interest on the compensation due him.

This conclusion is sustained by the holding of our supreme court in the case of

Chamberlain v. City of Des Moines, 154 N. W. at page 767, wherein it is said:

> "It is true that the statute which authorizes recovery of damages for change of grade does not provide that interest may be allowed. But it does provide for payment in advance of the change, thus creating a liability as of that date, and if the city does not pay or tender the money in advance of the change, interest is necessary to make the injured party whole, and, under the general statute allowing interest on sums due, we think interest should be allowed."

Now the question is, when did the compensation in the instant case become due?

Under the law as it existed at the date of the injury, compensation began on the 15th day after the injury. Paragraph g, section 2477-m9, of the supplement to the code, 1913, provides:

> "No compensation shall be paid for an injury which does not incapacitate the employe for a period of at least two weeks from earning full wages; but if incapacity extends beyond a period of two weeks, compensation shall begin on the fifteenth day after the injury."

Then under paragraph j of the same section payments became due each week and continued according to the character of the injury.

Therefore, under the facts stated in your letter, interest should commence on the first weekly installment on the fifteenth day after the injury, and on the deferred installments as they became due each week thereafter, and continue until paid.

W. R. C. KENDRICK, *Assistant Attorney General.*

RECOVERY FROM THIRD PARTY

When an employe is injured by a third person and receives a sum of money from said third person in consideration not to sue, the compensation from employer should be reduced by that sum.

January 24, 1919.

Hon. A. B. Funk, Industrial Commissioner.

Dear Sir: I am in receipt of your letter of the 13th inst., enclosing the transcript of the evidence in the hearing before the board of arbitration in the case of A. B. Bodine v. Model Laundry Company, et al., attached to which is an instrument marked "Exhibit A."

The transcript aforesaid discloses the fact that on July 25, 1917, claimant received a serious injury while in the course of and arising out of his employment with the Model Laundry Company of Waterloo, Iowa, by reason of a collision between the vehicle he was driving for his employer and a street car of the Waterloo, Cedar Falls and Northern Railway Company.

Thereafter, on the 7th day of November, 1917, claimant and the said railway company entered into a written instrument, heretofore referred to as "Exhibit A," which instrument provided as follows:

"THIS AGREEMENT, made this 7th day of November, 1917, by and between the Waterloo, Cedar Falls and Northern Railway Company, hereinafter called the Railway Company, and Albert B. Bodine, of Waterloo, Iowa, hereinafter called Bodine, WITNESSETH:

"WHEREAS, on the 25th day of July, 1917, at about 5:30 p. m., the said Bodine, while in the employ of the Model Laundry Cleaning & Dyeing Company, of Waterloo, Iowa, was injured in a collision between a laundry wagon, which he was then driving for his employer, and a street car of the Railway Company on Bridge Street in Waterloo, Iowa, and

WHEREAS, the said Bodine claims that under the circumstances the said collision was not the result wholly of his own want of reasonable care, but was in part the fault of the railway company, while on the other hand the Railway Company claims that it and its employes were not at fault or responsible for the collision in any degree, and

WHEREAS, the said Bodine has reached an agreement with the Railway Company in consideration of the sum of $750.00 to be paid him to covenant not to sue the Railway Company on account of any personal injuries or damage sustained by him in said collision or accident.

NOW, THEREFORE, THIS AGREEMENT WITNESSETH:

"The Railway Company in consideration of the said Bodine covenanting not to sue the said Railway Company or any of its officers, servants or employes for or on account of injuries sustained by him in the collision referred to in the preamble hereof, hereby agrees to pay to the said Bodine the sum of Seven hundred and fifty ($750) Dollars and the said Bodine in consideration of the payment to him by the said Railway Company of the said sum of Seven hundred and fifty ($750) Dollars from the Railway Company.

"It is hereby expressly understood and agreed that this instrument is not a release to the said Railway Company nor to said Bodine's employer or the insurer of said employer under the Workman's Compensation Act of the State of Iowa, nor to any other corporation, firm, or person, but is simply a covenant not to sue the said Railway Company, its officers, servants, or employes, on account of the injuries above mentioned.

Waterloo, Cedar Falls & Northern Ry. Co.
By Maurice A. Welsh, Supt.
Albert B. Bodine.
WITNESSES:
Corinne Anderson
Maurice A. Welsh."

You then ask for an opinion from this department as to whether the instrument, marked "Exhibit A," is of such a character as to relieve the claimant from the duty of accounting to the insurer for the $750.00 received from the Waterloo, Cedar Falls and Northern Railway Company.

In determining whether the amount received by the claimant from the railway company should be deducted from any compensation due from the employer, or, in this case, the insurer, it seems to me the only question to be considered is whether or not the $750.00 payment was, in effect, "damages recovered" from the railway company. If it is to be so considered, then, under our statute, the amount of compensation to which the employee is entitled from his employer must be reduced by that amount.

Our statute provides:

> "Where an employe coming under the provisions of this act receives an injury for which compensation is payable under this act and which injury was caused under circumstances creating a legal liability in some person other than the employer, to pay damages in respect thereof:
>
> "(a) Proceedings against both parties. The employe or beneficiary may take proceedings both against that person to recover damages and against the employer for compensation, but the amount of the compensation to which he is entitled under this act shall be reduced by the amount of damages recovered.
>
> "(b) Indemnity-subrogation. If the employe or beneficiary in such case recovers compensation under this act, the employer by whom the compensation was paid or the party who has been called upon to pay the compensation, shall be entitled to indemnity from the person so liable to pay damages as aforesaid, and shall be subrogated to the rights of the employe to recover therefor."

The statute just quoted declares in substance, that the compensation due the employee from his employer should be reduced, when (1) the injury was caused under "circumstances creating a legal

liability in some person other than the employer, to pay damages in respect thereof." And, (2) the employee "recoverd" damages from said third party. Said section also provides that the employee may "take proceedings" against both his employer and said third party, but if the employee is paid compensation by his employer, then said employer shall be subrogated to the rights of the employee as against said third party.

Now the question arises, What is meant by the language "circumstances creating a legal liability," and the term "recovered?" Also, What is meant by the words "take proceedings?"

Although making a diligent search of the adjudicated cases in the United States relating to claims for compensation arising under workmen's compensation statutes, I am unable to find a case where the facts are similar to those in question. However, under the English statute, which is very similar to our own, I find a case somewhat in point. The English act provides:

> "Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof:
>
> "(1) The workman may take proceedings both against that person to recover damages and against any person liable to pay compensation under this act for such compensation, but shall not be entitled to recover both damages and compensation.
>
> "(2) If the workman has recovered compensation under this Act, the person by whom the compensation was paid, and any person who has been called upon to pay an indemnity under the section of this act relating to subcontracting, shall be entitled to be indemnified by the person so liable to pay damages aforesaid, and all questions as to right to and amount of any such indemnity shall, in default of agreement, be settled by action, or, by consent of the parties, by arbitration under this act."

In the case just referred to, a workman entered into an agreement with a company on whose premises he was injured, but who were not his employers, that in consideration that he made no legal claim against them they would pay him a certain amount. He accepted said payment, and later filed a claim against his employer for compensation.

It was held:

(1) That the expression "circumstances creating a legal liabil-

ity'' means, not merely circumstances which *in fact* create a legal liability, but circumstances which *are alleged* to create a legal liability, and which would be the foundation of an action for negligence.

(2) That the term ''take proceedings,'' used in connection with taking proceedings against both the employer and the third person, is not to be confined to *legal proceedings actually taken,* but is satisfied *if a claim is made* against some person other than the employer for negligence.

(3) That the term ''recover'' compensation does not necessarily mean to recover *by means of legal proceedings,* but that it is sufficient if the workman has *claimed* compensation and received it.

Page v. Burtwall, (1908) 2 K. B. 758.

In the Page case the employee claimed that the payments he had received from the third party were merely gratuities and would not prevent him from taking proceedings against his employer for compensation; that ''legal liability'' can only be determined by means of an action, and taking ''proceedings'' must mean taking legal proceedings under which he ''recovers'' either damages or compensation; that a person can only ''recover'' damages by means of an action.

The court in passing on these questions says at page 761:

> ''This case raises a question under section 6 of the act of 1906, and before dealing with the particular circumstances of the present case I think it well to call attention to the words of section 6. It is as follows: 'Where the injury for which compensation is payable under this act was caused under circumstances creating legal liability in some person other than the employer to pay damages in respect thereof.' That must mean not merely if there are circumstances which in fact create a legal liability for negligence, but where there are circumstances which it is alleged create that liability, and which are the foundation of an action for negligence. Then it provides that the workman may take proceedings against that person to recover damages, and of course it cannot be ascertained whether there is a liability of that kind until after the action has been commenced and brought to trial; and that confirms, as it seems to me, conclusively the interpretation I put on the earlier words. Sub-section 1 says, 'the workman may take proceedings both against that person to recover damages and against any person liable to pay compensation under this act

for such compensation, but shall not be entitled to recover both damages and compensation.' Now as I read that, the meaning is this. A workman has, or asserts he has, a right against his own employer for compensation under the workmen's compensation act—he has, or asserts he has, a right against somebody, not his employer, based upon negligence; he is not bound to exercise his option in the first instance, as was the case under the act of 1897, but he may, if so minded, take proceedings concurrently, but if he recovers damages he cannot get compensation, and if he recovers compensation he cannot get damages. I am not prepared to assent to the view that this section is meaningless unless there has been a legal proceedings actually commenced against a person who is not the employer. It seems to me that the section ought to be construed as operative in the case where a claim is made by the man against a person who is not his employer for negligence under which claim compensation in the nature of damages—not damages—is paid by that person without any writ issued, and upon terms that no writ should issue."

Then again at page 762 it is said:

"I decline to limit the word 'recover' to recover by virtue of legal proceedings."

Further on page 762 it is said:

"The result was a plain offer made and a plain offer accepted, and that after demand had been made upon the company, or an assertion (denied by the company, but an assertion, nevertheless) that they were clearly liable to the applicant for damages for injuries which he had sustained. Under the circumstances it seems to me that it is a case which falls within s. 6, sib-s. 1. The applicant has recovered damages from the British Xylonite Company; he is not entitled to recover compensation from his employer."

Then again at page 763, in the concurring opinion of Justice Farwell, it is said:

"Now 'creating a legal liability' cannot mean that the court has to determine judically that there was a legal liability before the section can apply; for that would involve one of two things—either that the workman must litigate up to judgment against a third person to see if he is legally liable, or that the court must determine the liability of a third person not before it, as if an action were brought against him. Therefore the section refers, in my opinion, to a prima facie case of legal liability, some thing that is not pure bounty, but a prima facie case of liability, which although not acknowledged is yet discharged by the payment of money. That in a sense is

> tantamount to a payment into court with denial of liability. Here, on the letters that have been read, I cannot doubt there was at any rate an arguable case of liability on the part of the company. The claims were compromised on the terms of his receiving a certain sum. That being so, the question is whether he has 'recovered.' I am of opinion that he has, in that he has received. That is the common sense of it. The workman is not to have it twice over."

And in a second concurring opinion, Justice Kennedy says at page 764:

> "But the section says at its close, 'He shall not be entitled to recover both damages and compensation'; and it appears to me a narrow and unjustifiable view to hold that 'recover' means recover in the course of and as the result of some litigious proceedings. It is not so in the act. It is not 'recover in such proceedings,' but 'recover,' and 'recover,' it appears to me, bears the meaning which was put upon that word by Vaughan Williams, L. J. in the case of Oliver v. Nautilus Steam Shipping Co. (1). 'applied for and received.' The workman did in this case 'apply for and receive' damages. As to that I do not think the correspondence leaves one in doubt."

To the effect that the legal liability of the third party does not have to be established by an action in court is stated in the following cases:

Rosenbaum v. Hartford News Co., 103 Atl. 120.
Miller v. Beck, 108 Ia. 575.
Cleveland Ry. Co. v. Hilligoss, (Ind.) 86 N. E. 485.

The general doctrine relative to the effect of a release of one of two or more joint wrong-doers, or the effect of a covenant not to sue between an injured employe and a third party who caused said injury, is not controlling; for it is nowhere claimed that the $750 payment was a mere gratuity, and the gist of the matter hereunder consideration is, whether the $750 payment is in effect "damages recovered." In any event, the rule declaring that the release of one joint tort feasor releases all, or that a covenant not to sue one joint tort feasor does not release the others, is inapplicable to the facts in question, for the reason that the Model Laundry Company and the Waterloo, Cedar Falls & Northern Railway Company are not joint tort feasors. That the employer and a third party who injured the employe are not joint tort feasors has been so held in the case of

Dettloff v. Hammond, Standish & Co., 161 N. W. (Mich.) 949.

Therefore, in determining whether or not "Exhibit A" is of such a character to relieve the claimant from the duty of accounting to the insurer, we are forced to resort largely to statutory construction, rather than to adjudicated cases.

Turning, then, to section 2477-m6, supra, we find three propositions:

(1) Was the injury caused *under circumstances creating a legal liability* in some person other than the employer?

That it was must be conceded; otherwise, the railway company would not have paid $750 to escape suit. Neither corporations nor individuals are paying $750 to escape a lawsuit for personal injuries unless they feel there is a legal liability on their part to the person injured; and the rule is well settled that it is not necessary to establish such liability by an action in court.

(2) The employe may take proceedings both against the third party to recover damages and against the employer for compensation, but the amount of compensation to which he is entitled shall be reduced by the amount of damages recovered.

It is claimed in the appeal before you that the $750 payment is not to be considered as "damages recovered," but merely the consideration of a covenant not to sue. That position is untenable. For what is it a covenant not to sue? The answer is unquestionably damages. And who prevents a suit by which damages might be recovered? Nobody but the railway company. And what does the claimant receive for his promise not to sue the railway company for damages? He receives $750. Unquestionably, the courts would consider that payment a recovery.

(3) If the employe recovers compensation from his employer, then the employer shall be entitled to indemnity from the third party so liable in damages, and to that end the employer shall be subrogated to the rights of the employe to recover therefor.

But, how can the employer recover from said third party when the employe and third party have already entered into an agreement, in consideration for which the said third party pays the employe $750, and the condition of said agreement being that the employe shall not sue said third party for damages on account of said injuries? By virtue of the statute the employer is subrogated to the rights of the employe to recover from said third party, but, the employe has frittered away his right to sue. When the employer

is subrogated he acquires only those rights his employe may have against the third party, and no others. If the third party refuses to amicably indemnify the employer, then the employer's only recourse is an action at law to compel him so to do; but, when the employer is subrogated that right is gone and the employer receives nothing. How can it then be claimed that the requirements of the statute have been complied with? I do not believe the rights of the empoyer can be defeated in that manner.

Therefore, I am of the opinion that the agreement referred to as "Exhibit A" does not relieve the claimant from the duty of accounting to the insurer for the $750 received from the Waterloo, Cedar Falls & Northern Railway Company.

W. R. C. KENDRICK, *Assistant Attorney General.*

EFFECT OF RECOVERY OF DAMAGES FROM THIRD PARTY

Discussion as to the amount of compensation to be paid by the employer when employe is killed by third party and the estate receives damage.

June 2, 1920.

Hon. A. B. Funk, Industrial Commissioner.

Dear Sir: You have referred to this department the letter of Kenline & Roedell, attorneys at Dubuque, Iowa, in which said firm of attorneys ask your department for an opinion upon the following statement of facts:

> One Peter Campbell was killed in the year 1919 on a Chicago Great Western crossing in Dubuque, while employed by A. Y. McDonald Company, and in the performance of his duties. The decedent left a sister as sole partial dependent, and several brothers and sisters as heirs at law. Compensation due the dependent sister is agreed on at $1,212. The administrator of deceased has filed a claim with the railroad company for damages.

You then ask the following questions:

> (1) If the railroad company pays to settle, and out of the amount so paid, the said sister receives say $600, can the compensation company make good its contention that it should pay the sister no compensation at all?
>
> (2) If total compensation is paid, and settlement is then made with the railroad company, can the compensation company successfully intervene in the estate proceedings to recover back (1st) all that it paid by way of compensation, or (2nd) so much as would represent the difference between the

amount of compensation paid, and the interest of $600 as heir at law in the amount of settlement paid by the railroad company?

The law applicable to a proper determination of your two questions will be found in section 2477-m6, supplement to the code, 1913, which reads as follows:

> "Where an employe coming under the provisions of this act receives an injury for which compensation is payable under this act and which injury was caused under circumstances creating a legal liability in some person other than the employer, to pay damages in respect thereof:
>
> "(a) *Proceedings against both parties.* The employe or beneficiary may take proceedings both against that person to recover damages and against the employer for compensation, but the amount of the compensation to which he is entitled under this act shall be reduced by the amount of damages recovered.
>
> "(b) *Indemnity—Subrogation.* If the employe or beneficiary in such case recovers compensation under this act, the employer by whom the compensation was paid or the party who has been called upon to pay the compensation, shall be entitled to indemnity from the person so liable to pay damages as aforesaid, and shall be subrogated to the rights of the employe to recover therefor."

From a reading of the foregoing section it is clear that your first question should be answered in the negative. If the dependent sister only received $600 as her portion of the damages recovered against the railroad company on account of the death of her deceased brother, and it was determined that she should receive $1,212 as compensation under the compensation act, then she would be entitled to the difference between $600 and $1,212 or $612.

As to your second question the law clearly provides that the employer is merely subrogated to the rights of the employe and in this case, therefore, it is clear that if the employer pays the total amount of compensation, to wit, $1,212, but the interest of the dependent sister in the recovery against the railroad company amounts only to $600, then the extent to which the employer may recover from the railroad company would be limited to the amount paid by the railroad company to the dependent sister, to-wit, $600.

W. R. C. KENDRICK, *Assistant Attorney General.*

REWARD TO WIDOW

In case of death of employe, leaving wife and children, the wife is entitled to all the compensation.

January 20, 1919.

Hon. A. B. Funk, Industrial Commissioner.

Dear Sir: I have your letter of the 13th inst. requesting an opinion from this department as to whether or not the compensation due because of the death of a husband and father may legally be divided between the surviving spouse and the children of the deceased.

It seems to me that our legislature has clearly expressed itself in that respect.

Subdivision 4 of paragraph C., section 2477-m16, supplement to the code, 1913, declares:

> "If the deceased employe leaves dependent surviving spouse, the full compensation shall be paid to such spouse; but if the dependent surviving spouse dies before payment is made in full, the balance remaining shall be paid to the person or persons wholly dependent, if any, share and share alike. If there be no person or persons wholly dependent, then payment shall be made to partial dependents."

It is evident that but one construction can be given to the foregoing statutory provision, and that is, the entire compensation must be paid to the wife of a deceased workman, but in the event the workman leaves no wife, but dependent children, as defined in subdivision 4 of paragraph C, section 2477-m16, supra, then the compensation due must be paid such dependent children, share and share alike.

The foregoing conclusion is further strengthened from the fact that subdivision 4, supra, further provides that in the event of the death of the surviving spouse before payment to her has been made in full, then any balance remaining shall be paid to those persons wholly dependent, share and share alike, which in the given case would be the dependent children of the deceased.

I am, therefore, of the opinion that the compensation payable on account of the accidental death of a workman under the compensation laws of this state, cannot be divided between the surviving spouse and the children of the deceased, but the entire compensation must be paid to the surviving spouse; and this, regardless of

whether the settlement is in the form of a lump sum or weekly payment.

W. R. C. KENDRICK, *Assistant Attorney General.*

EXPERT WITNESS FEES

Physicians appearing as witnesses before the commissioner are not entitled to $4 per day expert fees.

January 20, 1919.

Hon. A. B. Funk, Industrial Commissioner.

Dear Sir: I have your letter of the 14th inst, in which you ask for an opinion as to whether or not physicians testifying as witnesses before the board of arbitration or commissioner, are entitled to four dollars per day as expert witness fees.

The only fee allowed a witness in any tribunal is that fee provided for by statute. Section 2477-m24, supplement to the code, 1913, provides:

> "The fees for attending as a witness before the industrial commissioner shall be one dollar and fifty cents per diem; for attending before an arbitration committee, one dollar per diem."

Unless the legislature has made additional provision than that just quoted, it is apparent that a physician would not be entitled to any greater fee than provided for in section 2477-m24 aforesaid. By reference to section 4661 of the code you will find that the legislature has made additional provision, for it is declared therein that:

> "* * * witnesses in any court of record, except in the police courts, shall receive for each day's attendance one dollar and twenty-five cents * * * Witnesses called to testify only to an opinion founded on special study * * * * shall receive additional compensation, to be fixed by the court * * * but such additional compensation shall not exceed four dollars per day while so employed. * * *"

But it will be observed that the statutory provision just quoted applies only to a proceeding or trial in a court of record, and would not be available in any other tribunal. Even in a court of record, in order to entitle a party to fees as an expert, it must appear that the witness is called as an expert and to testify to an opinion on his special study and experience. It has been so held in *Snyder v. Iowa City,* 40 Iowa, 646, and the doctrine announced in the Snyder

case was followed by Judge Deemer in his work on Pleading and Practice, Vol. 1, section 466.

In the Snyder case, supra, the reason why a witness is not entitled to expert fees unless called as such is forcibly stated in the following language:

> "But it does not affirmatively appear that these witnesses were called because they were physicians, and for the purpose of testifying to an opinion founded on their special study and experience as physicians. For ought that is shown they were called simply because they happened to know facts respecting which any one would be competent to testify. The law allows no extra compensation for such testimony."

In any event, under the present law, the extra fees allowed an expert witness applies only to a proceeding in a court of record, and it is my opinion that a physician would not be entitled to a fee of four dollars per day as a witness in a hearing, either before an arbitration committee or before you as commissioner.

I would suggest, however, that this defect in the workmen's compensation statute be called to the attention of the present legislature.

W. R. C. KENDRICK, *Assistant Attorney General.*

OPINIONS RELATING TO PHARMACY COMMISSION

PHARMACY COMMISSION HAS NO AUTHORITY OVER SALE OF CERTAIN STOCK FOODS

It is not necessary that a person be a registered pharmacist in order to compound or sell at retail stock remedies containing poisons. The regulating of the sale of stock foods and remedies is under the jurisdiction of the dairy and food commissioner. The law does not contemplate that the commissioners of pharmacy should deal with the sale of stock remedies whose sale is licensed by the dairy and food commissioner.

June 12, 1919.

Hon. D. E. Hadden, Commissioner of Pharmacy, State House.

Dear Sir: We have your letter of June 4th, in which you state:

> "Under sections 2588 and 2593 of the code, we would like an opinion upon the following points:
>
> "Can anyone not being a registered pharmacist of this state, compound or sell at retail stock remedies consisting of such drugs as nux vomica (a poison) incorporated with other ingredients; also worm expellers consisting of calomel, santonine or malefern. Said stock remedies being put up in 100 pound and smaller packages and sold by salesmen who travel from place to place."

Section 2588 of the supplement of 1913, to which you refer, provides in part as follows:

> "No person not a registered pharmacist shall conduct the business of selling at retail, compounding or dispensing drugs, medicines or poisons, or chemicals for medicinal use, or compounding or dispensing physicians prescriptions as a pharmacist nor allow anyone who is not a registered pharmacist to so sell, compound or dispense such drugs, medicines, poisons or chemicals, or physicians' prescriptions. * * * No one shall be prohibited by the provisions of this chapter, relating to the practice of pharmacy, from selling insecticides or fungicides consisting of hellebore, Paris green, etc. * * *"

Section 2593, to which you refer, provides in part as follows:

> "No person shall sell at retail any poisons enumerated in the following schedule, to wit: Acids * * * nux vomica, etc.

> * * * without affixing to the bottle * * * containing the poison, a label bearing the name of the article and the word poison distinctly shown, with the name and place of business of the registered pharmacist from whom the article was obtained * * * ; provided however, that nothing herein contained shall be construed to permit or authorize the sale of any of the poisons herein named where the sale thereof is otherwise prohibited or regulated by law. * * *''

Section 2594 provides that any itinerant vendor of

> ''any drug, nostrum, ointment, or appliance of any kind for the treatment of any disease or injury, and all those who by any method publicly profess to treat or cure disease, injury or deformity, shall pay to the treasurer of the commission of pharmacy an annual fee of one hundred dollars.''

At first reading it may appear that no one would be entitled to sell at retail any stock food containing any of the poisons enumerated in section 2593, supplement of 1913, without having a pharmacist's permit, but when the foregoing chapter with reference to the practice of pharmacy is read in connection with section 5077-a8, supplement of 1913, we find that there is an apparent conflict. The section last above mentioned has reference to the jurisdiction of the dairy food commissioner over concentrated commercial foodstuffs, which term includes not only mixed meals and feeds, but also

> ''condimental stock foods, patented proprietary or trademarked stock or poultry feeds claimed to possess medicinal or nutritive properties, or both; and all other materials intended for feeding to domestic animals, but it shall not include hay, straw, whole seeds, etc. * * *''

The remedies mentioned in the sample advertising matter you enclose with your request for an opinion discloses that the stock remedies are within the definition of concentrated commercial foodstuffs, as defined by our statute, and being such, it is necessary for the proprietors thereof to secure a permit from the dairy and food commissioner to sell and offer for sale their remedies within this state. The law further requires them to submit a sample of their product to that officer for inspection and analysis. That the state, in the exercise of its police power, has authority to regulate and otherwise control the sale of stock foods and stock remedies, has been definitely settled not only by the courts of this state, but by the supreme court of the United States.

Standard Stock Food Co. v. Wright, 225 U. S. 540.

Taking the chapter of the code with reference to the practice of pharmacy in its entirety, and section 5077-a8 of the supplement of 1913 and the sections following, relating to the authority of the dairy and food commissioner over the sale of stock foods, we can reach no other conclusion than that the chapter with reference to the practice of pharmacy was not intended to cover the sale of concentrated commercial feeding stuffs, or of stock remedies under the jurisdiction of the dairy and food commissioner.

We find that section 2593, *supra* recognizes that there may be other regulations other than those contained in the chapter relating to the practice of pharmacy, prohibiting or regulating the sale of poisons, for we find the following:

> "Provided, however, that nothing herein contained shall be construed to permit or authorize the sale of any poisons herein named where the sale thereof is otherwise prohibited or regulated by law."

In the case you present we find that there are other regulations covering the sale of the poison mentioned, namely, section 5077-a8, supplement of 1913, relating to the sale of stock remedies and concentrated commercial feeding stuffs.

We are therefore of the opinion that it is not necessary that one be a registered pharmacist of this state in order to compound or sell at retail stock remedies containing such drugs as nux vomica, when the sale of such stock remedies is made under the permit of the dairy and food commissioner.

B. J. POWERS, *Assistant Attorney General.*

AUTHORITY OF PHARMACY COMMISSION

The pharmacy commission has no authority to inspect drug stocks of physicians or hospitals kept by them to be compounded or dispensed, and has no authority to exact a fee from persons delinquent in renewing their certificate to practice pharmacy.

July 25, 1919.

Mr. H. E. Eaton,
Secretary Commission of Pharmacy.

Dear Sir:

We have your letter of July 12, 1919, in which you ask the opinion of this department upon the following:

> "This department would like to know if under section

4999-a32 and following sections relating to the manufacture or sale of drugs, being adulterated or misbranded, they have the right to inspect physician's offices, state and private hospitals where drugs and medicines are compounded or dispensed?

"Also, if under section 2589-d as amended by the 38th General Assembly requiring that the 'annual renewal fee of $2.00 SHALL BE PAID on or before the 22d day of March,'' the commission of pharmacy has the authority to rule that after March 22d, a delinquent fee of $1.00 shall be added to this renewal fee of $2.00?

"We feel from our past experience a great many do not pay this fee until in May, June and July, and some even much later, that it very much interferes with the systematic checking in our office files, and some such penalty would be acceptable to the registered pharmacist, rather than to drop their names from the list of registered pharmacists.''

It is our opinion that section 4999-a32, supplement to the code, 1913, and sections following to and including 4999-a39 do not give you authority to inspect physician's offices, state and private hospitals where drugs or medicines are compounded or dispensed.

As to your second inquiry, section 2589-b, supplement to the code, 1913, as amended by chapter 95, acts of the 38th General Assembly, provides for the payment of an annual renewal fee for renewal certificates on or before the 22d day of March. The only effect of the failure to pay this fee and procure a renewal certificate is that the conduct of the business of a pharmacist without such renewal becomes a misdemeanor. There is no authority for the commission to charge anything as a delinquent fee.

SHELBY CULLISON, *Assistant Attorney General.*

RIGHTS UNDER ITINERANT VENDOR'S OF DRUG LICENSE

One who possesses an itinerant vendor's of drugs license is not entitled thereby to sell soap, baking powder, spice and toilet articles as such articles are not drugs. In order to sell such articles the peddler should secure a license under section 1347-a, supplement, 1913.

August 13, 1919.

Mr. W. W. Comstock, County Attorney,
West Union, Iowa.

Dear Sir:

We have your letter of August 12th, in which you request an opinion from this department upon the following proposition:

"There are several parties in this county who hold an itinerant vendor's of drugs license and who claim that they are entitled to sell baking powder, soap, spices and toilet articles under this license, under the provisions of section 1347-a, supplement of 1913. Will you advise me whether their contention is correct?"

Section 2594, supplement of 1913, provides in part as follows:

"Any itinerant vender of any drug, nostrum, or appliance of any kind for the treatment of any disease or injury, and all those who by any method publicly profess to treat or cure diseases, injury or deformity, shall pay to the treasurer of the commission or pharmacy an annual fee of one hundred dollars, upon the receipt of which the secretary of the commission shall issue a license for one year from its date. * * *"

Section 4999-a33, supplement of 1913, defines the term "drug" in the following language:

"The term 'drug,' as used in this act, shall include all medicines and preparations recognized in the United States pharmacopoeia or national formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation or prevention of disease of either man or other animals, or for the destruction of parasites."

Baking powder, ordinary soap, spices and toilet articles are not used for the treatment of any disease or injury, nor are they included within the definition of a drug as given by statute, nor does the United States pharmacopoeia or national formulary recognize such articles as drugs. It should be understood, however, that medicated soap would come within the classification of a drug.

It is therefore the opinion of this department that the parties to whom you refer are not entitled to sell the articles mentioned under an itinerant vendor's of drugs license, and that if they intend to engage in the business of selling such articles outside of the incorporated cities and towns of your county, they should comply with section 1347-a, supplement of 1913.

B. J. POWERS, *Assistant Attorney General.*

OPINIONS RELATING TO STATE FIRE MARSHAL

USE OF CONTINGENT FUND

Additional assistants may be employed by the head of a department and paid from the contingent fund of such department without the consent of the committee on retrenchment and reform.

August 13, 1919.

Mr. J. A. Tracy, State Fire Marshal, State House.

Dear Sir: We are in receipt of your letter of July 24th in which you state:

> "I would respectfully request your official opinion on the construction of the law, section 2468-l, chapter 7-a, of the state fire marshal law, code supplement, 1913, of Iowa.
>
> "Section 2468-l says among other things, 'the said fire marshal may contract such other expense as may be necessary in the performance of his official duties, providing the expenses of the office shall not exceed the sum of thirteen thousand five hundred dollars annually.'
>
> "It has been the general practice heretofore that when the office was so crowded with work that the regular clerk could not attend to all of the clerical work an extra clerk would be hired until the work was caught up. During the vacation period of the regular clerk extra help would be provided to carry on the work. During the period the annual report is being made up extra help is absolutely necessary. This has been taken care of out of our annual appropriation except on two or three occasions, when we were compelled to ask the retrenchment and reform committee for an additional allowance, which was granted out of the funds appropriated for that purpose.
>
> "Section 1, chapter 272, acts 38th General Assembly, among other things says 'the number of employes and provision for compensation therefor for the various offices and departments, *except where otherwise provided by law,* shall not exceed the number herein named, and the compensation to each per annum, and for such employment shall be the amounts as hereinafter fixed.'
>
> "You will notice on lines 317 to 322, inclusive, of the same chapter the number of employes is set out together with salary allowed.
>
> "Section 33 of chapter 273 sets out the contingent fund

allowed at $2,000.00 for the two years, leaving the following questions for your official opinion:

"1. Can the state fire marshal under the fire marshal law hire additional help in case of sickness or vacation of the regular clerk without applying to the retrenchment and reform committee for permission to do so?

"2. Can the state fire marshal hire additional help to assist in making up the annual report without applying to the retrenchment and reform committee for permission to do so, providing the total expense of the fire marshal's office does not exceed the appropriation and contingent fund allowance?

"3. What items of expense must the contingent fund be used for?"

Section 2468-b, supplement to the code, 1913, provides as follows:

"The state fire marshal is hereby empowered to appoint a deputy fire marshal to assist him in his work, and with the approval of the executive council may appoint and fix the compensation of such additional deputies, clerks and assistants as may be necessary to properly and efficiently conduct the affiairs of his office."

Section 2468-d, supplement to the code, 1913, provides:

"With the approval of the executive council the state fire marshal may, in addition to the provisions of section 2, appoint any person, or persons, as state inspectors, or inspectors, who may be known to him to be competent and skilled in the inspection of buildings and their contents."

Section 2468-e to section 2468-k, supplement to code, 1913, enumerates the duties of the state fire marshal, among which are the investigation of the causes of fires, the record of fires in the state, taking testimony under oath as to the cause of fires, inspection of buildings where fires have occurred, examination of buildings as to whether they are liable to fire or otherwise, and the supervision of fire drills in public schools.

Section 2468-l, supplement to the code, 1913, fixes the salary of the fire marshal at $2,500.00 and of the deputy at $1,800.00, and contains the following provision:

"This said fire marshal, his deputies and assistants shall be entitled to their actual and necessary traveling, hotel and other expenses while away from the city of Des Moines on business of the office; and the said fire marshal may contract

such other expenses as may be necessary in the performance of his official duties, but the total amount to be expended for all purposes, including salaries, compensation, fees and expenses, except the office expenses provided in section 1 hereof, shall not exceed the sum of thirteen thousand five hundred dollars annually.''

Section 2468-p, supplement to the code, 1913, annually appropriates the sum of $13,500.00 for the purpose of maintaining the department of the state fire marshal, paying all expenses thereof.

Chapter 272, acts of the 38th General Assembly, section 1, lines 1 to 6, provides:

''Until July 1, 1921, the number of employes and provision for compensation therefor, for the various offices and departments of the state at the seat of government, except where otherwise provided by law, shall not exceed the number herein named, and the compensation to each per annum and for such employment shall be the amounts as hereinafter fixed.''

And for the office of state fire marshal provides:

''One fire commissioner shall receive salary of $2,500.00.

''One deputy, salary not to exceed $2,000 00.

''Two assistant deputies, each at a salary not to exceed $1,600.00.

''One stenographer and clerk at a salary from $1,080.00 to $1,300.00.''

Section 1 further provides, lines 417 to 437, as follows:

''No additional help shall be employed by the head of any department, and no additional pay shall be granted or authorized to any of the employes provided for in this act without first having received the approval of the committee on retrenchment and reform. The employes and extra help provided for the various offices and the additional compensation for service provided in this resolution shall at all times be subject to reduction, limitation or other disposition by the committee on retrenchment and reform, whenever such committee shall find that the number of employes and the amount of additional help and compensation for the purpose named in this resolution should be reduced, eliminated or changed from one office to another and an order made by said committee, and a copy thereof filed with the department whose employes or help or compensation for help shall be reduced or changed and filed with the auditor of state shall be sufficient to prevent further expenditure for such employes, help or service. The

retrenchment and reform committee in making an order furnishing any clerical assistance or expending any money for any other state purpose herein provided for, shall enter the same in its records, filed in the office of the secretary of state, and file a copy of said order with the department affected, and with the auditor of state. * * *''

Section 33, chapter 273, acts of the 38th General Assembly, appropriates the sum of $2,000.00 for the office of the state fire marshal as a contingent fund for the period ending June 30, 1921.

I think it is apparent from reading the statutes above quoted that the legislature did not intend that the employes of the office of the state fire marshal should be limited to those enumerated in chapter 272, acts of the 38th General Assembly. The act just referred to does not, in express terms, repeal other provisions of the code relative to the office of the state fire marshal, and as the law does not favor repeals by implication, it should not be construed as a repeal unless its provisions are irreconcilable with the other statutes pertaining to the office of the state fire marshal, but rather such a construction should be given as will harmonize all statutes upon the subject.

Of course, the salaries fixed by the act of the 38th General Assembly for the officers and employes therein enumerated cannot be changed by you. But as shown by the statutes heretofore quoted it is provided that you may, with the approval of the executive council, appoint additional deputies, clerks and assistants and inspectors in order to properly and efficiently conduct the affairs of your office and for the purpose of paying these expenses and other expenses which it is necessary for you to incur, an appropriation of $13,500.00 is made.

By chapter 273, acts of the 38th General Assembly, above quoted, you are given in addition to this annual appropriation, the sum of $2,000.00 as a contingent fund. No provision is made in the statute as to the purpose or purposes for which a contingent fund may be used, but the denomination of the fund as a contingent fund indicates that it is to be used for the payment of expenses not ordinarily met in the conduct of your office and not anticipated by the legislature.

In view of these statutes, it is my judgment that you may employ, with the approval of the executive council, additional deputies, clerks, assistants and inspectors without the consent of

the committee on retrenchment and reform so long as the entire expense of your office does not exceed $13,500.00, and that for unexpected expenses caused by making up your annual report and caused by sickness or vacation of your regular help or caused by an unusual amount of business which cannot be officially attended to by your regular force, you may employ additional help temporarily and pay therefor from the contingent fund, and may pay from said fund such other unexpected expenses as may arise.

I think the provision in chapter 272, acts of the 38th General Assembly, relating to the employment of additional held with the approval of the committee on retrenchment and reform in no manner limits your right to use funds already appropriated for your office, but is merely a limitation upon your right to hire additional help which must be paid for from some source other than from moneys appropriated to the use of your department for that purpose. In other words, where it becomes apparent that your appropriation is not sufficient to hire and pay the help required, then you may make application to the retrenchment and reform committee and that committee may give additional help or additional pay and order the same paid out of the appropriation of $40,000.00 given to the committee on retrenchment and reform by chapter 273, acts of the 38th General Assembly. The provisions just referred to limiting the right to hire help are in my judgment to be construed in such a manner as to prohibit the hiring of help or the payment of salaries beyond the appropriations made for the various departments so that claims will not be arising against the state for services rendered for which no appropriation had been made in advance by the legislature. In other words, the object of the act referred to is to safeguard the state of Iowa against claims for services rendered departments of the state which cannot be paid from some appropriation made by the General Assembly to such department.

SHELBY CULLISON, *Assistant Attorney General.*

OPINIONS RELATING TO HIGHWAY COMMISSION

USE OF TOWNSHIP ROAD FUNDS

Township road funds of a township in one county cannot be used to improve a township road lying wholly within a township in an adjoining county.

December 3, 1919.

State Highway Commission, Ames, Iowa.

Dear Sir: We have your letter of November 28th in which you state:

> "We would appreciate a ruling from your department on the following proposition:
>
> "North from the town of Stratford, in Hamilton county, a township road is established on the Webster-Hamilton county line. On account of topographical conditions, the road as at present traveled lies almost wholly within the townships on the Hamilton county side of the line. Nearly all of the traffic which this road carries, however, originates in Webster county inasmuch as this road is considerably used by people living north and west of Stratford, in Webster county, and who have this town of Stratford as their trading point.
>
> "The county engineer of Hamilton county has been requested to make an estimate as to what it would cost to put this road in satisfactory condition for travel. Upon investigation it is found that the road could be more cheaply improved if it were moved still further east into Hamilton county and made to follow a natural ravine. In this way some very steep grades on the road could be eliminated.
>
> "Would it be possible for the townships on the Webster side of the line to participate in the cost of this improvement? If so, what is the proper method of handling this work?"

We have made an examination of the statutes with reference to township roads, but we fail to find anything which would authorize townships in Webster county to use funds to improve a road wholly within townships in Hamilton county. Express provision has been made permitting boards of supervisors in adjoining counties to jointly agree on a district for the hard surfacing of roads in the following cases:

"1. When a primary road substantially parallels a county boundary and is not more than one mile from such boundary line, or

"2. When a primary road approaches a county boundary line at such an angle that the hard surfacing hereunder of such road will reasonably necessitate a district with a substantial part thereof in different counties, or

"3. When a primary road constitutes a common boundary line between different counties."

Section 36, chapter 237, acts of the 38th General Assembly.

We have been unable to find any such provision with reference to township roads. In fact, section 52, chapter 237, acts of the 38th General Assembly, provides in part that if a township road sought to be improved is on a township line that an agreement shall be executed by both townships and one-half of that portion of the cost payable from township funds shall be borne by such township.

The improvement contemplated in your letter is not on a common boundary line between two townships, and until the legislature sees fit to authorize funds belonging to a township in one county to be expended in the improvement of a road wholly within a township in an adjoining county, we know of no provision which would warrant such an expenditure. The general rule is that funds derived from the levy of a tax are to be expended within the district thus taxed. In the case presented in your inquiry this rule would not be observed, and the funds would be expended in a township over which neither the township trustees in Webster county nor the board of supervisors of Webster county would have any further jurisdiction.

B. J. POWERS, *Assistant Attorney General.*

REPAIRING RURAL ROUTES

There is no authority in our statutes authorizing the collection by the United States against the county of a claim for increased compensation paid rural mail carriers for increased distance traveled on account of repairing the county roads.

December 5, 1919.

Iowa State Highway Commission, Ames, Iowa.

Gentlemen: In your letter of the 18th ult. you ask the opinion of this department upon the following:

"On account of construction work in progress on certain highways, which are a part of rural mail routes, the mail carrier has been forced to travel a greater distance than would be required for the regular route. The post office department has filed a bill with the county for additional compensation to the rural carrier on account of this increased distance which the carrier has been forced to travel.

"Is the county responsible for a claim of this kind, and if so, from what fund should payment be made when the road under construction is a primary road."

It is the understanding of this department that compensation of rural mail carriers is measured to some extent by the mileage. So if, because of repair of roads, the carrier is required to travel a greater distance than under normal conditions, he would probably be entitled to increased compensation because of the greater distance traveled. But we do not know of any provision of our own statutes, nor of the revised statutes of the United States, nor any rule or regulation of the post office department that would authorize the collection of a claim against the county for such increased compensation.

W. R. C. KENDRICK, *Assistant Attorney General.*

STONE QUARRY

Board of control cannot transfer title to a quarry to Highway Commission.

December 8, 1919.

Mr. F. R. White, Chief Engineer,
State Highway Commission, Ames, Iowa.

Dear Sir: In your letter of the 3d inst. you state in substance as follows:

"Several years ago the board of control purchased a farm in the northeast corner of Lyon county on which was located a quarry containing a very high quality of stone for road purposes. That it is your understanding that it was planned to operate this quarry with prisoners, but that the plan fell through.

"That the 38th General Assembly passed a bill authorizing the executive council to dispose of this real estate, except that the quarry site and roads leading thereto are reserved.

"That there will apparently be a serious shortage of material in this state for the hard surfacing of roads, and that it had occurred to the state highway commission that since the

board of control does not contemplate opening this quarry, that it might be possible to have the same transferred to the state highway commission for the purpose of producing road materials therefrom.

"That you have taken the matter up with the executive council and board of control, and that they are willing to turn the quarry over to the state highway commission if they have authority to do so."

You therefore ask from this department an opinion upon the following:

"We are writing to ask your opinion as to whether there is legal authority for the board of control or the state executive council to transfer title to this quarry to the state highway commission."

In answer thereto this department has to say that the executive council, the board of control and the state highway commission are creatures of statute, and possess only those powers which have been expressly conferred by the legislature, and such as are necessarily incident to those conferred. It is quite evident from your letter that the title to this real estate is in the state of Iowa. Neither the executive council, the board of control, nor the state highway commission, would have the power to take and hold title to real estate for the state unless expressly conferred.

It is impracticable within the limits of this opinion to set out the different provisions of statute with reference to these different bodies, but an examination of the acts creating them, and acts amendatory thereto, will disclose that they have no power to take title to real estate for the state, unless expressly authorized to do so.

The act of the 38th General Assembly to which you refer is doubtless chapter 17, which authorizes the executive council to sell the land "except that portion thereof whereon the quarry site and roadway or roadways thereto are located." Under this provision it is clear that the executive council has the power to sell this real estate, except that portion reserved, but until the sale is made the title remains in the state. And even if the other portion were sold, that reserved for quarry site and roadways still remains in the state, and the executive council is not given authority to convey title thereto.

So far as this department is advised there is no provision of

statute authorizing the state highway commission to engage in business, and therefore it would have no power to operate this quarry unless authorized to do so by the legislature. It may be that when the land was acquired it was contemplated that the quarry should be worked with prisoners, and perhaps the board of control might have had the power to work the quarry with prisoners, but without express authority it could not transfer its rights to some other arm of the state.

It is therefore the opinion of this department that your inquiry must be answered in the negative.

H. H. CARTER, *Assistant Attorney General.*

CITY OR TOWN CANNOT BE INCLUDED IN IMPROVEMENT DISTRICT OF SECONDARY ROAD SYSTEM

The board of supervisors have no authority to include a city or town within the limits of a special assessment district for improvement of roads in the secondary road system.

January 26, 1920.

Iowa State Highway Commission, Ames, Iowa.

Gentlemen: Your request for the opinion of this department on the following question has been referred to me for attention:

> "We would appreciate a ruling from your department as to whether or not property lying within the corporate limits of a town or city can be included within the limits of a special assessment district established for the purpose of graveling or oiling roads included in the secondary road system."

The power to establish, maintain and control the streets, highways, avenues and alleys in cities and incorporated towns is vested in the city and town council, and the funds necessary for these purposes, except as specifically otherwise provided, is derived from assessments levied against the property of such cities and towns. The same power is vested in the board of supervisors, in conjunction with the township trustees in certain cases, as to all other roads and highways within the county, and the funds necessary for the purpose, except as to certain specified funds, is derived from taxes levied upon the property in the county situated outside the corporate limits of municipalities.

The board of supervisors, except as otherwise provided by statute, have no voice in the construction, maintenance or supervision of streets and highways lying within the corporate limits of municipalities, and, therefore, we must look for specific authority

conferred upon the board to establish a special assessment district comprising a city or town, or any part thereof.

Chapter 237, acts of the 38th General Assembly, section 1, states that it is the intention of the chapter to divide the highways of the state, and each county, into what is termed "primary" and "secondary" systems, and to provide for the substantial and durable improvement of the primary roads of a county from federal aid funds, motor vehicle registration fees and proceeds of assessments on benefited real property, and to permit the diversion of other existing highway funds to the construction, improvement and maintenance of the secondary system of roads.

Section 3 divides the highways of the state into two systems, the "primary road system" and the "secondary road system." The first embraces those main marked roads, *not including roads within cities,* which connect all county seat towns and cities and main market centers and which have already been designated under section 2, chapter 249 of the acts of the 38th General Assembly.

The secondary road system includes all roads not embraced in the primary system *or within the limits of cities and towns,* and it is provided that they shall continue to be classed as at present, as county road or township road, as the case may be.

It is expressly stated in section 1 of the act that "no division established by the board of supervisors shall embrace roads or streets within a city," and section 8 further provides that "no district established by the board of supervisors shall embrace real estate within a city." In connection therewith, however, it is stated "that no proceedings for an improvement which embraces a road or street of a town shall be effected by the fact that subsequent to the establishment of the district, and before the completion of the improvement, such town becomes a city by change in population."

It is true that express authority is not hereby conferred upon the board of supervisors to include property embraced within the corporate limits of a town, in an improvement district, and yet it may fairly be inferred that such was the legislative intent. However, it must not be overlooked that the statute in this connection is dealing with the *primary* and not the secondary road system.

Section 35 provides that:

> "The board of supervisors shall not drain, grade or hard surface any highway within the limits of cities. Draining and grading on the primary system within towns shall be done by said town at its own expense. The board of supervisors is hereby given plenary jurisdiction to hard surface, within any town, any road or street which is a continuation of the primary road system of the county."

Section 37 provides that:

> "Whenever any public highway that is a part of the primary road system is located along the corporate limits of a city, it may be improved by hard surfacing by the board of supervisors as part of the primary system under this act. In such case one-half of such hard surfacing along such corporate line shall be paid by such city."

Here, again, it is the primary and not the secondary road system involved.

Section 46 is as follows:

> "The secondary road system shall embrace the following classes of roads: (1) County roads which now exist of record, or which may hereafter exist of record by additions from the township roads, exclusive of all roads of the primary road system, and (2) township roads, which shall embrace all other roads not included within cities and towns. The county road cash fund, under the jurisdiction of the board of supervisors, and the township road funds, under the jurisdiction of the township trustees, are hereby wholly dedicated and pledged after July 1, 1920, to the county and township roads, respectively, as provided by law."

Section 47 provides, at length and in detail, for the establishment of road districts, under the secondary system, but is entirely silent on the question of whether such assessment districts may include a city or town, or any portion thereof. Subsequent sections are devoted to this particular system, but they shed no light on the question submitted.

As before stated, the power to establish, construct and maintain, as well as the supervision and control of all streets, avenue, roads and highways in cities and incorporated towns, is vested in the city or town council, as the case may be, and, therefore, the determination of the question presented may impair or affect such power.

The authority to establish special assessment districts for the improvement of roads and highways is, by the chapter referred to, conferred upon the board of supervisors, and, therefore, if the power exists to establish such districts, for the construction or improvement of the roads comprising the secondary system, which includes a city or town, it should appear in said chapter or elsewhere in the statutes pertaining to the powers and duties of the board. My attention has not been called to, nor have I been able to find any statute conferring such power or authority upon the board of supervisors, and I am, therefore, of the opinion that property lying within the corporate limits of a city or town cannot be included within a special assessment district estabished for the purpose of improving roads included in the secondary road system.

J. W. SANDUSKY, *Assistant Attorney General.*

REPAIR OF SIDEWALKS WHICH ARE A PART OF A BRIDGE

Section 1527-s8 of the 1915 supplemental supplement makes it the duty of the board of supervisors to keep in repair sidewalks which are attached to and form a part of a bridge in cities of second class.

February 2, 1920.

Iowa State Highway Commission, Ames, Iowa.

Gentlemen: We have your request for the opinion of this department on the following question:

> "Section 1527-s8, supplemental supplement, 1913, charges the boards of supervisors with the duty to construct and maintain all bridges and permanent culverts throughout the county.
>
> "A question has come up concerning the repairing of sidewalks used for foot traffic only, but which are bracketed to the side of the bridge structure proper. These sidewalks were originally built by the county in 1904, but the repairs of the sidewalk since that time have been made and paid for by the city.
>
> "This bridge is located inside of a city of the second class. The question now arises as to whether or not the duty of the board to construct and maintain the bridge extends to the sidewalks or only to the roadway portion of the bridge itself.
>
> "We will appreciate an opinion from your department on this point."

Section 1527-s8 of the 1915 supplemental supplement, to which you refer, provides in part as follows:

> "The duty to construct and maintain all bridges and permanent culverts throughout the county is imposed upon the board of supervisors."

We do not understand that this provision applies to bridges in cities of the first class, nor to bridges in cities of the second class having a population of five thousand or over, and which are traversed by a stream two hundred feet or more in width from shore line to shore line. Aside from these exceptions, however, we understand that it applies to all other permanent bridges in the county.

It appears from your statement that the bridge in question, including the sidewalks attached thereto, was originally constructed by the board of supervisors, but that the city has since kept the sidewalks in repair.

We do not think that the mere fact that the city has seen fit to keep the sidewalks in repair imposes any obligation upon it to do so. The duty to construct and repair all bridges is broad enough, I think, to cover the sidewalks which are attached to and become a part thereof. They are for the purpose of relieving traffic upon the center or main road part of the bridge, as well as to make it safe for foot passengers to traverse, and while it might be true that slight repairs could be more conveniently made by the city authorities, yet it is not obligatory upon them so to do, and it is the duty of the county to keep the sidewalks which are a part of the bridge in repair just as much as the bridge itself.

J. W. SANDUSKY, *Assistant Attorney General.*

FUNDS OF COMMISSION

When the commission has charged to maintenance fund expenses that might properly have been charged to the federal aid engineering fund the former fund may be reimbursed by transferring thereto, from the latter fund, a sum equal to the amount represented by the charges thus made.

June 2, 1920.

Mr. F. R. White, Chief Engineer,
Iowa State Highway Commission, Ames, Iowa.

Dear Sir: Your request for the opinion of this department on the following questions has been referred to me for attention.

You state:

> "a. Can the cost of engineering work in connection with the construction of federal aid projects be charged to the federal aid engineering fund?
>
> "b. Can the commission's maintenance fund be reimbursed from the federal aid engineering fund for the amounts which have heretofore been expended in handling the construction engineering in connection with federal aid projects?"

Section 42 of chapter 237, acts of the 38th General Assembly, provides as follows:

> "The federal aid engineering fund created by chapter 249, laws of the 37th General Assembly, shall be continued, and the treasurer of state is hereby directed annually to transfer to such fund from the funds derived from year to year under the act regulatory of motor vehicles, an amount equal to the estimated costs of plans and specifications for the current year, as certified by the highway commission. Said fund shall be used for engineering work connected with federal aid road projects and paid out only on itemized vouchers approved by the highway commission and audited by the state board of audit."

Section 45 of the chapter provides for creating a fund for the maintenance of the highway commission, which can be used for no other purpose. It is general in its terms and may be used for any purpose properly connected with the maintenance of the highway commission.

The fund provided by the section quoted can be used only for engineering work in connection with federal aid road projects, and when the general maintenance fund has become depleted by the use of part thereof in defraying expenses plainly contemplated by and which might properly have been changed to and paid from the former fund, there can be no illegality or impropriety in transferring to and reimbursing the general maintenance fund to the extent and amount represented by the payment of bills for strictly engineering work in connection with federal aid road projects.

J. W. SANDUSKY, *Assistant Attorney General.*

CONTRACTS WITH FOREIGN CORPORATIONS

Contract for road improvement entered into with foreign corporations are valid even though such corporations have failed to obtain a permit to transact business in Iowa.

June 15, 1920.

Mr. C. Coykendall, Engineer,
Iowa State Highway Commission, Ames, Iowa.

Dear Sir: Your letter of recent date addressed to the attorney general has been referred to me for attention.

You state:

> "Our attention has been called to the statutes relative to the registration of foreign corporations desirous of transacting business in this state. Contracts for road work have been awarded to corporations who have taken out their articles of incorporation in other states."

You then ask:

> "Will you please advise us whether it will be necessary for these corporations from outside the state to register with the secretary of state before their contracts for work in this state become binding and valid?"
>
> "Also please advise us as to the proper course of procedure in the case of contracts entered into and approved by the state highway commission with such outside corporations who have later registered under the laws of this state."

Section 1636 of the code provides:

> "No person or persons acting as a corporation shall be permitted to set up the want of a legal organization as a defense to an action against them as a corporation, nor shall any person sued on a contract made with such an acting corporation, or sued for an injury to its property, or a wrong done to its interests, be permitted to set up a want of such legal organiaztion in his defense."

Section 1637 of the supplement to the code, 1913, requires all foreign corporations to obtain a permit from the secretary of state of the state of Iowa before said corporations shall be authorized to transact any business in this state.

In construing section 1637 of the supplement to the code, 1913, together with section 1636 of the code, the supreme court of Iowa, as well as the United States district court, has held that contracts entered into by foreign corporations with persons in this state are valid and enforcible even though such corporations have

not obtained a permit from the secretary of state, as required in section 1637, *supra.*

Spinney v. Miller, 114 Iowa, 210.
Iowa Lillooet Gold Mining Co. v U. S. F. & G. Co., 146 Fed., 437.

Therefore, it is the opinion of this department that the contracts referred to in your letter are valid and binding so far as relating to the question of whether or not the foreign corporation with with the contract has been entered into has obtained a permit from the secretary of state to transact business in the state of Iowa.

However, we would suggest that hereafter you be careful and execute contracts only with corporations authorized to transact business in Iowa. I would further suggest that you request the foreign corporations with whom contracts have been entered into to at once obtain the necessary permit.

W. R. C. KENDRICK, *Assistant Attorney General.*

METHOD OF ASSESSING FOR IMPROVEMENT

Under the provisions of section 18 of chapter 237 acts of 38th General Assembly, a tax levy exceeding four per cent of the fair market value of each tract of land cannot lawfully be made. The tracts cannot be assessed *en masse* but must be assessed individually.

July 29, 1920.

State Highway Commission, Ames, Iowa.

Gentlemen: We have your letter of July 19th in which you state:

> "We are asking your opinion of certain sections of the primary road law which relate to the fixing of special assessments. Sections 14, 15, 16 and 17 of chapter 237, acts of the 38th General Assembly, outline the manner in which special assessments for hard surfacing shall be determined. Section 18 of said act provides that 'no real estate, under any circumstances, though embraced within more than one road assessment district, shall be specially assessed for the original cost of hard surfacing in an amount exceeding, in the aggregate, 4 per cent of the fair market value thereof. Any deficiency in the said 25 per cent of the total cost, occurring by reason of said 4 per cent limitation, shall be paid from the county's allotment of the primary road fund.'
>
> "We wish to know whether or not this 4 per cent limitation applies individually to each and every tract of land listed for

assessment within the district or whether said 4 per cent limitation applies to all lands within the assessment district considered as a whole. We have in mind a case where if certain lands are assessed their fair proportion of the cost, the amounts so assessed will exceed 4 per cent of the fair valuation of the land, the land being almost worthless. It is possible that if the difference between 4 per cent of the fair market value of this land and the portion of the cost assessable to such land were added to the assessments on other lands within the road district that the total assessment would not exceed 4 per cent of the fair market value of all lands within the district."

The supreme court has not had occasion to pass upon the proposition presented in your inquiry. However, a statute of somewhat the same nature, governing public improvements in cities and towns, has been a part of our law for a number of years. We refer to section 792-a, supplement, 1913, which provides as follows:

"When any city or town council or board of public works levies any special assessment for any public improvement against any lot or tract of land, such special assessment shall be in proportion to the special benefits conferred upon the property thereby and not in excess of such benefits. Such assessment shall not exceed 25 per centum of the actual value of the lot or tract at the time of levy, and the last preceding assessment roll shall be taken as *prima facie* evidence of such value."

In construing this and similar statutes it has been repeatedly held that acts of this nature relating to special assessments abutting property are generally construed in favor of the owner of the property.

Smith v. City, 106 Iowa, 590;
Rawson v. City of Des Moines, 133 Iowa, 514, 517.

In the case of *Stutsman v. Burlington*, 127 Iowa, 563, the plaintiff owned three lots and all of them adjoined each other. All improvements were on the center lot. The lots were assessed for a special improvement en masse and objection was made to such assessment on the ground that the proper method would be to assess each lot individually. Upon appeal to the supreme court this contention was affirmed.

The principle involved in the matter of imposing taxes for a public improvement in a city is so similar to that which is involved in the proposition presented by you that we have no hesitation in stating that the assessment should be made upon each tract of

land in accordance with the benefits derived from such improvement, but in all cases limited to 4 per cent of the fair market value thereof. We do not believe that it was the thought of the legislature to provide that the limitation should be based on 4 per cent of the fair value of all land included within the assessment district. We think this limitation of 4 per cent was intended to apply to any assessment that might be made on any particular tract of land.

B. J. POWERS, *Assistant Attorney General.*

LIMITATION ON LEVY

Chapter 1, title IV of the code, is the only exception from the limitation imposed under section 1384 of the code, prohibiting the levy of more than three mills in any one year to take care of bonded indebtedness.

September 7, 1920.

State Highway Commission, Ames, Iowa.

Gentlemen: Your letter of the 21st ult. addressed to the attorney general has been referred to me for attention.

You ask for a construction of section 1384 of the code of 1897, which provides:

> "The board of supervisors shall not in any one year levy a tax of more than three mills on the dollar for the payment of any bonded indebtedness or judgments rendered therefor, except as provided in chapter 1, title 4 of the code, unless the vote authorizing the issuance of the bonds fixes a higher rate."

Chapter 1, title 4 of the code, to which section 1384 refers, is the chapter dealing with the funding of the county indebtedness. Bonds issued for any indebtedness authorized under chapter 1 are exempted from the limitation imposed under section 1384. I know of no other exception to said section.

W. R. C. KENDRICK, *Assistant Attorney General.*

EXPENSE OF BOARD OF APPORTIONMENT

The fees and expenses of boards of apportionment should be paid out of the primary road fund.

September 24, 1920.

Iowa State Highway Commission, Ames, Iowa.

Gentlemen: Your request for the opinion of this department on the following question has been referred to me for attention:

"Referring to section 14, chapter 237, acts of the 38th General Assembly, you will note that provision is made for the appointment of a board of apportionment of three resident freeholders of the county, which board shall apportion among all the property within any road assessment district, the amount to be assessed against such property because of the construction of such road.

"So far as we have been able to determine the law makes no specific mention of the manner in which the members of said board of apportionment shall be paid, or the fund from which payment shall be made. We have before us bills from Cerro Gordo county for the per diem and expenses of a board of apportionment appointed by the board of supervisors of that county. These bills are drawn on the primary road fund. We wish your opinion as to whether the per diem and expenses of the board of apportionment for any road assessment district should be paid from the funds for that district.

"If the cost of said board of apportionment is not payable from the district funds, then it would seem that such cost would be payable from the county general fund.

"We will be glad to have your opinion in this matter at as early date as possible."

The section referred to provides in part as follows:

"A board of apportionment of three resident freeholders of the county shall be appointed by the board of supervisors to apportion all special benefits to real estate within each district, but the same board of apportionment may act for more than one district. * * * Each member of the board of apportionment shall be paid in full for all services at the rate of six dollars per day of actual service, and ten cents per mile for each mile necessarily traveled in the performance of his duties, and bills therefore, duly sworn to and itemized, shall be returned to the board of supervisors with the report of the apportioners."

No provision is made in this section for paying for the services of the board of apportionment, and it is also silent as to the fund to which such expense should be chargeable, but it should be borne in mind that the improvement contemplated by the section is a part of the primary road system and that only 25 per cent of the total expense of such improvement may be apportioned against the real estate classified and valued, the balance thereof to be paid from the primary road fund.

Section 4 provides:

"That the portion of said fund apportioned as above pro-

vided is hereby pledged to the completion of said primary system and is dedicated by the state to the county, to be used solely for the payment of the cost of such improvement or the maintenance thereof."

The duties of the board of apportionment are confined entirely to the improvement of the primary road system, but they are not limited to a particular district and may act for more than one improvement district, and I am therefore of the opinion that the costs and expense of such board should be charged to and paid out of the primary road fund.

J. W. SANDUSKY, *Assistant Attorney General.*

EXPENSE OF DRAINAGE CULVERTS

All expense incident to grading and drainage of primary road system in incorporated towns must be borne by said towns, and the fact that the work is done by the board of supervisors does not relieve the town from any part of the expense.

Iowa State Highway Commission, Ames, Iowa.

Gentlemen: Your request for the opinion of this department on the following question has been referred to me for attention.

You state:

> "If, in the improvement of an extension of the primary road within an incorporated town, it is necessary to construct side ditches along the road in order to improve the surface drainage, who should pay for the entrance culverts required to provide proper ingress and egress to the property, and from what funds should such payment for such culverts me made?"

I understand from your letter of explanation that the board of supervisors of Polk county, acting under the provisions of section 38 of chapter 237, acts of the 38th General Assembly, did the grading and draining on a portion of the primary road system in the town of Ankeny which the town had refused to do.

Section 35 of the chapter referred to provides in part as follows:

> "The grading and draining of the primary system within towns shall be done by such town at its own expense. The board of supervisors is hereby given plenary jurisdiction to hard surface within any town any road or street which is a continuation of the primary road system of the county. * * *"

Section 38 of the chapter further provides:

> "In case any town fails to do the grading and draining required to be done in such town on the primary roads about

to be improved hereunder * * * the said commission shall have power to assume charge of such grading (or) draining * * * and pay for same from primary fund belonging to said county, and in such case the cost thereof shall be certified by said commission to the county treasurer, who shall reimburse the primary fund of the county by deducting the amount from the next succeeding apportionment of tax funds belonging to the general fund of said town."

The section first referred to makes it the duty of towns to do the work therein contemplated. Section 38 confers upon the board of Supervisors all necessary authority to do said work in case the town failed to do it. Therefore, any and all expense incurred by the board of supervisors in the performance of such work may and should be deducted from the next succeeding apportionment of tax funds belonging to said town.

It would be a strange doctrine, indeed, where the law plainly enjoins the performance of a duty upon a municipal corporation, and further provides that in the event of the failure of the corporation to perform such duty, it might or should be performed by the board of supervisors of the county, that the delinquent or defaulting corporation should be relieved from any part of the expense incident to and arising from the proper performance of such duty by the board. In other words: If the town of Ankeny had done the grading and draining in question it surely could not have escaped the payment of the expense of furnishing all material, equipment and appliances necessary for the proper performance of the duty enjoined, hence the failure to perform such duty cannot be rewarded by relieving the town of any part of the expense incurred in making the improvement in question.

J. W. SANDUSKY, *Assistant Attorney General.*

COUNTY ENGINEER

County engineer cannot take contracts for road work in other counties.

October 27, 1919.

Mr. J. H. Ames, Bridge Engineer, Ames, Iowa.

Dear Sir:

Your letter addressed to the department of justice has been referred to me for reply.

You state:

"The question has come up as to whether a county engineer

of one county may, while he is holding such office, take contracts in his own name in other counties in the state."

You then ask:

"We would like to have an opinion from your department as to whether or not there is expressed statutory prohibition to a county engineer being interested directly or indirectly in contracts for highway work in other counties of the state."

We are unable to find any statute expressly prohibiting the county engineer from taking road contracts in other counties. Section 1527-s15, supplement of 1913, provides that the county engineer shall not be interested in any contracts for the improvement of any road coming under the provisions of Chapter 122, acts of the 35th General Assembly, creating a system of county road construction.

While the act applies to certain roads in every county of the state, yet it was undoubtedly the intention of the legislature to limit the prohibition of the county engineer to road contracts within the county for which he has been appointed engineer.

Section 1527-s15, supplement of 1913, reads:

"The county board of supervisors and the engineer are charged with the duty of repairing and dragging the county road system as is required to keep same in proper condition, and shall adopt such methods as are necessary to maintain continuously, in the best condition practicable, the entire mileage of this system. No member of the highway commission, their deputies, or assistants, or any other person in the employ of the commission, no county supervisor, township trustee, county engineer, road superintendent or any person in their employ or one holding an appointment under them, shall be, either directly or indirectly, interested in any contract for the construction or building of any bridge or bridges, culvert or culverts or any improvement of any road or parts of road coming under the provisions of this act."

However, the question of whether the county engineer may take road contracts in other counties can be easily settled at the time he is appointed by the board of supervisors.

Section 1527-s3, supplemental supplement provides:

"The board of supervisors of each county shall employ a competent engineer or engineers for such length of time, not exceeding one year, and at such compensation, to be paid out of the county funds, as may be fixed by the board of

supervisors. Said engineer or engineers shall work under the direction and instructions of the board of supervisors in the performance of the duties hereinafter provided, and each shall give bond for the faithful performance of his duties in a sum not less than one thousand dollars, nor more than five thousand dollars. The tenure of office of any engineer may be terminated by the board of supervisors for cause or by the state highway commission for incompetency,''

While section 1527-s3 does not expressly require the county engineer to devote his entire time to the county during his term of office, yet that would be the natural inference, and in any event, the board could include such a provision as a consideration of his employment.

W. R. C. KENDRICK, *Assistant Attorney General.*

PAYMENT OF CERTAIN EXPENSES INCIDENT TO ROAD IMPROVEMENT

Fees of board of supervisors, publication of notices and services of county engineer on secondary road projects should be paid out of general fund.

September 13, 1919.

Mr. F. R. White, Acting Chief Engineer, Iowa State Highway Commission, Ames, Iowa.

Dear Sir: Your letter of the 8th inst., addressed to Attorney General H. M. Havner, has been referred to us for attention.

You ask:

''We have an inquiry from the auditor of Franklin county, asking as to whether the following charges can be made against the account of secondary road district:

''a. Session work of the board of supervisors, in connection with such secondary road district.

''b. Committee work of the board of supervisors.

''c. Publication of notices of hearings, letting of contracts, etc.

''d. Any engineering services.''

The establishment of secondary road district is governed by chapter 237, acts of the 38th General Assembly.

As to session and committee work of the board of supervisors in connection with the establishment and maintenance of secondary road districts, the act in question makes such work a part of the

general duties of the board without making any provision for additional fees or manner of payment. When acting as a county board their fees and mileage shall be paid out of the general fund.

Section 469, code supplement 1913.

As to the publication of such notices as are required by said act, no express provision is made in the act for the payment thereof out of the funds available for secondary road district purposes. The publication of notice in all proceedings of the board, unless otherwise expressly provided by statute, shall be made in the official county papers and paid for out of the general fund. Such notices are of the official proceedings of the board and should be paid for out of the general fund.

Section 441, supplemental supplement.

With reference to the services of the county engineer on secondary road projects, no provision is made in the act for his services out of the county road cash fund or special assessments. It will be observed that the act expressly provides that the total cost of "improving" a county road in the secondary system, by "oiling, graveling or other suitable surfacing" shall be paid out of the county road cash fund and special assessments according to fixed proportions. The services required of the county engineer cannot be said to be a part of the "improvement" of secondary roads as contemplated by said act. The services of the county engineer are practically limited to the preparation of plans for such improvements and the inspection of the work during its progress. These are additional duties imposed upon him as county engineer, and as they are employed by the county the county shall pay for their services out of the general fund.

However, I notice that you have been paying for the making of surveys and the preparation of plans and specifications out of the federal aid engineering fund, under instructions to that effect from the secretary of agriculture of the United States. That is proper so far as your certified costs of plans and specifications used for engineering work in connection with federal aid road projects; but it would not be proper to pay the county engineer out of that fund for any of his services, in preparing plans for and inspecting the work on secondary road systems.

I am therefore of the opinion that each of your questions should be answered in the negative.

B. J. POWERS, *Assistant Attorney General.*

CONDEMNATION FOR HIGHWAY PURPOSES

Land may be condemned to widen highways whenever for any reason such condemning is shown to be advisable.

August 6, 1919.

Iowa State Highway Commission, Ames, Iowa.

Gentlemen: We have your letter of August 4th in which you propound the following questions:

> "Does section 1527-r1, supplemental supplement, 1915 or any other section of the statute give the county the right to condemn land adjacent to the highway and railroad right of way, which is needed for the purpose of removing obstructions to the view of approaching trains. This land is required clearly to eliminate danger at railroad crossings, but we often have difficulty in agreeing with the property owner on a fair compensation for a small parcel of land which lays outside of the highway right of way and adjacent to the railroad right of way.
>
> "We are desirous of knowing what provision is made for acquiring land for this purpose and whether or not there is authority under the section above mentioned to condemn land for this purpose."

Section 1527-r1, supplemental supplement to the code, 1915, contains the following provisions:

> "Ten freeholders of any county by a petition to the board of supervisors of said county or the county engineer may, at any time, recommend the expediency and advisability of changing the course of any part of any road or stream within any county, in order to avoid unnecessarily expensive bridges, grades or railroad crossings, or to straighten any road, or to cut off dangerous corners on the highway or to widen any road above statutory width, or for the purpose of preventing the encroachment of a stream upon a public highway, specifying clearly the change recommended, and whether any part of any highway already established should be vacated and abandoned, and what part. The board may, thereupon, order the engineer to make a survey and report on such proposed change, and in order to comply with such order, the engineer shall have a right to enter upon the premises proposed to be taken and make said survey. If, from a consideration of the survey and report on such proposed change, the board deem the change advisable, it shall have power to buy such right of way and take conveyance thereof in the name of the county and to pay for the same out of either the county road or bridge fund or out of both funds, as may appear advisable."

You will notice that this section provides that recommendation may be made to widen any road above statutory width and that section 1527-i2 provides that if an agreement cannot be reached with the owner of the land sought to be procured for any of the purposes mentioned in section 1527-r1, condemnation may be had to acquire it. I think that these two sections give authority to acquire additional land by condemnation proceedings whenever, for any reason, it is expedient or advisable so to do.

SHELBY CULLISON, *Assistant Attorney General.*

USE OF FUNDS

Section 40 of the new highway law does not authorize the state highway commission to expend funds for office rent. But such expense may be paid from the highway maintenance fund created by section 1571-m32 of the supplemental supplement.

June 24, 1919.

Iowa State Highway Commission, Ames, Iowa.

Gentlemen: We have your letter of June 11th in which you state:

> "The Highway Commission has for the past several years maintained 6 district offices and this number after July 1, will be increased to 9. All of the present district offices, excepting the one at Cedar Rapids, are maintained in the county court house, and no expense has been incurred in connection with said offices for rent, light, heat, etc. Owing to the fact that Cedar Rapids is not a county seat, the commission is unable to provide for its district engineer at that point without paying rent for same.
>
> "We find that suitable quarters can be secured at Cedar Rapids at a cost of $35 per month. The commission is of the opinion that authority is granted in section 40, chapter 237, acts of the 38th General Assembly, for incurring such expense. Said section in part, reads as follows:
>
> " 'Sec. 40. Purchase of material or road machinery—distribution of equipment received of federal government. The state highway commission, with the consent of the board of supervisors of any county, is authorized to purchase for and on behalf of any such county, road material or road machinery, after receiving competitive bids, and to pay for the same out of such county's allotment of the primary road fund, and is directed to purchase, rent or lease any machinery *or other articles necessary for the use and most economical operation of field engineering work,* the testing of materials, *the preparation of plans,* and *for allied purposes,* in order to enable the commission to carry out the provisions of this act, and to pay

for the same out of the state highway commission maintenance fund.' ''

You will note from the provisions of section 40 above set out that the state highway commission is directed to ''purchase, rent or lease'' any machinery or other articles necessary (1) for use in field engineering; (2) for testing materials; (3) for the preparation of plans; and (4) for allied purposes.

We do not see how office rent could be construed within either division one or two, and further it is improbable that the legislature intended the rent of an office to be included in either the third or fourth division.

As we view it, it is exceedingly doubtful whether office rent could by any rule of construction be said to be a proper item of expenditure under section 40 to which you direct our attention. However, we think that office rent is an expense which may be incurred by the state highway commission and paid out of the maintenance fund provided for in section 1571-m32 of the supplemental supplement, 1915, as amended by chapter 212, acts of the 37th General Assembly. That portion of the foregoing section to which we direct your attention has reference to the sum to be set aside from the automobile funds for the maintenance of the state highway commission. It provides as follows:

> ''Five per cent of all moneys paid into the state treasury on and after the taking effect of this act and pursuant to its provisions, shall be set aside and shall constitute a maintenance fund for the state highway commission. Said five per cent shall be used for no other purpose than as a maintenance fund for said state highway commission, and shall be drawn out only on warrant drawn by the auditor of state on itemized vouchers approved by the state highway commission, the expenditures of which commission shall be audited by the executive council, and a full and complete report of all said expenditures shall be published in the annual report under the act creating the state highway commission * * *''

This maintenance fund is for the purpose of maintaining a state highway commission; or in other words, this fund is for the purpose of paying the legitimate expenses of the commission incurred in the performance of its duties. The commission has authority to employ assistants; it has authority to employ engineers and draftsmen; it is required to make plans and specifications; it is required to inspect highway improvements; it is required to

test the materials which go into these improvements; it is required to supervise the construction of the various improvements; and the expense incident to these various operations is to be paid from the maintenance fund.

The legislature having indicated the work to be done by the state highway commission, certainly intended that it should be provided with a place where its operations could be most economically and efficiently condutced and we are, therefore, of the opinion that if the state highway commission finds it necessary to rent a room or rooms for the use of one of its engineers charged with the supervision of a part of the work of the state highway commission, that the commission has authority to expend a reasonable sum for the payment of rent for such room or rooms.

B. J. POWERS, *Assistant Attorney General.*

USE OF MAINTENANCE FUND

May use maintenance fund to provide office and office equipment for use by commission at Ames.

July 23, 1919.

Iowa State Highway Commission, Ames, Iowa.

Gentlemen:

We have your letter of July 18th in which you submit the following proposition for an opinion from this department:

> "We are writing to ask your opinion as to the propriety of making an expenditure from the maintenance fund of the state highway commission for remodeling and furnishing rooms recently assigned to this department by the Iowa State College.
>
> "At a conference of the building committee of the state board of education and the state board of audit, it was agreed that the college should furnish the highway commission with office rooms, light, heat and janitor service. It was therefore agreed that all special equipment should be ordered by the highway commission and paid for by the funds provided for the maintenance of that department.
>
> "Since the enactment of chapter 237, acts of the 38th General Assembly, the work of the highway commission has been expanded at a rapid rate. For the past two months the department has been endeavoring to secure additional rooms in the college building, and has just obtained possession of four additional rooms of considerable size.
>
> "These rooms are equipped for class room and laboratory

work, and are decidedly lacking in the furnishings desirable in office rooms. The board of education is loath to authorize an expenditure for remodeling these rooms in accordance with our desires and as our office work is now extremely congested, and as immediate relief should be afforded, we are asking if it would not be within the intent of the law for this department to go ahead with the necessary repairs and secure the necessary equipment, and render bills for same against the maintenance fund of this department.

"To this department it is highly important that immediate action be taken to make these rooms habitable. The entire cost of the repairs and equipment needed will probably amount to from ten to fifteen hundred dollars, and consists of the following items:

"Removing blackboards from walls, painting walls and ceilings, covering concrete floors with cork carpet, placing awnings over west windows, placing screens in windows, erecting partitions in at least one room, rewiring room and providing additional lighting fixtures.

"In asking authority for these expenditures, we would also like to include the items of soap and paper towels for use in our office. These items have formerly been furnished by the college, but for the past four months they have been refused, except upon the condition that we pay for same, and as the state board of audit has declined to approve any bills for these two items, our employees have been deprived of these items, except as they have been furnished personally."

Under date of June 24, 1919, we sent you an opinion relative to your right to use the maintenance fund to procure office room for district engineers from which I quote as follows:

"It (section 1571-m32 of the supplemental supplement to the code, 1915, as amended) provides as follows:

" 'Five per cent of all moneys paid into the state treasury on and after the taking effect of this act and pursuant to its provisions, shall be set aside and shall constitute a maintenance fund for the state highway commission. Said five per cent shall be used for no other purpose than as a maintenance fund for said state highway commission, and shall be drawn out only on warrant drawn by the auditor of state on itemized vouchers approved by the state highway commission, the expenditures of which commission shall be audited by the executive council, and a full and complete report of all said expenditures shall be published in the annual report under the act creating the state highway commission * * *'

"This maintenance fund is for the purpose of maintaining

a state highway commission; or in other words, this fund is for the purpose of paying the legitimate expenses of the commission incurred in the performance of its duties. The commission has authority to employ assistants; it has authority to employ engineers and draftsmen; it is required to make plans and specifications; it is required to inspect highway improvements; it is required to test the materials which go into these improvements; it is required to supervise the construction of the various improvements; and the expense incident to these various operations is to be paid from the maintenance fund.

"The legislature having indicated the work to be done by the state highway commission, certainly intended that it should be provided with a place where its operations could be most economically and efficiently conducted."

I think that the comments of Mr. Powers upon the purpose of your maintenance fund apply with equal force to the situation disclosed in your present letter and it is the opinion of this department that you may expend such reasonable sums from your maintenance fund as are necessary to furnish you proper office rooms and equipment, including items of soap, paper towels, and other articles of that character.

SHELBY CULLISON, *Assistant Attorney General.*

PURCHASE OF GRAVEL PITS

Counties cannot purchase any one gravel pit in excess of five acres in area and cannot purchase any real estate costing more than $10,000 without submitting to vote.

July 23, 1919.

Iowa State Highway Commission, Ames, Iowa.

Gentlemen:

We have your letter of July 21st in which you ask an opinion as to the authority of a county to purchase a forty-acre gravel pit at a price of $575 per acre.

Section 2024-i, supplement to the code, 1913, provides:

"The board of supervisors of any county is hereby authorized and empowered within the limits of such county and without the limits of any city or town, to procure, purchase or condemn, enter upon and take any lands, not to exceed five acres in any one place, for the purpose of obtaining gravel or other suitable material with which to improve the roads and highways of such county including a sufficient roadway to such land by the most reasonable route, and to

pay for the same out of the county road funds, and it shall be the duty of the board of supervisors of each county, where such material can be found within the county as herein provided, to procure, purchase or condemn such tracts so that no part of the county shall be more than six miles distant from land where such material can be obtained for highway purposes; * * *''

I can find no other statute relative to the purchase of gravel pits and it is plain from this section that the authority of the board to either purchase or condemn gravel pits is limited to procuring not more than five acres in any one place and I don't think that the board, under this section, has authority to purchase a forty acre tract for a gravel pit.

Furthermore, section 423 of the supplemental supplement to the code, 1915, as amended by chapter 73, acts of the 38th General Assembly, prohibits the board of supervisors from purchasing real estate at a cost of more than $10,000 without submitting the question of said purchase to the legal voters of the county and it is the opinion of this department that this prohibition applies to the purchase of land for gravel pits so that the board cannot purchase the gravel pit at a cost of more than $10,000 without submitting the question to the legal voters and procuring authority from them for such purchase.

SHELBY CULLISON, *Assistant Attorney General.*

USE OF HIGHWAY EQUIPMENT

Highway commission may permit the board of control to use highway equipment, received from United States government, in building and maintenance of highways at state institutions.

July 9, 1919.

Mr. F. R. White, Iowa State Highway Commission,
Ames, Iowa.

Dear Sir:

In your letter of July 3d you ask an opinion of this department as to whether you may allot to the board of control trucks received from the United States government to be used in the maintenance of roads under the board of control at state institutions.

Section 40 of chapter 237, acts of the 38th General Assembly provides:

''Should the government of the United States provide for free distribution among the states, of machinery or other

equipment suitable for use in road improvement, the state highway commission is empowered to receive and receipt for such machinery and equipment, and to take such action as will secure to the state the benefit of any such tenders by the federal authorities. Said commission is further authorized, in the event of such distribution to the states by the federal authorities, to make such apportionment of said machinery or other equipment among the counties of the state as in its judgment will best facilitate work in progress or contemplated by any county or counties, but the title and right of possession of such property so received from the federal government shall at all times rest in the state highway commission for the use and benefit of the state. The executive council is hereby authorized to pay the expense, if any, attending the transportation of such machinery or other equipment to the state of Iowa, out of any funds in the state treasury not otherwise appropriated."

You will observe that the trucks received from the government and accepted by the highway commission under the authority of the act above quoted, are the property of the state of Iowa, and that the commission is authorized to apportion the same among the counties of the state in such manner as will best facilitate road work in progress or contemplated by any county or counties.

The statute does not require that the commission shall make such apportionment, but merely confers authority to do so, in case the commission determines that such course is proper and will facilitate road construction.

It is my judgment that trucks and other road building equipment received by the state from the federal government may be used by the state in any road construction, and that it is entirely proper for you to permit some portion of the equipment received by you to be used by the board of control in the construction and maintenance of state highways.

SHELBY CULLISON, *Assistant Attorney General.*

USE OF FEDERAL AID ENGINEERING FUND

Under chapter 237, acts of the 38th General Assembly, the highway commission cannot use the federal aid engineering fund to reimburse counties for engineering work done on federal aid roads.

June 13, 1919.

Mr. F. R. White, Chief Engineer, Ames, Iowa.

Dear Sir:

Your favor of June 6th to Mr. Havner has been referred to me for attention.

You submit the following question:

> "Can the highway commission reimburse the counties out of the federal aid engineering fund for the cost of surveys and plans prepared by the county engineer under the commission's direction for federal aid projects located on the primary road system."

Section 10, chapter 237, of the acts of the 38th General Assembly, provides that the highway commission shall make or cause to be made, proper surveys, and shall prepare the plans, specifications and estimates for such improvement, or shall cause the same to be prepared by the county engineer under its supervision.

Section 42 of the same act provides that the federal aid engineering fund, created by chapter 249 of the acts of the 37th General Assembly,

> "shall be used for engineering work in connection with federal road projects, and paid out only on properly itemized vouchers, approved by the state highway commission and audited by the state board of audit."

It seems to me to be plain from this latter section, that the counties can have nothing to do whatever with the expenditure of the federal aid engineering fund; that all work done which is to be paid for out of that fund must be contracted for by the state highway commission, and bills therefor rendered through the highway commission to the state and approved by the state board of audit.

I do not think that the counties ought to be permitted to do any engineering work and pay for the same and then secure reimbursement from the federal aid engineering fund. The law contemplates that that fund shall be administered by the state and not by the counties, and it is my judgment that for all work done, bills should be rendered by the person doing the work to the highway commission for its approval, and upon approval should be sent to the state board of audit for allowance.

SHELBY CULLISON, *Assistant Attorney General.*

PROCEDURE TO WIDEN HIGHWAY

When a public road is to be widened above the statutory width Sec. 1527-rl, Supplemental Supplement is the proper statute under which to proceed.

May 31, 1919.

Mr. C. Coykendall, Engineer of Road Management, Iowa State Highway Commission, Ames, Iowa.

Dear Sir:

Your letter of the 17th inst. addressed to the department of justice has been referred to me for reply.

You state in your letter that some question has arisen as to the proper chapter of the code governing the procedure relative to widening a public highway. You also request that we render an opinion in this matter directly to the county engineer of Marshall county, in which county the question has arisen.

Beg to advise that this department does not give opinions to county officials except to the county attorney and for that reason I am addressing this opinion to you and you may forward the same to the county engineer of Marshall county, if you so desire.

Section 1483 of the supplement to the code, 1913, as amended by the 37th General Assembly, provides:

> "Roads hereafter established, unless otherwise fixed by the board, shall be at least sixty-six feet wide, and in no case less than forty; within these limits they may be increased or diminished in width, altered in direction, or vacated, by pusuing the course prescribed in this chapter."

From the foregoing statutory provision, it will be seen that the width of a public road shall not be less than forty feet so that if the road in question was established at a width of forty feet, then it may be widened by pursuing the course prescribed in chapter 1, title 9, of the code and amendments thereto.

Section 1527-r1 of the supplemental supplement (1915) provides:

> "Ten free-holders of any county by a petition to the board of supervisors of said county or the county engineer may at any time recommend the expediency and advisability * * * to widen any road above statutory width."

The sections of said chapter 1 immediately following section 1527-r1 above quoted, then provide the procedure when it is desired to widen a public highway beyond the statutory width.

We are therefore of the opinion that chapter 1 aforesaid is the

proper statute under which to proceed in the matter in question.

W. R. C. KENDRICK, *Assistant Attorney General.*

CARE OF HIGHWAY EQUIPMENT RECEIVED FROM U. S.

Right of state highway commission to make provision for care and preservation and distribution of road machinery sent to the state by the federal government, and pay expenses out of maintenance fund of the state highway commission.

May 27, 1919.

Iowa State Highway Commission, Ames, Iowa.

Gentlemen:

Your letter of May 22d is as follows:

"Section 40, chapter 237, acts of the 38th General Assembly, among other things contains the following:

"'Should the government of the United States provide for free distribution among the states, of machinery or other equipment suitable for use in road improvement, the state highway commission is empowered to receive and receipt for such machinery and equipment, and to take such action as will secure to the state the benefit of any such tenders by the federal authorities. Said commission is further authorized, in the event of such distribution to the states by the federal authorities, to make such apportionment of said machinery or other equipment among the counties of the state as in its judgment will best facilitate work in progress or contemplated by any county or counties, but the title and right of possession of such property so received from the federal government shall at all times rest in the state highway commission for the use and benefit of the state. The executive council is hereby authorized to pay the expense, if any, attending the transportation of such machinery or other equipment to the state of Iowa, out of any funds in the state treasury not otherwise appropriated.'

"Some time ago we received from the federal government a tentative list of approximately 20,000 motor trucks which they propose to distribute to the states. This list was only tentative, but should the government deliver this many trucks, Iowa's portion would amount to approximately 560.

"If all of these trucks were distributed to the counties at this time, it would mean from five to six trucks for the average county. Many of the counties now have trucks which they have purchased so that they would be unable to use this number profitably.

"Also, it appears desirable for the most advantageous use of these trucks that the commission should keep a reserve

supply and deliver to the counties only those trucks which they can use to the best advantage at this time. Thus, if a reserve supply of trucks were kept by the commission it would be possible for us to loan to any county which is doing a large amount of hauling of materials such number of trucks, say eight, ten, or a dozen, as was necessary to handle the work properly.

"If we are to keep a reserve supply of these trucks, we must of necessity have storage rooms (yards and sheds) where the trucks can be properly taken care of.

"We are writing you for an opinion as to whether the commission has authority to lease ground for such storage yards, and to construct or lease any sheds or storage room necessary for such reserve supply of trucks, or other equipment which might be distributed by the government, which it might seem necessary to hold in reserve.

"We will appreciate an opinion at an early date, as we have today received notice from the government that one hundred fifty-eight trucks have been assigned to us."

The only provision contained in chapter 237, acts of the 38th General Assembly relating to the payment of expense in connection with the machinery and other equipment sent out by the federal government is that portion of section 40 which allows the executive council to pay "the expense, if any, attending the transportation of such machinery or other equipment to the state of Iowa, out of any funds in the state treasury not otherwise appropriated." The law is silent as to the manner in which the machinery is to be distributed or how it is to be kept, pending its distribution to the counties or from what fund such expenses may be paid. Section 40, however, contains this language: "and to take such action as will secure to the state the benefit of any such tenders by federal authorities." This would appear to be sufficient authority to vest the commission with the right to lease such land as may be necessary, and to lease or erect such structures as may be necessary for the temporary care and preservation of the government property.

The provisions of section 1571-m32, supplement to the code, 1913, creating a maintenance fund for the use of the state highway commission would seem to be the only fund which might be used for the purpose of paying the expense in connection with the care, preservation and distribution of the machinery furnished by the government.

The maintenance fund will continue although a different amount has been provided for under chapter 275, acts of the 38th General Assembly, which will become effective July 4, 1919. I do not believe the federal aid engineering fund is available for the purpose of paying any of these expenses.

W. R. C. KENDRICK, *Assistant Attorney General.*

CONTRACTORS' BONDS

To discharge the surety on the bond of a contractor for building county bridges on the ground of extension of time for completing the work without notice, agreement to extend must be a valid agreement, based upon a sufficient consideration and specific as to time of extension.

May 19, 1919.

Mr. J. H. Ames, Bridge Engineer, Iowa State Highway Commission, Ames, Iowa.

Dear Sir:

Your letter of the 1st inst., addressed to the department of Justice, has been referred to me for attention.

You ask:

> "We have a case in mind of where a county contracted with a certain contractor to build bridge and culvert work in that county for a certain definite sum of money. The board through negligence failed to take formal action extending the contractor's time beyond that specified in the contract as the date of completion. The contractor proceeded with the work, however, for a period of time considerably in excess of sixty days. The question now arises as to whether the bond which he filed to cover this work is in effect or whether it was released when the county failed to notify the bonding company of an extension of time greater than sixty days."

In dealing with one phase of your question section 1527-a18 of the supplement to the code, 1913, provides:

> "The surety on any bond given to guarantee the faithful performance and execution of any work shall be deemed and held, any contract to the contrary notwithstanding, to consent without notice:
>
> "1. To any extension of time to the contractor in which to perform the contract when each particular extension does not exceed sixty days."

In order to discharge a surety on account of extension of time, there must be an agreement, founded upon a sufficient consideration and for some definite period of time.

Roberts v. Richardson, 39 Ia. 290;
Morgan v. Thompson, 60 Ia. 280.

When that agreement may be implied from the surrounding circumstances, as well as expressly shown, then the agreement to extend time must be such as to debar further proceedings against the principal, for otherwise it will be insufficient to discharge the surety.

Davis v. Graham, 29 Ia. 514.

In the case of *Roberts v. Richardson,* supra, it is said at page 292:

> "The law is also well settled that if the surety relies upon an agreement to give time to the principal, it must be a valid one, one founded on a sufficient consideration, for it is only where the creditor, by his act or contract, has precluded himself from demanding performance of the principal, or entitles the latter to claim for any time an exemption from performance that the surety will be discharged, and the principal cannot claim such exemption under an agreement not based upon a valuable consideration.
>
> "*Hershler v. Reynolds, supra.* Leading cases in equity, Vol. 2, part 2, 383, 384. Hence a mere promise of forbearance on the part of the creditor will not operate as a discharge of the surety, if it want any of the characteristics necessary to make it effectual as a contract, and render it legally binding."

There is one well recognized principle of law which must be considered in determining whether or not the surety on a bond has been discharged. That principle is that the mere delay of the person for whose benefit the bond is given, to take action against the principal in the bond, when there is any default, will not, in the absence of fraud or collusion, discharge the surety.

Davis v. Graham, 29 Ia. 514.

However, if through the negligence of the creditor, the surety has been prejudiced, that is, actually damaged, then the surety would have the right to deduct the amount of his damage from the amount of the liability; but that is a matter of defense and does not go to the validity of the bond.

Under your statement of facts, there was no agreement, based upon any valid consideration, extending the time for completing the bridge and culvert work, nor is there any evidence that the surety on the bond of the contractor was prejudiced by reason

of the delay or negligence on the part of the board of supervisors, so that under the facts stated, we are of the opinion that the bond is a valid instrument, and that the surety thereon has not been discharged.

W. R. C. KENDRICK, *Assistant Attorney General.*

BOUNDARIES OF STATE

The center of the channel of a river is actual boundary of state and is not changed by an avulsion.

May 9, 1919.

Iowa State Highway Commission, Ames, Iowa.

Gentlemen:

In your favor of the 7th you say:

> "We have been requested by Plymouth county to assist them in the preparation of plans for the improvement of a bridge and road on the line between South Dakota and Iowa north of the town of Akron.
>
> "The Big Sioux river, which forms the dividing line between the two states, changed its course a short time ago by cutting off a point of land and this stream change has necessitated quite an extensive improvement in order to accommodate traffic crossing the river at this point.
>
> "We would appreciate your advice as to what we should consider the state line in the event of a stream change of this character. In other words, does the state boundary follow the main channel of the stream when stream changes of this kind occur, or is the state boundary fixed by the original survey which was made at the time the state lines were determined. The determination of the exact location of the state line in this instance involves a large expenditure and the division of expense is based on the location of the state lines.
>
> "I would be glad to furnish you with a sketch showing the conditions here if it would be of any assistance in answering the above questions."

As I understand it from other sources, the river broke across a narrow neck of land, establishing a new channel, and leaving what might be called a horseshoe bend, as the old dry, channel, touching the town of Akron. I am further informed that the water is all being carried through the new channel, and that there is nothing but stagnant water in the old channel.

If I have stated the facts correctly, then this change in the course of the river is what is known in the law as an avulsion.

That being the case, the boundary between the states of South Dakota and Iowa remains just where it was before, in other words, in the center of the channel of the stream as it existed immediately before the avulsion occurred. This question has been frequently before the supreme court of the United States, Three of the leading cases are the following:

Nebraska v. Iowa, 143 U. S. 359;
Missouri v. Nebraska, 196 U. S. 23;
Arkansas v. Tennessee, (1918) 246 U. S. 158; L. R. A. 1918-D, 258.

In all of these cases the principle is clearly announced that when the changes are due to accretion, the stream remains the true boundary; also that it is the center of the stream or main channel that is the true boundary. It is not determined by dividing the distance between the banks.

On the other hand, it is set forth with equal clearness that when there is an entire change of the channel so that a new channel is established, and the old dries up, or at least ceases to perform the function of carrying the water as a stream, that the boundary does not change but remains where it was at the time of the avulsion.

If I am correct, then, in my facts, the new channel is entirely in the state of South Dakota.

F. C. DAVIDSON, *Assistant Attorney General.*

REMOVAL OF SNOW FROM SIDEWALKS ON BRIDGES

Counties are not responsible for keeping the sidewalk over a bridge inside a city free from snow and ice, even though the bridge was erected by the county.

February 6, 1919.

Iowa Highway Commission, Ames, Iowa.

Gentlemen:

Your letter of the 18th ult. addressed to the attorney general has been referred to me for attention.

You state:

> "Butler county a year or so ago constructed and paid for a reinforced concrete arch bridge consisting of three 10-feet arch spans in the town of Shell Rock. A sidewalk was constructed on either side of this bridge by the county for pedestrian use.

"The question has now come up concerning the responsibility of the county in connection with keeping the snow and ice removed from these sidewalks. We might state that the bridge is located wholly within the incorporated town of Shell Rock and on one of the city streets, although the construction of the bridge itself was paid for entirely from county funds."

Section 422, paragraph 18, supplemental supplement, 1915, provides:

"To provide for the erection of all bridges which may be necessary and which the public convenience may require, within their respective counties, and to keep the same in repair, except as is otherwise provided by law."

Section 757 of the code provides:

"Cities shall have the care, supervision and control of all bridges and culverts within the corporate limits thereof; shall cause the same to be kept open and free from nuisances; and shall construct and keep in repair all public culverts within the limits of said corporations. They may aid in the construction of any county bridges within the limits of said city, or in the construction of any bridge contiguous to said city, on a highway leading to the same, or in the construction of any bridge across any unnavigable river which divides the county in which said city is located from another state, by appropriating a sum not exceeding ten dollars per linear foot thereof."

Section 758 of the supplemental supplement, 1915, provides:

"Cities of the first class and also cities of the second class having a population of five thousand or over, and which are traversed by a stream two hundred feet or more in width from shore line to shore line shall have full control of the bridge fund levied and collected as provided by law, and shall have the right to use the same for construtcion of bridges, culverts and approaches thereto, repairing the same, and paying bridge bonds and interest thereon issued by such city, and shall be liable for defective construction thereof, and failure to maintain the same in safe condition as counties now are with reference to county bridges; and no county shall be liable for any such bridge or injuries caused thereby."

Under the foregoing sections it has been held that, except in cities of the first class and cities of the second class over five thousand population, that the county has the right to erect public bridges on public highways inside the limits of the city.

Bell v. Foutch, 21 Iowa, 119.
Barrett v. Brooks, 21 Iowa, 144.
Oskaloosa Steam Engine Works v. Pottawattamie County, 72, Iowa, 134.
Slutts v. Dana, 138 Iowa, 244.

But after the county has erected a bridge inside the city limits, then such bridge becomes a city street, and the city alone is required to keep the same in reasonable and ordinary good care.

Holmes v. Hamburg, 47 Iowa, 348.
Sachs v. City of Sioux City, 109 Iowa, 224.
Freeman v. Independence, 123 Iowa, 1.

Special charter cities also levy taxes for and control their own bridge fund. Sections 1003, 1004 and 1005, supplement, 1913.

Cities under commission form of government also have exclusive authority to levy a tax to create a bridge fund upon the property within said city.

City of Keokuk v. Kennedy, 156 Iowa, 680.

It is negligence for the city to permit ice and snow to remain upon its sidewalks until it becomes rough and dangerous as a result of thawing and freezing.

Finnane v. City of Perry, 145 N. W., 494.

From all the foregoing it is evident that the county of Butler is under no obligation to keep the snow and ice removed from the sidewalk in question.

W. R. C. KENDRICK, *Assistant Attorney General.*

BUILDING BY DAY LABOR

Under section 1527-s11 of the 1915 supplemental supplement of the code of Iowa a board of supervisors has the power to build by day labor at a cost not to exceed the lowest bid received at a public letting. After taking bids on the original bridge or culvert the board is not required to advertise for the cement, gravel, bars, form lumber, labor, etc., so long as it stays below the lowest bid received with the total cost.

January 29, 1919.

Iowa State Highway Commission, Ames, Iowa.
Gentlemen:

We are in receipt of your communication of the 18th inst., from which it appears that the board of supervisors of Benton county, Iowa, entered into a contract with the Waterloo Construction Company for their 1919 requirements on reinforcing

steel at a fixed price; and that said board intends to let all bridges and culverts and reject those prices which seem the highest and build by day labor, using the bars from the Waterloo contract, and putting the jobs in under the lowest bids received; and said board takes the position that after taking bids on the original bridge or culvert that they are not required under the law to advertise for the cement, gravel, bars, form lumber, labor, etc., so long as they stay below the lowest bid received with the total cost.

With reference to the foregoing you request an opinion from this department as to the legality of the above under section 1527-a11 of the 1915 supplemental supplement to the code of Iowa, which section is as follows:

> "Standard specifications for all bridges and culverts, railroad overhead crossings or subways shall be furnished without cost to the counties and railroad companies by the state highway commission, and work shall be done in accordance therewith, and when said bridge and curvert work is completed and approved a duplicate statemgent of the cost thereof shall be filed at once with the state highway commission by the county auditor. All culverts and bridge construction, tile and tiling and repair work or materials therefor, of which the engineer's estimated cost shall be one thousand dolars or less, may be advertised and let at a public letting, or may be let privately at a cost not to exceed the engineer's estimate, or may be built by day labor. All culvert and bridge construction, grading, tile and tiling and repair work, or materials therefor, of which the engineer's estimated cost shall exceed one thousand dolars shall be advertised and let at a public letting, provided, that the board shall have the power to reject all bids, in which event they may readvertise, or let privately by submitting contract to the state highway commission for approval, or build by day labor, at a cost not to exceed the lowest bid received. All bids received shall be publicly opened, at the time and place specified in the advertisement, and shall be recorded in detail, in a book kept for that purpose, by the county auditor; said book shall at all times be open to the public fee for inspection. Any proposed contract which shall exceed the sum of two thousand dollars for one bridge or culvert, or repairs thereon, shall be first approved by the state highway commission before the same shall be effective as a contract. Before beginning the construction of any permanent bridge or culvert by day labor or by contract, the plans, specifications, estimate of drainage area, estimates of cost and their specific location shall be filed in the county auditor's office by the engineer. Bridges

erected over drainage ditches shall, where necessary, be so constructed to allow the superstructure to be removed for cleaning said ditches with as little damage to the removal and permanent parts of said bridge as practicable. On completion, a detailed statement of cost, and of any additions or alterations to the plans shall be added to the above records by the engineer, all of which shall be retained in the county auditor's office as permanent records, and when said work is completed and approved, a duplicate statement of the cost thereof shall be filed at once with the state highway commission by the county auditor. The county auditor to draw warrants for the amount of pay rolls for labor furnished under the day labor system, when said pay rolls are certified to the engineer in charge of the work. Said bills shall be passed upon by the board at the first meeting following said payment."

Particular attention is directed to that part of said section which provides as follows:

> "All culvert and bridge construction, grading tile and tiling and repair work, or materials therefor, of which this engineer's estimated cost shall exceed one thousand dollars shall be advertised and let at a public letting, provided, that the board shall have the power to reject all bids, in which event they may readvertise, or let privately by submitting contract to the state highway commission for approval, or build by day labor, at a cost not to exceed the lowest bid received."

It will be noted that the board has the power under said section to reject all bids and to build by day labor at a cost not to exceed the lowest bid received. It is the opinion of this department that there is nothing in said section that makes the method pursued by Benton county illegal. The power to build by day labor implies the power to provide the necessary material. The letting is public and open to competition. All that is required of the board if they build by day labor is that the cost shall not exceed the lowest bid received.

C. W. PIERSOL, *Assistant Attorney General.*

BIDDER'S BOND

The Iowa state highway commission is not authorized by any statute to prescribe or require the giving or acceptance of a bidder's bond for the protection of a county, in the place of a certified check accompanying bids on highway bridges and materials.

January 20, 1919.

Iowa State Highway Commission, Ames, Iowa.

Gentlemen:

This department is in receipt of your letter of the 9th inst.

wherein you ask for an opinion as to the legal sufficiency of an enclosed form denominated by you, a bidder's bond; and as to whether or not it would be a desirable substitute for a certified check accompanying a bid; and concerning which you write as follows:

> "We are submitting to you for your consideration and approval a proposed form of bidder's bond which we contemplate using in the place of the 5 per cent certified check which accompanies contractor's bonds filed at lettings on highway bridges and materials in this state.
>
> "One of these bonds, properly filled out, would be filed by the bidder with his proposal, it being our intention to prepare a form of bond which will fully protect the county in the event that the bidder fails to enter into a contract with the board of supervisors on work awarded him under his proposal.
>
> "* * * A bidder's bond will also be more convenient from the contractor's standpoint because it will not tie up a considerable sum of his money in certified checks during the bidding season. The county officials are sometimes slow in returning the certified checks filed with the bid, consequently the contractors doing a considerable amount of business in the state have a large sum of money outstanding in the form of certified checks."

My answer to all of the foregoing is that I am of the opinion that the Iowa state highway commission is not authorized by any statute to prescribe or require the giving or acceptance of such a bond.

C. W. PIERSOL, *Assistant Attorney General.*

OPINIONS RELATING TO BRIDGES AND HIGHWAYS

DEFECTIVE ROADS

General discussion as to the liability of counties for defective roads.

December 5, 1919.

Mr. Earl W. Vincent, County Attorney,
Guthrie County, Iowa.

Dear Sir:

Your favor of November 18th addressed to the attorney general has been referred to me for answer.

In your letter you ask the opinion of this department upon the following:

> "During the summer of 1917 Guthrie county caused to be constructed a certain large concrete bridge over a creek crossing one of a main traveled highways of the county and on one of the county roads. Previous to the building of this bridge there had been a jog in the road at this particular point and the old bridge was maintained on this jog in the road and out of the direct line of the highway. The bridge had been completed or practically completed, but the approaches to said bridge had not been completed. As a matter of fact I think the evidence will show that no work whatever had as yet been done when an automobile in the night time, driven by a party who was not familiar with the road, drove over the embankment and into the ditch near the end of said bridge, injuring the occupants of the car and damaging the car. The county had maintained no barriers or warning to parties traveling on the road. The old bridge in the jog in the road was still maintained and was being traveled just the same as it had been for more than 10 years past, and the new bridge and road leading to it was not in any way in use by the public.
>
> "Under this state of facts is the county liable in damages to the injured parties?"

As you are well aware, no opinion this department might give would be binding upon any court, and might not even be very persuasive. However, there are some general principles which our supreme court has laid down.

First: There is no liability of a municipal corporation (county) for negligence as to roads, except as to bridges. And this liability has not been extended by recent road legislation by virtue of which certain roads may have been adopted as county roads.

Second. The liability for negligence as to construction and repair of bridges includes approaches, which are regarded as a part of the bridge for such purposes.

Miller v. Boone County, 95 Iowa, 5.
Eginaire v. Union County, 112 Iowa, 558.

Other cases might be cited, but this is clearly the law. But our supreme court will not extend this liability, and in a very recent case, *Snethen v. Harrison County,* 172 Iowa, 81, it has so held. In that case the court said at page 85:

> "Appellant contends, however, that the county should be held liable on the same theory that it is responsible for the construction, maintenance and repair of county bridges; and it must be confessed that the analogy is quite close. But this court, in adopting the rule of liability for defective bridges, did not follow the general rule then existing in other jurisdictions, and has, since its adoption, persistently and consistently refused to enlarge the same. (See cases hitherto cited). It has refused to apply it to county jails and courthouses, to ditches and drains constructed by legislative authority, and to the care of paupers and insane; and it may well be affirmed that county bridges constitute the only exception in this state to the rule of non-liability."

The above case was decided after the new road law had gone into effect, and it was the claim of the appellant that the county should be held liable as to the highway as well as bridges.

The facts in the case seem quite similar to those given by you, and we therefore suggest that if you have not already done so that you read this case carefully.

As already suggested, this department cannot say as a matter of law that there is no liability; but, from the facts you have given, in the light of the above case, it would seem very doubtful if there was any liability on the part of the county.

W. R. C. KENDRICK, *Assistant Attorney General.*

SERVICE OF NOTICE IN ASSESSING FOR IMPROVEMENT

Section 14, chapter 237, 36th General Assembly requires personal service of the notice the county auditor must give to all interested parties

in the proceedings apportioning special assessments against property for road improvements.

January 28, 1920.

Mr. Hal H. Mosier, Assistant County Attorney,
Waterloo, Iowa.

Dear Sir:

We have your letter of the 23d inst. wherein you request the views of this department on the question of whether the notice which the county auditor is required to serve, under the provisions of section 14, chapter 237, acts of the 38th General Assembly, must be served personally upon all persons whose name appears in the apportionment report:

A careful reading of the section leads me to the conclusion that personal service is required, and I will briefly state my reasons therefor.

The statute provides that upon receipt of said apportionment the county auditor shall fix the day for hearing before the board of supervisors and cause notice to be served upon each person whose name appears in said apportionment report, or in any recommendations accompanying the same as owner and also upon the person or persons in actual occupancy of any such real estate, which notice shall state the amount of special assessments apportioned to each tract.

It is further provided that the county auditor shall cause such notice to be published in at least one of the official newspapers of the county once each week for two consecutive weeks, proof of such service to be made by affidavit of the publisher and filed with the county. Omission to serve any party with notice shall work no loss of jurisdiction on the part of the board, and such omission shall only affect the persons upon whom service has not been had, and if, before or after the board has entered its final order in apportionment proceedings, it be discovered that service of said notice has not been had upon any necessary person, as provided, then the board shall fix a time for hearing as to such omitted parties and shall cause such notice to be served upon them either by publication, as in this section provided, or by personal service in the time and manner required for service of original notices in the district court.

It will be observed that provision is made for a notice to be served on the order of the board of supervisors if proper service

has not been made upon any owner of property affected. This appears to me to be an additional safeguard for the purpose of acquiring jurisdiction of all interested parties. The return of the officer who had attempted to make the personal service would disclose the fact as to whether personal service had or not been made on each interested party, and if such return disclosed such a condition of facts, at the hearing before the board of supervisors, which, in the judgment of the board, would make personal service of the notice impracticable or impossible, then the board is authorized to cause service to be made upon such parties by publication. In such circumstances the board acts in a judicial capacity and its action could not be assailed or questioned, except by direct action.

The question, like many others arising in the construction of a statute, is not entirely free from doubt, but, as jurisdiction in such matters is always vital, the safe course should be followed.

J. W. SANDUSKY, *Assistant Attorney General.*

CANNOT HARD SURFACE A SECONDARY ROAD

Roads included in the seondary road system may not be improved by hard surfacing or paving and the cost thereof assessed against abutting property.

March 8, 1920.

Hon. Frank F. Messer,
Iowa City, Iowa.

Dear Sir:

I have your request for the opinion of this department on the following questions:

> "(1). The road legislation of the 38th General Assembly provides a manner in which secondary roads may be hard surfaced. This is upon petition, notice, etc. Assume that all property owners liable for assessments account pavement of secondary road petition for same. Board grants petition and orders pavement constructed. The assessment, of course, is made, but this with county road funds available are insufficient to cover cost of improvement. Can the board of supervisors order warrants issued, marked unpaid, and then issue bonds under code section 403, and acts amendatory thereto, to cover said indebtedness, previous to the petition being filed, notice given, etc., and the doing of anything thereunder, the county in question has, by popular vote, ordered the board of supervisors to proceed with hard surfacing within the county?

"(2). Assume that board of supervisors call election to vote on question of bond issue to hard surface roads. Election held and vote for such issue. Can funds derived from sale of bonds be used on anything other than primary roads of the county?"

Your first question assumes that chapter 237, acts of the 38th General Assembly, provides a manner in which roads comprising the secondary road system may be hard surfaced.

In this assumption I fear you are incorrect. Complete provisions are made in the act for paving or hard surfacing roads embraced in the primary road system, but I have not been able to find that any such provision extends to or includes any part of the secondary system.

There appears in section 47 of the act of the following language:

"In order to provide for the graveling, oiling, or other suitable surfacing of roads of the secondary system * * *"

and it has been suggested that the words "or other suitable surfacing" might be construed to mean "hard surfacing," but in this I cannot concur. Other suitable surfacing must be held to mean surfacing with similar material and in like manner, as with crushed rock and oil, or divers kinds of material suitable for surfacing or top dressing of roads and highways, as distinguished from hard surfacing, which we understand to mean paving.

Provision was made by chapter 95, acts of the 33d General Assembly, and which was represented in the 1913 supplement to the code by sections 1527-f to 1527-r, inclusive, for establishing permanent road districts and paving roads embraced therein, which doubtless included roads now forming part of the secondary road system, but this law was repealed in express language by section 56 of the acts of the 38th General Assembly referred to.

The two road systems, primary and secondary, are each clearly and distinctly defined by this act. Sections 1 to 44, with certain exceptions, deal with the primary road system, and authorize the holding of elections to vote on the question of hard surfacing, bonding, etc. The remainder of the chapter, with certain exceptions, deals with the secondary road system, and is silent on all these important matters which I have just mentioned, though it provides, in detail, for the improvement of the roads embraced within that system, and when we consider the vast difference between the cost of paving or hard surfacing a given number of

miles of highway, and the improvement of a like number of miles by graveling and oil surfacing, we can readily see and appreciate the reasons which impelled the legislature to require, the submission of the former plan to the voters of the county and to dispose with such formality in the improvement of the latter system.

The authority to impose upon property owners, within a road improvement district, the cost and expense necessarily incident to and resulting from hard surfacing highways therein, may not be inferred from uncertain or ambiguous language. It should and must result from express terms, or, at least, *reasonable* implication. Otherwise, such authority has not been conferred.

A careful examination of the statutes dealing with the subject of highways, and also with the powers and duties of the board of supervisors generally, fails to disclose that they possess the authority to hard surface roads embraced within the secondary road system, and, not possessing such authority, they cannot, of course, issue warrants or bonds to cover indebtedness incurred thereby.

The second question is, I think, indirectly disposed of by the conclusion above announced, but, however, that may be, it must be and is answered in the negative.

J. W. SANDUSKY, *Assistant Attorney General.*

CONTRACTORS' BONDS

Highway commission has power to prescribe that contract for road work be performed in sections, and accept bond to cover each section.

April 13, 1920.

Mr. A. G. Rippey, County Attorney,
Des Moines, Iowa.

Dear Sir:

Your letter of the 8th inst. addressed to the attorney general has been referred to me for reply.

You state:

> "Proposals for bids were invited for improving a highway under chapter 237 of the 38th General Assembly. Bids were received and the lowest bid was accepted. It may be desirable to divide the work into three or four sections in order to expediate the completion of the work. Under chapter 347 of the 38th General Assembly, a bond is required to the full amount of the contract price."

You then ask:

> "Can the board of supervisors or highway commission divide the work into three or four sections and require the furnishing of a bond for each section in the proportion that said section bears to the entire improvement covered by the bid accepted?"

We have carefully examined chapter 237 and chapter 347, acts of the 38th General Assembly governing the letting of contracts for road construction and requiring a bond to be filed by the successful contractor to the full amount of the contract, and we are unable to find wherein the law expressly prohibits or permits the work under the contract to be divided up into sections, and a bond furnished for each section in lieu of one general bond to cover the entire contract.

Section 10, chapter 237, *supra,* requires the work to be done in accordance with certain definite plans, specifications and estimates, prepared under the supervision of the highway commission and filed with the county auditor, and those plans, specifications and estimates may not be legally deviated from, except in so far as the same may be modified by the highway commission to meet unforseen or better understood conditions.

Now, then, if by dividing the work up into sections would violate any of the express conditions of your contract, neither the board of supervisors nor the highway commission would be authorized or justified in changing the terms of the contract; provided, however, the highway commission would have the power to modify the terms of the contract in order to meet unforseen or better understood conditions.

Therefore, if it would be impossible for the contractor to obtain a single bond for the full amount of the contract, then the highway commission would be justified in modifying the contract so as to permit the contractor to furnish separate bonds for different sections of the work:

It is further provided in section 11 of the act that:

> "The form and conditions of all contracts, the form and conditions of all bonds taken or required for the full performance or maintenance of all work, shall be prescribed by the state highway commission. All contracts for performing paving work or furnishing material therefor shall be in writing and shall be secured by a bond for the faithful performance thereof, which bond shall be so drawn as to

fully secure the proper county from defective workmanship or material for five (5) years after the completion of contract.''

Under the foregoing statutory provision it is possible that the highway commission could legally prescribe that the contract for road improvement be divided into separate parts and provide the manner and conditions of performing each part, and also prescribe, that a separate bond be filed for each part.

While it is the general practice to furnish one bond to cover the entire contract, yet the ultimate object to be obtained in such matters is the full and adequate protection of the county. Therefore, if the highway commission is satisfied sufficient or better protection is secured by prescribing separate bonds for different sections of the work, the commission probably has that power.

I would suggest, however, that in the event any one section of the work is of a character necessitating a greater cost than other sections, the penalty in the bond for that section should be greater than in the bonds for the other sections of the work.

I would also suggest that each bond be drawn so as to secure the county for five years after the completion of the entire contract, and not merely the section of the work for which the bond was specifically given.

In conclusion, I will say that the dividing of the work up into sections under an entire contract and accepting bonds to cover each section is solely within the discretion of the highway commission.

W. R. C. KENDRICK, *Assistant Attorney General.*

CONDEMNING OF GRAVEL BEDS

Manner of condemning land for gravel pits by counties is prescribed in section 1999 of the code.

June 15, 1920.

Mr. Tom Boynton, County Attorney,
Forest City, Iowa.

Dear Sir:

Replying to your letter of recent date addressed to the attorney general inquiring as to the procedure for condemning land to be used by the county for the purpose of obtaining gravel pursuant to section 2024-i of the supplement to the code, 1913, permit me

to call your attention to section 2024-k, which is a part of the same act and which provides as follows:

> "Proceedings for condemnation of land as contemplated in this act shall be in accordance with the provisions relating to taking private property for works of internal improvements."

The manner of taking private property for works of internal improvements is prescribed in section 1999 of the code.

Therefore, it will be necessary for your board of supervisors to adopt a resolution condemning certain described land for the purpose of obtaining gravel and then place a copy of that resolution in the hands of the sheriff and direct that official to impanel a jury to assess the damages, make return of the finding of the jury, and file the same with the county auditor.

However, under section 423 of the supplement to the code, 1915, as amended by chapter 73, acts of the 37th General Assembly, the board of supervisors would not be authorized to condemn land for the purpose of obtaining gravel at a cost of more than ten thousand dollars without submitting the question to the legal voters and procuring authority from them for such purchase.

W. R. C. KENDRICK, *Assistant Attorney General.*

RESTORING CULVERTS

County not required to install culvert when ingress and egress to property is destroyed by township trustees in grading the public highway.

July 22, 1920.

Mr. J. A. Nelson, County Attorney,
Decorah, Iowa.

Dear Sir:

You ask for an official opinion from this department on the two following questions:

> "(1). The trustees of Bluffton township have graded the road in front of a certain man's place, making a ditch through his private right of way which is of such dimension that it interferes with this man's traveling in and out over his private right of way leading to said highway. He insists that he should be provided with a culvert on this approach. The question is: Is the county under obligations to furnish a culvert in this instance?
>
> "(2). I have also the following question raised by the

county auditor in connection with preparing the ballot for the coming election:

Republican was nominated for trustee by the Democrats in Fremont township in this county. Is it the duty of the auditor to place his name on the ballot as a candidate on the Democratic ticket?''

As to your first question, I am of the opinion that the county is under no obligation whatever to furnish a culvert.

The statute authorizes the township trustees to employ a road superintendent to oversee the work on the roads in the township for the current year. Section 1533 of the supplement to the code, 1915, as amended by chapter 104, section 1, acts of the 38th General Assembly. A road superintendent must file a bond for the faithful performance of his duties. Section 1545, supplement to the code, 1915. It is also provided by statute that the road superintendent shall not destroy the ingress and egress to any property. Section 1566 of the code.

Hayden v. Whitaker, 156 Iowa 87.

As to your second question, it would be the duty of the auditor to place the names of such candidates upon the official ballot. If the nominee did not care to remain upon the ballot, then it would be his duty to withdraw in writing at least fifteen days before the day of the election.

W. R. C. KENDRICK, *Assistant Attorney General.*

BILL BOARDS IN HIGHWAYS

The board of supervisors have authority to remove all bill boards from the highways under their jurisdiction.

July 29, 1920.

Mr. Ralph S. Stanbery, County Attorney,
Mason City, Iowa.

Dear Sir:

We have your request for an opinion upon the following proposition:

''Our board of supervisors are anxious to keep the highways absolutely clear of all advertising matter and to permit nothing in the way of signs in the highways, excepting such official road markers as shall pass their approval and the approval of the state highway commission.

''Our thought was to notify all persons, firms and corpora-

tions whose signs may now be in the public highways to remove the same within thirty days or they would be removed by the road patrolmen under the instructions of the board of supervisors. I would like your opinion on the question of whether the board of supervisors has authority to take such action."

Your inquiry is in part answered by the provisions of section 1560 of the supplement, 1913, which reads as follows:

> "The road supervisor shall remove all obstructions in the roads, but must not throw down or remove fences which do not directly obstruct travel, until notice in writing, not exceeding six months, has been given to the owner or agent of the land inclosed in part by such fence."

Again, by the enactment of section 1527-s17, supplement, 1913, as amended by chapter 410, acts of the 37th General Assembly, it will be found that:

> "County and township boards, charged with the duty of improving public highways, shall have power to remove all obstructions in the highways under their jurisdiction, but fences and poles used for telephone, telegraph or other transmission purposes shall not be removed until notice, in writing, of not less than ten days, has been given to the owner, occupant or agent of the land inclosed in part by such fence or to the owner or company operating such lines * * *."

Further provision is made that if such removal is not made by the owner that the same may be ordered by the county or township boards, but the cost thereof shall be charged to the respective owners of such fence or poles.

That a public highway from side to side and end to end belongs to the public is too well settled to be the subject of dispute.

Perry v. Castner, 124 Iowa 386;
Rae v. Miller, 99 Iowa 650;
Slocum v. R. R. Co., 57 Iowa 675;
Quinn v. Baage, 138 Iowa 426, 430.

It has been repeatedly held that fences may constitute an obstruction and be removed by road officials under the provisions of section 1560 of the supplement, 1913.

It has also been held that mandamus would lie as an appropriate action for compelling a road supervisor to remove obstructions from the road such as trees.

Patterson v. Vail, 43 Iowa 142.

It has likewise been repeatedly held that an obstruction need not entirely block traffic in order to be the subject of removal. It is classed as an obstruction if it is shown that it is an impediment or hindrance which tends to interfere with free passage along the highway. The law does not define the extent to which an obstacle must extend in order to be an obstruction, hence "if an obstacle in any way, it is within the prohibition."

Overhouser v. American Cereal Co., 118 Iowa 417, 92 N. W. 75, 75.

Thus a stone in the street may be an obstruction.

Overhouser v. American Cereal Co., supra.

Apparently the precise question presented in your inquiry has not been passed upon by our supreme court, but applying the rules announced with reference to obstructions, we feel justified in stating that if the signs along the highway in any manner tend to obstruct the passage or have a tendency to render passage more difficult or less safe that they may be removed by the respective county or township boards. The statutes herein set forth are sufficiently broad to authorize the removal of "all obstructions," and we think such sections authorize the removal of all signs in the public highway which partakes of the nature of an obstruction.

It might further be stated that no person has a right to appropriate a part of the highway to his own use by using it for the posting of signs or advertising matter. The highway belongs to the public and the public may protect its use of such premises by removing all obstacles placed therein. The very fact that the legislature has authorized the board of supervisors and the board of railroad commissioners to grant authority to transmission lines to erect poles along the highways tends to indicate that the use of the highway is subject to supervision in the interest of the public. That advertising signs are obstacles tending to impede passage along a highway can be established by inquiry of any tourist who has tried to follow a marked trail and been obliged to stop at a corner and read over a dozen signs to ascertain the official trail marker.

While the legislature has not specifically granted authority to county and township officials to remove signs from the highway, yet we are of the opinion that such power has been given such boards by reason of authority having been granted them to remove all obstructions in the highway.

B. J. POWERS, *Assistant Attorney General.*

WHEN TOWNSHIP MAY CONTRACT INDEBTEDNESS FOR ROAD PURPOSES

Townships may contract indebtedness for improving township roads and pay for the same by making a levy therefor at the April meeting of the trustees as provided in section 1528, supplement 1913.

October 13, 1919.

Mr. E. H. Willging, County Attorney,
Dubuque, Iowa.

Dear Sir:

We have your letter of October 11th in which you state:

> "A series of floods have put many of our roads in such shape as to make them impassable. The road funds are exhausted. Can the township trustees arrange in any way to anticipate the levy by borrowing money so that the roads may be made safe for ordinary travel?
>
> "Your opinion on this at your earliest opportunity would be appreciated."

In answering your inquiry we desire to direct your attention to section 1528, supplement, 1913, relating to the powers and duties of township trustees, which in part provides as follows:

> "At the April meeting said trustees shall determine: (1) the rate of property tax to be levied for the succeeding year for the repair of roads, culverts and bridges, and for guide boards, plows, scrapers, road drags, tools and machinery adapted to the repair of roads, culverts and bridges and for the destruction of noxious weeds in the public highways and other public places, *and for the payment of any indebtedness previously incurred for road purposes, and levy the same which shall not be more than four mills on a dollar on the amount of the township assessment for that year* * * *."

