

STATE OF IOWA
1922

FOURTEENTH BIENNIAL REPORT

of the

ATTORNEY GENERAL

for the

BIENNIAL PERIOD ENDING DECEMBER 31, 1922

Ben J. Gibson
Attorney General

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W. R. C. KENDRICK.....Assistant Attorney General
B. J. POWERS.....Assistant Attorney General
NEILL GARRETTAssistant Attorney General
WINOGENE HOBBSSecretary to Attorney General
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MARY WARDStenographer

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Samuel A. Rice.....	1856-1861
Charles C. Nourse.....	1861-1865
Isaac L. Allen.....	1865-1866
Frederick E. Bissell.....	1866-1867
Henry O'Connor.....	1867-1872
Marsena E. Cutts.....	1872-1877
John F. McJunkin.....	1877-1881
Smith McPherson.....	1881-1885
A. J. Baker.....	1885-1889
John Y. Stone.....	1889-1895
Milton Remley	1895-1901
Charles W. Mullan.....	1901-1907
Howard W. Byers.....	1907-1911
George Cosson	1911-1917
H. M. Havner.....	1917-1921
Ben J. Gibson.....	1921-

REPORT OF THE ATTORNEY GENERAL

TO THE HONORABLE N. E. KENDALL, Governor of Iowa:

In compliance with the provisions of law, I have the honor to submit herewith a brief report of the business of the Department of Justice for the years 1921 and 1922.

In recent years the work of the department has become so varied and extended as to almost preclude the possibility of even partially covering the same in a report such as contemplated by the statute. This being true, I have endeavored to eliminate therefrom all routine matters, and to present only such subjects as may probably be interesting and beneficial to the people of the state.

In the beginning of the year 1921 it was deemed advisable to attempt to reorganize the department, all to the end that the work of the various officers and branches of the department might be unified and coordinated. It was then the thought, and it is the thought now, of the writer, that the department of justice should be the law office of the state government, and that in connection with its work as such it should so attempt to conduct its business as to make possible complete cooperation between it and the other departments of the state government, as well as the several county and municipal governments.

The Thirty-ninth General Assembly enacted a statute authorizing the attorney general to establish in the department of justice a bureau of investigation. Under the authority thus granted all special agents and all special peace officers were consolidated into one force and placed under a chief. In addition to such consolidation of the work of the peace officers in one complete secret service department, there was also established a bureau of criminal identification. The primary thought and purpose was to create a central clearing house for the use and benefit of the local governments of the state, and to stimulate and foster among the various officers, both local and state, a spirit of mutual assistance and cooperation. Schools of instruction were held throughout the state, attended by sheriffs, chiefs of police and other police officers. These schools had to do not only with criminal identification and investigation, but also were a part of a general plan of statewide attack upon all violations of the criminal law.

DEPARTMENT FINANCES

In the body of the report there has been set out a summary of the expenses and receipts of the department during the past two years. Such summary discloses the fact that there has been a substantial reduction in the expenses of the department during the period of time referred to. This reduction has been accomplished not by a diminution in the amount of work done, but is, in my opinion, due to the application to the affairs of the department of a budget system, and to the consolidation of the work as referred to.

In this connection attention is called to the fact that the appropriation for the department contingent fund was reduced five thousand dollars (\$5,000); that of the contingent fund thus appropriated there shall be expended on December 31st not to exceed 60 per cent. Of the special peace officers fund it is estimated that there will be a material and substantial saving of not less than 20 per cent.

LEGISLATIVE INVESTIGATIONS

At the time of adjournment of the Thirty-ninth General Assembly the committee on departmental affairs submitted to you, as the chief executive of the state, three specific investigations for such further action as might be deemed right and proper and in accordance with the provisions of law. These three investigations are commonly known as the Hinshaw investigation, the Barney investigation and the Havner investigation. In a special report to you dated November 20, 1922, it is shown that the Hinshaw matter is now pending and will be for trial the forepart of the coming year in the district court of Dickinson county, Iowa. The Barney investigation was disposed of by the executive council and never completed, Mr. Barney leaving the department sometime during the forepart of the year 1921. The Havner investigation was closed by reason of the fact that, after a complete investigation of the matter, it was discovered that the expenditure was in conformity to the appropriation made by the legislature. A detailed statement with reference to this is enclosed with the report.

TAXATION CASES

During the past two years there has been a large increase in the number of taxation cases throughout the state. Such cases are to be found in practically every county in the state, and in some instances litigation has arisen which involves taxation state wide. This is no doubt due to the increase in levies in the several taxing

districts of the state and to a corresponding increase in the amount of taxes to be paid. Space will not permit me to cover all of these cases. Therefore, in dealing with the subject I will confine my remarks to the so-called railroad taxation cases, the telephone and transmission line cases, and the bank taxation cases.

RAILROAD TAXATION CASES

At the annual tax meeting of the executive council in August, 1921, the valuation for taxation purposes of railroad properties was increased in practically every instance. Nine of the larger lines of the state instituted in the United States district court for the southern district of Iowa suits in equity, in which it was contended that farm lands throughout the state had been assessed upon a relatively lower basis of assessed to actual value than had railroad property, and particularly the property of the complainants. It was contended that, whereas farm lands were assessed on the average value of \$76.34 per acre throughout the state, as a matter of fact such lands were worth in the market not less than \$200.00 per acre, and that such figure should be the assessed value of such farm lands. That the property of the carriers was assessed at varying percentages from 73 per cent of the actual value to more than 120 per cent of the actual value, according to the carrier. These cases were submitted to the United States district court on an application for temporary injunction, and were heard by Circuit Judge Stone and District Judges Wade and Munger. A temporary injunction was issued enjoining all of the assessment in excess of 10 per cent below the 1920 assessment. Thereafter, depositions relative to farm land values were taken throughout the state and subsequently the cases were settled and disposed of by the sustaining of the assessment as to all carriers save seven, and as to these seven an assessment equal to the 1920 assessment, and 10 per cent higher than that fixed by the federal court, was the basis. Land values for assessment purposes were unchanged and there was no reduction below the 1920 assessment as to railroad property.

In the year 1922 the only railroad taxation cases were the present pending cases of the Chicago, Rock Island & Pacific Railway Company and the Chicago Great Western Railroad Company. These cases were presented to the United States district court for the southern district of Iowa, before Circuit Judge Stone and District Judges Munger and Wade, and after a full hearing the application

for a temporary injunction as made by the carriers was denied and the assessment made by the executive council sustained. The carriers have appealed to the supreme court of the United States from the ruling of the judges. We have faith that the supreme court will sustain the district court.

TRANSMISSION LINES

Upon the same theory as that upon which the railroad tax cases were instituted, there were also brought certain transmission line cases. These cases were in the district court of the United States for the southern district of Iowa. They were submitted upon the application for a temporary injunction. Prior to the determination by the court, the complainants in each instance dismissed the cases at their cost, and paid the tax upon the increased value as set by the executive council. The most important of these cases are as follows: Iowa Falls Electric Company vs. N. E. Kendall, Governor of Iowa, et al; Iowa Rail and Light Company vs. N. E. Kendall, Governor of Iowa, et al., and Iowa Electric Company vs. N. E. Kendall, Governor of Iowa, et al.

TELEPHONE CASES

Along the same lines there were filed in the district court of the State of Iowa in and for Polk county certain telephone cases, the most important of which were the American Telegraph and Telephone Company vs. N. E. Kendall, Governor of Iowa, et al., and the Northwestern Bell Telephone Company vs. N. E. Kendall, Governor of Iowa, et al. These cases were set down for hearing on the application of the attorney general, and prior to hearing were dismissed and the increased valuations as set by the executive council sustained.

BANK TAXATION CASES

A number of bank taxation cases are now pending in the several courts of this state, and most of the questions involved are presented in cases pending before the supreme court. It is expected that shortly the court will hand down decisions clarifying the situation. This being true, I deem it inadvisable to enter into an extended discussion of these cases. Suffice it to say that the questions involved may be roughly stated as—

First: The question as to whether or not the banks are entitled to deduct from their assets for taxation purposes the value of the liberty bonds held by such banks, and—

Second: The question as to whether or not bank stock must be assessed upon the same relative and uniform basis as moneys and credits.

The determination of these cases is of such vital importance that I am calling attention to it at this point in the report, so that it may be kept in mind by you and by the legislature. It may be necessary that remedial legislation be enacted, and if so I deem it of the utmost importance that the opinion of the supreme court be given the most careful consideration.

CASES IN SUPREME COURT OF UNITED STATES

During the two years a number of cases have been presented to the supreme court of the United States, all of which are still pending except the case of Louis F. Nagel vs. State of Iowa, which was determined in favor of the state. A complete table setting forth the cases now pending in the supreme court of the United States is annexed to and made a part of this report.

During the period the state of Iowa joined with the state of Wisconsin and other states in the presentation of the claims of the various states under the so-called "Transportation Act of 1920." It was the contention of the states in these cases that the transportation act did not apply to intrastate traffic, but only to interstate traffic. The vital importance of these cases to the state will be realized when it is understood that such cases involved the two-cent passenger fare law of the state, as well as the powers of the railroad commission to fix freight rates intrastate. This case was presented to the supreme court of the United States by the representatives of forty-two states, including Iowa. The supreme court rendered an opinion upholding the contentions of the carriers, and in effect sustaining the power of the interstate commerce commission over intrastate rates, where such commission found as a matter of fact that such intrastate rates created an unjust and undue burden upon interstate commerce.

Prior to the determination of these cases by the supreme court of the United States, the department, in conjunction with your office, filed a bill in equity in the district court of the United States for the southern district of Iowa, in which an injunction was asked prohibiting the putting into force in this state of the orders of the interstate commerce commission in connection with passenger rates and fares. Among other things it was contended that the rates, fares and charges fixed by the interstate commerce commission were

unreasonable, unjust and excessive as to the citizenship of Iowa, and amounted to a taking of their property without due process of law; that the rates, fares and charges were so unreasonable in many instances as to deprive the citizens of the state of the right to use such transportation systems, and in effect to injure and destroy the commerce and traffic of the people of Iowa. That by reason of such facts the action of the interstate commerce commission was unconstitutional and void. This suit is still pending, although we are frank in saying that with the present determination of the matter by the supreme court of the United States, there is but little, if any, hope of ultimate success.

In addition to such rate case submitted to the supreme court of the United States, the state has just recently submitted the case of State of Iowa vs. August Bartels, in which the question presented was as to the constitutionality of the Iowa foreign language statute.

CRIMINAL CASES IN THE SUPREME COURT OF IOWA

During the past two years there have been submitted to the supreme court of the state of Iowa, 126 criminal cases. Of these cases 83 have been affirmed, and 28 have been reversed. Practically all of the important cases have been determined by the supreme court, but there are still pending, undetermined, 26 cases.

Without entering into an extended discussion of these cases, suffice it to say that during the two year period a great many very important cases have been determined by the supreme court of the state. Among such are the cases of the State of Iowa vs. William C. Olander, State of Iowa vs. Eugene C. Weeks, and State of Iowa vs. Ira Pavey, which cases were appeals from conviction of murder in which the death penalty had been imposed. The case of the State of Iowa vs. William C. Olander was of special importance, in that it involved the question of the constitutionality of the statutes of the state authorizing the filing of county attorney's information in lieu of indictments. The supreme court of this state sustained the constitutionality of this law, and upheld the amendment to the constitution of the state conferring authority upon the legislature to enact such a statute. The other two cases involve no serious questions of law, and were important solely because of the fact that the death penalty had been imposed in each.

The case of State of Iowa vs. National Selright Association is of importance in the enforcement of the prohibitory law within this state. The supreme court decided that federal permits under the national prohibitory act to manufacture so-called "medical com-

pounds," afford no protection to a dealer in this state when the compound is intoxicating and capable of being used as a beverage. In this case it is also determined that a state may legislate more stringently in the interests of prohibition than the federal government has done in the Volstead act.

GENERAL CIVIL CASES

Civil cases in all the courts handled by the department during the past biennium are so numerous that I can only call attention to the list of such cases as included in the schedules made a part of this report.

GENERAL INVESTIGATIONS

General investigations have been made throughout the state in a large number of cities and towns, including Des Moines, Waterloo, Mason City, Iowa City, Sioux City and Council Bluffs. These investigations have resulted in the removal or resignation of a number of officers and the return of hundreds of indictments. I make this brief reference to general investigations only for the purpose of calling attention to the same.

GENERAL LIQUOR PROSECUTIONS

In connection with the other work, there has been established in the department a complete intoxicating liquor file. In this file is to be found a complete statistical review of the activities in each of the several counties of the state, in connection with the enforcement of the prohibitory laws. To this date, this file has been confined to cases in the district court. It is hoped that in the next biennium this file can be extended to include not only the cases in the district court, but also the cases in the justice and police courts throughout the state, all to the end that there may be on file in the department a complete statement of each case in which a conviction was had throughout the state. I believe that the very fact that this file is kept, and that in it is to be found the name and record of every violator of the prohibitory laws, will in and of itself serve to deter others from violating such laws. In any event, this file should be available to each and every peace officer in Iowa, so that in all arrests for violations of the prohibitory laws, such officer may by communication with this department be able to determine whether or not such offender is an habitual criminal within the meaning of the habitual criminal statutes.

With these few remarks, we submit herewith the net result as shown by the district court records to October 1, 1922. This will

disclose the fact that there have been 1,802 convictions for violations of the prohibitory laws in the district court. There have been imposed fines aggregating \$292,072.70, which coupled with the prison sentences imposed makes a formidable showing.

I believe that it can be conservatively estimated that the cases in police courts and justice courts throughout the state, will add to this total not less than 33 1-3 per cent.

In connection with this branch of the report, I would call attention to the fact that there has been, during the biennium, a steady decrease in the number of actual violations of the prohibitory laws. This I believe is due in no small part to the energetic efforts of the local peace officers throughout the state. I feel that they are entitled to commendation from this department, and I do not hesitate to offer such commendation. In some few instances difficulties have been encountered with local officers. In other instances difficulties have been encountered in securing convictions from juries, but on the whole the officers and people of the state have shown a desire to enforce the laws of this state relating to the manufacture and sale of intoxicating liquors. I firmly believe that in the future there will be a steady decrease in the number of violations of these laws, and there certainly will be, if the people of the state as a unit and the officers of the state as a unit join together in one movement to enforce, without fear or favor, the laws of the state. I have faith that this will be done.

AUTO THEFTS

In connection with the bureau of investigation there has been established an automobile theft file. In this file is to be found a complete list of all stolen and recovered motor vehicles that have been reported to the department. During the period from August 1, 1921, to November 1, 1922, there have been reported from outside sources as stolen 14,962 motor vehicles, of which 2,903 have been recovered. There have been reported both in and out of the state of Iowa, as stolen, 16,162 motor vehicles, of which 3,610 have been recovered. The cities of Iowa have reported as stolen 989 motor vehicles, of which 687 have been recovered. The percentage of recovered automobiles to the number stolen in cities reporting in Iowa is approximately 70 per cent. This is so much greater than in any of the surrounding states as to entitle the officers of these cities, as well as the peace officers of the state, to commendation.

From March 1, 1921, to October 1, 1922, a period of approximately one year and seven months, the special peace officers of this

department recovered 241 motor vehicles having a valuation of \$201,400. In this section of secret service work the peace officers have secured more than thirty convictions and many indictments are still pending.

INFORMATION AND IDENTIFICATION

This department has established a complete bureau of identification and information. In this branch of the department files are kept for identification purposes containing the finger prints and photographs of all persons arrested and convicted of felonies, of fugitives from justice, of inmates of all the penal institutions of the state, as well as of other persons arrested for crime. This file has grown until thousands of finger print impressions and photographs are on file. The importance of this file to the officers of Iowa has been demonstrated by the fact that through it 411 persons accused of crime have been identified. The bureau has placed the peace officers of Iowa in touch with the files of bureaus of identification maintained by the United States government at Fort Leavenworth, Kansas, and Atlanta, Georgia, as well as those maintained by cities and other states. The result is that wherever finger print impressions and photographs of criminals can be obtained identification can ordinarily be made.

RECOMMENDATIONS FOR REMEDIAL LEGISLATION

I have been impressed during the past two years with the fact that criminal procedure and criminal law have failed to keep pace with the rapidly changing conditions. In this report it will be impossible to cover criminal procedure and criminal law in detail. I can at best but make a few recommendations which I believe are of importance.

1. The laws of this state relative to concealed weapons are antiquated and almost worthless. "Gun toting" is a menace to society, and is the base for a great percentage of the crimes committed in this state. It is, therefore, imperative that the state have a real concealed weapon statute. This statute should provide for the registration of weapons capable of concealment upon or about the person, to the end that for every concealed weapon someone may be responsible. The sale of dirks, billies and similar articles should be absolutely prohibited. Permits should only be granted after the most rigid examination by the officer issuing the same. Failure to have the permit upon the person at the time of arrest should be prima facie evidence of guilt. The statute also should

cover the carrying of such weapons either upon or about the person, in suit cases, automobiles or otherwise. In this connection attention is called to the present statutes in California and New York, and to the bill recommended by the County Attorneys Association of Iowa.

2. The recent decision of the supreme court of this state in the so-called "Carroll County Case" demands a revision of the laws relative to appearance bonds in criminal cases. This statute should be revised so that in all cases of failure to comply with the conditions of the bond the court shall declare the same forfeited. As a part of the forfeiture the court should direct the clerk to give not more than ten days' notice to all bondsmen to appear and show cause, if any, why judgment should not be entered. If appearance is not then made, judgment should be entered at once. If appearance is made, the case should be immediately tried as an ordinary action. That section of the code relating to voluntary appearance should be amended so that the forfeiture and judgment should never be set aside unless the defendant voluntarily appears or is surrendered by his bondsmen within sixty days after the entering of judgment and forfeiture. Such a statute will, in my opinion curb the promiscuous signing of bonds by professional bondsmen and will insure collection of forfeited bonds without unnecessary delay.

3. We are all agreed that the innocent should be speedily released; and we are likewise agreed that the guilty should be speedily punished. With this thought in mind, may I call attention to the fact that under the criminal procedure as it now exists in Iowa, months and oftentimes years intervene between the time the crime is committed and punishment is inflicted. Criminal cases should have the right of way in every court in the state. The time of appeal to the supreme court should be reduced from six months to thirty days. Certainly in thirty days a defendant can make up his mind as to whether or not he intends to appeal. There are perhaps many other ways in which criminal procedure can be speeded up, and I can only suggest that any law which has for its object prompt punishment for the guilty and prompt release of the innocent will be a boon to law enforcement.

4. All absurd technicalities in the criminal law should be removed. Space will not permit calling attention to every defect. I do, however, desire to recommend that the statutes of this state be amended so that all claims as to lack of jurisdiction and as to

defects in indictments and information be presented to the trial court in advance of the trial, stating specifically the exact grounds of objection, and the trial court given full power to at once and on its own motion correct such defects. That technicality which has caused the reversal of many cases, namely, the reference of the county attorney to the fact that the defendant has not taken the stand, should be removed.

5. I see no reason why a defendant should not be indicted on several counts for all crimes growing out of the same transaction, and I see no reason why he should not be tried for all at the same time. For example, where a man breaks and enters a building, stealing certain property therein, he should be placed on trial for breaking and entering, for larceny, and for any other crime which grows out of and is a direct part of the transaction. This would cause the conviction of many who are guilty and escape, and could under no circumstances be prejudicial to any who are innocent.

6. The prohibitory statutes of this state should be amended so that there is a sliding scale of increased punishment for each subsequent violation of such laws. Habitual violators of such laws are a real menace to the state and a certain clog to law enforcement. Increased penalties reaching to penitentiary sentences for the third and subsequent violations will do much to aid in the enforcement of the liquor laws. This statute should be so worded that the term "subsequent violations" shall apply to all violations of the prohibitory law by the same individual whether the specific offense be the same in each instance or not.

In this connection also I am impressed with the thought that the manufacture and sale of so-called "hootch" is a menace not only to law enforcement but to the very life and health of our people. The manufacturer of distilled whiskey, called "hootch," should receive certain and severe punishment. I believe the statute in this regard should be amended to attain such result.

While I have not given the matter the serious consideration which it is undoubtedly entitled to, yet I believe consideration should be given to the question as to whether or not punishment should be prescribed for the purchase of intoxicating liquor for use as a beverage, the same as for the sale thereof.

7. In recent years price fixing of basic products has become a matter of general knowledge, and likewise of public concern. I am firmly of the belief that the anti-trust laws of this state should be

amended so as to render it possible for those charged with the enforcement of the law to strike at the heart of conspiracies to fix prices. I am of the belief that a rule of evidence should be established which will render it possible to reach such law violators. In this connection, may I state that such legislation can injure no one who is innocent, but will strike at those who are guilty.

8. The statutes of this state relative to the punishment of public officers for embezzlement of public funds should be amended so as to release the state from the necessity of proving demand. Embezzlement from the county or from the state is no different than embezzlement from a person, partnership or corporation, and should receive the same consideration in criminal law.

9. The statutes of this state relating to the removal of public officers should be amended so as to apply to appointive as well as elective officers. It is absurd to say that removal proceedings may be instituted by summary action as against the mayor of a city or town, and that such proceedings cannot be instituted against a chief of police.

10. Certain remedial legislation should be enacted relating to the powers of sheriffs and other peace officers in the pursuit of criminals. I realize the grave questions involved in this recommendation, and I, therefore, call attention to the fact that it should be so carefully considered as to avoid all question as to conflict of jurisdiction between officers of different municipalities. However, some provision should be made whereby a sheriff in the pursuit of a criminal will not be required to stop at the county line, but may pursue the criminal anywhere in the state; always preserving primary jurisdiction in the officers of the county or municipality for which they are elected or appointed.

11. There are many other recommendations which might be made but time and space will not permit. This department, however, would indeed be pleased to consult with reference to other remedial legislation which may render more possible the ideal of perfect law enforcement to which the commonwealth is entitled.

COMMENDATIONS

I cannot close this letter without calling attention to the splendid service rendered by the assistants in this department. Without the service of such men as have been attached to the department we would have been almost helpless. High class lawyers are difficult of attainment in public service; compensation at best is but meager,

and I therefore feel that it is but right and proper for me to say that the assistants in this department are entitled, by reason of their service, to the praise of the people of Iowa. The office force has likewise rendered splendid service. I would not close without referring to the splendid work of the chief of the bureau of investigation and his splendid assistants. I believe their work, as shown by the summaries attached, will meet with commendation from all.

In conclusion may I express the hope that during the next two years we may merely serve as we ought to serve in the interest of the people of Iowa.

Respectfully submitted,

BEN J. GIBSON, Attorney General.

SCHEDULE "A"—CRIMINAL CASES SUBMITTED TO THE SUPREME COURT OF IOWA
 JANUARY TERM, 1921

Title of Case	County	Decision	Nature of Action
State v. Frank Rolling.....	Plymouth.....	Affirmed.....	Seduction.
State v. Roy VanBuskirk.....	Plymouth.....	Affirmed.....	Forfeiture of bond.
State v. Howard K. Berry.....	Iowa.....	Affirmed.....	Assault with intent to rape.
State v. Seth Smith.....	Marion.....	Reversed and remanded.....	Rape.
State v. Frank Kappem.....	Story.....	Affirmed.....	Possession of burglary tools.
State v. Brownie Bowman.....	Polk.....	Affirmed.....	Murder.
State v. Quan Sue.....	Story.....	Affirmed.....	Murder.
State v. Lloyd Patton.....	Polk.....	Affirmed.....	Robbery.
State v. Merle Rowles.....	Polk.....	Affirmed.....	Larceny.
State v. Frank Higgins.....	Polk.....	Affirmed.....	Illegal sale of intoxicating liquor..
State v. Homer Wright.....	Greene.....	Affirmed.....	Seduction.
State v. James Thomas Townsend....	Dubuque.....	Affirmed.....	Murder.

MAY TERM, 1921

State v. H. V. Culbertson.....	Jefferson.....	Affirmed.....	Gambling.
State v. Earle Prentice.....	Lucas.....	Affirmed.....	Larceny.
State v. Wesley Lutz.....	Wapello.....	Affirmed.....	Breaking and entering.
State v. Bennie Miller.....	Ringgold.....	Affirmed.....	Rape.
State v. James Davis.....	Monona.....	Affirmed.....	Murder.
State v. Wm McClain.....	Woodbury.....	Affirmed.....	Robbery.
State v. Tom Ivers and Fred Keller..	Woodbury.....	Affirmed.....	Larceny.
State v. Clifford McGraw.....	Woodbury.....	Reversed and affirmed.....	Red light statute.
State v. Fred Keller.....	Woodbury.....	Reversed and remanded.....	Larceny.

State v. Fred Broderick.....	Woodbury.....	Affirmed.....	Receiving stolen goods.
State v. John D. Bowers.....	Cherokee.....	Reversed and remanded.....	Keeping a gambling house.
State v. Sherman Carter.....	Guthrie.....	Affirmed.....	Forgery.
State v. Carl Ringdahl.....	Winneshiek.....	Modified and affirmed.....	Nuisance.
State v. M. O. Kingsbury.....	Audubon.....	Reversed.....	Bootlegging.
State v. Thomas E. Howard.....	Page.....	Affirmed.....	Murder.
State v. August Bartels.....	Bremer.....	Affirmed.....	English language.

SEPTEMBER TERM, 1921

State v. Frank Hawkins.....	Monroe.....	Affirmed.....	Murder.
State v. Hayes Van Gorder.....	Monroe.....	Reversed and remanded.....	Expense of transcript.
State v. Andrew Schwenterman.....	Wapello.....	Reversed.....	Forgery.
State v. Howard K. Berry.....	Iowa.....	Affirmed.....	Rape.
State v. Homer Wright.....	Greene.....	Affirmed.....	Rape.
State v. Vina Wallack.....	Mahaska.....	Affirmed.....	Murder.
State v. R. M. Ireland.....	Polk.....	Reversed.....	Larceny.
State v. G. B. Propp.....	Polk.....	Affirmed.....	Receiving stolen property.
State v. Certain Intoxicating liquors, et al.....	Polk.....	Affirmed.....	Seizure of liquor.
State v. A. R. Graves.....	Polk.....	Affirmed.....	Murder.
State v. Alice Randolph.....	Madison.....	Affirmed.....	Larceny.
State v. Leonard Christani.....	Warren.....	Reversed and remanded.....	Arson.
State v. C. J. Van Hoozier.....	Pottawattamie.....	Reversed and remanded.....	Larceny.
State v. Roy Cook.....	Page.....	Affirmed.....	Larceny.
State v. Charles Walker.....	Hamilton.....	Reversed and remanded.....	Breaking and entering.
State v. W. C. Olander.....	Webster.....	Affirmed.....	Murder.
State v. Georgia Johnson.....	Palo Alto.....	Reversed and remanded.....	Adultery.

SEPTEMBER TERM, 1921—Continued.

Title of Case	County	Decision	Nature of Action
State v. Phoebe Henderson.....	Pocahontas.....	Affirmed.....	Larceny.
State v. Ben Ferrand.....	Calhoun.....	Reversed.....	Breaking and entering.
State v. Alonzo Brooks.....	Linn.....	Reversed and remanded.....	Murder.

JANUARY TERM, 1922

State v. C. W. Wilson.....	Lee.....	Affirmed.....	Escaped prisoner.
State v. George S. Potter.....	Louisa.....	Reversed and remanded.....	Larceny.
State v. Joe Banock.....	Clarke.....	Affirmed.....	Larceny.
State v. Charles Conger.....	Keokuk.....	Affirmed.....	Wife desertion.
State v. Charles F. Christiansen.....	Woodbury.....	Affirmed.....	Murder.
State v. Francis Kelley.....	Johnson.....	Reversed and remanded.....	Larceny.
State v. Frank Roby.....	Madison.....	Reversed and remanded.....	Rape.
State v. Jesse McDowell.....	Marion.....	Affirmed.....	Liquor nuisance.
State v. Ernest Humphrey.....	Polk.....	Affirmed.....	Burglary.
State v. Richard Bouma.....	Polk.....	Affirmed.....	Seduction.
State v. Earl Lavalleur.....	Polk.....	Affirmed.....	Breaking and entering.
State v. Henry Adams.....	Polk.....	Affirmed.....	Murder.
State v. Carrie E. Rowley.....	Polk.....	Reversed and remanded.....	Attempt to commit an abortion.
State v. Lillian Newbiser.....	Polk.....	Affirmed.....	Keeping house of ill fame.
State v. Lizzie Christie.....	Polk.....	Reversed.....	Robbery.
State v. Dan Brafford.....	Polk.....	Modified and affirmed.....	Manufacturing intoxicating liquor.
State v. W. A. Reade.....	Clay.....	Affirmed.....	Larceny.

State v. Ernest Borwick.....	Pottawattamie.....	Reversed and remanded.....	Murder.
State v. W. W. Earl.....	Pottawattamie.....	Affirmed.....	Larceny.
State v. James Harbour.....	Pottawattamie.....	Affirmed.....	Murder.
State v. William Thomas, Jr.....	Dubuque.....	Reversed and remanded.....	Rape.
State v. Fay Davis.....	Benton.....	Reversed.....	Seduction.
State v. Henry Tonn.....	Linn.....	None.....	Criminal syndicalism.

MAY TERM, 1922

State v. Joe Banock.....	Clarke.....	Affirmed.....	Larceny.
State v. Carmello Russo.....	Appanoose.....	Affirmed.....	Murder.
State v. M. L. Brady.....	Lyon.....	Affirmed.....	Violation of blue sky law.
State v. Francis Wrenn.....	Plymouth.....	Affirmed.....	Rape.
State v. Ira Pavey.....	Sioux.....	Affirmed.....	Murder.
State v. John Landingham.....	Polk.....	Affirmed.....	Receiving stolen property.
State v. Roy Smith.....	Polk.....	Affirmed.....	Adultery.
State v. Eugene Weeks.....	Polk.....	Affirmed.....	Murder.
State v. Cecil Huckelberry.....	Polk.....	Affirmed.....	Assault with intent to rape.
State v. James C. Hume.....	Polk.....	Reversed.....	Liquor injunction.
State v. Lee Spangler.....	Hamilton.....	Reversed.....	Breaking and entering.
State v. Roy Heald.....	Greene.....	Affirmed.....	Breaking and entering.
State v. Joe Herrebout.....	Polk.....	Affirmed.....	Larceny.

SEPTEMBER TERM, 1922

State v. Robert Lee Scott.....	Jefferson.....	None.....	Manslaughter.
State v. A. J. Boyd.....	Jefferson.....	Reversed and remanded.....	Receiving stolen property.
State v. Dominick Olivia.....	Monroe.....	Affirmed.....	Murder.
State v. Archie Burris.....	Wapello.....	Reversed and remanded.....	Murder.

SEPTEMBER TERM, 1922—Continued.

Title of Case	County	Decision	Nature of Action
State v. Ed Arnold.....	Ringgold.....	Affirmed.....	Larceny.
State v. Oscar Smith.....	Union.....	Reversed and remanded.....	Rape.
State v. Ed Arnold.....	Union.....	Affirmed.....	Larceny.
State v. Frank Richardson.....	Monona.....	Affirmed.....	Stolen auto.
State v. J. R. Welch, et al.....	Woodbury.....	None.....	Larceny.
State v. J. W. Bunn.....	Cherokee.....	Affirmed.....	Felonious assault.
State v. A. L. Wilson.....	Mahaska.....	Reversed and remanded.....	Assault with intent to murder.
State v. Bert Kersberger.....	Mahaska.....	None.....	Bootlegging.
State v. John Schumacher.....	Scott.....	None.....	Lewdness.
State v. Pauline Lloyd.....	Johnson.....	Affirmed.....	Larceny.
State v. William Stader.....	Polk.....	Affirmed.....	Larceny.
State v. George Lint.....	Polk.....	Affirmed.....	Manufacturing intoxicating liquor.
State v. Max Ginsberg.....	Polk.....	Affirmed.....	Manufacturing intoxicating liquor.
State v. Andrew Golden.....	Polk.....	Affirmed.....	Sodomy.
State v. Jesse Crouse.....	Polk.....	Affirmed.....	Nuisance.
State v. Felix Barber.....	Polk.....	Affirmed.....	Nuisance.
State v. Oscar W. Brown.....	Wright.....	Affirmed.....	Larceny.
State v. John Lilteich.....	Louisa.....	Affirmed.....	Sale of intoxicating liquor.
State v. Walter Harrington.....	Buena Vista.....	Affirmed.....	Robbery.
State v. Grant P. Griffin.....	Emmet.....	Affirmed.....	Murder.
State v. Z. H. Johnson.....	Pocahontas.....	Affirmed.....	Bootlegging.
State v. Ova Omundson.....	Pocahontas.....	Affirmed.....	Assault with attempt to commit great bodily injury.
State v. Cliff Solon.....	Fremont.....	Affirmed.....	Larceny.
State v. G. L. Harris.....	Harrison.....	Reversed and remanded.....	Robbery.
State v. Lewis Pillsbury.....	Mills.....	None.....	Rape.
State v. Nelson Luce.....	Page.....	Affirmed.....	Breaking and entering.
State v. E. R. Casebeer.....	Tama.....	Dismissed.....	Cheating by false pretenses.

State v. E. R. Casebeer.....	Tama.....	Dismissed.....	Selling worthless stock.
State v. E. R. Casebeer.....	Tama.....	Dismissed.....	Selling worthless stock.
State v. A. E. Budlong.....	Tama.....	Dismissed.....	Selling worthless stock.
State v. A. E. Budlong.....	Tama.....	Dismissed.....	Selling worthless stock.
State v. Jacob E. Decker & Sons.....	Cerro Gordo.....	Affirmed.....	Polluting stream.
State v. B. F. Marquardt.....	Winnebago.....	Affirmed.....	Nuisance.
State v. Earl Llewlyn Throst.....	Allamakee.....	None.....	Murder.
State v. Earl Daley.....	Allamakee.....	Affirmed.....	Nuisance.
State v. James LaVere.....	Fayette.....	Affirmed.....	Cheating by false pretenses.
State v. Myrtle Bower.....	Fayette.....	Affirmed.....	Adultery.
State v. Harry West.....	Cedar.....	Affirmed.....	Rape.

CRIMINAL CASES PENDING IN THE SUPREME COURT

Title of Case	County	Nature of Action
State v. George Cahill.....	Lee.....	Escape from penitentiary.
State v. W. J. Steckel.....	Jefferson.....	Cheating by false pretenses.
State v. Hayes Van Gorder.....	Monroe.....	Manslaughter.
State v. A. J. Boyd.....	Van Buren.....	Receiving stolen goods.
State v. Robert Gardner.....	Van Buren.....	Seduction.
State v. R. S. Leeper.....	Decatur.....	Larceny.
State v. G. F. Kritenbrink.....	Union.....	Obtaining money by false pretenses.
State v. Cecil Huckelberry.....	Polk.....	Assault with intent to commit rape.
State v. C. R. Metcalf.....	Woodbury.....	Murder.
State v. W. E. Burke.....	Woodbury.....	Breaking and entering.
State v. Harold Moe.....	Woodbury.....	Larceny.
State v. Mrs. Joe Allen.....	Woodbury.....	Larceny.
State v. Jim Allen.....	Woodbury.....	Murder.
State v. Wm. Hildebrand.....	Woodbury.....	Breaking and entering.
State v. W. D. Shields.....	Woodbury.....	Burglary.
State v. Sam Mitchell, et al.....	Woodbury.....	Robbery.
State v. J. E. Welch.....	Woodbury.....	Breaking and entering.
State v. Jesse Adams.....	Woodbury.....	Murder.
State v. R. L. Kaufman.....	Dallas.....	Cheating by false pretenses.
State v. Roscoe Burch.....	Madison.....	Larceny.
State v. Joe Kelly, et al.....	Marion.....	Murder second degree.
State v. Seth Smith.....	Warren.....	Rape.
State v. Fred DeWolf, et al.....	Johnson.....	Gambling.
State v. D. W. Taylor.....	Polk.....	Rape.
State v. Beryl Bogue.....	Polk.....	Seduction.
State v. Joe Williams.....	Polk.....	Murder.
State v. Earl Stricker.....	Black Hawk.....	Nuisance.
State v. J. W. McCoy.....	Black Hawk.....	Nuisance.
State v. Charles Gentle, et al.....	Black Hawk.....	Nuisance.
State v. C. H. Luden.....	Black Hawk.....	Nuisance.

State v. Alva J. White.....	Black Hawk.....	Nuisance.
State v. Henry Potter.....	Woodbury.....	Maintaining a nuisance.
State v. Severt Javick.....	Fayette.....	Rape.
State v. Harry Williams, et al.....	Black Hawk.....	Nuisance.
State v. Dave Fairweather, et al.....	Black Hawk.....	Nuisance.
State v. Eugene Sangster.....	Buchanan.....	Rape.
State v. Thos. Ragsdale.....	Story.....	Operating automobile while intoxicated.
State v. O. E. Phelps.....	Story.....	Larceny.
State v. James Lynch.....	Story.....	Burglary with gas.
State v. Will Baene.....	Webster.....	Rape.
State v. Roy Fortune.....	Wright.....	Larceny.
State v. Herbert Bige.....	Wright.....	Breaking and entering.
State v. Mrs. Chas. Owen.....	Audubon.....	Larceny of poultry.
State v. Arthur Hickman, et al.....	Cass.....	Murder.
State v. Virgil Kinart.....	Harrison.....	Nuisance.
State v. Sigfrid Trybom.....	Montgomery.....	Murder second degree.
State v. Eva King.....	Pottawattamie.....	Murder second degree.
State v. William Bullis.....	Pottawattamie.....	Receiving stolen property.
State v. Alfred Lebeck.....	Shelby.....	Bootlegging.
State v. Howard Rolf.....	Benton.....	Larceny.
State v. Glenn Ramsdell.....	Tama.....	Seduction.
State v. Clyde Bolton.....	Floyd.....	Cheating by false pretenses.
State v. Dan Wisely.....	Hancock.....	Seduction.
State v. H. D. Ivey.....	Allamakee.....	Larceny.
State v. Lester J. Reysa.....	Fayette.....	Cheating by false pretenses.
State v. Joseph W. Bauer.....	Fayette.....	Assault with intent to commit murder.
State v. Edward Heaton.....	Crawford.....	Larceny.
State v. Harry Atkinson.....	Story.....	Bootlegging.
State v. Aaron Waxman.....	Woodbury.....	Bigamy.
State v. Arthur Sheldon.....	Lee.....	Escaping from penitentiary.
State v. Robert M. Shoeman.....	Dallas.....	Larceny.
State v. Bud Purcell.....	Woodbury.....	Assisting prisoner to escape from jail.
State v. Claude Shaver.....	Woodbury.....	Murder.
State v. John Lavery.....	Woodbury.....	Robbery.
State v. John Bird.....	Monona.....	Robbery.

CRIMINAL CASES PENDING IN THE SUPREME COURT—Continued.

Title of Case	County	Nature of Action
State v. Elmer Hamilton.....	Page.....	Robbery.
State v. J. M. Lennan.....	Webster.....	Nuisance.
State v. Earl Beckner.....	Fayette.....	Rape.
State v. John Draden.....	Clarke.....	Rape.
State v. Charles Johnson.....	Wapello.....	Delinquency.

SCHEDULE "B"

CASES PENDING IN UNITED STATES DISTRICT COURT

C. G. W. Ry. Co. v. N. E. Kendall, et al.
 C. R. I. & P. R. R. v. N. E. Kendall, et al.
 N. E. Kendall, Governor, et al., v. C. N. W. Ry. Company.

CASES DISPOSED OF IN UNITED STATES DISTRICT COURT

M. & St. L. R. R. Co. v. N. E. Kendall, et al.
 Interurban Railway Company v. N. E. Kendall, et al.
 Ft. D. D. M. & So. Ry. Co. v. N. E. Kendall, et al.
 Iowa Falls Electric Company v. N. E. Kendall, et al.
 Iowa Railway & Light Company v. N. E. Kendall et al.
 Iowa Electric Company v. N. E. Kendall, et al.
 C. R. I. & P. Ry. Co. v. N. E. Kendall, et al.
 C. N. W. Ry. Co. v. N. E. Kendall, et al.
 C. B. & Q. R. R. Company v. N. E. Kendall, et al.
 A. T. & Santa Fe R. R. Co. v. N. E. Kendall, et al.
 C. M. & St. P. Ry. Co. v. N. E. Kendall, et al.
 Dubuque & Sioux City R. R. Co. (Ill. Cent.) v. N. E. Kendall, et al.
 M. & St. L. R. R. Company v. N. E. Kendall, et al.
 Wabash R. R. Company v. N. E. Kendall, et al.
 C. R. I. & P. Ry. Co. v. Bd. of R. R. Commissioners, et al. Equity No. 4113.
 Ft. D. D. M. & So. R. R. Co. v. Bd. of R. R. Commissioners, et al. Equity No. 4114.
 Wabash Ry. Co. v. Bd. R. R. Commissioners, et al. Equity No. 4115.
 C. & N. W. Ry. Co. v. Bd. of R. R. Commissioners, et al. Equity No. 4116.
 C. M. & St. P. Ry. Co. v. Bd. of R. R. Commissioners, et al. Equity No. 4117.
 The Atchison, Topeka & S. F. Ry. Co. v. Bd. of R. R. Commissioners, et al. Equity No. 4118.
 C. St. P. M. & C. Ry. Co. v. Bd. of R. R. Commissioners, et al. Equity No. 4119.
 C. B. & Q. R. R. Co. v. Bd. of R. R. Commissioners, et al. Equity No. 4120.
 The M. & St. L. R. R. Co. v. Bd. of R. R. Commissioners, et al. Equity No. 4121.
 Illinois Central R. R. Co. v. Bd. of R. R. Commissioners, et al. Equity No. 4122.
 C. G. W. R. R. Co. v. B. of R. R. Commissioners, et al. Equity No. 4123.
 Great Northern Ry. Co. v. Bd. of R. R. Commissioners, et al. Equity No. 4124.
 Inter-Urban Ry. Co. v. Bd. R. R. Commissioners, et al. Equity No. 4125.
 Waterloo, Cedar Falls Ry. Co. v. Bd. of R. R. Commissioners, et al. Equity No. 4130.
 C. & St. P. M. & O. Ry. Co. v. Bd. of R. R. Commissioners, et al. Equity No. 4131.
 C. G. W. R. R. Co. v. Bd. of R. R. Commissioners, et al. Equity No. 4132.
 G. N. Ry. Co. v. Bd. of R. R. Commissioners, et al. Equity No. 4133.
 C. B. & Q. R. R. Co. v. Bd. of R. R. Commissioners, et al. Equity No. 4134.
 C. M. & St. P. Ry. Co. v. Bd. of R. R. Commissioners, et al. Equity No. 4135.
 Ft. D. D. M. & S. R. R. Co. v. Bd. of R. R. Commissioners, et al. Equity No. 4136.
 C. & N. W. Ry. Co. v. Bd. of R. R. Commissioners, et al. Equity No. 4137.
 M. & St. L. Ry. Co. v. Bd. of R. R. Commissioners, et al. Equity No. 4138.
 C. R. I. & P. Ry. Co. v. Bd. of R. R. Commissioners, et al. Equity No. 4139.

Atchison, Topeka & St. F. Ry. Co. v. Bd. of R. R. Commissioners, et al.
Equity No. 4140.

Wabash R. R. Co. v. Bd. of R. R. Commissioners, et al. Equity No. 4141.

Ill. Central R. Co. v. Bd. of R. R. Commissioners, et al. Equity No. 4142.

SCHEDULE "C"

RECEIVERSHIPS

- M. V. Henderson v. Citizens State Bank of Onawa.
- M. V. Henderson v. Rome Savings Bank.
- M. V. Henderson v. Farmers Savings Bank of Ulmer.
- M. V. Henderson v. Farmers Savings Bank of Harper.
- W. J. Murray v. First Trust and Savings Bank of Sibley.
- M. J. Murray v. Melcher State Bank.
- W. J. Murray v. Massena Savings Bank.
- W. J. Murray v. Bevington State Bank.
- W. J. Murray v. Harris Savings Bank.
- W. J. Murray v. State Bank of Oto.
- W. J. Murray v. Citizens Savings Bank of Curlew.
- W. J. Murray v. American Savings Bank of Sioux City.
- W. J. Murray v. North Liberty Savings Bank.
- W. J. Murray v. Swalesdale Savings Bank.
- W. J. Cass, Receiver, v. Morningside Lumber & Milling Company.
- State of Iowa, ex rel. Ben J. Gibson, v. Automobile Trade Mutual Ins.
Co.
- State of Iowa, ex rel. Ben J. Gibson, v. American Bonding & Casualty
Co.
- State of Iowa v. Livestock Insurance Company.
- State of Iowa v. Northwest Mutual Insurance Association.
- State of Iowa v. Farmers Livestock Insurance Company.
- State of Iowa v. Lion Bonding & Surety Company.

SCHEDULE "D"

CIVIL CASES PENDING AND DISPOSED OF DURING PERIOD FROM JANUARY 1, 1921, TO JANUARY 1, 1923

- City of Ames v. Board of Education.
- American Telephone Company v. State of Iowa.
- James Banning v. Ed Elliott, Sheriff.
- Citizens State Bank v. C. Long, et al.
- In re assessment C. R. I. & P. Ry. Co. for hard surfacing in O'Brien Co.
- S. C. Collins Oil Company v. W. B. Barney.
- John Dillon v. John B. Mann.
- Des Moines Terminal Company v. N. E. Kendall, et al.
- Des Moines Union Ry. Co. v. State of Iowa, et al.
- Extradition of H. E. Powers.
- First National Bank of Guthrie Center v. L. B. Anderson.
- A. C. Fritz v. District Court of Black Hawk County.
- Fort Madison Gas Light Company v. T. P. Hollowell, Warden.
- J. D. Hollingshead Co. v. Board of Control.
- State of Iowa, ex rel. F. M. Hudson v. Albert Smith, Mayor.
- Iowa State Board of Education v. C. A. Hutchinson.
- Kent Brothers v. O'Donnell & Hansen.
- Henry W. Lex v. Selway Steel Post Company.
- A. O. Lloyd v. W. C. Ramsay, et al.
- Fred C. McCutcheon v. W. J. Burbank, et al.
- State of Iowa, ex rel. O. W. Lee, vs. McKeivitt.
- Nannie Matthews v. Mrs. Lucy Sickels.
- Mahaska County State Bank v. T. E. Graham, et al.
- Luvina Melenski v. A. B. Funk.

In re Eli J. Miller, Bankrupt.
Elmer Nelson, et al., v. Popcorn Company.
New York Life Insurance Company v. W. J. Burbank.
National State Bank, Mount Pleasant, v. Henry County, et al.
Northwestern Bell Telephone Company v. N. E. Kendall, et al.
Wm. C. Olander v. T. P. Hollowell.
Oskaloosa National Bank v. T. E. Graham, et al.
Polk County v. City of Des Moines.
Nielson v. Board of Supervisors of Scott County.
Henry Quellmalz Lumber & Mfg. Co. vs. Tom Hollowell, et al.
W. C. Ramsay v. James C. Hume, Judge.
Right and Authority of Secretary of State to Issue Retail Dealers' Motor Vehicle License.
Roy Royer v. Paul T. Beardsley, et al.
George H. Schafer, et al., v. State of Iowa.
State of Iowa, ex rel. Ben J. Gibson, v. Automobile Trade Mutual Ins. Co.
State of Iowa, ex rel. John B. Hammond, v. C. C. Hamilton, Judge.
State of Iowa v. Cedar Rapids Fire & Rubber Company.
State of Iowa, ex rel. Ben J. Gibson v. C. W. Judkins, Treasurer.
State of Iowa v. International Proprietaries, Inc.
Story County v. Highway Commission.
State of Iowa v. E. C. Hinshaw.
State of Iowa v. White Iowa Manual Labor Institution.
State of Iowa v. F. F. Balzer.
State of Iowa v. Des Moines Dairy Company, et al.
Ettie Swayne v. Board of Supervisors of Polk County
State of Iowa v. Bankers Automobile Insurance Company.
State of Iowa v. Jessie Williams, et al.

125098

SCHEDULE "E"
INHERITANCE TAX CASES—SUPREME COURT

Title of Case	County	Decision	Notation
In re Estate of R. B. Curtis.....	Van Buren.....	Reversed.....	Treasurer of State, Appellee.
In re Estate of Harry Higgins.....	Tama.....	Affirmed.....	Treasurer of State, Appellant.
In re Estate of William H. Kite.....	Cedar.....	Affirmed.....	Treasurer of State, Appellant.
In re Estate of Goettelman.....	Winneshiek.....	Affirmed.....	Treasurer of State, Appellee.
In re Estate of Ida M. Waterman.....	Union.....	Affirmed.....	Treasurer of State, Appellant.
In re Estate of Wayne Choate.....	Mills.....	None.....	Treasurer of State, Appellant.
In re Estate of Lucia S. Annis.....	Mitchell.....	None.....	Treasurer of State, Appellant.
In re Waterman, Appellee, v. Burbank, ap- pellant.....	Union.....	None.....	
In re Estate of Christ Pederson.....	Shelby.....	None.....	Treasurer of State, Appellant.

SCHEDULE "F"
PARTIAL LIST OF INHERITANCE TAX CASES—DISTRICT COURT

Title of Case	County	Notation
In re Estate of Samuel C. Zieger.....	Hardin.....	Tax of \$2,775.31 collected.
In re Estate of William Murray.....	Humboldt.....	Judgment approximately \$5,500.00 ordered, previously collected \$10,950.00.
In re Estate of Aaltje van der Pol.....	Marion.....	Holding bequests to foreign missions taxable. Tax of \$208.60.
In re Estate of Peter Kladivo.....	Linn.....	Tax of \$300.00 collected.
In re Estate of Francis McCullough.....	Allamakee.....	A lien established for tax of approximately \$7,000.00.
In re Estate of Eugene Flannery.....	Dubuque.....	Tax collected of \$1,920.00.
In re Estate of Anna E. Repp.....	Black Hawk.....	Tax of over \$900.00 collected.
In re Estate of Andrew A. Berg.....	Winnebago.....	Filed petition to remove administrator. Tax of \$250.54 collected.
In re Estate of Maria Johnston.....	Webster.....	Collected tax of \$64.28.
In re Estate of A. W. Crawford.....	Madison.....	Holding executor entitled only to statutory allowance.
In re Estate of Chas. C. Carhart.....	Franklin.....	Construing exemption allowed.
In re Estate of William J. Conway.....	Allamakee.....	Holding insurance policy payable to estate taxable; \$881.77 collected.
In re Estate of John Lageson.....	Allamakee.....	Holding treasurer had authority to require report of assets and liabilities; \$584.02 collected.
In re Estate of S. L. Moore.....	Boone.....	Holding charity foundation exempt.
In re Estate of Carrie A. Rand.....	Des Moines.....	Holding property passing under a trust agreement taxable; \$1,350.00 collected.
In re Estate of Margaret J. Judge.....	Dallas.....	Contested deductions.
In re Estate of Isaac Alden.....	Dubuque.....	Objections to final report.
In re Estate of James S. Smith.....	Madison.....	Objections to final report.
In re Estate of Margaret Macumber.....	Madison.....	Objections to final report.
In re Estate of R. G. Smith.....	Pottawattamie.....	Objections to final report.
In re Estate of John W. McConkie.....	Story.....	Contested deductions.

NOTE: In addition to the foregoing there were forty-six other cases in which compromise settlement was made with the approval of the court, the attorney general having investigated and advised settlement in said matters.

NOTE: The department in connection with the treasurer of state has assisted in every examination held under the provisions of the acts of the 39th general assembly, providing that the treasurer of state could issue a citation bringing any person before him for the purpose of submitting to an examination under oath with reference to estates subject to the imposition of a tax. Some eight or ten examinations have been held and in all but one case either a tax has been collected or a lien therefor established. The tax obtained from this source will amount to more than \$12,000.00.

SCHEDULE "G"

District court record by counties of cases involving violation of the intoxicating liquor laws of Iowa, with charges and penalties imposed from January 21, 1921, to October 1, 1922, as reported to this department. This schedule does not include cases in federal court or cases in inferior courts such as justice and police courts. It is estimated that the total would be increased 33 1-3 per cent were such records available. In addition to the fines imposed, as shown in this schedule, jail sentences were also imposed in the majority of cases.