No express authority is conferred upon the board to incur indebtedness, and if such authority exist it must alone be inferred from the fact that among the things they are to determine and provide for at the April meeting of the board is: "Any indebtedness previously incurred for road purposes." The indebtedness therein contemplated should, in my opinion, be such as might have arisen from necessity in keeping the road passable, completing improvements, the cost of which may have exceeded the estimates made therefor, and providing for contingencies which had not been foreseen and provided for.

We therefore answer your inquiry by stating that it is our opinions that township trustees may contract indebedness which

will be taken care of by the levy to be made April first in the following year. It is, of course, understood that the expenditure should be a reasonable one and one that may be readily taken care of by the levy which the trustees are authorized to make in April.

B. J. POWERS, *Assistant Attorney General.*

DESTRUCTION OF WEEDS IN HIGHWAY

Under the provisions of section 1565-a of the supplemental supplement as amended by chapter 228, acts of the 38th General Assembly the township trustees and city councils have authority to compel the destruction of all noxious weeds on land within their respective jurisdictions; also to compel the destruction of all other weeds which render the streets or highways unsafe for travel.

August 26, 1919.

Mr. J. M. Berry, County Attorney,
Clarion, Iowa.

Dear Sir:

We have your letter in which you state:

> "Will you kindly advise me as to the construction placed upon section 1565-a, supplemental supplement of 1915, by your office? Can the destruction of obnoxious weeds be compelled when they are on a farm, and are not adjacent to a highway?
>
> "And can their destruction be compelled under that section where they are a nuisance to adjoining landowners, by reason of their scattering seed on an adjoining farm?"

Section 1565-a of the supplemental supplement of 1915, as amended by chapter 228, acts of the 38th General Assembly, provides for the destruction of (1) noxious weeks, and (2) such other weeds as render the streets or highways unsafe for public travel, or which in any manner interfere with the proper construction or repair of such highway. We are setting forth the section at length, and dividing it into two paragraphs, in order to make clear our view upon this matter.

> "(1). It shall be the duty of each owner, occupant, person, company or corporation in control of any lands within the state of Iowa, whether the same shall consist of improved or unimproved lands, town or city lots, lands used for railway right of way or depot grounds, land in which the public has any easement for road, street or other right of way, or lands used for any purpose whatsoever, to cut, burn, or otherwise entirely destroy *all noxious weeds as defined in section 2*

hereof at such times in each year and in such manner as shall prevent the said weeds from blooming or coming to maturity.

"(2). *And to keep the said lands free from such growths of other weeds as shall render the streets or highways adjoining the same unsafe for public travel* or shall interfere in any manner with the proper construction or repair of the said streets and highways, and shall cause to be cut, near the surface, all weeds on the streets or highways adjoining such lands between the first day of July and the first day of August of each year, except in the case of noxious weeds which reach maturity before July 15th, and the township trustees or city or town may require cutting at an earlier date. But nothing herein contained shall prevent the landowner from harvesting the grass grown upon the roads along his land in proper season."

Section 1565-b of the supplement of 1913 sets forth the weeds which are declared by law to be noxious, and the following sections of the supplement of 1913 provide for the destruction of both noxious weeds and also such weeds as render the streets and highways unsafe for public travel. Without setting these sections out at length and calling your attention to the specific provisions of the various sections supporting our view, permit us to state that it is our opinion that the board of trustees of each township and councils of the respective cities and towns have authority to compel property owners to destroy noxious weeds upon their premises, even though such weeds do not in any way render the streets and highways adjoining such lands unsafe for public travel. Furthermore, they have authority to compel the destruction of all other weeds which render unsafe travel upon the streets and highways.

B. J. POWERS, *Assistant Attorney General.*

BRIDGES OVER MISSISSIPPI RIVER

Plans and specifications for the reconstruction of a bridge across the Mississippi River should be submitted to the Secretary of War and to the Chief Engineer for approval, such river being navigable waters is under the jurisdiction of Congress.

August 20, 1919.

Mr. J. M. C. Hamilton, County Attorney,
Fort Madison, Iowa.

Dear Sir:

We have your letter of August 15th in which you ask for the opinion of this department upon the following proposition:

"The Atchison, Topeka and Santa Fe Railway Company have a bridge extending from Ft. Madison, Iowa, to a point in Hancock county, Illinois. There is a wagon road on each side of the railroad bridge which is operated as a toll bridge. The railway company finds it necessary to strengthen the wagon bridge in order to permit the driving of heavy trucks across this bridge. The cost of making this reconstruction or repair will approximate $40,000. The railway company desires to know whether or not it is required to submit its plans for reconstruction to any public officers or commissions of this state."

In answering your inquiry, we first desire to direct your attention to the fact that the code of 1873 provided for the regulation of ferries and bridges and gave the board of supervisors certain jurisdiction over such enterprises. Provision was further made granting certain railway or bridge companies the right to construct railway bridges across the Mississippi, the Missouri or Big Sioux rivers in order to connect with the terminals of the various roads. Provision was further made that no bridge should be built, under the authority granted by the code, until the plan for such bridge had been submitted to and approved by the board of supervisors of the county in which the bridge is to be partly located. Further authority was granted the board of supervisors to permit the construction of suitable roadways and footways for teams and foot passengers in connection with such bridges. The provisions of the code of 1873 were carried into the code of 1897 and up to this time no material change has been made in these provisions.

Section 2113 of the supplement, 1913, grants to the board of railroad commissioners authority to inspect bridges of the various railroad companies and to require them to make safe all such structures.

In addition to the foregoing provisions, we desire to direct your attention to a few of the federal statutes regulating bridges over navigable waters. Section 9961, United States compiled statutes, 1916, gives the secretary of war of the United States and the chief of engineers jurisdiction over the plans and specifications of all bridges proposed to be erected across navigable waters. Before any such bridge can be constructed these plans and specifications must be submitted to these officers for approval. The plans and specifications not only describe the bridge itself, but all necessary works thereto. The section then states in part as follows:

"And when plans for any bridges to be constructed under

> the provisions of this act have been approved by the chief of engineers and by the secretary of war, it shall not be lawful to deviate from such plans, either before or after completion of the structure, unless the modification of such plans has previously been submitted to and received the approval of the chief of engineers and of the secretary of war."

There are other provisions in the federal statutes governing the construction and operation of such bridges, but it is not necessary for us to set them forth in this opinion. It will suffice to direct attention to the fact that in construing this statute the supreme court of the United States has held that it supersedes any regulation the state may make with reference to the construction of such bridges.

In the case of:

Monongahela Bridge Co. v. United States, 216 U. S. 177,

the supreme court held that a bridge over an interestate waterway, though erected under the sanction of the state and not an illegal structure, or an unreasonable obstruction to navigation in view of the condition of commerce and navigation when erected, must be taken as having been constructed with knowledge of the paramount power of congress to regulate commerce among the states, and subject to the condition or possibility that congress might, at some time after its construction, and for the protection and benefit of the public, exert its constitutional power to protect free navigation as it then existed against unreasonable obstructions. Thus in this case the contention of the chief of engineers and the secretary of war that this bridge was an obstruction to navigation was sustained and the bridge ordered removed, even though it was constructed in compliance with the laws of the state of Pennsylvania.

In view of the federal statute, which the supreme court of the United States has construed as superseding state statutes, we can reach no other conclusion than that the plans and specifications for the reconstruction of this bridge should be submitted to the secretary of war and to the chief of engineers for approval. This is true even though our statute states that the board of supervisors should approve such plans.

B. J. POWERS, *Assistant Attorney General.*

STATUTORY LIMIT OF INDEBTEDNESS

The board of supervisors has power to exceed statutory limit of indebtedness for extraordinary expenses. Repairing bridges damaged by extraordinary floods are extraordinary expenses.

July 25, 1919.

Mr. E. H. Willging, County Attorney,
Dubuque, Iowa.

Dear Sir:

Your letter of the 11th inst. addressed to Attorney General H. M. Havner, has been referred to me for reply.

You ask:

> "I have been consulted by the board of supervisors of this county relative to the authority which they might have to issue bonds for the purpose of restoring and repairing bridges which went out last year by extraordinary flood damage.
>
> "The bridge fund is practically exhausted and the damage caused amounting to approximately $75,000, cannot be repaired without a special bond issue. Your advice at early convenience will be appreciated.

The statutory provisions material to a correct determination of your question are the following:

Paragraph 18, section 422 of the supplemental supplement of 1915, declares that the board of supervisors shall have power to

> "provide for the erection of all bridges which may be necessary, and which the public convenience may require, within their respective counties, and to keep the same in repair, except as is otherwise provided by law."

Section 423 of the supplemental supplement as amended by chapter 332 of the acts of the 37th General Assembly provides:

> "The board of supervisors shall not order the erection of courthouse or jail when the probable cost will exceed ten thousand dollars, or a county home or other building, or bridge, except as provided in section four hundred twenty-four of the code, which the probable cost will exceed five thousand dollars, nor the purchase of real estate for county purposes exceeding five thousand dollars in value, until a proposition therefor shall have been first submitted to the legal voters of the county, and voted for by a majority of all persons voting for and against such properties at a general or special election, notice of the same being given for thirty days previously, in a newspaper, if one be published in the county, and, if none be

published therein, then by written notice posted in a public place in each township in the county."

Section 424 of the code provides:

"The board of supervisors of any county having a population of more than ten thousand may appropriate, for the construction of any one bridge which is or may hereafter become a county charge, within the limits of such country, or may appropriate toward the construction of any bridge across any unnavigable river which is the dividing line between any two counties in this state, or between one county in this state and another state, such sum as may be necessary, not exceeding the sum of forty dollars per lineal foot for superstructures, but in no case shall they appropriate for said purpose, including superstructure, superstructure and approaches, a sum exceeding fifteen thousand dollars; but, in any county having a population exceeding fifteen thousand, said board may appropriate, as aforesaid, not to exceed twenty-five thousand dollars; but not more than fifteen thousand dollars shall be expended in the construction of such bridge across a stream which is the dividing line between two counties."

Section 1306-b of the supplement to the code, 1913, as amended by chapter 85 of the acts of the 37th General Assembly, provides:

"No county or other political or municipal corporation shall be allowed to become indebted in any manner for its general or ordinary purposes to an extent exceeding in the aggregate the amount of one and one-fourth per centum of the actual value of the taxable property within such county or corporation, provided, however, cities and incorporated towns may for the purpose of purchasing, erecting, extending or maintaining and operating waterworks, electric light and power plants or the necessary transmission lines therefor, gas works and heating plants or of building and constructing sewers, incur additional indebtedness, not exceeding in the aggregate, added to all other indebtedness, five per centum of the actual value of the taxable property within such city or incorporated town. The amount of such taxable property shall be ascertained by the last state and county tax list previous to the incurring of such indebtedness."

Section 403 of the supplement to the code, 1913, provides:

"Whenever the outstanding indebtedness of any county on the first day of January, April, June or September in any year exceeds the sum of five thousand dollars, the board of supervisors, by a two thirds vote of all its members, may fund or refunded the same, and issue the bonds of the county

thereof in sums not less than one hundred dollars nor more than one thousand dollars each, payable at a time stated, not more than twenty years from their date. In counties containing a city or cities of the first class, the indebtedness incurred in making and repairing of the bridges may be refunded whenever such outstanding indebtedness equals or exceeds the sum of five thousand dollars, the tax to pay such bonds and interest to be levied under the provisions of section four hundred and six of the code, but only on the assessable property in the county outside of the limits of said city or cities of the first class. * * *''

Section 406 of the code provides:

"The board of supervisors shall cause to be assessed and levied each year upon the taxable property in the county, in addition to the levy authorized for other purposes, a sufficient sum to pay the interest on outstanding bonds issued in conformity with the provisions of this chapter, accruing before the next annual levy, and such proportions of the principal that, at the end of eight years, the sum raised from such levies shall at least equal fifteen per cent of the amount of bonds issued; at the end of ten years, at least thirty per cent of the amount; and at or before the date of maturity of the bonds, shall be equal to the whole amount of the principal and interest; the money arising from such levies shall be known as the bond fund, and shall be used for the payment of bonds and interest coupons, and for no other purpose whatever; and the treasurer shall open and keep in his books a separate account thereof, which shall at all times show the exact condition of said bond fund.''

From the foregoing statutory provisions, the following conclusions may be reasonably reached:

1. That the power to repair or reconstruct county bridges is conferred upon the board of supervisors.

2. That the board of supervisors shall not direct such bridge construction to exceed $2,500 without a vote of the people authorizing the same.

3. That the statutory limit of indebtedness may be legally exceeded only when such indebtedness arises from some unusual or extraordinary cause.

4. That when the indebtedness incurred by a county such as Dubuque in the repair of its bridges equals or exceeds $5,000. Then refunding bonds may be legally issued to take care of such indebtedness.

5. That the principal and interest of such bonds shall be provided for by a sufficient tax levy.

In your particular case, if your bridge fund has been exhausted, and your county has reached the statutory limit of indebtedness, then your board of supervisors have the power to create an indebtedness in excess of the statutory limit only in the event the repair or reconstruction of county bridges is an unusual or extraordinary expense.

Our supreme court has not passed directly upon that identical question, but it has strongly intimated that the building of a bridge would be an extraordinary expense.

France v. City of Des Moines, 166 N. E. 209.

In the case of *Dunbar v. Board of Supervisors,* 5 Idaho 407, in construing a constitutional provision similar to our statutory provision, as found in section 1306-b, *supra,* it was held that the building of a county bridge was an extraordinary expense.

Under the conditions as they exist in Dubuque county, I am therefore of the opinion that the reconstruction and repairing of the county bridges that were damaged or destroyed by extraordinary floods would come within the exemption of section 1306-b, supplement to the code, 1913, and that the board of supervisors would have authority to incur such indebtedness within the limit provided in sections 423, supplement to the code, 1913, and 424 of the code, without a vote of the people, and issue warrants on the county bridge fund for the payment thereof, and when the warrants reached the sum of $5,000, then the board of supervisors would have the power to issue and sell refunding bonds to take up such warrants.

However, the provisions of section 1527-a11 of the supplemental supplement, relating to the advertising for bids and the approval of the highway commission, must be observed.

W. R. C. KENDRICK, *Assistant Attorney General.*

ASSESSMENTS AGAINST RAILWAY RIGHT-OF-WAYS

Railway right-of-ways are not subject to special assessments for road improvements where the right-of-way is a mere easement.

July 3, 1919.

Mr. Ralph S. Stanberry, County Attorney,
Mason City, Iowa.

Dear Sir:

Your letter of June 24th to Mr. Havner has been received and

referred to me for attention. You ask the opinion of this department upon the following question:

> "In paving country roads where the highway crosses a railroad right of way what authority has the county to assess any part of such costs to the railroad company? Does the county pave across the right of way or is it up to the railroad company to do the paving, and if notice must be served on the railroad company, kindly advise under what section of the statute this matter is set out fully."

The supreme court of this state, in the case of *Chicago, Rock Island and Pacific Railway Company v. City of Ottumwa*, 112 Iowa, page 300, held that special assessments could not be levied against a railway right of way, which consisted merely of an easement, without express statutory authority. This case has been followed in *Oskaloosa v. The Traction and Light Company*, 141 Iowa, p. 239; has been cited in *C. R. I. & P. Ry. v. City*, 172 Iowa, at page 426, and in *C. G. W. Ry. Co. v. City*, 176 Iowa, p. 254.

The rule announced in the Ottumwa case has never been abandoned by our court, although it was questioned in the case of *C., R. I. & P. Ry. Co. v. City, supra*. There has really been no occasion since the Ottumwa case for the court to directly pass upon the question because the statutes relating to special assessments since the Ottumwa case until the present road law have all provided specifically for assessments against railway right of ways.

The present road law, enacted by the 38th General Assembly, is no broader in its terms than the statute construed in the Ottumwa case, *supra*, and if the supreme court adheres to the rule announced in the Ottumwa case, then a right of way which is a mere easement cannot be assessed specially for the improvement of the highways on which it abutts.

As to the matter of paving between the tracks; that is, the crossing proper, there seems to be no method provided for compelling the railway company to do the paving, or of assessing the railway company in case the county does the paving. Code section 2054 provides that railway companies crossing public highways shall maintain a safe and adequate crossing, but no rule is established for the determination of the character of the crossing other than that it must be safe and adequate, and that for failure to maintain such crossing the company will be liable to any person injured by reason of its unsafe condition.

It is the opinion of this department that the majority opinion in the Ottumwa case is unsound, and that the dissenting opinion is really the best reasoning, and that the supreme court ought to be given an opportunity to pass upon the question again. We believe that the supreme court ought to and will recede from the position taken in the Ottumwa case if opportunity is given, and that, therefore, in proceedings under the new road law, railway right of ways should be assessed, so that the question of the liability of an assessment can again be presented to the court for determination.

SHELBY CULLISON, *Assistant Attorney General.*

USE OF FEDERAL AID FUNDS

Use of federal aid money on other than hard surface construction is permissible upon approval of secretary of agriculture.

June 4, 1919.

Mr. Chas. S. Macomber,
Ida Grove, Iowa.

Dear Sir:

Your letter of the 2d to Mr. Havner has been referred to me for reply. You submit the following inquiries:

> "First: Upon this federal aid to permanent roads can the board of supervisors expend the federal money in the work of permanent grading, or does the federal money have to be expended on the simple concrete work?
>
> "Second: Has there been any increase in the compensation allowed the county supervisors, and if so what is the new law, and when does it go into effect?"

Answering your first inquiry, I call your attention to the act of congress of July 11, 1916, chapter 241, commonly called the federal aid act.

Section 1 provides:

> "The secretary of agriculture and the state highway department of each state shall agree upon the roads to be constructed therein *and the character and method of construction.*"

Section 6 provides:

> "Any state desiring to avail itself of the benefits of this act shall, by its state highway department, submit to the secretary of agriculture project statements setting forth

proposed construction of any rural post road or roads therein."

And:

"That the secretary of agriculture shall approve only such projects as may be substantial in character and the expenditure of funds thereby authorized shall be applied to such improvements."

And:

"No payment of any money apportioned under this act shall be made on any project until such statement of the project and the plans, specifications and assessments therefor shall have been submitted to and approved by the secretary of agriculture."

It will be observed from the provisions of the statute above quoted that any method of road construction upon which federal aid money is expended must be approved by the secretary of agriculture, and it is my opinion that it is within his power to approve the expenditure of funds for construction other than concrete or similar hard surfacing.

As to your second inquiry, chapter 104 of the acts of the 38th General Assembly, effective by publication on March 31, 1919, increases the per diem of members of the board of supervisors to $5.00 and mileage to 10 cents.

SHELBY CULLISON, *Assistant Attorney General.*

GRADING AND DRAINING OF SECONDARY ROAD

Adjacent land owners cannot be assessed for cost of grading and draining road in secondary system.

May 16, 1919.

Mr. Harry Langland, County Attorney,
Nevada, Iowa.

Dear Sir:

Your letter of the 6th inst. addressed to the attorney general has been referred to me for reply.

You ask whether or not House File No. 542, passed by the 38th General Assembly and commonly known as the highway law, authorizes the board of supervisors to establish a road district embraced in the secondary road system and assess a portion of the cost of grading and draining such roads to the adjacent

landowners. You also state that the roads in question are township roads.

The provisions of the foregoing act particularly applicable to the questions in issue will be found in sections 46, 47 and 51 thereof.

Section 46 provides:

> "The secondary road system shall embrace the following classes of roads:
>
> "Township roads which shall embrace all other roads not included within cities and towns."

Section 47 provides:

> "In order to provide for the graveling, oiling, or other suitable surfacing of roads of the secondary system, the board of supervisors shall have power, on petition therefor, to establish road assessment districts, but such district need not necessarily follow the zone limits provided herein for the improvement of primary roads."

Said section 47 further provides that the board shall direct the county engineer to examine the roads within the proposed district, and report, among other findings, whether said proposed roads require further grading or draining. Then said section further provides that the board may

> "withhold final order in such matter (establishing the district) until such roads, or any designated part thereof, are drained or graded to their satisfaction."

It will be seen that the act above quoted contemplates that the road will be placed in condition for surfacing prior to taking any action toward surfacing the same, and if the roads require further grading or draining, then such work must be done before proceeding with the surfacing.

Section 51 provides:

> "The total cost of so improving a township road within said district shall be apportioned and paid in the proportion of 25 per cent from the county road cash fund, 50 per cent from the township road funds of the township or townships embracing said township road (according to their relative mileage) and 25 per cent from the special assessments on benefitted lands."

Again referring to said section 51, it will be found that the

improvement of the road for which an assessment against adjacent landowners may be made is limited to

"oiling, graveling or other suitable surfacing."

No reference is made to "grading" or "draining said roads, and it is evident that the assessment allowed is for the purpose of oiling, graveling or other suitable surfacing. The cost of grading or draining is to be taken from the funds otherwise provided by statute for that purpose.

We are, therefore, of the opinion that your question should be answered in the negative.

W. R. C. KENDRICK, *Assistant Attorney General.*

VACATION OF ROAD MARKING CORPORATE LIMITS

A road marking a short distance of corporate limits of incorporated town may be vacated by board of supervisors although corporate limits extend to center of road.

March 7, 1919.

Mr. A. B. Hoover, County Attorney,
Marshalltown, Iowa.

Dear Sir:

Your letter of the 4th inst. addressed to Attorney General Havner has been referred to me for attention.

You state that the board of supervisors of Marshall county desire to vacate a portion of a county road that marks a short distance of the corporate limits of the town of LeGrand, in order to cut out a dangerous railroad crossing. You also state that the center of this particular road marks the corporate limits of the town of LeGrand.

You then ask whether or not the board of supervisors has the power to vacate said road.

Section 751 of the code confers upon incorporated cities and towns the power to vacate highways within their corporate limits; and section 1482 of the code confers upon the board of supervisors the power to vacate roads in the county.

Under those statutory provisions our supreme court has held that the board of supervisors has no authority to establish or vacate a highway within the limits of an incorporated city or town.

Gallaher v. Head, 72 Iowa 173:
Chrisman v. Brandes, 137 Iowa, 433.

But since the filing of the opinions in the cases above cited, our legislature has created and put into operation the county road system, by the provisions of which the board of supervisors is given jurisdiction over the roads included in said county road system, and in defining the roads to be included in the county road system, section 1527-a3, of the supplemental supplement, 1915, provides:

> "* * * The system of road construction herein provided shall apply only to highways outside of the limits of cities and towns; provided, however, that whenever any public highway, located along the corporate line of any city or town, is partly within said city or town and partly without the same, the said highway or any part thereof, may be included in and made a part of the county road system, and when so included it may be improved by the board of supervisors as are other parts of the county road system. * * *"

The legislature has also provided that ten freeholders of the county may recommend by petition to the board of supervisors the advisability of changing the course of any part of any road within the county in order to avoid dangerous railroad crossings, etc. Section 1527-r1 of the supplemental supplement in part provides:

> "Ten freeholders of any county by a petition to the board of supervisors of said county or the county engineer may, at any time, recommend the expediency and advisability of changing the course of any part of any road or stream within any county, in order to avoid unneccessarily expensive bridges, grades or railroad crossings, or to straighten any road, or to cut off dangerous corners on the highway, or to widen any road above statutory width, or for the purpose of preventing the encroachment of a stream upon a public highway, specifying clearly the change recommended, and whether any part of any highway already established should be vacated and abandoned, and what part. * * *"

Provision is then made for a hearing and action on said petition, and the board given the power to abandon any part of the highway. (See sections 1527-r2, 1527-r3 and 1527-r7 of the supplemental supplement).

In accordance with the statutory provisions just quoted, it would seem that the board of supervisors would have power to

vacate a road adjoining the limits of an incorporated town, though the corporate limits of said town extended to the center of the said road. Our supreme court has never passed on this identical question, so far as we are able to find, but I believe the legislature has conferred that power upon the board, under proper procedure, by the express legislation above referred to. However, in the instant case, it would be advisable to secure the co-operation of the city council of LeGrand, and induce the city council to vacate that portion of the road within the city limits.

W. R. C. KENDRICK, *Assistant Attorney General.*

OPINIONS RELATING TO DRAINAGE MATTERS

SALE OF DRAINAGE BONDS

The board of supervisors have no authority to pay the county auditor or any other person a commission for selling either drainage improvement certificates or county drainage bonds.

September 10, 1919.

Hon. Frank S. Shaw,
Auditor of State.

Dear Sir:

We have your letter of September 5th in which you state:

> "I desire your opinion on the following question: If drainage improvement certificates have been issued by the board, the certificates drawing 6 per cent interest, which is the limit of interest they may draw, has the board of supervisors any legal authority to pay the county auditor, or any other person, a commission or certain percentage for negotiating and selling the same?"

In answering your inquiry we desire to direct your attention to section 1989-a26, supplement, 1913, as amended by chapter 271, acts of the 38th General Assembly. This section provides that special improvement certificates shall bear interest not to exceed 6 per cent per annum, payable annually. And it further provides that:

> "No certificate shall be issued or negotiated for the use of the drainage district for less than par value with accrued interest up to the delivery or the transfer thereof."

Section 1989-a27, supplement, 1913, as amended by chapter 271, acts of the 38th General Assembly, provides that where the board of supervisors desire to issue drainage bonds of the county rather than improvement certificates provided for in the preceding section, that they may do so, but such drainage bonds shall:

> "bear not more than 6 per cent annual interest and payable semi-annually in the proportions and at the times when such taxes shall have been collected, and may devote the same at par with accrued interest to the payment of the work as it progresses or may sell the same at not less than par, with

accrued interest and devote the proceeds to such payment; * * *"

You will therefore observe that improvement certificates as well as county drainage bonds cannot be sold for less than par. There is no provision whatsoever in the law authorizing the board of supervisors to sell these bonds for less than par, nor is there any provision authorizing the board to pay a commission for the sale of such improvement certificates or drainage bonds.

We therefore state to you that it is the opinion of this department that the board of supervisors have no legal authority to pay the county auditor, or any other person, a commission for negotiating the sale of improvement certificates or of county drainage bonds.

B. J. POWERS, *Assistant Attorney General.*

ISSUANCE OF DRAINAGE WARRANTS

Provision of chapter 366 37th General Assembly do not apply to warrants issued to pay engineer and his personal employes.

August 6, 1920.

Hon. F. S. Shaw,
Auditor of State.

Dear Sir:

You have orally requested an opinion relating to the payment of an engineer employed under the provisions of chapter 2-a, supplement to the code, 1913, the exact question being whether the provisions of chapter 356 of the laws of the 37th General Assembly apply so as to prevent the board of supervisors from paying the drainage engineer the several amounts which may be earned by his assistants and employes, or whether each assistant and employe of the engineer must be given a warrant individually for the service performed.

Section 1989-a41, supplement to the code, 1913, as amended, reads as follows:

"Any engineer employed under the provisions of this act shall receive such compensation per diem as shall be fixed and determined by the board of supervisors. Appraisers of damages and commissioners to assess benefits, other than the engineer, shall receive such compensation as the board of supervisors may allow, not to exceed five dollars per day each, and all other fees and costs required under the provisions of this act shall be the same as provided by law for like services in other cases. Such costs and expenses shall

be paid by the order of the board of supervisors out of the county treasury from the levee or drainage funds collected for that purpose upon warrants drawn by the county auditor. And the amount of fees for publication of all notices required to be published by the provisions of this act shall be fixed by the board of supervisors not exceeding thirty-three and one-third cents for each ten lines of brevier type, or its equivalent."

Under the drainage law the board is authorized to employ an engineer for the purpose of making a preliminary survey and a report. Later, if a district is established, a construction engineer is employed. A literal reading of the language of the sections relating to the employment and to the payment would seem to indicate that the service was to be performed by the engineer in person, and, of course, that no one would participate in any portion of the compensation to be paid to him, but a little reflection shows that it is absolutely necessary for the engineer to have some assistance, and in the case of a very large district it would be almost impossible for him to do all of the work without assistant engineers as well as other employes. It must be that the law contemplated this situation and recognized the fact that the engineer would not personally perform all the detail work. It was well understood by the legislature that the engineer appointed would doubtless have an office where draftsmen other than himself might be engaged, and in order that he might have competent assistants it would be necessary that he employ men not for each individual undertaking, but that he employ them in his business, whether of a public or private nature. The law requires the engineer to put up a bond and under this bond he would be liable for errors or omissions of those whom he might employ, as well as for his own mistakes. None of these assistants or employes are required to put up a bond, and it would seem to me proper that the man who must be responsible for their acts should have some compensation to cover that responsibility. Our superme court has recognized this situation.

Pritchard v. Woodbury County, 150 Iowa 576;
Zinser v. Board of Supervisors, 137 Iowa 665;
In re Drainage District No. 3, 146 Iowa 564;
Lyon v. Sac County, 155 Iowa 374.

Thus in the Pritchard case, *supra,* the supreme court used the following langage:

"Again, it is said that the county surveyor did not in

fact make the surveys himself, but intrusted that important matter to untrained and irresponsible subordinates. It is thus that the surveyor appointed by the board did not run all or any great proportion of the levels himself, nor did he measure the distances with his own hands, but he had two assistants who did the necessary work under his directions, and he made some of the surveys himself. The engineer or surveyor drew all the plats and profiles and made and filed a report showing the elevations of the different tracts of land, depth and size of the main ditch and the laterals, the termini of the various ditches, and all other matters necessary to give full and accurate information regarding the proposed district. * * *

"It is manifestly impossible for one man to make a survey such as was required in this case. He must, to some extent at least, depend upon the reports and actions of others who assist, and, having given general directions and gone over the ground setting stakes and actively assisting part of the time in the actual work of running levels, etc., we think a sufficient compliance with the statute is shown. *Zinser v. Board,* 137 Iowa 665, relied upon by appellants, says nothing to the contrary. *In re Drainage District No. 3,* 146 Iowa 464, supports our conclusion here."

The same provision was discussed by the supreme court in the later case of *Lyon v. Sac County,* 155 Iowa 367, 374. In that case the engineer did not personally take any part in surveying the district, but that work was done by his brother, and all that the engineer in charge did was to look over the district and to make up his recommendations from the reports that had been turned in by his assistants. The court said in that case that he did not give the personal attention to the work that he should have given and that he ought to have declined the appointment, but at the same time it reaffirmed the statement in the earlier case, that the law does not contemplate that the engineer shall attend to every detail of the work. For your benefit we quote in this case as follows:

"The engineer took no part in surveying the district, and did not examine the proposed district subsequent to his appointment. The survey was made by an assistant, his brother, and he also prepared the plat and profile; and the engineer appointed made the report in reliance on these, with such information as his assistant gave and his recollection of the land from having previously surveyed a portion of it. The controlling importance of this report was pointed out in *Zinser v. Board,* 137 Iowa 660; *Hartshorn v. Wright Co.,*

142 Iowa 72, and *in re Nishnabotna River Improvement District No. 2,* 145 Iowa 130.

"Of course, it is not necessary that the engineer attend to every detail of the work. Much must be done by assistants. *Pritchard v. Board,* 150 Iowa 565. But the law contemplates that the supervisors shall have the advantage of the best judgment of a competent engineer, and this can be given only upon a thorough, actual examination and study of the proposed district, in connection with such measurements as may be essential to exact knowledge of the typography of the territory to be drained. Unless an engineer is willing to do this and take personal charge of the necessary surveys, he should decline the appointment and permit another to be selected, willing to do everything essential to supply the most accurate information and insure the soundest judgment on the problem presented, even though not large. * * * The manner in which the engineer discharged his duty, however, was an irregularity in the proceedings, and not a jurisdictional defect. His report, containing data exacted by statute, was before the board, and, notwithstanding irregularities in preparing it, these, in the absence of any charge of fraud, at least, did not deprive the board of supervisors of jurisdiction to order the improvement. *In re Drainage District No. 3 v. Hardin County,* 146 Iowa 564. It follows that the objections interposed were rightly overruled, and lapse of the engineers not such as to interrupt the authority of the board of supervisors in establishing the district."

The legislature has permitted these statutes to stand with the interpretations placed thereon by our supreme court so that we are justified in saying that in effect the law authorizes the appointment of a competent engineer to do the preliminary work and also a competent engineer to have charge of the construction work in each district; that the more important portions of the work he should attend to personally, but that much of the detail he may leave in the hands of his assistants.

Up to the time of the adoption of chapter 356, acts of the 37th General Assembly, there can be no serious question about the right of the board of supervisors to contract with an engineer for the performance of his services, although such performance may include the payment of assistants and employes of the engineer. It is true that section 1989-a41, above quoted, required the payment of a per diem, but I see no reason why the board might not contract with the engineer to pay him a certain per diem for his own services and to pay a certain per diem for his assistants

and a certain per diem for his rod men and other helpers. The per diem agreed to be paid to the engineer to cover the work of his assistants and employes might be in excess of the amount actually paid by him to these assistants and employes. It is a matter of common knowledge that in order to keep a capable corps of assistants and helpers an engineer must give steady employment and regular compensation, whether he is able to use the men every day or not. He might have several projects in charge and find it necessary to shift these men from one project to another and some of them might not be drainage projects at all. He might find it advisable to keep one or more skilled draftsmen, only a portion of whose time might be employed upon drainage work.

Under the construction of the drainage laws as given by the supreme court in the authorities above referred to, we feel constrained to hold that the drainage law permits the employment of an engineer, who, in turn, might have a corps of assistants and helpers paid by him upon a per diem or any other basis, but for whom he could file per diem bills with the county auditor for the time actually employed by them upon the work of any drainage district for which the engineer had been employed, and that this per diem for the assistants and helpers might be that agreed upon by the engineer and the board of supervisors, although not the amount actually paid by the engineer to these men.

This brings us to a consideration of the effect to be given to chapter 356 of the acts of the 37th General Assembly. It is provided by section 7 thereof as follows:

> "All warrants issued by the auditor shall be made payable to the person performing the service or furnishing the supplies for which said warrant makes payment, and shall state the purpose for which said warrant was issued."

It will be observed that this act is amendatory of section 4661 of the code relating to witness fees and of section 353 of the code relating to the payment of jury fees, and that it is a substitute for section 471 of the code relating to the issuance of county warrants.

We are not attempting at this time to determine exactly what is meant by section 7 of this act. I feel that it does not cover the issuance of drainage warrants. Drainage warrants are not

county warrants; they are paid out of the funds of drainage districts exclusively. Each drainage district is a separate entity and the legislature has provided a distinct and separate method by which the drainage district is to be handled. The mere fact that the warrants are issued by the county auditor and paid by the county treasurer is not controlling.

There is a separate and distinct provision relating to county engineers. Thus section 1527-s21b, supplemental supplement to the code, 1915, provides:

> "All county engineers employed in drainage or road work for the county or any drainage district and all their assistants engaged in such work shall file an itemized and verified account before the board of supervisors stating the time actually employed each day, the place where the work was done, the character of the work done, and also file vouchers for any expense, with such account."

It is very likely that this section refers only to county engineers holding their positions as such, but even giving it the broad construction, that it might refer to any engineer employed by the county for road or drainage work, it would not be inconsistent with the position we have taken.

To illustrate: I have before me the contract between the board of supervisors of Poweshiek county and the Central States Engineering Company, which I understand is merely a trade name for C. H. Young, the engineer who owns and controls the organization bearing that name. This contract provides for a certain per diem for Mr. Young and a certain per diem for assistant engineers, a certain per diem for draftsmen, a certain per diem for the head chairman and a different per diem for the rear chairman, a per diem for stenographic help, etc. If the section last quoted above covers the case of Mr. Young he would be required to file an itemized and verified account showing the amount of time actually employed by him personally on each drainage district and the amount of time of each of his several assistants, and setting forth the compensation due him for each of his assistants and employes on the basis of the contract. It is my understanding that some of these men, and perhaps all of them, are employed by the month by Mr. Young. He is only entitled to collect pay for them for the time actually employed in each drainage district upon which he may have been named as the engineer.

It is, therefore, my opinion that section 7 of chapter 356 of the acts of the 37th General Assembly does not apply to an engineer appointed by the board for the purpose of making preliminary survey or for the purpose of carrying on the construction work of a drainage district.

It follows that the contract with the Central States Engineering Company, to which you have called my attention, is a valid contract for the board of supervisors to make.

F. C. DAVIDSON, *Special Counsel.*

METHOD OF ENTERING DRAINAGE ASSESSMENTS

There is no statute prohibiting the county auditor from extending drainage assessments upon the regular tax records. However, as a matter of efficient administration of the law the drainage assessments should be entered in a separate record, and the auditor of state may so require.

There is no provision in the law authorizing the payment of half of a drainage tax in March and the other half in September. The entire annual assessment should be paid in March. But when the county issues "drainage bonds" the tax may be paid semi-annually.

May 3, 1919.

Mr. T. P. Harrington,
Algona, Iowa.

Dear Sir:

We have your letter of May 1st, written at the request of your county treasurer and your county auditor, wherein you ask for an opinion upon the following matters:

> "1. Is there any law prohibiting the county auditor from extending drainage assessments upon the regular tax books, or should the drainage assessments be entered in a separate book and collection thereof made directly from such records?
>
> "2. Does the law authorize the division of a drainage assessment so that one-half can be paid in April and one-half in September?"

In answering your first question, permit us to state that we are not aware of any statute requiring the county auditor to enter drainage assessments in a separate book, and requiring the county treasurer to make collection directly from that record. There is nothing in the law to prohibit the county auditor from extending drainage assessments upon the regular tax books and the county treasurer may make his collection directly from such records.

It is true that the state checkers from the office of the auditor of state have insisted upon a separate record being kept of drainage assessments. The observance of this rule is urged for the reason that in almost every instance where the drainage assessments have been entered upon the regular tax books confusion and difficulty have resulted. To illustrate: Here is a case where the drainage tax is extended by the auditor for the current year along with the regular taxes. The assessments not yet due are not entered upon any record then in the hands of the treasurer. The property owner calls at the treasurer's office and expresses a desire to pay all assessments upon his property and to release the same from the lien of such taxes. The treasurer has put the tax for the current year upon his records. In most cases the treasurer goes to the county auditor and ascertains the amount of the payments yet unpaid upon the records and adds them to the tax for the current year. The result is that the treasurer collects far more taxes than he is charged with by the books in his custody. The state checkers have informed us that they have frequently found the county treasurer in possession of hundreds of dollars more than his books called for, as the result of such a method of handling drainage assessments.

The procedure thus urged by the state checkers is not one required by law, but rather one necessary to accomplish an accurate administration of our law. I desire to direct your attention to that part of section 89 of the supplement to the code, 1913, which provides as follows:

> "The auditor shall keep his office at the seat of government, is the general accountant of the state, and it is his duty:
>
> "* * *
>
> "7. To superintend the fiscal affairs of the state, and secure their management as required by law; to furnish proper instructions, directions and forms to the county auditors and treasurers, in compliance with which they shall severally keep their accounts relating to the revenue of the state, and perform the duties of their several offices; also forms for the reports required to be made by said officers to said auditor, *and of receipts to be given by such treasurers to the taxpayers,* and such officers shall conform in all respects to the forms and directions thus prescribed:"

Section 100-b, supplement of 1913, grants authority unto the

auditor to formulate, prescribe and install a uniform system of accounting for the county officers, and furthermore this section provides:

> "It is hereby made the express duty of the examiners to assist the respective officers in installing such system in each of the counties throughout the state."

In view of these sections, it would appear that the auditor of state might require the keeping of drainage assessments in a separate book from that in which regular taxes are extended, since he is given the right to prescribe the form of tax books and receipts to be issued. I might add at this point that practically all of the counties are keeping a separate record for the drainage taxes, according to Mr. Wall, chief of county examiners.

As to your second inquiry, there is some confusion in the statute. Take, for instance, section 1989-a13, supplement of 1913, and we find the following:

> "*In estimating the benefits as to lands not traversed by said improvement,* they shall not consider what benefits such lands will receive after some other improvment shall have been constructed, but only the benefits which will be received by reason of the construction of the improvement in question, as it affords an outlet for the drainage of such lands, or bridges an outlet nearer to said lands or relieves the same from overflow. *Said tax shall be levied upon the lands of the owners so benefited in the ratio aforesaid and collected in the same manner as other* taxes for county purposes. * * *"

It should be further noted that there is no provision whatsoever in this section for division of taxes into installments covering a period of years. The section merely states that the tax on *lands not traversed by said improvement* shall be levied and collected in the same manner as other taxes for county purposes. "Other taxes for county purposes" are not divided into installments and extended over a period of years in the absence of an express provision to that effect.

However, there is another section which provides for the spreading of the tax over a period of years, and we think it should be construed in connection with the section just called to your attention. Section 1989-a26, supplement of 1913, provides in part as follows:

> "The special assessment for benefit made by the commissioners appointed for that purpose, as corrected and

approved by the board of supervisors, shall be levied at one time by the board against the property so benefited, and when levied and certified shall be payable at the office of the county treasurer. If the owner of any parcel of land, lot or premises against which any such levy shall have been made and certified, which is embraced in any certificate provided for in this section, shall within thirty days from the date of such assessment promise and agree in writing endorsed upon such certificate, or in a separate agreement, that in consideration of having the right to pay his assessment in installments, he will not make any objection of illegality or irregularity as to the assessment of benefits, or levy of such tax upon and against his property, but will pay said assessment with interest thereon at such rate not exceeding six per centum per annum as shall be payable in *ten equal installments,* the first of which with interest on the whole assessment shall mature and be payable on the date of such assessment, and the others with interest on the whole amount unpaid annually thereafter at the same time and in the same manner as the March semi-annual payment of ordinary taxes; but where no such terms and agreement in writing shall be made by the owner of any land, lot or premises then the whole of said special assessment, so levied upon and against the property of such owner, shall mature at one time and be due and payable with interest from the date of such assessment, and *shall be collected at the next succeeding March semi-annual payment of ordinary taxes.* All of such tax with interest shall become delinquent on the first day of March next after its maturity and shall bear the same interest with the same penalties as ordinary taxes. * * *''

The supreme court in the case of *Fitchpatrick v. Fowler,* 157 Iowa 215, had occasion to construe the foregoing section, and it should be noted that in this opinion the court refers to the ''ten equal installments'' as a tax payable in ten annual installments. (Page 221).

The court in part states:

''For the purposes of collecting such special assessments, they are by this enactment separated into two classes. One class embraces all assessments where the owners have entered into the prescribed contract, and the other class includes all where no such contract is made. Speaking of the first class, it is provided that *such* tax *so* levied shall be payable in *ten annual* installments with interest not to exceed 6 per cent. Here 'such tax' is very clearly limited in its application to assessments of the first class mentioned. It is then provided, as we have already noted, that, when no contract is made, the whole of '*said* special assessment' upon the property of

> *such* owner shall be due and payable, with interest, and be collected with the next semi-annual collection of ordinary taxes. 'All of *such* tax with interest shall become delinquent on the first day of March next after its maturity and shall bear the same interest and penalties as ordinary taxes.' Here 'such tax' just as clearly refers to assessments of the second class as the like words earlier in the section refer to assessments of the first class. Such is the natural as well as the apparent grammatical connection between the words 'such tax' and their antecedent." (Page 221).

In view of the interpretation thus placed upon the section by the supreme court, we think it clear that in cases where *improvement certificates* are issued that there is no provision in the law authorizing a division of the tax so that one-half may be paid in March and one-half in September. It is our opinion that the law as it appears in the foregoing section, and as interpreted by our supreme court infers that each installment of the tax is due and payable in the month of March of each year.

However, if the board of supervisors proceed under section 1989-a27 and issue "drainage bonds of the county," we are of the opinion that in such cases payments should be made both in March and in September. The section in part provides:

> "If the board of supervisors shall determine that the estimated cost of reclamation and improvement of such district of land is greater than should be levied in a single year upon the lands benefited, *instead of issuing improvement certificates as provided in the preceding section*, it may fix the amount that shall be levied and collected each year and may issue *drainage bonds of the county, bearing not more than six per centum annual interest and payable semi-annually in the proportions and at the times when such taxes shall have been collected*, and may devote the same at par, with accrued interest, to the payment of the work as it progresses or may sell the same at not less than par, with accrued interest, and devote the proceeds to such payment; * * *"

The foregoing section provides in case "drainage bonds of the county" are issued, that they shall bear "not more six per centum annual interest, and payable semi-annually in the proportions and at the times when such taxes shall have been collected." We think it was the intention of the legislature in such cases to provide for the payment of part of the tax in March and then permit the payment of the last half in the month of September. In this way, interest on the bonds would be collected semi-

annually, and paid semi-annually, and it is our opinion that the law provides that it shall be thus collected in two installments, one payable in March and the other in September.

B. J. POWERS, *Assistant Attorney General.*

TAXATION OF DRAINAGE WARRANTS

Drainage warrants are not exempt from taxation under the provisions of section 1304, supplemental supplement, 1915.

April 1, 1919.

Mr. Wilson Cornwall, County Attorney,
Spencer, Iowa.

Dear Sir:

We have your letter of March 29th in which you state:

> "Section 1304, paragraph 1 of the code, supplement of 1913, provides that drainage bonds and certificates are exempt from taxation. I would like your opinion as to whether or not this section is to be construed as exempting drainage warrants."

In answer to your inquiry, we desire to direct your attention to a part of the provision of section 1304, supplemental supplement, 1915, which is as follows:

> "The following classes of property are not to be taxed:
>
> "1. The property of the United States and this state, * * * municipal, school and *drainage bonds or certificates hereafter issued by any municipality, school district, drainage district or county within the state of Iowa;* * * *"

In this same connection it should be remembered that our supreme court has often held that taxation is the rule and exemption the exception, and that therefore the statute exempting from taxation must be strictly construed and that he who claims the exemption must bring himself clearly within the meaning of the statute.

Trustees of Griswold College v. State of Iowa, 46 Iowa 275.

It should be noted that there is no provision in the statute declaring that *drainage warrants* are subject to exemption. It is true that drainage bonds or certificates are exempt, but there is no intimation that the exemption shall apply to drainage warrants.

It is therefore the opinion of this department that drainage

warrants are not to be included in the exemption provided for in the section of the supplemental supplement above cited.

B. J. POWERS, *Assistant Attorney General.*

PAYMENT OF DRAINAGE CERTIFICATES AND BONDS

Drainage improvement certificates may be paid by taxpayer at any time, section 1989-a26, 1913 supplement. Drainage bonds can only be paid at maturity, section 1989-a27, 1913 supplement.

January 19, 1920.

Mr. Vernon Johnson, County Attorney,
Sidney, Iowa.

Dear Sir.

Your request for the opinion of this department on the following question has been referred to me for attention.

You state:

> "Our county auditor has called upon me for an opinion relative to the right of a party whose land is situated in a drainage district to pay certain assessments against his land after the improvements have been completed, and long after bond has been issued to take up the indebtedness against the drainage district.
>
> "We have some parties who desire to pay their assessments with accrued interest up to date, and then desire to be relieved from any further taxes relative to the same except as might be necessary to improve the same.
>
> "I contend that after he has failed to pay his assessment at the time the improvement has been made and bonds are sold to pay the money that he did not pay, he cannot afterwards pay the tax, as these bonds would draw interest up to the full twenty years, yet in section 1989-a26, supplement to the code, 1913, it appears that he would have that right."

Section 1989-a26 of the 1913 supplement to the code, to which you refer, provides in part as follows:

> "And the board may provide by resolution for the issuance of improvement certificates, payable to bearer or to the contractors who have constructed the said improvement or completed part thereof within the meaning of this act in payment or part payment therefor, each of which certificates shall state the amount of one or more assessments or part thereof made against the property designating it and the owners thereof liable to assessments for the cost of same, and said certificate may be negotiated. Such certificates shall transfer to the bearer, contractor or assigns all right

and interest in and to the tax in every such assessment or part thereof described therein, and shall authorize such bearer, contractor or assignee to collect and receive every assessment embraced in said certificate, by or through any of the methods provided by law for their collection, as the same mature. Such certificates shall bear interest not to exceed six per centum per annum, payable annually, and shall be paid by the taxpayer to the county treasurer, who shall receipt for same and cause the amount paid to be applied to the payment of the certificate issued therefor. Provided, that any person shall have the right to pay the full amount of tax so levied against his property, together with interest thereon to date of payment at any time he desires so to do, even before the maturity of any certificates issued therefor."

The provisions of the section set out authorize the issuance of improvement certificates to cover the cost of special assessments for drainage improvements, and clearly provides that any person shall have the right to pay the full amount of the tax levied against his property, together with interest thereon to date of payment, at any times he desires so to do.

Section 1989-a27 of the 1913 supplement, authorizing the issuance of bonds for drainage improvements, provides in part as follows:

"If the board of supervisors shall determine that the estimated cost of reclamation and improvement of such district of land is greater than should be levied in a single year upon the lands benefited, instead of issuing improvement certificates as provided in the preceding section, it may fix the amount that shall be levied and collected each year and may issue drainage bonds of the county, bearing not more than six per centum annual interest and payable semi-annually in the proportions and at the times when such taxes shall have been collected, and may devote the same at par, with accrued interest, to the payment of the work as it progresses or may sell the same at not less than par, with accrued interest, and devote the proceeds to such payment; and if in the sale of said bonds a premium is received, such premium shall be credited to the drainage fund, and should the cost of such work exceed the estimate, or should the proceeds of the tax when collected be insufficient to pay the principal and interest of bonds sold, a new apportionment of the tax may be made and other bonds issued and sold in like manner, to meet such excess of cost or shortage in the proceeds of the tax, but in no case shall the bonds run longer than fifteen years. Any property owner may pay the full amount of the

benefit assessed against his property before such bonds are issued and receive a receipt in full thereof. Such payment shall be made to the county treasurer, and it shall be the duty of the county auditor to certify to the treasurer the amount of any such assessment when requested to do so, and the treasurer shall enter the same upon the tax lists in his hands in a separate place provided therefor, and shall furnish the auditor with duplicate receipts given for all assessments so paid in full."

Provision is here made for the property owner to pay the full amount assessed against his property *before* such bonds are issued and receive a receipt therefor. The terms and times of payment of the bonds, issued under the provisions of this section, are fixed by the board of supervisors and they can only be paid according to the terms and times so fixed.

J. W. SANDUSKY, *Assistant Attorney General.*

PAYMENT OF COST OF DRAINING HIGHWAY

The benefits assessed for drainage against county roads should be paid by the county and the benefits assessed against township roads should be paid by the township.

August 22, 1919.

Mr. Wilson Cornwall, County Attorney,
Spencer, Iowa.

Dear Sir:

On August 13th you wrote to this office, enclosing a letter from the county auditor of your county, with a request for an opinion.

The letter from the county auditor proposes the following question:

"The board of supervisors wishes an opinion in the matter of drainage assessments against county and township highways in drainage districts as set forth in section S. 1989-a19.

"Prior to the creation of the state highway commission and division of roads into county and township roads the section read: 'Whenever any highway within the levee or drainage district will be benefited, etc., * * * one-fourth of said assessment shall be paid by the county from the county road fund * * * and three-fourths by the township.' The only change made in this section is by the 37th General Assembly, which made it read: 'Whenever any county or township highway, etc., * * *'

"Prior to the divsion of the roads into county and township roads the highway in any township was assessed a certain

sum and the county paid one-fourth and the township three-fourths. After the division of the roads the appraisers returned the assessment as so much against the county highway, when a county highway was in the district, and so much against the township highway. The county paid the county highway tax and the board called upon the township for all of the township highway assessment.

"The amendment by the 37th General Assembly does not clear this matter up any as to the question we ask.

"The question is: Should the appraisers divide the assessment as to the county roads and township roads? If the answer is 'yes,' should the county pay one-fourth of the township assessment?

"Or should the appraisers assess so much against the highways and the county pay one-fourth of the entire assessment and the township the three-fourths?"

Section 1989-a19, as amended by the 37th General Assembly, provides in substance that any county or township highway is benefited by the construction of any improvement in such district, the benefits thereto should be classified and commissioners appointed to assess benefits and that when the assessment is finally made, one-fourth thereof shall be paid by the county from the county road fund or from the county drainage fund and three-fourths by the township, and further provides that such assessment may be paid by the township from its road fund or out of the drainage fund created for that purpose as provided for by section 1528 of the supplement.

Section 1528 of the supplement provides for the levying of a drainage tax by the township trustees for the payment of drainage assessments against highways of the township.

Section 1530 of the supplement provides that the board of supervisors may levy a tax to be known as the county road fund to be paid out for work done on the roads in the county, and may in addition thereto levy a drainage tax for the purpose of paying drainage assessments levied against highways in the county.

Section 1527-s8 of the supplemental supplement contains the following provision:

"The county road fund, the county road building fund, the county drainage fund, and all other moneys received by the board of supervisors for road purposes, except as otherwise provided, shall be placed in the county road cash fund, and

shall be paid out only on order of the said board of supervisors for the purchase of tools, machinery and equipment, or for tile and tiling, or for filling on culverts and bridge approaches as herein provided, or for work done on the county road system, or for the elimination of dangers at railroad crossings on both county and township roads, at the discretion of the boar of supervisors on an adjustment of such dangerous conditions by negotiations between the railroad and the board of supervisors, or upon an order and finding of the railroad commission. All money received by the township trustees for road purposes shall be expended for and upon the township road system, or for the elimination of dangers at railroad crossings on the township roads, at the discretion of the township trustees, on an adjustment of such dangerous conditions by negotiations between the railroad company and the township trustees, or upon an order and finding of the railroad commission."

It will be noticed from reading the above sections that they are in conflict and that while section 1989-a19 provides for the payment of drainage assessments upon both county and township roads, part by the county and part by the township, that section 1527-s8 of the supplemental supplement prohibits the expenditure of the county's funds on any road except county roads and limits the expenditure of the township funds to the township roads.

Where statutes are in conflict and cannot be harmonized, the rule of construction is that the later enactment must prevail. I can see no way to harmonize these statutes. The only fund available to the county for the payment of drainage assessments is restricted in its use to county roads and cannot be used for the payment of drainage assessments in township roads, and the only fund available to townships for the payment of drainage assessments is limited in its expenditure to township roads and cannot be used upon the county roads.

It is the opinion of this department that section 1527-s8 of the supplemental supplement, being a later enactment, must control and that the county must pay the assessments against county roads and the township must pay the assessments against township roads.

SHELBY CULLISON, *Assistant Attorney General.*

EMPLOYMENT OF ATTORNEY IN DRAINAGE MATTERS

Board may employ county or other attorney after establishment, but cannot pay fees in case a district is abandoned, before establishment.

October 7, 1919.

Mr. Benjamin F. Butler, County Attorney,
Sibley, Iowa.

Dear Sir:

Replying to your request of the 4th inst. for an opinion on the following questions:

1. Has the board of supervisors the right to employ an attorney under the provisions of chapter 1989-2b, supplement to the code, 1913?

2. In case the proceedings for a district are abandoned under the provisions of chapter 1989-2b, does the board have authority to pay attorney fees as part of the costs?

3. When may the county attorney receive compensation as attorney for a drainage district?

These questions are not presented in this precise form in your letter, but I take it that the answer of the above questions will cover the situation upon which you have requested an opinion.

Section 1989-b8, supplement to the code, 1915, provides that in case an appeal is taken, that the same procedure shall apply as is provided by chapter 2-a, supplement to the code, 1913, which provides in part:

> "When any appeal is taken from the order of the board made in any drainage proceeding coming before it for action, it shall be the duty of the board to employ counsel to represent the interests of the drainage district affected by said appeal on the trial thereof in the appellate courts and the expense thereof shall be paid out of the drainage fund of sueh district."

Now, in actual practice it has been found that the workings of the drainage law are too complicated for the average board of supervisors, and that it is economy for the board to employ an attorney and have the benefit of his services at practically every step of the proceedings. Appeals are much less likely to be taken, and if taken, are much less likely to be successful in case the board follows the advice of the county attorney or some other attorney that it may see fit to employ,

As you suggest in your letter, this is not county work, and

there is no reason why the county attorney may not be employed and paid, under all circumstances and proceedings when the board is authorized to employ attorneys at all.

The question therefore arises as to when the board of supervisors may employ an attorney, if ever, except in cases of appeal.

In my judgment, the drainage district is a separate entity, and when acting for it, the board is not in any sense representing the county, but I cannot carry this reasoning far enough to warrant me in answering your second question in the affirmative. If the district has once been established, even though organized under chapter 1989-2b, I think there is no doubt about the right of the board to employ and pay counsel for services rendered after the formation of the district. But if the abandonment of the proceedings occurs before the formation of the district, then I do not believe the board of supervisors has any authority to pay attorneys fees to the county attorney or to any other attorney in connection with the matter.

If then, in the case to which you allude, the district was established, it would be my opinion that the board could pay your fees for services rendered after the establishment. But if the abandonment occurred before the establishment of the district, then that no fees could be allowed. If attorney fees had been incurred after the establishment of the district and the project is then abandoned, I see no reason why the provisions of section 1989-b10, supplement to the code, 1915, as amended by chapter 29, laws 38th General Assembly, with reference to the payment of costs out of the county fund should not apply.

F. C. DAVIDSON, *Assistant Attorney General.*

DESTRUCTION OF WELL BY DRAINAGE

Owner of a well cannot assert claim for damages resulting from the location of a drainage improvement where he has filed no claim.

November 17, 1919.

Mr. Tom Boynton,
Forest City, Iowa.

Dear Sir:

Your request to the attorney general for an opinion has been referred to me. I quote from your letter the following statement of the question:

"The board acting for and in behalf of a drainage dis-

trict, formally and legally established a drainage district; gave the notices required by law; let a contract and proceeded to construct the improvements according to plans and specifications; a portion of the improvement consisted of drain tile; they were laid according to plans, etc., through land upon which was located a surface water well, approximately 14 feet deep; the well was apparently spring fed and had for many years furnished all water required by the landowner for not only family purposes, but also sufficient for a large herd of live stock; pump was worked by windmill; the drain tile passed about 500 feet distant from the well and immediately thereafter the well went dry; owner has filed claim for cost of constructing new well 170 feet deep."

It is very evident that neither the engineer who laid out the proposed improvement nor the landowner contemplated the damages that would result to the spring from the laying of the drain tile. If the landowner suspected that any such damage would occur, he had a right, under the statute, to file a claim for the damages and have the matter adjudicated before the board of supervisors. He has waived his remedy in that respect.

There is no express authority anywhere in the statute permitting a landowner to bring suit against a drainage district. Certain questions can be raised by appeal, but obviously a matter of this kind cannot be brought into court in that way at this time. The drainage district has only such powers as are conferred upon it by statute, and as I understand it, the same principles would apply to a suit against it as would apply to a suit against a county or a township. I do not believe there is any remedy open to the landowner against the drainage district. It is his misfortune that he did not anticipate the damage that would be occasioned by the putting in of this drain.

Having failed to file a claim for damages in the time and according to the manner prescribed by statute, it seems to me as if he is now without legal remedy.

F. C. DAVIDSON, *Assistant Attorney General.*

DRAINS OPENING ON HIGHWAY

Right of land owner to drain his land upon highway. Construing section 1963 in connection with 1989-a53.

November 3, 1919.

Mr. W. H. Wehrmacher, County Attorney,
Waverly, Iowa.

Dear Sir:

I am in receipt of your favor of the 23d ult. in which you ask

the opinion of the attorney general regarding the proper construction to be given to section 1963 of the code of 1897; that is, you desire to know whether a person who has constructed an outlet to a drain must leave the highway in the same condition as it was before, in so far as the mechanical construction of the outlet to the drain is concerned, or does it mean that the road must be left in as good condition as it was before, with reference to water that may stand along the side of the road on account of the outlet to the drain. I presume this section ought to be interpreted in the light of section 1989-a53, supplement to the code, 1913.

Under that section the owner of a tract of land may drain the same in the general course of natural drainage into a natural water course, or into a natural depression leading into a natural water course, when such drainage is wholly upon the owner's land. It is therefore my idea that the owner of a tract of land may do just what this section contemplates, even though the outlet of his drain is practically at the highway, as long as it is on his own land. Of course, the fee title to the highway rests in him subject to the easement in the public; and in a sense, he is still draining the water to an outlet upon his own land, even though he enters the highway for the purpose of securing an outlet, so long as he does not cross the highway with his drain.

However, I do not think it is necessary to carry the interpretation that far in order to answer your question. It must be that the legislature knew that the bringing of water upon the public highways would cause more or less of a saturated condition, unless there was a sufficient culvert and a sufficient drain below.

The legislature has gone so far and the courts have gone so far in this state in assisting the owner of lands to procure drainage in the general course of natural drainage that I think that all that was intended was that the adjoining owner should leave the highway in as good condition as it was before his drain was put in. That is, the grade should not be interfered with, or if disturbed, it should be replaced, but I do not think that the law contemplates that the landowner using such a drain must keep the road free from the accumulation of water that is brought down by the drain. In very many cases this could not be done without going upon the lands of an adjoining owner for the purpose

of completing the drain; and, of course, the upper owner would have no right to take such a course.

I am therefore inclined to the opinion that the legislature intended to give an owner the right to open a drain upon the public highway, even though it resulted in occasionally flooding or saturating it, providing that at the time he completed his drain he left the grade and ditches in as good condition as they were before.

It might not be out of place in this connection to call attention to the provisions of chapter 1989-2b, supplement to the code, 1915, which give the board of supervisors the right to lay out highway drainage districts and assess a portion of the expense to the landowners benefited thereby.

F. C. DAVIDSON, *Assistant Attorney General.*

ESTABLISHMENT OF DRAINAGE DISTRICTS

Right to establish district composed of city or town considered.

March 27, 1919.

Mr. W. H. Downing, County Attorney,
Primghar, Iowa.

Dear Sir:

I have your request of the 22d inst. for an opinion on the language of section 1989-a38, supplement to the code, 1913, with reference to the right of the county board of supervisors

> "to establish a drainage district in a city or town alone under said section; that is, where there is no land that needs draining which is adjacent to said town or city and no drainage district is needed, and where there isn't any being asked for, can the board of supervisors of a county just for the benefit of a city or town alone establish a district within the town or city by itself?"

It is hard to conceive of just such a situation as you mention, namely, that there would be no land whatever adjoining the city or town which would need drainage, while that just inside the corporation would need it. If the question is purely academic, I do not feel that we ought to be asked to answer it.

There is no provision in the drainage law that would permit a city or town to petition for a drainage district, but any property owner or owners may do so, and whether the district embraces all or a part of the city or town would be immaterial.

Under such a petition the engineer undoubtedly would recommend such a system of drainage as would adequately take care of storm water and cellar drainage of property located in such city or town, but under the guise of such proceedings a sanitary sewer could not be established, nor could the drainage sewer be used for the purpose of affording an outlet for sanitary sewage if the matter were contested. Whether the drainage area within the city included within the district was all in one watershed would not be controlling, in my judgment. That is a matter that would rest within the sound discretion of the engineer laying out the district. The board of supervisors should adopt his report, or if they are not satisfied with the same they may appoint another engineer, but they should not proceed independently of the recommendations of the engineer, made in accordance with the provisions of the drainage law.

It has been the policy of our supreme court to uphold drainage improvements and to construe the law very liberally in support of any action taken by the board of supervisors in establishing a drainage district. The court has gone so far as to say that the board acts in a legislative capacity in such matters, and with certain exceptions that its action is not subject to review by the courts.

The authority granted upon the board under the provisions of section 1989-a1, supplement to the code, 1913, is very broad and its provisions in connection with drainage is not in any sense limited to the drainage of agricultural lands, although the provisions of the act were undoubtedly framed with that as the chief purpose in view.

You will note the amendment with reference to the issuance of bonds by a city or town to pay drainage taxes as it appears in chapter 28, laws of the 37th General Assembly.

F. C. DAVIDSON, *Assistant Attorney General.*

PAYMENT OF DRAINAGE WARRANTS

The county treasurer is required to post notice, as provided for by the Code, section 484, of warrants outstanding, for which he has funds on hand to pay. In case such outstanding warrants are drainage warrants, he is required to give, in addition to the foregoing notice,

a written notice by mail to the holder of such warrants as provided for by chapter 162, acts 38th General Assembly.

November 15, 1919.

Mr. Benjamin F. Butler, County Attorney,
Sibley, Iowa.

Dear Sir:

We have your letter of November 7th in which you state:

> "I request your opinion upon the following matter:
>
> "Section 484 of the code, 1897, provides in part 'at the expiration of 30 days from the date of such posting interest on the warrants so named shall cease.'
>
> Section 3 of chapter 162, laws of the 38th General Assembly, mentions in the last clause the matter of interest on these warrants.
>
> "Is it your idea that this section 3 of chapter 162 changes the above provisions of section 484?"

Section 484 of the code to which you refer provides as follows:

> "He shall issue calls for outstanding warrants at any time he may have sufficient funds on hand for which such warrants were issued; shall give notice to what number of warrants the funds will extend, or the number which will be paid, by posting a written notice in the treasurer's office, and, at the expiration of thirty days from the date of such posting, interest on the warrants so named shall cease; and, when a warrant which draws interest is taken up, he shall indorse upon it the date and amount of interest allowed, and such warrant shall be canceled and not reissued."

Section 3, chapter 162, acts of the 38th General Assembly, which you also mention, deals with the issuing and payment of drainage warrants and states:

> "Whenever the treasurer shall have funds on hand to pay such warrant or warrants, he shall in *addition* to the call provided for in section four hundred eighty-four (484) of the code, mail a written notice of such call to the then holder thereof as shown by his said record, and shall make a memorandum showing the date of mailing such notice as shown by the memorandum herein required to be made, the interest on such warrant or warrants shall cease."

You will observe from a reading of the last preceding quotation that the notice provided for is to be deemed "additional" to that provided for in section 484 of the code. As we construe the law, the provision of the 38th General Assembly in no manner changes

the force and effect of section 484. The new provision is simply additional and requires that when the county treasurer shall have funds on hand sufficient to pay drainage warrants outstanding, that he mail written notice to the holder of such warrants. He is required to mail this notice in addition to the posting of notice provided for in section 484.

B. J. POWERS, *Assistant Attorney General.*

PAYMENT OF DRAINAGE WARRANTS

Treasurer must mail notice of intention to take up bonds, as well as post such notice in his office.

February 25, 1920.

Mr. Wilson Cornwall, County Attorney,
Spencer, Iowa.

Dear Sir:

Your esteemed favor of the 23rd inst. addressed to Attorney General H. M. Havner has been referred to me for reply.

You ask relative to the notice required by the county treasurer in order to stop the running of interest on drainage warrants.

You then state:

> "Some of the county treasurers have taken the position that any warrant registered prior to July 4, 1919, does not come within the provisions of this act, and where the warrant was registered prior to July 4, 1919, a call for payment need be given only by posting notice in the treasurer's office and that no notice need be mailed."

Section 5, chapter 162, acts of the 38th General Assembly, provides:

> "Whenever the treasurer shall have funds on hand to pay such warrant or warrants, he shall in addition to the call provided for in section four hundred eighty-four (484) of the code, mail a written notice of such call to the then holder thereof as shown by his said record, and shall make a memorandum showing the date of mailing such notice as shown by the memorandum herein required to be made, the interest on such warrant or warrants shall cease."

Prior to the enactment of the statute just quoted the only notice given holders of drainage warrants by the county treasurer was by posting such notice in the office of the county treasurer. The amendment to section 484 of the code, found in section 3, chapter 162, *supra,* does not go to the substance of the drainage warrant,

but merely adopts a procedure to be followed by the county treasurer when he has money on hand to take up and pay any number of drainage warrants. This procedure is for the benefit of the holders of the warrant.

Therefore I am of the opinion that the notice required in section 3, chapter 162 of the acts of the 38th General Assembly, should be given not only to the holders of warrants issued subsequent to July 4, 1919, but also to holders of drainage warrants issued prior to that date.

W. R. C. KENDRICK, *Assistant Attorney General.*

DRAINAGE DISTRICTS WITHIN A CITY

When drain is established wholly within a city of second class, board of supervisors should construct such culverts as are reasonably necessary and city such other as it may desire, or it may contribute to construction of county culverts.

November 13, 1919.

Mr. Geo. E. Allen, County Attorney,
Onawa, Iowa.

Dear Sir:

Your two letters of the 5th inst. addressed to the attorney general have been referred to me for answer.

As I understand it, you desire the opinion of the attorney general upon the following situation:

> The board of supervisors of your county has established a drainage district wholly within the limits of the city of Onawa, a city of the second class, and the question has arisen whether the board of supervisors is required to build the culverts needed in connection with the drain.

There seems to be another phase of your inquiry which perhaps ought to receive attention first. As I understand it, the engineer who has recommended the drainage district has also recommended as a part of the improvements to be constructed therein, certain culverts which are to be used as intakes; that is, are to be used for the purpose of carrying surface water into the drain.

I presume it might be proper under some circumstances for the board of supervisors, when establishing a district and ordering improvements constructed as recommended by the engineer, to order culverts constructed which are really a part of the drainage improvement under the drainage law, the same to be paid for out of the funds of the drainage district. As you suggest, the board in

such case is acting for the drainage district and not for the county, but their authority to act for the drainage district is apparently limited by the provisions of section 1989-a19, supplement to the code, 1913, which in part reads as follows:

> "Whenever such levee, ditch, drain or change of any natural water course crosses a public highway, necessitating the removal or the building or rebuilding of any bridge or bridges, the board of supervisors shall remove, build or rebuild such bridge or bridges, paying the costs and expenses thereof from the county bridge fund. * * *"

Ordinarily I do not believe the board of supervisors has the power, when acting for the drainage district, to put in culverts at the expense of the drainage district, but where the real purpose is to provide proper intakes for surface water, which are really essential to the success of the drain itself, it might be proper for the expense to be charged against the drainage district, but only in case such culverts are recommended by the engineer as a part of the drainage system.

Several statutes bear upon the other questions submitted. Section 422, supplement to the code, 1913, relating to the powers of the board of supervisors, contains this provision:

> "18. To provide for the erection of all bridges which may be necessary, and which the public convenience may require, within their respective counties, and to keep the same in repair, except as is otherwise provided by law."

Section 1527-s3, supplemental supplement to the code, in part provides as follows:

> "*The system of road construction* herein provided shall apply only to highways outside of the limits of cities and towns; provided, however, that whenever any public highway, located along the corporate line of any city or town, is partly within said city or town and partly without the same, the said highway or any part thereof, may be included in and made a part of the county road system, and when so included it may be improved by the board of supervisors as are other parts of the county road system. *The system of bridge and culvert work* herein provided for shall apply to all highways throughout the county outside of the limits of cities of the first class; provided, however, that when any part of any public highway located along the corporate line of a city of the first class * * *"

Section 1527-s8 contains the following language:

> "All culverts and bridges shall be paid for out of the

county bridge fund, except as provided in section 13 of this act."

Section 13 of said act is the same as section 1527-a13, supplement to the code, 1913, and so far as applicable here relates only to the placing of temporary culverts by the township. It does not bear directly upon the questions you have propounded.

Construing these various sections relating to the building of bridges and culverts by the county, it seems to me that it is fair to say that the law contemplates that in cities of the second class and towns, the board of supervisors shall construct permanent culverts and bridges, but I do not think that it follows from that statement that they must construct such culverts and bridges on every street, but under the language of paragraph 18 of section 422, supplement to the code, 1913, they are only required to provide for the erection "of all bridges which may be necessary and which the public convenience may require within their respective counties." This would authorize the board of supervisors to select a street or streets crossed by the drainage district as in their judgment might require permanent culverts or bridges and that the county would not be required to construct culverts upon other streets that might be crossed by the drain.

Some assistance in determining this question is to be found by consulting section 757 of the code of 1897, which reads as follows:

> "Cities shall have the care, supervision and control of all public bridges and culverts within the corporate limits thereof; shall cause the same to be kept open and free from nuisances; and shall construct and keep in repair all public culverts within the limits of said corporations. They may aid in the construction of any county bridges within the limits of said city, on a highway leading to the same, or in the construction of any bridge across any unnavigable river which divides the county in which said city is located from another state, by appropriating a sum not exceeding ten dollars per lineal foot therefor."

So far as this section is in conflict with the later provisions above quoted, the latter will control.

It would seem to me as if it would be the duty of the county to construct such permanent culverts across this drain as are reasonably necessary and are required by the public convenience, and if the city wants other culverts it can construct the same; and, of course, can aid in the construction of permanent culverts by the county under the provisions of section 757 above quoted.

F. C. DAVIDSON, *Assistant Attorney General.*

OPINIONS RELATING TO TAXATION

TAXATION OF FREIGHT LINE COMPANIES, ETC.

"Freight line companies" and "equipment companies" are subject to taxation under the provisions of section 1342-a, Supplement 1913. A "freight line company" is a company whose business it is to operate freight cars, etc., over lines of railroads it neither owns or leases. An "equipment company" is a company whose business it is to furnish or lease cars to railroads it neither owns, controls or operates.

November 7, 1919.

Hon. R. E. Bales, Secretary,
Executive Council.

Dear Sir:

You have requested this department to render you an opinion upon the following state of facts:

> "Does the American Railway Express Company come within the provisions of section 1342-a, etc., supplement, 1913? The business of the company is carried on in cars owned by various railroad companies over whose lines it operates, with the exception of a comparatively small number of specially constructed refrigerator cars which are engaged exclusively in the transportation of express matter."

In answering your inquiry, we first desire to set out in full section 1342-a, supplement, 1913, which states:

> "Every company engaged in business of operating cars, not otherwise listed for taxation or taxed in Iowa, for the transportation of freight, whether such freight be owned by such company, or any other person or company, over any railway line or lines, in whole or in part within this state, such line or lines, not being owned, leased or operated by such company, whether such cars be termed box, flat, coal, ore, tank, stock, gondola, furniture or refrigerator cars, or by some other name, shall be deemed to be a freight line company. Every company engaged in the business of furnishing or leasing cars of whatever kind or description, to be used in the operation of any railway line or lines wholly or partially within this state, such line or lines not being owned, leased or operated by such company, and such cars not being otherwise listed for taxation in Iowa shall be deemed to be an equipment company."

Section 1342-b provides that "every freight line and every equip-

ment company, as designated in the preceding section, * * *,'' etc., shall make and deliver to the executive council a statement under oath showing the name of the company, etc.

From a careful reading of the section first above set out it will be observed that there are two kinds of companies which are required to make the report just referred to. These companies are designated and defined as ''freight line companies'' and ''equipment companies.'' By paraphrasing the section, it reads:

> ''Every company engaged in the business of operating cars * * * over any railroad line or lines * * * not being owned, leased or operated by such company * * * shall be deemed a freight line company. Every company engaged in the business of furnishing or leasing cars * * * to be used in the operation of any railway line * * * such line or lines not being owned, leased or operated by such company, * * * shall be deemed to be an equipment company.''

Under the state of facts given to us, we are of the opinion that the American Railway Express Company comes within the definition of a freight line company. It is engaged in the business of operating cars over railway lines within this state which it does not own or have control of by virtue of any lease. These cars are engaged in the transportation of freight and express, and we are of the opinion that such company is required to make the report to the executive council as provided for in section 1342-b, supplement, 1913, and the section immediately following.

B. J. POWERS, *Assistant Attorney General.*

TAXATION OF MUNICIPAL TRANSMISSION LINES

Municipally owned transmission lines are exempt from state tax even though such lines are partly located outside city limits.

July 9, 1920.

Hon. R. E. Johnson, Secretary,
Executive Council.

Dear Sir:

Your letter of the 29th ult. addressed to the attorney general has been referred to me for reply.

You ask:

> ''The executive council would like your opinion as to whether electric transmission lines, owned by municipalities, but located outside of the city limits, are taxable by the state.

"Are these (see enclosed list) towns which are served by the Northern Gas and Electric Company exempt from taxation? If not, to whom shall we look for the taxes—the town or the Northern Gas and Electric Company?"

In answer to your first question I am of the opinion that electric transmission lines owned by municipalities are exempt from taxation by the state, whether such lines are located within or without the city limits.

Pursuant to section 1304 of the supplemental supplement the following class of property is exempt from taxation:

"Property of a * * * city when devoted entirely to public use and not held for pecuniary profit."

The better line of authorities hold that municipally-owned utilities are exempt from taxation even though the product of that utility is furnished to consumers at a fixed rental or price.

County Commissioners v. City of Wellington, 60 L. R. A. (Kan.) 850.

Under section 720 of the supplement to the code, 1913:

"Cities and towns shall have power to purchase, establish, erect, maintain and operate, within or without the corporate limits of any city or town, * * * erect power plants, with all the necessary * * * wires."

In answer to your second question, it is evident that all transmission lines owned by municipalities are exempt from taxation.

W. R. C. KENDRICK, *Assistant Attorney General.*

TRANSMISSION LINES

Electric transmission lines owned by cities of another state but located partly in Iowa, are not exempt from taxation.

July 28, 1920.

Hon. R. E. Johnson, Secretary,
Executive Council.

Dear Sir:

We have your favor of the 27th inst. in which you ask for an opinion from this department as to whether the electric transmission lines owned by a municipality in the state of Minnesota, but a part of said line being located in Iowa, is exempt from taxation for state purposes.

Section 1304 of the supplement to the code, 1915, exempts the

property of cities and towns, when devoted entirely to public use and not held for pecuniary profit. Under that section we have held that electric transmission lines owned by cities in the state of Iowa are exempt from taxation. But we do not believe it was the intention of the legislature to exempt the property of cities of another state, even though such property is located in this state.

Taxation is the rule and exemption therefrom the exception. To entitle a person to exemption from taxation such exemption should be expressed in unmistakable terms. They are not to be inferred or implied from doubtful or ambiguous language.

Our supreme court has held that a statute exempting the shares of stock held in a manufacturing corporation applied only to corporations organized under the laws of Iowa. *Morril v. Bentley,* 150 Iowa 677. Although the courts of this state have not passed upon the question raised in your letter, so far as I am able to find, yet I am of the opinion that our courts would not make a more favorable ruling concerning the exemption of property owned by a foreign city than was made in the Morril case, *supra.*

I am therefore, of the opinion that your question should be answered in the negative.

W. R. C. KENDRICK, *Assistant Attorney General.*

ASSESSMENT OF PRIVATE BANK OWNING STOCK IN MERCANTILE CORPORATION

A private bank owning stock in a mercantile corporation is entitled to deduct such shares of stock from its taxable assets.

May 28, 1919.

Hon. F. S. Shaw,
Auditor of State.

Dear Sir:

We have your letter of May 26th in which you state:

> "If a private bank lists $6,000 as a part of their assets which is invested in the stock of a lumber company, such company being incorporated and assessed and pays its taxes under section 1318, which provides for the assessment of merchants, would they be in this case entitled to deduct from their capital, surplus and undivided earnings the $6,000 or should they be assessed upon their capital, surplus and undivided earnings less their real estate and government bonds, the same as incorporated banks?"

In answering your inquiry, we desire to direct your attention to section 1318 of the code, which provides as follows:

> "Any person, firm or corporation, owning, or having in his possession, or under his control within the state, with authority to sell the same, any personal property purchased with a view of its being sold, * * *, shall be held to be a merchant for the purposes of this title. In assessing such stocks of merchandise, the assessor shall require the production of the last inventory taken, and in the assessment toll shall state the date thereof, and if in the judgment of the assessor such is not correct, or if such time has elapsed since the inventory was taken that it shall have ceased to be reliable as to the value thereof, he shall appraise the same by personal examination. The assessment shall be made at the average value of the stock during the year next preceding the time of assessment, and, if the merchant has not been in business so long, then the average value during such time as he shall have been so engaged, and, if commencing, then the value at the time for assessment, *and the provisions of this section shall apply and constitute the method of taxation of a corporation whose business or principal business is of a like character, and shall be in lieu of any tax on the corporate shares.*"

We further desire to direct your attention to the provisions of section 1321 of supplement, 1913, with reference to the assessing and taxing of private bankers. The section in part provides:

> "Private banks or bankers, or any persons other than corporations hereinafter specified, a part of whose business is the receiving of deposits subject to check, on certificates, receipts, or otherwise, or the selling of exchange, shall prepare and furnish to the assessor a sworn statement, showing the assets, aside from real estate, and liabilities of such bank or banker on January first of the current year, as follows:
>
> * * * * *
>
> "The actual value of bonds and stocks of every kind and shares of capital stock or joint stock of other corporations or companies held as an investment, or in any way representing assets, *and the specific kinds and descriptions thereof exempt from taxation.*
>
> * * * * *
>
> The aggregate actual value of moneys and credits, *after deducting therefrom the amount of deposits and the aggregate actual value of bonds and stocks, after deducting the portion thereof otherwise taxed in this state,* and also the other property pertaining to the business, shall be assessed as provided by section thirteen hundred and five (1305) of this chapter, not including real estate, which shall be listed and assessed as other real estate."

You will note from the foregoing that if the shares of stock were possessed by an individual that they would be exempt from taxation for the section first above quoted stated that the taxing of a mercantile corporation in the manner therein provided "shall be in lieu of any tax on the corporate shares." You will further note that when a private banker lists his assets, he is required to set out "the actual value of bonds and stocks of every kind and shares of capital stock or joint stock of other corporations or companies held as an investment" and "the specific kinds and description thereof exempt from taxation." If a private banker possessed stock in a mercantile corporation, we think this section clearly implies that he shall set it forth and that he is entitled to set it forth as exempt from taxation. You will further note that in arriving at the property of a private banker subject to taxation, he is entitled to deduct therefrom "the amount of deposits and the aggregate actual value of bonds and stocks, *after deducting the portion thereof otherwise taxed in this state.*"

It is the opinion of this department that a private banker is entitled to deduct, as exempt from taxation, shares of corporate stock held in a corporation engaged in a mercantile business in view of the foregoing sections.

B. J. POWERS, *Assistant Attorney General.*

DEDUCTING LIBERTY BONDS IN HANDS OF BANKS

Under the amendment of section 1304, supplemental supplement 1915, passed by 38th General Assembly banks and trust companies are entitled to have deducted obligations of the United States issued since the declaration of war with Germany in assessing the stock of the bank, provided such bank or trust company owned such obligations 60 days prior to December 31st and did not possess the same for the sole purpose of securing such deduction.

May 12, 1919.

Mr. Charles E. Hughes, County Attorney,
Belle Plaine, Iowa.

Dear Sir:

We have your letter of May 9th in which you request an opinion from this department relative to the deduction of United States government bonds in assessing the value of bank stock and in part you state:

> "The majority of the banks are making a claim for a deduction of all certificates of indebtedness as well as Liberty bonds and war savings stamps. I have advised the board

that they should not deduct the amount of certificates of indebtedness because of the fact that they are short-time obligations and were issued coincident with the various liberty loans. In order that we may not be wrong in this matter and that there may be uniformity I would like an opinion thereon from your office."

Section 1304, supplemental supplement of 1915, contained the exemptions from taxation authorized by our law and among the classes of property exempted was:

"The property of the United States and this state, * * *; municipal, school and drainage bonds or certificates hereafter issued by any municipality, school district, drainage district or county within the state of Iowa; * * * no deduction from the assessment of the stock of any bank or trust company shall be permitted because of such bank or trust company holding such bonds and certificates as may be exempted above."

The 38th General Assembly, by the passage of Senate File No. 479, amended the foregoing section by adding thereto the following:

"Provided, however, that in determining the assessed value of bank stock, the amount of obligations issued by the United States government since the declaration of war against Germany, actually owned by a bank or trust company shall be deducted, and any bank or trust company which since January 1, 1919, has been assessed on its shares of stock without so deducting such United States government securities shall be entitled to have its assessment on its shares reduced by the board of supervisors of the county in which such bank is located, so as to deduct from its total valuation such government securities. Provided, however, that no deduction shall be made unless the bank or trust company claiming the same shall have been the owner in good faith and not for the sole purpose of securing such deduction, of said securities for a period of more than sixty (60) days prior to December 31st of the year preceding that for which the assessment is made."

You will note from the foregoing that "the amount of obligations issued by the United States government since the declaration of war with Germany" are to be deducted. The present war with Germany was declared on the sixth day of April, 1917. Hence obligations of the United States government issued since that date and actually owned by a bank or trust company should be deducted under the provisions of this act. An obligation is any written contract whereby one party becomes bound to another

such as by the issuance of certificates of indebtedness, war savings certificates, thrift stamps or government bonds. The United States is obligated to pay to the holders of such certificates or bonds the sums respectively specified therein. A certificate of indebtedness is just as much an obligation of the United States as a bond. It is true that a certificate of indebtedness is of short duration and cannot be issued for a period longer than one year. *Sections 6824, U. S. Compiled Statutes,* 1916; *6829-kk, U. S. Compiled Statutes,* Temp. Sup., 1917. It should be noted that the amendment provided for by the 38th General Assembly is such that bonds or obligations of the United States issued prior to April 6, 1917, are not to be deducted, and if any bank or trust company seeks to have obligations of the United States issued prior to the declaration of war with Germany deducted, its request should be denied, as there is no provision in the law authorizing such procedure.

You will note that this law provides that a bank or trust company shall be permitted to make such deduction (1) when it has in good faith been the owner of such obligations "for a period of more than sixty (60) days prior to December 31st of the year preceding that for which the assessment is made," and (2) that such bank or trust company must have been the owner of such obligations "for the sole purpose of securing such deduction."

It should be noted in this connection that one who claims exemption must be able to point out some statute or rule of law which sustains such exemption.

In re assessment of Boyd, 138 Iowa 583.

In view of this well-established rule, the burden is upon the bank or trust company claiming the right to such deduction to produce evidence showing that it is clearly within the exemption provided for in the foregoing act and unless such bank or trust company is able to clearly establish its right to such determination, it should be denied.

B. J. POWERS, *Assistant Attorney General.*

TAXATION OF BANK STOCK AND PAYMENT OF TAX THEREON

Banks that have paid taxes upon capital stock of real estate fixed by assessor and is deducted cannot recover refund when court fixes a different valuation.

September 30, 1920.

Mr. Lew McDonald, County Attorney,
Cherokee, Iowa,

Dear Sir:

Your letter of the 13th inst. addressed to Attorney General Havner has been referred to me for reply.

You ask for an opinion from this department as to whether, under the ruling of our supreme court, in the case of *Security Savings Bank v. Board of Review of the City of Waterloo,* filed July 6, 1920, and reported in northwestern advance sheets of August 27, 1920, at page 562, banks are entitled to a refund of taxes assessed against the shares of stock, wherein the amount of the bank's capital actually invested in real estate was not deducted by the assessor in fixing the assessable value of the shares of stock, particularly whether such banks are entitled to a refund for the year 1919, and which were paid on April 1, 1920.

The holding of our supreme court in the Security Savings Bank case, *supra,* is to the effect that, in fixing the amount of the capital of a bank invested in real estate and to be deducted from the assessable value of the shares of stock in such banks under section 1322 of the supplement to the code, 1913, the amount of capital actually invested shall be deducted, and not the actual value at which said real estate is valued by the assessor, as prescribed in section 1324 of the code.

I am of the opinion that such banks are not entitled to have any part of such taxes refunded which were paid without protest on April 1, 1920. It is familiar doctrine in this state that taxes paid voluntarily under mistake of law and distributed among the several funds cannot be recovered by the party so paying them.

Adair County v. Johnson, 160 Iowa 683.

For your own information, I might suggest that a notice of filing and petition for rehearing in the Security Savings Bank case has been served and filed. A hearing will probably be had at the January, 1921, term.

W. R. C. KENDRICK, *Assistant Attorney General.*

TAXATION OF STOCK IN FEDERAL RESERVE BANK

The stock of a federal reserve bank is not exempt from taxation under the provisions of section 1, chapter 257, acts of 38th General Assembly.

April 28, 1920.

Mr. B. E. Rinehart, County Attorney,
Anamosa, Iowa.

Dear Sir:

Receipt is hereby acknowledged of your favor of yesterday wherein you ask the opinion of this department on the following question:

> "Where a bank holding stock in a federal reserve bank, which stock is nontaxable, can the bank deduct such stock against their local tax assessment the same as liberty bonds and that class of paper?"

Section 1 of chapter 257, acts of the 38th General Assembly, provides, in part, as follows:

> "That section 1304, supplemental supplement to the code, 1915, be and the same is hereby amended by adding after the semicolon in line 16 thereof the following: 'Provided, however, that in determining the assessed value of bank stock the amount of obligations issued by the United States government since the declaration of war against Germany, actually owned by a bank or trust company shall be deducted.'"

The exemption here provided pertains to the class of obligations therein described and cannot be extended to any other class, and as the stock of a federal reserve bank does not come within the class of obligations specified, the same may not be deducted from the assets of a banking institution.

J. W. SANDUSKY, *Assistant Attorney General.*

TAXATION OF LAND CONTRACTS

What is termed optional contracts which merely give an option to purchase are not taxable.

March 15, 1920.

Mr. Lew McDonald, County Attorney,
Cherokee, Iowa.

Dear Sir:

We have your favor of the 13th inst. pertaining to the question of the taxation of what may be termed "land contracts," and in reply will say that the ordinary contract for the sale of land, the deed thereto to be executed at a future time, and providing for partial payments or payment in full, is taxable under our laws.

I call your attention to the case of *F. W. Rampton, appellant, v. G. L. Dobson, treasurer of Polk county, appellee,* 156 Iowa 315, which rules the point very clearly and cites a number of cases in support thereof.

There is a class of contracts sometimes designated "optional contracts," where the person is given an option to buy a farm, but there is nothing obligatory upon the party to perform the contract. Under such circumstances the purchase price of the farm is not taxable as moneys and credits, and the rule applicable to this class of cases is announced in the case of *In re Listing and Assessing Property of Shields Bros.,* etc., 134 Iowa 559; and also in the case of *Frank Bissell, appellant, v. The Board of Review of the Town of Dunlap,* 158 Iowa 38.

From a careful reading of these cases I think you may readily distinguish the class of contracts that are taxable from those that are not taxable.

J. W. SANDUSNY, *Assistant Attorney General.*

DEDUCTING AMOUNT DUE OF LAND CONTRACTS

Indebtedness incurred by contract for purchase of real estate may be deducted from moneys and credit if properly listed.

December 10, 1919.

Mr. H. S. Stephens, County Attorney,
Clarinda, Iowa.

Dear Sir:

Your favor of the 15th inst. addressed to the attorney general has been referred to me for answer.

In your letter you say:

> "Mrs. Helen V. Anderson of Essex, Iowa, Route No. 1, on January 1, 1919, had $14,000 in moneys and credits, and $3,000 indebtedness on February 26, 1919. She gave in this amount to the assessor for taxation. Some time in June, 1918, she contracted for the purchase of 120 acres of real estate in Montgomery county, and by the terms of this contract she was to get possession March 1, 1919, and agreed therefore to pay $33,000, the vendor leaving a mortgage on the farm for $13,000. Mrs. Anderson's contention is, that by this contract, she created an indebtedness in the sum of $33,000, and that this indebtedness should be deducted from her moneys and credits. This being the case, if this indebtedness is deducted, she would have no moneys or credits on which to pay tax."

You ask whether Mrs. Anderson is entitled to a deduction from her moneys and credits of the amount of indebtedness which she she has incurred by the execution of the contract.

In answer thereto we have to say that section 1312 of the code supplement provides for the listing of property for taxation by each inhabitant of the state.

Section 1310 provides for the assessment of moneys and credits.

Section 1311 provides that in making up the money or credits which any person is required to list or to have listed or assessed he will be entitled to deduct from the actual value thereof the amount of all debts owing by him.

Section 1373 provides that if any person is aggrieved by the action of the assessor in assessing his property, he may make complaint to the board of review, and if dissatisfied with its action, may appeal therefrom to the district court within thirty days after the adjournment of the board.

In order to avail himself of the privilege of deducting his indebtedness from his moneys and credits the taxpayer must list the indebtedness which he desires to have deducted. He may waive the right to have his indebtedness offset against his moneys and credits.

Carpenter v. Jones County, 130 Iowa 494.

In defining the word "credits" our supreme court has held that where one holds an enforceable contract for the sale of land he has such a credit as would be subject to taxation.

In re Assessment of Boyd, 138 Iowa 583;
Clark v. Horn, 122 Iowa 375;
Rampton v. Dobson, 156 Iowa 315.

If, however, the contract is simply an option to purchase it is not taxable.

In re Shields Brothers, 134 Iowa 559;
Bissell v. Board of Review, 158 Iowa 38.

We assume from your letter that the contract to which you refer is a contract for the sale of land rather than a mere option. If this be true there is no question but that the contract itself would be taxable as a credit. If so it must necessarily follow that the obligation incurred by the vendee under the contract

is such an indebtedness as might be used as an offset against moneys and credits, providing the proper steps were taken by the taxpayer to entitle him to such offset.

It is therefore the opinion of this department that under the contract referred to by you, Mrs. Anderson would be entitled to offset the indebtedness incurred by her under such contract as against moneys and credits, providing she listed it as an indebtedness at the time of making her assessment and also took the necessary steps to preserve her rights under the statute.

H. H. CARTER, *Assistant Attorney General.*

TAXATION OF ANNUITIES AND LIFE ESTATE

Annuities are subject to ordinary taxation in this state at their actual value by virtue of Sec. 1310, Supplement 1913. The value of an annuity should be computed by use of mortality tables. Where a person deeds a farm to a college and reserves to himself the income from the farm during his life, the land is subject to ordinary taxation even though the college may be exempt.

February 25, 1919.

Mr. Maxwell A. O'Brien, County Attorney,
Oskaloosa, Iowa.

Dear Sir:

We have your letter of February 21st in which you ask for our opinion upon the following propositions:

> "I am writing to ask you whether an annuity bond given by an educational institution, to-wit: Penn College of this city to a private individual, which pays 5 per cent during the individual's life, is taxable. This bond arose through a gift to the college by this man and providing that he was to have the above annuity, the college giving bond for the same. Would seem that this taxable, but just what means to use to arrive at its value I cannot determine, and would like to have your opinion on it.
>
> "Penn College has, also, sold a number of lots and in their deeds provided that they shall be free from taxes until 1921. I presume that this does not have any effect upon their being assessed to the present owners.
>
> "Another instance, a man deeded his farm to the college with the reservation of the income from same during his life. I presume that this would fall under the same classification as the above mentioned annuity bond as to its taxable value."

In response to your first question permit us to direct your attention to section 1310, supplement, 1913, which provides in part as follows:

> "Moneys, credits and corporation shares or stock, except as otherwise provided, cash, * * * *annuities*, and corporation shares or stock not otherwise taxed in kind, *shall be assessed and*, * * * *shall be taxed* upon the uniform basis throughout the state of five mills on the dollar of actual valuation, same to be assessed, and collected where the owner resides. * * *"

You will therefore see that our legislature has provided for the assessment and taxation of annuities at their actual value. In arriving at the actual value of an annuity it is stated in *3 Corpus Juris,* page 210, that:

> "In absence of statute or rule to the contrary, it is generally proper to compute the value of an annuity by means of mortality tables."

You should therefore secure a 5 per cent single life table, assuming there is only one annuitant, and by the use of such table compute the present worth of the annuity, and the present worth should become the basis for the assessing of the five-mill levy. In this connection permit us to suggest that you will find a 4 per cent single life table in the Iowa Inheritance Tax Laws issued by the treasurer of state in 1918. You will also find a 5 per cent single life table in Gleason & Otis on Inheritance Taxation, pages 221 and 223.

In the second paragraph of your letter you state that Penn College has sold a number of lots and provided in their deed that the lots shall be free from taxes until 1921. You are right in your assumption that this has no effect upon the right of the assessor to assess the lots to the present owners.

In the third paragraph of your letter you state that a man deeded his farm to the college with the reservation of the income from the same during his life. We are of the opinion that in this instance the owner of the farm has in his deed reserved to himself a life estate. The fact that the remainder man in this case is a college, and under the statutes of this state is exempt from ordinary taxation, would not change the rule that the life estate in the farm should be assessed and taxed as ordinary real property. The fact that it will some time be exempt from taxation does not make it exempt in the hands of the life tenant. To

hold otherwise would permit a man to convey his property to a benevolent corporation exempt from ordinary taxation and yet retain the use of the same during his lifetime and thus escape his just burden of taxes.

This is not a case of an annuity, for an annuity has been defined as

> "a stated sum payable annually or as a yearly payment of a certain sum of money granted to another in fee, for life, or for years, and chargeable only on the person of the grantor."
>
> 3 *Corpus Juris,* 200;
> *White v. Marion,* 139 Iowa 479;
> *Nehls v. Sauer,* 119 Iowa 440.

In the case of *White v. City of Marion,* 139 Iowa 479, 485, the supreme court in considering the exemption of an old soldier who was possessed of a life estate in certain real property said:

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

It is therefore the opinion of this department that the land in question should be assessed and taxed just as though the life tenant was the owner in fee.

B. J. POWERS, *Assistant Attorney General.*

MORTGAGES

A citizen of Iowa owning a mortgage on real estate in another state is subject to taxation in Iowa even though the mortgage is taxed in the other state.

May 15, 1920.

Mr. Harry Langland, County Attorney,
Nevada, Iowa.

Dear Sir:

Your letter of the 14th inst. addressed to the attorney general has been referred to me for reply.

You state:

> "A man living in Ames, Iowa, is the owner and holder of a mortgage on a South Dakota farm; he sent this mortgage to South Dakota to be recorded; the recorder informed him that he must pay a registry mortgage tax of $90 before

the mortgage will be recorded. He has been assessed in this county for moneys and credits on this same mortgage."

You then ask:

"Does this amount to double taxation? Should the mortgage be exempted from taxation in this state?"

The supreme court of this state has repeatedly held that moneys and credits owned by a resident of Iowa, which moneys and credits are located in another state, are taxable in Iowa even though such moneys and credits are also taxed in the state of their physical location, and such taxation does not violate the rule against double taxation.

It is therefore the opinion of this department that the mortgage referred to in your letter should be taxed in this state.

W. R. C. KENDRICK, *Assistant Attorney General.*

PLAN OF ASSESSING MERCANTILE CORPORATIONS

Where a mercantile corporation conducts its business at A, but its articles of incorporation name B as the principal place of business, and in fact, no business is transacted at the latter place, the holding of stockholders meetings, the stock of merchandise should be returned for taxation purposes at A.

Owners of stock in a bank should be assessed at the place where the bank is located.

December 24, 1919.

Mr. Charles E. Miller, County Attorney,
Albia, Iowa.

Dear Sir:

We have your letter of December 5, in which you ask for the opinion of this department upon the following propositions:

"(1). An incorporated company conducts a general merchandise store in A, but in its articles of incorporation names B as its principal place of business and holds its stockholders' meetings there. It conducts no merchandise or other business in B. Can it escape taxation on its stock of merchandise in A by giving in its corporate stock for taxation in B?

"(2). Can a bank which is not a branch of any other bank legally give in its corporate stock for taxation elsewhere than where it conducts business?"

In answer to your first inquiry we desire to direct your attention to section 1318, which provides in part as follows:

"Any person, firm or corporation, owning, or having in his possession, or under his control within the state, with authority to sell the same, any personal property purchased with a view of its being sold, * * * shall be held to be a merchant for the purposes of this title. In assessing such stocks of merchandise, the assessor shall require the production of the last inventory taken, and in the assessment roll shall state the date thereof, and if in the judgment of the assessor such is not correct, or if such time has elapsed since the inventory was taken that it shall have ceased to be reliable as to the value thereof, he shall appraise the same by personal examination. The assessment shall be made at the average value of the stock during the year next preceding the time of assessment, and, if the merchant has not been in business so long, then the average value during such time as he shall have been so engaged, and, if commencing, then the value at the time for assessment, and *the provisions of this section shall apply and constitute the method of taxation of a corporation whose business or principal business is of a like character, and shall be in lieu of any tax on the corporate shares.*"

You will observe from a reading of the foregoing that it is the stock of merchandise or the property of the corporation which is to be assessed and not the shares of corporate stock.

We now draw your attention to the place where such property should be listed for taxation. Section 1315 of the code provides as follows:

"Moneys and credits, notes, bills, bonds and corporate shares of stock 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."

In case the business of the corporation is conducted in two or more places then the provisions of section 1317 of the code become applicable, which provides in part as follows:

"When a person, firm or corporation is doing business in more than one assessment district, the property and credits existing in any one of such districts, or arising from business done in such district, shall be listed and taxed in that district, and the credits not existing in or pertaining especially

to the business in any district shall be listed and taxed in that district where the principal place of business may be. The personalty, moneys and credits connected with or growing out of all business transacted directly or indirectly by or through the servants, employes or agents of any person, firm or corporation engaged in the banking business, having an office or agency in more than one assessment district for the transaction of business, shall be taxable as provided in this chapter for the taxing of private banks and bankers, in the assessment district where said branch business is done. An assessment made in such district shall be considered, and proper deduction made in determining the taxable property of such person or firm, or shares of stock of such corporation, at its principal place of business. The stipulation for the payment of obligations growing out of the business of such agency, in another district than the place where such agency is located, shall not determine where the property or credits of such parties shall be taxed. Any individual of a partnership is liable for the taxes due from the firm. * * *''

Taking the foregoing provisions into consideration together with the provisions of section 2 of article 8 of the constitution, which provides that:

> ''The property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals.''

we can reach no conclusion other than to hold that the stock of merchandise and property of the corporation mentioned and which is located within the assessment district of A should be listed and assessed within the assessment district of A rather than that of B. In this connection we refer you to the case of *Layman v. Telephone Company,* 123 Iowa 591, which has some bearing upon this subject.

Answering your second inquiry we assume that the bank mentioned in your inquiry is either a national, state or savings bank, and therefore its stock should be assessed to the individual stockholders at the place where the bank is located in compliance with the provisions of section 1322, supplement, 1913.

B. J. POWERS, *Assistant Attorney General.*

TAXATION OF CONCERNS IN GRAIN BUSINESS

Taxation of corporations engaged in the grain business should be under the provisions of section 1315 and there should be no tax levied on the shares of stock under the provisions of section 1318.

May 11, 1920.

Mr. T. F. Lynch, County Attorney,
Pocahontas, Iowa.

Dear Sir:

I have reached a conclusion in connection with the question of the assessment of elevator corporations in your county. This matter was taken up by you, Mr. Hudson and Mr. Rassler orally with me about a week ago.

It is my opinion that a corporation engaged in the grain business should be assessed under the provisions of section 1315 of the code. I had some doubt about whether there should also be an assessment of the shares of corporate stock, but I am inclined to think there should be no such assessment.

Section 1318 provides for the assessment of merchants and of stocks of merchandise, and that section closes with this provision:

> "The assessment shall be made at the average value of the stock during the year next preceding the time of assessment; and, if the merchant has not been engaged in business so long, then the average value during such time as he shall have been so engaged; and, if commencing, then the value at the time for assessment, and the provisions of this section shall apply and constitute the method of taxation of a corporation whose business or principal business is of a like character, and shall be in lieu of any tax on the corporate shares."

It seems to me that an elevator company comes within the definition of "a corporation whose business or principal business is of a like character," and therefore that the assessment made under section 1318 is "in lieu of any tax on the corporate shares."

F. C. DAVIDSON, *Assistant Attorney General.*

TAXATION OF INSURANCE COMPANIES OWNING UNITED STATES BONDS

The value of United States Bonds is not to be deducted from capital, surplus and profits in determining value of shares of stock in such corporation.

January 30, 1919.

Hon. R. E. Bales,
Secretary Executive Council.

Dear Sir:

I am in receipt of an inquiry from Mr. Shaw, auditor of state, asking for an opinion on the following:

"In the assessment of stock of corporations such as insurance companies, etc., where the stock is assessed to the individual stockholder, is the corporation entitled to deduct government bonds from its capital, surplus and undivided earnings?"

The opinion which I have given you under date of January 30, 1919, with reference to bank stock applies in this case, and the question is determined by the decision in the case of

Head v. Board of Review, 170 Iowa 300,

which case has been followed in the case of

First National Bank v. City of Council Bluffs, 161 N. W. 706.

It is therefore the opinion of this department that in arriving at the value of such shares of stock there can be no deduction for any kind of bonds, government or otherwise.

H. M. HAVNER, *Attorney General.*

TAXATION OF NOTES SECURED BY MORTGAGES ON LAND IN OTHER STATES

Notes held by residents of Iowa secured by mortgage on Nebraska real estate are assessable and taxable in Iowa.

April 22, 1919.

Mr. W. A. Follett, County Attorney,
Atlantic, Iowa.

Dear Sir:

Your letter of the 18th inst. addressed to Attorney General H. M. Havner has been referred to me for reply.

You ask whether or not a resident of Iowa owning promissory notes secured by a mortgage on real estate situated in Nebraska is liable to taxation on said notes in this state.

Section 1350 of the code provides that:

"Personal property shall be listed and assessed each year in the name of the owner thereof on the first day of January."

A promissory note secured by a mortgage on real estate is personal property for the purpose of compensation.

In the case of

Judy v. Beckwith, 137 Iowa 24,

our supreme court held the shares of stock in an Illinois corporation held and owned by a resident of Iowa are assessable and taxable in this state. In that case it is said that:

> "The rule applies, not alone to corporate shares, but to moneys and credits and other personalty of kindred nature."

The rule announced in the case of *July v. Beckwith, supra,* applies to promissory notes owned by residents of Iowa and secured by mortgage on real estate situated in Nebraska.

W. R. C. KENDRICK, *Assistant Attorney General.*

ASSESSING RAILROAD SHOPS

Railroad shops listed and assessed by the executive council are not subject to taxation by local authorities for school purposes.

March 2, 1920.

Mr. J. M. C. Hamilton, County Attorney,
Fort Madison, Iowa.

Dear Sir:

While in the city a few days ago you submitted to this department for an opinion a letter addressed to you and written by E. C. Lynn, superintendent of schools in Lee county, and bearing date of November 26, 1919.

The question Mr. Lynn asked is as follows:

> "Has the independent school district of Fort Madison any legal right to include the Santa Fe railroad shops as property within the district subject to taxation for the building of a new school house?"

It is our opinion that the shops of the Santa Fe Railroad Company located in the Fort Madison school district are not subject to taxation for school house purposes. If the shops are used exclusively in the operation of that railroad, and have been listed and assessed by the executive council of the state of Iowa, then such property is not subject to taxation by local authorities for school house purposes.

Section 1334-1334-a, Code Supplement, 1913;
Section 1342 of the Code;
C., B. & Q. Ry. Co. v. Kelley, 105 Iowa 106.

W. R. C. KENDRICK, *Assistant Attorney General.*

TAXATION OF TRACTORS AND THRESHING MACHINES

Tractors owned by farmers and used exclusively in farming are to be exempted from taxation under the provisions of section 1304 supplemental supplement, 1915. Threshing machines are not in the same classification.

February 3, 1920.

Mr. E. J. Wenner, County Attorney,
Waterloo, Iowa.

Dear Sir:

We have your request for an opinion upon the following questions:

> "Is a farm tractor owned by a farmer and actually and exclusively used by him on his farm and not used in doing work for others for hire exempt from taxation?
>
> "I am also asked this question with reference to threshing machines. Within the last two or three years small machines have become popular, and several farmers have purchased machines to do their own work. These are operated by their own tractors."

In answering your inquiry permit us to first direct your attention to two rules which have been repeatedly adhered to in the interpretation of the statutes dealing with questions of taxation.

The first is that "taxation is the rule, and exemption the exception; therefore, strict construction of the statute under which the exemption is claimed is also the rule."

> *Farwell v. Des Moines Brick Manufacturing Co.*, 97 Iowa 286.

The second rule is that "every presumption is in favor of liability for taxation, and if a reasonable doubt exists it is to be resolved in favor of the state."

> *Lacey v. Davis*, 112 Iowa 106.

With these rules in mind we direct your attention to that portion of section 1304, supplemental supplement, 1915, which reads as follows:

> "The following classes of property are to be taxed: * * *
>
> "5. The farming utensils of any person who makes his livelihood by farming, the team, wagon and harness of the teamster or drayman who makes his living by their use in hauling for others, and the tools of any mechanic, not in any case to exceed three hundred dollars in actual value."

There have been no decisions of our supreme court interpreting the preceding section of the statute with reference to exemption. In construing the statutes with reference to exemptions from execution, our court has held that a threshing machine cannot be claimed exempt under language which makes "the proper tools or implements of a farmer exempt from execution."

Meyer v. Meyer, 23 Iowa 359.

While our court has adhered to this view, yet we ought to state that it is not in accord with the opinions rendered in a number of other states, wherein threshing machines have been held to be exempt from execution.

In re Baldwin, 12 Pac. 44, 71 Cal. 74;
Muso v. Darrah, 2 Ohio Dec. 604.

In the more recent case of *Murphy v. Continental Insurance Company,* 178 Iowa 375, involving the recovery for the loss of certain farming utensils destroyed by fire, our supreme court held that the term "farming utensils," as employed in a policy of insurance, was broad enough to permit the property owner to recover for the loss of a windmill and stock scales stored on the farm awaiting erection, and in discussing the question of what constitutes a utensil the court in part states as follows:

"The Century Dictionary defines 'utensil' as:

"'An instrument or implement, as, utensils of war; now, more especially, an instrument or vessel in common use in the kitchen, dairy or the like, as distinguished from agricultural implements and mechanical tools.'

"Webster's Dictionary says it is:

"'An instrument or vessel, especially one used in the kitchen or in a dairy.'

"The supreme court of North Carolina in *Elliott v. Fosten,* 57 N. C. 433, said that the word 'utensil' will embrace everything from household purposes or applicable to the trade to which the term has reference.

"In *Laporte v. Libby,* 114 La. 570, the court expressed the same view:

"'The word "utensils" more especially means an implement or vessel for domestic or farming use. See Standard Dictionary, verbo. As used in civil code, article 3259, "utensils" is a translation of "utensiles," used in article 2102 of the code Napoleon. This word, in France, has been held to

include a threshing machine. Fuzier Herman, Code Civil, Vol. 4, p. 873. In French jurisprudence the word is used as synonymous with "agricultural instruments," whatever may be their nature. Baudry Lancantinerie, Droit Civil, Des Privileges, Vol. 1, p. 445, No. 472. Laurent says that the word "utensils" has a very extended meaning. It has been held in other states of the Union that "mowers" and "combined harvesters" used by debtors for necessary farm work are within the meaning of the term "farming utensils or implements" as used in exemption laws. * * * We are of the opinion that a steam thresher is clearly within the term "farming utensils," as used in civil code, article 3259.'

"A combined harvester was held to be a utensil in *In re Estate of Klemp,* 119 Cal. 41, and a thresher was so found to be in *Spence v. Smith,* 121 Cal. 536. In *Lahn v. Carr,* 120 La. 797, it is said that a steam engine used in connection with a pump for irrigation, with a thresher, and with machinery for cultivating a crop of rice, and not shown to have been used for any other purpose than the cultivation and harvesting of such crop, is a 'farming utensil' within civil code, article 3259, on which the privilege of the vendor is superior to that of the lessor of the land, and this whether the engine was bought as part of the pump, or of the thresher, or at any other time and from any other source."

It will thus be observed that under the definition above given that a tractor and a threshing machine may properly be classified as a "farming utensil," but whether the legislature intended to have the term "utensil" construed so broadly in the statute with reference to exemption from taxation is very doubtful.

The reasoning in the case of *Meyer v. Meyer, supra,* appeals to us as being very forceful and to announce the rule which ought to be applied in solution of the present problems. At page 375 of 23d Iowa the court states:

"The threshing machine was used by the husband to thresh his own grain, and that of other people for hire. Under section 2361, plaintiff claims that this is not assets to be administered, because, as she asserts, it is property which, under sections 3304 and 3305 of the revision, is exempt from execution. Whether it is thus exempt is the only question made. It is plain to be exempted under the language, 'the proper tools or implements of a farmer.' Taking these last sections together, we are of opinion that they intended to exempt only the ordinary and usual tools of husbandry, and do not extend to a threshing machine owned by a farmer farmer to thresh his own grain, and that of others for hire.

"This opinion rests upon the nature of the machine and the obvious purpose of the exemption law. Rev. sections 3304-3309. The machine is complicated and expensive. Judges and legislators must be taken to be conversant with the common facts of every day life. Such a machine cannot be operated with less than from six to ten horses. It also requires a large force of men. It costs several hundreds of dollars to purchase one. Not one farmer in twenty—perhaps not one in a hundred—owns a machine of this character. The farmer, in general, does not find such a machine a profitable investment. It is cheaper to hire than to own. In consequence of these facts, threshing machines are operated almost exclusively by persons who buy and own them on purpose to thresh grain for others for hire. In a few instances two or more farmers club together and buy one in common. Very rarely does a farmer buy such a machine for his own use alone. If he owns one, it is generally with a view to 'job' or thresh for others. And such would seem to have been the purpose for which the testator owned the machine in question. A few machines do all the threshing for a township, and threshing grain may be said to be a business by itself. In view of these facts the exemption law was passed. In view of these facts the law should be construed. The law makes no extravagant exemptions. It is intended for the poor rather than the rich. Its design is to enable the debtor and his family to live, by shielding from the creditor the ordinary and usual means of acquiring a livelihood.

"The exemption is of necessary articles, tools, instruments, etc., and not articles and things merely convenient. Thus it exempts a team of two horses, but a team of two horses cannot operate such a machine. That such a machine is not a necessary implement of husbandry is apparent from the fact, that most farmers neither own nor care to own one.

"These circumstances distinguish a threshing machine from a plow, reaper, mower, binder or fanning mill, and the latter may well be exempt and not the former. It might be very convenient for a farmer to own a small portable mill, run by steam, to grind the grain into flour, after it is threshed, but would it be exempt from execution? Why may it not be if a threshing machine may be held to be exempt? Before concluding, it may be observed, that under a statute similar in its objects and not essentially dissimilar in its language, a threshing machine has been recently held in New York not to be exempt. *Ford v. Johnson,* 34 Barb. 364.

"All the members of the court concur in the above conclusion, but a portion of the court do not wish to be bound if a case should arise in which a threshing machine was claimed by a farmer who owned and needed it for actual use, and did not keep and own it for the purpose of gain."

We are inclined to the view that the exemptions intended by the statute were to be applied to the usual tools and utensils needed in farming. In this day and age the farm tractor is of such common use that it may be said to be one of the necessary and usual tools used in the farming industry, and we are therefore of the opinion that a tractor owned by a farmer and used by him for such purposes is to be exempt from taxation. We are of the opinion that a threshing machine does not come within this classification since it is not one of the usual and ordinary tools or utensils possessed by farmers in this state. It is only a very small percentage of the farmers who own such a machine.

Should it later be that a threshing machine is owned by a great majority of the farmers it may be that it will then be classed as one of the ordinary farming utensils, but the conditions at the present time do not warrant us in holding it to be such.

B. J. POWERS, *Assistant Attorney General.*

TAXATION OF CATTLE SOLD JANUARY 1ST

A resident of Iowa who ships cattle out of this state before January 1st and who sells the same on the Chicago market on January 1st should not have such cattle assessed to him as personal property, but should be assessed with the value of such cattle as a "money and a credit" and be taxed thereon.

November 19, 1919.

Mr. Harry Langland, County Attorney,
Nevada, Iowa.

Dear Sir:

We have your inquiry of recent date in which you request the opinion of this department upon the following proposition:

> "During the latter part of the year 1918 a resident of Story county loaded several cars of cattle for shipment to Chicago. The cattle were consigned to a commission house at that place and were sold on the market by such commission men on January 1, 1919. The cattle were not in Iowa on January 1st, having been shipped a day or so prior thereto. I would like to know whether whether these cattle should be assessed to the owner as personal property or whether they should be assessed as a money and credit."

In answering your inquiry we first desire to direct your attention to that part of section 1350 of the code, which provides that:

"Property shall be taxed each year. The personal property shall be listed and assessed each year in the name of the owner thereof on the first day of January. * * *"

Section 1304, supplemental supplement, 1915, provides that certain classes of property are not to be taxed.

Section 1508 of the code states that:

"All other property, real or personal, is subject to taxation in the manner prescribed, and this section is also intended to embrace: Ferry franchises and toll bridges, which, for the purpose of this chapter are considered real property; horses, cattle, mules and asses over one year of age; sheep and swine over six months of age; * * *"

Section 1312, supplement, 1913, relates to the listing of property for taxation, and in part states:

"Every inhabitant of the 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; * * *"

In addition to the foregoing statutes section 1309 of the code defines what constitutes a credit in the following terms:

"The term credit, as used in this chapter, includes every claim or demand due or to become due for money, labor, or other valuable thing, every annuity or sum of money receivable at stated periods, and all money or property of any kind secured by deed, title bond, mortgage or otherwise; but pensions of the United States or any of them, or salaries, or payments expected for services to be rendered, are not included in the above term."

Under the state of facts presented to us the person to whom you refer did not possess any cattle within the jurisdiction of the state of Iowa on January 1st. The cattle were in the state of Illinois. While it may be possible that this state would have authority to tax the owner of such cattle, yet the general rule as expressed by the text writers is opposed to such a holding.

Judson on Taxation, second edition, section 482, states:

"The taxation of personal property according to its actual situs is so clearly established in the different states, that practically no attempt is made to assert the right to tax tangible personal property, such as merchandise, live stock, furniture, etc., at the domicil of the owner, when the property is not located within the state. The state statutes providing for the taxation of property *within the state* have been con-

> strued as meaning property actually situated therein. Thus it was held in New York that an assessment of a citizen or one domiciled in that state, upon capital invested in business in New Orleans, and from stock and household furniture in New Jersey, was erroneous under a statute which provided that 'all lands and all personal estate within this state * * * shall be liable to taxation.' The court based its opinion upon the language and purpose of the statute, and intimated that the legislature could have taxed the property, but had not done so. In other words, the question was one of construction, and not of power. * * *''

While the authorities view with favor the rule above announced, yet when it comes to the question of taxing moneys and credits, it has been repeatedly held that the foregoing rule does not apply and that moneys and credits belonging to a person domiciled within the taxing jurisdiction should be listed and subjected to taxation even though such moneys and credits were in fact due from residents of other states.

Section 1313 of the code contemplates just such procedure. It provides:

> ''Moneys and credits, notes, bills, bonds and corporate shares of stock 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.''

In the case of

> *Kirtland v. Hotchkiss,* 100 U. S. 491,

it was held that a citizen of Connecticut was properly assessed for taxation in that state on bonds owned by him which were executed in Chicago and secured by a mortgage upon Chicago property. These bonds were assessed as a part of his personal property. The court in part stated:

> ''The question does not seem to us to be very difficult of solution. The creditor, it is conceded, is a permanent resident within the jurisdiction of the state imposing the tax. The debt is property in his hands constituting a portion of his wealth, from which he is under the highest obligation, in common with his fellow citizens of the same state, to con-

tribute for the support of the government whose protection he enjoys.

"That debt, although a species of intangible property, may, for purposes of taxation, if not for all others, be regarded as situated at the domicile of the creditor. It is none the less property, because its amount and maturity are set forth in a bond. That bond, wherever actually held or deposited, is only evidence of the debt, and if destroyed, the debt—the right to demand payment of the money loaned, with the stipulated interest—remains. Nor is the debt, for the purpose of taxation, affected by the fact that it is secured by mortgage upon real estate situated in Illinois. * * * The debt, then, having its situs at the creditor's residence, both he and it are, for the purposes of taxation, within the jurisdiction of the state. It is, consequently, for the state to determine, consistently with its own fundamental law, whether such property owned by one of its residents shall contribute, by way of taxation, to maintain its government. Its discretion in that regard cannot be supervised or controlled by any department of the federal government, for the reason, too obvious to require argument in its support, that such taxation violates no principle of the federal constitution. Manifestly it does not, as is supposed by counsel, interfere in any true sense with the exercise by Congress of the power to regulate commerce among the several states. Nor does it, as is further supposed, abridge the privileges or immunities of citizens of the United States, or deprive the citizen of life, liberty, or property without due process of law, or violate the constitutional guaranty that the citizens of each state shall be entitled to all privileges of citzens in the several states. * * * "

We are therefore of the opinion that you should proceed to make the assessment in the case presented to us on the basis of a money and credit rather than assess such cattle as personal property.

B. J. POWERS, *Assistant Attorney General.*

EFFECT OF ASSESSING LOTS IN GROSS

Where a number of town lots are assessed as one tract of land they must be sold at tax sale as one tract but where assessed separately they must be sold separately. And when once lawfully assessed and sold in gross the county treasurer has no authority to divide the lots and allow the owner to redeem as to part and not as to the others.

October 2, 1919.

Mr. F. H. Don Carlos, County Attorney,
Perry, Iowa.

Dear Sir:

We have your letter of September 27th in which you state:

> "If assessor's book shows that a party owns three or four lots in a block and same are sold for delinquent taxes, must the treasurer offer each lot separately? Or can he legally offer all lots for sale?
>
> "If the treasurer has sold four lots or more, same being in one party's name, and afterwards a lot or two is sold, can the last owner demand that auditor separate the lots and allow him to pay up delinquent taxes on his two lots and not pay up on others?"

In answering your inquiry, permit me to state that our supreme court has repeatedly adhered to the doctrine that where land is properly and legally assessed for taxation in a body instead of parcels it may be sold for taxes in gross; but if separate parcels of land are assessed separately, or are, in fact, separate and distinct tracts of land, a sale thereof is void. You will find this doctrine announced in the case of *Corbin v. DeWolf*, 25 Iowa 124. This case was reaffirmed in *Ware v. Thompson*, 29 Iowa 66; *Corning Town Co. v. Davis*, 44 Iowa 630. There are also a number of other cases in which the same doctrine has been adhered to. You will therefore observe that if the assessor has assessed each lot separately that it would be necessary for the treasurer to sell each lot separately, but if a number of lots have been assessed together as one tract of land, then it is the duty of the treasurer to sell the entire tract as one tract of land even though there may be a number of lots in the tract. If your assessor assessed the lots in gross and they were sold in gross, there is no provision in the law whereby the owner may pay up delinquent taxes on part of the lots and not on the remaining ones. One reason why the division cannot be made is that under the provisions of section 1423 of the code the purchaser at a tax sale acquires an undivided portion in the tract which he bids off at the sale. Such being the case, the lien which he thus acquires cannot be divided by a division of the property thereafter made.

B. J. POWERS, *Assistant Attorney General.*

ASSESSING COUNTY FOR STREET IMPROVEMENTS

Special assessments for street improvements should be against the county when the street abutting land owned by county and used by fair association is paved.

January 29, 1920.

Mr. Wilson Cornwall, County Attorney,
Spencer, Iowa.

Dear Sir:

Your letter of the 21st inst. addressed to Attorney General H. M. Havner, has been referred to me for reply.

You state:

> "In the year 1917 Clay county held an election and the people voted to purchase forty acres of ground for fair grounds. The title to the land was taken in Clay county. The Clay County Fair Association was then organized, and leased the ground purchased by the county and erected valuable improvements thereon. In the year 1919 the city of Spencer paved the streets abutting on the fair grounds."

You then ask:

> "Should the county pay for the street improvement, or should the improvement be assessed against the fair association?"

Section 792, supplement to the code, 1913, provides that the cost of improving any street shall be assessed against the owner of the abutting property.

Therefore the cost of paving the street abutting the grounds owned by Clay county and used for fair grounds purposes shall be assessed to the county.

W. R. C. KENDRICK, *Assistant Attorney General.*

COLLECTION OF PENALTY ON DELINQUENT SPECIAL ASSESSMENTS

When a special assessment for sewer improvement is divided into installments and one installment becomes delinquent, the county treasurer should offer the property, against which such assessment is a lien, for sale for such delinquent installment. Installments not then due or delinquent should not be computed in determining the amount of tax to be collected at such tax sale.

October 16, 1919.

Mr. Clarence R. Off, County Attorney,
North English, Iowa.

Dear Sir:

We have your letter of October 15th in which you state:

> "The treasurer of Iowa county at present is collecting a great many sewer assessments from the various towns within the limits of the county, and other assessments which are covering a period of ten years or better in order that the property holder may pay the assessment without any inconvenience financially.
>
> "The question as it came up several days ago was to the effect of collecting the full amount of the assessment throughout the period of years if the property had to be sold for taxes or whether just that part of the assessment which was due that year; that is, does the taxes and assessments then due have to be collected by sale or does the taxes then due and the full amount of the assessment for the period of years have to be paid at the November tax sale."

In answering your inquiry permit us to direct your attention to that part of section 829 of the code which reads as follows:

> "Property against which a special assessment has been levied for street improvement or sewers may be sold *for any sum of principal or interest due and delinquent* at any regular or adjourned tax sale, penalties and right of redemption, and certificates and deeds on such sales shall be made in the same manner and with like effect, as in case of sales for the non-payment of ordinary taxes. * * * *The purchaser at such sale shall take the property charged with the lien of the remaining unpaid installments and interest.* * * *."

As we view this section, we think the intention of the legislature was to provide that in case any installment of a special assessment become delinquent, that the treasurer should offer for sale the property against which the assessment was a lien for such delinquent installment and interest thereon. We do not believe that the fact of one installment becoming delinquent makes all future installments delinquent at the same time when the law expressly provides that the installments shall be made to cover a period of years and that no penalty attached on the various installments until they become delinquent.

Furthermore, you will observe that the section in question provides that the purchaser at the tax sale takes such property

"charged with the lien of the remaining unpaid installments and interest." In case that the sale included the entire assessment the lien for future assessments, installments and interest would not exist.

We therefore are of the opinion that in case one installment becomes delinquent that your treasurer should offer the property for sale solely because of the delinquency of such installment and that he should not compute installments not yet due or delinquent in determining the amount of tax for the purpose of collecting such delinquent tax at a tax sale.