County	No. Cases	Charge	Fine	Total
Adair	5	Manufacturing	\$ 700.00	\$ 700.00
Adams				
Allamakee	2	Bootlegging	750.00	1,550.00
	1	Nuisance	800.00	
Appanoose	30	Nuisances	9,500.00	9,500.00
	8	Injunctions		
Audubon	1	Bootlegging	150.00	150.00
Benton				
Black Hawk	17	Bootlegging	1,950.00	22,965.00
	2	Contempt	50.00	
	1	Sentence—4 months		
	17	Injunctions		
	17	Nuisances	20,115.00	
	1	Manufacturing	100.00	
	7	Selling	750.00	
Boone	19	Bootlegging	1,900.00	5,500.00
	31	Injunctions		
	23	Nuisances	3,600.00	
	5	Sentences—16 months		
Bremer				
Buchanan	4	Bootlegging	600.00	5,600.00
	16	Nuisances	5,000.00	
Buena Vista	3	Manufacturing	500.00	800.00
	1	Nuisance	300.00	
Butler				
Calhoun	1	Bootlegging	200.00	700.00
	1	Sentence—6 months		
	1	Contempt	500.00	
Carroll	1	Bootlegging	100.00	100.00
Cass	2	Bootlegging	200.00	1,100.00
	3	Nuisance	900.00	

County	No. Cases	Charge	Fine	Total
Cedar				
Cerro Gordo	15	Bootlegging	1,800.00	
	11	Manufacturing	1,325.00	
	19	Nuisance	7,800.00	
	2	Selling	150.00	
	15	Transporting	1,600.00	12,675.00
Cherokee	10	Bootlegging	1,050.00	
	1	Sentence—2 months		
	12	Nuisance	2,750.00	
	4	Manufacturing	500.00	4,300.00
Chickasaw	2	Manufacturing	600.00	
	1	Sentence—Not given		
	1	Bootlegging	250.00	
	1	Transporting	100.00	950.00
Clarke	1	Bootlegging	300.00	
	1	Sentence—Escaped		
	1	Nuisance	1,000.00	
	1	Sentence—Forfeit bond		1,300.00
Clay	2	Bootlegging	150.00	
	3	Manufacturing	450.00	
	1	Nuisance	300.00	
	1	Injunction		900.00
Clayton	8	Bootlegging	3,100.00	
	1	Sentence—2 months		
	3	Manufacturing	500.00	
	2	Selling	200.00	3,800.00
Clinton	26	Nuisances	9,650.00	
	5	Manufacturing	400.00	
	9	Selling	1,000.00	11,050.00
Crawford	5	Bootlegging	600.00	
	1	Sentence—3 days		600.00
Dallas	4	Bootlegging	800.00	
	9	Nuisances	5,150.00	5,950.00
	3	Sentences—did not pay fine		
	2	Injunctions		
	2	Writ of Abatement		
	3	Manufacturing	250.00	250.00
Davis				
Decatur	3	Bootlegging	400.00	
	2	Manufacturing	250.00	
	2	Injunctions		650.00
Delaware	1	Bootlegging	100.00	
	4	Manufacturing	350.00	
	1	Selling	50.00	
	1	Transporting	100.00	600.00

County	No. Cases	Charge	Fine	Total
Des Moines	6	Bootlegging	850.00	
	1	Sentence—3 months		
	5	Manufacturing	550.00	
	14	Nuisances	4,600.00	
	1	Contempt		
	1	Sentence—3 months		6,000.00
Dickinson	2	Bootlegging	250.00	
	1	Sentence—Fine not paid		
	2	Manufacturing	300.00	
	1	Sentence—Fine not paid		550.00
Dubuque	6	Nuisances	1,800.00	
	1	Manufacturing	192.70	1,992.70
Emmet	7	Manufacturing	825.00	
	2	Selling	150.00	
	3	Transporting	250.00	1,225.00
Fayette	12	Bootlegging	4,650.00	
	3	Sentences—1 yr.-3 mos.		
	6	Nuisances	2,250.00	
	8	Manufacturing	1,250.00	
	8	Selling	1,050.00	
	1	Sentence—30 days		
	1	Writ of Abatement		9,200.00
Floyd	2	Bootlegging	500.00	
	2	Injunctions		
	8	Nuisances	2,700.00	
	2	Writ of Abatements		3,200.00
Franklin	6	Bootlegging	1,300.00	
	2	Manufacturing	300.00	
	1	Selling	100.00	1,700.00
Fremont	1	Bootlegging	150.00	
	1	Sentence—6 months		
	1	Nuisance	500.00	
	1	Manufacturing	200.00	
	5	Transporting	500.00	
	1	Sentence—15 days		1,350.00
Greene	3	Nuisances	700.00	
	2	Bootlegging	400.00	
	1	Manufacturing	300.00	1,400.00
Grundy	1	Nuisance	392.50	
	1	Injunction		
	1	Selling	200.00	592.50
Guthrie	1	Transporting	100.00	100.00
Hamilton				

County	No. Cases	Charge	Fine	Total
Hancock	20	Manufacturing	4,750.00	5,250.00
	1	Jail sentence		
	1	Bootlegging	500.00	
Hardin	3	Manufacturing	350.00	500.00
	1	Sentence—30 days		
	1	Selling	150.00	
Harrison	3	Bootlegging	900.00	5,100.00
	3	Sentences—2 yrs.3 mos.		
	9	Nuisances	4,100.00	
	2	Manufacturing	100.00	
Henry	1	Manufacturing	100.00	200.00
	1	Bootlegging	100.00	
Howard	6	Manufacturing	900.00	900.00
Humboldt				
Ida	6	Bootlegging	900.00	1,450.00
	3	Manufacturing	550.00	
Iowa	4	Bootlegging	1,750.00	4,200.00
	2	Sentences—10 months		
	5	Nuisances	1,000.00	
	7	Injunctions		
	7	Writs of Abatement		
	1	Selling		
Jackson	3	Manufacturing	150.00	450.00
	1	Nuisance—Also 30 days	300.00	
	3	Injunctions		
Jasper	3	Bootlegging	700.00	3,500.00
	6	Nuisances	2,500.00	
	2	Manufacturing	300.00	
	7	Injunctions		
Jefferson	3	Bootlegging	600.00	2,350.00
	2	Sentences—11 months		
	4	Transporting	400.00	
	2	Contempt	600.00	
	2	Manufacturing	150.00	
	2	Nuisances	600.00	
	5	Injunctions		
Johnson	5	Bootlegging	1,450.00	1,950.00
	3	Sentences—5 months		
	2	Injunctions		
	2	Writs of Abatement		
	2	Nuisances	500.00	
Jones	9	Bootlegging	1,400.00	3,300.00
	1	Sentence—1 year		
	4	Nuisances	1,900.00	

REPORT OF THE ATTORNEY GENERAL

County	No. Cases	Charge	Fine	Total
Keokuk	3	Bootlegging	900.00	3,700.00
	5	Nuisances	2,700.00	
	1	Manufacturing	100.00	
Kossuth	4	Bootlegging	650.00	1,150.00
	1	Nuisance	300.00	
	3	Manufacturing	200.00	
Lee	6	Bootlegging	1,000.00	10,750.00
	25	Nuisances	8,250.00	
	6	Manufacturing	1,000.00	
	1	Contempt	500.00	
	3	Writs of Abatement		
Linn				
Louisa	4	Bootlegging	400.00	1,575.00
	5	Nuisances	750.00	
	2	Manufacturing	150.00	
	3	Selling	275.00	
Lucas	2	Manufacturing	150.00	750.00
	2	Nuisances	600.00	
	5	Injunctions		
Lyon	2	Bootlegging	200.00	2,225.00
	5	Nuisances	1,500.00	
	1	Sentence—90 days		
	4	Manufacturing	325.00	
	1	Selling	50.00	
	2	Transporting	150.00	
	2	Injunctions		
	2	Writs of Abatement		
Madison	2	Nuisances	700.00	800.00
	1	Selling	100.00	
	2	Transporting—4 months		
	1	Bootlegging—4 months		
Mahaska	4	Injunctions		
	1	Nuisance—6 months		
Marion	11	Nuisances	5,000.00	6,900.00
	4	Sentences—18 months		
	3	Bootlegging	900.00	
	3	Transporting	1,000.00	
	1	Sentence—Eldora		
Marshall	3	Bootlegging	900.00	5,175.00
	3	Nuisances	700.00	
	5	Manufacturing	850.00	
	12	Selling	2,725.00	
	2	Sentences—90 days		

County	No. Cases	Charge	Fine	Total
Mills	3	Bootlegging	1,100.00	3,100.00
	1	Contempt	500.00	
	3	Nuisances	1,300.00	
	2	Selling	200.00	
	3	Sentences—1 yr.-9 mos.		
Mitchell	1	Bootlegging	100.00	1,400.00
	5	Nuisances	1,300.00	
Monona	16	Nuisances	3,600.00	4,100.00
	2	Bootlegging	200.00	
	1	Selling	300.00	
Monroe	2	Contempt	450.00	1,450.00
	8	Nuisances	1,000.00	
	10	Injunctions		
Montgomery	3	Bootlegging	350.00	2,750.00
	5	Nuisances	2,200.00	
	1	Possession	100.00	
	1	Transporting	100.00	
	3	Injunctions		
Muscatine	8	Manufacturing	1,000.00	2,400.00
	1	Sentence—30 days		
	3	Transporting	300.00	
	5	Nuisances	900.00	
	2	Selling	200.00	
	6	Injunctions		
O'Brien	2	Bootlegging	50.00	350.00
	1	Nuisance	300.00	
Osceola	1	Nuisance	300.00	400.00
	1	Manufacturing	100.00	
Page	4	Bootlegging	1,000.00	1,300.00
	2	Sentences—2 yrs.-6 mos.—		
	1	Nuisance	300.00	
	5	Injunctions		
Palo Alto	1	Nuisance	500.00	500.00
Plymouth	20	Nuisances	8,300.00	8,850.00
	3	Transporting	300.00	
	3	Bootlegging	250.00	
Pocahontas	8	Bootlegging	950.00	1,850.00
	3	Manufacturing	300.00	
	2	Nuisances	600.00	
Polk	48	Nuisances	10,550.00	19,050.00
	70	Manufacturing	7,300.00	
	19	Selling	1,200.00	
	104	Injunctions		

County	No. Cases	Charge	Fine	Total
Pottawattamie	14	Bootlegging	2,600.00	17,350.00
	3	Sentences—150 days		
	2	Contempt	350.00	
	45	Nuisances	14,400.00	
	3	Sentences—150 days		
	27	Injunctions		
Poweshiek	1	Nuisance	300.00	600.00
	1	Selling	200.00	
	2	Manufacturing	100.00	
Ringgold				
Sac	2	Manufacturing	100.00	450.00
	2	Bootlegging	350.00	
Scott				
Shelby	3	Bootlegging	750.00	1,072.50
	1	Transporting	322.50	
Sioux	5	Bootlegging	425.00	425.00
Story	7	Bootlegging	2,200.00	2,400.00
	1	Nuisance	200.00	
	1	Sentence—6 months		
Tama	9	Bootlegging	1,600.00	3,300.00
	5	Nuisances	1,600.00	
	1	Selling	100.00	
Taylor	1	Selling	125.00	1,725.00
	3	Manufacturing	1,200.00	
	3	Bootlegging	400.00	
	1	Injunction		
Union				
Van Buren	1	Selling	100.00	100.00
Wapello	1	Bootlegging	100.00	2,500.00
	5	Nuisances	2,400.00	
	24	Injunctions		
Warren	10	Nuisances	4,300.00	4,500.00
	3	Manufacturing	200.00	
Washington	12	Bootlegging	2,100.00	2,800.00
	3	Transporting	700.00	
	1	Selling—3 months		
Wayne	1	Bootlegging	200.00	600.00
	1	Nuisance	300.00	
	1	Selling	100.00	

County	No. Cases	Charge	Fine	Total
Webster-----	9	Bootlegging -----	2,450.00	
	5	Sentences—1 yr.6 mos.-----		
	19	Nuisances -----	8,450.00	
	3	Sentences—6 months-----		
	1	Contempt -----	650.00	
	18	Selling -----	2,825.00	
	18	Injunctions -----		14,375.00
Winnebago-----	2	Nuisances -----	600.00	600.00
Winneshiek-----	11	Bootlegging -----	1,200.00	
	4	Nuisances -----	1,450.00	
	1	Manufacturing -----	150.00	2,800.00
Woodbury-----	16	Nuisances -----	5,800.00	
	2	Contempt -----	550.00	
	154	Injunctions -----		
	3	Writs of Abatement-----		6,350.00
Worth-----				
Wright-----	3	Bootlegging -----	800.00	
	4	Nuisances -----	1,900.00	
	2	Selling -----	200.00	2,900.00
Total-----	1,802			\$292,072.70

SCHEDULE "H"

SPECIAL PEACE OFFICERS—SUMMARY OF WORK DONE IN CONNECTION WITH AUTOMOBILE THEFTS.

Automobiles recovered.....	241
Total valuation of automobiles recovered.....	\$201,400.00
Convictions for auto thefts.....	30
Indictments pending for auto thefts.....	12
Return to other states.....	10

SCHEDULE "I"

SHOWING NUMBER OF AUTOMOBILES REPORTED STOLEN AND
NUMBER REPORTED RECOVERED IN THE CITIES IN IOWA
FROM AUGUST 1, 1921, TO NOVEMBER 1, 1922.

Police Departments, State of Iowa	Stolen	Recovered
Ames.....	4	2
Burlington.....	9	---
Cedar Rapids.....	3	---
Council Bluffs.....	102	56
Creston.....	1	---
Davenport.....	38	3
Des Moines.....	760	623
Dubuque.....	1	3
Fort Dodge.....	2	---
Muscatine.....	6	---
Keokuk.....	1	---
Ottumwa.....	2	---
Sioux City.....	53	---
Waterloo.....	7	---
Totals.....	989	687

SCHEDULE "J"

SHOWING NUMBER OF AUTOMOBILES REPORTED TO THE BU-
REAU AS STOLEN AND NUMBER REPORTED RECOVERED
FROM AUGUST 1, 1921, TO NOVEMBER 1, 1922.

Automobiles stolen in Iowa, outside of the City of Des Moines, reported by co-operators.....	440	
Automobiles recovered in Iowa, outside of City of Des Moines, reported by co-operators.....		84
Automobiles stolen in Des Moines, Iowa, reported by Auto Theft Bureau, Des Moines, Police Department.....	760	
Automobiles recovered in Des Moines, Iowa, reported by Auto Theft Bureau, Des Moines, Police Department.....		623
Automobiles stolen outside of the State of Iowa.....	14,962	
Automobiles recovered outside the State of Iowa, reported by co-operators.....		2,903
Total number of automobiles reported stolen.....	16,162	3,610
Total number of automobiles reported recovered.....	3,610	
Total number of automobiles unrecovered in our files.....	12,552	

SCHEDULE "K"

SPECIAL PEACE OFFICERS—NUMBER OF CASES IN WHICH CON-
VICTIONS HAVE BEEN SECURED AND IN WHICH
SUCH OFFICERS ASSISTED.

Crime	Number of Convictions
Murder	28
Robbery	17
Assault with intent to commit great bodily injury.....	4
Carrying concealed weapons.....	4
Extortion	1
Cheating by false pretense.....	15
Conspiracy	8
Embezzlement	1
Forgery	7
Using mails to defraud federal court.....	2
Uttering forged instruments.....	1
Crimes relating to chastity.....	28
Breaking and entering.....	34
Bank burglary	23
Possession of burglary tools.....	2
Larceny	81
Receiving stolen property.....	10
Assisting prisoners to escape.....	2
Persons captured and returned to other states.....	22
City officials removed.....	9
Disturbing the peace.....	9
Unlawful assembly	70
Violations of injunctions—Federal court.....	4
Gambling	41
Liquor nuisance	90
Held to grand jury—Pending.....	106
Liquor injunctions issued.....	35
<hr/>	
Total	654

SCHEDULE "L"

SPECIAL PEACE OFFICERS—CONFESSIONS—NUMBER AND DIS-
POSITION OF CASES.

Crime	Disposition	Number
Breaking and entering.....	Plead guilty.....	45
Breaking and entering.....	Tried and convicted.....	7
Larceny.....	Plead guilty.....	52
Larceny.....	Tried and convicted.....	12
Murder—50 years.....	Plead guilty.....	1
Murder—Life.....	Plead guilty.....	2
Murder—Death sentence.....	Convicted.....	1
Larceny of automobile.....	Returned to other states.....	4
Rape—20 years Fort Madison.....	Plead guilty.....	2
Rape—20 years Anamosa.....	Plead guilty.....	1
Murder—Life.....	Convicted.....	3
Murder—Death sentence.....	Plead guilty.....	2
Extortion.....	Plead guilty.....	1
Robbery.....	Plead guilty.....	14
Murder—Indicted.....	Pending.....	2
Carrying concealed weapons.....	Plead guilty.....	3
Nuisance.....	Plead guilty.....	1
Bootlegging.....	Plead guilty.....	3
Operating gambling house.....	Plead guilty.....	2
Gambling.....	Plead guilty.....	17
Soliciting for purpose of prostitution.....	Plead guilty.....	1
Prostitution.....	Plead guilty.....	4
Cheating by false pretense.....	Plead guilty.....	7
Adultery.....	Plead guilty.....	3
Robbery with aggravation.....	Plead guilty.....	3
Using mail to defraud.....	Plead guilty.....	1
Driving automobile without owner's con- sent.....	Plead guilty.....	2
Receiving stolen property.....	Plead guilty.....	5
Assault to do great bodily injury.....	Plead guilty.....	3
Forgery.....	Plead guilty.....	7
Forgery.....	Convicted.....	2
Disturbing the peace.....	Plead guilty.....	9
Conspiracy.....	Plead guilty.....	4
Possession of burglary tools.....	Plead guilty.....	1
Breaking and entering.....	Paroled from bench.....	6
Broke jail before sentence.....	2
Serving time for other crimes.....	2
Confessions obtained for bank robbery.....	18
Total	255

SCHEDULE "M"

SPECIAL PEACE OFFICERS—INDICTMENTS PENDING.

STATE COURTS

Crime	Number
Cheating by false pretense.....	24
Larceny	37
Forgery	3
Robbery with aggravation.....	2
Conspiracy	6
Receiving stolen property.....	10
Robbery	4
Murder	4
Bootlegging	54
Rape	1
Wife desertion	1
Breaking and entering.....	30
Possession of burglar tools.....	2
Improper registration of auto.....	1
Assault with intent to commit great bodily injury.....	2
Embezzlement	2
Bank robbery	4
Assault with intent to commit murder.....	2
Gambling	1
Nuisance liquor	20
Operating gambling house.....	2
Exhibiting obscene pictures.....	2
Carrying concealed weapons.....	2
Total.....	216

FEDERAL COURT

Crime	Number
Manufacturing and bootlegging.....	31
Narcotics	1
Violation of injunction.....	3
Total.....	35

SCHEDULE "N"

BUREAU OF IDENTIFICATION—FINGER PRINT FILES—PHOTO-
GRAPH FILES—IDENTIFICATIONS MADE.—AUGUST
1, 1921, TO OCTOBER 1, 1922.

Number of finger print records from sheriffs.....	841
Number of finger print records from police.....	1,844
Number of finger print records from penal institutions.....	2,202
Number of finger print records filed—total.....	5,966
Number of files of persons wanted.....	1,711

Number of finger print files by crime.....	4,512
Number of finger print files alphabetically.....	5,966
Number of identifications made.....	411
Number of photographs filed.....	2,668

NOTE: Complete records are kept of all records of identification by counties, cities and states, also by races, color and sex.

SCHEDULE "O"

SUMMARY OF SOME FACTS NOT SHOWN IN PRECEDING SCHEDULES RELATIVE TO THE WORK OF THE BUREAU OF INVESTIGATION.

The department through its special peace officers assisted in cases in which penalties were inflicted as follows:

Death penalties	5
Life imprisonment	16
Total number of years of punishment imposed.....	2,204
Jail sentences imposed total number of months.....	122
Number of cases still pending.....	357
Number of cases on which convictions have been secured....	655
Amount of fines imposed.....	\$ 37,449.95
Number of identifications made.....	411
Number of finger prints filed.....	5,966
Number of files of persons wanted.....	1,711
Number of photographs filed.....	2,668
Number of automobile theft cards filed.....	16,162
Number of individual cards in letter file.....	1,802
Total property recovered.....	\$231,704.00

STATE OF IOWA
1922

FOURTEENTH BIENNIAL REPORT

of the

ATTORNEY GENERAL

for the

BIENNIAL PERIOD ENDING DECEMBER 31, 1922

Ben J. Gibson
Attorney General

Published By
THE STATE OF IOWA
Des Moines

125098

Brought into collection from the Ben and Missing

ATTORNEY GENERAL'S DEPARTMENT

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JOHN FLETCHERAssistant Attorney General
W. R. C. KENDRICK.....Assistant Attorney General
B. J. POWERS.....Assistant Attorney General
NEILL GARRETTAssistant Attorney General
WINOGENE HOBBSSecretary to Attorney General
MARY DAHLBERG.....File Clerk
FERN SEIDStenographer
MARY WARDStenographer

ATTORNEY GENERALS OF IOWA

David C. Cloud	1853-1856
Samuel A. Rice.....	1856-1861
Charles C. Nourse.....	1861-1865
Isaac L. Allen.....	1865-1866
Frederick E. Bissell.....	1866-1867
Henry O'Connor.....	1867-1872
Marsena E. Cutts.....	1872-1877
John F. McJunkin.....	1877-1881
Smith McPherson.....	1881-1885
A. J. Baker.....	1885-1889
John Y. Stone.....	1889-1895
Milton Remley	1895-1901
Charles W. Mullan.....	1901-1907
Howard W. Byers.....	1907-1911
George Cosson	1911-1917
H. M. Havner.....	1917-1921
Ben J. Gibson.....	1921-

SOME OF THE
IMPORTANT OPINIONS
OF THE
ATTORNEY GENERAL
FOR
Biennial Period
1921-1922

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OPINIONS RELATING TO LEGISLATIVE MATTERS

AUTHORITY OF RETRENCHMENT AND REFORM COMMITTEE OVER PHARMACY COMMISSION—BOARD OF PAROLE

The retrenchment and reform committee has no authority to extend the time in which the members of the pharmacy commission may be allowed to perform the duties of their office, nor can the said committee limit the time in which the members of the board of parole may perform the duties of their office.

March 16, 1922.

Hon. Chester W. Whitmore, Chairman Retrenchment and Reform Committee: We have your letter in which you state:

"Attached hereto find letter from the commissioners of pharmacy, of date January 4, 1922, asking that this committee extend by thirty days the period of ninety per annum limit, by line 5 of section 28, chapter 340 of acts of the 39th general assembly, for their employment."

The letter from the commissioners of pharmacy attached to your communication states:

"We respectfully ask your favorable consideration for an extension of thirty (30) days for the three members of this department in order that we may complete our year's work ending July 1, 1922.

"The 39th G. A. made provision for only 90 days for year's work for each commissioner, and we find that we have now used up about 60 days for each member in the past six months, and unless such an extension is granted we find that our 90 days will have expired long before the time for the June examination to be held at Iowa City, which all departments hold there at the close of the college year, and the next six months is the heaviest part of our work, as we will have held three examinations before July 1."

You then further propound the following question:

"While on this subject, the committee asks your opinion as to what authority of law, if any, it has to limit the time and expense charged by members of the board of parole under section 34 of chapter 340, acts of the 39th general assembly."

The retrenchment and reform committee has been in existence for many years. The provision with reference to the membership of the committee has been changed from time to time, but the duties of the committee have remained largely the same since the adoption of the code of 1897.

Section 182 of the code provides as follows and defines the duties of the committee:

"Said committee shall examine into the reports and official acts of the executive council and of each officer, board, commission and department of the state at the seat of government, in respect to the conduct and expenditures thereof, and the receipts and disbursements of public funds thereby. It shall report to the general assembly a joint resolution fixing the number of employes, and the salary of each, for the several offices, boards, commissions and departments for the ensuing biennial period, and recommend such appropriations and legislation as shall promote public interests and an efficient and economical administration of the affairs of the state."

Your committee has been also given power to summon and examine witnesses, administer oaths, compel the production of books, papers and evidence, and to punish for contempt, etc., section 183 of the code. In addition thereto your committee has been given authority under the provisions of chapter 340, acts of the 39th general assembly, commonly designated the salary act, to reduce, limit or to make other disposition of the salary to be paid employes of the state. It has been and still is the opinion of this department that your committee has no authority to in any way change the salary of an officer of the state, and by the use of the term "officer" we refer to those who are occupying offices created by statute and which require that the one holding the same exercise discretion in the performance of the duties of such office. The members of the pharmacy commission are required to exercise discretion, and unquestionably the members of such commission are officers of the state of Iowa. The legislature has fixed the per diem of the members of this commission at \$10.00 per day, "*not exceeding in the year, ninety days.*"

In the opinion of this department under date of July 13, 1921, it was held that the committee had authority to regulate the salary of employes. We did not pass in that opinion upon the matter of regulating the salary of the officers created by statute. In the instant case we are dealing with officers, and it is the opinion of this department that you have no authority to in any wise adopt any resolution changing or affecting the salary of such officers, or to change in any manner the number of days allowed by statute to any officer or commission to perform his or its duties. This view of the statute relative to the power of your committee would prevent you from granting the request of the commissioners of pharmacy.

What we have said with reference to the pharmacy commission is equally applicable to the inquiry you have made with reference to your authority over the members of the board of parole. The members of this board are officers of the state of Iowa. They are clothed with discretion, and since the legislature has not seen fit to limit the number of days in which they shall be required to perform their duties, we are impressed with the thought that you have no power to limit the time in which they may perform them.

The views herein taken are in conformity with the previous opinions of this department wherein it was held that the retrenchment and reform committee had no power to increase the salary of the secretary of the state board of health. Report of attorney general, 1919-1920, page 78. Also see opinion to dairy and food commissioner, report of attorney general, 1917-1918, pages 3, 5 and 9, holding that the salary of the deputy dairy and food commissioner could not be increased by the retrenchment and reform committee.

BEN J. GIBSON, *Attorney General*,

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

AUTHORITY OF RETRENCHMENT AND REFORM COMMITTEE

The retrenchment and reform committee may authorize and provide additional help to the various state departments, but it cannot create new offices. The appropriation of \$100,000 annually to aid standard schools cannot be used to defray expenses of an inspector of standard schools.

December 7, 1921.

Hon. P. E. McClenahan, Superintendent Public Instruction: We desire to acknowledge receipt of your request for an opinion upon the following proposition:

"May the retrenchment and reform committee legally authorize the appointment of a supervisor or inspector of one-room schools for the purpose of carrying out the provisions of chapter 364, acts of the 38th general assembly, and authorize the payment of the salary or compensation, including traveling expense of such employe out of the appropriation for such schools as provided in section 8 of said chapter if in its judgment it finds such an employe necessary to carry out the provisions of this chapter?"

Your inquiry contains two separate provisions:

(1) Whether the retrenchment and reform committee may legally authorize the appointment of a supervisor or inspector of one-room schools.

(2) Whether the fund provided for in chapter 364, acts of the 38th general assembly may be used in paying the salary of such appointee and his traveling expenses.

As we view the provisions of section 40 of chapter 340, acts of the 39th general assembly, the retrenchment and reform committee may authorize and provide employes and extra help for the various offices and departments of the state of Iowa.

The statute, however, does not authorize the retrenchment and reform committee to create new offices and appoint persons thereto. Its authority is limited to providing extra help and employes for the various departments.

The second proposition leads us to an inquiry as to the use to which the funds provided for in chapter 364, acts of the 38th general assembly, may be put to. A close study of the act will disclose that it relates to the standardization of rural schools.

The first section defines what shall constitute a standard school.

The second provides the minimum requirements and makes it the duty of the superintendent of public instruction to prescribe and promulgate requirements he deems necessary for standard schools as to the minimum requirements for standards of teaching, general equipment, sanitation, library and safety of grounds and kindred requirements.

The third section provides for the making of yearly reports by the county superintendent to the superintendent of public instruction.

The fourth section relates to state aid and provides the amount to be allowed each standard school for each pupil who has attended schools in said district for at least six months of the previous year.

The fifth section relates to the grade of certificates the teacher of such school must hold and for the minimum average daily attendance.

The sixth section as does the fourth relates to the expenditure of funds and authorizes the superintendent of public instruction to furnish the suitable door plate or mark of identification to be placed upon each standard school.

The seventh provision provides for the disbursement of the funds to be paid schools of a standard grade. It fixes the prerequisites for the

issuance of the warrants and then provides how the proceeds of the warrant shall be distributed by the school corporation.

The act then provides in section eight for an appropriation of one hundred thousand dollars annually to carry out the provisions of the act in question and it further provides that the "fund if not all used shall be allowed to accumulate and shall not be turned back into the state treasury, *nor used for any purpose other than herein provided.*"

There is absolutely no provision in this act for the payment of any sum whatsoever for inspection of a standard school. The purpose for which the funds provided for is to be expended is definitely fixed in the act and it is the view of this department that the retrenchment and reform committee have no authority to authorize an expenditure of any portion of the fund thus provided for for any purpose whatsoever. The statute itself fixes the only use to which such funds may be devoted and is conclusive upon the matter.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

RIGHT OF GOVERNOR TO RECALL BILL

The governor has no right to return a bill to house originating same after it has passed both houses and been sent to him to be signed. Discussion of legislative authority to recall the bill from governor before it is signed.

April 2, 1921.

Hon. N. E. Kendall, Governor of Iowa: In your letter of April 2, 1921, you ask for an opinion from this department upon the following proposition:

"After a bill, originating in the house, has passed that body, been messaged to the senate, passed there, returned to the house, signed by the president of the senate and the speaker of the house, properly enrolled and presented to the governor, can it be recalled by the house upon resolution adopted by it?"

In the enactment of laws the legislature and the executive act together. The following process must be followed:

A bill must be properly originated, must pass both houses, must be signed by the speaker of the house and the president of the senate, and then must be presented to the governor. The governor has the right to either sign the bill or to return it to the house in which it originated.

Section 16 of article III of the constitution covers this matter. We quote it.

"Every bill which shall have passed the general assembly, shall, before it becomes a law, be presented to the governor. If he approve, he shall sign it; but if not, he shall return it, with his objections, to the house in which it originated, which shall enter the same upon their journal, and proceed to reconsider it; if, after such reconsideration, it again pass both houses, by yeas and nays, by a majority of two-thirds of the members of each house, it shall become a law, notwithstanding the governor's objections. If any bill shall not be returned within three days after it shall have been presented to him (Sunday excepted), the same shall be a law in like manner as if he had signed it, unless the general assembly, by adjournment prevent such return. Any bill submitted to the governor for his approval during the last three days of a session of the general assembly, shall be deposited by him in the office of the secretary of state within thirty days

after the adjournment, with his approval, if approved by him, and with his objections, if he disapproves thereof."

It will be observed further, that there is no rule of the house or of the senate which provides that one of the houses can recall a bill from the governor without the consent of the other house. It will be observed further that there is no statute in the state which so provides. We must look then alone to the provisions of the constitution, to parliamentary procedure and to the decisions of the court.

We have already quoted one section of the constitution and we will not quote the other sections applicable to the enactment of laws for the very simple reason that they are more or less inapplicable to the situation presented, however, we may say, that there is no provision in the constitution which authorizes the recall of a bill by the house originating the bill without the consent of the other house after the same has been presented to the governor. On the other hand, the constitutional provisions seem to specify that after this has been done there seems to be but one process to follow and this has been quoted.

This very proposition has been determined in the case of the *People vs. Devlin*, 33 N. Y. 269; 88 Amr. Dec. 377, in which the court held flatly that "when a bill has passed both branches of the legislature and has been signed by the proper officers and sent to the governor for approval, it cannot be recalled except by the joint action of both. If the governor sends the bill to either house on the request of such house any action it may take thereon is a nullity."

The court in this case discusses this matter at length and points out the absolute necessity for such a holding.

It may be said that if the governor acting out of courtesy should acquiesce in the request for a return of the bill would such request confer any power upon the house to act further upon it? I am frank in saying I do not believe that the house would have any power to act upon the measure without the consent and concurrence of the senate. This would be true, in my opinion, even if the governor had intended to allow them to so act. The question is not acquiescence, it is not courtesy, it is solely a question of power. The power conferred upon each branch of the legislature and upon the governor is specific. No authority is shown to be given for such an act either by the rules of the legislature, by the statute or by the constitution.

In our search of parliamentary procedure we have been unable to find a single precedent to sustain such a contention. In fact, it has been the universal custom in the congress of the United States to recall bills from the president only by the concurrent action of both the house of representatives and the senate. We do not take the time to cite these precedents, suffice it to say that there are thousands of such precedents in the several states and in the national congress.

It would seem to be unnecessary to point out the reason for the matter, but it will be observed that after a bill has passed both houses that it is the joint act of the legislature, not the act of one branch of the legislature. To permit the house to exercise the right would give the house power to nullify the joint action of the legislature, reversing the case.

Assuming that the senate was seeking to recall the measure after it had

been adopted by the legislature and properly signed by the speaker of the house and by the president of the senate the result would be that twenty-six members of a legislature consisting of one hundred fifty-eight members could nullify a joint action of the entire legislature.

If the right is true in one instance it would be true in all, and if the joint action of the legislature could be set aside in an instance such as you suggest it could be set aside in all instances, which would be contrary to the very principles of legislative action.

We find in our own files that this matter has been determined by previous attorneys general throughout a long period of years, and that they have uniformly held as I am compelled to hold in this instance.

It follows therefore, that after a bill has been presented to the governor the house originating the measure cannot without the consent of the other body recall the same, especially where objection has been raised.

BEN J. GIBSON, *Attorney General.*

OPINIONS RELATING TO THE EXECUTIVE COUNCIL

EXECUTIVE COUNCIL MAY ACCEPT SIDEWALK CERTIFICATES FROM INVESTMENT COMPANIES

The executive council is authorized to accept sidewalk assessment certificates as security for the faithful performance of contracts entered into by corporation operating under the provisions of chapter 13-a of title IX of the code.

March 8, 1922.

Hon. Glenn C. Haynes, Auditor of State: I desire to acknowledge receipt of your recent inquiry for an opinion upon the following proposition:

"Is the executive council authorized to accept sidewalk assessment certificates as security for faithful performance of all contracts entered into by associations subject to the provisions of chapter 13-a of title IX of the code?"

The chapter of the code above referred to relates to the regulation of certain persons, firms and corporations, etc., engaged in the business of selling shares of stock, contracts, etc., upon the partial payment or installment plan.

Before such a company shall engage in business in this state the law requires that it secure the approval of the executive council to transact business and that

"Before any association shall be authorized to transact business contemplated by this chapter it shall deposit with the auditor of state a bond approved by the executive council, guaranteeing the faithful performance of all contracts entered into by such association or securities of the kind designated in subdivisions one, two, three, four and five of section 1806 of the code as amended by chapter 66, acts of the 28th general assembly, or such other securities as shall be approved by the executive council in the amount of \$25,000, * * *."

Section 1806, supplement, 1913, above referred to relates to the securities which life insurance companies are required to deposit with the state and the third paragraph thereof states that

"bonds or other evidences of indebtedness of any county, city, town or school district within the state or any other state, drainage district bonds of this state, improvement certificates issued by any municipal corporation of this state such certificates being a first lien upon real estate within the corporate limits of the municipality issuing the same, where such bonds or other evidences of indebtedness are issued by authority of and according to law and bearing interest, and are approved by the executive council; * * *"

may be deposited with the state and held in trust for the purpose of fulfilling any contract in the policies or certificates of such companies.

It will be observed that a sidewalk certificate when duly issued by a city comes within the provisions of the section above mentioned and we desire to advise you that it is the opinion of this department that the executive council may receive the same as a security of a company operating under the provisions of title IX of chapter 13-a of the supplement, 1913.

BEN J. GIBSON, *Attorney General.*

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

**AUTHORITY OF EXECUTIVE COUNCIL TO ASSESS TRANSMISSION
LINES FAILING TO MAKE REPORTS**

Transmission lines omitting to report lines subject to taxation may be assessed by the executive council and the assessment certified to the county auditor.

January 9, 1922.

Hon. N. E. Kendall, Governor of Iowa: Your letter of the 28th ult. addressed to Attorney General Ben J. Gibson has been referred to me for attention.

Complaint has been made that certain public utility corporations doing business in Dickinson county failed to furnish to the executive council of Iowa all the mileage of their transmission lines, and the complainant asks how to proceed to make said omitted property subject to taxation.

Section 1346-k, supplemental supplement, provides that only that part of transmission lines located outside the limits of a city or town shall be assessed by the executive council. That portion of said lines located within the limits of cities and towns is assessed by the taxing officials of said cities and towns.

Section 1346-k reads as follows:

"That every company owning or operating a transmission line or lines for the conduct of electric energy and which line or lines are located within the state, and which said line or lines are also located wholly or partly outside cities and towns, shall on or before the first day of May in each year, furnish to the executive council of the state of Iowa a verified statement as to its entire line or lines within this state, when all of said line or lines are located outside cities and towns, and as to such portion of its line or lines within this state as are located outside cities and towns, when such line or lines are located partly outside and partly inside cities and towns, showing:

"First. The total number of miles of line owned, operated or leased, located outside cities and towns within this state, with a separate showing of the number of miles leased;

"Second. The location and length of each division within the state and the character of poles, towers, wires, sub-station equipment and other construction of each such division, designating the length and portion thereof in each separate county into which each such division extends."

Section 1346-m, supplemental supplement, requires the executive council, at its meeting on the second Monday in July of each year, to assess such transmission lines. In making the assessment the executive council shall ascertain the value per mile of such transmission lines by dividing the total value by the number of miles of line located outside of cities and towns. The council will then ascertain the taxable value of such lines by taking one-fourth of the actual value and then multiply the taxable value by the number of miles of line of each company transacting business in the respective counties, and the taxable value as thus found shall be certified by the executive council to the several county auditors of the respective counties into, over or through which said line or lines extend.

Section 1346-o, supplemental supplement, then provides that the board of supervisors of the respective counties into, over or through which said lines extend shall, at the first meeting after the aforesaid statements have been received by the county auditor, spread the levy by entering the same in its minute book and making an order stating the length of the lines and the assessed value of the property of each of said companies in

each township or lesser taxing district outside of cities and towns. The county auditor shall then transmit a copy of said order to the trustees of each township and to the proper taxing boards in lesser taxing districts into which the line or lines extend outside of cities and towns.

If the entire tax has been paid, I have no doubt that the executive council would have power to reassess the property of the companies in question. In the event of a reassessment, it would be necessary to have facts showing that a certain number of miles of lines had not been returned by the companies for assessment. It would also be necessary to give the companies interested notice of the hearing. The council could then reassess the property of the respective companies who failed to report their entire mileage and certify the taxable value to the county auditor of the respective counties through which the lines extend. The board of supervisors could then meet and spread the levy.

However, inasmuch as the council has already assessed the lines of the companies in question for the year 1921 and certified the taxable value to the respective county auditors, and the various boards of supervisors have spread the levy and the books for all have been made up and the tax list is in the hands of the county treasurer, it would seem to me to be impracticable to attempt a reassessment at this time. I would suggest, however, that this matter be kept in mind and when the transmission lines are assessed this year that you call for the facts alleged in Mr. Smith's letter to you, and if they are substantiated, the council can assess the property that was omitted in your assessment in 1921.

As to the telephone line in question, practically the same law would apply as applies to electric transmission lines, except that the council assesses the entire mileage of telephone lines regardless of their being located inside or outside of the limits of cities and towns. Therefore, what has been said with reference to assessing the omitted transmission lines would equally apply to the assessment of the omitted telephone lines—namely, that this matter be kept in mind when the council is assessing the property of the companies in question for the year 1922 and then assess the lines according to the facts available.

BEN J. GIBSON, *Attorney General*.

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

DECORATING OF STATE HOUSE

In absence of appropriation of funds for such purpose, the executive council has no authority to spend money for decorating state house on occasion of Imperial Council of Shrine conclave.

May 17, 1921.

Hon. R. E. Johnson, Secretary Executive Council: I have your letter of the 16th inst. in which you ask this department for an opinion upon the following question:

"A proposition has been submitted to the executive council for the decorating of both the interior and exterior of the state house for the week that the Imperial Council of the Shrine meets in Des Moines. The council are of the opinion that as the meeting is to be a national affair, that some decorating should be done and to that end, they ask if in your opinion any funds available for the use of the council may legally be used to defray the expenses incident to such decorating."

Section 24 of article 3 of the constitution of Iowa provides as follows: "No money shall be drawn from the treasury but in consequence of appropriations made by law."

Section 31 insofar as applicable to the question presented provides as follows:

"No public money or property shall be appropriated for local or private purposes, unless such appropriation * * * be allowed by two-thirds of the members elected to each branch of the general assembly."

I am unable to find any act of the legislature appropriating money for the purpose referred to in your letter and there is no general appropriation for the use of the executive council which would authorize the expenditure of any funds now appropriated for such purpose. I am, therefore, of the opinion that no funds appropriated for the use of the executive council may be regularly expended in the decoration of the state house on the occasion of the meeting of the Imperial Council of the Shrine.

BEN J. GIBSON, *Attorney General*.

By B. J. FLICK, *Assistant Attorney General*

SALE OF LAKES AND LAKE BEDS

Right of executive council to sell under chapter 2-b, title XIV, 1915, supplement as amended by chapter 203 of 38th general assembly considered.

April 14, 1921.

Hon. R. E. Johnson, Secretary of Executive Council: Your letter of March 30 addressed to the attorney general with request for an opinion has been referred to me for answer. You state:

"The executive council desire an opinion as to whether or not they may offer for sale, lake beds that have been previously drained, taking into consideration the law as it appears in chapter 2-b, title IV of the 1913 and 1915 supplement to the code and chapter 203 of the acts of the 38th general assembly."

Chapter 2-b of title XIV of the 1913 supplement granted to the executive council the power to lease, sell and convey any lake or lake bed within the state either before or after draining the same and prescribed the method of procedure to be followed in making such sale. Section 2900-b of the 1915 supplement repealed chapter 2-b of title XIV of the 1913 supplement in part, but provided that the repeal should not apply to certain lakes and lake beds therein excepted. Chapter 203 of the acts of the 38th general assembly amended section 2900-b of the 1915 supplement by granting express authority to the executive council to sell or lease the excepted lakes referred to in said amended section and directing the manner in which the net proceeds should be disbursed so that section 2900-b now reads as follows:

"The law as it appears in chapter 2-b, title XIV of the supplement to the code, 1913, be and the same is hereby repealed; provided, however, that this repeal shall not apply 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 \$500.00 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, and such excepted lake beds may be sold or leased by the executive council as provided in said chap-

ter, the net proceeds to be disbursed in the same manner as is provided in relation to the disbursement of proceeds received from similar sources by chapter 246 of the laws of the 37th general assembly."

From what has been said it will be observed that in enacting section 2900-b of the 1915 supplement to the code the legislature expressly excepted certain lakes and lake beds from the operation of the repeal, thereby preserving in the executive council the authority to sell the excepted lakes, and in enacting chapter 203 of the laws of the 38th general assembly expressly authorized the executive council to sell or lease such excepted lakes.

It is the opinion of this department that the legislature had the power to make the exceptions that it did in 2900-b from the operation of the repeal therein enacted and to add thereto the provisions of chapter 203 of the 38th general assembly.

It will appear, therefore, that the executive council may offer for sale and sell lake beds, which, under the authority of the executive council had been already drained prior to the taking effect of chapter 2-b of title XIV of the 1915 supplement and also to sell lake beds, in the draining of which the sum of \$500.00 had been in good faith expended prior thereto.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

CONTROL OF STATE OVER LAKESHORE

Land lying between meandered line and high water mark of non-navigable lakes belongs to state, and cottages built on that land without consent may be removed in a suit by the state.

April 1, 1921.

Hon. R. E. Johnson, Secretary Executive Council: We have your communication, enclosing a letter from E. E. Clark of Spirit Lake, Iowa, in which an opinion from this department is requested upon the following state of facts:

"There is a cottage located on shore of Spirit Lake, which is almost wholly below the meandered line and almost entirely on state land."

It is then asked:

"Is the removal of this cottage a matter wholly within the jurisdiction and control of the executive council of Iowa?"

I can find no statute conferring upon the executive council any jurisdiction in matters of this kind.

It is the established law of this state that the title of the land lying between the meandered line of non-navigable lakes and the water's edge, that is, high water mark, is in the state. *Schlosser vs. Cruickshank*, 96 Iowa, 414; *State vs. Jones*, 143 Iowa, 398.

Any persons unlawfully appropriating state land and erecting buildings thereon are subjects to an injunction restraining the further unlawful use of state land and the removal of said buildings. This suit should be brought in the name of the state by the attorney general.

Therefore, the question propounded by Mr. Clark should be answered in the negative.

BEN J. GIBSON, *Attorney General*,

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

ACCEPTANCE OF GIFT OF LAND BY EXECUTIVE COUNCIL

Donations of real estate for park purposes may be accepted by the executive council subject to certain conditions which are lawful, but cannot be accepted under all conditions.

March 4, 1921.

Hon. R. E. Johnson, Secretary Executive Council: In the letter of February 18, 1921, I am requested to give an opinion upon the following question:

"May the council for and on behalf of the state accept donations of real estate to be used for park purposes, in an instance where certain conditions or restrictions for the use of said land is made a part of the conveyance?"

This question involves the construction of the following sections, being sections 2903 and 2904 of the code:

"A gift, devise or bequest of property real or personal, may be made to the state, or to any county or other municipal corporation, to be held in trust for and applied to any specified purpose within the scope of its authority, but the same shall not become effectual to pass the title in such property unless accepted by the executive council in behalf of the state, or the governing board or body in behalf of a municipal corporation, as the case may be."

"If gifts are made to the state or a county or municipal corporation in accordance with the preceding section, for the benefit of an institution thereof, the property, if accepted, shall be held and managed in the same way as other property of the state, county or corporation acquired for or devoted to the use of such institution; and any conditions attached to such gifts shall become binding upon the state, county or corporation upon the acceptance thereof."

The following sections of the code, relating to parks, are also to a certain extent applicable to a consideration of this question:

"The title to all lands purchased or donated for park or highway purposes under the provisions of this act shall be taken in the name of the state and if thereafter it shall be deemed advisable to sell any portion of the land so purchased the proceeds of such sale shall be placed to the credit of the said fish and game protection fund to be used for such park purposes, except that on request of any of the donors of the fund with which such land was purchased the amount contributed by the donor making such request shall be refunded to such donor without interest, provided that application for such refund must be made within six months from the date of the sale of such lands, and provided also, that no such lands shall be sold except in compliance with legislative enactment designating specifically the lands to be sold."

"The executive council is empowered and authorized on behalf of the state to receive donations of land for either park or highway purposes in conformity with the provisions of this act, and lands so donated shall not be sold, and if abandoned by legislative enactment, shall revert to the original owner."

In determining this proposition two questions are involved. First, does the executive council have authority to accept donations of real estate for park purposes subject to any conditions, and second, does the executive council have authority to accept donations of real estate for park purposes subject to all conditions. As to the first of these questions, namely, as to whether or not donations may be accepted subject to any condition, there is no question as to the law. If such conditions are in themselves lawful, and if they are conditions which may be properly

accepted under the statutes of this state relating to parks, then the executive council would undoubtedly have authority to accept the donations subject to such conditions. In this connection it is submitted that each particular case must depend upon its own particular facts and the provisions of the condition or conditions a part of the conveyance. For that reason it is impossible to determine the authority in a particular instance. If a general rule were to be laid down it might be said that if the condition is one which the executive council might enter into independent of the question of the conveyance itself then they would undoubtedly have authority to accept subject to such condition; otherwise not. It is hardly necessary from what has been said to further consider this matter. It will become apparent to you that the executive council does not have authority to accept donations of real estate to be used for park purposes subject to conditions of every kind. It is easy to imagine conditions which are illegal in their nature. Under such circumstances the donations could not be accepted. There are other conditions which are lawful in their nature and yet such that the executive council would not be permitted to enter into on behalf of the state of Iowa. Under such circumstances the executive council would not be authorized to accept the conveyance subject to such conditions.

It will therefore be apparent, first that the executive council may accept donations of real estate for park purposes subject to certain conditions which are lawful and the terms of which the council would under the law be authorized to accept on behalf of the state as a contract; second, the executive council cannot accept donations of real estate subject to all conditions but only as to those conditions which as stated, are lawful and which they have authority under the statutes, to accept.

We would suggest that where a donation is offered subject to said conditions that it would be advisable to consider each particular case from the facts and circumstances of such case rather than to depend upon a general rule.

BEN J. GIBSON, *Attorney General.*

WHEN EXECUTIVE COUNCIL MAY GRANT BOARD OF HEALTH AUTHORITY TO EMPLOY ADDITIONAL HELP

Executive council has authority to authorize board of health to employ assistant sanitary engineer. The executive council has no authority to authorize board of health to employ, permanently, assistant sanitary engineer. May do so for certain specific purposes, temporary employment.

February 26, 1921.

Hon. R. E. Johnson, Secretary Executive Council: In answer to your recent letter requesting an opinion upon the following question:

"Has the executive council authority to employ an assistant sanitary engineer in the office of the board of health?"

Section 2565 of the code, defining the powers of the board of health, provides in part as follows:

"The board shall have charge of and general supervision over the interests of the health and life of the citizens of the state; * * * 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."

Section 2569-a of the 1913 supplement to the code provides as follows:

"In any case where five or more citizens in any locality in this state present a petition to the state board of health signed by such citizens setting forth complaint regarding sanitary conditions in their locality, it is hereby made the duty of the state board of health to use all means at its command to make special effort to improve the sanitation and health conditions and precautions in such localities of this state. If the local board of health should fail to carry out the directions of the state board of health, the state board of health may employ the necessary assistants to carry out the provisions of this act."

Under the provisions of the foregoing sections of the code and supplement, it is apparent that conditions might arise under which the employment of an assistant sanitary engineer for temporary purposes might become imperative.

Section 2564-a of the supplement to the code provides as follows:

"That all appropriations or provisions hereafter to be made or which have been made the state board of health for public health purposes of whatever nature or character, shall be expended under the immediate supervision and direction of the executive council of the state, * * *

Under the provisions of the last quoted section, it is our opinion that the executive council may authorize the employment of an assistant sanitary engineer for specific purposes for carrying out the duties imposed upon the state board of health by the other provisions of the law, but that such employment would only be authorized for temporary purposes in cases of emergency arising under the provisions of the statutes first above quoted and under the authority of chapter 388, acts of the 38th general assembly if it is conceivable that the services of a sanitary engineer would be required in carrying out the provisions of section 9, section 105, section 106, and section 108, of senate file 475, acts of the 38th general assembly, which is chapter 123 of the acts of the 38th general assembly and is denominated the "housing law of Iowa."

Chapter 272 of the acts of the 38th general assembly insofar as applicable to the question presented by you, is as follows:

"Section 1. 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 herein fixed.

State board of health * * One sanitary engineer, salary not to exceed \$2500.00 * * *

"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. * * **

Assuming that your question is as to whether or not the executive council may authorize the employment permanently of an assistant sanitary engineer in the office of the state board of health, and construing all of the sections above quoted together, it is our opinion that your question would be answered in the negative. The provisions of chapter 272 indicate clearly that the employment for the several departments

for which appropriations are therein made, are limited to the employes therein named.

We conclude therefore that the only purpose for which an assistant sanitary engineer could be employed in the office of the board of health, under the authority of the executive council, would be for temporary employment in carrying out the provisions of the law with relation to sanitary investigations, as above indicated.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

OPINIONS RELATING TO ELECTIONS

NOMINATION OF MEMBER OF BOARD OF SUPERVISORS

In district comprising four or five townships of county candidate receiving largest number of votes by voters of district is nominated although less than 35 per cent of the total.

June 26, 1922.

Mr. Clarence D. Roseberry, County Attorney, Le Mars, Iowa: Your letter of June 13 addressed to the attorney general has just been called to my attention.

You state that a party running for the office of supervisor in one of the districts of Plymouth county had three opponents for the nomination. He secured a plurality vote but only about 33 per cent of the total vote cast for that office. The district comprises four or five of the townships, but does not represent the entire county. You desire to know whether or not the 35 per cent of the votes cast for such an office is necessary to nomination or whether it is deemed that a plurality is sufficient in a supervisor district.

Your question is answered by the provisions of section 1087-a19, supplement to the code, 1913. That section provides in part as follows:

"The candidate or candidates of each political party for each office to be filled by the voters of any subdivision of a county having received the highest number of votes shall be duly and legally nominated as a candidate of his party for such office."

In our opinion a candidate for supervisor in a district less than a county voted for by the residents of such district receiving the highest number of votes cast at the primary is the nominee of the party for that office even though the total vote received by him is not 35 per cent of the entire vote cast for the office. The district to be represented by such candidate is in effect a subdivision of the county.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

HOW TO DETERMINE 35 PER CENT OF VOTE WHEN TWO ARE TO BE ELECTED

Where vote is for two to fill two offices nomination is determined by taking one-half total vote cast and computing 35 per cent of one-half of such total vote.

June 26, 1922.

Mr. W. A. Newport, Assistant County Attorney, Davenport, Iowa: Your letter of June 6 in which you request the opinion of this department on the vote which each candidate for board of supervisors voted for in a county is required to receive where the names appear in same column on the ballot with instructions to vote for two has just been called to my attention.

I note that you have already advised that the manner in which to arrive at how many votes have been cast for each office is to take the

total number of votes cast for the two offices, divide in half and each candidate would be required to receive 35 per cent of one-half of the total vote cast for the two offices.

It is our opinion that your advice in this matter is correct.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

DELEGATES TO COUNTY CONVENTION

When precinct allowed three delegates and only one elected two old delegates hold over. If not determined by lot convention to pass on credentials and determine who shall sit. One delegate may cast vote of entire delegation.

June 26, 1922.

Mr. W. H. Tedrow, County Attorney, Corydon, Iowa: Your letter of June 24 addressed to Mr. Gibson has just been referred to me for attention. You state:

"We have a delicate situation here in regard to our nomination for sheriff. There are five candidates in the field, and it will be settled in the convention as neither of them received the 35 per cent required by law.

"One precinct has three delegates, at the primary only one was elected.

"Section 1087-a25 says: 'The term of office of such delegates shall begin on the day following the final canvass of the votes by the board of supervisors, and continue for two years and until their successors are elected.'

"Same section says: 'If any precinct shall not be fully represented the delegates present from precinct shall cast the full vote thereof, but there shall be no proxies.'

"Now, if the one delegate comes will he have the power to cast the full vote of his delegation? Will the delegates elected two years ago have a right to a voice in the convention?

"Please write me a short opinion on this situation, for the nomination of a sheriff might depend on this voice in the convention."

The situation presented is indeed a peculiar one. There is no doubt in the mind of the writer that the delegate elected at the last convention has a right to a seat in the convention. The serious question is as to who shall be the other two delegates to sit with him as representatives of his precinct. Since there seems to be no provision of the law governing the situation it seems to me that it would be a good idea for the old delegates, two of whom will hold over, to determine by lot among themselves the two that shall sit with the one elected at the last primary. If this cannot be adjusted in an amicable manner we assume that it would be the duty of the convention to pass upon the credentials of the three old delegates and determine who is to sit in the convention with the delegate elected at the last primary.

There is no doubt in our minds that the one delegate if he is in the convention alone representing his precinct would have authority to cast the vote of his entire delegation as the statute plainly so provides.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

DELEGATES TO COUNTY CONVENTION

When party central committee fails to fix number of delegates to county convention, county auditor does and uses own discretion as to number.

May 22, 1922.

Mr. C. A. Palmer, County Auditor, Waukon, Iowa: Your letter of the 11th inst. addressed to Attorney General Ben. J. Gibson has been referred to me for reply.

You ask for an opinion from this department with reference to the authority of the county auditor to fix the number of delegates to the county convention in the event the respective party county central committees fail to fix the number and file a statement thereof in the office of the county auditor. Also, upon what vote and in what ratio the number of delegates should be fixed.

The statute covering your question will be found in section 1087-a25 of the supplement to the code, 1913, the portion material to a correct determination of your question being as follows:

"In each county there shall be held in each year in which a general election in November is to take place a county convention of each political party. Said county convention shall be composed of delegates elected at the last preceding primary election, and shall be held on the fourth Saturday following the primary election, convening at 11 o'clock A. M. The number of delegates from each voting precinct shall be determined by a ratio adopted by the respective party county central committees, and shall be thus determined and a statement designating the number from each voting precinct in the county filed in the office of the county auditor at least thirty days before the primary election; if not so done, the auditor shall fix the number. * * *"

From the foregoing statutory provision, it will be observed that no definite ratio is prescribed by statute. Neither does the statute prescribe what vote is to be taken as the basis, whether the vote for president or the vote for governor, or any other officer.

The statute clearly contemplates that the respective party county central committees will meet and select such number of delegates from each precinct in the county as they may deem best. The statute leaves it discretionary with the county central committees to determine the number of delegates to the county convention. In determining that number, it is fair to assume that the respective party county central committees will use good judgment and ordinary common sense and select such number as will be fully representative of each voting precinct, but avoid selecting such a large number as to make the convention unwieldy.

In the event the respective party county central committees fail to select the number of delegates to the county convention and file a statement thereof with the county auditor, then it becomes the duty of the county auditor to fix the number. In fixing that number the county auditor uses the same discretion, and in exercising that discretion it is also fair to assume that the county auditor will use good judgment and common sense in selecting such a number as will give each voting precinct in the county ample representation and yet not make the convention unwieldy. The statute does not require you to follow the suggestion of either the chairman of the state central committee or the chairman of the county central committee in fixing the ratio, but con-

templates that the county auditor will take into consideration the facts as they exist in each voting precinct and fix a ratio which will give each voting precinct a fair representation in the county convention. If this procedure is followed by the county auditor, then the delegates elected to the county convention will be the legal delegates and the acts of the convention in making proper nominations and certifying such nominations will be legal.

BEN J. GIBSON, *Attorney General*,

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

NOMINATION OF DISTRICT JUDGE

In district composed of one county district judges shall be nominated by judicial convention under chapter 3, 38th G. A.

June 26, 1922.

Mr. R. N. Johnson, Assistant County Attorney, Fort Madison, Iowa: Your letter of the 3rd inst. addressed to Mr. Gibson has been referred to me for attention. You state:

"The first judicial district consists only of Lee county and the question has been presented as to how the candidates for judge of the district court shall be nominated by the different parties. Whether by the county convention under section 1087-a25 of the 1913 supplement, or by a judicial convention under section 3 of chapter 63 of the acts of the 38th general assembly."

Section 1087-a25 of the supplement to the code, 1913, was repealed by the 35th general assembly in the enactment of a nonpartisan judicial law. You will note that the last section of the nonpartisan judicial act repeals all acts or parts of acts in conflict therewith.

It follows therefore that it will be necessary in your county to have a judicial convention under section 3 of chapter 63 of the acts of the 38th general assembly for the selection of candidates for the district bench.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

DUTY OF CLERK WHEN TOWNSHIP DIVIDED

When a township is divided, the clerk acts as clerk of election in precinct where he lives.

May 23, 1922.

Mr. H. B. Owens, County Auditor, Logan, Iowa: Your letter of the 13th inst. addressed to Attorney General Ben J. Gibson has been referred to me for reply.

You state that one of the townships in your county has been divided into two voting precincts and that the township clerk resides in one of these voting precincts located in a town.

You then ask for the opinion of this department as to whether or not such township clerk may act as clerk of election in the township in which he resides.

The statute covering your question will be found in section 1093 of the supplement to the code, 1913, the portion material to your inquiry being as follows:

"In township precincts the clerk of the township shall be a clerk of election of the precinct in which he resides. * * *"

From the foregoing statutory provision, it will be observed that where the township has been divided into more than one voting precinct that the township clerk shall be the clerk of election in the precinct in which he resides. Therefore, if the precinct in which the township clerk resides in your case is located in town, then such clerk will be the clerk of election in that particular precinct.

BEN J. GIBSON, *Attorney General*,

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

ELECTION BOARDS

Discussion of who may serve on precinct election boards.

May 23, 1922.

Mr. Fred M. Hudson, County Attorney, Pocahontas, Iowa: I am in receipt of your letter dated May 22, 1922, in which you request an opinion from this department. Your letter is in words as follows:

"Some question has arisen in this county as to who should serve on election boards and also as to how the election boards should be selected.

"Section 426 of the compiled code would appear to govern this matter. In the event that two of the trustees of any township are of one political party and the third is of another I construe this section to mean that they serve as judges of election. However, in case they are all of one political party, then, and then only, the board of supervisors make a selection. The board would under this section have to appoint the second clerk.