B. J. POWERS, *Assistant Attorney General.*

COLLECTION OF INTEREST ON PAVING CERTIFICATES

It is the duty of the county treasurer to collect interest on paving certificates up to the time of payment, including penalties from the time the assessment, represented by the certificate, became delinquent.

March 3, 1920.

Mr. Carl H. Cook, County Attorney,
Glenwood, Iowa.

Dear Sir:

We have your request for the opinion of this department on the following question:

> "During the year 1917 the city of Glenwood paved their streets and in payment of the work issued specal assessment certificates against the abutting and adjacent property. The assessment was not certified by the city to the county auditor in time to go on the tax books in the spring of 1918 but first appeared on the tax books in January, 1919. There was a suit pending in the supreme court to test the validity of the proceedings leading up to the pavement and for that reason a large number of the citizens did not pay their assessment. The supreme court decided in favor of the city and it is now necessary that the assessments be paid. The city attorney has taken the position that on the assessments there should be collected six per cent annual interest from the date of the levy until the assessment is paid and in addition thereto a one per cent penalty per month after the assessment becomes delinquent.
>
> "My position in the matter is that six per cent annual interest should be collected in this case from the date of the levy to April 1, 1919, the date on which the assessment first became delinquent, at which time the six per cent rate stops

> and the one per cent a month as penalty is collected from then on. The county treasurer is up in the air about it and has asked your opinion. Please advise me in this matter as soon as possible."

The difference between you and the city attorney, as I understand your question, is this: Should the county treasurer collect six per cent interest per annum, plus one per cent a month penalty on the assessments, from the time the same became delinquent up to the time of payment, or should he only collect the six per cent per annum up to the time the assessments became delinquent and only the one per cent a month penalty thereafter until paid?

If that is the question, then it involves the construction of that part of section 825 of the 1913 supplement to the code, which provides as follows:

> "All such taxes, with interest, shall become delinquent on the first day of March next after their maturity and shall bear the same interest, with the same penalties, as ordinary taxes."

Ordinary taxes do not draw interest until they become delinquent, from which time, under the provisions of section 1413 of the code, they

> "shall draw interest, as a penalty, of one per cent per month until paid."

The term "interest," as used in this connection, may be treated as superfluous, for it is, in fact, a penalty for nonpayment and and incentive or inducement to the prompt payment of taxes. This is the manifest purpose and effect of the language used, and hence, when we come to construe the provisions of section 825, above set out, we must bear in mind that the words "the same interest" relates to and means the date of interest the certificate bears on its face, namely, six per cent per annum; and the words "with the same penalties" relates to and means the one per cent per month penalty that ordinary taxes bear after they become delinquent, as provided in section 1413 referred to.

The usual form of certificates issued for street improvements partake, in a measure, of the nature of a contract and provide for the payment of interest at six per cent per annum until paid, and the penalty of one per cent per month after the assessment represented by the certificate becomes delinquent should not be held to supercede or take the place of the interest provided for in the certificate unless the law clearly contemplates such effect.

The penalty, as before stated, is intended as an additional and further inducement for the taxpayer to make prompt payment of the taxes assessed against his property, and there can be no impropriety or injustice in requiring the defaulting taxpayer to pay the interest and penalty.

In the case of *Paving Company v. Webster County,* 143 Iowa 255, the company had accepted improvement certificates in payment for paving work in the city of Fort Dodge. The county had collected the amounts of the assessments, including interest and penalties, and paid the amounts of the assessments and interest collected, but withheld the amounts represented by the penalties collected on the theory that the penalties belonged to the county. The district court held that the holder of the certificates, the contractor, was entitled to the interest and penalties, and in affirming the judgment of the district court the supreme court said:

> "Nor is it inconsistent with the stipulation for interest contained in the contract or in the form of certificate issued. The excess collected beyond the statutory or contract limit is not interest (which is a premium paid for the use of money), but is a penalty which a party to whom the debt or tax is due is entitled to exact both as a stimulus as to prompt payment and as compensation for possible injuries which the latter may suffer by reason of the delay. * * * This penalty independent of the contract and the right to exact it is not a right which the city or county has any power to grant or take away."

It is true that the exact question before us was not directly involved in the case cited, but the language of the court is in line with the reasons which we have tried to set forth, and aid us in reaching the conclusion that the county treasurer should collect interest at six per cent up to the time the assessments are paid, together with the accrued penalties.

J. W. SANDUSKY, *Assistant Attorney General.*

COMPUTING TAX FOR SPECIAL ASSESSMENTS PAYABLE IN INSTALLMENTS

The correct method of computing interest and penalty on special assessments for paving, when divided into installments, is for the treasurer to compute interest from the date of the assessment until delinquent at the rate specified in the ordinance; after the assessment becomes delinquent the treasurer should compute penalty at the rate of one per cent per month from date of delinquency until paid.

October 15, 1919.

Mr. Newton W. Roberts, County Attorney,
Ottumwa, Iowa.

Dear Sir:

We have your letter of October 13th in which you request an opinion from this department upon the following proposition:

> "A resident of this state, against whom paving taxes have been assessed, has raised the question as to whether, under our statute, we can collect penalty from him on paving taxes which were to be paid in seven installments."

In answering your inquiry permit us to state that the correct method of determining the amount to be paid is for your county treasurer to compute interest at the rate specified in the ordinance from the date on which the assessment was made by the city council to the date when the tax becomes delinquent. If the tax is delinquent the treasurer should compute penalty at the rate of one per cent per month from the date the tax became delinquent until it was paid.

This computation would be in accordance with the provisions of sections 827 and 829 of the code, and furthermore, would be in accordance with the rule announced by the supreme court in the case of *Rystad v. Drainage District,* 170 Iowa 178, and *Barber Asphalt Paving Company v. District Court,* 163 Northwestern 214.

B. J. POWERS, *Assistant Attorney General.*

COMPUTING TAX ON DELINQUENT SPECIAL ASSESSMENTS

Where an assessment for special improvements is in litigation it does not become delinquent until finally determined. The county treasurer should compute interest on such tax at 6% until delinquent, unless the ordinance fixes a different rate, and penalty at the rate of 1% per month from date of delinquency until such assessment is paid.

September 30, 1919.

Mr. Earl W. Vincent, County Attorney,
Guthrie Center, Iowa.

Dear Sir:

We have your letter in which you present the following proposition:

> "When should the treasurer start to compute interest and at what rate under the facts stated, and also when should he start to compute the penalty on said tax? The facts are as follows:

"On August 20, 1917, the town of Guthrie Center certified to the county treasurer certain taxes for street improvements against the C., R. I. & P. Railway Company. On the 24th day of February, previous, the district court had affirmed this assessment. The railroad company perfected an appeal to the supreme court of the state of Iowa. The assessment was there affirmed on the 19th day of February, 1919."

Under the rule announced in the case of *Rystad v. Drainage District,* 170 Iowa 178, the proper method of determining the interest and penalty would be for the county treasurer to compute interest at the rate of six per cent from the date the assessment was made by the city council until the tax was finally affirmed by the supreme court on the 19th day of February, 1919, and from the date last mentioned the treasurer should compute the penalty at the rate of one per cent per month.

The rule just announced has been reaffirmed in the case of *Barber Asphalt Paving Company v. District Court,* 163 N. W., page 214.

B. J. POWERS, *Assistant Attorney General.*

WHEN LIEN FOR TAXES ON PERSONAL PROPERTY ATTACHES

The lien for taxes on a stock of goods attaches when levy of taxes made, although stock is liable for the tax if sold between date of assessment and sale.

August 26, 1919.

Mr. C. F. Wennerstrum, County Attorney,
Chariton, Iowa.

Dear Sir:

Your letter of the 23d inst. addressed to Attorney General H. M. Havner has been referred to me for attention.

You ask:

"The question has arisen here through the county treasurer's office as to when taxes on personal property become a lien upon personal property. The facts are the assessment was made in January of last year, the stock of goods was sold in April and the taxes did not become due until January of this year. Were they a lien upon the goods before January, 1919?"

Taxes due from an owner of personal property are not a lien upon said property, except when expressly so prescribed by statute.

The only statute in Iowa making personal property taxes a lien will be found in section 1400 of the supplement to the code, 1913, as amended by chapter 337, acts of the 37th General Assembly, which reads as follows:

> "Taxes upon real estate shall be a lien thereon against all persons except the state. Taxes due from any person upon personal property shall be a lien upon any and all real estate owned by such person or to which he may acquire title. As against a purchaser, such liens shall attach to real estate on and after the 31st day of December in each year. Taxes upon stocks of goods or merchandise, fixtures and furniture in hotels, rooming houses, billiard halls, moving picture shows and theaters shall be a lien thereon and shall continue a lien thereon when sold in bulk, and may be collected from the owner, purchaser or vendee, and such owner, purchaser or vendee of any such goods, merchandise, furniture or fixtures shall be personally liable for all taxes thereon. In all cases where buildings are assessed as personal property the taxes shall be and remain a lien on said buildings from the date of levy until paid."

As to the tax due on the stock of goods referred to in your letter, while the lien does not attach until the tax is due and that is when the levy has been made, yet the stock is liable for the tax, even though the stock has been transferred in bulk between the date of assessment and the date of the levy, and can be collected against the stock in whomsoever hands the same is found. In this connection see the case of *Larson v. Hamilton County,* 123 Iowa 485.

W. R. C. KENDRICK, *Assistant Attorney General.*

BACTERIOLOGICAL LABORATORY SUBJECT TO TAXATION BUT TAXES NOT A LIEN ON SAME

Taxes due on personal property are not a lien on such property unless made so by statute. Since taxes upon equipment of a bacteriological laboratory are not so declared to be, such equipment cannot be held for such taxes after having been sold by the one originally assessed as owner thereof.

September 23, 1919.

Mr. H. K. Lockwood, County Attorney,
Cedar Rapids, Iowa.

Dear Sir:

We have your letter of September 20th in which you state:

> "The Cedar Rapids Clinical Laboratory owns personal property consisting of an X-ray machine, and all of the other

usual equipment and fittings contained in a bacteriological laboratory. The former owner was Dr. Ware. The property and equipment were sold by Dr. Ware to Dr. Blair, Dr. Ware, or someone in his behalf, representing that the personal property taxes thereon were fully paid. It has developed, however, that there are still due certain personal property taxes on the said property, which the tax collector has endeavored to enforce by virtue of section 1400 of the supplement to the code as amended by chapter 337 of the laws of the 37th General Assembly.

"I have advised the county treasurer that, in my judgment, this personal property cannot be held for these taxes in the hands of an innocent purchaser."

In answering your inquiry, permit me to state that we agree with the advice you have given your county treasurer. The section of the supplement to which you refer provides in part as follows:

"Taxes due upon stocks of goods or merchandise, fixtures and furniture in hotels, rooming house, billiard halls, moving picture shows and theaters, shall be a lien thereon and shall continue a lien thereon when sold in bulk, and may be collected from the owner, purchaser or vendee, and such owner, purchaser or vendee of any such goods, merchandise, furniture or fixtures shall be personally liable for all taxes thereon. * * *"

As we view it, the equipment of a bacteriological laboratory is not within the foregoing classification and therefore no lien has ever attached to such equipment.

You will observe that in the case of

Jaffray & Company v. Anderson, et al, 66 Iowa 718,

decided under a former statute, that taxes levied upon personal property do not constitute a lien upon such property unless made so by virtue of an affirmative statute. In view of this rule, there can be no question about the correctness of the advice you have given your county treasurer to the effect that no lien exists against the bacteriological laboratory equipment of the Cedar Rapids Clinical Laboratory.

B. J. POWERS, *Assistant Attorney General.*

WHEN FARM PRODUCE EXEMPT

Farm produce raised by or for a person are now exempted from taxation.

April 20, 1920.

Mr. T. M. McAdam, County Attorney,
Mount Pleasant, Iowa.

Dear Sir:

We have your favor of the 17th inst. wherein you request the opinion of this department on the following question:

> "Our county auditor is having trouble with his assessor about assessing grain, hay, etc., received for rent. They think that section 1304 of the code as amended by chapter 115 of the 38th General Assembly exempts crops received for rent from taxation. I think the statute means that crops raised by the person himself or for him by employes, etc., are exempt."

Section 1304 of the supplemental supplement to the code provides in part as follows:

> "The following classes of property are not to be taxed. * * *
>
> "Paragraph 3. The farm produce of the person assessed harvested by or for him. * * *"

Prior to the amendment of this paragraph by chapter 115, acts of the 38th General Assembly, that paragraph read in part as follows:

> "The farm produce of the person assessed harvested *by* him. * * *"

The exemption was then limited to the farm produce harvested *by* the farmer. The obvious purpose of the amendment was to enlarge the right of exemption, and it now applies to farm produce harvetsed by or for the farmer and therefore it should be held that where the landlord receives from the tenant a share of the crops as rental for the leased premises that the farm produce so received should be held exempt from taxation.

J. W. SANDUSKY, *Assistant Attorney General.*

CITIES OF SECOND CLASS HAVE SOLE JURISDICTION TO LEVY CERTAIN BRIDGE TAXES

Board of supervisors have no authority to levy a five mill bridge tax on the property located in a city of the second class traversed by a stream more than two hundred feet wide, authority in such cases being vested in the respective cities.

May 1, 1919.

Mr. Claude M. Miller, County Attorney,
Iowa City, Iowa.

Dear Sir:

Your letter of the 22d ult. addressed to Attorney General H. M. Havner has been referred to me for reply.

You state:

> "May the board of supervisors of Johnson county, Iowa, levy a five-mill bridge tax upon property situated within the corporate limits of the Iowa City, Iowa, and expend the same upon the county roads of the county? Levy was made last September."

You state that Iowa City is a city of the second class, and is traversed by the Iowa river, a stream more than two hundred feet in width from shore line to shore line.

The statutory provisions which seem to control the question in issue are found in sections 758, 758-a and 758-d of the supplemental supplement to the code, 1915, and section 758-b and 758-c of the supplement to the code, 1913.

Section 758, *supra,* particularly provides:

> "Cities of the first class and also cities of the second class having a population of five thousand or over, and which are traversed by a stream two hundred feet or more in width from shore line to shore line shall have full control of the bridge fund levied and collected as provided by law, and shall have the right to use the same for the construction of bridges, culverts, and approaches thereto, repairing the same, and paying bridge bonds and interest thereon issued by such city, and shall be liable for defective construtcion thereof, and failure to maintain the same in safe condition as counties now are with reference to county bridges; and no county shall be liable for any such bridge or injuries caused thereby."

From the foregoing statutory provisions it will be seen that cities such as Iowa City "have full control of the bridge fund levied and collected as provided by law, and shall have the right to use the same for the construction of bridges, etc." Under said section such cities are also made liable for deficits in its bridges; counties are no longer liable for defects in such bridges; have no control whatever over the city bridge fund, and are, in fact, no longer interested in either the fund or the bridge. Unless such a city is to determine the amount necessary to keep its bridges in repair, or to build new bridges and reconstruct old ones, then there would always be that uncertainty of not having a sufficient fund available for that purpose, for the reason that the county is no longer directly interested in such matters.

In fact, our supreme court has indicated the existence in such cities of the power to make the necessary levy. In the case of

Iowa City v. Watson, 166 N. W. at page 85, while that express question was not raised, yet Chief Justice Preston, writing the opinion of the court, used the following language:

> "While it may be true, as argued by appellant, that the city is given control of its bridges and is made liable for defects after July 4, 1915, it would seem that the statute before quoted (section 758) provides for the city making the levy to meet any such expense incurred."

It will also be noticed that when the question arises as to the building or reconstruction of bridges in such cities, then section 758-a, *supra,* provides that the cost thereof shall be ordered paid from the city bridge fund, to be levied upon all the property within any such city, and that such city shall have the power to make a levy sufficient to cover the cost of such improvement and provide for its payment in installments, and that certificates of such levy shall be filed with the county auditor and by him placed upon the tax lists and turned over to the county treasurer for collection.

Then sections 758-b and 758-c, *supra,* permit any such city to anticipate the collection of taxes authorized to be levied for a city bridge fund, and issue certificates or bonds with interest coupons and secured by assessments and levies.

While section 1303 of the supplemental supplement provides that the board of supervisors shall make the levy for bridge purposes on all property except property assessable within the limits of any city of the first class, and although section 758, *supra,* does not expressly declare that the city council shall make the levy, yet, as stated by Chief Justice Preston in the case of *Iowa City v. Watson, supra,* we are of the opinion that section 758 provides for the city making the levy.

Therefore we are of the opinion that the board of supervisors of Johnson county have no authority to make the levy in question, and expend the money raised thereby on the county roads of the county.

W. R. C. KENDRICK, *Assistant Attorney General.*

WHO SHOULD ACT AS BOARD OF REVIEW IN CITIES UNDER CITY MANAGER PLAN

When a city is organized under the city manager plan the office of township assessor ceases and the board of review appointed by the council supersedes all other such boards.

February 27, 1920.

Mr. E. H. Willging, County Attorney,
Dubuque, Iowa.

Dear Sir:

Your esteemed letter of the 24th inst. addressed to Attorney General H. M. Havner has been referred to me for reply.

You state:

> "We have recently adopted the city manager plan here and thereby removed ourselves from the operation of our city charter. Under the statute I take it that the township trustees and the township clerk are automatically removed from office. Under the existing statute they were the board of review for Julien township and the city council the board of review for the city. The city and township lines are coterminous."

You then ask:

> "The assessment has been made for the township and for the city by the respective assessors, and the question now is as to whether or not the city council may review the assessment made by the township assessor, or whether a review of township assessment is required at all.
>
> "The question also arises as to whether or not there is any further need for the township assessor, there being no township territory outside of the city limits."

The statutes of Iowa provide that a township assessor shall be elected only by the electors residing outside the limits of a city located within the township, and also that the person elected assessor shall reside outside the limits of such city.

Section 565, supplement to the code, 1913, declares:

> "In each even-numbered year there shall be elected in each township, a part of which is included within the corporate limits of any city or town, by the voters of such township residing without the corporate limits of such city or town, one assessor who shall be a resident of said territory outside of said city or town."

The statute also provides that the township assessor shall assess all property in the township, except such property as is otherwise assessed.

Section 1345, supplement to the code, 1913, declares:

> "The assessor shall list every person in his township, and assess all the property, personal and real, therein except such as is heretofore exempted or otherwise assessed * * *."

You state that the city of Dubuque has recently adopted the city manager plan of government. I assume that you mean that the electors of the city of Dubuque have voted to adopt the plan, but that the city has not yet been fully organized under such plan of government as provided by law—that is, the election of officers has not yet been held.

The statute provides that after the question of the adoption of such form of government has been submitted to the voters and carried at an election called for that purpose, the mayor shall call a special election for the selection of a city council, unless the regular city election occurs within one year from the date of the election at which the new form of government was adopted.

Section 1056-b1, supplement to the code, 1915, as amended by section 2, chapter 68, acts of the 37th General Assembly, declares in part:

> "If, however, the next regular city or town election does not occur within one year after the special election at which such form of government is adopted, the mayor shall, within ten days after such election, by proclamation, call a special election of councilmen, as herein provided and shall give thirty days' notice of such special election, which notice shall be included and given in the call for such special election."

The council thus elected shall have the power to determine the tenure of any officer that it has authority to appoint.

Section 1056-b3, supplement to the code, 1915, in part declares:

> "Except the members of the library board, the council shall have power to determine the tenure of office of any officer or the term of employment of any employe that it is authorized to appoint or employ, and to declare any such office vacant, or to discharge any such employe with or without cause, as it may deem advisable, * * *"

The statute authorizes the council to appoint an assessor.

Section 1056-b18, supplement to the code, 1915, in part declares:

> "The council shall, at the first meeting after its members are elected, appoint * * * an assessor."

Thus, it will be seen, the township assessor has no jurisdiction within the limits of a city located in any township. Further, that, after a city has been fully organized under the city manager plan of government, the council may terminate the tenure of the city assessor elected and acting under the old form of government, and appoint another and fix his term of office.

The statute also provides that the council of the new form of government shall appoint three persons, who shall constitute a local board of review of the city.

Section 1056-b18, supplement to the code, 1915, in part declares:

> "The council shall, on or before the first Monday of April, in each year, also appoint three persons who shall constitute a local board of review of the city or town in which they are appointed."

Therefore it is the opinion of this department that, when a city adopts the city manager plan of government and is legally organized thereunder, and wherein the limits of such city and township in which it is located are coterminous, the tenure of the township assessor ceases and terminates as soon as the new city council takes legal action declaring the tenure of such official terminated and appoints a successor; and, when all the foregoing action has been taken, that the board of review appointed by the council supersedes all former boards of review for the purpose of reviewing the assessment of property in the city in which the new board is appointed.

W. R. C. KENDRICK, *Assistant Attorney General.*

REFUSAL TO FURNISH ASSESSOR WITH STATEMENT

A property owner who refuses to furnish the assessor with a verified statement as required by law is subject to a penalty of 100 per cent, and the board of review has no authority to remit such penalty.

April 16, 1919.

Mr. J. M. C. Hamilton, County Attorney,
Fort Madison, Iowa.

Dear Sir:

We have your letter of April 12th in which you state:

> "An owner of real estate refused to furnish to the assessor a verified statement, and the assessor thereupon made the assessment and added to the taxable valuation 100 per cent thereof as required by section 1357, code of 1897. Upon the request of the local board of review, and after the assessor had completed his assessment and turned his books over to the local board of review, the owner verified his assessment or took the oath as required by the statute. Can the local board of review relieve the owner from the penalty added by the assessor?

> "In my opinion the local board of review can raise or lower the assessment as provided by law, but they must add 100 per cent to whatever taxable valuation they place upon the property. They cannot cancel the penalty."

In answering your inquiry, we direct your attention to the provisions of section 1357 of the code, which provides as follows:

> "If any corporation or person refuse to furnish the verified statements in this chapter required, or to list his property, or take or subscribe the oath in this chapter required the executive council, or assessor, as the case may be, shall proceed to list and assess such property according to the best information obtainable, and shall add to the taxable valation one hundred per cent thereof, which valuation and penalty shall be separately shown and shall constitute the assessment; *and if the valuation of such property shall be changed by any board of review, or on appeal therefrom, a like penalty shall be added to the valuation thus fixed.*"

The supreme court had occasion to consider this section of the code in the case of

> *Farmers Loan and Trust Co. v. Town of Fonda,* 114 Iowa 728.

The facts in this case disclose that the Farmers Loan and Trust Company refused to furnish to the assessor the verified statement required by law. Thereupon the assessor placed a value upon the property and added the one hundred per cent penalty. At page 732 the supreme court states:

> "Appellant complains of the addition of 100 per cent to the taxable value of the property of the Fonda branch by way of penalty for refusal to make returns as required by code, section 1357. But it appears that the proper officer of the Fonda branch was requested and given opportunity to make the returns provided for by law before the assessor's books were closed and refused to do so. This failure could not be remedied by making return to the assessor after the books were closed and placed before the board of review. The penalty was therefore incurred, and properly imposed on the assessment made by the board of review."

Again, in the case of *McCallum v. Board of Review,* 178 Iowa 468, 476, the court, in considering the section of the statutes above set forth and also the case above cited stated:

> "In the case of *Farmers Loan and Trust Co. v. Town of Fonda,* 114 Iowa 728, the plaintiff had refused to list its property, and a penalty was assessed. We refused to disturb

such assessment because, as we there said, the failure to properly list the property 'could not be remedied by making return to the assessor after the books were closed and placed before the board of review.' *The clear implication of that holding was that, if the owner had appeared to the assessor while the books were still open and in his hands, the assessment should have been made as asked, and the penalty expunged.* * * *''

We assume from the statement of facts in your letter that the owner of the real estate never appeared before the assessor while the books were still open and in the assessor's hands, and ask that he be allowed to make a return in the manner required by law.

We further take it that the attempt of the owner to comply with the law was not made until after the books had been completed and turned over to the local board of review. Such being the case, we are of the opnion that the local board of review has no authority to relieve the property owner from the 100 per cent penalty provided by section 1357 of the code.

B. J. POWERS, *Assistant Attorney General.*

EFFECT OF STATUTE OF LIMITATIONS ON COLLECTION OF TAXES

While the statute of limitations bars actions to collect delinquent taxes after five years, yet, under the provisions of the code, the county treasurer may collect such taxes by distress or sale after the expiration of the five years for the reason that the statute of limitations does not apply to collection under the summary system. However, penalty and interest delinquent more than four years cannot be collected by distress or sale.

March 27, 1919.

Mr. Maxwell A. O'Brien, County Attorney,
Oskaloosa, Iowa.

Dear Sir:

We have your letter of March 24th in which you state:

"I am writing to inquire whether or not it is possible for the county treasurer to collect taxes that are delinquent and have been brought forward from year to year, back of a period of five years from the last assessment.

In the instant case a man was assessed with personal taxes back as far as 1906 and did not pay them. His taxes were brought forward from year to year and carried as delinquent, and he has now come into possession of some real estate which

the treasurer has assessed these delinquent taxes against. Under the ruling of the case, *City of Burlington v. B. & M. Ry.*, 41 Iowa 134, and the cases following, it would seem that the statute of limitations bars a collection of delinquent taxes after five years.

"If there are any other rulings in this matter, which applies to collection of these taxes, I would like to know of the same so we can proceed to look after the same."

In answering your inquiry, permit us to direct your attention to section 1389-a, supplement of 1913, which provides that the treasurer shall keep a book in his office as part of the records thereof, to be known as the delinquent personal tax list, in which he shall enter all delinquent personal taxes, of any preceding year.

Section 1389-b, supplement of 1913, provides that the names of the delinquents shall be alphabetically arranged in such delinquent tax record, and that the amount of the tax, and for what year or years, shall be stated in the record book, together with a statement of where the property was located when assessed.

Section 1389-c, supplement of 1913, then provides:

"Personal tax entered on delinquent personal tax list, as provided in sections 1 and 2 of this act, *shall constitute a lien on any real estate owned or acquired by any such delinquent, and so remain until the same has been paid or legally cancelled, and taxes not so entered for each year shall cease to be a lien.*"

Section 1389-d, supplement of 1913, provides as follows:

"The treasurer shall each year, upon receiving the tax list, enter upon the same in separate columns opposite each parcel of real estate on which the tax remains unpaid for any previous year, the amount of such unpaid tax, and unless such delinquent real estate tax is so brought forward and entered it shall cease to be a lien upon the real estate upon which the same was levied, and upon any other real estate of the owner. *But to preserve such lien it shall only be necessary to enter such tax, as aforesaid, opposite any tract upon which it was lien.* Any sale for the whole or any part of such delinquent tax not so entered shall be invalid."

In this same connection we further desire to direct your attention to the provisions of section 1390 of the code as amended by chapter 137 of the 37th General Assembly, which provides as follows:

"The treasurer, after making the entry, shall proceed to collect the taxes, and the list shall be his authority and justification against any illegality in the proceedings prior to receiving the list; and he is also authorized and required to collect, as far as practicable, the taxes remaining unpaid on the tax books of previous years, his efforts to that end to include the sending by mail of a statement to each delinquent taxpayer not later than the first day of November of each year."

Section 1391, supplemental supplement of 1915, provides that:

"*No penalty or interest, except for the first four years, shall be collected upon taxes remaining unpaid four years or more from the thirty-first day of December of the year in which the tax books containing the same were first placed in the hands of the county treasurer,* and the board of supervisors at the January meeting may declare such tax unavailable, and when so declared by the board, the amount shall be credited to the treasurer by the auditor as unavailable and he shall apportion such tax among the funds to which it belongs. Any portion of such tax belonging to the state shall be reported by him in his semi-annual settlement sheets to the auditor of state as unavailable, whereupon the auditor of state shall credit the county with the amount so reported, *but nothing in this act shall be construed to in any way release the county treasurer from any duty required of him in the collection of delinquent taxes, nor to release the taxpayer from his liability for the same.* Should any of such tax afterwards be collected, the county treasurer shall distribute the net amount collected among the several funds the same as though it had never been declared unavailable, and the portion belonging to the state shall be credited back to the state and included in the treasurer's remittance of other state taxes to the trasurer of state, and shall be reported by the county auditor in his semi-annual settlement sheets to the auditor of state, who shall recharge the same to the county."

We further desire to direct your attention to section 1414 of the code, which states:

"The treasurer shall collect *all delinquent taxes by distress or sale of any personal property belonging to the person to whom such taxes are assessed, and not exempt from taxation, or any real or personal property upon which they are a lien,* but he shall continue to receive the same until collected, and any owner or claimant of any real estate advertised for sale may pay to the county treasurer, at any time before the sale thereof, the taxes due thereon, with accrued penalties, interest and costs to the time of payment."

You will note from the foregoing that the statutes provide that the county treasurer shall enter from year to year all delinquent personal taxes in a delinquent tax register in his office. You will further note that there is no provision authorizing him to charge off from his records as unavailable any delinquent taxes on his books unless the same have been declared unavailable by the board of supervisors of his county. (Section 1391, supplemental supplement of 1915). You will further note that the law provides that personal taxes entered upon the delinquent tax list constitute a lien on any real property owned or acquired by any such delinquent, *and so remains until the same have been paid or legally cancelled.* (Section 1389-c, supplement of 1913). You will further note that section 1391, supplemental supplement of 1915, provides that:

> "*No penalty or interest,* except for the first four years, shall be collected upon taxes remaining unpaid four years or more from the 31st day of December of the year in which the tax books containing the same were first placed in the hands of the county treasurer. * * *"

While this section states that no penalty or interest shall be collected in certain cases, yet it does not state that the tax itself shall not be collected. Taking this provision of the statute in connection with the sections we have previously cited, it is clear that there is nothing to prevent the collection of a delinquent personal tax which has been delinquent for more than five years.

You will note that section 1414 of the code provides that the treasurer

> "shall collect delinquent taxes by distress or sale, and any personal property belonging to the person to whom such taxes were assessed * * * or any real or personal property upon which they are a lien * * *"

There is no provision in the law which denies the treasurer the right to collect by distress or sale regardless of the length of time since the taxes were originally assessed.

In your letter you call attention to the case of *City of Burlington v. B. & M. Ry. Co.*, 41 Iowa 134, and you have seemingly interpreted this case to hold that taxes delinquent for more than five years cannot be collected. If you will turn again to this case you will find that it merely holds, using the words of the court, that

> "we conclude that *the section*, as to all taxes levied for the year 1866, and prior years, is barred. * * *"

You will notice that this case simply holds that the right of action for the recovery of delinquent taxes is barred after a period of five years. There is no disputing this rule, for it has been repeatedly followed in this state. But it should be borne in mind that an "action" to collect taxes is entirely different from the right of the treasurer to collect delinquent taxes by distress or sale of the real or personal property of the one delinquent. There is absolutely no limitation upon the right of the treasurer in the matter of collecting taxes by distress or sale other than that he cannot collect penalties or interest except for the first four years. (Section 1391, supplemental supplement of 1915).

In the case mentioned in your letter the person delinquent is now in the possession of real property; and under this state of facts the treasurer is authorized to proceed to collect the delinquent taxes by distress or sale. There is no need of bringing an action as the statute provides for a different method of collection when property is so situated as to be capable of being held by distress for delinquent taxes. Our two-fold method of collecting taxes authorizes such a summary proceeding, as well as collection by judicial proceedings. However, the statute of limitations applies only to actions instituted under the latter system.

We therefore advise that you proceed to instruct your treasurer to collect the delinquent taxes for the entire period by proceeding under section 1414 of the code, authorizing the collection of delinquent taxes by distress or sale.

B. J. POWERS, *Assistant Attorney General.*

PRESERVATION OF TAX LIENS

General discussion as to procedure necessary to preserve lien for real and personal taxes and special assessments.

March 17, 1919.

Hon. Frank S. Shaw,
Auditor of State.

Dear Sir:

Your letter of the 10th ult. addressed to Attorney General Havner has been referred to me for attention.

You ask in substance:

> "For citation of authority sustaining the position heretofore taken by the department of justice, that the statute of limitations does not run against the lien for delinquent real

and personal taxes and special assessments, when brought forward according to law, so that the lien may be enforced after a period of five years."

Relating to the lien for delinquent real estate taxes section 1389-d of the supplement to the code, 1913, provides:

> "The treasurer shall each year, upon receiving the tax list, enter upon the same in separate columns opposite each parcel of real estate on which the tax remaining unpaid for any previous year, the amount of such unpaid tax, and unless such delinquent real estate tax is so brought forward and entered it shall cease to be a lien upon the real estate upon which the same was levied, and upon any other real estate of the owner. But to preserve such lien it shall only be necessary to enter such tax, as aforesaid, opposite any tract upon which it was a lien. Any sale for the whole or any part of such delinquent tax not so entered shall be invalid."

Under the foregoing section it has been held that, unless the delinquent tax is brought forward each year, the tax ceases to be a lien; otherwise the lien remains in force until paid. The same rule applies to special assessments.

Paxton v. Ross, 89 Iowa 661;
Fitzgerald v. City of Sioux City, 123 Iowa 396;
Holleran v. Toenningsen, 178 Iowa 1368.

As to the lien against the owner's real estate for delinquent personal taxes our statute provides:

> "The treasurer shall, after October first, and before December thirty-first, of each year, enter in a book to be kept in his office as a part of the records thereof, to be known as the delinquent personal tax list, all delinquent personal taxes of any preceding year."

Section 1389-a, supplement to the code, 1913.

> "Such entry of tax on delinquent personal tax list shall give the names of delinquents alphabetically arranged, with amounts of tax and for what year or years, and where property was located when assessed."

Section 1389-b, supplement to the code.

> "Personal tax entered on delinquent personal tax list, as provided in sections 1 and 2 of this act, shall constitute a lien on any real estate owned or acquired by any such delinquent, and so remain until the same has been paid or legally concelled, and taxes not so entered for each year shall cease to be a lien."

Section 1389-c, supplement to the code, 1913.

Under the statutory provisions just quoted it has been held that, after the tax has once been entered in the delinquent personal tax list, it remains a lien on the realty of the person against whom assessed until paid or legally concelled even though the delinquent tax is not brought forward each year.

Watkins v. Couch, 142 Iowa 164, 168.

It will be seen therefore that unless the delinquent taxes on real estate and special assessments are brought forward each year they cease to be a lien, otherwise they remain in force until the tax is paid or the lien legally cancelled. But as to delinquent personal taxes the lien attaches when the tax is entered in the delinquent personal tax list, and to preserve the lien it is not necessary for the treasurer to bring it forward each year.

W. R. C. KENDRICK, *Assistant Attorney General.*

WHEN TAXES LIEN ON PERSONAL PROPERTY

Taxes levied upon personal property do not constitute a lien upon such property unless especially made so by statute. The provisions of section 1400 supplement 1913, as amended, declaring that taxes "upon stocks of goods or merchandise, etc., does not make taxes due from a publishing firm a lien against its presses and printing equipment since such property cannot be classed as "goods or merchandise."

June 10, 1919.

Hon. Frank S. Shaw,
Auditor of State.

Dear Sir:

We have your letter of June 5th in which you state:

> "I desire your opinion on the following question: In case of the failure of a publishing firm, and they are about to be sold out at a sheriff's sale, is the delinquent tax against such firm a lien upon their stock and property in case it is sold at sheriff's sale? In other words, should the treasurer file his claim against this stock, and should it be paid out of the first proceeds of the sale?"

In answering your inquiry, we desire to direct your attention to that part of section 1400 of the supplement, 1913, as amended by chapter 337, acts of the 37th General Assembly, which reads as follows:

> "Taxes upon real estate shall be a lien thereon against all persons except the state. Taxes due from any person upon

> personal property shall be a lien upon any and all real estate owned by such person or to which he may acquire title. As against a purchaser, such liens shall attach to real estate on and after the thirty-first day of December in each year. Taxes upon stocks of goods or merchandise, fixtures and furniture in hotels, rooming houses, billiard halls, moving picture shows and theaters shall be a lien thereon and shall continue a lien thereon when sold in bulk, and may be collected from the owner, purchaser or vendee, and such owner, purchaser or vendee of any of such goods, merchandise, furniture or fixtures shall be personally liable for all taxes thereon. In all cases where buildings are assessed as personal property the taxes shall be and remain a lien on said buildings from the date of levy until paid."

This section is the only one to be found which makes the taxes due from an owner of personal property a lien upon said property. You will note that this lien does not attach to all personal property, but only to "stocks of goods or merchandise, fixtures and furniture in hotels, rooming houses, billiard halls, moving picture shows and theaters. * * *"

The case which you mention in your letter has reference to a publishing firm. We do not think of a publishing firm as one having a stock of goods or merchandise, nor do we think that there is any provision in the foregoing section which would support the claim that a lien exists against the presses and equipment of a publishing firm.

In the case of *Jaffray & Co. v. Anderson, et al,* 66 Iowa 718, our supreme court held under a former statute, that taxes levied upon personal property is not a lien upon such property unless made so by virtue of an affirmative statute. The last paragraph of the opinion gives a very clear statement of the reason why taxes levied upon personal property should not be considered as a lien upon the same. It is as follows:

> "It will be observed that no specific lien is created by the law above cited, excepting upon real property. The taxes upon real property, and any taxes upon personal property of the owners of real property, are made a lien upon the real property owned by such person. But no lien is provided for as against personal property. Section 857 and 859 provide for distraining the property of the delinquent taxpayer. There is no authority therein for distraining the property of a purchaser of personal property upon which a tax has been levied. Appellant claims that a lien upon personal property is created by section 865. The latter part of that section is a direction

to the treasurer to collect the delinquent taxes by a sale of any property upon which the taxes are levied, or any other personal or real property belonging to the person against whom the taxes are assessed. This language does not create a lien upon personal property. It is a mere requirement that the treasurer shall distrain the property upon which the tax was levied, if owned by the taxpayer, or he shall distrain any other property owned by him. If it had been the intention of the legislature to create a lien upon personal property for taxes levied thereon, and thus embarrass its sale and delivery, so that no person could safely purchase the same without an examination of the tax books to ascertain if the same is taxed, the language employed would leave no doubt of the intent. We do not feel called upon to hold that such was the intention, and thus seriously interfere with the business interests of the country, which requires that the transfer of personal property shall not be attended with any such restraints."

In the case of *Howard County v. Strother,* 71 Iowa 683, our supreme court held that where there was no lien upon personal property for taxes levied thereon, that there was no claim which the county could make for taxes that would take priority over other liens.

In the statement of your proposition, we take it that the sale to be made by the sheriff is for the purpose of satisfying a lien. Since no lien exists on account of the taxes levied against this personal property, it is clear that the treasurer has no claim which he can assert against the property that would take priority over that under which the sheriff is acting. The treasurer might seize under a distress warrant any sum remaining in the hands of the sheriff after the satisfaction of the debt for which he holds execution.

It should also be remembered that the owners of the personal property are not relieved from liability for the tax levy against the personal property even though it may be sold at a sheriff's sale to satisfy the claims of creditors.

B. J. POWERS, *Assistant Attorney General.*

ACCEPTING PAYMENT OF TAXES UNDER PROTEST

There is no provision in the law declaring as illegal the acceptance of taxes by the county treasurer when the same is paid under protest.

March 29, 1919.

Mr. H. K. Lockwood, County Attorney,
Cedar Rapids, Iowa.

Dear Sir:

We have your letter of March 27th enclosing a communication you received from your county treasurer, and in which he asks your opinion upon the following matter:

> "Some of the banks in Cedar Rapids claim they have been assessed erroneously on their capital stock in connection with the liberty bonds that they hold, and they wanted me to accept the money and they would pay the same under protest. I want to inquire from you whether I could do this legally, and if I did accept the money under protest whether or not I would be personally liable in the matter?"

It is the opinion of this department that there is nothing in the law which declares the acceptance of taxes paid under protest to be illegal.

B. J. POWERS, *Assistant Attorney General.*

COUNTY TREASURER LIABLE FOR COSTS WHERE REAL ESTATE ERRONEOUSLY SOLD FOR TAXES

When real estate is erroneously sold for taxes the county treasurer is liable for the costs incident to the sale.

February 6, 1919.

Mr. H. K. Lockwood, County Attorney,
Cedar Rapids, Iowa.

Dear Sir:

Your letter of the 31st ult. addressed to Attorney General Havner, has been referred to me for reply.

You enclose a copy of a letter written by you to your county treasurer relative to the erroneous sale of real estate belonging to C. H. Whitcomb on account of non-payment of taxes.

Under the facts stated in your letter to your county treasurer, we are of the opinion that his office should stand the expense of the mistake. If the taxes on C. H. Whitcomb's real estate were in fact paid the sale was void regardless of how the receipt read. The mistake was that of his deputy, for whose acts the treasurer is responsible.

W. R. C. KENDRICK, *Assistant Attorney General.*

BOARD OF REVIEW IN SPECIAL CHARTER CITIES

In special charter cities the city council has sole jurisdiction to act as a board of review, and the township trustees have no jurisdiction.

April 15, 1919.

Hon. F. S. Shaw,
Auditor of State.

Dear Sir:

Attention, Mr. J. F. Wall:

In your favor of the 12th inst. you request an opinion upon the following question:

> "The city of Dubuque is located in Julian township, but the city limits does not include the entire township, and it is also a special charter city. Now, the question is, should the city council act as a local board of review for equalizing the assessment of property in the city limits of Dubuque, and should the township trustees act as such board for the territory outside the city limits, or may the township trustees act as the board of review in equalizing all property within the township, including the city of Dubuque, for taxation for general purposes?"

I desire to call your attention to section 1370 of the code of 1897, the portion of which relating to this matter reads as follows:

> "The township trustees shall constitute the local board of review *for the township or the portion thereof not included within any city or town,* and the city or town council shall constitute such board for such city or town. * * *"

This section was amended by the 34th General Assembly as follows:

> "* * * Provided, however, that in townships having a population of twenty thousand or more, and situated entirely within the limits of a city under special charter, and in cities having a population of twenty thousand or more, including cities under special charter, the board of review may begin the performance of the duties herein defined on and after the first day of March each year."

The above section now appears as a part of section 1370, supplement to the code, 1913. I desire also to call your attention to section 1004, supplement to the code, 1913, which makes applicable to special charter cities a number of sections regarding the assessment and levy of taxes, including section 1370.

Notwithstanding the statements appearing in

State v. Finger, 46 Iowa 25, and
Kinsey v. Sweeney, 63 Iowa 254.

I think there is no question but what the provisions of section 1370, as amended, now make it the duty of the city council to act as a board of review on assessments made upon property within the limits of the special charter city.

F. C. DAVIDSON, *Assistant Attorney General.*

SCHOOL PROPERTY CANNOT BE SOLD TO PAY DELINQUENT TAXES OR SPECIAL ASSESSMENTS

The property of a school district cannot be sold for taxes or special assessments. The county treasurer is not liable on his bond for paying over money, deposited with him in a school condemnation case, without deducting taxes not then due.

March 20, 1919.

Hon. Frank S. Shaw,
Auditor of State.

Dear Sir:

We have your letter of March 12, 1919, in which you ask the opinion of this department on the following:

> "In 1916 the district of Mason City condemned property for school purposes. On August 13, 1916, the school district deposited the amount found due the owner with the county treasurer. The county treasurer paid the total amount allowed by the condemnation jury, to the original owners of the land, without deducting the following taxes due, and a lien on the land when same was condemned by the district, the last half of 1915 tax, and $142.35 special assessments levied in 1915. The property was sold in 1916 for the last half of 1915 tax.
>
> "Now, the question is, is the tax sale for 1915 tax legal, and can the county treasurer now sell the property for this special tax, or is the old treasurer liable on his bond for this tax on account of paying all the purchase price to the owner of the land without deducting the tax?"

The tax sale for the 1915 tax made after the school district acquired the property by condemnation has no validity, nor can the property now be sold for the special tax.

Independent School District of Oakland v. Hewitt, 105 Iowa 666;

Edwards and Walsh v. Jasper County, 117 Iowa 365.

I do not believe that the county treasurer is liable on his bond for the failure to deduct the general tax or the special assessment from the fund deposited with him. No statutory authority is given the treasurer to take such action. Had the general tax been due at the time the fund was in the hands of the treasurer doubtless the treasurer could, under section 1406 of the code, have levied upon the fund by distress. But the last half of the 1915 tax was not due at the time the treasurer paid out the fund, and there was no authority given him to hold it for taxes thereafter to accrue. So far as that tax is concerned, I am of the opinion that the treasurer has done nothing which would create liability on his part.

As to the special assessment, I feel that that is a matter of private controversy between the certificate holder and the school district and county treasurer, concerning which no opinion should be given by this department. From whom a certificate holder may collect the special assessment and in what manner he should proceed, I express no opinion.

F. C. DAVIDSON, *Assistant Attorney General.*

OPINIONS RELATING TO INHERITANCE TAXATION

A WIDOW NOT AN HEIR OF HER DECEASED HUSBAND

A widow is not an heir of her deceased husband so that she may inherit property devised to the "heirs" of her husband in case such deceased husband leaves any children surviving him; hence any funds paid to the widow by an executor under such a will is without sanction in law and the state cannot impose a tax on such unlawful and unauthorized distribution.

November 7, 1919.

Hon. E. H. Hoyt,
Treasurer of State.

Dear Sir:

We have your request for an opinion of the right of the state to collect an inheritance tax under the following state of facts:

> "Robert L. Alexander died in the year 1903, leaving a will disposing of his entire estate. The third provision of the will is as follows: 'All the residue and remainder of my personal estate I give and bequeath in the manner as follows: One-third to the heirs of my son, William H. Alexander, deceased.'
>
> "The executor of the estate of Robert L. Alexander has given to the surviving spouse of William H. Alexander one-third of the estate bequeathed to the heirs of said William H. Alexander and the remaining two-thirds to the children of said William H. Alexander. Is the state of Iowa entitled to an inheritance tax on the bequest paid to the widow of William H. Alexander?"

In answering your inquiry we desire to call your especial attention to the fact that the provisions of this will bequeathed "one-third to the *heirs* of my son, William H. Alexander, deceased." Our court has recently held that a surviving widow is not an heir of her deceased husband.

Blackman et al. v. Wadworth, 65 Iowa 80;
Phillips v. Carpenter, 79 Iowa 600;
Kuhn v. Kuhn, 125 Iowa 449.

In the case of *Breun v. Mathieson,* 139 Iowa 409, 413, it is said:

> "In this state the widow, so far as her dower interest is concerned—that is, taking as a widow only, there being direct descendants of deceased—is not an heir."

The part which a widow takes in the property her husband dies seized of in this state is not by virtue of heirship, but goes to her as a matter of contract and of right given to her under the provisions of section 3366 of the code. She cannot acquire such interest through inheritance.

It will therefore be observed that the distribution of part of the estate of Robert L. Alexander to the surviving widow of the son of William H. Alexander is without sanction in law. The executor had absolutely no authority to make such distribution. The property thus distributed belongs to the heirs of William Alexander, and his surviving widow is entitled to no interest whatsoever in this bequest.

Such being the case, we do not consider that the state of Iowa has a right to impose an inheritance tax upon the sum unlawfully distributed to such widow.

B. J. POWERS, *Assistant Attorney General.*

COMPENSATION OF COUNTY ATTORNEY IN INHERITANCE TAX MATTERS

A county attorney who makes an unsuccessful attempt to collect an inheritance tax from an estate is not entitled to any compensation therefor. The only time when such attorney is entitled to extra compensation is when his efforts are successful and a tax has actually been paid into the state treasury.

November 17, 1919.

Hon. E. H. Hoyt,
Treasurer of State:

Dear Sir:

We have your letter of November 8th in which you state in part as follows:

> "A number of cases have come to the attention of this department in which the county attorney was directed by the department to appear for the treasurer of state and prosecute or advise, as the case might be, and in these contested cases the court held adversely to the department and no tax was collected. The county attorney had rendered all the service in representing the treasurer of state that was necessary, and have asked for and insisted upon some compensation for their services. The department has always held under the section above referred to that requisition could not issue for any amount in compensation.

"We desire that you furnish this department with written opinion advising if there is any section under which these county attorneys can be compensated for the services rendered in such cases."

In answering your inquiry we desire to direct your attention to section 1481-a32, supplement 1913, which provides as follows:

"It shall be the duty of the county attorney of each county, when directed by the treasurer of state, to perform such legal services as shall be necessary in the enforcement of said tax, but such attorney shall have no authority to receipt for or receive any of such tax. He shall advise and assist the clerk and appraisers in the discharge of their duties in collateral inheritance tax matters, and see that the notices required by law are properly made and returned. In each estate where the county attorney has performed such legal services, he shall receive a compensation as follows, viz.: On the first one hundred dollars ($100.00) or fraction thereof of tax paid, ten per cent; on the excess of one hundred ($100.00) to five hundred dollars ($500.00) five per cent; on the excess of five hundred dollars ($500.00) to one thousand dollars ($1,000.00) three per cent; on all sums in excess of one thousand dollars ($1,000.00) one per cent, but not to exceed one hundred and fifty dollars ($150.00) from any one estate. Provided, however, that except in cases of litigation requiring the filing of a petition or answer in court, the fee in any case shall not exceed the sum of fifty dollars ($50.00). *When the treasurer of state has issued his receipt for the tax in an estate, in which the county attorney has been directed to render legal services, and has performed such services, the treasurer of state shall certify the amount due for such services to the auditor of state, who shall issue his warrant on the treasurer of state in favor of the said county attorney for the sum due.* If the county attorney is attorney for the executor, administrator or other person interested in the estate the treasurer of state may employ another attorney to represent the state."

From a reading of the foregoing section it will be observed that the fee to which a county attorney is entitled in inheritance tax matters is based upon a certain percentage of the amount of tax collected. That part which we have underlined clearly indicates that it was the intention of the legislature that the county attorney should be paid for his services in the enforcement of the tax only when the tax had been paid to the treasurer of state. The statute contemplates that the treasurer of state shall have issued his receipt for the tax before the treasurer of state certifies to the auditor of state the amount to which such county attorney is entitled.

We also desire to direct your attention to chapter 232, acts of the 38th General Assembly, which fixes the compensation and duties of county attorneys. It provides that county attorneys shall receive an annual salary which depends upon the population of their respective counties and that the salary shall be paid in twelve equal installments on the first day of each calendar month of each year, out of the general fund of the county, and

> "in addition to the salary above provided, he shall receive the fees as now allowed to attorneys for suits upon written instruments where judgment is obtained, for all fines collected where he appears for the state, but not otherwise, and school fund mortgages foreclosed, and his necessary and actual expenses incurred in attending upon his official duties at a place other than his residence and the county seat, which shall be audited and allowed by the board of supervisors of the county. * * *
>
> "It shall be the duty of the county attorney to furnish free of charge legal advice to all school boards and townships officers."

After reading the foregoing, we do not think that anyone would care to hold that a county attorney would be entitled to compensation other than that fixed by statute where he failed in his attempt to impose a fine upon a defendant for a violation of the laws of this state. Before he is entitled to a percentage of a fine, it is necessary that he collect it. Until such collection is made, he is not entitled to anything other than his salary. In this connection we call your attention to section 1289 of the code, which provides:

> "The salaries of all officers authorized in this code shall be paid in equal monthly installments at the end of each month, and shall be in full compensation for all services, *except as otherwise expressly provided.*"

The only time the statute provides that a county attorney shall receive compensation in addition to his salary for looking after inheritance tax matters is when a tax is collected. There is express provision in the statute to that effect. There is no provision in the statute authorizing the payment of any sum to such county attorney in addition to his salary when his efforts do not result in the imposition of a tax.

It is therefore the opinion of this department that before the treasurer of the state has authority to certify to the auditor of

state the sum to which a county attorney may be entitled for services rendered in connection with the inheritance tax, that it is necessary that the efforts of the county attorney to enforce the collection of a tax be successful and that the tax in fact be first paid to the treasurer of state before certificate is made to the state auditor.

B. J. POWERS, *Assistant Attorney General.*

ATTORNEY FEE IN INHERITANCE TAX MATTERS

Where the inheritance tax is paid under protest and thereafter the right to collect is litigated, the county attorney is entitled to the fee allowed in "cases of litigation." It is immaterial whether the litigation precedes or follows the payment of the tax; the fact of litigation entitles the county attorney to the larger fee.

March 21, 1919.

Hon. E. H. Hoyt,
Treasurer of State.

Dear Sir:

We have your letter of March 18th in which you state:

> "Under section 1481-a32, in which the duties and compensations of county attorneys employed in collection of collateral inheritance tax are defined, you will note that in estimating the compensation for county attorneys the compensation may, in cases where there is litigation, be granted to the extent of $150.00.
>
> "In an estate now upon our records, in which the tax has been paid in the sum of $14,107.01, and which was paid under protest, petition being filed at the same time that the tax was paid, said litigation being handled later by the county attorney, and in which the estate was successful, will the county attorney in this case be paid the larger fee as provided by section referred to above?"

Section 1481-a32 noted in the first paragraph of your letter reads in part as follows:

> "It shall be the duty of the county attorney of each county, when directed by the treasurer of state, to perform such legal services as shall be necessary in the enforcement of said tax, but such attorney shall have no authority to receipt for or receive any of such tax. He shall advise and assist the clerk and appraisers in the discharge of their duties in collateral inheritance tax matters, and see that the notices required by law are properly made and returned. In each estate where the county attorney has performed such legal services, he shall receive a compensation as follows, viz.: On the first one hundred ($100.00) or fraction thereof of tax paid, ten per cent;

on the excess of one hundred dollars ($100.00) to five hundred dollars ($500.00) five per cent; on the excess of five hundred dollars ($500.00) to one thousand dollars ($1,000.00) three per cent; on all sums in excess of one thousand dollars ($1,000.00) one per cent, but not to exceed one hundred and fifty dollars ($150.00) from any one estate. *Provided, however, that except in cases of litigation requiring the filing of a petition or answer in court, the fee in any case shall not exceed the sum of fifty dollars ($50.00).* When the treasurer of state has issued his receipt for the tax in an estate, in which the county attorney has been directed to render legal services, and has performed such services, the treasurer of state shall certify the amount due for such services to the auditor of state, who shall issue his warrant on the treasurer of state in favor of the said county attorney for the sum due. * * *''

This section provides that a county attorney shall receive a fee not to exceed $50.00 in all cases except those in which there is litigation; in event of litigation he is entitled to a fee not to exceed $150.00.

In the case you mention the litigation did not precede the payment of the tax, but was subsequent thereto, the tax having been paid under protest. If, in the course of the litigation following the payment of the tax, it was necessary for the county attorney to prepare and file either a petition or an answer, it is the opinion of this department that he is entitled to the fee allowed in case of litigation. The fee to be allowed in cases of litigation applies to those where the litigation follows the payment of the tax as well as those where the litigation precedes its payment. In other words, it is immaterial whether the litigation is precedent or subsequent to the payment of the tax. The fact of there having been litigation in connection with the collection and payment of the tax is sufficient to bring it within the provision of the law for additional compensation.

B. J. POWERS, *Assistant Attorney General.*

BEQUEST TO RED CROSS SUBJECT TO INHERITANCE TAX

A bequest to the American National Red Cross is subject to the imposition of the Iowa collateral inheritance tax since such corporation is a "body corporate and politic in the District of Columbia" and not a charitable corporation organized under the statutes of this state.

July 28, 1920.

Hon. E. H. Hoyt,
Treasurer of State.

Dear Sir:

We have your request for an opinion upon the following proposition:

"Is property passing under the will of a decedent to the American National Red Cross Society subject to the inheritance tax of this state as assessed under sections 1481-a and 1481-a1 of the supplement, 1913?"

In answering your inquiry we first desire to direct attention to the status of the American National Red Cross Society. This organization as it now stands is a corporation incorporated under an act of Congress passed January 5, 1905, and was created "a body corporate and politic in the District of Columbia" by section 7697, U. S. compiled statutes, 1916. It derives its corporate franchise solely from the act of Congress above mentioned. It is not a part of the government even though it has repeatedly granted aid to government enterprises. It cannot be said to be a part of the federal government. Its status is that purely of a corporation, and we have therefore but one question left to consider, and this is, whether a gift to it made by a decedent who was a resident of this state is subject to the imposition of an inheritance tax. In view of the provisions of section 1481-a1, supplement, 1913, and of the decision of the supreme court announced in the case of *In re Will of Max Peterson,* 172 N. W. 206, we are constrained to hold that a bequest to the American National Red Cross is subject to the imposition of a tax, is not being a domestic corporation organized for charitable purposes.

B. J. POWERS, *Assistant Attorney General.*

BEQUEST TO CITIZEN OF NORWAY

The treaty of 1783 entered into by the United States and Norway and Sweden is effective as to Norway in so far as it relates to matters of inheritance. The treaty, however, has no application where a citizen of the United States disposes of his property at his death to subjects of Norway residing there and in such cases a tax of 20% should be exacted.

September 9, 1919.

Hon. E. H. Hoyt,
Treasurer of State.

Dear Sir:

We have your letter in which you state:

"I desire the opinion of the attorney general's office as to the rate of collateral inheritance tax to be exacted from the estate of Laura Olson.

"The pertinent facts are as follows: Laura Olson, a resident of Polk county, Iowa, died intestate May 5, 1918. Upon May 18, 1918, the administrator duly qualified and took

possession of the assets of the estate, aggregating considerably more than one thousand dollars, the entire estate being situated in Iowa. The estate is to be divided equally among fourteen collateral heirs, ten of whom are alien non-residents living in Norway. The parties are all nieces and nephews. The decedent was a native of Norway, but the information as to whether or not she ever acquired American citizenship is not obtainable."

In response to your request, permit us to state that the right of a subject of Norway to inherit property located in the United States is governed by acticle 6 of the treaty of 1783, entered into by the United States with Norway and Sweden. On July 24, 1827, another treaty was concluded between the United States with Norway and Sweden, and in that treaty article 17 specifically provided that article 6 of the treaty of 1783, dealing with inheritance, was revived and made applicable to all the countries under the dominion of the contracting parties.

The treaty concluded July 4, 1827, is still in force and effect between this government and Norway, with the exceptions of articles 13 and 14, which were terminated July 1, 1916, in accordance with the provisions of what is known as the seaman's act.

Later on the union between Norway and Sweden was dissolved, but the treaty thus entered into jointly with Norway and Sweden was considered by Norway as still binding upon that government in so far as it related to the affairs of Norway. The Norwegian charge d'affaires ad interim notified the secretary of state to that effect by communication dated December 7, 1905.

Article 6 of the treaty of 1783 has been passed on in a number of cases, but the only case pertaining to your inquiry is to be found in 245 U. S. 176. In this case (*Duus v. Brown, treasurer of state of Iowa*) the supreme court of the United States held that the foregoing article had no reference whatsoever to a case when a citizen of the United States disposes of his property to citizens of Norway. The court held that the treaty had application solely to cases where subjects of Norway residing in the United States dispose of their property to subjects of Norway, and to cases where citizens of the United States owning property in Norway dispose of their property to citizens of the United States. This is in conformity to the rule announced in *Frederickson v. Louisiana,* 23 How. 445.

You will therefore observe that it is impossible to tell you the rate of tax to be exacted from the estate of Laura Olson until it is ascertained whether she was a subject of Norway or whether she was a citizen of the United States. If she was a subject of Norway, then you cannot exact a greater tax than would be exacted in case the property passed from a citizen of the United States to other citizens of the United States, but if you find it to be that she is a citizen of the United States, then you may lawfully exact a tax of 20 per cent for the reason that the treaty between the United States and Norway does not control the disposition of property by a citizen of this country to subjects of Norway.

B. J. POWERS, *Assistant Attorney General.*

POWER OF APPOINTMENT

When a testator died during the time an unconstitutional inheritance tax law existed and by the terms of his will a life estate was given to a designated person with remainder to her "children or descendants living at the time of her decease" the remainder estate is not transferred to such children or descendants until the death of the life tenant. Therefore if a valid law existed at the time of such event the transfer of the remainder estate should then be taxed. Further, it is the exercise of a power of appointment that effects a transfer of property and not the instrument creating the power.

April 14, 1919.

Hon. E. H. Hoyt,
Treasurer of State.

Dear Sir:

We have your letter of April 1st in which you state:

> "We submit you herewith copy of the will in estate of Vernon Phelps, and desire an opinion from your department as to whether bequests under this will of real estate located in the state of Iowa are liable for the collateral inheritance tax, and as to the question whether the title to this real estate vested at the time of death in any of said heirs?"

The will to which you refer in your letter in part provides:

> "I give and bequeath to my niece Celia Pellett of Flint, Michigan, the use, rents and profits of my farm, situate in the county of Chickasaw in the state of Iowa, and containing about one hundred and fifty acres of land—for and during the natural life of her, the said Celia Pellett—with remainder to her children or descendants living at the time of her decease in fee simple. I hereby authorize and empower her, my said niece, Celia Pellett, to devise any or all of said lands in Chick-

asaw county, Iowa, by her last will and testament or proper instrument in writing to take effect and convey said lands in the event that she, said Celia Pellett, die and leave no issue her surviving."

It further appears from the information you have furnished us that Vernon Phelps died on the 26th day of July, 1896.

The original collateral inheritance law of this state became effective July 4, 1896, but this law was declared unconstitutional by the supreme court for the reason that there was no provision in the law for notifying those interested in the estate of appraisement proceedings.

Ferry v. Campbell, 110 Iowa 290; 81 N. W. 604.

However, before this case was decided by the supreme court the 27th General Assembly enacted a provision for notice and removed the objection to the unconstitutionality of the act. The act of the 27th General Assembly became effective by publication on the 8th day of April, 1898. It will thus be noted that the testator died during the time in which we had an unconstitutional inheritance tax law. Our supreme court has said that in case the estate vested in the heirs during the time the unconstitutional statute purported to be a part of our law, that the same passed exempt from the imposition of our tax.

Harriett v. Potter, 115 Iowa 648;
Montgomery v. Gilbertson, 134 Iowa 291.

Therefore, if the interests in the one hundred and fifty acre farm mentioned in the provision of the will above set forth, vested at the time of the death of Vernon Phelps in the children or descendants of Delia Pellett, the state of Iowa cannot impose a tax; if no interest vested in said children or descendants at the time of the death of Vernon Phelps, then the estate is liable for the tax. A vested remainder has been defined as follows:

"A vested remainder at the common law is one where there is some person in case, known and ascertained, who by will or deed creating the estate is to take and enjoy the same upon the expiration of the existing particular estate, and whose right to such remainder no contingency can defeat."

Fulton v. Fulton, 179 Iowa 948, 962.

The plain terms of this will disclose that the children or descendants of Celia Pellett were to possess no interest in this estate except in case they survived Celia Pellett. In case they did

not survive her, then she was given the right to convey the premises by "last will and testament or proper instrument in writing to take effect and convey said lands in event that the said Celia Pellett died leaving no issue her surviving." In other words, Celia Pellett possessed a life estate in the premises mentioned, and the remainder was to descend to her children or descendants in event said children or descendants survive her. Otherwise, she was given the power of appointment with authority to transfer the property to whomsoever she desired. While a transfer made in pursuance of such a power derives its origin from the testator, yet there is in fact no transfer of property until the power is exercised by the proper person. It is the exercise of the power that effects a transfer.

It is clear from the terms of this will that no transfer was to take effect until the death of Celia Pellett, except in event all her children or descendants died during her lifetime. No interest was to pass to her descendants until her death, and since our tax is upon the transfer of the property, the tax was not due until that event.

In this case there was a contingency which might defeat any interest the children or descendants of Celia Pellett might have in the estate of Vernon Phelps, namely, the possibility that they might die before Celia Pellett. This contingency is the thing which prevents the estate from vesting in the children or descendants of Celia Pellett at the time of the death of Vernon Phelps. Such children acquired a vested interest, fixed and certain only in event they survive Celia Pellett.

Without attempting to set forth the many authorities upon this proposition, which would serve no useful purpose at this time, we desire to state that it is the opinion of this department that the remainder estate provided for in the will of Vernon Phelps is subject to the inheritance tax of this state.

B. J. POWERS, *Assistant Attorney General.*

BEQUEST TO WIDOW WITH POWER OF APPOINTMENT SUBJECT TO TAX

When a testator gives to his widow power to pay such sums to his sister as the wife deems in her discretion can be conveniently paid to such sister, the sums thus transferred under the power are subject to the inheritance tax of this state.

April 30, 1919.

Hon. E. H. Hoyt,
Treasurer of State.

Dear Sir:

In response to your verbal request for an opinion upon the right of the state to insist upon the payment of an inheritance tax from the estate of Alonzo C. Parker, permit us to state that we are of the opinion that the transfer of part of the assets of said estate to Mrs. William H. Atkinson is taxable under our law.

The will of Alonzo C. Parker provided in part as follows:

> "I devise and bequeath to my beloved wife, Mary R. Parker, all the rest and residue of my property, of whatever kind and nature, real and personal, and wherever situated; subject, however, to the following conditions: If the income from my estate is more than sufficient to keep and maintain my said wife in comfortable and suitable manner, such as her needs and necessities demand, and if the condition of the estate, in view of such needs, will warrant such expenditure, she shall pay to my sister, Mrs. William H. Atkinson, of Jacksonville, Texas, such sums of money from time to time as her needs and immediate necessities reasonably demand; it is my desire, however, that my said wife do not so pay when to do so will place her in financial distress or embarrassment; conditioned, further, that in the event that my said wife shall again marry, then in that event she shall pay to my said sister, from my estate remaining at said time, the sum of five thousand ($5,000.00) dollars, if said sister be then living; the purpose of this condition being to provide for my sister in the event of such marriage and possible consequent loss of interest and affection for my said sister on the part of my said wife and consequent withdrawal of support under the first condition herein set forth; and my said wife, upon acceptance of my bequest herein set forth, assumes the obligation to pay my said sister said sum of five thousand ($5,000.00) dollars on the conditions aforesaid, and said sums from time to time on the conditions aforesaid, and I hereby bequeath to my said sister said sum of five thousand ($5,000.00) dollars on the condition and contingency of remarriage as aforesaid."

It further appears that on December 2, 1918, the said Mrs. William H. Atkinson entered into an agreement with Mary R. Parker, individually and as executrix of the estate of Alonzo C. Parker, whereby the said Mary R. Parker, in the capacity aforesaid, transferred and conveyed to the said Mrs. William H. Atkinson and husband certain real property of an agreed value of

$2,500.00 and the further sum of $2,500.00 in cash in full settlement of all claims against the estate of Alonzo C. Parker and Mary R. Parker by virtue of the provisions of the will of the said Alonzo C. Parker.

In brief, the will of Alonzo C. Parker gave to his wife, Mary R. Parker, a power of appointment; in other words, gave to her the right to set apart certain benefits to Mrs. William H. Atkinson at her discretion. Mary R. Parker, as executrix of the estate of Alonzo C. Parker, has exercised that power of appointment given to her by virtue of the will of Alonzo C. Parker, and she has, in pursuance of the authority thus granted, actually transferred and conveyed to Mrs. William H. Atkinson property of the agreed value of $5,000.00.

It is the opinion of this department that the provisions of section 1481-a, supplement, 1913, which provides in part as follows, is sufficiently broad to authorize the imposition of a tax in this case. The statute reads:

> "*The estates of all deceased persons,* whether they be inhabitants of this state or not, and whether such estate consists of real, personal or mixed property, tangible or intangible, and any interest in, or income from any such estate or property, which property is, at the death of the decedent owner, within this state or is subject to, or thereafter, for the purpose of distribution, is brought within this state and becomes subject to the jurisdiction of the courts of this state, or the property of any decedent, domiciled within this state at the time of the death of such decedent, even though the property of such decedent so domiciled was situated outside of the state, except real estate located outside of the state passing in fee from the decedent owner, *which shall pass by will or by the statutes of inheritance of this or any other state or country, or by deed, grant, sale, gift, or transfer made in contemplation or the death of the donor, or made or intended to take effect in possession or enjoyment after the death of the grantor or donor, to any person, or for any use in trust or otherwise,* other than to or for the use of persons, or uses exempt by this act shall be subject to a tax of five (5) per centum; * * *"

Furthermore, section 1481-a44, supplement, 1913, expressly provides for the appraisement of such estates and definitely fixes the time when the tax becomes due; that is, upon the actual transfer. The statute in part provides:

"Estates in expectancy which are contingent or defeasible and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, *shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof,* without diminution for or on account of any valuation theretofore made of the particular estates for purposes of taxation, upon which said estates in expectancy may have been limited. When an estate, devise, or legacy can be divested by the act or omission of the legatee or devisee, it shall be taxed as if there were no possibility of such divesting. * * *"

A case somewhat of the same general nature came before the court of appeals of the state of New York and it was there held that upon the transfer of property under a power of appointment, such as existed in the estate of Alonzo C. Parker, that the inheritance tax of New York should be imposed. In that case the trustees mentioned in the will of the decedent were given discretion as to whom they should transfer the property of the decedent and also as to the amount to be thus given to such beneficiaries. The court, after a thorough consideration, held that the exercise of the power effected a transfer of the property and that such a transfer authorized the imposition of the tax.

In re Stewart, 131 N. Y. 274; 30 N. E. 184.

It is therefore the opinion of this department that the transfer of the property to Mrs. William H. Atkinson in pursuance of the terms of the will of Alonzo C. Parker is subject to the inheritance tax of this state.

B. J. POWERS, *Assistant Attorney General.*

WHEN SUM RECEIVED FOR WRONGFUL DEATH SUBJECT TO TAX

A sum received by an administrator in settlement of a claim for damages for the wrongful injury and death of a decedent is subject to an inheritance tax upon transfer to collateral heirs.

April 16, 1919.

Hon. E. H. Hoyt,
Treasurer of State.

Dear Sir:

We have your letter of April 10th in which you state:

"We wish to submit to you copy of compromise settlement made by F. W. Curtis, administrator of the estate of Sedwick Terrell, deceased, with the Chicago & Northwestern Railroad Company.

> "This party was injured while in the service of this railroad company, dying a few days after injury. At the date of his death his estate consisted of about $100.00. His only relatives appear to have been brothers and sisters. Action was taken against the railroad for damages, which was settled as you see by compromise, this compromise settlement increasing the assets of the estate $2,200.00, and these assets passing to collateral heirs.
>
> "Under the circumstances is the amount of assets of this estate liable for collateral inheritance tax under our laws?"

The compromise settlement mentioned in your letter merely discloses that upon payment of the amount mentioned was for the purpose of satisfying "any and all claims against said railway company on account of the injury and death of Sedwick Terrell," and the administrator petitions the court "for authority to accept said sum of money in full compromise and settlement of all claims, demands and causes of action of every kind and nature arising or growing out of the injury and death of said Sedwick Terrell. * * *" The question presented under this state of facts appears to be a new one, so far as it relates to inheritance taxation.

However, we desire to direct your attention to that part of section 1481-a, supplement, 1913, which provides as follows:

> "*The estates of all deceased persons*, whether such estate consists of real, personal or mixed property, tangible or intangible, and any interest in, or income from any such estate or property, which property is, at the death of the decedent owner, within this state or a subject to, or thereafter, for the purpose of distribution, is brought within this state * * * which passes by will or by the statutes of inheritance * * * to any person, * * * other than to or for the use of persons, or uses exempt by this act shall be subject to a tax of five per centum; * * *"

You will note from the foregoing that it is the estates of deceased persons that are the subject of taxation upon passing to certain persons. The funds received from the Chicago & Northwestern Railroad Company for the injury and death of said Sedwick Terrell formed a part of his estate. The fact that the money was received from the railroad company in payment of a claim for injury and death of the decedent does not take it out from the operation of the law relative to the administration of estates. The funds received from this source become as much a part of his estate as if received from the sale of personal property belonging to him.

We further direct your attention to the fact that section 1481-a1, supplement, 1913, provides that the tax should not be imposed or collected in certain instances and upon certain transfers of property. However, you will observe that no exemption is provided for in case the estate consists of a sum, or sums, received as a result of the injuring and killing of the decedent.

We further direct your attention to section 1481-a45, supplement, 1913, which, in substance, states that the person claiming the exemption has the burden of proof, and that it is a duty resting upon him to point out his right to the exemption.

We are, therefore, of the opinion that under the circumstances in this case, the estate of Sedwick Terrell is liable for a collateral inheritance tax imposed by the laws of this state on the transfer of the same to collateral heirs.

B. J. POWERS, *Assistant Attorney General.*

TAXING THE TRANSFER OF CORPORATE STOCK

Where a corporation is incorporated in more than one state it is to be regarded as a domestic corporation of each state and each state may insist on the payment of an inheritance tax based upon the full value of the stock. This is true even though the property of the corporation may be located in a number of states.

February 13, 1919.

Hon. E. H. Hoyt,
Treasurer of State.

Dear Sir:

We have your letter of recent date in which you state as follows:

> "The attorney representing the estate of Jno. B. Manning, late of New York, has raised the question of the right of this department to take into consideration the full appraised value of stock of an Iowa corporation in arriving at the basis for estimating the collateral inheritance tax upon bequests passing to collateral heirs.
>
> "His contention is that the corporation having been incorporated in several other states other than Iowa, that this department should prorate the value of this stock according to the several states in which said company is incorporated. Said incorporation being the Chicago, Rock Island and Pacific Railway Company, which originally was incorporated under the laws of the state of Iowa.

"Please advise us as to the merits of their rights to such contention that may be sustained by our statute or court's opinion."

In answering your inquiry permit us to direct your attention to the provisions of section 1481-a38, supplement of 1913, which requires all Iowa corporations organized for pecuniary profit to make a report to the treasurer of state of all transfers of its stock made during the preceding year which are subject to the payment of inheritance tax. This section reads as follows:

"All Iowa corporations organized for pecuniary profit, shall on July first of each year, by its proper officers under oath make a full and correct report to the treasurer of state of all transfers of its stock made during the preceding year by any person who appears on the books of such corporation as the owner of such stock, when such transfer is made to take effect at or after death of the owner or transferor, and all transfers which are made by an administrator, executor, trustee, referee, or any person other than the owner or person in whose name the stocks appeared of record on the books of such corporation, prior to the transfer thereof. Such report shall show the name of the owner of such stocks and his place of residence, the name of the person at whose request the stock was transferred, his place of residence and the authority by virtue of which he acted in making such transfer, the name of the person to whom the transfer was made, and the residence of such persons, together with such other information as the officers reporting may have relating to estates of persons deceased who may have been owners of stock in such corporation. If it appears that any such stock so transferred is subject to tax under the provisions of this act, and the tax has not been paid, the treasurer of state shall notify the corporation in writing of its liability for the payment thereof, and shall bring suit against such corporation as in other cases herein provided unless payment of the tax is made within sixty days from the date of such notice."

Section 1481-a37 further provides as follows:

"If a foreign executor, administrator, or trustee shall assign or transfer any corporate stock or obligations in this state standing in the name of a decedent, or in trust for a decedent, liable to such tax, the tax shall be paid to the treasurer of state on or before the transfer thereof; otherwise the corporation permitting its stock to be so transferred shall be liable to pay such tax, interest and costs, and it is the duty of the treasurer of state to enforce the payment thereof."

We further direct your attention to the provisions of section 1626 of the code, which provides that in order to make a full

and complete transfer of the shares of stock in such corporation, it is necessary to have such stock transferred upon the books of the corporation.

> "The transfer of shares is not valid, except as between the parties thereto, until regularly entered upon the books of the company, showing the name of the person by and to whom transferred, the numbers or other designation of the shares, and the date of the transfer; but such transfer shall not exempt the person making it from any liability of said corporation created prior thereto. Its books must be so kept as to show the original stockholders, their interests, the amount paid on their shares, and all transfers thereof; which books, or a copy thereof, so far as the items mentioned in this section are concerned, shall be subject to the inspection of any person desiring the same. * * *"

It will be noted that our legislature has provided that the transfer of shares of stock to be fully effective must be transferred upon the records of the corporation, and provision has been made authorizing the taxation of the transfer of all shares of stock when the transfer is subject to the provisions of the inheritance tax laws of this state.

That the sovereign creating a corporation may make regulations prescribing the manner and the form in which the shares of stock in such corporation shall be transferred is too well settled to be questioned. And, furthermore, it is competent for the sovereign state to provide that a corporation organized under its laws shall have its situs within that state. Thus in the case of *Corry v. Mayor and Council of Baltimore,* 196 U. S. 465, it was held that the sovereign that creates a corporation has the incidental right to impose reasonable regulations concerning the ownership of stock therein, and it is not an unreasonable regulation to establish the situs of stock for purposes of taxation at the principal office of the corporation, whether owned by residents or nonresidents, and to compel the corporation to pay the tax for the stockholders, and to give it a right of recovery therefor against the stockholders, and to give such corporation a lien upon the stock for such tax.

At page 476 the court said:

> "The principle upheld by the rulings of this court to which we have referred, concerning the taxation by the states of stock in national banks, is that the sovereignty which creates a corporation has the incidental right to impose reasonable regulations concerning the ownership of stock therein, and

> that a regulation establishing the situs of stock for the purpose of taxation, and compelling the corporation to pay the tax on behalf of the shareholders, is not unreasonable regulation. Applying this principle, it follows that a regulation of that character, prescribed by a state, in creating a corporation is not an exercise of the taxing power of the state over persons and things not subject to its jurisdiction."

The rule announced in the foregoing case has been repeatedly followed by the supreme court of the United States, and it is equally clear, under the doctrines of the supreme court, that a state which has created a corporation has such control over the transfer of its shares of stock that it may administer upon the shares of the decedent owner by taxing the right of succession thereto.

Baker v. Baker, Eccles & Co., 242 U. S. 394, 401.

The fact that the Chicago, Rock Island and Pacific Railroad Company is incorporated in Illinois as a domestic corporation, and also incorporated in Iowa as a domestic corporation does not change the rule above stated. In the eyes of the law, the railway company is a domestic corporation of each state, and is the holding in the case of *Railroad Commission Cases*, 166 U. S. 307. In these cases, it was held that a railroad having a continuous line in two or more states, and owned and managed by a corporation whose corporate powers are derived from the legislative power in each state in which the road is situated, is a domestic corporation of each state, and that each state has jurisdiction over such corporation upon all matters not expressly granted to the United States.

Again, in the case of *Muller v. Dows*, 94 U. S. 444, it was held that the Chicago, Rock Island and Pacific Railroad Company, having been incorporated both in Iowa and Illinois, was, nevertheless, a domestic corporation of Iowa, even though it had consolidated with another corporation of the same name in Missouri.

It will thus be noted that the sovereign creating a corporation has sufficient jurisdiction over it to make provision as to the manner in which the stock of the corporation shall be transferred, and to further fix the situs of the shares of stock of such corporation, regardless of the place where the property might be, at the principal office of the corporation within the state to which it owes its existence.

The succession tax, or inheritance tax, is not a tax upon the property of the corporation; it is merely a tax upon the right to transfer property from a decedent to certain beneficiaries.

In re Stone, 132 Iowa 136; 109 N. W. 445; 10 Ann. Cas. 1033.

The transfer of the shares of stock of the Chicago, Rock Island and Pacific Railway Company is made effectual by compliance with the laws of the state of Iowa. In the absence of such compliance with the statutes of this state, there is no full and effective transfer of the corporate stock. The beneficiaries entitled to the shares of stock are compelled to invoke the aid of the laws of the state of Iowa in completing their right to the possession and enjoyment of the bequest, and whenever anyone is required to ask assistance of the laws of this state in enforcing their right to possession or enjoyment of property, they have property "within this state" and subject to the jurisdiction of the courts of this state.

Hoyt v. Keegan, administrator, — Iowa —; 167 N. W. 521.

In this connection it should be remembered that the right to inherit or to take by law, and the right to devise and bequeath property are not natural and inalienable rights, nor are they guaranteed by the state or federal constitutions, but are within the control of each state.

United States v. Perkins, 163 U. S. 625;
Magoun v. Illinois Trust and Savings Bank, 170 U. S. 283.

And since the matter of inheritance is a right acquired solely by virtue of law, there is no valid reason why a sovereign state cannot make such regulations as it sees fit to place upon the right of succession to property. In the case of *Welch v. Treasurer and Receiver General,* 223 Mass. 87, this matter was thoroughly discussed, and it was held that it was competent for a state to levy its succession tax upon the transfer of stock of a corporation at the domicile of the decedent owner, regardless of the fact that the state of the domicile of the corporation might also levy a tax upon the transfer of the stock, and the fact that the corporation was incorporated in two or more states would not change the rule that each sovereign state in which the corporation was incorporated might apply its inheritance or succession tax.

It is therefore the opinion of this department that the state of Iowa may exact its inheritance tax of 5 per cent upon the full value of the shares of stock of a corporation domiciled in this state, even though such corporation may be incorporated in one or more states, and be required to pay a tax in each state in which it is domiciled, there being no constitutional objection to taxation of the succession to the same property in more than one state.

Blackstone v. Miller, 188 U. S. 203.

It is not a "double taxation" in a legal sense, because the same taxing jurisdiction does not levy a second tax upon the same property. A double taxation, obnoxious to the rule, is when the second or additional burden is imposed by the same soverignty which imposed the first.

Judy v. Beckwith, 137 Iowa 24, 32.

You should therefore insist upon the payment of the tax of 5 per cent upon the transfer of such stock, and take as a basis therefor the full appraised value thereof.

B. J. POWERS, *Assistant Attorney General.*

WHAT ESTATE SUBJECT TO INHERITANCE TAX

Estates, over $1,000.00 in value after deducting debts are taxable on the entire estate or that portion thereof going to collateral heirs.

April 25, 1919.

Mr. S. D. Quarton, County Attorney,
Algona, Iowa.

Dear Sir:

We have your letter of the 17th inst. in which you ask the opinion of this department upon the following:

> "Will your office please be kind enough to furnish me an opinion as quickly as possible as to the construction of sections 1481-a and 1481-a1, supplemental supplement to the code of 1915, relative to collateral inheritance tax. What I want to know is whether the 5 per cent tax there provided for is to be collected on the *whole* estate or whether it is to be collected on that portion of the estate in excess of $1,000. For instance: An estate is appraised at $1,200. The debts amount to $100, leaving a net estate of $1,100. Is the 5 per cent to be collected on $1,100 or $100?"

Section 1481-a1 of the supplement to the code, 1913, provides that:

"The tax imposed by this act shall not be collected when the entire estate of the decedent does not exceed the sum of one thousand dollars after deducting the debts as defined in this act."

We are of the opinion that this does not create an exemption of one thousand dollars, but rather is simply a limitation upon the character of estates to be taxed. In other words, if the estate exceeds one thousand dollars it is taxable in its entirety in so far as it goes to collateral heirs, while if it does not exceed one thousand there is no tax. We do not think that section 1481-a of the supplement to the code, 1913, in any manner modifies this construction.

You should therefore base your tax on the entire amount of the estate, and not upon the amount less one thousand dollars.

SHELBY CULLISON, *Assistant Attorney General.*

FEES OF COLLATERAL INHERITANCE APPRAISERS

Inheritance tax appraisers are entitled to $3.00 per day for their services and five cents a mile for distance traveled in going and returning from place of appraisement. They are not entitled to cost of conveyance in addition to mileage.

March 10, 1919.

Mr. S. J. Moore, Clerk of the District Court,
Decorah, Iowa.

Dear Sir:

We have your letter of March 6th in which you state:

"The collateral inheritance tax appraisers in Winneshiek county insist on my taxing mileage and conveyance for them when they perform their duties as collateral inheritance tax appraisers.

"I cannot find any section in this code which provides for this, and I have refused to tax the amount that they claim for conveyance.

"Please give me your opinion in this matter."

In response to your inquiry we desire to direct your attention to the provisions of section 1290-a, supplemental supplement of 1915, which fixes the compensation of appraisers. It is as follows:

"That the compensation of appraisers appointed to appraise property belonging to any estate as a basis for the assessment of the collateral inheritance tax shall be three dollars per day for each appraiser and mileage as hereinafter provided and in other cases where the compensation of apprais-

ers is not now fixed by statute, shall be two dollars per day for each appraiser and five cents a mile for the distance traveled in going to and returning from the place of appraisement, to be paid out of the property appraised or by the owner or owners thereof."

It will be observed from the provisions of the foregoing section that each appraiser is entitled to $3.00 a day for his services, and is entitled to "five cents a mile for the distance traveled in going to and returning from the place of appraisement." There is no provision whatsoever in the law for taxation of the cost of conveyance. It was undoubtedly the intention of the legislature to have the allowance of five cents a mile cover the cost of conveyance.

You are therefore correct in refusing to enter as part of the appraisement the cost of conveyance other than the taxation of mileage as provided in the section above set forth.

B. J. POWERS, *Assistant Attorney General.*

PROOF OF ADOPTION

Property devised to a person who claims exemption on account of being the adopted child of testator must establish the fact of adoption by clear convincing and satisfactory proof. Otherwise, property so devised subject to tax.

March 20, 1920.

Mr. T. M. Rasmussen,
Exira, Iowa.

Dear Sir:

We have your favor of the 16th inst. requesting the opinion of this department on the following question.

You state:

"I have been applied to for an opinion on the following state of facts: Some twenty years ago a woman took a very small child into her home where the child remained until the death of the woman about four years ago, and where the child received exactly the same care and consideration that natural children of the woman received; This woman made a will before her death in which she made the following provision, "to my adopted daughter Julia L. Christensen who I have raised in my family and consider in all respects as my own, I give and bequeath," etc. She also refers to this girl in other parts of the will as her adopted daughter. It appears that no one is able to find any papers or the record of any instruments showing formal adoption of this child. The question referred to me is whether or not the share given to

this girl is subject to the collateral inheritance tax under this state of facts. I have given my opinion in the matter, but it does not seem to meet with the entire approval of the parties concerned and I am requested to refer the question to your office for an opinion."

The question presented involves the construction of the statutes pertaining to adoption, especially section 3253 of the 1913 supplement to the code, and also involves the construction of parts of sections 1481-a and 1481-a1 of said supplement, pertaining to collateral inheritance or succession taxes.

Section 3253, above referred to, provides as follows:

"Upon the execution, acknowledgment and filing for record of such instrument, the rights, duties and relations between the parent and child by adoption shall be the same that exist by law between parent and child by lawful birth."

The question of the regularity and legality of instruments executed for the purpose of adoption has frequently been before our supreme court for determination, and in each instance the court has held that a substantial compliance with the statute is indespensible. I will not attempt to analyze the cases but will simply cite them for your perusal and consideration. They follow:

Long v. Hewitt, 44 Ia., 363.
Tyler v. Reynolds, 53 Ia., 146.
Bresser v. Searman, 112 Ia., 720.
Hopkins v. Antrobus, 120 Ia., 21.
Lamb v. Morrow, 140 Ia., 89.

The last cited case was an action against the treasurer of state and involved both the question of the right to assess the succession tax, and also, the right to exemption therefrom under articles of adoption. Judge Deemer, speaking for the court, said:

"It is practically conceded that the articles of adoption, to which reference has been made, were insufficient in law, to make Charlotte Holmes a legally adopted child of John and Mary, and it is clear that under the rule announced in this state these articles cannot be regarded as establishing the heirship of William Holmes. *Long v. Hewitt,* 44 Iowa, 363; *Bresser v. Searman,* 112 Iowa 720; *Hopkins v. Antrobus,* 120 Iowa, 21, and cases cited. See, also, *Sires v. Melvin,* 135 Iowa, 460. Appellee's counsel contend, however, that the case is in equity, and that the attempt at adoption, and the conduct of the parties thereunder, should be considered in arriving at a final conclusion of the controversy. The answer to this is that the case is not in equity, and if it were, the mat-

> ters relied upon cannot make one an heir if in fact they do not in law establish that relation."

It should be observed that section 3253 above set out provides that upon *execution, acknowledgment, and filing for record* of such instrument the rights, duties, and relations between parent and child by adoption shall be the same that exists by law between parent and child by lawful birth and the right of inheritance from each other shall be the same as between parent and child born in lawful wedlock. And, in all cases where parties claim rights under adoption, there must be a strict compliance with this provision.

The only proper and safe rule that should be applied in determining whether property devised to a person claiming exemption from a succession tax, by reason of being a lawful heir of the testator by adoption, is to require such person to establish a state of facts that would enable him to prevail in a suit against a collateral heir of the testator, involving the title to the property so devised, if such testator had died intestate. In other words, the fact of adoption must be established by competent and satisfactory proof.

Section 1481-a, above set out, makes the estates of all deceased persons subject to the tax with the following exceptions:

> (1) When the entire estate of the decedent does not exceed the sum of $1,000 after deducting the debts as defined in this act;
>
> (2) When the property passes to the husband or wife:
>
> (3) When the property passes to the father, mother, lineal decendent, adopted child, or the lineal decendent of an adopted child of decedent.

The statement of the testatrix, represented by the following clause in the will,

> "To my adopted daughter, Julia L. Christensen, who I have raised in my family and consider in all respects as my own, I give and bequeath,"

and other references therein to the devisee as her adopted daughter, should be given due weight and consideration in determining the question of adoption. The testatrix doubtless looked upon and considered the child as her adopted daughter, but the statute requires the execution and filing for record of formal adoption articles and it is necessarily incumbent upon the party claiming such relationship to establish such fact and a failure to do so makes the bequest subject to the collateral inheritance tax.

J. W. SANDUSKY, *Assistant Attorney General.*

OPINIONS RELATING TO PUBLIC HEALTH

GRANTING OF PERMITS TO PRACTICE MEDICINE

The state board of medical examiners have no authority to issue a permit to anyone to practice medicine in this state except as provided by statute and since the statute does not authorize the acceptance of the standards of the national board of medical examiners the local examining board has no authority to issue a permit to one who has passed an examination before such national board.

November 21, 1919.

Dr. Guilford H. Sumner, Secretary State Board of Health,

Dear Sir:

We have your letter of November 20th in which you ask for the opinion of this department upon the following proposition:

> "Will you kindly give this office your written opinion as to whether or not the state board of medical examiners can legally recognize or accept the examinations given by the national board of medical examiners in lieu of an examination given by this board."

You have further informed us that the national board of medical examiners is a voluntary association and in no way connected with any state or federal government.

The sole authority of the state board of medical examiners to issue licenses to persons desiring to practice medicine in the state of Iowa is governed by section 2582, supplement to the code, 1913, which provides in part as follows:

> "From and after January 1, 1899, all persons beginning the practice of medicine in the state of Iowa must submit to an examination as set forth in this chapter, and in addition thereto, shall present diplomas from medical colleges recognized as in good standing by the state board of medical examiners and all persons receiving their diplomas subsequent to January 1, 1899, shall present evidence of having attended four full courses of study of not less than twenty-six weeks each, no two of which shall have been given in any one year. The state board of medical examiners shall examine the graduates of the medical departments of the state university of Iowa and of such other medical colleges in this state as are recognized by said board of medical examiners as being in good

and legal standing at the annual medical commencement and at the location of said state university and other medical colleges respectively:

(a) A certificate of registration showing that an examination has been made by the proper board of any state, on which an average grade of not less than seventy-five (75) per cent was awarded, the holder thereof having been at the time of said examination the legal possessor of a diploma from a medical college in good standing in this state, may be accepted in lieu of an examination, as evidence of qualification. But in case the scope of said examination was less than that prescribed by this state, the applicant may be required to submit to a supplemental examination in such subjects as have not been covered.

(b) A certificate of registration or license, issued by the proper board of any state, may be accepted as evidence of qualification for registration in this state, provided the holder thereof was, at the time of such registration, the legal possessor of a diploma issued by a medical college in good standing in this state, and that the date thereof was prior to the legal requirement of the examination test in this state. The fee for such examination shall be fifty dollars.

* * * * * * *''

You will observe from a reading of the preceding quotation that there are three conditions under which you may issue a license:

1. That the applicant present to you proper evidence of study in a medical school and that he pass a satisfactory examination.

2. In case the applicant has attended a medical college recognized as a standard school by the state board of medical examiners of Iowa and that such applicant shows to you that he has submitted to an examination before the proper board of some other state and passed such examination with an average grade of seventy-five per cent.

3. You are authorized to issue a certificate when the applicant is the holder of a certificate issued by the proper board of another state and furthermore, that he be the possessor of a diploma issued by a medical school of good standing in this state and that the date of such diploma was prior to the time of the enacting of legal requirements in this state.

The recognition or acceptation of the examinations given by the national board of medical examiners cannot be substituted for

the requirements which any state may enact with reference to this matter. The national board of medical examiners is purely a voluntary organization and since the statute does not authorize you to accept the standards of any voluntary organization but limits you solely to the standards fixed by the board of examiners of the various states, we are of the opinion that you have no authority to substitute the same for the requirements specified in our statute.

B. J. POWERS, *Assistant Attorney General.*

APPROPRIATION FOR ELIMINATING VENEREAL DISEASES

By the terms of sections 116-a and 116-b of the 1913 supplement, all annual appropriations shall be for the fiscal year beginning July 1st and ending June 30th thereafter.

June 26, 1920.

Dr. Guilford H. Sumner,
Secretary State Board of Health.

Dear Sir:

Your request for the opinion of this department on the following questions has been referred to me for attention.

You state:

"Chapter 299, section 22, 38th General Assembly of the state of Iowa, reads as follows:

" 'Sec. 22. Appropriation. The sum of fifteen thousand dollars ($15,000.00) or so much thereof as may be necessary, is hereby annually, for the years 1919 and 1920, appropriated to carry out the provisions of this act, and such requirements as shall be made by the United States public health service in eliminating the venereal diseases, syphilis, gonorrhea, chancroid and ophthalmia noonatorum from the state.'

"QUESTION PROPOUNDED: Does this appropriation end December 31, 1920, or does it end June 30, 1921, the end of the biennial period?

"There is a publication clause attached to this law, which reads as follows:

" 'Sec. 24. Publication clause. This act being deemed of immediate importance shall take effect and be in force from and after its publication in the Des Moines Capital and in the Des Moines Register, newspapers published in Des Moines, Iowa.'

"'I hereby certify that the foregoing act was published in the Des Moines Capital April 25, 1919, and in the Des Moines Register April 26, 1919.'

"'Signed, W. S. Allen, Secretary of State.'

"We began using these funds on July 1, 1919, and will have used $15,000.00 on July 1, 1920, and, if we are estopped from using the appropriation on December 31, 1920, then we will have used only the sum of $22,500, when we should have been allowed $15,000 for each year in the biennial period to correspond with the government appropriation. Kindly inform us when the appropriation ceases, December 31, 1920, or June 30, 1921, the end of the biennial period."

Chapter 177, acts of the 29th General Assembly, and which is represented in the 1913 supplement to the code by section 116-a and section 116-b, provides as follows:

"That after the taking effect of this act all annual appropriations shall be for the fiscal year beginning with July first and ending with June thirtieth of the succeeding year, and when such appropriations are made payable quarterly, the quarters shall end with September thirtieth, December thirty-first, March thirty-first and June thirtieth, but nothing in this act shall be construed as increasing the amount of any annual appropriation."

"Annual appropriations hereafter made shall be disbursed in accordance with the provisions of the acts granting the same pro rata from the time such acts shall take effect up to the first day of the succeeding quarter as provided in section one of this act."

The obvious purpose of this chapter was to establish a uniform rule in regard to the beginning and termination of appropriation acts, and since it took effect all annual appropriations were held to be for the fiscal year beginning July 1 and ending June 30 of the succeeding year.

The only doubt that could arise in this particular instance is the fact that the appropriation act in question embraces the following words:

"for the years 1919 and 1920,"

but it appears to me it would be giving this language undue effect to hold that it obviated the rule laid down by the act of the 29th General Assembly, and it is therefore the opinion of this department that the appropriation to which you refer ceases on June 30, 1921.

J. W. SANDUSKY, *Assistant Attorney General.*

ADVERTISING BY DENTIST

It is in violation of law for a dentist to advertise his business in any other name than his own.

July 30, 1920.

Dr. C. B. Miller,
Secretary State Board of Dental Examiners.

Dear Sir:

We have your letter of recent date asking for an opinion from this department as to whether or not it is a violation of the laws of Iowa for any person engaged in the practice of dentistry to advertise his business in any other name than his own.

With your letter you submit advertisements appearing in the Des Moines and Mason City newspapers wherein dental offices are advertised under the names of "New York Dental Company" and "Craven Dental Company".

The law applicable to your question will be found in section 1, chapter 309, acts of the 37th General Assembly, which provides as follows:

> "It shall hereafter be unlawful for any licensed dentist to operate or conduct, in the state of Iowa, a dental office or dental parlors where dentistry or dental surgery in any of its departments is practiced under any other name than his own, or to display, in connection with his practice, on signs, stationery, cards, circulars, newspapers, or other mediums of advertising, any other than his own name; but these provisions shall not be so construed as to prevent two or more licensed dentists who are associated in the practice, from using all of their names, or so as to prohibit a widow or an heir of a deceased dentist, or his administrator, executor or trustee, from operating or conducting such office until reasonable opportunity has been given for disposal of same."

Section 2600-o4, of the supplement to the code, 1913, provides:

> "It shall be unlawful for any person to practice dentistry in this state without having first complied with all the statutory provisions regulating the same, and any person who shall violate any of said statutory provisions shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than fifty dollars, nor more than five hundred dollars, or by imprisonment in the county jail not more than sixty days, or by both such fine and imprisonment."

Pursuant to the provisions of the statutes above quoted I am of the opinion that the advertisements submitted are in violation of the laws of Iowa and the parties conducting a dental parlor under the names appearing in said advertisements are liable for the penalty prescribed in section 2600-o4, *supra*.

W. R. C. KENDRICK, *Assistant Attorney General.*

REINSTATING DELINQUENT OPTOMETRISTS

Discretionary with board to reinstate delinquent optometrists without another examination. Delinquent fee $10 per year and $1 per month for each month less than a year.

July 30, 1920.

Dr. Guilford H. Sumner,
Secretary Board of Optometry Examiners.

Dear Sir:

Your letter of the 29th inst. addressed to Attorney General H. M. Havner has been referred to me for attention.

You ask for an opinion from this department as follows:

> "Will you kindly give this office your written opinion as to just how long a registered optometrist may allow his certificate to become delinquent, and still be entitled to reinstatement by this board upon the payment of all dues in arrears. In other words, can this board legally reinstate an optometrist whose certificate has become delinquent for a period beginning in July, 1918, up to the present date, said optometrist having been in the service of the U. S. army for that period?
>
> "We have several applicants for reinstatement whose credentials are satisfactory to this board, and we desire to know if we can reinstate them upon payment of all dues in arrears, and if we should ask ten dollars for each year of delinquency and an additional dollar for each month of the present year."

The statute material to a proper determination of your question will be found in section 1, chapter 213, acts of the 37th General Assembly, which provides:

> "That from and after the 30th day of June, 1917, all registered optometrists shall, during the month of July of each year, pay to the board of optometry examiners an annual license fee of $1.00, and for each month any such registered optometrist is in default of payment of such annual license fee an additional $1.00 shall be added to and made a part of such license; but such total license fee shall not exceed in any one year the sum of ten dollars ($10.00). The license to prac-

tice optometry in this state may be canceled by the board of optometry examiners for a failure of such registered optometrist to pay the annual license fee as herein required within six (6) months from the time same is due and payable."

From a reading of the foregoing statute, it will be observed that it is entirely discretionary with the board of optometry examiners as to whether a registered optometrist who has failed to pay the annual license fee shall be reinstated. If the board reinstates such a delinquent, the board is only acting within its discretionary powers.

As to the amount of fees to be exacted in a case such as you state in your letter, I am of the opinion that the sum of $10.00 for each full year of delinquency and an additional dollar for each month of the present year should be demanded.

W. R. C. KENDRICK, *Assistant Attorney General.*

TREATMENT OF VENEREAL DISEASES

General discussion as to when a person is suspected of having a venereal disease should be examined.

July 8, 1920.

Dr. Wilbur S. Conkling,
A. A. Surg., U. S. Public Health Service.

Dear Sir:

Your letter of the 14th ult., addressed to the attorney general, has been referred to me for reply.

You submit a copy of a letter written to you by Dr. H. L. Saylor, city health commissioner, Des Moines, Iowa, in which he asks the following questions:

"(1) When we have reason to suspect that a person has a venereal disease in the infectious stage and that such a person is not taking treatment and using proper precautions as provided by law and we are investigating to determine definitely whether the person does actually have a venereal disease in the stage mentioned, where may we make such examination?

"(2) When the location in which such a person is found is not suitable for an examination, have we authority to take them to a place for examination which we think is suitable? For instance, our office or the city hospital?

"(3) If it seems necessary to restrain such a person by quarantine or restraining order, may we legally so restrain them in a jail while making such examination? See venereal law, sec. 8, sec. 9, (a) (b).

"(4) When a person known to have a venereal disease in the infectious stage is not being treated and taking proper precaution as provided by law—that is unmanageable by kindly or persuasive methods—can such person be quarantined or isolated legally only at such place or places as the county board of supervisors have specifically provided or designated for such purpose? See venereal law, sec. 13."

In answer to the first and second question, I am of the opinion that any person suspected of being afflicted with a venereal disease in the infectious stage may be examined in any place where such suspected person is found. If the place where such suspected person is found is not suitable for an examination, except a person in jail under arrest, then the examination can be made at any suitable place within the discretion of the local board of health.

Chapter 299, section 8, acts 38th General Assembly.

In answer to your third question, if it becomes necessary to restrain a suspect by quarantine, and the county has provided a detention hospital for persons afflicted with venereal diseases, then I believe the proper place in which to restrain such person is in the detention hospital so provided, although that question is not altogether free from doubt.

Chapter 299, section 13, acts 38th General Assembly.

Although section 13, *supra,* refers only to persons actually afflicted with a venereal disease, yet I believe the statute is broad enough to include persons suspected. If the county has not provided a detention hospital, then the place where the suspect shall be restrained is discretionary with the local board of health, but in no event can a jail be primarily used as a detention hospital. However, if a suspect is already confined in jail on a criminal charge, then it would be proper to segregate such suspect from the other prisoners in making the examination.

The fourth question should be answered in the affirmative.

Chapter 299, section 13, acts 38th General Assembly.

W. R. C. KENDRICK, *Assistant Attorney General.*

DETAINING THOSE SUSPECTED OF HAVING VENEREAL DISEASE

The local board of health or city health officer has the power to restrain, examine, or isolate a person infected or suspected of having gonorrhoea. Place where examination should be held discussed.

August 25, 1920.

Dr. Wilbur S. Conkling,

A. A. Surg., U. S. Public Health Service.

Dear Sir:

Your letter of the 23rd inst., addressed to Attorney General H. M. Havner, has been referred to me for reply.

You enclose a letter from Dr. W. W. Daut, city health officer of the city of Muscatine, in which that official states in substance:

> "I have traced at least one case of gonorrhoea to a young married woman living in the country in Muscatine county. It is a fact that she has been spreading the disease throughout this locality. I have written her to come to my office, and I have also tried to get her through the police of our city, that is, when she was in town.
>
> "Who has the power to arrest this woman, if any, and what is my authority in this particular case?"

If, as the doctor states, it is a known fact that the woman in question is infected with gonorrhoea, then the case should be reported to the local board of health of the city of Muscatine, and handled as provided for under chapter 298, section 5, acts of the 38th General Assembly, which provides:

> "Upon receipt of a report of a case of venereal disease, it shall be the duty of the local board of health to institute, for the protection of other persons from infection by such venereally diseased person, such measures as said local board of health is already empowered to use to prevent the spread of other contagious, infectious, or communicable diseases."

Under the section of the statute above quoted, the local board of health would be empowered to quarantine and isolate any person when found within the city limits of Muscatine. No power of arrest is conferred upon either the board of health or any police officer in such cases, but the board may order her restrained, quarantined and isolated, and if necessary, rent a place for that pur-

But if the case is in fact a suspected case, then the doctor's powers would be as prescribed in section 8 of chapter 299, *supra*, which provides:

> "In all suspected cases of venereal diseases in the infectious stages, the local board of health shall immediately use every available means to determine whether the person or persons suspected of being infected or suffering from said diseases or any of them, and whenever any of said diseases are found to exist, the local board of health shall whenever possible ascertain the sources of such infection. In such investigations the local board of health and its health officer are hereby vested with full powers of inspection, examination, isolation, internment or quarantine, if necessary, and disinfection of all persons, places and things as provided herein, and as may be required by the state board of health or local

board of health, except, in cases of persons known to the local board of health to be of good character and reputation, and who are under treatment by a qualified and reputable physician, and are taking recognized precautionary measures to prevent the infection of others, these powers shall not be exercised."

Should the patient refuse to obey any order of the local board of health, then sections 20 and 21 of said chapter 299 provide:

"Sec. 20. It shall be unlawful for any person to neglect or refuse to obey any order of the state or local board of health, authorized by this act, or to interfere with or obstruct said state board of health or local board of health, or the representative of either, in the discharge of any of their duties under this act."

"Sec. 21. Any person violating any of the provisions of this act shall be punished by a fine of not more than five hundred dollars ($500.00) or by imprisonment in the county jail for a period not to exceed six months or by both such fine and imprisonment. * * *"

If it becomes necessary to restrain such suspect by quarantine, and the county is provided with a detention hospital for persons afflicted with venereal diseases, then the proper place to make the examination and restrain the suspect is in the detention hospital, so provided for. The same institution should also be used for examining and restraining a person actually infected. But if the county has not provided a detention hospital, then the suspect may be examined where found, and if the place where found is not suitable for such examination, then the place where the said suspect shall be restrained and examined is discretionary with the local board of health, which may be at the office of the city health officer, but in no event shall the person be incarcerated in a jail, unless such suspect is also charged with some criminal offense.

W. R. C. KENDRICK, *Assistant Attorney General.*

PROTECTION OF CITY'S WATER SUPPLY

Cities may police territory which is the source of water supply, even though outside city limits, or may condemn the land or authorize water company to do so.

July 30, 1919.

State Board of Health,
State House.

Gentlemen:

The letter written by Dr. G. F. Severs of Centerville, one of the members of your board, and addressed to Prof. L. Higgins,

state sanitary engineer, has been referred to this department by your board with a request that we furnish you the information asked for by Dr. Severs.

His letter is as follows:

> "Mr. E. N. Mitchell, manager for the Centerville Water Co., called this morning and is rather anxious to know whose duty it is to police the catchment area for the water company. Have you ever got an opinion yet from the attorney general's office? Kindly let me hear from you in regard to this matter as we are anxious to clean up this area and prevent further pollution.
>
> "The water company has offered to purchase the 120 acres covered by the old farmhouse and outbuildings if they can buy the same for what it is actually worth. On the other hand, in case these people demand an exhorbitant price has the city or township any right to condemn this land and have the same appraised and purchase it at the appraisement price?"

The two following questions are asked by Dr. Severs: first, has a city the legal right to police the territory from which it receives its water supply when that territory is outside the limits of said city; and second, has either the city or a private corporation which operates a water works plant from which the city receives its supply the power to condemn the land on which the reservoir or works are located when such property is outside the limits of said city?

The statutory provisions material to a determination of your two questions are

Section 722 of the supplement to the code, 1913, which provides:

> "They shall have power to condemn and appropriate so much private property as shall be necessary for the construction and operation of said works or plants, and for the purpose of constructing and maintaining dams across the non-navigable waters and watercourses of the state in forming reservoirs and sources of water to supply such waterworks and plants, as provided for the condemnation of land for city purposes; to issue bonds for the payment of the cost of establishing the same, including the cost of land condemned on which to locate them, and to confer by ordinance the power to appropriate and condemn private property for such purpose upon any individual or corporation authorized to construct and operate such works or plants."

Section 723 of the code provides:

> "For the purpose of maintaining and protecting such works or plants from injury, and protecting the water of such water works from pollution, the jurisdiction of such city or town shall extend over the territory occupied by such works, and all reservoirs, mains, filters, streams, trenches, pipes, drains, poles, wires, burners, machinery, apparatus and other requisites of said works or plants used in or necessary for the construction, maintenance and operation of the same, and over the stream or source from which the water is taken for five miles above the point from which it is taken."

Under section 722 of the supplement to the code, 1913, the supreme court of Iowa has held that a city is authorized to condemn lands to protect, maintain and continue its water supply.

LaPlant v. City of Marshalltown, 134 Iowa 251.

Under the provisions of said section, the power of the city to condemn land to protect its water supply may be conferred upon private corporations.

Pursuant to the provisions of section 723, the jurisdiction of a city shall extend over the territory occupied by reservoirs, mains and works of the water company for the purpose of preventing pollution and protecting the source of the water supply for said city. This jurisdiction extends for a distance of five miles above the point from which the water is taken.

W. R. C. KENDRICK, *Assistant Attorney General.*

OPINIONS RELATING TO CORPORATIONS

WHEN STOCK MUST BE SOLD FOR CASH

A compliance with the law governing subscriptions for stock precludes the acceptance of anything but money, except upon application to executive council as provided by section 1641-b, 1913, supplement to code.

June 11, 1920.

Hon. W. C. Ramsay,
Secretary of State.

Dear Sir:

We have your favor of the 15th inst. wherein you submit to this department the following questions:

> "May a corporation sell its stock at par value and accept in payment thereof United States liberty bonds at full par value, taking into consideration the provisions of section 1641-b of the 1913 supplement to the code? If not, how may they be taken in payment for stock?
>
> "Would your opinion be different if the corporation were an insurance company?"

Section 1641-b of the 1913 supplement to the code, to which you refer, reads, in part, as follows:

> "That from and after the passage of this act no corporation organized under the laws of the state of Iowa, except building and loan associations as defined and provided for in chapter 13, title IX of the code, shall issue any capital stock or any certificate or certificates of shares of capital stock or any substitute therefor, until the corporation has received the par value thereof. If it is proposed to pay for said capital stock in property or in any other thing than money, the corporation proposing the same must, before issuing capital stock in any form, apply to the executive council of the state for leave so to do."

The provisions of the section quoted are very clear, explicit and comprehensive and a compliance therewith precludes the acceptance of anything but money, or its equivalent, meaning a check or draft, for shares or certificates of capital stock except upon application to the executive council, where complete provision is made for fixing the value of property for such purposes.

As to your second question, that is answered by sections 1783-4 and f of the 1913 supplement to the code, which requires that the capital stock of insurance companies shall be fully paid up in cash.

J. W. SANDUSKY, *Assistant Attorney General.*

COMPUTATION OF FEES OF FOREIGN CORPORATION

Must pay fee upon increase of capital used in Iowa regardless of fact that such increase may not make capital in use in Iowa $10,000.00.

August 8, 1919.

Hon. W. C. Ramsay, Secretary of State.

Dear Sir:

Your letter of August 6th to Mr. Havner has been referred to me for reply.

You ask regarding the interpretation of the statutes of this state with reference to fees to be charged foreign corporations authorized to do business in this state. The substance of your inquiry is as to whether a foreign corporation doing business in this state and having less than $10,000 of the property of the corporation within the state of Iowa is required, upon an increase of such property, to pay a fee upon all of such increase or only upon the portion thereof in excess of $10,000.

Section 1637, supplement to the code, 1913, among other things, provides as follows:

> "Before a permit is issued authorizing such corporation to transact business in the state of Iowa, said corporation shall pay to the secretary of state a fee of ten cents per one hundred words for recording the certified copy of the articles of incorporation, with resolution and statement as previously set forth, and filing fee of twenty-five dollars upon ten thousand dollars or less of money and property of such company actually within the state of Iowa, and of one dollar for each one thousand dollars of such money or property within this state in excess of ten thousand dollars. If from time to time the amount of money or other property in use in the state of Iowa by said foreign corporation is increased, said corporation shall at the time of said increase, or at the time of making annual report to the secretary of state, in July of each year, file with the secretary of state a sworn statement showing the amount of such increase, and shall pay a filing fee thereon of one dollar for each one thousand dollars or fraction thereof of such increase, together with a recording fee of ten cents per one hundred words, but not less than fifty cents."

Under this section, when the company first seeks authority to transact business in this state, if its property and money within the state of Iowa is less than $10,000, it shall pay a fee of $25.00, and if its money or property exceeds $10,000, it shall pay a fee of $25.00 and $1.00 for each thousand dollars of such property in excess of $10,000. Upon increase of the property of the corporation in use in the state of Iowa, the corporation is required to pay a filing fee of $1.00 for each one thousand dollars or fraction thereof of such increase. The statute does not say that the fee shall be paid upon each thousand dollars of increase in excess of $10,000 but says plainly that whenever there is an increase in the amount of property used in the state of Iowa, there shall be a fee paid of $1.00 per thousand upon such increase and this is true whether the increase brings the property in use over $10,000 or not. Any other construction would require that we read into the statute something that is not there either by express words or by fair intendment.

It is the opinion of this department that you should charge a fee of $1.00 per thousand upon the increase in the property of foreign corporations used in this state regardless of whether such increase makes the value of the property used greater or less than $10,000.

SHELBY CULLISON, *Assistant Attorney General.*

WHEN SECRETARY OF STATE SHOULD REFUSE TO FILE ARTICLES

The secretary of state should refuse to file articles of incorporation which provide for what is termed "patent stock" when it is provided in such articles that the holder of such stock shall at all times possess fifty-one per cent of the voting power in such corporation and a like per cent of dividend and assets thereof upon its dissolution.

August 15, 1919.

Hon. W. C. Ramsay, Secretary of State.

Dear Sir:

We have your letter of August 14th in which you request us to render you an opinion with reference to the legality of the articles of incorporation presented to you for filing by the Engle Commercial Fertilizer Company of Newton, Iowa. You ask whether sections 4, 5 and 9 of these articles are legal and whether or not they are in accord with the public policy of this state.

Without setting the articles of incorporation out at length, we will be content with setting forth article 4 and article 5 as follows:

"Article IV. The capital stock shall be one hundred thousand dollars, divided into shares of one hundred dollars each, and none of said stock shall be issued until the corporation shall have received the par value thereof.

"Subject to the approval of the executive council as by statute provided, real estate, personal property, work and labor, patent rights, and choses in action may be taken and received for stock at such prices and upon such terms and conditions as may be agreed upon by the board of directors.

"Of such total authorized capital stock there shall be issued for patents and patent rights such an amount as shall be agreed upon by the board of directors and authorized by the executive council, said stock to be known as patent stock. Of all stock not issued as patent stock, one-third shall be issued as preferred stock and the remaining two-thirds as common stock.

"Article V. The patent stock shall at all times possess and exercise fifty-one per cent of the voting power of all of the capital stock of the corporation issued and outstanding, said voting power to be divided and distributed among the shares of patent stock issued and outstanding in equal proportions. The patent stock issued and outstanding shall, subject to the rights of holders of preferred stock, be entitled to and receive fifty-one per cent of the dividends declared by the corporation, and the patent stock shall upon the termination, dissolution or winding up of the affairs of the corporation be entitled to and receive fifty-one per cent of all the property and assets of the corporation, subject to the rights of the holders of the preferred stock, said dividends, property and assets to be divided and distributed among the shares of patent stock issued and outstanding in equal proportions."

Article IX to which you direct our attention deals with the election of the officers of the corporation and definitely fixes the voting power associated with the patent and common shares of stock of this company. Since the objections we find to these articles can be predicted upon the fourth and fifth articles, we have omitted setting forth the ninth article.

After careful study of these articles of incorporation, we are of the opinion that the provisions of the fourth and fifth articles are not only contrary to the public policy of this state but in fact are an evasion of the provisions of section 1641-b of the supplement, 1913, commonly called the "Peterson Law." This law provides that no corporation organized under the laws of the state of

Iowa, with certain exceptions, shall issue any capital stock or any certificate or certificates of shares of capital stock, or any substitute therefor, until the corporation shall have received the par value thereof. The law further provides that if it is proposed to pay for said capital stock in property or in any other thing than money, the corporation proposing the same must, before issuing the capital stock in any form, apply to the executive council of the state of Iowa for leave so to do. The provision is further made for submitting an application to the executive council and for an investigation to ascertain the real value of the property which the corporation is to receive for the stock it thus proposes to issue. In other words, the intention of the legislature of this state was to provide that for every share of stock issued, the corporation should receive par value therefor, and that all stockholders shall have paid in to the corporation an equal amount for each share of stock they possessed.

The articles of incorporation submitted to you by the Engle Commercial Fertilizer Company seek to evade the force and effect of this statute by providing that there shall be issued what is known as patent stock and that this patent stock shall be issued in payment for the patent regardless of the value of the patent and shall represent fifty-one per cent of the voting power, fifty-one per cent of the dividends of the corporation and fifty-one per cent of the assets upon dissolution. In other words, the holder of the patent stock controls and owns fifty-one per cent of the corporation even though the executive council may see fit to place a value upon such patent in a sum far less than would be represented by fifty-one per cent of the stock of such corporation.

I am therefore returning to you the articles of incorporation submitted to us and advise you to refuse to file said articles of incorporation with the records of your office for the reasons above given.

B. J. POWERS, *Assistant Attorney General.*

WHEN FOREIGN CORPORATION RELIEVED FROM PAYING FEES

To relieve a foreign corporation from paying the fee under section 1637 code supplement, 1913, must be strictly limited to manufacturing.

July 30, 1919.

Hon. W. C. Ramsay, Secretary of State.

Dear Sir:

I have your letter of the 24th inst. in which you ask for an opinion from this department as to whether or not the Perfection

Corn Planter Manufacturing Company located at Sioux Falls, S. D., would come under the exemption applying to the foreign corporations carrying on a manufacturing business as provided for in section 1637 of the supplement to the code, 1913, and therefore be exempt from the payment of the fee required by said section.

By a reference to said section, you will find that only corporations for pecuniary profit carrying on a manufacturing business, as clearly defined and restricted by its articles of incorporation, are exempt under said section.

I have examined the articles of incorporation of said company and I find that said articles do not restrict the business to purely manufacuring but authorizes the company to buy and sell real estate indiscriminately.

I am therefore of the opinion that inasmuch as the authority to purchase real estate is not limited to such real estate as is necessary for the proper conduct of its manufacturing business that said corporation does not come within the exemption of said section 1637.

W. R. C. KENDRICK, *Assistant Attorney General.*

COMPUTATION OF FEE REQUIRED OF FOREIGN CORPORATION

The tax or fee charged foreign corporations should be computed on the property used in this state, and when there has been an increase it should be computed on that increase.

August 20, 1919.

Hon. W. C. Ramsay, Secretary of State.

Dear Sir:

Your two letters of the 19th inst. addressed to Attorney General H. M. Havner relating to the fee for increased capital in use in this state of the Prairie Pipe Line Company, a Kansas corporation, and the General Cigar Company, a New York corporation, have been referred to me for attention.

You state that when the above mentioned corporations made their first report as to the amount of their property in use in this state, that said corporations reported a certain amount; that their next annual report showed decrease in the amount of property used in this state, but their third annual report showed an increase over the first report.

You then ask whether you should base your tax upon the increase as shown by the third report over the first report, or upon the increase as shown by the third report over the second report.

Your question will be determined from that portion of section 1637 of the supplement to the code, 1913, which reads as follows:

> "Before a permit is issued authorizing such corporation to transact business in the state of Iowa, said corporation shall pay to the secretary of state a fee of ten cents per one hundred words for recording the certified copy of the articles of incorporation, with resolution and statement as previously set forth, and a filing fee of twenty-five dollars upon ten thousand dollars or less of money and property of such company actually within the state of Iowa, and of one dollar for each one thousand dollars of such money or property within this state in excess of ten thousand dollars. If from time to time the amount of money or other property in use in the state of Iowa by said foreign corporation is increased, said corporation shall at the time of said increase, or at the time of making annual report to the secretary of state, in July of each year, file with the secretary of state a sworn statement showing the amount of such increase, and shall pay a filing fee thereon of one dollar for each one thousand dollars or fraction thereof of such increase, together with a recording fee of ten cents per one hundred words, but not less than fifty cents."

From the foregoing statutory provision, it is plain that the payment of an additional tax shall be required only when there has been an increase in the amount of property used in this state by foreign corporations, and in computing such additional tax in the present instance, you should base the same on the increase as shown in the third report over the first report.

W. R. C. KENDRICK, *Assistant Attorney General.*

AGENCY OF FEDERAL GOVERNMENT

A foreign corporation acting as an agency of the federal government is exempt from making the report and paying the fees required of such corporations.

November 24, 1919.

Hon. W. C. Ramsay, Secretary of State.

Dear Sir:

Your letter of the 31st ult., addressed to Attorney General H. M. Havner, has been referred to me for reply.

You ask whether or not the United States Housing Corporation is required to make the report and pay the fees referred to in section 1637 of the supplement to the code, 1913.

You inform this department that the United States Housing Corporation is an agency of the government of the United States, and is engaged at the present time as a holding corporation for the title to the property located at the cantonment at Camp Dodge.

It is a well recognized rule of law that a state cannot tax or control any of the property belonging to the government of the United States, in the manner provided for in section 1637.

Therefore, if you are satisfied that the United States Housing Corporation is acting in the capacity of an agency of the United States with reference to the title to the property at the cantonment located at Camp Dodge, then said corporation would be exempt from the provisions of said section 1637.

W. R. C. KENDRICK, *Assistant Attorney General.*

OPERATING HOTEL NOT MERCANTILE BUSINESS

A foreign corporation engaged in the hotel business is not carrying on a mercantile business within the exemption found in section 1637, supplement of 1913.

October 11, 1920.

Hon. W. C. Ramsay, Secretary of State.

Dear Sir:

Your request for an opinion from this department as to whether or not the Miller Hotel Company, a corporation organized under the laws of Delaware, comes within the exception found in section 1637 of the supplement to the code, 1913, which exempts corporations

> "carrying on mercantile or manufacturing business as clearly defined and designated by its articles of incorporation"

has been referred to me for attention.

I am of the opinion that said corporation does not come within the exemption above quoted, and is therefore subject to the payment of the fee prescribed by section 1637 *supra.*

The articles of incorporation of said company permit it to transact various objects of business, and is extremely broad in its provisions in that respect.

Article III specifically permits the corporation to engage in the business of operating hotels in any part of the United States. The operation of hotels is not the transaction of a mercantile business as contemplated in section 1637. The term "mercantile" means pertaining to merchants or the business of merchants, or the buying and selling of commodities.

Garretson v. Merchants Insurance Co., 81 Iowa 727;
Toxaway Hotel Co. v. H. L. Smathers, 216 U. S. 439;
In re United States Hotel Co., 134 Fed. 225.

Neither does the transaction of real estate business come within the meaning of the term "mercantile." Article III aforesaid also permits the corporation in question to engage generally in the business of buying and selling real estate.

In re Kingston Realty Co., 160 Fed. 445.

Therefore, I am of the opinion that the Miller Hotel Company shall comply with section 1637, supplement to the code, 1913, with respect to paying the fee therein prescribed.

W. R. C. KENDRICK, *Assistant Attorney General.*

RENEWAL OF CORPORATE EXISTENCE

Corporations may renew charter by amending articles during corporate existence prior to a period of three months before termination of its charter, but it must file amended and substituted articles and pay fees required by section 1618 supplement to the code, 1913.

October 16, 1919.

Hon. W. C. Ramsay, Secretary of State.

Dear Sir:

Your letter of the 8th ult., addressed to Attorney General H. M. Havner, has been referred to me for reply. An earlier answer would have been given but the department has not been agreed on what the answer should be. Hence the delay.

You state:

> "The Iowa Gate Company of Cedar Falls, Iowa, was incorporated under the law for pecuniary profit on May 17, 1900, the capital stock authorized being $120,000, and the expiration date being fixed as of May 14, 1920.
>
> "That on July 30, 1919, said corporation amended its articles, increased its capital stock to $400,000, extended its corporate existence for a period of twenty years from the

30th day of August, 1919, and remitted to your department the sum of $280.60 as a recording and filing fee."

You then ask:

"(1) Does a corporation have the right by way of amendment to extend its corporate period;

"(2) If it does have the right—taking into consideration that the corporate period does not expire until May 15, 1920—when may or must such extension be made;

"(3) What amount of filing fee must be charged by the secretary of state in case you find that they are allowed to extend their corporate period in the manner proposed in said amendment?"

The first two questions may as well be answered together because they involve a discussion of the same statutory provisions. The general section relating to making amendments to corporate articles is found in

Section 1615, supplement to the code, 1913 which reads as follows:

"Amendments to articles of incorporation making changes in any of the provisions of the articles may be made at any annual meeting of the stockholders or special meeting called for that purpose, and they shall be valid only when recorded, approved and published as the original articles are required to be. If no increase is made in the amount of capital stock, a certificate fee of one dollar and a recording fee of ten cents per one hundred words must be paid; no recording fee less than fifty cents. Where capital stock is increased the certificate fee shall be omitted but a filing fee of one dollar per thousand dollars of such increase together with a recording fee of ten cents per one hundred words shall be paid. Such amendments need only be signed and acknowledged by such officers of the corporation as may be designated by the stockholders to perform such act."

It was held in the case of

Lamb v. Dobson, 117 Iowa 124,

that under this section, as it then stood, a corporation might extend the period of its existence by simply amending its articles but after the decision in that case, the legislature adopted what is now known as

Section 1618, supplement to the code, 1913, a portion of which is as follows:

"Corporations for the construction and operation, or the operation alone, of steam railways, interurban railways and street railways, for the establishment and conduct of savings banks, or for the transaction of the business of life insurance, may be formed to endure fifty years; those for other purposes, not to exceed twenty years; but in either case they may be renewed *from time to time* for the same or shorter periods, within three months before or after the time for the termination thereof, if a majority of the votes cast at any regular election, or special election called for that purpose, be in favor of such renewal, and if those voting for such renewal will purchase at its real value the stock voted against such renewal. Such renewals shall date from the expiration of the corporate period which it succeeds and shall be limited in duration to a period not exceeding the time allowed by law to the same class of corporations."

From a reading of the section last quoted, it might be argued that the legislature did not intend that a corporation could ever extend the period of its existence except that it follow the course prescribed in this section within a period of three months before or a period of three months after the date of the expiration of its original charter. The section apparently so states and still we feel that it should be construed in connection with section 1615 of the supplement to the code, 1913, first above quoted. It is a rule of statutory construction that where two statutes are apparently opposed to each other, both shall be given such force and effect as shall permit of their being harmonized rather than to declare that the one repeals the other. The section first quoted specifically states that amendments to articles of incorporation may be made by "making changes *in any of the provisions* of the articles, etc." and of course one of the provisions necessarily is a statement of the duration of the corporate term of existence. It seems to us that without doing violence to the language of either section, that it is proper to hold that section 1618, supplement to the code, 1913, is intended to permit corporations to renew their corporate term for a full period of twenty to fifty years as the case may be at any time within three months before or a period of three months after the date of the expiration of the original charter, but that it does not necessarily follow that a corporation may not extend its corporate existence except that the term of the new period of its existence would begin from the date of the renewal certificate issued by the secretary of state.

There is no reason, however, why the provisions of section 1618, supplement to the code, 1913, should not be followed in other par-

ticulars where the corporation seeks to amend its articles so as to extend its corporate existence during a period of its existence more than three months prior to the date of its termination as set out in the original charter. The amendment must take the form of amended and substituted articles and the filing fee required by section 1618, supplement to the code, 1913, for a renewal of its corporate existence must be paid.

As bearing somewhat on this question and particularly on fees to be paid, see

National Lead Co. v. Dickinson, 70 N. J. L. 596.

In the case of the Iowa Gate Company, I see no reason why it may not amend its articles of incorporation at this time so as to extend its corporate existence for a period of twenty years but in doing so, it must file with the secretary of state amended and substituted articles and pay the regular renewal fees; and the new corporate period will begin from the date upon which the renewal certificate is issued by the secretary of state.

F. C. DAVIDSON, *Assistant Attorney General.*

RENEWAL OF CORPORATE EXISTENCE

A chapter 1, title IX corporation may renew its corporate existence by filing amended and substituted articles.

May 27, 1920.

Hon. W. C. Ramsay,
Secretary of State.

Dear Sir:

Your letter of the 26th inst. addressed to the attorney general has been handed to me for reply.

You ask for an opnion from this department on the following facts:

> "This company commenced its corporate existence on November 8, 1902. Its corporate period expires on November 8, 1922. These renewal articles provide for an extension of said corporate period to March 1, 1940. In view of said provisions of sections 1615 and 1618 of the code as amended, I will ask that you kindly give me a written opinion as to whether or not this corporation shall be permitted to extend its corporate period at this time and in this manner."

This department has heretofore ruled that a corporation for pecuniary profit organized under the corporation laws of Iowa

may renew its corporate existence by merely amending its articles of incorporation pursuant to the provisions of section 1615 of the supplement to the code, 1913, although under section 1618 of the supplement to the code, 1913, it is provided that a corporation may renew its corporate existence if action to that end is taken within three months prior or three months after the expiration of the corporate period, as disclosed by the articles of incorporation and the records in the office of the secretary of state.

This ruling is bottomed upon the rule of statutory construction, which requires that in the construction of two statutes which seem to conflict in their provisions, a construction shall be given which will sustain both statutes. The ruling is further based upon the provisions found in section 1615, which permit amendments to the articles of incorporation by making changes in any of its provisions.

In the instant case the corporate existence is renewed by a resolution of the stockholders adopting amended and substituted articles and presenting the same to your office for filing.

If the corporate existence of a corporation may be renewed by merely amending the articles of incorporation, then I am of the opinion that the same result may be accomplished by resolution of the stockholders adopting amended and substituted articles of incorporation.

I might add, however, that before the renewal would become effective the corporation would be required to comply with any of the provisions of section 1618 of the supplement to the code, 1913, which do not in any way conflict with the provisions of section 1615.

W. R. C. KENDRICK, *Assistant Attorney General.*

WHERE CORPORATE EXISTENCE OF FOREIGN CORPORATION IS LESS THAN 20 YEARS

Where the charter of a foreign corporation expires within twenty years from the date on which it seeks to be admitted to transact business in this state, the secretary of state should issue it a permit only for the period in which it may exercise corporate functions.

September 26, 1919.

Hon. W. C. Ramsay,
Secretary of State.

Dear Sir:

We have your letter of September 24th in which you state:

"There has been presented to this department for filing a certified copy of the articles of incorporation together with application, resolution and statement of the George A. Hormel & Company, a corporation, Austin, Minnesota.

"I am enclosing herewith the said articles, and ask that you kindly furnish me with a written opinion upon the following question:

"The above mentioned corporation was duly incorporated under the laws of the state of Minnesota; said articles providing for a corporate period of thirty years, beginning with November 1, 1901, which makes the date of expiration in Minnesota November 1, 1931. Taking this into consideration, for what period of time shall I issue a charter? Shall it be for the full period of twenty years, or shall it be until November 1, 1931, the date upon which it expires in the state of Minnesota?"

In answering your inquiry, permit us to state that it is the opinion of this department that you should not issue a permit for a greater period than twenty years in any event, and when it is shown by the articles of incorporation or by any other source of information, that the existence of a foreign corporation will expire in its state of origin before the expiration of twenty years, that you should issue a permit only for a period equal to that in which the corporation may still exercise its corporate functions. In the present case of the George A. Hormel & Company, it is our opinion that you should issue a permit that will not run for a greater length of time than November 1, 1931.

B. J. POWERS, *Assistant Attorney General.*

RENEWAL OF CORPORATE EXISTENCE

Corporation cannot renew its corporate existence without purchasing the stock of those objecting thereto.

March 1, 1920.

Hon. W. C. Ramsay,
Secretary of State.

Dear Sir:

Your letter of the 26th ult. addressed to Attorney General H. M. Havner has been referred to me for reply.

You state:

"The Des Moines Casket Company of Des Moines, Iowa, were duly incorporated under the laws of the state of Iowa on

March 10, 1900, their corporate period expiring February 15, 1920.

"It appears that at the 1920 adjourned annual meeting of said company, held the latter part of January or the first part of February, a majority of the stockholders voted in favor of renewal of the corporate period, while about one-fifth of the stock was opposed to such action and have filed with me a protest against such renewal, until the majority has purchased the stock of the minority who oppose.

"The corporation has presented its renewal articles for filing, but with such protest at hand I do not feel disposed to issue to the corporation a certificate of renewal."

You then ask:

"The question arises as to the interpretation of section 1618 of the code. Must the secretary of state file these articles and issue a certificate of renewal, or is he in duty bound to observe the protest as filed, and refrain from issuing the renewal certificate until satisfied that the stock of the minority has been purchased, as provided for by section 1618? In other words, is the matter of buying the stock of the ones opposing renewal a condition precedent to the filing of the renewal articles?"

The statutory provision governing your question will be found in section 1618 of the supplement to the code, 1913, which provides in part as fallows:

"Corporations for the construction and operation, or the operation alone of steam railways, interurban railways and street railways, for the establishment and conduct of savings banks, or for the transaction of the business of life insurance, may be formed to endure fifty years; those for other purposes not to exceed twenty years; but in either case they may be renewed from time to time for the same or shorter periods, within three months before or after the time for the termination thereof, if a majority of the votes cast at any regular election, or special election called for that purpose, be in favor of such renewal, *and if those voting for such renewal will purchase at its real value the stock voted against such renewal.*"

It is the opinion of this department that the purchase of the stock of the minority stockholders who object to the renewal of the life of the corporation, by those voting for a renewal, is a prerequisite to the legal renewal of the existence of the corporation; and in the face of such objections being filed in your department on the part of minority stockholders you will be acting

within your legal rights if you refuse to file and record said articles of renewal.

W. R. C. KENDRICK, *Assistant Attorney General.*

WHERE ARTICLES PROVIDE NO LIMIT TO CORPORATE EXISTENCE—WHERE ARTICLES PROVIDE FOR MANUFACTURE OF INTOXICATING LIQUOR

Where the articles of incorporation of a foreign corporation do not limit the corporate existence the secretary of state should not issue a permit to such corporation for a greater period than twenty years.

Where the articles of incorporation provide that the purpose of the corporation is to manufacture alcohol the secretary of state should refuse to issue any permit as the purpose for which such a corporation exists conflicts with the laws of the state.

September 26, 1919.

Hon. W. C. Ramsay,
Secretary of State.

Dear Sir:

We have your letter of September 24th in which you state:

> "I am herewith handing to you a certified copy of articles of incorporation together with application, resolution and statement of the Dyer Company, Cleveland, Ohio, same having been presented to this department for filing, with the request that a charter be issued authorizing them to transact business in this state.
>
> "I have examined these articles, but find no provision as to the date of expiration of this corporation in the state in which incorporated.
>
> "Kindly give me your written opinion, stating for how long a period of time I shall issue a certificate of incorporation in this state."

In answering your inquiry permit us to state that it is the opinion of this department that you should not issue a permit in instances such as above noted for a longer period than twenty years. It is true that there is no provision in the law with reference to the length of time for which a permit to a foreign corporation shall be issued. However, I do not think the legislature intended to grant foreign corporations greater rights and privileges than those granted to corporations organized under the laws of this state. Therefore, we think that you should not issue a permit for a greater period than that for which a permit will be granted to a domestic corporation.

In this particular case we believe that you ought to refuse to issue any permit whatsoever. You will observe that the third provision in the articles of incorporation of this concern provides that the purpose of the corporation shall be to

> "manufacture, buy, sell, lease, and otherwise deal in machinery for the manufacture of sugar, starch, alcohol, and any and all of its by-products; also to buy, own, lease, and operate plants for the production of sugar, starch, alcohol and any and all by-products, ingredients and compounds thereof."

The manufacture of alcohol is absolutely prohibited by the laws of this state, either directly or indirectly. In view of this prohibition, we do not think you ought to issue a permit to this company to transact business within this state when the business proposed to be transacted is in violation of our law. You will observe that should you grant them a permit to transact the business outlined in their articles of incorporation, that in case they attempted to exercise the rights granted by such a permit the company would immediately be subject to presecution for exercising those rights.

We therefore advise you to refuse to file these articles of incortion, or to issue a permit to this company to transact business within this state.

B. J. POWERS, *Assistant Attorney General.*

WHAT VALUE MAY BE FIXED ON STOCK

Shares of stock may be divided into preferred and common and the value of the preferred may be $100 per share and the common one mill per share.

May 22, 1919.

Hon. W. S. Allen,
Secretary of State.

Dear Sir:

We have your letter of the 19th inst. in which you state:

> "Articles of incorporation have been submitted for filing and recording in this department wherein it is provided that 10,000 shares of preferred stock may be issued each of the par value of $100.00, and also that 10,000 shares of common stock may be issued each of the par value of one mill."

You then request an opinion from this department as to whether you should file and record said articles as provided in section

1610 of the supplement to the code, 1913, if said articles are regular and in accordance with law in other respects than that referring to the value of the common stock.

So far as we are able to find, the statutes of Iowa do not prohibit a division in the value of the shares of stock of a corporation organized under the laws of this state and as provided for in the articles to which you refer.

Therefore it is the opinion of this department that if said articles are in accordance with the law in all other respects, then it would be your duty to file and record the same.

W. R. C. KENDRICK, *Assistant Attorney General.*

AUTHORIZING DIRECTORS TO INCREASE CAPITAL

The articles of incorporation may confer upon the directors the power to amend increasing the capital to a definite amount.

December 18, 1919.

Hon. W. C. Ramsay,
Secretary of State.

Dear Sir:

You have verbally submitted the following question to this department for an opinion:

> "Have the stockholders of a corporation for pecuniary profit the legal authority to confer, in the articles of incorporation, upon the board of directors the power to amend the articles so as to increase the capital stock to a definitely specified amount?"

It is said in *10 Cyc.* at page 540:

> "The capital of a corporation, fixed by its charter, articles of incorporation, or other governing instrument, cannot be increased by the directors without the action of the shareholders, unless expressly authorized thereto by the charter, governing statute, or other valid governing instrument."

In support of that statement the following cases are offered:

Newport Cotton Mill Co. v. Sims, 103 Tenn. 455, 53 S. W. 735;

Chicago City R. Co. v. Allerton, 18 Wall. (U. S.) 233, 21 L. Ed. 902.

In Cook on Corporations, 7th Ed., section 285, it is said:

> "The power to increase the capital stock may be vested in the directors."

In support of that proposition the author cites the case of *Sutherland v. Olcutt*, 95 N. Y. 93.

In the Sutherland case, *supra*, the court held that the stockholders could legally confer upon the directors the power to amend the articles so as to increase the capital stock to a certain amount.

I can find no statutory provision expressly prohibiting the stockholders from conferring upon the board of directors the power to amend the articles so as to increase the capital stock to a definite amount fixed by the articles.

The doctrine is well established by the highest authority that the stockholders of a corporation may do as they please, so far as they act within legal bounds. It is equally established by competent legal authority that the stockholders may confer upon the directors the power to amend the articles in a specific manner and for an express purpose. Such power is inherent in the stockholders.

Therefore I am of the opinion that your question should be answered in the affirmative.

W. R. C. KENDRICK, *Assistant Attorney General.*

SALE OF GOLD NOTES HELD TO BE UNDER BLUE SKY LAW

A Delaware corporation desiring to sell its 10-year 6% gold notes in Iowa should comply with the blue sky law when such notes are not to be disposed of in the ordinary course of trade or commerce.

February 6, 1920.

Hon. W. C. Ramsay,
Secretary of State.

Dear Sir:

Your request for an opinion upon the proposition of whether the ten-year convertible gold note of the Skinner Company was within the provisions of the blue sky law has received our consideration, and we desire to advise you that we are of the opinion that the sale of this security within the state of Iowa comes within the provisions of the blue sky law.

The manner in which this company evidently contemplates to dispose of its notes is not in the ordinary course of trade or commerce, and we therefore hold that its sale is within the operation of the blue sky law.

B. J. POWERS, *Assistant Attorney General.*

SALE OF STOCK ON INSTALLMENT PLAN

Foreign corporations selling stocks on the partial payment or installment plan must comply with the provisions of chapter 66, acts of the 30th General Assembly.

March 1, 1920.

Hon. W. C. Ramsay,
Secretary of State.

Dear Sir:

I have your favor of today enclosing two letters from the law firm of Tinley, Mitchell, Pryor, Ross & Mitchell, each pertaining to the subject referred to in your letter.

You state:

> "I attach hereto a letter from Mr. Emmet Tinley, attorney, representing Mr. H. L. Tinley, who holds a broker's permit No. 74 from this office, which is self-explanatory.
>
> "Mr. H. L. Tinley recently reported under his broker's permit sales on the partial payment plan. In our letter to him on January 5, 1920, his attention was called to section 1920-k, chapter 13-a, code of Iowa, and he was requested to discontinue sale of stock on that plan. His brother, acting as an attorney, has taken issue with this department on this ruling, and it is requested that you render to this department an opinion as to whether section 1920-k is applicable to foreign corporations selling stock in the state of Iowa through either agents or brokers."

Section 1920-k of the 1913 supplement to the code, to which you refer, is as follows:

> "The term 'association' when used in this act shall mean any person, firm, company, partnership, association or corporation, other than building and loan associations and insurance companies and associations, which issue stocks on the partial payment or installment plan. The term 'issue' shall mean issue, sell, place, engage in or otherwise dispose of or handle. The term 'stock' shall mean certificates, memberships, shares, bonds, contracts, debentures, stocks, tontine contracts, or other investment securities or agreements of any kind or character issued upon the partial payment or installment plan."

This section is a part of chapter 66, acts of the 30th General Assembly, and in construing the section quoted it may not be amiss to refer to the title to this act, which reads as follows:

> "An act to provide for the regulation of persons, firms, companies, partnerships, associations or corporations, other

than building and loan associations and insurance companies and associations, which issue, place, sell or otherwise engage in the business of handling certificates, memberships, shares, contracts, debentures, bonds, stock, tontine contracts, or other investment securities or agreements of any kind or character, on the partial payment or installment plan, prescribing the terms and conditions upon which such persons, firms, companies, partnerships, associations or corporations shall be permitted to do business within this state."

It was the clear and manifest intention of the legislature, not only as expressed in the title of the act, but also in the section quoted, to provide for the regulation of *all* persons, firms, companies, partnerships, associations, and corporations, other than building and loan associations, and insurance companies and associations, which issue stocks *on the partial payment or installment plan,* and I am entirely at a loss to understand upon what theory it can be claimed that foreign corporations which issue such stocks shall not be held subject to the provisions which are made distinctly applicable to all persons, firms, companies, partnerships, associations and corporations, except those specifically excepted.

The term "securities or agreements of any kind or character" is both clear and exceedingly comprehensive; and the definition of the term "stock," as provided in the section, is both specific and comprehensive, reading as follows:

> "The term 'stock' shall mean certificates, memberships, shares, bonds, contracts, debentures, stocks, tontine contracts, or other investment securities or agreements of any kind or character issued upon the partial payment or installment plan."

And must be held to apply to all the instruments enumerated therein, when issued *on the partial payment or installment plan,* by all classes of persons, firms, companies, partnerships, associations and corporations other than those specifically exempted.

J. W. SANDUSKY, *Assistant Attorney General.*

SALE OF OIL LEASES UNDER BLUE SKY LAW

Oil leases are "securities" under our blue sky law and the sale thereof may be regulated by the secretary of state.

April 27, 1920.

Hon. W. C. Ramsay,
Secretary of State.

Dear Sir:

We have your request for the opinion of this department on the question as to whether our laws regulating the sale of stocks, bonds and other securities is susceptible of a similar construction to the one placed upon the statute of Minnesota regulating the sale of securities by the attorney general of that state, copy of which opinion is attached to your request.

The Minnesota statute is very similar to our own, and reads in part as follows:

> "Any stocks, bonds, investment contracts or other securities."

Our statute provides in part as follows:

> "Any stock, bonds or other securities."

It will be observed that the only difference between the two statutes is that "investment contracts" are embraced in the Minnesota statute and are not included in ours; and, while it is true that the closing paragraph of the opinion of the learned assistant attorney general holds that the oil leases are "investment contracts," they are none the less "securities" under both the laws of Minnesota and our own state, and the forceful and unanswerable argument of the gentlemen clearly shows such to be the fact.

I deem it unnecessary to set out the opinion referred to, as you are in possession of same, but shall be content with expressing my full approval thereof, and, therefore, hold that every person, firm, association, company or corporation selling or offering for sale the so-called oil leases must secure a permit from the secretary of state.

J. W. SANDUSKY, *Assistant Attorney General.*

WHEN FOREIGN PUBLIC UTILITY COMPANY UNDER BLUE SKY LAW

A foreign public utility corporation desiring to sell stock in this state must comply with the blue sky law and secure a permit from secretary of state.

May 7, 1920.

Hon. W. C. Ramsay,
Secretary of State.

Dear Sir:

You request an opinion from this department upon the following question:

> "A public utilities corporation organized under the laws of the state of Maine, and its principal business located in Iowa, and having the issuance of its stock controlled by the executive council of Iowa, as provided for in section 1641-l and 1641-m, desires to offer for sale a portion of its stock in the state of Iowa. Do they come under the exemption as provided for in section 1920-ul, paragraph c, supplemental supplement to the code of Iowa?"

Under section 1920-ul of the supplemental supplement, all foreign corporations are required to obtain a permit from the secretary of state prior to offering any of its certificates of stock for sale in this state, except the stock in foreign corporations when the laws of the state of their creation provide that no capital stock of a corporation can be legally issued unless the value of said stock is fully paid for in cash, or in property valued by a legally appointed officer or commission of such state.

Therefore, if the laws of the state, in which the corporation referred to in your letter is created, expressly provide as above stated, then such corporation may legally offer its shares or stock for sale in this state without securing a permit from the secretary of state, otherwise not.

Paragraph (c), section 1920-ul of the supplemental supplement, provides another exemption to foreign corporations from the operation of the so-called blue sky law of Iowa.

Paragraph (c) reads:

> "Securities of public or quasi-public corporations, the issue of which securities is regulated by any public board or commission now or hereafter created by the laws of this state."

I am not familiar with any law of this state which provides for a public board or commission to regulate the issue of securities in foreign corporations. Section 1641-l of the supplement to the code, 1913, to which you refer, provides in substance merely that a foreign public utility corporation may legally issue any stock and take property in payment therefor; that the value of such

property shall be passed upon by the executive council of Iowa. If the term "securities" found in paragraph (c), *supra,* can be held to be broad enough to include shares of stock in a corporation, then the exemption in said paragraph (c) would not apply, unless the stock attempted to be sold by the corporation referred to in your letter is or was issued for property.

Therefore, from the facts stated in your letter, I am of the opinion your question should be answered in the negative.

W. R. C. KENDRICK, *Assistant Attorney General.*

OPINIONS RELATING TO OILS AND OIL INSPECTORS

PUMPING GASOLINE AND KEROSENE THROUGH SAME HOSE

A retail dealer cannot legally sell both gasoline and kerosene out of the same pump, nor use separate pumps when connected by the same hose.

May 12, 1920.

State Board of Health.

Gentlemen: You have orally requested an opinion from this department on the following questions:

> "(1). Is it a violation of the law for a retail dealer in gasoline and kerosene to use the same pump in delivering to the purchaser both gasoline and kerosene?
>
> "(2). Would it be a violation of the law if the gasoline and kerosene were delivered through separate pumps but through the same hose?"

Section 2510-j of the supplement to the code, 1913, provides:

> "Every person dealing at retail in gasoline in this state shall after the first day of January, nineteen hundred and seven, deliver the same to the purchaser, in quantities of more than one quart and less than six gallons, only in barrels, casks, packages, cans or measures painted vermillion red and having the word 'gasoline' plainly stenciled or marked thereon. No such dealer shall deliver kerosene in a barrel, cask, package or can painted or marked as above. Every person purchasing gasoline for use shall procure and keep the same only in barrels, casks, packages or cans painted and marked as above. No person keeping for use, or using, kerosene shall put or keep the same in any barrel, cask, package or can painted or marked as above. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished by fine of not less than five, nor more than one hundred dollars."

I am therefore of the opinion that your questions should be answered in the affirmative.

W. R. C. KENDRICK, *Assistant Attorney General.*

HANDLING OF GASOLINE

Gasoline and kerosene may be pumped from cars to supply tanks through the same pipes and pump.

June 17, 1920.

Hon. John W. Cox,
Chief Oil Inspector.

Dear Sir:

We have your request for an opinion upon the following question:

> "Do the laws of Iowa prohibit dealers in gasoline and kerosene from using the same line of pipes and the same pump in pumping gasoline and kerosene to their warehouses and supply tanks?"

I have made a careful search through the statutes of Iowa, and I am unable to find any statute directly bearing upon the subject of your inquiry. Section 2510-j of the supplement to the code, 1913, prohibits a retail dealer in gasoline, in quantities of more than one quart and less than six gallons, from delivering to a customer kerosene in a can or measure used also for delivering gasoline. But that section does not apply to a dealer when pumping gasoline or kerosene from the cars to his supply tank or warehouse.

However, the practice of using the same pipeline and pump for transferring gasoline and kerosene from the cars to supply tanks should be condemned, and until the legislature can enact remedial legislation along that line I would suggest that when the state oil inspectors find in existence such a situation as you refer to in your letter, they should call the dealer's attention to the danger of such practice and urge him to abandon it.

W. R. C. KENDRICK, *Assistant Attorney General.*

SALE OF GASOLINE

Pumps at service station must be painted red and marked "gasoline."

August 26, 1919.

Hon. J. P. Risley,
Chief Oil Inspector.

Dear Sir:

You ask whether or not the gasoline pumps used at the various service stations over the state for serving owners of automobiles

with gasoline should be painted red and plainly stenciled "gasoline."

The statutory provision covering your question will be found in that part of section 2505, supplemental supplement, 1913, which reads as follows:

> "No gasoline shall be sold, given away or delivered to any person in the state until the package, cask, barrel or vessel containing the same has been painted red, and plainly marked 'gasoline' in such manner as the board of health may prescribe."

Pursuant to the foregoing statutory provision all containers in which gasoline is delivered to a purchaser shall be painted red and marked "gasoline." When gasoline is purchased at service stations it is delivered to the purchaser and placed in the tank of his automobile through the pump. If the can in which gasoline is delivered to my residence shall be painted red and marked "gasoline," then I can see no legal reason why the same requirements shall not apply to the pump when I buy gasoline for my car at a service station.

I am therefore of the opinion that all pumps used at service stations for pumping gasoline into automobile tanks shall be painted red and plainly marked "gasoline."

W. R. C. KENDRICK, *Assistant Attorney General.*

WHEN OIL INSPECTOR SHOULD REBATE FEES

When oil has been rejected for illuminating purposes by the oil inspector and the owner of such oil disposes of it outside the state of Iowa, he is entitled to a rebate on the cost of such inspection upon properly certifying that fact to the chief oil inspector as provided in section 2505 of the supplemental supplement.

August 14, 1919.

Hon. J. P. Risley,
Chief Oil Inspector.

Dear Sir:

We have your letter of August 14th in which you ask for an opinion from this department upon the following proposition:

> "A question has arisen in the oil inspection department regarding 'rebates' on cars that have been rejected for 'illuminating purposes' and shipped outside the state in consequence of such rejection. It has been the custom in the past that no rebate has been allowed, but the oil companies are now asking that rebate be allowed.

> "I will refer you to paragraph six (6) of section 2505 of supplemental supplement of the law for your information regarding rebates."

Section 2505 to which you refer provides for the inspection of petroleum products and states that the inspectors of oil shall inspect oil and shall charge the person for whom inspection was made at the rate of seven cents per barrel. There are other provisions with reference to the charge which are not material to your inquiry.

The sixth paragraph of the foregoing section provides as follows:

> "There shall be no refund or rebate of charges made or paid for inspection except upon a duly certified certificate of the owner that the goods, for which the rebate is asked, have been disposed of outside of the state, said certificate to be in such form as shall be prescribed by the chief of oil inspector of state, and shall be delivered to the inspector and attached to his monthly report. The amount of such rebate per barrel allowed during any fiscal year shall be determined by the chief oil inspector of state during the month of July of each year, and shall equal approximately the net proceeds per barrel from the inspection service of the state during the preceding fiscal year, the same to be seven sents per barrel."

You will observe that the only time when a rebate is to be made for inspection is when the rejected oil is shipped outside of the state of Iowa. When the rejected oil has thus been disposed of and the owner presents you with a duly certified statement in such form as you may designate, it becomes your duty to make a refund or a rebate to such owner. The amount of this rebate is to be determined by you during the month of July of each year, and the amount to be refunded shall equal approximately the difference between the charge of seven cents per barrel and the actual cost of making the inspection. The intent of the legislature was doubtless to charge the owner of rejected oil, which he disposes of outside of this state, with the actual cost of inspection.

It is therefore the opinion of this department that when the owner of oil, thus rejected and disposed of outside of the state, presents to you a certificate in proper form, that it is your duty to make the refund or rebate provided for in section 2505 of the supplemental supplement above set forth.

B. J. POWERS, *Assistant Attorney General.*

OPINIONS RELATING TO ELECTORS AND ELECTIONS

MARKING OF BALLOT

The voter is permitted to write in the name, in the proper place, of any candidate for whom he desires to vote, placing a cross in the square opposite such name and the vote will be counted for such candidate. Nor does it make any difference if such name appears under different party appellations when ballots so marked are cast by different persons.

November 17, 1920.

Mr. J. A. Nelson, County Attorney,
Decorah, Iowa.

Dear Sir:

I have your letter of the 15th inst. wherein you state the following:

> "We have a situation here wherein a contest in Pleasant township for township trustee there was a man whose name appears as regular nominee under the Republican ticket, and then through agitation parties centered on a certain other person as a candidate and had his name written in different places on the ticket. For instance, his name was written in a great many places on the Democratic ticket, a great many times on the other ticket, and a great many times on the independent ticket. In summing up the returns all of the votes cast of the different parties for this one man were summed up together, and in the total vote he had a majority over the regular Republican nominee. Is this man legally elected?"

Section 7 of chapter 86, acts of the 38th General Assembly, is a substitute for section 1119 of the 1913 supplement to the code and provides as follows:

> "That section 1119 of the supplement to the code, 1913, be amended by substituting therefor the following: Upon retiring to the voting booth the voter shall mark his ballot. He may place a cross, if he desires, in the circle at the head of one ticket on the ballot and the voter may place a cross in the square opposite the name of any candidate for whom he desires to vote, whether he has put a cross in the circle or not.
>
> "If the voter does not wish to vote for all the candidates of his party to an office where more than one candidate is to

be elected the cross in the circle at the top of his ticket shall not apply to said office, but the voter must mark crosses in the squares opposite the names of the candidates for whom he intends to vote. The voter may also insert in writing in the proper place the name of any person for whom he desires to vote, making a cross opposite thereto. The writing of such name without making a cross opposite thereto, or the making of a cross in a square opposite a blank without writing a name therein shall not affect the validity of the vote."

By the provisions of this section the voter is permitted to write in the name of any candidate for whom he desires to vote, making a cross opposite thereto, and the vote will be counted for such candidate. It cannot make any difference how many different and distinct columns of the ballot such name is written in if written in the proper place and the square opposite thereto properly marked the ballot must be counted for such candidate for that office.

The ballot used at the preceding election had seven columns under the following political or party appellations: Republican, Democratic, Socialist, Farm Labor, Socialist Labor, Prohibition and Independent, and the voter had the right to write in the name of a candidate for a particular office in any one of those volumns, and I am therefore of the opinion that the votes were properly counted for the Democratic candidate for trustee of Pleasant township in your county.

J. W. SANDUSKY, *Assistant Attorney General.*

TIME TO CANVAS VOTES UNDER HIGHWAY LAW

The time for canvassing votes at a special election under the new highway law (chapter 237, acts of 38th General Assembly) is governed by section 1171 of the code.

May 27, 1919.

Mr. Harry Langland, County Attorney,
Nevada, Iowa.

Dear Sir:

We have your letter of May 26th in which you state:

"Should canvass of votes of special election under new road law be made according to section 1149 of code or section 1171? Would like your opinion on this by June 2nd if possible."

In answering your inquiry, we desire to direct your attention to section 1149 of the code to which you refer in your letter. It is as follows:

> "At their meeting on the Monday after the general election, at twelve o'clock noon, the board of supervisors shall open and *canvass the returns,* and make abstracts, stating, in words written at length, the number of ballots cast in the county for each office, the name of each person voted for, and the number of votes given to each person for each different office."

Section 1171 states as follows:

> "In case a special election has been held the board of county canvassers shall meet at one o'clock in the afternoon of the second day thereafter and canvass the votes cast thereat. The county auditor, as soon as the canvass is completed, shall transmit to the secretary of state an abstract of the votes so canvassed, and the state board, within five days after receiving such abstracts, shall canvass the returns. A certificate of election shall be issued by the county or state board of canvassers, as in other cases. All the provisions regulating elections, obtaining returns, and canvass of votes at general elections, *except as to time,* shall apply to special elections."

It is the opinion of this department that your board of canvassers should proceed according to the time mentioned in section 1171 for the reason that the election you mention is a special election. You will note that all provisions regulating elections and relating to the obtaining of the returns thereof and to the canvass of the votes cast at such special election are to be governed by the same provisions as those applying to general elections "except as to time" of canvassing the returns.

B. J. POWERS, *Assistant Attorney General.*

NOMINATING PRESIDENTIAL ELECTORS

Nomination of presidential electors by convention or caucus legal when no nomination has been made in certain districts at the primary.

September 24, 1920.

Hon. W. C. Ramsay,
Secretary of State.

Dear Sir:

Upon my return to the office I find your request for an opinion in which you state your question as follows:

"I am handing you herewith document filed in my office by the convention officials of the democratic state convention recently convened and held at Cedar Rapids.

"The enclosed document purported to nominate presidential electors for six congressional districts in the state wherein no nominations were made in the primary election in June of this year.

"I am requesting an opinion as to the legality of these nominations, and have agreed to notify the interested parties before Thursday of this week.

"I therefore respectfully solicit your assistance in this matter."

The primary law provides for the selection of presidential electors by substantially the same system that is followed for the selection of state officers and of United States senator and representative in Congress. Sections 1087-a1, 1087-a4 and 1087-a10, supplement to the code, 1913. Section 1087-a10 provides for nomination papers in case of the two electors at large to be signed by at least one per centum of the voters of the party in each of at least ten counties of the state, etc.; and nomination papers for a district elector to be signed by at least two per centum of the voters in at least one-half the counties of the district, etc. The adoption of this method for the selection of electors by means of the primary apparently repealed the provisions of section 1098 of the code of 1987 relating to nominations by conventions and caucuses, and this section has been treated as repealed so far as inconsistent with the primary law. The primary law also made provision for certificates of nomination. See section 1087-a19, relating to the canvass by the board of supervisors and the furnishing of certificates of nomination, and also section 1087-a22, relating to the canvass by the executive council, meeting as a canvassing board, to canvass the returns received from the various counties and to determine the nominations made for state offices and for offices of districts larger than a county, etc. These sections with reference to certificates of nomination apparently repealed by implification the provisions of section 1099 of the code of 1897.

It was the holding of the supreme court in this state in the case of

Pratt v. Secretary of State, 141 Iowa 196-199, that:

> "The first requirement of the primary law is that the candidates of political parties for all offices which under the law are filled by the direct vote of the voters of this state at the general election in November shall be nominated by a primary election. This requirement is mandatory, and the method of nomination provided for in the primary statute is exclusive. It follows that the provisions of chapters 3 and 4, title 6, code, so far as they provided methods of nomination *inconsistent with the provisions of the primary enactment, were by that enactment repealed by implication.*"

Sections 1098 and 1099 are found in chapter 3 of title 6 of the code, and so far as the nomination of state and county officers is concerned they must be held to have been repealed by implication; but, as we shall later show, they have been given a new force and meaning by a recent amendment so far as they relate to the selection of presidential electors.

Under the opinion of this department rendered June 14, 1918, to Mr. C. H. Cook, assistant county attorney, Glenwood, Iowa, it was held that as to county officers there was no method provided for the filling a vacancy occurring when no nomination papers had been filed, but where certain persons had received votes for a county office by writing in of names, but where no candidate had received enough to equal 10 per centum of the party vote cast for governor at the preceding election in that county. It was there held that as to county officials there could be no nomination by the party convention to supply a candidate in such a case.

Several arguments might be advanced showing the distinction between the selection of presidential electors and the selection of the party candidate on the county ticket, but it is sufficient, I think, to notice the change in the law that was made by the 38th General Assembly.

The 38th General Assembly adopted chapter 86, which in substance provided that the names of the president and vice-president should appear in the party tickets upon the official ballot and that the names of those nominated as electors of president and vice-president should not appear upon the official ballot, and a number of sections of law were amended to conform to this change. Section 1173 was repealed and in lieu thereof the following was adopted:

> "At the general election in the years of the presidential election, or at such other times as the congress of the United

States may direct, there shall be elected by the electors of the state, one person from each congressional district into which the state is divided, as elector of president and vice-president, and two from the state at large, no one of whom shall be a person holding the office of senator or representative in congress, or any office of trust or profit under the United States. Each elector of each congressional district and each elector at large nominated by any party or group of petitioners shall receive the combined vote of the electors of the state for the candidates for president and vice president of such party or group or petitioners, *and a vote cast for the candidates for president and vice-president of the United States shall be the votes of the voter for the electors of the respective party or group of petitioners.* The canvass of the votes for candidates for president and vice-president of the United States and the returns thereof shall be a canvass and return of votes cast for the electors of the same party or group of petitioners, respectively, and the certificate of such election made by the governor shall be in accord with such return."

Among the sections amended by that chapter is section 1099 of the code of 1897, the legislature changing the word "may" to "shall" in the ninth line of the section so that the section as amended reads as follows:

"Certificates of nominations, made *as provided in the preceding section,* shall, besides containing the names of candidates, specify as to each:

"1. The office to which he is nominated.

"2. The party making such nomination, or political principle which he represents, expressed in not more than five words.

"3. His place of residence, with the street and number thereof, if any.

"In case of electors for president and vice-president of the United States, the names of the candidates for president and vice-president *shall* be added to the party or political name. Every such certificate of nomination shall be signed by the presiding officer and secretary of the convention, caucus or meeting of qualified electors, or by the board of canvassers to which the returns of such primary election are made, each of whom shall add to his signature his place of residence, and shall be sworn to by each signer thereof to be true to the best of his knowledge and belief, and a certificate of the oath shall be annexed to the certificate of nomination. The presiding officer and secretary of each convention, primary, caucus or meeting shall also certify, to the officer with

whom the nomination certificates are filed, the names and addresses of each of the members of the executive or control committee appointed or elected by or representing it, and the provisions, if any, made by it for filling vacancies in nominations; and this may be done in the nomination certificate, or by a separate certificate." (38th G. A., ch. 86, § 1; 24 G. A., ch. 33, §§ 4, 6).

In the case of presidential electors the board of canvassers referred to above would be the state board of canvassers composed of the executive council, as provided by section 1087-a22; but, according to the provisions of this section, this return in case of presidential electors may be made by the "presiding officer or secretary of the convention, caucus, or a meeting of qualified electors." The effect of this amendment is to provide an additional method of selecting presidential electors because section 1099 refers specifically to the method of nomination as provided by section 1098. Accordingly it would seem that if the nomination of presidential electors is not made for any reason, by the primary, then it may be made by any of the methods provided in section 1098 and certified as provided in section 1099. While not strictly in harmony with the primary law, it is, in view of the amendment of said section, a later enactment, and must be given some force and effect.

Unless we give it effect in cases where there has been no nomination made by the primary, it must be ignored entirely. We cannot assume that the legislature did a useless thing. It supplies authority for the nomination which has been made by the democratic state convention, although there may be some question as to whether the selection of these presidential electors should not have been made by the various congressional districts they represent.

I am informed that there were two of the congressional districts of the state which failed to nominate in the primary candidates for the office of presidential electors on the republican ticket, but at a district convention or caucus such selections were made and have been certified to your office. It would seem that section 1099 as amended with its reference to section 1098 would supply the authority for this action.

It is therefore my judgment that you should recognize the nominations made by the democratic party to fill the offices of electors from the several districts covered by the certificate which you

have enclosed in your letter, and that you should also recognize the legality of the nominations made in the case of republican electors from the Third and Eleventh congressional districts.

F. C. DAVIDSON, *Special Counsel.*

WOMEN MAY ASSIST IN NOMINATING PRESIDENTIAL ELECTORS

Women, otherwise qualified may join in signing a petition nominating a candidate for the office of presidential elector.

August 2, 1920.

Hon. W. C. Ramsay,
Secretary of State.

Dear Sir:

We have your letter of July 28th in which you request an opinion from this department upon the following proposition:

> "Section 1100 provides that nominations for candidates for state offices may be made by nomination paper or papers signed by not less than five hundred qualified voters of the state; for county, district or other division, not less than a county, by such paper or papers signed by not less than twenty-five qualified voters, residents of such county, district or division. In view of the fact that women are now qualified to vote for presidential electors, would they be qualified to sign petitions nominating candidates for the office of presidential elector?"

Answering your inquiry, permit us to state that it is the opinion of this department that while women are not qualified electors to the full extent granted men, yet so far as being qualified to vote for presidential electors the restriction which heretofore existed on account of sex, has been entirely removed by the enactment of chapter 353, acts of the 38th General Assembly, wherein it was provided:

> "* * * That the right to vote for presidential electors shall not be denied or abridged on account of sex, and that every woman who has attained the age of twenty-one (21) years and who possesses all other qualifications requisite to a male voter, shall be entitled to vote, the same as men, at any election held for the purpose of electing presidential electors."

It is the opinion of this department that the foregoing provision clothes women, otherwise qualified, with all of the privileges which a male voter may be entitled to, including the right to join in a petition of nomination for a presidential elector under the provisions of section 1100 of the code.

B. J. POWERS, *Assistant Attorney General.*

VOTES REQUIRED TO NOMINATE AT PRIMARY

The requirement that a person whose name is written in for a particular county office must receive 10% of the vote for governor applies to state offices.

July 27, 1920.

Hon. W. C. Ramsay,
Secretary of State.

Dear Sir:

Your letter of the 24th inst. addressed to H. M. Havner, attorney General, has been referred to me for reply.

You ask:

> "Does a vacancy in fact exist under the statute as amended by the acts of the 38th General Assembly where no candidate for certain office is voted for at the primary election, or where the name of a certain candidate is written in on the ballot and such written signatures do not equal or exceed 10 per cent of the vote cast for that office?
>
> "In a case such as is herein cited for the office of state representative, has the county convention of either political party any authority in the premises for filling the vacancy?"

This department has hertofore ruled that, when no candidate has filed nomination papers for any particular office and the voters write in the name of some person for such office, unless the person whose name is written in receives a vote equal to at least 10 per cent of the vote cast in the county for governor at the preceding general election, no nomination has been made, and the county convention is without power to fill the ticket by nominating a person for that particular office. I am enclosing a copy of our ruling.

We are of the opinion that the same rule applies to state offices. Chapter 253, acts of the 38th General Assembly, does not modify the rule when applying to state offices, but expressly makes the 10 per cent rule applicable thereto.

W. R. C. KENDRICK, *Assistant Attorney General.*

TIME FOR FILING NOMINATION PAPERS FOR STATE OFFICES

Discussion as to the last day for candidates for state offices to file nomination papers.

April 27, 1920.

Hon. W. C. Ramsay,
Secretary of State.

Dear Sir:

You have submitted to this department an oral inquiry with reference to the last day upon which you are permitted, under the law, to file nomination papers of candidates for an elective state office or for a representative in congress, or for a member of the General Assembly.

In answer to that inquiry, we think that nomination papers may be filed by candidates for these offices tomorrow, April 28th.

In reaching this conclusion we would call your attention to the language of section 1087-a10, supplement to the code, 1913, a portion of which reads as follows:

> "No candidate for an elective county office shall have his name printed upon the official primary ballot of his party unless at least thirty days prior to the day fixed for holding the primary election a nomination paper shall have been filed in his behalf in the office of the county auditor; and no candidate for nomination for an elective state office, or for representative in the congress of the United States, or member of the General Assembly, shall have his name printed upon the official primary ballot of his party unless at least forty days prior to such primary election a nomination paper shall have been filed in his behalf in the office of the secretary of state."

We think the statutory rule with reference to the compilation of time covers this question (section 48 of the code, paragraph 23), which reads as follows:

> "In computing time, the first day shall be excluded and the last included, unless the last falls on Sunday, in which case the time prescribed shall be extended so as to include the whole of the following Monday."

F. C. DAVIDSON, *Assistant Attorney General.*

COMPENSATION OF SCHOOL ELECTION JUDGES

Judges at school election are not entitled to compensation, which rule applies where directors or other persons act as judges.

March 17, 1920.

Mr. A. B. Hoover, County Attorney,
Marshalltown, Iowa.

Dear Sir:

We have your request for the opinion of this department on the following question:

> "I have been asked with reference to what compensation is provided for judges of school elections, and my opinion has been given that while there is no law fixing the compensation for judges of school elections that in order to carry out the law that the judges of such elections are entitled to the same compensation as the judges in general and primary elections, viz: thirty cents per hour, except where one of the judges of such elections might be a member of the school board, and in which event such member would be entitled to his usual per diem, and nothing more.
>
> "If I am wrong in this opinion will you kindly correct me and give me such an opinion as will governor in these matters in the future?"

You are correct in your statement that there is no law specifically fixing the compensation for judges of school elections.

There is a provision in chapter 225, acts of the 37th General Assembly, which repeals section 2755 of the 1913 supplement to the code, which provides for the appointment of two suitable persons to be registrars in each of the election precincts of certain school corporations and which provides that they shall receive the same compensation as registrars appointed for general elections, to be paid by the school corporation.

Section 2780 of the 1913 supplement to the code provides as follows:

> "It shall audit and allow all just claims against the corporation, and no order shall be drawn upon the treasury until the claim therefor has been audited and allowed; it shall from time to time examine the accounts of the treasurer and make settlements with him; shall present at each regular meeting of the electors a full statement of the receipts had and expenditures made since the preceding meeting, with such other information as may be considered important; and

shall fix the compensation to be paid the secretary. But no member of the board or treasuer shall receive compensation for official services."

You will observe that by the terms of this section, no member of the board or treasurer shall receive compensation for official services, and where members of the board of directors were acting as judges of a school election the services thus performed would be official services just as much as any other services that they might perform for and on behalf of the school district, and I think it may be fairly inferred from this that the law does not contemplate that members of the school board or other persons who may be acting as judges at a school election shall receive any compensation for such services.

J. W. SANDUSKY, *Assistant Attorney General.*

NUMBER OF BALLOTS REQUIRED

Statute does not fix exact number. Auditor must have printed a sufficient number of ballots for primary or general election, as case may be, and in determining the amount necessary he should take into account the number of ballots cast at the last election and add to such number sufficient to make an ample supply for all purposes mentioned in the statute and for the contingencies therein referred to.

April 6, 1920.

Mr. W. J. Springer, County Attorney,
Leon, Iowa.

Dear Sir:

We have your favor of the 2d inst. wherein you request the opinon of this department on the following questions:

"1. By what method shall the county auditor determine the number of ballots to be printed for the several parties for the primary election?

"2. The interpretation of your office of chapter 353 of the 38th General Assembly, and, if your office interprets that it applies to the next primary election, how shall he determine the number of ballots to be printed thereunder?"

Section 1087-a1 of the 1913 supplement makes certain provisions of the general election law applicable to the primary election and provides in part as follows:

"The provisions of chapters 3 and 4, title 6, and chapter 8. title 24, of the code, shall apply so far as applicable to all primary elections, the same as general elections, except as hereinafter provided."

Section 1087-a15 of the same chapter provides that after the printing of the official ballots the auditor shall change a sufficient number thereof to supply each voting precinct in the county with ten sample ballots of each political party.

Section 1087-a16 of said chapter further provides that:

> "All necessary election supplies, including poll books as provided by law, for the general election, together with a sufficient number of official primary ballots of each party, shall be furnished for the primary election board for each precinct by the county auditor. * * *"

Section 1110 of chapter 3 of title 6 of the code provides in part as follows:

> "The officers charged with the printing of the ballots shall cause to be delivered to the judges of election seventy-five ballots, of the kind to be voted in such precinct, for every fifty votes or fraction thereof cast therein at the last preceding election of state officers. * * * Any officer charged with the printing and distribution of ballots shall provide and retain at his office an ample supply of ballots, in addition to those distributed to the several voting precincts, and if at any time the ballots furnished to any precinct shall be lost, destroyed or exhausted before the polls are closed, on written application, signed by a majority of the judges of such precinct, he shall immediately cause to be delivered to such judges, at the polling place, such additional supply of ballots as may be required, and sufficient to comply with the provisions of this chapter. For general elections, the supply of ballots so retained shall only equal the number provided for the precinct casting the largest vote at the preceding general election, * * *."

From the foregoing provisions of the several sections of the statute it is clearly apparent that the exact number of ballots that should be printed and furnished is not fixed or determined, and therefore, it devolves upon the officer whose duty it is to furnish the ballots, to provide a sufficient number for the various purposes, and in doing so he should take into account the number of ballots cast at the preceding primary or general election, as the case may be, and add to such number an ample amount to cover all contingences referred to and provided for in the statute.

In this connection it may not be amiss to suggest that if the suffrage amendment is ratified prior to the primary election, that from 75 to 100 per cent additional ballots should be provided.

As to your second question, I am of the opinion that it can have no application to primary elections.

J. W. SANDUSKY, *Assistant Attorney General.*

TIME FOR FILING NOMINATION PAPERS FOR COUNTY SUPERVISOR

When counties are divided into supervisor districts, nomination papers or affidavits of candidates must be filed fifteen days prior to date of election.

May 20, 1920.

Mr. A. J. Burt, County Attorney,
Emmetsburg, Iowa.

Dear Sir:

Replying to your request over the telephone as to whether or not this department has ever ruled on the question as to how many days before election nomination papers must be filed for the office of board of supervisors, in the event the county is subdivided into districts, beg to advise that I can find no ruling upon that subject.

However, under section 1087-a10 of the supplement to the code, 1913, you find the following provision:

> "A candidate for an office to the filled by the voters of any subdivision of a county * * * shall not be required to file any nomination paper or papers. * * * Each and every candidate shall make and file his affidavit, stating that he is eligible to the office for the township, county, district or state in which he is or may be a bona fide candidate for nomination. * * * * If no such paper or papers are required, then he shall file such affidavit alone, or there shall be filed a nomination paper signed by ten qualified voters of any subdivision of a county, with the county auditor, at least fifteen days prior to such primary election."

Evidently from the section of the statute above quoted, all that is required for a candidate for the office of county supervisor from one of the districts is that he either file an affidavit that he will be a candidate, or a petition containing ten names, at least fifteen days before the date of the election.

W. R. C. KENDRICK, *Assistant Attorney General.*

BOARD OF SUPERVISORS MAY OPEN VOTING MACHINES

In a primary election contest it is proper for the board of supervisors to do any and all things necessary to determine the questions presented including opening the voting machines.

June 14, 1920.

Mr. Arthur G. Rippey, County Attorney,
Des Moines, Iowa.

Dear Sir:

Replying to your oral request for the opinion of this department on the question of the authority of the board of supervisors to open the voting machines in a contest based upon the provisions of section 1087-a18 of the 1913 supplement to the code, has been referred to me for attention.

The section provides that:

> "Any candidate whose name appears upon the official primary ballot of any voting precinct may require the board of supervisors * * * to recount the ballots in case any such precinct * * * at the time fixed for canvassing the returns of the judges of election, by filing with the county auditor not later than the day before such meeting, a showing in writing, duly sworn to by such candidate, that fraud was committed, or error or mistake made in counting or returning the votes cast in any such precinct. * * * The showing must be specified, and from it there must appear reasonable ground to believe that a recount of the ballots would produce a result as to his candidacy different from the returns made by the judges. If such showing is made to the satisfaction of the board, it shall thereupon recount the ballots cast in any such precinct for the office for which the contestant was a candidate. * * **"

The foregoing section outlines and prescribes the conditions upon which the board of supervisors may recount the ballots cast in any precinct for any particular office. It requires that a proper showing be made to the satisfaction of the board that *fraud was committed, or error or mistake made in counting or returning the votes cast in such precinct for such office.* It therefore follows that the board is authorized and empowered to do any and all things necessary to determine such questions, including the opening of the voting machines, and sections 1137-a24 and 1137-a25 of the supplement should not be construed to abridge or limit such power.

J. W. SANDUSKY, *Assistant Attorney General.*

PRE-ELECTION PROMISES

It is illegal for a candidate for a county office to promise his deputy to divide the salary if the deputy will stay out of the race for that office.

July 15, 1920.

Mr. W. J. Greenell,
Clinton, Iowa.

Dear Sir:

Upon my return to the city I find your letter bearing date of July 10, 1920, in which you ask for an opinion from this department upon the following question:

> "Is it illegal for a county officer, elected by the people, to divide his salary with his deputy? It is really an agreement. That is, the officer promised the deputy that if he would keep out of the race he would divide the salary. That is, he gives the deputy enough of his salary to even things up, so they both get the same amount."

Such a contract as you refer to is not only invalid but absolutely illegal and subjects a candidate making such a promise to criminal prosecution.

Section 1134-a of the supplement to the code, 1913, provides:

> "It shall be unlawful for any candidate for any office to be voted for at any primary, municipal or general election, prior to his nomination or election, to promise, either directly or indirectly, to support or use his influence in behalf of any person or persons for any position, place or office, or to promise directly or indirectly to name or appoint any person or persons to any place, position or office in consideration of any person or persons supporting him or using his, her or their influence in securing his or her nomination, election or appointment."

Section 1134-b of the supplement to the code, 1913, also provides:

> "It shall be unlawful for any person to solicit from any candidate for any office to be voted for at any primary, municipal or general election, or any candidate for appointment to any public office, prior to his nomination, election or appointment, to promise, directly or indirectly, to support or use his or her influence in behalf of any person or persons for any position, place or office, or to promise either directly or indirectly to name or appoint any person or persons to any place, position or office in consideration of any person or persons supporting him or her, or using his, her or their influence in securing his or her nomination, eletcion or appointment."

The penalty for violating either of the two preceding sections is a fine of not less than fifty dollars nor more than three hundred

dollars, or by imprisonment in the county jail for not less than thirty days nor more than six months.

W. R. C. KENDRICK, *Assistant Attorney General.*

NOMINATING DISTRICT JUDGE

Nomination of district judge to be made by party committee when vacancy occurs after holding of judicial convention.

August 13, 1920.

Hon. C. C. Hamilton, Judge Fourth Judicial District,
Sioux City, Iowa.

Dear Sir:

I have before me your letter of the 10th inst., and your telegram of the same date, requesting an opinion from this department as to the steps that should be taken to nominate a successor to Judge Anderson.

As I understand it, Judge Anderson resigned on August 8th, his resignation to take effect September 1st, and that you have been appointed to fill the vacancy thus created, and under the law you will be entitled to hold the office until the next general election, and until your successor is elected and qualified.

As I understand it, the terms of office of all three judges in the Fourth Judicial District terminate January 1, 1923, and on that account there has been no occasion for the counties comprising this district to hold a judicial convention this year. The question therefor arises as to the manner in which party nominations may be made.

I have recently given an opinion to Hon. C. A. Rawson, chairman of the republican state central committee, regarding the filling of the vacancy by the republican party to supply a candidate for the position made vacant by the death of Mr. Justice Gaynor. Many things that are said in that opinion are applicable to your situation, so that I enclose you a copy of the same.

There is, however, some difference in the language of chapter 63 of the acts of the 38th General Assembly in reference to the selection of district judges from that used in connection with the selection of judges of the supreme court. Thus, section 3 of that act reads as follows:

> "In each judicial district there shall be a district central committee composed of one member from each county of such

district; provided, however, that in districts composed wholly of one county there shall be three members of such committee, and in districts composed of two counties there shall be two members of each committee from the county having the larger population. Such committeemen shall be selected by the county convention in each county held in accordance with the provisions of section ten hundred eighty-seven-a-twenty-five (1087-a25), supplement to the code, 1913. Until such conventions are held, the chairman of the county central committee of each political party shall act as committeemen from his county for such judicial districts, and in counties having more than one such committeeman such additional committeemen shall be selected by the county central committee in said county. Vacancies in any such district committee shall be filled by the county central committee of the county where such vacancy occurs. In each judicial district in which a judge, or judges, of the dstrict court therein is to be elected, a judicial convention shall be held by each political party participating in the primary election of that year. Not less than ten days nor more than forty days before the day fixed for holding the county convention, a call for such judicial convention to be held shall be issued by the party central committee for such district, and published in at least one newspaper of general circulation in each county in the district which shall state, among other things, the number of delegates each county in the district shall be entitled to, and the time and place of holding the convention. Such call shall be filed with the county auditor in each county in the district not less than five days before the date of holding the county convention as now fixed by law, and the county auditor shall attach a copy thereof to the certified list of delegates required to be delivered by him to the chairman of the county central committee of the respective political parties. Each county convention held in such judicial district shall select such a number of delegates to the judicial convention as is specified in the call for such judicial convention. Such district convention shall not be held earlier than the first Thursday, not later than the fifth Thursday following the date of holding the county convention. The convention may nominate as many candidates for the office of judge of the district court in said district as there are judges in said district to be elected at the general election to be held in the year in which such convention is held. The organization and the procedure in such judicial district convention shall be the same as in the state convention. Such convention may transact such other business as may properly be brought before it. Judges of the district court shall be elected at the general election in the same manner as state senators are elected."

Standing alone the opening sentence requires a convention:

> "In each judicial district in which a judge or judges of the district court therein is to be elected a judicial convention shall be held by each political party participating in the primary election of that year,"

but taken in connection with what immediately follows, it will be seen that the convention referred to is that which is to be held in an election year when judges are to be regularly selected to take the places of those whose terms expire on the following January 1st. The same might be said with reference to the sentence:

> "The convention may nominate as many candidates for the office of judge of the district court in said district as there are judges in said district to be elected at the general election to be held in the year in which such convention is held."

This obviously refers back to the regular judicial convention, and it seems to me could not have reference to a recalling of that convention if it had already been held or the selection of delegates, etc., if no regular judicial convention had been held.

If Judge Anderson had resigned before the holding of this regular convention, of course the convention would have had the authority to nominate someone as a candidate to fill out his unexpired term.

However, since the convention was not called at all because, so far as we know at that time, there were no judges to be elected this year, it seems to me that there is now no machinery of the law provided for the calling of such a convention.

You will note in section 7 of the act that all of the laws with reference to "filling vacancies" apply, and it is therefore my opinion that the vacancy should be filled under the provisions of section 1087-a24, which you will find quoted at length in copy of the letter to Mr. Rawson.

I am informed that when the republican county convention of Monona county met a district committeman was selected, but that when the republican county convention of Woodbury county met no district committemen were selected. Under section 3 of the act, above quoted, Woodbury county is entitled to two members of that committee. I might say that this is one reason for believing that it was the intention of the legislature to leave the

filling of vacancies which might occur after the holding of the district convention to this committee, as otherwise, there would be no reason for providing for the selection of two members of the committee from the larger county.

You will note the provision that the chairman of the county central committee of each political party shall act as the committeeman from his county for the judicial district "until such conventions are held," referring to the county conventions.

Inasmuch as the Woodbury county republican convention has already been held, I think two vacancies exist in the office of district party committeemen. It is provided by said section 3:

> "Vacancies in any such district committee shall be filled by the county central committee of the county where such vacancy occurs."

As far as the republican party is concerned, if I am correctly informed, the naming of a candidate as a successor to Judge Anderson should be done by the judicial district committee, comprised of one member of the committee already selected by the republican county convention of Monona county, and by two members of that committee to be selected to fill vacancies by the republican county central committee of Woodbury county.

I am not advised as to what has been done by the democratic party, but it occurs to me that the foregoing statement would cover all contingencies that would be likely to arise in connection with the naming of a candidate as a successor to Judge Anderson by that party.

F. C. DAVIDSON, *Special Counsel.*

RIGHT OF WOMEN TO VOTE

Right of women to vote at municipal elections of 18th amendment has been ratified.

August 23, 1920.

Mr. Nelson Miller, City Solicitor,
LeMars, Iowa.

Dear Sir:

Answering your favor of the 21st inst., with reference to the right of the women to vote on the question of purchasing gas works in the city of LeMars, I beg to say:

That if three-fourths of the states have ratified the suffrage amendment there can be no question but that the amendment is

in full force and automatically repeals every provision of the state constitution or of our state statutes that in any way act as a bar to the exercise of suffrage by women the same as men.

I call your attention to the following cases:

United States v. Reese, 92 U. S. 214, 217;
United States v. Cruikshank, 92 U. S. 542, 555;
Neal v. Delaware, 193 U. S. 370, 388;
McPherson v. Blacker, 164 U. S. 1, 39;
Guinn v. United States, 238 U. S. 347;
Myers v. Anderson, 238 U. S. 368, 376.

The last case in particular would seem to cover the exact question that you have asked.

Naturally, I do not pretend to say whether the amendment is in full force or not, but presume it is. The federal constitution makes no provision with reference to the method in which the fact of ratification shall be made known, although by an act of congress it is required that the different states certify the action of their respective legislatures to the secretary of state of the United States, who, in turn, makes proclamation of the fact of ratification.

F. C. DAVIDSON, *Special Counsel.*

RULES TO DETERMINE CITIZENSHIP OF WOMEN AND CHILDREN

Women take the citizenship of their husbands and minor children of their parents. General discussion relating thereto.

September 1, 1920.

Mr. J. C. Hansen, Chairman Polk County Democratic Central Committee, Des Moines, Iowa.

Dear Sir:

Your letter of the 1st inst. addressed to Hon. H. M. Havner, attorney general of Iowa, has been referred to me for reply.

You request an opinion from this department upon the following questions:

"1st. Suppose a woman has become a citizen by marriage who is divorced from her husband and adopts her maiden name by decree of court, does she then lose her citizenship?

"2d. Is a foreign born woman, unmarried, a citizen if her father took out naturalization papers before she became of age?

"3rd. Is an American born woman who has married a foreigner (not naturalized) a citizen? If she lost her citizenship what would be her status if she was divorced from such a foreigner?

"4th. A foreign born woman, by marrying an American citizen becomes a citizen by marriage, has she to live in the United States five years before she can vote, or would she be entitled to a vote as soon as marriage took place, granting that she had lived in the state and county the required time the statute provides?

"5th. Is a foreign born woman, whose husband is dead but was an American citizen, entitled to vote?

"6th. The registration rules also require that a foreign born citizen shows proof before registration by showing his citizenship papers.

"You are probably aware that some of these different types come to register or vote. They would be unable to prove themselves citizens because they in reality do not possess any naturalization papers. What would the registration and election board do in that case?"

Prefacing this opinion I will say that section 1994 of the revised statutes of the United States of 1878 declares:

"Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen."

As to your first question, section 4, act of March 2, 1907, 34 U. S. Stat. L. 1228, provides:

"That any foreign woman who acquires American citizenship by marriage to an American shall be assumed to retain the same after the termination of the marital relation if she continues to reside in the United States, unless she makes formal renunciation thereof before a court having jurisdiction to naturalize aliens, or if she resides abroad she may retain her citizenship by registering as such before a United States consul within one year after the termination of such marital relation."

As to your second question, section 5 of said act of March 2, 1907, provides:

"That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent: *Provided,* that such naturalization or resumption takes place during the minority of such

child: *And, provided further*, that the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States."

As to your third question, section 3 of said act of March 2, 1907, provides:

> "That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein."

That an American born woman forfeits her American citizenship by marrying a foreigner is also the holding in

Mackenzie v. Hare, 239 U. S. 299.

As to your fourth question, I am of the opinion that since a foreign born woman acquires the right of American citizenship through marriage and further qualifies in respect to residence in the state and county and properly registers as required by statute, she has the right to vote.

I am also of the opinion that your fifth question should be answered in the affirmative, provided she continues to remain in the United States subsequent to the death of her husband.

As to your sixth question, the registration laws of Iowa provide that, in cities where registration is required, and in the years when it is necessary to register, every person claiming the right to vote at the next election shall present himself to the board of registration in his precinct and be examined as to his qualifications. After being sworn by one of the members of the board such applicant shall be interrogated respecting, among other things, his citizenship, the ulterior purpose of such investigation being to determine the applicant's right to vote. If the board is satisfied in that respect then he or she should be registered. Section 1077, supplement to the code, 1913.

If conditions exist such as you suggest in your sixth question, then the members of the registration board should satisfy themselves that the applicant is an American citizen, and if that can be proved without the presentation of naturalization papers, then I believe the applicant should be registered and not denied the right of suffrage.

W. R. C. KENDRICK, *Assistant Attorney General.*

WHERE VOTING PLACE MAY BE LOCATED

Board of supervisors may provide voting places inside city limits for voters living outside but within the township.

October 14, 1920.

Mr. W. H. Wehrmacher,
Waverly, Iowa.

Dear Sir:

Your letter of the 12th inst. addressed to Attorney General H. M. Havner has been referred to me for attention.

You ask for an opinion from this department on the following question:

> "I would like an opinion from your department as to whether or not a polling place could be established in the city of Waverly, Iowa, for the voters of Washington township to cast their ballots at the next general election.
>
> "The city of Waverly is located in the central part of Washington township, having formerly been a part of Washington township, and the reason the board desires to have the polling place in the city of Waverly is on account of the fact that it would be more convenient for all persons residing in Washington township to vote in the city of Waverly than any other place in Washington township."

The law applicable to your question will be found in section 1091 of the supplement to the code, 1913, which provides as follows:

> "That section ten hundred ninety-one of the code be and the same is hereby repealed and the following enacted in lieu thereof:
>
> "Polling places for precincts outside the limits of a city, but within the township, or originally within the setoff as a separate township from the township in which the city is in whole or in part situated, may, for the convenience of the voters, be fixed at some room or rooms in the courthouse or in some other building within the limits of the city as the board of supervisors may provide."

From the foregoing statute, it will be observed that the board of supervisors of your county is authorized to provide a place within the city of Waverly wherein the voters residing outside the city limits may vote.

W. R. C. KENDRICK, *Assistant Attorney General.*

VOTING MACHINES

Voting machines not equipped with party levers should not be used at general election for 1920.

September 25, 1920.

Mr. J. F. Alber, County Auditor,
Des Moines, Iowa.

Dear Sir:

The attorney general has referred to me for reply your letter of the 12th inst., copy of which is as follows:

> "An uncertainty has arisen with respect to the use of voting machines in Iowa which do not contain a lever permitting the voter to vote an entire ticket such as the republican ticket by the movement of a single lever.
>
> "The uncertainty arises because of the actions of the 38th General Assembly restoring the circle to the form of ballot where a ballot is used.
>
> "I understand this does not have any relation to voting machines, and that the voting machines are governed by distinct statutes was recognized by our supreme court in 132 Iowa, pp. 38, 49.
>
> "I am advised that our voting machines can be changed by the insertion of a lever permitting the voting of an entire ticket, but that this will involve an estimated expense of about $50.00 for each machine, and very large expense to the entire state.
>
> "We wish to avoid it unless the law makes it necessary, and will be grateful for your opinion as to whether it is necessary."

The question you present is one of great difficulty. The 38th General Assembly adopted chapter 86, which is amendatory of a number of the sections of the election law, relating to the form of the official ballot, and the method in which it may be voted. In substance, it provides for the placing upon the ballot of the name of the candidate for president and vice-president of each political party, instead of a list of the presidential electors nominated by each party. It also provides for the placing of a circle opposite the party designation, and section 7 of that act further provides that the voter may place a cross if he desires in the circle at the head of one ticket on the ballot, and a cross in the square opposite the name of any candidate on another ticket. Then the

cross in the circle at the top of the ticket only counts for those offices where no candidates on another ticket has been voted for.

As far as the ordinary Australian printed ballot is concerned, the act is plain, and your question, as I understand it, is whether by implication voting machines now in use should be so changed so that by the turning of a single lever the voter may cast his ballot for all of the candidates on a certain ticket, with like opportunity to vote for other candidates on other tickets should he so desire.

Turning to the statutes with reference to the use of voting machines, section 1137-a7, et seq., we find that the board of supervisors of any county, or the council of any incorporated city or town, may purchase and use voting machines in any one or more of the voting precincts in said county, city or town. It is also provided that commissioners shall be appointed who shall examine and pass upon the accuracy and efficiency of machines offered for sale, and after a voting machine has been approved by the state board, it may be purchased and used by the counties and municipalities.

Section 1137-a11 provides as follows:

> "A voting machine approved by the state board of voting commissioners must be so constructed as to provide facilities for voting for the candidates of at least seven different parties or organizations; must permit a voter to vote for any person for any office, although not nominated as a candidate by any party or organization, and must permit voting in absolute secrecy. It must also be so constructed as to prevent voting for more than one person for the same office, except where the voter is lawfully entitled to vote for more than one person for that office, and it must afford him an opportunity to vote for any or all persons and no more, at the same time preventing his voting for the same person twice. It may also be provided with one ballot in each party column or row containing only the words 'presidential electors,' preceded by the party name, and a vote for such ballot shall operate as a vote for all the candidates of such party for presidental electors. Such machines shall be so constructed as to accurately account for every vote cast upon it."

It will be noted that it is not necessary for the voter to register his vote as to each presidential elector, and on the other hand, the machine may be so arranged that a vote for "presidential electors preceded by the party name" shall operate as a vote for all candidates of such party for presidential electors.

There is no provision for placing the name of a candidate for president and vice-president on the ballot, but it is clear that so far the presidential ticket is concerned, the method of voting is practically the same as that now provided on the printed ballot.

Section 1137-a15 reads as follows:

> "All ballots shall be printed in black ink on clear, white material, of such size as will fit the ballot frame, and in plain, clear type as the space will reasonably permit. The party name for each political party represented on the machine shall be prefixed to the list of candidates of such party. The order of the list of candidates of the several parties or organizations shall be arranged as provided in section eleven hundred and six of the code, except that the lists may be arranged in horizontal rows or vertical columns."

There never was any express provision in the voting machine law with reference to the use of party levers, to correspond with the circle on the ballot. The voting machine law was adopted as chapter 37, acts of the 38th General Assembly, and at that time the election laws provided for a circle on the ballot, and under section 1119 of the code of 1897, the marking of the ballot in the circle was substantially the same as the new statute passed by the last General Assembly. As I am informed, the first machines that were installed in the state, some of which are still in use, were equipped with the party levers. No doubt this was done so that the method of voting might conform as nearly as possible to that in use for voters using the Australian ballot.

As a part of the voting machine act adopted by the 38th General Assembly, we find the following:

> "All of the provisions of the election law *now in force* and not inconsistent with the provisions of this act shall apply with full force to all counties, cities, and towns adopting the use of voting machines. Nothing in this act shall be construed as prohibiting the use of a separate ballot for constitutional amendments and other public measures."

Later on, the circle was removed from the ballot in 1906, chapter 44, laws of the 31st General Assembly. To conform as nearly as practicable with this change, the machine later installed, representing as I am informed, the machines now in use in about twenty-two counties, were made without the party lever.

In determining the answer that should be given to your question, it is necessary to construe section 21 of chapter 44, laws

of the 28th General Assembly, above quoted, and especially the words *"now in force."*

It is not uncommon for a legislature, in passing a statute definining some mode of procedure, to refer to the provisions of some other statute, and to make the statute referred to applicable to the procedure to be defined.

If the words "now in force" had been omitted, there is no doubt but what the reference to "all of the provisions of the election law * * * not inconsistent with the provisions of this act" would thereby have become a part of the voting machine law, and that all amendments made in the election laws, and not inconsistent with the voting machine law, should become a part thereof. Did the addition of the words "now in force" change this rule of construction?

I am inclined to think that the use of this expression did not.

The legislature must have had in mind that the general election laws with reference to the form, printing and marking of the ballot might be changed from time to time. When the general election laws relating to the removal of the circle from the ballot went into effect, under chapter 44, laws of the 31st General Assembly, the voting machine commission actually did approve the use of machines which were not equipped with party levers, and manifestly, this was proper.

Could the words "now in force" have had the effect of preserving the provisions as to the circle on the ballot as a part of the voting machine law? If so, then the circle provision which was then in force has never been changed so far as the voting machine is concerned. To so hold would lead us to a ridiculous conclusion; and, in fact, require us to say that even though the general election laws with reference to the form, printing and marking of the ballot had been repealed, still, so far as the voting machine law is concerned, they would remain in force in the same form in which they existed at the time the voting machine law was adopted.

Bearing somewhat on this question are the following:

Clay v. Pennoyer Creek Improvement Co., 34 Mich. 204, 210;

Nok v. Detroit Building Co., 30 Mich. 511;

United States v. Bassett, 2 Story 403;

Vallejo & N. R. Co. v. Reed Orchard Co., (Cal.) 170 Pac. 426.

In the last named case the court has stated the rule thus:

> "Where a statute by adoption refers, not to a particular statute thereof, but to the law generally which governs the particular subject, the reference is to be construed as applying, not only to the law as it existed at the time of enacting the adoption statute, but to the law as changed from time to time, and as it exists when invoked in an action or proceeding. *Gaston v. Lamkin,* 115 No. 29, 21 S. W. 1100; *Culver v. People,* 161 Ill. 89, 43 N. E. 812."

This conclusion is strengthened by reason of the fact that if a county or city wishes to buy new voting machines it surely would not be contended that the voting commission should permit the purchase of machines which were not equipped with party levers.

It has been suggested that the last legislature must have known of the existence of voting machines in twenty-two counties of the state which were not equipped with party levers, and must have intentionally failed to amend the voting machine law so as to require such equipment to be added. It is further suggested that the legislature might possibly have taken this attitude because of the expense incident to the adding of this equipment. There is some force to this argument, but I do not think it should overcome the provisions of the law above referred to, which lead to the other conclusion.

I think this conclusion is in accordance with the authorities, and in accordance with the practical construction that has been placed upon section 21 of chapter 44 of the acts of the 31st General Assembly, by the change that was made in the voting machines to correspond with the change in the election laws when the use of the circle was dispensed with.

In a meeting of the county auditors at the Polk county courthouse I was requested to state in this opinion what provision might be made to take care of the increased vote due to the adoption of the woman suffrage amendment in counties where voting machines are in use.

Section 1137-a8 reads as follows:

> "Hereafter the board of county supervisors of any county, or the council of any incorporated city or town in the state of Iowa may, by a two-thirds vote, authorize, purchase, and

order the use of voting machines in any one or more voting precincts within the said county, city or town, until otherwise ordered by said board of county supervisors or city or town council."

If sufficient machines that conform to the law cannot be provided in time for the election I think the board of supervisors should order the use of the machines discontinued and provide for the use of the ordinary form of ballot in all precincts.

F. C. DAVIDSON, *Special Counsel.*

VACANCY ON SUPREME COURT

Filling a vacancy in the office of judge of the supreme court occurring after the holding of a judicial convention.

August 14, 1920.

Hon. C. A. Rawson, Chairman Republican State Central Committee, Des Moines, Iowa.

Dear Sir:

Complying with your oral request for an opinion with reference to the proper procedure for the placing in nomination of a candidate on the republican ticket to succeed Mr. Justice Gaynor as a member of the supreme court, beg to say:

That under the provisions of section 1278 of the code of 1897 a successor to Mr. Justice Gaynor should be appointed by the governor until the vacancy can be filled at the general election in November this year. Inasmuch as his term of office does not expire until December 31, 1924, no successor was to be chosen for him this year, and the provisions of law with reference to filling vacancies in nominations where a candidate dies or withdraws or refuses to run have no application.

In order to clearly understand the situation, it is perhaps well to go into the history of the legislation on the subject.

Before the adoption of the primary law, section 1102 of the code provided a method of filling vacancies in the nomination of candidates, but had no reference to vacancies in an office which was not to be filled by the voters in that year.

In the case of *Pratt v. Hayward,* 141 Iowa 196, the supreme court held that section 1087-a24 was a substantial re-enactment of the provisions of section 1102 of the code of 1897, and furnished the only authority in the matter. The court further said:

"In our judgment the authority of any party committee is therein limited to cases where nominations have been previously made at the primary, and vacancies have thereafter occurred. This section does not authorize a party committee to make a nomination in the first instance. It is only given power to nominate when the nominee of the primary election is no longer a candidate, and because of such fact a vacancy occurs. *Healey v. Wipf*, secretary (S. D.) 117 N. W. 521. And no other or greater power was conferred by section 1102 of the code, and, were we to be governed by that section in this case, we should be compelled to hold the central committee without the power assumed by it. Section 1087-a26 provides for nominations by convention when there has been a failure for any reason to nominate a senator at the primary election. This course was open to the interested parties herein, and they had no right or authority to proceed as they did."

It will be noted that this opinion appeared on February 11, 1909, and at that time the 33rd General Assembly was in session.

It is to be noted also that during the previous summer Senator Allison had died after the June primary, and the 32nd General Assembly was reconvened for the purpose of providing a method by which his successor might be nominated. In substance, it was provided that if a vacancy occurs in the office of the United States senator after the holding of the state convention, and thirty days before the holding of the November election, that the convention should be reconvened and a party candidate named to fill the vacancy.

It is obvious that the 33rd General Assembly knew the situation as disclosed in the Pratt case, *supra*, and what had been done by the extra session of the 32nd General Assembly in providing a method for the selection of a candidate to fill a vacancy in the nomination for the office of United States senator.

As we have already pointed out, the primary law as passed by the 32nd General Assembly, already covered the filling of vacancies occurring before the holding of a convention, and also the filling of vacancies occurring after the holding of a convention, but the vacancies to be thus filled related only to nominations that had been made in the primaries or in the convention.

For the purpose of providing a method of filling vacancies in an office for which no nomination had been made in the primary or in convention, and after the holding of a convention, the 33rd

General Assembly added certain provisions, so that the act as amended, later designated as section 1087-a24, reads as follows:

> "In case of a tie vote resulting in no nomination for any office, or election of delegates or party committeemen, the tie shall forthwith be determined by lot by the board of canvassers, or judges of election, as the case may be. Vacancies occurring in nominations made in the primary election before the holding of the county, district or state convention, shall be filled by the county convention if the office in which the vacancy in nomination occurs is to be filled by the voters of the county; by a district convention if the office in which the vacancy in nomination occurs is to be filled by the voters of a district composed of more than one county; by the state convention if the office in which the vacancy occurs is to be filled by the voters of the entire state. Vacancies in nominations in such offices occurring after the holding of a county, district or state convention, or on failure of any such conventions to fill a vacancy in a nomination, as aforesaid, then it shall be filled by the party committee for the county, district or state, as the case may be. If a vacancy shall occur in any such office too late for the filing of nomination papers for candidates therefor, in the primary election and before the holding of a county, district or state convention, as the case may be, then the convention having jurisdiction shall make nomination for such office; and if a vacancy in any such office shall occur after the holding of a county, district or state convention, then nomination for such office may be made by the party committee for the county, district or state, as the case may be, etc."

It remains to call attention to the work of the 38th General Assembly, chapter 63, which changed the method of nominating judges and restored that power to the several political parties. It provided for the calling of a judicial convention to be held not less than one week nor more than two weeks after the regular state convention.

There is no provision for the recalling of this convention in case of a vacancy occurring, because of the death or withdrawal of a candidate, nor because of a vacancy occurring in the office of judge of the supreme court. The only reference to the filling of vacancies occurs in section 7 of that act, which reads as follows:

> "All the laws relating to the certificates of nomination, filing the same, certifying nominations to the officers having charge of the printing of the ballots, printing of the names of candidates on the official ballot, the method of withdrawal,

filling vacancies, conducting general elections, of canvassing the ballot, of announcing the result, of recounting the ballot, of publishing notice of nomination and election, contesting the election, and the penalty for illegal voting, misconduct of the election officials, and the making of the sworn return, so far as applicable, be the same for the election of suprme, district and superior judges as is now provided by the general election laws of Iowa for the election of state, district, county and city officers."

It might be contended that the words: "As is now provided by the general election laws of Iowa for the election of state, district, county and city officers" would not be broad enough to cover the provisions of the primary law, where section 1087-a24 is found, but I think that section 7 is intended to refer broadly to all of the laws relating to elections, because it will be noted that it reads:

"All the laws relating to the certificates of nomination, filing the same, certifying nominations to the officers having charge of the printing of the ballots."

These provisions are found only in the primary law. Consequently, I think the expression "filling vacancies" must be held to refer to the provision above mentioned, as the same is set out in and forms a part of the primary law.

It has been suggested that in 1908, after the judicial convention had been held, Mr. Justice Bishop died, and that the vacancy was filled by the recalling of the judicial convention. This might be considered as a precedent but for the fact that at that time the amendment as made by the 38th General Assembly, to which we have called attention, was not in force. Mr. Justice Bishop was not a candidate at the time of his death. His term of office was not due to expire until 1910, so that the action then taken cannot be cited as a precedent to be followed at this time.

It is therefore my opinion that the republican state central committee is the proper body to place in nomination a candidate on the republican ticket for the office of judge of the supreme court, to fill out the unexpired term of Mr. Justice Gaynor.

F. C. DAVIDSON, *Special Counsel.*

CORRECTING ERROR IN NOMINATION PAPERS

An amendment correcting an error in the original petition nominating a person for office is valid although filed after the time limit.

March 24, 1919.

Mr. James H. Willett, County Attorney,
Tama, Iowa.

Dear Sir:

Your letters of the 18th and 22nd inst. addressed to Attorney General Havner have been referred to me for reply.

You submit a petition and amendment thereof nominating P. Hixon of Tama, Iowa, as a candidate for the office of mayor of said city. It appears that the original petition failed to disclose the place of business and post office address of each petitioner, and to correct such error an amended petition was executed by the same persons, seventeen in number, who signed the original petition, the amendment properly disclosing the place of business and post office address of each of the signers, with the possible exception of O. H. Mills. It further appears that the original petition was filed with the city clerk so as to leave 15 days between the date of filing and the date of the election; but that the amendment was filed too late to leave 15 days between the date of filing and the date of the eletcion.

You also intimate that a contest will probably follow, owing to the alleged error in the nomination petion of Mr. Hixon, and you ask for an opinion from this department as to the legality of said petition.

Permit me to respectfully inform you that, as a general rule, this department does not decide election contests, nor furnish legal opinions in matters of this kind; but, under the peculiar circumstances, we feel constrained to make an exception in this instance and to give your our opinion in that matter.

Section 1100 of the code, in providing for the nomination of candidates for city offices by petition, requires that:

> "Each elector so petitioning shall add to his signature his place of business and post office address."

Section 1104 of the supplemental supplement requires such petition to be filed with the city clerk

> "not more than forty nor less than fifteen days before the day fixed by law for the holding of the election."

It is further provided in section 1104 that

> "such * * * nomination papers thus filed, and being apparently in conformity with law, shall be regarded as valid."

And it is again provided in said section that:

> "Any error found in such papers may be corrected by the substitution of another, executed as is required for an original nomination certificate or paper."

The foregoing are all the statutory provisions applicable to the solution of your question. It will be seen therefrom that when such papers are filed and are apparently in conformity with law, then they shall be regarded as valid. The preamble to both petitions declares that the petitioners are electors of the city of Tama and the man whom they seek to nominate as a candidate for mayor is a citizen of that town. Therefore, said original peition is apparently in conformity with law, except that it fails to disclose the place of business and post office address of the signers. However, to cure that error a duplicate petition showing the place of business and post office address is filed.

But, it is claimed, the duplicate petition was filed too late, and, therefore, the nomination of Mr. Hixon fails to comply with the law, and for that reason he is not entitled to have his name printed on the official ballot as a candidate for the office of mayor. The statute itself answers that objection. Section 1104 of the supplemental supplement provides that if an error is found in the nomination paper it can be corrected by the substitution of another, "executed" as required for an original nomination paper. The statute nowhere requires that the substituted petition shall be "filed," but only that it shall be "executed" as is required for the original petition. By reference to the amended petition it will be found that, with the addition of the place of business and post office address, it is an exact duplicate of the original petition. (It, therefore, complies with the statute in that respect, and the name of P. Hixon should be printed on the official ballot).

This department has always taken the position that the right of suffrage, guaranteed to the electors of Iowa by the constitution of the state, should not be destroyed and the electors disfranchised by a mere immaterial, unprejudicial technicality. In a matter as important as the election of the chief executive of a city, the people should be given an equal opportunity to express their choice. In the matter of the nomination of P. Hixon as a candidate for the office of mayor of your city, we believe that his nominating petition substantially complies with the statute, and that his name should be printed on the official ballot.

32 W. R. C. KENDRICK, *Assistant Attorney General.*

EXPENSES OF ELECTION

When an election on the proposition of establishment of a consolidated school is defeated the expenses incurred should be paid out of the funds of the county on order of the board of supervisors.

October 14, 1919.

Mr. Ralph S. Stanberry, County Attorney,
Mason City, Iowa.

Dear Sir:

Your letter of the 22nd ult. addressed to Attorney General H. M. Havner has been referred to me for reply.

You state in substance:

> "That an election was recently held in your county for the purpose of establishing a consolidated independent school district, but at said election the proposition failed; that the expenses incurred have been filed with the board of supervisors."

You then ask whether or not the board of supervisors may legally allow bills for such expenses and order the same paid out of the county fund.

Section 2734-b, suplement to the code, 1913, relating to the duties of the county superintendent, provides in part:

> "He shall, on the first Monday of each month, file with the county auditor an itemized and verified statement of his actual and necessary expenses incurred during the previous month in the performance of his official duties within his county, and such expenses shall be paid by the county board of supervisors out of the county fund, but the total amount so paid for any one year for such purposes shall not exceed the sum of four hundred dollars."

If the calling and holding of an election to vote on the question of establishing a consolidated school district are part of the "official duties" of the county superintendent, then the expenses connected with such election shall be paid out of the county funds, not to exceed, however, four hundred dollars in any one year.

Referring to chapter 149, acts of the 38th General Assembly, we find the following provisions:

> "When a petition describing the boundaries of contiguous territory, containing not less than sixteen sections, within one or more counties, asking for the establishment of a con-

solidated independent school district, and signed by one-third of the qualified voters residing therein, is filed with the county superintendent of the county in which the largest number of qualified voters in the proposed district reside, he shall, within ten days, give public notice of the place and date when all objections shall be filed. * * * All notices under this act shall be by one publication in a newspaper published within the proposed district, or if there be none, then in a newspaper having a general circulation within the proposed consolidated district."

Then after providing for the filing of objections by the persons opposed to such district it is further provided in said chapter.

"Within five days after such filings the county superintendent shall review all papers filed in his office and after careful review and investigation of their merits shall overrule or sustain the objections filed and fix and determine the boundary lines of the proposed consolidated district."

Provision is then made for appealing to the county board of education from the decision of the county superintendent fixing the boundary lines of the proposed district, and then said chapter proceeds as follows:

"If no objections be filed, or if the objections be not sustained, it shall be the *duty* of the county superintendent with whom said petition has been filed *to call an election* in the proposed consolidated district, legal notice of which shall be given as hereinbefore provided."

And it is finally provided in said chapter:

"The judges of the elections herein provided for shall be appointed by the county superintendent with whom the petition was filed."

It will be observed from the provisions of chapter 149 just quoted that it is made a part of the official duty of the county superintendent to file in his office the petition for the establishment of the proposed consolidated school district, to set a day for hearing objections thereto, to publish notice of the date set for such hearing, to fix and determine the boundary lines of the proposed district, and if no objections are filed, or if objections thereto are not sustained by the county board of education on appeal, then to call an election and appoint the judges thereof; in fact, it will be seen that it is made his duty to supervise the entire matter.

Therefore, I am of the opinion that the expense of holding an election for the establishment of a consolidated independent school district, when the proposal fails, shall be audited and allowed by the board of supervisors and paid out of the county fund.

W. R. C. KENDRICK, *Assistant Attorney General.*

OPINIONS RELATING TO AUTOMOBILES

OPERATION OF BUS LINE

A father and son driving an auto bus to the depot, do not have to take out a chauffeurs license, provided they operate the bus line in connection with a garage.

January 24, 1920.

Mr. Harry Langland, County Attorney,
Nevada, Iowa.

Dear Sir:

Your letter of the 22nd inst. addressed to Attorney General H. M. Havner has been referred to me for attention.

You request an official opinion from this department upon the three following questions:

> "A father and a son run a bus line to the depots, meeting the trains. They use an auto bus. They want to know whether or not they must have chauffeur license. Sometimes the father drives and sometimes the son.
>
> "Sometimes they have a young man drive same. They have this young man hired regularly to make drives for them, either the bus or cars to other towns. Should this young man have a license?
>
> "Again, occasionally in a pinch, being short of help, they will hire a young man to drive the bus to the depot or drive an auto out on a trip. They want to know whether or not this man must have a licence."

Section 11, chapter 275, acts of the 38th General Assembly, so far as material to a determination of your question, provides:

> "It shall be unlawful for any person known as a chauffeur, and employed for hire therefor, to operate or drive a motor vehicle upon the public highways, or streets, of cities or towns of this state, unless licensed by the department as herein provided.
>
> "Any person desiring a chauffeur's license shall file with the department an application under oath stating his name, residence, business residence, if any, age, color, single or married, whether he has ever been convicted of a violation of

the motor vehicle laws of this state or any other state, or has been convicted within one year of intoxication, and such other information as the department may require. Such license shall not be issued until the department is satisfied that the applicant is over eighteen (18) years of age and is a fit and proper person to receive such license. The fee for chauffeur's license shall be two dollars ($2.00), payable annually, and shall expire on the last day of the year for which it is issued."

Section 2 of that chapter defines a chauffeur to mean:

"Any person who operates an automobile in the transportation of persons or freight and who receives any compensation for such services in wages, commissions or otherwise, paid directly or indirectly, or who as owner or employee operates an automobile carrying passengers or freight for hire; provided, however, that this definition shall not include manufacturers' agents, proprietors of garages and dealers, salesmen, mechanics, or demonstrators of automobiles in the ordinary course of their business."

In enacting the law above quoted, the General Assembly evidently had in mind the alarming number of automobile accidents in this state, caused by reckless driving, and attempted to reduce such accidents to a minimum, as far as legislation could do so, especially when human beings or ordinary freight were being transported for hire.

In drafting a law that would be fair in its application, the General Assembly must have also had in mind the fact that a man ordinarily employed in a garage to drive the cars could not have the same interest in the protection of the cars, nor in the manner of operating them, as would the owner of the business.

With that view undoubtedly in mind, the General Assembly drew a marked distinction between the cases of to whom the act shall apply, and exempted therefrom the proprietors of garages.

Therefore, in answer to your first question, if the father and son are in partnership, and operate the bus in the ordinary course of business in connection with their garage, then neither of them would be required to take out a chauffeur's license.

In answer to your questions numbers 2 and 3, I am of the opinion that each should be answered in the affirmative.

W. R. C. KENDRICK, *Assistant Attorney General.*

DEALER'S LICENSE

Applicant for license may operate on number of dealer for fifteen days after purchase. Dealer is entitled to as many duplicate dealer's numbers as he is willing to pay for. Dealer cannot operate his private car on dealer's number but must procure separate license therefor.

July 16, 1919.

Hon. W. C. Ramsay,
Secretary of State.

Dear Sir:

Your letter of July 16th to Mr. Havner has been referred to me for answer.

You ask the opinion of this department upon the following proposition:

> "Would you kindly give this office your written opinion upon the construction of sections 1571-m10 and 1571-m14, supplement to the code, 1913, relative to the registration of motor vehicles. We are particularly interested in knowing whether there is any restriction as to the number of duplicate plates which may be issued to any dealer or manufacturer. Also, to what extent a dealer's number plate may be used on his own private car or cars or on those purchased from him."

Section 1571-m10 of the supplement to the code, 1913, provides:

> "Upon the sale of a motor vehicle by a manufacturer or dealer, the vendee shall at once make application by mail or otherwise for registration thereof, after which he may operate the same upon the public highways without its individual number plates thereon for a period of not more than fifteen days, providing that during such period the motor vehicle shall have attached thereto, in accordance with the provisions hereof, metal number plates to be furnished by the secretary of state to the dealer as provided in section fifteen bearing the registration number of the manufacturer or dealer under which it might previously have been operated for demonstration purposes; and, provided further, that no manufacturer or dealer shall permit the use of his demonstration or registration number by such vendee until application for registration be so made as aforesaid."

It seems to be plain from the reading of this section that after the purchaser of a car from a dealer has made application to the secretary of state for a license, he may operate the car upon the public highways for fifteen days without its individual num-

ber plates, providing he has attached thereto dealer's numbers issued to the dealer under the provisions of section 1571-m14, supplemental supplement, 1915. Section 1571-m14, supplemental supplement to the code, 1915, relates to applications for and insurance of dealers licenses and number plates. This section provides that the dealer who has been registered and assigned a number may

> "obtain as many duplicates of such number plates as may be desired upon the payment to the secretary of state of one dollar for each duplicate set, provided that if a manufacturer or dealer has an established place of business in more than one city or town, such manufacturer or dealer shall secure a separate and distinct certificate of registration and number plates for each such place of business."

It seems plain from this provision that when a dealer has properly registered, he is entitled to receive as many duplicate number plates as he is willing to pay for.

The same section also contains the following provisions:

> "Nothing in this section shall be construed to apply to a motor vehicle operated by a manufacturer or dealer for private use or for hire, which said motor vehicle or vehicles shall be individually registered as provided in sections 7 and 8 of this act, but no dealer or manufacturer shall be required to keep more than one car registered for his private use."

The effect of this portion of the section is to require the dealer to have at least one car that he uses for private use registered other than under a dealer's license and carry a number separate and distinct from his dealer's number. In other words, the dealer is not permitted to operate a private car on a dealer's number.

SHELBY CULLISON, *Assistant Attorney General.*

SECOND HAND DEALERS NOT ENTITLED TO DEALER'S LICENSE

Persons buying and selling second hand autos exclusively are not "dealers" and must comply with the law relating to transfer of license.

August 28, 1919.

Hon. W. C. Ramsay,
Secretary of State.

Dear Sir:

Your letter of the 26th inst. addressed to Attorney General Havner has been referred to me for attntion.

You ask whether or not a person dealing in second-hand automobiles exclusively comes within the definition of a "dealer" to

the extent that he does not have to have a license, other than a dealer's license.

The statutory provision governing your question will be found in section 20, chapter 275, acts of the 38th General Assembly, which reads as follows:

> "It shall be unlawful for any person, firm, association, or corporation to buy any second-hand or used automobile, or motor vehicle without requiring and receiving from the vendor thereof, a certificate of registration and transfer from the officer whose duty it is to register or license motor vehicles in the state in which said motor vehicle is registered or licensed, showing the factory number, license number, description, and ownership of said motor vehicle, or to sell or offer for sale any second-hand or used motor vehicle without furnishing to the vendee of said motor vehicle, a certificate of registration and transfer from the officer whose duty it is to register or license motor vehicles in the state in which motor vehicle is registered or licensed, showing the factory number, description, license number and ownership of said motor vehicle.
>
> * * * *
>
> "Any person, firm, association or corporation found guilty, personally or by agent, of violating any of the provisions of this section shall be imprisoned in the penitentiary not more than five (5) years or be fined not more than one thousand dollars ($1,000) or be imprisoned in the county jail not more than one (1) year."

From the foregoing statutory provision, you will observe that it is unlawful for a second-hand dealer to purchase a car without obtaining a transfer of the license, and that he is also forbidden to sell such car without transferring to the purchaser a certificate of transfer from the proper official whose duty it is to register motor vehicles in this state.

W. R. C. KENDRICK, *Assistant Attorney General.*

NO DEALER'S LICENSE SHOULD BE ISSUED TO SECOND HAND DEALER

The law does not authorize the secretary of state to issue a dealer's license to second hand dealers in automobiles.

September 4, 1919.

Hon. W. C. Ramsay,
Secretary of State.

Dear Sir:

In compliance with your further request for an official opinion from this department as to whether or not a person or firm engaged

in the business of buying and selling second-hand or used automobiles is entitled to a dealer's license under the laws of Iowa in force at the present time, beg to advise that it is a violation of the statutes of this state for any person engaged in the purchase and sale of second-hand or used cars to place a dealer's number on such cars; and, further, that there is no legal authority for the secretary of state to issue a dealer's number or a dealer's certificate of registration to any person or firm exclusively so engaged.

Section 1571-m14 of the supplemental supplement authorizes the secretary of state to issue a general distinctive number and certificate of registration to any person or firm manufacturing or dealing in motor vehicles only when such manufacturer or dealer has made and filed with the secretary of state a sworn application containing the following facts:

> "A brief description of each style or type of motor vehicle manufactured or dealt in by such manufacturer or dealer, including the character of the motive power, the amount of such motive power, stated in figures of horsepower in accordance with the rating established by the association of licensed automobile manufacturers."

It is evident from the statute just quoted that only established manufacturers or dealers in new cars of a certain make are intended, because it would be absolutely impossible for a person dealing indiscriminately in all makes of second-hand cars to give a description of each style and type of cars dealt in or the motive power thereof.

The statutes of Iowa further provide that when a used or second-hand car is sold the person selling the car shall notify the secretary of state and have the license transferred to the purchaser.

Section 1571-m9 of the code supplement, 1913, provides:

> "Upon the sale or transfer of a motor vehicle registered in accordance with the provisions of this act, the vendor shall immediately give notice thereof with his name, post office address and registration number, and the name and address of the vendee, to the secretary of state, and the vendee shall, within ten days after the date of such sale or transfer, notify the secretary of state thereof upon a blank furnished promptly by him for that purpose, stating the name, post office address, and business address of the previous owner, the number under

which such motor vehicle is registered, and the name, post office address, with street number if in a city, including county and business address of the vendee. Upon filing such statement duly verified such vendee shall pay to the secretary of state a fee of one dollar, and upon receipt of such statement and fee the secretary of state shall file such statement in his office and note upon the registration book or index such change in ownership."

The statutory provision just quoted applies to all persons buying and selling second-hand cars, and requires such dealers to again notify the secretary of state when such dealers resell the car. The Iowa law demands this information from all dealers in second-hand automobiles in order that the secretary of state may keep a strict account on all cars licensed in this state, and any violation of such provision on the part of dealers in second-hand cars is a misdemeanor and subjects the offender to prosecution and punishment under the criminal laws of this state.

Therefore, it is the opinion of this department that a dealer's license cannot be legally issued to a person or firm dealing in second-hand or used automobiles, unless such dealer is a regular dealer in some specific make of cars, and in no event can a person or firm lawfully sell a second-hand car without notifying the secretary of state and obtaining a transfer of the original license number to the new purchaser. If you find such second-hand dealers violating the law in that respect they should be vigorously prosecuted.

W. R. C. KENDRICK, *Assistant Attorney General.*

Note—The views expressed in the two foregoing opinions were sustained by the supreme court in the case of *Re Right of Secretary of State* to issue licenses to those engaged in sale of used motor vehicles. Decided November 1, 1920.

Later: On rehearing the opinion of the supreme court first announced was not followed, and the law construed to entitle second-hand dealers to a dealers' license.

CITIES HAVE NO AUTHORITY OVER ISSUANCE OF DEALER'S LICENSES

City authorities have no power to deny auto dealers authority to drive cars on dealer's license unless a prospective customer is in the car. The test is, whether the car is being used for private use or for hire.

January 29, 1920.

Mr. Roy U. Kinne, County Attorney,
Storm Lake, Iowa.

Dear Sir:

Your letter of the 15th inst. addressed to the attorney general has been referred to me for reply.

You state:

> "The city authorities of Storm Lake have served notice on all of the auto dealers not to drive their new cars they have for sale on their dealer's numbers unless they have a prospective buyer in the car. The dealers have been ordered not to take their cars out of the garage unless a prospect is in the car."

You then ask in substance:

> "May a legally licensed dealer in automobiles drive a new car upon the public highway, on his dealer's license, so long as he does not use his car for pleasure or for hire?"

The law applicable to your question will be found in section 23, chapter 275, acts of the 38th General Assembly, which reads as follows:

> "Every person, firm, association or corporation manufacturing or dealing in motor vehicles, may instead of registering each motor vehicle, make an application for a general distinctive number for all the motor vehicles owned or controlled by such manufacturer or dealer. On the payment of a registration fee of twenty-five dollars ($25.00), such application shall be registered in the office of the department. The department shall thereupon assign and issue to such manufacturer or dealer a general distinctive number, and without expense to the applicant, issue and promptly deliver to such manufacturer or dealer, a certificate of registration and two number plates with a number corresponding to the number of such certificate.
>
> "Such number plates shall be displayed by each motor vehicle of such manufacturer or dealer when the same is operated or driven on the public highways. Such manufacturer or dealer may obtain as many duplicates of such number plates as may be desired upon the payment to the department of fifteen dollars ($15.00) for each duplicate set, provided that if a manufacturer or dealer has an established place of business in more than one city or town, such manufacturer or dealer shall secure a separate and distinct certificate of registration and number plates for each such place

of business. Nothing in this section shall be construed to apply to a motor vehicle operated by a manufacturer or dealer for private use or for hire, which said motor vehicle shall be individually registered as provided in this act."

It will be observed that the act above quoted provides that

"Nothing in this section shall be construed to apply to a motor vehicle operated by a manufacturer or dealer for private use or for hire."

If a dealer is not operating a car on a dealer's license for his private use or for hire, then he is not violating the statute above quoted. Whether or not he is operating such car for his private use or for hire is a question of fact to be determined in each case. The mere fact that a prospective purchaser was not riding in the car at the time the car was being driven upon the public highway would not necessarily be conclusive proof that the car was being operated for the owner's private use or for hire.

It is a cardinal principle of law in this state that a municipality is without power to enact an ordinance which will conflict with a state law upon the same subject matter. Likewise, municipal officers are acting beyond their powers when they issue and attempt to enforce orders or rules that have the same effect. However, it is common knowledge that in many cities and towns the privilege accorded dealers in automobiles, as found in the section of the statute above quoted, is often grossly abused, and when that privilege is repeatedly abused by the dealer, then it should be the policy of all law enforcing officers to enforce the law and stop that abuse. But, in the enforcement of the motor vehicle law, as in the enforcement of any other law, common sense should be exercised by the officers.

Under the facts stated in your letter, it seems to me that the officials of the city of Storm Lake have exceeded their powers.

W. R. C. KENDRICK, *Assistant Attorney General.*

CARS IN TRANSIT

Car assembled in Des Moines may be driven by dealer to his place of business under card "car in transit."

August 21, 1920.

Hon. W. C. Ramsay, Secretary of State,

Dear Sir:

Complying with your oral request for an opinion on the state of facts hereinafter set forth I beg to say:

As I understand it, the Ford Automobile Company in Detroit is shipping into Iowa the parts of Ford cars, which are assembled at the plant here in Des Moines. Dealers from over the state come here and procure these cars.

Your question is whether section 21 of chapter 275 of the acts of the thirty-eighth general assembly permits such cars to be driven by these dealers to their several places of business, using the pasteboard cards bearing the words "car in transit" with the date of purchase.

That portion of the statute involved reads as follows:

> "Provided further, that a motor vehicle that is being brought into this state from another state either for use or for sale herein, may be driven upon the public highway for a period of not to exceed ten (10) days provided it shall carry, both on the front and rear a pasteboard card bearing the words 'car in transit' and the date of purchase."

There is no doubt but that this portion of the statute would apply if the car were being driven into the state from Detroit, and we think it would be a very technical construction of the statute to say that because the car is first shipped to the company's own warehouse to be assembled in this state, that it cannot be driven from Des Moines to the dealer's place of business under this provision.

We think, so far as the construction of this statute is concerned, the car ought to be recognized as in transit into the state, although it is not assembled until it reaches Des Moines. Inasmuch as this is a criminal statute, it should be liberally construed in favor of the person charged with its violation.

I am, therefore, of the opinion that, if the dealer procuring such a car from the assembling plant in Des Moines affixes the cards as provided in the above quotation from the law, he is entitled to drive the car under such cards to his place of business in this state.

F. C. DAVIDSON, *Special Counsel.*

FILING OF CHATTEL MORTGAGE ON AUTOMOBILE

Chattel mortgage on car filed with recorder conveys notice of mortgagee's rights, and purchaser can't rely on license receipt only.

October 8, 1920.

Hon. W. C. Ramsay, Secretary of State,
Dear Sir:

We have your request for an opinion from this department upon the following question:

"Will you please secure a ruling and advise us the relative value, legally, of a mortgage against an automobile compared to the license receipt which the state gives an owner.

"It has been called to my attention by men of legal minds that the state in issuing this license as it is now issued, gives a clear title to the automobile and that an innocent purchaser need look no further relative to the car's title."

I am unable to find any provision of chapter 275, acts of the 38th General Assembly known as the motor vehicle law, which would have the effect of repealing chapter 327, acts of the 38th General Assembly relating to the filing of chattel mortgages, or any provision thereof.

Therefore I am of the opinion that a mortgage given by the owner of an automobile and filed with the county recorder, the owner of the car remaining in possession, would convey constructive notice to everybody of the interest the mortgagee has in the automobile, and a person buying the car from the owner could not safely rely upon the license receipt only.

W. R. C. KENDRICK, *Assistant Attorney General.*

REFUNDING OF LICENSE FEE

Cannot refund license fee paid before January first even. though car is sold prior to that date.

March 25, 1920.

Hon. W. C. Ramsay, Secretary of State,

Dear Sir:

Your letter of the fifteenth inst. addressed to the attorney general has been referred to me for reply.

You ask:

Would it be possible, under the present motor vehicle law, to allow refund on license fees paid by dealers who, having paid licenses on used cars previous to January first in order to avoid penalties, have resold these cars to parties outside of the state who have no use for these licenses and who must pay license fees on their cars in their own states? This occurs quite frequently in the border cities of our state.

I can find no provision in the motor vehicle law known as chapter 275, acts of the 37th General Assembly that would authorize you to refund the amount paid for a license.

Section 3 of the act expressly provides:

> "Every motor vehicle originally licensed as provided by law shall, so long as it is subject to license, within the state, pay an annual license fee in advance."

Section 16 provides:

> "On January 1, of each year, a penalty of one dollar shall be added to all fees not paid by that date."

From the foregoing statutory provisions it will be observed that the law expressly provides all licenses are to be paid in advance and in the case of renewals such licenses shall be paid before January first of each year.

Therefore, in the event the dealer in second hand cars finds it to his personal advantage to sell the car after he has paid the license, and the sale occurs prior to January 1, I can see no reason, nor find any legal authority, for you to refund the license fee.

W. R. C. KENDRICK, *Assistant Attorney General*

ATTACHING OF METAL PLATES TO TRUCKS, ETC.

The metal plate required to be attached to all trucks, trailers and motor vehicles used for other than the conveyance of passengers, giving weight and loading capacity may be attached by the owner of the vehicle.

January 21, 1920.

Hon. W. C. Ramsay, Secretary of State,

Dear Sir:

Your letter of the 20th inst. addressed to Attorney General H. M. Havner, has been referred to me for reply.

You ask:

> Section 10, chapter 275, acts of the 38th General Assembly, provides that motor trucks, trailers and vehicles used for the conveyance of other than passengers, shall have attached thereto a metal plate showing the weight of the vehicle and load capacity. Can a vehicle not so equipped be registered or operated on the public highways. A number of trucks and trailers are manufactured without the metal plate attached and treasurers have in some cases refused registration for this reason.

That part of section 10, chapter 275 acts of the 38th General Assembly material to a determination of your question provides:

> "All motor trucks, trailers, and motor vehicles used for other than the conveyance of passengers shall have attached

> thereto a conspicuous metal plate giving the actual weight of the vehicle equipped and weight of loading capacity as specified by the manufacturer or maker and no license shall be issued until the vehicle is so equipped. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction, shall be subject to a fine of not less than five dollars ($5.00) nor more than ($50.00) fifty dollars for the first and second offenses. Upon a third conviction, the department shall have authority to cancel the certificate of registration and call in the number plates and a new license shall not be issued for any such motor vehicle for a period of one year.

It will be observed that all motor trucks, trailers, and motor vehicles used for other than the conveyance of passengers shall have attached thereto a conspicuous metal plate giving the actual weight of the vehicle and the weight of loading capacity *as specified by the manufacturer or maker.*

It is clear that unless such vehicles are equipped with metal plates giving the actual weight of the vehicle and weight of loading capacity they cannot be legally licensed; but, as to whether such plates shall be placed on the vehicle by the manufacturer or maker raises a question not altogether free from doubt.

The statute says, "as specified by the manufacturer or maker" of the vehicle. The language just quoted is susceptible of a double meaning. It might be construed to mean that the manufacturer or maker shall attach to such vehicles a metal plate giving the weight and loading capacity; or that the owner of such vehicle may attach such plate disclosing thereon the weight and loading capacity as specified by the manufacturer.

How the courts will construe the above statutory provision in a prosecution for operating a motor vehicle without a license, this department is unable to predetermine. However, the statute being of a criminal nature, the courts would construe it favorably to the accused.

Therefore I am of the opinion that the owners of such vehicles would comply with such statute by attaching a metal plate giving the weight and loading capacity as specified by the manufacturer; but in order to eliminate any doubt, I would suggest that manufacturers of all motor trucks, trailers, and motor vehicles used for other than the conveyance of passengers be requested to attach such a plate.

W. R. C. KENDRICK, *Assistant Attorney General.*

AUTOMOBILES USED IN CARRYING MAIL

Automobiles owned by rural mail carriers and used exclusively in carrying the mails are not subject to state law requiring licenses.

January 10, 1920.

Hon. W. C. Ramsay, Secretary of State,

Dear Sir:

I have your verbal request for an opinion as to whether or not a rural mail carrier owning an automobile, which he uses exclusively in the carrying of mail under an allowance therefor from the postoffice department, is required to procure an automobile license in this state.

It is a well recognized principle of law that a sovereign state is without power to tax the means and instrumentalities employed by the federal government in carrying on the operations of its various governmental functions.

That principle of law was first announced in the case of *McCullough v. Maryland,* 4 Wheaton, 301, wherein at page 429, Chief Justice Marshall said:

> "We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers."

The rule announced in the McCullough case, *supra,* has been uniformally followed by the supreme court of the United States.

With the McCullough case in mind, the postoffice department has ruled,

> "That it will not be necessary for letter carriers who use their own machines under departmental allowance in connection with the delivery of mail matter to procure a (state) license."

It is therefore the opinion of this department that rural mail carriers, who devote their entire time to the carrying of mails and use their own automobiles for that purpose under an allowance therefor from the postoffice department, are not required to procure a state automobile license.

W. R. C. KENDRICK, *Assistant Attorney General.*

CONVERTING TOURING CAR INTO A TRUCK

A touring car converted into a truck or delivery vehicle is still licensed as a touring car.

December 20, 1919.

Hon. W. C. Ramsay, Secretary of State,

Dear Sir:

You have submitted to this department for an opinion the following question:

> "Does a passenger car, when converted or remodeled into a truck or delivery wagon, take the passenger car rate as fixed by the executive council or the rate specified for the registration of trucks as set out in section 10, chapter 275, acts of the 38th General Assembly."

The 38th General Assembly enacted a law regulating the licensing of all motor vehicles, motor trucks and motorcycles. That law will be found in chapter 275 of the session laws of the 38th General Assembly.

Under the provisions of said act, all motor vehicles, except motor trucks and motorcycles, are required to be licensed and pay a license fee based upon the value and weight of the car; while the license fee on all motor trucks is based upon the loading capacity per ton of each truck, together with the character of tires with which the truck is equipped.

In order to ascertain the value and weight of motor vehicles or the loading capacity of motor trucks, every manufacturer of motor vehicles, including trucks, sold or offered for sale in this state, is required to file in the automobile department of this state a sworn statement showing the various models manufactured by him, the price list, weight, and the loading capacity of trucks. From that statement, together with other information, the state automobile department shall prepare an additional statement, showing the value, weight and loading capacity of the various makes and models of all motor vehicles, including trucks, sold, offered for sale, or previously registered in this state. The statement prepared by the state automobile department shall then be furnished to the executive council, and from that statement the executive council finally fixes the value and weight of all motor vehicles, except trucks, upon which the license fee is based. Sections 15 and 16. The statute itself fixes the license fee on trucks. Section 10.

It will therefore be observed that the act in question draws a clear distinction between trucks and ordinary motor vehicles, and

the license fee which each shall pay and the means of ascertaining that fee.

There is no provision in the law to cover a case where an ordinary touring car has been converted into a so-called truck that will change the method of arriving at the license fee to be collected. The nearest provision of that kind that can be found is the following provision in section 10.

> "All motor trucks, trailers, and motor vehicles used for other than the conveyance of passengers, shall have attached thereto a conspicuous metal plate, giving the actual weight of the vehicle equipped and weight of loading capacity as specified by the manufacturer or maker, and no license shall be issued until the vehicle is so equipped."

From the provision above quoted, it will be seen that when an ordinary motor vehicle is used for other than the conveyance of passengers, the actual weight of the vehicle and the loading capacity must be specified *by the manufacturer*. In that event, such motor vehicles would take the rate provided by section 10 for motor trucks.

Therefore, unless a touring car is licensed as a touring car, regardless of the fact that it is afterwards converted into a so-called truck, then it would be impossible to correctly fix the basis upon which it can be licensed. That conclusion must be correct for the two following reasons:

(1.) The weight and loading capacity would not be specified thereon by the manufacturer, as prescribed in section 10.

(2.) It would be impossible to include it in the list furnished by the manufacturer to the state automobile department as required in section 13, and in the list furnished by the state automobile department to the executive council, as provided for in section 15.

I am therefore of the opinion that when a passenger motor vehicle is converted into a so-called truck or delivery vehicle that it should still be licensed as a passenger car.

W. R. C. KENDRICK, *Assistant Attorney General.*

ADMINISTERING OF OATH TO APPLICANT FOR LICENSE

County treasurer or his deputy authorized to administer oath to applicant for registration of motor vehicles.

December 4, 1919.

Hon. W. C. Ramsay, Secretary of State,

Dear Sir:

I have your letter of the 20th ult. in which you ask as to whether or not county treasurers or their deputies are authorized to administer oaths in connection with the application for registration of motor vehicles.

Section 393 of the code, so far as material to the question at issue, provides:

> "* * * All persons * * * appointed by authority of law, who have any duty to perform by virtue of their office of appointment requiring the administration of oath, are authorized to administer oaths and take affirmations. * * *"

Pursuant to the foregoing statutory provision, whenever it is necessary to administer an oath in any matter connected with the business of an office to which a person has been appointed by authority of law, then such person has the power to administer such oaths. While the statute expressly confers the power to administer oath upon those appointed to a particular office, yet it would be absurd to hold that the same power could not be exercised by one "elected" to the same office.

Therefore, if it is necessary to administer an oath in connection with some matter being transacted through the office of the county treasurer, then the county treasurer or his deputy may legally administer the oath.

The motor vehicle law enacted by the 38th General Assembly requires that verified application for registration must be filed in the office of the county treasurer. Section 4 of said chapter provides:

> "Every owner of motor vehicle which shall be operated or driven upon the public highways shall, except as herein otherwise expressly provided, have filed in the office of the county treasurer of the county in which he resides, a verified application for registration or registration on a blank to be furnished by the department for that purpose, containing such information as the department may require for the efficient administration of this act."

Therefore, we are of the opinion that a county treasurer or his deputy has authority to administer an oath to an applicant for registration of a motor vehicle.

W. R. C. KENDRICK, *Assistant Attorney General.*

COST OF MAILING CERTIFICATES AND NUMBER PLATES

County treasurer has no authority to charge ten cents to cover postage in mailing out certificates of registration and number plates.

March 9, 1920.

Mr. H. K. Lockwood, County Attorney,
Cedar Rapids, Iowa.

Dear Sir:

Your letter of the 5th inst. addressed to Attorney General H. M. Havner has been referred to me for attention.

You ask:

> Will you kindly give me an opinion on the following proposition. Has the county treasurer any authority to demand ten cents postage of applicants for the registration of motor vehicles, who have mailed their application and remittance to the county treasurer and have not appeared personally at the office.

The law governing your question will be found in section 5, chapter 275, acts of the 38th General Assembly, which provides as follows:

> "Upon receipt of the application and license fee for a motor vehicle, as provided in this act, the county treasurer shall file such application in his office and register such motor vehicle with the name, post office address and business address of the owner, together with the facts stated in such application, in a book or index to be kept for the purpose, under the distinctive number assigned to such motor vehicle by the county treasurer, which book or index shall be open to public inspection during reasonable business hours, and he shall give to the owner a receipt for the fee paid, and shall forthwith assign to such motor vehicle a distinctive number, and, *without expense to the applicant, shall issue and deliver, or forward by mail or express to the owner, a certificate of registration and container for same in such form as the department may prescribe, and duplicate number plates bearing a number corresponding to the number assigned to such motor vehicle.*"

Therefore, it is the opinion of this department that the county treasurer of your county has no legal authority to demand ten cents from applicants for registration of their automobiles to cover postage in mailing to such applicants certificates of registration and number plates.

W. R. C. KENDRICK, *Assistant Attorney General.*

COLLECTION OF DELINQUENT FEES

A list of delinquent motor vehicle registrations shall be placed in the hands of the sheriff each year by the county treasurer, and the sheriff shall proceed to collect them.

March 9, 1920.

Andrew Bell, Jr., County Attorney,
Denison, Ia.

Dear Sir:

Your letter of the 7th inst., addressed to the attorney general, has been referred to me for attention.

You ask:

> "Concerning the automobile law, section 16, has the sheriff authority this year to hold and sell an automobile, the owner of which has not applied for license for such vehicle? Does this section go into effect 1921 or has the sheriff authority to work this year as provided in this section?"

Section 16, chapter 275, acts of the 38th General Assembly, provides in substance:

> "That the county treasurer, in the first week in May of each year, shall cause to be published in each of the official newspapers in his county, a list of motor vehicles owned within his county, upon which the license fee has not been paid for that year."

Said section further provides:

> "It shall be the duty of the county treasurer to deliver to the sheriff of the county, fifteen days from the date of publication of the delinquent motor list, a certified list of the motor vehicles on which the fees are delinquent, as shown by the records of his office."

Upon receipt of this list by the sheriff, it is further provided in said section, that:

> "It shall be the duty of the sheriff of the county to forthwith proceed to the collection of the unpaid fees and penalties as certified to his by county treasurer by taking possession of the motor vehicle described in said certified list and proceed to advertise and sell same upon ten (10) days' notice for the purpose of collecting fees, penalties and costs. Said certified list shall for all purposes be a sufficient warrant therefor."

From the provisions of section 16, above quoted, the duties of the treasurer and sheriff are plain, with reference to the collection

of delinquent automobile registration fees, and the provision in said section that,

> "on April 1st of the year 1921, and annually thereafter, the department shall furnish to the county recorder of each county a list of all motor vehicles in said county on which the registration fee has not been paid"

has nothing whatever to do with the foregoing duties required of the treasurer and sheriff.

Therefore, it is not only the duty of your sheriff to proceed at once to collect delinquent automobile registration fees for this year and each subsequent year after the list has been placed into his hands by the county treasurer, but also he would be derelict in his official duties if he fails or neglects to take such action.

W. R. C. KENDRICK, *Assistant Attorney General.*

APPORTIONMENT OF AUTOMOBILE FUND

Chapters 275 and 237, acts of the Thirty-eighth General Assembly are inconsistent with, and, therefore, repeal section 1571-m32 of the supplemental supplement of the code, which apportioned a part of such fund to cities and towns.

April 26, 1920.

Mr. H. K. Lockwood, County Attorney,
Cedar Rapids, Iowa.

Dear Sir:

Receipt is hereby acknowledged of your favor of the 19th inst., enclosing copy of a letter written to you by O. N. Elliott, city attorney, Cedar Rapids, and each involving the construction of chaper 275, acts of the 38th General Assembly, pertaining to the registration and licensing of automobiles and the distribution of the funds arising therefrom.

In reply will say that the chapter referred to expressly repeals chapter 2-b of title 8 of the supplement to the code of 1913, and section 38 of the chapter repeals all acts or parts of acts inconsistent with the chapter or contrary thereto, and the question presented is whether section 1571-m32 of the supplemental supplement is repealed.

There is no doubt, I take it, that so much of said section as conflicts with the chapter referred to is repealed, but such parts thereof as are not in conflict with the new act still remain in force.

Section 35 of the chapter provides, in part, as follows:

> "Ninety-four (94) per cent of all moneys paid into the state treasury pursuant to the provisions of this act, except as otherwise provided by law, and section 39 hereof, shall be apportioned among the several counties in the same ratio that the area of each county bears to the total area of the state, said apportionment to be made by the treasurer of state."

It should be observed that the apportionment, "except as otherwise provided by law," shall be as stated, and I am, therefore, of the opinion that this contemplates that a portion of section 1571-m32 still remains in force and effect and that the city solicitor is right in claiming that chapter 275, acts of the 38th General Assembly does not repeal the part of section 1571-m32 of the supplemental supplement, which apportions a part of the automobile fund to cities and towns; but I am constrained to believe that chapter 237, acts of the 38th General Assembly, is in conflict with the part of the section which we think chapter 275 does not repeal and that the two chapters, construed together, effectually eliminate or repeal the section referred to.

J. W. SANDUSKY, *Assistant Attorney General.*

DISMANTLED AUTOMOBILES

As to when a dismantled automobile is not subject to license.

July 23, 1920.

Mr. S. D. Quarton, County Attorney,
Algona, Iowa.

Dear Sir:

Your letter of the 14th inst. addressed to the attorney general has been referred to me for reply.

You ask:

> "If a car has not been in use for a considerable length of time and has been overhauled and placed in running order, is the owner forced to pay the penalty upon the same for each month since the first of the year when making application for license."

This department has heretofore ruled that unless the owner of an automobile complies with section 9 of chapter 275, acts of the 38th General Assembly, it will be necessary for him to pay the penalty accrued at the time he applies for a license.

W. R. C. KENDRICK, *Assistant Attorney General.*

LIGHTS REQUIRED ON AUTOMOBILE

It is lawful to operate a motor vehicle with but a single light when such light meets the statutory requirements as set forth in the motor vehicle law.

July 29, 1920.

Mr. H. K. Lockwood, County Attorney,
Cedar Rapids, Iowa.

Dear Sir:

We have your letter of July 23, in which you request an opinion from this department upon the following propositions:

> "In section 25, chapter 275 of the acts of the 38th General Assembly, do you understand that there is no duty to display two or more vehicles when 'such motor vehicles are properly equipped with one light in the forward center of such motor vehicle,' and if so, what is meant by the words 'properly equipped'? If you should answer the first question in the affirmative, would you state that any person on any kind of a motor vehicle might, if they saw fit, take off the two front lights and place one light in the forward center of the car and still comply with the law? If it is within the law to equip a car with one light in the forward center does such car require a red tail light?"

A motor vehicle may be said to be "properly equipped" with one headlight in the forward center of such motor vehicle when it has:

(1) A white or tinted light, other than red, on the forward part of such vehicle, and so placed as to be seen from the front and of sufficient illuminating power to be visible at a distance of five hundred (500) feet in the direction in which displayed, and to reveal any person, vehicle or substantial object, seventy-five (75) feet ahead of the lamps.

(2) Such vehicle may be said to be "properly equipped" when it contains one light, as above provided, on the forward part of said vehicle and a red light to the rear so constructed and placed as to throw a white light directly upon the registion marker.

(3) If such lighting device is over four (4) candle power, and is equipped with a reflector, its use is unlawful unless such reflector is so designed or arranged that the directly reflected or undiffused beam of such light when measured seventy-five (75) feet or more ahead of the light shall not rise above forty-two (42) inches from the lever surface on which the vehicle stands under all conditions of load.

(4) Such motor vehicle cannot be said to be "properly equipped" if it is equipped with an electric bulb or other lighting device of a greater capacity than thirty-two (32) candle power, no matter how the same may be shaded, covered or obscured.

(5) Such motor vehicle cannot be said to be "properly equipped" if the one light in the forward part of the car is what is commonly called a "spot light."

We think that all of the foregoing provisions and requisites are found in section 25 of chapter 275 of the acts of the 38th General Assembly, and that they fully answer the inquiry submitted. We might add for the purpose of making our position a little clearer, that a person may remove two lights on the forward part of a motor vehicle and replace the same with one light provided the one light meets the above qualifications, but in any event such car must be equipped with a red tail light.

B. J. POWERS, *Assistant Attorney General.*

SCHOOL DISTRICTS DO NOT NEED LICENSES FOR AUTOMOBILES

Consolidated school districts do not have to take out license for cars or drivers.

September 10, 1919.

Mr. A. Ray Maxwell, County Attorney,
Corning, Iowa.

Dear Sir:

Your letter of the 8th inst. addressed to Attorney General H. M. Havner has been referred to me for reply.

You state:

"Is it necessary for the consolidated school districts to pay automobile registration fees on the trucks used solely for the transportation of school district to the consolidated school?

"Is it necessary for the drivers of such trucks to take out the license now required by the government for persons engaged in using automobiles for hire, the drivers of such trucks being paid entirely by the consolidated districts and not by the passengers."

In answer to your first question, beg to advise that the law does not expressly exempt consolidated school districts from the payment of the license fee on automobiles owned by the district. It has been the rule, however, of the automobile department to

grant exemption to school districts on the broad ground that the property of such corporations is not subject to taxation.

In answer to your second question, beg to advise that there is no provision in the law in effect at the present time requiring the drivers of automobile trucks to take out a state license. The law enacted by the 38th General Assembly requiring chauffeurs to secure licenses does not take effect until December 1, 1919.

W. R. C. KENDRICK, *Assistant Attorney General.*

WHEN TRUCK DRIVER NOT A CHAUFFEUR

Truck drivers engaged in the moving of dirt for a contractor are not chauffeurs.

August 24, 1920.

Hon. R. M. Williams,
Superintendent Automobile Department.

Dear Sir:

You have submitted to this department for an opinion the following oral question:

> "Are the drivers of the trucks engaged in moving the dirt from the Fifth street cut in the city of Des Moines to be classed as chauffeurs under the provisions of chapter 275, acts of the 38th General Assembly?"

In defining the term "chauffeur," section 2 of the act declares:

> "'Chauffeur' shall mean any person who operates an automobile in the transportation of persons or freight and who receives any compensation for such service in wages, commission or otherwise, paid directly or indirectly, or who as owner or employe operates an automobile carrying passengers or freight for hire; provided, however, that this definition shall not include manufacturers' agents, proprietors of garages and dealers, salesmen, mechanics, or demonstrators or automobiles in the ordinary course of their business;"

An additional exception to the term "chauffeur" has been prescribed in Senate File No. 543 by the 38th General Assembly, wherein it is provided:

> "The word or term 'chauffeur' as defined by the laws of this state shall not apply to employes engaged in operating motor trucks or persons, firms or corporations engaged in mercantile and agricultural enterprises."