"Voting machines will be used in all townships in this county. In sixteen but one machine will be used and in four two machines will be used. The above section is specific as to the membership of the board for a township where but one machine is used. Where two or more machines are used who compose the election board and how are the members selected? In the four townships where two machines are to be used the board of supervisors have appointed four judges to serve as an election board. Is this correct, and if not what would be correct?

"In general I wish to ask your opinion as to who compose election boards and also as to who selects or appoints them, if such is necessary?"

There is no doubt as to the correctness of your ruling relative to the right of township trustees to serve as judges of election. Section 426 of the compiled code; supplemental supplement, 1915, section 1093; acts of the 38th general assembly, chapter 69, section 1, provides as follows:

"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. Not more than two judges and not more than one clerk shall belong to the same political party or organization, if there be one or more electors qualified and willing to act as such judge or clerk, and a member or members of opposite parties. In cities and towns, the councilmen shall be judges of election; but in case more than two councilmen belonging to the same political party or organization are residents of the same election precinct, the county board of supervisors may designate which of them shall serve as judges. 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 supervisors shall determine by lot which two of the three trustees shall be judges of such precinct. The membership of such election board shall be made up or completed by the board of supervisors from the parties

which cast the largest and next largest number of votes in said precinct at the last general election, or that one which is unrepresented; but, in city and town elections, the powers given in this chapter and duties herein made incumbent upon the board of supervisors shall be performed by the council. If, at the opening of the polls in any precinct, there shall be a vacancy in the office of clerk or judge of election, the same shall be filled by the members of the board present, and from the political party which is entitled to such vacant office under the provisions of this chapter. The election board at any special election shall be the same as at the last preceding general election. In case of vacancies happening therein, the county auditor may make the appointments to fill the same when the board of supervisors is not in session; provided, however, that the election board in precincts using only one voting machine shall consist of three judges, only two of whom shall be of the same political party, and two of whom shall also act as clerks."

This section provides that election boards shall consist of three judges and two clerks. It further provides that not more than two judges and not more than one clerk shall belong to the same political party. The section further provides that in cities and towns the councilmen shall be judges of election, but that in case more than two councilmen belonging to the same political party are residents of the same election precinct, the county board of supervisors may designate which of them may serve as judges. Observe the distinction between the selection of the judges in cities and towns and in townships. In cities and towns, the councilmen who shall act, where all cannot act, are chosen by the board of supervisors. In townships where some of the trustees cannot act because of the fact that all belong to the same political party, the selection is to be determined by the board of supervisors by lot.

Referring to the second question submitted by you, it is the opinion of this department that in all election precincts using voting machines, whether one or more machines, there shall be but one set of election judges. The only provision of the statute as to additional judges is found in the so-called county board law, enacted by the 39th general assembly, which provides that in all precincts in which voting machines are not used, and which precinct has a larger number than three hundred voters, that there shall be two sets of judges—one the receiving board and the other the counting board.

BEN J. GIBSON, *Attorney General.*

POLL BOOKS USED AT PRIMARY ELECTIONS

Both poll books should be returned by the election board of each precinct to the county auditor within twenty-four hours after the election.

May 22, 1922.

Hon. Glenn C. Haynes, Auditor of State: You have requested the opinion of this department on the question of what disposition the primary election board of each precinct shall make of the poll books furnished them by the county auditor after the primary election has been held.

Chapter 2-A of title VI of the supplement to the code, 1913, contains what is known as the primary election law. Section 1087-a17 of that chapter contains the provisions relative to the furnishing of lists of

voters and poll books to the various precinct election boards. It is provided in the last sentence of that section that

"The county auditor shall prepare for each voting precinct two of the above mentioned lists duly certified by him, and taken from the poll books of the last preceding primary election, which he shall deliver to the succeeding primary election boards at least one day prior to the day of the primary election, and which lists, together with the poll books of the primary election, shall be returned to the said auditor in good condition within twenty-four hours after the primary election, to be preserved by him."

It will be observed that the provisions of chapter 2-A of title VI completely provides for the holding of primary elections. The provision just quoted above is the only provision in the chapter relative to the return of poll books after the primary election has been held. It will be noted therein that the primary election boards are required to return the "poll books of the primary election" to the auditor within twenty-four hours after the primary election, to be preserved by him.

Section 1145 of the code of 1897 provides for the return of poll books after the general election in November. It is provided therein that one poll book shall be returned to the county auditor and the other poll book returned to the respective city, town or township clerks wherein the precinct is located. This section does not apply in any manner to the return of poll books in primary elections. Section 1087-a47 of the supplement to the code, 1913, which is also a part of the general primary election law, provides that certain sections of the code shall be applicable to primary elections. Section 1145 of the code of 1897 is not included therein.

The reason for returning both poll books to the county auditor after a primary election is found in section 1087-a19 of the supplement to the code, 1913. It is provided therein in part that

"On the second Tuesday next following the primary election in June, the board of supervisors shall meet, open, and canvass the returns from each voting precinct in the county, and make abstracts thereof, stating in words written at length the number of ballots cast in the county by each political party, separately, for each office, the name of each person voted for and the number of votes given to each person for each different office and shall sign and certify thereto and file the same with the county auditor. Such canvass and certificate shall be final as to all candidates for nomination to any elective county office or office of a subdivision of a county; and the candidate or candidates of each political party for each office to be filled by the voters of any subdivision of a county having received the highest number of votes shall be duly and legally nominated as the candidate of his party for such office."

It will be observed that the county board of supervisors acts as the canvassing board for all candidates for nomination to any "elective county office or office of a subdivision of a county." That being the case, there is no occasion for the township or city having the poll book used in the primary election because there is no duty enjoined upon such subdivision of a county relative to the canvassing of the returns. Hence, for this reason alone both books ought to be returned to the county auditor. On the other hand, it is provided in sections 1146 and 1147 of the code of 1897 that after the general election a board of canvassers shall meet and canvass returns from all precincts for votes cast for

officers to be elected by such subdivision of the county. It is then provided that the board of canvassers of such subdivision shall report and give notice of its findings. Thus, it is observed that the law enjoins the duty upon these political subdivisions of the county to canvass the returns at the general election in November. This fact is the reason for the provisions of section 1145 of the code of 1897, requiring one poll book to be returned to the county auditor and the other to the clerk of the township or city as the case may be.

It is, therefore, the opinion of this department that within twenty-four hours after the primary election, the election board of each precinct should return both poll books to the county auditor.

BEN J. GIBSON, *Attorney General.*

AFFIDAVIT OF CANDIDATE

When affidavit of candidate must be filed.

May 9, 1922.

Mr. V. F. Sieverding, County Attorney, Grundy Center, Iowa: Under date of May 8 the auditor of your county wrote to this department for an opinion on the following question:

"If a candidate for a county office, fails to file his affidavit, (in which he declares, that if, nominated and elected he will qualify as such officer) at the time he files his nomination papers, or at any time prior to thirty days before the primary election, can he at any time, twenty days prior to the primary election, file such affidavit, and have his name printed on the official primary ballot."

We are writing directly to you so that the rule in regard to our opinion will be followed and at the same time the auditor may have the benefit of our judgment on the above question.

Section 1087-a10, supplement to the code, 1913, which provides for the filing of nomination papers for candidates for elective office provides in part as follows:

"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 and will be a bona fide candidate for nomination for said office, and shall file such affidavit with the said nomination paper or papers when such paper or papers are required."

The answer to the question of your auditor will depend upon the meaning of the word "with" as used in the portion of section 1087-a10 above quoted.

By chapter 185, section 3, laws of the 18th general assembly, it was provided:

"Before any allowance of attorney's fees shall be made by the court, the court shall be fully satisfied by affidavit of the attorney engaged in the cause, which affidavit shall be filed with the original papers, etc."

In construing the meaning of the word "with" as used in the above provision the supreme court of Iowa in the case of *Wilkins vs. Troutner*, 66 Iowa, on page 559, uses the following language:

"The statute uses the expression filed with the original papers. It is said that 'with' is not synonymous with 'at the same time.' Ordinarily this may be so, but we think it must be so construed in the statute under consideration. If this is not so, then the statute is meaningless, unless it can be said that the affidavit may be filed with, that is, placed

among, the original papers, and filed at any time after judgment; and clearly this is not the intent of the statute."

We believe that the same reasoning is applicable to the question under consideration. Giving to the word "with" the only meaning that will make it effective in expressing what we believe to be the intent of the legislature it is our judgment that the affidavit of the candidate for county office must be filed at the same time as his nomination papers and not later than thirty days before the primary election in order that the auditor would be warranted in placing his name on the official primary ballot.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

SIGNING OF NOMINATION PAPERS

An elector may sign nomination papers for but one candidate for an office. Nomination papers once filed cannot be removed.

April 7, 1922.

Mr. Floyd Billings, County Attorney, Red Oak, Iowa: This department is in receipt of your letter dated April 6 in which you request an opinion from this department. Your request is in words as follows:

"In this county we have five candidates for the office of county recorder in the coming primaries. Number one, the present recorder, after announcing his candidacy, intimated that he had withdrawn from the race, and on the strength thereof number six announced his candidacy and secured the signatures of a large number of persons to his petition who had previously signed the nomination papers of number one. Number one has not withdrawn from the race and I desire a construction of section 1087-a10, supplement 1913—section 368 C. C. 1919, commencing on line thirty-one page 104, as follows:

"*Each signer of a nomination paper shall sign but one such nomination paper for the same office, except where more than one officer is to be elected to the same office, in which case he may sign as many nomination papers as there are officers to be elected.*"

"Query: Do the signatures on the petition of number one stand, by reason of prior date, or should the same names appearing on both sets of papers be disregarded in the count of signatures necessary?"

It is of course unquestioned that a nomination paper once filed cannot be removed. It is likewise true that only one nomination paper for each office can be signed by each elector.

In the question submitted by you the elector signs a nomination paper which is filed in conformity to law. Therefore, every single elector qualified to sign would be counted for the candidate first filing as mentioned in your letter, that is number one.

The signatures subsequently made to other nomination papers would be void and not counted. In this connection I would suggest that you at once advise the candidates so that they can secure the necessary number and not be by reason of this rule barred from becoming candidates.

BEN J. GIBSON, *Attorney General*.

WHO PAYS COST OF TOWNSHIP ELECTION

County not liable for expenses of holding election to vote on erection of township hall.

February 7, 1922.

Mr. A. B. Hoover, County Attorney, Marshalltown, Iowa: Your letter of the 27th ult. addressed to Attorney General Ben J. Gibson has been referred to me for reply. You state:

"A short time ago there was an election held in one of our townships for the purpose of voting upon the erection of a township hall and I have been asked whether the township or the county should pay for the election."

It is a well established rule of law in this state that the county is not chargeable with the expense of holding a special election in a township unless such payment is expressly authorized by statute. *Turner vs. Woodbury County*, 57 Iowa, 440; *Mousseau vs. City of Sioux City*, 113 Iowa 246.

The law providing for the calling of a special election to vote on the question of building a township hall is found in chapter 26, acts of the 26th general assembly. In that act no express provision is made for the county to pay the expenses incurred in holding the election; in fact, the act is silent as to whom shall pay the expenses.

The only section of the code which might be construed as fixing liability on the county is that part of section 1129, which reads as follows:

"The expense of providing booths, guard rails, and other things required in this chapter shall be paid in the same manner as other election expenses."

The portion of section 1129 just quoted is a part of chapter 33, section 20, acts of the 24th general assembly. In the case of *Bras vs. McConnell*, 114 Iowa 401, it was held that the provisions of chapter 33, supra, did not apply to special elections held for the purpose of voting taxes. I am, therefore, of the opinion that the county is not liable for any portion of the expenses in question.

As to whether the township should pay the expenses of the election in question, I am of the opinion that it should not, for the reason there are no township funds available for such purposes.

The only manner of paying the expenses in question is to use the funds created by taxation in the event the proposition to build a township hall carries, such expenses being incidental to the building of the hall. If the proposition is defeated, then I know of no statutory provision for paying the expenses of the election.

BEN J. GIBSON, *Attorney General*,

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

BALLOT BOXES

Separate ballot boxes unnecessary for women voters.

November 7, 1921.

Mr. Herbert McCabe, County Attorney, Dubuque, Iowa: Your letter of the 5th inst. addressed to Attorney General Ben J. Gibson has been referred to me for attention. You ask:

"The board of supervisors of Dubuque county have requested me for an opinion as to whether or not separate voting booths and ballots will have to be provided for women voters under existing law. The question now comes up as the voters of Dubuque county will vote on November 15, on the question of hard surfacing roads and providing for the issuance of bonds for that purpose. As Dubuque county now has voting machines the question resolves itself into the proposition as to whether separate machines will have to be provided for women voters at the coming election as well as all other elections to be held in the future."

While this department has not given a formal written opinion as to whether separate ballot boxes shall be used at all elections in which women participate, yet this question came up time and again during the administration of Honorable H. M. Havner as attorney general, particularly preceding the last general election, and while the question was not altogether free from doubt, yet this department uniformly held that separate ballot boxes were unnecessary.

However, in various voting precincts in the state separate ballot boxes were provided for the ballots cast by the women voters, while in other sections of the state the same ballot boxes were used for the ballots cast by both men and women. So far as the writer is informed, where voting machines were used at the last general election, both men and women voters used the same machine.

With the final ratification of the amendment to the federal constitution conferring suffrage upon women, we believe that women were automatically placed upon the same footing as men so far as elections are concerned, and automatically repealed all state statutes which discriminated against women voting upon the same basis as men. For that reason we are of the opinion that both men and women shall use the same voting machine in the coming election in your county.

BEN J. GIBSON, *Attorney General*,

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

ABSENT VOTERS

Application for official ballot must be made not less than three days before election. S. S. 1137-c. If election Monday, request must be made not later than Friday preceding.

June 30, 1921.

Mr. Hamilton Tobin, County Attorney, Vinton, Iowa: Your letter of the 16th inst. to which the department replied on the 20th inst. has just been referred to me for consideration.

You ask that we write to the county auditor of your county, Mr. Logan Hines, our construction of section 1137-c of the supplemental supplement to the code, particularly with relation to the number of days before the election that an absent voter is required to make application for an official ballot to be used at that election.

The section to which you refer is as follows:

"Any elector, as defined in the foregoing section, expecting to be absent from the county of his residence on the day of any such election may, not more than fifteen or less than three days prior to the date of such election, make application to the county auditor of such county, or the clerk of the city or town, as the case may be, for an official ballot to be voted at such election."

Under paragraph 23 of section 48 of the code of 1897, which is 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."

Assuming as you do in your letter that an election falls on Monday it will be necessary to make and file the application for an official ballot on Friday previous in order to have the same filed in three days, under the statute quoted.

Your auditor when he assumes that the application should be made on Thursday preceding evidently has in mind the statute with relation to the service of original notice and the filing of petitions, which statute provides that notice shall be served so as to leave at least ten days between the time of service and the first day of the term. This statute means ten clear days, but it specifically so provides.

The way to apply the computing statute to the question submitted by you is as follows:

"Include Monday, Sunday and Saturday and exclude Friday the day of making and filing applications."

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

EFFECT OF WRITING IN NAMES OF PRIMARY ELECTION BALLOT

When names are not printed on the official ballot at the primary election, but are written in, and these candidates do not receive 10 per cent of the total vote cast for governor of the party ticket at last general election, there is no vacancy such as can be filled by county or district convention.

September 11, 1922.

Hon. W. C. Ramsay, Secretary of State: You have requested an opinion from this department, your request being in substance as follows:

"It appears that in certain representative and senatorial districts in this state, that at the primary election held in June, 1922, the names of no candidates were printed on the official ballot. It appears, however, that at the primary election the names of certain candidates were written in the blank space provided, but that in certain instances such candidates whose names were thus written in, did not receive 10 per centum of the total vote cast for governor of the party ticket at the last general election, as provided by section 1087-a19 of the supplement to the code, 1913. You ask whether or not under such circumstances there is a vacancy such as can be filled by the county or district conventions, as the case may be. Under the circumstances enumerated there is no vacancy, and the county and district convention is without authority to nominate."

This has been the ruling of this department for years, and we see no reason why the ruling should be modified. It has been known to the central committees of each of the several counties and districts of the state, has been known to your department, and has been known to the legislature. The legislature has not seen fit to amend the law in this regard, nor have the rulings of the department ever been seriously questioned. This department would not be justified in receding from the established rule, and it is reaffirmed in this opinion.

In this regard your attention is called to the opinions of the attorney

general for the years 1917-1918, at page 376, and also to the opinions of the attorney general for the years 1919-1920, at page 471.

BEN J. GIBSON, *Attorney General.*

ELECTIONS

- (1) County convention cannot nominate supervisor in counties having supervisor districts when there was no regular candidate at primary. (2) Person nominated by county convention does not have to file acceptance, but in case of withdrawal he should follow Sec. 1101, S. S., as amended. (3) County convention has no authority to nominate candidates for township offices.

September 1, 1922.

Hon. Glenn C. Haynes, Auditor of State: You have submitted to this department for an opinion a letter addressed to you from Mr. W. G. Wickham, County Auditor of Union county, bearing date August 17, 1922, in which he asks the following questions:

1. A man was nominated by the county convention for county supervisor who was voted for at the primary election, but did not receive 5 per cent of the votes cast at the general election in 1920. This party was nominated by the delegates from his district and confirmed by the delegates from his district at the county convention. Should this party have his name printed on the ballot this fall?

2. Shall I print all names on the ballot this fall who were nominated at the county convention but who did not have their names appear upon the primary ballot, but who were voted for by their friends writing their names on the ballot at the primary election?

3. If a person was nominated by the county convention, does that person have to file his acceptance or refusal for said office with the county auditor, or should he be put on the ballot as the convention has so named?

4. Can I place the name of a township officer upon the ballot this fall who was nominated by the county convention to take the place of a person who was nominated at the primary when I have no notice of his nonacceptance of such nomination, except action by the county convention?

5. When no name of any candidate was printed on the primary ballot for an office, but some voter wrote in one name only and that nominee received only one vote and refuses to run, can the county convention fill that office?

In answer to your first question, if such candidate was a regular candidate at the primary election and his name appeared upon the primary ballot but he failed to get 5 per cent of the votes cast at the last general election, then the vacancy caused thereby should be filled in the manner provided for in section 1087-a24 of the supplement to the code, 1913, which provides as follows:

"Vacancies in nominations for offices to be filled by the voters of a territory smaller than a county shall be filled by the members of the party committee for the county from such subdivision."

If the party referred to did not have his name printed upon the primary ballot at the primary election, but some of his friends merely wrote in his name and voted for him, but he did not receive the number of votes required by statute for nomination, then neither the county convention nor the party committee could make a nomination for that office, but such office shall remain unfilled.

In answer to your second question, this department has heretofore

ruled that when no names appeared printed on the primary ballot for a county office and friends merely wrote their names in and voted for them and such persons did not receive the number of votes required by statute to nominate, then, and in that event, the county conventions have no power to nominate a person for that particular office and such office shall remain blank upon the ticket to be voted on at the general election.

In answer to your third question, it is our opinion that when a person is legally nominated by the county convention and his nomination properly certified, then, and in that event, it is not necessary for the person so nominated to file with the county auditor his acceptance. If he desires to withdraw, he shall do so in accordance with section 1101 of the supplemental supplement, as amended by chapter 100, acts of the 38th general assembly, and chapter 105, acts of the 39th general assembly.

In answer to your fourth question, it is the opinion of this department that the county convention has no power to fill vacancies in township offices.

In answer to your fifth question, we have covered the same in connection with your second question.

BEN J. GIBSON, *Attorney General*,

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

WHEN COUNTING JUDGES AUTHORIZED

Chapter 60, acts of the 39th G. A. does not apply to city elections wherein provision is made for counting judges at certain elections.

January 5, 1922.

Mr. C. E. Swanson, County Attorney, Council Bluffs, Iowa: Your letter of the 31st of December, 1921, addressed to Mr. Gibson, has been referred to me for attention. You state:

"A question has arisen in this city with reference to the interpretation of chapter 60, acts of the 39th general assembly. Mr. V. A. Morgan, city attorney, has gone into the construction of the statute quite thoroughly and says:

"I am wondering whether or not the language used in section 14 of the act was deliberately and advisedly used. The section in question is as follows:

"This act shall apply to all general and primary elections but shall not apply to school elections or town elections."

"I assume that by this exclusion, the act is made to apply to all other elections, (primaries, general elections and city elections). However, the legislature uses the term 'general' in defining the applicability. This term 'general,' when so used has a definite meaning, as I see it—and does not include 'city elections.' Therefore the applicability of the act is left in the air as far as the city election is concerned. I assume, however, that the legislature intended the act to apply in such cases."

"I believe that the question raised by Mr. Morgan is of quite general importance and will greatly appreciate it if you will render an opinion with reference to the applicability of the statute to city primaries and city elections."

Section 1089 of the code of 1897 provides as follows:

"The term 'general election,' as used in this chapter, shall apply to any election held for the choice of national, state, judicial, district, county or township officers; that of 'city election' shall apply to any municipal election held in a city or town; and that of 'special election' shall apply to any other election held for any purpose authorized or required by law."

This section clearly distinguishes between general elections, special elections and city elections. At no place is there a reference to a town election as such distinguished from a city election and it is pertinent in answering your question to determine whether or not the legislature intended to except from the provisions of chapter 60, acts of the 39th general assembly elections held in cities.

We call your attention to paragraph 16 of section 48 of the code of 1897, which is as follows:

"16. Town. The word 'town' means an incorporated town, and may include cities."

It is our opinion that the legislature did not intend to include in the provisions of chapter 60 above referred to city elections and we believe that it is perfectly proper to so interpret section 14 of that chapter as to include in the term "town elections" city elections.

It was the purpose of the act to relieve the conditions that usually exist at general and primary elections, to facilitate the counting of the ballots and hasten compilation of the returns at election time.

It is our opinion therefore that chapter 60, acts of the 39th general assembly does not apply to school elections or elections in cities and towns.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

OPINIONS RELATING TO AUTOMOBILES

WHO REQUIRED TO OBTAIN CHAUFFEUR'S LICENSE

Persons whose employment makes the driving of a car only incidental to their real employment not required to take out chauffeur's license.

May 25, 1921.

Mr. W. M. Colladay, Motor Vehicle Department: You recently submitted a request for an opinion as to whether certain employes of the Bell Telephone Company who drive a truck in connection with their other work should be required to take out a chauffeur's license.

You state the facts as follows:

"They hire their men as linemen, groundmen, installers, etc. These men handle trucks in doing their work, but are not hired as truck drivers, although they do drive the trucks in doing their work."

It is our view of the law that a person who incidentally drives a car or truck in connection with his employment, but his principal employment being to do other work and the driving simply a matter incidentally thereto, does not come within the provisions of the law requiring him to take out a chauffeur's license. If, however, the main work of such a person is to drive a truck or car and incidentally he performs other services in connection with the driving he should be required to take out a license. In this latter class would be included persons driving a delivery truck delivering goods about a city where they would incidentally load or unload the goods, but their main work would be the driving of the motor vehicle.

A case of this kind would depend largely upon the particular facts and must necessarily rest somewhat in the discretion of the person issuing a license.

BEN J. GIBSON, *Attorney General*,

By JOHN FLETCHER, *Assistant Attorney General*.

CHAUFFEUR'S LICENSE

An employe of the federal government cannot be compelled to take out chauffeur's license.

August 6, 1921.

Hon. W. C. Ramsay, Secretary of State: Mr. Colliday of the motor vehicle department, has orally requested the opinion of this department as to whether persons employed by the federal government to drive motor vehicles at the institution maintained by the government at Knoxville, Iowa, can be required to take out a chauffeur's license under the law enacted by the 39th general assembly.

In view of the holding of the United States supreme court in the case of *Johnson vs. State of Maryland*, decided on November 8, 1920, your question must be answered in the negative.

In the case above referred to, an employe of the postoffice department was arrested in the state of Maryland for violation of a law similar to the Iowa statute. The supreme court in passing upon the

question held that the state of Maryland could not require an employe of the federal government to take out a license.

Since the matter has been passed upon by the United States supreme court, a further discussion of the subject is unnecessary in this opinion.

BEN J. GIBSON, *Attorney General*,

By JOHN FLETCHER, *Assistant Attorney General*.

REGISTRATION IN ANOTHER STATE

Owner of motor vehicle who becomes resident of this state must pay license fee for that year even though vehicle registered under laws of another state. Treasurer must demand license fee for that year before issuing license for subsequent year.

February 21, 1921.

Mr. J. S. Parrish, County Attorney, Leon, Iowa: Replying to your letter of February 14 with request for an opinion on the following state of facts:

"On and prior to January, 1920, Mr. Steckel, a traveling salesman, lived at Council Bluffs and used a Ford car to cover his territory lying in Missouri, in which state he was required to take out a license. Later in the year he moved to Grant City, Missouri, and about December, 1920, he resigned his position and moved to Lamoni in Decatur county and since then has resided in Iowa and has kept his car in this state. Under the circumstances must the treasurer demand payment of the 1920 license before issuing a license for 1921?"

Under the motor vehicle law the purchaser of an automobile must pay a full year's license thereon no matter what time during the year he makes the purchase.

Section 3 of the act, so far as applicable to the facts presented in your question, is as follows:

"Section 3. Every motor vehicle kept in this state and whose owner is a resident of this state and every motor vehicle kept in this state, except temporarily by a nonresident owner * * * shall not be operated by its own power upon any public highway without being licensed, etc."

Section 10 of the act is as follows:

"An annual license fee shall be paid for each motor vehicle operated upon the public highways of the state unless said vehicle is specially exempted under the provisions of this act * * *"

Section 21 of the law provides in part 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 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.'"

Section 8 of the law is as follows:

"Registration shall be renewed annually, as provided in section 10 to take effect on the first day of January of each year; provided that the county treasurer shall withhold the registration of any motor vehicle, the owner of which have failed to register the same under the provisions of this act for any previous period or periods for which it appears that registration should have been made, until the fee for such previous period or periods shall be paid. All certificates of registration issued under provisions of this act shall expire on the first day of the calendar year for which they were issued."

We note that you say in your letter that your county treasurer had an opinion from this department on this question and you call our attention to the provisions of section 3 of the act. There is no record here of an opinion having been given by this department on the identical question presented, but it is our opinion that your treasurer is taking the right stand, provided Mr. Steckel became a resident of Iowa at any time during the year 1920 and brought his car into this state and used it on the roads.

In our opinion section 3, wherein it provides "and every motor vehicle used in this state and not properly licensed under the laws of another state," does not refer to motor vehicles actually owned and used by residents of this state on the roads of this state, but refers rather to motor vehicles operated upon the highways under conditions other than by a resident owner.

BEN J. GIBSON, *Attorney General*,
By B. J. FLICK, *Assistant Attorney General*.

REGISTRATION OF AUTOMOBILE IN ANOTHER STATE

A resident of Iowa licensing his car in another state must also license his car in this state.

January 5, 1922.

Hon. Lloyd Thurston, Osceola, Iowa: I am directed to answer your letter of the 19th ult. addressed to Attorney General Ben J. Gibson, in which you ask this department to construe section 3, chapter 275, acts of the 38th general assembly, particularly that portion of said section commencing with the word "and" in the fifth line thereof and which reads as follows:

"And every motor vehicle used in this state and not properly licensed under the laws of another state shall not be operated by its own power upon any public highway without being licensed."

In your letter you state that a man by the name of C. C. Henderson came to Iowa from California in the latter part of April, 1921, bringing with him an automobile which he had registered in California for the year 1921. You then contend that, having licensed the car in California, no license should be procured in this state.

Section 3 above referred to reads as follows:

"Every motor vehicle kept in this state and whose owner is a resident of this state, and every motor vehicle kept in this state, except temporarily by a nonresident owner and every motor vehicle kept and used in this state a majority of the time, and every motor vehicle used in this state and not properly licensed under the laws of another state shall not be operated by its own power upon any public highway without being licensed and without carrying license number plates and proper license certificate and without having had its license fee duly paid, all as required by law. Any such motor vehicle once licensed in the state and by removal not longer subject to license in this state, shall upon being returned to this state and subject to license be again originally licensed. 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."

Construing the statute just quoted with reference to Mr. Henderson I am assuming that Mr. Henderson has been a resident of Iowa since April, 1921.

It will be observed from section 3 that "Every motor vehicle kept in this state and whose owner is a resident of this state" shall be licensed.

Therefore, unless the statute contains provisions to the contrary, the automobile owned by Mr. Henderson, a citizen of Iowa, and kept in this state since April, 1921, must be registered in Iowa during the remaining portion of the year of 1921.

The only language in section 3 which might appear to conflict with the portion above quoted is the following:

"And every motor vehicle used in this state and not properly licensed under the laws of another state."

It will be observed that in the portion of the statute last quoted no reference is made to the residence of the owner of the car. Inasmuch as the first part of the section makes it the duty of every resident to register every car kept by him in this state, it necessarily follows that the portion of the statute last above quoted refers to a nonresident who is using his car in this state, and therefore the one provision does not conflict with the other.

I am therefore of the opinion that the automobile in question was subject to registration in Iowa for the remainder of the year of 1921.

BEN J. GIBSON, *Attorney General*,

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

EFFECT OF REGISTRATION OF AUTOMOBILE IN ANOTHER STATE

Resident owner doing business in adjoining state, keeping auto there and licensed there, must procure license here when he closes out business and returns to Iowa.

October 18, 1921.

Mr. E. H. Koopman, County Attorney, Sibley, Iowa: Replying to your letter of the 30th ult. in which you ask for an opinion from this department as to whether the owner of an automobile should secure a license in Iowa under the following state of facts, and if so for what period of the year he will be required to pay a license fee, to-wit:

"Where a person who maintains his residence in this state and his family lives here, but he being in the real estate business and maintains an office in South Dakota and had been maintaining such office there for a year or more, and had been registering his auto in Dakota for the year of 1920 because he used same there in his business nine-tenths of the time, only driving it to his home and family about once a month; and believing that he also would continue in the real estate business at the beginning of the year 1921 and he having his car located there registered his car there again for the year of 1921 and kept his car stored there in Dakota, for the first three months of this year, and after that finding that there was no further real estate business to do for him in Dakota he came back and lived with his family in this county, and took his car with him and has been using it here most of the time, if not all the time, since the first day of April here in Iowa. However, going back to Dakota on business about once a month."

Under the foregoing statement of facts, I am of the opinion that the owner of the automobile is required to secure a license in Iowa and pay a fee based upon ownership as of April 1, as provided for in chapter 16,

acts of the 39th general assembly, namely, three-fourths of the annual license fee for the year 1921.

BEN J. GIBSON, *Attorney General*,

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

REGISTRATION IN ANOTHER STATE

Once licensed in state, then sold and registration cancelled, must be again licensed on being returned to state.

June 28, 1921.

Mr. W. M. Colladay, Superintendent Motor Vehicle Department: Your letter of the 24th inst. addressed to the attorney general has been referred to me for answer.

You request an opinion on the following question:

"A question has come up with regard to section 3 wherein it states 'Any such motor vehicle once licensed in the state and by removal not longer subject to license in this state, shall upon being returned to this state and subject to license be again originally licensed.'

"This is the question: If a party register a car for the year 1921 and sells same outside of the state, cancelling the registration of record, then another party in the state buy this car from the owner in the foreign state, is it necessary to have this car relicensed in the state of Iowa or would the original license still stand?

"We have made the statement that when the car once having been disposed of to an owner in a foreign state and came back, the former registration having been cancelled, that it would be necessary for the car to be reregistered. Your opinion in this matter would be greatly appreciated."

It is the opinion of this department that you have been disposing of this question properly.

The proper construction of section 39 applied to the facts submitted by you is as follows:

As soon as registration is cancelled by a resident holder and the car sold to a nonresident of the state of Iowa and removed from this state the same is no longer subject to registration in Iowa. If that car, or any other car, is subsequently purchased from a dealer in a former state and returned to Iowa there is no reason why the one bringing it into this state ought not to pay a registration fee, otherwise there would be no record of the transfer of the ownership of such vehicle.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

LIEN FOR MOTOR VEHICLE REGISTRATION FEE

The lien of registration fee is superior to prior mortgage on motor vehicle if the same attaches under the statute.

June 19, 1922.

Mr. L. A. Riter, County Attorney, Rock Rapids, Iowa: Your letter of June 15 requesting an opinion on the question of the priority of the lien of a chattel mortgage on a motor vehicle over a lien for renewal registration fees attaching subsequent to the execution of a mortgage has been referred to me for attention.

The lien of the registration fee attaches against the motor vehicle in

the hands of anybody who may own it on January 1 of each year. The owner by executing a mortgage upon the vehicle could not convey to the mortgagee a right greater than that which he himself possessed nor an immunity from the payment of the registration fee which is in lieu of taxes.

It follows therefore that the lien of the registration fee is paramount and superior to that of chattel mortgage.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

INTEREST ON MOTOR VEHICLE FUNDS

Interest collected on funds deposited in local banks to credit of motor vehicle department does not pass into hands of state treasurer until time provided by law. It should be credited, not to general fund of state but to refund account until covered back to state treasurer, when it would become part of primary road fund as distinguished from general fund of the state.

May 9, 1922.

Hon. Glenn C. Haynes, Auditor of State: This department is in receipt of your letter dated May 8, 1922, which is in words as follows:

"In checking over the accounts of the motor vehicle department, we find that an item of \$469.13, being bank interest collected by the motor vehicle department funds deposited in local banks to their credit, was taken as a credit by the motor vehicle department. When this item was turned over to the treasurer of state the amount was credited to the general revenue as a miscellaneous receipt.

"We can find no statute authorizing the credit of this amount to the motor vehicle department. It is therefore requested that you furnish this department with an opinion as to whether or not this credit can be legally made."

The facts of this matter, as we understand, are that while there was in the possession of the motor vehicle department under the provisions of the law a bank balance known as the refund fund, the motor vehicle department has had remitted to it in the manner provided by law one-half of one per cent of the money collected by the several county treasurers for fees and penalties under the motor vehicle act; this remittance is for the purpose of caring for refunds. It remains in the possession of the motor vehicle department and does not pass into the hands of the state treasurer until the time provided by law. The motor vehicle department deposited such refund and was allowed certain interest on daily balances during the time such fund was held by the motor vehicle department. Such item of interest was a fair growth on the amount of such refund balance and would be credited not to the general fund of the state but to the refund account of the motor vehicle department until covered back to the state treasurer in the manner provided by law. It would then become, as would the balance, a part of the primary road fund as distinguished from the general fund of the state.

BEN J. GIBSON, *Attorney General*.

OPERATION OF MOTOR VEHICLE WITHOUT LICENSE

Operation of motor vehicles upon the public highways of this state during any year without proper license for such year is in violation of law.

March 8, 1922.

Hon. W. C. Ramsay, Secretary of State: You have requested an opinion from this department as to whether or not the owner of a motor vehicle may operate same on the public highways of this state from the first day of January to and including the time of the publication of the delinquent list, as provided in section 16 of the motor vehicle laws.

The facts causing the submission of this question are, as we understand, substantially as follows:

It appears that the special officers of the motor vehicle department, operating in the city of Des Moines, have called the attention of certain owners to the fact that their license has not been paid for 1922 and that therefore they were violating the law by driving such motor vehicles upon the public highways. The owners have questioned the action of the officers in this respect, it being contended by such owners that until the publication of the list of delinquents there is no violation of law in operating such motor vehicles upon the public highways of this state.

Under the provisions of section 3 of chapter 275 of the acts of the 38th general assembly, it is provided that every motor vehicle used in this state and not operated and not properly licensed under the laws of another state shall not be operated by its own power upon any public highway without being licensed and without carrying license number plates and proper license certificate and without having had its license fee duly paid, all as required by law.

Section 8 of this chapter provides that:

"All certificates of registration issued under the provisions of this act shall expire on the last day of the calendar year for which they were issued."

Section 29 of this act provides that:

"The violation of any of the provisions herein shall constitute a misdemeanor punishable by a fine of not to exceed one hundred dollars, except as otherwise provided in this act."

Under the provisions of section 8 the license for the year 1921 expired on December 31, 1921. The owners of motor vehicles could not thereafter operate such motor vehicles upon the public highways of this state without securing license plates for the year 1922. In the event that such motor vehicles are operated upon the public highways without such license plates and without the license fee having been paid, there would be a violation of the provisions of the motor vehicle law and violators would be subject to punishment as is provided in section 29.

Section 16 has no relation to the right to operate a motor vehicle. It has relation only to the collection of fees and penalties. It is additional to and not in conflict with the other provisions of the law. The purpose of this section is to provide a speedy and adequate method of securing delinquent licenses and penalties.

It therefore follows that the operation of a motor vehicle upon the public highways of this state during any year without proper license for such year is in violation of law.

BEN J. GIBSON, *Attorney General.*

TAXATION OF AUTOMOBILE WHEN NOT REGISTERED

Motor vehicles not registered and licensed during the year 1921 should be assessed for taxation the same as other property in the taxing district, for that year.

January 9, 1922.

Mr. W. M. Colladay, Superintendent Motor Vehicle Department: You recently requested of this department an opinion as to whether or not motor vehicles which were not registered and licensed during the year 1921 should be assessed for taxation the same as other property for that year.

In reply will say that the motor vehicle law requires the registration and licensing of all motor vehicles operated or driven upon the public highways of the state. It also provides that when so licensed, the license fee shall be in lieu of all other taxes. If a motor vehicle is not registered and licensed under the motor vehicle law, it should be taxed the same as other personal property in the taxing district in which it is located, as there is no distinction between a motor vehicle and any other class of property for taxation purposes, except that when a license fee is paid such license fee is in lieu of other taxes, as above stated.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

AUTOMOBILE LICENSES

Motor vehicle department should discourage the use of any other than approved lenses, and while it cannot be held that no other can be used, yet it should recommend to the public the use of approved lenses.

August 3, 1921.

Hon. W. C. Ramsay, Secretary of State: In your letter dated July 29, 1921, you submit to this department for an opinion certain questions relating to the motor vehicle law of the state. For convenience we quote your request at length. It is in words as follows:

"Numerous questions are being asked with regard to the headlight lens law. One question in particular is this 'If I have a lens upon my car which may cast a proper light, but the lens is not approved by the department, will it be legal?'"

"Another question is this 'Can I paint a green visor upon my plain glass and have the lens legal?'"

"It would appear to me, as they have decided in Nebraska, that home made devices are not legal, but before making any statement I desire to have your opinion of this matter."

"I am attaching herewith a clipping from a newspaper which describes the lens law in a way in the state of Nebraska. They have tested their lenses upon the same basis and stipulations as used in this state."

"I desire to have rendered a complete opinion upon this subject in order that I may advise the county treasurers next week and be able to answer the questions they will put to me, as I am sure they will be numerous."

In connection with the foregoing request and orally, the superintendent of the motor vehicle department in your office has requested us to include in this opinion our opinion on section 25 of chapter 275 of the acts of the 38th general assembly, as amended by the acts of the 39th general assembly, in and so far as the same has relation to lenses and devices not approved by the highway commission.

In this connection your superintendent calls our attention to the possibility of many owners of motor vehicles acquiring devices or lenses which, while not approved by the highway commission, in effect so focus the rays of light as to comply with the requirements of the law. He asks whether or not the use of such devices or lenses is unlawful within the meaning of this section.

Section 25 of chapter 275 of the acts of the 38th general assembly, as amended by chapter 159 of the acts of the 39th general assembly, has relation to the operation of motor vehicles upon the public highway. It provides for certain signaling devices and also provides the kind of lights to be used on motor vehicles.

This section in and so far as it has relation to the use of lights is lengthy and need not be quoted at length in this opinion. Suffice it to say that the section provides that during the period from one-half after sunset to one-half hour before sunrise all motor vehicles, excepting motorcycles, motor bicycles, and such other motor vehicles as are properly equipped with one light in the forward center of such motor vehicle, shall display two or more white or tinted lights on the forward part of such vehicle. The law specifically provides that red lights shall not be used on the front or forward part of the vehicle. The law further provides that these forward lights shall be so placed as to be seen from the front and visible at a distance of 500 feet in the direction in which displayed. The law further provides that such lights shall be of such power as to reveal persons, vehicles or substantial objects 75 feet ahead of the lamps. The law also provides for a red light to be displayed on the rear of a motor vehicle visible for a distance of at least 50 feet. The regulations with relation to those motor vehicles, motorcycles and motor bicycles equipped with one forward light are the same, except that there is only one light to be displayed on the forward part of the vehicle and one red light to the rear. Otherwise the law is the same.

It will be observed that there is a provision which has relation to the possibility of one or more of the lights failing to work, but this is immaterial to the consideration of the questions involved.

After providing with relation to the number and kind of lights to be displayed the law then provides:

"It shall be unlawful to use on a vehicle of any kind operated on the highways of this state, including motorcycles, any lighting device of over four (4) candle power, equipped with a reflector, unless the same shall be so designed, or arranged that the directly reflected and 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 level surface on which the vehicle stands under all conditions of load. If, in addition to headlights, any such vehicle is equipped with any auxiliary light, projecting lights, or devices other than the rear lamp, such auxiliary light or lights shall be subject to all the restrictions of this section, regarding direction of the beam. If a spotlight is used on a motor vehicle it shall be unlawful for any person to direct its rays toward the eyes of the driver or occupants of an approaching vehicle, or to the left of the center of the traveled way when meeting another vehicle. No person shall operate a motor vehicle on any highway of this state 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."

The law then provides the penalty for a violation of the provisions of the section.

This was the law at the time of the enactment of chapter 159 of the acts of the 39th general assembly. We quote the amendment to this section at length. It is to be found in section 16 of chapter 159 to which we have referred:

"It shall be the duty of the state highway commission to examine all headlight, lenses submitted to it by manufacturers and dealers, and any such lenses so submitted which, when in operation with an electric bulb or other lighting device of a capacity not in excess of that provided by this act, casts a light which complies with the provisions of this act, shall be placed upon the approved list of the state department. The fee for each such examination shall be twenty-five (\$25.00) dollars, and the state highway commission is hereby authorized to collect and remit to the state treasurer said fee and credit to the account of the primary road fund. It shall also be the duty of the state department to furnish county treasurers with a list of such lenses as are upon the approved list of the department, and such lenses used on any motor vehicle operated in this state equipped with a lighting device of a candle power not exceeding the provisions of this act, together with the lenses so approved by the department, shall be conclusively presumed to be lawful."

It will be observed that the amendment in no way modifies the provisions of the original law. The provisions of the original law as to what is an unlawful light remains the same. The manner in which the light is to be focused, the candlepower of the light, the restrictions and regulations with relation to spotlights and other auxiliary lights remain the same. The amendment simply provides for an approved list of lenses. The owner of any motor vehicle using such lenses so approved by the highway commission is protected. The law provided that lenses so approved by the department shall be conclusively presumed to be lawful. This in effect protects the owner of a motor vehicle equipped with such lenses from prosecution under this section.

In this connection, however, it must not be forgotten that the highway commission in approving such lenses will undoubtedly provide also for the focus. Such lenses when focused as specified in the findings of the highway commission are conclusively presumed to comply with the law.

It should also be remembered that the lens has no relation to the candlepower of the light or to the other provisions of the section to which reference has been made.

The purpose of the amendment was to render available to the owners of motor vehicles in this state an approved list of lenses to the end that any owner might be enabled to choose a lens which would in all respects comply with the provisions of the law.

The purpose of the law as a whole is to render negligible the possibility of accidents on the public highways due to the use of improper lighting devices on motor vehicles. It makes but little difference whether such results be obtained from the use of a glass lens or from the use of some device so long as the result be obtained.

We are firmly of the opinion that the use of the word lens in connection with the amendment must be held to include devices, whether made of glass or otherwise, which in the opinion of the highway commission are sufficient to attain the results sought to be obtained by the law.

It is therefore the opinion of this department that the words "automobile lenses" as used in the section to which we have referred, must be held to include lighting devices or lenses which when used on motor vehicles and when properly focused control the rays of light in such a manner as to comply with the provisions of the section in question.

The highway commission, therefore, in considering lenses and devices have authority to consider all such lenses and devices.

The question as to whether or not such lens and devices are sufficient is a question of fact to be determined by the state highway commission, and their finding with reference thereto when submitted to the state department is conclusive within the meaning of the law.

With relation to the second question submitted we are of the opinion that the owner of a motor vehicle may use any lens or device which he may desire, providing only that such lens or device must so control the rays of light as to comply with the provisions of the section of the law.

In prosecutions, however, the user of such lens or devices is not conclusively presumed to have complied with the law. In such cases it is only necessary for the state to prove beyond a reasonable doubt that the owner of such motor vehicle has used a light declared to be unlawful by the law.

The advantage to the owner of a motor vehicle in using an approved lens is so great as to almost negative the use of any other lens, and it is our opinion that in the course of time the use of approved lenses will become universal, and this is as it should be for the simple reason that it will render the enforcement of the law less difficult and will enable the owner of a motor vehicle to know that he is not violating such law.

I am frankly of the opinion, therefore, that your department should discourage the use of any other lenses than approved lenses, and while you cannot hold that no other lenses can be used, yet you can recommend to the public the use of approved lenses and the result will be practically the same.

BEN J. GIBSON, *Attorney General.*

SALE OF AUTOMOBILE FOR TAX—WHEN COUNTY TREASURER MAY REFUSE TO REGISTER

Sheriff must get his costs from sale of car. County treasurer may refuse registration when transfer is made without paying delinquent fees and penalties.

July 28, 1921.

Mr. Earl W. Vincent, County Attorney, Guthrie Center, Iowa: Your letter of the 19th inst., addressed to Attorney General Ben J. Gibson, has been referred to me for reply.

You ask in substance three questions:

"First—In the event the sheriff in collecting the delinquent motor vehicle fees and penalties cannot sell a car for enough to pay the sheriff's fees in addition to the license fees and penalties, can the sheriff collect his cost?"

"Second—When the owner of a car sells the same, without paying delinquent fees and penalties due thereon, can the county treasurer lawfully refuse to issue a new certificate of registration when application for transfer is made, until all delinquent fees and penalties are paid?"

"Third—In enforcing the motor vehicle law should an attempt be made to enforce the provisions of the statute literally?"

In answer to your first question, this department has uniformly held that if the owner of the car will voluntarily pay the delinquent fees, penalties and costs, the sheriff shall collect the same from him, but if it becomes necessary to sell the car in order to realize the delinquent fees, penalties and costs, then the sheriff's fees must be realized from the proceeds of the sale of the car, and in no other way.

In answer to your second question, it is the opinion of this department that the county treasurer is legally authorized to insist upon the payment of all delinquent fees and penalties prior to issuing a new certificate of registration when application is made for a transfer upon the sale of the car. It is the certificate of registration that is being transferred, and the owner of the car cannot obtain a valid certificate of registration without paying all delinquent fees and penalties. Section 8, chapter 275, acts of the 39th general assembly directs the county treasurer to withhold the registration of any motor vehicle when the owner has failed to register the car and pay the fees for any previous period.

In answer to your third question, the enforcement of the statute depends upon the circumstances surrounding each individual case. It is possible that occasions may arise when the literal enforcement of this statute would be unavailing. We believe the county attorneys will exercise absolute fairness and good, sound, common sense in attempting to carry out the true intent of the act. Some provisions in the statute call for a more rigid enforcement than others. However, we have the utmost confidence in the judgment and ability of the county attorneys, and we believe that they will exercise the same in the performance of their official duties, one of which is the enforcement of the motor vehicle law in their respective counties.

BEN J. GIBSON, *Attorney General*,

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

MOTOR VEHICLES—REGISTRATION FEES

Fees for 1921 must be paid on cars registered in 1920 and carried over before sold and shipped outside state, and owner remains personally liable therefor if not paid.

May 26, 1921.

Mr. W. M. Colladay, Superintendent, Motor Vehicle Department: We have your letter of May 3, requesting an opinion on the following proposition:

"We have a request for an opinion to cover dealers who may have on hand some cars registered for 1920 but without registration for 1921, which are sold to parties outside of the state and shipped.

"What we desire to know is it necessary when they sell these cars in that manner for the dealer to have them registered for 1921 before selling same?"

Since the receipt of this letter we have talked with you and you assured us that your letter has reference to automobiles which were registered individually in the year 1920 and were not operated on the highway under a dealer's license and that the owner of these cars has not applied for and received a dealer's license covering these cars for the year 1921.

Our opinion, therefore, is based on your letter with these added facts.

Section 10 of the motor vehicles law provides for annual license fees.

Section 8 provides:

"Registration shall be renewed annually as provided in section ten (10) to take effect on the first day of January of each year."

Section 16 insofar as applicable provides as follows:

"All registration or other fees herein or heretofore provided for in this act shall be and continue a lien against the motor vehicle for which said fees are payable until such time as they are paid as provided by law, with any accrued penalties. The lien of the original registration fee shall attach, at the time the same is first payable, as provided by law, and the lien of all renewals of registration shall attach on January 1 of each year thereafter."

By the foregoing provisions of the law registration and other fees required to be paid are declared to be a lien on the vehicles subject to registration from January 1 of each year after they have been first registered individually. Cars in the hands of dealers who registered them individually in 1920 and who have not paid their 1921 registration fees are subject to the lien above provided for and if not paid collection may be enforced against the owner who, according to the provisions of the latter part of section 16, shall remain personally liable therefor.

It follows that dealers who have on hand cars registered individually for 1920 but not registered for 1921, the dealer having no dealer's license for 1921, cannot ship them to parties to whom they are sold outside of the state without first paying the 1921 license fee or remaining personally liable therefor.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

PARTIAL RATE FOR LESS THAN YEAR

Sixth year fee applicable to cars brought in from outside the state. Also cars brought into state after quarterly reduction effective entitled to such reduction.

May 25, 1921.

Mr. W. M. Colladay, Superintendent of Motor Vehicle Department: You recently requested from this department an opinion with reference to the application of section 10 of chapter 275, acts of the 38th general assembly, as amended by senate file No. 284, acts of the 39th general assembly, which became effective by publication on the 10th day of March, 1921.

Your particular inquiry is as follows:

"Will this three-fourths, one-half and one-fourth rate apply to cars brought into the state during the second quarter such as a car which has been registered five times in another state and is entitled to what is known in this state as the one-half rate, should we allow them the three-quarter rate?"

It is our view of this amendment to the law that it would apply alike to new and second hand vehicles where the second hand vehicle was brought into the state after the date when a particular reduction became effective, that is to say, that if a second hand vehicle was purchased after the first day of April and before the first day of July the three-fourths annual license fee for that particular car would be required, and if the car had previously been registered five times in another state

the applicant would be required to pay three-fourths of the annual fee upon that particular car for the sixth registration if application is made after April 1 and one-half if after July 1.

BEN J. GIBSON, *Attorney General*,

By JOHN FLETCHER, *Assistant Attorney General*.

FEE FOR PUBLISHING DELINQUENT LIST

The rate of compensation for publishing list of motor vehicles on which registration fee has not been paid shall be as provided for in Sec. 1293, Supp. 1913. Each official paper is entitled to full fee.

May 12, 1921.

Hon. W. C. Ramsay, Secretary of State: *Attention Mr. Colladay*. You have submitted to this department for an opinion the question as to the rate of compensation for publishing the list of motor vehicles in each county each year on which the registration fee has not been paid. You ask:

"Will you kindly give us the rate of compensation for publishing this list? The treasurer states that a fee of 50 cents per description is all that is allowed, making 16 2-3 cents for each name in each paper. Mr. Caswell, secretary of the Iowa Press Association, reports that your department has ruled that each paper is entitled to the full legal rate. Kindly give us this information at an early date and also furnish the same to Mr. Hale."

The law governing your question will be found in section 16, chapter 275, acts of the 38th general assembly, the portion applicable being as follows:

"On April 1 of the year 1921, and annually thereafter, the department shall forward to the county treasurer of each county, a list of all motor vehicles in said county on which the registration fee has not been paid, showing the amount of the delinquent fee, registration number, make and factory number, together with the name and address of the owner of each car as disclosed by the records. In the first week of May of each year the county treasurer shall cause to be published in each of the official newspapers in his county, a list of all motor vehicles owned within his county upon which the license fee has not been paid for that year. Such list shall show the factory number, make and model of the vehicle together with the name and postoffice address of the owner thereof as shown by the records of his office and the amount of the license fee and penalty due upon the vehicle. Immediately after the publication of the list as herein provided, it shall be the duty of the county treasurer to collect the license and penalty.

"The county treasurer shall collect from each delinquent, fifty cents (\$.50) on each vehicle on which the fee is delinquent to cover cost of publication. The cost of publication provided for in this section shall be paid as other bills for the maintenance of the department, but shall first be certified by the county treasurer of the county in which the publication was made, and approved by the department."

Also section 1293 of the supplement to the code, 1913, which provides:

"The compensation, when not otherwise fixed, for the publication in a newspaper of any notice, order, citation or other publication required or allowed by law, shall not exceed one dollar for one insertion, and fifty cents for each subsequent insertion, for each ten lines of brevier type, or its equivalent, in a column not less than two and one-sixth inches in width. For publication of the official ballot, forty cents for each ten lines of brevier or its equivalent may be charged, the space necessarily occupied thereby being measured as if it were in brevier type set solid. In no case shall the cost of publishing the official ballot exceed

forty dollars for each of the two papers in which it shall be published, except in presidential years, when it shall not exceed the sum of seventy dollars for each of said papers. Weekly publications may be made in a daily or weekly newspaper. The plaintiff or executor, in all publications concerning actions, executions and estates, may designate the newspaper in which such publication shall be made. If any newspaper refuse to make publication thereof, when copy therefor, with the cost or security for payment of the cost, is tendered, such publication may be made in some other newspaper of general circulation at or nearest to the county seat, with the same effect as if made in the newspaper so refusing."

Pursuant to that portion of section 16, chapter 275, above quoted, it will be observed that,

"In the first week of May of each year the county treasurer shall cause to be published in each of the official newspapers in his county, a list of all motor vehicles owned within his county upon which the license fee has not been paid for that year."

It will also be observed that,

"The county treasurer shall collect from each delinquent fifty cents (\$.50) on each vehicle on which the fee is delinquent to cover the cost of publication."

However, there is no other provision in the act prescribing the rate to be paid for such publications, and we do not believe the fifty cents referred to is intended to cover the entire cost of publishing the delinquent list, but shall simply be collected by the county treasurer from each delinquent and forwarded to the state automobile department to apply on the cost. No specific compensation being fixed in chapter 275 for such publications, section 1293 of the supplement to the code, 1913, would therefore apply.

As to whether each official newspaper in the county is entitled to the full legal rate, we believe they are. Section 15, chapter 275, *supra*, expressly provides that the county treasurer shall publish the list in each of the official newspapers in his county.

BEN J. GIBSON, *Attorney General*,

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

TRANSFER OF AUTOMOBILES

General discussion as to transfer when original owner refuses to make transfer.

January 23, 1921.

Mr. W. M. Colladay, Superintendent Motor Vehicle Department: Your letter of the 26th inst., enclosing a letter from Chester L. Neve, deputy county treasurer of Woodbury county, has been referred to me for attention.

This letter states:

"As we have had several inquiries regarding cars attached by the sheriff and sold at sheriff's sale, we would like an opinion as to what procedure the sheriff would take in securing the certificate of registration from the original owner if an attempt was made to hold up the certificate thereby interfering with the completion of the transfer of ownership on record.

"There is a case pending at present where the sheriff here seized a car and the certificate of registration could not be found in the car, and when the owner was questioned he would not state where it was and absolutely refused to give any information regarding it. The sheriff's

office have requested us to find out what power they can use in forcing the owners of such cars to locate the certificate, and also in securing his signature, if a duplicate certificate is made. I presume the county attorney could serve notice on the owner and bring him in but the sheriff requested us to write you for this information."

Section 18, chapter 275, acts of the 38th general assembly provides:

"Upon the transfer of ownership of any registered motor vehicle, the owner shall immediately give notice to the county treasurer, upon the form on the reverse side of the certificate of registration, stating the date of such transfer, the name and postoffice address, with street number if in a city, of the person to whom transferred, the license number, and such other information as the department may require. The purchaser of the motor vehicle shall join in the notice of transfer to the county treasurer and shall at the same time make application for the transfer of the motor vehicle and for a new certificate of registration. Upon filing the application for transfer, the applicant shall pay a fee of one dollar (\$1.00) for the transfer, thereupon the county treasurer, if satisfied of the genuineness and regularity of such transfer, shall register said motor vehicle in the name of the transferee and issue a new certificate of registration as provided in this act. Until said transferee has received said certificate of registration and has written his name upon the face thereof, delivery and title to said motor vehicle shall be deemed not to have been made and passed. The county treasurer shall forthwith notify the department of such transfer and upon receipt of such statement, the department shall file such statement in his office and note upon the registration book or index, such change of ownership.