Unless the drivers of said tractors are engaged in the transportation of freight, and receive a compensation for such services, then said drivers do not come within the meaning of the term "chauffeur."

The term "freight" has been legally defined as follows:

> " 'Freight' is a compensation for the carriage of goods."
> *Watson v. Duykinck* (N. Y.) 3 Johns. 335.
>
> "The word, in its original and elementary signification, means the hire which is earned by transportation of goods."
> *Poland v. Sparton* (U. S.) 19 Fed. Cas. 912.
>
> "The word 'freight' has several meanings in common parlance. It may refer to goods carried by a common carrier, or it may refer to the charge for the carrying of such goods."

I am informed that the moving of the dirt from the Fifth street cut is pursuant to a contract between the city of Des Moines and an individual contractor, by the terms of which the dirt is taken from said cut and dumped upon city grounds in another part of the city. Also, that the dirt removed is the property of the city, and the contractor is paid a specific sum of money per yard for excavating and hauling the dirt.

If I am correctly informed, then, it must be apparent that the character of work performed by the drivers of said trucks does not come within the meaning of the term "freight" as defined by the courts; nor do I believe that the legislature ever intended to classify drivers of motor vehicles engaged in the performance of such duties as chauffeurs.

I am therefore of the opinion that your question should be answered in the negative.

W. R. C. KENDRICK, *Assistant Attorney General.*

ISSUANCE OF CHAUFFEUR'S LICENSE TO MINORS

A chauffeur's license cannot be issued to a person under 18 years of age, and not to a male between 18 and 21 years without the parent or guardian joining in the application.

February 20, 1920.

Hon. R. M. Williams,
Superintendent of Automobile Department.

Dear Sir:

Your letter of inquiry bearing date February 18, 1920, and addressed to Attorney General H. M. Havner, has been referred to me for reply.

You ask for an opinion from this department upon the two following questions:

> (1) Can the motor vehicle department issue a chauffeur's license to a person under the age of eighteen years if the parent or guardian join with the minor thereon?
>
> (2) Under what conditions can the department issue a chauffeur's license to a person between the age of eighteen and twenty-one years?

In answer to your first question, section 11, chapter 275, acts of the 38th General Assembly, declares:

> "Such license shall not be issued until the department is satisfied that the applicant is over eighteen years of age. * * * No chauffeur's license or badge shall be issued to any applicant under the age of eighteen years."

In answer to your second question, it is the opinion of this department that no male person between the age of eighteen years and twenty-one years may be lawfully issued a chauffeur's license without the parent or guardian of such applicant joins in the application thereof.

Section 11, chapter 275, acts of the 38th General Assembly, provides that:

> "The application to the department to operate a motor vehicle, as chauffeur, shall not be granted by the department unless a parent or parents having custody of such applicant or the guardian of such applicant shall have joined in said application by signing the same."

W. R. C. KENDRICK, *Assistant Attorney General.*

OPINIONS RELATING TO SCHOOL AFFAIRS

OFFICE OF COUNTY SUPERINTENDENT

The county superintendent must maintain his office at the county seat.

March 28, 1919.

Hon. A. M. Deyoe,
Superintendent of Public Instruction.

Dear Sir:

Your letter of the 21st inst. addressed to Attorney General Havner has been referred to me for reply.

You state that the county superintendent of Pocahontas county desires to remove her office to Fonda in said county, but will conduct all examinations and hold all trials at the county seat.

You then ask whether or not she can legally do so, provided she maintains what you term "a part of her office" at the county seat; and whether or not the board of supervisors would be authorized in paying the expenses of her office at Fonda.

Your question is governed by section 468 of the code, which reads as follows:

> "The board of supervisors shall furnish the clerk of the district court, sheriff, recorder, treasurer, auditor, county attorney and county superintendent with offices at the county seat, together with fuel, light, blanks, books and stationery necessary and proper to enaoble them to discharge the duties of their respective offices; but in no case shall any of such officers, except the county attorney, be permitted to occupy an office also occupied by a practicing attorney. Nothing herein shall be construed to include the law books or library of the county attorney."

Your questions should, therefore, be answered in the negative.

W. R. C. KENDRICK, *Assistant Attorney General.*

ELECTION IN CONSOLIDATED INDEPENDENT SCHOOL DISTRICT

Where an election has been carried to form a consolidated independent school district and is followed by an election of directors who fail to

qualify a vacancy exists in the corporation which should be filled by an election called by the county superintendent.

January 23, 1919.

Hon. A. M. Deyoe,
Superintendent of Public Instruction.

Dear Sir:

From your letter to this department bearing date December 11, 1918, it appears that the consolidated district of Saude, Chickasaw county, was organized under section 2794-a of the 1915 supplement to the code of Iowa and legalized by chapter 35 of the 37th General Assembly of Iowa; and that a board of directors was elected, but failed to qualify. Concerning this situation, you ask for an opinion upon the following propositions:

(1) Inasmuch as these officers failed to qualify within ten days, is there an existing vacancy?

(2) Is it the duty of the county superintendent to call another election, electing other officers?

(3) Is this a corporation without officers, or are the boards of the school townships, in which territory was taken to organize the Saude district, in control of this territory?

Section 2 of the aforesaid chapter 35 of the 37th General Assembly of Iowa provides as follows:

"That the time provided for the organization of said consolidated independent school district by the selection of its directors and officers is hereby extended to January 1, 1918."

It appears that a board of directors for this consolidated independent district was elected in July, 1917.

With reference to the election of a board of directors for a consolidated independent school district, section 2794-a contains the following provision:

"If a majority of the votes so cast in each territory shall be in favor of such independent organization, the organization of the proposed consolidated independent school corporation shall be completed by the election of a board of directors for said school corporation, as provided in section twenty-seven hundred ninety-five of the code."

Section 2795 of the code is as follows:

"If the proposition to establish an independent district carries, then the same board shall give the usual notice for

a meeting to choose a board of directors. Two directors shall be chosen to serve until the next annual meeting, two until the second, and one until the third annual meeting thereafter. The board shall organize by the election of officers in the usual manner."

Section 2771 of the 1913 supplement of the code is as follows:

"A majority of the board of directors of any school corporation shall constitute a quorum for the transaction of business, but a less number may adjourn from time to time. Vacancies occurring among the officers or members shall be filled by the board by ballot, and the person receiving the highest number of votes shall be declared elected, and shall qualify as if originally elected or appointed. When the board reduced below a quorum, by resignation or otherwise, the secretary of the board, or if there be no secretary, the county superintendent shall call a special election to fill the vacancies, giving notice in the same manner as for the annual meeting on the second Monday in March."

I am of the opinion that on account of the failure of the board of directors to qualify, a vacancy exists in this corporation which should be filled by an election called by the superintendent of Chickasaw county.

C. W. PIERSOL, *Assistant Attorney General.*

EFFECT OF PUBLICATION CLAUSE IN AN ACT

An act of the legislature with a publication clause attached becomes effective on the day following the date of its last publication. So where an act granting funds for aid to consolidated school purposes has been duly published the funds thus provided for are immediately available on the day following the last publication.

June 20, 1919.

Hon. A. M. Deyoe,
Superintendent of Public Instruction.

Dear Sir:

We have your letter of June 18th in which you state:

"Enclosed find a copy of house file No. 342, acts of the 38th General Assembly. We wish to ask as to whether or not, in your opinion, the publication clause in this act makes the full one hundred and fifty thousand dollars ($150,000.00) available this year."

House file No. 342 to which you refer provides as follows:

"Section 1. That section twenty-seven hundred ninety-four-g (2794-g), supplemental supplement to the code, 1915, be and the same is hereby amended by inserting after the words 'one hundred' in line seven (7) the word 'fifty.'

"Section 2. This act being deemed of immediate importance shall take effect and be in full force from and after the time of its passage and publication in the Des Moines Register, and in the Des Moines Capital, newspapers published in Des Moines, Iowa."

The foregoing act was published in the Des Moines Capital on April 25th and in the Des Moines Register on April 28, 1919, and under the rule announced in the case of

Arnold v. Kossuth County, 151 Iowa 155,

the law became effective on the day following the date of the last publication. That is, the law became effective on the 29th day of April, 1919. That the legislature has authority to provide that a law shall become effective upon publication is in accordance with the provisions of section 26 of article III of the constitution of Iowa and with the provisions of section 36 of the supplement of 1913.

When a law becomes effective by publication it has the same force and effect as if it contained no such clause and went into operation in the usual manner on July 4th following its enactment.

We are therefore of the opinion that the act made available the full sum of $150,000.00 for state aid to consolidated schools on the day following the last publication.

B. J. POWERS, *Assistant Attorney General.*

OLD CEMETERY CANNOT BE CONDEMNED AS SCHOOL HOUSE SITE

A cemetery cannot be acquired as a school site by any satutory provision. There is no provision authorizing the removal of a grave for any purpose in this state. The only manner in which such cemetery can be removed is by obtaining consent of the next of kin of those buried in such cemetery.

September 10, 1919.

Hon. P. E. McClenahan,
Superintendent of Public Instruction.

Dear Sir:

We have your letter in which you state:

"We would like to have opinion from your office on the following question:

"May a cemetery which is no longer used as a burying ground be vacated and the graves removed to some other cemetery for the purpose of using the old cemetery as a school site?"

In answering your inquiry, permit us to state that there is a well-established rule of law to the effect that except in cases of necessity or for laudable purposes, the policy of the law is that the sanctity of the grave shall be maintained and that a body once suitably buried shall remain undisturbed.

It should be further stated that there is a well-established rule that in the absence of legislative authority there can be no removal of a cemetery except in unusual cases or where the next of kin give consent to the removal of the remains of their relatives buried in such cemetery.

I am not aware of any provision of the statutes of Iowa authorizing the removal of a cemetery for any purpose whatsoever.

It is therefore apparent that the only method whereby a cemetery may be removed is by obtaining consent from the next of kin of those buried in such burying ground. This seems to be the only method of procedure in this state in view of the absence of legislative authority authorizing the removal of graves in cemeteries which have long been abandoned as places for the burial of the dead.

B. J. POWERS, *Assistant Attorney General.*

SCHOOL ELECTION AUTHORIZING ISSUE OF BONDS

The petitions to the board of directors asking that an election be called for the purpose of voting on the question of issuing bond to build school house need not state the amount of funds necessary for the purpose.

Hon. P. E. McClenahan,
Superintendent of Public Instruction.

Dear Sir:

Your request for the opinion of this department on the following question has been referred to me for attention.

You state:

"Section 2820-d1 of the school laws, as amended by chapter 314 of the 38th General Assembly, provides that 'any school corporation shall be allowed to become indebted * * * to an amount not to exceed in the aggregate, including all other

indebtedness, five per centum of the actual value of the taxable property within such school corporation.''

''Section 2820-d2 provides 'that before such indebtedness can be contracted in excess of one and one-quarter per centum of the actual value of the taxable property ascertained as provided in this act, a petition signed by a number equal to twenty-five per cent of those voting at the last school election shall be filed with the president of the board of directors, asking that an election shall be called, stating the purpose for which the money is to be used, and that the necessary schoolhouses cannot be built and furnished, or that sufficient land cannot be purchased to add to a site already owned, within the limit of one and one-quarter per centum of the valuation.'

''If a petition should be filed with the president asking that a special election be called 'at which election the question of allowing said school corporation to become indebted for the purpose of building and furnishing a schoolhouse to an amount not to exceed in the aggregate, including all other indebtedness, five per centum of the actual value of the taxable property within such school corporation,' does it meet the requirements of section 2820-d2 above quoted, or is it necessary to state in the petition the specific amount in dollars and cents for which the petitioners are asking that the district be bonded?''

The question presented, as I understand it, is simply this: Does the law require that the petition filed with the president of the board of directors should state or set out the amount for which bonds should be issued, or in other words, should the petition fix the amount of indebtedness that may or shall be incurred?

I do not think the language used is susceptible of such construction. It is not for the petitioners to say what sum is necessary. Their province is to petition the board of directors asking that an election be called, stating the purpose for which the money is to be used—not the amount thereof—and that the necessary schoolhouse cannot be built and furnished within the limit of one and one-quarter per centum of the taxable value of the property within the school corporation. It is true that the signing of the petition by the requisite per cent of the voters of the district and the filing thereof with the president of the board of directors is jurisdictional. It is in fact indispensible, for it forms the basis for the subsequent actions by the board of directors whose duty it becomes to not only call the election, but to determine the amount neces-

sary to accomplish the purpose stated in the petition and submit the same to the qualified voters of the district for their approval. All of which is clearly and distinctly pointed out by section 2820-d3 which provides as follows:

> "The president of the board of directors, on receipt of such petition shall, within ten days, call a meeting of the board who shall call such election, fixing the time and place thereof, which may be at the time and place of holding the regular school election. Four weeks' notice of such election shall be given by publication once each week, in some newspaper published in the said town or city, or if none is published therein, in the next nearest town or city in the county. At such election the ballot shall be prepared and used in substantially the following form:

Yes	"Shall the (naming the independent district, issue bonds in the sum of..... ..... Dollars
No	($.....) for the purpose of constructing or equipping schoolhouses?"

Your question is, therefore, answered in the negative.

J. W. SANDUSKY, *Assistant Attorney General.*

COSTS INCIDENT TO SCHOOL ELECTION

The expense incident to publishing notice of consolidated school election paid by the county out of the general fund.

March 31, 1920.

Hon. P. E. McClenahan,
Superintendent of Public Instruction.

Dear Sir:

I have your letter of the 13th inst. in which you state:

> "Under section 2794-a as amended by chapter 148, acts of the 38th General Assembly, whenever a petition is filed with the county superintendent signed by one-third of the qualfied voters residing within certain territory of not less than sixteen sections described within the petition, it is necessary that the county superintendent shall publish a notice of the time when objections to the establishment of the consolidated district shall be heard. It is also required by this section that the county superintendent shall publish a notice of election to establish a consolidated district if the petition is approved, and if the election carries shall publish a notice for the election of a board of directors."

You then ask:

> "May any of this expense for publication of notices be charged to the county superintendent's expenses as defined under section 2734-b, as amended by chapter 303, acts of the 38th General Assembly, which provides that the total amount so paid for any one year for such purposes shall not exceed the sum of four hundred dollars?"

It is the opinion of this department that the expense referred to in your letter should be paid out of the general funds of the county and no part of said expense should be charged to the four hundred dollar allowance referred to in section 2734-b, as amended by chapter 303, acts of the 38th General Assembly.

W. R. C. KENDRICK, *Assistant Attorney General.*

PURCHASE OF TRUCK BY DIRECTORS

The board of directors of an independent consolidated school district may purchase a truck for transporting scholars to and from school, and the board may pay for the same from the general fund. If the purchase of a truck exhausts the general fund warrants may be still issued on such fund and marked "not paid for want of funds."

November 28, 1919.

Mr. F. H. Don Carlos, County Attorney,
Perry, Iowa.

Dear Sir:

We have your letter of November 25th in which you ask for the opinion of this department upon the following questions:

> "May a board of a consolidated independent school district purchase a truck in sum of about $800.00 for transporting children to and from school and thereby exhaust the school treasury to such an extent that they will be short of funds before the school year is over?
>
> "If question is answered in affirmative, what procedure will board take to replenish the treasury so that they can pay teachers and running expense of school?
>
> "If board cannot purchase a truck out of general fund, in what manner may they proceed to purchase a truck, and from what fund shall same be paid for?
>
> "If board shall already contracted for a truck to be paid out of general fund, and they have no right to do so, what procedure shall they take to rectify the errors?"

In answering your inquiry, we desire to first direct your attention to that part of section 2794-a, supplemental supplement, as amended, which states:

> "It shall be the duty of the school board of any consolidated independent school corporation and school township maintaining a central school to provide suitable transportation to and from school, wherever a child of school age living within said district, and outside the limits of any city, town or village, but the board shall not be required to cause the vehicle of transportation to leave the public highway to receive or discharge occupants thereof. The board shall from time to time, by resolution regularly adopted, number and designate the route to be traveled by each conveyance in transporting children to and from school. * * *
>
> "The school board of any consolidated independent school corporation shall contract with as many suitable persons as they deem necessary for the transportation of children of school age to and from school, such contract to be in writing and shall state the number of route, the length of time contracted for, etc. * * *"

It will be observed from a reading of the foregoing provisions that the school board of any consolidated independent school corporation is authorized to provide means of transportation for children residing in such district to and from the school. The statute does not specifically state that such school board may purchase a vehicle for this purpose, but we are of the opinion that if the school board finds it necessary because of its inability to contract with suitable persons to convey such children to and from school, that it may provide its own conveyances for that purpose. Likewise, if the board finds that it can purchase a truck and convey such children at a less expense than by contracting with some one to thus transport the children, we are of the opinion that they may do so under the provisions above set forth.

We now turn to the next feature of your inquiry, namely, whether or not the school board may contract indebtedness for the purchase of such a truck. You will observe from a reading of section 2768, supplement, 1913, as amended that the school treasurer has two funds in his possession. One is known as the schoolhouse fund and the other has been designated as the general fund. The section in part provides:

"The treasurer shall receive all moneys belonging to the corporation, pay the same out only upon the order of the president, countersigned by the secretary, keeping an accurate account of all receipts and expenditures in a book provided for that purpose. He shall register all orders drawn and reported to him by the secretary, showing the number, date, to whom drawn, the fund upon which drawn, the purpose and amount. The money collected by tax voted or the proceeds of the sale of bonds valid for the purpose of building schoolhouses shall be called the school fund, and all other moneys received for any other purpose shall be called the general fund, and he shall keep a separate account with each fund, paying no order that fails to state the fund upon which it is drawn and the specific use to which it is to be applied. Whenever an order cannot be paid in full out of the fund upon which it is drawn, partial payment may be made. All school orders shall draw lawful interest after being presented to the treasurer and by him indorsed as not paid for want of funds. * * *"

From a reading of this section, it is evident that the schoolhouse funds cannot be used for the purpose of purchasing an automobile or truck for the transportation of scholars. We do not think there is any question, however, for the availability of the general fund for such a purpose. If there are not funds enough in the possession of the treasurer to fully meet the needs of the district, he may issue a warrant whenever an order in proper form is presented to him and mark such warrant "as not paid for want of funds" and thereafter such warrant shall draw interest as provided by law.

The wisdom of a school board purchasing a truck at an expense of $800.00 and thus exhaust the general fund of the district is not for this department to determine. There is no question, however, in our minds with reference to the authority of such board to contract such an indebtedness, and if it does not have funds on hand sufficient to fully pay for such truck, warrants may be issued for the amount of funds on hand and also warrants issued for the amount still due and the same may be marked "not paid for want of funds," and shall draw interest from that date as provided by law.

B. J. POWERS, *Assistant Attorney General.*

USE OF INTEREST RECEIVED FROM PERMANENT SCHOOL FUNDS

Interest received from the "permanent school fund" cannot be distributed except in the manner provided for in section 7 of article 9 of the constitution. Any attempt to change the basis of distribution from one made on proportion of youths in the respective school districts between the ages of five and twenty-one is in violation of the constitutional requirement.

December 8, 1919.

Hon. E. J. Hook,
Decorah, Iowa.

Dear Sir:

We are in receipt of your letter of November 20th, in which you request an opinion from this department upon the following proposition:

> "Does chapter 354, acts of the 38th General Assembly, contravene the constitutional provision with reference to the apportionment and distribution of interest of the permanent school funds of Iowa?"

In answering your inquiry, we first desire to direct your attention to article 9 of the constitution of Iowa. Section 1 of the article in question provides as follows:

> "The educational and school fund and lands shall be under the control and management of the General Assembly of this state."

Section 2 relates to the permanent fund devoted to the code of the state university.

Section 3 provides as follows:

> "The General Assembly shall encourage, by all suitable means, the promotion of intellectual, scientific, moral and agricultural improvement. The proceeds of all lands that have been, or hereafter may be, granted by the United States to this state, for the support of schools, which may have been or shall hereafter be sold or disposed of, and the five hundred thousand acres of land granted to the new states, under an act of congress, distributing the proceeds of the public lands among the several states of the Union, approved in the year of our Lord one thousand eight hundred and forty-one, and all estates of deceased persons who may have died without leaving a will or heir, and also such per cent as has been or may hereafter be granted by congress, on the sale of lands in this state, shall be, and remain a perpetual fund, the

> interest of which, together with all rents of the unsold lands, and such other means as the General Assembly may provide, shall be inviolably appropriated to the support of common schools throughout the state."

Section 4 provides that the clear proceeds of all fines collected for any breach of the penal laws shall be exclusively applied in the several counties in which such money is paid for the use of the schools of that county, and the division is to be made in proportion to the number of youths subject to enumeration in such districts, and is to be devoted to the support of common schools or to the establishment of libraries.

Section 5 relates to the sale of what is known as university lands and the investment of the proceeds for the benefit of the state university.

Section 6 has reference to those who shall handle and control the funds pledged to the support of the university and those pledged to the support of the common schools of the state.

Section 7 provides as follows:

> "The money subject to the support and maintenance of common schools shall be distributed to the districts in proportion to the number of youths, between the ages of five and twenty-one years, in such manner as may be provided by the General Assembly."

We are of the opinion that any attempted distribution of the interest received from the permanent school funds of this state pledged to the support of the common schools cannot be made on any basis other than that set forth in section 7, which we have herein set out at length. We are supported in this view by the decision of the supreme court in the case of *District Township of City of Dubuque v. The County Judge of Dubuque County,* 13 Iowa 250. In this case a school tax was levied upon the taxable property of Dubuque county under and by virtue of the provisions of the school law of 1858, from which was collected $4,445.86. In accordance with the provisions of section 32, session laws of 1858, page 70, the county judge divided half of this tax in equal amounts among all the school districts in the county. The other half he divided among the school districts in proportion to the number of persons in each between the ages of five and twenty-one years. The plaintiff insisted that the action of the judge in making the above distribution was in conflict with the consti-

tution and therefore void. Action was then brought to recover the difference between the distribution that was made by the judge and the one which should have been made in conformity with the requirements of the constitution. In passing upon the merits of this claim, the court at page 251 stated:

> "We suppose that it is sections 3 and 7 of the second division of article 9 of the constitution, in relation to school funds, and school lands, upon which the plaintiff relies, as showing the invalidity of the act above referred to. The first of these sections; that is, section 3, defines what shall constitute a perpetual fund for educational purposes, and then concludes with these words: 'The interest of which (meaning the interest arising from the permanent school fund), together with all rents of the unsold lands, and such other means as the General Assembly may provide, shall be inviolably appropriated to the support of the common schools throughout the state.'
>
> "The expression '*and such other means as the General Assembly may provide,*' must include, *ex vi termini* any other funds than those named which the legislature should authorize to be raised for the support of schools. Under the authority of the aforesaid act of 1858, the county of Dubuque levied and collected a school tax of $4,445.00, for the support of schools in that county. The same act declares how this fund shall be used and distributed, namely, one-half in equal sums among all the districts of the county, the other moiety to be distributed to the districts in proportion to the number of youths between the ages of five and twenty-one. But the seventh section of the 9th article of the constitution above referred to, provides that 'the money subject to the support and maintenance of common schools, shall be distributed to the districts in proportion to the number of youths between the ages of five and twenty-one years, in such manner as may be provided by the General Assembly.'
>
> "It is impossible for us to perceive how the act of the legislature referred to can stand with this provision of the constitution. They seem to be irreconcilable. The constitution has ordained one rule, and the General Assembly has adopted and authorized a different rule for the distribution of the same fund. The latter, of course, must yield to the former."

We think from the foregoing, that if the basis for the distribution is upon any other plan than in proportion to the number of youths between the ages of five and twenty-one years, that such distribution cannot be sustained. We therefore turn to the

act of the 38th General Assembly and direct your attention to the fact that it is supplemental to a provision already enacted as a part of our law, appearing in the supplemental supplement of 1915, section 2823-u7. The section last mentioned authorizes school boards in cities, including cities under special charter and commission form of government, having a population of twenty thousand or more, to purchase or lease land outside of the boundaries of such city for educational purposes, and the land is to be used as a school garden or school farm and is to be maintained for the purpose of providing a summer home for pupils of the city who may desire to continue their studies all the year round and to supply them with an opportunity to perform productive work in such vocational lines as agronomy, clericulture, viticulture, apiculture, and kindred subjects.

The 38th General Assembly, by the enactment of chapter 354, provided that whenever a school board acted under and in accordance with the provisions of section 2823-u7, *supra,*

> "shall provide agricultural training, work and recreation of a practical character, upon suitable grounds easily accessible to the school children of that district for at least three consecutive years for not less than six nor more than ten weeks duration during each year, and with a bona fide enrollment of at least fifty (50) pupils during each year of said period, and shall make an exhibit showing a successful experience in carrying out such enterprise and activities over a period of at least two (2) years, the school district providing such training shall be paid annually, commencing with the third (3rd) year, out of the state school fund, not otherwise appropriated, a sum equal to two dollars ($2.00) per capita per week for each pupil who pursues such wholesome and voluntary activities during at least two-thirds of the period during which such opportunity is provided."

Section 2 of the foregoing chapter provides that whenever a school board, acting under the provision of section 2823-u7, *supra,*

> "shall provide the necessary grounds, equipment and instruction for the training of teachers and young people in nature study and experimentation in forestry, gardening, fish culture and of fostering of fruit life and animal life, correlating the same with regular school work of the district, the school district providing such training shall be paid annually out of the *state school fund,* not otherwise appropriated, an amount equal to one-half the sum annually appropriated by said school board and actually expended by it in carrying out the purpose contemplated by this act."

Section 5 of the act in question authorizes the use of any apparatus belonging to a school district necessary to carry out the provisions with reference to instruction along agricultural lines.

Sections 4 and 5 provides as follows:

> "The secretary of any school board acting under the provisions of said chapter 14-e, title 13, supplemental supplement to the code, 1915, shall, if such district is entitled to state funds under the provisions of this act, prepare a voucher for the amount due his school district by the state of Iowa, which voucher shall be fully itemized, verified by the secretary of said school board and have attached thereto the certificate of the superintendent of said school board certifying to what such school district has actually done during the preceding year in carrying out the purpose of the said chapter 14-a, title 13, supplemental supplement to the code, 1915; and when such voucher so prepared is presented to the auditor of state, he is hereby authorized and directed to thereupon draw a state warrant, payable to said school district, for the amount called for in said voucher upon the school funds of the state; and the treasurer of state is hereby authorized and directed, when presented with such warrant properly endorsed, to pay the amount of such warrant to the school district named as payee therein out of said state school fund not otherwise appropriated.
>
> "There is hereby appropriated out of any money in the state school fund, not otherwise appropriated, the sum of two thousand dollars ($2,000.00) for the purpose of carrying out the provisions of this act."

From a reading of the preceding sections of chapter 354, it will be observed that the basis of apportionment is not made upon the number of youths between the ages of five and twenty-one years residing in such district. The apportionment, if it may be called such, seems to be predicated on the thought that schools doing agricultural work for at least three consecutive years for not less than six nor more than ten weeks during each year, and with a bona fide enrollment of fifty pupils, shall be entitled to a sum up to $2.00 per capita per week for each pupil who pursues study along agricultural lines, and this is to come out of the "state school fund."

So far as we have been able to ascertain, there is no such thing as the "state school fund." The constitution provides for a "permanent school fund," and statutes have been enacted pro-

viding the necessary machinery for carrying out the provisions of the constitution. We have taken it that the term "state school fund" used in the act in question was intended to refer to the "permanent school fund" mentioned in the constitution, and have written this opinion with that thought in mind.

Section 2 of the act in question provides that whenever a school board shall provide the necessary grounds, equipment and instruction for the training of teachers and young people in nature study and forestry, gardening, fish culture, etc., that the school district providing such training shall be paid annually out of the "state school fund," not otherwise appropriated, equal to one-half the sum annually expended by the school board in carrying out the purposes of this act.

If the intention of the legislature was that the permanent school fund should be used in aiding school boards in cities of 20,000 or over to maintain instruction along the lines designated in the act in question we think it is clear that such fund is not available as the basis of distribution called for would be in conflict with that laid down in the constitution. If the legislature intended that the school boards should receive this aid from the "state school fund" it is equally clear that the law is invalid for the reason that the legislature did not provide any such fund.

It is with reluctance that this department finds it necessary to hold that an act of the legislature so commendable and progressive as the act in question must be held unconstitutional, but in view of the clear and unequivocal provisions of our constitution with reference to the distribution of interest from the permanent school fund of this state we can arrive at no other conclusion. We do not think the constitutional provision has been observed in the enactment of chapter 354, and furthermore, that no officer having in his hands funds belonging to the permanent school funds of this state has any authority whatsoever to make such a distribution as provided for in the act of the 38th General Assembly.

B. J. POWERS, *Assistant Attorney General.*

REPAIRING OF SCHOOL PROPERTY

Section 2779 of the code is mandatory and contracts for repair of school houses in excess of $300 must be advertised, etc. Painting of school house held to be repairing.

January 13, 1920.

Mr. Maxwell A. O'Brien, County Attorney,
Oskaloosa, Iowa.

Dear Sir:

Your request for the opinion of this department on the following facts has been assigned to me for attention.

You state:

> "A district in this county painted one of the school buildings in the district at an expense of over $300.00 without following the provisions in said section.
>
> "It was my belief that such action was unlawful without following the provisions of said section, in that the said painting came under the head of repairs."

Section 2779 of the code provides, in part, as follows:

> "Nor shall any schoolhouse be erected or repaired at a cost exceeding three hundred dollars save under an express contract reduced to writing, and upon proposals therefor, invited by advertisement for four weeks in some newspaper published in the county in which the work is to be done, and the contract shall be let to the lowest responsible bidder, bonds with sureties for the faithful performance of the contract being required."

The provisions of the section quoted are clearly mandatory, and the board of directors have no authority to erect or repair a schoolhouse at a cost exceeding three hundred dollars, save under an express contract reduced to writing, and upon proposals therefor, invited by advertisement in some newspaper published in the county in which the work is to be done.

As to the question whether "painting" comes under or is embraced within the term "repairing" I think there can be no reasonable doubt. Keeping buildings in repair contemplated their preservation by painting, at reasonable intervals, just as much as the putting on of a new roof or otherwise doing the things necessary to preserve the property from waste and decay. But aside from the technical question of whether painting is embraced within the term "repairs" it should be borne in mind that the intent and purpose of the part of the section set out is to require publicity of the actions of the board of school directors when large or substantial sums of the public funds are expended, and such purpose may not be defeated by a narrow or technical construction of the law.

J. W. SANDUSKY, *Assistant Attorney General.*

PUPILS CANNOT BE EXCUSED FROM PART TIME SCHOOL

The board of directors of a school district cannot excuse pupils from attendance of school, at a "part time" school, authorized under chapter 94, acts of 39th General Assembly.

January 26, 1920.

Mr. Henry H. Jobens, County Attorney,
Davenport, Iowa.

Dear Sir:

Your letter of the 20th inst. addressed to the attorney general has been referred to me for attention, and in reply I will say that I took the matter up with the assistant superintendent of public instruction for the purpose of getting his ideas of this school law, to which you refer, and I am advised by him that his department takes the view that the school board has no discretion in such matters.

Section 7 of the act provides as follows:

> "The enforcement of this act shall rest with the school board in the district in which such part-time school, department or class shall have been established and the state department of public instruction through its inspectors and the state board for vocational education through its supervisors of vocational education, in conjunction with the county superintendent of schools, are empowered to require enforcement of the same on the part of school boards."

It may have occurred to you that it was the intention of the legislature to confer some discretion on the board in the matter of the enforcement of the act, but I think it will not bear such construction. Instead of fixing a discretion in them it appears to me that it compels them to enforce the act according to its terms and provisions, which clearly contemplate that all children embraced within the classes defined by the statute should be required to attend school as the act provides.

J. W. SANDUSKY, *Assistant Attorney General.*

WHO ENTITLED TO WORK PERMIT

Boy fifteen years old who has not reached sixth grade cannot get work permit by attending part time classes.

October 25, 1919.

Hon. A. L. Urick, Commissioner Bureau of Labor Statistics,

Dear Sir:

I have your request for an opinion on the following question:

> "Can a boy fifteen years old who has not reached the sixth grade in school be given a work permit, providing he attends part time classes? He is a boy who in all likelihood will do no more with his academic work. The work that he is now in is practically a training school for the work that he plans to do in later years."

A work permit can be issued to a child between the ages of fourteen and sixteen years only when a showing is made that the child has completed a course of study equal to six year grades in reading, writing, spelling, English language, grammar, and arithmetic, among other requirements.

Paragraph 2, section 2477-d, supplemental supplement, provides:

> "The school record of such child filled out and signed by the chief executive of the school which such child has last attended certifying that the child is able to read intelligently and write legibly simple sentences in the English language, and has completed a course of study equivalent to six yearly grades in reading, writing, spelling, English language, geography, and arithmetic. Such school record shall give also the name, date of birth and residence of the child as known on the records of the school and also the name of its parent, guardian or custodian."

Therefore, unless the act of the legislature providing for the establishment of part time schools for vocational and other education modifies the instructions and requirements of said paragraph 2 above quoted, a child under sixteen years of age cannot be given a work permit unless he has completed a course of study equivalent to the six grades in our common schools.

Now, the act providing for the establishment and maintenance of part time schools authorizes the board of directors in any particular district to organize such schools for the education of minors between the ages of fourteen and sixteen, when, among other requirements, such minors hold a work permit.

Section 1, chapter 94, acts of the 38th General Assembly, provides:

> "What the board of directors of any organized school district may establish and maintain part-time schools, departments, or classes in aid of vocational and other education for minors between the ages of fourteen (14) and sixteen (16) years (1)holding work certificates, or (2) who have not completed the eighth grade and are employed in a 'store or mercantile establishment', where eight (8) or a less number of persons are employed, or in 'establishments or occupations

which are owned or operated by their own parents', or (3) who have completed the eighth grade and are not engaged in some useful occupation; and such board of directors shall organize such a part time school, department, or class whenever there are fifteen (15) minors as defined above, resident in the district. The courses of study of such part time schools, departments, or classes may include, 'any subject given to enlarge the civic or vocational intelligence', of the pupils attending."

Thus it will be seen that a boy fifteen years of age who has not reached the sixth grade in common school could not be given a work permit, and unless such boy has a work permit he could not be eligible to enter part time classes. No exemption is found in chapter 94 from the provisions of paragraph 2, section 9477-d of the supplemental supplement.

Therefore, your question should be answered in the negative.

W. R. C. KENDRICK, *Assistant Attorney General.*

MINORS HOLDING WORK PERMITS

All minors holding work permits must attend part time classes when organized, regardless of residence of minors.

December 9, 1919.

Mr. W. H. Bender, Director of Vocational Education,

Dear Sir:

You have referred to this department a letter written to the Iowa state board of vocational education by F. J. Sessions, supervisor employed minors, Davenport, Iowa, in which an opinion is desired upon the following question:

"The law says that all children working on permits must attend the part time school. We have a number of minors working on permits from adjacent school districts in Iowa and a few from Illinois. I cannot interpret the law to mean anything else than that all these should attend the part time school and have so insisted. The question has been raised whether or not I am right and I should be glad to have your ruling in the matter."

The law applicable to your question will be found in sections 1, 6, and 7, chapter 94, acts of the 38th General Assembly.

Section 1 provides:

"That the board of directors of any organized school district may establish and maintain part time schools, departments, or classes in aid of vocational and other education for minors between the ages of fourteen (14) and sixteen (16)

years (1) holding work certificates, or (2) who have not completed the eighth grade and are employed in a "store or mercantile establishment," where eight (8) or less number of persons are employed, or in "establishments or occupations which are owned or operated by their own parents," or (3) who have completed the eighth grade and are not engaged in some useful occupation; and such board of directors shall organize such a part-time school, department, or class whenever there are fifteen (15) minors as defined above resident in the district. The courses of study of such part time schools, departments, or classes may include, "any subject given to enlarge the civic or vocational intelligence," of the pupils attending."

Section 6 provides:

"When such part time school shall have been established, any parent or person in charge of such minor as defined in section 1 hereof who shall violate the provisions of this act shall be punished by a fine of not less than ten (10) dollars nor more than fifty (50) dollars, or any person unlawfully employing any such minor shall be punished by a fine of not less than twenty (20) dollars nor more than one hundred (100) dollars, or be imprisoned in the county jail not to exceed thirty (30) days."

Section 7 provides:

"The enforcement of this act shall rest with the school board in the district in which such part time school, department, or class shall have been established and the state department of public instruction through its inspectors and the state board for vocational education through its supervisors of vocational education, in conjunction with the county superintendent of schools, are empowered to require enforcement of the same on the part of school boards."

From the provisions of section 1, above quoted, it will be seen that when there are fifteen of the class therein defined resident in said district and holding work permits, then it is mandatory on the part of the board of directors of each school district to organize part time schools.

Section 6, above quoted, prescribes a penalty on the part of the parent or any person in charge of such minor for violating any of the provisions of the part time school act. Section 6 also makes it unlawful for any person to employ any minor in violation of the provisions of such act.

Section 7, above quoted, prescribes the method of enforcing the provisions of the act.

From the foregoing statutory provisions it seems clear to me that when part time schools are organized that all of the minors of the class referred to in section 1 of the act, holding valid work permits are required to attend the part-time class, regardless of the residence of such minors.

W. R. C. KENDRICK, *Assistant Attorney General.*

VOCATIONAL EDUCATION

Under the state and federal vocational law factories may be used for the training of boys under 16 years of age.

September 30, 1919.

Hon. A. L. Urick, Commissioner of Labor,

Dear Sir:

Your letter of the 23rd inst., enclosing copy of a letter addressed to you by Mr. Wilbur H. Bender, director and supervisor of the state board for vocational education, has been referred to me for attention.

You state in substance:

> "That the school board at Newton, Iowa, has decided to conduct a course in trade and industrial education under the federal and state laws relating to vocational education, and said board desires to make arrangements with the owners of certain factories located at Newton, whereby certain portions of said factories and the tools and machinery thereof may be used in connection with such education for boys fourteen years of age and upward."

You then ask:

> "First: Whether or not the placing of children under sixteen years of age in such factories and permitting them to operate or assist in operating dangerous machinery would be in violation of section 4999-a2 of the supplement to the code, 1913.
>
> "Second: Whether or not the protection afforded the owner of such industrial plants under the workmen's compensation laws of Iowa would be impaired or lost."

The provision of section 4999-a2 *supra* applicable to your first question reads as follows:

> "Children under sixteen years of age shall not be permitted to operate or assist in operating dangerous machinery of any kind."

Unless the federal or state vocational law modifies the prohibition found in said section 4999-a2, then it would be unlawful to

permit children under sixteen years of age to operate or assist in operating dangerous machinery, even when the operation of such machinery was in connection with their education to fit them for some useful calling.

But since the statute of which section 4999-a2 is a part was enacted the congress of the United States has enacted the Smith-Hughes act, to provide for the promotion of vocational education, and wherein it is provided in section 11 thereof:

> "That the controlling purpose of such education shall be to fit for useful employment; that such education shall be of less than college grade and shall be designed to meet the needs of persons over fourteen years of age who are preparing for a trade or industrial pursuit or who have entered upon the work of a trade or industrial pursuit; that the state or local community, or both, shall provide the necessary plant and equipment determined upon by the state board, with the approval of the federal board of vocational education, as the minimum requirement in such state for education for any given trade or industrial pursuit."

And said act and section further provides:

> "That such education shall be given in schools or classes under public supervision or control."

And further:

> "That such schools or classes giving instructions to persons who have not entered upon employment shall require that at least half of the time of such instruction be given to practical work on a useful or productive basis."

Then before a state may avail itself of the benefits of the federal act, such state must accept the provisions thereof. This the state of Iowa has done, as found in chapters 290 and 300 of the acts of the 37th General Assembly.

It will therefore be seen that the provisions of section 4999-a2, supplement 1913, have been modified, at least to the extent, of permitting children under sixteen years of age to be in factories and to operate or assist in operating dangerous machinery.

Your second question may be answered by calling your attention to the fact that children in such vocational training are students and not employees, and therefore the workmen's compensation law would not apply.

In conclusion, I am of the opinion that if the education of the children in question is given in classes under public supervision

and control, and they are not employed nor receive any wages from the owner of the plant, and are not under his supervision or control, and the particular branch of the factory in which they are working is placed entirely under the supervision and control of a public instructor, and the entire arrangements meet with the approval of both the state and federal boards for vocational education, then there can be no legal reason why it would not be proper to use the conveniences and appliances of a well organized, existing industrial plant for the purpose of vocational education for boys over fourteen years of age and upward.

W. R. C. KENDRICK, *Assistant Attorney General.*

TUITION TO BE CHARGED

A school corporation admitting as students those who reside in other school corporations cannot charge a sum in excess of $8.00 per month as tuition unless an agreement to pay a greater sum is made at the time such students are admitted. In such cases the student or his parents may be required to pay the amount in excess of $8.00, which is chargeable to the school corporation of the student's residence, before being admitted.

June 5, 1920.

Mr. Frank K. Reynard, County Attorney,
Mt. Ayr, Iowa.

Dear Sir:

We are in receipt of a request for an opinion from the county superintendent of schools upon the following proposition:

> If in a certain district the average high school tuition was more than the eight dollars fixed by law, may the school board collect the eight dollars from the home district and the remaining amount from the parents of the student? If so, may the tuition for the past year be so collected, even though it was not announced to the parents at the beginning of the year, or must the full tuition be agreed upon at the time the student enters high school?

The law as it stands in chapter 156, acts of the 37th General Assembly, as amended by chapter 72, acts of the 38th General Assembly, provides in part as follows:

> "Any person of school age who is a resident of a school corporation which does not offer a four-year high school course and who has completed the course as approved by the department of public instruction for such corporation shall be permitted to attend any public high school or county high school in the state approved in like manner *that will receive him.* * * *

> The school corporation in which such student resides shall pay to the secretary of the corporation in which such student *shall be permitted to enter* a tuition of eight dollars per month, but in districts in which there is a city of the first class a tuition fee of eight dollars per month may be charged, in the high school department of the latter corporation during the time he so attends, not exceeding, however, a total period of four school years; provided that such tuition shall in no case exceed the average cost of said tuition in such high school * * *."

You will observe from a reading of the foregoing that it is not obligatory upon a school corporation to admit students who reside in another school corporation. The law provides that where there is no high school course offered in the school district in which the student resides that the district of his residence shall be required to pay the tuition of such student to any school corporation which will receive him, but provision is further made that the school corporation in which the student resides shall not be required to pay a sum in excess of eight dollars per month, nor in any case a sum in excess of the average cost of tuition in that district if less than eight dollars per month.

If a school corporation accepts a student who resides in another school corporation without notifying such student that it expects to exact a greater sum than eight dollars per month, it is the opinion of this department that such school corporation cannot thereafter demand a greater sum than that specified by statute for the time such student has enjoyed the privileges of instruction in that district. However, since a school corporation is not obliged to receive such students it may notify them in advance that they will not be admitted on the basis of eight dollars per month and it is within the power of the school corporation to provide that the terms of admission shall be that the student pay a greater tuition. As a matter of practical operation we have been informed that a number of school corporations are exacting a sum in excess of eight dollars per month, and of this amount eight dollars is being paid by the school corporation of which the student is a resident and the balance by the student or his parents. This arrangement, however, is made in advance of the admission of the student to the high school, and it is the opinion of this department that it is only by virtue of such agreement that an amount in excess of the sum specified by statute may be collected.

B. J. POWERS, *Assistant Attorney General.*

PAYMENT OF TUITION FORBIDDEN WHEN PUPIL IN PRIVATE SCHOOL

District board unauthorized to pay transportation and tuition in private or denominational school when a school is closed for lack of pupils.

September 8, 1920.

Mr. J. M. C. Hamilton, County Attorney,
Ft. Madison, Iowa.

Dear Sir:

I have your letter of the twenty-fifth ult., enclosing a letter from M. C. Lynn, county superintendent of Lee county, in which the opinion of this department is requested upon the following question:

> "If a school is closed under the terms of section 2773 of the school laws as amended by the last General Assembly, do you think this would give a school board the right to pay transportation and tuition to a private or denominational school?"

The law material to a determination of your question will be found in section 2773, supplement to the code, 1913, as amended by chapters 24, 143 and 160, acts of the 38th General Assembly, and section 2774 of the code, as amended by chapter 386, acts of the 37th General Assembly.

Section 2773, *supra,* provides in substance that where the average attendance in any school for the last preceding term was less than five pupils, such school shall be closed and instruction provided for to pupils in another school. The portion of said section material to your question reads as follows:

> "In case a school in any district be closed as herein provided, then the board of such school corporation shall provide for the instruction of the pupils in said district in another school as conveniently as may be, and shall provide for the transportation of such pupils to such other school when any one or more of such pupils reside more than one and a half miles from the school to which they have been assigned, or shall allow to the parent or guardian of such pupil or pupils a reasonable sum for transporting such child or children to such other school. The school board of the corporation in which the school that is closed under the provisions of this section is situated shall pay to the secretary of the school corporation in which children attend from the closed school the average cost of tuition and other expenses in the school wherein such children attend."

Section 2774 reads:

> "It may, when necessary, rent a room and employ a teacher, where there are ten children for whose accommodation there is no schoolhouse; and when the board is released from its obligation to maintain a school, or when children live at an unreasonable distance from their own school, the board may contract with boards of other school townships or independent districts for the instruction of children thus deprived of school advantages, in any school therein, and the cost thereof shall be paid from the general fund. And when there will be a saving of expense, and children will also thereby secure increased advantages, it may arrange with any person outside the board for the transportation of any child to and from school in the same or in another corporation, and such expenses shall be paid from the general fund."

It will be observed that section 2773 requires the school board to provide instruction

> "in another school as conveniently as may be."

No specific limitation is placed upon the character of schools in which instruction shall be provided, but the character of such schools is clearly implied. It is provided further on in section 2773 that

> "The school board of the corporation in which the school that is closed under the provisions of this section is situated shall pay to the secretary of the school corporation in which children attend from the closed school the average cost of tuition and other expenses in the school wherein such children attend."

And again in section 2774 it is expressly provided:

> "The board may contract with boards of other school townships or independent districts for the instruction of children thus deprived of school advantages in any school therein and the cost thereof shall be paid from the general fund."

Evidently when a school is closed on account of not having in attendance the statutory number of pupils the board of directors shall make arrangements for their instruction in the most conveniently located school in another district, and provide transportation to those who reside more than one and one-half miles from the school to which they have been assigned. While private or denominational schools are not specifically excluded, yet sections 2773 and 2774 deal with public schools, all arrangements for tuition shall be made with the boards of the school corporation in which the pupils

attend school, and no reference is made anywhere to private or denominational schools.

I am, therefore, of the opinion your question should be answered in the negative.

W. R. C. KENDRICK, *Assistant Attorney General.*

TRANSPORTATION OF SCHOLARS

Where a school is closed on account of lack of scholars it is the duty of the directors to arrange for the instruction of the scholars in another district and for their transportation to and from such school. The amount to be paid for such transportation is a reasonable sum and is not limited to $5.00 per scholar by section 2806 of the code as amended.

August 8, 1919.

Mr. M. R. Hammer, County Attorney,
Newton, Iowa.

Dear Sir:

We have your letter of July 31st in which you ask for an opinion of this department upon the following proposition:

> "Where the schools are closed in a district because of lack of scholars, what amount may be allowed for the transportation of the children residing therein to another school?"

Section 2773 of the code, as amended, provides that where the average attendance in any school for the last preceding term was less than five pupils, that school shall be closed and the children transported to another district, except where there is a showing that the number of children of school age has been so increased that ten or more will be enrolled and will attend such school at the next term. There are certain other conditions which may warrant the continuance of the school, but they are not important to your inquiry.

The section then makes the following provision with reference to transportation:

> "In case a school in any district be closed as herein provided, then the board of such school corporation shall provide for the instruction of the pupils in said district in another school as conveniently as may be, and shall provide for the transportation of such pupils to such other school when any one or more of such pupils reside more than one and a half mile from the school to which they have been assigned, or shall allow to the parent or guardian of such pupil or pupils a reasonable sum for transporting such child or children to such other school."

You will note from the part just quoted that the school corporation must not only provide for the instruction of pupils in another district, but they must also provide for the transportation of such pupils to that school when any one or more of such pupils reside more than a mile and a half from the school to which they are assigned. In case the school corporation does not care to provide for the transportation, it may allow the parents or guardian of such children a reasonable sum for transporting children to the school. The law merely provides that a reasonable sum shall be allowed the parents, and what constitutes a reasonable sum is to be governed by the facts and circumstances of each case, and only those acquainted with the conditions are in a position to state what would be a reasonable sum.

Section 2806 as amended, provides in part, as follows:

> "The board of each school corporation shall at its regular meeting in July, or at a special meeting called for that purpose between the time designated for such regular meeting and the third Monday in August, estimate the amount required for the general fund, not exceeding sixty dollars for each pupil of school age, but each school corporation may estimate not to exceed six hundred and fifty dollars for each school thereof, and such additional sum as may be necessary not exceeding five dollars for each person of school age for transporting children to and from schools."

You will observe that this section provides that the board may estimate the amount required for the general fund in a sum not exceeding sixty dollars for each pupil of school age within the school corporation; and further that if it is necessary to transport the children to and from the schools that an additional sum not to exceed five dollars for each person of school age may be certified to the proper taxing authorities. As we view it, this section does not limit the payment for transportation of children to five dollars for each person of school age. If the cost of transportation can be paid from the sixty dollars, together with the other expenses to be taken care of from the general fund, then it is not necessary that the board require the levy of the additional five dollars. In other words, if the sixty dollars mentioned will take care of the expenses to be paid from the general fund, then there is no need of levying an additional five dollars. This section does not limit the amount which may be paid for transporting of the school children to and from the schools; it merely limits the amount of funds which may be levied in any one year for school purposes.

Taking this section in connection with section 2773, *supra,* it is our opinion that there is no limitation on the amount on which the board of a school corporation may allow for the transporting of children of that district to a school, except that the sum must be a reasonable one.

B. J. POWERS, *Assistant Attorney General.*

FREE TEXT BOOKS

The question whether free textbooks should be furnished scholars should be voted on at the annual meeting.

March 27, 1919.

Mr. Homer S. Stephens, County Attorney,
Clarinda, Iowa.

Dear Sir:

Your letter of the 25th inst. addressed to Attorney General Havner has been referred to me for attention.

You ask:

> "Is it legal for a school board in an independent school district to call a special meeting of the electors to vote on the question of purchasing free text books? In other words, can the free text book proposition be voted on at any other time than the annual meeting?"

The statutory provisions bearing on this question will be found in sections 2783, 2825, 2836 and 2837 of the code, and section 2806 of the supplement to the code, 1913.

Section 2783 of the code, as amended by chapter 386, acts of the 37th General Assembly, in part, provides that the board of directors of any school corporation

> "shall, when directed by a vote of the district, purchase and loan books to scholars, and shall provide by levy a general fund therefor."

Section 2806 of the supplement to the code, 1913, as amended by chapter 386, acts of the 37th General Assembly, in part, provides:

> "The board of each school corporation shall at its regular meeting in July, or at a special meeting called for that purpose between the time designated for such regular meeting and the third Monday in August, estimate the amount required for the general fund * * *. No tax shall be estimated by the board after the third Monday in August, in each year * * *."

Section 2825 of the code, as amended by chapter 386, acts of the

37th General Assembly, in part, provides:

> "All the books and other supplies purchased under the provisions of this chapter shall be paid out of the general fund, and the board of supervisors shall annually certify to the board of supervisors the additional amount necessary to levy for the general fund of said district to pay for such books and supplies. * * *"

Section 2836 of the code, as amended by chapter 56, acts of the 37th General Assembly, provides:

> "Whenever a petition signed by ten per cent of the qualified voters, to be determined by the school board of any school corporation, shall be filed with the secretary thirty days or more before the annual meeting of the electors, asking that the question of providing free text-books for the use of pupils in the public schools thereof be submitted to the voters at the next annual meeting, he shall cause notice of such proposition to be given in the call for such meeting."

Section 2837 of the code, 1913, provides:

> "* * * The electors may, at any election called as provided in the last section, direct the board to discontinue the loaning of text-books to pupils."

From section 2783 it will be found that the board of directors may purchase and loan text-books to scholars when directed by a vote of the district, and provide for payment thereof by levy of the general fund. It will be noticed that section 2825 requires that the board of directors shall "annually" certify to the board of supervisors the "additional" amount necessary to levy for the general fund of said district to pay for such books. And it will be further observed that section 2806 limits the time for estimating the amount required for the general fund to not later than the third Monday in August of each year.

So, that, even though it might be claimed that section 2783 authorizes a vote on this question at any meeting of the electors of the district, yet in any event the corporation must make provision for the payment of the books by levy on the general fund, and the estimate therefor must be made prior to the third Monday in August in each year. Any special meeting of the electors held at a date so as not to permit an estimate being made without the required time would accomplish nothing.

But there is another provision of our statute bearing on this question, which seems to indicate that the proper time to determine the question of free text-books is at the annual meeting.

Section 2836 provides that:

> "Whenever a petition signed by ten per cent of the qualified voters, to be determined by the school board of any school corporation, shall be filed with the secretary thirty days or more before the annual meeting of the electors, asking that the question of providing free text-books for the use of pupils in the public schools thereof be submitted to the voters at the next annual meeting, he shall cause notice of such proposition to be given in the call for such meeting."

Then the following section, to-wit, 2837, provides that in the event the electors desire to discontinue loaning text-books to pupils, that question must be submitted to the electors at an annual meeting.

It would therefore seem that if the question of discontinuing the practice of supplying text-books free to the pupils must be presented and determined at an annual meeting, then the question of supplying such books in the first instance should be decided upon and determined at the annual meeting of the electors.

While the electors might legally determine this question at a special meeting held so as to permit an estimate of the amount necessary to supply the books prior to the third Monday in August, yet we are of the opinion that the proper time to determine that question is at the annual meeting of the electors, and believe that such was the evident intention of the legislature.

W. R. C. KENDRICK, *Assistant Attorney General.*

UNIFORM TEXT BOOKS

The county board of educators has authority to provide reasonable compensation to be paid from county funds for the services of depositaries of text books.

August 12, 1919.

Mr. A. B. Hoover, County Attorney,
Marshalltown, Iowa.

Dear Sir:

On August 8th you left with us a letter from your county superintendent of schools to yourself in which an opinion was sought upon the following:

"Has the county board of education elected in accordance with the provisions of section 1072 of the code of Iowa authority to fix the amount of commission on sales allowed by the county to the depository agents arranged for under section 2832 of the code of Iowa?"

Section 2832, supplement to the code, 1913, provides that when uniform text-books have been adopted in any county, the county board of education shall meet and select the school text-books for the entire county and contract for the same, and that:

"The board of education may arrange for such depositories as it may deem best and may pay for said school books out of the county funds and sell them to the school districts at the same price as provided for in section twenty-eight hundred and twenty-four of this chapter, and the money received from said sales shall be returned to the county funds by the said board of education monthly."

Section 2824 of the code referred to above provides that such books shall be sold at cost.

The county board of education which is referred to in the statutes above cited, is the board provided for by chapter 56, acts of the 38th General Assembly, and the board chosen under the provisions of that act has full authority over the matter of uniform text-books.

There is nothing in the statute which gives the board of education authority to pay the depository selected by it for keeping the books, but the fact that it is given authority to select depositories carries plainly implied authority to pay to such depositories a reasonable compensation for the services rendered by them.

Ries v. Hemmer, 127 Iowa 408 at 411.

The compensation provided by the board of education should be paid from the county fund, but should not be added to the cost of the books when they are sold to the various districts. In other words, the contemplation of the statute is that the cost of handling the books shall be borne by the county and that the school district shall be required to pay only the price which the county board of education is required to pay to the party furnishing the books under contract with the board.

SHELBY CULLISON, *Assistant Attorney General.*

USE OF FOREIGN LANGUAGE PROHIBITED

The English language is the only medium of instruction authorized for the teaching of secular subjects in the public and private schools of Iowa, below the 8th grade. Priests and others have no authority to teach reading and writing in a foreign language below the 8th grade on the theory that such instruction is necessary to a proper understanding of the Bible even though such language may be used in teaching religion.

November 3, 1919.

Mr. H. J. Ferguson, County Attorney,
Tama, Iowa.

Dear Sir:

We have your letter of October 31st in which you request an opinion from this department upon the following proposition:

> "Under the provisions of chapter 198, acts of the 38th General Assembly, is it lawful to teach reading, writing and spelling in the German language in connection with the teaching of the catechism in a school conducted by the pastor of a church on Saturdays or when the public schools are not in session. Pupils who will attend will be classified below the eighth grade."

Chapter 198, acts of the 38th General Assembly, to which you refer provides as follows:

> "Sec. 1. That the medium of instruction in all secular subjects taught in all of the schools, public and private, within the state of Iowa, shall be the English language, and the use of any language other than English in secular subjects in said schools is hereby prohibited; provided, however, that nothing herein shall prohibit the teaching and studying of foreign languages as such as a part of the regular school course in any such school, in all courses above the eighth grade.
>
> "Sec. 2. That any person violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than twenty-five dollars ($25.00) nor more than one hundred dollars ($100.00)."

You will observe from a reading of this chapter that the medium of instruction in all secular subjects in all schools, whether public or private, within this state shall be in the English language. Furthermore, that the use of any other language for the teaching of such secular subjects is prohibited, the only exception being that the act is not to be so construed as to prohibit the teaching and

studying of foreign languages as a part of the regular school course in any such school above the eighth grade.

We do not believe the legislature intended that the German language or any other foreign language should be used as the medium of instruction of reading, writing and spelling, all purely secular subjects, in connection with the teaching of the Bible. Such an interpretation would practically nullify the force and effect of this statute.

It is the opinion of this department that the statute in question permits the use of a foreign language in teaching religion, but that no one is authorized, under the veil of this privilege, to proceed with the teaching of purely secular subjects on the theory that an understanding of these studies is necessary in the proper instruction in religious matters.

We are therefore of the opinion that the proposition submitted to us should be answered in the negative.

B. J. POWERS, *Assistant Attorney General.*

Note: The view expressed in this opinion was adhered to by the district court at Waverly, Iowa, in the case of *State v. August Bartels,* who was found guilty of a violation of this statute. The case was fully submitted to the supreme court at the May term, 1920, and the conviction affirmed.

SALARY OF COUNTY SUPERINTENDENT

School board presidents in convention assembled can raise salary of county superintendent. (But see S. F. 124 to the opposite effect.)

April 22, 1919.

W. W. Comstock, County Attorney,
West Union, Iowa.

Dear Sir:

I have your letter of the 19th inst. calling attention to that part of section 2742 of the supplement to the code, 1913, authorizing the school board presidents in convention assembled, to increase the salary of the county superintendent, and which reads as follows:

> "* * * and the representatives of the school corporations in session may allow them such further sum by way of compensation as may be just and proper."

Under section 1072 of the supplement to the code, 1913, prior to the amendment passed by the 38th General Assembly, the sole purpose of holding a convention of the school board presidents on the first Tuesday in April, 1915, and each third year thereafter, was to select a county superintendent or to fill a vacancy in that office.

The 38th General Assembly then amended section 1072 and required the holding of a convention of the school board presidents on the first Monday in April, 1919, for the purpose of selecting a county board of education.

At first blush it seemed that the sole business that could be lawfully transacted at the convention in 1919 was the selection of a county board of education. But upon reflection and further examination of section 2742 of the supplement to the code, 1913, it would seem that the school board presidents could lawfully consider the question of the salary of the county superintendent at the convention in 1919, inasmuch as it is provided in said section 2742 that

> "the representatives of the school corporations *in session* may allow them such further sum by way of compensation as may be just and proper."

The school board presidents were "in session" at their convention held on the first Monday in April, 1919, and we are of the opinion that section 2742 aforesaid is broad enough to authorize the delegates to that convention to consider the question of the salary of the county superintendent and raise it if they so determine.

W. R. C. KENDRICK, *Assistant Attorney General.*

ADJOURNMENT OF CONVENTION OF SCHOOL PRESIDENTS

Less than a quorum can adjourn the convention of school presidents to a fixed date in the future.

April 16, 1919.

Mr. W. R. Williams, County Attorney,
Eldora, Iowa.

Dear Sir:

Your letter of the 12th inst. addressed to Attorney General Havner has been referred to me for reply.

You state that at the meeting of the presidents of the respective school corporations contemplated in section 1072 of the supplement to the code, 1913, a quorum was not present, and that an opinion from this department is desired as to whether or not those present could legally adjourn the meeting to a fixed date, and at such adjourned meeting transact the business which could have been legally transacted at the original meeting.

I am unable to find any holding of the supreme court directly in point However, under a former statutory provision it was required that a school treasurer be elected at the regular meeting of the board of directors on the third Monday in September. Pursuant to said provision of the statute, the board met and elected a person to that position, and then adjourned to a day certain, about a month thereafter, in order to give the person elected an opportunity to think it over and to accept or decline the office. Thereupon the board adjourned until another day certain, at which time the board met and elected another person to the office.

In passing on the power of the board to adjourn to a day certain and the legality of the business transacted at the adjourned session, our supreme court, in the case of

Carter v. McFarland, 75 Iowa, at page 199, says:

> "A regular meeting, unless special provision is made to the contrary, may adjourn to a future fixed day; and at such meeting it will be lawful to transact any business which might have been transacted at the stated meeting, of which it is, indeed, but the continuation."

Under parliamentary rules when there is less than a quorum present at a meeting of any kind, the only power which such quorum may exercise is the power to adjourn.

Article 20 of Reed's Parliamentary Rules provides:

> "If a quorum be not present, and that fact is ascertained by a count by the chair, or in any other way previously determined by the assembly, the assembly must adjourn, unless it remains in session to compel attendance. If no time has been fixed for the next meeting, the assembly, even if there is no quorum, may fix the time. Otherwise an adjournment would be a dissolution."

It has also been held that when there is not a quorum present at municipal meetings, those present may adjourn to a day specially set.

28 Cyc, 328;
Duniway v. Portland, 47 Ore. 103.

I am therefore of the opinion that when there is less than a quorum present at the convention of the presidents of the various school corporations contemplated in section 1072, *supra,* that such quorum has the power to adjourn the convention to a fixed date in the future.

B. J. POWERS, *Assistant Attorney General.*

VOTERS CANNOT REMOVE DIRECTORS

There is no provision in the statutes of Iowa granting the voters of a school district the right to remove school directors.

May 23, 1919.

Mr. W. H. Wehrmacher, County Attorney,
Waverly, Iowa.

Dear Sir:

We have your letter of May 21st in which you state:

> "I am very anxious to know whether there is any statute in this state that would give the right to the voters to remove the school directors of an independent school district.
>
> "I am unable to find any such statute up to this time, and wish that you might answer this promptly."

We have made a diligent search through the statutes and do not find anything which authorizes the removal of a school director by the voters of the school district.

Furthermore, we find that chapter 8 of title 6, relative to removal from office, fails to mention the officers of any school district.

B. J. POWERS, *Assistant Attorney General.*

SALARY OF COUNTY SUPERINTENDENT

Under the provisions of the act of the 38th General Assembly the board of supervisors have no authority to pay the county superintendent of schools a salary in excess of that fixed by statute unless the board of supervisors have, prior to the passage of the act of the 38th General Assembly authorized the payment of a greater sum by affirmative action to that effect.

May 5, 1919.

Mr. Andrew Bell, Jr., County Attorney,
Denison, Iowa.

Dear Sir:

We have your request for an opinion from this department upon the question of the salary which should be paid to the county superintendent of schools, and you give the following state of facts:

> "At a county convention of school presidents held on April 2, 1918, in accordance with the provisions of chapter 107 of the 35th General Assembly, for the purpose of electing a county superintendent of schools for the term of three years, in Crawford county, Iowa, the following proceedings were had: 'Moved, seconded and carried by unanimous vote of the convention that the salary of county superintendents of schools be fixed at $250.00 per month, and the same shall take effect at once.'
>
> "The board of supervisors took no action whatever upon this resolution passed by the presidents of the board of directors, but have paid the superintendent's salary of $250.00 per month, as the claims were filed with the county auditor."

However, on the 24th day of January, 1919, the board of supervisors adopted the following resolution:

> "Resolved by the board of supervisors of Crawford county, Iowa, that the county auditor is hereby authorized to issue warrants for salaries of the county officers and employes, as fixed by law and the board of supervisors, all in accordance with chapter 356 of the 37th General Assembly of the state of Iowa."

You then call our attention to the fact that:

> "The 38th General Assembly in Senate File No. 124 repealed section 2742 of the supplement of the code of 1913, fixing the salary of county superintendents in the counties of the size of Crawford county at $1,800.00, with the provision, however, that 'where a county superintendent now received by action of the board of supervisors a sum greater than the amount fixed herein, this law shall not be construed so as to reduce said sum."

You then request:

> "I would like to have a written opinion as to whether the county superintendent of schools should be allowed the $250.00 per month as originally given him by the county convention

of school presidents or whether he shall receive the sum of $1,800.00 per year as fixed by Senate File No. 124."

Section 2742 of the supplement, 1913, to which you direct our attention, in part provides as follows:

> " * * * County superintendents shall receive the following salaries, payable monthly *and the representatives of the school corporations in session may allow them such further sum by way of compensation as may be just and proper.* He shall receive a salary of fifteen hundred dollars a year * * *; and the board of supervisors may allow him such further sum by way of compensation as may be just and proper."

It will thus be noted that there were three ways in which the salary of the county superintendent was determined under the old law. First, by the minimum fixed by the statute; second, such sum as the representatives of school corporations might grant in addition to the salary fixed by the statute; third, such sum as the board of supervisors might fix in addition to that provided for by the statute.

The foregoing was repealed by the 38th General Assembly, and the salary of each county superintendent of schools was fixed by the statute in accordance with the population of the respective counties. However, the following provision was incorporated into the act of the 38th General Assembly:

> "Provided, that, where county superintendents are now receiving by action of the board of superintendents a greater sum than the amount fixed herein, this law shall not be construed so as to reduce said sum."

Under the facts stated in your letter, it appears that the board of supervisors, prior to the enactment of this new statute by the 38th General Assembly, had taken no affirmative action with reference to increasing the salary of your county superintendent of schools. It does appear, however, that the representatives of the school corporation in session moved and adopted a resolution increasing the compensation of your county superintendent to $250.00 per month. It further appears that your auditor has drawn a warrant each month for that amount under the blanket resolution of the board of supervisors, but it does not appear that the board as such has entered any motion or resolution directly dealing upon the question of the compensation to be paid to your county superintendent. The provision of the act of the 38th

General Assembly is such that no reduction is to be made if "by action of the board of supervisors a greater sum than the amount fixed herein" has been granted to such county superintendent. The ordinary acceptation of the term "action" implies the exercise of a power or the spending of energy or effort toward the accomplishment of a given result. In this case, the board of supervisors have not expended either effort or energy toward granting to the county superintendent an increase in salary. The action of the board has been rather one of sufferance and silence.

A reduction in salary from $3,000.00 to $1,800.00 a year is to be regretted, but the provisions of the law are such that we can arrive at no other conclusion than that the board of supervisors of your county have never taken any action in reference to increasing the compensation to be paid your county superintendent of schools. We do not deem the action of the representatives of the school corporations in itself sufficient to entitle your board to call it the action of the board of supervisors of Crawford county, and therefore your county superintendent's salary is the sum fixed by statute, namely, $1,800.00 per year.

B. J. POWERS, *Assistant Attorney General.*

SALARY OF COUNTY SUPERINTENDENT

A board of supervisors may amend the records so as to make the same conform to the true intent of the members of the board. Thus the record may be amended so as to show the amount of the salary the board intended should be paid the county superintendent of school.

June 10, 1919.

Mr. Andrew Bell, Jr., County Attorney.
Denison, Iowa.

Dear Sir:

Supplemental Opinion

We have your letter of June 30th with reference to the opinion we rendered you on May 5th upon the question of the salary to be paid your county superintendent. In that opinion we held that your board had no authority to pay your county superintendent an amount in addition to that specified in the act of the 38th General Assembly, in view of the fact that your board of supervisors had never taken any affirmative action with reference to granting your superintendent an additional salary.

You now inform us that your board of supervisors have amended the resolution of January 24, 1919, so that it conforms to and discloses the real purpose and intent of your board in the passage of the resolution first mentioned. By the passage of this motion to correct the proceedings of January 24th, it is clear that the board of supervisors intended to grant to your county superintendent of schools the salary which had theretofore been fixed by the representatives of the school corporation.

It is well settled that a board of supervisors may amend its records so that the records speak the truth and disclose the real intent of the members thereof with reference to any particular matter.

Tod v. Crisman, 123 Iowa 693;
Mann v. City of LeMars, 109 Iowa 251;
Beattie v. Roberts, 156 Iowa 575, 580.

B. J. POWERS, *Assistant Attorney General.*

COMPENSATION OF COUNTY SUPERINTENDENT

In counties where the compensation of the superintendent was fixed at a greater sum than is provided by chapter 293, 38th General Assembly and the superintendent resigns and the vacancy is filled by appointment, the appointee is entitled to receive, for the remainder of the term, the same salary as his predecessor.

May 22, 1920.

Mr. C. M. Miller, County Attorney,
Iowa City, Iowa.

Dear Sir:

We have your favor of the 19th inst. wherein you request the opinion of this department on the following questions.

You ask:

"Section 6, chapter 293, acts of the 38th General Assembly, provides that 'each county superintendent of schools shall receive for his services the following compensation: * * * In counties having a population of 20,000 and less than 30,000, $1,800.00 * * * provided, that, where county superintendents are now receiving by action of the board of supervisors a sum greater than the amount fixed herein, this law shall not be construed to reduce said sum.'

"This act repeals section 2742, code supplement, 1913.

"When this act of the 38th General Assembly went into effect and for some time prior thereto the county superintendent of this county was receiving $2,200.00 by action of the board of supervisors, and continued to receive compensation at the rate of $2,200.00 until he resigned on April 1, 1920. The county board of education elected a successor, who took office on April 1, 1920, and it would seem that by strict interpretation of chapter 293 cited above the salary of the present county superintendent is $1,800.00 in this county; that the words, 'where county superintendents are now receiving by action of the board of supervisors a sum greater than the amount fixed herein, this law will not be construed to reduce said sum,' apply only to those persons in office on July 4, 1919. I am not entirely satisfied, however, that this interpretation is correct, and since $1,800.00 is so little compensation for work requiring ability, education and experience, it needs no argument that it is not enough. I should like to have your opinion as to the compensation of the present incumbent of the office of county superintendent of schools in this county which has a population slightly under 30,000."

Prior to the taking effect of chapter 293, acts of the 38th General Assembly, the compensation of the county superintendent was fixed by section 2742 of the 1913 supplement to the code. Section 6 of the chapter repeals the section last referred to and enacts a substitute therefor and fixes the salary of the county superintendent. It contains, however, the following proviso:

"Provided that where county superintendents are now receiving, by action of the board of supervisors, a greater sum than the amount fixed herein, this law shall not be construed so as to reduce said sum."

It was the intention of the legislature to permit salaries then fixed, which were in access of the amounts named in the new act, to remain as fixed. The compensation was a given sum annually and for the period for which the superintendent had been elected, and I think it is proper to hold that the sum so ascertained would continue throughout the period and might properly be paid to the appointee who was appointed to fill out the unexpired term of the county superintendent.

B. J. POWERS, *Assistant Attorney General.*

EXPENSES OF COUNTY SUPERINTENDENT

Board of supervisors has no authority to pay expenses of superintendent while attending a convention outside of the state.

March 25, 1919.

Mr. Andrew Bell, Jr., County Attorney,
Denison, Iowa.

Dear Sir:

Your letter of the 19th inst. addressed to Attorney General Havner has been referred to me for reply.

You state that your county superintendent of schools attended a meeting of the department of superintendents at Chicago recently. You then ask for an opinion from this department as to the authority of the board of supervisors to allow and pay his expenses incurred while at the said meeting.

Section 2742 of the supplement to the code, 1913, provides among other things:

> "He shall receive a salary of twelve hundred fifty dollars a year, the expenses of necessary office stationery and postage, and those incurred in attendance upon meetings called by the superintendent of public instruction; claims therefor to be made by verified statements filed with the county auditor, who shall draw his warrant upon the county treasurer therefor; and the board of supervisors may allow him such further sum by way of compensation as may be just and proper."

Section 2434-b of the supplemental supplement provides among other things:

> "He shall, on the first Monday of each month, file with the county auditor an itemized and verified statement of his actual and necessary expenses incurred during the previous month in the performance of his official duties *within his county*, and such expenses shall be paid by the county board of supervisors out of the county fund, but the total amount so paid for any one year for such purposes shall not exceed the sum of $250.00."

The foregoing statutory provisions are the ones relating to the expenses of the superintendent of public instruction, payable by the board of supervisors.

It will be noticed therefrom that no provision is made for the payment of such expenses as were incurred by your county superintendent while attending the meeting in Chicago.

W. R. C. KENDRICK, *Assistant Attorney General.*

EXPENSES OF COUNTY SUPERINTENDENT

County superintendent is not allowed expenses incurred in a trip outside the state.

July 16, 1920.

Mr. Lew McDonald, Attorney at Law,
Cherokee, Iowa.

Dear Sir:

Your letter of the 12th inst. addressed to the attorney general has been referred to me for attention.

You ask for an opinion from this department as to whether or not the county superintendent of public instruction in your county is entitled to her expenses incurred in attending a conference of educators at Washington, D. C., as a delegate from the state of Iowa under appointment by the governor.

I am of the opinion that the board of supervisors of your county would have no authority to allow such expenses. Section 2734-b, relating to the expenses allowed a county superintendent of public instruction, provides:

> "He shall, on the first Monday of each month, file with the county auditor an itemized and verified statement of his actual and necessary expenses incurred during the previous month in the performance of his official duties within his county. * * *"

It is also provided in section 2742 of the supplement to the code, 1913, that the county superintendent of public instruction shall receive his expenses incurred in attendance upon meetings called by the state superintendent of public instruction.

It is therefore apparent that the expenses incurred in attending a conference outside the state of Iowa, and called by an official other than the superintendent of public instruction of Iowa, cannot be allowed by the board of supervisors of the county of the residence of such county superintendent.

W. R. C. KENDRICK, *Assistant Attorney General.*

WHEN A VILLAGE IS WITHIN PROPOSED DISTRICT

Population of village included in consolidated school district should be ascertained by count of inhabitants residing upon and within limits of platted area.

June 9, 1920.

Mr. C. E. Miller, County Attorney,
Albia, Iowa.

Dear Sir:

Referring to our conversation over the telephone this morning about the construction to be placed upon that part of chapter 149, acts the 38th General Assembly, embraced in lines sixty to sixty-four of the act, inclusive, will say, that section 177 of the 1913 supplement to the code, pertaining to the census of the state, provides as follows:

> "Wherever in the code or the supplement to the code, the population of any county, city or town is referred to, it shall be determined by the publication above provided for as of the date of said certificate, and such census publication shall be evidence of all matters therein contained, and of said certificates thereto."

Section 638 of the code, pertaining to municipal corporations, provides in part as follows:

> "The municipal corporations referred to in this title shall be divided into cities of the first and cities of the second class and towns. Town sites platted and unincorporated shall be known as villages."

I take it from our conversation that it is a village involved in a formation of the school district in your county, and if so, the census law does not require that a separate census of the village be taken, and it would therefore seem to be proper to determine by actual count the number of people residing in such village, its boundaries to be determined by the plat thereof. Anyone living outside of the platted portion, of course, should not be included in the number of inhabitants embraced within the limits of the village.

Applying this rule, I think you may properly determine the question you are confronted with.

J. W. SANDUSKY, *Assistant Attorney General.*

ELECTION OF SCHOOL OFFICERS

Consolidated school districts are embraced in term "Independent districts" and candidates for directors should be nominated by petition. Treasurer of such districts should be elected by board of directors when

district does not include city or town. If district includes city or town treasurer should be elected by vote same as directors are elected.

February 10, 1920.

Mr. Carl H. Cook, County Attorney,
Glenwood, Iowa.

Dear Sir:

We have your favor of the ninth inst., submitting the following propositions for the opinion of this department:

You state:

> "First: What is the method of electing officers in a consolidated school district just formed, and is it necessary that candidates file nomination papers?
>
> "Second: Is the treasurer of a consolidated district elected or appointed?"

You will observe that by the provisions of section 2794-a of the supplemental supplement, as amended by chapter 432, acts of the 37th General Assembly, and chapters 149 and 277 of the acts of the 38th General Assembly, which deal with the question of consolidated districts, that such districts are designated independent consolidated districts.

You will further observe, by referring to section 2754 of the 1913 supplement, that provision is there made as follows:

> "The names of all persons nominated as candidates for office in all independent city or town districts shall be filed with the secretary of the school board not later than seven days previous to the day on which the annual school election is to be held."

Therefore, nomination papers should be filed in consolidated districts.

As to your second proposition, I will call your attention to section 2757 of the supplemental supplement, which provides in part as follows:

> "On the same day the board of each independent city, town and village corporation, school townships maintaining school or schools with high school departments, and consolidated independent school districts, except as provided in section 2754 of this chapter, and the new board of every other school corporation, shall elect from outside the board a secretary and treasurer."

The exception referred to is contained in section 2754 of the 1913 supplement, and is as follows:

> "In districts composed in whole or in part of cities or towns, a treasurer shall be chosen in like manner."

"In like manner" refers to the election of directors by a vote of the electors of the district. In such cases the treasurer is elected in the same manner as the members of the board.

The parts of the two sections above set out are, to say the least, confusing, if not, in fact, contradictory, but, however that may be, it is perfectly clear, that, if the consolidated district does not include a city or town, then the treasurer should be elected by the board of directors, while on the other hand, if the consolidated district does embrace a city or town, then it would seem as though the treasurer should be elected by a vote of the electors of the district.

J. W. SANDUSKY, *Assistant Attorney General.*

PUBLISHING NOTICE OF PROPOSED DISTRICT

When an attempt is being made to organize a new consolidated school district consisting of land in two counties and there is no newspapers published in the district, it is sufficient that notice be published of such intended formation in the nearest newspaper having general circulation in the proposed district. It is not necessary to publish notice in newspapers in both counties.

September 21, 1920.

Mr. Vernon Johnson, County Attorney,
Sidney, Iowa.

Dear Sir:

We have your request for an opinion upon the following proposition:

> "A new consolidated school district is being formed in the north part of Fremont county and the south part of Mills county. There is no newspaper published within the confines of this new consolidated school district. The nearest newspaper is published at Thurman, Iowa, and is about three and a half miles from the consolidated school district in question, and has a general circulation over the entire consolidated district. Two newspapers are published at Glenwood, Iowa, a point located about nine miles from the consolidated district in Mills county."

You desire to know whether it is necessary to publish notice of the formation of this district in Mills county.

In answering your inquiry, we desire to direct attention to that part of section 2794-a, supplement of 1913, as amended by chapter 432, acts of the 37th General Assembly, and chapter 149, acts of the 38th General Assembly, which provides as follows, after determining the procedure to be followed in the formation of a consolidated independent school district:

> "All notices under this act shall be by one publication in a newspaper published within the proposed district, or if there be none, then in a newspaper having general circulation within the proposed consolidated district, which publication shall be made not less than five days nor more than fifteen days prior to the hearing or election to which they refer."

We are inclined to believe that the statute has been substantially complied with under the facts you have presented. Notice has been published in a newspaper having general circulation within the proposed consolidated district, and the fact that a small portion of the district lies in a county other than that wherein the newspaper is published does not effect the legality of the notice given. Every step required by the statute has been complied with; more cannot be required.

B. J. POWERS, *Assistant Attorney General.*

WHERE NEW DISTRICTS FORMED AFTER TAXES LEVIED

Where a new school district is formed after the taxes for the old districts have been levied such levies are to be deemed void. Exception stated.

Octobr 11, 1920.

Mr. T. M. Rasmussen, County Attorney,
Exira, Iowa.

Dear Sir:

Your request for the opinion of this department on the following question has been referred to me for attention.

You state:

> "The treasurer of this county has requested that I give him an opinion on the construction of section 2794-a, paragraph (b) of the supplemental supplement, relating to school taxes after the formation of a consolidated district. It would

seem that under this section all taxes previously certified are void as to the property included within the consolidated district. In two instances in this county consolidated districts were formed and organization of school boards perfected after the first of July of this year, and levy made for school purposes as provided by law. The proceeds of this levy will not be available until next year, of course, and the query now is what becomes of the taxes levied and in part collected this year on the property within the respective consolidated districts; that is, I am referring to school taxes only.

"The section referred to specifically provides that when organization of school board is completed, 'all taxes previously certified shall be void;" levy is made and certified by the new board, and levy made by the board of supervisors at the same time and in the same manner as other school taxes, which is for the ensuing year only.

"One of our consolidated districts is composed of one entire school township, so that in that case the taxes paid would be returned to the same district that paid it, in case there is any warrant for paying it. The other district is composed of territory in two different townships.

"The treasurer wants to know what to do with this money collected from the owners of property within these consolidated districts, which was levied last year and in part collected this fall.

"We should very much appreciate your opinion in the matter."

Paragraph (b) of section 2794-a of the supplemental supplement, to which you refer, provides as follows:

"The organization of the school board in consolidated independent school corporations shall be effected on or before the first day of July following their election, and when completed, all taxes previously certified shall be void so far as the property within the limits of the consolidated independent school corporation is concerned, and the board of said consolidated independent school corporation shall at a regular meeting or a special meeting called for the purpose, at any time prior to the third Monday in August of each year, levy for the general fund of said school the amount of all necessary taxes for all school purposes, which shall not exceed fifty dollars for each person of school age, except that where an approved high school course is maintained in such school the levy may be sixty dollars for each person of school age, the amount so levied to be certified by them to the county board

of supervisors on or before the first Monday of September in each year, and the board of supervisors shall levy said tax at the same time, and in the same manner that other school taxes are required to be levied.''

The foregoing provisions contemplate that the organization of the school board in consolidated independent school corporations which have been completed under paragraph (a), as amended by chapter 432, acts of the 37th General Assembly, of the section, shall be effected on or before the first day of July following their election. Upon the happening of which event and at which time all taxes (for school purposes) previously certified shall be void so far as the property within the limits of the new consolidated school corporation is concerned, and the board shall at a regular meeting, or a special meeting called for the purpose, at any time prior to the third Monday in August of each year make the necessary levy upon the taxable property within the school corporation for all school purposes.

This levy, in effect, supercedes any levy previously made, *in that year*, upon the taxable property within the limits of the new district for school purposes; but in no manner effects the levy thereon made during the previous year and the proceeds of which were intended and are necessary for the maintenance of the schools of the district until the funds arising from the levy made by the board of the new district are available.

In other words, if the levy of taxes made by the board of the new consolidated school corporation is upon the same property for the same year as a levy theretofore certified the prior levy is thereby made void, otherwise not. Therefore if the taxes in the hands of the treasurer were levied the year previous to the formation of the consolidated district they are necessary for the maintenance of the school of the new district and should be paid over to the treasurer thereof, while on the other hand, if the taxes so held are the proceeds of a levy made and certified in the same year that a levy was made and certified by the school board of the new consolidated district, then they should be refunded to the parties who paid them, otherwise the taxpayer would be taxed twice in the same year for the same purpose.

J. W. SANDUSKY, *Assistant Attorney General.*

DUTY OF OLD SCHOOL BOARDS WHEN NEW DISTRICT FORMED

When a new consolidated school district is formed and directors elected therefor, it is the duty of the old school boards to wind up their business and turn the property over to the new board. All contracts in force at the time of consolidation should be carried out.

Tax levies certified up by the new consolidated board in certain cases, cancel levies previously certified by the old board.

October 13, 1919.

Mr. Paul E. Roadifer, County Attorney,
Logan, Iowa.

Dear Sir:

We have your letter of October 6th in which you ask for an opinion of this department upon the following propositions:

> "First: What board has charge of the schools in the territory taken over as a consolidated school district, which are now running in the same school buildings, and under the contracts with teachers made by the former school townships?
>
> "No new building can be acquired by the new district this winter, and it becomes a question of how to run the schools and particularly as to what schools the pupils should attend.
>
> "Second: What taxes are cancelled by the organization of the new district, and what is to be done with the funds on hand by the old township board?"

In answering your first proposition, permit me to state that as we view the law with reference to consolidated schools, the intention was that the old school boards in districts covered in whole or in part by the organization of a consolidated district should proceed to wind up their affairs and turn their property over to the new consolidated school district. This would be in accordance with section 2802, supplement of 1913. The contracts with school teachers entered into by the old board should be continued over by the old board, or by the consolidated board. It is not necessary that the erection of a new building be completed before the new board assumes jurisdiction. The consolidated district becomes an organization whenever the district has been formed by proper procedure and directors elected for each district.

> *Linn Grove Consolidated School District v. Rokitan et al,* 169 N. W. 656.

Immediately upon the election of the directors they have authority to and are charged with the duty of caring for the property

and affairs of the new district. It is to be understood, however, that before they can be clothed with jurisdiction over the property in the hands of the old board or boards, that the old board shall turn it over to the new board in the manner provided in section 2802, supplement of 1913.

On your second proposition, permit me to state that as we view the law, the taxes certified by the new board should cancel those certified to by the old board. It is the duty, however, of the old board to call an election in the territory not included in the new district, and after officers have been elected for such district, and after officers have been elected for each district, then the funds on hand should be divided in accordance with the provisions of section 2802, supplement of 1913, between the consolidated district and the new independent rural district. If the new independent rural school directors cannot be elected before the time required for certifying to the county auditor of the amount necessary for the purpose of conducting the school during the coming year, then as we view it, the old board should certify up the amount required to run the schools in this new independent rural district, but if it is possible to elect a new board in such district prior to the time of certifying up such tax, then the matter should be left to the new board.

You will therefore observe that with reference to the second proposition presented, we agree with the advice you have already given to your board of supervisors.

B. J. POWERS, *Assistant Attorney General.*

EMPLOYMENT OF DEPUTY SUPERINTENDENT

County superintendent may not appoint a deputy without consent of the board of supervisors.

August 14, 1919.

Rose M. Parker, County Superintendent,
Harlan, Iowa.

Dear Madam:

On August 5th you wrote to this department asking an opinion upon the following question:

> "Does the phrase 'With the approval of the board of supervisors entered of record' mean that the county superintendent cannot appoint a deputy unless the board says he

can? If so, upon what grounds should a refusal be based. Or does it mean that the superintendent shall appoint the deputy and the board approve her choice?''

Chapter 311, acts of the 38th General Assembly, provides with reference to the appointment of a deputy by the county superintendent:

> ''He may appoint a deputy with the approval of the board of supervisors entered of record for whose acts he shall be responsible and who may act in his stead except in visiting schools and trying appeals, the salary of such deputy to be fixed by the board of supervisors, but the said salary shall not be less than seven hundred fifty dollars.''

I have given this statute considerable study, and while the act is inaptly worded, I think that its proper construction is plain. It seems to me that the phrase ''With the approval of the board of supervisors'' is a limitation upon the power of appointment, rather than upon the choice of an appointee. In other words, that the exercise of the power of appointment must be with the approval of the board of supervisors and not that the choice of a person must be with the approval of the board. This construction is, in my judgment, compelled by the fact that the use of the preposition ''with'' indicates a connection with the words ''may appoint,'' while if the connection had been with the word ''deputy'' the connection should have been by a verb, as, for instance: ''He may appoint a deputy to be approved by the board of supervisors.''

It is the opinion of this department, therefore, that a deputy county superintendent may not be appointed without the exercise of the power of appointment being authorized by the board of supervisors.

SHELBY CULLISON, *Assistant Attorney General.*

LEVY OF TAXES WHEN DISTRICT IS IN TWO COUNTIES

When a consolidated school district embraces territory in two counties the county auditors should not consider the county line in making the millage levy since the consolidated district is so to be treated as a complete entity for taxation purposes.

September 26, 1919.

Mr. R. E. Johnson, County, Auditor,
Muscatine, Iowa.

Dear Sir:

We have your letter of September 25th in which you state:

"We have a part of a consolidated school district known as Letts Consolidated School District. About one-fourth of the district is in Muscatine county and the rest in Louisa county.

"The directors of this district have certified to the auditor of Louisa county and myself a levy that would raise $29,000. However, the law covering the amount of money to be raised in districts of this character makes a limit of $80.00 for each child of school age in the district.

"There are, I understand, 226 children, which would give them the right to raise $18,080.00 plus the 5 per cent excess allowed for shrinkage. Thirty-seven of these pupils are from Muscatine county, which figured at $80.00 would raise $2,960.00, our proportionate share of the $18,000.00. This would make a millage tax of 20 mills on the valuation in our county.

"The question now arises, shall I, as auditor of this county, figure as above, or do I take the whole district as a basis and work out the rates of our county to the total valuation of the district? In the latter instance the rate would be 29 mills, which, figured on the valuation in Muscatine county, would raise $4,350.00, or $1,200.00 more than the number of pupils in this county figured at $80.00 per pupil amounts to.

"The point I raise is, do I ignore county line or do I not, when arriving at the millage levy?"

In answering your inquiry, permit us to state that as we view it, the county lines are entirely to be ignored in levying a tax for a consolidated school district which embraces territory in two or more counties. For school purposes this consolidated district becomes a separate and distinct entity and the tax required to support the school should be assessed upon all property within the district upon the same basis. If it were otherwise this condition might arise, to-wit: It might be that there would be no children whatsover in that part of Muscatine county within such district, and if you proceeded upon the theory that the county line made a distinct division of your district for taxing purposes, then you would entirely escape taxation for the reason that there were no children of school age in said district, and that the provision for a tax not to exceed $80.00 for each person of school age would prevent you from levying any tax whatsoever. We do not believe that the legislature intended that the county line should thus be considered and consequently permit such a condition to arise.

We therefore advise you to ignore the county line in arriving at the millage levy to be made for the Letts Consolidated School District.

B. J. POWERS, *Assistant Attorney General.*

DISSOLUTION OF SCHOOL DISTRICT

Obtaining the approval of the county superintendent to a petition to dissolve a consolidated independent school district is a prerequisite.

August 20, 1920.

Mr. A. Ray Maxwell, County Attorney,
Corning, Iowa.

Dear Sir:

Upon my return to the office from my vacation I found your letter of the 31st ult. in which you ask for an opinion upon the following facts:

> "The situation is that a consolidated district has been properly organized in a township of this county. Now, a petition for dissolution has been prepared and has upon it the signatures of more than one-third of the voters of the territory within the district. The petition has been filed with the county superintendent for her approval, as required by the statute, but she does not feel disposed to approve the same, and has not done so yet. I have been called upon to give an opinion as to whether she is to pass upon, whether the dissolution must be approved by her, or whether her approval consists only in finding that the petition therefor is sufficient in form, substance and signers.
>
> "I will appreciate it if you will take the time to give me your written opinion on the meaning of that word 'approval' as used in the section mentioned."

The law pertaining to your question will be found in section 2794-a, subdivision (f), supplement to the code, 1915, which reads as follows:

> "Whenever a petition signed by one-third of the electors in a consolidated independent school corporation asking that said district be dissolved and describing the boundaries of the district or districts proposed to be organized out of the territory then included in such consolidated independent school corporation and having the approval of the county superintendent, if one county, and the superintendent of each if more than one county, and by the state superintendent of

public instruction if the county superintendents do not agree, is filed with the board of said consolidated independent district, it shall be the duty of said board within ten days to call an election for which they shall give the same notices as are required in section twenty-seven hundred and forty-six of the code, and twenty-seven hundred and fifty of the supplement to the code, 1907, at which election all voters residing within the district shall be allowed to vote by ballot for or against such dissolution. If a majority of all votes cast at said election be in favor of dissolving the consolidated district, same shall be dissolved and the organization of a new district or districts be forthwith completed by the election of a board of directors as provided by statute; provided, however, that such dissolution shall become effective only when the reorganization of the territory included in the original consolidated district is completed. The assets and liabilities of any such school corporation thus dissolved shall be equitably divided as provided in section twenty-eight hundred and two of the supplement to the code, 1907."

The language of this section is plain and simple, and the meaning unmistakable. The statute above quoted clearly provides that the approval of the county superintendent be obtained as a prerequisite to submitting to the voters residing in the district the question of dissolving a consolidated independent school district. Evidently the terms of the statute confer upon the county superintendent the discretion of determining whether or not a petition for the dissolution of the district shall be submitted to the voters.

So far as the language used in the statute is concerned the meaning thereof is plain and unambiguous, and it is unnecessary to resort to extraneous facts in order to determine what the legislature meant. However, I am informed that the paramount reason for conferring such seemingly arbitrary power upon the county superintendent was in order that the interests of the minority residents in the district be fully protected. For instance, after a consolidated independent district has been organized, a new school building may have been erected at a large cost to the district, and bonds issued to cover the cost. A majority of the residents in the district might become dissatisfied, and if the question of dissolution was submitted such majority could carry the election and cast the entire burden of the bond issue upon the minority residents. To prevent such action by the majority residents, I am informed, was the principal reason for conferring

upon the county superintendent the discretionary power of approving or disapproving the petition calling for submitting to the voters the question of dissolving a consolidated independent school district.

Some light is thrown upon this question by the provisions of the statute and the practice followed in this state prior to the 37th and 38th General Assemblies. The original act providing for the organization of consolidated independent school districts was passed by the 31st General Assembly, it being chapter 141 of the sessions laws of that session. You will find in that act the same provision and in the identical language, with reference to the approval of the county superintendent, as found in subdivision (f), section 2794-a, of the supplement to the code, 1915. In the organization of consolidated independent school districts throughout the state it has been uniformly recognized that the approval of the county superintendent shall be obtained as a prerequisite to the submission of the question to the voters. The 37th and 38th General Assemblies amended the former law by striking out the provision requiring the approval of the county superintendent and inserting in lieu thereof provision for a hearing before that official, with the right of appeal to the county board of education. Chapter 432, acts of the 37th General Assembly, and chapter 149, acts of the 38th General Assembly. But no change was made by the legislature requiring the approval of the county superintendent in case of dissolution. While that fact is not controlling, yet it should be taken into consideration when construing the provision found in subdivision (f), section 2794-a, *supra,* requiring the approval of the county superintendent in dissolving consolidated independent school districts.

Therefore, I am of the opinion that the approval of the county superintendent is a prerequisite to submitting the question of dissolving such districts to the voters.

W. R. C. KENDRICK, *Assistant Attorney General.*

APPROPRIATIONS FOR TEACHERS' INSTITUTE

The board of supervisors has no authority to appropriate funds for teachers' institute purposes except for current year.

January 27, 1919.

Mr. Joseph Flynn, County Superintendent,
Dubuque, Iowa.

Dear Sir:

We have your letters of January 17th and January 23rd in which you present the following facts:

> "The board of supervisors neglected to make an appropriation under the provisions of section 2738, supplement, 1913, for the county institute fund at their January meeting, 1918. The county institute fund, at the close of the year 1918, nevertheless had on hand a balance of $80.00. You now ask whether the board would have authority to appropriate $200.00 for the year 1918 and $200.00 for the year 1919."

In answering this inquiry, we desire to direct your attention to one of the provisions of section 2738, supplement, 1913, which provides as follows:

> "To defray the expenses of said teachers' institute, in addition to the fifty dollars received annually from the state and one-half of all examination fees collected in the county, one hundred fifty dollars from the general county fund *shall be available for that purpose* in counties having a population of thirty thousand or less, which amount shall be appropriated by the board of supervisors of such county *at their January session in each year,* and in counties of over thirty thousand, two hundred dollars shall be thus appropriated for such purpose."

You will note that this appropriation is made "to defary the expense of said teachers' institute." Under the facts gathered from your letters, we find that the expenses for the year 1918 have not only been paid, but that you have in addition a balance of $80.00 in the teachers' institute fund. The law provides that the board of supervisors shall appropriate at their January session in each year, in counties of over thirty thousand, $200.00 for the purpose of defraying the expenses of the teachers' institute. It is evidently the intention of this section to make an appropriation sufficient to defray the expenses of the institute to be held during that year. The statute does not require that the full appropriation be expended. It merely states that such sum "shall be available for that purpose."

It is the opinion of this department that the board of supervisors would have no authority under this section to appropriate

$200.00 to defray the expenses of a teachers' institute during the previous year when all the expenses incident thereto have been fully paid and a balance still remains in the institute fund.

We think that the board of supervisors are limited to making an appropriation for the year 1919, and under the facts stated, have no authority to make an additional appropriation to cover the one which should have been made during the previous year.

B. J. POWERS, *Assistant Attorney General.*

CANCELLATION OF TEACHER'S CONTRACT

A school board may agree with a teacher to cancel a contract entered into prior to the enactment of the minimum wage law and thereafter enter into another contract with the same teacher at an advanced wage equal to the minimum wage. But such a contract cannot be antedated so as to pay additional compensation for services already rendered and paid for under the first contract.

February 13, 1920.

Mr. John H. Howard, County Attorney,
New Hampton, Ia.

Dear Sir:

We have your letter of February 9th, in which you ask for the opinion of this department upon the following propositions:

> "The minimum teacher's wage law has been causing considerable trouble in the county and I would appreciate an opinion from your office on the following questions:
>
> "First: Where a teacher has entered into contract prior to July 4th, 1919, for a less amount than stated in the minimum wage law, has the school board power to cancel that contract and enter into a new contract with the same teacher in order that she may have the benefit of the new law?
>
> "Second: If the board can cancel the contract made prior to July 4th, 1919, and make a new contract, have they power to ante date the new contract? That is, could they enter into contract February 1st, 1920, agreeing to pay the teacher a certain amount of money from September 1st, 1919, the teacher being at that time under a contract with the same board for a less amount?"

In answer to your first question, permit me to state that the practical construction which has heretofore been placed upon contracts entered into prior to July 4, 1919, has been that a school board might agree with the teacher to cancel their contract and

enter into a new contract with such teacher, granting her the benefits of the new minimum wage law.

In answering your second inquiry, permit me to state that it has been the ruling of the superintendent of public instruction that a school board could not ante-date the new contract and thus increase the pay of the teacher for services which had already been rendered and fully paid for. The new contract should be given force and effect only from the date on which it is entered into. This has been the practical construction in such cases.

B. J. POWERS, *Assistant Attorney General.*

SCHOOL DISTRICT

Power to fill vacancy on board and to borrow money considered.

January 3, 1919.

Mr. Maxwell A. O'Brien, County Attorney,
Oskaloosa, Iowa.

Dear Sir:

Your favor of the 30th ult. addressed to the attorney general has been referred to me for attention.

In your letter of the 30th ult. you referred to a letter written by you on the 13th ult., and asked for an opinion from this department on the two questions asked therein, to wit:

> "(1) The first case, a consolidated school district was organized at Wright, in this county, which was contested, and taken to the supreme court. While this case was pending, which was considerable time, the district elected directors, and they proceeded to conduct a consolidated school, making levies, etc. The supreme court ruled they were not legally organized, and completely knocked out their consolidation. The question now arises whether the directors of the old sub-district, as they existed when the consolidation took effect, would still hold their office, or whether it would be necessary for the sub-districts to elect new officers. In case the old directors were held over, there are several sub-districts that will only have one of such directors, at this time, having lost the other, and the question arises whether he could appoint the balance of the board.
>
> "We have another situation wherein a consolidated district elected a treasurer, who qualified and gave bonds for one term. He was re-elected again last term, but failed to give a new bond. This man was a banker, operating a small private

bank, and he recently became insolvent, the bank thrown into the hands of the receiver, and the matter is now pending in several different cases in federal and state courts, and we also have an indictment against him for embezzlement. The consolidated district had about $4,000.00 worth of funds in his hands, which is now lost to them, at least temporarily, and they do not know how to proceed to obtain funds with which to conduct their business. There is also the question of whether or not the directors would be liable for any loss suffered by the district, through their failure to require the treasurer to give a bond. It seems that all the losses which have occurred have taken place during the time for which he gave no bond, and that everything was straight during the term for which a bond was given. I believe that this banker also put school warrants up as collateral for personal debts of his own, which had been paid, and should have been cancelled."

As to your first question, section 2751 of the code provides that the director of a sub-district of a school township shall be elected at the annual meeting held on the first Monday in March of each year, at which election one director shall be elected for each sub-district. Then section 2758 of the supplement to the code, 1913, provides that each director shall hold office for a term to which he is elected and until a successor is elected and qualified. Said section further provides that in case of a vacancy the office shall be filled by appointment by the board of directors of the school township, of which the sub-district is a part, until the next annual meeting. So that in your case, if there is a vacancy in the directory, then such vacancy may be filled as provided in said section; otherwise the old director will hold over until the next annual meeting.

As to your second question, I would call your attention to section 2768, supplement to the code, 1913, which declares among other things, that whenever an order is presented to the school treasurer and there are no funds with which to pay it, the treasurer shall mark it not paid for want of funds, and said order will draw interest from that date. So far as I am able to find there is no authority for the directors to either borrow money or issue bonds for the ordinary indebtedness of the district, but they are empowered to create an indebtedness for property which the board is expressly authorized to purchase, or an indebtedness which they are expressly authorized to create, and they have power to

create such indebtedness even when there is no fund on hand from which to pay it.

Therefore, I would suggest that your board go ahead and make such indebtedness as the statute authorizes, and then issue warrants or orders on the proper fund, letting the treasurer mark them not paid for want of funds, until such time as the board can make a tax levy to cover same. In support of such procedure, you might see:

Hanna v. Wright, 116 Iowa, 275;
Johnson v. School Corporation of Cedar, 117 Iowa, 319.

In this connection, I might suggest that you are not required to furnish the information requested by your school board as a part of your official duties, and in the event of a suit you would not be required to furnish your services as county attorney, and, therefore, I would further suggest that you ask your school board to consult some competent local attorney in the further progress of the matter, except, of course, any feature of the case of a criminal nature.

W. R. C. KENDRICK, *Assistant Attorney General.*

COMPULSORY VACCINATION OF SCHOOL CHILDREN

The state board of health has power to require vaccination of school children and teachers and may bar from school unless vaccinated.

December 17, 1919.

Mr. F. C. Bush, County Attorney,
Osage, Iowa.

Dear Sir:

Your favor of the sixth instant addressed to the attorney general has been referred to me for answer.

In your letter you say:

> "The school director at Riceville has asked me as to an order passed by town council there directing that all school children and teachers be vaccinated or that those not vaccinated be barred from the school. I understand this was done at the suggestion of the state board of health."

You therefore ask for an opinion from this department upon the following questions:

> (1) "Is this order enforceable at all, being by the council and ordered obeyed by the local board of health, and

applying to school only and not public gatherings generally?''

(2) ''Is it enforceable as applying to teachers as well as pupils?''

(3) ''Can the vaccination order be enforced in any way, that is any person forced to be vaccinated against their protest?''

(4) ''Also, can teachers and pupils be barred from school under the order, for not being vaccinated?''

In answer thereto I beg to say that you have not submitted a copy of the order to which you refer. It is therefore impossible to know what its provisions are.

I call your attention, however, to code section 2565, which among other things provides:

> ''The board shall have charge of and general supervision over the interests of the health and life of the citizens of the state; matters pertaining to quarantine, registration of marriages, births and deaths; authority to make such rules and regulations and sanitary investigations as it from time to time may find necessary for the preservation and improvement of the public health, which, when made, shall be enforced by local boards of health and peace officers of the state.''

You will observe that the state board of health is given authority to make such rules and regulations as it may find necessary for the preservation and improvement of the public health, and that when made they shall be enforced by local boards of health and peace officers of the state. Such rules and regulations when made have the force and effect of law. *Pierce v. Doolittle,* 130 Iowa, 333. I do not have any copy of the rules and regulations of the state board of health at hand but I assume that it has adopted regulations with reference to vaccination. If so, such regulations must govern and it is the duty of the local boards of health and the peace officers of the state to enforce them.

Whether the order of the town council of Riceville, to which you refer, is enforceable or not will depend upon whether the state board of health has adopted a regulation authorizing or requiring school children to be vaccinated or providing that those who are not vaccinated shall be barred from the school. It will also depend upon whether the town council in passing this order acted in its capacity as a town council or in its capacity as a local board of health.

It is the view of this department that the state board of health might make a regulation with reference to vaccination which would apply to schools only, and not include public gatherings generally.

In answer to your second inquiry, it is the view of this department that whether the order to which you refer would be enforceable as to teachers as well as pupils would depend upon the provisions made by the state board of health and also the validity of the order of the local board of health. If the regulations of the state board of health were sufficiently broad to include teachers and the action of the local board of health was regular, I see no reason why teachers might not be included with pupils in the order.

In answer to the first part of your third inquiry I have to say that section 2565, above referred to, provides for the enforcement of such order if made. As to the latter part of your inquiry, I assume that the state board of health has not made any regulation providing for forcible vaccination of any person against his protest, but simply provides for the exclusion of any who may not be vaccinated from the public schools.

Your fourth inquiry has already been answered.

I herewith enclose you a copy of a brief which has been prepared by this department touching some of these questions, which may be helpful to you.

H. H. CARTER, *Special Counsel.*

OPINIONS RELATING TO FISH AND GAME LAWS

MEANING OF ARTIFICIAL AMBUSH

"Artificial ambush" as used in section 2551 of the supplemental supplement means any device artificially constructed, of whatever material composed, used for the purpose of concealing the hunter from the view of the game birds sought to be protected. And no device may be used with the intent to attract or deceive on land or water, except decoys may be used in hunting wild geese and ducks.

November 12, 1920.

Mr. W. E. Albert, State Fish and Game Warden.

Dear Sir:

Your letter of the 10th inst. enclosing copy of letter received from T. B. Todd of Mason City wherein he requests an opinion from your department on the following question has been referred to me for attention. He states:

> "There has been some argument in our community in regard to using blinds in hunting ducks. It states in the game laws that an artificial ambush cannot be used. Just how would you interpret "artificial ambush" and can you use a blind made of cornstalks, rushes, grasses, or twigs? It is understood that you cannot use blinds on state waters, but can you use them on slough land with the owner's permission? The county auditor and county treasurer of this county also are in doubt about the meaning of "artificial ambush" or the use of cornstalks, etc., as a blind. None of us want to go contrary to the state laws, so if you will kindly inform us by first mail, it will be greatly appreciated."

Section 2551 of the supplemental supplement of the code as amended by chapter 202, acts of the 37th General Assembly provides in part as follows:

> "No person shall kill any of the birds mentioned in this section from any artificial ambush of any kind or with the aid or use of any sneak boat or sneak box, or other devise used for concealment in the open water, nor use any artificial light, battery or any other deception, contrivance or device whatever, with the intent to attract or deceive any of the birds mentioned in this chapter, except that decoys may be used in hunting wild geese and ducks, but no person shall at

> any time hunt or shoot from any boat, canoe, contrivance or device whatever on any of the waters of this state between sunset and sunrise."

I am entirely at a loss to understand why any doubt should arise as to the meaning of the term "artificial ambush," as used in the statute. It should and does mean any and all devices which have for their object and purpose the obscuring or concealing of the hunter from the view of the birds sought to be protected, and the material of which it is, or may be constructed is wholly immaterial. If its construction is artificial its use is absolutely prohibited in the open waters of the state. Nor may any contrivance or device be used with the intent to attract or deceive such birds, either on land or water, except that decoys may be used in hunting wild geese and ducks.

J. W. SANDUSKY, *Assistant Attorney General.*

FUNDS OF FISH AND GAME WARDEN

The salaries, traveling, contingent and other expenses of state fish and game warden and deputies should be paid from the fish and game protection fund. The "boundary water fund" cannot be used for such purposes, but can be used for the maintenance of the state fish hatcheries, Etc.

August 1, 1919.

Hon. W. E. Albert, State Fish and Game Warden,

Dear Sir:

We have your letter of recent date in which you ask for an opinion from this department upon the following proposition:

> "May the fees derived under section 2547-b, supplement 1913, be used in paying the salaries and traveling expenses of the state fish and game warden and his deputies. Also may this fund be used for the purpose of taking care of the contingent expenses of this department?"

In answering your inquiry, we first desire to direct your attention to the fact that the salaries of all persons connected with your department are to be paid from the fish and game protection fund provided for by section 2563-a1, supplement 1913. This is required by the provisions of chapter 272 of the acts of the 38th General Assembly which state as follows, after enumerating the amount which the warden and the employes of the fish and game department shall receive:

"All of the above salaries shall be paid from the fish and game protection fund."

In view of the express provision contained in the act of the 38th General Assembly, it is our opinion that no salaries can be paid to the employes of your department except from the fish and game protection fund therein mentioned.

You will further observe that chapter 272, acts of the 38th General Assembly provides that

"All employes of the department shall receive their actual expenses, while away from their homes on duty."

You will note that the act of the 38th General Assembly fails to state from what fund these expenses shall be paid, but if you will turn to section 2539 of the supplement, 1913, you will find that provision is made for the payment of a salary to the state fish and game warden

"together with his necessary traveling contingent and office expenses, to be paid out of moneys collected under the provisions of chapter 154, acts of the 33rd General Assembly."

In other words, these expenses are to be paid from the fish and game protection fund above mentioned.

Section 2562 of the supplement, 1913, provides for the appointing of an assistant fish and game warden and for the employment of such additional assistants as may be needed. You will observe that the provisions of this section state that those thus employed shall be entitled to a fixed compensation and in addition their

"actual expenses for time and money actually employed and expended by them in the enforcement of the provisions of this act."

The law fails, however, to state from what fund these expenses shall be paid but as we view it, the clear intention of the legislature was that the necessary traveling and contingent expenses of such assistants should be paid from the same fund that the necessary traveling and contingent expenses of the state fish and game warden are paid out of, namely, the fish and game protection fund.

Among the duties of the state fish and game warden, is that of taking charge of and management of the state fish hatcheries and of the stocking of the waters of the state with fish native to the

country. Furthermore, he is required to take such action as necessary to protect young fish and to remove them from dead or cut off waters and to perform other duties in the preservation of game and fish.

It is the view of this department that the funds received under section 2547-a, *et seq,* which you have designated boundary water fund, is to be employed solely for the purpose of meeting the expenses of your department in connection with the preservation of the fish of this state and in the stocking of the waters of this state with fish and for the purpose of maintaining the state fish hatcheries. The law having provided for the payment of salaries out of the fish and game protection fund and for the payment of the necessary traveling and contingent and office expenses of the department out of the fish and game protection fund, clearly indicates that the legislature did not intend the boundary water fund to be used for those purposes.

We are therefore of the opinion that the boundary water fund should be used solely for such expenses of your department as are not specifically provided for by the fish and game protection fund.

B. J. POWERS, *Assistant Attorney General.*

POSSESSION OF FURS OF CERTAIN ANIMALS

General discussion concerning chapter 396, making it unlawful to have in one's possession furs of animals referred to in said chapter during the closed season.

December 13, 1919.

Hon. W. E. Albert, State Fish and Game Warden,

Dear Sir:

Your letter of the 10th inst., addressed to the attorney general's office, has been referred to me for attention.

You submit with your letter a communication from D. A. Beckwith, Tama, Iowa, in which Mr. Beckwith states in substance:

> "An information was filed against a person by the name of Frank Flynn, accusing him of having illegal furs in his possession during the closed season. That said Flynn claims to be a manufacturer, and for that reason he claims to have the right to have in his possession during the entire year such furs as are defined in chapter 396, acts of the 37th General Assembly."

Mr. Beckwith then asks:

"(1) If Flynn is not a manufacturer, has he the right to hold from one year to another the class of furs described in said chapter?

"(2) If he is a manufacturer, then could he legally have such furs in his possession after the five day limit prescribed in said chapter, unless the furs were in the process of manufacture?"

The law applicable to your questions will be found in chapter 396, acts of the 37th General Assembly, which reads:

"It shall be unlawful for any person to kill, trap, or ensnare any beaver, mink, otter or muskrat, between the fifteenth day of March and the fifteenth day of November following, except where such killing, trapping or ensnaring may be for the protection of public or private property; or to molest, injure or destroy any muskrat house; or, to have in possession during the closed season provided for in this act, except during the first five days thereof, any of the animals or carcasses or parts thereof described in this act, whether lawfully or unlawfully taken within or without this state; provided that nothing herein contained shall be deemed to apply to green hides in process of manufacture."

In the interpretation of criminal statutes and the enforcement thereof it is a safe policy to use ordinary common sense. The evident purpose of the legislation in question was to prevent the unnecessary destruction of the class of animals referred to in said act during the period between March the fifteenth and November the fifteenth of each year. To further protect the lives of such animals the legislature made it unlawful for any person to have in his possession during the closed season the hides of such animals. However, to that inhibition there was a reasonable exception, namely, to that class of dealers as to whom there could be no question but that their possession of such furs during the closed season was for a lawful purpose. If, for instance, those engaged in the preparation of green hides for manufacturing purposes, as well as retail dealers or jobbers selling the manufactured article for wearing apparel.

Therefore, in answer to your first question, if Mr. Flynn does not come with the excepted class, then it would be unlawful for him to have in his possession during the closed season what might be termed the raw fur or hide of such animals.

In answer to your second question, I am of the opinion that if Mr. Flynn can bring himself clearly within the meaning of the term manufacturer as contemplated by the legislature, then he may lawfully have in his possession at any time during the year the hides or fur of such animals.

W. R. C. KENDRICK, *Assistant Attorney General.*

WHEN KILLING OF DEER LEGAL

An owner of a domesticated deer may kill the same at any time and sell it to a butcher who may lawfully dispose of its carcass. The prohibition in the statute against killing deer was not intended to apply to domesticated animals, but to those commonly classed as wild animals.

December 22, 1919.

Mr. A. B. Hoover, County Attorney,
Marshalltown, Iowa.

Dear Sir:

We are in receipt of your letter of December 20th in which you ask the opinion of this department on the following proposition:

> "One of our farmers living near Marshalltown has a herd of domesticated deer, among which is a buck that has become so unruly that he is dangerous to anyone going near the herd, and has attacked the owner several times. He has asked me today if he would be permitted to kill the animal and sell it to the butchers here. I find where he has a right to kill, as the owner, but as to whether or not he would have a right to dispose of the carcass to the butchers I am unable to determine from the law as it now reads."

In answering your inquiry permit us to state that, as we view the law, the intention of the legislature was that the prohibition against the killing of deer, elk and kindred animals was to apply to those which were what is commonly called wild animals and not to those domesticated, for you will observe that section 2551-a provides as follows:

> "That it shall be unlawful for any person other than the owner, or person authorized by the owner, to kill, maime, track, or in any way injure or capture any deer, elk, or goat except when distrained as provided by law."

This section clearly gives the owner of a domesticated animal a right to kill it and we think that he has a right to sell it under

such circumstances, even though the trafficking in animals of the same class, but in the wild state, is prohibited.

To hold that an owner of a domesticated deer has no authority to kill it for the purpose of food or to sell it for such purpose reads something into the law which is not there, either in express words or by reasonable implication.

B. J. POWERS, *Assistant Attorney General.*

FISH AND GAME LAWS CONSTRUED

Trappers have no greater rights than hunters and may not enter upon the enclosed or cultivated lands of another without consent of owner or tenant.

January 27, 1920.

Hon. W. E. Albert, State Fish and Game Warden,

Dear Sir:

Your request for the opinion of this department on the question raised by the letter of Mr. Trigg, of January 15, 1920, concerning the rights of trappers, has been referred to me for attention.

The gentleman states:

> "There is some argument here between owners of property and trappers as to the rights of the latter under the law. The matter has been referred to me, and in order to present the matter correctly, I am writing to you. The property owners contend that they have the right to keep the trappers from trapping along the rivers on their property, while the trappers contend that they have a trapping right ten feet back from the water's edge on this property, regardless of warnings issued by property owners.
>
> "Will you kindly inform us as to this matter, referring to section of code upon which you base your opinion."

Sections 2563-a1 of the 1915 supplemental supplement and 2563-a3 of the 1913 supplement provides as follows:

> "No person shall hunt, pursue, kill or take any wild animal, bird, or game in this state, with a gun, or trap fur-bearing animals or game without first procuring a license as herein provided."
>
> "The state fish and game warden shall furnish county auditors with application blanks for a license and license blanks. These blanks shall provide for the insertion of the name, age,

sex, and place of residence of the applicant and of the licensee. The license shall authorize its holder to hunt in accordance with the provisions of this act in any county of the state, but not on enclosed or cultivated lands without permission of the owner or the tenant, or upon any public highway; and shall bear a facsimile signature of the state fish and game warden and the seal and signature of the county auditor (of the county) in which it is issued."

Under these provisions a trapper has the same rights as a hunter, and no greater, and, therefore, may not go upon the closed or cultivated lands without the permission of the owner of such lands or the tenant in possession thereof.

J. W. SANDUSKY, *Assistant Attorney General.*

WILD DUCKS IN CAPTIVITY

A wild duck does not become a domestic fowl by being held in captivity; nor does a duck of the wild species bred and raised in captivity ever become a domestic fowl under the interpretation placed upon the laws protecting fish and game. Just when the progeny of a wild duck crossed with a domestic duck becomes a domestic fowl is a query.

February 5, 1920.

Hon. W. E. Albert, State Fish and Game Warden,

Dear Sir:

We have your letter, in which wou state:

In connection with the administration of section 2562-b, supplemental supplement, 1915, do you consider that a wild duck or its progeny kept or raised in captivity ever becomes a domesticated fowl and is thus no longer subject to regulations prescribed in this section? If so, when? If wild ducks are crossed with domestic species, at what cross or generation is the progency considered a domestic fowl and no longer subject to regulation under the state game laws?

The section to which you refer provides as follows:

"Sec. 59. The ownership and title of all wild game, animals and birds, found in the state of Iowa, except deer in parks and public and private preserves, the ownership of which has been acquired prior to taking effect of this act, and all fish in any of the public waters of the state, including all ponds, sloughs, bayous or other waters adjacent to any public water, which ponds, sloughs, bayous and other waters are stocked with fish by overflow of public waters, is hereby declared to be in the state, and no wild game, animals,

birds or fish shall be taken, killed, or caught in any manner at any time, or had in possession, except the person so catching, taking, killing, or having in possession, shall consent that the title to said wild game, animals, birds, or fish, shall be and remain in the state of Iowa for the purpose of regulating and controlling the use and disposition of the same after such catching, taking, or killing.

"Any person desiring to engage in the business of raising and selling pheasants, wild duck, wood duck, quail and other game birds, or any of them, in a wholly enclosed preserve or enclosure, of which he is the owner or lessee, may make application in writing to the state fish and game warden for a license so to do. That state fish and game warden, when it shall appear that such application is made in good faith, shall upon the payment of an annual fee of two dollars, issue to such applicant a breeder's license permitting such applicant to breed and raise the above described game birds, or other game birds, or any of them, on such preserves or enclosures; and to sell the same alive at any time for breeding or stocking purposes; and to kill and use same; or sell same for food. Such license must be renewed annually upon the payment of the fee as hereinbefore set forth, and the possession of such license shall exempt the license holder from the penalties of this chapter for killing, having in possession, or selling the game birds, or any of them set forth in this section; provided that said birds have been bred and raised upon the said preserve, or within said enclosure, by the license holder, or secured by him by purchase from without the state of Iowa."

We have been unable to find any decision of any court passing squarely upon the question presented in your letter. We do find, however, that a number of courts of last resort have adhered to the doctrine that a wild animal or a wild fowl does not become a domesticated animal or fowl merely by being confined and subjected to the immediate control of man.

It has been repeatedly held that deer of the wild species, bred and raised in captivity, are nevertheless subject to the provisions of the game laws, even though they may be gentle and no longer have the proclivities of wild deer.

State of Missouri v. Weber, 102 S. W. 955, 10 L. R. A. (M. S.) 1150;

Graves v. Dunlap, County Warden of Game, 87 Wash., 648, 152 Pac. 532, L. R. A. 1916 C, 338, and cases cited thereunder.

No fixed rule can be laid down stating at what cross or generation the progeny of a wild duck or fowl is to be classed as a domestic fowl. We have been unable to find any authorities whatsoever touching upon this question.

We offer the suggestion that it is possible that each case of crossing of wild fowls with domestic fowls presents a question of fact which may necessitate determination in view of its own particular circumstances. It is possible that a court, in passing upon this matter, might announce the rule to be that so long as the fowl possesses the distinctive marks and characteristics of the wild fowl, and these are the predominating characteristics of such fowl, that it shall be classed as a wild one rather than a domesticated one. We have, however, been unable to find any authority announcing this to be the rule of law and we, therefore, do not submit this suggestion to be the rule established by any court.

The matter is involved in considerable doubt and we suggest that you proceed with extreme caution in such matters so that you may act clearly within the provisions of the law in attempting to visit a punishment upon those who may have in their possession a breed of wild fowl which have been crossed with domestic ones.

B. J. POWERS, *Assistant Attorney General.*

FISH IN BAYOU

Fish in a bayou adjacent to non-navigable streams that have never been meandered belong to the owner of the land, provided the bayou has no natural outlet or inlet.

June 6, 1919.

Mr. Frank K. Reynard, County Attorney,
Mount Ayr, Iowa.

Dear Sir:

You state that along Platt and Grand rivers in your county are small bayous which have no natural outlets or inlets, but which bayous become filled with water and stocked with fish by overflow of said Platt and Grand rivers during high water.

You further state that these bayous are located entirely upon land owned by private persons, although adjacent to Platt and Grand rivers; and that the owner of the land (through a receiver in a foreclosure proceeding) upon which one of such bayous is

located gave a person permission to seine said bayou, and that the said person seined the bayou under such permission although no fish were obtained.

You then ask whether or not the party so seining violated any law of the state of Iowa.

The statutory provisions material to a determination of the question in issue are the following, to-wit: Code section 2545, sections 2540, 2544 and 2562-b of the supplemental supplement.

Section 2545 provides:

> "Persons who raise or propagate fish upon their premises, or who own premises on which there are waters having no natural inlet or outlet through which such waters may become stocked or replenished with fish, are the owners of the fish therein and may take them as they see fit, or permit the same to be done. Any person taking said fish without the consent of such owner shall be guilty of a misdemeanor, and be prosecuted and punished as provided in the preceding section, and such owner may recover three times the value thereof from the person so taking them."

Section 2562-b, so far as material, provides:

> "The ownership and title of * * * all fish in any of the public waters of the state, including all ponds, sloughs, bayous, or other waters adjacent to any public waters, which ponds, sloughs, bayous and other waters are stocked with fish by overflow of public waters, is hereby declared to be in the state."

Section 2540, so far as material, provides:

> "* * * nor shall anyone at any time take from the waters of the state any fish, except minnows for bait, unless by hook and line * * *. The possession of a * * * seine * * * shall be unlawful * * *. And it shall be lawful for the state fish and game warden, or any of his deputies or assistants to seize without warrant and sell or destroy any such * * * seine wherever found. * * *"

Section 2544 provides:

> "Any person, firm or corporation who shall violate any of the provisions of section twenty-five hundred forty of the supplement to the code, 1907, as herein amended, or twenty-five hundred forty-one, twenty-five hundred forty-two or twenty-five hundred forty-three of the code, shall be guilty of a misdemeanor, and, upon conviction, shall pay a fine of not

> less than five nor more than fifty dollars and cost of prosecution for each offense, or be imprisoned in the county jail for not less than one day nor more than thirty days, and the taking of each fish in violation of law shall be construed to be a separate offense."

From the foregoing statutory provisions, it will be seen that it is unlawful to take fish from public waters of the state except by hook and line, and that the possession of a seine is unlawful, except as permitted under section 2547-a of the supplemental supplement.

It will be further observed that the ownership of all fish in all ponds, sloughs or bayous is in the state, when such ponds, sloughs or bayous are adjacent to public waters and are stocked with fish by overflow of such public waters.

So that if the Platt and Grand rivers in your county are "public waters," then it would be unlawful to seine in the bayou adjacent thereto, when said bayou is stocked with fish by reason of the overflow of said rivers. The ownership of the land on which the bayou is located under such circumstances would be immaterial.

Whether or not the said Platt and Grand rivers are "public waters" is a question of fact. The doctrine is well recognized that the water in a non-navigable stream which has been meandered in the government surveys of the public lands, belongs to the government for the use of all the people, and are therefore public waters.

In sustaining this well recognized doctrine, our supreme court in the case of

> *Brown v. Cunningham,* 82 Iowa, at page 513, says:
>
> "The plaintiff and another were engaged in cutting and putting up ice obtained in the Wapsipinicon river, not a navigable stream, but meandered in the government surveys of the public lands, and, therefore, its bed was never disposed of by the government by sales of the adjacent lands."

Further in said opinion, at page 516, the court says:

> "The beneficent Creator opened the fountains which filled the stream for the benefit of his creatures, and has bestowed no power upon man or governments created by man to defeat his beneficence. Of course, the use of the water may be regulated by the state, but the state may not forbid its use to the people. * * * Whoever has lawful access to the

> stream flowing over a bed owned by the government, and held in trust for the benefit of the people, may use the water as regulated by law."