"The provisions provided for herein for the transfer of motor vehicles shall apply to the sale and transfer of all motor vehicles to manufacturers or dealers."

While the statute above quoted contemplates the presentment of the certificate of registration showing the transfer before the county treasurer shall register the car in the name of a person other than the original owner, nevertheless, we are of the opinion that if the court, in an attachment proceeding, has jurisdiction of both the subject matter and all of the persons interested in the car, that the court has the power to order the car sold to pay the judgment entered in the case and direct a county treasurer to register the same in the name of the purchaser. In such event a certified copy of the judgment and proceedings showing the same should be presented to the county treasurer at the time registration is requested.

The essential fact to be present in all such cases, however, is the fact that the court has jurisdiction of both the persons affected and the subject matter. If the jurisdiction exists, then the court has the power to make the necessary order.

BEN J. GIBSON, *Attorney General*,

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

LICENSING OF TOURING CAR REBUILT AS TRUCK

A touring car actually and in good faith transformed into a truck can be licensed as a truck.

July 27, 1921.

Hon. W. C. Ramsay, Secretary of State: After a careful reconsideration by this department of the opinion written by the writer bearing date of December 29, 1919, and addressed to you, I am directed by the attorney general to modify the same in the following particular:

In the event a touring car formerly licensed, is entirely transformed into a truck so that the original features of a touring car no longer exist, and the car, so transformed, discloses its true weight and loading capacity so that the county treasurer may accurately determine the fee, then it is the opinion of this department that a touring car, so transformed, in good faith may be licensed as a truck. Otherwise than in this particular the original opinion must govern.

BEN J. GIBSON, *Attorney General*,

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

See page 513 report of attorney general 1919-1920 for opinion of December 29, 1919.

WHEN LICENSE REQUIRED FOR NEW AUTOMOBILE

A dealer is not required to have dealers license for new cars, if they are not operated upon public highway.

April 19, 1921.

Mr. W. M. Colladay, Superintendent Motor Vehicle Department: Your letter of the 7th inst., addressed to Attorney General Ben J. Gibson, has been referred to me for reply. You ask:

"We would appreciate your opinion of the motor vehicle law with regard to dealers who do not have a dealers license but who handle new cars. What we desire to know is, if a dealer does not have a dealers' license and obtains new automobiles, should he register these automobiles the same as any private individual who may buy a new car from a licensed dealer."

"I am of the opinion that in the event a dealer in automobiles does not operate new cars upon the public highway he is not required to obtain a license of any kind for such new cars.

Section 3, chapter 275, acts of the 38th general assembly prohibits the operation of motor vehicles upon the public highway without a license.

Section 23, chapter 275, provides that a dealer may secure a general distinctive number to cover cars owned and kept for sale by such dealer, upon the payment of \$25, and two number plates will be furnished to him. If such dealer desires additional number plates he can obtain duplicate sets upon the payment of \$15 for each duplicate set. Wherever the dealer uses such cars upon the public highway he should always have attached thereto one of these sets. Therefore it is apparent that unless such dealer operates his new cars upon the public highway he is not required to have even a dealers' license, in fact, no license whatever.

BEN J. GIBSON, *Attorney General*,

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

PENALTY ON DELINQUENT FEES

A penalty attaches on the first of every month to any fees that are delinquent, under provision of par. 16, ch. 275, Acts 38th G. A.

February 18, 1921.

Mr. W. M. Colladay, Superintendent Motor Vehicle Department: Your letter of February 3, requesting the opinion of this department upon the following question has been referred to me for attention.

"This department would be pleased to have your opinion as to our charging penalties upon new cars, rebuilt cars and foreign cars which are run upon the public highway, before obtaining the proper license. This is in connection with section 16 of chapter 275."

The part of section 16 of chapter 275 acts of the 38th general assembly referred to in your question reads as follows:

"On January 1 of each year, a penalty of one dollar shall be added to all fees not paid by that date, and one dollar shall be added to such fees on the first of each month thereafter that the same remains unpaid until paid."

It will be noted by a careful reading of the entire motor vehicle law, and particularly of section 16 thereof, that the penalty therein provided was intended to refer to all fees due under the provisions of this chapter. Therefore, it is the opinion of this department that a penalty attaches on the first of each and every month to any fees that have become due and are delinquent.

BEN J. GIBSON, *Attorney General*,

By NEILL GARRETT, *Assistant Attorney General*.

COST OF SALE

Sheriff entitled to costs before payment of license fee in collecting delinquent list. Expense incident to taking possession to be paid.

June 4, 1921.

Mr. W. M. Colladay, Superintendent Motor Vehicle Department: Your letter of May 16, addressed to the attorney general, has been referred to me for answer. You state:

"The county sheriff of Harlan, Iowa, has asked for information concerning the seizing of motor vehicles in connection with the delinquent list. He asked about cars that were seized and sold and the amount paid for the car was not sufficient to cover the amount of the sheriff's costs and the license fee and penalties, how was this to be handled. That is would the amount be used for the sheriff's costs and the balance turned over to apply on the license?"

"Another question also asked was where it was necessary for him to seize cars and tow them into town, if he would be allowed remittance for extra help necessary to have the car brought into town?"

The provision of the motor vehicle law defining the duties of the sheriff with reference to taking possession of and selling motor vehicles for unpaid license fees is found in section 16 of chapter 275, acts of the 38th general assembly, and that portion fixing his compensation for services performed is as follows:

"The sheriff shall be entitled to receive as costs, the sum of two dollars (\$2.00) for serving the writ or warrant of seizure and ten cents (\$.10) for each mile actually traveled by him in collecting the fee and penalties, and dollar (\$1.00) per day for care of the motor vehicle while in his possession, which shall be collected from the owner of such delinquent motor vehicle, such costs and mileage, and costs of care while in his possession, shall be retained by him in full for his services."

It will be observed that the compensation of the sheriff as fixed by the portion of the statute above quoted is denominated costs and the latter part thereof provides that the same "shall be retained by him in full for his services."

Costs to which an officer is entitled in the service and execution of writs and processes for the sale of property covered by a lien, which he

is enforcing, are ordinarily, and as we think, invariably paid first. In cases of mortgage foreclosure, if the sale price is not sufficient to extinguish the debt and pay the costs the costs are always first paid before any of the proceeds of sale are applied on the debt.

Because of this rule, and especially because of the fact that the statute above quoted specifically provides that the sheriff shall retain the costs allowed him for his services, it is the opinion of this department that in cases where automobiles are seized by a sheriff for nonpayment of license fees and sold by him under the provisions of the law, and the proceeds of such sale are not sufficient for the payment of license fees, penalties and sheriff's costs, the sheriff's costs shall be retained by him and the balance turned over to apply on the license fees.

In answer to your second question, it is our opinion that in cases where it is absolutely necessary for the sheriff to tow cars which he has seized into town for the purpose of care pending sale, and it is necessary that he employ extra help to have the car brought into town, such help should be paid from the proceeds of sale, not as care, costs or fees, but as expense incident to taking possession of the car.

BEN J. GIBSON, *Attorney General*,

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

NO AUTOMOBILE SHOULD BE REGISTERED WHEN ENGINE OR SERIAL NUMBER DEFACED

No license can be issued upon any vehicle unless the original serial and motor number is shown on the certificate of registration.

May 25, 1921.

Mr. W. M. Colladay, Superintendent Motor Vehicle Department: You recently submitted a request for an opinion to this department in which you ask an interpretation of section 20, chapter 275, acts of the 38th general assembly, your particular inquiry being with reference to the registration of a motor vehicle where the serial or engine numbers have been in any manner defaced or changed.

That part of the section necessary to an interpretation of the question presented reads as follows:

"It shall be unlawful for any person, firm, association or corporation to deface, or alter any serial number, engine number or assembling number of a motor vehicle or registration number of certificate of registration or to have in his or its possession a motor vehicle, the serial number or engine number of which is defaced, altered or tampered with unless said person, firm, association or corporation has in his or its possession 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, showing good and sufficient reason why numbers are defaced, changed or tampered with; and also showing the original serial or engine number, and also showing the ownership of said motor vehicle."

A reading of this section discloses that no person can have lawfully in his possession a motor vehicle where the engine number or serial number of which has in any manner been altered, defaced or tampered with unless he has in his possession a certificate of registration and a transfer from the officer whose duty it is to register motor vehicles which shows upon its face the reasons for the numbers having been defaced or

altered. It is our opinion that such showing must be made, as to the alteration of the numbers as will clearly satisfy the person issuing the license on the automobile that the applicant for the license is the bona fide owner of the vehicle and that he did not obtain the same through the wrongful act of any person.

You will notice, however, that in no case, regardless of the proof filed, can a treasurer or other person authorized to license a motor vehicle issue a license where the numbers have been tampered with, unless the original serial number and engine number are clearly shown so there can be no mistake as to the identity of the machine, and in addition to showing these original numbers, the ownership of the motor vehicle must be clearly shown to be in the person applying for the license.

It has been called to our attention that in many instances where serial or engine numbers have been defaced that certificates of registration have been issued upon affidavit of some person showing ownership in the applicant, and without any showing as to the original serial and engine number. Such a registration is entirely illegal and unless the original engine number and serial number appear upon the certificate of registration the motor vehicle is not properly licensed and peace officers should take into possession any such motor vehicle until proper registration is made.

BEN J. GIBSON, *Attorney General*,

By JOHN FLETCHER, *Assistant Attorney General*.

EFFECT OF JUNKING AUTOMOBILE

When owner failed to pay license fee for certain year and car was junked the following year, license for previous year must be paid.

February 26, 1921.

Mr. W. M. Colladay, Superintendent Motor Vehicle Department: Your letter of the 21st, addressed to Attorney General B. J. Gibson has been referred to me for attention. You state:

"The owner of a motor vehicle failed to pay his license fee for a certain year; the following year the car was in storage and junked."

You then ask:

"Is the owner of said car compelled to take out registration for the year previous to the storage and junking of the car?"

It is my opinion that the owner of the car is liable for the license fee for the year previous to the year in which the car was in storage and junked.

BEN J. GIBSON, *Attorney General*.

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

PURCHASE OF SECOND HAND CARS TO BE SHIPPED OUT OF STATE

A brokerage concern in Iowa cannot buy second hand cars from other dealers and ship and sell the same outside the state without first having obtained the 1921 license.

February 8, 1921.

Hon. Walter C. Ramsay, Secretary of State: In your letter of February 8, 1921, you submit to us the following question for an opinion thereon:

"Can a brokerage concern located in Iowa buy second hand cars from other dealers and ship and sell the same outside of the state without first having obtained the 1921 license?"

Section 20 of chapter 275 of the acts of the 38th general assembly provides 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 said motor vehicle is registered or licensed, showing the factory number, description, license number and ownership of said motor vehicle."

It will be noted from this section that it is 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. It will therefore become apparent that there cannot be a lawful purchase of a second hand or used car, whether from another dealer or from an individual, without there having been required and received a certificate of registration and transfer.

It will be unnecessary to quote the other sections of the chapter, but from a reading of the whole chapter there would seem to be no doubt that your question must be answered in the negative and that a license fee must be paid.

BEN J. GIBSON, *Attorney General*.

SPEED LIMIT OF AUTOMOBILES

Maximum speed prescribed by chapter 275 is mandatory—city or town has no authority to change. City or town may determine and establish suburban district and business district, but provisions of law relative to speed, govern.

June 20, 1921.

Mr. John L. Cherny, County Attorney, Independence, Iowa: In your letter of June 17, 1921, you have requested an opinion from this department as to the interpretation to be given chapter 275, acts of the 38th general assembly, insofar as the same relates to maximum speed in cities and towns.

The questions submitted by you are as follows:

"Can a city adopt an ordinance fixing a maximum speed in suburban districts at less than twenty, and in the business district at less than fifteen miles per hour? The wording in the statute quoted reads that the maximum to be fixed by ordinance 'shall not exceed,' from which the argument is made that local authorities are permitted the discretion of fixing any maximum speed under fifteen and twenty miles respectively.

"A second question is raised, but this, doubtless will be answered by answering the first, can a city fix a maximum for the entire corporate limits, regardless of whether suburban or business, of any fifteen miles per hour?"

Chapter 275, to which you refer, insofar as applicable, is in words as follows:

"Provided, that the local authorities of any city or town *may establish a suburban district* in which the maximum speed of any vehicle shall not exceed twenty (20) miles per hour, and a business district in which the maximum speed of any vehicle shall not exceed fifteen (15) miles per hour, provided that such city or town shall have placed conspicuously on every main highway where the rate of speed changes, signs of sufficient size to be easily readable by a person using the highway, bearing the words: 'City of _____,' 'Town of _____,' 'Slow down to _____ miles' (the rate being inserted), and also an arrow pointing in the direction where the speed is to be reduced or changed, and also on further condition that such ordinance, rule or regulation shall fix the punishment for violation thereof, not to exceed twenty-five dollars, or five (5) days in jail, which punishment shall, during the existence of such ordinance, rule or regulation, supersede those otherwise specified in this act."

It is the opinion of this department that the maximum speed prescribed by this section is mandatory and that the city or town has no authority to change the maximum speed provided in this section. You will note that the authority given to the city is not to determine what the maximum speed shall be but is to determine the suburban district and the business district so that the same will be clearly marked and established. When the districts are established the provisions of the law relative to speed govern. The purpose and intent of the legislature in this section was to provide uniform speed regulations throughout the entire state leaving to the cities and towns the right to determine where the suburban district ends and the business district begins.

BEN J. GIBSON, *Attorney General.*

OPINIONS RELATING TO INSURANCE

SALE OF INSURANCE CERTIFICATES

The sale of certificates issued upon the partial payment plan without a permit from the auditor of state is in violation of law, and would subject the person selling or offering for sale to punishment under the Iowa law.

August 11, 1922.

Hon. Glenn C. Haynes, Auditor of State: I am in receipt of your letter dated August 11, 1922, in which you request an opinion from this department. Your request is in words as follows:

"I am enclosing a communication from the insurance department, together with a copy of a letter sent by that department to the Security Benefit Association, of Topeka, Kansas, a copy of that association's reply to same, and a sample twenty-year deposit certificate of the Security Trust Company of Topeka, Kansas.

"In my judgment, the selling of the contract enclosed herewith is a violation of section 1920-q. It is requested that you examine the contract and if you find it to be in violation of the above named section, to take such steps as may be necessary to stop the practice and prosecute the violators."

Section 1920-k of the supplement to the code of 1913 provides 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."

Section 1920-l of the supplement to the code of 1913 provides as follows:

"No association contemplated by this act shall issue any stock until it shall have procured from the auditor of state a certificate of authority authorizing it to engage in such business. To procure such certificate of authority it shall be necessary for such association, to file with the auditor of state a statement under oath, showing the name and location of such association, the name and post office address of its officers, the date of organization, and if incorporated a copy of its articles of incorporation, also a copy of its by-laws or rules by which it is to be governed, the form of its certificates, stocks or contracts, all printed matter issued by it, together with a detailed statement of its financial condition and such other information concerning its affairs or plan of business as the auditor of state may require. The same shall be, by the auditor of state laid before the executive council for consideration."

The sample certificate of the Security Trust Company of Topeka, Kansas, enclosed in your letter is a certificate which is issued upon the partial payment plan, monthly, for 240 months. It is so clearly within the provisions of this chapter and of the sections to which we have referred, as to need no explanation. The sale of this certificate in this state without a permit from the auditor of state would be in violation

of the laws of Iowa, and would subject the person selling or attempting to sell the same to punishment under the provisions of section 1920-q, supplement to the code, 1913. BEN J. GIBSON, *Attorney General*.

CO-INSURANCE

Section 1746 of code relating to co-insurance does not apply to any other than fire insurance policies.

February 2, 1922.

Hon. A. C. Savage, Commissioner of Insurance: I have your verbal request for an opinion as to whether the permissive clause found in section 1746 of the code of 1897, as amended, applies to any other contract written by a fire insurance company transacting the business authorized under chapter 4 of the code, except contracts covering loss or damage by fire.

The original act prohibiting co-insurance will be found in chapter 31, acts of the 25th general assembly, which reads as follows:

"That any provision, contract or stipulation contained in any contract policy of insurance, issued or made by any fire insurance company, association or corporation insuring any property within this state whereby it is provided or stipulated that the assured shall maintain insurance on any property covered by the policy to the extent of eighty per cent on the value thereof, or to any extent whatever, and any provision or stipulation in any such contract or policy of insurance that the assured shall be an insurer of the property insured to any extent; and any provision or stipulation in any such contract or policy to the effect that the assured shall bear any portion of the loss on the property insured, are hereby declared to be null and void, and the liability of the company, association or corporation issuing the policy, shall be the same as if no such agreement, stipulation or stipulations were contained in policy or contract.

"It shall be the duty of the auditor of state to examine the form of all policy contracts hereafter issued or proposed to be issued by any fire insurance company, association or corporation now authorized by law, or that may hereafter apply to be authorized, to transact the business of fire insurance in this state, and he shall refuse to authorize any such company, association or corporation to do business in this state, and shall not renew the authority, or certificates of any company, association or corporation authorized to do business in this state, whenever the form of policy, contract issued, or proposed to be issued by any such company, association or corporation, contains any of the provisions or stipulations referred to in section one of this act, or provisions of a similar import."

By reference to the title of the act above quoted, you will observe that the act was proposed to cover policies of fire insurance. Said title reads as follows:

"An act to declare void certain provisions in policies of fire insurance, and to require the auditor to refuse to authorize insurance companies whose policies contain such provisions to do business in this state."

Under the act above quoted, the inhibition applies only to "policies of fire insurance" issued by any fire insurance company doing business in this state. However, upon the adoption of the code of 1897 the language used in chapter 31 was changed, the word "fire" being omitted, and limiting the inhibition to only such companies as are transacting the insurance business provided for in chapter 4, title 9 of the code. So that under section 1746 of the code, no insurance company transacting

the business authorized in chapter 4 could incorporate in any of its policies or attach thereto any provision or rider requiring the insured to be an insurer of his property to any extent.

But section 1746 of the code of 1897 was amended by the 34th general assembly, the amendment being found in chapter 79 of the session laws of that session. By the terms of the amendment the insured was permitted to apply for a co-insurance clause and the company was authorized to attach it to the policy. Chapter 79 prescribes the form of the co-insurance clause and by reference thereto you will observe that the form could only apply to a fire insurance policy. The first paragraph of said form provides as follows:

"In consideration of a reduction from the established rate of per cent to per cent, in premiums to be paid to the..... Insurance Company for insurance upon the following described propertyI hereby request that a co-insurance rider be attached to the policy to be issued by said company and hereby agree, that during the life of the policy I will maintain insurance on said property to the extent of at least.....dollars, (or).....per cent (whichever may be agreed upon) of the actual cash value thereof at the time of fire, and that failing to do so, I shall become a co-insurer to the extent of such deficit."

It is also provided in the form for the acceptance by the insured as follows:

"In consideration of the acceptance by the insured of a reduction in premiums from the established rate of per cent, it is hereby agreed that the insured shall maintain insurance during the life of this policy upon the property insured:

- "1. To the extent of.....dollars, or
- "2. To the extent of at least.....per cent of the actual cash value thereof, at the time of fire (whichever may be agreed upon) and, that failing to do so the insured shall be a co-insurer to the extent of such deficit."

While the title to the act, known as chapter 79, provides for the amendment to section 1746 of the code relating to co-insurance clauses in "policies of fire insurance companies," yet in as much as the form prescribed by the legislature refers only to policies covering loss or damage by fire, I am of the opinion that the legislature never intended to extend the permissive clause found in section 1746 to other kinds of risks written by fire insurance companies, such as tornado, windstorm and other casualties.

BEN J. GIBSON, *Attorney General*,
 By W. R. C. KENDRICK, *Assistant Attorney General*.

INSURANCE COMPANIES NOT REQUIRED TO SECURE PERMIT FROM SECRETARY OF STATE

Insurance companies making loans, etc., in this state not required to secure permit from secretary of state. Permit from commissioner of insurance all that is required.

November 21, 1921.

Hon. A. C. Savage, Commissioner of Insurance: Your letter of the 9th inst., addressed to this department, has been referred to me. You request an opinion on the following proposition:

"My attention has been called to chapter 139, acts of the 39th general assembly, which amended section 1637 of the code.

"Will you kindly give me your opinion as to whether or not this section 1637, as amended by chapter 139, affects insurance companies doing business in this state? Prior to enacting chapter 139, there seems to have been no doubt but that all foreign corporations were permitted to buy, sell, and otherwise deal in notes, bonds and mortgages and other securities as provided at the end of the last paragraph of section 1637. Chapter 139, under section 3, struck out the last sentence of the section, and the question has arisen whether or not insurance companies were prevented from buying, selling, and dealing in notes, mortgages, and other securities in this state without a permit from the secretary of state.

The first paragraph of section 1637, among other things provides that

'Any corporation for pecuniary profit organized under the laws of another state, or of any territory of the United States, or of any foreign country, which has transacted business in the state of Iowa since the first day of September, e.ghteen hundred eighty-six, or desires hereafter to transact business in this state, AND WHICH HAS NOT A PERMIT TO DO SUCH BUSINESS shall file with the secretary of state a certified copy of its articles of incorporation * * *'

"I wish to call your attention to the fact that an insurance company can only secure permission to do business in this state through a certificate of authority and permit from the department of insurance, and the question has arisen whether or not the words capitalized do not exempt insurance companies from the provisions of the law."

Under date of July 15, 1921, this department furnished you an opinion in which it was determined that an insurance company is entirely under the supervision of the commissioner of insurance and is not required to secure a permit from the secretary of state to transact business in the state of Iowa. On page 7 of that opinion you will find the following paragraph:

"What has been said in relation to the secretary of state and his supervision over the corporations, associations, etc., included in the blue sky act, is equally true of the commissioner of insurance with relation to the supervision of insurance companies in this state, his control over them is complete and absolute by the provisions of chapter 224 above referred to from the time their organization is conceived and all along through their entire existence so long as they are doing business in this state."

We believe it is not necessary to emphasize our opinion as set forth in the above quoted paragraph. A permit from the commissioner of insurance is all that is required of an insurance company.

The statute provides for service of notice on insurance companies by service on the commissioner of insurance so that the courts of this state may have jurisdiction of controversies arising between insurance companies and those with whom they deal, so that having been permitted to do business and having submitted to the jurisdiction of the courts of this state in case of a controversy arising on any of their contracts or obligations nothing could be gained by requiring an insurance company to secure a permit from the secretary of state and in our opinion they are not required so to do.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

**REFUND OF TAXES ILLEGALLY COLLECTED FROM CERTAIN
INSURANCE COMPANIES**

The \$125,000 appropriation covers all taxes paid under protest, where facts are identical with cases decided by the supreme court.

October 13, 1921.

Hon. A. C. Savage, Commissioner of Insurance: You have submitted the following question to this department for an opinion:

"Under chapter 310, acts of the 39th general assembly, \$125,000 was appropriated for the payment of certain taxes paid under protest by insurance companies transacting business in the state of Iowa, and which taxes have been adjudged by the supreme court of the state of Iowa to have been erroneously collected."

"The question is raised as to whether or not refund can be made to other companies than those involved in the case of the Continental Casualty Company, wherein the supreme court determined that certain taxes were illegally collected. A large number of companies during the past five years have paid their taxes under protest, claiming they should not be required to pay taxes on premiums returned on cancelled policies or for re-insurance.

"Will you kindly give us your opinion whether or not the commissioner of insurance, acting with the executive council, is authorized to make refunds to any other company than those involved in the case above mentioned?"

The chapter referred to is known as "chapter 310, acts of the 39th general assembly," and reads as follows:

"Section 1. That there is hereby appropriated out of any money in the state treasury not otherwise appropriated, the sum of one hundred twenty-five thousand (\$125,000) dollars for the payment of certain taxes paid under protest by insurance companies transacting business in the state of Iowa and which taxes have been adjudged by the supreme court of the state of Iowa, to have been erroneously collected.

"The commissioner of insurance is hereby authorized to certify all said claims to the executive council. When such claims are approved by the executive council, they shall be payable out of the state treasury upon warrant issued by the auditor of state."

The decision of the supreme court of Iowa mentioned in your letter, is known as in re Continental Casualty Company, and is reported in 179 Northwestern Reports, 185, and the issues were as follows:

"First: 'Under section 1333 of the code, as amended, are unearned premiums on cancelled policies subject to tax?'"

"Second: 'Under the same section of the code, are premiums received on business ceded to another company when the entire tax has been paid upon the original premium, subject to the tax, both companies being organized under the laws of another state than Iowa?'"

The portion of section 1333 material to a proper determination of the question is as follows:

"Every insurance company incorporated under the laws of any state of the United States other than the state of Iowa, not including associations operating under the provisions of chapter 7, title IX, of this code, or fraternal beneficiary associations doing business in the United States, shall, at the time of making the annual statements as required by law, pay into the state treasury as taxes two and one-half per cent of the gross amount of premiums received by it for business done in this state, including all insurance upon property situated in this state and upon the lives of persons resident in this state during the preceding year."

The holding of the court in the Continental Casualty Company case on the first issue, was:

"The only fair construction of the statute, therefore, is that 'premiums received' can refer only to those premiums which the company has a right to retain as its own absolute property."

And in construing the second issue, the court says:

"The question presented, therefore, is whether such distribution of business between these companies, *and perhaps others*, amounts to a receiving of additional premiums upon which an additional premium tax should be paid."

The court then holds:

"Under the stipulation of facts herein the liability of the indemnifying company, in the event of loss, was to the insuring company, and not to the policy holder. The policy holder paid one premium. This premium paid for his insurance. The full premium tax upon it was paid. In the state of New York this premium so received by the insuring company was apportioned pursuant to the pre-existing contract. A division of the premium worked a division of the loss, if any. Did this apportionment create insurance upon property within this state in any other sense than that the original policy covered property within this state? Was there any new insurance created upon property in this state? We think not. Indeed, we think that the distribution of these premiums in the manner indicated by the stipulation of facts, was business done by these companies in the state of their domicile. We see no fair reason for saying that such business should be deemed as constructively done in Iowa, or should be deemed as coming within the letter or spirit of our statute."

So that, even though the three insurance companies made parties to the suit were the only companies directly affected by the decision, yet the decision will stand as a precedent, until overruled, and will govern all future cases presenting identical facts.

Now, the legislature appropriated one hundred and twenty-five thousand dollars,

"for the payment of certain taxes paid under protest by insurance companies transacting business in the state of Iowa, and which taxes have been adjudged by the supreme court of the state of Iowa to have been erroneously collected."

The question now is,

"What taxes were intended to be included in the one hundred and twenty-five thousand dollars appropriated?"

At the time the appropriation was made, there were a large number of foreign insurance companies who had paid under protest, taxes identical with those in issue in the Continental Casualty Company case. Surely, the legislature never intended to limit the appropriation to only the three companies mentioned in the case then pending in the supreme court, for the reason that less than five thousand dollars were involved. The legislature had in mind all such taxes paid under protest by all the foreign insurance companies. And inasmuch as the decision in the Continental Casualty Company case must apply to all future cases presenting identical facts, until overruled, it cannot possibly be violent construction to hold that the one hundred twenty-five thousand dollars appropriated shall apply to all foreign insurance companies, except those exempted in the statute, which have paid taxes, under protest, identical with those in issue in the Continental Casualty Company case. And such is the holding of this department.

However, if the amount of claims filed exceed the appropriation, the claims should then be prorated.

BEN J. GIBSON, *Attorney General*.

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

INSURANCE AGENTS' LICENSE

Cities and towns have no power to require by ordinance insurance agents to procure license.

July 30, 1921.

Hon. A. C. Savage, Commissioner of Insurance: Your request for an opinion as to the legality of a proposed ordinance of the city of Cedar Falls, Iowa, requiring all insurance agents to procure a license prior to engaging in the insurance business as such and making the violation of said ordinance a penalty, has been referred to me for attention:

Without setting out the proposed ordinance in full it prohibits any person, firm or corporation from engaging in the business of representing any insurance or liability company as agent within the city of Cedar Falls without first procuring a license from the mayor of said city. The proposed ordinance also provides a penalty for a violation thereof.

It is an elementary rule of law that cities and towns cannot exercise any power of taxation or license unless it be expressly conferred by the legislature, or absolutely necessary to carry out some other power expressly conferred, and in case of doubt, the power will always be denied. The foregoing rule was announced by the supreme court of Iowa several years ago, and the court has consistently adhered thereto ever since. In fact, our court has directly held that cities and towns in Iowa are without authority to require, by ordinance, insurance agents to procure a license prior to transacting any insurance business. *State vs. Smith*, 31 Iowa 493. The legislature has never expressly conferred upon cities and towns this power and therefore it does not exist.

I might add that the supreme court of Iowa has held that neither the power to tax nor the power to regulate, conferred by the legislature upon cities, gives the right to license. *Burlington vs. Bumgardner*, 42 Ia. 673.

BEN J. GIBSON, *Attorney General*,

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

CANCELLING LICENSE OF MUTUAL ASSESSMENT ASSOCIATIONS

When state mutual assessment associations fail to maintain the statutory number of applications, commissioner of insurance may cancel license and report to attorney general.

July 19, 1921.

Hon. A. C. Savage, Commissioner of Insurance: You request an opinion from this department upon the following state of facts:

"In case a state mutual assessment association is licensed by this department and at the time it receives such license, has the requisite number of applications as provided by statute and is subsequently examined by this department and found to have less than one hundred twenty-five members, is it the duty of this department to cancel the license of such association to transact the business of insurance?"

The law governing your question will be found in section 1821-d of the supplement to the code, 1913, which in part reads:

"If upon investigation or examination, it shall appear that any company is * * * in an unsound condition * * * he (commissioner of insurance) may revoke its certificate of authority to transact business within this state and having revoked the certificate of any company organized under the laws of this state, he shall at once report the same to the attorney general who shall apply to the district court or any judge thereof for the appointment of a receiver to close up the affairs of said company * * *"

Pursuant to the provisions of section 3, chapter 120, acts of the 39th general assembly, no state mutual assessment association shall transact any insurance business until it has received a certain specified number of applications aggregating a prescribed amount. Section 3 in part reads:

"No state mutual assessment association shall issue policies until at least one hundred and twenty-five (125) applications have been received in any class as shown by section one (1) hereof, representing the following amount of insurance: classes 1, 2, 3 and 5, two hundred and fifty thousand dollars (\$250,000) each, class 4, one hundred thousand dollars (\$100,000) * * *"

It will be observed, as a prerequisite to transacting the business of insurance by a state mutual assessment association, that it shall have a certain prescribed number of applications aggregating a definite amount. This statutory provision is jurisdictional, and until such companies have the prescribed number of applications aggregating the required amount of insurance, they have no authority to transact any insurance business in this state.

If a state mutual assessment association is required to have a certain prescribed number of applications aggregating a definite amount of insurance before it may legally transact any insurance business in Iowa, then it must follow that such association shall maintain the required number of applications totaling the prescribed statutory amount in order to be in good standing and continue transacting the business of insurance. Pursuant to section 1821-d above quoted, the moment such association fails to maintain the prescribed number of applications and amount of insurance, it is then in an unsound condition and the insurance commissioner of Iowa may at once revoke its authority to do business and report his action to the attorney general for the purpose of obtaining the appointment of a receiver and closing up the business of the association.

However, I would suggest that, in the event you find any of the state mutual assessment associations in Iowa failing to maintain the statutory number of applications, you give such companies a reasonable opportunity to secure the required number of applications prior to exercising your authority and cancelling their permit to do business.

BEN J. GIBSON, *Attorney General*,

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

STOCK COMPANIES

Stock companies organized under the law as it was prior to July 4, 1921, with paid up capital stock of \$100,000, still authorized to do business in Iowa notwithstanding provisions of Sec. 5, Ch. 429, Acts 39th G. A. relating to mutual companies.

July 15, 1921.

Hon. A. C. Savage, Commissioner of Insurance: Your letter of the 12th inst. addressed to the attorney general has been referred to me for answer. You request an opinion of this department on the following proposition:

"Under the provisions of section 4, chapter 261 of the acts of the 39th general assembly, it is provided in part that

"From and after the taking effect of this act, no insurance company other than life shall be incorporated to transact business upon the stock plan with less than two hundred thousand dollars (\$200,000.00) capital, the entire amount of which shall be fully paid up in cash and invested as provided by law."

"Under the provisions of subsection 5 of section 1693 of the code of Iowa as amended, the statute now provides in part as follows:

"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 by domestic stock insurance companies transacting the same kind of insurance."

"Under the provisions of section 1783-e of the code of Iowa as amended, prior to July 4 when chapter 261 became effective, the minimum capital stock requirement for stock insurance companies in this state was \$100,000.00.

"Heretofore and prior to July 4, 1921, certain mutual insurance companies having a surplus of more than \$100,000.00 and less than \$200,000.00 had been authorized to write policies of insurance in this state without additional contingent liability.

"Are these companies now, under the provisions of chapter 4, section 261, acts of the 39th general assembly, required to have a surplus of \$200,000.00 in order that they may write a policy without contingent liability?"

As stated by you prior to July 4, 1921, when chapter 261 of the acts of the 39th general assembly became effective the minimum capital stock requirement for stock insurance companies in this state was \$100,000.00. Chapter 261, above referred to, makes it a condition to the right to incorporate an insurance company on the stock plan from and after July 4, 1921, that such companies have a fully paid up capital of \$200,000.00. Nothing in the entire act, however, requires that companies already doing business and having a paid up capital stock of \$100,000.00 shall increase that capital stock to \$200,000.00, and there is no provision in chapter 261 which makes it unlawful for such companies to continue to do business in the state of Iowa.

It follows therefore that under the law as it now stands stock companies organized prior to July 4, 1921, with a paid up capital stock of \$100,000.00 are still authorized to do business in this state.

Section 5 of chapter 429 of the acts of the 37th general assembly, as quoted by you, provides in part as follows:

"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."

This provision relates to mutual insurance companies. And since, as above indicated, insurance companies on the stock plan organized and doing business prior to July 4, 1921, may still transact insurance business when their paid up capital stock equals \$100,000.00 it is the opinion of this department that mutual companies having a surplus of \$100,000.00 or more may continue to issue policies for cash premiums without an additional contingent premium.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

AUTHORITY OF INSURANCE COMMISSIONER OVER INSURANCE COMPANIES

Commissioner of insurance has charge of the insurance companies doing business in this state including the sale of stock preliminary to organization and supervision over the insurance business of all such corporations to the exclusion of the secretary of state.

July 15, 1921.

Hon. A. C. Savage, Commissioner of Insurance: Your letter of June 29th addressed to this department has been referred to me for answer. You request an opinion on the following question:

"Chapter 224 of the acts of the 39th general assembly provides that the commissioner of insurance shall have supervision over the organization of domestic insurance corporations and over the transactions leading up to the organization of such corporations, and control over the sale in Iowa, of stock of domestic or foreign insurance companies or associations, or companies or associations proposing to engage in an insurance business.

"Under the provisions of chapter 189 of the acts of the 39th general assembly, the secretary of state has control over the sale of stock in this state, with certain exceptions, among which exceptions is the following:

"* * * and the stock and obligations of any insurance company *when such insurance is legally authorized to transact business in this state by the insurance department thereof.*"

"Not only is this exception indefinite in its form, but it was the thought of this department when the bill embodying chapter 224 was presented to the legislature, that it was desirable and intended that this department should have control of the organization of insurance companies prior to the time that they were authorized to transact the business of insurance in this state.

"Both of these statutes are effective July 4, and inasmuch as there are now several insurance companies in the state of Iowa, which are still in the organization period, and have not been licensed to transact the business of insurance, we would request your advice as to whether such companies come under the control of this department by virtue of the specific provisions of chapter 224, or come under the jurisdiction of the secretary of state under the provisions above mentioned in chapter 189."

A decision of the question presented will necessarily involve a discussion of chapter 149, acts of the 36th general assembly; chapter 189, acts of the 39th general assembly, which two chapters constitute what is commonly called the blue sky law; and also chapter 224, acts of the 38th general assembly, relating to the control of insurance companies by the commissioner of insurance.

The design of the blue sky law is expressed in the title to the act of the 36th general assembly above referred to. A reading of that title will disclose that its purpose is "to prevent fraud in the sale and disposition

of stocks, bonds and other securities within this state by requiring an inspection of such stocks, bonds and other securities and an inspection of the business of such persons, firms, associations, companies or corporations, including their agents and representatives, and the payment of an inspection fee." Section one of this act as amended designates the persons, firms, corporations, etc., that shall be required to secure a permit from the secretary of state before doing or offering to do any business. Section two of the same act designates exceptions and names the persons who shall be excepted and the conditions under which such exception shall apply. It further provides for an inspection of the business in detail and an inspection fee, reports that are to be made, how process shall be served upon the secretary of state and the person, firm, corporation, etc., affected shall be bound thereby. It further provides for examinations by the secretary of state, annual statements to be filed with the secretary, and finally, penalties for the violation of any of the provisions of the act.

Among the exceptions referred to in section two of the blue sky act as amended by the 39th general assembly will be found in the latter part of paragraph "e" of said section the following language, which was referred to and quoted by you above:

"And the stock and obligations of any insurance company when such insurance is legally authorized to transact business in this state by the insurance department thereof."

This would seem to exempt insurance companies from complying with the provisions of the blue sky act only after they have been authorized by the insurance commissioner to transact insurance business within this state, but such we believe was not the legislative intent, as we shall attempt to demonstrate more clearly in the further discussion of this question.

As above indicated, the purpose of the blue sky act is to prevent fraud not only in the organization but in the transaction of business of corporations organized under the laws of this state for pecuniary profit, and it applies as well to individuals, associations, firms, etc., unless expressly excepted from the provisions of the act.

In this connection the title to chapter 224, acts of the 39th general assembly, is very significant. It provides as follows:

"An act to prevent fraud in the organization of Iowa insurance corporations, and the sale and disposition of the stock and other securities of insurance corporations within the state of Iowa by placing the supervision of such organization and sale under the control of the commissioner of insurance, fixing the penalty for violating the provisions of this act and providing for an appeal from the commissioner of insurance."

Section one of this act defines the power of the commissioner over the organization of insurance companies and the sale of their stock, and provides specifically as follows:

"The commissioner of insurance is hereby given supervision over the organization of domestic insurance corporations and over all transactions leading up to the organization of such corporations, and also over the sale in the state of Iowa of all stock certificates or other evidences of interest either by domestic or foreign insurance companies or organizations proposing to engage in any insurance business."

It further provides that the commissioner of insurance shall prescribe the method of keeping books, the character of the advertising to be used, that he shall fix a time within which such organization shall be completed, the maximum promotion expense which may be incurred is fixed and it differs from that fixed in the blue sky act. The latter part of section one provides as follows:

"The commissioner of insurance shall have power to regulate all other matters in connection with the organization of such domestic corporations and the sale of stock or the issuing of certificates by all insurance corporations within the state of Iowa to the end that fraud may be prevented in the organization of such companies and the sale of their stocks and securities."

The act further provides a penalty for noncompliance with, or violations of, the provisions of the act and provides for an appeal from the decision of the commissioner of insurance, as does the blue sky act from the decision of the secretary of state.

It is a general rule of statutory construction that all consistent statutes which can stand together, relating to the same subject, are treated prospectively and construed together as though they constitute one act. This is true where the acts relating to the same subject were passed at different dates or in the same session and on the same day. The amendment to the blue sky act and the chapter relating to the commissioner of insurance were passed by the same legislature and took effect on the same day, so that the ordinary rule, that a statute of long standing must yield to a recent enactment in case of conflict will not in this instance avail. There is another rule of construction, however, that in our judgment applies to the question under consideration. A general statute relating to a subject will yield in case of conflict to a specific enactment relating to the same, or a portion of the same, subject matter.

A study of the two acts under consideration in this opinion will demonstrate clearly that there is an irreconcilable conflict in the two acts of the legislature. The blue sky law places under the supervision of the secretary of state the organization together with all the preliminary steps looking to the organization of all corporations organized under the laws of this state for pecuniary profit, not expressly exempt from the obligation of the act by its provisions.

The secretary of state has supervision of the sale of promotion stock as well as the sale and transfer of stock, securities and other commodities dealt in by it subsequent to organization. In other words, the secretary of state is the lawful guardian of the persons, associations and corporations falling under the provisions of that act, and to him in his representative capacity they are responsible for the proper conduct of their business from the very beginning of their existence.

What has been said in relation to the secretary of state and his supervision over the corporations, associations, etc., included in the blue sky act, is equally true of the commissioner of insurance with relation to the supervision of insurance companies in this state, his control over them is complete and absolute by the provisions of chapter 224 above referred to from the time their organization is conceived and all along through their entire existence so long as they are doing business in this state.

In our opinion the plain specific provisions of chapter 224, acts of the 39th general assembly, will prevail over the general provisions of chapter 189, acts of the 39th general assembly, and inasmuch as the latter part of section one of said act provides:

"The provisions of this act shall apply to insurance corporations now organizing or selling their stocks and securities within the state of Iowa."

You are advised that such companies come under the control of the department of insurance and that your department has supervision over the organization of insurance companies prior to the time that they are authorized to transact the business of insurance in this state, and control over the sale of their promotion stock while such companies are in process of organization.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

WHAT ASSESSMENT COMPANIES NOT ENTITLED TO DO BUSINESS IN IOWA

An assessment life, health and accident company organized in another state since March 23, 1907, cannot be licensed to do business in this state.

May 21, 1921.

Hon. A. C. Savage, Commissioner of Insurance: You have requested an opinion from this department upon the following state of facts:

"Under provisions of section 1798-a of the code of Iowa as amended "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 * * *"

"Section 1, chapter 234, acts of the 37th general assembly, amended this section by adding thereto the following:

"Provided, however, that the insurance commissioner of this state may authorize any health or accident insurance company or association organized under the laws of any other state or territory, to do business in this state, if, under the laws of such state or territory health and accident insurance companies or associations organized under the laws of this state are permitted to do business in such state'.

"The Washington Life and Accident Insurance Company of Chicago, Illinois, an assessment company, now requests admission in the state of Iowa for the purpose of transacting assessment business in this state under provisions of the above statute."

You then ask:

"We therefore request your opinion on the constitutionality of this section as amended, in view of the fact that this statute definitely authorizes foreign companies and associations to transact business and to exercise rights and powers which this department has no authority to grant to Iowa companies or associations transacting the same kind of business."

In answer to your question, it will not be necessary to pass upon the constitutionality of the statute in issue, for the reason that the general rules of law govern the facts stated.

It is the general rule of law that when the statutes of the state expressly prohibit a domestic insurance corporation to transact a cer-

tain specified class of insurance, then insurance corporations, organized under the laws of a sister state, are unauthorized to transact in this state the class of insurance prohibited to domestic companies. In other words, foreign corporations shall comply with the laws of the state in which they attempt to do business, and if the laws of that state prohibit domestic corporations from transacting a certain kind of business, then foreign corporations are also prohibited from engaging in that particular business. *State vs. Aetna Life Insurance Co.*, 69 Ohio 317; *People vs. Fidelity & Casualty Co.*, 153 Ill. 25; *Floyd vs. Loan & Investment Co.*, 49 W. Va. 327; *Walker vs. Rein*, 14 No. Dak. 608; *Cowell vs. Springs Co.*, 100 U. S. 55; *Christian Union vs. Yount*, 101 U. S. 356.

In *State vs. Aetna Life Insurance Company*, supra, it is said:

"The conclusion above reached, viz.: that under favor of section 3596, life insurance companies may rightfully be licensed and permitted to transact within this state the business of employers liability insurance, is sufficient to determine the only question presented in this case, and renders unnecessary a consideration of relator's second proposition. However, referring to the claim upon this proposition, we may say: that inasmuch as the business of employers' liability insurance is not unauthorized or prohibited in Ohio, but such business is expressly recognized and permitted by our statutes, we incline to the view that in the absence of affirmative statutory provisions prohibiting life insurance companies from engaging in such business, that a life insurance company organized under the laws of a sister state and authorized by its charter to write employers' liability insurance, may by the law of comity be licensed and permitted to write such insurance in this state upon complying with the requirements of the statutes of this state as to deposits, etc., even though the right to transact that particular kind of insurance may not have been exercised by, or conferred upon domestic life insurance companies by positive statutory grant. If the business is within the charter powers of such foreign company, it is enough that such business is not prohibited in this state, is not obnoxious to the policy of our laws and is not against the interests of our citizens."

In *People vs. Fidelity and Casualty Company*, it is said:

"The rule is, that where there is no positive prohibitive statute, the presumption, under the law of comity that prevails between the states of the union, is that the state permits a corporation organized in a sister state to do any act authorized by its charter or the law under which it is created, except when it is manifest that such act is obnoxious to the policy of the law of this state."

In *Colwell vs. Springs Company*, supra, it is said:

"If the policy of the state or territory does not permit the business of the foreign corporation in its limits, * * * it must be expressed in some affirmative way."

In *Walker vs. Rein*, supra, it is said:

"The contract which the plaintiff is seeking to enforce is one which the laws of this state prohibit on grounds of public policy, because it is likely to result in injury to our citizens. It is no less injurious or repugnant to public policy because made by a foreign corporation outside of the limits of our state. It was one which affected a citizen of and property within a state. This foreign insurance company was licensed to insure the property of residents of this state, and it received that license as matter of grace. It cannot abuse that privilege by making contracts which the legislature, in order to protect our citizens, has forbidden domestic corporations to make. It cannot plead its foreign domicile as a ground for immunity from our laws and at the same time invoke the aid of our courts on the ground of comity to enforce a contract which is contrary to the policy of our laws. Comity cannot be thus

extended to the injury of our own citizens and so as to discriminate in favor of foreign corporations, to the disadvantage of domestic corporations of like character."

Section 7898-a, supra is the same as section 1, chapter 83, acts of the 32nd general assembly, which took effect March 23, 1907, by publication.

Since that date, assessment, health, life and accident insurance companies have been prohibited from organizing and transacting business in Iowa, the only assessment companies permitted to transact business in this state, being those organized prior to March 23, 1907. Under section 1, chapter 83, supra, as well as the holding of the cases hereinbefore cited, foreign life, health and accident insurance companies, organized upon the assessment plan, subsequent to March 23, 1907, would be barred from transacting business in Iowa.

It may be claimed that section 1, chapter 234, acts of the 37th general assembly, authorizes the commissioner of insurance to issue permits to foreign assessment insurance companies, organized since March 23, 1907. Section 1, chapter 234, amends section 1798-a and reads:

"Provided, however, that the insurance commissioner of this state may authorize any health or accident insurance company or association organized under the laws of any other state or territory, to do business in this state, if, under the laws of such state or territory health and accident insurance companies or associations organized under the laws of this state are permitted to do business in such state."

The statute just quoted is reciprocal in character. It authorizes the commissioner to admit foreign companies when the foreign states admit Iowa companies in the same class and character. Since March 23, 1907, assessment, life, health and accident companies could not legally organize and transact business in this state, except as fraternal societies, and if they could not be organized, it is evident they could not be admitted into another state, for the reason that there would not be anything to admit. If there was no company to be admitted to the foreign state, then there could be no reciprocity.

In addition to the reasons above stated, we have a statute which subjects foreign corporations to all the restrictions imposed upon domestic corporations. It is section 1639 of the code and reads in part as follows:

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

While similar statutes have been held by courts not to be prohibitive in character, yet, in view of the fact that insurance companies of the kind and character of the one in question, are prohibited from even organizing in Iowa, we believe that section 1639, while not controlling, should be recognized in considering the question in issue. However, from all the foregoing, we are of the opinion that you would be fully authorized in denying the Washington Life and Accident Company of Chicago, Illinois, a license to transact business in Iowa.

BEN J. GIBSON, *Attorney General*,

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

NON-CONTINGENT LIABILITY POLICIES

The holder of a non-contingent liability policy in a mutual cannot be further assessed, even though the surplus of the company drops below \$100,000.

May 19, 1921.

Hon. A. C. Savage, Commissioner of Insurance : You have requested an opinion from this department upon the following question:

"What is the status of the holders of mutual policies, such policies being issued without additional contingent liability under the provision of section 5, chapter 429, acts of the 37th general assembly, in case the company issuing such policies fails to maintain a surplus equal to \$100,000?"

"In other words, would such a policy holder be liable to assessment even though his policy contained no contingent liability in case the company's surplus dropped below the \$100,000 statutory requirement?"

Section 5, chapter 429, acts of the 37th general assembly provides:

"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 observed that the solution of this question depends entirely upon our statute. In some states mutual insurance companies may issue policies for cash premiums, in the absence of statutory prohibition, but then in those states the holders of such policies are still liable for assessments when the assets of the company are insufficient to pay all losses. In Iowa, the converse rule prevails and mutual insurance companies cannot issue policies upon the all cash premium plan, in the absence of express statutory authority. *Corey vs. Sherman*, 96 Iowa 114. But section 5, chapter 429, supra, expressly authorizes the issuance of policies by mutual insurance companies for a cash premium without any additional or contingent liability, provided the company has a surplus of not less than \$100,000.

The supreme court of Iowa has not had occasion to pass upon the effect of section 5, chapter 429, but the state of Minnesota has a similar statute, under which insurance is permitted on the all cash plan, provided the company has a "capital" (same as surplus) amounting to \$200,000, which must include \$40,000 in actual funds. The supreme court of Minnesota construed that statute and held that policies issued thereunder were merely contracts of insurance, and contained nothing creating any other relation between the corporation and the policy holders than that of insurer and insured. In *re Minnesota Mutual Fire Insurance Company*, 49 Minnesota 191.

Under such policies the insured would not be liable to assessments. In the case under consideration we believe the policy is a contract of insurance without any contingent liability, the issuance of which is fully authorized under section 5, chapter 429, acts of the 37th general assembly and is binding upon the company and the insured is not subject to future

assessments, regardless of the fact that the surplus of the company has been reduced to \$100,000 since the issuance of the policy.

BEN J. GIBSON, *Attorney General*,

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

TRANSFER OF FUNDS OF INSURANCE COMPANIES

Surplus funds transferred from general fund to benefit fund in fraternal cannot be legally returned to the general fund.

May 18, 1921.

Hon. A. C. Savage, Commissioner of Insurance: You have requested an opinion from this department upon the following facts:

"In January, 1919, the board of directors of the Brotherhood of American Yeomen, acting under by-law number 34, transferred \$100,000 from the general fund to the benefit fund to pay claims accruing on account of the influenza epidemic. Later, the board returned the \$100,000 to the general fund."

You ask:

"Had the society any legal authority to take this \$100,000 out of the benefit fund and place it back into the general fund?"

The power of the Brotherhood of American Yeomen to create and dispose of its various funds is prescribed in its articles of incorporation and by-laws, as well as by statute.

Article 3 of its articles of incorporation authorizes the society:

"To create and maintain a fund or funds by means of assessments levied on and payable by the members of the association for the payment of benefits and the expenses of the association, and for the accumulation of the reserve fund to be used as provided in the by-laws of the association."

The general fund of the society is created from various sources, as prescribed in the by-laws.

Section 65 provides:

"He (chief correspondent) shall procure a full line of supplies necessary for the supreme office and Homestead work and the transaction of business, which shall be sold to the Homestead at cost for cash only. The proceeds of all such sales shall be placed immediately in the general fund of the association."

Section 122 provides:

"Application for beneficial or auxiliary membership shall be made on forms prescribed by the chief medical director which shall be approved by the board of directors. The applicant shall pay a medical examination fee of not less than \$1.50, \$1.00 of which shall go to the local examiner, and fifty cents of which shall be sent with the application to the supreme office and be credited to the general fund."

Section 134 provides:

"Auxiliary members shall pay an adoption fee of \$2.00, local Homestead dues and a monthly payment of 60 cents per month. Forty-five cents of each monthly payment shall be set aside in a separate fund to be used for the payment of benefits as provided in section 141; the remainder of said monthly payments to be credited to the general fund."

Section 155 provides:

"The chief correspondent shall separate the amounts remitted monthly into the general and benefit funds by placing in general fund 15 cents of each member's monthly payment and 75 per cent of the first twelve assessments on all new members, said 75 per cent to be computed on amounts remaining after deducting the 15 cents, as hereinbefore provided,

and the balance remaining he shall place in the benefit fund. Of each monthly payment made by social members, he shall place 10 cents in the benefit fund."

The by-laws also provide how the general fund may be expended or disposed of.

Section 9 provides:

"The members of the supreme conclave shall receive the sum of \$9.00 per day for the time actually occupied in going to, attendance upon and returning from the supreme conclave, and only their railway and sleeping car fare actually and necessarily expended by them in going to and returning from the supreme conclave by the nearest practicable route, except the board of directors and the law committee, whose compensation shall be as provided in sections 46 and 76 of these by-laws, and the salaried officers of this association, who shall be paid only their actual and necessary hotel and traveling expenses, which compensation and expenses, shall be paid by the association out of the general fund. All other members of the supreme conclave shall receive the same mileage and per diem as the delegates."

Section 74 provides:

"The premium for bonds of supreme officers shall be paid out of the general fund of the association."

In article III of the articles of incorporation the general expenses of the society may be paid out of the general fund. This would include salaries, supplies, taxes and other expenses incurred in the legitimate conduct of the business, except the payment of claims arising under its certificates. In addition to the foregoing, the by-laws authorize the transfer of surplus money in the general fund to the benefit fund.

Section 34 provides:

"The board of directors may at the end of each fiscal year transfer to the benefit fund any surplus money remaining in the general fund."

The statutes of Iowa permit the creation of benefit funds by fraternal beneficiary societies, and when created, they are to be impressed with a trust for the purpose of the fulfillment of its certificates and contracts.

The by-laws of the Brotherhood of American Yeomen expressly provide the creating of a benefit fund and how it shall be expended.

Section 31 provides:

"The board of directors shall examine all claims and bills against the association, and authorize payment of such as are proper and just charges against the association, and may authorize and order any necessary extra assessment calls for the benefit fund."

Section 134 provides:

"Auxiliary members shall pay an adoption fee of \$2.00, local Homestead dues, and a monthly payment of 60 cents per month. Forty-five cents of each monthly payment shall be set aside in a separate fund to be used for the payment of benefits as provided in section 141; the remainder of said monthly payments to be credited to the general fund."

Section 155 provides:

"The chief correspondent shall separate the amounts remitted monthly into the general and benefit funds by placing in the general fund 15 cents of each member's monthly payment and 75 per cent of the first twelve assessments on all new members, said 75 per cent to be computed on amounts remaining after deducting the 15 cents, as hereinbefore provided, and the balance remaining he shall place in the benefit fund. Of each monthly payment made by social members, he shall place 10 cents in the benefit fund."

Section 194 of the by-laws further provides:

"The net contributions made by all members of the association, under whatsoever form of certificate held, which are not applicable under the terms of these by-laws to the general fund, or to a specific reserve fund herein provided for, shall constitute and be paid into the common benefit fund of the association for the purpose of paying claims as the same shall arise, without regard to the form of certificate under which claim occurs."

As heretofore observed, the board of directors may transfer to the benefit fund any surplus money remaining in the general fund at the end of each fiscal year.

The purpose for which the benefit fund may be disposed are also expressly prescribed by the by-laws.

Section 61 provides:

"He shall not issue any order on the grand master of accounts for the payment of any claim from the benefit fund until it shall have been ordered paid by the board of directors at a regular or special meeting of said board, and such order shall be countersigned by the grand foreman."

Section 134 provides:

"Auxiliary members shall pay an adoption fee of \$2.00, local Homestead dues and a monthly payment of 60 cents per month. Forty-five cents of each monthly payment shall be set aside in a separate fund to be used for the payment of benefits as provided in section 141; the remainder of said monthly payments to be credited to the general fund."

The by-laws also permit the loaning of the benefit fund under certain conditions.

Section 35 provides:

"It shall be the duty of the board of directors, whenever there is any surplus money in the benefit fund to loan the same under the same limitations as are provided in section 32 for the loaning of the reserve fund. The board shall also have the authority to transfer, when they need it, the loans made from the surplus benefit fund to the reserve fund in exchange for cash in the same amount."

The foregoing appears to be the only provision in the articles of incorporation and by-laws governing the creation and disposition of the general and benefit funds.

There is no express provision permitting the board of directors to transfer money from one fund to another indiscriminately, nor is there any express authority for loaning any money in the general fund to the benefit fund. The by-laws do provide the manner in which the benefit fund may be augmented; and one source is by transferring thereto any surplus remaining in the general fund at the end of each fiscal year. This is what was done in the present case. But when such surplus has been transferred, then it becomes impressed with a trust, the same as any other portion of the benefit fund, and shall be held for the fulfillment of its certificates.

BEN J. GIBSON, *Attorney General*,

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

TRANSFER OF FUNDS OF INSURANCE COMPANIES

Yeoman society has no authority to loan the benefit fund and take as security mortgage on property owned by the society.