Under the foregoing statutory provisions, court ruling and facts stated in your letter, the bayou referred to would not come within the exemption found in section 2545 of the code, but would come within the provisions of section 2562-b of the supplemental supplement; provided that the Platt and Grand rivers are "public waters." Whether they are or are not public waters will depend upon whether these streams have ever been meandered. That fact must be established before a conviction can be obtained in such cases as the one in issue.

The records in the state land office show that the Platt and Grand rivers have never been meandered, and I am therefore of the opinion that the waters in these two rivers are not public waters as contemplated by section 2562-b, *supra,* and that the bayou in question is located on private land and has no natural outlet or inlet, and that the fish found therein belong to the owner of the land and can be legally taken and disposed of in any manner the owner may choose.

W. R. C. KENDRICK, *Assistant Attorney General.*

FEES OF FISH AND GAME WARDEN

Fees for serving warrants by deputy fish and game warden should be taxed and paid into the state treasury.

October 24, 1919.

Mr. L. J. Chapman, Assistant County Attorney,
Ottumwa, Iowa.

Dear Sir:

You ask whether or not a justice of the peace should tax a fee in favor of deputy fish and game wardens for serving warrants in the enforcement of fish and game laws.

Section 2562 of the supplemental supplement provides that deputy fish and game wardens

> "shall have full power and authority to serve and execute all warrants and process of laws issued by any court in enforcing the provisions of this act, or any other law of this state relating to the propagation, preservation and protection of fish, game and birds, in the same manner as any constable or sheriff may serve and execute the same and receives the same fee therefor. * * *"

Under the foregoing section the justice of the peace shall undoubtedly tax a fee for serving a warrant by a deputy fish and game warden when the costs are paid by the person violating the law.

But in the event such fee is taxed and collected, then the fee shall be turned over to the fish and game warden and by him deposited in the state treasury.

Section 170-d, supplement to the code, 1913, provides:

> "That all officers of state, elective or appointive, all boards, commissions and departments, except the department of agriculture, shall turn into the state treasury or bank or depository to the credit of the state treasurer, as designated by the state treasurer, not later than the third day succeeding the collection thereof, ninety per cent of all fees (,) commissions and moneys collected or received with an itemized statement of sources from which received and the fund to be credited; and shall also file with the auditor of state a duplicate of such statement. The balance actually collected in cash remaining in the hands of any officer, board, or department, shall not exceed the sum of five thousand dollars, and no money collected shall be held more than ninety days."

Therefore, though the statutes of Iowa authorize the taxation of fees in favor of deputy fish and game wardens for serving warrants, such deputies may not lawfully appropriate such fees to their own use, but must turn them over to be deposited in the state treasury.

W. R. C. KENDRICK, *Assistant Attorney General.*

FEES OF FISH AND GAME WARDEN

Discussion as to the fees to be taxed in favor of deputy fish and game warden.

December 9, 1919.

Mr. C. G. Lake, Deputy Game Warden,
Chester, Iowa.

Dear Sir:

You ask for an opinion as to whether or not the following fees are the regular fees which should be taxed in a case wherein a person has been arrested by a deputy game warden and a plea of guilty has been entered, to-wit: serving warrant, seventy-five cents; mileage, ten cents each way; attending court, one dollar.

The law material to a determination of your question will be found in sections 4598 of the code and 2562 of the supplemental supplement.

Section 4598 provides as follows:

> "For traveling fees, going and returning by the nearest traveled route, per mile, five cents.
>
> "For serving each warrant of any kind, seventy-five cents.
>
> "For attending each trial in a criminal case, for each calendar day, one dollar."

As to the charge of one dollar for attending court where there is a plea of guilty entered, our supreme court has held in the case of *Wheeler v. Clinton County*, 92 Iowa 44, that a constable is not entitled to one dollar for attending a trial before a justice when a plea of guilty is entered.

That portion of section 2562 of the supplemental supplement material to a determination of your question provides as follows:

> "Such deputy warden shall have full power and authority to serve and execute all warrants and process of law issued by any court in enforcing the provisions of this act, * * * in the same manner as any constable or sheriff may serve and execute the same and receive the same fee therefor."

Pursuant to the provision of the foregoing section it will be observed that the fees to be taxed in a case where a person has been arrested by the deputy game warden for the violation of the fish and game laws of this state; that is, the fees to be taxed in favor of the deputy warden for his services are the fees allowed constables or sheriffs in the event they should perform a similar service, namely, the fees provided for in section 4598 of the code.

While the law as it now stands provides a greater fee for the sheriff that for the constable, yet at the time section 2562, *supra,* was enacted the law provided that when the sheriff performed duties in the justice's court, that his fees should be the same as allowed constables.

Therefore, I am of the opinion that the fees to be taxed in favor of the deputy game warden are the fees provided for in section 4598 of the code.

As to the fees to be taxed in your particular case, the charge of ten cents per mile each way should be only five cents per mile each way, and the charge of one dollar for attending court should be eliminated.

W. R. C. KENDRICK, *Assistant Attorney General.*

OPINIONS RELATING TO HOTELS AND HOTEL KEEPERS

TRANSIENT GUEST DEFINED

A "transient guest" is a person who has no intention to remain where he is lodging for any permanent length of time.

May 28, 1919.

Mr. J. B. Heefner,
Inspector of Hotels.

Dear Sir:

Your letter of the 16th inst. addressed to Attorney General H. M. Havner has been referred to me for reply.

You state:

> "I desire an opinion on the definition of term 'transient guest' under the hotel law as amended by the 38th General Assembly, House File No. 255."

The term "transient" has been defined to mean the opposite of "resident." The latter describes a person at rest in a town, while the former describes him in his passage through or across it.

Town of New Haven v. Town of Middlebury, 63 Vt. 399.

Under the poor laws relating to the support of paupers the term "transient" is defined to be:

> "Any person not having come to reside in the town is regarded as a transient."
>
> *30 Cyc.* 1142.

In Pennsylvania it was a violation of the law for a doctor to open a transient office and practice medicine without a license. A doctor rented an office for a year in a certain town and came to that town and kept fixed office hours on three days of each week. He was prosecuted under the law above referred to, and in defining the term "transient" the court, in the case of *Commonwealth v. Townley,* 7 Pa. Dist. Rep., at page 416, says:

"Webster defines the word transient, 'Not lasting; not permanent; of short duration.'

"The Century dictionary defines the word as follows: 'Transient—adj. and noun. *Trans,* over; *ire,* go.'

" 'I. (1) Passing across, as from one thing or person to another. (2) Passing with time; of short duration; not permanent; not lasting; temporary.

" 'II. (1) One who, or that which, is temporary, passing, or not permanent. Specifically. (2) A transient guest.'

"Accepting these definitions, and applying the same to the facts found by the special verdict, how can it be said that the place where the defendant practiced medicine and surgery in New Castle was a 'transient office?' On the contrary, the 'office' the 'place,' the defendant assigned to persons seeking medical or surgical advice or prescription, where he could be met or visited, possessed all the elements of permanency. He contracted for the 'place' for one year at a fixed annual rental; he occupied it continuously three certain days in each and every week for fifteen months from the date of the lease, and was continuing to occupy it at the time of his prosecution. There was certainty as to the time he could be found at his office; certainty as to the place and the continuance in the same place."

In the case of *City of Waukon v. Fiske,* 124 Iowa, it will be found that at page 468 that our supreme court has defined "transient" as follows:

" 'Transient' is a relative term, which, in the absence of an inflexible statutory or legislative definition, may be the source of much vexation and uncertainty. The abuse sought to be avoided by this statute is undoubtedly the practice of that class of dealers who, with large or small stocks of goods, establish themselves for a few days, weeks, or months in a place, and then move on into another field, staying nowhere long enough to have acquired a permanent residence, and, while claiming the benefit and protection of the laws of the state, contribute nothing to the local or general public revenue."

It will therefore be seen that while it is impracticable to formulate a definition of the term "transient" that will be applicable to the various phases of life in which that term is used, yet the predominating elements of that term are clearly expressed by such conditions as are not permanent but temporary only.

Going now to your direct question as to what is the correct definition of the term "transient guest," the same reasoning will

apply that applies to characters of a transient nature. It seems to me that a proper definition of the term "transient guest" is a person who has no intention to remain where he is lodging for any permanent length of time; or, as stated in the case of *City of Waukon v. Fiske, supra,* those persons who "establish themselves for a few days, weeks, or months in a place, and then move on into other fields, staying nowhere long enough to have acquired a permanent residence." In any event, you will have to use your judgment, and determine each case according to its particular facts, but by following the suggestions above made, you will not find it so very difficult to determine when a person is and when he is not a transient guest.

W. R. C. KENDRICK, *Assistant Attorney General.*

NOTICE OF PRICE OF ROOMS

Hotels shall keep posted in each room a card disclosing price of room per day for each person occupying same. Form of card suggested.

May 29, 1919.

Mr. J. B. Heefner,
Inspector of Hotels.

Dear Sir:

Your letter of the 16th inst. has been referred to me for reply.

You state:

> "I desire an opinion as to what constitutes the proper wording on notices posted in the room and lobby of a hotel according to sections 2514-h1 and 2514-m7, as some hotels in order to get the capacity of their rooms in busy times are seeking to post a price for one guest and having the same price for two guests and $1.00 extra for each person additional, while at normal times they would rent to an individual at a reduced rate."

The statutory provisions to which you refer will be found in House File No. 255, enacted by the 38th General Assembly, and the portions thereof material to a consideration of the question in issue will be found in sections 2514-h1 and 2514-m7 thereof.

Section 2514-h1 provides:

> "On taking effect of this act and on or before January 1 of each year thereafter every person, firm or corporation now engaged in the business of conducting a hotel, and every per-

son, firm or corporation who shall hereafter engage in conducting such business shall make application to the inspector of hotels for a license to conduct such business which application shall be accompanied by a statement showing the maximum rates to be charged for each room in such hotel to the guests, when occupied by one guest, by two guests, by three guests or more and on the first day of July and January in each year thereafter; and the rate for each room shall be posted on a card on the inside of the entrance door to such room in type of such size and dimension sufficiently large to be easily read. A complete list of rooms by number and floor together with rate for each room shall be continuously kept posted on the wall near the office in the lobby of such hotel and open to public inspection without request from the management and no greater rate shall be charged or collected. Provided that any hotel inspected and certified during the year 1919, prior to the taking effect of this act, shall not require license until after December 31, 1919."

Section 2514-m7 provides:

"On the inside of the door of each lodging room there shall be posted in a conspicuous place a card stating the price of said room per day per person and said posted price shall not be increased until the manager of said hotel shall have given the hotel inspector provided for in this act sixty (60) days' notice of his intention to so increase the said price and stating the amount he proposes to charge and receive permission from the said inspector to increase the rates."

From the statutory provisions just quoted it was the evident intent of the legislature that a card shall be posted in each room of a hotel which will show the maximum rate of that particular room when occupied by one person, two persons, or three or more persons. It would be proper to have this card read as follows: "Union Hotel Rate Card. Room No. 100. The maximum rate on this room for one person is $3.00; two persons, $6.00; each additional person, $1.00."

Or, if preferred, the hotel manager could legally charge the same rate for two persons as for one. That is to say, a card reading as follows would comply with the provisions of the code: "Union Hotel Rate Card. The maximum rate on this room for one person is $3.00; for two persons, $3.00; each additional person, $1.00."

In other words, the management is not required to charge more for two persons when occupying the room than when only one occupies it. All that is required is that the maximum rate for

each person be posted, and any card which discloses that information will be in accordance with law.

W. R. C. KENDRICK, *Assistant Attorney General.*

WHEN Y. M. AND Y. W. C. A.'s SUBJECT TO INSPECTION AS HOTELS

Y. M. C. A. is liable to inspection the same as a hotel when renting sleeping rooms to transient guests.

February 14, 1919.

Mr. J. B. Heefner,
State Inspector of Hotels.

Dear Sir:

Replying to your request for an opinion as to whether or not Y. M. C. A. and Y. W. C. A. buildings, doing a transient lodging business, would come within the definition of a hotel and therefore subject to inspection as such.

Also as to whether or not your department can demand and collect the legal fee required from hotels under section 2514-s, supplement to the code, 1913.

Section 2514-h, supplement to the code, 1913, defines a hotel as follows:

> "Every building or structure kept, used, advertised as or held out to the public to be an inn, hotel or public lodging house, or place where sleeping accommodations are furnished for hire to transient guests whether with or without meals in which four or more sleeping rooms are used for the accommodation of such guests, shall for the purpose of this act be defined to be a hotel, and wherever the word 'hotel' shall occur in this act it shall be construed to mean and cover every such building or structure as is described in this section, except as herein provided."

It will be seen from the foregoing section that any place where sleeping accommodations are furnished for hire to transient guests comes within the definition of a hotel as used in said section.

Whether Y. M. C. A. and Y. W. C. A. buildings come within the definition of a hotel as defined in said section is purely a matter of fact. If such buildings are used for the purpose of furnishing sleeping accommodations for hire to transients, then they come within the definition of a hotel and are subject to inspection as provided for in chapter 12-a, title XII of the supplement to the code, 1913, and the same inspection fees can be charged and collected as provided for in said chapter relating to the inspection of hotels.

W. R. C. KENDRICK, *Assistant Attorney General.*

OPINIONS RELATING TO COUNTY OFFICERS

COMPENSATION OF COUNTY ATTORNEYS

(1) No right to charge percentage on collection of forfeited bonds.

(2) No right to charge percentage on collection by civil suit of amounts due county.

(3) Is entitled to compensation when at request of board of supervisors he goes into another county to commence action for benefit of his county.

January 28, 1919.

Hon. Frank S. Shaw,
Auditor of State.

Dear Sir:

I am in receipt of three requests for an opinion regarding fees to be allowed county attorneys, and as these requests are closely related, I shall answer all in one opinion.

Your questions are as follows:

> "(1) Has the county attorney a legal right to charge a county a per cent for collection of forfeited bonds the same as for fines?
>
> "(2) Has the county attorney a legal right to charge the county a per cent for collecting amounts due the county in a civil action, for instance, for the collection of amounts due the county for the support of insane patients in state institutions?
>
> "(3) Has the county attorney a legal right to collect from the county per diem for his services in prosecuting the collection of a debt due the county where he brings the suit in another county?"

Section 308, supplemental supplement to the code, 1915, provides in part as follows:

> "In addition to the salary above provided, he shall receive the fees as now allowed to attorneys for suits upon written instruments where judgment is obtained, for all fines collected where he appears for the state, but not otherwise, and school fund mortgages foreclosed, and his necessary and actual expenses incurred in attending upon his official duties at a

> place other than his residence and the county seat, which shall be audited and allowed by the board of supervisors of the county. * * *''

Under this provision the county attorney is entitled to the same fees upon fines collected "where he appears for the state" as is allowed upon instruments providing for the taxation of attorneys' fees. (See section 3869 of the code.) There is an exception to this rule provided for in section 2429 of the code relating to the attorney prosecuting a person charged with keeping a liquor nuisance, or one who is charged with contempt for violation of a liquor injunction; in such case the attorney prosecuting such cause is entitled to a reasonable sum for his services, and in a case a fine is assessed, to ten per centum of the fine collected. There is no provision permitting the county attorney to recover a per centum because of securing a judgment on a forfeited bond. I would, therefore, answer your first question in the negative.

Under section 301, supplemental supplement to the code, 1915, the county attorney is required:

> "2. To appear for the state and county in all cases and proceedings in the courts of his county to which the state or county is a party, except cases brought on change of venue from another county. He shall appear in the supreme court in all cases in which the county is a party, and also in all cases transferred on change of venue to another county, in which his county or the state is a party."

If, therefore, the civil action is one brought in the courts of county where the county attorney holds office, he is not entitled to a percentage for making collection, unless the collection is one based upon a written instrument providing for the taxation of attorneys' fees.

Answering your second question, I would say that he would not be entitled to a percentage or to any fees whatever outside his salary because of prosecuting a civil action for the collection of accounts due the county for the support of insane patients of state institutions.

Your third question relates to suits brought by the county attorney outside the county where he holds office. The paragraph of section 301, quoted above, really answers your question. The county attorney is only required to prosecute such suits in the court of the county where he holds his office, and if he, at the

request of the board of supervisors goes into another county to prosecute a suit for the collection of some debt due the county, he is entitled to be paid for his services as well as to have his necessary expenses. If, on the other hand, the suit be first brought in the county where he holds his office and be transferred to another county upon motion made for change of venue, it is the duty of the county attorney to follow such suit, without additional compensation, and this would be true whether the suit be civil or criminal in its nature.

The case of *Bevington v. Woodbury County,* 107 Iowa 424, aids us in answering this third question. At the time the suit was brought the statute did not require the county attorney to follow a case on change of venue into another county. It was held by the supreme court that the plaintiff who was county attorney of Woodbury county and had followed a case into Plymouth county was entitled to payment for his services rendered in that county. The same rule would appear to apply to a civil action brought by the county attorney at the request of the board of supervisors in a county other than that of the residence of the county attorney.

F. C. DAVIDSON, *Assistant Attorney General.*

CLERICAL ASSISTANCE FOR COUNTY ATTORNEY

The bard of supervisors may, under certain conditions, employ clerical assistance for the county attorney, and the fact that the county attorney maintains his office elsewhere than in the court house does not affect the right of the board to grant such assistance.

March 27, 1919.

Mr. H. J. Ferguson, County Attorney,
Tama, Iowa.

Dear Sir:

We have your letter of March 26th in which you ask for a ruling from this department upon the following matter:

> "Is the board of supervisors authorized under the statute to hire a stenographer for the county attorney office and pay for the same out of the treasury of the county when the office of the county attorney is not located in the courthouse?
>
> "I have the opinion of your department which was given to Mr. Jebens of Davenport on the second day of February, 1918, but in that case Mr. Jebens had his office in the courthouse. In your opinion does it make any difference whether the office is in the courthouse or outside?"

In answering your inquiry, permit us to refer you again to the opinion of this department rendered to Mr. Henry Jebens, county attorney of Scott county, under date of February 2, 1918. (Report of Attorney General, 1917-18, page 306). In this opinion we held that under certain conditions the board of supervisors were authorized to employ clerical assistance for the office of county attorney. It is the opinion of this department that the rule announced in that opinion should be applied alike to cases where the county attorney maintains his office in the courthouse and to cases where his office is maintained elsewhere.

B. J. POWERS, *Assistant Attorney General.*

FEES OF COUNTY ATTORNEY IN CERTAIN LIQUOR CASES

Under the provisions of sections 2419 and 2421 of the code, the county attorney is entitled to a reasonable attorney fee in prosecutions under these sections in addition to his regular compensation.

June 23, 1919.

Mr. Lester A. Riter, County Attorney,
Rock Rapids, Iowa.

Dear Sir:

We have your letter of June 19th in which you state:

> "In cases where an attorney fee is taxed by the justice court for violation of sections 2419 and 2421 of the code of 1897, upon conviction or plea of guilty for transportation of liquor by an individual to or for others not holding a permit, which said liquor was not properly consigned by having the owner's name and address thereon, is the county attorney appearing for the state and prosecuting the case entitled to this fee aside from his salary compensation? If not, should the money be turned over to the school fund in the same manner as in cases of fines?"

In answering your inquiry, we desire to direct your attention to the provisions of section 2419 of the code, which provides as follows:

> "If any express or railway company, or any common carrier, or person, or any one as the agent or employe thereof, shall transport or convey to any person within this state any intoxicating liquors, without first having been furnished with a certificate from the clerk of the court issuing the permit, showing that the consignee is a permit holder and authorized to sell liquors in the county to which the shipment is made,

such company, common carrier, person, agent or employe thereof, shall, upon conviction, be fined in the sum of one hundred dollars for each offense and *pay the costs of prosecution, including a reasonable attorney's fee to be taxed by the court.* The offense herein created shall be held committed and complete and to have been committed in any county in the state in which the liquors are received for transportation, through which they are transported, or in which they are delivered. The defendant in a prosecution under this section may show by a preponderance of the evidence as a defense that the character, circumstances and contents of the shipment were not known to him, or that the person to whom the shipment was made had complied with the mulct tax."

Section 2421 of the code to which you refer provides punishment for anyone conveying or transporting intoxicating liquor without the same being labeled, as required by law, and it in part states:

"The violation of any provision of this section by any common carrier, or any agent or employe of such carrier, or any other person, shall be punished the same as provided in * * *." Section 2419 above set out.

We have underlined that portion of section 2419 which has special application to your inquiry. It provides that upon conviction the defendant shall be fined one hundred dollars for each offense and "pay the costs of prosecution, including a reasonable attorney's fee to be taxed by the court." Nothing is said with reference to who shall receive this attorney's fee, but it is clear that the fee shall be paid to the attorney prosecuting the case, and since it is a criminal case, the case must of necessity be prosecuted by the county attorney, the only exception to this being where a special prosecutor appears.

Section 308 of the supplemental supplement fixes the compensation to be paid the various county attorneys, but no mention is made as to whether he shall receive the attorney's fee provided for in the foregoing sections. It is our opinion, however, that a county attorney is entitled to a fee provided for in the above section in addition to such sum as he may receive as a salary under the provisions of section 308 of the supplemental supplement, 1915. The statute expressly provides for the taxation of an attorney's fee as part of the costs of prosecution, and we are of the opinion that this fee is for the use and benefit of the

county attorney who looks after the trial of the matter in behalf of the state.

B. J. POWERS, *Assistant Attorney General.*

COMPENSATION OF COUNTY ATTORNEY FOR COLLECTING CLAIMS OF COUNTY

Board of supervisors have no authority to allow additional compensation to county attorneys for collecting claims due the county for support of inmates of state institutions.

January 21, 1920.

Mr. J. A. Rogers, County Attorney,
Clarion, Iowa.

Dear Sir:

We have your request for the opinion of this department on the following question:

"I desire your opinion on the following matter: November 9, 1919, I was appointed county attorney to fill vacancy caused by the removal of Mr. J. M. Berry from the state.

"Soon afterward the board of supervisors requested that I should collect for the support of all persons in the various state institutions from this county, and for whom the county had paid. No effort had been previously made to make such collection from those entitled to pay for such support.

"No previous county attorney had been required to make such collections, so that under the order of the board of supervisors I am required to perform the duties and work which should have been done by my predecessors, and such as does not arise during my administration.

"There are a large number of this class of claims, many estates' liability involved, as well as persons individually responsible.

"Can the board allow a reasonable compensation for making these collections and investigations which should have been done by previous county attorneys? The board is willing, but I desire your opinion on the subject before accepting same."

Section 301 of the 1913 supplement to the code pertaining to the general duties of the county attorney provides in part as follows:

"2. To appear for the state and county in all cases and proceedings in the courts of his county, to which the state or county is a party. * * *

"5. To enforce all forfeited bonds and recognizances, and *to prosecute all proceedings necessary for the recovery of debts,* revenues, moneys, fines, penalties and forfeitures accruing to the state or his county, or to any school district in his county. * * *"

Chapter 232, acts of the 38th General Assembly, fixes the compensation of the county attorney, of the class to which your county belongs, at fourteen hundred ($1400) dollars. It further provides for the payment of fees in certain specific cases, and other statues make additional provisions for the payment of fees in clearly designated cases.

Section 303-a of the 1913 supplement authorizes the county attorney, with the approval of the judge of the district court, to procure such assistance in the trial of a person charged with felony as he may deem necessary, and the board of supervisors are required to allow reasonable compensation therefor, and it further provides that nothing in the act shall prevent the board from employing an attorney to assist the county attorney in any cause or proceeding in which the state or county is interested.

It is true, of course, that other and further duties are enjoined upon the county attorney by law, aside from those enumerated in the section first referred to, but in all such cases it must be held that compensation therefor is included in his regular salary, unless the statutes enjoining such duties provides for additional compensation.

The minute detail into which the law goes in fixing and regulating the compensation of the county attorney leaves but little discretion in the board of supervisors concerning such matters, and I am, therefore, of the opinion that the board cannot allow you additional compensation for the services you refer to. I will also say that I am constrained to believe that the performance of such services is fairly contemplated by that provision of section 301 which is above set out and underscored.

J. W. SANDUSKY, *Assistant Attorney General.*

COUNTY ATTORNEY CANNOT HAVE FUND FOR USE IN CRIMINAL INVESTIGATIONS

Board of supervisors has no power to create a fund to be placed at the disposal of the county attorney to be used at his discretion in criminal investigation.

September 8, 1919.

Mr. Realff Otteson, Assistant Attorney General,
Davenport, Iowa.

Dear Sir:

Your letter of the 5th inst. addressed to Attorney General H. M. Havner has been referred to me for reply.

You ask whether or not a fund can be legally created by the county to be placed at the disposal of the county attorney, to be drawn on at any time for the purpose of bringing back fugitives from justice, and for the payment of expenses connected with investigations of criminal matters.

We are of the opinion that no such fund can be legally created.

As to the payment of expenses connected with the return of fugitives, the county auditor is authorized to audit and pay such expenses only upon the sworn statement of the agent appointed by the governor to go and bring back the fugitive.

Chapter 151, acts of the 38th General Assembly.

As to expenses incident to criminal investigations, the board of supervisors would probably have the power to authorize the incurring of such expenses in any specific investigation under the general power conferred upon the board in subdivisions 11 and 22, section 422, supplemental supplement, and to allow the bills when filed. But the board would certainly not have the power to appropriate a certain sum to be used indiscriminately by the county attorney and at his own discretion in criminal investigations generally.

In any event, the funds of the county can be appropriated only upon warrants drawn by the county auditor. Ordinarily the auditor is authorized to draw warrants only upon the advice of the board of supervisors; but in certain instances the auditor is authorized to issue warrants before the same have been passed upon by the board of supervisors.

Section 4, chapter 356, acts of the 38th General Assembly.

W. R. C. KENDRICK, *Assistant Attorney General.*

APPOINTING OF SPECIAL COUNSEL BY BOARD OF SUPERVISORS

The board of supervisors has power to appoint special counsel regardless of the consent of the county attorney.

March 8, 1920.

Mr. Geo. F. Henry, Assistant County Attorney,
Des Moines, Iowa.

Dear Sir:

Your letter of the 1st inst. addressed to Attorney General H. M. Havner has been referred to me for attention.

You state:

> "During the year 1919 I served as an assistant county attorney of Polk county, Iowa, looking after the civil litigation of the county; as adviser of the various county officials, and as adviser of the board of supervisors upon such matters as were referred to me by such board. The business of the county has grown to such proportions that beginning with January 1, 1920, the board realized that the work done by me during the year 1919 was fairly worth more than they were paying me as such assistant county attorney, which was $2,000 per year, and the board also felt the need of a more constant attendance of their legal adviser at board meetings than had been possible under the arrangement which was made for 1919.
>
> "The board has expressed a desire to appoint me legal adviser of the board under an arrangement as to services and salary which is satisfactory to the board and myself, but some members of the board have expressed a doubt as to the power of the board under the law to employ a legal adviser independently of an assistant county attorney."

You then ask:

> "Has the board of supervisors the power to employ me to act solely as legal adviser of the board and of the officials of the county; and, if so, could such appointment be made effective as of January 1, 1920?"

It is the opinion of this department that the board of supervisors does not have the power to employ special counsel, when such employment would have the effect of entirely superseding the duly elected and acting county attorney; for the reason that such action on the part of the board would be a nullification of chapter 9, title III of the code, which defines the powers and prescribes the duties of the county attorney.

But the legislature has conferred upon the board of supervisors the general power to manage the affairs of the county.

Paragraph 11, section 422, code supplement, 1915, relating to the powers of the board provides:

> "To represent the respective counties, and to have the care and management of the property and business thereof, in all cases where no other provision shall be made."

Pursuant to said statutory provision just quoted, the supreme court of Iowa has held that the board of supervisors has the power to employ special counsel on behalf of the county.

Taylor County v. Standley, 79 Iowa 666.

In the Standley case, *supra,* it is said at page 670:

> "We are of the opinion that the board of supervisors was authorized to employ counsel on behalf of the county by virtue of the general powers given them by statute to manage the affairs of the county, and that their right to do so, and to cause proceedings to be instituted in the name of the county, in cases of this kind, does not depend upon the consent of the county attorney, nor upon his willingness or ability to appear for the county."

In addition to the powers conferred upon the board of supervisors by section 422 of the code supplement, 1913, the legislature has also expressly conferred upon the board the power to employ an attorney to assist the county attorney in any cause or proceeding in which the county is interested.

Section 303 in part provides:

> "But nothing in this section shall prevent the board of supervisors from employing an attorney to assist the county attorney in any cause or proceeding in which the state or county is interested."

As observed from the case of *Taylor County v. Standley, supra,* the board of supervisors has the power under section 303 of the code to employ special counsel on behalf of the county. The holding in the Taylor case was followed in

Bevington v. Woodbury County, 107 Iowa 424;

and cited with approval in

Guinn v. Mahaska County, 155 Iowa 527.

Therefore, it is the opinion of this department that the board of supervisors of Polk county has the power to appoint you special

counsel to act solely as legal adviser to the board, such appointment to take effect only from the date said board legally and officially makes the appointment; provided, however, that such appointment does not have the effect of entirely usurping the powers and duties conferred and imposed upon the county attorney by statute, and entirely superseding that official.

W. R. C. KENDRICK, *Assistant Attorney General.*

SHERIFF MILEAGE RATE WHEN SERVING PROCESSES FOR JUSTICE COURT

The sheriff is entitled to charge and receive the same mileage rate while serving processes issued from a justice court that he would be allowed if the process issued from the district court.

January 17, 1919.

Mr. Frank K. Reynard, County Attorney,
Mt. Ayr, Iowa.

Dear Sir:

We have your letter of January 11th in which you ask the following question:

> "Is a sheriff who serves a process issued by a justice of the peace entitled to the mileage rate allowed a sheriff in ordinary cases, or is he limited to the mileage rate to which constables are entitled?"

Prior to the 37th General Assembly the fees to be collected by a sheriff were fixed by section 511 of the supplement of 1913. This section in part provides:

> "Each sheriff is entitled to charge and receive the following fees:
>
> * * * *
>
> "12. Mileage in all cases required by law, going and returning, five cents per mile.
>
> "23. * * * When sheriffs perform official duties in justices' courts their fees shall be the same as allowed constables."

This section was repealed in its entirety by chapter 49, 37th General Assembly, and the present act in part provides:

> "Each sheriff is entitled to charge and receive the following fees:
>
> * * * *

> "11. Mileage in all cases required by law, going and returning, ten cents per mile, provided that this paragraph shall not apply when provision is made for expenses, and in no case shall the law be construed to allow both mileage and expenses for the same services and for the same trip."

No reference whatsoever is made in this section to the fact that the sheriff when serving the processes issued from the court of a justice of the peace is limited to the fees allowed a constable. Prior to the enactment of chapter 49 of the 37th General Assembly the restriction was clear that a sheriff could not charge or receive mileage fees in excess of those allowed a constable. This restriction or limitation having been removed by the act of the 37th General Assembly, it is the opinion of this department that the sheriff is entitled to charge and receive the same mileage rate in serving processes issued from the court of justices of the peace as he is entitled to charge and receive for the service of processes issued from the district court of his county. The limitations appearing in the code supplement having been repealed indicates that the legislature intended to remove the limitation which previously existed to grant the sheriff the right to charge and receive the same mileage rate when engaged in duties connected with the justice court.

B. J. POWERS, *Assistant Attorney General.*

SHERIFF'S FEES

Sheriffs cannot demand payment of fees in advance, except possibly mileage fees.

January 27, 1919.

Mr. Newton W. Roberts, County Attorney,
Ottumwa, Iowa.

Dear Sir:

I have your letter of the 20th inst. in which you ask:

> "Can the county sheriff demand an advancement of mileage fees before rendering any service in civil cases? Just what fees can he demand in advance?"

It is a general rule that when the compensation of a public official is not fixed by law, but consists of fees, he may demand the payment of those fees in advance, unless some other provision is made by statute.

Citing:

Ripley v. Gifford, 11 Iowa 367;
29 Cyc., 1430.

Now, referring to our statute we find that all sheriffs are placed on a salary basis, and that all fees collected, except mileage shall be paid to the clerk of the district court and by that official turned over to the county treasurer. Section 510-a, supplemental supplement, 1915. The statute also requires quarterly reports from the sheriff of all fees or mileage charged or taxed, said reports to be made to the board of supervisors, and at the time of making such reports he shall make full statement with said board. Section 508, supplement to the code, 1913. From the section just referred to no provision can be found requiring the payment of fees in advance.

Paragraph 18 of section 1, chapter 49, acts of the 37th General Assembly provides:

> "The amounts allowed the sheriff by law for mileage and for necessary and actual expenses paid by him and for board of prisoners and for waiting on and washing for prisoners, as in this section provided, may be retained by him in addition to his salary. But all other fees of every kind and nature which he receives for services performed in his official capacity or by virtue of his office shall belong to the county and be paid into the county treasury accordingly."

Thus it will be seen that mileage is practically the only fee the sheriff may retain in addition to his regular compensation.

If there were no other statutory provisions on this subject it would be reasonable to assume that the sheriff could rightly demand the payment of mileage in advance. But the legislature has enacted the following:

> "Nothing in this act shall be so construed as to relieve any peace officer from the full and faithful discharge of all the duties now or hereafter enjoined upon him by law."
> Section 499-d, chapter 6, supplement, 1913.

Therefore it would seem that the sheriff could demand his fee for mileage in advance, but if the party from whom it was demanded refused to pay it the sheriff would not be justified in refusing to "discharge all of the duties now or hereafter enjoined upon him by law."

However, the safest procedure for the sheriff to follow is to make the service and charge the fees and have them taxed as part of the costs.

W. R. C. KENDRICK, *Assistant Attorney General.*

WHO IS THE "CHIEF DEPUTY" SHERIFF

Even though the sheriff of a county appoint but one deputy, such deputy is the "chief deputy" within the meaning of chapter 278, acts of 38th General Assembly.

August 1, 1919.

Mr. Tom Boynton, County Attorney,
Forest City, Iowa.

Dear Sir:

We have your letter of July 21st in which you state:

> "I would very much like the interpretation your department places upon the words 'chief deputy' as used in section 5 of chapter 278, laws of the 38th General Assembly. Our county sheriff has never employed more than one deputy. Recently he asked me for my opinion as to the meaning of the words in question, and I informed him that in my judgment there could be no chief deputy unless he employed two or more men."

The section to which you call our attention provides that in all counties the sheriff shall, in writing, appoint one or more persons not holding a county office as deputy or deputies and then further provides that:

> "In all cases the board of supervisors shall fix the number of deputies. The salary of the chief deputy shall be sixty-five per cent of that of his principal, but not to exceed eighteen hundred dollars; the other deputies to be fixed by the board of supervisors. * * *"

In view of the holdings of our supreme court it is settled that even though the sheriff appoint but one deputy such deputy is the chief deputy. We refer you to the following cases where this precise question was passed upon:

Boydenhofer v. Hogan, 142 Iowa 321;
Culver v. Fayette County, 142 Iowa 269.

B. J. POWERS, *Assistant Attorney General.*

APPOINTMENT OF DEPUTY SHERIFF

The sheriff in all counties has authority to appoint a deputy and the board of supervisors should approve the bond of such deputy when it is found sufficient. (Senate file No. 308, acts 38th General Assembly.)

May 20, 1919.

Mr. T. M. McAdam, County Attorney,
Mt. Pleasant, Iowa.

Dear Sir:

We have your letter of May 14th in which you state:

> "Under the law passed by the 38th General Assembly sheriffs are required to appoint a deputy in every county in the state. I have been asked whether the board of supervisors are required to approve the bond of such deputy, if such bond is good and sufficient. An early reply will be much appreciated.
>
> "The statute says the sheriff shall appoint. It seems mandatory. Is it not so?"

The act of the 38th General Assembly to which you refer is known as Senate File No. 308, and that portion of it relating to your inquiry reads in part as follows:

> "In all counties the sheriff shall, in writing, appoint one or more persons, not holding a county office, as deputy or deputies, for whose acts he shall be responsible, and from whom he shall require a bond, which appointment and bond shall be approved by the officer having the approval of the principal's bond; and such appointment may be revoked in writing, which appointment and revocation shall be filed in the auditor's office. In all cases the board of supervisors shall fix the number of deputies. * * *"

The first section of the act states:

> "Each clerk of the district court may, in writing, with the consent of the board of supervisors, appoint one or more deputies, not holding a county office, * * *"

The second section states that the county auditor

> "may, in writing, with the consent of the board of supervisors, appoint one or more deputies, not holding a county office, * * *"

Section 3 contains a similar provision with reference to the county treasurer, and section 4 contains a similar provision with

reference to the county recorder. But you will note that section 5 states that

> "in all counties the sheriff shall, in writing, appoint one or more persons, not holding a county office, as deputy or deputies, * * *"

It would appear from this fact that the legislature intended that the sheriff should appoint a deputy, and this fact is further emphasized in that the legislature did not require the consent of the board of supervisors to such appointment. It is true the act states:

> "In all cases the board of supervisors shall fix the number of deputies,"

but we do not consider this as authorizing the board of supervisors to fix the number at none. In fact, by so doing they have not fixed the number of deputies at all. We think a fair interpretation of this section is such as to permit the sheriff to appoint at least one deputy and that he may appoint such additional deputies, subject to the limitation made by the board of supervisors, as he deems necessary.

We therefore are of the opinion that it is the duty of the board of supervisors to approve the appointment and bond of the deputy, in case such bond is good and sufficient. The sufficiency of a bond is for the board of supervisors to determine, and if it is found such, the law contemplates that it shall be approved.

I might add that there is good reason why a sheriff should have a deputy who is qualified to serve notices and carry out the orders of court, and perform such other services as may be required of him by law during the absence or inability of the sheriff. It is not uncommon for the sheriff to be in one part of the county attending to official business when there is need of services in another portion of the county. The legislature may have deemed it wise to provide for a deputy who might be available in the absence of the sheriff from the county seat, and this fact lends strength to the view that we have taken that the sheriff should appoint a deputy.

B. J. POWERS, *Assistant Attorney General.*

SALARY OF CHIEF DEPUTY SHERIFF

The salary of the chief deputy sheriff should be computed on the basis of 65% of that of the sheriff plus the $300 allowed for house rent. In case the county furnishes the sheriff with a house, the computation of the chief deputy's salary should be made on the basis of cash actually paid plus $300. But in either event, the amount paid should not exceed $1,800 per year.

October 25, 1919.

Mr. Newton W. Roberts, County Attorney,
Ottumwa, Iowa.

Dear Sir:

We have your letter of October 18th in which you request the opinion of this department upon the following proposition:

> "What is the basis for computing the salary of a chief deputy sheriff under the provisions of section 5, chapter 278, and section 4, chapter 293, acts of the 38th General Assembly?"

In answering your inquiry, we first desire to direct your attention to that portion of section 5, chapter 278 of the acts of the 38th General Assembly, which provides as follows:

> "The salary of the chief deputy shall be sixty-five per cent of that of his principal, but not to exceed eighteen hundred dollars; the other deputies to be fixed by the board of supervisors. * * *"

Section 4, chapter 293, acts of the 38th General Assembly, in part provides as follows:

> "Each county sheriff shall receive for his services the following compensation (compensation fixed being based upon the population of the various counties), * * * in counties where the sheriff is not furnished a residence by the county an additional sum of three hundred dollars per annum shall be allowed."

The question thus narrows down to whether the $300.00 allowed a sheriff for house rent shall be considered in determining the salary of the chief deputy. As we view the statutes in question, the allowance of $300.00 for house rent, in case the county does not provide a house, is part of the sum such sheriff receives for his services. Hence in computing the salary of the chief deputy the actual emoluments of the office should be taken into consideration. Therefore the computation of the salary of the chief

deputy should be based on the salary paid to the sheriff plus the allowance of $300.00 for house rent.

In case the sheriff is furnished a house by the county he receives $300.00 less for his services than he receives when no house is furnished. We think that in determining the salary of the chief deputy under such conditions, that the sum of $300.00 should be added to the actual cash salary paid to such sheriff and that the chief deputy should receive a salary equal to sixty-five per cent of such amount, but in no case to exceed $1,800.00. Any other construction would result in gross inequality in the salaries of chief deputies where the sheriff was furnished with a house in one county where the sheriff in another county of equal size was given $300.00 house rent.

We are therefore of the opinion that the advice given to your deputy sheriff with reference to the basis on which his salary should be computed is correct.

B. J. POWERS, *Assistant Attorney General.*

APPOINTING DEPUTY SHERIFF AND FIXING OF HIS COMPENSATION

While the "letter of law" may permit a board of supervisors to fix the salary of a regular deputy sheriff in excess of the amount paid the chief deputy yet the spirit of the law would be violated by so doing. But if the board finds it necessary to appoint a special deputy for a limited time it may do so and pay such special deputy a salary in excess of that paid the chief deputy. (Construing chapter 278, acts 38th General Assembly.)

October 22, 1919.

Mr. Verner Gabrielson, County Attorney,
Fort Dodge, Iowa.

Dear Sir:

We have your letter of October 15th in which you make a request for the opinion of this department upon the following proposition:

> "Chapter 278 of the laws of the 38th General Assembly deals with the compensation of deputy county officers; section 5 deals with deputy sheriffs. This section provides "The salary of the chief deputy shall be 65 per cent of that of his principal but not to exceed $1,800.00, the other deputies to be fixed by the board of supervisors.' The board of supervisors of this county has asked me whether or not they can appoint a second

deputy and name his salary to exceed that of the chief deputy."

Permit us to state that while the wording of this statute clothes the board of supervisors with discretion as to the salary which shall be paid deputies other than the chief deputy sheriff, yet we do not think it was the intent of the legislature that the board should fix a salary by the year for *a regular deputy* in excess of the salary to be paid the chief deputy.

If, however, it becomes, in the opinion of the board of supervisors, necessary to employ a special deputy or special deputies for a limited period we think this section gives to the board of supervisors authority to pay to such special deputy or special deputies a salary in excess of that which is paid to the chief deputy.

B. J. POWERS, *Assistant Attorney General.*

PERMITS TO CARRY CONCEALED WEAPONS

The sheriff may issue a permit to a private person to carry a concealed weapon under section 4775-4a, supplement 1913.

January 7, 1919.

Mr. F. H. Don Carlos, County Attorney,
Perry, Iowa.

We have your letter in which you ask for an opinion of this department on the following proposition:

"May a sheriff issue a permit to carry a concealed weapon to a private individual not acting in an official capacity?"

Chapter 171, acts of the 37th General Assembly, provides as follows:

"For the purpose of enforcing the laws, local, state or national, the mayor or chief of police in cities of the first class, special charter cities and cities under the commission form of government, where there is an organized police force, and in counties, cities of the second class, town and villages, the sheriff of the county may on request of mayors or peace officers issue a permit, limited to the time therein to be designated to carry concealed a revolver, pistol or pocket billy, provided that in the judgment of said officials such permit shall be granted for defense or service while on official duty, or to express, mail or bank agents or messengers or other officers requiring them for protecting property in their care. Each such permit shall, unless revoked by notice in writing

sent by registered mail to the permit holder by the officer issuing same, expire on December 31st following the issuance. The officer issuing the permit shall, except as to peace officers, special police, plain clothes officers and secret service men, keep a record showing the name and address of the person to whom issued, and for what period of time, which record shall not be open to public inspection."

Section 4775-4a, supplement, 1913, provides in part as follows:

"It shall be the duty of said officials to issue a permit to go armed with a revolver, pistol or pocket billy to all peace officers *and such other persons who, in the judgment of said officials should be permitted to go so armed.* * * *"

The fact that the provisions of chapter 171, 37th General Assembly, were enacted as a substitute for section 4775-3a, supplement, 1913, the said section having been repealed, and the further fact that said substitute was enacted subsequent to the passage of section 4775-4a of the supplement does not change the rule of construction that they are to be construed together if possible. It is only when the provisions of the two acts are so inconsistent that they cannot be construed together that the one last passed should prevail. In this case the law clearly provides that certain officials mentioned in chapter 171, acts of the 37th General Assembly, may grant a permit to peace officers to carry a concealed weapon and to such other persons who, in the judgment of said officials, should be permitted to go so armed. Thus if a sheriff deems that the applicant should be granted a permit he has authority to issue it.

B. J. POWERS, *Assistant Attorney General.*

SALARY OF DEPUTY COUNTY AUDITORS WHERE THERE ARE TWO COUNTY SEATS

In counties having two county seats the auditor may appoint two deputies, each of whom shall receive a salary of not less than one-half that of the auditor and not to exceed $1,200 per year.

April 29, 1919.

Mr. J. M. C. Hamilton, County Attorney,
Ft. Madison, Iowa.

Dear Sir:

We have your letter of recent date in which you request an opinion from this department upon the following question:

"Has the auditor of Lee county the right to appoint two deputies who shall each receive a salary of one-half that paid to the auditor, Lee county having two county seats, and district court being held in two places, Fort Madison and Keokuk?"

In answering this question, permit us to direct your attention to the provisions of section 481, supplemental supplement, 1915, as amended by chapter 77, acts of the 37th General Assembly. The section, as amended, in part provides:

"Each county auditor may, in writing, with the consent of the board of supervisors, appoint one or more deputies not holding a county office, for whose acts he shall be responsible. * * * Each deputy shall receive a salary not exceeding twelve hundred dollars a year, to be fixed by the board of supervisors. * * * Provided that * * * any county in which the district court is held in two places the salaries of the first and second deputies shall be one-half that of the principal. * * *"

It is the opinion of this department that the foregoing provision of our statute permits the appointment of two deputies at a salary not less than one-half that of the principal, and not exceeding $1,200.00 per year.

B. J. POWERS, *Assistant Attorney General.*

FEES FOR RECORDING TRANSCRIPT OF COURT PROCEEDING IN SEVERANCE OF TERRITORY FROM CITY

A county recorder should charge the usual fee for recording a transcript of the court records received from the clerk of the district court showing the severance of territory from town and should certify the cost of so recording to the clerk. On receipt of such certificate the clerk should enter such costs as a part of the costs in the case.

December 24, 1919.

Mr. Harry Langland, County Attorney,
Nevada, Iowa.

Dear Sir:

We have your letter of December 4th in which you state:

"Our county recorder has requested me to obtain the ruling of your department on the following matter:

"In connection with the severance of territory from a town there seems to be a decree or transcript recorded in the office of the county recorder. She wants to know whether or

not she should charge for the recording of such decree or transcript. An attorney has left such papers there and stated that there is no recording fee."

In answer to your inquiry, we first desire to draw your attention to the provisions of section 498 of the supplement, 1913, which fixes the fees a recorder should charge for the recording of all instruments. You will observe that no one is exempt from the payment of a recording fee under the provisions of this section.

Section 627 of the code provides for the payment of costs in proceedings such as mentioned in your letter, and it in part provides as follows:

"The costs, except witness fees, shall be paid by the petitioners, but each party shall pay its own witnesses."

Taking these two facts together, we are of the opinion that your county recorder should record the transcript received from the clerk of the district court and certify the costs of such recording to the clerk, who should tax the same as a part of the costs in the action.

B. J. POWERS, *Assistant Attorney General.*

QUALIFICATION OF CLERK OF DISTRICT COURT

A person appointed to the office of clerk of the district court should be a qualified elector at the time of his appointment. If not, his official acts are not void and cannot be assailed in a collateral proceeding. He is what is termed an "officer de facto."

March 1, 1920.

Mr. Vernon Johnson, County Attorney,
Sidney, Iowa.

Dear Sir:

We have your letter of the 28th inst. wherein you request the opinion of this department on the following proposition:

"H. R. Smith, the clerk of the district court, has tendered his resignation to the board, which was accepted.

"Some time in the early fall of 1919, September or October last, Mr. W. E. Craft of one of the local banks here in Sidney sold out his banking interests, his home and most of his household furniture. I understand that he did leave some furniture here, but from what I can gather it was left for sale. He

made it known here in Sidney that he was going to the state of Washington and enter the wholesale fruit business. After he arrived in Washington he bought a home and had the United States census taken of him and his family out there. About the time or a few weeks before Mr. Smith resigned, Craft and his family came back to Sidney, Iowa.

"Now the board of supervisors has appointed Mr. Craft to fill the vacancy caused by the resignation of Mr. Smith.

"In the case of *State ex rel v. Van Beck*, 87 Iowa 569, it is held that none but qualified electors can hold elective offices, except by special provision. So far as I am able to learn this case has never been overruled. *State v. Groome*, 10 Iowa 308, would, in a measure, apply to the case of Mr. Craft.

"I have no objection to the appointment of Mr. Craft. He is a republican, and the board who made the appointment is democratic. What I am worried about, is the appointment legal, and if not, how will his acts as clerk affect the legality of his doings?

"The board seems inclined to let matters ride as they are unless someone makes a kick. If it is my duty to object I would like to have your assistance in this matter. If it is not illegal, and I have no duties in connection with said matter, I am also willing to let the matter ride, but I would like to know what is expected of me."

The case in the 87th Iowa, to which you refer, involved the right to the office of sheriff. In that case the party receiving the majority of votes cast for the office was an alien at the time of the election, but prior to the time for him to qualify on the first of January he had taken out his naturalization papers, and it was held that he was entitled to hold the office, although he was not an elector on the day of election. That case has been cited at different times by the supreme court, but never questioned or overruled.

The term "elector" has a clear and well defined meaning, and the definition of the word given by Webster is as follows:

"One who elects, or has the right of choice; a person who is entitled to take part in an election, or to give his vote in favor of a candidate for office; a person legally qualified to vote."

Section 1 of article II of the constitution provides as follows:

"Every male citizen of the United States, of the age of twenty-one years, who shall have been a resident of this state

> six months next preceding the election, and of the county in which he claims his vote sixty days, shall be entitled to vote at all elections which are or may be authorized by law."

I take it from your letter that Mr. Craft was, prior to his going to the state of Washington, a resident citizen of your county, and a qualified elector in every sense of the term. The question then arises whether his removal from the state was of a permanent character which would take him from the qualifications of a voter. The mere removal from the state to another state would not have that effect. It would also be necessary that he should have had the permanent and fixed intention of making his home elsewhere, and if such was true, and he went to the state of Washington intending to make his home there, the length of time that he might remain there would make no difference; he would have lost his residence in your county, and upon return thereto, with the intention of making his home there again, he would have to reside the six months in the state and the sixty days in the county as provided by the constitution.

It is sometimes difficult to determine from all the facts just what the status of a aprty is in circumstances like these. The intention, however, of the party is usually a controlling element, although other circumstances also weigh in the determination of the question.

Your apparent anxiety about the legality of the acts of the appointee are unnecessary, as I view the law. He was appointed by the board of supervisors with whom the power is lodged to make the appointment, and the mere fact that he was ineligible, for any particular reason, would not make the appointment void nor could it affect the validity of his acts as clerk of the district court. He would be what is termed an officer de facto, and his official acts could not be collaterally assailed, and in support of that proposition I will cite you the following cases:

Keeney v. Leas and Lyons, 14 Iowa 464;
Stickney v. Stickney, 77 Iowa 699;
State v. Powell, 101 Iowa 282;
Metropolitan National Bank v. Commercial State Bank, 104 Iowa 682;
Murphy v. Lentz, 131 Iowa.

The next question arising is as to what your duties are in this particular case, if Mr. Craft is in fact ineligible to the office, for the reasons stated.

An action of quo warranto, as provided by section 4315 of the code, is the proper remedy to test his rights to the office, and in this connection I will also call your attention to section 4315 of the code, which provides as follows:

> "Such action may be commenced by the county attorney at his discretion, and must be so commenced when directed by the governor, the General Assembly, or a court of record."

By the provisions of this action you will observe that a discretion is vested in the county attorney whether he will institute the proceedings or not. The following section makes provision for the bringing of the action by any citizen of the state who is interested in the question.

It was your duty, as county attorney, if from all the facts in your possession, you did not belive that Mr. Craft was eligible to the office, to so advise the board of supervisors, and if you have done so it would seem to me as though you had done your duty.

Now, as to whether you should begin the quo warranto proceedings or not, you must determine that fact yourself from all the circumstances in the case.

Trusting the foregoing will enable you to reach a proper conclusion in the matter, I am

J. W. SANDUSKY, *Assistant Attorney General.*

EMPLOYMENT OF COUNTY ENGINEER IN DRAINAGE MATTERS

County engineer cannot be employed by the board of supervisors to act as drainage engineer.

August 28, 1919.

Mr. W. A. Follett, County Attorney,
Atlantic, Iowa.

Dear Sir:

Your letter of August 23rd to Mr. Havner has been referred to me for reply.

You enclosed a letter from the county auditor upon which an opinion is sought upon the following proposition:

"Can the board of supervisors employ the county engineer to make preliminary surveys on drainage propositions at $110.00 per mile, and deduct pro rata from his salary as county engineer for time actually devoted during office hours on such drainage work?

"The county engineer is employed under a contract at a stated salary of $2,200.00 per year, payable monthly, and in addition is allowed 10 cents per mile for travel expenses on road and bridge work."

Section 1527-s3 provides for the employment of a county engineer "for such length of time not exceeding one year and at such compensation to be paid out of the county funds as may be fixed by the board of supervisors." The construction heretofore placed upon this section by this department and the highway commission is indicated by the comments thereon contained in the state highway service bulletin, supplement to volume 3, number 9, under date of September, 1915. Therein it is said:

"Experience of previous years has fully demonstrated the wisdom of employing the full time of a competent and experienced engineer who shall be responsible for all engineering work in the county. Such engineer shall be employed for the calendar year commencing January 1st and ending December 31st."

I think the statute fairly contemplates that for the time employed the engineer shall give his entire services to the county work. The duties of the county engineer are multitudinous and many are of such a character that he should be subject to call by the board at all times. If during the ordinary working hours of the day he is engaged in private enterprises he must neglect one or the other or at least make an inconvenient situation. While it is true that an employe can perform work other than for his employer when his own work is completed without violating his duty to his employer, I think that the county engineer appointed for a year should, during the ordinary working hours, give his full time to the county, and that the employment by the board of such engineer for drainage work cannot be sustained if the drainage work to be done requires his attention during the ordinary working hours when he should be engaged in his duties as county engineer, and I think this conclusion is correct even though an arrangement is made whereby the time during which

he is at work as drainage engineer is deducted from the amount of his salary as county engineer.

SHELBY CULLISON, *Assistant Attorney General.*

REMOVAL OF A MEMBER OF BOARD OF SUPERVISORS FROM DISTRICT WHERE ELECTED

Where a member of the board of supervisors removes from the district in which he was elected to another district in the county such removal creates a vacancy.

March 17, 1920.

Mr. Lester A. Riter, County Attorney,
Rock Rapids, Iowa.

Dear Sir:

We have your favor of the 10th inst. wherein you request the opinion of this department on the following question:

> "A question has arisen in this county upon which I would like to have the opinion of your department. The question is as follows:
>
> "In a county which is divided into districts under the statute, and one member of the board of county supervisors is elected for his term of office by the voters of his particular district, does a supervisor duly elected by a district and qualified and acting in the discharge of his duties as such, become disqualified, or does his office become vacant, by reason of his removal from such district electing him, to another district within the same county?
>
> "My thought and understanding of the laws applicable cause me to belive that such removal from the district, so long as he remains a resident and actually resides within the county, does not disqualify him or cause the office to become vacant. However, on account of differences of opinion I ask for an official opinion.
>
> "You, of course, understand that Lyon county is in a rural community and that we have five districts in the county, each district comprising several townships."

Section 415 of the 1913 supplement to the code and sections 417 and 418 of the code, which pertain to the election of members of the board of supervisors, provides as follows:

> "The board of supervisors may, at its regular meeting in January in any even-numbered year, divide its county by townships into a number of supervisor districts correspond-

ing to the number of supervisors in such county; or, at such regular meeting, it may abolish such supervisor districts, and provide for electing supervisors for the county at large.

"Such districts shall be as nearly equal in population as possible, and shall each embrace townships as nearly contiguous as practicable, each of which said districts shall be entitled to one member of such board, to be elected by the electors of said district.

"In case such division or any subsequent division shall be found to leave any district or districts without a member of such board of supervisors, then, at the next ensuing general election, a supervisor shall be elected by and from such district having no member of such board; and if there be two such districts or more, then the new member or members of said board shall be elected by and from the district or districts having the greater population according to the last census, and so on, until each of said districts shall have one member of such board."

It is true, of course, that members of the board of supervisors elected by and in respective districts of the county are county officers and perform official duties in any part of the county, but as they must be residents of such districts at the time they are elected, I am constrained to believe that such residence must continue throughout their term of office.

Section 1255 of the code provides that every civil office shall be vacant upon the happening of either of the following events:

"Paragraph 3. The incumbent, ceasing to be a resident of the state, district, county, township, city, town or ward by or for which he was elected or appointed or in which the duties of his office are to be exercised."

You will observe that by the provisions of this paragraph that if the incumbent ceases to be a resident of any of the subdivisions enumerated, "*By or for which he was elected,*" the office becomes vacant.

This language is positive and explicit and must be held to mean what it says; and, therefore, if a member of the board of supervisors removes to another supervisor district of the county during his term of office the office thereby becomes vacant.

J. W. SANDUSKY, *Assistant Attorney General.*

OFFICES OF COUNTY SUPERVISOR AND MAYOR INCOMPATIBLE

The office of county supervisor is incompatible with the office of mayor of an incorporated town.

April 20, 1920.

Mr. Ralph H. Munro, County Attorney,
Parifield, Iowa.

Dear Sir:

We have your favor of the 17th inst. wherin you ask the opinion of this department on the following question:

> "Mr. J. B. Bryant, one of the board of supervisors of this county was recently elected mayor of Batavia, one of the towns of this county, where he has his place of residence.
>
> "He has requested me to ask you for an opinion as to whether he can qualify and act as mayor of Batavia and at the same time continue as a member of the board of supervisors."

On February 23, 1917, this department rendered to Tom Boynton, county attorney of Winnebago county, an opinion on the question of incompatibility of offices, wherein we discussed at some length the question and reviewed some leading authorities on the subject, and I am enclosing herewith a copy of that opinion.

As announced in that opinion, our state has recognized the common law rule that a person cannot hold two offices at the same time which are incompatible, though we do not go to the length that other jurisdictions have in holding offices incompatible. It is clear, I think, that the greater part of the duties of the mayor of an incorporated town or city are not incompatible with the duties of a member of the board of supervisors, but there are some duties of the office of mayor that are, as I view it, incompatible with the duties of a member of the board. For instance, the mayor is a magistrate and conservator of the peace, and as such may file bills with the board of supervisors for services rendered in a criminal case. The mayor is also a member of the board of review of the corporation of which he is mayor, and his acts in such capacity are subject to review by the board of supervisors. There may be other instances where the duties of the two offices are liable to become or may be incompatible, and I am therefore constrained to the opinion that we should hold in this instance that the person

may not discharge with absolute impartiality all the duties of the two offices, and that they are therefore incompatible.

J. W. SANDUSKY, *Assistant Attorney General.*

POWERS AND DUTIES OF BOARD OF SUPERVISORS

The limitation placed upon the powers of the board by section 423-S. S., as amended by chapter 71, 38th General Assembly and chapter 336, which enacts a substitute for section 424 of the code, does not prohibit the voters of a county from authorizing the construction of a bridge in excess of the amount fixed in said substituted provision.

March 31, 1920.

Mr. Charles S. Macomber, County Attorney,
Ida Grove, Iowa.

Dear Sir:

We have your favor of the 29th inst. wherein you ask the opinion of this department on the following questions:

> "I wish for your opinion to assist mine in satisfying the board of supervisors. They desire to build a bridge. The bridge will cost more than $25,000, and chapter 336 of the 38th General Assembly says that counties of this size cannot appropriate to exceed $25,000. Now, I wish to know just what course to pursue to get it. It certainly can be built. I take it for granted that it is necessary to have a vote of the people upon it. Can you enlighten me and refer me to the law by sections?"

Section 423, supplemental supplement, as amended by chapter 71, acts of the 38th General Assembly, which pertains to the powers and duties of the board of supervisors, provides as follows:

> "The board of supervisors shall not order the erection of a courthouse, jail or county home when the probable cost will exceed ten thousand dollars, or any other building, or bridge, except as provided in section four hundred twenty-four of the code, when the probable cost will exceed five thousand dollars, nor the purchase of real estate for county purposes exceeding two thousand dollars in value, until a proposition therefor shall have been first submitted to the legal voters of the county, and voted for by a majority of all persons voting for and against such proposition at a general or special election, notice of the same being given for thirty days previously, in a newspaper, if one be published in the county, and if none be published therein, then by written notice posted in a public place in each township in the county."

Chapter 336, acts of the 38th General Assembly, to which you refer, and which also pertains to the powers and duties of the board of supervisors, repeals section 424 of the code, and enacts a substitute therefor, which provides in part as follows:

> "The board of supervisors of any county having a population of fifteen thousand or less may appropriate for the construction of any one bridge within the limits of such county a sum not to exceed twenty-five thousand dollars $(25,000), and may appropriate for the construction of any one bridge on the line between such county and another county of this state or between such county and another state, a sum not to exceed fifteen thousand dollars ($15,000)."

By the provisions of the latter act the board of supervisors is permitted to appropriate a sum not to exceed $25,000 for any one bridge, and by the provisions of section 423, as above set out, the board of supervisors is prohibited from erecting any building or bridge, except as provided in section 424, when the probable cost will exceed $5,000, until a proposition therefor shall have been first submitted to the legal voters of the county, and voted for by a majority of all persons voting for and against such proposition at a general or special election.

The limitation is in each instance placed upon the powers of the board of supervisors, but neither section professes to nor in any manner limits the amount that the voters of the county may authorize for the construction of a bridge, and I am therefore of the opinion that if the voters of your county will, at an election properly held, authorize expenditure for such purpose in excess of the $25,000 limitation before referred to, that such act would be in all respects legal and valid.

J. W. SANDUSKY, *Assistant Attorney General.*

BOARD OF SUPERVISORS HAVE NO AUTHORITY TO DONATE FOR PAVING

The board of supervisors have no authority to donate or appropriate county funds to pay for paving constructed in a city street adjoining the courthouse where there is no assessment contemplated. But the city may by proper procedure construct such pavement and assess the county for its part of the cost thereof.

April 5, 1919.

Mr. O. H. DeGroote, County Attorney,
Humboldt, Iowa.

Dear Sir:

We have your letter of April 2nd in which you state:

> "Our county plans to pave through the town of Dakota City, our county seat, on into the country as a part of the federal aid road project.
>
> "The town of Dakota City by individual subscription has raised several thousand, and Humboldt county desires to appropriate $4,000 in aid of said project, which $4,000 is the estimated cost of the paving in front of the courthouse, 330 feet frontage.
>
> "The road will not be a county road, as it passes through a town.
>
> "The question is, can the board of supervisors legally donate or appropriate $4,000 or any sum, from the road fund or other fund to said project and to pay for the paving in front of the courthouse, there being no assessment contemplated."

We desire to direct your attention to the provisions of section 422, supplemental supplement of 1915, which specifies the powers possessed by the board of supervisors. That portion pertinent to your inquiry is as follows:

> "The board of supervisors at any regular meeting shall have the following powers, to-wit:
>
> * * * *
>
> "3. To make such orders concerning the corporate property of the county as it may deem expedient.
>
> * * * *
>
> "5. To build and keep in repair the necessary buildings for the use of the county and of the courts; provided that no such building shall be erected or repaired when the probable cost thereof shall exceed two thousand dollars, except under an express written contract, * * *"

There is no other provision of the law specifying the powers of the board of supervisors, except as above quoted, that may be construed to grant any power to appropriate funds for the purpose mentioned in your letter.

It is the opinion of this department that the power granted the board of supervisors

> "to make such orders concerning the corporate property of the county as it may deem expedient"

cannot be construed to grant them authority to appropriate money for the purpose of paving in front of the courthouse.

One reason for this view is that the streets and alleys bordering the courthouse are not a part of the county property. The county has no jurisdiction over the streets and alleys of an incorporated town.

Chrisman v. Brandes, 137 Iowa 433; 112 N. W. 833.

You will note that the statute grants them the power to make orders concerning the corporate property of the county. Since the streets and alleys of an incorporated town are not part of the corporate property of a county, the board of supervisors have no authority to make orders concerning the same.

While the board of supervisors has power

> "to build and keep in repair the necessary buildings for the use of the county and of the courts,"

yet this provision of the statute cannot be interpreted to be broad enough to include power and authority to pave the street or highway adjoining the courthouse. The authority granted under the statute is to build and "keep in repair the necessary buildings" for the use of the county. It has never been held that pavement was included within the term "buildings." In a number of cases, however, it has been held that a bridge was not a building. (*Footnote in 9 Corpus Juris,* 686). Such being the case it is the opinion of this department that the board of supervisors have no authority to appropriate or donate public funds for the purpose of assisting in the paving of a street of a town.

However, we do not want it inferred that a county is not liable for the cost of pavement constructed along its property by proper action of the town or city, for the case of *E. & W. Construction Company v. Jasper County,* 117 Iowa 365, is authority for the contrary.

B. J. POWERS, *Assistant Attorney General.*

ILLEGAL LEASE

A lease between the board and a bank is illegal when a member of the board is also an officer in the bank.

February 11, 1919.

Mr. C. H. Cook, County Attorney,
Glenwood, Iowa.

Dear Sir:

Your letter of the 5th inst. addressed to Attorney General Havner has been referred to me for reply.

You state:

> "In view of the fact that there is not sufficient room in the courthouse here the board is considering renting a room for the use of the county superintendent. The room which they contemplate renting is owned by the Mills County National Bank.
>
> "Mr. H. H. Cheney, one of the members of the board of supervisors, is an officer and stockholder in said bank, and I have been asked by Mr. Cheney to present the matter to you.
>
> This is practically the only room in the city available for this purpose."

You then ask:

> "Would the board in your opinion have the right to rent the room from the bank as long as Mr. Cheney is a member of the board and also an officer of the bank?"

There is no doubt that the board would have the right to rent a room outside of the courthouse for the use of the county superintendent, provided there was no suitable location in the courthouse.

Section 468 of the code provides:

> "The board of supervisors shall furnish the clerk of the district court, sheriff, recorder, treasurer, auditor, county attorney and county superintendent with offices at the county seat, together with fuel, lights, blanks, books and stationery necessary and proper to enable them to discharge the duties of their respective offices, but in no case shall any of such officers, except the county attorney, be permitted to occupy an office also occupied by a practicing attorney. Nothing herein shall be construed to include the law books or library of the county attorney."

Also in support of the above conclusion we would refer you to the case of

Hill v. City of Clarinda, 103 Iowa 409,

where a statute similar in character was passed on.

But the question raising the most serious doubt is whether a contract of the character in issue between the board and the Mills County National Bank would be illegal and void, inasmuch as one of the members of the board is also an officer in said bank.

It is a well recognized rule of law that a contract with a public officer, under which his private interest *may* conflict with the interest of the public which he is serving and under which he *may* be tempted to violate his duty to the public is against public policy and void.

Following the rule above referred to, our supreme court has held that a bank could not enforce a contract between a city and a contractor, which contract had been assigned to the bank by the contractor, when a member of the city council is also an officer in said bank.

James v. City of Hamburg, 174 Iowa 301.

In addition to the ruling of our supreme court, the legislature has declared that members of the board of supervisors shall not become parties, directly or indirectly, to any contract to furnish supplies, material or labor to the county.

Section 468-a of the supplement to the code, 1913, provides:

> "Members of boards of supervisors and township trustees shall not buy from, sell to, or in any manner become parties, directly or indirectly, to any contract to furnish supplies, material or labor to the county or township in which they are respectively members of such board of supervisors or township trustees."

It would therefore seem, as a legal proposition, that such a contract as you mention would be illegal and void as against public policy, if not within the literal inhibition of the statute.

W. R. C. KENDRICK, *Assistant Attorney General.*

PURCHASE OF REAL ESTATE FOR COUNTY PURPOSES

Board of supervisors can only purchase real estate for county purposes without vote of people when the aggregate value does not exceed $5,000.

February 11, 1919.

Mr. T. M. McAdam, County Attorney,
Mt. Pleasant, Iowa.

Dear Sir:

Your letter of the 6th inst. addressed to Attorney General Havner has been referred to me for reply.

You state:

> "Our board of supervisors would like to buy a piece of real estate to take in a whole block into the courthouse grounds. They can buy the property for $2,000.00. Some two years ago the board bought other real estate situated on other parts of the same block for the same reason, expending therefor some $3,000.00. Our statute provides that the board may purchase real estate of a value not to exceed $5,000.00 without a vote of the electors for such purpose."

You then ask:

> "The board wishes to know whether the statute means they can buy up to the value of $5,000.00 only once, or whether the statute means they can buy more than once up to the value of $5,000.00."

Section 423 of the supplemental supplement, as amended by chapter 332, acts of the 37th General Assembly, provides:

> "The board of supervisors shall not order the erection of a courthouse or jail when the probable cost will exceed ten thousand dollars or a county home or other building, or bridge, except as provided in section four hundred twenty-four of the code, when the probable cost will exceed five thousand dollars, nor the purchase of real estate for county purposes exceeding five thousand dollars in value, until a proposition therefore shall have been first submitted to the legal voters of the county, and voted for by a majority of all persons voting for and against such proposition at a general or special election, notice of the same being given for the thirty days previously, in a newspaper, if one be published in the county, and, if none be published therein, then by written notice posted in a public place in each township in the county."

So far as we are able to find, the supreme court has never expressly passed upon the question presented. However, under a somewhat similar statute our court has stated that the board could order erection of the structures mentioned in the statute, and in each case spend the limit, all without a vote of the people.

Merchant v. Tama County, 32 Iowa 200.

In fact, section 423, *supra,* expressly gives the board that power. Inasmuch as it would be impossible to erect a building without ground upon which to erect it, then it must be self-evident that, for the erection of the buildings to be used for the different purposes mentioned in the statute, the board would have power to

purchase real estate upon which to erect the building, up to $5,000 for each building. But after the board has already spent $5,000 in the purchase of real estate for any one of such purposes it is equally as clear that the board could not evade that limitation by purchasing a parcel of ground one year for $5,000 and the next year purchase another parcel for $5,000 for the same purpose, and continue that procedure for several years until they had purchased the entire tract of which the former parcels were a part, thereby finally purchasing a tract to be used for one and the same purpose and costing the county more than the amount which the board may legally spend without a vote of the people.

We are, therefore, of the opinion that your board has power only to purchase property in the block in question for courthouse purposes not to exceed $5,000 in value in the aggregate.

W. R. C. KENDRICK, *Assistant Attorney General.*

PLACE OF PAYMENT IN COUNTY BONDS

Board of supervisors has no right to make bonds payable at any other place than at the county treasury.

August 31, 1920.

Hon. F. S. Shaw,
Auditor of State.

Dear Sir:

You have requested an opinion from this department upon the following:

> "Is it a legal contract for the supervisors to arrange for bonds and interest to be paid in some distant place, thus forcing the treasurer to pay out money without immediate delivery of coupons?"

There are two lines of authorities covering the question. In the absence of any designation, county bonds are payable at the office of the county treasurer. One line of authorities holds that, unless expressly authorized by legislative enactment, the board of supervisors has no power to make county bonds payable at any other place than at the office of the county treasurer.

People v. Tazwell County Supervisors, 22 Ill. 147;
Johnson v. Stark County, 24 Ill. 75;
City of Pekin v. Reynolds, 31 Ill. 529.

According to other decisions, however, when no place of payment is designated by statute, the power to issue bonds carries with it the power to make the same payable beyond the limits of the county.

Skinker v. Butler County, 112 Mo. 332;
Lynde v. The County, 83 U. S. 86.

In the case of *People v. Tazwell County, supra,* the court in passing upon this question, says at page 151:

> "It is objected that the county had no right to issue bonds or other obligations, payable at any other place than at the county treasury. * * * States, counties and corporations, created for public convenience only, are not required to seek their creditors to discharge their indebtedness, but when payment is desired the demand should be made at their treasury. That is the only place at which payment can be legally insisted upon, and it is the only place where the treasurer can legally have the public funds with which he is entrusted. To authorize the auditor to draw his warrants on the treasurer, payable in a sister state or in a foreign country, necessarily imposes an obligation on the treasurer to provide funds at that place to meet them. And his duties requiring him at the treasury would require the employment of agents, the transmission of the funds at a risk of loss and at a considerable expense in charges, insurance and discounts, which are not incident to its payment at the treasury. And the same reasons apply with equal force to cities, counties and public corporations of a similar character. The legislature has conferred no such general power on such bodies, and in its absence they have no power to make their indebtedness payable at any other place than at their treasury."

While in the case of *Lynde v. The County, supra,* Justice Swayne, delivering the opinion of the court, says at page 13:

> "It is not a valid objection that the bonds were made payable and were sold beyond the limits of the county of Winnebago and of the state of Iowa. The power to issue them carried with it authority to the county judge as to both these things—to do what he deemed best for the interests of the county for which he was acting.
>
> "These points have been so frequently ruled in this way that it is needless to cite authorities to support them."

However, the supreme court of Iowa has passed upon a somewhat similar question in an action upon a written contract between a contractor and a school district for the sale of a number of fur-

naces, the contract providing for payment at a distant city. Our court followed the rule in Illinois, and held that a school district or other quasi municipal corporations has no authority to make a contract fixing the place of payment at any other place than its treasury without specific legislative authority.

Furnace Company v. District of Seymour, 99 Iowa 115.

In the Iowa case just city the court said at page 119:

> "Now, it has been held, and, as we think, correctly, that a school board or other quasi municipal corporation has no right to make a contract fixing the place of payment at any other place than its treasury without specific legislative authority. See *People v. County of Tazwell,* 22 Ill. 147; *City of Pekin v. Reynolds,* 83 Am. Dec. 244."

Our supreme court has uniformly held that a county is a quasi municipal corporation.

Soper v. Henry County, 26 Iowa 264;
Hanson v. City of Cresco, 132 Iowa 533.

I am unable to find any statute in this state specifically authorizing the payment of county bonds or interest-bearing coupons to be made at any other place than at the office of a county treasurer. However, the fact that a coupon is made payable somewhere other than at the treasury of county will not invalidate it, but the objectionable words will be regarded as surplusage.

Johnson v. Stark, 24 Iowa 75.

I am therefore of the opinion that county bonds and interest-bearing coupons fixing the place of payment at any other place than the office of the county treasurer will not be invalid, but in the absence of specific legislative authority such provisions will be regarded as surplusage, and could be lawfully ignored by the county treasurer when such bonds or coupons mature and insist upon their being presented at his office before making payment.

W. R. C. KENDRICK, *Assistant Attorney General.*

BONDS OF DEPOSITORIES OF COUNTY FUNDS

New bonds should be required of depositories of county funds when a county treasurer resigns and a new treasurer is appointed.

January 10, 1920.

Mr. J. F. Wall, Chief Clerk,
County Accounting Department.

Dear Sir:

Your request for the opinion of this department on the following question has been referred to me.

You state:

> "Would the resignation of the county treasurer necessitate the filing of a new bond by depository bank, or would the present bond be operative under a new treasurer?"

Section 1457 of the 1913 supplement to the code provides in part as follows:

> "A county treasurer shall be liable to a like fine for loaning out, or in any manner using for private purposes, state, county or other funds in his hands, but the county treasurer shall, with the approval of the board of supervisors as to place of deposit, by resolution entered of record, deposit such funds in any bank or banks in the state to an amount fixed by such resolution at interest at the rate of at least two per cent per annum on ninety per cent of the daily balances payable at the end of each month, all of which shall accrue to the benefit of the general county fund; but before such deposit is made such bank shall file a bond with sureties to be approved by the treasurer and the board of supervisors in double the amount deposited, conditioned to hold the treasurer harmless from all loss by reason of such deposit or deposits; provided that in cases where an approved surety company's bond is furnished, said bond may be accepted in an amount equal to ten per cent more than the amount deposited. Said bond shall be filed with the county auditor and action may be brought thereon either by the treasurer or the county as the board of supervisors may elect; * * *"

The form of bond used in this class of cases runs to the county, and the particular treasurer named, and is for the protection of each, and suit may be brought thereon by either, as the board of supervisors may elect.

I take it for granted that when a county treasurer resigns, and the board of supervisors appoint a successor, that a full and complete settlement is made with the retiring officer, the same as there would be at the end of a term of office; and, as the supreme court has held in the case of *State v. Rhein, Treasurer,* 149 Iowa

76, that the statute authorizes the county treasurer, and not the board of supervisors, to select the depositories for the county funds, that it would be proper and the safer policy for the new treasurer to designate the depositories, subject, of course, to the approval of the board, and require the execution and approval of new bonds.

J. W. SANDUSKY, *Assistant Attorney General.*

STENOGRAPHER'S FEES FOR ATTENDING PRELIMINARY EXAMINATION

The board of supervisors is not authorized to allow fee of stenographer reporting preliminary hearings.

January 10, 1919.

J. H. Wyllie, County Attorney,
Sigourney, Iowa.

Dear Sir:

Your letter of the 18th ult. addressed to Attorney General Havner has been referred to me for reply, but owing to other matters demanding my entire attention I have been unable to answer your letter earlier.

You ask in substance whether the county attorney can call a stenographer and report the preliminary examination in state cases and charge the expense to the county.

The authority of the board of supervisors to allow such a claim, if at all, will be found in section 5227 of the code and paragraph 11, section 422 of the supplemental supplement, 1915.

Section 5227 provides:

> "The magistrate shall, in the minutes of the examination, write out or cause to be written out the substance of the testimony given on the examination by each witness, the names, place of residence, business or profession of each witness, and the amount he is entitled to for mileage and attendance. . By agreement of parties or their attorneys the magistrate may order the examination taken down in shorthand and certified substantially in the manner provided for taking depositions by a stenographer, but the cost thereof shall not be taxed against the county."

Paragraph 11, section 422, provides:

> "To represent the respective counties, and to have the care and management of the property and business thereof, in all cases where no other provisions shall be made."

The board of supervisors has the care and management of the property and business affairs of the county, and unquestionably the enforcement of the criminal laws are affairs of the county. But it will be observed that the powers conferred by paragraph 11 may be exercised in all cases where no other provision has been made, and if other provision has been made, then such power does not exist.

Now, then, it is made the duty of the magistrate, under section 5227, to write out or cause to be written out the substance of the testimony given on the examination by each witness. If he causes the testimony to be reduced to writing he does so for his own convenience, and it has been held that the county is not chargeable therefor.

Sanford v. Lee County, 49 Iowa 148.

However, by agreement of the parties or their attorneys the magistrate may order the testimony taken down in shorthand, but in such event section 5227, *supra,* provides that the cost thereof shall not be taxed against the county.

By referring to paragraph 11, aforesaid, it will be found that the board may exercise powers in the management of the affairs of the county in all matters where no other provision is made; but section 5227 makes other provisions, and declares that the costs incurred in taking down in shorthand the testimony of a witness at a preliminary examination shall not be taxed against the county.

It is therefore evident that the board of supervisors would not be authorized in allowing the fee of a shorthand reporter in preliminary hearings before a justice of the peace.

W. R. C. KENDRICK, *Assistant Attorney General.*

FILLING OF VACANCIES TO OCCUR AFTER TERM EXPIRES

A board of supervisors cannot forestall the rights and prerogatives of their successors by making prospective appointments to fill anticipated vacancies in an office, the term of which cannot begin until after their own term and power of appointment has expired.

October 31, 1919.

Mr. A. B. Hoover, County Attorney,
Marshalltown, Iowa.

Dear Sir:

We have your letter of October 27th in which you request this department to render you an opinion upon the following propositions:

> "A member-elect of the board of supervisors of this county, who will take office the first of January, has asked me whether or not the old board that will retire at the end of the year has a right to make appointments for superintendent of the county farm, superintendent of the poor, etc., before it retires, or whether such appointments should be made by the new board as it shall be organized after the old board goes out of office.
>
> "It seems that this old board is contemplating making these appointments for the coming year before it goes out of office instead of giving the new board that privilege."

In answering your inquiry, permit me to state that I am not aware of any statute directly affecting the question submitted to us. Section 2243, supplement, 1913, governs the appointment of a steward for the county farm and provides as follows:

> "The board may appoint a steward of the county home, who shall be governed in all respects by the rules and regulations of the board and its committees, and may be removed by the board at pleasure, and who shall receive such compensation, perform such duties, and give such security for his faithful performance as the board may direct."

You will observe from a reading of this section that the one who holds the office of steward does so at the pleasure of the board of supervisors and that he has no fixed term of office.

We now direct your attention to the rule governing the right of a public board to make a prospective appointment of a public officer who will not commence his term of office until after the appointing board has gone out of office. There are two cases in Iowa in which it has been held that a school board has no authority to enter into a contract with a teacher wherein such teacher is to perform the duties required of him wholly within the time of service of the new board of school directors.

In the case of *Burkhead v. Independent School District of Independence,* 107 Iowa 29, the old board entered into a written

contract with the plaintiff by the terms of which he agreed to render services as superintendent and teacher of its schools for a period of five years. He taught school for three years under this contract and then was discharged by the defendant school corporation and notified that the contract was null and void. He then brought an action for the purpose of recovering the salary for the year ending in June following his discharge. The supreme court, after consideration of the various statutes with reference to the employment of teachers, stated:

> "We think that an examination of the statutes leads to the inevitable conclusion that the legislature intended such contracts to be limited in duration to the school year as determined by the board of directors. If not so limited, then the directors might employ teachers for any number of years, tie up the hands of their successors in office, and wrest from the control of the people the schools which they are required to support. The spirit of these statutes is repugnant to the idea that one board of directors, by contract wholly to be performed in the future, can divest future boards of the power to select teachers, and make contracts therefor, and indirectly take from the people all the advantages to be derived from annual elections. This conclusion is strengthened by the universal practice of employing a teacher for a single school year."

In the more recent case of *Independent School District v. Pennington,* 181, Iowa 933, the facts disclose that after the election of one new member to the school board but prior to the time he should enter office, namely, July 1st, the old school board hired the defendant Pennington as school teacher for the coming year. Her services were to be performed wholly within the term of the board thereafter to be organized. Our court adhered to the rule announced in the case of *Burkhead v. Independent School District,* and held that the board had no authority to employ such teacher under such circumstances.

These cases announce the rule with reference to the employment of school teachers in Iowa. I have not been able to find any other cases in the Iowa reports in which this question has been raised. However, the matter has been passed upon in the opinions of several states, notably New Jersey and Ohio.

In the case of *State ex rel Bosnes v. Meehan,* 45 N. J. Law Rep. 186, it was held that an outgoing board of freeholders could not fill the office of keeper of the jail that was not to become vacant during

the term of their own official life. This was the holding even though the law provided that by a vote of two-thirds of the members of the board of freeholders that such keeper of the jail could be removed at any time.

Again in the case of *Fitch v. Smith,* 57 N. J. Law Rep. 526, it was held that an outgoing board of trustees of public schools could not appoint one to an office that would not become vacant during the term of their own official life. This same rule was adhered to in the case of *Erie Railroad Company v. Patterson,* 74 N. J. Law Rep. 738.

In the case of *Potter v. Union Township,* 91 N. J. Law Rep. 129, the old township committee sought to fix the salary of the assessor for the year which commenced after the expiration of their term of office. The new board cut the salary of the assessor, and in passing the matter, the New Jersey supreme court, at page 132, stated:

> "Moreover, it does not seem reasonable to believe that the legislature ever intended that the governing municipal body, in the expiring moments of its dissolution, should have the authority to fix the salaries of officers whose terms are to begin under a new governmental body. Such a condition would preclude the bringing about of economy in its administration of municipal affairs."

In the case of *State v. Sullivan,* 81 Ohio 79, it appears that the governor, under his power of appointment, appointed one James C. Morris as member of the railroad commission of the state of Ohio for a term of six years, the said term to commence on the first Monday in February, 1909, and to terminate on the first Monday in February, 1915, This appointment was confirmed by the Senate of the state of Ohio. The term of office of the governor who made the appointment expired at noon on the 11th day of January, 1909, and at that time the governor-elect took office. On January 21, 1909, the new governor appointed one John Sullivan to be a member of said railroad commission in the place of James C. Morris, who had been appointed by the former governor. The supreme court, after careful review of the various decisions, announced the law to be well settled under the common law that an officer clothed wtih power of appointment to a public office cannot forestall the rights and prerogatives of his successor by making appointments to fill anticipated vacancies in an office,

the term of which cannot begin until after his own term and power of appointment has expired.

In view of these decisions, we are of the opinion that your present board of supervisors have no authority to make appointments to the various county offices when such appointees are not to take office until after the expiration of the term of the board now serving. We are of the opinion that such procedure is contrary to public policy and that the making of such appointments in no way prevent the new board from filling the offices by such appointments as they see fit to make.

B. J. POWERS, *Assistant Attorney General.*

USE OF FUND TO CARE FOR INSANE

The board of supervisors have no authority to use the tax levied for care of inmates in the state hospitals for insane for any other purpose nor can the fund be transferred to any other fund.

December 3, 1919.

Mr. Harry Langland, County Attorney,
Nevada, Iowa.

Dear Sir:

We have your letter of November 11th in which you state:

> "Last year our board of supervisors made a levy for state insane fund to take care of county's insane at Clarinda. During this year the county transferred about forty patients from Clarinda to our new county home. As a consequence our county insane fund is exhausted. After it became exhausted we have been using our poor fund. It is getting rather low. Our state insane fund is in good shape. The board wishes me to write to your office for an opinion as to whether or not they could transfer any money from the state insane fund to either the county insane fund or the county poor fund."

In answering your inquiry, permit us to state that section 2292 of the supplement, 1913, expressly provides that the tax levied to care for the inmates of the state hospitals for the insane and the inmates of the hospital for inebriates cannot be used for any other purpose than that designated nor can it be transferred to any other fund.

The statute so declares and is conclusive upon the matter.

B. J. POWERS, *Assistant Attorney General.*

TRANSFER OF FUNDS

Where there is money in the poor farm fund in excess of the needs of such fund the same should be transferred to the general fund of the county as provided in section 454 of the code.

October 29, 1919.

Mr. A. B. Hoover, County Attorney,
Marshalltown, Iowa.

Dear Sir:

We have your letter of October 24th in which you state:

> "Last year there was a levy made for the purpose of paying for additional land for our poor farm, and the fund secured from such levy was put into what is called the poor farm fund. After paying for the land they found they had about twelve hundred dollars in the fund more than was necessary for the purchase price, and the auditor has asked me for an opinion as to what can be done with the surplus in order that it can be put into use and not lie idle in a fund which may not be used again for several years.
>
> "I have called his attention to sections 454 and 456 of the code, which seems to provide that such funds shall go into ordinary county fund, but he desires to know whether it cannot be transferred into the poor fund, as they are in need in that fund more than in any other. In fact, the poor fund is heavily overdrawn."

Section 454 of the code, to which you refer, provides as follows:

> "In case the amount produced by the rate of tax proposed and levied exceeds the amount sought for the specific object it shall not therefore be held invalid, but the excess shall go into the ordinary county funds."

Section 456 of the code states:

> "In any county of this state where any special levy has been made to pay any claim, bond or other indebtedness, and the same shall have remained in the treasury of the county, uncalled for, for a period of three years, the board of supervisors of such county may authorize such unclaimed fund to be transferred to the general county fund."

These sections clearly state that the surplus shall be transferred into the general fund. I have been unable to find any statute which would warrant any other disposition than that provided for in the preceding section.

In 1898 this department was called upon to pass upon the question whether or not the board of supervisors had authority to transfer money from the bridge fund to the county fund, and in that opinion Attorney General Milton Remley held that there was no authority for the board to make such transfer. (Attorney General's Report, 1898, page 169). The writer of the opinion just referred to also held that it was in violation of law to transfer money raised for the purposes of the board of health to the road fund. (Attorney General's Report, 1898, page 318).

We therefore state that it is the opinion of this department that there is no authority to transfer the surplus in your fund known as the "Poor Farm Fund" to any other than the general fund.

B. J. POWERS, *Assistant Attorney General.*

DESTRUCTION OF TREES INTERFERING WITH TRANSMISSION LINES

Board of supervisors has no authority to destroy trees merely because they interfere with electric transmission lines.

July 19, 1920.

Mr. Wilson Cornwall, County Attorney,
Spencer, Iowa.

Dear Sir:

Upon my return to the office from an extended absence I found your letter of the 8th inst. enclosing a letter from A. W. Chamberlain, county auditor, in which he asks for an interpretation of chapter 417, acts of the 37th General Assembly, in the following particulars:

> "What is the meaning of the forty-rod windbreak mentioned in section 1, and to what extent can the board remove trees in this forty-rod windbreak?
>
> "What is the meaning of the wording in section 4, which reads as follows: 'Nor shall it apply to trees along the highway which are a part of a grove or forest that extends more than five rods from the road line?'
>
> "In a general way the board wants to know to what extent they can cut down trees so there will be no interference with electric lines along the highway."

Taking your questions in their order, it is apparent that the board of supervisors has no power to destroy or cut down any kind

of trees used as a windbreak, except that in the event a windbreak consists of Osage orange, the board has the authority to order them trimmed

"by cutting back within five feet of the ground."

As to your second question, chapter 417, *supra,* does not apply to

"trees along the highway which are a part of a grove or forest that extends more than five rods from the road line."

It is evident, therefore, that the board of supervisors has no authority to order trimmed or destroyed any part of a grove or forest along a public highway when such grove or forest is large enough to extend back more than five rods from such highway. However, a distinction should be drawn between a grove and a windbreak.

As to the third question, the board of supervisors has no arbitrary power to cut down trees simply because such trees interfere with electric transmission lines along the public highway. The only authority conferred upon the board by chapter 417, relative to trimming or cutting down trees, is to trim Osage orange or hedges of shrubbery along the public highway, and then only by cutting them back within five feet of the ground, or to destroy altogether any and all trees on the line of the highway along a public road except Osage hedge fences and the variety and character of trees mentioned in section 4 of said chapter.

W. R. C. KENDRICK, *Assistant Attorney General.*

REMOVAL OF TREES OBSTRUCTING HIGHWAY

The removal of trees along line of highway is within the discretion of the board where such trees are not a part of a windbreak or included in a grove or forest extending back more than five rods from road line.

February 5, 1920.

Mr. Lew McDonald, County Attorney,
Cherokee, Iowa.

Dear Sir:

Your request for the opinion of this department on the following question has been referred to me for attention:

"Will you please give me your interpretation of the statute, the exceptions on the bottom of page 445 of chapter 417 of the acts of the 37th General Assembly. The case is this: We

have an abandoned grove that has some willows, maple, walnut and other trees in it that holds the snow in the road. The board wants the same cut down. They are further than forty rods from any building, some on the highway line and some back a short distance. I am wondering how far the discretion of a board of supervisors would go in cutting such trees as excepted by the statute above named. If there is positively no injury to any landowner, except the sentiment of holding the trees, and it is positively shown that they are a detriment to the road, could the board in their discretion take action to cut the same?''

Section 1 of the chapter you refer to provides that the owner of Osage orange and hedges of shrubbery other than trees along the public highway shall keep the same trimmed by cutting back within four feet of the ground. That with the exception of Osage orange hedge fences, no trees or shrubbery, except as hereinafter provided, shall be permitted on the line of the highway along the public road, unless used for certain stated purposes.

Section 2 provides for the enforcement of the provisions of the act, and section 4 enumerates certain exceptions, and reads as follows:

''This act shall not apply to evergreen trees, walnut trees, oak or maple trees, or other hardwood trees, which in the judgment of the board of supervisors should be let stand, nor shall it apply to trees along the highway which are a part of a grove or forest that extends more than five rods from the road line, nor to any single tree or group of trees (not exceeding ten in number) which by reason of their age or beauty the board of supervisors in its judgment believes should not be cut down.''

If the trees in question are not embraced within what is termed ''windbreak'' as defined and limited in section 1, nor included in a grove or forest that extends more than five rods from the road line, as stated in section 4, then they are embraced within the classes, as to and concerning which, the board of supervisors may exercise its judgment in allowing them to stand, or in cutting them down. In other words, if the trees sought to be removed are not included in a windbreak for residences, orchard or feed lot, limited as section 1 provides, or a grove or forest extending back more than five rods from the road line, then it is left to the judgment of the board of supervisors whether they shall be removed or allowed to stand.

J. W. SANDUSKY, *Assistant Attorney General.*

USE OF TOWNSHIP ROAD MACHINERY BY COUNTY

Where a township allows a county to use its road machinery for constructing roads within the township and there is no agreement as to compensating the township for the use thereof the township is not thereafter entitled to compensation.

July 29, 1920.

Mr. W. H. Wehrmacher, County Attorney,
Waverly, Iowa.

Dear Sir:

We have your request for an opinion upon the following proposition:

> "Can a township legally charge the county for the use of road machinery that the county may use, which belongs to the township? In several instances in this county township road machinery has been used within the townships, and the townships have filed a bill against the county for the use thereof."

We assume from the statement above made that the township authorities gave permission to the county to use its road machinery, and it is the opinion of this department that if no agreement was at that time made and entered into with reference to compensating the township for the use of the road machinery that the township is not at present in a postion to make claim for the use of such machinery. We think we may properly assume that the township anticipated that it would receive a direct benefit by permitting the county to use its machinery in the building of roads within the townships. Hence, in the absence of an agreement with reference to compensation the township is not legally entitled to the same.

B. J. POWERS, *Assistant Attorney General.*

PAYMENT OF EXPENSES FOR ESTABLISHMENT OF QUARANTINE

The expenses incident to maintaining and raising quarantine should be audited by the local board of health and submitted to the board of supervisors who may pay such items from the poor fund of the county.

May 27, 1920.

Mr. A. J. Burt, County Attorney,
Emmetsburg, Iowa.

Dear Sir:

We have your request for an opinion upon the following proposition:

> "A number of bills have been filed by the marshal of one of our towns and by the township clerks for putting up quarantine signs. Should these bills be paid by the county?"

In answering your inquiry, permit me to state that the provisions of section 2571 of the code provides that:

> "All expense incurred in the enforcement of the provisions of this chapter (relating to the state board of health), when not otherwise provided, shall be paid by the town, city or township; in either case all claims to be presented and audited as other demands. In the case of townships the trustees shall certify the amount required to pay such expenses to the board of supervisors of the county, and it shall advance the same, and, at the time it levies the general taxes, shall levy on the property of such township a sufficient tax to reimburse the county, which, when collected, shall be paid to and belong to the county."

The provisions of the preceding section were repealed by chapter 156 of the acts of the 33rd General Assembly and provision was made by the enacting of section 2571-a, supplement, 1913, as amended by chapter 80, acts of the 38th General Assembly, that:

> "All bills and expenses incurred in carrying out the provisions of this section and establishing, maintaining and raising quarantines and furnishing necessary detention hospitals shall be filed with the clerk of the local board of health. The board at its next regular meeting or special meeting called for the purpose shall examine and audit the same, and if found correct, approve and certify the same to the county board of supervisors for payment. If the board of supervisors determine such bills payable, under the provisions of this act, *it shall order the county auditor to draw warrant therefor upon the poor fund of said county.* * * *"

Further provision is made by sections 2575-a4 and 2575-a5 for taking care of the expense of those under quarantine for contagious diseases, but when you make a complete analysis of them you will find that the method of payment is that set forth in section 2571-a, supplement, 1913, as amended by chapter 80, acts of the 38th General Assembly.

It is, therefore, the opinion of this department that under the present statute the cost of establishing and raising quarantine is to be cared for out of the poor fund of the county.

B. J. POWERS, *Assistant Attorney General.*

USE OF TAXES LEVIED FOR TREATMENT OF VENEREAL DISEASES

The tax levy authorized by chapter 299, acts of 38th General Assembly is exclusively for the treatment of venereal diseases and the erection and equipment of a detention hospital for the treating of those afflicted with such diseases. The board of supervisors have no authority to use the funds derived from such tax for any other purpose whatever.

September 23, 1919.

Mr. Verner Gabrielson, County Attorney,
Fort Dodge, Iowa.

Dear Sir:

We have your letter of September 22d, in which you state:

> "Chapter 299 of the laws of the 38th General Assembly deals with public health. Section 13 of this chapter provides for a detention hospital. Section 14 provides that a levy of two mills on the dollar may be made for the purchase of real estate for hospital purposes. The board of supervisors of this county asked me for an opinion on this chapter, the point being whether or not the board of supervisors can levy a tax for a detention hospital only or whether they could levy a tax for a general hospital which could include a detention hospital. I have advised them that in my opinion they have no right to levy a tax under this chapter for general hospital purposes and that they can levy a tax for a detention hospital only."

In answering your question, permit us to state that we are of the opinion that the advice you have given your board of supervisors is correct.

The chapter relates solely to the treatment of venereal diseases, and the provision made therein for a hospital is for a hospital for the treatment of such diseases. We do not believe that the legislature intended that the tax levy provided for in this act or the bond issue provided for therein should be directed to purposes other than for the erection of a hospital for the purpose of treating such disease or diseases. In fact, section 14 of the chapter in question expressly provides that the tax levied for the purpose therein mentioned shall be used for the purpose specified by said act "and for no other purpose whatever." This statement in itself is sufficient authority for the stand you have taken.

B. J. POWERS, *Assistant Attorney General.*

SALE OF COUNTY HOME BY BOARD OF SUPERVISORS

Paragraph 20 of section 422 of the supplemental supplement, as amended by chapter 33, 37th General Assembly, authorizes the board to sell county home property and they are not required to submit the matter to a vote of the people of the county.

February 9, 1920.

Mr. L. A. Riter, County Attorney,
Rock Rapids, Iowa.

Dear Sir:

We have your favor of the 5th inst. requesting the opinion of this department on the question of the authority of the board of supervisors to sell county home property without first submitting the question to the qualified voters of the county at an election held for that purpose

Section 422 of the supplemental supplement to the code, which is comprised of twenty-five separate paragraphs, and as amended by chapter 33, acts of the 37th General Assembly, provides in part as follows:

> "The board of supervisors, at any reguar meeting, shall have the following powers, to-wit:
>
> "20. To purchase for the use of the county any real estate necessary for the erection of buildings for the support of the poor of the county, and for a farm to be used in connection therewith; to remove the site of and designate a new site for the erection of any building or buildings for the care and support of the poor, and in case of such removal or change of site or purchase of real estate for buildings and a place to be kept and used for the care and support of the poor, to sell any interest that the county may have in the real estate and improvements thereon which were therefore used and occupied for that purpose; and to make appropriations not exceeding three hundred dollars in any one year for the growing of experimental crops thereon under the direction of the board."

Section 423 of the 1913 supplement, as amended by chapter 71, acts of the 38th General Assembly, provides in part as follows:

> "The board of supervisors shall not order the erection of a courthouse, jail or county home, when the probable cost will exceed ten thousand dollars, or other building or bridge, except as provided in section 424 of the code, when the

> probable cost will exceed five thousand dollars, nor the purchase of real estate for county purposes exceeding two thousand dollars in value until a proposition therefor shall have been first submitted to the legal voters of the county, and voted for by a majority of all persons voting for and against such propositions at a general or special election."

Section 2241 of the 1913 supplement to the code further provides that the board of supervisors of each county may order the establishment of a county home in such county, whenever it is deemed advisable, and also the purchase of such land as may be necessary for use of the same, and may make the requisite contracts and carry such order into effect, provided the cost of said county home and land, if in excess of five thousand dollars, shall be first estimated by said board and approved by a vote of the people.

You will observe that these limitations placed upon the board of supervisors in all cases pertain to expenditures contemplated by the board, and it does not appear in these section, nor elsewhere in the code, as far as I have been able to find, that any limitaion is placed upon the board in selling county property, as authorized by subdivision 20 of section 422 and as amended by the acts of the 37th General Assembly, and I am, therefore, of the opinion that it will not be necessary for the board of supervisors of your county to submit to the voters thereof the question of selling the county home property.

J. W. SANDUSKY, *Assistant Attorney General.*

DEPOSITORY OF PUBLIC FUNDS BELONGING TO COUNTY

Before a county treasurer should deposit public funds in any bank such depository should file a bond guaranteeing the security of such funds as provided by law. This bond should be required in every case, and even though such bank is not within the county.

November 26, 1919.

Mr. J. M. C. Hamilton, County Attorney,
Fort Madison, Iowa.

Dear Sir:

We have your letter of November 24th in which you state:

> "The county treasurer has requested my opinion as to whether or not banks located outside of the county, in which banks county funds are kept or deposited, should file with

the auditor a bond as provided for by section 1457, supplement to the code, 1913, under the following circumstances:

"Where drainage or other bonds are issued the place of payment is frequently specified at some banking house frequently holding funds in the amounts of several thousand dollars before remitting to the county treasurer."

In answering your inquiry, we first desire to set forth section 1457, supplement to the code, 1913, which reads:

"A county treasurer shall be liable to a like fine for loaning out, or in any manner using for private purposes, state, county or other funds in his hands, but the county treasurer shall, with the approval of the board of supervisors as to place of deposit, by resolution entered of record, deposit such funds in any bank or banks in the state to an amount fixed by such resolution at interest at the rate of at least two per cent per annum on ninety per cent of the daily balances payable at the end of each month, all of which shall accrue to the benefit of the general county fund; but before such deposit is made, such bank shall file a bond with sureties to be approved by the treasurer and the board of supervisors in double the amount deposited, conditioned to hold the treasurer harmless from all loss by reason of such deposit or deposits; provided, that in cases where an approved surety company's bond is furnished, said bond may be accepted in an amount equal to ten per cent more than the amount deposited. Said bond shall be filed with the county auditor and action may be brought therein either by the treasurer or the county as the board may elect; and the state treasurer shall be liable to a fine of not more than ten thousand dollars for a like misdemeanor. But nothing done under the provisions of this section shall alter or affect the liability of the treasurer or the sureties of his official bonds."

The preceding section, when taken in connection with the other provisions in the chapter of the code with reference to the security of revenue, clearly indicates that the legislature intended that every depository of public funds should give bond for their safe keeping.

The county treasurer is bound to account for all funds passing into his possession, and in order to protect such treasurer in depositing county funds in the various banks of the state provision was made that such depositories should give to the treasurer a bond guaranteeing the safe keeping of such funds.

The security of the public revenue is of supreme importance and we are of the opinion that the interests of the public, as well as the

exercise of sound business judgment on the part of the treasurer, would sanction a rule requiring all depositories of public funds to give bond for their safe keeping.

The advice which you have given to your county treasurer, holding that such depositories should give bond in the case you presented, is directly in line with the thought and opinion of this department.

B. J. POWERS, *Assistant Attorney General.*

COMPENSATION FOR CARRYING COUNTY WARRANTS

County cannot agree to pay compensation other than interest to a banking house for carrying warrants of county.

July 15, 1919.

Mr. George E. Allen, County Attorney,
Onawa, Iowa.

Dear Sir:

Your letter of July 12th to Mr. Havner has been referred to me for answer.

You state in your letter that the proposition of the White-Phillips Company to which your letter refers is as follows:

> "We hereby agree to carry all the warrants which your county may issue during the year 1919 on its various funds, when the said warrants are properly stamped by the treasurer of your county, "Not paid for want of funds." We agree to cash these warrants at their full face value. The warrants are to bear interest at the rate of 5 per cent from the date of stamping by the treasurer. We also agree to furnish the county with the necessary sight draft envelopes required to draw on us for these warrants free of expense to the county.
>
> "During the month of January, 1920, the county is to agree to take up these warrants at full face value plus all accrued interest at the rate of 5 per cent, or we will exchange these warrants for bonds as stipulated in another letter to your county. We also agree to furnish the county with all the necessary legal proceedings required to issue bonds free of charge to the county.
>
> "For our services in connection with handling these warrants and in guaranteeing and protecting the credit of the county, the county agrees to pay us at the time of taking up the warrants 1 per cent of the face value of the warrants which we are carrying.
>
> "Respectfully submitted,
> "THE WHITE-PHILLIPS COMPANY."

I think there are several objections to entering into a contract upon the proposition submitted by the White-Phillips Company.

It is sufficient, however, to call attention to the fact that under the provisions of section 403 of the supplement to the code, 1913, county warrants are to draw 5 per cent interest after they are stamped "Not paid for want of funds." To permit an arrangement such as is contemplated by the proposition of the White-Phillips Company in effect authorizes the issuance of warrants bearing a greater rate of interest than the statute permits. I am certain that the board of supervisors cannot do by indirection what is prohibited if done directly.

Paragraph 11 of section 422 of the supplement to the code, 1913, is not broad enough to permit the board of supervisors to conduct the business of the county in a manner other than provided by statute, and paragraph 22 of said section merely provides for the adoption of rules and regulations for the government of the board as an organization and does not confer any additional powers.

I do not think your board ought to enter into the proposed contract.

SHELBY CULLISON, *Assistant Attorney General.*

SALE OF COUNTY FUNDING BONDS

County funding bonds should not be sold on contract before issue but should only be sold after issue.

June 24, 1919.

Mr. George E. Allen, County Attorney,
Onawa, Iowa.

Dear Sir:

Your letter of the 18th inst. to Mr. Havner has been referred to me for reply.

You enclose a contract between the White-Phillipps Company of Davenport, Iowa, and the board of supervisors, treasurer and auditor of your county, wherein it is provided that the White-Phillipps Company will honor and pay upon presentation to it all warrants of the county drawn upon its road or bridge funds during the year 1919, and will accept on January 1, 1920, in exchange for said warrants the funding bonds of the county in an amount sufficient to cover all warrants for which there is not

enough money in the treasury in the respective funds to pay the warrants on said debt, the bonds to bear interest at the rate of five per cent and mature in equal annual installments from 1921 to 1937, and to be received by the Wihte-Phillipps Company at a premium of $3.50 per thousand dollars of bonds issued.

You ask whether the county officials mentioned have authority to make such a contract, and state that it seems to you that it is a serious question whether an agreement to issue bonds to take up warrants not yet issued for indebtedness not yet incurred is of any validity.

Section 403 of the supplement to the code, 1913, authorizes the board of supervisors to issue funding bonds whenever the outstanding indebtedness of the county on the first day of January, April, June and September in any year exceeds the sum of $5,000.

Section 404 of the supplement to the code, 1913, provides:

> "Whenever bonds issued under this chapter shall be executed, numbered consecutively, and sealed, they shall be delivered to the county treasurer and his receipt taken therefor, and he shall stand charged on his official bond with all bonds delivered to him and the proceeds thereof, and he shall sell the same, or exchange them, on the best available terms, for any legal indebtedness of the county outstanding on the first day of January, April, June, or September next preceding the resolution of the board authorizing their issue, but in neither case for a less sum than the face value of the bonds and all interest accrued on them at the date of such sale or exchange. And if any portion of said bonds are sold for money, the proceeds thereof shall be applied exclusively for the payment of liabilities existing against the county at and before the date above named. * * *"

You will note that this statute contemplates that the treasurer shall not sell the bonds until after they are issued, and that he shall then sell or exchange the same on the best available terms.

I do not think that the contract which you enclose is one that should be entered into by the county, and I believe that it contravenes the terms of the statutes just quoted. The bonds have not yet been issued, and whether the price called for in the contract is the best available cannot be determined at this time. It may be that the premium agreed to be paid by the White-Phillipps Company is as large as the county may receive after the bonds are

issued, but on the other hand the treasurer may receive an offer for the bonds when issued which will bring a greater premium than provided in this contract, and if the contract is binding, he could not accept a greater offer.

In my opinion the contract cannot be sustained.

SHELBY CULLISON, *Assistant Attorney General.*

DISPOSITION OF FINES

All fines collected for violating state laws in prosecution before city mayors should be turned over to the county treasurer.

December 18, 1919.

Mr. F. J. Kennedy, County Attorney,
Estherville, Iowa.

Dear Sir:

Your letter of the 6th inst. addressed to the attorney general has been referred to me for reply.

You state:

> "That fines collected for the violation of the liquor laws in prosecution before the mayor of your city are paid to the city treasurer."

You then ask:

> "Should they not be turned over to the county treasurer?"

The law applicable to a determination of your question will be found in section 4338 of the code, which reads as follows:

> "Fines and forfeitures not otherwise disposed of go into the treasury of the county where the same are collected, for the benefit of the school fund."

Pursuant to the statutory provision above quoted, all fines assessed and collected for any breach of the penal laws of the state in a proceeding before a city mayor should be turned over to the county treasurer.

I call your attention to the case of *Gunn v. Mahaska County*, reported in 155 Iowa at page 527, wherein this question is very ably discussed in a general way.

W. R. C. KENDRICK, *Assistant Attorney General.*

AUTHORITY OF BOARD OF SUPERVISORS OVER POOL HALLS

The board of supervisors may license pool halls but may neither regulate nor prohibit their operation.

August 8, 1919.

Mr. Chas. E. Miller, County Attorney,
Albia, Iowa.

Dear Sir:

Your letter of July 31st to Mr. Havner has been under consideration since its receipt.

You ask the opinion of this department upon the following:

> "I would like an opinion from your office on sections 1 and 2, chapter 358 of the acts of the 37th General Assembly, relating to the operation of the pool and billiard halls outside the corporate limit of cities and towns.
>
> "First: May the board of supervisors adopt rules and regulations for the operation of pool and billiard halls, and if so may they revoke license for violation thereof?
>
> "Second: May the board of supervisors, or the auditor acting under resolution of the board of supervisors refuse to grant a license for the operation of the pool and billiard halls, provided the applicant for a license tenders the license fees prescribed by resolution of the board?"

I have not been able to find any cases directly bearing upon the questions propounded, and so far as I can ascertain they are of first impression in this state.

The object of all statutory construction is to determine the legislative intent, and in ascertaining that intent, resort may be had to the history of the statute to be construed. I find that chapter 358, acts of the 37th General Assembly, originated as house file No. 251 and as originally introduced provided that boards of supervisors should have the authority to "regulate, license or prohibit pool and billiard halls and bowling alleys" and authorized the board to fix a license fee of not less than five dollars nor more than twenty-five dollars per month. The bill as was introduced was referred to a committee which reported recommending that all after the enacting clause be stricken and that there be susbstituted the law as it now appears in chapter 358. This report of the committee was adopted and the bill passed in its amended form.

From the fact that the legislature with deliberation refused to accept the original bill providing for regulation or prohibition, I am satisfied that the bill in its final form should not be construed so as to authorize the board of supervisors to either prohibit or regulate, but merely to demand a license not in excess of the amount specified in the statute.

I think, therefore, that both of your questions should be answered in the negative.

SHELBY CULLISON, *Assistant Attorney General.*

NEW CHATTEL MORTGAGE LAW.

September 3, 1919.

To the County Attorneys of Iowa.

Dear Sir:

Requests for opinions upon the meaning of the new chattel mortgage law (chapter 352, acts of the 38th General Assembly) are received at this office almost daily. We are therefore sending you herewith the views of this department upon several features of the act which have been brought to our attention. We suggest that you hand the extra copy of this letter we are enclosing to your county recorder.

Div. 1

PURPOSE OF THE NEW LAW.

The evident intent of the legislature in passing this new law was to do away with the necessity of entering at length chattel mortgages upon the records in the office of the county recorder, and to substitute therefor a plan of filing such instruments in that office and providing for their retention until paid or otherwise disposed of as provided by law.

Div. 2

THE DUTY OF THE RECORDER WHEN A CHATTEL MORTGAGE IS PRESENTED TO HIM.

Under the provisions of the present law the county recorder is required to file and deposit all such instruments presented to him for that purpose. There is no other option in the matter when

the instrument is properly acknowledged. It is his duty to file and deposit the same, and he should retain the mortgage until a release is effected, as set forth in division 6 of this opinion. If any one should demand that a county recorder record such mortgage, we believe he should do so and charge therefor, but such recording does not warrant the recorder in surrendering the mortgage. Whether the mortgage is recorded and then filed and deposited or whether simply filed and deposited, the recorder's duty is just the same, namely, to retain possession of the mortgage. The recording adds nothing to the effectiveness of the instrument. In every case the recorder should enter in the index provided for under the new law all chattel mortgages presented to him for filing and deposit. If the one who presents the mortgage demands that such mortgage be entered on the records at length it should be indexed just the same as if it were presented merely for filing and deposit. Recorders are not required to keep two indexes, but should keep only one, and that in the form and manner provided for by the acts of the 38th General Assembly.

Div. 3

WHEN A "TRUE COPY" IS PRESENTED FOR FILING.

Section 2 of the act in question provides:

> "No sale or mortgage of personal property * * * is valid * * * unless written instrument covering the same is executed, acknowledged like conveyances of real estate, and such instrument, or true copy thereof, is duly recorded or filed and deposited with the recorder."

You will note that the law states that a "true copy" of such instrument may be filed and deposited. There is nothing in the statute to indicate who shall determine whether the copy is in fact a true copy of the original instrument. We therefore advise all county recorders when requested to file "a true copy" of any instrument to take such steps as necessary to satisfy themselves that the copy presented to them is a "true copy" of the original instrument. If it be necessary to compare the copy presented with the original, then the recorder should do so, or request that a duly certified copy of such instrument be presented to him if he is unable to make a comparison himself. If the recorder has satisfied himself that the copy presented to him for filing is in

fact a true copy he should attach a certificate to that effect to such an instrument.

Div. 4

DUTY WHEN A REAL PROPERTY MORTGAGE CONTAINS A CHATTEL MORTGAGE CLAUSE.

A number of banks and insurance companies and others are using forms for real estate mortgage containing chattel mortgage clause covering rents, profits, crops, etc. Heretofore such mortgages have, in many instances, been recorded as a real property mortgage, and then entered in the chattel mortgage index. It is the view of this department that when any such mortgage is presented that the recorder should enter it at length as a real property mortgage and properly index it as such and then file and deposit the same and index it as a chattel mortgage. Furthermore, the recorder should retain possession of all such mortgages unless the company or person presenting it gives him an express waiver in writing to the effect that the mortgagee waives the filing, depositing and indexing of such mortgage as a chattel mortgage. Such waivers should be noted on the margin of the real property mortgage where such mortgage is recorded at length, and retained for future reference. This is the safe plan of procedure.

Div. 5

DUTY TO FURNISH RECEIPT.

When any such instrument is presented to a recorder for filing, the person so doing may request a receipt for such instrument, and if such request is made, it is the duty of the county recorder to issue a receipt therefor, describing such instrument as to grantor, grantee, date, consideration and date filed. When such a request is made by mail, the county recorder should not only issue the receipt, but should mail such receipt to the person thus requesting it. He should do this even though the one requesting it does not provide postage therefor.

Div. 6

WHEN TO SURRENDER A CHATTEL MORTGAGE.

The law provides for the surrendering of an instrument only upon condition that it is satisfied by the making of a proper

entry. The recorder is then authorized to surrender such instrument, when requested to do so, to the mortgagor or person executing the same. There is no other provision authorizing the surrender of such instrument.

B. J. POWERS, *Assistant Attorney General.*

Supplemental to the opinion of the attorney general, dated on September 3, 1919, with reference to the new chattel mortgage law.

November 20, 1919.

Mr. Verner Gabrielson, County Attorney,
Fort Dodge, Iowa.

Dear Sir:

You will observe in the fourth division of the opinion of the attorney general, dated on the third of September, 1919, this department held that when a real property mortgage contained a chattel mortgage clause covering rents, profits, crops, etc., that it was the duty of the county recorder to retain such mortgage and file, deposit and index it as a chattel mortgage, even though it was also recorded at length and indexed in the real property records.

We further stated that if the mortgagee gave to the recorder an express waiver in writing to the effect that such mortgagee waives the filing, depositing and indexing of such mortgage as a chattel mortgage, that the recorder was authorized to return such mortgage to the mortgagee.

We do not think it necessary that an express waiver be given in writing every time such a mortgage is received by the county recorder for recording purposes as a real property mortgage. It is the opinion of this department that such a mortgagee may execute a general blanket waiver covering all mortgages which he may thereafter present for recording purposes, and by such waiver surrender his right to have such mortgage filed, deposited and indexed as a chattel mortgage.

Upon the giving of such a general blanket waiver, we are of the opinion that the recorder is fully authorized to return such mortgage, after having properly recorded it at length, and having indexed it in the real property mortgage records, and that he may treat such mortgage, when he has such a waiver in his possession, as a pure real property mortgage.

B. J. POWERS, *Assistant Attorney General.*

PAYMENT OF POSTAGE UNDER CHATTEL MORTGAGE LAW

Under the provisions of chapter 352, acts of the 38th General Assembly, it is the duty of the county recorder to issue a receipt for any instrument deposited for filing when requested to do so. If use of the United States mails is necessary to effectuate delivery of the receipt the postage charges should be borne by the office of the county recorder.

August 5, 1919.

Mr. Marion Hammer, County Attorney,
Newton, Iowa.

Dear Sir:

We have your letter in which you state:

> "It seems that foreign corporations are in the habit of mailing a large number of chattel mortgages to her for recording. Now, under our new law relating to the filing of mortgages in section 3 of same, it speaks about the recorder issuing receipts to the parties who are filing the instruments.
>
> "She is not at all adverse to issuing receipts, but under this new law the filing fee has been cut to 25 cents, and if she pays postage on these receipts back to persons who filed the mortgages it means that the county will only receive 23 cents fee on each one.
>
> "Therefore she has asked me whether or not it would not be proper for people who want the receipts returned to them when the same are issued that they should send the proper amount of postage for same."

Section 3 of chapter 252 of the acts of the 38th General Assembly to which you refer provides as follows:

> "Upon receipt of any such instrument, the recorder shall indorse thereon the time of receiving it, and shall file the same in his office for the inspection of all persons, and such filing shall have the same force and effect as if recorded at length; *upon request of person presenting instrument for filing,* the county recorder shall issue a receipt therefor, and such receipt shall describe instrument as to grantor, grantee, date, consideration and date filed."

You will observe that section 11 of the act provides that:

> "The fees to be collected by the county recorder under this act shall be as follows: For filing any mortgage, bill of sale, extension agreement, release of mortgage or other instrument affecting the title to or incumbrance of personal property twenty-five cents each. * * *"

There is no provision in the law authorizing the recorder to collect more than 25 cents. Nor does the law require the recorder to issue a receipt for the instrument filed except upon request of the person presenting it. Nor does the law make it the duty of the recorder to deliver such receipt. It merely requires that the recorder shall issue such a receipt, but we think that a fair interpretation of the law is that the recorder, after having issued this receipt, should deliver it to the person entitled thereto if request is made therefor.

While the law does not require in so many words that the recorder shall expend postage in delivering a receipt when required, yet we think that such an expenditure would be proper and would be consistent with common business courtesy and in accord with the method in which the public is entitled to have a public office conduct its business.

It is therefore the opinion of this department that the postage required in mailing a receipt for an instrument left for filing under the provisions of chapter 352, acts of the 38th General Assembly, should be borne by the office of the county recorder.

B. J. POWERS, *Assistant Attorney General.*

OPINIONS RELATING TO TOWNSHIP OFFICERS

TOWNSHIP TRUSTEES CANNOT BE INTERESTED IN CONTRACTS WITH TOWNSHIPS

Section 468-a, 1913, supplement to the code, prohibits township trustees from being parties to or interested in any contract to furnish supplies, material or labor to townships in which they are members of such body, and they may not employ one of their members to act as road superintendent.

April 3, 1920.

Mr. J. A. Nelson, County Attorney,
Decorah, Iowa.

Dear Sir:

We have your favor of the 1st inst. wherein you request the opinion of this department on the following question:

> "We have this proposition in a couple of townships: The trustees in Hesper and Fremont townships have been unable to secure the services of a road supervisor, and in one of the township the trustees among themselves hired one of the trustees to act as road superintendent."

Section 468-a of the 1913 supplement to the code provides as follows:

> "Members of boards of supervisors and township trustees shall not buy from, sell to, or in any manner become parties, directly or indirectly, to any contract to furnish supplies, material, or labor to counties or townships in which they are respectively members of such board of supervisors or township trustees."

This statute is clear and explicit, and absolutely prohibits the trustees of a township from directly or indirectly furnishing supplies, materials or labor to the township in which they are respectively members of the board of trustees of such township.

The supreme court has been called upon to pass upon this section and other sections of the code pertaining to like subjects and matters, and in each instance have ruled that it was unlawful

for the officers of a township or a city or town to be parties to or interested in contracts concerning improvements of the township or city or town.

An instructive case, and which rules the question before us, is *State v. Yorke,* 135 Iowa 529.

J. W. SANDUSKY, *Assistant Attorney General.*

COMPENSATION OF TOWNSHIP CLERK

The township clerk is entitled to a commission of 2% upon all funds received into his hands by virtue of his office. This applies to funds borrowed as well as funds received by taxation.

January 7, 1919.

Mr. E. G. Graham, County Attorney,
Jefferson, Iowa.

Dear Sir:

We have your letter of January 3rd in which you state the following proposition:

> "The township borrowed quite a large sum of money to pay drainage claims, the money being paid in as a credit to the township and paid out under authority of law. A tax is levied to pay this indebtedness. This tax is collected by the treasurer of the county, paid into the hands of the township and again paid out. In computing the compensation of the clerk under the provision of the above law, is he entitled to his 2 per cent on the amount of money borrowed and paid out, and is he entitled to his 2 per cent on the money collected and turned over by the treasurer to pay the indebtedness?"

By turning to division 2, section 591 of the supplement, 1913, you will find:

> "The township clerk shall receive:
>
> "(1) * * *
>
> "(2) For all money coming into his hands by virtue of his office, except money received from his predecessor in office, unless otherwise provided by law, the two per cent; * * *"

Section 576, supplement, 1913, declares:

> "It shall be the duty of each township clerk to receive, collect, preserve, and disburse, under the orders of the township trustees, all funds belonging to his township, including

the cemetery fund, and those which are now or may hereafter be by law created or authorized."

The funds procured by virtue of the loan were as much a part of the funds of the township as funds derived through taxation. The township clerk is held to the same degree of responsibility in handling borrowed funds as those derived from taxation or from any other source. The statute affirmatively provides that the clerk shall receive "*for all money coming into his hands by virtue of his office, except money received from his predecessor in office, unless otherwise provided by law, two per cent.*" Since the funds derived from the loan pass into the hands of the township clerk by virtue of his office, it is the opinion of this department that he is entitled to two per cent upon borrowed funds as well as upon funds derived from taxation or from other sources. The statute so states and is conclusive.

B. J. POWERS, *Assistant Attorney General.*

FORMATION OF NEW TOWNSHIPS

Where a township is divided and two new townships formed and trustees duly elected for the new townships the old trustees have no further duties to perform after the new trustees assume their offices. This is true even though the term of service of some of the old trustees may not have expired.

December 1, 1919.

Mr. Guy W. Eaton, County Attorney,
Waukon, Iowa.

Dear Sir:

We have your letter of November 26th in which you state:

"Some time ago, upon the presentation to the board of supervisors of a petition such as the law requires, the board of supervisors of Allamakee county divided McKee township, in which the city of Waukon is situated, into two townships as provided in section 554 of the code and sections following.

"The question now arises as to what shall become of the township officers elected some time ago to serve for a period of time extending beyond next January 1st, at which time the division of the township is to be made."

In answering your inquiry, permit us to direct your attention to paragraph 7 of section 422, supplemental supplement, 1915,

which states that the board of supervisors at any regular meeting shall have power

> "to set off, organize and change the boundaries of townships in the respective counties, designate and give names thereto, and define the place of holding the first election;"

Section 1074-a, supplement, 1913, provides as follows:

> "At any time when a new township has been created in a year in which no general election is held by law, the county board of supervisors of the county affected shall call a special election for the election of three trustees and other township officers of the new township, which officers shall continue in office until their successors are elected and qualified."

Section 556 of the code provides that when the board of supervisors have divided the township into two townships that, except for election purposes, including the appointment of the necessary election officials, such division shall not take place until the first Monday of January next ensuing.

Taking these sections in connection with the entire chapter of the code devoted to townships and township officers, we are of the opinion that the intention of the legislature was that upon the division of one township into two new townships and the election of trustees in each of the new townships, that on the first day of January next ensuing the new township officers should assume their duties in their respective townships and that the old board of township trustees should at that time proceed to wind up their business and divide the property and funds of the township as provided in the statute. The fact that some of the trustees in the old township have not fully served out the term for which they were elected does not in any way give them right to participate in the affairs of the two new townships.

There are one or two cases having some analogy to the present situation, one of which is *Linn Grove Independnt Consolidated School District v. Hokkan,* 169 N. W. 656. In this case the supreme court held that when the election of the directors of the new consolidated district had been completed that they were authorized to assume control and jurisdiction over the property belonging to the old districts. In other words, the new school board assumed all of the functions theretofore exercised by the school boards in the various districts composing the new independent district.

In the case of *Younker v. Susong,* 173 Iowa 663, it was held that the establishment of a municipal court in the city of Des Moines abolished all the duties hitherto vested in the justice of the peace.

The case of *Lamb v. B., C. R. & N. R. Co.,* 39 Iowa 333, has some bearing upon the question presented in your inquiry.

Taking the cases cited herein and the statutes in question as a whole, we are of the opinion that when the township trustees of the new townships assume the duties of their office on January 1st, that the trustees of the old township no longer have any authority to act as a township trustee since the township for which they were elected to serve no longer has any existence.

B. J. POWERS, *Assistant Attorney General.*

TOWNSHIP ELECTION BOARDS

The clerk of a township should act as clerk of election for the township election board and the township trustees should act as judges of such election board at special elections. That portion of section 1093, supplemental supplement, 1915, stating that the election board at "any special election shall be the same as at the last preceding general election" refers to manner of organization, etc., and not to the personnel.