May 17, 1921.

Hon. A. C. Savage, Commissioner of Insurance: You ask for an opinion from this department upon the following state of facts:

"In the spring of 1919 the Brotherhood of American Yeomen conveyed to the commissioner of insurance of Iowa the real estate upon which its present office building is located.

"Sometime during the same spring the society, finding itself without sufficient funds in the general fund, executed a mortgage to the benefit fund of the society for \$80,000."

You ask:

"Did the directors have authority to execute such a mortgage and was it a legal investment of the funds of the society as contemplated by Section 1839-1 of the supplement to the code of Iowa?"

In determining your question the articles of incorporation and by-laws of the society, as well as the statutes of Iowa, must be considered. The only provision in the articles of incorporation germane to the question is the general power to create and maintain a fund or funds by means of assessments for the payments of benefits and the expenses of the association.

I find in the by-laws express provision for the creation of a benefit fund. Section 155 provides:

"The chief correspondent shall separate the amounts remitted monthly into the general and benefit funds by placing in the general fund 15 cents of each member's monthly payment and 75 per cent of the first twelve assessments on all new members, said 75 per cent to be computed on amounts remaining after deducting the 15 cents, as hereinbefore provided, and the balance remaining he shall place in the benefit fund. Of each monthly payment made by social members, he shall place 10 cents in the benefit fund. New members shall be liable for the monthly payment current in the month of adoption."

Section 194 of the by-laws further provides:

"The net contributions made by all members of the association, under whatsoever form of certificate held, which are not applicable under the terms of these by-laws to the general fund, or to a specific reserve fund herein provided for, shall constitute and be paid into the common benefit fund of the association for the purpose of paying claims as the same shall arise, without regard to the form of certificate under which claim occurs."

Then, with reference to loaning the benefit fund, it is provided in section 35 of the by-laws:

"It shall be the duty of the board of directors, whenever there is any surplus money in the benefit fund to loan the same under the same limitations as are provided in section 32 for the loaning of the reserve fund. The board shall also have the authority to transfer, when they need it, the loans made from the surplus benefit fund to the reserve fund in exchange for cash in the same amount."

Section 32 of the by-laws, referred to under section 35 supra, provides:

"The securities representing the reserve fund shall be held in trust by the commissioner of insurance, under the jurisdiction of the board of directors, and it shall be loaned in compliance with the laws of Iowa. As far as practicable and profitable, such funds shall be loaned on first mortgage security upon approved real estate, municipal, government and school bonds, and at such rate of interest as shall be legal, and approved by the board of directors. No loans shall be made by the board of

directors in any towns or cities of less than 2,000 population, and no loans shall be made upon any town or city real estate, except improved property. No loan shall be made for more than 40 per cent of the actual cash value of the property. No part of the reserve fund shall be loaned to a supreme officer or director of this association, either directly or indirectly. No loan shall be made of a less sum than \$500.00. No director or other officer of the association shall receive directly or indirectly from any person or persons whomscever any rebate, commission, compensation or pecuniary advantage of any kind on account of any such loan being made except expenses and per diem as provided by these by-laws to be paid to such person by the association. Provided further, that the borrower shall pay to the association such charges for inspecting and investigating as may be fixed by the board of directors."

It will be observed that section 32 of the by-laws permits the loaning of the reserve fund of the society only in compliance with the laws of Iowa, and as section 35 authorizes the loaning of the benefit fund under the same limitations as are provided for loaning the reserve fund, the benefit fund may lawfully be invested in such securities only as are permitted by the statutes of Iowa.

The laws of Iowa governing fraternal beneficiary societies limit the investment of funds of such societies, accumulated for the purpose of fulfilling its certificates in certain, specified securities.

Section 1839-1 of the supplement to the code, 1913, permits the investment of such funds:

"Bonds, mortgages and other interest bearing securities being first liens upon real estate within this state or any other state, where they at least double the amount loaned thereon and secured thereby, exclusive of improvements, or two and one-half times such amount including the improvements thereon if such improvements are constructed of brick or stone. * * *"

Section 1839-k of the supplement to the code, 1913, authorizes the investment of the benefit fund of fraternal beneficiary societies in a home office under certain restrictions. Said section provides:

"Any fraternal beneficiary society, order or association organized under the laws of this state, accumulating money to be held in trust for the purpose of the fulfillment of its certificates or contracts shall be permitted to invest not to exceed ten per cent of the aggregate amount of such accumulation in such real estate in this state as is necessary for its accommodation as a home office, and in the purchase or erection of any building for such purpose it may add thereto rooms for rent; provided that before any association shall invest any of its funds in accordance with the provisions of this subdivision it shall first obtain the consent of the executive council. Any company or association so investing its funds shall convey the real estate thus acquired to the auditor of state by deed, such property to be held by him in trust for the benefit of the members of such association, the value thereof to be determined from time to time by the auditor of state. Provided, that nothing in this act shall be construed to permit the officials or board of directors of such society, order or association to make such investment without authority specifically granted by the said society, order or association, through its grand or supreme lodge or convention."

Pursuant to section 1839-k, supra, fraternal beneficiary societies may invest their benefit and reserve funds in a home office. No authority is granted for investing the general fund of such societies in that class of property. Under section 1839-1, supra, the benefit fund may also be invested in first mortgages on real estate. Evidently that means real estate owned by some individual or corporation other than the society itself.

In the case under consideration the building must have been built from funds taken from the benefit fund. Therefore it would be an anomalous situation to be loaning the benefit fund and taking as security real estate that already belonged to that fund.

It occurs to us that the transaction in question was, in effect, an unauthorized transfer of funds and a clear evasion of the law. Benefit funds of fraternal societies are impressed with a trust for the sole benefit of the holders of its certificates and such funds cannot be legally diverted to other uses. The transfer in question was such an illegal diversion and in our opinion, cannot be sustained.

BEN J. GIBSON, *Attorney General*,

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

INSURANCE COMMISSIONER

The insurance commissioner is not authorized to expend funds of the state in going outside of state without first obtaining consent of executive council.

August 25, 1922.

Executive Council: I am in receipt of your letter dated August 24, in which you request an opinion from this department. Your request is in words as follows:

"Mr. A. C. Savage, commissioner of insurance, has made application to the executive council asking authority to attend a mid-summer meeting of the national convention of insurance commissioners to be held at Swampscott, Mass., September 5 to 9.

"Section 5462, supplement to the compiled code, authorizes the commissioner of insurance to contract such expense as may be necessary in attending meetings of insurance commissioners, while chapter 221, acts of the 39th general assembly, provides for the approval of the executive council of various departments in attending conventions or other public gatherings outside the limits of the state of Iowa. The council desire an opinion as to whether or not their approval is necessary in compliance with chapter 221, acts of the 39th general assembly, before Mr. Savage may attend the meeting. The council would like to have this opinion at your earliest convenience as the meeting is to be held in the early part of September."

You will observe that under the provisions of chapter 221 of the acts of the 39th general assembly that no state officer or employe aside from those excepted by the act is authorized to incur state expense in attending any convention or other public gathering or conference outside the limits of the state of Iowa without first obtaining the consent of the executive council of the state. Not only is it true that consent must be obtained, but the auditor of state must refuse to pay any claim for such expenses filed with him, unless the claim be accompanied by a copy of a certificate of authority issued by the secretary of the executive council showing that such person or persons were authorized by the executive council to create such expense.

It is true that under the provisions of section 5462 the following is provided:

"He may contract such expenses as may be necessary in the performance of his official duties, including all actual and necessary expenses incurred in attending meetings of the insurance commissioners and such other expenses as shall be approved by the executive council."

Neither this provision nor any other provision of the insurance laws enacted prior to the time of the enactment of chapter 221 of the acts of the 39th general assembly would govern in any case where the two statutes conflict. It is fundamental that where two statutes conflict and the two cannot be construed so as to give full force and effect to both that the later enactment will prevail.

It necessarily follows that in order for the insurance commissioner to incur the expense referred to the necessary consent must be obtained. What is said in this letter relative to the insurance commissioner applies with full force and effect to every official of the state government not excepted under the provisions of the act nor by subsequent enactments. The executive council might well consider the provisions of the insurance laws for the purpose of determining what should be done upon an application made by the commissioner for consent to attend a convention. In other words, the intent of the legislature as manifested in the insurance laws should by right be given weight in determining the application but it in no way is controlling.

BEN J. GIBSON, *Attorney General*.

OPINIONS RELATING TO TAXATION

REFUND OF TAXES

The board of supervisors is without authority to abate or refund a tax properly levied upon property properly assessed. In certain cases board may rescind its action, notify county treasurer and reinstate tax. Treasurer may on his own motion reinstate after service of notice as provided by law.

June 28, 1922.

Hon. Glenn C. Haynes, Auditor of State: I am in receipt of your letter dated June 10, 1922, in which you request an opinion from this department as to a certain question submitted by one of your examiners. Your letter enclosing the request for the examiner is as follows:

"I am enclosing herewith a letter received from Mr. A. S. Lawrence, state examiner, which relates to a refund of taxes made by the board of supervisors of Tama county. It is requested that you please render this department an official opinion on the question presented by Mr. Lawrence.

"I am also enclosing the original petition which belongs on file in the office of the county auditor of Tama county, and ask that you kindly return the same to this office."

The letter of the examiner is as follows:

"A problem has been presented to us which is respectfully referred to attorney general for a written opinion. The question has reference to the exemption of a land contract from taxation. The case in point is exactly the same as the 'Macumber Case' from Ida Grove, upon which we have a written opinion, under date of October 18, 1921.

"The question now propounded, goes a little further than is touched upon by above opinion. In this instance the board of supervisors by action entered of record under date of July 5, 1921, instructed the treasurer to abate the tax on one of these land contracts, the same being for \$134,000. Now, in view of the fact that under the opinion in the 'Macumber case' such abatement was entirely illegal, is not the action of the board of supervisors null and void, and should not the treasurer proceed to reinstate this assessment on the tax list, and enforce the collection of the tax as if no such attempted abatement had been made? Further, should not the treasurer, as a preliminary step to the placing of said assessment on the tax list, serve the party with notice as provided for in section 1385-b?

"For the purpose of explaining the case more clearly, we enclose copy of original petition as acted upon by the board, which please return."

The main points presented in your letter have already been determined by this department, and it is but mere repetition to state that the board of supervisors is without authority to abate or refund a tax properly levied on property properly assessed. It is assumed that the land contract assessed and on which a tax was levied, was a contract enforceable on January 1 of the year in question. The assessment was therefore proper and legal. The mere fact that the land was afterwards taken back would have nothing to do with the matter at all, and would not justify the board of supervisors in abating the tax or in refunding a tax already collected. What should be done in this case is for the board of supervisors to rescind its action, notify the county treasurer of such rescission, and reinstate this tax. The treasurer on his own motion can reinstate the tax

after service of notice as provided by law. In any event, it would perhaps be advisable to serve notice.

BEN J. GIBSON, *Attorney General*.

REFUNDING OF TAXES

The board of supervisors should refuse to make a refund of taxes where a tract of land had been assessed in gross with the notation that it contained 44 acres when in fact it contained but 38 acres and there being no provision in the statute that the basis of taxes shall be based on the acreage in any particular tract.

March 23, 1922.

Mr. John L. Cherny, County Attorney, Independence, Iowa: We have your request for an opinion with reference to the authority of the board of supervisors of your county to grant an application for refund of tax complained to have been erroneously or illegally exacted and paid under facts as follows:

"The applicant has voluntarily paid his taxes during the past five years on a tract containing 44 acres according to the land records in the auditor's office based on old surveys. He had the tract re-surveyed this year and the survey shows 38 acres, said last survey being now accepted in the auditor's office as official.

"The applicant is asking for a refund for each of the past five years for taxes paid by him on the six acres represented by the excess of 44 over 38 acres. It seems that he has never signed an assessment roll. He acquired the property just after the assessment for the first year was made. Two years later he was away from the county and the assessor copied the records from the previous assessment. This year he signed the assessment showing the corrected survey."

You have further advised us that the assessment was made in gross and not per acre although the acreage was reported.

I do not believe that the board of supervisors should approve the application for refund made to them for the reason that the assessment was made in gross and not at so many dollars per acre.

If the contention of the applicant is correct that he is entitled to a refund it would necessarily follow that thousands of assessments made over the state of Iowa have been such as to warrant a refund of tax. It is not an unfrequent thing to tax the northeastern quarter of a certain section of land at a specified sum while as a matter of fact the said quarter section may not contain one hundred and sixty acres or it may contain more than a regular quarter section.

In the absence of any provision of the statute stating that the value shall be so much per acre and that the tax to be imposed shall be based upon such value per acre we believe that the intention of the law was to require the assessment to be upon the tract of land in its entirety.

We, therefore, desire to advise you that it is the opinion of this department that the application now pending before your board of supervisors should be denied.

BEN J. GIBSON, *Attorney General*,

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

REFUNDING TAXES PAID ON REAL ESTATE NOT IN EXISTENCE

Board of supervisors may remit taxes paid on land that does not exist, as assessment is erroneous.

January 5, 1922.

Mr. A. L. Chantry, County Attorney, Sidney, Iowa: Your letter of December 31, 1921, addressed to this department has been referred to me for attention. You state:

"I have a tax matter of which I am in doubt and would like your advice and opinion.

"During the year 1915 certain lands which at the time were not in existence in Iowa on account of the changing of the channel of the Missouri river, was sold for tax and the tax purchaser has paid tax subsequently laid on the lands.

He now discovers that there is no land such as he believed he purchased at tax sale and has made an application to the board of supervisors to refund payments so made.

"To the best of my information these lands have not been regularly assessed by the local assessor for many years and were not so assessed at the time of a sale, but the land was put on the tax books by the county auditor, either voluntarily or at request of some one holding tax certificate.

"Such assessment may be valid if land was in existence and omitted, but is it so when there was no such land?

"Has the board of supervisors the authority under section 1417 of the code of Iowa or any other section to grant a petition for refund of this tax with subsequent payments and to direct the county treasurer to make refund payment to the tax certificate holder?

"I understand that the statute of limitations would eliminate all claims which are over five years.

"As the matter is of considerable importance and of interest to those concerned I would be grateful for an early reply."

Section 1417 of the code of 1897 referred to in your letter is as follows:

"The board of supervisors shall direct the treasurer to refund to the taxpayer any tax or portion thereof found to have been erroneously or illegally exacted or paid, with all interest and costs actually paid thereon. In case any real estate subject to taxation shall be sold for the payment of such erroneous tax, interest or costs, the error or irregularity in the tax may be corrected at any time provided in this chapter, but such correction shall not affect the validity of the sale or the right or title conveyed by a treasurer's deed, if the property was subject to taxation for any of the purposes for which any portion of the taxes for which the land was sold was levied, and the taxes were not paid before the sale, or the property redeemed from sale."

It is our opinion that the tax payer is entitled to a refund of the taxes paid by him within the statutory limitation in the case cited by you, because it must be apparent that no land subject to taxation existed and the taxes levied thereon have been erroneously paid.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

NO REFUND ALLOWED WHEN DEDUCTIONS NOT CLAIMED

Board of supervisors cannot refund amount paid on moneys and credits from which indebtedness properly deductible was not claimed at time of assessment.

July 11, 1921.

Mr. Geo. W. Prichard, County Attorney, Onawa, Iowa: Your letter of the 6th inst. addressed to Mr. Gibson has been referred to me for answer.

You state the following facts:

"A few years ago one Hatt sold his farm and since that time has been paying a tax on moneys and credits of \$19,000.00. During the fall of 1919 he entered into a contract for the purchase of certain land in Nebraska on which contract he paid a small sum down and owed a balance of about ten thousand dollars. At the time he was assessed in the early spring of 1920 he again listed his moneys and credits at \$19,000, but asked no deductions because of debts.

"Recently on the advice of counsel he was informed that he was entitled to a reduction for his debts and he has filed with the board a bill or petition for refund because of erroneous assessment for the amount due on this contract for the Nebraska land.

"The board wishes to know of you whether or not they may now legally refund these taxes, and if the refund should be made. They have not seemed to wish to follow my advice in the matter and wished that I put it up to you, which I gladly do."

We assume that Mr. Hatt seeks a refund of his taxes under section 1417 of the code. That section of the code you will observe authorizes the board of supervisors to refund to the tax payer any tax or portion thereof found to have been erroneously or illegally exacted or paid. That the taxes paid by Mr. Hatt in your county could not be refunded under the facts above set out seems to have been clearly decided in the case of *Carpenter vs Jones County*, reported in the 130th Iowa, beginning on page 494.

In this case an assignee for the benefit of creditors sought to have refunded taxes paid on moneys and credits of his assignor because of the fact that indebtedness which was properly deductible under the statute was not claimed by his assignor at the time of assessment.

On page 497 Mr. Justice Weaver, writing the opinion for the court, uses the following language:

"As we have already suggested the tax is neither illegal nor void. It is not even erroneous, irregular, or informal. Snyder had the property which was taxed and that property charged with the tax has passed into the hands of the assignee. That such tax would have been less, or that no tax would have been levied had Snyder seen fit to disclose his true condition to the assessor and demand the setting off of his liabilities to the full amount of his moneys and credits, is something, which, at this stage of affairs, is wholly immaterial. *Had he made no assignment, he would not now be heard to dispute the validity of the tax, and in this respect his assignee occupies no stronger position.*"

It is the opinion of this department that your board of supervisors is not authorized to refund the taxes paid by Mr. Hatt or any portion under the facts stated.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

SUSPENSION AND CANCELLATION OF TAXES

Under chapter 281, 39th general assembly, board of supervisors may, on application, suspend taxes to aged and infirm as therein provided payable in the year in which application is made.

December 22, 1921.

Mr. Newton Roberts, Ottumwa, Iowa: Your letter with request for an opinion on the construction of chapter 281, acts of the 39th general assembly, has been referred to me for attention. You state:

"Chapter 281, acts of the 39th general assembly, provide for suspension of taxes in certain cases, also for cancellation after suspension.

"Mr. Walter Young, county treasurer, asked me whether this act can affect taxes already assessed for the coming year. He was of opinion that to attempt to suspend taxes already assessed under said act might be retroactive. This law was passed after the assessment was made, when does it in fact take effect?"

For convenience we quote chapter 281 above referred to:

"Whenever a person by reason of age or infirmity, is unable to contribute to the public revenue, such person may file a petition, duly sworn to, with the board of supervisors, stating such fact and giving a statement of property, real and personal, owned or possessed by such applicant and such other information as the board may require. The board of supervisors may thereupon order the county treasurer to suspend the collection of the taxes assessed against such petitioner, his polls or estate, or both, for the current year, or such board may cancel and remit said taxes, provided, however, that such petition shall first have been approved by the council of the city or town in which the property of the petitioner is located, or by the township trustees of the township in which said property is located.

"In the event that the petitioner shall sell any real estate upon which the tax has been suspended in the manner provided herein, or by reason of death shall leave the real estate to heirs, the taxes without any accrued penalty, that have thus been suspended shall all become due and payable, with six (6) per cent interest per annum, from the date of such suspension.

"The board of supervisors may, if in their judgment it is for the interests of the public and the petitioner, cancel and remit the taxes assessed against the petitioner, his polls or estate or both, even though said taxes have previously been suspended as in this act provided."

The evident purpose of the legislature was to afford relief to the persons in the class referred to from the payment of taxes at a time when they were by reason of age or infirmity unable to contribute to the public revenue and it is our opinion that under the authority of that chapter the board of supervisors could either suspend collection of or cancel and remit the taxes for the year 1920 payable in 1921, the proper application having been made to the board during the current year.

It is our view that the application is to be made for a suspension of the taxes to be paid during the year in which the application is made, otherwise it would hardly be workable.

To hold otherwise would be to permit a tax payer to anticipate his financial condition a year in advance of the time when he makes application for suspension.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

COMPROMISING TAXES ILLEGAL

Board of supervisors has no authority to compromise taxes legally assessed.

April 13, 1922.

Mr. G. L. Norman, County Attorney, Keokuk, Iowa: I am directed to answer your letter of the 29th ult., in which you request an opinion from this department upon the following proposition:

"In the spring of 1921, after the county auditor had corrected the assessment of bank stock by including government obligations in assets when computing the value of stock, every bank appealed and none of these cases have ever been disposed of. The bank representatives yesterday held a meeting with the board of supervisors relative to compromising the old

taxes if possible. Do you think that the board of supervisors has any authority to compromise these taxes, especially since the taxes have been paid under protest and distributed to the various funds? If the board of supervisors should compromise them, do you think they could get money back from the school districts, towns and the state?"

At the threshold of this opinion it is well to observe just what powers can be lawfully exercised by the board of supervisors in relation to taxation. It is elementary that the board can exercise such powers only as are conferred upon it by legislative enactment. Its powers are enumerated, and the enumeration relates alone to county affairs. Any attempted exercise of powers not conferred, or necessarily implied, is illegal and void.

In *Richards vs. Warren County*, 31 Iowa, at page 388, Chief Justice Day, announcing the opinion of the court, says:

"The board of supervisors are agents of the county, whose powers are defined and limited by the act creating them. Beyond the powers conferred upon them by statute their acts do no more bind the county than do those of a special agent, when he transcends the purposes of his agency, bind his principal."

In *Hull & Argalls vs. Marshall County*, 12 Iowa, at page 154, Chief Justice Lowe, announcing the opinion of the court, says:

"A county is a political sub-division of the state, invested with certain limited and specified powers, which are divided among and are to be assessed by a class of agents or county officers appointed for that purpose. Their duties are not only defined, but the mode of performing them is in many instances prescribed by law; especially those which relate to the fiscal operations of the county, and the raising of money by taxation. When this is done, it is a well settled maxim that the power must be exercised precisely as it is given."

In the *Town of Crandon vs. Forest County*, reported in 64 N. W., at page 848, the court, in passing upon the powers of the board of supervisors, without authority of law, to deduct from the taxes levied by a town a portion thereof alleged to be invalid, pronounces the following rule:

"The powers of the county board are statutory, and it has no common-law authority, and no implied powers, except such as are fairly incident and reasonably necessary to the exercise of its express powers. Section 1114, Rev. St., provides that the town treasurer is to be created by the county treasurer with the amount of taxes returned as unpaid, and that all taxes returned as delinquent shall belong to the county, and be collected with the interest and charges thereon, for its use; but it does not follow, however, as an incident of such ownership on the part of the county, that the county board can remit or give away such taxes in whole or in part, and no such power can be inferred from the statutory powers conferred upon the county board."

From the foregoing quotations, it is apparent that the board of supervisors has no power to compromise such taxes referred to in your letter unless clearly authorized by express statute. Now, what are the powers of the board of supervisors in matters relating to taxation? Section 1303 of the code prescribes the duty of making the levy. Section 1307 of the code authorizes the board to remit in whole or in part the taxes of any person whose property has been destroyed by fire, tornado, etc. Section 1375 of the code constitutes the board of supervisors a county board of review for the sole purpose of adjusting the assessments between the several towns, cities and townships in the county. And section 1417 of the code requires the board to direct the county treasurer to refund to the

taxpayer such taxes as are either erroneously and illegally exacted or paid. These are substantially all the statutes covering the duties of the board of supervisors relating to taxation, so far as material to a proper consideration of the question in issue.

It cannot be seriously contended that either section 1303, 1307 or 1375 confers upon the board the power to compromise the corrected assessment by the county auditor. The only statute that might be claimed to give such power to the board is section 1417 of the code. But section 1417 cannot apply in this case, for the reason that it must be assumed that the tax is legal; at least until the district court on appeal determines otherwise.

Therefore, from all the foregoing it is clear that the board of supervisors of your county is wholly without power to compromise the tax in question; and such is the holding of this department.

BEN J. GIBSON, *Attorney General*,

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

TAX ON MORTGAGES

A recovery can be had from a county only in cases of erroneous or illegal taxation.

May 26, 1922.

Mr. Andrew Bell, County Attorney, Denison, Iowa: I am in receipt of your letter dated May 24. Your letter is in words as follows:

"Would like your opinion on the following proposition:

"A party in this county sold a farm during the year 1918, receiving a small down payment and taking back a mortgage for balance of purchase price, at the same time giving warranty deed to purchaser. On January 1, 1921, said land was assessed to the purchaser and the mortgage was assessed to the party who had sold the farm and who holds the mortgage. The purchaser paid no interest since the fall of 1920 and finally was compelled to give up the farm which he did by conveying the same by deed to the first party. Is the party of the first part who sold the farm and paid the 1921 taxes on both the farm and mortgage entitled to recover from the county the amount she has paid as taxes on said mortgage for 1921, upon a claim filed with the county auditor setting out these facts and that the same had been erroneously collected and paid."

We take this opportunity of finally determining this question. Under the law a note secured by a mortgage on real estate is assessable as moneys and credits or as moneyed capital as the case may be.

In the case submitted by you the mortgage and note were in existence on January 1, 1920, and on January 1, 1921. It was at that time assessable to the holder thereof and was so assessed. A recovery cannot be had from the county under the circumstances stated in your letter. It is only where the tax is erroneous or illegal that a recovery can be had. This tax is neither.

BEN J. GIBSON, *Attorney General*.

COLLECTION OF SPECIAL ASSESSMENTS

When a county auditor places in the hands of the county treasurer a certified copy of the schedule of special assessments levied by a city for street improvements the county treasurer has authority to collect the taxes therein certified by sale if not paid when due. It is not necessary that such special assessments be entered in the book containing the regular taxes.

December 8, 1921.

Mr. L. A. Riter, County Attorney, Rock Rapids, Iowa: We have your letter of December 5 requesting an opinion of this department. You have stated to us as follows:

"Upon holding our tax sale today a very serious dispute and controversy arose relative to the authority of the county treasurer to sell real estate for special assessments and improvements, such as paving and sewer assessments, for the reason that, the contention was, section 826 of the code had not been strictly and literally complied with by the county treasurer.

"The facts are about as follows: The assessment is regular in every respect and in compliance with the statute in the following particulars; in that the certificate of assessments was properly certified to the county auditor, and also the special assessment record certified by the various city clerks for the various assessments, to the said county auditor. Thereafter the county auditor filed the same and made a certified copy of the special assessments as spread by the city clerks, and certified these certified copies to the county treasurer.

"The county treasurer according to custom heretofore followed in his office, has a blank book entitled 'Special Assessment Record' in which he inserted the loose-leafed ledger sheets as certified to him by the county auditor, but made no other entry upon the tax lists except performing and doing the things as above stated."

Section 826 to which you refer provides as follows:

"A certificate of levy of such special assessment, fixing the number of installments and time when payable, certified as correct by the clerk, shall be filed with the auditor of the county, or of each of the counties, in which such city is situated, and thereupon said special assessment as shown therein shall be placed on the tax list of the proper county."

Under the facts given us there is but one question involved and that is whether the special assessments have been placed on the tax list of the county. Our statute does not define what shall constitute the tax list, nor have any decisions been rendered by our supreme court directly passing upon the matter. The reasoning, however, in the case of *Jewett vs. Foot*, 119 Iowa, 369, tends to indicate that the words "tax list" refers to the tax book or record relating to the current taxes to be collected in any one year. In other words, the "tax list" is a public record of persons and property subject to a tax together with a statement of the amount of tax due. *Halthaus vs. Adams County*, 74 Nebr., 861; 105 N. W., 632.

There is no requirement in our statute that all of the taxes due from one person or levied against any specific property be in one volume or book. In view of the absence of such a statute there can be no objection if the taxes due should be entered in more than one book or tax list.

There is another reason which is of considerable importance to our mind and that is when special assessments have been certified and divided into installments the tax list of such special assessments covers a period of years and when placed in the hands of the treasurer he has before him a complete record of all taxes and the installments due thereunder certified to him as required by law. Hence, any one interested in the property may come to him and pay the tax then due as well as future installments and the treasurer has an accurate record to guide him in the collection of the same. It is impracticable to enter special assessments each year on the current tax list.

The county treasurer in your case has a tax book or tax list in his office giving the name of every person liable for a tax and the property

on which the same is a lien. This record furthermore sets forth the amount of tax due from each person and this, we believe, is all that the provisions of section 826 require.

BEN J. GIBSON, *Attorney General*,

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

COLLECTION OF PENALTY ON SPECIAL ASSESSMENTS

Persons waiving irregularity and entitled to pay in annual installments should not be charged with penalty of one per cent per month. Citing *Fitchpatrick vs. Fowler*, 157 Iowa, 215.

April 2, 1921.

Mr. S. G. Brammer, County Attorney, Estherville, Iowa: Your letter of the 26th ult. addressed to the attorney general has been referred to me for reply.

You request an opinion with reference to the interpretation of section 825 of the supplement to the code of Iowa, 1913, relating to the payment of special assessments for street improvements and sewers.

The particular question in which you are interested is whether a penalty of one per cent per month can be added in addition to the six per cent interest against persons who have signed waivers as provided in the section above referred to.

It is the opinion of this department that the case of *Fitchpatrick vs. Fowler*, 157 Iowa, 215, determines the particular question presented by you. While it is true that the court had under consideration in that case the interpretation of section 1989-a26 of the supplement to the code of Iowa, 1913, yet that section in so far as it relates to interest and penalty is identical with section 825 of the supplement to the code, 1913.

In the *Fitchpatrick* case the court held that section 1989-a26 in effect divided, for the purpose of collection, special assessments into two classes, one class embracing assessments where owners had filed waivers and the second class embracing assessments where the owners had not signed waivers, and in the opinion the court held that the penalty of one per cent a month only applied to the latter class. What the court said in that case of section 1989-a26 of the supplement can be said with equal force and effectiveness as to section 825 for the reason that the statutes are identical in language so far as interest, penalties and waiver provisions are concerned and relating to the same class of assessments.

It is, therefore, the opinion of this department in view of the holding of the supreme court in the case above referred to that where waivers have been executed that the one per cent penalty cannot be collected as against this class of assessments.

BEN J. GIBSON, *Attorney General*,

By JOHN FLETCHER, *Assistant Attorney General*.

PAYMENT OF SPECIAL ASSESSMENTS

Installments can only be paid as they became due, unless the entire unpaid balance of the assessment is paid, and interest computed thereon as provided by law.

June 28, 1922.

Hon. Glenn C. Haynes, Auditor of State: I am in receipt of your letter dated April 24, 1922, and I take this occasion to determine the matters referred to therein. Your letter is in words as follows:

"The town of Dayton, this County, have entered on our tax lists, for collection, special assessments for a sanitary sewer and have made it a bond issue instead of certificates.

"A case has come up as follows: \$124.31 was assessed against a certain lot in Dayton. The waiver was signed and the first payment of \$17.76 was made to the treasurer of Dayton. The balance of the installments are as follows:

"Due in 1922, \$24.99; 1923, \$23.17; 1924, \$22.10; 1925, \$21.03; 1926, \$19.90; 1927, \$18.83.

"The 1922 installment was paid in March and at the same time they offered to pay \$35.52 for the payments due in 1923 and 1924. Can payments be made in this manner?

"We have always collected the installments as they came due unless they wish to pay the entire unpaid balance and would then compute interest as provided by law."

The statute does not authorize the payment of more than the installment due at a given time, unless the entire tax is paid. This being true, your interpretation is correct.

BEN J. GIBSON, *Attorney General.*

WHEN SPECIAL ASSESSMENTS BECOME DELINQUENT

Penalties begin to draw on the first day of March after their maturity.

June 10, 1921.

Mr. L. A. Riter, County Attorney, Rock Rapids, Iowa: This department is in receipt of your letter dated June 9, 1921, in which you ask for an opinion as to the interpretation to be given section 825 of the code in and so far as the same applies to the time assessments begin to draw penalties.

In this request for an opinion you state that special assessments have been duly and legally levied as is provided by this section, and you assume further that the owners of the property against which such special assessments have been levied have failed to sign waivers as is provided by this section. With this state of facts you ask as to when such assessments begin to draw penalties, as is provided by the last sentence of said section.

You will note that section 825, after providing for the levy of assessments, provides that the owners of the property against which such special assessments have been levied be given the right to sign a written waiver of their right to object to such special assessments, and that in consideration of their doing so are given the right to pay such special assessments in installments.

As to the question of penalties in and so far as applicable to the instances where waivers have been signed we refer to our opinion dated May 21, 1921, in which this question is determined.

After so providing, the statute continues as follows:

"But where no such promise and agreement in writing shall be made by the owner of any lot or parcel of land or railway or street railway within said time, 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, on the date of such assessment, and shall be collected at the next succeeding March semi-annual payment of ordinary taxes. 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."

The law relative to the attaching of penalties as to ordinary taxes is that such penalties attach at once upon such taxes becoming delinquent. This rule applied to the special assessments, as referred to in this section, can leave no doubt as to the time such special assessments begin to draw penalties. The section, as noted, provides that such assessments become delinquent on the first day of March after their maturity, therefore, such assessments begin to draw penalties on such date.

BEN J. GIBSON, *Attorney General.*

LEVIES FOR MAINTENANCE OF PRIVATE CEMETERIES

Township trustees may levy tax for maintenance of private cemeteries if same is open to general public use, providing the levy is made for this specific purpose.

June 30, 1922.

Mr. Elmer F. Pieper, County Attorney, Waukon, Iowa: Your letter of June 17 referring to section 574 of the code of 1897 and section 586, supplemental supplement, 1915, has been referred to me for attention.

It is our judgment that under the section last referred to the township trustees would have authority to levy a tax not exceeding one mill for the maintenance and improvement of a cemetery privately owned if the same is open to general public use. However, such a levy should designate the purpose for which it is made. That is to say, the levy should show that it is made for the purpose of maintenance or improvement of privately owned cemeteries within the township which are devoted to general public use in order that the funds raised thereby would be available to such privately owned cemeteries. The fund raised by a general levy for the improvement of cemeteries within the township would not in our judgment be available to privately owned cemeteries though they may be devoted to the general public use. In other words, the levy to be available to privately owned cemeteries should be made specifically for that purpose.

BEN J. GIBSON, *Attorney General,*

By B. J. FLICK, *Assistant Attorney General.*

POLL TAX

All able bodied male citizens of a township who are between the ages of twenty-one and forty-five at any time between April 1, and September 1 of any year are liable for the payment of poll tax. Or in case option so to do is provided by the trustees and they elect so to do two days labor may be performed in lieu of the payment of such poll tax.

June 30, 1922.

Mr. Paul C. Thonn, Assistant County Attorney, Northwood, Iowa:

Your letter of June 9 addressed to Mr. Gibson has been referred to me for attention.

You ask for a construction of section 2 of chapter 172, acts of the 39th general assembly, relating to poll tax. That section is as follows:

"That all able bodied male citizens between the ages of twenty-one and forty-five who are residents of the township outside the corporate limits of cities and towns shall between the first day of April and the first day of September of each year pay to the road superintendent a sum not to exceed five dollars (\$5.00), said sum to be fixed by the township trustees at the April meeting. Provided, however, that the township trustees of each township may at the regular April meeting provide whether or not each person may at his option perform two days' labor in lieu of payment of money as provided in this act. All money received by the road superintendent under provisions of this act shall be immediately paid to the township clerk for the benefit of the general township road fund. The tax and money so collected shall be expended upon the township road system under the supervision of the road superintendent."

This section provides that the levy for poll tax shall be made at the April meeting of the board of trustees and shall not exceed the sum of five dollars and that the same shall be paid by all able bodied male citizens who are residents of the township outside of cities and towns between the first day of April and the first day of September of each year.

It further provides that the township trustees at the April meeting may provide whether or not each person may at his option perform two days labor in lieu of payment of money as provided in said act.

It is our opinion that all able bodied male citizens residents of such township who are between the ages of twenty-one and forty-five years between the dates above specified, to-wit, April first and September first, are required to pay the poll tax referred to in said section or in case option so to do is provided by the trustees and they elect so to do two days labor may be performed in lieu of the payment of such poll tax. In other words, all such able bodied male citizens who are between the ages of twenty-one and forty-five at any time between April first and September first of any year are liable for the payment of such poll tax.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

LEVY FOR ROAD PURPOSES

Discussion of authority of township trustees to levy for road purposes.

April 21, 1922.

Mr. D. H. Meyerhoff, County Attorney, Corning, Iowa: I am in receipt of your letter dated April 19 in which you request an opinion from this department upon the following proposition:

"What is the limit of the authority of township trustees to levy for road purposes?"

The township trustees under the law have authority to levy thirteen mills for road purposes. Such authority and the purpose for which the levy may be used may be divided as follows:

A. The general township road levy not exceeding four mills. This is found in section 1528 of the supplement to the code, 1913.

B. Additional general township road levy not to exceed two mills provided by section 55 of the primary road law.

You will observe that under A and B the total general township road levy is now six mills.

C. The township road drag levy. This is not less than one nor more than two mills and is provided for by section 1570-b2 of the supplement to the code, 1913, as amended by senate file No. 51 of the acts of the 38th general assembly.

D. The township road drainage levy not exceeding five mills. This levy is provided by section 1528 of the supplement to the code, 1913.

You will observe from reading these sections of the code that there is a general township road levy, as stated, of not exceeding six mills, a township road drag levy not exceeding two mills and a township road drainage levy not exceeding five mills.

It is of course unnecessary to point out that the levies authorized by the statute can only be used for the purposes specified by law.

BEN J. GIBSON, *Attorney General.*

**CITIES MAY BE PURCHASER AT TAX SALE—USE OF FUNDS—
ISSUANCE OF WARRANTS—TRANSFER OF FUNDS—
ISSUANCE OF TAX DEEDS**

- 1—A city may be a purchaser at a delinquent tax sale of city property against which special assessments have been levied wherein the city has issued bonds or certificates of indebtedness to cover such assessments.
- 2—The general fund of a city may be used in caring for the deficit in special funds, such as the fire fund.
- 3—Claims of a city should be paid upon warrants only, issued under the provisions by law.
- 4—The treasurer of Dubuque county should issue tax deeds on sales made prior to the change in the form of government of the city of Dubuque.
- 5—Excess in the bond or judgment fund of a city may be transferred to the general fund.

April 10, 1922.

Hon. Glenn C. Haynes, Auditor of State: We have your letter before us in which you ask for the official opinion from this department upon the following propositions which may be summed up thus:

"1. Has the city of Dubuque the right to purchase, at delinquent tax sale, city property against which special assessments have been levied, the money in payment of such taxes being drawn from the general fund and when the tax is collected the money received by the city treasurer is credited to the special assessment bonded debt fund?"

* In answering your inquiry permit us to advise you that the provisions of section 829 of the code specifically authorize the purchase of property at delinquent tax sales by any city having issued bonds or certificates of indebtedness to cover the special assessments.

"2. Is it legal to appropriate \$20,000.00 of the general fund receipts to the fire fund for the reason that it is going to require \$20,000.00 more in the fire fund to operate that department than will be received by means of the direct tax? For example: the tax returns \$87,000.00 for fire purposes, it is estimated that it will cost \$107,000.00 to operate the department for the fiscal year. Is it proper and legal to use the \$20,000.00 from the general fund miscellaneous receipts for fire purposes? By miscellaneous receipts I mean dog tax, business licenses, permits, etc."

In answer to this inquiry permit us to direct your attention to the fact that section 887 of the code provides as follows:

"The council of each city or town shall levy a tax for the year then ensuing, for the purpose of defraying its general and incidental expenses, which shall not exceed ten mills on the dollar."

In construing this section it has been held that a deficiency in the water tax may be paid out of the general fund. *Creston Water Works Co. vs. Creston*, 110 Iowa, 687.

Again, where a city contracts to pay a stipulated water rental it is liable for the full payment, although in excess of the sum realized from a special assessment authorized for that purpose, and the general fund may be resorted to to make up the deficit. *Marion Water Co. vs. City of Marion*, 121 Iowa, 306.

The line of reason followed in the foregoing case would clearly authorize the expenditure of a portion of the general funds to make up the deficit in the fire fund of the city of Dubuque.

"3. Should not legally authorized city warrants be used in payment of all claims?"

The provisions of section 660 of the code expressly provides that the treasurer of cities and towns shall disburse all moneys received by him only on warrants drawn and signed by the proper officer and sealed with the city seal. There is no other way provided by statute for the disbursement of the funds of a city other than upon warrants, as above specified.

"4. Is the treasurer of the city of Dubuque, or the treasurer of Dubuque county authorized by law to issue tax deeds on sales made prior to the change in the city government?"

As we understand it the city of Dubuque is now operating under the city manager plan. It formerly operated under a special charter and while under such charter the city treasurer executed tax deeds on the sale of property for delinquent taxes. Under the general law governing cities, no such authority is reposed in the city treasurer. The issuance of tax deeds is vested wholly in the county treasurer, since the treasurer of the city of Dubuque has no authority to issue tax deeds at this time, and we believe that the only one to authorize the same is the county treasurer.

5. You have asked the following question with reference to the city of Maquoketa:

"At Maquoketa we found a cash balance of approximately \$5,500.00 in the general bond fund. All general city bonds have been retired. There is no general city debt at this time. How is the \$5,500.00 balance in that fund to be disposed of? Can it be used in paying electric light plant bonds or interest, or must it be transferred to the general fund by a resolution duly presented and passed by a majority vote of the council present?"

In answer to the foregoing, we find that the provisions of section 897 provide for the transfer of the surplus in the judgment or bond tax funds to the general funds to the city or town. The method to be pursued is outlined in the section herein referred to.

"6. Electric light bonds in the sum of \$65,000.00 were approved by voters at a special election. Approximately \$6,000.00 in warrants have been issued over and above the \$65,000.00 which were necessary to complete the plant and extend the transmission lines. How are these warrants to

be funded? By a funding bond issue or a transfer of funds to cover the deficit? The city treasurer is holding these warrants which bear 6 per cent interest from date of issue, same having been stamped 'Not paid for want of funds'."

We have not attempted to answer the foregoing as it is more a question of policy than law involved in the same. We do not feel that we should attempt to assume the functions of the city council in the determination of this question.

BEN J. GIBSON, *Attorney General*,

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

TAXATION OF EQUIPMENT AND MACHINERY

Lien for taxes upon stocks of goods—section 1400 of the code as amended provides a lien for taxes upon stocks of goods or merchandise when sold in bulk. Machinery and equipment of a creamery is to be taxed under the provisions of section 1319 of the code.

April 12, 1922.

Mr. Hamilton Tobin, County Attorney, Vinton, Iowa: I am in receipt of your letter dated April 8, 1922, in which you request an opinion from this department. Your request is in words as follows:

"Would the equipment of a creamery be liable for the delinquent taxes unpaid by previous owner, under section 1400 of the code? The code specifies stocks of goods and merchandise and buildings assessed as personal property as being liable for taxes when sold in bulk and we are wondering if this section would apply to the equipment of a creamery when sold in bulk."

The provisions of section 1319 of the code are as follows:

Manufacturers. Any person, firm or corporation who purchases, receives or holds personal property of any description for the purpose of adding to the value thereof by any process of manufacturing, packing of meats, refining, purifying, or by the combination of different material, with a view to making gain or profit by so doing and selling the same, shall be held a manufacturer for the purposes of this title, and he shall list for taxation such property in his hands; but the average value thereof to be ascertained as in the preceding section, whether manufactured or unmanufactured, shall be estimated upon those materials only which enter into its combination or manufacture. Machinery used in manufacturing establishments shall, for the purpose of taxation, be regarded as real estate. Corporations organized under the laws of this state for pecuniary profit, and engaged in manufacturing as defined by this section, and which have their capital represented by shares of stock, shall, through their principal accounting officers, list their real estate, personal property and moneys and credits in the same manner as is required of individuals. The owners of capital stock of manufacturing companies, as herein provided for, having listed their property as above directed, shall be exempt from assessment and taxation on such shares of capital stock."

It will become apparent at once that the machinery and equipment of a creamery is to be taxed under the provisions of this section. A creamery is clearly a manufacturing establishment as distinguished from a mercantile establishment. It is true that a stock of goods and merchandise might consist of creamery products, and, if so, would be taxed under the provisions of section 1318 of the code as amended. However, in this opinion we are referring only to the actual equipment and machinery of a creamery which is used and maintained for the purpose of manufacturing creamery products.

Section 1400 of the code as amended provides a lien for taxes upon stocks of goods or merchandise, when sold in bulk. It does not refer to the machinery and equipment of a manufacturing establishment. Such equipment and machinery is for the purposes of taxation to be regarded as real estate in accordance with the provisions of section 1319 of the code, and would, of course, be subject to the lien provided.

This opinion must not be construed beyond the exact finding as herein set forth.

BEN J. GIBSON, *Attorney General*.

FOREST RESERVATIONS

Cannot have more than one on one tract of land. Must be 200 trees on each acre, not an average of 200 trees.

April 7, 1922.

Mr. Elmer F. Pieper, County Attorney, Waukon, Iowa: Your letter of the 2nd inst., addressed to the attorney general has been referred to me for reply. You ask:

"May an owner select any number of forest reservations on his farm, providing each contains over the minimum requirement of two acres?"

"Are the requirements of this statute met with if the entire reservation has an average of 200 trees per acre?"

The law governing your first question will be found in section 1400-c of the supplement to the code, 1913, as amended by chapter 224, acts of the 38th general assembly, which reads as follows:

"On any tract of land in the state of Iowa, the owner or owners may select a permanent forest reservation not less than two acres in continuous area, or a fruit-tree reservation not less than one or more than ten acres in area, or both, and upon compliance with the provisions of this chapter, such owner or owners shall be entitled to the benefits hereinafter set forth."

Pursuant to the provisions of the statute above quoted, it will be observed that the owner of a tract of land may select a permanent forest reservation, and that the same must not be less than two acres *in continuous area*. If it was intended by the legislature that a person could select more than one forest reservation on a particular tract of land, the statute would have permitted him to select forest reservations instead of "a permanent forest reservation." It follows, therefore, that only one forest reservation can be selected by the owner on any particular tract of land.

The law governing your second question will be found in that portion of section 1400-d of the supplement to the code, 1913, which reads as follows:

"A forest reservation shall contain not less than two hundred growing forest trees on each acre."

It will be observed from the portion of the statute above quoted that there must be at least two hundred growing forest trees on each acre. It is evident, therefore, that a tract of land containing an average of two hundred trees per acre would not meet the requirements of the statutes.

BEN J. GIBSON, *Attorney General*,

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

ASSESSMENTS OF GRAIN DEALERS—LIVE STOCK SHIPPERS

Section 1315 provides assessments are to be made upon average amount of capital used, etc., as applied to grain dealers. Stock shipper assessed under section 1318, code 1897.

April 1, 1921.

Mr. T. E. Moen, Des Moines, Iowa: The letter of G. A. Lyon addressed to you from Inwood, Iowa, and by you referred to this department for an opinion states the following propositions:

"Do we have a right to assess our local stock buyer, also our grain dealers on their average yearly business done and about what per cent?"

"The case at issue is this. We assessed our stock buyer as well as our grain men, but our stock buyer claims exemption of tax on his business on the grounds that no other stock buyer in the county is taxed on his business. The county supervisors through the advice of the county attorney advised our city council the tax was not legal and that we, the council, recommend to the supervisors that it be cancelled. Now the question is, should we do this or not? If so, should not the grain men be exempt from tax on this business also?"

We will first take up the question of the assessment of grain dealers. Code, section 1315, is as follows:

"Each grain, ice or coal dealer shall be assessed upon the average amount of capital used by him in conducting his business. In estimating the amount of capital so used, there shall be taken into consideration the increase and decrease of the value of grain held in store, and upon the value of his warehouses, ice houses, granaries or cribs situated upon lands leased from railway companies or other persons, and upon the value, if any, of such leasehold interest."

This section of the statute makes plain the method for the assessment of grain dealers and nothing that we could say would add to the clearness of the means afforded by the statute for the assessment of such business.

As to the assessment of a stock buyer the question is one that cannot be answered with that satisfactory degree of accuracy that this department would like to employ in rendering its opinions. The only decision by the supreme court with reference to the assessment of a dealer in livestock under the provisions of 1318 of the code regulating the assessment of merchants is the case of *Jewell vs. Board of Trustees*, reported in 113 Iowa beginning on page 47. The opinion in this case is by Judge Deemer, for whom a profession in this state has the most profound respect, and while in that particular case the decision was that the assessment was erroneously made, yet the decision seemed to turn on the fact that the stock which consisted of sheep was purchased with the idea of feeding it and preparing it for market and not for the purpose of immediate sale.

On page 50 the following language is used:

"That statute (referring to section 1318) says that any person having in his possession any personal property, purchased with a view to its being sold, shall be held to be a merchant. Under a strict literal interpretation this would seem to cover every article of personal property that was not purchased for consumption or personal use. Was that the intent of the legislature in defining the term? If it was, then a large amount of personal property can only be assessed by a small part of its value. Very few farmers purchase stock for immediate consumption or use. They buy it to feed and fit for the market and ultimately to sell; but this does not, to our mind, make them merchants. True, the ultimate object is sale, but not sale in the condition in which they buy. They buy primarily

with the purpose of feeding and preparing for the market. Immediate sale is not contemplated or expected. There are, it is true, persons who trade and traffic in live stock the same as in ordinary merchandise, but they are not feeders. They feed simply to preserve life and flesh, not to add to the avoirdupois. They purchase with a view to immediate sale. The ordinary stock raiser buys, not for immediate sale, but to derive a profit from the produce that he feeds his stock. *There is a manifest difference between a stock merchant or buyer and a stock feeder, and this distinction, we think, is preserved in the statutes.* Section 1308 provides that sheep and swine over six months of age are subject to taxation in the manner prescribed. *If held by one with a view to traffic therein, as in merchandise, then they are to be taxed as provided in section 1318, and if not so held they should be listed and assessed each year in the name of the owner thereof on the first day of January—listed at their actual value, and assessed at 25 per cent of such actual value.*"

A careful reading of this entire opinion will justify the following conclusions: That if live stock is purchased with the purpose in view of feeding the same to add to its weight in the preparation of the same for market, or, in other words, if the one purchasing the stock is what we usually term a feeder then the live stock itself which he has on hands on January 1 is to be listed at its actual value and assessed at 25 per cent thereof.

If, however, the person purchasing the stock does so with the view of trafficking therein as in merchandise, and while he may feed the stock, it is only for the purpose of preserving life and it appears that the stock is for sale at any and all times and such person is one who is really known as a stock buyer, his property should be assessed under the provisions of section 1318 of the code which has relation to assessment of the property of merchants.

BEN J. GIBSON, *Attorney General,*

By B. J. FLICK, *Assistant Attorney General.*

TAXATION OF CO-OPERATIVE GRAIN COMPANIES, ETC.

Co-operative companies incorporated and operating lumber, grain and coal business should be assessed for taxation under sections 1315 and 1318 of the code, 1897.

March 21, 1922.

Mr. V. F. Sieverding, County Attorney, Grundy Center, Iowa: You have requested the opinion of this department upon the following proposition:

"A controversy has arisen in this county between an assessor and a co-operative company as to the proper method of assessing them. The facts are these: This co-operative company operates a lumber, grain and coal business. They insist upon being assessed upon their lumber stock at the average stock carried throughout the year the same as other lumber yards and on their grain and coal business upon the average amount of capital used by them in conducting their business, following sections 4497 and 4499 (compiled code). The assessor insists upon assessing them, or rather the individual stockholders, at the place of business under section 4513 (compiled code).

"Will you kindly advise me which one you consider correct in this matter, so that I may correctly advise the assessor?"

Section 1318 of the code, 1897, relates to the assessment of stocks of merchandise owned by merchants and defines the method of taxation. That section is 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, or which has been consigned to him from any place out of this state to be sold within the same, or to be delivered or shipped by him within or without this state, 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 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 will be observed from a reading of section 1318, as set out above, that the last few lines of the section provide that the method of taxation set out in the section shall apply to corporations whose business is of a like character to that described in the section. The last phrase of the section specifically provides that such method and such tax shall be in lieu of any tax on the corporate shares. Therefore, the provisions of section 1323 of the code, 1897, do not apply in such cases. There is no need for the citation of authorities or an extended explanation in view of the plain language of the statute on this proposition.

We note in your statement of facts that the co-operative company operates a grain and coal business in addition to its lumber business. There is a special section of the code controlling the taxation of such businesses. The grain and coal business of the company should be assessed under the provisions of section 1315 of the code, 1897, which we set out as follows:

"Each grain, ice or coal dealer shall be assessed upon the average amount of capital used by him in conducting his business. In estimating the amount of capital so used, there shall be taken into consideration the increase and decrease of the value of grain held in store, and upon the value of his warehouses, ice houses, granaries or cribs situated upon lands leased from railway companies or other persons, and upon the value, if any, of such leasehold interest."

The lumber business, then, should be assessed under the provisions of section 1318 of the code, 1897, and the grain and coal business under the provisions of section 1315 of the code, 1897.

BEN J. GIBSON, *Attorney General*,

By NEILL GARRETT, *Assistant Attorney General*.

TAXATION OF DOGS

General discussion as to taxation or licensing of dogs under chapter 140, acts 39th general assembly.

November 8, 1921.

Hon. Glenn C. Haynes, Auditor of State: You have requested this department for an opinion, basing your request upon certain propositions relating to chapter 140 of the acts of the 39th general assembly, commonly known as the dog license law.

The first question submitted by you is in substance as follows:

"When is the license delinquent in such a sense as to entitle the charging of the one dollar delinquent fee provided for in section 10 of the act."

Section 10 provides in substance that the county auditor shall on or before the first day of May of each year cause to be published in the official newspapers of the county a list of all dogs reported by the assessor upon which the tax has not been paid.

It further provides that the auditor shall not later than the twentieth day of May cause to be spread upon the tax books of the county such license tax together with one dollar delinquent fee and the costs of publication, which delinquent fee and costs shall be collectible in the same manner and in the same way as any other delinquent tax. While the act as a whole provides that the tax must be paid before the 15th day of January it does not provide that the delinquent fee shall be entered until the list is published. Such a fee being a penalty can only attach at the time as provided by the statute. Therefore, it must be held that the penalty of one dollar does not attach until publication. It might be said, however, that upon publication the fee at once attaches and it is the duty of the auditor to at once spread the same upon the tax books together with the costs of the publication. This should be done without delay following the publication and in no event should the publication and spreading of the tax be later than the 20th day of May.

Your second proposition is as follows:

"Can the county auditor accept the fee and issue a license for an application for a dog license made to him on or after the 16th day of January and up to and until the time he entered the tax on the tax lists of the county which shall not be later than the 20th day of May?"

The county auditor is undoubtedly authorized to accept the application of an applicant for a license under the provisions of this act at any time prior to the spreading of the license tax with penalty and costs upon the tax books of the county. There is no other construction possible. The statute authorizes the licensing of dogs and were it to be held that the auditor could not accept the application there would be no method known to the law whereby the owner of a dog could license between the 16th day of January and the date of the publication.

The third question submitted by you is as follows:

"On what tax list should the auditor spread the delinquent license tax together with the penalty and costs?"

The delinquent license tax together with penalty and costs should be placed by the auditor upon the current tax list to be collected during the current year. The license taxes provided for by this act for the current year. For example, the license taxes due January 15, 1922, are for the year 1922 and for use during such year. It follows that the tax must be spread on the current tax books, that is, the license taxes for the year 1922 would be spread on the tax books evidencing the assessment for the year 1921.

The fourth question submitted by you is as follows:

"When the owner of a dog against whom the license tax together with penalty and costs has been assessed pays the same is the auditor authorized to issue a license and tag to such owner?"

Such owner upon payment of the license tax together with penalty and costs is entitled to a license and tag. It will be observed, however, that

the payment under such circumstances will be made to the county treasurer. There must then be some method arranged whereby the county treasurer can certify the fact of such payment to the county auditor and the county auditor be thus authorized to issue the license and tag. This must be arranged by the officers themselves and in order to make the same uniform throughout the state we would suggest that your department should issue a uniform regulation for the use of all the county auditors and treasurers of the state in this connection.

The fifth question submitted by you is as follows:

"From what funds should the costs of publication be paid in the first instance?"

The costs of publication should be paid in the first instance from the domestic animal fund which should be reimbursed whenever such costs are collected from the persons entitled to pay the same under the provisions of the act.

The sixth question submitted by you is as follows:

"Can the county auditor collect the delinquent fee and publication costs prior to the time such tax and delinquent fee is entered on the tax list in the treasurer's office?"

In our opinion after the publication has been made the entire cost of publication together with penalty and the original license tax must be paid and under the provisions of the act should be paid to the county treasurer's office. The county auditor, should he collect, would be unable to make his books correspond with those of the county treasurer. For uniformity, therefore, if the owner should desire to pay prior to the time of the spreading of the tax and after the time the delinquent fee and publication is due he should pay to the county treasurer in accordance with a uniform regulation existing between the county treasurer and the county auditor of the county.