October 22, 1919.

Mr. H. H. McNeil, County Attorney,
Indianola, Iowa.

Dear Sir:

We have your letter in which you ask:

> "How will we make up the election board in townships for a special election to be held in this county for the purpose of voting on a county hospital proposition?"

In answering your inquiry, permit us to direct your attention to section 1093 of the supplemental supplement, 1915, which in part provides:

> "Election boards shall consist of three judges and two clerks, and their compensation shall be thirty cents per hour while engaged in the discharge of their duties. * * * In township precincts the clerk of the township shall be a clerk of election of the precinct in which he resides, and the trustees of the township shall be judges of election, except that, in townships not divided into election precincts, if all the trustees be of the same political party, the board of super-

visors shall determine by lot which two of the three trustees shall be judges of such precinct. * * * The election board at any special election shall be the same as at the last preceding general election. * * *''

If it were not for that part of the foregoing section which provides that ''the election board at any special election shall be the same as at the last preceding general election'' there would be no question with reference to the persons who constitute a township election board. This last sentence somewhat obscures the real intent of the legislature, but after careful consideration we are of the opinion that the portion of the section just referred to does nothing more than indicate the manner in which an election board at a special election shall organize itself and conduct its business.

As we view it, the election board is to be composed of the township clerk and the township trustees, as provided for in said section, and when they meet together for the purpose of conducting a special election they shall organize themselves together and perform the duties placed upon them by law in the same manner as the election board did at the last preceding general election. We do not think it was the intention of the legislature to provide that the identical persons who acted at the last general election should act as the election board at a special election held long after their term of office had expired and when there is a clerk and trustees then holding office capable of qualifying as election officials.

B. J. POWERS, *Assistant Attorney General.*

PURCHASE OF ROAD MACHINERY BY TOWNSHIP

Townships may purchase such machinery for road purposes as is necessary and reasonable.

October 15, 1919.

Mr. John H. Howard, County Attorney,
New Hampton, Iowa.

Dear Sir:

Your letter of the 4th inst. addressed to Attorney General H. M. Havner has been referred to me for attention.

You ask:

''Has the township trustees authority to purchase machinery for road purposes and thereby create a legal indebtedness against the township?''

The law material to a determination of your question will be found in section 1528 of the supplement to the code, 1913, which reads as follows:

> "The rate of property tax to be levied for the succeeding year for the repair of roads, culverts and bridges and for guide boards, plows, scrappers, road drags, tools and machinery adapted to the repair of roads, culverts and bridges and for the destruction of noxious weeds in public highways and other public places and for the payment of any indebtedness previously incurred for road purposes, and levy the same, which shall not be more than four mills on a dollar on the amount of the township assessment for the year, which when collected, shall be expended under the direction and order of the township trustees. * * *"

From the statute just quoted no express authority is conferred upon the board to incur indebtedness, and if such authority exists it must alone be inferred from the fact that among the things they are to determine and provide for is "any indebtedness previously incurred for road purposes." The indebtedness therein contemplated should, in my opinion, be such as might have arisen from necessity in keeping the road passable, completing improvements, the cost of which may have exceeded the estimate therefor, and providing for contingencies which had not been foreseen and provided for.

If, however, it is contemplated that any indebtedness might be lawfully incurred for the purchase of road machinery, such indebtedness should be surely reasonable and limited to the purchase of tools and machinery actually needed and adapted to the uses enumerated in the statute, and of a value proportionate to and corresponding with the needs of the township and to ability to pay therefor, which rule, if applied, would ordinarily deter township trustees from purchasing unnecessary machinery or road equipment requiring the expenditure of large sums of money.

By reference to section 1527-b14 of the supplemental supplement, 1915, you will find that provision is made whereby the township trustees may obtain the use of the county's road equipment for use on the township roads, which would at least indicate that the township trustees shall not incur an indebtedness for unusually expensive machinery or such road equipment as cannot be used regular on the township roads.

Again in section 1533 of the supplemental supplement, 1915, you will find that the township trustees are forbidden to incurr an indebtedness for road work "unless the same has been or shall at the time be provided for by an authorized levy."

Therefore, I am of the opinion that the township trustees may incur an indebtedness for which the township is liable for such machinery as is necessary and reasonable for use upon the township roads.

W. R. C. KENDRICK, *Assistant Attorney General.*

LIABILITY OF TRUSTEES FOR CONTRACTING WITH ONE OF THEIR NUMBER

Township trustees are all criminally liable for entering into a contract with one of their members to perform labor on the roads.

September 11, 1919.

Mr. Earl W. Vincent, County Attorney,
Guthrie Center, Iowa.

Dear Sir:

Your letter of the 8th inst. addressed to Attorney General H. M. Havner has been referred to me for reply.

You state:

> "I write to inquire whether or not the board of trustees of a township may employ one of their own members to work the roads of the township. Also, where one of the members of the board of trustees has been employed to work the roads may he collect from the township the reasonable value of such services? If the members of the board of trustees allow a bill of one of its members for such services are the members of the board other than the one who has done the work criminally liable for allowing and paying the bill for such services?"

The statutory provision material to a determination of your question will be found in section 468-a, supplement to the code, 1913, which provides:

> "Members of boards of supervisors and township trustees shall not buy from, sell to, or in any manner become parties, directly or indirectly, to any contract to furnish supplies, material, or labor to the county or township in which they are respectively members of such board of supervisors or township trustees."

In applying the prohibition in the section just quoted our supreme court has held that a township trustee who entered into a contract with the road superintendent to furnish men and teams to perform labor for the township was guilty of an indictable misdemeanor.

State v. York, 131 Iowa 535;
State v. York, 135 Iowa 529.

In the York case, *supra,* it was held that neither the motive, good faith, nor whether the trustee did or did not personally benefit by the contract, were material as to the question of his guilt, but that the act was forbidden without regard to those things, and was indictable as a misdemeanor under code sections 4905 and 4906.

To me it is just as reprehensible for the other trustees to enter into such a contract as it is for the trustee to contract to furnish the labor. In the absence of express statutory inhibition such a contract would be voted as against public policy. When the legislature enacted section 468-a, it was undoubtedly the intention of that body to prohibit the township trustees from entering into any contract with one of their members by which the people's money could be spent to the personal advantage of any member of the board. To permit such a contract between the township trustees and one of their members would open the way to collusion and fraud. The legislature intended to avoid that identical thing. Yes, it went further than that and eliminated all temptation to graft.

Such intention on the part of the legislature is apparent from the language used in section 468-a, wherein it is said that

> "township trustees shall not * * * *in any manner* become parties, directly or indirectly, to *any contract* to furnish supplies, material or labor to the * * * township in which they are township trustees."

How much clearer could the legislature have expressed its intention? Are not all the trustees *parties to such contract?* Could it not be possible for all the trustees to secretly agree that one of them should take a contract to furnish supplies to the township at an exorbitant price and then divide the profit? Is it not just as important to the public to prevent the other trustee from profiting by such a contract as it is to merely prohibit

the trustee who agreed to furnish the supplies from gaining any personal benefit thereby? Is the act of one not as reprehensible in the eyes of the public as the act of the other? We think so, and we believe the legislature so intended.

Therefore, we are of the opinion that all the trustees who were parties to the contract referred to in your letter are guilty of violating section 468-a, code supplement, 1915, and are liable to prosecution under code sections 4905 and 4906.

W. R. C. KENDRICK, *Assistant Attorney General.*

JURISDICTION OF JUSTICE OF PEACE IN VAGRANCY CASES

Justice of peace has jurisdiction of vagrancy case when change is taken from police court, even though arrest is made during the night and within the jurisdiction of the police court.

May 31, 1919.

Mr. Verner E. Gabrielson, County Attorney,
Fort Dodge, Iowa.

Dear Sir:

Your letter of the 17th inst. addressed to the attorney general has been referred to me for reply.

You state that four persons were recently arrested in your city on the charge of vagrancy; that an information was filed under code section 5119 in the police court, and that defendants appeared and moved for a change of venue on the ground that the judge was prejudiced against them; that the judge of the police court sustained the motion, and certified the case over to the next nearest justice of the peace; that said defendants appeared in the justice court and filed a motion to dismiss the prosecution on the ground that the justice of the peace was without jurisdiction, and that the justice of the peace sustained the motion and dismissed the prosecution.

Section 5120 of the code provides:

> "Upon complaint made on oath to any magistrate against any person as being such vagrant within his jurisdiction, he may issue a warrant for the arrest of such person, and his examination, and the complaint, warrant and arrest, shall be governed by the provisions of the last chapter, as nearly as practicable, except as herein provided."

Section 5121 of the code provides:

> "Peace officers shall arrest any vagrant whom they find at large, and not in the care of some discreet person, and take him before some magistrate of the county, city or town in which the arrest is made."

Section 5122 of the code provides:

> "If such arrest is made during the night, the officer may keep the person arrested in confinement until the next morning, unless bail be given, and if made within the jurisdiction of a police court, he must be taken before such court, unless the judge is absent."

From the foregoing statutory provisions, it will be seen that any magistrate has jurisdiction, except that when an arrest is made during the night within the jurisdiction of a police court, then the accused must be taken before such police court, unless the judge is absent.

The justice of the peace is a magistrate and therefore has jurisdiction in a case of vagrance, except that when a person is arrested on that charge during the night within the jurisdiction of a police court, then the police court will have the preference in the trial of the case. But if for any legal reason the police court is unable to try the case, then the case may be properly tried before a justice of the peace.

Section 692 of the code provides in part as follows:

> "The proceedings before a mayor or a police court shall be, as far as applicable, in accordance with the law regulating similar proceedings before a justice of the peace. * * *"

Section 5585 of the code provides:

> "Before any testimony is heard, a change of place of trial may be applied for by an affidavit filed, stating that the justice is prejudiced against the defendant, or is of near relation to the prosecutor upon the charge or the party injured or interested, or is a material witness for either party, or that the defendant cannot obtain justice before him, as the affiant verily believes."

If the change of venue is allowed, then the case will be certified to the next nearest justice of the peace. Code section 5586.

Now the facts in the case at issue show that the case was transferred from the police court to the justice of the peace upon the defendant's own motion. Therefore the police court was unable to

try the case, and as the statutes confer jurisdiction upon the justice of the peace to try such cases, it is evident under the facts in this case, the justice of the peace had jurisdiction and was clearly in error when he sustained defendant's motion to dismiss.

If you cannot convince the justice of the peace of his error, and that official continues to dismiss such cases on the ground of lack of jurisdiction, then I would suggest that the next time the police judge sustains a motion to transfer such a case to the justice of the peace you sue out a writ of certiorari to the district court and let that court rule on the question as to whether or not the justice of the peace has jurisdiction in such cases.

W. R. C. KENDRICK, *Assistant Attorney General.*

JURISDICTION OF JUSTICE OF THE PEACE

When the statute provides a maximum punishment in excess of constitutional limit justice has jurisdiction up to limit.

January 15, 1919.

Hon. W. B. Barney,
Dairy and Food Commission.

Dear Sir:

Replying to your verbal request for an opinion as to the correctness of the view taken by Thomas A. Goodson, county attorney of Wayne county, as to whether a justice of the peace would have jurisdiction in a prosecution under section 2515-g, supplement to the code, 1913, beg to advise that in my opinion a justice would have jurisdiction.

Section 2515-g provides:

> "Any person violating any of the provisions of this act shall be guilty of a misdemeanor, and upon conviction therefor shall be punished by a fine of not less than twenty-five nor more than one hundred dollars or by imprisonment for not less than thirty days in the county jail."

Our state constitution has defined the jurisdiction of a justice of a peace as follows:

> "All offenses less than felony, and in which the punishment does not exceed a fine of one hundred dollars, or imprisonment for thirty days, shall be tried summarily before a justice of the peace, or other officer authorized by law, on information under oath, without indictment, or the inter-

> vention of a grand jury, saving to the defendant the right of appeal; and no person shall be held to answer for any higher criminal offense, unless on presentment or indictment by a grand jury, except in cases arising in the army or navy, or in the militia, when in actual service, in time of war or public danger."
>
> Section 11, article 1, constitution of Iowa.

Under an ordinance providing for imprisonment in excess of the foregoing constitutional provision our supreme court in *City of Keokuk v. Dressel,* 47 Iowa, at page 601, said:

> "The ordinance, while it provides for imprisonment which may be in excess of the time prescribed by the constitution, provides also for punishment authorized by that instrument. Its provisions are not void, for they are not necessarily in conflict with the constitution. That may be enforced until they reach the limit of the punishment prescribed in the constitution. The ordinance is in harmony with the statute of the state."

It would, therefore, seem that the mere fact that the statute above quoted provides for a maximum punishment in excess of the above constitutional limit would not deprive the justice from taking jurisdiction and, if the accused was found guilty, inflict such punishment as would be within his jurisdiction to inflict, to-wit, thirty days in jail.

W. R. C. KENDRICK, *Assistant Attorney General.*

APPOINTING OF TOWNSHIP OFFICERS WHERE TERRITORY IS SEVERED FROM A CITY OR TOWN

When territory is severed from a city or town so that its boundaries no longer coincide with those of a civil township the township organization should be resumed by appointment of township officers as in cases of vacancies.

July 15, 1919.

Mr. Realff Ottesen, Assistant County Attorney,
Davenport, Iowa.

Dear Sir:

Your letter of July 11th to the attorney general has been referred to me for answer.

You say:

> "Some years ago the people residing in what was known as Rockingham township, Scott county, Iowa, by proper pro-

ceedings incorporated the town of Rockingham, the limits of said town being co-incidental with the boundaries of the township of Rockingham. In accordance with the statutes of Iowa the offices of township trustees and clerk were then abolished, and the duties of these officers were assumed by the town counsel and clerk of the town of Rockingham. The court has just recently decided a case severing part of the territory of Rockingham township from the town of Rockingham, so that now the town of Rockingham and the township of Rockingham are no longer co-incidental, and a large part of the township of Rockingham is no longer located within the limits of the town of Rockingham.

"We would like to have your opinion on the question as to what steps should now be taken, if any, to secure officers to administer the affairs of the township of Rockingham, and carry out the duties devolving upon the township trustees of said township, or how these duties can be carried out until the next general election."

Section 560, supplement to the code, 1913, provides:

"Where a town or a city, not acting under a special charter, constitutes one or more civil townships, the boundary lines of which coincide throughout with the boundary lines of the town or city, the offices of township clerk and trustee are abolished."

Section 561 of the code provides:

"The duties required by law of the township clerk in such cities shall be performed by the clerk, and those required of the board of trustees shall be performed by the city council."

I have not been able to discover any statutory provision relative to what shall be done in the event the boundaries of a city, because of severance of territory, no longer coincide with the boundaries of a township.

It seems to me, however, that in view of the provisions of the statute above quoted, that when the boundaries of the city and township are no longer coincident, then the township shall resume its township organization. In other words, it is only when the boundaries of the town and township coincide that the offices of trustee and clerk are abolished. Such being the case, the result is that upon the severance of the territory from the city, the necessity of a township organization and township officers, and no officers having been provided for, a vacancy exists in the various offices.

Section 1272, supplement to the code, 1913, provides that when the offices of all the township trustees are vacant the county auditor shall appoint to fill the vacancies, and the same section provides that the trustees shall fill vacancies in other township offices.

It is my judgment that a vacancy exists in the office of all of the township trustees in Rockingham township, and that your county auditor should make appointments to fill those vacancies, and that upon the qualification of such appointees, that they should proceed to fill the other township offices by appointment.

SHELBY CULLISON, *Assistant Attorney General.*

OPINIONS RELATING TO SOLDIERS AND SAILORS

COMPUTING EXEMPTION OF MONEYS AND CREDITS OF SOLDIERS

Soldiers' exemption on moneys and credits based upon actual value, as actual value is the taxable value.

October 8, 1920.

Hon. R. E. Johnson,
Secretary Executive Council.

Dear Sir:

We have your request for an opinion as to the manner of applying the tax exemption provided for in chapter 191, acts of the 37th General Assembly, as amended by chapter 377, acts of the 38th General Assembly, creating an exemption to honorably discharged soldiers or sailors of the Mexican war, the war of the Rebellion, the war with Spain, the Chinese relief expedition, or the Philippine expedition, or to the widow of such soldier or sailor remaining unmarried.

Chapter 191 bases the exemption upon the taxable value of the property of such soldier or sailor and their widows.

Section 1310 of the supplement to the code, 1913, prescribes the manner in which moneys and credits shall be assessed, namely, five mills on the dollar of the actual value of the property.

It is evident that when the legislature changed the method of valuation of property for exemption purposes it overlooked the statutory basis of assessing moneys and credits, or at least omitted to make any other provision for exempting that class of property than existing at the time.

Therefore, inasmuch as no exemption can be claimed than is expressly allowed by statute, I am of the opinion that the tax exemption allowed such soldiers or sailors and their widows, on moneys and credits, is the amount named in chapter 337, acts of the 38th General Assembly, based upon the actual value thereof.

To illustrate: If an honorably discharged soldier of the war of the Rebellion owned moneys and credits valued at $1,500, then he would be entitled to deduct therefrom for tax exemption purposes the sum of $700, and the balance would be taxable at the rate of five mills on the dollar.

W. R. C. KENDRICK, *Assistant Attorney General.*

SOLDIERS NOT EXEMPTED FROM PAYMENT OF OPTOMETRISTS ANNUAL FEE

Registered optometrists in the military service of the United States are not exempt from the penalties for failure to pay their annual license fee.

April 29, 1919.

Dr. Guilford H. Sumner,
Secretary Board of Optometry Examiners.

Dear Sir:

Your letter of the 26th inst. addressed to Attorney General H. M. Havner has been referred to me for attention.

You ask for an opinion from this department as to whether or not the board of optometry examiners are authorized to remit the penalty provided by statute for failing to pay the annual license fee by registered optometrists in this state, in the event such parties are in the military service of the United States.

That part of the statute applicable to the question at issue is found in section 1, chapter 213, acts of the 37th General Assembly, which provides:

> "That from and after the 30th day of June, 1917, all registered optometrists shall, during the month of July of each year, pay to the board of optometry examiners an annual license fee of $1.00, and for each month any such registered optometrist is in default of payment of such annual license fee an additional $1.00 shall be added to and made a part of such license; but such total license fee shall not exceed in any one year the sum of ten dollars ($10.00)."

From the foregoing statutory provision it is evident that the charge and collection of the penalty therein provided for is mandatory upon the board of optometry, and I can find no law exempting persons in the military service of the United States from the payment of that penalty in the event of default of payment of the annual license fee.

However, the statutes of Iowa permit the executive council, upon the recommendation of the attorney general, to compromise claims which the state has against individuals, and I have no doubt that registered optometrists who have failed to pay their annual license fee on account of their being in the military service of the United States could have the penalty remitted by making application to the executive council.

W. R. C. KENDRICK, *Assistant Attorney General.*

PAY OF NATIONAL GUARDS

The state is liable to pay compensation to the national guard troops ordered into the service of the United States in 1898 only when they remain national guard troops and prior to being sworn into the service of the United States.

December 22, 1919.

Hon. Louis G. Lasher,
The Adjutant General.

Dear Sir:

I am in receipt of your favor of November 28th, with a request for an opinion from this department concerning the compensation of national guard troops after they were ordered into the service of the United States in 1898, and as to the rights of volunteers during the same period.

In reply will say that the section of the statute involved is as follows:

> "When a requisition shall be made by the president of the United States for troops, the governor, as commander-in-chief, shall order into service the national guard of the state, or such portion thereof as may be necessary, and if insufficient, so many of the militia as is required, designating the same by draft if a sufficient number shall not volunteer, and shall organize the same and commission officers thereof; and while so in service the national guard and militia shall be subject to the same regulations and receive from the state the same compensation and subsistance as the army of the United States receives."

The acting adjutant general construed this statute at that time to mean that the pay on the part of the state should continue only until such time as the militia and the volunteers were sworn into the United States service. While we would be personally interested in holding that the volunteers of 1898 would be entitled

to pay during their entire time of service both as members of the militia and as soldiers of the United States, yet a careful analysis of the section forces us to the opposite conclusion.

The statute provides:

> "When a requisition shall be made by the president of the United States for troops, the governor, as commander-in-chief, shall order into service the national guard of the state, or such portion thereof as may be necessary, and if insufficient, so many of the militia as is required."

You will notice that the statute authorizes the governor, as commander-in-chief, to order into service the national guard of the state or such portion thereof as may be necessary, and if insufficient, so many of the militia as is required. The governor could under no circumstances be authorized to order any man into the service of the United States under this statute, but he does have the power to order them into the service of the state.

The statute further provides, that he shall organize these troops and commission officers thereof. Under no circumstances could he commission officers in the United States service. Whatever officers he would commission would be commissioned under and by virtue of the authority of the state.

We are therefore forced to the conclusion that the service referred to is service as a part of the national guard of the state and could not refer under any circumstances to service as a part of the army of the United States.

The last part of the section, which provides:

> "While so in service the national guard and militia shall be subject to the same regulations and receive the same compensation and subsistence as the army of the United States receives."

This last part refers to this body of troops as the national guard, and says, "While so in service the national guard and militia shall be subject to the same regulations" as the army of the United States. We do not presume upon any stretch of imagination that this last part could be construed to refer to a man while in the service of the United States. The last clause precludes any such construction. When the national guard and the volunteers were sworn into the United States service in 1898 the national guard of Iowa then ceased to exist. These men were no longer

a part of it, but they were a part of the volunteer army of the United States.

It is therefore the opinion of this department that the only period of time that the militia and the volunteers of the state of Iowa in 1898 were entitled to receive pay from the state was the period during which they were in service prior to the time they were sworn into the service of the United States.

H. M. HAVNER, *Attorney General.*

WHEN WIDOW OF SOLDIER EXEMPT FROM TAXATION

The widow of a soldier of the war of the rebellion is entitled to claim certain exemptions from taxation as long as she remains unmarried, but upon remarrying she loses the right to such exemption.

December 29, 1919.

Mr. J. A. Nelson, County Attorney,
Decorah, Iowa.

Dear Sir:

We have your letter of December 24th in which you request an opinion from this department upon the following proposition:

> "A soldier of the war of the rebellion dies, leaving a widow. The widow remarries; this time to one who is not a soldier, but nevertheless she claims the widow's exemption provided for under the statute for soldiers' widows. Should such exemption be granted under these circumstances?"

In answering your inquiry, we desire to direct your attention to paragraph 7 of section 1304, supplemental supplement, 1915, as amended by chapter 191, acts of the 37th General Assembly, and chapter 377, acts of the 38th General Assembly, which provides in part as follows:

> "The property, not to exceed seven hundred dollars ($700.00) in taxable value, and poll tax, of any honorably discharged Union soldier or sailor of the Mexican war or the war of the rebellion, or the *widow remaining unmarried* of such soldier or sailor * * * shall not be subject to taxation."

In view of the foregoing provision it is the opinion of this department that as soon as the widow of a Union soldier or sailor remarries she is no longer entitled to claim the exemption provided for, as above set forth.

B. J. POWERS, *Assistant Attorney General.*

EXEMPTION FROM TAXATION IN SPECIAL CHARTER CITIES

Special charter cities may assess property for municipal purposes on a different basis than cities of the general class, and the soldier's exemption is to be computed accordingly.

January 14, 1920.

Lieut. Col. Frank E. Lyman,
Member Legislative Committee, U. S. W. V.

Dear Sir:

Your communication of the 7th inst. signed jointly by yourself and Mr. Frank E. Lynch, representing the legislative committee, department of Iowa, United Spanish War Veterans, and addressed to Attorney General H. M. Havner, has been referred to me for attention.

You state, in substance, that the city of Dubuque, acting under a special charter, assesses all property on an 80 per cent basis, and on account of that fact the tax exemption allowed to honorably discharged soldiers of the Spanish-American war has been greatly reduced, as compared with the exemption in cities of the general class wherein property is assessed on the basis of 25 per cent of its actual value.

You then ask, in substance, as to whether there is any legal authority for cities acting under special charters to assess all property within the city limits upon a higher basis than 25 per cent of the actual value of said property; and if there is not, how can the assessment be corrected so as to allow honorably discharged soldiers of the Spanish-American war their full exemption?

Your question is not altogether free from doubt. The general law relating to the assessment of property for taxation will be found in section 1305, supplement to the code, 1913, which reads as follows:

> "All property subject to taxation shall be valued at its actual value, which shall be entered opposite each item, and shall be assessed at twenty-five per cent of such actual value. Such assessed value shall be taken and considered as the taxable value of such property, upon which the levy shall be made. Actual value of property as used in this chapter shall mean its value in the market in the ordinary course of trade. This section shall not apply to special charter cities."

It will be observed that the provisions of section 1305 shall not apply to special charter cities. The law governing cities acting under special charters will be found in section 1056-a5, supplement to the code, 1913, which provides:

> "That the assessed or taxable value of all property, and the value at which it shall be listed, and upon which the levy shall be made in special charter cities shall be provided by the city council of such city."

Chapter 191, acts of the 37th General Assembly, as amended by chapter 377, acts of the 38th General Assembly, exempts from taxatation

> "the property not to exceed three hundred dollars ($300.00) in taxable value and poll tax of any honorably discharged soldier or sailor of the war with Spain. * * *"

It will be observed from the provisions of chapter 191, *supra,* that the law exempts from taxation the property of an honorably discharged soldier of the Spanish-American war only to the extent of three hundred dollars of its taxable value. It will also be seen from the provisions of section 1056-a5, *supra,* that the General Assembly of Iowa has conferred upon special charter cities the sole power to fix the basis upon which all property located in such cities shall be assessed.

If the language used in section 1056-a5 is given a broad construction, then a sharp conflict would arise in that method of assessing property located within and property located without the limits of cities acting under special charters for state and county taxes. It does not seem reasonable that the General Assembly ever intended such an inequitable result. In fact, it is the general practice in special charter cities throughout the state, except in the city of Dubuque, and possibly one other city, where the city council has fixed a higher taxable value than twenty-five per cent of the actual value, to limit the application of the same to taxation for municipal purposes only.

So far as we are able to ascertain, the supreme court of Iowa has never passed squarely upon this specific question. The supreme court had this identical question before it in the case of *C. & N. W. Ry. Co. v. City of Cedar Rapids,* 127 Iowa 678, but the members of the court were equally divided and the per curiam opinion decides nothing and still leaves the question in doubt.

However, it is the opinion of this department that section 1056-a5, supplement to the code, 1913, authorizes a city acting under a special charter to provide by ordinance for the taxing of property upon a higher basis than twenty-five per cent of its actual value only for municipal purposes.

Therefore, the exemption allowed honorably discharged soldiers of the Spanish-American war in special charter cities should be computed both upon the basis adopted by the city council for taxing property for municipal purposes and upon a twenty-five per cent basis for taxes other than for municipal purposes. If the tax officers fail to allow such soldiers their full exemption, then it will be necessary for the soldier affected to bring an action in court to correct the assessment. In that event he will need the services of an attorney.

W. R. C. KENDRICK, *Assistant Attorney General.*

WHO ENTITLED TO SOLDIERS' RELIEF

When entitled to relief. It is not necessary that an old soldier be a pauper or in abject poverty to be entitled to relief under the chapter providing that the soldier's relief commission and the board of supervisors may grant aid to "indigent" United States soldiers, etc. An "indigent" person is one without means to provide for his comfortable existence.

February 4, 1920.

Hon. Louis G. Lasher,
Adjutant General.

Dear Sir:

We have your request for an opinion upon the following propositions:

> "Should the term 'indigent U. S. soldiers,' as used in the chapter relating to soldiers' relief, be construed to authorize granting of aid to only those soldiers who are paupers or in abject poverty, and what amount should be allowed for funeral expenses of such indigent soldiers?"

In answering your inquiry, we desire to direct your attention to section 430 of the supplemental supplement of 1915, which provides in part as follows:

> "A tax not exceeding one mill upon 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 U. S. soldiers, sailors and marines, and their indigent wives, widows, and minor children, not over fourteen years of age if boys, nor over sixteen if girls, having a legal residence in the county. * * * Said fund to be expended for the purpose aforesaid by the joint action and control of the board of supervisors, and the relief commission, as hereinafter provided."

Section 451 of the code provides for the distribution of the fund above mentioned by the soldiers' relief commission, which shall consist of three persons, two or whom shall be honorably discharged U. S. soldiers, sailors or marines. The members of this commission are appointed by the board of supervisors. Provision is also made for the meeting of such commission, and for the making of a report to the board of supervisors of those persons whom the commission may have reason to believe are in need of relief or will be in need of relief during the coming year.

Taking the provisions with reference to soldiers' relief as a whole, we are of the opinion that the term "indigent," as used in the foregoing section, does not necessarily refer to soldiers who are paupers, nor to those who are in abject poverty.

By the use of the word "pauper" it is usually intended to designate one whose support imposes a burden upon the public treasurer, while "indigent" is more commonly used to describe one who is without property or means of comfortable subsistence, but who is not a public charge.

Weeks v. Pennfield, 84 Conn. 844.

With this thought in mind, the supreme court of Wisconsin in the case of *Coffeen v. Preble,* 142 Wis. 183; 185 R. S. 954; 97 L. R. A. (R. S.) 1079, has held that it was proper for a town to furnish medical aid to a family, all of whom were bid-ridden by typhoid fever, under a statute permitting it to relieve all poor and indigent persons whenever they stood in need thereof, although the family to whom relief was given owns a slight equity in a small piece of property, has some credit at a grocery store, and a small amount of money.

A review of the opinions of a number of courts of last resort reveals the fact that it has been frequently held that a person may be indigent and still possess property. The great weight of

authority supports the view that a person is indigent when they are not possessed of sufficient funds to comfortably provide for themselves.

No hard and fixed rule can be laid down in determining when an old soldier is indigent. It is a matter which should be addressed to the sound discretion of the soldiers' relief commission and the board of supervisors.

Public funds should not be expended in assisting those who are able to care for themselves. At the same time, we feel that the purpose and intent of the legislature in the enactment of the chapter with reference to soldiers' relief was to so provide that no honorably discharged U. S. soldier or sailor should spend his last days in need of the reasonable comforts of life. We do not think the relief should be denied except to those who are in abject poverty or paupers. It may be granted to others even though they are not public charges. As above stated, it is a question addressed to the sound discretion of the soldiers' relief commission and the board of supervisors.

In answering your second question, permit me to state that section 435 of the supplement of 1913 provides that the board of supervisors may designate some suitable person in each township to cause to be decently interred the body of any honorably discharged soldier, sailor or marine who served in the army or navy of the United States during any war, and who may thereafter have died without sufficient means to defray the expenses of his funeral. The expense of such funeral shall in no case exceed the sum of $50.00.

Section 434 of the code provides that a sum not to exceed $15.00 may be expended in the purchase of a headstone to mark the burial place of any such deceased soldier.

B. J. POWERS, *Assistant Attorney General.*

SOLDIERS' EXEMPTION

Various Rulings of Attorney General on Allowance of Exemptions from Taxation to Soldiers, Etc.

April 16, 1919.

To the County Attorneys of Iowa.

Dear Sir:

So many requests for opinions upon the question of soldiers' exemption has been received by this department that we have prepared an opinion covering most of the features upon which advice has been sought. We suggest that you acquaint yourselves with the contents of this opinion and inform your county officers thereof.

Div. 1

THE STATUTE

Section 3 of chapter 380, acts of the 37th General Assembly, provides as follows:

> "The homestead of all soldiers, sailors or other persons in the military or naval service of the United States shall be exempt from taxes during their term of service in the present war; or other property to the actual value of ten thousand dollars ($10,000) in the event of no such homestead."

Div. 2

HOMESTEAD OR $10,000 OF OTHER PROPERTY EXEMPT

The first part of the section says:

> "The homestead of all soldiers, sailors or other persons in the military or naval service of the United States shall be exempt from taxes during their term of service in the present war;"

There follows the word "war" a semi-colon, and following the semi-colon the disjunctive "or," showing a complete separation of

the first part from the part which follows. The remainder of the statute reads as follows:

> "other property to the actual value of ten thousand dollars *in the event of no such homestead.*"

It is the opinion of this department that if a soldier has a homestead, only the homestead is exempt from taxation. If he has no homestead, then he may have other property, real or personal, exempt to the amount of ten thousand dollars.

If the one entitled to the exemption has no homestead but has an undivided interest in either real or personal property, his interest in such property is exempt from taxation, subject to a limitation in value of ten thousand dollars.

Div. 3.

WHERE HOMESTEAD STANDS IN THE NAME OF THE WIFE.

It is the view of this department that chapter 380, acts of the 37th General Assembly, should be given a liberal construction with a view of securing for soldiers, sailors and other persons engaged in the military service of the United States the benefits of the exemption provided, and therefore the right to the exemption should not be restricted or limited to a case where the *legal* title to the homestead is in the name of the person claiming exemption. The right to the exemption turns upon the question of whether the property sought to be exempted is really the homestead of the soldier, sailor or other person engaged in the military service of the United States. It is immaterial whether the legal title to such property is in the husband or the wife; the question to be decided is whether or not the property in fact is the homestead.

Div. 4

NO EXEMPTION FROM SPECIAL ASSESSMENTS.

It is our opinion that the provisions of chapter 380, acts of the 37th General Assembly, do not exempt property of persons in the military service from this payment of special assessments for local improvements. This opinion is supported by the decision in the case of *Munn v. Board of Supervisors,* 161 Iowa 26, where, in passing upon the question of whether special assessments are to be included in the term "taxes," the court at page 36 stated:

"But though the authority to levy a special assessment is derived from the same source (i. e. from the legislature) it does not follow that the words 'tax' or 'taxes' as found in the CONSTITUTION, or as ordinarily understood, means the same thing as, or includes, special assessments."

The provision of the soldiers' and sailors' civil relief act of March 8, 1918, set forth as division 12 of this opinion should be noted in this same connection.

Div. 5

NO EXEMPTION FROM POLL TAX.

No exemption is provided in the acts of the 37th General Assembly from the fifty cents poll (head) tax provided for section 1303, supplemental supplement, 1915.

Nor has any exemption been granted from the poll (road) tax provided for in section 1550 of the supplement, 1913, as amended by the 37th General Assembly, chapter 355, and following sections. However, it should be observed that three days' notice must be given each person liable for this tax; if the person liable therefor cannot be notified, there is no means provided by law for the collection of the same.

It should also be observed that section 2215-f33, supplement, 1913, provides in part as follows:

"Every officer and soldier of the guard shall be exempt from jury duty *and labor on the road on account of poll tax during his term of service.* * * *"

Div. 6

SOLDIER NOT OBLIGED TO CLAIM EXEMPTION.

You will observe from the reading of chapter 380, acts of the 37th General Assembly, that it is not incumbent upon the soldier or sailor or person in the service of the United States to claim his exemption from taxation. It is the judgment of this department that it is the duty of the taxing officers to ascertain who are entitled to this exemption, and to see that the exemption is given to the various persons entitled thereto.

A soldier may appoint some one as his agent to designate what property he desires to have exempted from taxation, in event he

has no homestead. If some unauthorized person attempts to designate the property which shall be exempted to the soldier and the soldier repudiates such designation and desires other property exempted, it is his privilege to do so. He is not bound by the acts of an unauthorized person in designating exemptions in his behalf.

Div. 7

LENGTH OF TERM OF SERVICE NECESSARY TO ENTITLE A SOLDIER TO EXEMPTION.

Under the wording of this statute, it is the opinion of this department that the exemption above provided is granted to any person engaged in the military or naval service of the United States who serves *any part of the year* 1918, which tax was due and payable January 1, 1919, and for the further term of service of such sailor or soldier in the present war. Or if such soldier is in the service during any part of the year 1919 he is entitled to exemption from the tax assessed in 1919.

Div. 8

MEMBERS OF ARMY NURSE CORPS AND NAVY NURSE CORPS EXEMPT.

Members of the army nurse corps should be considered as "persons in the military * * * service of the United States" and for that reason exempt from taxation to the same extent as that granted to soldiers. The nurse corps herein referred to is that organized under the act of February 2, 1901. (Sec. 1831 U. S. Compiled Statutes, 1916). Members of such corps are under the direct supervision of the war department, and receive their pay through the pay department.

Persons in the hospital corps of the army, including nurses, are entitled to the same exemption granted to soldiers, for the reason that they are persons in the naval service of the United States, by virtue of the act of August 29, 1916. (Sec. 2511-a, U. S. Compiled Statutes, 1916).

Div. 9

RED CROSS NURSES, WIDOWS OF SOLDIERS, Y. M. C. A., SALVATION ARMY AND KNIGHTS OF COLUMBUS WORKERS NOT EXEMPT.

Red Cross nurses are not persons in the military or naval service of the United States. They are working under a separate and independent organization, viz.: the American National Red Cross, a corporation organized by congress by the act of January 5, 1905. (Sec. 7617, U. S. Compiled Statutes, 1916). They receive their pay through such organization, and while responsible to some extent to the military authorities, yet they cannot be considered as a member of either the military or naval units of the United States.

There is no provision whatsover in the statute exempting widows of persons who have been "soldiers, sailors or other persons in the military or naval service of the United States" from taxes. Likewise, there is no provision exempting persons engaged in Y. M. C. A., Salvation Army, Knights of Columbus, Jewish Welfare, or such kindred work from taxation.

Div. 10

REAL PROPERTY PURCHASED AFTER ASSESSMENT NOT EXEMPT IN THE HANDS OF A SOLDIER.

Real property purchased after the tax lien attaches is not exempt from taxation, even though in the hands of a soldier.

Section 1400, supplement, 1913, provides in part as follows:

> "Taxes upon real estate shall be a lien thereon against all persons except the state. * * * As against the purchaser, such lien shall attach to the real estate on or after the 31st day of December in each year."

Furthermore in the case of *First Congregational Church of Cedar Rapids v. Linn County,* 70 Iowa 396, the plaintiff, a religious corporation, in August, 1880, purchased a city lot for the purpose of erecting thereon a house of worship, and it was used for no other purpose after its purchase, but in January of the same year it was assessed to the plaintiff's grantor. It was held that the property was not exempt, in the hands of the plaintiff, from taxation for the year 1880.

In part the opinion states:

> "Land, not exceeding one section, 'devoted solely to the appropriate objects' of a religious institution, is exempt from taxation. (Code 797). All property of the state not exempt is subject to taxation each year. (Code 796, 807). The taxes are levied annually, and each assessment and levy are for the year in which they are made. The lot in question was, without doubt, in a condition to be taxed for more than seven months of a year; being, for that time, the property of the plaintiff's grantor. Within that time it had been assessed. The taxes were not levied until September. It is not necessary to inquire whether the tax was a lien from the assessment. It is sufficient to know that for seven months of the year it was subject to taxation, and that during all that time it was subject to assessment and other proceedings preliminary to the levy of the tax for the whole year, whereby it was brought within the exercise of the taxing power. *The lot, being subject to taxation, certainly ought to pay taxes for that time. But there are no provisions of the law under which the tax may be apportioned. The state must lose the whole tax, or the plaintiff must pay it. In the exercise of its power to protect its revenue the state may enforce the tax for the whole year.* The exemption from taxation, under code 797, was not intended to act retrospectively, and exempt from prior taxes, or prior liability for taxes. The provision was intended to operate prospectively, and to exempt property from future liability * * *"

In view of section 1400 of the supplement, 1913, and the reasoning in the foregoing case, we are of the opinion that real property acquired by a soldier, from one in whose hands it would be subject to taxation, after having been assessed, is not exempt in such soldiers' hands.

Div. 11

WHEN HOMESTEAD BEING PURCHASED ON PAYMENT PLAN IS EXEMPT.

Where a soldier is purchasing a homestead upon contract and title is to remain in the vendor until certain payments are made, he is entitled to claim such homestead exempt from taxation, provided, however, that in case the contract states that the vendor shall pay all taxes on said property, then in that event the homestead should not be exempt. This is so for the reason that the one obliged to pay the tax under the contract is not exempt from taxation, and it would be of no aid to the soldier to exempt such a homestead since he is not liable for the tax thereon.

Div. 12

UNITED STATES STATUTES RELATIVE TO SALE OF SOLDIERS' PROPERTY FOR TAXES.

In addition to the foregoing, we desire to direct your attention to the soldiers' and sailors' civil relief act of March 8, 1918, in which congress made the following provisions regarding the taxation and sale of property possessed by one in the military service of the United States.

Article 5 of said act provides in part as follows:

"(1) That the provisions of this section shall apply when any taxes or assessments, whether general or special, falling due during the period of military service in respect of real property owned and occupied for dwelling or business purposes by a person in military service or his dependents at the commencement of his period of military service and still so occupied by his dependents or employes are not paid.

"(2) When any person in military service, or any person in his behalf, shall file with the collector of taxes, or other officer whose duty it is to enforce the collection of taxes or assessments, an affidavit showing (a) that a tax or assessment has been assessed upon property which is the subject of this section; (b) that such tax or assessment is unpaid, and (c) that by reason of such military service the ability of such person to pay such tax or assessment is materially affected, no sale of such property shall be made to enforce the collection of such tax or assessment, or any proceeding or action for such purpose commenced, except upon leave of court granted upon an application made therefor by such collector of other officer. The court thereupon may stay such proceedings or such sale, as provided in this act, for a period extending not more than six months after the termination of the war.

"(3) When by law such property may be sold or forfeited to enforce the collection of such tax or assessment, such person in military service shall have the right to redeem or commence an action to redeem such property, at any time not later than six months after the termination of such service, but in no case later than six months after the termination of the war; but this shall not be taken to shorten any period, now or hereafter provided by the laws of any state or territory for such redemption.

"(4) Whenever any tax or assessment shall not be paid when due, such tax or assessment due and unpaid shall bear interest until paid at the rate six per centum per annum,

and no other penalty or interest shall be incurred by reason of such nonpayment. Any lien for such unpaid taxes or assessment shall also include such interest thereon."

It will thus be noted that it is the policy of the law to grant every protection possible to any person in the military or naval service and to prevent forfeiture of his rights through tax sales during his absence.

B. J. POWERS, *Assistant Attorney General.*

WHO ENTITLED TO EXEMPTION FROM TAXATION

Under the provisions of section 3, chapter 380, acts of 37th General Assembly, it is necessary that the claimant be in actual service and that such service be in the particular war referred to in the statute.

February 6, 1920.

Mr. E. J. Wenner, County Attorney,
Waterloo, Iowa.

Dear Sir:

We have your favor of the 4th inst. wherein you submit the following question for the opinion of this department.

You state:

"Our county auditor is desirous of a ruling with reference to the exemption from taxation of homesteads and property of soldiers of the world war.

"The matter is covered by section 3, chapter 380 of the 37th General Assembly.

"He particularly desires to know whether the exemption applies to men who were soldiers, and who are now at home undischarged and receiving $1.00 per month from the federal government on account of being subject to call. Of course, these men are living the life of civilians and are enjoying all the rights and privileges of civilians, though they are subject to call at any time."

Section 3 of chapter 380, acts of the 37th General Assembly, to which you refer, reads as follows:

"The homestead of all soldiers, sailors or other persons in the military or naval service of the United States shall be exempt from taxes during their term of service in the present war; or other property to the actual value of ten thousand dollars ($10,000) in the event of no such homestead."

The exemption is granted to soldiers, sailors and other persons *in* the military or naval service of the United States *during their term of service in the present war.* To entitle the claimant to the exemption provided for, two indispensable things must exist, namely, he must be *in the service* and such service must be *in the present war.* No presumptions, in favor of the claimant, may be indulged in when construing an exemption statute. Under the well settled principle of law, that taxation is the rule and exemption therefrom the exception, whatever presumptions are permitted must be in favor of the rule and against the exception.

It may be admitted that, technically speaking, we are still at war with Germany, but actually and in fact we are not and have not been at war with any nation for more than a year, and if the matter before us was confined to the sole question of whether a soldier or sailor actually in the military or naval service at the present time was engaged in *service in the present war,* we would doubtless be constrained to answer the question in the negative. But in addition to this, the claimant in the case before us has been relieved from service. He is, or can be at home and engaged in private pursuits, and the mere fact that he is technically listed as a "reserve" and receives $1.00 per month from the government does not continue him in the service. The statute not only contemplates actual service, but further contemplates that such service should be in the particular war referred to in the act, and upon no theory can we see how the claimant can be held to be in actual service, or in theoretical or any other kind of service in the war referred to in the statute, and we, therefore, rule that he is not entitled to the exemption claimed.

J. W. SANDUSKY, *Assistant Attorney General.*

SALE OF PROPERTY EXEMPTION FROM TAXATION

Under paragraph 7 of section 1304, supplemental supplement as amended by 37th and 38th General Assembly, the soldier, in case of sale of the property is only entitled to such portion of the exemption as had accrued at the period sale was made. Exemption to soldiers is a personal right and does not descend to heirs, unless they are included in class to which exemption is granted.

March 9, 1920.

Mr. L. A. Riter, County Attorney,
Rock Rapids, Iowa.

Dear Sir:

We have your request for the opinion of this department on the following questions:

You state:

> "(1) Does the sale of exempt property by a soldier, where the transaction and sale takes place during the year in question for taxation and following the assessment by the assessor, but by levy of the board of supervisors, terminate the exemption for the year in question? If it does terminate the exemption, at which date of the year must the transfer be made? That is, is there any particular time during the year before which it would terminate, and after which it would not terminate?
>
> "(2) In case of the decease of the soldier after assessment by the assessor, but prior to the time of levy by the board of supervisors at their September meeting, the party dying intestate, does the exemption apply or does it not apply?"

The questions presented involve the construction of paragraph 7 of section 1304 of the supplemental supplement, as amended by the 37th and 38th General Assemblies, and in order that we may view and consider this paragraph intelligently it may not be amiss for us to set the same out in full.

It provides:

> 7. The property, not to exceed seven hundred dollars in taxable value, and poll tax, of any honorably discharged Union soldier or sailor of the Mexican war or of the war of the rebellion, or of the widow remaining unmarried of such soldier or sailor, and the property not to exceed three hundred dollars in taxable value and poll tax, of any honorably discharged soldier or sailor of the war with Spain, Chinese relief expedition, or the Philippine insurrection, or the widow of any such soldier or sailor remaining unmarried. It shall be the duty of every assessor annually to make a list of such soldiers, sailors and widows, and to return such list to the county auditor upon forms to be furnished by such auditor for that purpose; but the failure on the part of any assessor so to do shall not affect the validity of any exemption. All soldiers, sailors, or widows thereof, referred to herein, shall receive a reduction equal to their amount of exemption, the same to be made from the homestead of such soldier or sailor or widow, if he or she shall so own a homestead of the value of such exemption, otherwise out of such property as shall be designated and owned by the soldier, sailor or widow, such designation to be made either to the assessor or by writing filed with the county auditor on or before July first each year.
>
> "The exemptions herein provided shall also extend to the property of the wife of any such soldier or sailor, where

they are living together and occupying the same as their homestead, and he has not otherwise received the benefits of this section; *provided, however, that such exemption shall only extend to the period during which such soldier, sailor or marine or widow thereof or the wife or minor child of any such soldier, sailor or marine remains the owner of said property, and upon the sale thereof to any person other than those of the class included in this section, said exemption shall cease, and the property shall be subject to taxation as other property.*"

Prior to the amendment adopted by the 38th General Assembly, and which is embraced in the lines in italic, this department had, on divers occasions, been called upon to construe the paragraph, and in each instance, where the rights of the party to the exemption were questioned or disputed, we held that if the exemption had been allowed by the assessor and so entered on the tax records by the proper officers by September first, that the right to such exemption became fixed, and that a conveyance of the property prior to December 31st following did not defeat the exemption, and that the property so conveyed was exempt, in the hands of the grantee, to the extent of the exemption theretofore allowed, and the taxing officers of the several counties of the state, quite generally, if not entirely, observed such rule in the collection of taxes.

With this fact in mind, we will endeavor to ascertain and determine what change was effected by the latter amendment.

It is obvious that the legislature intended to change the rule or system which we have endeavored to outline, but the difficulty is to determine to what extent such change has been effected. The words "such exemption shall only extend to the period such soldier * * * remains the owner of said property," are, as it appears to us, somewhat confusing, and we find it rather difficult to reach a satisfactory conclusion as to their purport and meaning. If they should be held to mean that the exemption should be spread over the entire calendar year, and the proportion thereof which should be allowed is represented by the part of the year which has expired or elapsed at the time the sale of the property is made, the object sought would undoubtedly be secured, though it would necessitate the ascertainment by the taxing officer of the exact date of the period when the exemption ceased. In other words, the date of the sale of the property. The application of

this rule would require such officer, after ascertaining such date, to divide the total amount of the exemption by the number of days in a calendar year, and multiply the amount thus obtained by the number of days which had elapsed at the date the sale of the property was consummated. This, we think, was the legislative intent, and we are of the opinion that it should be held to be the law.

The rules which we have held applicable to the first question do not obtain as to the second. The right to an exemption under the paragraph of the section which we have set out is, unquestionably, a *personal* right, for the benefit of the class designated in the paragraph, and may not be extended to others, and unless the property of the deceased soldier descends to the class in whose hands it would be exempt to the same extent as it would in his hands, the exemption ceased and was terminated by his death and the property in question became subject to taxation the same as other property.

J. W. SANDUSKY, *Assistant Attorney General.*

RECORDING OF SOLDIERS' DISCHARGES

The county recorder should record without charge any final discharge of any soldier, sailor or marine of the United States. The final discharge may be honorable, dishonorable, or a "bob-tail," but a discharge from the draft should not be recorded.

April 11, 1919.

Mr. Maxwell O'Brien, County Attorney,
Oskaloosa, Iowa.

Dear Sir:

A short time ago your county recorder requested this department to render an opinion to him regarding the recording of discharges of soldiers and sailors from the military service of the United States. The matter is of such general importance that we have, therefore, prepared the following opinion, and we desire that you inform your recorder of its contents.

Your recorder states:

> "I have been requested to record not only the regular honorable discharge from the United States army and navy, but also what is called a 'discharge from the draft.' Also a discharge from the army which does not say honorable, and is printed on blue paper; also release from active duty in

the navy placing a man in the naval reserve; also discharge from the merchant marine, and discharge from the state militia which was issued at the time the men enlisted for service over seas."

The 38th General Assembly enacted the following provisions with reference to the recording of discharges of soldiers and sailors:

"AN ACT

"TO REPEAL HOUSE FILE NO. 17 OF THE ACTS OF THE 38TH GENERAL ASSEMBLY AND TO ENACT A SUBSTITUTE THEREFOR TO PROVIDE FOR THE RECORDING OF DISCHARGE PAPERS OF DISCHARGED SOLDIERS, SAILORS AND MARINES.

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

"Section 1. That House File number seventeen (17) of the acts of the 38th General Assembly, which act was duly passed by the House of Representatives and the Senate, and was signed by the speaker of the House and the president of the Senate and approved by the governor, and was, on March 3, 1919, filed with the secretary of state, be and the same is hereby repealed and the following enacted in lieu thereof:

"The county recorder of each county in this state shall maintain in his office a special book in which he shall, upon request, record the final discharge of any soldier, sailor or marine of the United States. No recording fee shall be collected when the soldier, sailor or marine requesting such record shall be an actual resident of said county or shall have been such at the time of his entrance into the service of the United States. In all other cases the legal fee shall be charged.

"Section 2. There shall be kept in connection with such record an alphabetical index referring to the name of the soldier, sailor or marine, whose name appears in each discharge paper as recorded.

"Section 3. This act being of immediate importance shall be in force from and after its passage and publication in the Des Moines Register and the Des Moines Capital, newspapers published in Des Moines, Iowa.

"H. J. MANTZ, *Speaker of the House Pro Tem.*

"ERNEST R. MOORE, *President of the Senate.*

"I hereby certify that this bill originated in the House and is known as House File No. 537.

"W. C. RAMSAY, *Chief Clerk of the House.*

"Approved March 17 A. D., 1919.

"W. L. HARDING, *Governor.*"

You will note that the second paragraph of section 1 provides that the recorder shall keep a special book in which he shall, upon request

"record the final discharge of any soldier, sailor or marine of the United States."

The recorder should record such discharge whether it is an honorable discharge, a dishonorable discharge or what is known as a "bob-tail." The latter discharge is ordinarily printed on blue paper and is issued to a soldier when he is discharged from the service without recommendation for re-enlistment. The refusal to recommend may be either because of physical disability or on account of character.

The discharge from the draft, mentioned in the inquiry, is not a discharge from the service of the United States. It is more in the nature of an order for reclassification of the person named therein. He is not discharged from the military service by receiving such an instrument. He is merely ordered returned for the purpose of reclassification under the draft, and we are of the opinion that such a discharge is not to be recorded.

Release from active duty in the navy or from the merchant marine is not a final discharge and should not be recorded.

A discharge from the state militia is not a "final discharge" from the army, navy or marine service of the United States, and therefore is not to be recorded.

B. J. POWERS, *Assistant Attorney General.*

SOLDIERS' MEMORIAL BUILDING

In cases where the county erects a soldier's memorial building under the acts of the 38th General Assembly, the board of supervisors have charge of the erection and maintenance of that building by virtue of the provisions of section 422, supplemental supplement, 1915.

June 7, 1919.

Mr. Newton W. Roberts, County Attorney,
Ottumwa, Iowa.

Dear Sir:

We have your letter of May 28th in which you ask for our opinion upon the following matter:

> "The act of the 38th General Assembly with reference to the erection of memorial buildings (House File 215) provides that the city or town council shall appoint a 'community civic congress * * * being three persons, residents of said city or town, * * *' who shall co-operate with the council in all matters pertaining to community improvements and also with reference to a memorial building. In case the memorial building is constructed by the county instead of the city does the act imply that the board of supervisors shall have supervision of the erection and maintenance of such memorial building?"

House file 215, as originally introduced, merely granted power to cities and town authorizing them to erect soldiers' and sailors' memorial buildings and provided for the purchase or condemnation of the necessary grounds therefor, and also authorized the issuance of bonds therefor and a special tax for the purpose of maintaining such building and for the purpose of liquidating the bonds. An amendment was introduced granting to counties the same privilege as the bill originally contemplated should be granted to cities and towns.

Section 2 of the act in question provided that the city or town council should appoint a "community civic congress" which should co-operate with the city council with reference to the erection and maintenance of such memorial, but the act utterly fails to specify who should have charge of the memorial building in case it is a county enterprise. It is our opinion in such event that the board of supervisors have jurisdiction over the erection, construction and maintenance of such memorial building. Among the powers specified in section 422 of the supplemental supplement, 1915, we find the following granted to the board of supervisors:

> "* * * *
>
> "3. To make such orders concerning the corporate property of the county as it may deem expedient.
>
> "* * * *

"5. To build and repair the necessary buildings for the use of the county and of the courts; * * *

"6. To cause the county buildings to be insured in the name of the county, or otherwise, for its benefit, and in case there are no county buildings, to provide suitable rooms for county purposes; * * *

"* * * *

"9. To purchase, for the use of the county, any real estate necessary for the erection of buildings for county purposes; * * *

"* * * *

"11. To represent the respective counties, and to have the care and management of the property and business thereof, *in all cases where* no other provision shall be made; * * *

"* * * *

14. To fix the compensation of all services of county and township officers not otherwise provided for by law, and to provide for the payment of the same; * * *"

The foregoing section gives ample authority to the board of supervisors to take charge of any such memorial belonging to the county in view of the fact that no other body has been authorized or charged with its erection, construction and maintenance, and it is our opinion that section 422 of the supplemental supplement, 1915, is authority for the board of supervisors to take full and complete charge of any such county memorial building.

B. J. POWERS, *Assistant Attorney General.*

OPINIONS RELATING TO PENSIONS

WIDOWS' PENSION

There is no provision of the law prohibiting a county from continuing to grant a widow's pension to one who removes from the county after obtaining the same; nor does the statute state the length of time such widow must reside in said county to be entitled to a pension. Such matters are addressed to the discretion of the court.

July 29, 1920.

Mr. F. H. Don Carlos, County Attorney,
Perry, Iowa.

Dear Sir:

We have your request for an opinion upon the following proposition:

> "First: When the widow moves out of the county is she still entitled to her pension, and to what length of time, if any?
>
> "Second: How long must a widow be a resident of a county before she is entitled to receive a widow's pension?"

The matter of granting pension to a widow who has a dependent or neglected child or children under her custody is governed by sections 254-a20, a20-a, *et seq*, the supplement, 1913, as amended. A reading of these sections fails to reveal any provision dealing with a case where a widow who has been granted a pension removes from the county in which it was obtained. Neither does the statute specify how long such widow must be a resident of the county before she is entitled to receive aid.

After carefully reading the foregoing sections, we are convinced that the answer to both of these questions is something which should be addressed to the sound discretion of the court. The statutes in question are exceedingly broad and clothe the district court with almost unlimited discretion with reference to the granting of aid to widows.

We are impressed with the thought that each case must stand on its own facts and that if the county feels that it is being

imposed upon by any who has moved to said county for the purpose of availing herself of the provisions of the pension act, then we think it not only right, but proper that the county officials take such steps as necessary to fully advise the court with reference to the matter.

B. J. POWERS, *Assistant Attorney General.*

EFFECT OF LEGAL SETTLEMENT OF WIDOW ON RIGHT TO PENSION

The court may grant support to dependent children found in the county and tax the costs to that county, regardless of the legal settlement of the widowed mother.

March 26, 1919.

Mr. W. W. Comstock, County Attorney,
West Union, Iowa.

Dear Sir:

You state that on the 24th day of December, 1918, the judge of the superior court of Oelwein, Fayette county, Iowa, granted to Mrs. Bartels a certain allowance for the support of her dependent children, commonly known as a widow's pension; that prior to December, 1918, Mrs. Bartels had made her home in Chickasaw county.

You then ask whether the question of the legal settlement of the widow is material in determining the county which must finally assume the cost of the support of said dependent children, as granted to them by the order of the superior court of Oelwein.

Section 254-a14 of the supplement to the code, 1913 contains the following provisions, anmong others, that:

> "This act shall apply only to children under the age of sixteen. * * * For the purpose of this act the words 'dependent children' or 'neglected children' shall mean any child who for any reason is destitute or homeless or abandoned; or dependent upon the public for support. * * *"

Section 254-a15 of the supplemental supplement provides:

> "Any reputable person being a resident of the county, having knowledge of a child in his county who appears to be either dependent, neglected or delinquent, may file with the clerk of the court having jurisdiction of the matter a petition in writing, setting forth the facts, verified by affidavit;

it shall be sufficient if the affidavit is upon information and belief."

Section 254-a20 of the supplement to the code, 1913, as amended by chapter 150, acts of the 37th General Assembly, provides in part:

> "* * * * If the court finds that the mother of such dependent or neglected child is a widow, and if the court further finds that the mother is poor and unable to properly care for said child, but is otherwise a proper guardian, and that it is for the welfare of such child to remain at home, the court may enter an order finding such fact and fixing an amount of money necessary to enable such mother to properly care for such child; and thereupon it shall be the duty of the county board of supervisors, through its overseer of the poor or otherwise, to pay to such mother, at such times as said order may designate, the amount so specified for the care of such dependent or neglected child until further order of the court; providing, however, that the amount to be paid for the care of any such child shall not exceed the sum of two dollars per week; and provided further that such payment shall cease upon any such child's attaining the age of fourteen years. The court may, when the health of or condition of the child may require it, cause the child to be placed in a public hospital or institution for treatment or special care, or in a private hospital or institution which will receive it for like purposes without charge."

Section 254-a28 of the supplement to the code, 1913, provides:

> "This act shall be construed liberally to the end that its purpose may be carried out, to-wit: that the care, custody and discipline of a child shall approximately as nearly as may be that which should be given by its parents, and in all cases where it can properly be done, the child to be placed in an approved family home and become a member of the family by legal adoption or otherwise."

It will be seen from the foregoing statutory provisions that it was the evident intention of the legislature to provide solely for the care, support and treatment of dependent or neglected children found in any particular county. No reference is made whatever to the legal settlement of the mother, and the relief granted is not to the mother, but for the children. It will be further noticed that the chapter, of which the foregoing sections are a part, applies only to dependent or neglected children under the age of sixteen years. So that the law relating to the support

of the poor in general has no application to the granting of relief under the conditions found in chapter 5-b of the supplement to the code and amendments thereto.

We are, therefore, of the opinion that the legal settlement of Mrs. Bartels is immaterial in determining the liability of Fayette county for the support of her dependent children as ordered by the judge of the superior court of Oelwein.

W. R. C. KENDRICK, *Assistant Attorney General.*

PENSION FOR BLIND

When a blind person duly qualified applies for aid from a county the board of supervisors has no discretion about paying such person at least $150.00 per year. But the payment of a greater sum is wholly within the discretion of the board of supervisors.

October 31, 1919.

Mr. J. M. C. Hamilton, County Attorney,
Fort Madison, Iowa.

Dear Sir:

We have your letter of October 29th in which you state:

> "A question has arisen as to whether chapter 200 of the acts of the 38th General Assembly, compels the board of supervisors to make the allowance to all applicants who come within the provision of the act, or whether under section 2272-i of the 1915 supplement to the code it is discretionary with the board to give the aid. My opinion is that the said chapter 200, acts of the 38th General Assembly, compels the board to make an allowance of from $150 to $300 per annum to any applicant who comes within provision of the act."

In answering your inquiry, we desire to direct your attention to section 2722-j of the supplemental supplement, 1915, which reads as follows:

> "That all male persons over the age of twenty-one years, and all female persons over the age of eighteen years, who are declared to be blind in the manner hereinafter set forth, and who come within the provisions of this act, *shall at the discretion of the county board of superviors,* receive as a benefit one hundred fifty dollars per annum, payable quarterly, upon warrants properly drawn upon the treasurer of the county of which such person or persons are residents."

You will observe from a reading of the foregoing that the board of supervisors was given authority to grant aid to blind

persons coming within the purview of the act at their discretion. The preceding section was repealed by chapter 200, acts of the 38th General Assembly, and the following inserted in lieu thereof:

> "That all male citizens over the age of twenty-one years, and all female citizens over the age of eighteen years, who are declared to be blind in the manner hereinafter set forth, and who come within the provisions of this act *shall* receive as a benefit a sum not less than one hundred fifty dollars ($150.00) per annum, and not more than three hundred dollars ($300.00) per annum, payable quarterly, upon warrant properly drawn upon the treasurer of the county of which such citizen or citizens are residents. The board of supervisors of the county *shall at their discretion* determine what sum between one hundred fifty dollars and three hundred shall go to such citizen or citizens."

You will observe from a reading of the provision of the 38th General Assembly that the board of supervisors have no discretion with reference to granting aid to any one qualified to receive aid under the statute. The amount of aid was increased by the act of the 38th General Assembly from $150.00 per year to a sum not exceeding $300.00 per year. The payment of $150.00 is obligatory, but the payment of a greater sum is clearly discretionary with the board under the provisions of the present law.

In addition to the foregoing, we desire to call attention to the provisions of section 2722-p, supplemental supplement, 1915, which reads as follows:

> "It is hereby made the duty of the county board of supervisors of each county in this state to cause warrants on the county treasurer to be drawn, properly endorsed, payable to each of said persons in said county each quarter in each year thereafter during the life of said persons, while they are residents of said county or until said disability is removed."

Taking these various sections in their entirety, we are of the opinion that the advice given your board of supervisors is correct, namely, that where a person is otherwise qualified to receive aid under the provisions of pensioning the blind, that it is the duty of the board of supervisors to pay at least the sum of $150.00 to such person and that they have no discretion in the matter of making such payment; the payment of a sum in excess of $150.00, however, lies solely within the discretion of such board.

B. J. POWERS, *Assistant Attorney General.*

APPLYING FOR PENSION FOR BLIND

The application for a pension by a blind person may be made at any time during the year.

November 7, 1919.

Hon. B. W. Newberry,
Strawberry Point, Iowa.

Dear Sir:

I have your letter of November 5th regarding construction of the statutes referring to the blind, and in reply will say I have examined chapter 10-a, supplement to the code, 1915, and find among other provisions the following:

Section 2722-j provides:

> "That all male persons over the age of twenty-one years, and all female persons over the age of eighteen years, who are declared to be blind in the manner hereinafter set forth, and who come within the provisions of this act, shall at the discretion of the county board of supervisors, receive as a benefit one hundred fifty dollars per annum, payable quarterly, upon warrants properly drawn upon the treasurer of the county of which such person or persons are residents."

Section 2722-l provides:

> "It is hereby made the duty of the county board of supervisors in each county in this state, to appoint a regular practicing physician, whose official title shall be 'examiner of the blind,' who shall keep an office open in some convenient place during the first week of each year for the examining of applicants for said benefit."

Section 2722-n provides:

> "All persons claiming the benefit provided herein may go before the county clerk of their respective counties, and make affidavit to the facts which bring him or her within the provisions of this act, which shall be deemed an application for said benefit; two citizens, residents of the county, shall be required to make affidavits to the fact that they have known said applicant to be a resident of the state for five years and the county for the one year immediately preceding the filing of said application; the county clerk shall bring the same to the attention of the county board of supervisors, who shall refer the application to the examiner of the blind for said county."

Section 2722-o provides:

> "The county clerk shall register the name, address and number of applicant, and date of the examination of each of the applicants who has been so determined to be entitled to said benefits, and each year, on or before the fifteenth day of January, he shall certify to the county board of supervisors the names and residences of each applicant."

It is apparent from a reading of the chapter, and especially of the sections above quoted, that this act was passed for the benefit of the blind, and that it was the intention of the legislature that these people should be cared for under and by virtue of the terms of this contract.

You will notice that under section 2722-n it is provided that "all persons claiming the benefit provided herein may go before the county clerk of their respective counties, and make affidavit to the facts which bring him or her within the provisions of this act, which shall be deemed an application for said benefit." There is no limit upon the time this may be done; neither is there any limit with reference to the time of any other matters provided for the carrying out of this act, which indicates that it was the intention that this relief should be granted at any time during the year.

The fact that section 2722-l provides that the examining physician "shall keep an office open in some convenient place during the first week of each year for the examining of applicants for said benefit" does not indicate that it was the intention that he could not examine these applicants at any other time, but this provision is to compel the physician to keep an office open at a place convenient to the whole county during the particular period of the year named.

Section 2722-o provides that "the county clerk shall register the name, address and number of applicant, *and date of the examination of each of the applicants,* who has been so determined to be entitled to said benefit, and each year, on or before the fifteenth day of January, he shall certify to the county board of supervisors the names and residences of each applicant."

This provision does not indicate that the examination might not be made at any time, nor that the board should not commence the payment at any time, but the provision above quoted is for

the purpose of keeping a record every year where it will be convenient and readily accessible to any person who is checking up the affairs of the county.

It is the opinion of this department that a person may be examined and is entitled to be examined at any time, and that whenever it has been determined by the examining physician that a person is blind within the meaning of this act, that he or she is entitled to the compensation, and that it is the duty of the board to pay the same no matter what time of year this examination was made.

H. M. HAVNER, *Attorney General.*

OPINIONS RELATING TO PLUMBERS AND PLUMBING

LICENSING OF PLUMBERS IN CITIES AND TOWNS

Cities and towns have exclusive authority over the examinations and licensing of plumbers. The state board of health is empowered to adopt rules and regulations as to plumbing installation throughout the entire state and the rules so adopted are to be followed by cities and towns.

July 16, 1919.

State Board of Plumbing Examiners,
State House.

Gentlemen:

Your letter of July 13th, 1919, to Mr. Havner has been referred to me for reply.

In your letter you state:

"Chapter 378, laws of the 38th General Assembly, provides for establishing a code of rules governing the installation of plumbing in the state of Iowa. The governor has appointed the committee provided for in paragraph 2, section 2 of said chapter 378, and said committee is now engaged in assisting the state board of health in drafting the plumbing code.

"For the purpose of guiding the committee in its deliberations, said committee desires from you an opinion on the following questions:

"1. Does the code of rules or plumbing code provided for in section 2 of said act apply to and become mandatory in all the cities and towns of the state, and does such code of rules or plumbing code apply to all plumbing installed in the state, within and without the cities and towns?

"2. (a) Does the provision in paragraph 3 of section 2 of said act relating to certificates or license blanks to be furnished by the state board of health mean that the state board of health shall furnish such blank certificates or licenses to all of the cities and towns in the state?

"(b) Will such license be considered a state license issued by the state board of health to successful applicants in the

examinations provided for in the act, or will the blanks simply be furnished to the cities providing for such examinations to be issued by the proper authorities in such cities

"(c) What should be the wording and form of these certificates?

"(d) If these certificates should be issued to the individual plumbers upon recommendation of the local examining boards, should the state board of health maintain a registration of such qualified plumbers which would be made complete or corrected each year?

"(3) Section 5 of said act provides that master plumbers may receive a license without examination if application for such be made within ninety days after taking effect of this act. In any future case must a master plumber engaged in the business of plumbing be a practial plumber, or will the employing plumber, as stated in said section, by master plumber taking out a license, empower the man who is not a practial plumber to engage in the business of plumbing and to receive a license as a master plumber; or does the provision of paragraph 3 of said act defining the examination, place with the city council the right to determine the qualifications for the master plumber?

"The foregoing questions relative to master plumbers are asked because a reading of the law appears to indicate the possibility that city councils and local examining boards might so prescribe the rules and regulations for examination that enforcement of the same would be prejudicial and exclude from the plumbing business master plumbers who should be allowed to continue or engage in the business of plumbing."

I will answer the questions propounded by you in the order and under the number by which they appear in your letter.

1. Section 2 of chapter 378, acts of the 38th General Assembly, contains this provision:

"The state board of health is hereby empowered to make such provisions as may be necessary to establish a code of rules governing the installation of plumbing in the state of Iowa."

There is nothing in the language used, or in other parts of the act, limiting the application of such rules to cities and towns, but the words used are of such character that it is the evident intent of the legislature that the rules adopted by the board of health shall apply whenever plumbing is installed in the state, whether

in cities and towns or outside thereof, and the rules so adopted must be observed by cities and towns, although by the same section cities and towns are given power to adopt and enforce additional rules not inconsistent with the state law.

2. (a) Section 2 provides that "the state board of health shall provide and issue to cities and towns herein specified," i. e., cities and towns over six thousand population, "the necessary blank certificates or license blanks on application." It seems to me plain that it is the duty of the board of health, by this section, to furnish such blanks upon application.

(b) Section 3 of the act provides for a board of examiners, appointed by the city council in each city or town, and provides for an examination by such board of examiners under such rules and regulations as the council shall prescribe. Section 4 provides that such licenses shall be valid and recognized throughout the state for a period of one year from its issue.

To the extent that the license issued is valid throughout the state, it is a state license, but it is issued, as pointed out, by the examiners of a city or town. The state board of health does not issue the license, and has nothing to do therewith, nor with the examination upon which it is issued. The power given to the board of health is to prescribe a code for the installation of plumbing, and not for the examination of plumbers.

(c) If you will indicate to this department what blanks you desire we will prepare forms for you.

(d) There is nothing in the statute requiring the state board of health to keep a record of licensed plumbers, nor is there any provision whereby the state board of health can require a report from the examining board as to whom it has licensed. There is nothing whatever to prevent the board from keeping a record of licensed plumbers if it can secure information from the examing boards as to the licenses issued by each board.

3. As before pointed out, the matter of examining and licensing plumbers is left to an examining board appointed by the city council, and the examinations are to be held under such rules and regulations as the council shall prescribe.

SHELBY CULLISON, *Assistant Attorney General.*

PLUMBERS EXAMINATION AND LICENSE

The law relating to licensing of plumbers discussed and statement made of the law with reference to fees to be paid for license.

September 15, 1919.

Mr. C. F. Massard,
Des Moines, Iowa.

Dear Sir:

Your letter of September 12th addressed to Mr. F. S. Treat, secretary of the state board of control, has been handed to me for attention.

In this letter you ask to be advised:

> "whether or not a master plumber who was in business at the time, April 25, 1919 (senate file No. 214), as it appears on page 487 of the 1919 session laws, was approved, needs to pay the examination fee of ten dollars ($10.00). It is the contention of the plumbers that they are liable only for the renewal fee of two dollars ($2.00) as set forth in this act."

In reply thereto I have to say that section 3 of Senate File No. 214, the same being chapter 378, acts of the 38th General Assembly, provides, among other things, for the appointment of a board of examiners consisting of three members to examine applicants for and license "master plumbers," "employing plumbers" and "journeyman plumbers."

Said section further provides:

> "Said board * * * if satisfied as to the competency of the applicant, a certificate, or license, shall be issued to such master plumber, journeyman plumber or employing plumber, and the amount of the fee for examination shall not exceed ten dollars ($10.00) for a master plumber or employing plumber, and shall not exceed five dollars ($5.00) for a journeyman plumber. Fees for renewal for a master plumber or employing plumber's license shall not be more than two dollars ($2.00), and for a journeyman plumber's license shall not be more than one dollar ($1.00)."

Section 4 of said act provides that such certificates or license shall expire on the 31st day of December of each year, and may be renewed from year to year upon the payment of the renewal fee.

Section 5 of the act provides:

> "Such examining board shall issue a certificate, or license, upon the payment of the *regular fee*, without examination, to all master plumbers actually engaged in the business of plumbing at the time of the passage of this act, provided application for such license be made within ninety (90) days after taking effect of this act."

Under the provisions of the act under consideration a maximum fee for the examination and license in the first instance of master plumbers or employing plumbers shall not exceed ten dollars ($10.00), and for journeyman plumbers the fee shall not exceed five dollars ($5.00). The maximum fee for renewal of the master plumber's and employing plumber's license shall not exceed two dollars ($2.00), and for a journeyman plumber the fee shall not exceed one dollar ($1.00).

The act contemplates that the fees named in each instance may be less than the maximum provided for in the act.

The act further provides, however (section 5), that all master plumbers actually engaged in the business of plumbing at the time of the passage of this act making application for such license within ninety (90) days after the taking effect of the act, may have a certificate, or license, issued to them "without examination" and "upon the payment of the *regular fee.*"

From a reading of the act it seems clear that the legislature intended the "regular fee" to refer to the fee required for a license in the first instance, and not to the "regular fee." Clearly the words "regular fee" as used in section 5 could not refer to the "regular fee," for the reason that there were no outstanding licenses to be renewed.

It seems clear that all the legislature intended in section 5 of the act in question was to relieve all master plumbers actually engaged in the business of plumbing at the time of the passage of the act from taking an examination, but that the fee required would be the same as that fixed for a certificate, or license, where an examination is given.

C. W. LYON, *Assistant Attorney General.*

OPINIONS RELATING TO PUBLIC PRINTING

PRINTING AND BINDING

The contract entered into between the state board of public printing and binding and the Homestead Company for the printing of the "revised code" to be ordered by the "extra session" of the 1920 General Assembly is invalid.

January 20, 1920.

Hon. Ora Williams,
State Document Editor.

Dear Sir:

You state that Hon. J. L. Parrish of Des Moines has submitted, on behalf of the Homestead Company, the following question, and requested an official opinion from this department thereon:

> "The Homestead Company has submitted to me its contract with the board of public printing and binding of the state, of date December 19, 1919, covering the printing and binding of the code and session laws for an opinion as to the validity of the contract. The particular point involved is whether or not the compensation agreed upon is greater than the maximum rate fixed by the law. As I understand it, this involves the question of whether or not there is a maximum rate fixed by law for the work contemplated by the contract and required by the acts of the 38th General Assembly in respect to printing and binding these particular items.
>
> "May I be permitted to suggest to you that for the protection of the board of public printing and binding, as well as the contractor, that you get the opinion of the attorney general on this question, and that you furnish the Homestead Company a copy of this opinion."

It seems to me that the contract with reference to the printing of the code raises a more serious question as to the legality than the question as to whether the price at which the contract is let conflicts with the existing statutory schedule.

The 37th General Assembly created the board of public printing and binding and prescribed its duties. The provisions of the law applicable to the questions raised will be found in chapter 183.

Section 1 provides:

"There is hereby created and established a board of public printing and binding, the members of which shall be the governor, the secretary of state, the auditor of state and the treasurer of state; and it shall be the duty of said board to enter into contracts for and on behalf of the state of Iowa, as hereinafter provided, for all printing for the use of the state or its officers, boards, commissions and departments, or to be done at state expense, unless otherwise provided by law. The contracts herein authorized shall be for the procuring or purchase of everything pertaining to the printing and publication of all books, pamphlets, circulars, leaflets, blanks, cards, envelopes, letterheads, schedules, and all stationery, including the composition, engraving, stitching, ruling, press work, paper stock, lettering, numbering and binding."

Section 3 provides:

"On or before the first day of November of each year, beginning with the year 1918, the officers of the different departments of state coming under the provisions of this act shall file with the document editor for the following year an estimate of the probable amount and the kind needed of bulletins, circulars, folders, pamphlets, booklets, catalogs, books, reports, blank books, record books, blanks, envelopes, letterheads, cards, labels, invoices, receipts, postal cards, court documents, abstracts, cuts, plates, engraving, half-tones, illustrations and all other printing and binding work of any nature whatsoever, now or hereafter required for the above period."

Section 4 provides:

"All printing and binding designated in section three (3) of this act and all other printing and binding coming under the provisions of this act shall be classified in a general way by the board of printing and binding as follows: (1) Bulletins, circulars, folders, pamphlets, leaflets, catalogues, small books, reports, blank books, and all printing and binding of this nature, on which there is a general competition in the state; (2) codes, code supplements, session laws, record books, official register, census, geological survey, year book of agriculture, horticultural report, railroad commissioners report, expense report, Iowa documents, large books, and any other publication or printing and binding work on which there is not general competition in the state; (3) commercial work, such as envelopes, letter heads, cards, schedules, blanks, invoices, bills, labels, slips, postal cards, and all kinds of small jobs, commonly known as job printing; (4) General Assembly

journals, bills, resolutions, calendars, messages, bill indexes, manuals, and all other printing in connection with the legislature; (5) supreme court dockets, briefs, abstracts, and all other printing in connection with the supreme court, not otherwise provided for by law; (6) engraving, plates, cuts, half-tones, and all other illustrations used in state printing and binding."

Section 7 provides:

"On or before the third Monday in November of each year, beginning with the year 1918, the board of printing and binding shall cause to be printed for three consecutive issues in at least one daily paper in each of the seven largest cities in the state, as shown by the last state or federal census, an advertisement that sealed bids will be received until the second Monday in December for all printing and binding coming under the provisions of this act for the year following, beginning with the first day of January. All bids shall be submitted in sealed envelopes and shall be opened in the office of the board of printing and binding at ten o'clock a. m. on the second Monday of December of each year, and the contract shall be awarded in accordance with the provisions of this act. Said advertisement for bids shall specify that blank schedule and specifications in detail for bids may be obtained from the document editor, Des Moines, Iowa."

Section 13 provides.

"The board of printing and binding shall state in its specifications for printing and binding the time requirements with reference to all such work and shall fix in the specifications and contract the penalty for failing to comply with the provisions of the specifications and contract; provided, however, that no contractor shall be held accountable for delay occasioned by holding proofs or any other nonconformance to contract or specifications for which said contractor is in no way responsible."

Section 15 provides:

"The board of printing and binding upon the taking effect of this act shall adopt a maximum schedule of rates for printing and binding not including stock, which schedule shall be the existing statutory schedule. No contract for printing and binding shall be let for a greater price than the maximum of rates fixed."

From the foregoing statutory provisions it will be observed that the board of public printing and binding shall exercise supervision over all state printing, unless otherwise provided by

law. Under the act it becomes the duty of the heads of the various state departments to file with the document editor an estimate of the probable amount and kind of printing needed for the following year, and then the said printing board shall classify the printing and binding so estimated by the departmental heads, as well as all other printing and binding coming under the provisions of the act. After all printing and binding has been so classified it then becomes the duty of the said board to advertise for bids for all such printing and binding for the following year. The board shall prepare specifications to be submitted to the prospective bidders, and in these specifications the board shall state the time limit for the performance of the work. The board shall also adopt a maximum schedule of rates for printing and binding, which schedule shall be the existing statutory schedule, and no contract shall be let for a greater price than the maximum rates so fixed.

However, before any specifications can be made, bids submitted or contracts let for any state printing or binding, except in emergency cases, there must be some lawful estimate or authority for that specific classification of printing and binding.

In the instant case, if I am correctly informed, the code referred to in the specifications of the state board of public printing and binding, and the proposal of the Homestead Company bearing date of December 8, 1919, and the contract entered into on December 19, 1919, in a revised code which the said board believes will be printed during the year 1920, at the direction of the General Assembly of Iowa, as well as a possible edition of the session laws. In other words, the board of public printing and binding anticipates an extra session of the General Assembly, at which provision will be made for a revised code, and in order to take care of the printing and binding of the anticipated code and session laws the said board has prepared specifications and executed a written contract for the printing of the same.

But no extra session of the General Assembly has been called. If called, there is no reasonable assurance that it will consider a general revision of the laws, nor any assurance that a revised code will be ordered. And if an extra session is called, and at that session a revised code is ordered, yet there is no reasonable assurance that the General Assembly will order the code printed

and bound in the manner and form provided for in the specifications of the board of public printing and binding, and in the contract entered into with the Homestead Company by said board.

In the act creating the code commission no reference is made to a revised code. The only provision made by the 38th General Assembly was for a compiled code. Until the General Assembly expressly provides for the printing and binding of a revised code I am of the opinion that no contract can be lawfully entered into for the printing and binding of such a code.

However, if it can be rightfully claimed that the board of public printing and binding was acting within its powers in assuming that a revised code might be printed during the year of 1920, and acting upon that assumption advertised for bids and let a contract, then, and in that event the cost of printing would have to conform to the maximum rate fixed by law, for the reason that the General Assembly has not yet provided for a revision of our laws and prescribed the manner and form in which a revised code should be printed and bound. Until the General Assembly expressly provides that such a code shall be printed and prescribes that it shall be printed in such a manner as that the session rate fixed by law cannot possibly apply, then, and until then, all codes printed at the expense of the state shall be printed at a price not exceeding the existing statutory schedule.

W. R. C. KENDRICK, *Assistant Attorney General.*

PRINTING AND BINDING

Discussing the validity of the contract to be entered into with the Homestead Company for printing supplies for the motor vehicle department.

March 30, 1920.

Hon. Ora Williams,
Secretary State Board of Public Printing and Binding.

Dear Sir:

You submit the bid of the Homestead Company on certain printing, binding, stitching, numbering, ruling and perforating for supplies to be used in the motor vehicle department of the state, and ask for an opinion as to the authority of your board to enter into a contract in accordance with said bid.

You also state that advertisement for bids has been made in the newspapers designated by law, and after making an extra effort to secure competition you received only one offer, that of the Homestead Company.

Section 15, chapter 183, acts of the 37th General Assembly, creating the board of public printing and binding and regulating the state printing and binding, provides:

> "The board of printing and binding upon the taking effect of this act shall adopt a maximum schedule of rates for printing and binding not including stock, which schedule shall be the existing statutory schedule. No contract for printing and binding shall be let for a greater price than the maximum of rates fixed."

The existing statutory schedule for state printing and binding referred to in said section 15 will be found in sections 138 and 141, code supplement, 1913. That schedule applies to the character of printing and binding expressly referred to therein.

In the contract in question the printing and binding are of a character not expressed nor contemplated in sections 138 and 141, but are of an entirely different character, and the statutory schedule herein referred to is not applicable thereto.

The printed supplies of the motor vehicle department are of a special and unusual kind. They require numbering, punching, perforating, and the blocking or binding of the assembled sheets in duplicate and triplicate. The jobs are large, in some instances requiring over one million blanks. Not only that, but the supplies are required at a time when it would be practically impossible to estimate the amount at the time the law requires estimates to be filed for the succeeding year. It is imperative that the motor vehicle department have these supplies in order to carry on the work of that department. In fact, the letting of this contract becomes a case of public necessity.

Therefore, I am of the opinion that the board of public printing and binding is legally authorized to enter into the contract in question.

W. R. C. KENDRICK, *Assistant Attorney General.*

BASIS FOR ESTIMATING COST OF PRINTING

The 16 page form, document size, is the basis upon which to estimate cost of printing book press work. If a larger size, but less pages, is

the equivalent, payment should be made at the rate for 16 pages, document size.

April 19, 1920.

Hon. Ora Williams,
Document Editor.

Dear Sir:

Your letter of the 9th inst. addressed to the attorney general has been referred to me for attention.

You submit a copy of specifications and proposal for printing work falling within class 58 of the statute and involving compensation for press work under a job work classification.

You then ask whether or not paragraph 12 of the general specifications modifies the statutory requirement that such compensation shall be upon the basis of a form of sixteen pages, document size, or its equivalent.

The provisions of section 138, paragraph 2, supplemental supplement to the code, 1915, are mandatory, stating that the compensation for book press work shall be upon the basis of a form of sixteen pages, document size, or its equivalent.

The statutory provision just quoted does not prohibit the state from printing book press work of a larger or smaller size than the form of sixteen pages, document size. If the needs of any particular department of the state require book press work of a larger size than the ordinary document size, then that department undoubtedly has the right to ask for such printing, and the state unquestionably has the right to have the work done and paid for upon a basis of a form of sixteen pages, document size, *or its equivalent.* For instance, if a job of book press work of only eight pages and larger than a document size would be equivalent to a form of sixteen pages, document size, then the eight-page book or pamphlet would be paid for at the same rate per page as the sixteen page form. If the law is otherwise, then there would be no authority for printing the large books required by the insurance department and other departments of the state requiring unusually large forms of book work.

The provision in paragraph 12 of the general specifications cannot in any way modify the statutory provision, and if it could be said that paragraph 12 actually does modify the provisions of

section 138, paragraph 2 of the supplemental supplement, then the provisions of paragraph 12 should be ignored to that extent.

I am of the opinion that if it is necessary that the state highway commission bulletin requires a size larger than the ordinary document size that the printer who prints the bulletin is entitled to more pay for press work on a form of sixteen pages of said bulletin than for the statutory form of sixteen pages, document size.

However, I am of the opinion that there should be some limitation or check upon the size of such printing, and unless there is some good reason for printing a larger size than the ordinary document size, then payment for printing such larger size should be limited to the amount fixed by statute.

W. R. C. KENDRICK, *Assistant Attorney General.*

SCOPE OF STATUTE RELATING TO PUBLIC PRINTING

The statute limiting contracts for public printing to the statutory schedule does not apply to contracts including the printing, binding and stock.

Hon. Ora Williams,
Secretary State Board of Public Printing and Binding.

Dear Sir:

You have submitted to this department for an opinion the bids for printing, binding, work and stock necessary for the reports of various state departments, which the statute requires shall be made prior to the convening of the 39th General Assembly, and you ask whether or not the state board of public printing and binding may legally accept the lowest bid received and proceed with the printing of said reports.

Section 15 of chapter 183, acts of the 37th General Assembly, provides that all contracts for printing and binding shall conform with the statutory schedule with reference to the price to be paid for such printing and binding. The contract for printing the reports in question, however, calls for the completed product, including the printing, binding, paper and everything necessary to furnish the completed report. Then section 21 of chapter 183 requires that all contracts for such reports shall be let by bids per page, including everything, while section 138 of the supplemental supplement, the statute relating to the price to be paid for

printing, prescribed that the price shall be based upon a certain number of impressions of a form of sixteen pages, document size.

I am of the opinion that section 15, chapter 183, acts of the 37th General Assembly, applies to contracts involving printing and binding only, and does not apply when the contract calls for the furnishing of all the materials entering into the completed product; and inasmuch as section 21 of the act requires all contracts for printing state reports to be let per page, and section 22 of the act confers the discretion upon the board to let the contract either way, that is for the completed product or for merely the printing and binding, therefore, I am of the opinion that if the board fairly advertises for bids for the completed products then it may legally accept the lowest and best bid and proceed under the contract.

W. R. C. KENDRICK, *Assistant Attorney General.*

PUBLIC PRINTING

General discussion as to the scope of authority of board of public printing and binding.

February 26, 1919.

Hon. Ora Williams,
Document Editor.

Dear Sir:

You state that you are directed by the state board of public printing and binding to ask for an opinion from this department as to the jurisdiction of said board over all printing done at the expense of the state.

The powers conferred upon the board of public printing and binding, and the duties of said board and secretary thereof (also known as the document editor) are governed exclusively by the provisions of chapter 183, acts of the 37th General Assembly, together with sections 144-e to 144-o, inclusive, of the supplemental supplement, 1915.

The title to the act creating the board of public printing and binding declares that it is:

> "An act to abolish the office of state printer and state binder, to create a board of public printing and binding and establish the powers and duties thereof; also to provide for a contract system of procuring the public printing and binding

and the material and supplies required in connection therewith, and providing bonds for the various officers and providing penalties for the violation thereof."

From the title it will be observed that the primary purpose of the act was:

(1) To abolish the office of state printer and state binder;

(2) Create a board of public printing and binding, and

(3) To provide for a contract system of procuring the public printing and binding.

In defining the powers and duties of the board, section 1 of the act provides:

> "* * * and it shall be the duty of said board to enter into contracts for and on behalf of the state of Iowa, as hereinafter provided, for all printing for the use of the state, or its officers, boards, commissions and departments, or to be done at state expense, *unless otherwise provided by law.*"

It will also be noticed that said act carries a repeal clause in which it is provided "all acts and parts of acts in conflict herewith are hereby repealed."

The entire act gives one the impression that the effect of the act is to be restricted, for you frequently find the following, or similar, expressions limiting the operation of the act to the different "departments of state coming under the provisions of this act." While you find a repeal clause, yet the saving clause found in different sections of the act, to-wit: "unless otherwise provided by law," restricts the operation of the repealing clause to such acts as are in conflict other than those which the statutes expressly permit to be in conflict.

In other words, it seems to us that the primary purpose of the act in question was to supplant the state printer and binder with the board of public printing and binding, and the scope of its jurisdiction limited practically to the printing and binding heretofore done by the state printer and binder.

To search through all the statutes relating to the multitudinous duties and powers of the various commissions, boards, societies and departments of the state and to set out in detail the extent of those powers with reference to the printing of such commissions, boards, societies and departments would not serve the purpose of

an opinion, but the more practical method would be to turn to the specific chapter of the code governing any particular department, when the question is raised as to whether the printing for that particular department comes within the provisions of the act creating the board of public printing and binding and see if the printing for that department is "otherwise provided for by law." If the printing is therein otherwise expressly provided for, then the provisions of chapter 183 do not apply; otherwise they do.

To illustrate: The judges of the supreme court, acting through the chief justice, are expressly authorized to enter into contracts for the printing of the supreme court reports, and that contract may be entered into with another than the state printer.

Section 224-d of the supplemental supplement, wherein the foregoing authorization was found, provides:

> "The supreme court reports shall be published under contract entered into in the name of the state of Iowa under such terms, stipulations and conditions as a majority of the judges of the supreme court, acting through the chief justice, shall prescribe, provided that every such contract shall provide that the three hundred fifty copies first issued shall be delivered by the publisher to the secretary of state free of all cost to the state. The present contract for the printing and publication of the reports of the supreme court is hereby transferred to the jurisdiction of said judges for the sole use and benefit of the state which shall have the same power and rights in reference thereto as now possessed by the executive council. Provided that a majority of the judges of the supreme court may, if they deem it advisable, make the state its own publisher of the reports, causing the same to be printed and bound by the state printer and binder in the same manner and for the same compensation as is provided by law for other state printing and binding, and in event the state becomes its own publisher such reports shall be sold and distributed through the office of the secretary of state."

Thus it will be seen that section 224-d expressly provides for the printing of the supreme court reports by the judges, and would be a clear exception to the provisions of chapter 183. By following the suggestion herein made, you can readily determine whether or not the printing for any particular department comes within the provisions of chapter 183.

As to the refusal of the various boards, commissions, societies and departments to comply with the requirements of chapter 183,

and to which you refer in your letter of the 10th inst., with the exception of the state historical society, it is my opinion that they come within the provisions of said chapter.

The state historical society is given a certain appropriation, and it is expressly provided that the executive board thereof shall have exclusive jurisdiction in the management of its affairs and the expenditure of its funds. (See sections 2887 of the code and 2882-a of the supplement to the code, 1913).

As to the other boards and commissions referred to by you, I can find no express statutory provisions granting them the authority to procure their printing from any other source than that which applies to the various state departments generally.

W. R. C. KENDRICK, *Assistant Attorney General.*

June 27, 1919.

Hon. Ora Williams,
Document Editor.
Dear Sir:

Supplemental Opinion.

Supplementing the opinion heretofore rendered you by this department under date of February 28, 1919, we desire to state:

That it is our opinion that the authority hitherto vested in the executive council to furnish the department of justice with necessary printing and printed matter was transferred from that body to the board of public printing and binding upon its creation by the legislature.

It is your duty to supply and supervise the printing of all matter necessary for the department of justice, there being no other statutory provision whereby this department can secure printed matter; and in so doing you have authority to determine upon the kind and character of publications to be printed for this department.

B. J. POWERS, *Assistant Attorney General.*

PRINTING OF MAPS FOR GEOLOGICAL DEPARTMENT

The cost of printing of maps of the regions around Camp Dodge for a bulletin to be issued by the state geological department should not be paid from the annual appropriation provided for in section 2502, supplement, 1913.

June 6, 1919.

Mr. James H. Lees,
Assistant State Geologist.

Dear Sir:

I have been directed to reply to your letter of the 27th inst. in which you state as follows:

> "Last summer the executive council authorized the geological survey to purchase or have made 5,000 copies of a map of the region about Camp Dodge to accompany a bulletin on that region which we were preparing.
>
> "As the United States geological survey was lithographing an edition of this map for its own use, we asked that department to furnish us with the 5,000 copies which we needed. This was done and the bill rendered was for $226."

You then ask under what section of the code payment for these copies should be made.

The statutory provisions material to a determination of your question will be found in sections 2497 and 2499 of the code and sections 2500, 2501 and 2502 of the supplement to the code, 1913.

Section 2497 provides for the creation of a geological board.

Section 2499 requires the state geologist to make a complete survey of the natural resources of the state and all their economic and scientific aspects.

Section 2500 requires the state geologist to make detailed maps and reports of counties and districts as fast as the work is completed, which shall embrace such geological, mineralogical, topographical and scientific details as are necessary to make complete records thereof, and, when the information obtained warrants it, the results of any special investigation made by him may be brought together in a report for publication, accompanied by proper illustrations and diagrams. In the making of topographical maps he shall co-operate with the United States geological survey.

Section 2501 then provides that annual reports containing the information gathered by the state geologist, together with special bulletins valuable to the people at large for immediate use, shall be published at the expense of the state.

Section 2501 reads as follows:

> "The annual report, together with bulletins of educational and scientific value, and special bulletins containing information necessary for the immediate use of the people at large, shall be published by the state under the direction of the board, and disposed of as other published reports of state officers when no special provision is made, but the copies remaining in the control of the board after such distribution, after retaining a sufficient number to supply probable future demands, shall be sold to persons making application therefor at the cost price of publication, the money thus accruing to be turned into the treasury of the state."

Then section 2502 appropriates the sum of $8,000 annually to cover the cost of making the survey, but expressly excludes the cost of publishing and distributing the reports and bulletins heretofore referred to, such cost being expressly made a charge against the state by section 2501, *supra.*

It is therefore my opinion that the purchase and use of the maps in question formed part of the publication of your said report or bulletins, and the cost of the maps is a charge against the state, and should be paid out of any money in the state treasury not otherwise appropriated, and should not be charged against your $8,000 annual appropriation provided for in section 2502 of the supplement to the code, 1913.

SHELBY CULLISON, *Assistant Attorney General.*

OPINIONS RELATING TO INTOXICATING LIQUORS

ISSUANCE OF SEARCH WARRANTS

The right of a municipal court to issue search warrants is clearly given by the statutes.

August 25, 1920.

Mr. John B. Hammond.
City.

Dear Sir:

Your letter of the twenty-third, in which you ask an opinion of this department as to the jurisdiction of the municipal court to issue a search warrant in liquor cases, under the provisions of section 2413, supplemental supplement to the code, and the provisions of the 37th General Assembly, chapter 322, is at hand.

The jurisdiction of the municipal court is set out in section 694-c18, supplemental supplement to the code, 1915. By that section the municipal court is given concurrent jurisdiction with the district court in civil matters where the amount in controversy does not exceed $1,000.00, etc., and, also, "all criminal jurisdiction that is now or hereafter may be conferred upon justices of the peace, mayor's courts or police courts."

Since a search warrant may be issued by justices of the peace upon the filing of an information as provided by section 2413, supplemental supplement to the code, 1915, it follows that the same power exists in the municipal court.

Your attention is also called to the definition of the term "magistrate" as found in section 5097 of the code, and the "powers of magistrates" as defined in section 5098 of the code.

I think there is no question but what the authority is conferred upon a municipal court to issue a search warrant for liquor seizures where the information is filed as provided by law.

F. C. DAVIDSON, *Special Counsel.*

CONSPIRACY TO VIOLATE LIQUOR LAWS

Persons may be indicted for conspiracy even though they conspired to do acts less than a felony, hence they may be indicted for conspiracy to sell intoxicating liquor in violation of law.

August 6, 1919.

Mr. Verner Gabrielson, County Attorney,
Fort Dodge, Iowa.

Dear Sir:

We have your letter of August 5th in which you ask for our opinion upon the following proposition:

> "Can an indictment for conspiracy be returned except for conspiracy to commit a felony? Would an indictment charging two or more persons with having conspired together with intent to sell intoxicating liquor in violation of law be valid?"

We first direct your attention to the provisions of section 5059 of the code which provides as follows:

> "If any two or more persons conspire or confederate together with the fraudulent or malicious intent wrongfully to injure the person, character, business, property or rights in property of another, or to do any illegal act injurious to the public trade, health, morals or police, or to the administration of public justice, or to commit any felony, they are guilty of a conspiracy, and every such offender, and every person who is convicted of a conspiracy at common law, shall be imprisoned in the penitentiary not more than three years."

You will observe that the disjunctive "or" is used in designating the offenses which may be the basis for prosecution for conspiracy. That is, the defendants may be charged with having conspired together to injure the character of some person or to do acts injurious to the public trade, or to public morals or to commit a felony. It is not necessary that the defendants be charged with having conspired to commit a felony. It is not even necessary that they conspire to commit a crime. For instance in the case of *State v. Stevens,* 30 Iowa 381, the defendants were indicted for a conspiracy to fraudulently obtain a divorce. The obtaining of a divorce is not a crime but the conspiring together to use false and fraudulent means to do so may be the grounds for indicting the defendants for conspiracy, and this case so holds.

We also direct your attention to the case of *State v. Potter,* 28 Iowa 554, where the defendants were indicted for conspiracy to

defeat the enforcement of the prohibitory law of Iowa. In this case, the defendants conspired together to get out a writ of replevin to get liquor away from an officer who held it under a warrant.

Again in the case of *State v. Hardin*, 144 Iowa 264, the defendants were indicted for spiriting away witnesses or preventing them from being present at a trial of a case wherein they were subpoenaed as witnesses. There was no provision in our statute at that time that made such an act a crime and the only way to punish them was to indict them for conspiracy to prevent the administration of public justice and our supreme court held such an indictment to be proper.

A review of these cases and the authorities cited therein clearly show that an indictment will lie for conspiracy even though the defendants conspired to do less than commit a felony.

B. J. POWERS, *Assistant Attorney General.*

BURDEN OF PROOF IN SEARCH WARRANT PROCEEDINGS

The burden of proof in search warrant proceedings for the forfeiture of liquor is upon the state.

July 10, 1919.

Mr. Verner Gabrielson, County Attorney,
Fort Dodge, Iowa.

Dear Sir:

Your letter of June 30th to Mr. Havner has been referred to me for reply.

You ask for authorities on the question as to whether the burden of proof is upon the state in liquor condemnation cases under search warrant proceedings.

Under the provisions of section 2413, supplemental supplement to the code, 1915, as amended by the acts of the 37th General Assembly, search warrants may be issued when an information is filed alleging that intoxicating liquor is owned or kept, and one, is intended to be sold, or, two, has been purchased or procured as a result of solicitation, or, three, has been transported in violation of law.

Section 2415 of the supplemental supplement, 1915, provides that upon trial the proceedings shall be the same substantially as in cases of misdemeanor triable before justices of the peace,

and that if the judge or jury find that the liquor was, when seized, owned or kept for sale, or was purchased or procured as a result of solicitation, or has been transported in violation of law, then a judgment of forfeiture shall be entered.

You will observe that the statute requires that the case shall be tried substantially the same as misdemeanors are triable, and the burden in such event would be upon the state to prove the allegations made in the search warrant as to the unlawful character of the possession. It is true that proceedings under search warrants for condemnation of liquor are only *quasi* criminal.

State v. Taggart, 172 N. W. 299,

but whether civil or criminal, the ordinary rule is that the burden is upon the person making the complaint. However, in the trial of a case under search warrant proceedings you should bear in mind that section 2427 of the code, as amended by chapter 323, acts of the 37th General Assembly, provides that:

> "* * * the finding of intoxicating liquors in the possession of one not legally authorized to sell or use the same, except in a private dwelling house which does not include or is not used in connection with a tavern, public eating house, restaurant, grocery, or other place of public resort, or the finding of the same in unusual quantities in a private dwelling house or its dependencies shall be presumptive evidence that such liquors are kept for illegal sale."

And proof that liquor was found upon the premises described in the search warrant raises a presumption that they were for illegal sale and places the burden upon the defendant to explain his possession.

State v. Intoxicating Liquors, 109 Iowa 145.

SHELBY CULLISON, *Assistant Attorney General.*

AUTHORITY OF CITY TO PROHIBIT NUISANCE

A city may punish a person for violating one of its ordinances prohibiting the keeping of a liquor nuisance; and the state may file like charges against the same person for violation of the state law. In such cases the accused cannot plead former jeopardy.

June 20, 1919.

Mr. F. H. Don Carlos, County Attorney,
Perry, Iowa.

Dear Sir:

We have your letter of June 17th in which you state:

> "The city of Perry has charged a party with maintaining a liquor nuisance under city ordinance. I have charged the same party with liquor nuisance under the state law. Please advise me whether or not both the state and city can prosecute under the circumstances and whether the party is thereby put in jeopardy more than once.
>
> "I can see no reason why the state can not presecute and if the question of jeopardy arises it seems to me that the city ordinance is illegal."

In answering your inquiry, we desire to direct your attention to chapter 393 of the acts of the 37th General Assembly which repealed section 704 of the supplement, 1913, and enacted a substitute therefor. It provides that cities and towns

> "shall have power to suppress, restrain and prohibit gambling, bawdy houses, disorderly houses, houses of ill-fame, road houses where lewdness is carried on, opium or hop joints or places resorted to for the use of opium or hasheesh, or places where intoxicating liquor is illegally kept, sold or given away, and to punish the keepers and inmates thereof, or persons resorting thereto, or persons who, knowing the character or reputation of such places, transport others to or from any of the above described places."

You will therefore observe that authority has been expressly given to cities and towns to "suppress, restrain and prohibit" liquor nuisances. At the same time authority is given the state to institute proceedings to abate such nuisance or to punish the one who maintains such a nuisance.

The courts of this state are committed to the doctrine that if the subject of an ordinance is fairly within the power conferred upon the city or town, the mere fact that the matter has been covered by the statute will not invalidate the ordinance.

Town of Bloomfield v. Trimble, 54 Ia. 399.

And it has therefore been held that a person may be charged with gambling in violation of the city ordinance and punished thereunder and at the same time be charged with gambling in violation of the laws of the state and also be punished therefor.

Blodgett v. McVey, 131 Ia. 552.

Many cases treating upon this subject will be found in the case of

Town of Neola v. Reichart, 131 Ia. 492.

At page 500 of the preceding case, the court announces the following rule:

> "The principle that an act may constitute two offenses, one against the state and the other against a city or town, and that conviction of one may not be pleaded as constituting former jeopardy, as well as that authority to enact an ordinance with reference thereto is included in the general powers conferred on cities of most of the cases and text-writers and is sound."

The court then proceeds to cite many authorities sustaining the statement just quoted. In the case of

Town v. Lanz, 170 Ia. 437-444.

we find the court re-affirming the principle that cities and towns may enact ordinances even where the state has legislated upon the same subject.

It is therefore the opinion of this department that the city of Perry may prosecute a person for violation of a city ordinance prohibiting the maintaining of a liquor nuisance and that the state may also prosecute the same person for maintaining a liquor nuisance under the state statutes and that the question of jeopardy cannot be raised in such cases under the rule given in Town of Neola v. Reichart, *supra.*

B. J. POWERS, *Assistant Attorney General.*

ADVERTISING OF LIQUOR PROHIBITED

The printing or the distribution of circulars containing directions for making beer and telling where the necessary ingredients may be obtained, etc., is in violation of the anti-advertising act of the 37th General Assembly (chapter 136).

June 18, 1919.

Mr. H. K. Lockwood, County Attorney,
Cedar Rapids, Iowa.

Dear Sir:

We have your letter of June 13th in which you state:

> "I enclose herewith a circular of the Ideal Yeast Co., which I wish you would read, and advise me first is the distribution of these circulars by the said company a violation of the intoxicating liquor laws of the state?"

The circular you enclose contains directions for making beer in four different methods. It would serve no useful purpose to

set forth at length the directions given in the circular referred to; however, we desire to set forth a few paragraphs appearing on this circular, as follows:

"EVERY MAN HIS OWN BREWER

"This Company's Expert Chemist, after numerous experiments extending over a long period of time, has finally produced what the public has long been looking for, viz.: a beer extract that is absolutely pure, and that, when properly used, will produce a delicious beer for family use.

"Ideal Malt Products and Ideal Beer Extract are scientifically prepared from pure food products only, contain no drugs or chemicals.

"Beer made from these products will cost the consumer about one half as much, and will be better quality, than beer purchased from the average brewery.

"We know that any intelligent person can make first class beer from our products because thousands of our customers have been successful with it, and are repeating their orders. As a matter of fact it is as easy to brew good beer with this extract as it is to make a batch of bread.

"If the directions are carefully followed the product will be a pure, wholesome refreshing beer, containing all the nutritive and exhilirating qualities of the best brewery made beer. Do not guess at anything; measure the water, weigh the sugar and use the thermometer to ascertain temperature."

The circular also contains a price list of the products of the Ideal Yeast company. It further gives information with reference to the ordering of goods from this concern and asks for directions as to shipment, etc.

We are of the opinion that this circular is a direct violation of the anti-advertising act passed by the 37th General Assembly, known as chapter 136. The act in question in part provides:

"Any person who shall advertise for sale upon, or in, any street car, railroad car or other vehicle of transportation, or in any railway depot, hotel, etc. * * * by means of any sign or billboard, or any circular, etc. * * * letter or otherwise, within this state, any intoxicating liquor or liquids, whether malt, spirituous, cinous or fermented liquors or liquids, etc. * * * or advertise through any of the above described methods, or in any other way or manner display any such advertisement of the manufacture, sale, keeping for sale, or any such liquors

or liquids, or *furnishing the name of the person from whom, or the company or corporation from which, or the place where, or the price at which, or the method by which any such liquors or liquids may be purchased, obtained or procured;* etc. * * * shall be deemed guilty of a misdemeanor, erection, or place which is used or permitted to be used, for the purpose of printing, lettering, publishing, etc., * * * or for the publication of any newspaper, periodical or magazine which may contain any advertisement, notice, reference, editorial or story, giving information of the place where, or the person or firm from whom, *or the method by which,* or the price at which any intoxicating liquor or any other article the sale or keeping for sale of which is prohibited by laws of this state, may be purchased, *procured, or obtained,* and any building, erection or place where any such sign, etc. * * * circular pamphlet, circular letter or newspaper, periodical or magazine containing such advertisement, as herein described, are exhibited, posted or *kept for distribution,* sale or gift, and the machinery, type, fixtures and furniture used in printing and publishing any such advertisement, as described in this act, shall be deemed a public nuisance and may be enjoined and abated as provided in chapter six of title twelve of the code and amendments thereto, for enjoining and abating liquor nuisances."

We ought to add that the act of the 37th General Assembly follows to a considerable extent a similar statute in force in the state of Alabama. The validity of the Alabama statute was sustained in the case of

State v. Delaye, 193 Ala. 68 Southern, 993, L. R. A. 1915 E. 640.

You will also find that a statute of somewhat the same nature has been upheld in the state of Maine. See the case of

State v. Bass Publishing Company, 72 Atl. 994, 20 L. R. A. (n. s.) 495.

B. J. POWERS, *Assistant Attorney General.*

MANUFACTURE OF STILL, ETC.

The manufacture of a still for distilling intoxicating liquor is not in violation of our law, but if the still is used for such purposes it may be condemned as a nuisance and its owner punished. One who manufactures a still and prepares a mash to be used in the making of intoxicating liquor is engaged in the unlawful manufacture of liquor.

May 26, 1919.

Mr. Louis Murphy, Internal Revenue Collector,
Dubuque, Iowa.

Dear Sir:

We have your letter of May 21st in which you state that the commissioner of internal revenue desires to have our opinion upon the following proposition:

> "Is it unlawful to manufacture a still intended to be used in violation of law. I have had a case reported to this office of two men manufacturing a still, out of a copper kettle, a copper worm, a heavy oaken lid, etc., and preparing a mash, anticipating the making of distilled spirits."

You further state that you are making this inquiry for the reason that under the provisions of section 1001 of the act of congress of February 24, 1919, provision is made for the assessing of the sum of $1,000 on every person engaged in the unlawful manufacture of intoxicating liquor in any state or territory and a like sum upon any one who unlawfully manufactures stills.

Section 2382 of the supplemental supplement, 1915, as amended by chapter 248 of the 37th General Assembly, provides as follows:

> "*No one, by himself, clerk, servant, employe or agent, shall, for himself or any person else, directly or indirectly, or upon any pretense, or by any device, manufacture,* sell, exchange, barter, dispense, give in consideration of the purchase of any property or of any services or in evasion of the statute or keep for sale, any intoxicating liquor, which term shall be construed to mean alcohol, ale, wine, beer, spirituous, vinous and malt liquor, and all intoxicating liquor whatever, except as provided in this chapter, or solicit, take, or accept any order for the purchase, sale, shipment, or delivery of any such liquor, or aid in the delivery and distribution of any intoxicating liquor so ordered or shipped, or own, keep, or be in any way concerned, engaged or employed in owning or keeping any intoxicating liquor with intent to violate any provision of this chapter, or authorize or permit the same to be done; and any clerk, servant, employe or agent engaged or aiding in any violation of this chapter shall be charged and convicted as principal. And in case of a sale in which a shipment or delivery of such liquors is made by a common or other carrier, the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employe."

Section 2384 of the code provides as follows:

> "Whoever shall erect, establish, continue or use any building, erection or place for any of the purposes herein prohibited, is guilty of a nuisance, and upon conviction shall pay a fine of not less than three hundred nor more than one thousand dollars and costs of prosecution, which shall include a reasonable attorney's fee to be taxed by the court, and stand committed to the county jail until such fine and costs are paid, and the building, erection or place, or the ground itself, in or upon which such unlawful manufacture or sale or keeping with intent to sell, use or give away said liquors is carried on or continued or exists, and *the furniture, fixtures, vessels and contents are also declared a nuisance*, and in addition to the penalties hereinbefore affixed, shall be abated as hereinafter provided."

You will note from the foregoing section that the manufacture of intoxicating liquor is absolutely prohibited by the laws of this state. You will further note that all "furniture, fixtures, vessels and contents" used in connection with the manufacture or sale of intoxicating liquor are declared by law to be a nuisance and are to be abated as such.

It is the opinion of this department that the bare possession of a still or a worm in itself is not a violation of our law and furthermore, that there is nothing in our law prohibiting the manufacture of either such a worm or a still, but the moment such still or worm is put into use, there is a violation of our law. Furthermore, if two or more persons conspire together to manufacture a still and to thereafter proceed with the manufacture of intoxicating liquor, it is the opinion of this department that such persons could be indicted for the crime of conspiracy in accordance with the provisions of section 5059 of the code.

We are further of the opinion that under the facts stated in your letter the parties are engaged in the unlawful manufacture of liquor for the reason that they have prepared not only the utensils to be used in the manufacture, but they are also preparing a mash from which to manufacture intoxicating liquor.

B. J. POWERS, *Assistant Attorney General.*

INTOXICATING LIQUOR NUISANCES—RES ADJUDICATA

The fact that a court of equity refuses to enjoin a defendant for maintaining a liquor nuisance cannot be pleaded as *res adjudicata* by such defendant upon being indicted for bootlegging.

April 2, 1919.

Mr. Lew McDonald, County Attorney,
Cherokee, Iowa.

Dear Sir:

We have your letter of March 27th in which you state in part as follows:

> "I wish to have your opinion on another question of law.
>
> * * * I had a man charged with bootlegging and also brought an action in equity for enjoining the man from maintaining a liquor nuisance. * * * My case against this man in equity came on for trial first and by getting some of my best witnesses out of the way before I could get them subpoenaed I was beaten. Now the defendant moves to dismiss the criminal charge on the grounds of *res adjudicata.* What has been your experience with cases parallel to this?
>
> "I would also like your opinion on another point if you please, can a criminal case be dismissed during vacation of the court by the prosecutor filing a written motion of dismissal?"

In answering the inquiry presented in the first paragraph of your letter, we desire to direct your attention to the fact that the necessary elements of *res adjudicata,* as given by various authorities, does not exist in the instance mentioned in the first paragraph of your letter. It has been repeatedly held that a matter is not regarded as res adjudicata unless there is a concurrence of four conditions; first, identity in the thing sued for; second, identity of the cause of action; third, identity of the persons and of the parties to the action; fourth, identity in the quality of the persons for or against whom the claim is made. You will find quite a review of the authorities supporting this view in volume 7 of *Words and Phrases.* In the case of

LeRoy, et al. v. Collins, 165 Mich. 380; 130 N. W. 635.

the supreme court of the state of Michigan has said at page 636 of the Northwestern Reporter:

> "The first essential of the rule of res adjudicata is the identity of the matter in issue. The 'matter in issue' is defined to be 'that matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleadings.' See Chand on Res Judicata, page 35. 'If the same subject matter comes in question in a second action in a

court of last resort, it is bound by its own former decision.' Bigelow on Estoppel, vol. 1, p. 117. 'A matter or question, either of law or fact, is res judicata, or set at rest, as to adverse parties and their respective privies, if it was a material issue in the proceeding, directly involved, and not merely incidentally cognizable nor collaterally in question, and was adjudicated after a contest, by a final judgment on the merits.' Van Fleet's Former Adjudication, vol. 1, p. 2.''

Under the definition res adjudicata, defined as above stated, we do not see how it would be possible for the defendant to successfully enter such a plea under the facts stated in your letter. In the first place, the action to enjoin the maintenance of a liquor nuisance is brought under an entirely different section of the statute from the criminal charge of bootlegging. One essential element in relation to a nuisance is that it be in reference to *a place.* A nuisance cannot be said to exist except in relation to some *place or building.* A person may be enjoined for maintaining a liquor nuisance even though no sale of liquor be shown. The keeping of intoxicating liquor in some building or place with intent to sell or dispose of the same in violation of law, makes that place a nuisance and the owner of the place or the one who operates the place may be enjoined from using that place or building, or any other place or building as a place in which to keep intoxicating liquors with intent to sell the same in violation of law. In establishing the existence of a nuisance in an equitable action, it is competent to introduce in evidence the reputation of the place.

State v. Benson, 154 Ia., 313.

The offense of bottlegging is an entirely different thing from the offense of maintaining a nuisance. A bootlegger is defined by section 2461-a, supplemental supplement, 1915. Section 2461-b, supplement to 1915, provides that in actions in equity to restrain a bootlegger, it is not essential to the action that it be shown that the defendant had a known or permanent place of business or base of supplies.

In other words, the crime of bootlegging is separate and distinct from the maintaining of a liquor nuisance. The former relates to the sale or traffic in intoxicating liquor, and the latter relates to a place in which liquors are kept with intent to sell the same in violation of law. The evidence required in one case compels the plaintiff to show that the acts were committed and the

liquor kept in a certain place or building with intent to be sold or dispensed in violation of law. It is the use of a building or a place that constitutes a nuisance and not the person.

Hathaway v. Benton, 172 Ia. 299; 154 N. W. 474.

The crime of bootlegging relates to the acts of a particular individual without reference to any place or building.

Therefore, it is the opinion of this department that there is no merit in the plea of res adjudicata in the instance mentioned in the first paragraph of your letter.

In reference to the question asked in the second paragraph of your letter, permit us to state that you should proceed under the provisions provided for in chapter 43 of title 25 of the code in reference to the dismissal of criminal cases. Without passing upon the proposition presented in this part of your letter, we suggest that the safe method for you to pursue is to amend your indictment if possible or ask the court to grant you authority to resubmit the cause to the grand jury. Either of these methods would avoid any question as to the right to dismiss an action in vacation.

B. J. POWERS, *Assistant Attorney General.*

INTOXICATING LIQUORS

The sale of intoxicating liquor can be legally made in Iowa only by a permit holder. This is true even though the person selling the same possesses a federal permit and the sale is made for non-beverage purposes.

The possession of a federal license to sell intoxicating liquors is presumptive evidence that the possessor of the license is engaged in the unlawful traffic of dispensing intoxicating liquors. The only exception to this presumption is where the license holder is also possessed with a permit issued in pursuance to the laws of Iowa.

March 10, 1919.

Mr. Louis Murphy, Internal Revenue Collector,
Dubuque, Ia.

Dear Sir:

We have your letter of March 7th, in which you ask:

> "I have the honor to request that you please send me a list, if possible, of the so-called non-intoxicating near beers that can be sold in the state of Iowa in compliance with the law. If you have no such list please advise particularly if the

cereal beverage known as Fox Head Cream Brew manufactured by the Waukesha Brewing Company, Waukesha, Wis., can be lawfully sold.

"And also, do you hold that a person not holding a 'state permit' is violating the state law if he sells spirits under a permit issued by this department in compliance with the federal food control act, which requires that a bond be furnished stating that such goods, non-beverage, can be sold in its natural state only to users and dealers who have furnished a like bond under the food control act, which act strictly prohibits the use of any non-beverage goods in such a manner that any article manufactured therefrom can be used as a beverage?

"And do you hold that persons not having a 'state permit,' but who have in their possession, or who have been issued a retail liquor or malt liquor dealer's stamp by this department, are violators, without proof of sale, of the state laws."

In response to the question asked in paragraph one of your letter, permit us to state that we do not have a list of non-intoxicating near beers which can be sold in this state in compliance with law. We are not advised as to the character of the beverage mentioned in paragraph one of your letter, and therefore are unable to state whether its sale is in conformity with our law or not.

In answer to the proposition set forth in paragraph two of your letter, permit us to state that unless a person has a permit to sell and dispense intoxicating liquors in this state, any sale made by such person is in violation of law. This is true regardless of whether the liquor is to be used for non-beverage purposes or not. Thus it has been held by our supreme court that even though a registered pharmacist is by law authorized to purchase alcohol from a wholesale druggist holding a permit, yet such registered pharmacist has no authority to sell alcohol for scientific purposes. Before he has any authority to sell the alcohol it is absolutely necessary that he secure a permit in the manner provided by law.

Re Application of Hencry, 124 Iowa 358, 100 N. W. 43.

In answer to the third paragraph of your letter, permit us to state that section 2427 of the code, as amended by the 37th General Assembly, chapter 323, in part provides as follows:

"The fact that any person not authorized to keep for sale and to sell intoxicating liquors for lawful purposes, engaged

> in any kind of business, has or keeps posted in or about his place of business a receipt or stamp showing payment of the special tax levied under the laws of the United States upon the business of selling distilled, malt or fermented liquors, or shall have paid such special tax for the sale of such liquors in this state, shall be presumptive evidence that the person owning or controlling such special receipt or stamp, or having paid such special tax, is engaged in keeping for sale or selling intoxicating liquors contrary to the provisions of this chapter."

Furthermore, section 2427-a, supplement of 1913, provides that is shall be the duty of the various county attorneys in this state to secure from the federal internal revenue collector for Iowa a certified copy of the names of all persons who have paid the special taxes imposed upon the business of selling intoxicating liquors within their respective counties, etc.

Section 2427-c, supplement of 1913, provides as follows:

> "The certified copy furnished by the internal revenue collector of the name of any person who has paid to the federal government the special tax imposed upon the business of selling intoxicating liquors shall be prima facie evidence that said person is engaged in the sale of, or keeping with intent to sell, intoxicating liquors in violation of law, unless said person by way of defense shows that he has complied with all the terms and conditions of the mulct law, or that he is a registered pharmacist, actually engaged in business as such and said certified copy shall be competent evidence in any court within this state."

You will therefore observe that the possession of a federal permit to sell intoxicating liquors is presumptive evidence that such person is engaged in the unlawful traffic of intoxicating liquors within this state, unless such person has a permit from this state to sell or dispense such intoxicating liquor.

In connection with the foregoing, we desire to call your attention to the case of *State v. Colvin,* 127 Iowa 632, where it was said:

> "The defendants used a stand or place at which they sold a beverage liquor which contained one and one-half per cent. by volume, and the court received testimony tending to prove that such liquor was not intoxicating. There was error in the ruling. The statute (code, section 2382) specifically declares that alcohol is an intoxicating liquor, *and proof that liquor used as a beverage contains alcohol is sufficient to establish its character as intoxicating liquor, however much the alco-*

hol may be diluted, or however weak its intoxicating effect as a beverage may be. The statute so declares, and it is conclusive."

B. J. POWERS, *Assistant Attorney General.*

MANUFACTURE FOR PERSONAL USE PROHIBITED

Under the language of the statutes of this state it is unlawful for a person to manufacture intoxicating liquors for his own use.

June 18, 1919.

Mr. H. K. Lockwood, County Attorney,
Cedar Rapids, Iowa.

Dear Sir:

We have your letter of June 18th in which you state:

"Is it a violation of the intoxicating liquor laws for families in their own home to put together the ingredients named in the enclosed circular and manufacture home-made beer for their personal use?"

The circular to which you refer is one issued by the Ideal Yeast Company of your city and contains directions for the manufacture of beer. It would serve no useful purpose to set out the directions at this time.

The question presented in your inquiry has not been passed upon by the supreme court of this state. A number of cases have been decided by our supreme court holding that the manufacture of intoxicating liquor is in violation of the laws of this state, even though it was the intention to export the liquor from this state.

Pearson v. International Distillery, 72 Iowa 348;
Craig v. Werthmueller, 78 Iowa 598.

But we are unable to find any case decided by our court where the one manufacturing the liquor was making it for his personal use.

However, we think that section 2382 of the supplemental supplement, 1915, as amended by chapter 248 of the acts of 37th General Assembly, is sufficiently definite in itself to prohibit one from manufacturing intoxicating liquor for his own use. It provides in part as follows:

"No one, by himself, clerk, servant, employe or agent, shall, for himself or any person else, directly or indirectly, or upon

> *any pretense, or by any device, manufacture,* sell, exchange, barter, dispense, give in consideration of the purchase of any property or of any services or in evasion of the statute or keep for sale any intoxicating liquor, which term shall be construed to mean alcohol, ale, wine, beer, spirituous, vinous and malt liquor, and all intoxicating liquor whatever, except as provided in this chapter, or solicit, take, or accept any order for the purchase, sale, shipment, etc., * * * or be in any way concerned, engaged or employed in owning or keeping any intoxicating liquor with intent to violate any provision of this chapter, or authorize or permit the same to be done."

While our own court has not passed upon the question presented in your inquiry, yet we find that it has been before a number of other courts. One of the earliest cases in that of

State v. Lovell (1874), 47 Vt. 493.

In this case the defendant was being prosecuted for the manufacture of cider brandy for his own use. He requested the court to charge the jury that he had a right to distill cider brandy for his own use and consumption, or for sale without the state of Vermont. This request was refused by the trial court and the refusal sustained by the supreme court of Vermont, which in answering the contention of the defendant states:

> "The statute forbids the manufacture of distilled intoxicating liquors, and we are not aware that the statute is in conflict with any provision of the constitution."

The leading case upon this question is that of

Mugler v. Kansas (1887), 123 U. S. 662, 31 L. Ed. 211, 8 Sup. Ct. Rep. 273.