The seventh question submitted by you is as follows:

"Must the owner of a dog in cases where the license tax, delinquent fee and publication is spread on the tax lists make application for license and tag?"

In all events must the application be made. There are certain requirements to be mentioned in the application which are essential to the records in the office of the county auditor and such application is required even in cases where the license tax with penalty and costs is paid to the county treasurer. Such payment evidenced by the proper certificate of receipt of the county treasurer does away with the necessity of paying the auditor anything but does not dispense with the necessity for the application. This would in no way affect the twenty-five cents fee. As a matter of fact the twenty-five cents provided for in section 3 has nothing to do with the license tax at all. It is simply a provision providing a fee for the making of this application to all officers entitled to administer oaths.

The eighth question submitted by you is as follows:

"If a dog owner is not listed on the assessor's list and consequently is not on the tax list comes in on or after May 20th and states that he owned the dog prior to January 15th shall the auditor charge a delinquent fee?"

Under such circumstances the auditor should charge the original license fee together with penalty as provided by the law. The penalty attaches in all cases on the 20th day of May.

Your ninth question is as follows:

"If the owner of a dog loses the license tag is he required to take out a new license or only to secure a duplicate tag?"

The act is silent in this regard. It may be stated, however, that there is only one license required. What should be done is for the county officers to arrange a method whereby duplicate tags can be secured and furnish such tags upon proper application supported by proper affidavit showing the actual loss of the tag. Under such circumstances, however, the county auditor should charge the owner of the dog the cost of such duplicate tag.

BEN J. GIBSON, *Attorney General.*

COST OF PUBLISHING DELINQUENT DOG TAX LISTS

Cost of publication of delinquent dog tax lists shall be paid for out of domestic animal fund, being a necessary expense incident thereto, within a reasonable length of time after publication is completed.

June 30, 1922.

Hon. Glenn C. Haynes, Auditor of State: I am in receipt of your letter dated June 19, 1922, in which you ask as to whether or not a county auditor may issue warrants out of the domestic animal fund for the cost of publication of delinquent dog licenses.

Chapter 140, acts of the 39th general assembly relates to the taxation, licensing and controlling of dogs. It specifically provides that the auditor shall cause to be published in the official papers of the county a list of all dogs reported by the assessor, upon which the license and tax has not been paid. This publication is to be prior to a certain set date. The papers publishing such list would be entitled to compensation within a reasonable time after the completion of the publication. It follows, therefore, that the warrant issued by the county auditor should be delivered to the person entitled to the same, within such reasonable time.

This department has already ruled that such warrant must be paid from the domestic animal fund. This is upon the theory that the expense of such publication is a necessary expense incident to the collection of a specific fund, devoted to a specific purpose, and therefore, chargeable as against the gross collections for such fund.

BEN J. GIBSON, *Attorney General.*

COLLECTION OF DOG LICENSE

County treasurer cannot sell real estate for dog license fee of year in which sale is held. May sell next year. One dollar delinquent fee is only penalty attaching to dog license.

February 14, 1922.

Hon. Glenn C. Haynes, Auditor of State: Your letter of the 13th inst. addressed to Attorney General Gibson has been referred to me. You ask the opinion of this department on the following questions:

"First: Can the county treasurer advertise and sell at the regular tax sale, the real estate of a person for the delinquent dog license tax of such person, which has been entered on the tax list by the county auditor under the provisions of section 10, chapter 140, acts of the 39th general assembly? If he can, would it make any difference if the person against whom the delinquent dog license tax has been entered had paid the regular tax on the real estate prior to the date the delinquent dog license tax was entered on the tax list?"

"Second: Section 10 of chapter 140 acts of the 39th general assembly provides that a delinquent fee of \$1.00 shall attach at the time the delinquent dog license tax is entered on the tax list by the county auditor. Is this one dollar all the penalty that should be charged against this tax, or would the penalties provided for by code section 1413, as amended by chapter 66, acts of the 39th general assembly, apply to this tax?"

For convenience we quote section 10 of chapter 140 of the acts of the 39th general assembly:

"The county auditor shall, on or before the first day of May, each year, cause to be published in the official papers of the county, a list of all dogs, reported by the assessor, upon which this tax has not been paid and it shall be the duty of such auditor, not later than the twentieth day of May, to cause to be spread upon the tax books of the county such tax together with one dollar delinquent fee and the costs of publication, which tax and costs shall be collectible in the same manner and in the same way as any other delinquent tax. Should such tax and costs be uncollectible the cost of publication and collection shall be paid from the domestic animal fund."

You will note that the above section provides that the auditor shall cause to be spread upon the tax books of the county the delinquent dog license fee, which in said section is called a tax, not later than the 20th day of May, together with one dollar delinquent fee and costs of publication and further provides that such tax and costs shall be collectible in the same manner and in the same way as any other delinquent tax.

Section 1418 of the code of 1897, providing for tax sales, provides in part as follows:

"Annually, on the first Monday in December, the treasurer shall offer at his office at public sale all lands, town lots or other real property on which taxes of any description for the preceding year or years are delinquent."

It is our opinion that the license fees provided for in the so-called dog license law are in lieu of taxes for the year in which they are due and payable. It follows therefore, in view of the provisions above quoted, that the treasurer can offer real estate for sale only for taxes which are due and delinquent "for the previous year or years" and that he is not authorized therefore to sell such real estate for the license fee or tax due and delinquent the same year in which the sale is held. He may, however, collect such delinquent license fee tax by distress and sale under the other provisions of the statute and may sell the real estate the year following the one in which such tax is delinquent.

In answering your second question, the only penalty provided for in chapter 140, acts of the 39th general assembly, is the one dollar mentioned in section 10. There is no specific provision in that chapter that the delinquent license fee shall draw the penalty provided for by code section 1413 as amended and in the absence of any specific provision to that effect it is our opinion that the one dollar constitutes the only penalty which attaches.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

WHO REQUIRED TO PAY DOG LICENSE

Owner of dog under three months of age January 15 need not license.
Owner of dog over three months old January 1, but dog killed before
January 15, not required to pay license.

February 14, 1922.

Hon. Glenn C. Haynes, Auditor of State: Your letter of February 14, 1922, addressed to this department has been referred to my attention. You ask two questions as follows:

"First: Section 1 of Chapter 140, Acts of the 39th G. A., provides that on or before the 15th day of January, 1922, and on or before the 15th day of January each year thereafter, the owner of any dog three months old or over shall in written or printed form, supplied by the board of supervisors, apply to the county auditor for a license for each such dog owned by him. Does this mean that the owner of a dog under three months of age on January 15, 1922, will not be required to take out a license until sometime between the 1st and 15th of January, 1923, or would he be required to take out a license when his dog became three months old? If no license is required until January, 1923, what protection would the owner have against his dog being killed as a wild dog?"

"Second: If a person owned a dog over three months old on January 1 and failed to take out a license, but killed the dog before January 15, would he be required to take out a license? In other words, should the county auditor publish this person's name in the delinquent list and spread the tax upon the tax lists? If they are not required to take out a license, would they be required to do so if the dog was not killed until after January 15?"

In considering the first question submitted by you attention is called to the fact that the date fixed by the statute for licensing dogs is January 15. From January 1 to January 15 there is no requirement as to the licensing of a dog save and alone that during such period the owner of a dog is entitled to have such dog licensed in accordance with the provisions of the act.

It will be observed in this connection that there is an exemption for license of dogs under three months of age. That is to say, all dogs under three months of age on January 15 of the year are not required to be licensed during the year either before or after January 15. This answers the first part of the first question submitted by you.

With reference to what protection the owner of a dog not three months old on January 15 of a given year would have, your attention is called to the plain provisions of the statute which provides that the owner of a dog shall have a property right therein. The only dogs which may be killed as wild are those which are not licensed in the manner provided by law and such right would not be extended to include the right to kill dogs specifically exempted from the license.

In answering your second question your attention is once more called to the date January 15. There is no requirement that a dog shall be licensed prior to January 15. The right to have the dog licensed prior to such time exists but the requirement only attaches as of that date. This being true, a dog not alive on January 15 would not be subject to license and the owner could not be held for such license, neither should the name of the owner of a dog that had died prior to January 15 be

placed upon the delinquent list in the manner provided by law. If the dog was killed after January 15, the license requirement having attached, the dog should be listed on the delinquent list.

BEN J. GIBSON, *Attorney General.*

LIEN FOR TAXES

Taxes are not lien upon personal property. Mortgage and landlord's lien prior to taxes due.

February 9, 1922.

Mr. V. A. Arnold, County Attorney, Spirit Lake, Iowa: Your letter of the 7th inst. addressed to the attorney general and requesting an opinion from this department has been referred to me. You ask:

"The treasurer of this county desires the opinion of your office upon the following propositions:

"First: When does a tax become a lien upon personal property other than stocks of merchandise?

"Second: Is a mortgage on personal property superior and prior to taxes against the same?

"Third: Is a landlord's lien prior and superior to taxes against personal property?

"Fourth: In a court of bankruptcy are taxes on personal property superior and prior to a mortgage or a landlord's lien?

"The above queries do not contemplate stocks of merchandise."

In answering your questions it is understood as indicated in your letter that no reference is made to the lien of taxes upon real estate or upon stocks of merchandise.

The only statute creating a lien on personal property in this state is section 1404 of the code of 1897 and this relates entirely to personal property belonging to a non-resident of this state. The provisions of that section are clear and leave no doubt as to the priority of a lien for the taxes against the personal property of a non-resident of the state, so that section will be eliminated in the further discussion of your questions.

That taxes levied on personal property become a lien on any realty which the owner of such property may possess or which he may acquire but not on the personality itself and that such property may be sold and transferred subsequent to the time of the levy and before the payment of the taxes upon it without subjecting the purchaser to the payment of such taxes is clearly decided in the case of *Jaffray & Co. vs. Anderson*, et al, reported in 66 Iowa, beginning on page 718. A part of that opinion bearing on the question submitted 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. Sections 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 per-

sonal 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."

Under the provisions of sections 1406 to 1404 inclusive of the code of 1897 the treasurer may take possession of personal property and collect taxes due thereon from the owner thereof by distress and sale but he would be limited under these provisions to the personal property of which the person against whom he seeks to enforce the collection of taxes is, at the time he takes possession thereof, the owner. Of course, the transfer or encumbrance of such personal property after the treasurer had taken possession of the same for the purpose of collecting taxes would not interfere with the right of the treasurer to sell the same.

Your questions therefore should be answered as follows:

(1) Taxes are never a lien upon personal property other than stocks of merchandise and the personal property of non-residents.

(2) A mortgage on personal property is superior and prior to taxes against the same.

(3) A landlord's lien is prior and superior to taxes against personal property.

(4) In a court of bankruptcy a mortgage or landlord's lien upon personal property of a resident of this state is superior to taxes on the same.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

DUTY WHEN PROPERTY OMITTED FROM TAX SALE

When property subject to tax sale is overlooked and not advertised in time for tax sale held according to provisions of Sec. 1431, Supp. 1913, sale shall be held on the first Monday of the next succeeding month in which required notice can be given.

December 3, 1921.

Mr. Clarence R. Off, County Attorney, Marengo, Iowa: You have requested an opinion from this department on the proposition as to whether or not there is any method by which a county treasurer may advertise property subject to tax sale and sell same, when such property has been overlooked and not advertised in time for the tax sale to be held on the first Monday in December, as provided in section 1431, supplement to the code, 1913, as amended.

It is the duty of every county treasurer to be sure that he has listed and advertised all property subject to sale, on which there are delinquent taxes due. But should there be a parcel of land subject to tax sale which has not been advertised in time for the sale to be held on the first Monday in December, there is provision for the subsequent

advertising and sale of such property in section 1431 of the code of 1897. That section provides as follows:

"If from neglect of officers to make returns, or other good cause, real estate cannot be advertised and offered for sale on the first Monday of December the treasurer shall make the sale on the first Monday of the next succeeding month in which the required notice can be given."

It will be observed that the foregoing section provides that any such advertising and sale may be made on the first Monday of the next succeeding month.

BEN J. GIBSON, *Attorney General*,

By NEILL GARRETT, *Assistant Attorney General*.

WHAT INCLUDED IN TAX SALE

Includes all taxes carried forward and certified previous to sale.

November 23, 1921.

Hon. Glenn C. Haynes, Auditor of State: You have orally requested an opinion from this department as to the interpretation given section 1425 of the code. Your request is substantially as follows:

"If under this section property is advertised for sale, does the sale include not only the taxes for which the property has been previously advertised but also the taxes for the year preceding the date of the sale, that is to say, would the sale in the year 1921 include the general taxes for the year 1920?"

Section 1425 to which you refer is in words as follows:

"Each treasurer shall, on the day of the regular tax sale each year or any adjournment thereof, offer and sell at public sale, to the highest bidder, all real estate which remains liable to sale for delinquent taxes, and shall have previously been advertised and offered for two years or more and remained unsold for want of bidders, general notice of such sale being given at the same time and in the same manner as that given of the regular sale. Any taxes on such real estate, in excess of the amount for which the same was sold, shall be credited to the treasurer by the auditor as unavailable, and he shall apportion such excess among the funds to which it belongs, and if any of such excess belongs to the state, it shall be reported by him to the auditor of state as unavailable, who shall give the county credit therefor."

This section provides for the sale of property which has been previously advertised for sale and on which there were no bidders for the full amount of the taxes. It is commonly called the "scavenger's sale." The amount of the taxes due at the time of the sale is the base, and, therefore, the property would be sold for the taxes for all of the years, not only for which the property had been advertised and carried forward, but also for the year immediately preceding the tax sale. Our Supreme Court, while not directly passing upon this question, has in substance approved the same and has in effect held that the base is the amount due at the time of the sale. Mr. Justice Ladd, speaking in *Everson vs. Woodbury County*, says:

"The tract of land had been offered at tax sale for five successive years without bidders, and on December 4, 1899, was sold at what is commonly designated a 'scavenger's sale' for one-fifteenth of the amount then due, and a certificate issued which is now held by the plaintiff."

It will be observed that Mr. Justice Ladd speaks of the amount then due, which would be, as stated, the amount of taxes for the previous years as well as the year immediately preceding.

Mr. Justice Deemer in *Fitzgerald vs. Sioux City* holds to the same effect when he approves a sale thus made. In referring to such sale he says:

"The case was tried on an agreed statement; hence the facts are not in dispute. From this it appears that plaintiff holds a tax deed for certain of the lots in question, issued pursuant to a regular tax sale held in the year 1897 for taxes on the property for the years 1892-96, inclusive."

In this case Mr. Justice Deemer decides that all of the taxes which were properly carried forward and properly certified would be included in the taxes for which the property was sold. He says as follows:

"That the city so understood is evident from its acceptance without protest of its proportionate share of the taxes paid by the purchaser at tax sale. That they were included in the taxes for which the property was sold is conceded, and that they should have been is clear from a study of the statutes to which we have referred. See, as sustaining these conclusions, *Morrison vs. Hershire*, 32 Iowa 275."

From what has been stated, you will observe then that the sale for taxes includes all taxes properly carried forward and certified previous to the day of sale. It should be understood that the advertisement for the sale must be in conformity to law, and must include the taxes for which the property is to be sold. We make this suggestion in order that there may be no misunderstanding.

BEN J. GIBSON, *Attorney General*.

LEVY FOR TOWNSHIP ROADS

Township may levy not to exceed 6 mills for road purposes under Sup. 1913, Sec. 1528, and 38th G. A., ch. 237, Sec. 55.

November 22, 1921.

Mr. W. I. Saul, County Attorney, Carroll, Iowa: In your letter dated November 18, 1921, you ask for an opinion from this department. Your request is in words as follows:

"Section 2970, compiled code of 1919, gives the township trustees authority to levy not more than 4 mills on a dollar for road purposes. (S. 13, No. 1528).

"Section 2962, compiled code of 1919, empowers the trustees to make an additional 2-mill levy for township road purposes (38 G. A., ch. 237, No. 55).

"It is my contention that any township trustees have the right under these sections to make a levy of 6 mills for road purposes.

"Our auditor differs with me, saying that as section 2962 above is under the chapter primary and secondary road systems, that the additional 2-mill levy can only be made by such townships as have road districts.

"Please advise me at once which of us are correct."

There is no limitation in section 55 of chapter 237 of the 38th general assembly commonly known as the primary road law. This section simply authorizes the township trustees to levy an additional tax of 2 mills for township road purposes. It is additional to the provisions of section 1528 of the supplement to the code, 1913. Under the law then a township may levy not to exceed 6 mills for township road purposes.

It might be said that the county auditor is undoubtedly confusing the secondary road system with secondary road districts. The two are separate and distinct.

The secondary road system includes, (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 secondary road district is established by the board of supervisors in accordance with the provisions of section 47 *et seq* of the chapter. Section 55, however, is not limited by either of these facts. As a matter of fact it was inserted for the purpose of permitting such tax levy to insure the proper maintenance of the township roads. The primary road law so modified the provisions of the statute relative to the maintenance of roads as to determine that something be done to care for the township roads and so the provision was inserted.

BEN J. GIBSON, *Attorney General.*

DELINQUENT PERSONAL TAXES

Penalties and interest attaching to such taxes remaining unpaid for four years from the time of their entry are collectible, but no penalties or interest accruing after such four-year period will attach. Sec. 1391, S. S.

November 15, 1921.

Mr. J. A. Nelson, County Attorney, Decorah, Iowa: You have requested an opinion from this department on the proposition as to whether or not under the provisions of section 1391 of the supplemental supplement to the code, 1915, penalties and interest on personal property taxes may be collected for the first four years that they remain unpaid after the close of the year in which the books are first turned over to the county treasurer.

Section 1391 of the supplemental supplement to the code, 1915, now reads as follows:

"No penalty or interest, except for the first four years, shall be collected upon taxes remaining unpaid four years or more than 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 section 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 afterward 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 treasurer 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."

You call our attention to the recent case of *Collins Oil Company vs. Perrine*, reported in 188 Iowa, page 295. It will be noted in division

two of the opinion in that case that the Supreme Court considered section 1391 of the supplement to the code, 1913, the first part of which read as follows:

"No penalty or interest 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."

Under the law as it then stood, the Supreme Court in the case cited held that no penalties or interest could be collected after the four-year period specified in the statute had expired, but you will observe that that statute was amended by chapter 79 of the laws of the 36th general assembly so as to insert after the word "interest" in the first line a comma and the phrase "except for the first four years." Reading the first sentence of the section as amended, it will be observed that the construction placed upon the section by the opinion in the case of *Collins Oil Company vs. Perrine*, supra, has been changed by the amendment. As the section now reads it provides that the penalty and interest on taxes remaining unpaid four years or more may be collected for the first four-year period, but that no additional penalties or interest shall attach and be collectible after the expiration of that period.

It is, therefore, our opinion that under the provisions of section 1391 of the supplemental supplement to the code, 1915, penalties and interest attaching to delinquent personal taxes remaining unpaid for four years from the time of their entry on the books are collectible, but no penalties or interest accruing after the four-year period set out will attach.

BEN J. GIBSON, *Attorney General*,

By NEILL GARRETT, *Assistant Attorney General*.

COST OF PLANS PART OF EXPENSE OF SEWER CONSTRUCTION

Cost of plans are a part of the expense of sewer construction for which 5-mill levy can be made.

November 10, 1921.

Mr. Leo C. Percival, County Attorney, Winterset, Iowa: Your letter of the 5th inst. addressed to Attorney General Ben J. Gibson has been referred to me for attention.

You state:

"The town of Earlham has demanded that the auditor spread a 5-mill tax under the provisions of section 894-3, supplemental supplement of code, for the purpose of paying for the expenses of securing plans for a sewer for the town.

"They are not going to build a sewer now. They have secured plans for a sewer and this tax is to pay for the plans only."

You then ask:

"Can any portion of the tax provided for in section 894-3 be used for the payment of costs incurred in securing plans for a sewer for said town?"

Section 894-3, supra:

"A tax not exceeding, in any one year, 2 mills on the dollar on the assessed valuation of all property therein, for a city sewer fund, when the entire city comprises one sewer district, to be used to pay the cost of the making, reconstruction or repair of any sewer at the intersection of streets, highways, avenues, alleys, and at spaces opposite streets, highways, avenues and alleys intersecting but not crossing, and at spaces

opposite property owned by the city or the United States, and to pay the whole or any part of the cost of the making, reconstruction or repair of any sewer within the limits of said city; when a city has been divided into sewer districts, a tax not exceeding 2 mills on the dollar on the assessed valuation of all property in the sewer district, for a district sewer fund, to be used to pay, in whole or in part, the cost of the making, reconstruction or repair of any sewer located and laid in that particular district."

The statute just quoted has been made applicable to towns. Section 840-a, supplement to the code, 1913, as amended by chapter 59, acts of the 38th general assembly.

It is the opinion of this department that section 894-3 covers any costs incidental to the making, reconstruction or repair of any sewer within the limits of the town of Earlham. Certainly, the preparation of plans is incidental to the construction of a sewer, particularly if the sewer is of any magnitude; for without plans the engineer could not intelligently and accurately determine the location nor estimate the cost of the sewer.

However, as to the necessity of levying a 5-mill tax for the purpose of paying the costs of securing plans for a sewer, we believe that only such an amount as is necessary to cover such costs should be levied.

Therefore, a modified in this opinion, we believe that your question should be answered in the affirmative.

BEN J. GIBSON, *Attorney General*,

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

TAXATION OF REAL ESTATE CONTRACTS

Real estate contracts are assessable as credits. Options to buy real estate are not taxable. Both the real estate contract and the land are subject to taxation. If contract fails, vendor is liable for all taxes due, and must look to vendee for his damages.

May 6, 1921.

Mr. Arthur E. Lund, County Attorney, Tipton, Iowa: Your letter requesting the opinion of this department on the following proposition has been referred to me for attention. Your proposition as stated in your letter is as follows:

"A number of farms were sold last year on contract, said farm to be delivered March 1.

"The question presented by the assessors is, whether or not the seller of the land and holder of the contract is to be assessed the amount of the consideration of the contract, as property, or moneys and credits had on hand January 1.

"If it is your opinion that same is to be assessed, then what is to be done in case the contract fails, and he has to take the farm back again?

"In case he has to take the farm back again, and has paid tax on said contract, shall the county refund the tax to him? Would it make any difference in the latter case if he has to pay the tax on the land too, where he had to take it back and pay the tax on the real estate?

"We have a number of cases where the contract was assessed, and later the contract failed, and the seller had to take the land back and pay the tax on the land when he took it."

Before expressing our ruling on these questions, we will discuss briefly the elements entering into real estate contracts in general. These contracts have often been confounded with options to buy real estate.

Under an ordinary real estate contract, the vendor obligates himself to invest vendee with the title, upon the fulfillment by vendee of the obligations on his part relative to the payment of the remainder of the purchase price of the land. The situation is no different than where the title has been placed in the purchaser and payment of the purchase price secured by means of a mortgage on the land, acknowledging the indebtedness and creating a lien on the land to secure the payment of the balance due. A debt secured by a mortgage on land, and the mortgaged land, are both subject to taxation.

It is often difficult to distinguish between a contract and an option. Under a contract to buy real estate, an enforceable right in favor of the vendor arises. A valid indebtedness is created by such a contract which the seller can enforce against the purchaser. An option to buy real estate invests the vendor with no particular enforceable legal rights. The vendee may withdraw and not take advantage of his option and the vendor would lose no legal advantage thereby.

It is an agreement for the sale of real estate upon certain conditions precedent, by which neither a legal nor an equitable title is conveyed to the purchaser, but in which time is of the essence of the contract. This distinction must be kept in mind and the classification determined accordingly.

As is said above, the situation between the parties to a real estate contract is no different than that between the parties where the purchaser receives title to the real estate and gives a mortgage back to secure the purchase price. The legal effect of the transaction is the same in both instances, and in effect creates a new "property," namely, the contract indebtedness, aside from and in addition to property in the land. Indebtedness secured by a mortgage on real estate is taxable as a credit. The rule is so well settled on that point that we will not cite cases to sustain it. This brings us to the answer to the first question.

An enforceable contract for the sale of land is subject to taxation as a credit. See the following cases: *In re Boyd*, 138 Iowa 583; *Rampton vs. Dobson*, 156 Iowa 315; *Ingraham vs. Chandler*, 179 Iowa 304; *Lunde vs. Town of Slater*, 185 Iowa 605; *Perrine vs. Jacobs*, 64 Iowa 79; *Clark vs. Horn*, 122 Iowa 375; *Cross vs. Snakenberg*, 126 Iowa 636.

An option to purchase land does not vest the vendor with a property right and is not deemed a credit subject to taxation. See: *In re Shields, et al.*, 134 Iowa 559; *Rampton vs. Dobson*, 156 Iowa 315; *Ingraham vs. Chandler*, 179 Iowa 304; *Lunde vs. Town of Slater*, 185 Iowa 605.

In case the vendee fails to comply with the terms of the contract, and the vendor takes the real estate back, the situation is not changed. As said above, the property in both are separate and distinct. If the contract fails, the vendor has recourse on the vendee for damages. If the vendee has agreed under the contract to pay the taxes assessed against the land and he fails, the vendor has recourse on vendee for the damages so occasioned. Hence for any breach of the contract, the vendor must look to the vendee for the damages sustained.

Each real estate contract must be analyzed individually and classified as to whether it is a credit or not. If it is found to fall within the

class of taxable credits, then such a credit being independent and separate from the realty is taxable as well as the land. Should such a contract fail, the vendor is still liable for all the taxes unpaid, and his only recourse is against the vendee for the damages sustained.

BEN J. GIBSON, *Attorney General*,

By NEILL GARRETT, *Assistant Attorney General*.

TAXATION OF REAL ESTATE CONTRACTS

The down payment on a real estate contract of sale is taxable.

October 14, 1921.

Mr. L. O. Lampman, County Attorney, Primghar, Iowa: Your letter of the 27th ult., addressed to the Attorney General, has been referred to me for reply.

You ask for an opinion from this department upon the following statement of facts:

"A man sold a farm for \$48,000 under contract, received \$2,000 in cash, other payments to be made until 1924, at which time a mortgage was to be given for the unpaid balance of the purchase price. The seller gave in to the assessor his cash received and the mortgage to become due. The contract was cancelled—mutually rescinded. The seller retains the \$2,000 cash payment as damages. The seller has been compelled to pay taxes on the land and now objects to the payment of taxes on moneys and credits because of the double taxation on the same property."

You then ask whether or not the board of supervisors would have any authority to refund the tax paid upon the \$2,000.

The only authority the board of supervisors has to refund a tax is when the tax has been either erroneously or illegally exacted or paid. We do not believe that the tax paid upon the \$2,000 is either erroneously or illegally exacted or paid provided the person against whom the assessment was made was in possession of the \$2,000 as owner on the first day of January of the year in which the assessment was actually made.

Therefore, it is the opinion of this department that the board of supervisors would not be legally authorized to order the county treasurer to refund the tax paid upon the \$2,000 cash.

BEN J. GIBSON, *Attorney General*,

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

TAXATION OF LAND CONTRACTS

Section 1307 of the Code does not apply to land contracts which have failed.

October 18, 1921.

Chas. S. Macomber, County Attorney, Ida Grove, Iowa: You have requested an opinion from this department upon the following proposition, quoted from your letter:

"Prior to January 1, 1921, a party sells his farm during the boom and sells on contract—this contract he reports to the assessor and it is listed against him as being personal property held by him January 1, 1921; since the assessment lands have gone down with a crash and the contract turned out to be absolutely worthless and the party has had to take the farm back, so the contract was actually worth less when he reported it in to the assessor. Now I wish your opinion on section 1307

of the code; under that section has the board of supervisors the power to remit those taxes entirely, because of the fact that the property's value has been destroyed by the unavoidable casualty (wiping out of land values and sudden depreciation of land values and entire destruction of the value of the property so taxed."

Section 1307 of the code reads as follows:

"The board of supervisors shall have power to remit in whole or in part the taxes of any person whose buildings, crops, stock or other property has been destroyed by fire, tornado or other unavoidable casualty, if said property has not been sold for taxes, or if said taxes have not been delinquent for thirty days at the time of the destruction. But the loss for which such remission is allowed shall be such only as is not covered by insurance."

It is provided in section 1350 of the code of 1897 that, "property shall be taxed each year, and personal property shall be listed and assessed each year, in the name of the owner thereof on the first day of January." A land contract such as the one described, is a credit, and as such is taxable as personal property. Section 1309 of the code of 1897 defines the term credit as used in the chapter on taxation, as including "every claim or demand due or to become due for money, * * *, 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." There is no dispute as to whether or not a land contract falls within the category of a "credit" as defined by our statute. It is in effect, so far as we are concerned here, on the same status as any note, or other evidence of indebtedness. It is the duty of the holder of a note on January 1 to list that note for taxation. Should the maker of that note later become insolvent or should the note fail for any other reason, we are aware of no provision in the law which would entitle the holder of that note to a remission of the taxes assessed against it. The tax is levied as against property in existence on January 1. It has been the general practice to list all such property as of January 1, and to pay the taxes assessed thereon.

We will proceed now to a consideration of the proposition as to whether or not section 1307 is applicable to the particular facts given in the statement of the question hereinbefore set out.

It will be noted that the class of property to which the section is applicable is, "buildings, crops, stock or other property * * * destroyed by fire, tornado, or other unavoidable casualty." The class enumerated seems to include physical property such as buildings, animals, crops, machinery, implements, tools, equipment, etc., something which may be destroyed by fire, tornado, storm, flood, or by any of the elements. In other words, the classification seems to include only those kinds of property having physical properties, which are capable of being destroyed by any of the elements in the same class with those indicated.

A land contract is assessed for taxation to the holder thereof, and the land is assessed to the purchaser of that land. The two persons are separate and distinct, and have no connection whatever, so far as the taxing power is concerned. The land is not assessed in the name of the vender and his only interest in the payment of the land taxes is that he be protected so far as the taxes are concerned should the contract fail. The vender retains the legal title but only as security for the purchase

money, and the purchaser is regarded in equity as the owner and is vested with practically all the rights and obligations of an owner of the land. If he (the vender) pays the taxes, he pays for his vendee, and not for himself, so far as the law is concerned. The failure of the contract may necessitate the payment of taxes on both the contract and the land. But however that may be, it is an unavoidable situation.

We do not believe that the language of the statute is such as to cover land contracts which have failed. Neither do we believe that a failure of a land contract is a destruction of property by "fire, tornado or other unavoidable casualty." The phrase "other unavoidable casualty" cannot be construed to include any other kind of destruction than that indicated. The phrase does not open the door to all kinds of loss, and call them "unavoidable casualties."

The doctrine of *ejusdem generis*, that where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. (See 36 Cyc. p. 1119).

The words "other" or "any other" following an enumeration of particular classes, are therefore to be read as "other such like" and to include only others of like kind or character. (See 36 Cyc. p. 1119, and notes).

We believe that the rules stated are applicable to the facts presented and should be used to determine the legislative intent. The classes of property enumerated do not indicate an intention to include "credits." Neither do we think that the failure of a land contract is an "unavoidable casualty" to be included within the class of destructive elements enumerated.

For the reasons given we are of the opinion that the provisions of section 1307 are not applicable to the facts given in the statement as set out herein.

BEN J. GIBSON, *Attorney General*,

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

ACT OF 39TH G. A. PROVIDING ADDITIONAL PENALTIES NOT RETROACTIVE

Interpretation of Chapter 66, Acts of the 39th G. A. providing for additional 5 per cent penalty to be added to personal taxes is not retroactive and do not apply to delinquent taxes for the year 1920.

July 19, 1921.

Hon. Glenn C. Haynes, Auditor of State: Your letter of the 11th inst., addressed to the attorney general, has been referred to me for answer. You requested an opinion of this department on the following questions:

"Is chapter 66, acts of the 39th general assembly, which provides for the addition of an additional 5 per cent penalty to personal taxes not paid by the first Monday in December retroactive? In other words, is this 5 per cent to be added only to delinquent taxes of 1920, not paid by the first Monday in December, and subsequent years, or is it also meant to include tax of prior years?"

It is the general rule that unless the retrospective intention of the legislation is clearly expressed upon the face of the enactment, it shall

be deemed to commence in future. There is nothing in the amendment made by the 39th general assembly to section 1413 of the code of 1897, which would indicate that the same was to have a retroactive force, and it is therefore our opinion that chapter 66, acts of the 39th general assembly is not retroactive, and that the 5 per cent penalty therein provided does not attach to taxes on personal property for years prior to 1920. A careful study of section 1413 as amended by chapter 66, acts of the 39th general assembly, will lead to the conclusion that the legislature intended that the 5 per cent penalty provided for in the amendment is to attach but once in case of delinquency in the payment of personal taxes. The 1 per cent per month penalty provided by the first clause of section 1413 attaches in case of delinquency in the payment of first half of taxes on the first of March *following the levy*, and a like penalty in case of delinquency in payment of the last half of taxes attaches on October 1 *following the levy*.

It is our conclusion that the legislature intended that the 5 per cent additional penalty should attach in case personal taxes are not paid on or before the first Monday in December *following the levy*, and as above stated that such penalty should attach but once. If we were to hold that the 5 per cent added penalty could be collected on taxes delinquent prior to the year 1920, it would necessarily follow that while a delinquent personal tax remains unpaid a 5 per cent added penalty would attach each year, and this, we believe, is contrary to the intention of the legislature, to the spirit of the act, and to the general rules of construction.

We conclude, therefore, the words of limitation with respect to the time in which the 1 per cent penalty attaches to delinquent taxes should be supplied in the amendment enacted by the 39th general assembly providing for the 5 per cent additional penalty, and that taxes for years prior to 1920 which are not paid until after the first Monday in December, 1921, should not be increased by the amount of the 5 per cent penalty provided in such amendment.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

TAXATION OF BANKS

Not authorized to deduct slow paper and bad bills receivable from capital stock. May charge off and thus reduce surplus and undivided profits.

June 24, 1921.

Hon. Glenn C. Haynes, Auditor of State: This opinion is written in response to an oral request for the same on a certain report on bank assessments from Pottawattamie county, submitted by the auditor of that county, showing that in their statements to the assessors the banks are seeking to deduct from their capital stock certain items other than real estate such as depreciation on bills receivable, difference between actual and face value of government bonds, slow, doubtful and bad paper.

The manner in which national, state and savings banks shall list their property for assessment for taxation is provided for in Section 1322 of the 1913 Supplement to the Code. From this section it will be observed the value of the shares of stock at such banks is determined by adding

to the capital stock the surplus and undivided earnings and by deducting therefrom the amount of capital stock invested in real estate.

In the statement furnished by the county auditor of Pottawattamie county it appears that the banks of that county are seeking to establish a net value of their capital stock or capital by deducting therefrom items other than the amount of capital stock invested in real estate. This, they cannot do. It may be that by reason of the present financial situation resulting in slowness of collection and, in some instances, rendering notes and other items of bills receivable valueless the taxes which banks are paying under the statements furnished by them are rather burdensome, but, in our opinion, so long as items are carried by a bank as assets and so long as a statement shows surplus and undivided earnings a bank cannot voluntarily reduce its capital or its capital stock for the purposes of taxation. This conclusion is especially true in view of Chapter 218 of the laws of the Thirty-seventh General Assembly, which describes the method by which a banking institution may reduce its capital and cancel its stock with the approval of the superintendent of banking. This chapter is as follows:

"No corporation organized under the banking laws of the state of Iowa shall withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any part of its capital stock, except as hereinafter provided. If losses have at any time been sustained, equal to or exceeding undivided profits on hand, no dividends shall be made; and no dividends shall be made by any association formed under the banking laws of the state to an amount greater than the net profits on hand, less the losses and bad debts. Providing, however, that the capital stock may be reduced by the affirmative vote of the stockholders holding two-thirds of the shares of the capital stock, at a meeting of the stockholders to be called for this purpose in the manner and after the publication of notice as required in case of the increase of the capital stock. But no reduction shall be to any amount less than the capital required to authorize the confirmation of such association, and there shall be no reduction of capital or cancellation of stock, until said reduction or cancellation shall first be approved by the superintendent of banks."

We see no relief for the banks unless they actually charge off bad paper and reduction in value of bills receivable, thus reducing their surplus and undivided profits.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

COLLECTION OF TAXES BEFORE DELINQUENT—ISSUANCE OF RECEIPT AFTERWARDS

Special charter city—not liable on bond for penalty on taxes where they were in fact paid prior to delinquency but receipt issued at later date.

May 20, 1921.

Hon. Glenn C. Haynes, Auditor of State: Sometime ago you submitted to this department the following state of facts with a request for an opinion upon the same:

"The report of the state auditor upon the completion of the examination of the city accounts, find that there are still delinquent penalties (on taxes) that the city treasurer should have collected in past years, amounting to \$16,181.68.

"City Treasurer George Wybrant has resigned to take a position in a local bank. I am anxious to ascertain definitely just the attitude of the

state auditor's office regarding the collection of those delinquent penalties. To me there is an impropriety, at least, for the city treasurer, after having given a receipt in full for taxes, to come back on the taxpayer and state that the taxpayer must come through with a considerable amount of interest because the taxes had not been paid earlier, when testimony generally is to the effect that checks were in the hands of the city treasurer, who took his time making out the receipts for the taxes, and then dated the receipts on the date they were made, and not the date the checks were received in his hands as payment.

"Does the state auditor's office direct that the city treasurer be forced to make good on delinquent penalties to the amount of some sixteen thousand dollars, when the city treasurer has no legal recourse to enforce the collection of the delinquent penalties? I am anxious to know immediately your ruling on the matter, for if the city treasurer is to be held for these penalties we wish to have it distinctly understood at this time and not two or three years later."

If I understand the facts correctly the question for determination by this department is whether the city treasurer of Dubuque, which was at the time in question a special charter city, would be liable for penalty upon taxes which he collected prior to their delinquency but for which he issued receipts after the date upon which they became delinquent under the law.

If, as a matter of fact, the taxes were paid by the taxpayer prior to the date when they became delinquent under the statute, the mere fact that the treasurer issued a receipt showing their payment on a date subsequent to the time when they became delinquent, would not render the taxpayer liable for a penalty. The payment of the tax is the act that fulfills the obligation of the taxpayer and not the obtaining by him of a receipt showing their payment prior to the date of delinquency. The issuance of the tax receipt is evidence only of the payment of the tax and would not be entirely controlling as to the date of actual payment. As a matter of fact, it could be shown by evidence outside of the receipt that the taxes had been paid upon a date other than the one indicated in the receipt. For these reasons we do not believe the city treasurer liable for the penalties under the facts stated in your letter.

BEN J. GIBSON, *Attorney General*.

By JOHN FLETCHER, *Assistant Attorney General*.

LIABILITY OF STATE FOR SPECIAL ASSESSMENTS

The state is not liable for a special assessment by city against its property for construction of storm sewer.

May 18, 1921.

Board of Control of State Institutions: You recently submitted to this department a letter written to you by Mr. Mogridge, superintendent of the institution for feeble minded children at Glenwood, which letter is accompanied by a statement of the treasurer of Mills county for taxes which the county claims are due the city of Glenwood from the state of Iowa by reason of a special tax levied for the construction of a storm sewer in which state property is sought to be assessed for the improvement. You request to be advised as to whether the state is liable for this special assessment against its property.

The property of the state of Iowa and its several municipalities is exempt from taxation for the reason that the property of the state is the

instrumentality through which it performs its function as a government, and therefore, to tax it would be in effect taxing property produced by taxation. The state would undoubtedly have the right and the authority to subject its property and the property owned by its municipal subdivisions to taxation in common with other property within its territory, but its property cannot be subjected to taxation without its express consent which could only be expressed by legislative enactment.

The legislature of Iowa has not authorized a taxation of its property or of the property of any of its institutions either for general taxation or for special assessments and the courts of this state have uniformly held that in the absence of that express authority, taxing bodies are without power to levy and collect assessments from the state of Iowa. See upon this proposition: *Polk Co. Savings Bank vs. State of Iowa*, 69 Ia., 24; *C., R. I. & P. Ry. Co. vs. City of Ottumwa*, 112 Ia., 305; *E. & W. Construction Co. vs. Jasper Co.*, 117 Ia., 365.

In the cases above referred to the courts have adhered to the rule which we have above set out, and for this reason it is the opinion of this department that the state is not legally liable for the tax referred to in your communication.

BEN J. GIBSON, *Attorney General*,

By JOHN FLETCHER, *Assistant Attorney General*.

ISSUANCE OF TAX DEEDS

County treasurer is required to furnish tax deed to holder of tax certificate as of date of tax certificate when same is due even though taxes subsequent to date of tax certificate remain unpaid.

May 6, 1921.

Hon. Glenn C. Haynes, Auditor of State: Recently you submitted to this department a question involving the issuance of tax deeds by county treasurers, requesting an opinion upon a given statement of facts. This communication insofar as is necessary to determine the question presented is as follows:

"At the tax sale of 1918 a party buys a tax sale certificate, but refuses to pay the subsequent tax for the years 1919 and 1920. The property is regularly advertised and offered for sale for the subsequent tax, but no bids are received and this tax for 1919 and 1920 remains unpaid. The party who purchased the tax in 1918 now demands a treasurer's tax deed under his original purchase.

"Under these conditions can a deed be issued?"

Chapter 2 of title 7 of the code provides for the annual sale of lands for taxes. The first provisions of this chapter have to do with the sale, the date thereof and the manner and method of making the sale by the treasurer.

Section 1434 provides for the payment of subsequent taxes. Under the provisions of this section the purchaser at the tax sale in a given year can pay subsequent taxes and have the amount so paid with penalties and interest added to the amount required for redemption from the original sale upon compliance with the terms and provisions of this section.

Our court in interpreting this section has made it mandatory on the part of the purchaser at the tax sale to comply with the provisions of this

section in order to protect the holder of the tax sale certificate as to the payment of subsequent taxes.

We mention this section at this time to show that there is a provision of the law for the payment of subsequent taxes on the part of the holder of the tax sale certificate. However, it will be noted that in this section there is no provision, and for that matter, there is no provision in the entire code which requires the holder of a tax sale certificate to pay the subsequent taxes. It is a matter entirely discretionary with him.

The subsequent sections provide for the redemption from the original tax sale. This redemption may be made by those who are entitled to make it within a certain period of time as is provided by the statute.

Section 1441 of the code, as amended, provides the preliminary requisites to be performed on the part of the holder of the tax sale certificate to entitle him to the deed.

Section 1442 of the code provides that when these preliminary requisites have been complied with by the holder of the tax sale certificate that the treasurer then in office "shall make out a deed for each lot or parcel of land sold and unredeemed and deliver it to the purchaser upon the return of the certificate of purchase." This section provides that the deed shall be delivered upon compliance with the preliminary requisites to which we have referred.

In order that there may be no confusion we call attention to the fact that the holder of the tax sale certificate taking a deed thereon and in accordance with the law takes such deed subject to all taxes and liens of every kind which have attached to the property after the date of the issuance of the tax sale certificate. We might say in connection herewith that oftentimes there are a number of tax sale certificates out on the same property at the same time due to the fact that the original purchaser does not pay the subsequent taxes, and the treasurer in accordance with the law readvertises the property and sells and issues subsequent certificates.

We believe this is sufficient to inform you as to the situation in general and answers your question in particular.

BEN J. GIBSON, *Attorney General*.

ASSESSMENT OF PROPERTY OF CORPORATION

The shares of corporation stock of a corporation organized under the laws of Iowa is assessed at principal place of business under section 1323, code, 1897.

March 30, 1921.

Mr. J. F. Abegglen, County Attorney, Albia, Iowa: Your letter of March 28 addressed to Mr. Gibson in which you request an opinion on a proposition submitted to this department on March 21 has been referred to me for answer.

The question stated is as follows:

"A coal company has its offices and considerable other effects in A township, and also has a mine, coal lands and equipments, which it is operating extensively in B township. That among such assets in B township is a shaft, the coal under the land, and which it owns outright, engine house, boiler house, houses on lands which it owns, top and bottom, and which it rents, bank mules and a general store. I desire your opinion

as to whether the machinery and mining equipment and mules and the store are assessable as personal property in B township, where located, and if not what of the property enumerated in B township is assessable to the corporation?"

Section 1323 of the code relates to the taxation of the shares of corporation stock and so far as applicable to the question submitted, is as follows:

"The shares of stock of any corporation organized under the laws of this state, except those which are not organized for pecuniary profit, and except corporations otherwise provided for in this act, shall be assessed to the owners thereof, at the place where its principal business is transacted, the assessment to be on the value of such shares on the first day of January in each year; but in arriving at the total value of the shares of stock of such corporations, the amount of their capital actually invested in real estate owned by them, either in this state or elsewhere, shall be deducted from the real value of such shares, and such real estate shall be assessed as other real estate and the property of such corporation, except real estate situated within the state, shall not be otherwise assessed."

In construing the above section in the case of *Layman vs. Telephone Company*, reported in 123 Iowa, on page 591, Judge Deemer writing the opinion uses the following language, beginning at the bottom of page 598:

"To ascertain what is taxable, we must go to the statutes with reference to that subject. * * * This is provided for as to corporations in section 1323 of the code. Turning to that, we find that, as to corporations, it is the shares of stock and not the tangible personal property. Moreover, the same section provides that the assessment of these shares of stock shall be at the principal place of business of the corporation so that it is apparent that the defendant's personal property was in no event taxable."

In this case the question to be decided was whether or not the personal property of the Iowa Telephone Company, situated in Polk county, and which was of the value of forty thousand dollars (\$40,000), could be taxed in that county when the corporation was one organized under the laws of this state with its principal place of business at Davenport in Scott county. The language above quoted seems to indicate that the personal property of a corporation is not taxable under any circumstances but that the shares of stock alone are taxable at the principal place of business of the corporation.

Section 2 of article 8 of the constitution of Iowa provides:

"The property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals."

This provision of the constitution would seem to indicate that personal property of corporations should be assessed and listed for taxation the same as that of individuals, but a reading of the *Layman* case above referred to will disclose that Judge Deemer considered and referred to the above section in arriving at his conclusion therein announced. A careful consideration of the subject moreover will justify the conclusion that the personal property is taxed by reason of the fact that its value is taken into consideration in fixing the value of the shares of corporation stock.

The serious question presented by your proposition, however, is as to the location of the personal property of the corporation for taxation purposes.

Referring again to the case of *Layman vs. The Telephone Company* and

calling your attention particularly to page 600 of that opinion, we quote the following language:

"That it is competent for the legislature to adopt different methods for ascertaining the value of personal property, and to fix the situs of such property, is well settled."

In this connection he cites *Hawkeye Insurance Company vs. French*, reported in 109 Iowa, page 585. In the case last cited, the following language is used referring to the property of corporations:

"Surely their property is not subject to taxation the same as that of individuals if the only tax they are required to pay is that imposed by this section. (Referring to section 1333.) It may be well doubted whether a tax on premiums is a tax on property in any proper sense, but, however this may be it is manifest that the personal property of the corporation accumulated from year to year is not subject to taxation under the provisions relied upon by appellants. The legislature did not have the power to exempt this property from taxation and its act in so doing is clearly unconstitutional and void, neither had it the power to absolve these companies from the payment of county, city, and school taxes, that being true it was the duty of the assessor to list the stock of these corporations under the provisions of section 1323 of the code.

"We are not to be understood as questioning the right of the legislature to adopt different methods for ascertaining values adapted to the various peculiarities of the property or its right to fix the situs of the property, both real and personal, although, in the exercise of such rights, inequalities must of necessity, result."

In view of these decisions and others cited therein, and after a careful reading of the chapter with relation to the assessment of the property of corporations for taxation we can arrive at no other conclusion than that the property of corporations organized under the laws of the state of Iowa is assessable under the provisions of section 1323 of the code and that section 1317 cited by you in your letter has no application, if the corporation to which you refer is organized under the laws of the state of Iowa, which fact we have taken for granted in writing this opinion.

It may be, as suggested by Judge Deemer, that inequalities may necessarily result if this method of taxation is adopted, but so long as there can be no question of the right of the legislature to fix the situs of personal property for taxation and so long as by section 1323 they have provided for the assessment of the personal property of corporations by including its value in the shares of stock and have further provided that such shares of stock shall be assessed at the principal place of business of the corporation, we can arrive at no other conclusion than the one herein announced.

Of course, the real estate of the corporations mentioned in your letter is to be taxed where situated. As to what is real and what is personal property, you are perfectly capable of determining this question for yourself. You further state:

"Another coal corporation has its offices and main coal work in A township, and also has coal leases in B township, the coal of which it is now working, would these coal leases be subject to assessment in B township, where the coal is located, or would they be assessable in A township, their principal place of business, and if assessable in B township, in what manner should the value of such leases or coal rights be assessed?"

It is a fundamental principle of law that leases are personal property. If the coal rights to which you refer are represented by grants which

sever the fee that would in most instances be real estate, however, we assume that they are ordinary leases with the right to remove the coal from underneath the land. If we are right in this assumption, the leases would not be assessable in any event, but would, if the corporation is organized under the laws of the state of Iowa, be taken into consideration in assessing the shares of stock at the principal place of business.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

GOVERNMENT BONDS NOT DEDUCTIBLE IN ASSESSING BANKS

Government bonds cannot be deducted from the assessed value of bank stock. Citing *Des Moines National Bank vs. Fairweather, et al.*

February 16, 1921.

Hon. Glenn C. Haynes, Auditor of State: You recently made inquiry of this department relative to deduction by the assessor from the assessed value of bank stock, the amount of government bonds or other government securities held by such bank.

In reply to your inquiry I wish to advise that the supreme court in the case of *Des Moines National Bank vs. Thomas Fairweather, et al*, 181 N. W. 459, in an opinion rendered on the 12th day of February, 1921, held that chapter 257 acts of the 38th general assembly did not affect section 1322 of the code which contains the plan outlined by the legislature for arriving at the assessed value of all bank stock, and the court further found that the act had no effect as to section 1304 of the code. It is my opinion that in view of the decision of the supreme court in the case above referred to, the amount of government securities held by a bank cannot be deducted from the assessed value of its bank stock, and you should so notify the various county auditors of the state, that there may be no confusion with reference to the assessment for this year.

BEN J. GIBSON, *Attorney General*,

By JOHN FLETCHER, *Assistant Attorney General*.

COMPENSATION OF ASSESSORS

- 1—Board of supervisors fixes compensation only for assessors under chapter 103, acts 38th general assembly.
- 2—Board fixes time as well as compensation of township assessors under code supplement, section 592.

January 11, 1921.

Mr. Walter French, County Attorney, Waterloo, Iowa: Confirming our conversation over the telephone with your deputy, Mr. Reed, it is the opinion of this department that it is the duty of the board of supervisors to fix the compensation of assessors in cities of the first class and they may do this either on a salary basis or on a per diem basis.

It is our opinion that the board of supervisors does not fix the time to be employed by assessors in cities of the first class in making their assessment.

We come to this conclusion for two reasons:

- (1) Under the provisions of section 674 of the supplement to the code the compensation of assessors in cities having a population of twenty

thousand or over was fixed at a maximum of eighteen hundred dollars (\$1,800) per annum.

Under the provisions of chapter 103 of the acts of the 38th general assembly the board of supervisors still has the power to fix compensation on a salary basis but in addition it has the power to fix compensation on a per diem basis of not less than five dollars per day. If an assessor should spend the entire year at the minimum per diem rate of compensation he would not be able to earn the maximum provided for compensation on a salary basis.

(2) The provisions of chapter 103 of the acts of the 38th general assembly relate to compensation only. This is disclosed by the title of the act and also by the fact that nothing within the provisions of the section points out specifically that the board is to fix the time. Had the legislature intended this they would have expressed their intention clearly as they have in the provision with respect to township assessors. We do not mean to say that there is no room for doubt on the construction of chapter 103 but a careful study of the act has convinced us that the legislature did not mean that the board of supervisors should fix the time in which the work of the assessors in cities of the first class should be completed.

With reference to the compensation of township assessors, it seems to us it is beyond controversy that the board is impressed with the duty of determining the time which shall be spent by assessors in doing their work.

It is true that the title of section 592 relates to compensation of assessors but beginning after the semicolon in line four of said section you will find this language:

"Said compensation shall be for the succeeding year, and shall not exceed the sum of two and one-half dollars for each day of eight hours which said board determines may necessarily be required in the discharge of all official duties of such assessors."

The amendment of this section by the 37th general assembly changed only the per diem from two and one-half dollars to three and one-half dollars and did not affect the wording of the section requiring the board to determine the time to be consumed.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

TAXATION OF TELEPHONE COMPANIES

The central station maintained by several lines is assessed to each line in proportion to the respective interests.

September 26, 1921.

Hon. R. E. Johnson, Secretary of the Executive Council: You have requested a written opinion from this department on the following statement of facts:

"Several mutual telephone lines center at South English, Iowa. These various mutual lines have united in the operation and maintenance of a central station at South English, selecting, however, a specific body or association to control the central station. This separate body or association consists of three persons who were chosen at an annual meeting of representatives from each mutual line, and is called the South English Mutual Telephone Company. The cost of maintaining the central is

provided for by assessing each telephone having access thereto; and each mutual line has a separate switch board of its own. The property in the central, except the individual switch boards is owned jointly by the respective mutual lines."

You then ask:

"Shall the South English Mutual Telephone Company make and file the report required by section 1328 of the supplement to the code, 1913, for the purpose of taxation thereunder."

Section 1328, *supra*, requires

"Every telephone and telegraph company operating a line in this state" to make and file with the executive council of Iowa, on or before the first day of May each year, a report showing, among other things, the whole number of stations maintained on each line, and the value of the same, including the furniture.

Section 1330 of the supplement then prescribes that at the meeting of the executive council to be held on the second Monday in July the council shall proceed to find the actual value of such telephone companies for the purpose of taxation, and in arriving at that value the council may take into consideration the information contained in said reports, as well as any other information they can obtain. In fixing the assessment against said companies such assessment shall include:

"All property of every kind and character whatsoever, real, personal or mixed, used by said companies in the transaction of telephone business."

Now observing the arrangement of the respective mutual companies for maintaining the central office at South English, we find that said central office is, in fact, jointly owned and maintained by the various mutual companies, except that each mutual company owns its own switch board, and that each mutual company participates in any profits accruing from outside commercial business. The South English Mutual Telephone Company is a separate entity in name only.

It clearly follows therefore that the property of the so-called South English Mutual Telephone Company shall be valued and assessed for taxation to the various mutual companies in proportion to their respective interests therein, and that it is not only unnecessary but also improper for the South English Mutual Telephone Company to report the same, as a separate entity to the executive council.

BEN J. GIBSON, *Attorney General*,

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

WHEN FARM LAND IN CITY LIMITS SUBJECT TO CITY TAXES

Agriculture lands consisting of ten acres or more within the limits of an incorporated city or town is subject to taxation for city or town purposes. It is not to be treated as exempt.

March 14, 1921.

Mr. L. Dee Mallonee, County Attorney, Audubon, Iowa: We are in receipt of your letter of the 5th of March enclosing copy of an opinion by S. C. Kerberg, city attorney of Audubon, on the question of the taxation for city purposes of agricultural land situated in the limits of the city and involving a construction of section 616 of the code of 1897, as amended by section 616 of the supplement to the code of 1913. You state:

"It has been the general practice in this county, previous to this year to exempt all tracts of ten acres or more in the city, which were not used

for residence purpose and which were used for agricultural and horticultural purposes. It has been the general impression around here that either this section of the code was an exemption for all such tracts, whether in the original limits of the city or not, and also that tracts that were within the original limits should be exempted."

Section 616 of the 1913 supplement to the code is as follows:

"No lands included within said extended limits which shall not have been laid off into lots of ten acres or less, or which shall not subsequently be divided into parcels of ten acres or less by the extension of streets and alleys, and which shall also in good faith be occupied and used for agricultural or horticultural purposes, shall be taxable for any city or town purpose, except that they may be subjected to a road tax to the same extent as though they were outside of the city or town limits, which tax shall be paid into the city or town treasury. Said lands shall not be exempt from taxation for library purposes as provided by section seven hundred thirty-two of the supplement to the code, 1907, as amended by chapter forty-six of the acts of the 33rd general assembly."

This section of the statute refers to lands taken into the incorporate limits of a city or town by extension of the corporate lines and has no reference to agricultural or horticultural lands included in the original plat of the town.

This question has been passed on several times by the supreme court of Iowa, the first case of prominence being reported in the 77th Iowa, at page 553, and being entitled *Perkins vs. The City of Burlington*.

This case clearly decides that section 4 of the laws of 1876, as amended by chapter 169, acts of the 17th general assembly, which was the same as section 616 of the code of 1897, did not exempt lands in the original plat of a town from taxation for city purposes, even though the same might have been used exclusively for agricultural or horticultural projects.

It has been decided in the case of *Alexander vs. Davenport*, reported in 107 Iowa, page 90, that if the horticultural or agricultural use is merely temporary then the property is subject to municipal taxes.

In the case of *Windsor vs. Polk County*, reported in 109 Iowa, beginning on page 156, section 616 is again construed. In this case the controversy was over the taxation of lands brought into the city by an extension of the corporate limits and it was decided that the section does not apply to property which consists of sixteen acres, valued at \$20,000, occupied as a dwelling place, with a dwelling and other improvements thereon valued at \$30,000, fronting on a prominent street having water and gas, many fine residences being in the neighborhood and the place being bought and used as a home.

In the case of *La Grange vs. Skiff* in which the city of Storm Lake intervened and which is reported in 171 Iowa at page 143, it is decided that land in good faith occupied and used for agricultural purposes and not subdivided into parcels of ten acres or less which was not embraced in the corporate town as originally incorporated is not subject to taxes for municipal purposes.

The opinion of your city attorney states that the limits of the city of Audubon have never been extended. It follows that all of the real estate within the corporate limits of your town is subject to taxes for municipal purposes without regard to the number of acres embraced in any particular body of land and regardless of the purposes for which the land is used.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

WHO SHOULD PAY INHERITANCE TAX

The general rule is that each legacy shall bear its own share of inheritance tax unless the will expressly provides such tax shall be paid out of the residuary estate.

November 17, 1921.

Messrs. Clark, Dwinell & Meltzer, Attorneys at Law, Sibley, Iowa: We have your letter of November 15 requesting an opinion upon the following matter:

"The facts are these: Anna Neyens died testate and by the terms of her will she bequeathed to certain collateral heirs legacies ranging from \$100.00 to \$500.00. There was ample funds in the estate to pay these legacies without resorting to the real property. The residuary legatees of her will were also collateral heirs so that practically the entire estate was subject to the collateral inheritance tax.

"The question raised by certain of the specific legatees is as to whether or not the collateral inheritance tax should be deducted from their specific legacies or whether they should receive the full amount of their legacies and the tax be paid for them out of the residue of the estate."

Section 1481-a18 supplement, 1913, provides as follows:

"Every executor, administrator, referee or trustee having in charge or trust any property of an estate subject to said tax, and which is made payable by him, shall deduct the tax therefrom or shall collect the tax thereon from the legatee or person entitled to said property and pay the same to the treasurer of state, and he shall not deliver any specific legacy or property subject to said tax to any person until he has collected the tax thereon."

From the foregoing it will be observed that the inheritance tax due the state is to be deducted out of the share which each legatee or person receives. Our statute seems to be simply an announcement of the rule followed in many other states. The only exception that I am aware of in any decisions concerning this matter is where the will of the testator expressly provides that the tax should be paid out of the residuary estate. You will find the case of *Smith vs. State*, —Md.—; 107 Atlantic, 255, holding that the testator may thus provide for the payment of all inheritance taxes out of the residuary estate and that each legatee should receive the full amount given him under the will.

The rule seems to be well settled that each legacy must bear its own share of the tax unless the will otherwise directs. Gleason and Otis on Inheritance Taxation, first edition, page 183.

I assume from the facts stated in your letter that there was no provision that the inheritance tax should be paid out of the residuary estate. Hence, each legatee will have deducted from the property he receives the amount of the tax due the state.

BEN J. GIBSON, *Attorney General*,

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

TREASURER OF STATE CANNOT WAIVE TIME OF FILING OF OBJECTIONS TO INHERITANCE TAX APPRAISEMENTS

Treasurer of state has no authority under section 1481-a7, 1913, supplement, to waive provisions in connection with twenty day limit for filing objections to appraisal and cannot consent to filing objections later.

February 16, 1921.

Hon. W. J. Burbank, Treasurer of State: In answer to your letter of

February 11 in which you state that you desire the opinion of this department upon the following proposition:

"Has the treasurer of state under the provisions of section 1481-a7 of the supplement of 1913, authority to waive the provisions of said section in connection with the twenty day limit for filing objections to an appraisal, and to give his consent to the filing of objections after that date?"

It is our opinion that the treasurer of state has no authority to waive the provisions of the section above referred to in connection with the twenty day limit for filing objections to an appraisal.

In this connection we would call attention to the procedure subsequent to the filing of objections, and to the fact that the word "may" in the third line of said section grants a privilege which can be taken advantage of pursuant to the terms therein stated, and does not purport to fix a right. Under these conditions, it is our opinion that the word "may" although not mandatory is as effective in determining the status of the parties interested, including the treasurer of state himself, as if the word "shall" had been used.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

ANTICIPATING TAXES

Warrants issued in anticipation of funds to be raised by taxes during biennial period—not "debt."

June 11, 1921.

Mr. A. L. Chantry, Sidney, Iowa: Your letter of June 2, addressed to the attorney general, with request for an opinion on the question of the right of your auditor to issue warrants under the conditions stated in your letter has been referred to me for answer.

We quote your letter as follows:

"I wish to submit for your opinion the present condition financially of Fremont county and to be advised by your office concerning our right to further issue bonds or warrants.

"I am enclosing for your reference the sheets taken from the auditor of Fremont county's financial report for the year 1920. This will show you the total of bonds outstanding except the sum of \$8,500.00 paid during this year.

"It will also show the total valuation of property of the county as valued for the purpose of assessment for taxation.

"In addition to the amount of \$401,500 bonds outstanding there is now approximately \$40,000 in outstanding unpaid warrants and the general fund of the county overdrawn.

"With the fact in mind that the aggregate outstanding bonds and warrants will equal if not exceed the 1¼ per cent of our total valuation can the county auditor continue to issue warrants on allowances by the board of supervisors and the same upon presentation be registered for interest on account of no funds?

"I have doubt as to whether the county auditor has any legal authority to issue warrants upon any fund which is now depleted and overdrawn, for any purpose, for the reason that such additional warrant would be an obligation in excess of our constitutional limitation, the county's indebtedness already exceeding 1¼ per cent of our entire valuation.

"Will you please give me your opinion on these matters and any suggestions that would aid us in determining the legal course to follow in regard to the finances?"

The supreme court in the case of *Rowley vs. Clarke*, reported in 162 Iowa, beginning on page 732 has decided that certificates or warrants

issued in anticipation of revenues collectable within the biennial period and payable therefrom do not create a "debt" within the meaning of the term as used in the constitution. It is true that this case was decided under the provisions of section 3 of article 2 of the constitution but the language employed in the constitutional provision is identical with that employed by the legislature in section 1306-b of the 1913 supplement, as amended by the 37th and 38th general assemblies.

In the case cited, you will find the following language on page 741:

"It is well settled in this state that a municipality may anticipate the collection of taxes, and in defraying ordinary expenses may make appropriations and incur valid obligations to pay 'in advance of the receipt of its revenues,' even though the treasury be empty, and no actual levy made, and the city be otherwise indebted to the full limit. In some other states the levy of taxes must actually have been made in order to warrant the anticipation of revenues by issuing warrants in advance.

"Warrants issued in anticipation of taxes are held not to constitute a debt on the theory that moneys, the receipt of which is certain from the collection of taxes, are regarded as for all practical purposes already in the treasury and the contracts made upon the strength thereof are treated as cash transactions. Even though a municipality is indebted to the constitutional limit, this does not prevent it from levying such taxes as are authorized by law nor from issuing warrants within the limits of such levy in anticipation of their collection, and, if the warrants issued are within the amounts lawfully levied, they do not create an additional debt."

The above cited case contains a lengthy discussion of the question in which you are interested and we believe that by referring thereto you will find your question clearly and completely answered.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

RIGHTS OF PURCHASER AT TAX SALE

Purchaser of real estate sold for taxes cannot get clear title by permitting others to purchase for subsequent delinquent taxes at less than amount due and then take assignment of certificate.

November 8, 1922.

Hon. Glenn C. Haynes, Auditor of State: You have requested an opinion from this department upon the following statement of facts:

"We sold property on December 1, 1919, at regular tax sale for the delinquent tax of 1918, the delinquent being the bond and interest account only in drainage district No. 13, the maintenance and regular tax having been paid. The following year, the owner paid the first payment of all. This was the last tax that was paid by either the owner or the certificate holder. The second payment of all tax was offered at tax sale and passed for want of bidders, the next year it was also offered for all tax and passed. This fall the property will be offered at special sale to the highest bidder.

"The certificate holder does not intend to pay the back delinquent. He contends that he may obtain a deed from the 1919 sale as soon as the time is up, which will be about December 1, and let the delinquent go to scavenger sale and purchase it himself for the lowest bid and in this way be relieved or he could let some one else purchase at special sale and then he could buy the certificate from the other party and be relieved of the delinquent tax. The above is in case he obtain a deed before tax sale time this fall. He also states that if he did not get his deed on the first sale (1919) prior to special sale that he or some one else could purchase and still he could obtain his deed on the first sale and be relieved

as described above. He also contends that a certificate bought at scavenger sale may be bought from the certificate purchaser by the owner of the land and in this way the owner would be relieved of all unpaid tax."

Under section 1437 of the code it is provided that in case a redemption is made of any real estate sold for a less sum than the taxes, penalty, interest and costs, that in determining the amount to be paid upon redemption from such sale, the sum due at the time of the sale shall be the amount paid by the owner of the land in order to redeem.

Section 1437 provides:

"In case a redemption is made of any real estate sold for a less sum than the taxes, penalty, interest and costs, the purchaser shall receive only the amount paid and a ratable part of such penalty, interest and costs. In determining the interest and penalties to be paid upon redemption from such sale, the sum due on any parcel sold shall be taken to be the full amount of taxes, interest and costs due thereon at the time of such sale, and the amount paid for any such parcel at such sale shall be apportioned ratably among the several funds to which it belongs. Real estate so sold shall be redeemable in the same manner and with the same penalties as that sold for the taxes of the preceding year."

Section 1425 of the code provides that the county treasurer, on the date of the regular tax sale, may sell to the highest bidder all real estate which remains liable to sale for delinquent taxes, and which shall have been previously advertised and offered for sale for two years or more and remaining unsold for want of bidders.

Section 1425 provides:

"Each treasurer shall, on the day of the regular tax sale each year or any adjournment thereof, offer and sell at public sale, to the highest bidder, all real estate which remains liable to sale for delinquent taxes, and shall have previously been advertised and offered for two years or more and remained unsold for want of bidders, general notice of such sale being given at the same time and in the same manner as that given at the regular sale. Any taxes on such real estate, in excess of the amount for which the same was sold, shall be credited to the treasurer by the auditor as unavailable, and he shall apportion such excess among the funds to which it belongs, and if any of such excess belongs to the state, it shall be reported by him to the auditor of state as unavailable, who shall give the county credit therefor."

In construing section 1437 supra, our supreme court has held that in making redemption the owner must pay the amount due on the real estate at the time of the sale. *Soper vs. Espeset*, 63 Iowa, 326.

The supreme court of Iowa has also held that a purchase of a tax certificate by one who was under obligation to pay the taxes for which the sale was made amounts to a redemption from such sale. *Doud vs. Blood*, 89 Iowa, 237.

From the foregoing statutory provisions and rulings of our supreme court, it is apparent that a person whose duty it is to pay the taxes on real estate cannot acquire title thereto by purchasing at tax sale without paying all the amount of taxes due at the time of the sale. In the event of redeeming from tax sale where the real estate was sold for delinquent taxes, which had been previously advertised and offered for two years or more and remaining unsold for want of bidders, then under section 1437 supra; it is necessary for the owner of the land, or any person whose duty it is to pay the taxes thereon, to pay the full amount due at the time of the sale.

It was the clear intent of the legislature in enacting the foregoing statutes to prevent a taxpayer from declining to pay his taxes and take his chances that no one would bid the amount due, and then in case it was sold to the highest bidder he, the owner, could redeem for less than the amount due at the tax sale. The legislature clearly intended to provide against a combination between the purchaser and owner by which the state would or could be deprived of revenue to which it was justly entitled.

From the foregoing observations it is apparent that in the event the party referred to in your letter acquires title by tax deed prior to the regular tax sale in December, 1922, then and in that event in order to get clear title to the land it will be necessary for him to pay the full amount of all delinquent taxes referred to in section 1437 of the code, and such owner could not avoid paying the full amount by having a third party buy in the property at the delinquent tax sale and then assign the tax certificate to such owner.

With reference to the situation referred to in your letter wherein the purchaser at tax sale in 1919 does not obtain a tax deed prior to the special sale for delinquent taxes in December, 1922, and either purchases the property at such special sale, or permits a third party, or even the owner of the land to purchase at said special sale, and thereafter a tax deed is made by the county treasurer on the sale in 1919, I am of the opinion that the person who obtains a tax deed from the treasurer on the sale in 1919, prior to obtaining clear title to the property, is equally bound to pay the full amount of the delinquent tax for the subsequent years and for which the property is sold, under provisions of section 1425 of the code.

BEN J. GIBSON, *Attorney General*,

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

TAXATION OF FOREST RESERVATIONS

May select only one forest reservation on one tract of land, regardless of size of tract, provided it lies in one body.

October 14, 1922.

Mr. R. S. Herrick, Secretary State Horticultural Society: You request an opinion from this department as to whether the owner of a tract of land may legally select more than one permanent forest reservation thereon, that is, whether such owner may select forest reservations distinct and isolated from each other on several locations upon the same tract of land.

I have carefully examined the statute of Iowa authorizing the selection of a permanent forest reservation, and the provision authorizing the selection of a permanent forest reservation is to me not altogether free from doubt. Section 1400-c of the supplement to the code, 1913, as amended by section 1, chapter 224, acts of the 38th general assembly, reads as follows:

"On any tract of land in the state of Iowa, the owner or owners may select a permanent forest reservation not less than two acres in continuous area, or a fruit-tree reservation not less than one nor more than ten acres in area, or both, and upon compliance with the provisions of this chapter, such owner or owners shall be entitled to the benefits hereinafter set forth."

From the foregoing statutory provision, it will be observed that the owner of "any tract" of land in this state may select "a" permanent forest reservation not less than two acres in continuous area. Giving the language of section 1400-c its ordinary meaning would leave one to believe that only one forest reservation may be selected on any tract of land in this state. The term "tract" is susceptible to different meanings and might be applied to forty, eighty or one hundred sixty acres or more of land; but the better line of authorities define the term "tract" as meaning any contiguous quantity of land owned by the same claimant. *Martin vs. Cole*, 38 Iowa, 141. In the case of *Martin vs. Cole*, supra, it is said at page 146:

"When lands are in different sections or quarters, or are not contiguous and cannot be described as one tract by one description, they do not in fact constitute one tract and cannot so be designated."

From the language used in the foregoing statute, as well as the construction placed upon the term "tract" by the supreme court of this state, it would seem that where a piece of land laid in one body, even though it may comprise two or more governmental subdivisions, such body of land would constitute a tract of land within the meaning of section 1400-c, supra, and that only one permanent forest reservation could be legally selected thereon.

However, section 1400-g of the supplement to the code, 1913, provides as follows:

"The trees of a forest reservation shall be in groves not less than four rods wide."

The use of the term "groves" in the section just above quoted casts some doubt as to the limitation of just one forest reservation upon one body of land; but construing the forest reservation act altogether, it would seem that the intention of the legislature was to limit one forest reservation on one contiguous body of land regardless of its size.

In as much as it has been the practice in different portions of the state to permit the owner of one tract of land to select more than one permanent forest reservation thereon, and in as much as the use of the term "groves" in section 1400-g, supra, might lend some reason for believing that more than one forest reservation could be selected on one tract of land, I would, therefore, suggest that this seeming conflict be called to the attention of the next legislature and have this question definitely determined.

BEN J. GIBSON, *Attorney General*,

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

WHEN HOSPITALS EXEMPT FROM TAXATION

Hospitals operated by religious organizations not exempt unless devoted directly to church purposes and in no manner for pecuniary profit.

November 20, 1922.

Mr. W. P. Butler, County Attorney, Mason City, Iowa: You have requested an opinion from this department as to whether or not the property of a hospital operated in the following manner is exempt from taxation:

"The St. Joseph's Mercy Hospital of Dubuque, Iowa, being a corporation organized in the state of Iowa for non-pecuniary purposes, having its

principal place of business at Dubuque, Iowa, maintaining a hospital at Mason City, Iowa, which it is claimed is owned by the order of the Sisters of Mercy, an order of sisters in the Roman Catholic church, it being claimed that this hospital is not operated for profit, and the petition asks for an injunction enjoining the county auditor and county treasurer from spreading the taxes for the year 1922 on the ground that the property is exempt from taxation under sub-section 2 of section 1304 of the supplement of 1913."

That portion of sub-section 2 of section 1304 of the supplement to the code, 1913, applicable to your question reads as follows:

"All grounds and buildings used for * * * * religious institutions, * * * * devoted solely to the appropriate objects of these institutions, not exceeding one hundred sixty acres in extent, and not leased or otherwise used with a view to pecuniary profit."

Such property as specifically defined in that portion of sub-section 2 of section 1304 of the supplement to the code, 1913, is exempt from taxation, provided, however, that before such property shall be exempted the following provision of the statute shall be complied with:

"But all deeds or leases by which such property is held shall be filed for record before the property above described shall be omitted from the assessment."

It is a cardinal rule in construing exemption statutes that the statute shall be construed strictly and against the exemption. It is also another well recognized rule of law that taxation is the rule and exemption the exception. Applying the foregoing rules to the facts in your case, it will be found that sub-section 2 of section 1304 of the supplement to the code, 1913, does not specifically exempt the property of hospitals from taxation, and if such property is exempt in your case, it must be upon the ground that it is owned and operated by a religious institution. But property merely owned and operated by a religious institution is not exempt from taxation. Subsection 2, supra, specifically prescribes that before such property shall be exempt from taxation it shall be devoted solely to the appropriate objects of such religious institutions, and not used with a view to pecuniary profit. In construing that phase of the exemption statute, the supreme court of Iowa in the case of *Nugent vs. Dilworth*, reported in 95 Iowa at page 52, says:

"The law means directly, not indirectly, devoted to such a purpose."

It follows, therefore, that in order to exempt the property of a hospital from taxation the hospital, together with the property, must be devoted directly to church purposes and shall not be used in any manner for pecuniary profit. This is a question of fact in each particular case under consideration. With respect to the property of the hospital in question, before it may legally be exempted from taxation, it must clearly appear that it is being devoted directly to church purposes and not in any manner used with a view of pecuniary profit. The mere claim that the property is not being operated for profit is not sufficient, if, in fact, the property is actually being operated for profit, and the burden is upon the person claiming exemption to produce facts which will entitle such person to tax exemption.

BEN J. GIBSON, *Attorney General*,

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

WHEN REAL ESTATE NOT SUBJECT TO SALE FOR PERSONAL TAXES OF OWNER

Real estate transferred prior to December 31 is not subject to sale for personal taxes of the owner.

November 9, 1922.

Hon. Glenn C. Haynes, Auditor of State: You have requested an opinion from this department upon the following statement of facts:

"In collecting taxes on real estate for 1921 on our books this year there appears personal taxes set up with real estate. If there was a transfer of real estate between March 1, 1921, and December 31, 1921, am I to separate the personal from the real estate in such case?"

"The question to be determined is whether the county treasurer at the regular tax sale in December, 1922, can sell the real estate for the personal taxes of the owner of the real estate on January 1, 1921, in case the real estate had been transferred prior to December 31, 1921."

Your question will be determined by the provisions of section 1400 of the code, which provides 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 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."

It will be observed from section 1400 that as against a purchaser the lien for personal taxes shall attach to real estate on and after the 31st day of December in each year. Section 1400 is the same as section 853 of the code of 1873, with the exception that in section 853 of the code of 1873 the provision with reference to the lien attaching against the purchaser on the 31st day of December in each year was omitted.

In construing section 853 of the code of 1873, the supreme court of Iowa ruled that until the personal taxes are due the owner of real estate may convey it free of any lien for such personal taxes, and as to whether such personal taxes became due at the time of the levy or when the books were placed in the hands of the treasurer of the county for collection was an open question. *New England Loan and Trust Company vs. Young*, 81 Iowa, 732; *Castle vs. Anderson*, 69 Iowa, 428.

Since the filing of the opinions in the cases above cited, the legislature amended section 853 of the code of 1873 and added thereto the following:

"As against a purchaser, such liens shall attach to real estate on and after the thirty-first day of December in each year."

Therefore, it will be observed that the open question referred to in the cases above cited is now a closed question, and real estate sold prior to December 31 of the year in which a levy was made of personal taxes against the owner of the real estate transfers the real estate free from the lien prescribed in section 1400 of the code.

BEN J. GIBSON, *Attorney General*,

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

LIMITATION ON USE OF LIBRARY TAX

Money raised by taxation for library cannot be used to purchase museum, or to pay annuity to owner for privilege of exhibiting same in library building.

September 22, 1922.

Miss Julia A. Robinson, Executive Secretary and Director of Library Extension: Your letter of September 16 addressed to Mr. Gibson has been referred to me for attention. In your letter you enclose copy of a letter received by you from W. J. Reeves, secretary of the library board at Sibley, Iowa, in which he requests that you secure the opinion of this department as to the right of a library board to enter into an agreement with some old gentleman to appropriate money in the form of an annuity to be paid to him during the period of his lifetime as a consideration for a purchase of curios, antiques and "in fact, a small museum."

The funds raised by a tax levy can be used only for the specific purposes authorized by law. Section 3, chapter 252 of the acts of the 38th general assembly provide, among other things, that the library trustees have authority to provide rooms "for the care and exhibition of articles of historic interest."

Section 729-e of the supplement to the code, 1913, provides that whenever a local county historical association shall be formed in any county having a free public library, the trustees of such library may unite with such historical association and set apart the necessary room and to care for such articles as may come into the possession of said association; and said trustees are also authorized to purchase necessary receptacles and materials for the preservation and protection of such articles as are in their judgment of a historical and educational nature and pay for the same out of the library fund.

These are the only provisions with which we are familiar relating to the authority of the library trustees with reference to curios, antiques and articles of historical or educational value. Neither of these sections authorizes the expenditure of the library fund in the purchase of such articles, but merely for providing room, receptacles and materials for the preservation and protection of such articles.

It is our opinion, therefore, that the library board would not be authorized to enter into a contract by the terms of which they were to pay an annuity to a man during his lifetime for the right to exhibit articles of historic interest in the library room, or as a consideration for the purchase of such articles to be so exhibited.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

OPINIONS RELATING TO SOLDIERS

SOLDIERS' BONUS

Discussion as to the validity of the act authorizing the levy of a tax and all other acts necessary to the payment of the bonus.

December 21, 1922.

Hon W. J. Burbank, Treasurer of State: I am in receipt of your letter dated December 13, 1922, in which you request an opinion from this department as to the validity of the issuance of soldiers' bonus bonds as advertised in the Des Moines Daily Record and the Des Moines Register and Tribune, clippings of which advertisements are attached.

The issuance of the soldiers' bonus bonds as contemplated by you is in accordance with the provisions of chapter 332 of the acts of the 39th general assembly. This act provides that the state of Iowa may become indebted in the amount of \$22,000,000.00, to be evidenced by certain serial bonds to be prepared and sold by the treasurer of the state. The act further provides that the funds so raised shall be expended by the bonus board for the benefit of the soldiers, sailors, marines and nurses, citizens of the state of Iowa at the time of their enlistment, who actually served in the world war between the dates of April 6, 1917, and November 11, 1918.

I.

The first question arising in the determination of the validity of every act of the legislature is as to whether or not such act was enacted in accordance with the provisions of law and the constitution of the state of Iowa.

Of this there can be no doubt. The act was unanimously adopted by both the house and the senate, was properly enrolled, signed by the governor and filed with the secretary of state, as is required by the constitution of Iowa. Thereafter, and in accordance with the provisions of the constitution of the state, the law was published in at least one newspaper in each county throughout the state for three months preceding the general election in 1922. The act was submitted to the electorate of the state and adopted at such general election. It was declared officially carried by the state board of canvassers on November 29, 1922, the vote being 383,335 for the measure, and 195,898 against the measure. All of these facts are shown by the official records in the office of the secretary of state of the state of Iowa. It follows, therefore, that in and so far as the action of the legislature and of the people is concerned the statute stands as enacted in accordance with the provisions of the constitution.

II.

The second question arising is as to whether or not the title of the act conforms to section 29 of article III of the constitution of the state of Iowa. This section provides as follows:

"Every act shall embrace but one subject, and matters properly connected therewith; which subject shall be expressed in the title. But if

any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

The title of this act is in words as follows:

"An act authorizing the state of Iowa to become indebted in the amount of twenty-two million dollars, and providing for the issue and sale of bonds of said state in evidence thereof, to procure funds for and pay a bonus to persons who served in the military or naval service of the United States at any time between the sixth day of April, nineteen hundred seventeen, and the eleventh day of November, nineteen hundred eighteen, or their successor in interest, providing for a board to administer such payments, providing for an additional bonus for persons under disability, providing for the imposition, levy and collection of a direct annual tax sufficient to pay the principal and interest on said bonds, providing penalties for the violation of the provisions of this act, providing for the application of any surplus to the retirement of the indebtedness herein created, and providing for submission of this act to the people to be voted upon at the general election to be held in the year nineteen hundred twenty-two."

It will be observed that the title embraces but one subject and matters properly connected therewith. The subject is clearly expressed in the title; in truth, the title is so complete as to within itself practically contain a brief summary of the entire provisions of the act. There is no doubt that in and so far as the title is concerned it conforms to the constitutional provisions. The enacting clause also complies with the provisions of the constitution.

III.

The body of the act provides as follows:

"Section 1. The state of Iowa is hereby authorized to become indebted in the amount of twenty-two million dollars (\$22,000,000.00) and in evidence thereof there shall be issued and sold negotiable coupon bonds of said state, as hereinafter provided and the proceeds thereof shall be paid into the treasury of the state to be expended for the payment of a bonus to the persons defined in section four (4) of this act for the benefit of such persons, as prescribed by section eight (8) of this act, and for expenses incurred in carrying out the provisions of this act.

"Sec. 2. The treasurer of the state is hereby directed to cause to be prepared negotiable coupon bonds of this state in the amount of twenty-two million dollars (\$22,000,000.00) such bonds to bear interest at the rate of not to exceed five per cent per annum, which interest shall be paid semi-annually. Such bonds shall be issued so that said indebtedness shall be payable in twenty equal installments, the last of which shall be within twenty years from date of issue. Said bonds shall be signed by the governor, under the great seal of said state, attested by the secretary of state and countersigned by the treasurer of state, and the full faith, credit and resources of the state of Iowa shall be pledged for the payment thereof. The interest coupons attached to said bonds shall bear the lithographed facsimile of said officials. The treasurer of state shall sell said bonds to obtain funds to carry out the provisions of this act, and to make the payments hereinafter provided. Such bonds shall be sold at not less than the par value thereof and accrued interest thereon to the highest and most responsible bidder after advertising for a period of twenty consecutive days, Sundays excepted, in at least two daily newspapers printed in the city of Des Moines. Advertisements of sale shall recite that the treasurer of state, in his discretion, may reject any or all bids received and, in such event, he shall readvertise for bids in the form and manner above described as many times as in his judgment may be necessary to effect a satisfactory sale.

"Sec. 3. The proceeds of such bonds so paid into the treasury of state

shall constitute a bonus fund and shall be distributed to the persons entitled thereto, as hereinafter prescribed. Said twenty-two million dollars (\$22,000,000.00) is hereby appropriated out of said bonus fund for the purposes of carrying out the provisions of this act.

"Sec. 4. Every person, male or female, including army, navy, and marine corps, nurses who served in the military or naval service of the United States at any time between April 6, 1917, and November 11, 1918, and who at the time of entering into such service was a resident of the state of Iowa, and who was honorably separated or discharged from such service, or who is still in active service, or has been retired, or has been furloughed to a reserve, shall be entitled to receive from the proceeds of such bonds as a bonus, the sum of fifty cents (\$.50) for each day that such person was in active service, such bonus not to exceed a total sum of three hundred and fifty dollars (\$350.00). No person shall be entitled to such payment or allowance, whose service only was in the students army training corps, or who received from another state a bonus or gratuity of a like nature provided for by this act, or who being in such service, received civilian pay for civilian work. No person shall be entitled to such payment or allowance who being in the military or naval service of the United States, subsequent to April 6, 1917, refused on conscientious, political or other grounds to subject himself to military discipline or to render unqualified service. The husband or wife, child or children, mother, father, sisters or brothers, in the order named and none other, of any person as defined in this section, who died while in the service or who has deceased before receiving the benefits of this act, shall be paid the sum that such deceased persons would be entitled to hereunder if such deceased person had lived.

"Sec. 8. After the payment of all approved claims and expenses of administration of the board herein created, all funds remaining in the hands of the bonus board, after December 31, 1924, not in excess of two million dollars (\$2,000,000.00) shall constitute an additional bonus to be administered by the bonus board for the amelioration of the condition of residents of this state within the classes as defined in section four (4) of this act, who are suffering from disability. All funds remaining in the hands of the bonus board after December 31, 1924, in excess of the two million dollars (\$2,000,000.00) disability fund, shall be applied to the payment of the debt herein created.

"Sec. 11. To provide for the payment of the principal of said bonds so issued and sold and the interest thereon as the same become due and mature, there is hereby imposed and levied upon all the taxable property within the state of Iowa, in addition to all other taxes, a direct annual tax for each of the years said bonds are outstanding, sufficient in amount to produce the sum of one million one hundred thousand dollars (\$1,100,000.00) each year for twenty years for the payment of principal of said bonds and sufficient in amount to produce such additional sums as may be needed to pay the interest on such bonds. The treasurer of state shall annually certify to the executive council, prior to the time for the levy of general state taxes, the amount of money required to be raised to pay the principal and interest on such bonds maturing in the ensuing year and said executive council shall annually fix the rate per centum necessary to be levied and assessed upon the valuation of the taxable property within this state to produce funds sufficient to pay the principal of and interest upon such bonds as the same become payable, and such additional annual direct tax shall be levied, certified, assessed and collected at the same time and in the same manner as are taxes for general state purposes.

"Sec. 12. If any clause, sentence, paragraph, or part of this act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of the act, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment has been rendered."

The issue of bonds to which you refer is admittedly valid unless there is some provision in this act which is violative of some provision of the constitution of Iowa. Do any of the provisions contained within the act violate the constitution? I have given careful consideration to every section of the constitution in and so far as the same may restrict the power of the legislature and of the people to enact the legislation in question. In doing so I have taken cognizance of the contentions which have been made as to the validity of similar acts in other states. The contention most often presented is, that legislation such as this is violative of that provision of the constitution which prohibits the giving or loaning of the credit of the state to an individual, association or corporation.

Section 1 of article VII of the constitution provides as follows:

"The credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual, association, or corporation; and the state shall never assume, or become responsible for, the debts or liabilities of any individual, association or corporation, unless incurred in time of war for the benefit of the state."

It is generally recognized that the purpose for which this provision was placed in the constitution was to prevent the credit of the state from being extended except for a public purpose, or to fulfill and liquidate a moral or legal obligation incurred by the state. Debates of the constitutional convention, pages 260-272. A similar provision is found in practically every state constitution in the land.

It is fundamental that the credit of the state cannot be extended except for a public purpose, and it is likewise fundamental that taxes cannot be levied except for a public purpose. It is therefore imperative that in the determination of its validity, consideration must be given to the purpose of the act. Is such purpose public or private? Is there an obligation either in law, morals or honor such as will sustain the act of the legislature and the people? If the purpose of the act is public and if there is an obligation on the part of the state to those who benefit by its provisions, then the act does not violate this provision of the constitution.

I cannot conceive of a more public purpose than that of encouraging the spirit of service, of inspiring loyalty to the state and nation, and of promoting patriotism among the people. The government of the state and of the nation depends upon the loyalty, the patriotism and the service of the people. Any purpose expressed in law which has for its ultimate end the encouragement of these virtues among the people is undoubtedly public in its character. From the beginning of our government legislation providing for pensions and bonuses to soldiers has been held to be enacted for a public purpose. The continental states provided for pensions to the soldiers of such states who served in the armies during the revolutionary war. Similar legislation was enacted by the continental congress. From that day to this the granting of pensions and bonuses to the soldiers of the states and of the nation has been recognized as constituting a public purpose for which taxes may be levied and for which indebtedness may legally be incurred. Such legislation has been upheld not only because of a moral obligation upon the part of the states and of the nation to compensate those who serve in time of war, but also because of the fact that such legislation encourages patriotism and loyalty among the citizenship.

Judson on Taxation at page 304, says:

"Whatever legitimately tends to inspire patriotic sentiments, and to enhance the respect of citizens for the institutions of their country and incites them to contribute to its defense in time of war, has been held to be a lawful public purpose, such as will justify the exercise either of the power of taxation or of the power of eminent domain."

The supreme court of the United States has without deviation sustained the power of congress to provide pensions and bonuses for the soldiers who have served in the armies of the nation, not only for disability suffered but also for services rendered in the past.

The supreme court of this state in *Manning vs. Spry*, 121 Iowa, 191-195, says:

"A pension is a mere bounty or gratuity given by the government in consideration or recognition of meritorious past services rendered by the pensioner or by some kinsman or ancestor. The policy of granting the same has prevailed both here and in the mother country from a very early period, and no burden has been more easily borne or zealously guarded than this. The first continental congress, by act of August 26, 1776, provided for pensions for soldiers and sailors serving in the Revolutionary war; and one of the earliest acts of the congress was a pension bill passed September 29, 1789, 1 Stat. 95, chapter 24. Since that time a large number of general and special acts have been passed, and the government has been extremely liberal with those who have served it in time of need. The constitution does not confer express power to congress to pass such bills, but the right has been exercised under the grant of power to raise and support armies. As we view it, the power to grant pensions and bounties is inherent in government and its exercise is demanded not only from the standpoint of policy, but from the higher considerations of gratitude and patriotism."

In *United States vs. Hosmer*, 9 Wall. 432, the court says:

"We may add that it would not comport with the dignity of the government thus (in the matter there urged by the attorney general) to break faith with the gallant men who in that hour of gloom stood forth to peril their lives for their country." *Walton vs. Cotton*, 19 Howard 355; 60 U. S. R. 358; *United States vs. Hall*, 98 U. S. R. 343.

The court in *United States vs. Hall*, supra, says:

"Regular allowances paid to an individual by government in consideration of services rendered, or in recognition of merit, civil or military, are called pensions. Military pensions are divisible into two classes—invalid and gratuitous, or such as are granted as rewards for eminent services, irrespective of physical disability. Laws of the kind in this country granting invalid pensions were passed by the states during the revolution, and were followed by similar provisions passed by the continental congress. 1 Laws U. S. (Bioren & Duane's ed.) 687-692; 2 id. 73.

"Many of those provisions were in force when the constitution was adopted, and some of the early laws of congress under the new constitution were passed to fulfill and make good the obligations which were acknowledged by continental legislation. Such laws had their origin in the patriotic service, great hardships, severe suffering, and physical disabilities contracted while in the public service by the officers, soldiers, and seamen who spent their property, lost their health, and gave their time for their country in the great struggle for liberty and independence, without adequate or substantial compensation."

To the same effect see: *Gilbert vs. Minnesota*, 254 U. S. R. 325; *Gustafson vs. Rhinow*, (Minn.) N. W. R. 303; *State ex rel Atwood vs. Johnson*, 170 Wis. 218; Opinion of Justices, 211 Mass. 608; 98 N. E. R. 338; *Angle vs. Runyon*, 38 N. J. L. 403; *State ex rel Hart vs. Clausen*, (Wash.) 194 Pac. 793; 13 A. L. R. 580; 31 Yale Law Journal, 1921-1922 at p. 78; 10 Cal.

Law Review, Nov., 1921, p. 75; 6 Cornell Law Journal, 1920-1921, p. 448; 7 American Law Reports, (Note) p. 1636; Grey Limitation on Taxing Powers, Secs. 176-177-178.

This general rule as to the right of a government to grant bonuses and pensions has never been seriously questioned. It is almost, if not, fundamental. The only question that has ever arisen has been as to the right of the state, as a state, to grant a pension or bonus to soldiers who have served the nation. The distinction between the state and the nation is the basis upon which the court in the case of *People vs. Westchester National Bank*, 231 N. Y., 465, rendered its decision nullifying the New York bonus act. The court in this case held that the state as a state, was under no obligation either in equity, justice or morals to pay a bonus; that in order to create such a moral obligation as would justify the expenditure of public funds, the state must receive some direct benefit or some injury must have been suffered where the state might in fairness and honor be asked to respond. In this case the court frankly admits that the granting of a pension or bonus is a public purpose for which public revenues may be collected and expended, but says that the duty and obligation is on the nation. The rule thus announced by the majority in the New York case is contrary to the great weight of authority. The court itself was divided on the issue. Gordoza, J., dissenting, says:

"We are told that requital, if due at all, is due not from the state but from the nation which summoned the hosts to service. I find myself unable to define by bounds so artificial the claims of equity and honor. The service that preserved the life and safety of the nation, preserved at the same time the life and safety of the states."

The supreme court in *Gilbert vs. Minnesota*, 254 U. S., 325, says:

"Undoubtedly the United States can declare war, and it, not the states, has the power to raise and maintain armies. But there are other considerations. The United States is composed of the states, the states are constituted of the citizens of the United States, who also are citizens of the states, and it is from these citizens that armies are raised and wars waged, and whether to victory and its benefits or to defeat and its calamities, the states as well as the United States, are intimately concerned. And whether to victory or defeat depends upon their morale, the spirit and determination that animates them—whether it is repellant and adverse or eager and militant; and to maintain it eager and militant against attempts at its debasement in aid of the enemies of the United States, is a service of patriotism; and from the contention that it encroaches upon or usurps any power of congress, there is an instinctive and immediate revolt. Cold and technical reasoning in its minute consideration may indeed insist on a separation of the sovereignties and resistance in each to any co-operation from the other, but there is opposing demonstration in the fact that this country is one composed of many and must on occasions be animated as one and that the constituted and constituting sovereignties must have power of co-operation against the enemies of all."

To the same effect see opinion of the justices, 211 Mass. 608, *State ex rel Hart vs. Clausen* (Wash.) 194 Pac. 793; *State vs. Johnson*, 170 Wis. 213; *Gustafson vs. Rhinow*, 144 Minn. 415.

The soldiers, sailors, marines and nurses who rendered unqualified service in the great war, were citizens of Iowa, as well as citizens of the United States. The Iowa National Guard was the advance guard of the hosts of Iowa soldiers. The state at great expense and by great effort built the guard. The members of the guard had rendered years of service with scarcely any compensation at all. The guard was the citizen sol-

diery of Iowa. This guard was drafted into the service of the nation by reason of the fact that the membership was experienced and qualified to serve upon instant notice. Certainly the state is under a moral obligation to those who had served it for years as members of the National Guard, and who by reason of such service met the eventual test with honor and credit to the state.

Under the selective service act thousands of men were summoned from Iowa. Under this act the number of men to be furnished by each state and county was determined, the men being selected by local draft boards, officers of the state. Under this system many were exempted from the service by reason of their avocation or because they were physically unfit to bear arms. From the body of the citizenship was chosen a certain definite number who were required to render unqualified service.

We find, then, a certain definite number of men and women who are selected either by reason of their own voluntary act, or by reason of the selective service act, to fill the quota assigned to the state of Iowa. Such men and women went into the service and by reason of the fact that they did so, all who remained were exempted and directly received the benefits of such service. Those chosen served with honor and credit to the state. Many made the greatest sacrifice, that of life itself. Hundreds and thousands by reason of injuries suffered in the service, will throughout life have the war an ever-present reality. All, whether in camp or in trench received for such service only the meagre compensation allowed by the government. During their absence as citizens of the state serving the state, and completing the allotment of the state, the thousands who remained profited not only because they were not required to serve, but in a material way as well. Not only did the people as a people profit by such service, but the state as a state derived certain definite benefits. Under the constitution the national government is bound to maintain the sovereignty of the states, and the states are likewise bound to maintain the sovereignty of the nation. The United States was at war with the German empire; defeat in such war meant not only the destruction of the nation, but also the destruction of the state. Therefore, when the citizens of the state as soldiers, sailors, marines and purses served the nation, they likewise served the state and the direct result of their efforts was to repel invasion not only of the nation, but likewise of the state. To say that the state is under no obligation to such soldiers, either in honor, justice or morals, is at once repellant to all.

In this connection attention is also called to the fact that just what is a public purpose or just what is necessary to raise a moral obligation based on honor, justice and equity, is not subject to definition. Some purposes are clearly public, and such fact is easily discernible to all. There are likewise many purposes which are clearly private, and such fact is easily discernible to all. Between these two classes of purposes is to be found a twilight zone wherein it is very difficult to determine just whether or not a purpose is public or private. I am firmly of the opinion that the purpose of this act is clearly public, but at best it can only be said that the question involved is within that twilight zone in which minds may reasonably differ.

It is the fundamental duty of the courts to uphold the constitution, but

it is likewise the fundamental duty of the legislature and of the people to sustain the basic law and not to offend against its provisions. The legislature of this state by a unanimous vote after solemn consideration enacted the statute in question, thus giving expression to the conviction that the purpose of the act is public and that there is an obligation sufficient to sustain it. The people of the state by an overwhelming vote determined likewise. Certainly, strict legal concept should not govern the honor of the government itself, and where the legislature and the people have found that the honor of the state demands payment of the obligation contemplated by this act, their findings must prevail. This is fundamental, as stated in *State vs. Fairmont Creamery Company*, 153 Iowa, 706. Therein the court says:

"It is well settled that the courts will not declare unconstitutional an enactment of the legislature unless it is clearly and palpably so. The power of the courts to nullify the act of a co-ordinate branch of the government is one of grave importance. Its exercise has always been recognized by all the departments of government as essential to the well being of the body politic. But the power is one which the courts exercise with great caution and with the highest regard for the prerogatives of the legislative department. With the wisdom or the advisability of the legislation the courts have nothing to do. That question must be argued before the legislative tribunal.

"The previous utterances of this court in that regard are in harmony with those of the supreme court of the United States, *Booth vs. Ill.*, 184 U. S. 431, (22 Sup. Ct. 425, 46 L. Ed. 623); *Atkin vs. Kansas*, 191 U. S. 223, (24 Sup. Ct. 124, 48 L. Ed. 148); *Holden vs. Hardy*, 160 U. S. 397 (18 Sup. Ct. 383, 42 L. Ed. 780). Obedient to this rule, we pass to a consideration of the main question."

In this connection see also: *Greene vs. Frazier*, 253 U. S. 233; *Perry vs. Keene*, 56 N. H. 514; *State vs. Cornell*, 53 Neb. 556, 74 N. W. 59; *U. S. vs. Realty Company*, 163 U. S. 427; 17 Rose's notes, (U. S. Rep.) 705, 707; *Oswego & Syracuse Railway Company vs. State*, 226 N. Y. 351.

Again, while it is to be admitted that the policies and customs of the people and the action of the legislature of the state through the years is not determinative of the question as to whether or not a given act is unconstitutional, yet it must be given great weight by the courts. From the very beginning of her statehood, Iowa's expressions of gratitude to her citizens who have served as soldiers, sailors, marines and nurses, have been visible expressions. Many acts enacted following the civil war, such as the bounty acts, the memorial acts, the soldiers relief acts, the soldiers preference acts, the soldiers exemption statutes, and similar provisions, are but expressions by the legislature of a feeling that the state as a state, is morally indebted to those who serve her, as well as the nation, in times of war.

During the time of and following the period of the great war, the legislature enacted innumerable statutes for the purpose of aiding the soldiers, sailors, marines and nurses of the state. The 37th general assembly provided for the continuance of judicial causes, for exemption from special assessments, for exemptions of homesteads, and provided for a moratorium. The 38th general assembly provided a commission for the care and comfort of soldiers, sailors and marines, provided additional school privileges for discharged soldiers, provided free recording of discharge papers, provided for the erection by communities of memorial

buildings, made provision exempting the property of such soldiers from taxation, and provided for the compilation of a complete roster of all the citizens of Iowa who served in such war. The 39th general assembly enacted the soldiers preference acts, the tax exemption acts and the bonus acts. The state maintains at Marshalltown a soldiers' home at state expense, for all the soldiers, sailors and marines who have served the state and nation in time of war.

This recognition of the obligation due from the state to those of her citizens who have served the nation in time of war, covering as it does the entire period of statehood, coupled with the far more persuasive finding by the people of the state themselves as evidenced by the vote on this act, is of itself determinative of the questions involved.

The purpose of this act being public, there being a moral obligation on the part of the state to its soldiery, there is nothing within the act which is violative of the provisions of article VII of the constitution of the state of Iowa.

IV.

Another contention often presented is that the classification as provided by the act is unreasonable and discriminatory, and therefore offends against the constitution. It is fundamental that the legislature may classify persons, so long as the classification is not clearly unreasonable. Is the classification as provided in this act clearly unreasonable? It occurs to me that it is not. The act limits the benefits to those who rendered unqualified service as soldiers, sailors, marines and nurses between the dates of April 6, 1917, to November 11, 1918.

There is no doubt but that the entire civilian population rendered invaluable service to the state and the nation during the time of war. There is likewise no doubt as to the invaluable service rendered by those who served in the shipyards, in the lumber camps, in the munitions factories and as civilian employes of the national government. There is no doubt also as to the invaluable service of those who rendered qualified military service.

There is a clear distinction, however, between qualified service as thus rendered and that unqualified service rendered by those who will benefit by the terms and provisions of this act. Unqualified service not only includes that ordinary service of which I have spoken, but also that unlimited service demanded in time of war. Those rendering unqualified service placed themselves at the disposal of the government for service in camp or trench, to undergo whatever perils and hardships, pain and suffering, whatever lot might be theirs, whether of life or death, necessary to accomplish the ultimate victory. Such classification is reasonable and does not violate any of the provisions of the constitution.

V.

Another contention is that the act includes more than one subject matter, and therefore offends against section 29 of article III of the constitution. A reading of the act will convince that there is but one subject matter included. The intention of the constitutional prohibition is to prevent the union in the same act of incongruous matter, but it is a unity of object which is to be looked for in the ultimate purpose to be attained,

and not in the details for accomplishing such purpose. *Bereheim vs. Arnd*, 117 Iowa, 83. *Beaner vs. Lucas*, 138 Iowa, 215; *Sisson vs. Board of Supervisors*, 128 Iowa, 442.

There is but one purpose and object in this act, and that is to pay a bonus to the soldiers, sailors, marines and nurses who served during the period of time in question. All other matters contained in the act are simply matters necessary to accomplish the ultimate purpose and object of the act.

VI.

There are a number of other contentions sometimes raised, but such contentions are frivolous and not to be given consideration in this opinion.

VII.

There are a number of other reasons why this statute is valid in every particular. I have found it unnecessary to consider such reasons, however, because those given are sufficient. It will be observed that the Constitutional provisions to which reference has been made expressly exempts debts assumed arising out of war, and likewise it will be observed that the debt contemplated by this act flows not to an individual who is to secure any benefit therefrom, but to those who purchase the bonds. Whether or not either of these reasons would be sufficient alone to sustain the law, I deem it unnecessary to determine.

VIII.

Turning to the departmental orders which have been issued, by you, and which in effect are the minutes of your proceedings in conformity to this act. The legislature has conferred upon you wide discretionary power. It would be improper for this department to advise with reference to those things which are purely within your discretion. I have, however, gone over these departmental orders and find that they are in conformity to law and comply with this act. Where the legislature confers a discretion upon an officer and that officer exercises such discretion in good faith, his action will be upheld by the courts.

With this general observation I desire to call attention to only one further matter. This act provides that the bonds shall be sold to the highest bidder. The method of selling these bonds is of course discretionary with you, the only requirement being that you sell them at the best possible advantage to the state. I do not think you are bound to accept one bid, or two bids. The sole question is as to just what is to the best interests of the state.

BEN J. GIBSON, *Attorney General.*

SOLDIERS' BONUS

Discussion of the Iowa soldiers' bonus law as passed by the 39th general assembly.

December 4, 1922.

Hon W. J. Burbank, Treasurer of State: This department is in receipt of your letter dated November 10, 1922, in which you request an opinion from this department as to certain duties imposed upon you

by the terms and provisions of chapter 332 of the acts of the 39th general assembly. Your letter is in words as follows:

"In order to facilitate the levy and collection of a tax to put into operation the provisions of chapter 332 of the 39th general assembly entitled 'Soldiers Bonus,' it is our desire to certify at the earliest moment the amount necessary to be levied by the executive council.

"We desire your opinion upon section 11 of this chapter wherein directions are given as follows: 'The treasurer of state shall annually certify to the executive council * * * the amount of money required to be raised to pay the principal and interest on such bonds maturing in the ensuing year.'

"The amount necessary to pay the principal coming due in 1923 is \$1,100,000.00, the amount necessary to pay the interest coming due in 1923 at 4½ per cent is \$935,000.00, making a total of \$2,035,000.00 which will be necessary to raise by taxation if the bonds are sold as we verily believe they can be.

"The question upon which we wish your opinion is: Would the treasurer of state be within the law should he certify to the executive council such a tax or any tax until the bonds themselves are actually sold and maturity of the obligation of the state of Iowa actually established?"

The act to which you refer provides for a soldiers' bonus to be paid to certain soldiers, sailors, marines and nurses in active service during the world war. The purpose of the act is included within the title, which is in words as follows:

"An act authorizing the state of Iowa to become indebted in the amount of twenty-two million dollars, and providing for the issue and sale of bonds of said state in evidence thereof, to procure funds for and pay a bonus to persons who served in the military or naval service of the United States at any time between the sixth day of April, nineteen hundred seventeen, and the eleventh day of November, nineteen hundred eighteen, or their successors in interest, providing for a board to administer such payments, providing for an additional bonus for persons under disability, providing for the imposition, levy and collection of a direct annual tax sufficient to pay the principal and interest on said bonds, providing penalties for the violation of the provisions of this act, providing for application of any surplus to the retirement of the indebtedness herein created, and providing for submission of this act to the people to be voted upon at the general election to be held in the year nineteen hundred twenty-two."

Section 1 provides in substance that the state of Iowa is authorized to become indebted in the sum of \$22,000,000.00, and in evidence of such indebtedness it is provided that there shall be issued and sold certain negotiable coupon bonds of the state, the proceeds of which shall be paid into its treasury to be expended for certain purposes provided in the act.

Section 2 imposes upon the treasurer of state the duty of preparing such bonds in accordance with the provisions of this section. It also provides that such bonds shall not draw to exceed 5 per cent interest, payable semi-annually, and further provides that the maturity of the total amount of the indebtedness shall be within twenty years from the date of the issuance of the bonds. It is further provided that the treasurer of state shall sell the bonds to the highest and most responsible bidder after proper advertisement as directed, and at not less than the par value thereof.

Section 11 of the act provides a certain specific tax levy for the purpose of retirement of the bonds issued and sold as provided in sections 1 and 2; this section is in words as follows:

"To provide for the payment of the principal of said bonds so issued and sold and the interest thereon as the same become due and mature, there is hereby imposed and levied upon all the taxable property within the state of Iowa, in addition to all other taxes, a direct annual tax for each of the years said bonds are outstanding, sufficient in amount to produce the sum of one million one hundred thousand dollars (\$1,100,000) each year for twenty years for the payment of principal of said bonds and sufficient in amount to produce such additional sums as may be needed to pay the interest on such bonds. The treasurer of state shall annually certify to the executive council, prior to the time for the levy of general state taxes, the amount of money required to be raised to pay the principal and interest on such bonds maturing in the ensuing year and said executive council shall annually fix the rate per centum necessary to be levied and assessed upon the valuation of the taxable property within this state to produce funds sufficient to pay the principal of and interest upon such bonds as the same become payable, and such additional annual direct tax shall be levied, certified, assessed and collected at the same time and in the same manner as are taxes for general state purposes."

Section 14 of the act provides as follows:

"This act shall take effect immediately upon its adoption and approval at such election."

This statute was adopted by the 39th general assembly and was approved March 23, 1921. It was submitted to the people of the state of Iowa in the manner provided by law at the general election in 1922. The state board of canvassers have just issued their certificate declaring the act duly adopted by the people of the state of Iowa. At once upon the filing of such certificate it became effective in all its parts.

It is fundamental that officers charged with certain specific duties by the provisions of law, must proceed to the performance of such duties with reasonable diligence and to the end that the purpose and object of the law may be accomplished without unnecessary delay. In the exercise of such reasonable diligence the treasurer of state will forthwith prepare and issue the bonds referred to in the act. Such bonds will then be outstanding as an indebtedness of the state, to be paid in the manner provided for in the law. The situation then presented is that there will be outstanding certain bonds of the state of Iowa, the interest and principal of which will become due semi-annually beginning in the year 1923. In order to meet such interest and principal as the same matures, the legislature has specifically provided for a direct annual tax. To state that it was not the legislative intent that such tax should be levied in the year 1923, thus failing to provide for the payment of the interest and principal on the bonds outstanding, is absurd. It must be presumed that the intent of the legislature was that there should be levied and collected an annual tax sufficient to meet the bonded indebtedness and interest as the same matures, all in accordance with the true agreement on the part of the state. The entire act, its nature and object and the consequences that would result from any other construction, demands that such a construction be placed upon this statute. A very similar proposition was presented to the supreme court of this state in *Lumber Company vs. Board of Review*, 161 Iowa, 504, wherein the court said:

"We know of no general rule by which to test a statute in this respect. The issue does not depend upon the form of the statute, but upon the

intention of the legislature, to be ascertained from a consideration of the entire act, its nature, its object and the consequences that would result from construing it one way or the other. Ordinarily, statutes which are for the guidance of officers in the conduct of business devolving upon them, designed to secure order, system and dispatch in the proceedings and in the disregard of which the rights of persons interested cannot be injuriously affected, are held to be directory only."

It is true that the latter part of section 11 provides that

"The treasurer of state shall annually certify to the executive council, prior to the time for the levy of general state taxes, the amount of money required to be raised to pay the principal and interest on such bonds maturing in the ensuing year, and the executive council shall annually fix the rate per centum necessary to be levied and assessed upon the valuation of the taxable property within this state to produce funds sufficient to pay the principal of and interest on such bonds as the same become payable, and such additional annual direct tax shall be levied, certified, assessed and collected at the same time and in the same manner as are taxes for general state purposes."

The courts of this state as well as the courts of other states, have uniformly held that such directions in statutes relating to taxation, are directory and not mandatory. As stated by the supreme court of the United States in *French vs. Edwards*, 12 Wall. 506:

"There are undoubtedly many statutory requisitions intended for the guidance of officers in the conduct of business devolved upon them, which do not limit their power or render its exercise in disregard of the requisitions, ineffectual. Such generally, are requisitions designed to secure order, system, and dispatch in proceedings, and by a disregard of which rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the act shall not be done in any other manner or time than that designated."

The rule thus announced by the supreme court of the United States is the general rule adopted throughout the United States and in the state of Iowa. *Hill vs. Wolfe*, 24 Iowa, 577; *Easton vs. Savery*, 44 Iowa, 654; *Lumber Co. vs. Board of Review*, 161 Iowa, 504; *Hubbell vs. Polk County*, 106 Iowa, 622.

No tax payer of the state can be injuriously affected by reason of the failure to certify the tax in August, and to certify it in December. It follows, therefore, that the directions referred to must be held as directory and not mandatory, and that the certification may be made in December with the same force and effect as though made in August. It follows that unless there is something else, the treasurer of state is not only authorized but is directed by the act to certify to the executive council the amount of money necessary to pay the interest and principal on the bonds maturing in the year 1923.

It may be contended, however, that the bonds must be outstanding and sold prior to the levy of the tax. Without being thought as directing the procedure to be followed by the treasurer of state, may we suggest that the treasurer of state should, by proper departmental order entered in the public records of this state, make provision for the issuance of the bonds. It is of course imperative and necessary that in this connection you have the acquiescence and approval of the secretary of state and of the governor, who are vested with a certain discretion. The thought we have in mind is that the treasurer of state, exercising reasonable diligence, can by departmental order provide for the bond issue

sufficiently to enable him to make the proper certificate to the executive council and thus carry out the plain mandate of the legislature.