One of the defendants in this case had been indicted for having manufactured intoxicating liquor in Kansas. The Kansas statute provided, among other things, "That any person or persons who shall manufacture * * * intoxicating liquor shall be guilty of a misdemeanor." One of the contentions made in the defendant's behalf is stated and disposed of by Justice Harlan, speaking for the supreme court of the United States, as follows:

> "It is, however, contended that, although the state may prohibit the manufacture of intoxicating liquors for sale or barter within her limits for general use as a beverage, 'no convention or legislature has the right, under our form of government, to prohibit any citizen from manufacturing for

his own use, or for export, or storage, any article of food or drink not endangering or affecting the right of others.' The argument made in support of the first branch of this proposition, briefly stated, is that in the implied compact between the state and the citizen certain rights are reserved by the latter, which are guaranteed by the constitutional provision protecting persons against being deprived of life, liberty, or property without due process of law, and with which the state cannot interfere; that among those rights is that of manufacturing for one's use either food or drink; and that while, according to the doctrines of the commune, the state may control the tastes, appetites, habits, dress, food and drink of the people, our system of government, based upon the individuality and intelligence of the citizen, does not claim to control him, except as to his conduct to others, leaving him the sole judge as to all that only affects himself. * * * It is difficult to perceive any ground for the judiciary to declare that the prohibition by Kansas of the manufacture or sale, within her limits, or intoxicating liquors for general use there as a beverage, is not fairly adapted to the end of protecting the community against the evils which confessedly result from the excessive use of ardent spirits. There is no justification for holding that the state, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights; for we cannot shut out of view the fact, within the knowledge of all, that the public health, public morals, and the public safety may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to everyone, that the idleness, disorder, pauperism, and crime existing in the country are, in some degree, at least, traceable to this evil. *If, therefore, a state deems the absolute prohibition of the manufacture and sale within her limits of intoxicating liquors for other than medicinal, scientific,* and manufacturing purposes *to be necessary to the peace and security of society, the courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives.* They have nothing to do with the mere policy of legislation. Indeed, it is a fundamental principle in our institutions, indispensable to the preservation of public liberty, that one of the separate departments of government shall not usurp powers committed by the constitution to another department. *And so if, in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the efforts to guard the community against evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community,*

> *to disregard the legislative determination of that question. So far from such a regulation having no relation to the general end sought to be accomplished, the entire scheme of prohibition, as embodied in the constitution and laws of Kansas, might fail, if the right of each citizen to manufacture intoxicating liquors for his own use as a beverage were recognized.* Such a right does not inhere in citizenship. Nor can it be said that government interferes with or impairs any one's constitutional rights of liberty or property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society, and constitute, therefore, a business in which no one may lawfully engage. Those rights are best secured, in our government, by the observance upon the part of all such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the lawmaking power, upon reasonable grounds, declares to be prejudicial to the general welfare.''

The foregoing case of *Mugler v. Kansas,* was the basis for the decision of the supreme court of the state of Washington in the case of

State v. Fabbri, 167 Pac. 133, L. R. A. 1918 A, 416,

wherein it was held that the statute of Washington was sufficiently broad to prohibit one from manufacturing wine from grapes for his own personal use. This was so, even though defendant did nothing more than press the juice from the grapes and allow it to stand in a vat and ferment, the court holding that where one extracts the juice from grapes and permits it to ferment and become intoxicating liquor, he is within the statute forbidding the manufacture of such liquor if he thus intended to make liquor by allowing it to ferment. The court further held that there was no violation of any constitutional right when one was prohibited from manufacturing intoxicating liquor for his own use.

In the case of *State v. Marastoni,* — Ore. —, 165 Pac. 1177, the rule announced in the foregoing cases was followed and the conviction of the defendant for manufacturing wine from grapes was affirmed. The Oregon court further defined the word ''manufacture'' as follows:

> ''To make (wares, machinery, or other products) by hand, by machinery, or by other agency.''

In *Murphy v. Arnson,* 96 U. S. 131, 24 L. Ed. 773, it is observed:

"Beer may well be said to be manufactured from malt and other ingredients, whiskey from corn, or cider from apples. The fact that the identity of the original article or articles is lost, and that a new form or a new character is assumed, is not material in determining whether, within the popular idea, as embodied in the customs act, the article in question is a manufacture from its original elements.

"We are of the opinion that the word 'manufacture,' as used in section 3 of the act referred to, means to 'make' irrespective of the quantity produced, or to the use to which it is to be put."

The opinion in part continues as follows:

"It is claimed that because the defendant did no affirmative act to produce fermentation, but simply put the grape juice into a vat and 'let nature take its course,' he did not manufacture the wine; but this contention is unsound. Under such a construction no wine ever has been or ever will be made by human agency. The stipulation admits, in substance, that defendant placed the juice in the vat, and there allowed it to ferment, and that his intent was to use the greater portion as a beverage for himself and family as food with their meals, and to allow the remainder to become vinegar. He but pursued the usual process of making wine. The well-known action of the air and the germs therefrom which produce fermentation were utilized and intended to be utilized in the process of manufacturing. Some of the most important compounds known to commerce and medicine are manufactured by bringing two or more substances in contact and allowing the chemical forces of nature to produce a new compound or substance. *Murphy v. Arnson, supra.*"

In the more recent case of *Crane v. Campbell*, 245 U. S. 304, it was held that a state may prohibit and punish possession of intoxicating liquor, even though it was intended only for personal use, and in the closing paragraph of the opinion Justice McReynolds states:

"We further think it clearly follows from our numerous decisions upholding prohibition legislation that the right to hold intoxicating liquors for personal use is not one of those fundamental privileges of a citizen of the United States which no state may abridge. *A contrary view would be incompatible with the undoubted power to prevent manufacture,* gift, sale, purchase or transportation of such articles—the only feasible ways of getting them. An assured right of possession would necessarily imply some adequate method to obtain not subject to destruction at the will of the state."

It should also be remembered that prohibition is the rule in this state and he who claims to have a right to traffic or be interested in any way in intoxicating liquor must point out the statute which authorizes him to do so.

State v. Gregory, 110 Iowa 624, 627.

Furthermore, section 2431 of the code specifically provides that "courts and jurors shall construe this chapter so as to prevent evasion, and when these rules are taken into consideration in construing section 2382, *supra,* wherein it is clearly stated that:

> "No one, by himself, * * * shall for himself, * * * directly or indirectly, or upon any pretense, or by any device, manufacture, * * * any intoxicating liquor, which term shall be construed to mean * * * beer, * * * and all intoxicating liquor whatever, except as provided in this chapter,"

we can come to no other conclusion than that the laws of this state prohibit one from manufacturing intoxicating liquor for his own use.

It may not be amiss at this point to direct your attention to the act of congress of February 24, 1919, which in part provides:

> "Every person carrying on the business of a brewer, distiller, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquor, retail dealer in malt liquor, or manufacture of stills, as defined in section 3244 as amended and section 3247 of the revised statutes, in any state, territory, or district of the United States contrary to the laws of such state, territory, district, or in any place therein in which carrying on such business is prohibited by local or municipal law, or otherwise, imposed by existing law or by this act, $1000.
>
> "The payment of the tax imposed by this subdivision shall not be held to exempt any person from any penalty or punishment provided for by the laws of any state, territory, or district for carrying on such business in such state, territory, or district, or in any manner to authorize the commencement or continuance of such business contrary to the laws of such state, territory, or district, or in places prohibited by local or municipal law. * * *
>
> "That any person who carries on any business or occupation for which a special tax is imposed by sections 1000, 1001, or 1002, without having paid the special tax therein provided, shall, besides being liable for the payment of such special tax, be subject to a penalty of not more than $1,000 or to imprisonment for not more than one year, or both."

B. J. POWERS, *Assistant Attorney General.*

Note: The case of *State v. Ohman,* decided after this opinion was rendered, sustains this view of the law. (See 179 N. W. 143).

OPINIONS RELATING TO FARM IMPROVEMENT ASSOCIATIONS

WHEN SUPERVISORS SHOULD GRANT AID

The board of supervisors should not appropriate funds to an improvement association until such association has "raised"—that is collected in—the amount required by law.

July 2, 1919.

Mr. T. M. McAdam, County Attorney,
Mt. Pleasant, Iowa.

Dear Sir:

In your letter of June 30th you ask the opinion of this department as to whether chapter 90 of the acts of the 37th General Assembly, as amended by house file No. 260, enacted by the 38th General Assembly, and providing that the board of supervisors shall appropriate to farm improvement associations the sum double the amount raised among the members of such association in yearly subscriptions contemplates that such appropriation shall be made upon the subscriptions only, or shall be made when the subscriptions are actually paid.

Chapter 90 of the acts of the 37th General Assembly, as amended, provides in section 2:

> "Whenever the articles of incorporation have been filed as provided by this chapter, and the secretary and treasurer of said corporation have certified to the board of supervisors that said organization has among its membership at least two hundred farmers or farm owners in said county, and that said organization has raised from among its members the yearly subscription or not less than $1,000, the board of supervisors shall appropriate to that organization, to be paid from the general fund of said county, the sum double the amount of such subscription, and not to exceed, however, the total of $5,000 in counties with a population of twenty-five thousand or over, and in counties with a smaller population, $3,000 in any one year."

You will notice that the statute says that the appropriation shall be made when the organization

"has raised from among its members the yearly subscription of not less than $1,000."

It seems to me that the use of the word "raised" in connection with the amount designated in the statute shows the intention of the legislature to be that the money shall actually be paid into the organization before the board shall make its appropriation. Ordinarily, when the word "raised" is used in connection with money, as to raise money, it is understood as money collected, or providing a supply of money for use.

Childs v. Hillsboro Electric Light and Power Co., Atl. 271; 70 N. H. 318.

The statute in question is not accurately worded, but I think it is plain that the meaning of the legislature was that the county should make its appropriation when $1,000 had been paid in on subscriptions made, and that the board should act upon such construction in making an appropriation.

SHELBY CULLISON, *Assistant Attorney General.*

MAY SECURE SUBSCRIPTIONS FROM THOSE NOT ENGAGED IN FARMING

Farm improvement associations are not required to raise the fund necessary to secure aid from the county exclusively from its members who are farmers or farm owners.

July 3, 1919.

Mr. Verner Gabrielson, County Attorney,
Fort Dodge, Iowa.

Dear Sir:

We have your letter in which you state:

"Chapter 90 of the 37th General Assembly deals with farm improvement associations. This law was amended by our last General Assembly so that section 2 of this chapter reads as follows:

" 'Whenever the articles of incorporation have been filed as provided by this chapter, and the secretary and treasurer of said corporation have stated to the board of supervisors that the said organization has among its membership at least 200 farmers or farm owners in said county, and that said organization has raised from among its members a yearly subscription of not less than $1,000, the board of supervisors *shall* appropriate to said organization, to be paid from the

general fund of said county, a sum double the amount of subscription, not to exceed a total of $5,000 in counties having a population of 25,000, and $3,000 in smaller counties.'

"A contention has arisen between the farm bureau here and our board of supervisors. The farm bureau has over 200 farmers or farm owners, and also several hundred members who are not farmers or farm owners. The board of supervisors has doubled the subscription raised among the farmers, but refuses to double the subscription raised by members who are not farmers or farm owners. I would like it very much to have your interpretation of this law in particular as to whether or not the board of supervisors must double the total subscription raised by the members who are not farmers or farm owners. I have advised the board that in my opinion they must double the total subscription, and not confine it to doubling that raised by the farmers or farm owners."

In answering your inquiry, we desire to direct your attention to the fact that the section above set out specifically provides that such organization shall have at least "two hundred farmers or farm owners in said county" among its membership, but when the section deals with the raising of funds to carry on its work it states that "said organization" shall raise "from among its members" the sum therein stipulated. There is nothing in the statute that requires the two hundred farmers or farm owners in said county to raise the $1,000.

It is therefore our opinion that the advice you have given your board of supervisors as above set out is correct.

B. J. POWERS, *Assistant Attorney General.*

AMOUNT OF AID

The board of supervisors must appropriate a sum equal to double the amount subscribed from the members of such associations.

July 18, 1919.

Mr. W. H. Tedrow, County Attorney,
Corydon, Iowa.

Dear Sir:

Your letter of the 7th inst. addressed to Attorney General H. M. Havner has been referred to me for reply.

You state:

"When all the law has been complied with relative to making a county a member of the Farm Bureau Association

before it was amended by the 38th General Assembly is it absolutely compulsory for the board of supervisors to make the appropriation as specified in section II of the law as amended by the 38th General Assembly?''

Section 2, chapter 90, acts of the 37th General Assembly provide:

> ''Whenever the articles of incorporation have been filed as provided by this chapter and the secretary and treasurer of said corporation have certified to the board of supervisors that said organization has among its membership at least two hundred farmers or farm owners in said county and that said organization has raised from among its members a yearly subscription of not less than five hundred dollars ($500.00) the board of supervisors may, and they are hereby authorized to contribute to such organization a sum not to exceed twenty-five hundred dollars ($2500.00) per year, the same to be paid from the general fund of said county.''

The above section was amended by chapter 36, acts of the 38th General Assembly by striking out all after the word ''than'' in the tenth line thereof, and inserting in lieu thereof the following:

> ''One thousand dollars ($1000.00), the board of supervisors shall appropriate to such organization to be paid from the general fund of said county a sum double the amount of snch subscription not to exceed, however, a total of five thousand dollars ($5000.00) in counties with a population of 25,000 or over and in counties with a smaller population three thousand dollars $3000.00) in any one year.''

It will be seen, therefore, that the present law makes it mandatory upon the board of supervisors to appropriate a sum equal to double the amount of subscriptions raised from the members of such association, subject only to the limitations stated in chapter 36 aforesaid.

W. R. C. KENDRICK, *Assistant Attorney General.*

HOW THE ASSOCIATION MAY RAISE FUNDS

The board of supervisors shall make an appropriation to farm improvement associations of the required membership when the yearly subscriptions paid amount to $1,000.00 even though such subscriptions are greater than $1.00 each.

July 26, 1919.

Mr. H. K. Lockwood, County Attorney,
Cedar Rapids, Iowa.

Dear Sir:

In your letter of July 17th you ask the opinion of this department upon the following:

> "On October 20, 1916, there was filed with the county recorder of Linn county articles of incorporation of the Farm Improvement Association of Linn county, Iowa, as provided in section 1683-a of the code supplement.
>
> "The by-laws of the association provide that there shall be an annual assessment of $4.00 per member in addition to the annual dues as provided by the articles of incorporation, which assessment shall be used for the purpose of furthering the objects of the corporation, and paying the expenses of maintaining the corporation.
>
> "This association has raised from among its members a yearly subscription of more than $1000.00 by the collection of this extra $4.00 special assessment, but that less than $1000.00 has been received from annual subscriptions at $1.00 each.
>
> "The association desires to know whether they have brought themselves within the provisions of section 11 of the law as amended by the 38th General Assembly.
>
> "I will thank you for an opinion on this proposition at your earliest convenience."

Section 2, chapter 90, acts of the 37th General Assembly, as amended by chapter 36, acts of the 38th General Assembly, provides:

> "Whenever the articles of incorporation have been filed as provided by this chapter and the secretary and treasurer of said corporation have certified to the board of supervisors that the said organization has among its membership at least two hundred farmers or farm owners in said county, and that said organization has raised among its members the yearly subscription of not less than one thousand dollars, the board of supervisors shall appropriate to such organization, to be paid from the general fund of said county, the sum double the amount of such appropriation not to exceed, however, the total of five thousand dollars ($5000.00) in counties with a population of 25,000 or over and in counties with a smaller population three thousand dollars ($3,000.00) in any one year."

Under this statute two things are necessary before the board may make appropriation. First, the association must have in its membership two hundred farmers or farm owners, and, second, it must have raised from among its members by yearly subscription not less than one thousand dollars.

It is our opinion that it is not required that the subscription be limited to one dollar for each member, but whenever a thousand dollars has been received by subscription from the members and has been paid in, then the appropriation may be made.

SHELBY CULLISON, *Assistant Attorney General.*

FORM OF ARTICLES OF FARM IMPROVEMENT ASSOCIATION

Articles of farm improvement association need not state object of corporation to be to co-operate with department of agriculture and Iowa State College if that is in truth its object.

August 11, 1919

Mr. Edward H. Willging, County Attorney,
Dubuque, Iowa.

Dear Sir:

Your letter of August 5th to Mr. Havner has been referred to me for reply.

You ask the opinion of this department upon the following:

> "The Dubuque County Farm Bureau Association has made application for an appropriation, as provided by statute. Under section 4, page 90, acts of the 37th General Assembly, it is provided that the only farm improvement associations which should be entitled to receive this county aid should be such as are organized so as to co-operate with the United States Department of Agriculture and the Iowa State College of Agriculture and Mechanics Arts. The articles of incorporation, in this case, say nothing of any such intended incorporation, neither has any amendment to that effect been filed. It is my view that the intent of the statute was that the purpose of such co-operation be a matter of record.
>
> "The officers and directors have sent to me a certificate showing that they are co-operating. Is this sufficient to satisfy the statutory provisions?"

Section 1683-c, supplement to the code, 1913, provides for articles of incorporation of farm improvement associations, and you will observe that the form of articles in the statute state the

business of the corporation to be to advance and improve the science and art of agriculture, horticulture and animal husbandry. Nothing is said in the statute about requiring the articles of incorporation to state that the organization is to co-operate with the United States Department of Agriculture and the Iowa State College.

Chapter 90, section 2, acts of the 37th General Assembly, provides for an appropriation when the articles adopted pursuant to the above statute have been filed, and section 4 of chapter 90 limits the appropriations to associations which are so organized as to co-operate with the United States Department of Agriculture and the Iowa State College.

It is my opinion that if the organization is organized as provided in section 1683-c, supplement to the code, 1913, and is in fact conducting its affairs in co-operation with the departments above mentioned, that it is entitled to receive the aid and that the certificate of the officers is sufficient evidence of the activities of the organization.

SHELBY CULLISON, *Assistant Attorney General.*

WHEN AID MUST BE GRANTED

After such associations have complied with the statutory prerequisites the board of supervisors must appropriate the full amount annually.

September 10, 1919.

Mr. Burl McDonald, County Agent Leader,
Ames, Iowa.

Dear Sir:

Your letter of the 1st inst. addressed to Attorney General H. M. Havner has been referred to me for reply.

You ask for an opinion from this department as to what portion of the annual appropriation farm improvement associations are entitled to under section 2, chapter 90, acts of the 37th General Assembly, as amended by chapter 36, acts of the 38th General Assembly.

Said section as amended reads:

> "Whenever the articles of incorporation have been filed as provided by this chapter and the secretary and treasurer of said corporation have certified to the board of supervisors that the said organization has among its membership at least two

hundred farmers or farm owners in said county and that said organization has raised from among its members a yearly subscription of not less than one thousand dollars ($1000) the board of supervisors shall appropriate to such organization, to be paid from the general fund of said county, a sum double the amount of such subscription, not to exceed, however, a total of five thousand dollars ($5000.00) in counties with a population of 25,000 or over and in counties with a smaller population three thousand dollars ($3000.00) in any one year."

Pursuant to the statutory provisions just quoted, it is clear that when the secretary and treasurer of such associations have certified to the board of supervisors that it has a membership of at least two hundred members of the prescribed class, and has raised from among its members the yearly subscription of not less than $1,000.00, it is the duty of the board of supervisors to appropriate double the amount of such subscription, but in no event to exceed $3,000.00 in counties under twenty-five thousand population. This provision is mandatory, and it is not for the the board of supervisors to say as to how much will be appropriated. The statute fixes the amount to be appropriated, and it is the duty of the board to make the appropriation at least equal to double the amount of the subscription; beyond that, it is discretionary with the board up to the $3,000.00 limit.

As to what proportion of the appropri[illegible] made for the year 1919, the law does not permit th[illegible]iation to be split up in any portions, but requires the boar[illegible] appropriate the full amount for that year. For instance, if an association has the required membership and has raised $1,500 in yearly subscriptions from its members, then it is the duty of the board of supervisors to appropriate the full $3,000, it is immaterial how much of that sum the association will use; the statute compels the board to appropriate the full amount. That is, double the amount subscribed, not to exceed $3,000 in counties under twenty-five thousand population.

W. R. C. KENDRICK, *Assistant Attorney General.*

AID TO BE GIVEN IN "ANY ONE YEAR"

The term "any one year" appearing in chapter 36 of the 38th General Assembly with reference to the aid to be given farm improvement associations refers to a period of twelve consecutive months and not to any fiscal year or calendar year.

October 1, 1919.

Mr. F. H. Don Carlos, County Attorney,
Perry, Iowa.

Dear Sir:

We have your letter of September 27th in which you state:

> Under the provisions of chapter 90 of the acts of the 37th General Assembly as amended by chapter 36 of the acts of the 38th General Assembly, the board of supervisors are given authority to contribute to the support of the farm improvement associations. Is such farm improvement association entitled to the full amount allowed for the year 1919 or is it entitled only to a proportionate amount for 1919 because the law did not go into effect until March 5, 1919?

In response to your inquiry permit us to direct your attention to the fact that the law as it stood prior to the 38th General Assembly provided that the board of supervisors might contribute a sum "not to exceed $2,500.00 per year * * *." The 38th General Assembly provided that a greater amount might be contributed by the county, but provided that such amount should not exceed "a total of $5,000.00 in counties with a population of 25,000 or over, and in counties with a smaller population $3,000.00 *in any one year.*"

The term "any one year" has been defined by the supreme court of the United States in the case of United States v. Dickson et al, 40 U. S., [illegible] of time consisting of twelve months after a given da[illegible]ime of starting "any one year" need not necessarily begin with January first or any other fixed date. It merely means that during the period of twelve months such farm improvement associations shall not receive a sum in excess of the amount stated in the statute. You should therefore advise your board of supervisors that the law prohibits them from presenting to such farm improvement associations a sum in any twelve months in excess of the amount provided in the statute, and that there is no provision for apportioning the amount as your question implied the board desires to do.

B. J. POWERS, *Assistant Attorney General.*

AMENDING ARTICLES OF FARMERS' CO-OPERATIVE ASSOCIATIONS

A majority vote of all the stockholders of farmers' co-operative associations is required to amend its articles of incorporation.

December 5, 1919.

Mr. E. C. Nourse, Chief, Agricultural Economics Section,
Ames, Iowa.

Dear Sir:

Your favor of November 22nd, addressed to the attorney general, has been referred to me for answer.

In your letter you ask an opinion from this department upon the following:

> "Is it necessary that two-thirds of all members of a farmers' co-operative association be present and vote for any amendment to the articles of incorporation of an organization or is a two-thirds vote of the members present at any regular meeting sufficient?"

In answer to the foregoing inquiry, we have to say that it is assumed by this department that the association to which you refer is organized under section 1641-r1, supplemental supplement, and following sections.

Ordinarily, the articles of incorporation of the association provide the method by which the same may be amended. But it will be observed that in associations organized under the above sections the statute itself determines the manner. We call your attention to section 1641-r6, a portion of which reads as follows:

> "Sec. 1641-r6. Amending articles. The association may amend its articles of incorporation by a majority vote of its stockholders at any regular stockholders' meeting, or at any special stockholders' meeting called for that purpose, on ten days notice to all stockholders."

From the foregoing it would seem clear that it would require a majority vote of all the stockholders of the association in order to amend the articles of incorporation.

As to your second question, we will investigate the matter further and advise you at a later date.

W. R. C. KENDRICK, *Assistant Attorney General.*

OPINIONS RELATING TO MISCELLANEOUS MATTERS

SELECTION OF WOMEN FOR JURY SERVICE

It is discretionary with jury commission whether women shall be selected for jury service.

November 15, 1920.

Mr. A. G. Rippey, County Attorney,
Des Moines, Iowa.

Dear Sir:

In your letter of the 9th inst., you request an opinion from this department upon the following questions:

> "Will your office kindly advise me as to whether or not, in cities where jury commissioners are appointed to select grand and petit jurors, the names of women voters should be included in jury lists prepared by such commissioners?"
>
> "If women voters should be included, is it within the discretion of the jury commissioner to arbitarily fix any ratio of representation between women and men."

By reference to the law relative to the selection of jurors by a commission, to wit, chapter 267, acts of the 37th General Assembly, it will be found that the act merely provides that the commission shall

> "Select the names of persons, having the qualification of jurors, and who are of good moral character."

Section 332 of the code prescribes the qualification of jurors as follows:

> "All qualified electors of the state, of good moral character, sound judgment, and in full possession of the senses of hearing and seeing, and who can speak, write and read the English language, are competent jurors in their respective counties."

The 18th amendment to the constitution of the United States confers universal suffrage upon women, therefore, women who possess the qualifications prescribed in section 332 of the code are qualified to sit on grand and petit juries in Iowa.

It will be observed, however, that the statutes above quoted prescribe the qualifications of jurors and the manner of their selection, when selected by a jury commission, but nowhere do said statutes demand the selection of women, nor does the suffrage amendment require it.

Therefore, whether women will be selected as jurors lies entirely within the sound discretion of the commission. So long as the commission does not discriminate against the women electors on account of their being women, the commission may select women for or omit them from jury service.

In answer to your second question, I am of the opinion that, in the event the jury commission selects women, the number to be selected is entirely within its discretion; provided, however, there is no discrimination against the women on account of their sex.

In support of the conclusions reached in this opinion I refer you to the case of Neal v. Delaware, 103 U. S. 370.

W. R. C. KENDRICK, *Assistant Attorney General.*

COMPENSATION OF CITY COUNCILMEN

Compensation of councilmen in cities of the second class and in towns are limited to $1.00 for each session in which they act as a board of review. In order to be entitled to such sum the session must be at least three hours long. They are not entitled to receive $1.00 for each three hours spent in such work.

September 24, 1919.

Mr. Charles M. Hughes, County Attorney,
Belle Plaine, Ia.

Dear Sir:

We have your letter of September 22nd, in which you in part state as follows:

> "The county auditor of this county has asked me to get a ruling from you on the following matter:
>
> "Section 669 of the supplement of 1913 provides that councilmen in cities should be paid the sum of one dollar for each session of not less than three hours while they are engaged as a board of review.
>
> "In several of the cities of this county the council has met for a period of from six to nine hours in each day and has requested compensation at the rate of one dollar for each

three hour period. The checkers have refused to allow this sort of charge and considerable dissatisfaction has resulted.
"* * * * *

"Would you consider any allowance at the rate of three dollars for each three hour consultment proper under these circumstances?"

Section 669 of the suuplement of 1913, to which you refer, provides that cities of the first class may pay their councilmen such sum as may be prescribed by ordinance, but the same shall not exceed $250 per annum. Then provision is made that they shall not receive more than $2.00 per day when acting as a board of review. The section further provides:

"* * * In all other cities and towns they shall receive not to exceed $1.00 each for every regular or special meeting, and in the aggregate not exceeding $50 in any one year; but in such cities and towns the members shall be paid in addition to the foregoing for services as members of the board of review a sum not exceeding $1.00 for each session of not less then three hours, and the compensation for services as members of the board of review shall be paid out of the county treasury."

You will observe from the foregoing that the compensation for acting as a member of the board of review is "a sum not exceeding $1.00 for each session of not less than three hours." In other words, in order to be entitled to any compensation, the board must be in session for a period of not less than three hours, and the amount they shall receive for such session is a sum not exceeding $1.00.

We do not see how this section can be construed to mean that the members of the council shall be entitled to $1.00 for each three hours consumed in performing the duties required of them as a board of review. We are of the opinion that they are required to be in session at least three hours before they are entitled to any compensation whatsoever. The law does not provide the maximum length of time of a session, but it clearly stipulates that the minimum shall not be less than three hours in case compensation is to be allowed.

It is therefore the view of this department that the contention of the state checkers is fully sustained by the provisions of our law. There can be no question but that the compensation pro-

vided is inadequate, but the matter is one which should be referred to the legislature for correction, as that body alone has authority to provide otherwise.

B. J. POWERS, *Assistant Attorney General.*

WHAT CONSTITUTES A QUORUM OF A CITY COUNCIL WHERE ONE MEMBER SUSPENDED

When a city council consists of five councilmen and the mayor and one councilman is suspended pending removal proceedings, three members including the mayor, constitute a quorum.

November 23, 1920.

Hon. J. M. Rees, Mayor,
Ida Grove, Ia.

Dear Sir:

At the direction of the attorney general I am giving you the opinion of this department upon the following questions:

(1) When a city council consists of five councilmen and the mayor, if one of the councilmen is suspended from office pending removal proceedings, what number constitutes a quorum? That is, in the event two of the remaining councilmen refused to attend council meetings, would the mayor and two councilmen constitute a quorum?

(2) If the mayor and two councilmen constitute a quorum, could they proceed to fill the cavancy caused by the disqualification of the member against whom removal proceedings are pending?

When a city council consists of five councilmen and the mayor it would take four members of the council, including the mayor, to constitute a quorum. But when one member is legally disqualified from acting the number necessary to constitute a quorum would be reduced to three, including the mayor.

State v. Orr, 56 N. E. (Ohio) 14;
Lawrence v. Ingersoll, 6 L. R. A. (old) 308 and notes.

Therefore, in answer to your first question, your mayor and two other members of the city council would constitute a quorum.

In the event removal proceedings are instituted against a member of the city council a temporary vacancy exists from the date said member is suspended by the court or judge, and the vacancy may be legally filled by a majority vote of the legally acting and qualified members remaining of the city council.

Section 1258-g, Supp. 1913.
Sec. 1257 of Code.

Therefore, in answer to your second question your mayor and two other members of the council may fill the vacancy.

W. R. C. KENDRICK, *Assistant Attorney General.*

WHEN COUNCIL REFUSES TO FILL VACANCY IN OFFICE OF ASSESSOR

When the city council neglects or refuses to fill a vacancy in the office of city assessor, the council can be compelled to act by mandamus.

February 6, 1919.

Lester A. Riter, County Attorney,
Rock Rapids, Iowa.

Dear Sir:

You state that the person elected to the office of city assessor of the city of Rock Rapids, Iowa, has refused to qualify and act as such official, and that the city council of such city neglects to fill the vacancy caused by said failure to qualify within the time required by law.

You then ask what can be done to correct this situation; whether a mandamus proceedings can be legally instituted and compel the city council to fill the vacancy, or what action should be taken by the auditor.

It seems to me that the proper course to pursue would be the institution of mandamus proceedings.

Section 4341 of the code provides:

> "The action of mandamus is one brought to obtain an order commanding an inferior tribunal, board, corporation or person to do or not to do an act, the performance or ommission of which the law enjoins as a duty resulting from an office, trust or station. Where discretion is left to the inferior tribunal or person, the mandamus can only compel it to act, but cannot control such discretion."

Under the foregoing section, it has been said that when a duty is imposed upon a person, board or corporation resulting from an office, trust or station, mandamus can compel the person, board or corporation to act.

State v. Parker, 147 Ia. 69;
State v. Thomas, 152 Ia. 500;
Federal Contracting Co. v. Board of Supervisors, 152 Ia. 362;

Section 4345 of the code also provides:

> "The order of mandamus is granted on the petition of any private party aggrieved, without the concurrence of the prosecutor for the state, or on the petition of the state by the county attorney, when the public interest is concerned, and is in the name of such private party or of the state, as the case may be in fact brought."

Now, section 1272 of the supplement to the code, 1913, provides that when a vacancy occurs:

> "In the office of councilman or mayor of any city, and all other elective city offices, the council may appoint any qualified elector to fill such vacancy, who shall qualify in the same manner as persons regularly elected to fill such office, and shall hold such office until the qualification of the officer elected at the next regular municipal election."

I know of no statutory provision permitting any other instrumentality than the city council acting in the matter relative to filling the vacancy in question.

W. R. C. KENDRICK, *Assistant Attorney General.*

VACANCY IN OFFICE OF TOWN ASSESSOR

Vacancy in office of town assessor should be filled by town council.

September 3, 1919.

Mr. Harry Langland, County Attorney,
Nevada, Ia.

Dear Sir:

Your letter of the 30th ult., addressed to Attorney General H. M. Havner, has been referred to me for attention.

You ask:

> "Will you kindly let me know who fills a vacancy when one occurs in the office of the town assessor. The question has arisen whether the town council fills the vacancy or whether the board of supervisors does so."

The statutory provisions governing your question will be found in sections 649 and 1272 of the supplement to the code, 1913.

Section 1272 provides:

"Vacancies * * * in the office of councilman or mayor of any city, and all other elective city offices, the council men may appoint any qualified elector to fill such vacancy, who shall qualify in the same manner as persons regularly elected to fill such office, and shall hold such office until the qualification of the officer elected to fill such vacancy, who shall be elected at the next regular muhicipal election."

Section 649 provides:

"In towns there shall be elected, biennially, a mayor, treasurer and assessor."

From the foregoing statutory provisions it will be found that the town council fills all vacancies in the office of town assessor.

B. J. POWERS, *Assistant Attorney General.*

OFFICE OF CITY CLERK AND CITY ASSESSOR MAY BE HELD BY SAME PERSON

The office of city clerk and city assessor may be held by one person.

February 6, 1919.

Mr. J. E. Reaney, County Attorney,
Columbus Junction, Iowa.

Dear Sir:

Your letter of the 20th ult., addressed to Attorney General Havner, has been referred to me for attention.

You ask whether or not the same person can legally hold at the same time the two positions of city clerk and city assessor.

This question depends upon whether the two positions are incompatible. In the absence of express statutory inhibition, and in determining whether the two positions are incompatible, the fact whether or not one office exercises a supervisory power over the other is generally controlling.

We cannot find any statutory inhibition, nor can we find any such provision whereby one of said offices is granted supervisory powers over the other; neither do we believe that the exercise of both offices by one person is contrary to public policy.

Therefore, we are of the opinion that the two offices above mentioned may be held by the same person.

For general discussion of this question, we would refer you to the following cases:

Byran v. Catell, 15 Ia. 538;
State v. Beis, 135 Mo. 325;
State v. Goff, 15 R. I. 507;
State v. Green, 58 N. Y. 295.

W. R. C. KENDRICK, *Assistant Attorney General.*

FEES OF POLICE OFFICERS IN SPECIAL CHARTER CITIES

Police officers in special charter cities receiving a salary from the city must pay into the city treasury all fees received for services rendered in criminal cases prosecuted under city ordinances or under state laws.

April 8, 1919.

Hon. Frank S. Shaw, Auditor of State.

Dear Sir:

We have your inquiry of April 7th, in which you ask:

> "Have the police officers of the city of Muscatine the right to retain fees received for acting as witnesses in criminal cases in addition to the salary paid to them by the city of Muscatine?"

The city mentioned in your inquiry is one of the special charter cities of this state, and therefore we direct your attention to section 946 of the code, which provides as follows:

> "Police judges, magistrates, marshals and police officers, in criminal cases under the ordinances, shall receive the fees allowed for similar services in criminal cases under the state law, payable out of the city treasury; and for criminal cases under the state law they shall be paid the same fees that justices and constables receive under the state law, and payable from the county treasury. When such officers are paid a salary, the same shall be in lieu of all fees, and such fees, when collected, shall be paid into the city treasury. They shall make, under oath, a monthly report of such fees to the council."

This provision by its terms clearly states that

> "when police judges, magistrates, marshals and police officers * * * are paid a salary, the same shall be in lieu of all fees,"

and the fees which they are authorized to collect are to be "paid into the city treasury." There is no exception made in the law

granting such officers the right to retain any fees received by them for rendering services in criminal cases instituted either under the city ordinance or under the laws of this state.

The right of police officers to retain fees collected for services rendered in criminal prosecutions has before our supreme court a number of times, and in each instance where such police officer received a salary, it has been held that the fees that he receives are to be paid into the city treasury.

In this connection we direct your attention to the case of *Labour v. Polk County,* 70 Iowa 568-570, where it is stated:

> "It is insisted, however, that the payment of such fees in criminal cases to the city is, to that extent, the imposition of a tax on the people of the county to be expended for the benefit of the city, and is therefore unconstitutional. We do not think this position tenable. The fees are provided, as before stated, to pay for the service of officers in the execution of the laws of the state, and it was intended by the legislature to reimburse the city for compensation paid by the city to its officers for services done on behalf of the state. We think the law is not in conflict with the constitution. These views are in harmony with *Des Moines v. Hillis,* 55 Iowa 643."

In this same connection, we direct your attention to the case of City of Des Moines v. Polk County, 107 Iowa 525.

While these cases arose in relation to cities operating under the general statutory provisions as distinguished from special charter cities, yet the reasoning is applicable to the question you have presented.

It is therefore the opinion of this department that the fees received by a police officer in a special charter city for services rendered in the prosecution of criminal cases, either under the city ordinances or under the laws of this state, should be turned into the city treasury by such police officer, in the event he is paid a salary by the city for his services.

B. J. POWERS, *Assistant Attorney General.*

FEES OF CITY MARSHAL SERVING PROCESSES OF SUPERIOR COURT

Fees of city marshal acting as executive officer of the superior court should be paid by the county in criminal actions when the prosecution fails, or when the fees cannot be collected from the person liable to pay the same.

May 17, 1919.

Mr. F. H. Don Carlos, County Attorney,
Perry, Iowa.

Dear Sir:

You ask whether or not the town marshal, in serving processes of the superior court, can receive fees in addition to mileage, and if so, what fees he may legally charge.

As to your latter question, it has been the holding of this department that the fees of the town marshal in criminal actions in the superior court, when the prosecution fails, or when the fees cannot be collected from the person liable to pay the same, should be paid out of the county treasury, provided they are properly certified to by the judge of the superior court, and claim filed therefor.

In this connection, I would refer you to the following statutory provisions:

Section 280, code supplement of 1913, relating to the fees the marshal shall receive when acting as the executive officer of the superior court.

Section 512 of the code, pertaining to the duties of the sheriff, and the fees of such officer.

Section 4597, 4598 and 4599 of the code, relating to the fees charged by a constable when executing processes from the justice court.

Section 267 of the code, relating to the fees in the superior court in criminal cases.

W. R. C. KENDRICK, *Assistant Attorney General.*

PAYMENT OF COSTS INCURRED IN CRIMINAL INVESTIGATIONS

Costs incurred by police officers in making investigations, etc., should be paid by the city. A city cannot recover such expenses from the county unless directed to make such investigations by the proper county officers.

June 11, 1919.

Mr. J. M. C. Hamilton, County Attorney,
Fort Madison, Iowa.

Dear Sir:

We have your letter of June 6th in which you state:

"The chief of police of Fort Madison has filed with the county auditor of Lee county, a claim for the following items:

"Expenses incurred in searching Mexican village (Ft. Madison) for intoxicating liquors and guns.....$3.00

"Expenses incurred in conveying intoxicated man to jail (Ft. Madison) $3.00

"Expenses incurred in hiring car to search for a girl; together with other items of like nature.

"I had OK'd these bills but the same were rejected by the board of supervisors on the ground that they were properly a part of police expenses that should be paid by the city. The city of Fort Madison maintains no patrol service and it is frequently necessary for the police to hire cars in making arrests, etc.

"Kindly advise if these are bills that should be properly allowed by the board of supervisors, and oblige."

There is no statute specifically mentioning the items which may be a proper claim against a county and therefore your question involves an examination of a number of statutes. Section 568 of the 1913 supplement specifies the powers and duties granted to cities and towns, and among the number we find that "they shall have power to establish a police force, and to organize the same under the general supervision of the marshal and to provide one or more station houses."

Paragraph 16 of the foregoing section provides in part as follows:

"In cities of the first and second class, the council shall make the appropriation for all the different expenditures of the city government for each fiscal year at or before the beginning thereof. * * * The council of such cities shall advertise in at least two newspapers published in said cities for three weeks, two insertions for each week, for bids for furnishing all supplies of every kind for the several departments of the city, not required to be advertised for by the board of public works; said advertisements to be published two weeks before the beginning of each fiscal year."

In addition to the foregoing we find that section 667 requires that the officer or board in charge of any department shall file with the city clerk a sworn detailed statement of the supplies necessary for his or their department during the next fiscal year.

These sections clearly contemplate that the city shall provide its various departments with the necessary supplies and equip-

ment, so that the city may efficiently carry on its proper governmental functions. There can be no question but that the policing of the city is a governmental function. Section 662 specifies the duty of the city marshal, and among those specified are the following:

> "To diligently enforce all laws, ordinances and regulations for the preservation of public welfare in good order."

Members of the police force are likewise charged with the duty of maintaining order and the suppression of riots, etc., and we think it was clearly the intent of the legislature that the expenses incident to the exercising of the power granted to city marshals and to police officers should be paid by the city and not by the county.

Even the sheriff has no authority to go out on his own initiative and make investigations and charge the county with the expense of the same.

Section 499-c of the 1913 supplement provides as follows:

> "The sheriff shall, whenever directed so to do in writing by the county attorney, make special investigation of any alleged infraction of the law within his county, and report with reference thereto within a reasonable time to such county attorney. When such investigation is made the sheriff shall file with the county auditor a detailed, sworn statement of his expenses, accompanied by the written order of the county attorney, and the board shall audit and allow only so much thereof as it shall find reasonable and necessary."

Section 499-d, immediately following the foregoing section, specifically provides that:

> "Nothing in this act shall be so construed as to relieve any peace officer from the full and faithful discharge of all the duties now or hereafter enjoined upon him by law."

You will note from the foregoing that a sheriff has no authority to incur expense for making an investigation without a direction in writing. It would seem unreasonable that members of the police force of a city could incur expense in the investigation of a crime without any order from any county official and thereafter collect the expenses incurred from the county when such a right is not granted to the sheriff of a county. We do not think the statute contemplates any such inconsistency. We are of the opinion that a county cannot be charged with the expense of an

investigation made by any officer unless such officer was authorized to make the investigation by the proper county officials. The expenses for which a county should be held liable are those incurred in cases brought in the name of the state for the violation of its laws and properly taxable as costs in the action. It may be in some cases that the cost of storage of property seized under a search warrant and similar costs should be paid by the county, but we do not think the legislature contemplated that the county should be liable for the costs of securing evidence or making investigations unauthorized by any county official.

B. J. POWERS, *Assistant Attorney General.*

JURY FEES IN MUNICIPAL COURTS

The presentment of a fee certificate of the clerk of the municipal court, by a juror thereof, to the city auditor, is not sufficient in itself to authorize the city auditor to draw a warrant for the amount called for in the certificate; the city council must take affirmative action on each certificate and order warrants drawn therefor.

March 6, 1912.

Mr. Emmett P. Delaney,
Clinton, Iowa.

Dear Sir:

We have your letter of March 4th in which you state:

> "The question as to the proper method of making certain payments of expenses of the municipal court have arisen, and in particular as to the payment of jurors' fees.
>
> "The point is whether the city or county auditor should make a payment on presentation of the certificates from the clerk of municipal court.
>
> "Section 2 of chapter 226 of the law of the 37th General Assembly provides as to payments of all expenses of maintaining the court not otherwise provided for in this act from the city treasury.
>
> "If in your opinion the city auditor should issue the warrants upon presentation of the certificates from the clerk of municipal court it would seem that the proper procedure in order to protect the city auditor would be by a resolution by the city council authorizing him to make such payments and to honor them at the next meeting when presented by him. Or would it be necessary to delay payment of these fees until after they had been presented and allowed by the city council?"

In answering your inquiry, we desire to state that the acts of the 36th General Assembly creating municipal courts fails to make special provision as to the manner in which jurors shall be paid. Part of the costs of operating a municipal court is paid by the city and part by the county. The 37th General Assembly repealed section 48 of the municipal court act and enacted the following in lieu thereof:

> "The city council shall provide a suitable place for holding said court, and such other rooms and offices as may be necessary for the transaction of the business of said court. *All of the other expenses of maintaining said court not otherwise provided for in this act shall be paid from the city treasury.*

The matter of jurors' fees is one "not otherwise provided for" in the act, and therefore it is to be paid from the city treasury. Section 900 of the code as amended by chapter 196 of the 37th General Assembly provides for the drawing of warrants on the city treasury of cities and towns. It is as follows:

> "The auditor, clerk, or other officer of cities and towns whose duty it is to draw the warrants thereof *shall not draw any such warrant except from the vote of council,* and he shall draw no single warrant for an amount in excess of one thousand dollars. Warrants issued by any city or town shall not be received by the county treasurer in payment of the city or town taxes."

It is the opinion of this department that the foregoing section places a positive restriction upon any city officer authorized to draw warrants upon the city funds; it is necessary that the warrant be drawn as a result of the vote of the city council. The certificate of the clerk of the municipal court that a certain person has served as a juror in that court for a period of a certain number of days does not do away with the necessity of having the council authorize the proper officer to draw a warrant upon the city treasury for an amount necessary to pay the juror.

We do not think that the statute contemplates that the city council shall pass a resolution authorizing a city auditor to draw a warrant for a juror's fees upon the presentment of such a certificate.

It is our opinion that the statute contemplates affirmative action by the city council upon each certificate presented to it, and that

the city auditor has no authority to issue a warrant until the city council has authorized him to do so by vote of the council.

B. J. POWERS, *Assistant Attorney General.*

A CITIZEN WHO HIRES DETECTIVES TO RID CITY OF LAW VIOLATORS CANNOT COMPEL CITY TO REIMBURSE HIM

A city cannot legally reimburse a citizen for money voluntarily expended by him without contract with the city, in hiring detective to ferret out crime.

June 12, 1919.

Hon. I. E. Dougherty, City Attorney,
Rockwell City, Iowa.

Dear Sir:

Your letter of June 9th to Mr. Havner has been referred to me for reply.

You state that a citizen of your city employed two private detectives to ferret out violations of the law in your city, agreeing to pay them $5.00 per day for their services and their necessary expenses; that the citizen advanced these detectives in all $847.44, part of which was for their services, but the larger portion being for money lost by them in gambling games with men against whom they were seeking evidence; that as a result of the activities of such detectives certain prosecutions were instituted under city ordinances and one conviction was had for operating a gambling house and twenty convictions had for gambling; that your citizen took from his employes a receipt for the amount paid by him to them "for secret services rendered," and has filed such receipt with the city council and claims reimbursement from the city for the amount thereof.

You ask whether there is any way under the statute that the town can legally pay this bill or any part of it.

It is plain from your statement that the citizen who hired the detectives was, so far as the city is concerned, a mere volunteer. He had no authority from the council to employ detectives or police officers, and seems to have been operating entirely upon his own responsibility. Having no contract with the city for reimbursement, if he is entitled to receive anything at all on account of his payment, it is because of some implied obligation on the part of the city to pay him.

It is true that under some circumstances municipal corporations may become liable upon implied contracts, but the rule of fixing liability by implication extends no further in the case of municipal corporations than it does in the case of private individuals.

The rule is well settled that a contract cannot be implied to compensate one who has performed services for another as a mere volunteer, and this is true as to municipal corporations the same as to individuals.

Your citizen could not successfully maintain an action against the city to recover the amount that he has thus voluntarily paid, and such being the case, it is my judgment that the city has no right to reimburse him, for municipal corporations are not at liberty to allow claims upon which there is no liability on the part of the corporation.

SHELBY CULLISON, *Assistant Attorney General.*

REGULATION OF ITINERANT PHYSICIANS BY CITIES AND TOWNS

Cities and towns have authority to regulate and license itinerant physicians by virtue of section 700, supplemental supplement, 1915. Hence a physician who goes from place to place and solicits the public to meet him for treatment at a place other than at his office in the place of his residence is deemed an itinerant physician, and subject to municipal regulation.

January 6, 1920.

Mr. W. R. Williams, County Attorney,
Eldora, Iowa.

Dear Sir:

We have your letter of January 3rd in which you request this department to render you an opinion upon the following proposition:

> "Our city council has passed an ordinance requiring itinerant physicians to take out a license before they are permitted to practice in this city. A physician from Iowa Falls, who is a resident of Hardin county and who has had an office in Iowa Falls for a number of years, makes a regular visit to Eldora every Tuesday for the purpose of fitting glasses. This physician is regularly admitted to practice in this state, and the question, does he come within the class of itinerant physicians so that the council can require him to pay a license fee?"

In answering your inquiry, we first desire to direct your attention to the authority vested in a city council to enact ordinances with reference to itinerant doctors, etc.

Section 700 of the supplement, 1913, in part provides that city councils

> "shall have power to regulate, license and tax hotels, restaurants and eating houses; to define by ordinance who shall be considered transient merchants; * * * to regulate, license and tax peddlers, house movers, bill posters, itinerant doctors, itinerant physicians and surgeons, * * * etc."

In addition to the foregoing I desire to direct your attention to that portion of section 2581 of the supplement, 1913, which provides that:

> "Every physician practicing medicine, surgery or obstetrics, or professing or attempting to treat, cure or heal diseases, ailments or injuries by any medicines, appliances or method, who, by himself, agent or employe, goes from place to place or from house to house, or by circulars, letters or advertisements, solicits persons to meet him for professional treatment at places other than his office in the place of his residence shall be considered an itinerant physician; * * *"

It is the opinion of this department that the physician mentiond in your inquiry falls within the definition of an itinerant physician as above given. He holds himself out to treat, cure and heal diseases, ailments or injuries by medicine, appliances and methods, and, furthermore, he goes from the place of his residence to another place and solicits persons to meet him at a place other than his residence for the purpose of receiving professional treatment at his hands.

We refer you to the cases of *State v. Edmunds,* 127 Iowa 333, and to the case of *Fairfield v. Shallenberger,* 135 Iowa 615; as bearing upon this matter.

B. J. POWERS, *Assistant Attorney General.*

KEEPING SEWER DISPOSAL PLANTS IN REPAIR

The four-year period for keeping sewers in good repaid as prescribed in chapter 234, acts 38th General Assembly applies to sewer disposal plants.

December 4, 1919.

Hon. H. J. Mantz,
Audubon, Iowa.

Dear Sir:

Your favor of November 13th has been referred to me for answer.

You ask for an opinion as to whether the four-year obligation provided for in chapter 234 of the acts of the 38th General Assembly applies to sewer disposal plants.

It will be observed that the above chapter repeals section 814 of the supplement to the code of 1913 and enacts the following in lieu thereof:

> "All contracts for the making or reconstruction of street improvements or sewers shall contain a provision obligating the contractor and his bondsmen to keep such improvement or sewer in good repair for not less than four (4) years after the acceptance of the same by the city, and the bond shall be so conditioned as to conform to such contract."

It will be observed also that there are no general provisions especially providing for the construction of sewer outlets and purifying plants, so that if such outlets or plants be constructed they must be under the general provisions as to sewers. It is true that under section 840-g, supplement of 1913, it is provided that cities of the second class and towns shall have the power to levy annually a tax not to exceed three mills on the dollar to be used solely for the purpose of constructing outlets and purifying plants. But it will hardly be presumed that without this provision there would be no power to construct such outlets or purifying plants. If such outlets and plants may be constructed under the general powers as to sewers it would seem to follow that when the legislature used the term "sewers" in the chapter above referred to it intended to include in that term all those things which were necessarily incident to the successful operation of the sewers.

It is therefore the opinion of this department that the "four-year period" in chapter 234 of the acts of the 38th General Assembly applies to sewer disposal plants.

W. R. C. KENDRICK, *Assistant Attorney General.*

CITIES HAVE AUTHORITY TO PROVIDE BY ORDINANCE FOR MILK INSPECTOR

The general powers conferred upon municipalities by section 680 of the code doubtless embraces the authority to provide by ordinance for the appointment of a milk and cream inspector and to define his powers and duties.

July 7, 1920.

Hon. W. B. Barney,
Dairy and Food Commissioner.

Dear Sir:

Your request for the opinion of this department on the following question has been referred to me for attention,

"You ask:

"Has the mayor or city council in an incorporated city within the state of Iowa the power to appoint a milk inspector for said city?"

Section 680 of the code pertaining to the powers of municipal corporations provides in part as follows:

"Municipal corporations shall have power to make and publish, from time to tme, ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the powers and duties conferred by this title, and such as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort and convenience of such corporations and the inhabitants thereof."

The broad general powers conferred by this section vest in city and town councils the authority to adopt ordinances, provide for the appointment of an officer to test milk and cream or other food products sold or used in such municipality and to define in general his duties and to provide compensation therefor. Such ordinances would, of course, have to conform to state regulations on the subjects.

Neither the mayor nor the city council would have the right to make such appointment except when authorized to do so by ordinance properly adopted, and if they should attempt to do so they could not clothe such appointee with any powers whatsoever.

J. W. SANDUSKY, *Assistant Attorney General.*

DISPOSITION OF FINES COLLECTED IN STATE CASES IN MUNICIPAL COURTS

Fines and forfeitures arising from violation of state laws, by constitutional provision, go to the school fund and to the extent that section 694-c27 as amended by chapter 226, acts of the 37th General Assembly conflicts therewith the same is void.

July 6, 1920.

Mr. A. B. Hoover, County Attorney,
Marshalltown, Iowa.

Dear Sir:

Receipt is hereby acknowledged of your favor of June 13th wherein you submit to this department the question of the right of cities having municipal courts to all fines and forfeitures as provided by section 694-a27, as amended by chapter 226, acts of the 37th General Assembly.

This section as now amended clearly provides that all fees, fines, forfeitures, costs and expenses paid to the clerk and bailiff shall be paid to the city treasurer, but I am of the opinion that to the extent with which it conflicts with section 4 of article 12 of the constitution that it is void, and, therefore, all fines, penalties or forfeitures due on account of violation of state laws must go to the school fund as the constitution provides.

I understand that in the municipal courts of the city of Des Moines they have been taking all such fines and forfeitures, but that does not change the rules of law, and where a conflict exists between an act of the legislature and a constitutional provision the legislative act must give way, for the constitution is the supreme law of the land.

J. W. SANDUSKY, *Assistant Attorney General.*

HOUSING LAW

If cities coming under provisions of the housing law refuse to enforce the law, then the state board of health may act.

August 23, 1920.

Hon. Edwin H. Sands,
State Housing Commissioner.

Dear Sir:

Your letter of the 13th inst. addressed to the attorney general has been referred to me for attention.

You ask:

"Will you please inform me as early as convenient the

action possible to secure an enforcement of chapter 125, 38th General Assembly, senate file No. 475, known as the housing law."

"Most of the cities in which the law is mandatory have taken steps to secure its proper enforcement, but we have three cities in which there is absolutely no effort made or inclination toward the enforcement or the observance of any parts thereof. What we want to know is what we can do legally to enforce the cities to put into operation the provisions of the housing law."

The act in question is a state law, and is operative in cities having a maximum population of fifteen thousand, according to the last state or federal census. However, such cities may also enact ordinances imposing similar or greater requirements and prescribing for their enforcement.

Sec. 2, chap. 123, acts 38th General Assembly.

Primarily, it is the duty of the local health officer in each city, or to the official in such city to whom is committed the charge of safeguarding the public health, to enforce the provisions of the act, except that in cities wherein there is a department of buildings, then such department shall primarily enforce the provisions of the act, as contained under the title "fire protection," and under sections 89, 90 and 91.

Sec. 101, chap. 125, acts 38th General Assembly.

But in the event a city subject to the provisions of the act refuses to enforce the act through either the city health officer or the department of buildings, then the state board of health has jurisdiction to act.

Section 9 of the statute expressly provides that the state board of health

"shall have power to examine into the enforcement of the act in each city."

And upon such examination if the state board of health finds that the act is not being enforced, then section 105 of the statute provides that said board

"shall have power to aid so far as may be necessary to secure the enforcement of this act; and to that end said board may apply to any court or judge of competent jurisdiction for an injunction mandatory or prohibitive, and the county attorney

or attorney general shall prosecute such action in the name of the state of Iowa."

If it is desired to prosecute a person criminally for violation of any of the provisions of the act under section 95 thereof, then information should be filed with the justice of the peace, and it will be the duty of the county attorney to prosecute.

W. R. C. KENDRICK, *Assistant Attorney General.*

STATE HOUSING LAW

The jurisdiction over fire escapes on multiple dwellings in cities applicable to law is transferred to department of buildings.

September 5, 1919.

Hon. A. L. Urick,
Commissioner Bureau of Labor Statistics.

Dear Sir:

Your letter of the 22nd inst. addressed to Attorney General H. M. Havner has been referred to me for attention.

You ask in substance whether or not chapter 123 of the acts of the 38th General Assembly, known as the housing law, transfers from your department the jurisdiction over fire escapes in this state.

The 38th General Assembly enacted a law known as the housing law, being chapter 123 of the published session laws and dealing with the construction of dwellings, their sanitation and the safety of the inhabitants thereof. This act is made applicable to cities having a population of fifteen thousand or more, and also to towns of less than fifteen thousand when the city council adopts the law, and further, to mining camps when the state board of health determines that mining camps should come within the provisions of the law.

Section 36 of the act provides for the installation of fire escapes on all multiple dwellings thereafter erected exceeding two stories in height, and reads as follows:

> "Every multiple dwelling hereafter erected exceeding two stories in height shall have at least two independent ways of egress, each of which shall extend from the ground to the roof, and shall be located remote from each other, and each shall be arranged as provided elsewhere in this act. One of such ways of egress shall be a flight of stairs constructed and arranged as provided in sections 39, 40, 41 and 42 of this act.

In multiple dwellings of class A the second way of agress shall be directly accessible to each apartment, group or suite of rooms without having to pass through the first way of egress. In multiple dwellings of class B the second way of egress shall be directly accessible from a public hall. The second way of egress may be any one of the following as the owner may select:

"1. A system of outside balcony fire escapes constructed and arranged so as to comply with the state fire laws.

"2. An additional flight of stairs, either inside or outside, constructed and arranged so as to comply with the state fire laws.

"3. A fire tower located, constructed and arranged as may be required by the superintendent of buildings."

But in case of multiple dwellings already erected, fire escapes may be installed as meet with the approval of the building inspector of the city in which the dwelling is located.

Section 89 of the act provides:

"Every multiple dwelling exceeding two stories in height shall have at least two independent ways of egress constructed and arranged as provided in section 36 of this act. In the case of multiple dwellings erected prior to the passage of this act where it is not practicable in the judgment of the building inspector to comply in all respects with the provisions of that section, said building inspector shall make such requirements as may be appropriate to secure proper means of egress from such multiple dwellings for all the occupants thereof. No existing fire escape shall be deemed a sufficient means of egress unless the following conditions are complied with:

"(1) All parts of it shall be of iron, cement or stone.

"(2) The fire escape shall consist of outside balconies which shall be properly connected with each other by adequate stairs or stationary ladders, with openings not less than twenty-four by twenty-eight inches.

"(3) All fire escapes shall have proper drop ladders or stairways from the lowest balcony of sufficient length to reach a safe landing place beneath.

"(4) All fire escapes not on the street shall have a safe and adequate means of egress from the yard or court to the street or alley or to the adjoining premises.

"(5) Prompt and ready access shall be had to all fire

escapes, which shall not be obstructed by bathtubs, water closets, sinks or other fixtures, or in any other way.''

Now section 2 of the act defines and classifies a dwelling as follows:

''Certain words in this act are defined for the purpose thereof as follows: Words used in the present tense include the future; words in the masculine gender include the feminine and neuter; the singualr number includes the plural and the plural the singular; the word 'person' includes a corporation as well as a natural person.

''(1) *Dwelling.* A 'dwelling' is any house or building or portion thereof which is occupied in whole or in part as the home or residence of one or more human beings, either permanently or transiently.

''(2) *Classes of Dwellings.* For the purpose of this act dwellings are divided into the following classes: (3) 'Private dwellings;' (b) 'two-family dwellings,' and (c) 'multiple dwellings.'

''(a) A private dwelling is a dwelling occupied by but one family alone.

''(b) A two-family dwelling is a dwelling occupied by but two families.

''(c) A multiple dwelling is a dwelling occupied by more than two families.''

Then said section further classifies multiple dwellings into class A and class B, and provides:

''All multiple dwellings are for the purposes of this act divided into two classes, viz.: Class A and class B:

''Class A. Multiple dwellings of class A are dwellings which are occupied more or less permanently for residence purposes by several families and in which the rooms are occupied in apartments, suites or groups. This class includes tenement houses, flats, apartment houses, apartment hotels, bachelor apartments, studio apartments, kitchenette apartments and all other dwellings similarly occupied whether specifically enumerated or not.

''Class B. Multiple dwellings of class B are dwellings which are occupied, as a rule transiently, as the more or less temporarily abiding place of individuals who are lodged, with or without meals, and in which as a rule the rooms are occupied singly. This class includes hotels, lodging houses, board-

ing houses, furnished room houses, club houses, asylums, boarding schools, convents, hospitals, jails and all other dwellings similarly occupied whether specifically enumerated herein or not."

The power of enforcing that provision of the act relating to fire protection is conferred upon the department of buildings in each city in which the above applies.

Section 101 provides:

"The provisions of this act shall be enforced in each city by the health officer, except that the department of buildings, where such department exists in a city, shall enforce the provisions herein contained under the title "fire protection" and the provisions contained in sections 89, 90 and 91 thereof."

The act also contemplates that the building inspector in each of such cities shall be the inspector of said multiple dwellings, as far as relates to the necessary fire escapes to be installed.

Section 90 provides:

"Whenever any multiple dwelling is not provided with sufficient means of egress in case of fire the building inspector shall order such additional means of egress as may be necessary."

The act also confers upon the state board of health the power to aid in the enforcement of the act.

Section 105 provides:

"The state board of health shall have power to aid as far as necessary to secure the enforcement of this act; and to that end said board may apply to any court or judge of competent jurisdiction for an injunction mandatory or prohibitive and the county attorney or attorney general shall prosecute such action in the name of the state of Iowa. The county attorney may also prosecute an action in equity for injunction in the name of the state of Iowa upon the request of any local board of health where said act is being violated."

Section 9 also provides:

"The state board of health shall have the power to examine into the enforcement of this act in each city."

Then all existing statutes conflicting with any of the provisions of the housing law are expressly repealed.

Section 107 provides:

> "All statutes or parts thereof in conflict with the provisions of this act are hereby repealed. All charter provisions, regulations and ordinances of cities are hereby superseded in so far as they do not impose requirements other than the minimum requirements of this act, and except in case of such higher local requirements, this act shall in all cases govern."

Prior to the enactment of the housing law the commissioner of the bureau of labor statistics had general charge and supervision of the inspection and regulation of fire escapes.

Section 4999-a10, supplement of 1913.

Thus it will be observed that there exists a conflict as to who shall enforce the law relating to fire escapes on buildings included within the definition "multiple dwellings" in cities where the housing law is made applicable, but section 107 of chapter 125, acts of the 37th General Assembly, repeals all statutes in conflict with said chapter. Therefore, section 4999-a10 aforesaid is repealed in so far as it conflicts in any manner with said chapter 123.

I am therefore of the opinion that the duty to inspect fire escapes on such multiple dwellings as come within the scope of the housing law and to enforce the law relating thereto has been transferred from your department to the department of buildings in each city to which said act is made applicable. If there is no such department in such cities the board of health has jurisdiction in such matters.

W. R. C. KENDRICK, *Assistant Attorney General.*

MEMBER OF GENERAL ASSEMBLY MAY BE APPOINTED FOOD INSPECTOR

A member of the General Assembly is not disqualified under section 21, article 3 of the constitution of Iowa from being appointed food inspector.

May 19, 1919.

Hon. W. B. Barney,
Dairy and Food Commissioner.

Dear Sir:

I have your favor of the 9th inst. in which you ask whether or not the appointment of a member of the 38th General Assembly to the position of a food inspector under section 4999-a31b, sup-

plement of the code, 1913, would be in violation of section 21, article 3 of the constitution of Iowa.

Section 21, article 3 of the constitution, provides:

> "No senator or representative shall, during the time for which he shall have been elected, be appointed to any civil office of profit under this statute, which shall have been created or the emoluments of which shall have been increased during such term, except such offices as may be filled by elections by the people."

If the position of food inspector is a civil office, then you would have no authority to appoint a member of the General Assembly to that position for the reason that the emoluments thereof have been increased while the appointee was a member of the General Assembly.

A civil office is the grant and possession of the sovereign power and contemplates the exercise of sovereign acts. It also contemplates a fixed tenure, definite duties, the taking of an oath and the filing of a bond. Such was the holding in the case of *State v. Spaulding,* 102 Iowa 639.

In 2 Words and Phrases, page 1199, it is said:

> "An 'officer' is distinguished from an 'employe' by the greater importance, dignity and independence of his position, in being required to take an official oath, and perhaps to give an official bond, in the liability of misfeasance in office, and usually, though not necessarily, in the tenure of his office. *City of Baltimore v. Lyman,* 48 Atl. 145, 146; 92 Md. 591."

Now, section 4999-a31b, supplement to the code, 1913, provides, among other things, that the dairy and food commissioner may, with the consent of the executive council, appoint such assistants as he may deem necessary,

> "and they shall perform such duties as may be assigned to them by the state food and dairy commissioner."

There is nothing in that employment that even savors of a civil office, for assistants are not appointed for any definite term, nor do they exercise any sovereign powers, but on the contrary, they are required to perform such duties as are assigned to them by the state dairy and food commissioner.

I am therefore of the opinion that the appointment of a member of the 38th General Assembly to the position of food inspector

or assistant under section 4999-a31b, supplement to the code, 1913, does not come within the inhibition of section 21, article 3 of the constitution of Iowa, even though the salary attached to such position was increased while the appointee was a member of the 38th General Assembly.

W. R. C. KENDRICK, *Assistant Attorney General.*

ESTABLISHMENT OF STATE PARKS

State board of conservation, with written consent of executive council, may establish state parks on the border of any lake in the state, and the executive council is authorized to improve the same.

July 2, 1920.

Mr. Tom Boynton, County Attorney,
Forest City, Iowa.

Dear Sir:

Your letter of recent date addressed to Attorney General H. M. Havner has been referred to me for attention owing to his absence from the city.

You state:

> "I am writing you at the instance of the Lake Mills (Iowa) Improvement Association.
>
> "These gentlemen are very much interested in the improvement of Rice lake, located in this (Winnebago) county and Worth county. They have been informed by the park board, or conservation commission that said board, or commission, is without authority to proceed to restore and improve this lake without the legislature first having passed legislation authorizing them so to do."

You then add:

> "I would very greatly appreciate your opinion upon the question of the necessity of legislation being passed before the board is authorized to restore and improve this lake and purchase the land that may be necessary to properly do so."

So far as I am able to ascertain no official opinion has ever been rendered by this department on the subject.

Certainly no serious question can be legally raised to the power of the state board of conservation, by and with the written consent of the executive council, to establish state parks on the border of any lake in the state of Iowa, nor can there be any doubt that

the executive council of the state of Iowa is fully authorized to purchase or condemn land bordering on such lakes to be used for such purpose.

Chapter 236, acts of the 37th General Assembly, as amended by chapter 368, section 1, acts of the 38th General Assembly, expressly provides:

> "The state board of conservation, by and with the written consent of the executive council, is hereby authorized to establish public parks in any county of the state, upon the shores of lakes, streams or other waters of the state, or at any other place which have by reason of their location become historic or which are of scientific interest, or by reason of their natural scenic beauty or location become adapted therefor, and said board of conservation, under the supervision of the executive council, is hereby authorized to improve and beautify such parks. When so established they shall be made accessible from the public highways, and in order to establish such parks the executive council shall have the power to purchase or condemn lands for such purposes and to purchase and condemn lands for said highway purposes."

After a state park has been formally established on the border of any specific lake, then such lake may be improved under the direction of the state board of conservation, by and with the consent of the executive council.

Chapter 236, section 6, acts of the 37th General Assembly, as amended by chapter 368, sections 1 and 2, acts of the 38th General Assembly, provides:

> "The state board of conservation shall permit the improvement of such parks, when established, or the improvement of bodies of water, upon the border of which such parks may be established, by the expenditure of private or other funds, such improvement to be done, however, under the direction of the state board of conservation, by and with the consent of the executive council. The executive council may call upon any agencies of the state for assistance and information. When such state agencies' traveling expenses are not otherwise provided for, they shall be paid from the public state parks fund as other traveling expenses are paid."

To provide funds to cover the cost of establishing state parks, the purchase of land and improving the same, together with the improvement of any lake bordering on said park, the General Assembly of Iowa has not only appropriated out of the fish and game protection fund any amount thereof not necessary for the

support and maintenance of the state fish and game department, but has also made a specific appropriation of $100,000 available annually.

Chapter 236, section 11, acts of the 37th General Assembly, as amended by chapter 368, section 3, acts of the 38th General Assembly, provides:

> "For the purpose of carrying into effect the provisions of this chapter there shall be appropriated out of the fish and game protection fund any portion thereof which is in the judgment of the executive council unnecessary for the support and maintenance of the fish and game department, and in addition thereto there shall be appropriated annually out of any moneys in the state treasury not otherwise appropriated the sum of one hundred thousand dollars."

It is therefore apparent in so far as the power vested in the state board of conservation to establish state parks, by and with the written consent of the executive council, as well as the authority conferred upon the executive council to purchase or condemn land for such purposes, and to improve lake, on the borders of which such parks are established, such power and authority clearly exists.

However, the question might arise as to the expendiency of establishing a state park at any particular location in the state, as well as the funds available for the purchase and improvement of the same, together with the lake that might border thereon. But these questions do not affect the power vested in the state board of conservation and the executive council to establish state parks and improve them.

I will add, however, that a condition exists which might possibly enter into the feasibility of establishing a state park on the border of Rice lake, and that is the fact that the executive council ordered said lake drained in connection with the organization of a drainage district. I am not sufficiently informed to determine the progress made in the formation of such a district, but if the district has been fully organized and the reclaimed land is now being cultivated the cost of purchasing or condemning land in the drainage district might be so great that the executive council would not feel justified in authorizing so large an expenditure. But that is a question of policy which the executive council shall determine, and does not go to the question of power vested to the

state board of conservation and the executive council to establish state parks and improve the same.

W. R. C. KENDRICK, *Assistant Attorney General.*

TENURE OF APPOINTIVE OFFICE ABOLISHED BY REPEAL OF STATUTE GIVING POWER TO APPOINT

The abolition of an appointive board, without a saving clause as to appointments, *ipso facto* terminating the tenure of all appointive officers thereunder which are of indefinite duration. Hence with the repeal of a statute authorizing appointment of state veterinary surgeons all commissions terminate on such repeal.

July 29, 1920.

Mr. Peter Malcolm,
State Veterinarian.

Dear Sir:

We have your request for an opinion from this department upon the following propositions:

> "In a law enacted by the 38th General Assembly, chapter 287, the power of appointing assistant state veterinarian was transferred to the commission of animal health.
>
> "The condition existing at the present time is that there are a great many assistant state veterinarians scattered over the state who are holding commissions made prior to the passage of this act.
>
> "In behalf of the commission of animal health I would like to have an opinion as to what disposition, if any, should be made with the outstanding commissions."

Research has failed to disclose any opinion of the supreme court of this state dealing with any proposition similar to the one presented in your inquiry. We shall therefore address ourselves to the legislative history of the statutes with reference to the appointment of assistant state veterinarians, and we shall then apply what we deem to be the proper rules of construction to such cases.

Under the provisions of section 2533, supplement to the code, 1913, authority to appoint assistant state veterinary surgeons was vested in the governor, and we assume from the statement made in your letter that the appointments referred to were made by that officer. The 38th General Assembly, by the enactment of chapter 287, repealed section 2533 of the supplement of 1913, and further provided that the commission of animal health be empowered to appoint one or more veterinarians in each county as assistants,

and fix the compensation thereof. This act of the 38th General Assembly became effective April 30th. It will therefore be noted that at that time the appointive power of the governor was terminated, and that appointive authority thereafter became vested in the commission of animal health.

The precise question now presented is whether an assistant state veterinarian holding office under a power of appointment which terminated on April 30, 1919, is now entitled to exercise authority thereafter.

The supreme court of Nebraska had before it a question of somewhat similar nature, and it was there held that an appointment unlimited as to its term continues in force until revoked, or until the authority by which it was made ceases to exist. Hence, the abolition of an appointive board, without a saving clause as to appointments *ipso facto*, terminates the tenure of all appointive offices. This principle of law finds support not only in the reports of Nebraska, but also in the reports of Alabama.

State v. Board of Public Lands, 7 Neb. 42;
Nichols v. Momptroller, 4 Stew. (Ala.) 154;
Throop on Public Officers, sec. 304.

It will therefore be observed that applying the principle above announced, that the tenure of office of all appointees of the governor under the provisions of section 2533, terminated upon the taking effect of chapter 287, acts of the 38th General Assembly.

If the appointees of the governor are still attempting to act as state veterinarians we offer the suggestion that you notify them that their commissions have been nullified by the repeal of the provision of the statute authorizing their appointment.

B. J. POWERS, *Assistant Attorney General.*

CENSUS—TIME OF TAKING EFFECT OF

Census taken by the national government becomes effective, for state purposes from and after publication by secretary of state and benefits claimed or arising from or on account of increase in population cannot antedate such publication.

October 7, 1920.

Mr. S. B. Quarton, County Attorney,
Algona, Iowa.

Dear Sir:

Your request for the opinion of this department on the following question has been referred to me for attention.

You state:

> "The clerk of our district court has just received advance notification from the census bureau of change in population of Kossuth county. Inasmuch as the changes will in all probability when confirmed affect the salaries of a number of the county officers they would like to know when the new salaries will take effect.
>
> "Inasmuch as the census was taken some little time ago and the report thereof is long overdue, would the change in salaries date from the time the report was due, or from the time the report was received, certified and published as required by statute?"

Section 177-c of the 1913 supplement to the code provides in part as follows:

> "Whenever a general census is taken by the national government it shall be the duty of the secretary of state to procure from the supervisor of such census or other proper federal official a copy of such part of said census as gives the population of the state of Iowa, by counties, and the population of the cities and towns of Iowa, and file same in his office. He shall then at once cause such census report, giving the population of the state by counties, and the the population of the cities and towns of Iowa, to be published once in each of two daily newspapers of the state having general circulation, and from and after the date of such publication said census shall be in full force and effect throughout the state."

It is made the duty of the secretary of state, when a general census is taken by the national government, to obtain from the proper federal officer a copy of such part of the census as gives the population of the state by counties, and file such in his office and publish same in two daily newspapers in the state, from and after which time said census shall be in full force and effect.

It, therefore, follows that the change in population should and must date from that time and any benefits claimed or arising from or on account of an increase in population cannot antedate such publication.

J. W. SANDUSKY, *Aissistant Attorney General.*

EXTRADITING INSANE PATIENTS WHO ESCAPE FROM STATE HOSPITAL

The law provides no means for extraditing an insane person who escapes from one of the state hospitals for insane to another state.

July 31, 1919.

Mr. T. A. Goodson, County Attorney,
Bloomfield, Iowa.

Dear Sir:

Your letter of the 21st inst. addressed to Attorney General H. M. Havner has been referred to me for reply.

You state in substance that a man by the name of McAvoy was committed to the State Hospital for Insane and that he escaped therefrom and is now found in the state of Illinois.

You then ask whether or not there is any statutory provision for compelling the return of said McAvoy by his guardian.

There is no statutory provision permitting the requisition of a patient who has escaped from one of our state hospitals for insane and who is found in another state.

However, if it is desired to secure his return it is possible that you might secure it by taking the matter up with the local authorities in the county where he is now located in Illinois, and if he has not become a resident of that county and still has his settlement in your county, and you can further show that he may become a charge on the county where he is now located it is possible that you might induce the local authorities in Illinois to return him to Iowa, which they would have a right to do.

Otherwise I do not believe that you can force his return to this state.

W. R. C. KENDRICK, *Assistant Attorney General.*

DOG IS NOT A DOMESTIC BEAST UNDER SECTION 4818 OF CODE

A dog is not a domestic beast within the meaning of section 4818 of the code making it a crime for anyone to "maliciously kill, maim or disfigure any horse, cattle or *other domestic beast of another.* * * * "

June 17, 1919.

Mr. Claude M. Miller, County Attorney,
Iowa City, Iowa.

Dear Sir:

We have your letter of June 12th in which you request an opinion from this department upon the following matter:

> "Is a dog a 'domestic beast' within the meaning of section 4818 of the code?"

The section to which you refer provides as follows:

> "If any person maliciously kill, maim or disfigure any horse, cattle or other domestic beast of another, or maliciously administer poison to any such animal, or expose any poisonous substance with intent that the same shall be taken by such animal he shall be imprisoned in the penitentiary not exceeding five years, or imprisoned in the county jail not exceeding one year, or be fined not exceeding three hundred dollars."

Our supreme court has had occasion to pass upon this section in several instances. In the case of *State v. Enslow,* 10 Iowa 115, the court held a hog was a "domestic beast;" in the case of *State v. Harris,* 11 Iowa 414, an ox was held to be a "domestic beast;" and in the case of *State v. Linde,* 54 Iowa 139, and in *State v. Williamson,* 68 Iowa 351; also in the case of *State v. Lightfoot,* 107 Iowa 344, it was held that the maiming or disfiguring of a horse was punishable under the provisions of this section. But no case has been found which presents the question of whether or not a dog is a domestic beast within the meaning of this statute.

However, under an early statute of Minnesota, providing for the punishment of persons "who shall wilfully and maliciously kill, maim or disfigure any horse, cattle or other beasts of another person" it was held that a dog was not a beast within the meaning of the statute, and the court said:

> "It may be difficult to determine in all respects what animals the term 'beasts' as used in the statute includes, but it may be fairly assumed, as it seems to me, that all such as have, in law, no value were not intended to be included in that general term. Horses and cattle have an intrinsic value which their names import, and it is but reasonable to suppose that the intention of the law was, in using the term 'beasts,' to include such other animals as may properly come under the name of beasts, and as have an intrinsic value in the same sense that there is value in horses, oxen and cows. The term beasts may well be intended to include asses, mules, sheep, swine, and, perhaps, some other domesticated animals, but it would be going quite too far to hold that dogs were intended. A criminal offense should not be created by an uncertain and doubtful construction of a statute. If there be any doubt in the case, penal statutes are to be so construed as not to multiply felonies, unless the construction be supported by express words, or by a reasonable implication. *U. S. v. Gideon,* 1 Minn. 292, 296."

The supreme court of Tennessee held that a dog was not a beast within the meaning of their statute with reference to the killing

of beasts. In deciding the case, however, the court admitted that the term "beast" was broad enough to include dogs, but based the decision on the ground that the legislative intent was not to include dogs within the meaning of the statute. *State v. Phillips,* 1 Tenn. Cas. 34. Also in Maine it has been held that a statute making it a crime to kill or wound "domestic animals" does not apply to killing dogs. *State v. Harriman,* 75 Me. 562; 46 Am. Rep. 523. There are a few decisions to the contrary where the statute used the words "domestic animal" or "animals," but where the words "domestic beast" are used the decisions are nearly all in accord with the rule announced in the case of *U. S. v. Gideon, supra.*

In this same connection we desire to call your attention to the rule that where there are general words following particular or specific words the former must be confined to things of the same kind. Applying this rule to the construction of the statute in question, we do not think it can be said that the legislature intended to include dogs within the term "domestic beast" when the specific words preceding refer to "horse" and "cattle." In fact, some of the courts, in applying the rule above announced, have gone a great deal farther than it is necessary for us to go in holding that a dog is not within the term "domestic beast" as used in our statute. For instance, that a bull is not included under the words "or other cattle" as used in a statute which made it indictable for any person to wantonly or cruelly beat, abuse or ill treat any horse, mare, gelding, mule, ass, ox, cow, heifer, steer, sheep, or other cattle. *Sutherland on Statutory Construction,* section 268, page 351.

We also desire to direct your attention to the fact that the protection granted many animals is not extended to a dog. For instance, section 2340 of the 1913 supplement states that it is lawful for any person to kill a dog worrying or attacking sheep or other animals, or attempting to bite any person, and we further find that chapter 50 of the acts of the 37th General Assembly provides in part as follows:

> "That it shall be unlawful for any dog to run at large within this state between sunset and sunrise, except dogs while in the chase or accompanied by their owner or trainer. * * * Any dog found at large and upon the lands of one other than its owner contrary to the provisions hereof shall

be deemed a trespasser and may be lawfully killed by the owner, agent, employe or occupant of said lands; provided, however, that nothing in this act shall be deemed to apply to dogs owned or harbored within the limits of cities and incorporated towns having their own dog regulation while running at large within the limits of such city or town."

It is therefore the opinion of this department that the legislature did not intend to include a dog in the term "domestic beast" as used in section 4818 of the code as above set forth.

B. J. POWERS, *Assistant Attorney General.*

STATE HOSPITAL AND COLONY FOR EPILEPTICS

Persons committed to state hospital and colony for epileptics cannot be released on ten days' notice.

May 29, 1919.

Dr. H. Nelson Voldeng, Superintendent State Hospital and Colony for Epileptics,
Woodward, Iowa.

Dear Sir:

Your letter of the 19th inst. addressed to Attorney General H. M. Havner enclosing a letter from Mr. Sam Abrahamson, an attorney located at Des Moines, has been referred to me for reply.

You ask whether or not the legal status of a person afflicted with epilepsy is the same whether admitted to the State Hospital and Colony for Epileptics as voluntary patients or committed to said institution by the commissioners of insanity. That is to say, when a person is admitted upon commitment by the commissioners of insanity, can said patient's discharge be obtained upon a ten-days' written notice to the superintendent, or shall the patient's parole or discharge be obtained only with the consent of the board of control of state institutions.

Paragraph 5 of section 2727-a96 of the supplemental supplement relating to the custody of patients in the State Hospital and Colony for Epileptics provides:

"All persons admitted to said hospital and colony as sane epileptics shall until paroled or discharged be under the custody and control of the superintendent of said hospital, and said superintendent may restrain any such patient when he deems it necessary for the welfare of the patient and the proper conduct of the institution. Any person admitted as a

> sane epileptic, who is of legal age, or the parent or guardian of such patient, if a minor, may at any time obtain the discharge of such patient from the institution by giving at least ten days' notice in writing to the superintendent of the desire to obtain such discharge, and when the patient is thus discharged he will not be again admitted except under a warrant of commitment as herein provided."

The paragraph just quoted relates solely to "voluntary admissions" to the hospital and is to govern the custody and control of such patients. However, said paragraph further provides that in the event a voluntary sane patient becomes insane, then after the patient has been accorded a hearing, the superintendent shall have the authority to place such patient in the insane ward and from that time on the status of the patient shall be the same as though he had been regularly committed to the hospital by the commissioners of insanity.

While the term "insane epileptics" is used in paragraph 5, *supra*, there is no reference anywhere in the statutes to the original commitment or admission of "insane" epileptics to said hospital, nor is there any authority for the commissioners of insanity to commit "insane" persons to the hospital and colony for epileptics. The question of "insanity" is not passed upon by the commissioners of insanity, but the only question said commissioners determine is whether or not the person before them is an "epileptic" and a fit subject

> "for the care, custody, treatment and control of the State Hospital and Colony for Epileptics."

If it is found that such person is a fit subject for the care, custody, treatment and control of the State Hospital and Colony for Epileptics, then said commissioners will commit such person to said institution as provided for in paragraph 6 of section 2727-a96 of the supplemental supplement, which provides that:

> "The commissioners of insanity in each county shall have the same power and authority to commit persons to the State Hospital and Colony for Epileptics, except in cases of voluntary commitments to such hospital and colony as is now conferred by law upon such commissioners in connection with the commitment of patients to the State Hospital for Insane, and all laws relating to the admission of patients to the State Hospital for Insane shall apply to admission of patients to the State Hospital and Colony for Epileptics in all cases where such laws may be applicable."

When a person afflicted with the disease of epilepsy is "committed to the State Hospital and Colony for Epileptics his status is different than when such person is voluntarily "admitted" to said institution. When such person is "committed" he then becomes subject to the custody and control of the officials who exercise jurisdiction over that institution, namely, the board of control of state institutions; and although there is no statute expressly granting to such board the authority to retain such patients in said institution until paroled or discharged, yet that power is clearly implied.

Therefore we are of the opinion that in the case of voluntary patients their discharge may be obtained upon a ten-days' notice as provided for in paragraph 5, *supra;* but in the case of persons committed to the State Hospital and Colony for Epileptics by the commissioners of insanity such patients cannot be released upon notice, but may be legally retained in said institution until paroled or discharged therefrom.

W. R. C. KENDRICK, *Assistant Attorney General.*

RULES RELATING TO SLAUGHTER OF DISEASED ANIMALS

Commission of animal health cannot limit payment for killing tubercular cattle to the owners dispose of same within thirty days from date of appraisal.

May 12, 1920.

Hon. Robert D. Wall,
State Veterinarian.

Dear Sir:

Your letter of the 28th ult. addressed to the attorney general has been referred to me for attention.

You ask for a construction of section 10, chapter 287, acts of the 38th General Assembly, and in connection therewith you ask this question:

> "Have we the authority to make a rule or requirement that owners dispose of cattle within a limited period of time to avail themselves of the reimbursement provided by law? In some cases owners desire to hold reactor cattle for various periods of time to obtain offspring from them. It has been my contention that we cannot restrict the payment of this indemnity, or rather refuse to pay indemnity for cattle officially tested and condemned in such cases where the owner

prefers to hold them beyond the limit set by the department, and some of these claims have already been paid."

Section 10 provides for the examination and testing by your department of herds of cattle with a view of detecting a presence of tuberculosis. If, after such an examination, tubercular animals are found in said herd your commission shall have the authority to order such disposition of them as it considers most desirable. The owners of herds of cattle may apply to your commission for such an examination, and you may make such rules and regulations as you deem best to suppress the disease or prevent the spread thereof. Then the section provides:

> "If it is deemed advisable to slaughter an animal reacting to the tuberculin test, the owner shall be paid from the funds of the state treasury not otherwise appropriated, a sum equal to one-third of the difference between the proceeds from the sale of the salvage which the owner receives and the appraised breeding value of the animal, provided the state does not pay to the owner a sum in excess of eighty dollars for any pure bred animal and forty dollars for any grade."

Chapter 287 confers upon the commission of animal health the power to make such rules and regulations as may be necessary and proper for carrying out the purpose of the act, and further provides a penalty for violating any of the provisions thereof.

It will therefore be observed that the commission of animal health has the power to make rules and regulations, but such rules and regulations shall be reasonable, not in conflict with any express provisions of the act, and such as are necessary to carry into effect the evident purposes thereof.

It will be further observed that section 10 expressly provides that in the event any animal reacting to the tuberculin test is slaughtered, then and in that event the owner shall be reimbursed according to a certain statutory schedule.

The act also authorizes the commission to make such disposition of affected animals as it deems necessary, even to the extent of killing the animal. It further authroizes the commission to permit the owner of tubercular cattle to retain the animal for breeding purposes.

It would therefore seem to me that the violation of a rule of the commission by the owner of the animal, to the effect that an animal affected with tuberculosis shall be slaughtered within

thirty (30) days from the date of appraisal in order to be reimbursed, would not defeat such owner of the statutory right to such reimbursement, while on the other hand such violation might subject the violator to criminal proceedings.

However, it occurs to me that in the event animals condemned are about to bear offspring, and the owners desire to retain such animals until the offspring are born, you and the owners can make satisfactory arrangements for that purpose.

W. R. C. KENDRICK, *Assistant Attorney General.*

DISEASED CATTLE SLAUGHTERED OUTSIDE STATE

State cannot pay for animals slaughtered outside of state on account of tuberculosis.

November 20, 1920.

Mr. Peter Malcolm,
State Veterinarian.

Dear Sir:

You have requested an opinion from this department upon the followng question:

> "If the owner of a herd of cattle in Iowa had his cattle examined and tested with a view to detecting the presence of tuberculosis, and said cattle did not react to the test, and owner afterwards sold said cattle under contract to a person in another state, by the terms of which contract the owner guaranteed the cattle free from tuberculosis, and that said cattle should pass a similar test in the other state not earlier than sixty days nor later than ninety days from the date said cattle arrived in the other state, would the state of Iowa be justified in paying for any of such cattle killed in the other state on account of its reacting to the tuberculin test when examined in the other state?"

It is a universal legal principle that state money cannot be expended for any purpose other than expressly provided by statute.

If the owner of such cattle is entitled to any compensation under the state of facts submitted in your question, authority for payment must be found in section 10, chapter 287, acts of the 38th General Assembly.

Section 10, *supra,* provides as follows:

> "That owners of herds who desire to have their herds examined and tested with a view to detecting the presence of

tubreulosis, and with a further view of freeing their herds from such disease, may apply to the commission for testing and examination. A blank for such application shall be furnished by the commission and shall include such an agreement on the part of the person making the said application that he will conform to and abide by the rules and regulations laid down by said commission and follow the instructions of said commission designated to prevent the spread thereof. Upon receiving such application, or if herds or animals are examined on the commission's own motion, the commission shall, as soon as practicable, cause such tests or an examination to be made. If, after such an examination, tubercular animals are found therein, the said commission shall have authority to order such disposition of them as it considers most desirable and economical. Before being tested such animals shall be appraised at their cash value for breeding, dairy or beef purposes by a representative of the commission or a representative of the United States Bureau of Animal Industry, or both together with the owner. If these cannot agree as to the amount of the appraisal there shall be appointed three competent and disinterested men, one appointed by the commission, one by the owner and the third by the first two, to appraise such animals, which appraisal shall be final. The expenses of such appraisal shall be borne by the state. In the case of pure bred cattle the pedigree shall be proved by certificate of registry from the herd books where registered. If it is deemed advisable to slaughter an animal reacting to the tuberculin test the owner shall be paid from the funds of the state treasury not otherwise appropriated a sum equal to one-third of the difference between the proceeds from the sale of the salvage which the owner receives and the appraised breeding value of the animal, provided the state does not pay to the owner a sum in excess of eighty dollars for any pure bred animal and forty dollars for any grade. In all cases it is provided the animal has been owned at least six months, in the state, by the applicant, prior to the condemnation thereof."

It will be observed that section 10 authorizes the payment of cattle slaughtered in Iowa when it is deemed advisable by the commission of animal health of this state on account of said animal reacting to the tuberculin test; provided, however, that the animal was owned in this state at least six months prior to the condemnation thereof by the person making application for payment.

In the case cited in your question the animal has been taken from the state of Iowa, and at the time of its removal from this

state it showed no signs of tuberculosis, but after the animal had been in another state for a period of from two to three months it reacted to the tuberculin test when examined. Under the laws of Iowa the animal at that time could not be reshipped into this state.

I am of the opinion therefore that under the facts stated in your question the owner of the animal sold could not obtain payment from the state of Iowa.

W. R. C. KENDRICK, *Assistant Attorney General.*

MANUFACTURE OF ANTI-HOG-CHOLERA SERUM

Where a manufacturer of anti-hog-cholera serum possesses a license, issued by the commission of animal health, those who act as either wholesale or retail distributors of such serum need not secure a license in order to distribute and sell anti-hog-cholera serum.

January 2, 1920.

Robt. D. Wall,
State Veterinarian.

Dear Sir:

We have your request for an opinion upon the following proposition:

> "Is it necessary for jobbers and distributors of serum in this state to obtain a license to sell anti-hog cholera serum which is manufactured and sent to them by laboratories who have complied with the Iowa regulations and hold a valid state license? On investigation we find that some of these distributors are salaried men employed by the manufacturing laboratories, others dispose of the products on consignment, receiving a commission on the sales only, and others buy the serum outright from these laboratories and sell the serum under the original label."

In answering your inquiry, we desire to direct your attention to that part of chapter 379, acts of the 38th General Assembly, which provides as follows:

> "The commission of animal health shall have the power to make such rules and regulations governing the manufacture of serums and other biological products for use on domestic animals in laboratories located within the state and doing an intrastate business as it deems necessary to maintain the potency and purity of their products.

"It shall have the right and it shall be their duty through a duly appointed inspector to make such inspection of commercial plants and of all distributing agencies representing serum manufacturers located outside of the state doing business under a state permit as will insure a full compliance with the rules and regulations made to govern same. A person, firm, company or corporation, before selling or offering for sale within this state any anti-hog cholera serum shall first make application to the commission of animal health for permission to sell the same in the state.

"Said application shall give the name of said person, firm, company or corporation with its place or places of business. Such other information and samples of serum and other biological products shall be furnished whenever required by the commission of animal health.

"If the commission of animal health is satisfied that said person, firm, company or corporation is fit, proper and reliable, they shall issue to said person, firm, company or corporation a permit to sell said serum within the state for a period of one calendar year or part thereof, for which permit they shall collect the sum of fifteen dollars ($15.00), which money shall be deposited in the state treasury for the use of the commission of animal health. Said permit may at any time be cancelled or suspended by said commission of animal health when it becomes evident to them that the terms on which it was issued are being violated. No anti-hog cholera serum or other biological products shall be sold or offered for sale or use or be used in this state which have not been produced at a plant holding a valid United States government license for the manufacture and sale of anti-hog cholera serum and biological products at the time the said anti-hog cholera serum and biological products were made.

"A permit shall be granted a distributing agency for the distribution of anti-hog cholera serum and hog cholera virus by the commission of animal health on the same terms and subject to the same provisions as govern the granting of original permits."

The extent to which this law was intended to be applied is clothed with some doubt. If the act was intended by the legislature to be for the purpose of regulating, inspecting and supervising the manufacture of anti-hog cholera serum, then we are inclined to the view that its provisions should not be extended so as to require any person selling such serum thus inspected to obtain a license.

On the other hand, if the intent of the legislature in the enactment of this statute was to regulate the sale of anti-hog cholera serum, as well as to regulate the manufacture thereof, then it is clear that everyone connected with the manufacture, the distribution and the sale of such serum should obtain a license as provided for in the section above set forth.

In view of the confusion which exists in this law we find it necessary to state a few of the well-established rules on the construction of statutes imposing licenses.

One of the rules laid down in the case of *Treat v. White,* 181 U. S. 264, is that if there is any doubt with reference to the meaning and scope of the language of a statute imposing any license or tax, such doubt is to be resolved in favor of the taxpayer. This rule has also been followed in *ex parte Taylor,* 58 Miss. 478, 38 Am. Rep. 336, and has also been cited in *17 Ruling Case Law,* page 475, under the heading of "Licenses."

Furthermore, *Lewis' Southerland Sta. Const.,* 2d Ed., Vol. 2, sec. 546, states:

> "All statutes for interference with a legitimate industry or the ordinary uses of property * * * are treated with a consecutive regard for the liberty of the citizen in his laudible business and in the innocent enjoyment of his possessions."

The same authority, at section 524, announces the rule that if a statute is ambiguous a construction should be adopted most favorable to the accused.

Applying these rules to the statute in question, we are of the opinion that the intent of the legislature in the enactment of the foregoing statute was to make it possible to secure pure and effective anti-hog cholera serum, and we think they intended to go to the point of requiring every manufacturer to submit to inspection and to be otherwise regulated by the commission of animal health and that he secure a permit from this state before his product is placed upon the open market.

We think that a license granted to a manufacturer is sufficient authority to authorize him to distribute it through his sales agencies and to authorize those who handle it at retail to do so without the securing of an additional license.

One reason for thus holding is that if every person who handles such products is required to secure a license at a cost of fifteen

dollars ($15.00) that it will have a tendency to increase the cost of the anti-hog cholera serum to those who use it.

We do not believe that the legislature intended to make this measure one for revenue in view of the fact that express provision is made in section 2538-w, supplemental supplement, 1915, for the manufacture of anti-hog cholera serum at the state biological laboratories at Ames and for the sale of such serum at cost.

In holding that where the manufacturer has a license that that in itself does away with the necessity of each one who handles the product obtaining a license would be in keeping with the thought of the legislature in reducing the cost of the product to the ultimate consumer. Protection is still afforded the purchaser, even though the person or firm from whom he secures the serum is not required to have a license if the manufacturer of the product possesses one, for the reason that section 4 of chapter 379, acts of the 38th General Assembly, provides that anyone offering or keeping for sale

> "any anti-hog cholera serum or other biological products which are impotent, contaminated or harmful shall be fined in the sum of not less than one hundred ($100.00) nor more than five hundred dollars ($500.00)."

We are therefore of the opinion that it is not necessary for a jobber or a distributor of anti-hog cholera serum to secure a license from your department if the manufacturer of such product has complied with the laws of this state and holds a valid license issued by your department permitting the manufacture of such product.

B. J. POWERS, *Assistant Attorney General.*

VALIDITY OF MARRIAGE CONTRACT OUTSIDE OF STATE BY FIRST COUSINS

A marriage valid in the state where celebrated will be held valid here, and where a party, residing in this state, goes to another state, which does not prohibit the marriage of first cousins, and there marries his first cousin and returns to this state, where they live and cohabit as man and wife, they cannot be prosecuted for incest.

February 25, 1920.

Mr. Andrew Bell, Jr., County Attorney,
Denison, Iowa.

Dear Sir:

We have your request for the opinion of this department on the following question:

You state:

> "I would like to have your opinion upon the following proposition: A man who is a resident of this county and state goes to another state, which permits the marriage of first cousins, and marries a first cousin of his and then comes back to Iowa to live and cohabits with her as her husband. Is he guilty of incest under section 4936 of the supplement to the code of Iowa."

The question presented is a novel one in this state and has not been before the courts, so far as we are advised, for consideration or adjudication. It is also important and of vital interest by reason of the effect its ultimate determination may have upon the social and legal status of many families residing in this state.

Our statute, section 4936 of the 1913 supplement to the code, defining and punishing incest, as amended by the 33rd General Assembly by including first cousins in the list of persons between whom marriage was forbidden and made incestuous, reads in part as follows:

> "* * * If anyone marry his or her first cousin; or if any person, being within the degrees of consanguinity or affinity, in which marriages are prohibited by this section, carnally know each other, they shall be guilty of incest and imprisoned in the penitentiary not exceeding twenty-five years nor less than one year."

A pretty thorough search of text-books, as well as the reports of decisions of the several states, has not enabled us to find any direct and satisfactory authority determinative of the question involved, and, therefore, we must try to arrive at a conclusion by the application of general principles of law which we believe to be established by a majority of the decisions of American courts.

The question of the validity of marriages has always been a fruitful source of contention and litigation and there are few, if any, questions with which the courts have had to deal where there has been exhibited more refinement of logic, nicety of description or subtlety of distinction than on the various and complex questions pertaining to the relation and status of marriage.

It is, therefore, not surprising that the decisions of the courts are not always in accord in dealing with the subjects. This conflict, whether apparent or real, is often due to the peculiar wording of a statute, and, in other cases, to what is termed "the distinctive

policy of a state." It is not our province, however, to reconcile or attempt to reconcile these conflicts, and we will content ourselves with the adoption of the general rule that a marriage celebrated according to the laws of a state or country, and valid there, will be recognized as valid and binding here.

This rule, like all general rules, has its exceptions, some of which will be referred to hereinafter, but its soundness has often been questioned, and, in some instances, specifically denied, and it may not be amiss to briefly consider some of these cases.

In the case of *State v. Brown,* reported in 47 Ohio St. 102, the court was required to consider the sufficiency of an indictment which charged the defendant with the crime of incest with his niece. In an opinion sustaining the indictment the court said:

> "We hold, therefore, that by section 7019, Rev. St., sexual commerce between persons nearer of kin than cousins is prohibited, whether they have gone through the form of intermarriage or not, nor is it material that the marriage was celebrated in a country where it was valid, for we are not bound upon principles of comity to permit persons to violate our criminal laws adopted in the interest of decency and good morals and based on principles of sound public policy because they have assumed, in another state or country where it was lawful, the relation which leads to the acts prohibited by our laws."

It should be observed in considering the weight that might properly be given to this case that it was not charged in the indictment, nor did it otherwise appear, that the defendant and his niece had assumed the relation of marriage anywhere. It should also be observed that the court must have considered the rule of comity as furnishing *the only reason* why the validity of a marriage celebrated in another state should be held valid in the state of Ohio. The principles of comity may always be considered by the court when required to determine the validity of a marriage celebrated in another state when the laws of the state in which the court is sitting prohibits such marriages, but it is only one of many reasons influencing the court, and were there not more persuasive and cogent reasons impelling the great majority of American courts to not only recognize, but approve the, rule referred to, such rule could never have become the established law of the land.

In the case of *Pennegar v. State,* reported in 87 Tenn. 244, the American rule, for such it may be termed, was assailed in a vigorous opinion by the supreme court of that state, where in a conviction of lewdness was sustained, nothwithstanding the defendants had been married in Alabama, where the marriage was valid. The facts were stated by the court as follows:

> "E. N. Haney was divorced from her husband * * * upon the petition of the husband charging her with adultery with William Pennegar. * * * The divorced wife and the partner in her suit, shortly after the divorce, went to * * * Alabama, where they were married, * * * and on the next day * * * returned to * * * this state, the place of their former residence, where they had been living * * * as man and wife, all within the twelve months before the indictment found in this case, the husband * * * still living.
>
> "Section 3332, Mill. and V. code, enacts: 'When a marriage is absolutely annulled the parties shall, severally, be at liberty to marry again, but a defendant who has been guilty of adultery shall not marry the person with whom the crime was committed, during the lifetime of the former husband or wife.' * * *
>
> "It is admitted that there is nothing in the laws of Alabama prohibiting the guilty divorced party from marrying the paramour. The question therefore presented in this record is whether citizens of this state, prohibited by the statute referred to from marrying, can, by crossing over into a sister state, where such marriages are not inhibited, claim the benefit of the marriage there contracted when they return * * * to this state, having left the state for the manifest purpose of evading our statute. The question is of first impression in this state and one not free from difficulty by reason of certain well-established principles, universally recognized, which apparently would sustain such marriage, chief of which is that which says: 'A marriage valid where solemnized is valid everywhere.' Adjudged cases are to be found * * * which have sustained marriages identical with the one at bar in all of its essential facts, while others of equal respectability have reached a different result. * * * It may be said, therefore, to be a rule of universal recognition in all civilized countries that in general a marriage valid where celebrated is valid everywhere. We say, 'in general,' because there are exceptions to the rule as well stablished as the rule itself. * * * Now, * * * believing as we do that the statute in question which we are called upon to construe * * * is expressive of a decided state policy * * * we will not allow such persons to shield themselves behind a general rule of the law of

> marriage. * * * We do not intend in the slightest degree to encroach upon the principle which recognizes as valid marriages had in other states where the parties have gone to such other states for the purpose of avoiding our own laws in matters of form, ceremony or qualifications merely, but, confining ourselves to the facts of this case, we hold that where citizens of this state withdrew temporarily to another state and there marry for the purpose of avoiding the statute in question passed in pursuance of a determined policy of the state * * * such parties, upon their return, * * * and cohabiting as man and wife, are liable to indictment in the courts of this state for lewdness."

We have only set out such portions of the opinion as bear directly upon the question before us, omitting the criticism of numerous American decisions, which, as we read and understand them, are in direct conflict with the reasons advanced and conclusions reached. We should state, in this connection, that the English rule, which is quite generally held to be unsound by our court, is quoted, and, in fact, approved by the court in this case.

A review of the facts above set out, together with the conclusions of the court based thereon, impels us to question the authoritative character of this decision. The statute under consideration merely prohibits the guilty party in a divorce proceeding, based on a charge of adultery, from marrying his or her paramour during the lifetime of the injured party. No extraterritorial force or effect can be given or claimed for it. Its operation and effect is limited to and within the boundaries of the state of Tennessee. It is not essentially different from section 3181 of the 1913 supplement of our code, which prohibits the parties to a divorce proceeding from marrying again within one year from the date of the decree without the permission of the court, and in this connection we wish to cite the case of *Dudley v. Dudley,* 151 Iowa 142, wherein a construction of that statute is involved and a conclusion announced directly opposed to the case we are examining.

Much, and we believe undue stress is placed upon the fact that the divorced wife and her paramour, shortly after their divorce, went to Alabama and were married and the next day returned to the place of their former residence in Tennessee, where the former husband resided, and there lived and cohabited as man and wife. But surely it cannot be claimed that the violation of the statute was any more *serious or complete* than it would have been had they remained one year or ten years in Alabama before returning

to Tennessee. Suppose, however, that they had deferred their return for ten years, and, in the meantime, as a result of the marriage, children had been born to them and they then returned to their former domicile, would the court, in its zeal to vindicate the law, in an instance where it had been compelled to admit that the case, as it stood, was involved in doubt, felt as free and unrestrained to inflict upon the innocent offspring the stigma, reproach and disgrace of illegitimacy with all its far-reaching consequences and effects as it was to punish the defendants for seeking to evade or circumvent the laws of the state? We feel constrained to believe otherwise.

It is also worthy of consideration that it was sought to distinguish the case at bar from what we term the American rule and which, as before stated, the court had distinctly recognized by the application of the rule of "decided state policy," sometimes termed "distinctive policy of the state," notwithstanding the statute involved, did not attempt to give any extraterritorial operation to its provisions, and, also, a previous admission by the court that the question presented was of *first impression in this state.*

We have given considerable attention to the Tennessee decision, principally on account of its vigorous assault upon and severe criticism of the rule which we believe of too long standing and too firmly established in the United States to be now questioned or modified.

As heretofore stated, this rule, like all general rules, has its exceptions, among which may be mentioned the following:

First: Polygamous marriages and incestuous marriages which are manifestly contrary to the law of nature, as generally recognized in all Christian civilized countries, and which includes all persons in the direct line of consanguinity and brothers and sisters only in the collateral line.

Second: Marriages which are not only prohibited by law in the particular state, but which prohibition seeks to extend to the marriages of the class inhibited wherever celebrated, the legislative intent being to make such marriages invalid, whether celebrated within or without the state.

Such a statute will be held to have extraterritorial effect, to the extent, at least, of avoiding the rule referred to. The so-called miscegenation statutes of some of the southern states, which were

primarily designed to prevent the intermarriage of whites and negroes, are, in a measure at least, framed along these lines. Some of the cases which are held to come under the rule of "distinctive policy of the state" are due to these legislative enactments, but not all. The remainder of these exceptions are in states where the courts have adopted and consistenly adhered to a rule which thus becomes the "distinctive policy" of the particular state.

Among the earlier cases sustaining the doctrine that marriages valid in the state where celebrated were valid everywhere is *Stevenson v. Gray,* 17 B. Monroe 193, a leading authority, and from which we quote the following:

> "Our statute of 1878 did not attempt nor profess to give any extraterritorial operation to its own provisions or principles, even with respect to the marriage of citizens of Kentucky. And if it may be deemed a fraud upon it, and a contempt of the sovereign authority of the state for its own citizens to withdraw momentarily from her territory for the purpose of assuming and bringing back a relation prohibited by her laws during their joint lives, it would be worthy of consideration by the legislature whether the principles on which the state assumes to regulate marriage may not be better subserved by permitting, even in such cases, unless the admitted law of nature be violated, the operation of the general rule which refers the validity of the marriage to the *lex loci contractus,* than by avoiding it for the sake of vindicating the sovereign authority of the state."

Another instructive and authoritative case, and which was cited in the Dudley case, *supra,* is *Commonwealth v. Lane,* 113 Mass. 458, a part of which is as follows:

> "The only exceptions admitted by our law to that general rule are of two classes. First, marriages which are deemed contrary to the law of nature as generally recognized in Christian countries; second, marriages which the legislature of the commonwealth has declared shall not be allowed any validity, because contrary to the policy of our own laws. The first class includes those void for polygamy or incest. * * * To bring it within the exception on the ground of incest there must be such a relation between the parties contracting as to make the marriage incestuous according to the general opinion of Christiandom, and, by that test, the prohibited degrees include, besides persons in the direct line of consanguinity, brothers and sisters only, and no other collateral kindred. *Wightman v. Wightman,* 4 Johns. Ch. 343, 349, 351; 2 Ken. Com. 83, Story Confl., Sec. 14; *Sutton v. Warren,* 10 Net. 541; *Steven-*

son v. Gray, 10 B. Mon. 193; *Bowers v. Bowers,* 10 Reich. Eq. 557. In *Greenwood v. Curtis,* 6 Mass. 358, 378, 379: 'If a foreign state allows marriages incestious by the laws of nature, as between parent and child, such marriage could not be allowed to have any validity here. But marriages not naturally unlawful, but prohibited by the law of one state, and not of another, if celebrated where they are not prohibited, would be holden valid in a state where they are not allowed. As in this state a marriage between a man and his deceased wife's sister is lawful, but it is not so in some states. Such a marriage celebrated here would be held valid in any other state, and the parties entitled to the benefits of the matrimonial contract.' The distinction was approved by Chancellor Kent and Judge Story, 2 Kent Com. 85, note a Story Confl. of laws 116. * * * A marriage which is prohibited here by statute, because contrary to the policy of our laws, is yet valid if celebrated elsewhere according to the laws of the place, even if the parties are citizens and residents of this commonwealth and have gone abroad for the purpose of evading our laws, unless the legislature has clearly enacted that such marriage out of the state shall have no validity here. This has been repeatedly affirmed by well considered decisions."

We trust that the importance of the subject under consideration will be held to justify us in setting out a part of the very able opinion on the supreme court of Vermont in the case of *State v. Shattuck,* 69 Vt. 403, where the circumstances were somewhat similar to those involved in the question we are endeavoring to answer.

"The language of our statute is general, and it is a fundamental rule that no statute, whether relating to marriage or otherwise, will be given effect outside of the state or country enacting it. To bind even citizens abroad it must include them, either in express terms or by necessary implication. Hence, if a statute, silent as to marriage abroad, as ours is, prohibits classes of persons from marrying generally, or from intermarrying, or declares void all marriages not celebrated according to prescribed form, it has no effect upon marriages, even of domiciled inhabitants, entered into out of the state. Those marriages are to be judged of by the courts of such states, just as though the statute did not exist. If they are valid by the international law marriage and the local law of the place where celebrated, they are valid by the law of such state, and the statute has nothing to do with the question, if such international law is a part of the law of the state, as it is here, for a written law not construed to be extraterritorial does not change the unwritten law as to extraterrtorial marriages, and therefore parties who are under no disability by international law may choose their place of marriage, and if

the marriage is valid there it will be valid everywhere, though they were purposely away from home, and the same transaction in the state of their domicile would not have made them married. There is, therefore, no foundation for an argument based simply on the idea of an invasion of the law of domicile.

"This doctrine is entirely applicable to statutes prohibiting marriage after divorce. Such statutes are not extraterritorial, unless made so by express words or necessary implication, as has been frequently held in this country, though there are cases the other way, among which is the recent and well considered case of *Pennegar v. State,* 87 Tenn. 244, where the cases adopting the same view will be found. But the weight of American authority, as well as reason and analogy, sustain the other view."

We believe that the views above expressed announce the true American doctrine and would, undoubtedly, be followed by our supreme court, if called upon to consider the question submitted.

Questions of the validity of marriages, involving the principles which we believe applicable to this case, have never been *very seriously* considered by our supreme court, so far as we have been able to find, though in the case of *Dudley v. Dudley,* before cited, the question of violation of our statute prohibiting divorced persons from remarrying was involved, and Judge Deemer, speaking for the court, cited with approval the Lane case and divers other cases sustaining the same views.

The statute we are endeavoring to construe clearly prohibits the marraige of first cousins, and, with equal clearness, makes sexual intercourse between them incestuous, and we are therefore confronted with the plain and distinct question whether these provisions apply to a marriage celebrated in another state where no such inhibitions exist, but where one of the parties, at least, was a resident of this state, prior to the marriage, and has since returned to this state and the parties are now living and cohabiting here as man and wife.

Applying the principles so clearly set out in the opinions, from which we have quoted, we are irresistibly led to the conclusion that the marriage in question, admittedly valid and binding in the state where celebrated, must be held to be valid here, and whether one or both the parties were residents of this state prior to the marriage, and left here for the manifest purpose of evading the provisions of our statute, such fact could not affect the status of

the rights and privileges incident to and resulting from the relation of marriage, save and unless the admitted facts bring the case within the rule of "distinctive policy of the state" which we have before referred to.

To place the parties to this marriage in a different position before the law than would be the man and wife, standing in the same relation by consanguinity, who had been permanent residents of another state and married there, but subsequent thereto removed to this state for a temporary purpose, or permanent residence, the statute in question would have to be construed to have extraterritorial force and effect, which, as we have seen, can only result from *express words* or *necessary implication*, and surely it cannot be claimed that our statute includes the "express words" nor other language from which the implication can arise. "Necessary implication" is a term not diffiicult to understand and is frequently used by the court in construing statutes and acts of the legislature that fail to express, in clear and definite language, the object or manifest purpose intended, but it cannot be applied to language that is clear, definite and comprehensible, and where, as in this statute, the object and purpose is clearly and distinctly stated, its scope, effect or operation cannot be enlarged or extended by implication or interpretation.

The remaining question, as to whether the courts of this state have adopted and consistently followed a rule which should be held to establish a "distinctive state policy," as applicable to this case, is not difficult of solution. The main question before us, as stated in the early part of this opinion, is novel, or as stated by the learned judge who wrote the opinion in the Pennegar case, "of first impression," in this state, and it should not therefore be surprising that we have failed in our efforts to ascertain the *time* of the adopton of such rules, as well as instances of its application. It is possible, however, that such a rule could be properly based upon decisions of our court on kindred or other subjects involving what might be claimed to be violations of our penal laws outside the jurisdiction of the state and thereby establish a "distinctive state policy." But in the very recent case of *Dudley v. Dudley*, before referred to, and where the circumstances were not substantially dissimilar to those herein involved, the court made no reference to such a policy, but held the marriage in the state of Nebraska valid, notwithstanding the fact that our statute prohib-

ited divorced persons from marrying within one year, and we are therefore constrained to believe that the so-called "distinctive state policy" has not been established in this state.

This would seem to effectually dispose of all doubts pertaining to the status of the parties to this marriage, but it has been suggested that the following part of the section might be held to prevent the parties from living together as man and wife. The provision is as follows:

> "Or if any person being within the degrees of consanguinity or affinity in which marriages are prohibited by this section, carnally know each other, they shall be guilty of incest."

There could, of course, be no question about the violation of this provision if the parties are not protected by a valid marriage, but if the marriage is valid and binding, then it is inconceivable; in fact, absurd to say that the parties would be guilty of incest if they lived and cohabited together as man and wife.

The term "carnally know," in its ordinary acceptation, means sexual intercourse. As used in the statute it means illicit, unlawful sexual intercourse. In other words, sexual intercourse out of lawful wedlock, and the part of the section referred to can have no application to persons living and cohabiting together here as man and wife, under a law which our law recognizes as valid and binding, even though the parties thereto are within one of the degrees of consanguinity within which marriages are prohibited in this state.

The question is answered in the negative.

J. W. SANDUSKY, *Assistant Attorney General.*

GAMBLING AND LOTTERY DEVICES

A scheme by which a merchant sells his goods at usual and ordinary market prices, giving to each customer purchasing goods to the amount of $1.00 a key, and to the customer thus obtaining the particular key which will unlock a Victrola, said Victrola is a lottery and punishable by law.

May 16, 1919.

Mr. W. H. Tedrow, County Attorney,
Corydon, Iowa.

Dear Sir:

We have your letter of May 15th in which you state:

"A merchant has a victrola, and there are a number of keys, one of which will open the lock placed on the machine. When he sells $1.00 worth of goods he hands the purchaser one of the keys, and when all the keys are gone the purchaser who has the right key will unlock the machine and take the machine. Would you consider this a violation of law?"

In answer to your inquiry, I desire to first direct your attention to section 28 of article 3 of the constitution, which provides:

"No lottery shall be authorized by this state; nor shall the sale of lottery tickets be allowed."

In addition to this section of the constitution, I desire to direct your attention to section 5000 of the code, which provides as follows:

"If any person make or aid in making or establishing, or advertise or make public any scheme for any lottery; or advertise, offer for sale, sell, negotiate, dispose of, purchase or receive any ticket or part of a ticket in any lottery or number thereof; or have in his possession any ticket, part of a ticket, or paper purporting to be the number of any ticket of any lottery, with intent to sell or dispose of the same on his own account or as the agent of another, he shall be imprisoned in the county jail not more than thirty days, or be fined not exceeding one hundred dollars, or both."

Our supreme court has had occasion to consider what constitutes a lottery in the case of *Chancy Park Land Company v. Hart,* 104 Iowa 592, and one of the definitions given in this opinion (at page 595) is: "Where a pecuniary consideration is paid, and it is to be determined by lot or chance, according to some scheme held out to the public, when and how much he who pays the money is to receive for it, that is a lottery."

Furthermore, there is an opinion of the supreme court of Kansas on almost the identical proposition presented in your inquiry.

In the case of *Davenport v. City of Ottawa,* 54 Kan. 711, 45 Am. St. Rep. 303, the defendant was a partner in the firm of Davenport, Lathrop & Company, operating a large dry goods store in the city of Ottawa. This firm placed in its windows a locked box, with a glass front, containing $25.00 in bills, and advertised that all persons buying goods in their store, and paying therefor fifty cents or more, would be given a key, and that one and only one key would be given out which would unlock the box. The person receiving the

key which would unlock the box would be given the $25.00 from it. The defendant sold goods at the usual and ordinary prices, without extra charge on account of the said key, and gave to each purchaser who procured goods amounting to fifty cents or more a key, to which was attached a card stating in substance the above offer. It was held by the supreme court of Kansas that this transaction was in effect a sale of merchandise and a lottery ticket for an aggregrate price, and that the transaction was unlawful, and that a conviction was proper.

The court in part stated:

> "The only question presented for our consideration by the record in this case is whether the defendant sold lottery tickets. Counsel for appellant contends that there are two indispensable elements in the offense: '(1) A pecuniary consideration paid; (2) a determination by chance what and how much he who pays money is to have for it.' It is urged that the agreed facts show that the defendant was a merchant conducting a legitimate business, with a large stock of general merchandise, which he sold for the usual and ordinary prices, and that the scheme of giving the money in the box to whomsoever should chance to get the key that would unlock the box was merely in the nature of an advertisement, to draw attention and custom to the defendant's store; that, inasmuch as the defendant received no more in any instance for his goods than their fair and usual market value, no compensation was paid for the chance, but that the keys to the box and the chance to obtain a prize were a free gift to his customers, which he had a perfect right to offer. This argument, while plausible, is not sound. The defendant advertised his goods for sale. At the same time he advertised that, to every purchaser of goods to the value of 50 cents or more, paying in cash therefor, a key would be given, and that the person receiving the key which would unlock the box should receive the $25.00 as a free gift. Each sale, then, was a sale, not of the goods, but of a chance to obtain $25.00.
>
> "In this instance it may be conceded that the main purpose of the defendant was to increase his legitimate business by this scheme, and that the sale of merchandise was not used merely as a cover for conducting a lottery. The purpose of the defendant undoubtedly was to attract attention and stimulate trade at his store; but this case must be determined by the legal principles applicable to it. Suppose that instead of a large stock of general merchandise on which only moderate profits are made the defendant kept only such articles as usually bear a very high percentage of profit, and instead of

offering $25.00 had offered $1,000.00 on precisely the same terms as this $25.00 was offered, could anyone doubt for a moment that those who are inclined to invest small sums for the purpose of gaining large ones would be likely to purchase articles for which they had no special need merely with the hope of gaining the prize offered? Though the goods, in such a case, should be sold only at the regular retail price, the main business of the defendant would become that of selling chances to draw the $1,000.00 rather than merchandise for a legitimate profit. The key, with the card attached, was in substance and effect a lottery ticket. Purchasers were given to understand, whether truthfully or not does not affect the case, that one key and only one of those given out would unlock the box, and that whoever chanced to get the proper key would get the money. It is said that no element of chance existed, because the right of the purchaser to obtain a prize was, in fact, absolutely determined the instant he received the key. If the key fitted the lock the money was his from that instant. If it did not, it was not his.

"This contention is not sound, though specious. Neither buyer nor seller was supposed to know which was the true key to the box, and the fact would only be actually determined when the trial was made at the time appointed to unlock the box. But, even if we assume that the chance was determined when the sale was made, it would be equally a lottery, for the fortunate person would at once obtain a right to the prize, though he could not in fact get it until the time appointed. The unfortunate prchaser would at once receive his merchandise and his blank in the lottery. * * *"

In view of the foregoing, it is the opinion of this department that the scheme you have outlined is one prohibited by the laws of this state.

B. J. POWERS, *Assistant Attorney General.*

BLASTING IN COAL MINES

In all mines where coal is blasted from the solid, only such shots as are fired from the coal itself need be examined by a certified shot examiner. The rule as to who may shoot coal does not apply in cases where brushing or dirt is blasted away.

March 20, 1919.

State Mine Inspectors,
State House.

Gentlemen:

I am in receipt of your favor of March 11th with inquiry as follows:

> "Can shots, other than coal shots, in a mine where coal is blasted from the solid, be charged and fired without said shots being examined by a certified shot examiner?"

A careful reading of the state, section 2495-b, supplement to the code of 1913, when carefully analyzed forces one to the conclusion as hereinafter set out. The section reads as follows:

> "In all mines, *where coal is blasted, from the solid,* competent persons shall be employed to examine *all shots,* before they are charged. * * *"

That is the equivalent of saying that all shots where coal is being blasted from the solid, competent persons shall be employed to examine such shots before they are charged. This language could not be fairly construed to apply to anything except shots where the coal is being blasted from the solid, and would not apply to shots which were fixed with reference to brushing or dirt shots while making sumps.

It is the opinion, therefore, of this department that in all mines where coal is blasted from the solid, only such shots as are being fired in the coal itself, need be examined by a certified shot examiner.

H. M. HAVNER, *Attorney General*

WHAT CONSTITUTES MINERALS

General discussion as to whether shale, clay and grass roots are minerals.

March 19, 1919.

Mr. James H. Lees, Assistant State Geologist,

Dear Sir:

Your letter of the 16th inst. addressed to Attorney General Havner has been referred to me for attention.

You enclose with your letter a letter written to you by Dr. W. W. Rayster of Lehigh, Iowa, in which he asks whether or not shale, clay and grass roots are to be classed as minerals.

So far as we are able to find, our supreme court has never passed on that identical question, and it would seem to me that the proper place to obtain that information would be from the Interior Department of the United States at Washington.

However, Bouvier defines the term "minerals" as

> "Every substance which can be got from underneath the surface of the earth for the purpose of profit."

It has been held to include coal; *Henry v. Lowe,* 73 Mo. 96; paintstone; *Bartwell v. Camman,* 10 N. J. Eq., 123; freestone; L. R. 1, ch. 303; stone for making roads or paving; L. R. 4 Eq., 9; brick clay; L. R. 20 ch. div. 552; china clay; L. R. 7 chp. 699; sandstone; 2 Drew 5, 395; flintstone; L. R. 8 app. cas. 308.

The words "minerals" and "bree" have been held to include only minerals obtained by underground working. *Armstrong v. Granite Co.,* 147 N. Y. 495. The term "mineral lands," as used in the statutes relating to the public domain, embraced granite. *Northern Pacific Railway Company v. Soderberg,* 138 U. S. 526. All mineral deposits are not only metals proper, but also salt, coal and the like. *Bartwell v. Camman,* 10 N. J. Eq. 128.

As to the legal definition of the term "clay," apparently no cases have come before the courts of this state, so far as I have been able to find, involving the legal classification of that substance. However, the land department of the United States has passed directly on that subject, and in one case that department held that clay could not be located as a mineral, for the reason that clay was everywhere present in the soil, and to permit it to be located as mineral land would allow all agricultural land to be located under the guise of mineral claims. *Jordan v. Idaho Aluminum Company,* 20 L. D. 500. But in a later case, the land department seems to have adopted a different rule. *Pacific Coast Marble Company v. Northern Pacific Railway Company,* 25 L. D. 233.

It has also been held by the land department of the United States that land containing sandstone valuable for building purposes, and more valuable on that account than for agricultural purposes, is mineral land. *Brendatte v. Northern Pacific Railway Company,* 29 L. D. 248. And that land chiefly valuable for marble and slate contained therein is mineral land within the meaning of the statute. *Schrimpf v. Northern Pacific Railway Company,* 29 L. D. 327. But it has also been held that land not shown to contain mineral deposits in paying quantities for which mining operations are generally conducted, are not mineral lands within the meaning of the mining laws. *South Dakota v. McDonald,* 30 L. D. 357. And for limestone to fall within the mineral

laws, it must affirmatively appear that it is more valuable for the limestone than for agricultural purposes, 22 L. D. 353.

Thus it would naturally follow that the usual legal definition and meaning of the word "mineral," when used in deeds, leases and other legal instruments, includes rock, shale and clay, when those substances exist in sufficient quantity and are important enough in value to justify mining the same for some industrial use.

As to grass roots, we are of the opinion that they could not be legally classified as minerals.

W. R. C. KENDRICK, *Assistant Attorney General.*

ENGINEER'S CERTIFICATE TO NON-RESIDENTS

Non-residents of Iowa are permitted to apply for engineer's certificate upon equal basis with residents of this state.

June 17, 1920.

Hon. K. G. Kastberg,
Secretary State Board of Engineering Examiners.

Dear Sir:

You ask for an opinion from this department upon the following question:

> "Is it mandatory upon the state board of engineering examiners to permit non-residents of Iowa to make application for a certificate of registration upon equal terms with residents of the state, under section 10, chapter 392, acts of the 38th General Assembly?"

Section 10 provides:

> "At any time within six months after this act becomes effective, upon due application therefor and the payment of a fee of twenty-five ($25.00) dollars, the board shall issue a certificate of registration as provided by section 9 hereof to any person who under oath submits evidence prescribed by the board that he
>
> "(a) is more than twenty-five years of age,
>
> "(b) is of good character and
>
> "(c) has been engaged in the practice of professional engineering or land surveying for at least two years preceding the date of the passage of this act, or is a graduate of some recognized school of engineering. After this act shall have been in effect six months, the board shall issue certificates of registration only as provided in section 9 or section 11 hereof."

It will be observed from section 10, *supra,* that:

> "* * * Upon due application therefor, and the payment of $25.00, the board shall issue a certificate of registration * * * *to any* person who under oath submits evidence prescribed by the board. * * *"

In creating a state board of engineering examiners, and the requiring every person, with certain exceptions practicing professional engineering or land surveying in Iowa, to be registered, the legislature evidently intended to make the act applicable to both residents and non residents of the state; for nowhere in the act is any reference made to non residents. The language found in section 10 *supra* is clear and unambiguous, and it is my opinion that the provisions thereof apply alike to residents and non residents of Iowa.

W. R. C. KENDRICK, *Assistant Attorney Gneral.*

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