The responsibility for all such acts, and the responsibility for the correctness of your departmental orders, must necessarily rest on you, our only suggestion being that such orders should be so complete as to leave no question as to the amount necessary and as to the fact that the bond issue is an outstanding and existent fact. If all this is accomplished in a proper and correct manner, the mere fact that the bonds may be subsequently sold will be immaterial. That this is true will be manifest at once when a consideration is given to the fact that it is the duty of the treasurer of state to sell such bonds at the highest possible price, and for the best interests of the state. It may be that after advertisement as is contemplated by the law, that bids will not be received which would justify a sale of the bonds. This being true, the treasurer of state would be compelled in the performance of his duty to reject bids and to re-advertise. This might take a considerable length of time, and were it to be held that the bonds must be actually sold prior to the time that the tax levy is spread, there would inevitably result a condition in which no funds would be available to meet the bonds as they mature. The vital question is as to whether or not the bonds are dated, the maturity thereof certain and that the interest computed does not exceed that authorized by the statute.

In this connection it might be said that if proper departmental order is entered the bonds will become treasurer's bonds in the hands of the treasurer, held for sale, but still an outstanding and existent indebtedness of the state.

This opinion is limited strictly to the question submitted by you. This has been done at your express direction and acting upon that direction, we have attempted to confine our remarks solely to the very question submitted by you. Owing to the importance of this statute to the people of the state and the necessity for careful consideration of any question arising under it, we feel that all opinions from this department relative to it must be in writing. We make this statement to you not only for your benefit, but for the benefit of all those having to do with the administration of this act, all to prevent conflict as to just what should be done on occasions as they may arise.

BEN J. GIBSON, *Attorney General.*

TIME FOR FILING CLAIM OF EXEMPTION, ETC.

Soldiers' tax exemption must be filed by August 31. It is a personal exemption and cannot be transferred.

March 13, 1922.

Mr. Albert Steinberg, County Attorney, Eldora, Iowa: I am in receipt of your letter dated March 9, 1922, in which you request an opinion from this department. Your request is in substance as follows:

"I would be pleased to receive an opinion from your office in reply to the following inquiry. Is a claim for tax exemption filed by an ex-service man filed in time if filed in the county auditor's office on September 1? Or does it have to be on file with the auditor before the first day of September?

"If A, an ex-service man, who owns property and who has filed his

claim in due time transfers it to B, who is also an ex-service man, but who has not filed his claim, can B claim the benefits of the claim filed by A?"

Chapter 144 of the acts of the 39th general assembly provides for exemptions to soldiers, sailors, marines and nurses and is the chapter applicable to a determination of the question submitted by you.

Section 5 of this act provides as follows:

"If no such statement is filed, no exemption shall be allowed by the assessor, but may be allowed by the board of supervisors if such statement is filed before September 1 of the year for which the same is claimed."

You will observe from this section that the statement must be filed before September 1, the last day for filing would therefore be August 31.

The exemption provided by this chapter is a personal exemption and is given to the service men filing the statement required by section 5. Section 3 provides that such exemption shall only extend to the period during which such person remained the owner of such property.

In the question submitted by you if A complies with the law he would be entitled to an exemption under this act. His exemption, however, would only extend during the period of time in which he remains the owner of the property in question. Upon the transfer of the title A's exemption would cease. B would not be entitled to an exemption unless he also has complied with the statute. B could not claim the benefits of the exemption granted on the claim of A.

It must be remembered that taxation is the rule and exemption is the exception. There is no doubt as to the fact that this rule often times results in hardship but in the end is clearly for the best interests of the whole state. The legislature in passing statutes is presumed to be cognizant of this rule and where there is no provision clearly showing one entitled to an exemption it must be held that it was the intent of such legislature not to grant the same.

BEN J. GIBSON, *Attorney General.*

EFFECT OF SALE ON EXEMPTION

The exemption from taxation allowed an honorably discharged soldier is personal and extends only during the time he is the owner of the property. Upon sale or upon transfer of the same to those not exempt it becomes subject to taxation for its proportionate tax of the year.

March 9, 1922.

Mr. T. A. Michels, County Attorney, Washington, Iowa: We are in receipt of your request for an opinion upon the following proposition:

"The deceased was a G. A. R. and died during the month of April, 1920. When the assessment was made on him for that year he was living and claimed his exemption, but as stated did not live out the year, but died during April of the same year, 1920. Now when the taxes for the year 1920, became due and payable in 1921, the heirs of this man claimed his exemption, that is they insist that the property should be exempt for the whole year 1920, as though the testator had lived during the whole year 1920, when in fact he died during the month of April of 1920. The board of supervisors have had the matter under consideration for a time and they have granted the exemption for part of the year 1920, up to the death of the testator, and charged it against the property for the balance of the year, after the death, or in other words they contend that the ex-

emption stopped at the death of the testator, and have apportioned the year. On the other hand it is the contention of the heirs of this man that this cannot be done, and they are either entitled to the full year's exemption, 1920, or they are not entitled to any exemption, and that no apportionment can be made."

We desire to direct your attention to the fact that chapter 214, acts of the 38th general assembly, amended the existing law with reference to the exemption allowed an honorably discharged soldier, sailor, marine and widows of such persons by adding to the section the following:

"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 act, said exemption shall cease, and the property shall be subject to taxation as other property."

This department has previously held that the right of exemption is personal and does not descend to the heirs of a soldier unless the statute expressly provides that such heir is to be exempted.

I think from a reading of the provision above quoted, as you will see, that when the person thus exempt no longer remains the owner of the property that it becomes subject to a tax. It is true that the statute expressly provides that on the sale of the premises to one other than those mentioned in the statute as being exempt that it is subject to assessment as other property. I do not believe that the word "sale" should be taken in such a restrictive sense as to permit the imposition of a tax where the property does not pass by sale but passes by virtue of the statutes of inheritance, for you will note that the section states that the exemption shall extend to the period during which such soldier, etc. *remains the owner of said property.*

In the case you have referred to the property had passed out of the hands of one who was exempt from taxation and into the hands of owners clearly subject to the imposition of a tax. Your letter indicates that the board of supervisors have apportioned the tax and made allowance for the time the property was owned by one exempt from taxation. The statute makes no statement as to how this apportionment shall be made. I think this is a matter that can be and usually is properly considered by the board of supervisors and when they have thus acted I do not believe that they should refund the entire tax collected in a matter of this kind.

There is some doubt involved in connection with this statute but I would advise you to tell your board to refuse to make a refund of tax in this case.

BEN J. GIBSON, *Attorney General,*

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

AUTHORITY OF SOLDIER'S RELIEF COMMISSION

1. The board of supervisors may levy a tax for soldiers relief without consent or action on the part of the soldiers' relief commission.
2. In order to expend funds under the provisions of section 430, supplemental supplement, 1915, there must be joint action of the board of supervisors and the soldiers relief commission.

March 8, 1922.

Hon. Glenn C. Haynes, Auditor of State: We are in receipt of your request for the opinion of this department upon the following matters:

"Can the board of supervisors, under section 430, supplemental supplement, 1915, make a levy for the soldiers' relief fund when there has been no request for a levy by the soldiers' relief commission?"

"Can the board of supervisors allow and pay claims out of the soldiers' relief fund without any action being taken by the soldiers' relief commission? In other words, does it require joint action by the board of supervisors and soldiers' relief commission in order to make payments from this fund?"

"Can the funds derived from the one mill levy provided for in section 430, supplemental supplement, 1915, be used for the erection of a building to be used as quarters by the American Legion or ex-service men? If the fund can be thus expended, can the board of supervisors appropriate money for this purpose without the consent or joint action of the soldiers' relief commission?"

These three questions are so closely associated with the provisions of section 430 of the supplemental supplement, 1915, that we are herewith setting forth the same at length. It is 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 United States 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, or for the erection or maintenance of monuments or memorial halls in any cemetery or public place in the county, or across the line in an adjoining county where such cemetery is used chiefly by the inhabitants of the county voting the tax, except that where it is contemplated to erect any such monument or memorial hall within the corporate limits of any city or town, public park or public square, the consent of the city or town council, or park commissioners, as the case may be, having jurisdiction thereof, shall first be obtained; said fund to be expended for the purposes aforesaid by the joint action and control of the board of supervisors and the relief commission provided for by section four hundred thirty-one of the code."

You will observe from the reading of the foregoing section that the board of supervisors "may" levy a tax for the purpose mentioned in the foregoing section. There is absolutely nothing in the statute that requires them to await the action of the soldiers' relief commission before proceeding to make a levy. It is true that by virtue of the provisions of section 432, supplement, 1913, that the soldier's relief commission shall determine who are entitled to relief and the probable amount required to be expended for such purpose and that the commission shall certify to the board of supervisors the amount thereof. I do not believe that the failure of the soldier's relief commission to act in any way results in depriving the board of supervisors of the right to levy a tax for the purpose mentioned.

Your second inquiry is whether or not the board of supervisors and the soldiers' relief commission must act jointly in order to make payments from the fund in question.

You will note that the statute provides that the said fund is "to be expended for the purposes aforesaid by the joint action and control of the board of supervisors and the relief commission * * *." We think this very clearly shows that the board of supervisors cannot allow and pay out claims without the consent of the relief commission.

Your third inquiry is also answered by the provisions of the section of

the code above set forth, as you will see from the same that the funds thus derived from the tax levy may be expended "for the erection or maintenance of monuments or memorial halls in any cemetery or public place in the country, * * *"

This section permits the expenditure of funds for honorably discharged soldiers, sailors and marines. It makes no provision expressly for the American Legion or ex-service men. Whatever funds are expended under this section are for the benefit of all honorably discharged soldiers without regard to whether they are members of the G. A. R., the American Legion, The Spanish American War Veterans, or any other organization of a similar character.

BEN J. GIBSON, *Attorney General*,

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

ONE WHO WAS ONLY CALLED IN DRAFT NOT EXEMPT

One who was called under the draft law for service in the war with Germany but who never left his place of residence and was never actually in the army of the United States is not entitled to exemption from taxation.

February 2, 1922.

Mr. Herbert McCabe, County Attorney, Dubuque, Iowa: We have your letter of January 27 requesting an opinion from this department upon the following proposition:

"The case has arisen here and undoubtedly will arise again from time to time as to whether a man who was inducted into service by the local board and never left home is entitled to tax exemption under the tax exemption granted to ex-soldiers, sailors and marines of the world war.

"In the specific case which I have in mind, this man was inducted into service by the local board four days prior to the signing of the Armistice. On the date of the signing of the Armistice, November 11, he was advised by the local board that his services would not be needed. Later on he received through the local board his discharge from the draft, a copy of which I herewith enclose. He also received a check for \$4.60 in payment for his four days induction from the military authorities at Camp Dodge. He did not receive an honorable discharge from the United States army, navy or marine corps. The only evidence of his military service is his discharge from the draft."

In answering this inquiry it is important to bear in mind the principle that taxation is the rule and exemption is the exception and he who claims the exemption must show himself to be clearly within the term granting the same.

With this principle in mind we direct your attention to the provisions of chapter 144, acts of the 39th general assembly, which provides in part as follows:

"The property, not to exceed five hundred dollars (\$500) in actual value of any honorably discharged soldier, sailor, marine or nurse of the war with Germany" shall be exempt from taxation.

The young man mentioned in your letter was never actually in the service of the United States as a soldier. He has no honorable discharge from the army. He could not secure one by reason of the fact that he never was in the army.

The intent of the legislature was to grant exemption to the extent above quoted to those who were actually in the service and who had se-

cured an honorable discharge. The facts stated in your letter clearly indicate to us that this party is not entitled to the soldiers' exemption provided for in chapter 144, acts of the 39th general assembly.

The opinion herein given is in keeping with a previous opinion rendered by this department to Mr. Maxwell O'Brien, county attorney, Oskaloosa, Iowa, on April 11, 1919, in which he was advised that the county recorder should record without charge any final discharge of any soldier, sailor or marine of the United States but that a discharge from the draft should not be recorded as the statute provided for the recording of a final discharge issued by the United States government for one who had actually been in its service. (Report of the attorney general 1919-1920, page 714).

BEN J. GIBSON, *Attorney General*,

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

EXTENT OF SOLDIERS EXEMPTION

The exemption from taxation of property of soldier applies for year when assessed, if soldier was in service any part of that year.

October 14, 1921.

Mr. L. A. Crull, County Attorney, Muscatine, Iowa: Your letter of the 27 ult. addressed to the attorney general has been referred to me for reply.

You ask for an opinion from this department as to the legal authority of the board of supervisors to refund a tax paid under the following circumstances:

"Edward E. Ward, a resident and property holder of this county entered the military service July 1, 1918, and was discharged December 18, 1918. That in 1919 he paid the taxes that had been assessed in 1918 amounting to \$42.91. On the 26th day of August, 1921, he filed an application under oath asking for a remission of said tax."

The soldiers' exemption statute is known as chapter 380, acts of the 37th general assembly, and the portion thereof material to a proper determination of your question is section 3, which provides:

"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 (\$10,000) dollars in the event of no such homestead."

This department has heretofore construed said section to exempt the property from taxation of any person engaged in the naval or military service of the United States, provided such person was in the service during any part of the year which the property was assessed; and that it was the duty of the taxing officers to give him the exemption, whether he demanded it or not. To that ruling we still adhere.

As to whether the board of supervisors has any legal authority to refund a tax paid under the circumstances mentioned in your letter will depend upon whether or not such tax has been erroneously or illegally exacted or paid.

Section 1417 of the code expressly provides:

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

* * *

It will be observed that section 3, chapter 380, *supra*, especially exempts from taxes the property of soldiers during their term of service in the war with Germany. That provision is mandatory and imposes a duty upon the taxing officers to grant it. If the taxing officers do not grant it and taxes are paid then it is evident they have been erroneously paid within the meaning of section 1417, and the board of supervisors is legally authorized to order the county treasurer to refund the tax with interest, actually paid thereon.

BEN J. GIBSON, *Attorney General*,

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

SOLDIERS EXEMPTION WHEN IN TWO WARS

If a person served in both Philippine and World War, he is entitled to both exemptions. If an ex-soldier of both such wars marries woman who served in World War, both entitled to exemption. Soldiers entitled to exemption under contract of purchase.

August 13, 1921.

Hon. Glenn C. Haynes, Auditor of State: You have requested an opinion from this department upon the three following questions:

"First: If a person served in both the Philippine insurrection and the war with Germany, is he entitled to the tax exemptions allowed to those serving in both wars—namely: To the extent of \$2,300.00.

Second: If a man who served in the Philippine insurrection, or war with Germany, marries a woman who served in the World War as a nurse, are both entitled to tax exemptions on their property?

Third: If a person who served in either the Philippine insurrection or war with Germany buys property on contract, by the terms of which he agrees to pay the taxes, and takes possession, is such person entitled to tax exemption thereon?"

The law governing your questions will be found in section II, chapter 144, acts of the 39th general assembly. The portion of that act applicable to your questions reads as follows:

"The property, not to exceed eighteen hundred dollars (\$1,800.00) in actual value and poll tax of any honorably discharged soldier, sailor or marine of the war with Spain, Chinese relief, or the Philippine insurrection.

"The property, not to exceed five hundred dollars in actual value of any honorably discharged soldier, sailor, marine or nurse of the war with Germany."

It will be observed that the provisions of the statute quoted above are specific and definite. The statute expressly exempts the property of any honorably discharged soldier of the Philippine insurrection to the extent of \$1,800.00, and of any honorably discharged soldier in the war with Germany to the extent of \$500.00. The statutes were enacted as an expression of gratitude which the legislature of Iowa held for those who served their country in those two wars, and are, in a measure, compensation for such service. Nowhere therein can be found the slightest intimation that a person who served in both wars is not entitled to both exemptions, and to hold that a person who had the valor and patriotism to serve in both wars, and who served with honor to his country, is not legally entitled to all the tax exemptions granted to such soldiers, would violate not only the true spirit of the enactment, but also the express provisions of the statute itself.

I am therefore of the opinion that any person who served in both the Philippine insurrection and the war with Germany and received an honorable discharge, is entitled to exemption from taxation on his property to the extent of twenty-three hundred dollars (\$2,300.00).

As to your second question, the statute expressly grants to a woman who served as a nurse in the war with Germany, the same exemption from taxation as is granted to the men. There is no express provision in the statute forfeiting this exemption in the event such woman marries. If she married a man who never served in the world war, she would be entitled to the exemption. There is no sound reason for holding that she forfeits such exemption by marrying an ex-soldier.

The only provision of the statute which might seem to deny to a woman who married a soldier such exemption, is the following:

"The property, to the same extent, of the wife of any such soldier, sailor or marine, where they are living together, and he has not otherwise received the benefits above provided."

We do not believe the provision of the statute just quoted conflicts in any respect with the construction of the statute heretofore expressed. Construing the provisions just quoted with the other provisions of the statute, it is apparent that the provisions quoted apply only to a woman who never served in the world war as a nurse when she marries an ex-soldier. The legislature evidently intended to extend to the wife of a soldier the same exemption from taxation when she owns property, and her soldier husband does not.

Therefore, we are of the opinion that when both the wife and husband served in the world war, and both own property, that each is entitled to the full exemption from taxation.

As to your third question, it is the opinion of this department that an ex-soldier of either the Philippine insurrection or war with Germany, is entitled to tax exemption on property purchased under contract. In such event, the property is the property of the soldier within the contemplation of the tax exemption statute.

BEN J. GIBSON, *Attorney General*,

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

WHAT SOLDIERS ARE NOT EXEMPT FROM POLL TAX

Under the provisions of sec. 2 of ch. 144 the words "poll tax" were intended to cover the per capita or head tax, and the regular road poll tax for soldiers of the Spanish American war, but no such exemption was granted soldiers of the World War, they being limited to an exemption on property not exceeding \$500 in value.

July 21, 1921.

Hon. Glenn C. Haynes, Auditor of State: Under date of July 1 you forwarded to this department a letter from Fred W. Prosser, Auditor of Wapello county, in which he requested an opinion as to whether soldiers of the Spanish American war and of the late war, would be exempt from poll and head tax through the soldiers' exemption law enacted by the 39th general assembly. Section 2 of chapter 144, acts of the 39th general assembly, in so far as it is material to the determination of the question presented, reads as follows:

"The property, not to exceed three thousand dollars (\$3,000.00) in actual value and poll tax of any honorably discharged union soldier, sailor, or marine of the Mexican war or the war of the rebellion.

"The property, not to exceed eighteen hundred dollars (\$1,800.00) in actual value and poll tax of any honorably discharged soldier, sailor or marine of the war with Spain, Chinese relief or the Philippine insurrection.

"The property, not to exceed five hundred dollars (\$500.00) in actual value of any honorably discharged soldier, sailor, marine or nurse of the war with Germany."

It is quite evident that the words "poll tax" as used in this act, was intended to cover both the per capita, or head tax which is designated in the code as "poll tax," and the regular road poll tax was intended to be covered by the act and included in the exemption to be allowed to soldiers of the Spanish American war. But no such exemption was granted to soldiers of the late war, or what is commonly known as the war with Germany, as the soldiers of that war are limited to an exemption on property not exceeding \$500.00 in value.

BEN J. GIBSON, *Attorney General*,

By JOHN FLETCHER, *Assistant Attorney General*.

MEMBERS OF RESERVE CORPS NOT EXEMPT

Persons in the reserve corps of the U. S. service are not entitled to tax exemption unless such persons are on active duty. Sec. 3, ch. 380, acts 37th general assembly.

February 8, 1921.

Mr. L. V. Harpel, County Attorney, Boone, Iowa: Your inquiry of February 4 has been referred to me for attention. You request a ruling from this department as to whether or not reserve officers in the United States army and men in the naval reserve are exempt from taxes in this state as being in the military service of the United States.

Under the provisions of chapter 380, acts of the 37th general assembly, persons in the military or naval service of the United States are given certain tax exemptions. The particular section is as follows:

"Section 3. 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 (\$10,000) dollars in the event of no such homestead."

It is the ruling of this department that the intention of the foregoing section is to exempt persons who are on active duty only, and that persons in the reserve are not entitled to such exemption.

BEN J. GIBSON, *Attorney General*,

By NEILL GARRETT, *Assistant Attorney General*.

AMOUNT OF EXEMPTION OF SOLDIERS

Soldier whose homestead is worth less than \$3,000 may have balance of exemption allowed on other property.

Soldier holding contract for property on which he is required to pay the taxes is entitled to the exemption.

May 20, 1921.

Mr. W. E. Jackson, County Attorney, Burlington, Iowa: The depart-

ment is in receipt of your letter of the 22d ult. in which you request an opinion upon the following propositions:

"The county auditor of Des Moines county has handed me a letter from the auditor of state copying your instructions relative to exemption from taxation to soldiers, being senate file No. 598. Our local auditor requests me to ask you relative to the exemption following paragraph 5 of your letter.

"If the value of the homestead is less than the exemption allowed, can the exemption extend to other property over and above the homestead, either personal or real, until the full amount of the exemption has been allowed; for instance, an old soldier has a house worth \$2,000 and automobile or like property to the extent of \$1,000, is he allowed the full \$3,000 exemption of both the homestead and the automobile?"

"Another question which he desires to ask is: In the event a soldier is buying property under contract with the legal title still standing in the other party to the contract, the soldier occupies the property and in the contract is to pay the taxes on it, is he allowed exemption from taxation on this property, not standing in his name, but which he is purchasing under contract?"

In reply to your first inquiry will say that the property of a soldier of the civil war to the extent of \$3,000 in value is exempt from taxation if proper application for such exemption is made. The exemption applies to a homestead if he has one, and if no homestead, to other property. It is a fair interpretation of the law, I believe, to say that the legislature intended that property up to the value of \$3,000 should be exempt, and if the homestead would only be worth \$2,000 in the case stated by you he would be entitled to additional exemption upon other property to the amount of \$1,000.

It is the view of this department that a soldier purchasing property under contract by the terms of which he is required to pay the taxes, is entitled to the exemption provided by law, and it would only be a question of showing that he was liable for the tax upon the particular property described to warrant the exemption being granted.

BEN J. GIBSON, *Attorney General*,

By JOHN FLETCHER, *Assistant Attorney General*.

OPINIONS RELATING TO MILITARY MATTERS

PURCHASE CAMP DODGE—IMPROVEMENTS AND FIXTURES

The governor has the right to purchase such improvements, if in his judgment the same may be necessary for the use of the guard and such purchase be advisable on his part.

February 3, 1921.

Hon. L. G. Lasher, Adjutant General: The governor has requested this department to render an opinion as to his power under the laws of the state to purchase certain improvements and fixtures now on the state-owned land at Camp Dodge, Iowa. These improvements consist of a complete water works system, a complete electric light system, barracks, warehouses, pavement and other improvements.

Section 2215-f41 of the supplement to the code, 1913 (C. C., sec. 335), provides:

"The governor is authorized to expend from the funds appropriated for the support and maintenance of the guard such amounts as may be necessary in the erection of buildings and other improvements on the permanent camp grounds and rifle ranges purchased by the state for the use of the guard, or purchased by the United States for the uses of the guard of this state, when in his judgment such buildings and improvements will be for the permanent good of the guard."

It will be observed from this section that the governor is authorized to expend from the funds appropriated for the support and maintenance of the guard such sums as may be necessary for the erection of buildings and other improvements on the permanent camp grounds and rifle ranges of the state. It will be observed in this connection that the land referred to in the query is the permanent camp ground of the state of Iowa and was purchased for such purpose. It has been the property of the state for a great many years and has been devoted to the use of the guard. The only question involved in this query is as to the exact meaning of the words "erection of buildings and other improvements." Statutes such as this are not to be construed with any narrow or technical construction but are to be construed with the purpose in view of giving to such statutes the legislative intent. The legislative intent in making this statute will become apparent upon reading the same in connection with the entire military code. The purpose is to provide for improvements upon the permanent camping ground of the state. Whether such improvements were originally constructed by the state or whether they were purchased already constructed, the result is exactly the same.

The matter need not be discussed further. There is no question as to the right of the governor to purchase the improvements referred to if in his judgment the same be necessary for the use of the guard and such purchase be advisable on his part.

However, the governor has instructed me to ask you in connection with this matter to submit to him the report of a board of officers appointed by you for the purpose of inspecting such improvements, giving in general their opinion as to the value of the same and making a finding as to the necessity of the same. Of course it would be improper for

me to refer to the method to be pursued by you in this matter, as it is purely within your province. I would suggest, however, that after the board has made its report, that the same be forwarded to the governor with the recommendation of the adjutant general, for such action as he may deem proper.

BEN J. GIBSON, *Attorney General.*

RENT OF ARMORIES

History of national guard discussed. Held that "rent allowances" is an allowance in a fixed sum to be made by the armory board to a national guard unit for the payment of its armory rent, including light, heat, water, gas, janitor service and other necessary conveniences.

July 14, 1921.

Hon. Louis G. Lasher, Adjutant General: I am in receipt of your letter of June 17, 1921, in which you request the opinion of this department as to an interpretation to be given section 4 of house file number 827, acts of the 39th general assembly. This request is at length and we quote only the material part thereof. It is in words as follows:

"In its consideration of the provisions of the law as it now stands the board is somewhat in doubt as to the correct interpretation of the wording, 'The board shall for each unit of the guard fix the rent allowances to be paid by the state for other than state owned armories.'"

Section 4 of the act provides for the creation of an armory board, its meetings, and duties. The material part of this section is as follows:

"The governor shall appoint an armory board which shall consist of the adjutant general and four other officers from the active, reserve, or retired commissioned personnel of the guard. The board shall meet at such times and places as are ordered by the governor. The four officers so appointed shall serve at the pleasure of the governor. The board shall for each unit of the guard fix the rent allowances to be paid by the state for other than state owned armories and shall acquire, contract, erect, purchase, sell, maintain, repair, and alter state owned armories subject to the laws made and provided therefor. The board shall fix the amount to be paid to commanding officers of each division brigade, regiment, battalion, squadron, battery, troop, company or other units of the guard for headquarters expenses and shall provide by regulations how the same shall be disbursed by such commanding officers. The actions of the armory board shall be subject to the approval of the governor. The allowances made by the armory board shall, when approved by the governor, be paid from the funds appropriated for the support and maintenance of the guard."

Section 1 of article 6 of the constitution provides for the organization of a militia of this state, and provides further that such militia shall be armed, equipped and trained as the general assembly may provide by law. Section 7 of article 4 creates the governor as the commander-in-chief of the militia. Under such constitutional provisions the general assembly has heretofore and from time to time adopted statutes providing for the militia and for its training and equipment.

During the early years of the national guard in Iowa the federal government sought to exercise but little control over its organization and equipment. True from time to time it furnished certain supplies and equipment and certain allowances were made for federal pay and sustenance during encampment periods, but in general, the federal government exercised but little control over the militia. In 1916, however, the national congress passed an act providing for the national defense and

for other purposes. Under this act the national guard occupies a dual capacity, being under certain obligations to the national government, and likewise, being under certain obligations to the state; the government expending certain sums for the training, equipment and arming of the guard, and the state likewise, expending certain sums for such purposes.

Under the national defense act there has been published from time to time rules and regulations relating to the national guard providing for its training and equipment and in general providing for the carrying into effect of the provisions of such act.

It is unnecessary for the purpose of this opinion to refer to the national defense act or to the rules, regulations and orders so published thereunder with particularity. Suffice it to say that thereunder the federal government has established certain requirements which must be met in order that the several units of the national guard may receive the benefits flowing from the national government to the guard under the provisions of the act.

Among the requirements of the national government are those requiring suitable armories for the use of the guard. Such armories must conform to certain specified requirements and are subject to inspection by officers of the national government, all to the end that the armories may be such as to insure the proper housing of the guard, a proper place in which the guard may train and a proper place in which the equipment furnished by the national government may be kept and preserved. This was the law at the time of the enactment of house bill No. 827, acts of the 39th general assembly. The interests of the national government were apparent and known to the legislature at such time. It may be fairly assumed then that the legislature in the enactment of the law had an intent to fairly and honestly provide such armories for the several units of the national guard of this state as would fairly comply with the national defense act. It follows therefore that the provisions for rent allowances must be interpreted with this fact constantly in mind.

The armories are not owned by the state. Many of the armories used by national guard units are the property of private individuals, firms or corporations, others the property of cities, still others the property of holding companies. In this connection it might be said that in cases where the armories are owned by private interests, there is paid a certain set armory rent. Such rent may or may not include heat, gas, water, light and other services and conveniences. In other words, as to privately owned armories what is furnished to the guard unit as a part of the obligation on the part of the landlord varies in every instance. In cases where the armories are owned by the cities there are many instances in which the rents to be paid by the units are nominal. Such armories are oftentimes used for other public purposes. In many such instances also the city furnishes light, heat, gas, water and janitor service, in others it does not. Where the armories are owned by corporations organized for the purpose of holding titles to such armories such corporations take over the entire rent allowance made by the state, pays for light, heat, water and gas, furnishes janitor service and in many instances from such funds purchases fixtures for the building.

From what has been said, it will be observed that in practically every community in the state a different situation is presented. It certainly could not be contended that the state should be unfair to communities. Communities furnishing armories for the use of their national guard units and charging but nominal rent to the unit should not be discriminated against, neither should corporations organized for the purpose of building an armory, keeping it in repair, and caring for it for the use of the national guard unit in the community where such corporation is organized, be deprived of its portion of rent allowances. Such could not have been the intent of the legislature.

The term "rent allowances" is the plural. More than one thing must have been in the mind of the legislature at the time the law was enacted. It is a matter of common knowledge that in the renting of buildings by individuals, firms and corporations that in many instances light, heat, water and janitor service are furnished by the landlord. In many instances the landlord makes certain repairs, furnishes certain fixtures and does certain other work and makes certain other improvements for the purpose of making the building fit for occupancy for the purposes for which it is rented. This is a matter of such common knowledge that comment need not be made thereon. What is true as to such buildings is true as to armories.

It follows that the term "rent allowances" must be construed to be an allowance in a fixed sum to be made by the armory board to a national guard unit for the purpose of enabling such national guard unit to rent and provide for such unit an armory and to provide such armory with the necessary conveniences required by the rules and regulations of the federal government, including light, heat, water, gas, janitor service and other necessary conveniences. To hold otherwise would be to practically nullify the entire law, for no one can contend that a bare building would be of any use to the national guard unit or that it would meet the requirements of the federal government. There are many items which might properly be included within this term but such items are to be determined largely by the armory board. In this connection you will observe that the armory board is to fix the rent allowances to be paid to each national guard unit. Such armory board should provide rules and regulations for the expenditure of such rent allowances, require reports of such expenditures so that at all times the board may be in possession of facts and figures showing that the allowance made by them under the law is expended for the purposes intended by the legislature. This is more important when it is realized that the fund is a public fund and must be accounted for as such, the proper expenditure and accounting for such fund being vital and necessary in order to honestly carry out the intent of the law.

Should particular instances arise in which particular and peculiar questions are presented, this department will gladly advise with reference thereto.

BEN J. GIBSON, *Attorney General.*

OPINIONS RELATING TO BRIDGES AND HIGHWAYS

EXPENDITURE OF PRIMARY ROAD FUND FOR PAVING— LIMITATION ON

A city council may extend the width of a proposed pavement to exceed 18 feet, but aid from the primary road fund, as provided for under the provisions of chapter 230, acts 39th general assembly can only be obtained on a deficiency existing on the 18 ft. slab.

September 14, 1922.

Mr. Albert Steinberg, County Attorney, Eldora, Iowa: I am in receipt of your letter of August 28, 1922, in which you request an opinion from this department. Your request is in words as follows:

"May I submit the following question for your opinion? Can a city which is seeking aid from the primary road fund for paving as provided by chapter 230, of the 39th general assembly, obtain such aid where the special assessments would pay for a paving 18 feet in width?

In other words can the proposed paving be in excess of 18 feet and the city still receive the aid up to one-half the cost of an 18 foot slab although there would be no deficiency on a 19 foot pavement?

"Can the board of supervisors entertain a resolution in which the improvement proposed is in excess of 18 feet?"

The resolution of a city council should cover an 18 foot pavement as specified in chapter 230, of the acts of the 39th general assembly. There is nothing in the law which would prevent a city council by a separate and distinct resolution, or as a part of the same resolution, from extending the width of such pavement so that the ultimate width would exceed 18 feet. However, the resolution must be so distinct as to leave no room for doubt that the pavement proposed to be laid, and for which the appropriation is asked, is an 18 foot pavement.

Your letter states that "if the pavement proposed is not in excess of 18 feet, there will be no deficiencies." This being true, there could be no appropriation by the board under the provisions of chapter 230 of the acts of the 39th general assembly. It is only for deficiencies that the appropriation would be used. If there are no deficiencies, then there can be no appropriation.

BEN J. GIBSON, *Attorney General.*

IMPROVING STREETS OF INCORPORATED TOWN

Primary road funds cannot be used to acquire right of way through incorporated towns. Neither the highway commission nor the board of supervisors have authority to establish the grade of a primary road through an incorporated town.

June 2, 1921.

Iowa State Highway Commission, Ames, Iowa. In your letter of May 2, 1921, you ask for an opinion from this department as to the interpretation to be given chapter 237 of the acts of the 38th general assembly as amended by the acts of the 39th general assembly in and so far as the jurisdiction of the board of supervisors over the primary road within the limits of incorporated towns is concerned.

There are two questions submitted, the first of which is as follows:

"Can the board of supervisors expend the county's allotment of the primary road fund for the purpose of purchasing a right of way within the limits of such incorporated towns?"

An incorporated town is a municipal corporation organized under the laws of this state, vested with certain powers and charged with certain duties. Among the powers conferred upon incorporated towns is that of the control of the streets and alleys within the limits of such towns. This includes control of all highways within such limits.

The primary road law as amended, to which we have referred, confers upon the board of supervisors power to use the county's allotment of the primary road fund for the purpose of grading, draining, graveling or hard surfacing a primary road within the limits of incorporated towns having a population of less than two thousand.

There is no provision of law whereby the board of supervisors can expend the county's allotment of the primary road fund for the purchase of a right of way within the limits of such town.

In the consideration of all questions involving an interpretation of the primary road law this fact must be constantly kept in mind, namely, that the primary road fund is a fund made up not only of state funds but also of federal funds. It is of the utmost importance therefore that such funds be only expended for the purposes specified in the act or necessarily by implication included therein. By no strained construction can this law be construed to include the power to expend this fund for the purposes specified in your question.

The second question submitted by you is in substance as follows:

"Is the state highway commission and the board of supervisors obliged to make improvements within the limits of an incorporated town so as to conform to the grade established by the town council?"

The right to establish grades for streets and alleys within the limits of an incorporated town is expressly conferred upon the municipality. There is no provision of law which gives the highway commission or the board of supervisors the right to establish grades within such town.

The primary road law, however, provides that the board of supervisors may expend the county's allotment of the primary road fund for the purpose of grading and draining within the limits of such town. The right to use the primary road fund for such purpose was conferred by an amendment to the primary road law adopted by the 39th general assembly. The question then arises as to whether or not the board is required to expend this fund for the purposes specified in such a manner as to conform to the grades established by the city council.

In this connection it must be remembered that the primary road fund is a fund made up partially of state funds and partially of federal funds. The acceptance of the federal aid involved the acceptance of certain specified requirements. Among these requirements was one which required the approval of plans and specifications for all projects upon which this fund was to be expended. The plans and specifications for the project within the limits of an incorporated town likewise must be approved before the board of supervisors would be authorized to expend any part of such fund within such town.

It follows, therefore, that while the board of supervisors and the highway commission have no authority to establish grades within the limits of an incorporated town, yet before the board would be authorized to expend any part of the county's allotment of the primary road fund within the limits of such town the grades and all the other plans and specifications for the project must be approved.

BEN J. GIBSON, *Attorney General.*

DRAINAGE IN CITIES

The highway commission is not authorized to pay for grading and drainage in cities from primary road fund. May spend not to exceed 20 per cent annual allotment in paving cities.

February 1, 1922.

Mr. F. R. White, Chief Engineer, Iowa State Highway Commission, Ames, Iowa: This department is in receipt of your letter of the 18th of January, with the request for an opinion on the following question:

"In connection with the improvement of the River to River road through Jasper county, some very heavy grading work is required within the city limits of the city of Colfax. Yesterday, the mayor and the city solicitor of the city of Colfax were in the office in an effort to get a portion of this grading within the city limits of Colfax paid for from the primary road fund.

"The only law that permits the expenditure of any primary road funds within the limits of a city, is chapter 230 of the 39th general assembly. It has been our thought that this law did not apply to grading work, and that under this law, the primary road funds could be used only for paving, or possibly for paving and graveling of extensions of the primary roads within the city. The city solicitor, however, took the position that in his judgment the primary road funds could be used for grading extensions of primary roads within cities under the provisions of that law. He referred particularly to section 5 of chapter 230, acts of the 39th general assembly.

"Accordingly, we are writing to submit to you the following question: Do the provisions of chapter 230, acts of the 39th general assembly, authorize the expenditure of primary road funds for the payment of all or any portion of the cost of grading of extensions of primary roads within cities? We will be pleased to have your opinion in this matter."

The title of senate file 300 which appears in the acts of the 39th general assembly as chapter 230 thereof is as follows:

"An act to authorize the payment of a portion of the cost of paving extensions of primary roads within cities."

Section 1 of the act authorizes the payment for any or all of that portion of the improvement of extensions of primary roads by cities, which is not specially assessable on the property within the assessment district, and which would under the law have to be met by a tax on the city as a whole, from the primary road fund.

The sections referred to in said section 1 are 840-h to 840-r, supplemental supplement to the code, 1915, inclusive. An examination of those sections will disclose that they relate to the paving of highways leading into cities, the establishing of paving districts, resolution of necessity, etc.

Section 840-q refers to the establishment of a grade by the city council and further provides as follows:

"And no improvement provided for in this act shall be constructed.

upon any street, avenue or highway until the surface thereof shall have been graded so that such improvement when fully constructed will be in the established grade."

The language of this section needs no construction. It clearly provides that no improvement contemplated by the act of the 36th general assembly, of which sections 840-h to 840-r form a part, shall be made until the city council brings the street which it is proposed to improve to grade.

The head lines of section 5, chapter 230, acts of the 39th general assembly, are as follows:

"Election not required—grading and draining in cities."

In our opinion there is no authority for using the words "grading and draining in cities" at any place in chapter 230 above referred to. It is true that the latter part of section 5 is somewhat ambiguous and it might seem that it authorizes the payment of not to exceed 20 per cent from the annual allotment of the primary road fund for grading and draining within cities. It must be borne in mind, however, that the grading and draining referred to has reference only to primary roads and directions are found that in counties which have not authorized hard surfacing of primary roads the state highway commission shall give preference to such grading and draining projects.

It must also be remembered that streets, avenues or highways within cities are not a part of the primary road and the only improvement which is authorized to be done thereon and a part of the cost thereof paid from the primary road fund, is paving. It follows therefore that the latter part of section 5, to-wit,

"And not to exceed 20 per cent of the annual allotment of the primary road funds may be spent on projects within cities hereunder."

is intended to limit the amount which can be expended from the annual allotment of the primary road fund in any county to 20 per cent of such allotment in the payment of that portion of the paving of such streets, avenues or highways within cities in such county which have followed the provisions of sections 840-h to 840-r of the supplemental supplement to the code, 1915.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

OBSTRUCTION OF HIGHWAY

Way established under section 2028, code of 1897, as amended, is a public highway, and obstruction thereof is unlawful.

April 14, 1921.

Mr. T. A. Michels, County Attorney, Washington, Iowa: Your letter of April 12 addressed to this department is referred to me for answer. You state the following propositions:

"In the establishment of a road in this county, the question has arisen, if or not land taken under the above statute is public, in the sense that the person who gets the way from his farm to the public highway, can put a gate on the end and thus close the same.

"Some ten years ago, a land owner here, under the above statute, got a way out, to the main road, the costs were some \$700.00, he fenced the same, and is using the road up to the present time, when only a short while back, he put up a gate on the main road, and says, now that he bought this strip under this code section and can keep others out, but if

seems, that in *Jones vs. Mahaska, etc.*, 47 Iowa, 35, and again in *Miller vs. Kramer*, 148-160, our supreme court has held that this is public. It is my contention that under the theory of eminent domain, this can only be done where the public has an interest, and I can hardly see how the public would have an interest if they could not also use this narrow road if they so chose. However, council on the other side contends, that the public has an interest in that it is benefited to have, all people be able to get to the road, and thus be better able to use their land on which they live.

"The proceedings at the court house, here under which this way was granted, says 'For public purposes,' and if this road is not public it will be impossible almost for us to get our road through, for we had intended to use part of this way, and then extend the same, under the regular way of establishing roads, as is by law provided.

"In conclusion then, will say, who has title to this way out, to the main public road, at the present time, and can the person who had the same condemned and fenced, and paid for the costs of the same, exclude whoever he wishes, therefrom, to the extent, that he can close the gate, and put one on the main public road?"

The answer to your proposition will depend entirely upon whether or not the road in question is a public way established under the provisions of section 2028 of the code of 1897 as amended. If it is a public way it is unlawful for anyone to obstruct it either by placing a gate or fence across it or otherwise. You will, no doubt, recall that the district judge at each term of your court instructs the grand jury to investigate any complaint coming before it of the obstruction of public highways and informs them that anyone who obstructs a public highway in this state is subject to an indictment and prosecution therefor, so it seems clear that although the person mentioned in your letter might have paid the cost of a condemnation proceeding in the opening of the road in question, yet if the same was done under section 2028 of the code as amended that the highway became public upon the opening thereof and it would be unlawful for any person to obstruct the same.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

DUTY OF TREASURER OF STATE IN HANDLING PRIMARY ROAD FUND

Treasurer of state not required to keep record of counties allotment of primary road fund but when he has knowledge that any county has overdrawn its allotment he should mark any warrant presented to him as "not paid for want of funds."

March 22, 1921.

Hon. W. J. Burbank, Treasurer of State: You have requested from this department a written opinion upon certain propositions. In order to properly consider the same we deem it advisable to quote your letter in its exact terms. You ask:

"1. Are we required to know when a county's share of the primary road fund in our hands is overdrawn?

"2. If we have reason to believe that the claims and bills of a certain county are being paid out of money not received by the state and allotted to this particular county, what steps, if any, would we take?"

It will be observed that the second question relates to the apportionment to each particular county of the state of the primary road fund, and

it will be so considered. The two questions are so intermingled that in the opinion they must of necessity be more or less similarly united.

The 37th general assembly enacted what is known as the federal road aid act. This act is set out in full in chapter 249 of the acts of the 37th general assembly. This act was passed for the purpose of accepting the provisions of the federal road aid act. It will be remembered that congress, by an act approved July 11, 1916, adopted an act providing for aid to be given by the government of the United States to the several states for the construction of rural post roads and for other purposes. It was the intent of congress, and such intent is manifest in the act itself, to aid the several states in road building in proportion as such states would themselves aid in such purpose. Accordingly, as will be observed by referring to the acts of the 37th general assembly, our legislature enacted the necessary legislation to conform to the requirements of the federal act.

It will be observed that the legislature in this act took into consideration the funds which would be derived by the state from the motor vehicle road fund. At that time, however, the state had certain statutes relative to an apportionment of this fund among the several counties. This same principle of apportionment prevails in this act. Section 5 of the act is in words as follows:

"The state highway commission is hereby directed to apportion the federal aid provided for by the federal aid road act, among the several counties of the state, in the same ratio that the area of each county in the state bears to the area of the state."

Certain reports are required to be made by the state highway commission, one of which is that the commission shall notify the auditor of each county in writing the amount allowed to his county.

Before discussing this further, however, we desire to call attention to some other sections of the statute in order that the situation may be presented clearly. It will next be observed that the highway commission does not receive the funds but that the treasurer of state receives the funds, being authorized so to do by section 6, of this act. The treasurer of state, under section 6, is directed to open an account to be known as the federal county cooperation road fund, and to credit to such fund from time to time all federal aid received from the United States. This fund is a trust fund. The treasurer is directed to hold such fund for the sole and exclusive purpose of carrying out the provisions of the federal road aid act. The act goes further and says that this fund shall be used for no other purpose.

It will be observed from what has been said that first the aid is accepted; second that the highway commission apportions the fund; and third that the treasurer receives the fund. Through it all, however, it should be borne in mind that the fund is a trust fund held for a specific purpose.

It will next be observed that in order to comply with the provisions of the federal act, the treasurer of state is not only authorized, but he is directed to transfer from the motor vehicle fund an amount equal to the amount of the federal aid apportionment. The federal aid fund as thus added to becomes by this act the federal county co-operation road

fund and is covered by all the provisions above referred to relative to the trust character of the fund.

With these observations relative to the act of the 37th general assembly, and further tracing the history of this legislation, it will be observed that the 38th general assembly enacted what is known as the primary road law. This law is found in chapter 237 of the acts of the 38th general assembly.

Section 4 of this act provides for the primary road fund. This fund embraces the federal county co-operation road fund, to which reference has been made, and also the funds derived from the licensing of motor vehicles. This section further provides that the primary road fund shall be apportioned to the respective counties in the ratio that the area of the county bears to the total area of the state. It will be observed that this apportionment corresponds exactly with the provisions of the federal road aid act relative to the apportionment of the federal aid.

Before proceeding further it is advisable to consider chapter 275 of the acts of the 38th general assembly. This act is the act providing for the licensing and registering of motor vehicles. Section 35 of this act provides that the funds derived from the licensing of motor vehicles shall be forwarded by the county treasurers to the state treasurer. It further provides that 94 per cent of such money shall be apportioned among the several counties in the same ratio that the area of each county bears to the area of the state, said apportionment to be made by the treasurer of state. This act so far as the apportionment of the motor vehicle license fees is concerned is identical with the provisions of the federal road aid act and the primary road law as referred to.

These distinctions will be noted: first, that the apportionment of the federal aid is to be made by the highway commission; second, that the apportionment of the motor vehicle fund is to be made by the state treasurer; and third, that no provision is made as to who apportions the primary road fund. It will be observed, however, from a reading of these acts that the clear intent of the legislature was that the two funds should be united in a primary road fund, and such fund apportioned in the manner referred to. This will be referred to later.

Turning now to section 5 of the primary road law, it will be observed that the state highway commission shall open an account with each county of the state in relation to the primary road fund. The highway commission shall credit each county with its unused portion of the allotment of the federal aid and also with its allotment of the primary road fund. It is clear then, that the highway commission is to keep a set of books in which shall be kept an accurate account of the amount allotted to each county, charging each county the amount of warrants drawn against such allotment for work in such county and crediting such county from time to time with allotments of the federal aid and motor vehicle fees. The act further provides that the commission shall at all proper times keep each county fully informed as to the state of the account. The undoubted purpose of this provision is to keep accurate information of the condition of the account of each county not only in the office of the highway commission but also in the county.

Turning now to section 13 of this act it will be found that claims shall

be paid from the county's allotment, and warrants for the payment of such claims are to be drawn on the primary road fund.

I have been unable to discover any provision of the statute which requires the highway commission to keep the treasurer of state fully informed as to the state of the account of each county. Whether or not this was an oversight on the part of the legislature does not appear. However, the fact is present. The question arising then is the one submitted by you in your request for a written opinion.

The following provision of section 13 is squarely applicable to a consideration of this question. It is as follows:

"Upon the final approval of vouchers which are payable from the county's allotment of the primary road fund, such vouchers shall be forwarded to the auditor of state, who shall draw warrant therefor, and said warrant shall be paid by the treasurer of state from the primary road fund."

It will be noted from this section that the state treasurer is directed to pay the warrants from the primary road fund. He is not directed to pay such warrants from the county's allotment of the primary road fund.

Before proceeding further we desire to call attention to the provisions of the code of 1897, sections 104 and 105, as amended by the supplement to the code, 1913:

"He shall pay no money from the treasury but upon the warrants of the auditor, and only in the order of their presentation; or, if there is no money in the treasury from which such warrants can be paid, he shall, upon request of the holder, indorse upon the warrant the date of its presentation, and sign it, from which time the warrant shall bear interest at the rate of 5 per cent per annum until the time directed in the next section.

"He shall keep a record of the number and amount of the warrants so presented and indorsed for nonpayment, and, when there are funds in the treasury for their payment to an amount sufficient to render it advisable, he shall give notice to what number of warrants the funds will extend, or the number which he will pay, by three insertions in a newspaper printed at the seat of government. At the expiration of thirty days from the day of the last publication, interest on the warrants so named as being payable shall cease."

These two sections of the code will apply if the treasurer of state is limited in the payment of warrants to the amount of the allotment of any given county.

Before proceeding further it appears to us to be necessary to again refer to the federal road aid act of the United States. This act and its interpretation by the federal government is to a certain extent at least peculiar. As has been stated, the federal government helps the state in proportion as the state helps itself to build roads. Under this act the federal government each year apportions to the states the amount available for use in such state during the next succeeding year, the year commencing on July 1, in each instance and ending on June 30 of the succeeding year. It will be noted that the federal government, when it so certifies to the state of Iowa the amount of its apportionment, certifies the exact amount available under the act of congress for the succeeding year. Under the federal road aid act this money is not paid to the state either at the time of the issuance of the certificate referred to or on July 1, at the beginning of the year for which the funds are available. The act provides that the funds are not to be paid to the state until the state has

completed an improvement or purchased materials therefor. In other words the expenditure by the state must be made before the fund is actually received in the state treasury. This must have been considered by the legislature in section 5 of chapter 249, acts of the 37th general assembly. The legislature in this section provides for the apportionment of the federal aid. Now the federal aid is the amount which is certified and available for expenditure in Iowa. Each county under this act is entitled to its allotment of this federal aid. Our investigation discloses to us this, that the highway commission apportions this fund among the several counties on the first day of July, that is on the first day of the year for which the fund is available. The allotment thus made to the several counties of the state is then certified to the county auditors of the counties and becomes their allotment of the federal aid. However, as will be noted, the fund has not been received by the treasurer of state and will not be received until the work is completed or the materials purchased. Now note that the federal apportionment is made in the certificate which is received prior to the beginning of the year. Following this a little further we read in section 6 that the treasurer of state is authorized and directed to transfer from the motor vehicle road fund an amount equal to the amount of the federal aid apportionment to the state of Iowa for that year. One-half of this amount to be transferred on or about the first day of April and one-half to be transferred on or about the first day of August. This undoubtedly refers to the succeeding year so it will be noted that one-half of the amount so transferred by the treasurer of state is transferred prior to the apportionment made by the highway commission and half is transferred shortly thereafter.

We mention these facts, not that they are particularly applicable to the consideration of your two questions but to call attention to the fact that there is actually allotted to the counties in accordance with law, an amount in excess of the amount which is actually in the hands of the state treasurer.

However, from a reading of section 13, to which reference has been made, it will be noted that the highway commission has a perfect right to approve vouchers which are payable from the county's allotment of the primary road fund and forward such vouchers to the auditor of state who shall draw warrant therefor, and said warrant shall be paid by the treasurer of state from the primary road fund. No reference to the amount of the county's allotment in the primary road fund is made. It would seem to be clearly the intention of the legislature therefore to permit the treasurer to pay from the primary road fund for work in each county an amount equal to the county's allotment without reference to the amount of such allotment which is actually in his hands.

From what has been said it will be noted that there is no requirement of the law requiring the treasurer of state to keep an account with each separate county. The requirement so far as he is concerned is to keep the primary road fund, crediting such fund with receipts from the federal aid and with 94 per cent of the receipts from the motor vehicle fund. We have been unable to discover a single provision of the law which would lead to any other conclusion. It appears to us to be clearly the intent of the law that the highway commission is charged with the

duty of keeping the books of account with each county of the state, keeping the several counties informed of the condition of their account, crediting such accounts with the proper allotments and deducting therefrom disbursements made for the improvement of the highways in such counties. They are held strictly responsible for the correctness of such accounts and for maintaining the same in strict accord with the provisions of law.

However, in your questions you submit a provision that is entirely different. You ask the question, when you are informed that the allotment of a given county has been exhausted and warrants have been issued in excess thereof as to whether or not you would be justified in paying such warrants. We assume that you refer to the allotment and not to the amount of the allotment which is actually in your hands. In determining this question we should not only consider the provisions in the statutory law but we should also remember the character of this fund. It is a fund held in trust for the sole and exclusive purpose of carrying out the provisions of the federal road aid act. We need not enter into this question at length. It is clearly your duty, where you know that the allotment has been exhausted, to mark the warrants "not paid for want of funds." This is a duty incumbent upon you not by reason of any provision of the statute but rather it is a duty devolving upon you as a trustee in charge of public funds. Assuming that you have been informed that the amount of such funds allotted to a given county has been exhausted and that you know that such county's interest in such funds is no longer an existent fact, what should you do? Under such circumstances and conditions the county not being entitled to any of the funds in your hands, and you having full knowledge of that fact, you would necessarily be required to comply with the provisions of law relative to the stamping of warrants in cases where there is a lack of funds.

The question as to whether or not you are required to inform yourself of the condition of each county's allotment has already been answered. In connection therewith, permit us to observe that in our opinion you should call upon the highway commission asking them to keep you informed as to the condition of each county's allotment, so that you may have certain and definite information as to the condition of such allotment at all times. They will, under the law, be required to furnish you this information.

In this opinion, we have not overlooked section 24 of chapter 237 of the acts of the 38th general assembly relative to road certificates. These certificates are authorized and may be issued by a county in anticipation of the amount which will be received by such county from its several allotments for the current and succeeding years. For example, on January 1 there has been no allotment made to the county, yet the county under such circumstances can issue these certificates in anticipation. This was done for the purpose of permitting the county to anticipate allotments. It was not designed to anticipate the receipt of money which had already been allotted but was existent in the United States treasury and not in the state treasury. We mentioned this fact solely for the purpose of distinguishing and not that the matter is applicable.

BEN J. GIBSON, *Attorney General.*

PAVING OF STREETS OF TOWN SEEKING FEDERAL AID

A city council may extend the width of a proposed pavement to exceed 18 feet, but aid from the primary road fund, as provided for under the provisions of chapter 230, acts of 39th general assembly can only be obtained on a deficiency existing on the 18 foot slab.

September 14, 1922.

Mr. Albert Steinberg, County Attorney, Eldora, Iowa: I am in receipt of your letter of August 28, 1922, in which you request an opinion from this department. Your request is in words as follows:

"May I submit the following question for your opinion? Can a city which is seeking aid from the primary road fund for paving as provided by chapter 230, of the 39th general assembly obtain such aid where the special assessments would pay for a paving 18 feet in width?

"In other words, can the proposed paving be in excess of 18 feet and the city still receive the aid up to one-half the cost of an 18 foot slab although there would be no deficiency on a 19 foot pavement?

"Can the board of supervisors entertain a resolution in which the improvement proposed is in excess of 18 feet?"

The resolution of a city council should cover an 18 foot pavement as specified in chapter 230, of the acts of the 39th general assembly. There is nothing in the law which would prevent a city council by a separate and distinct resolution, or as a part of the same resolution, from extending the width of such pavement so that the ultimate width would exceed 18 feet. However, the resolution must be so distinct as to leave no room for doubt that the pavement proposed to be laid, and for which the appropriation is asked, is an 18 foot pavement.

Your letter states that "if the pavement proposed is not in excess of 18 feet, there will be no deficiencies." This being true, there could be no appropriation by the board under the provisions of chapter 230 of the acts of the 39th general assembly. It is only for deficiencies that the appropriation would be used. If there are no deficiencies, then there can be no appropriation.

BEN J. GIBSON, *Attorney General.*

USE OF PRIMARY ROAD FUND

Bridges may be built inside towns on primary road therein and paid for out of primary road fund.

May 8, 1922.

Iowa State Highway Commission, Ames, Iowa: I am in receipt of your letter dated May 5 in which you request an opinion from this department. Your request is in substance as follows:

"Section 4 of chapter 237, 38th general assembly provides that the primary road fund shall be expended solely for draining, grading, surfacing and maintenance of the roads of the primary road system, the elimination or improvement of railroad crossings and the construction and maintenance of bridges and culverts located on such primary system.

"Section 35 of chapter 237, 38th general assembly, as amended, provides that the improving by grading, draining, graveling or hard surfacing of roads or streets which are continuations of the primary road system within towns may be paid for from primary road funds.

"Would it be proper, under the sections above referred to or any other statute applicable, for the board of supervisors of Hardin county to pay for the construction of a bridge, costing approximately \$20,000.00, on a continuation of the primary road within the town of Alden? Plans have been prepared for the bridge in question and a letting is about to be

held. It is essential that the board know before awarding contract as to whether or not this structure may be paid for from the county's allotment of the primary road fund, therefore, an early reply will be greatly appreciated."

Section 3 of chapter 237 of the acts of the 38th general assembly in part provides as follows:

"The primary road system shall embrace those main market roads (not including roads within cities), which connect all county seat towns and cities and main market centers, * * *"

Under this provision the primary road system of the state includes that portion of primary roads within towns. The only part of the continuous highway known as the primary road which is not properly a part of the primary road system is that portion included within the incorporated limits of cities.

Section 4 of chapter 237 of the laws of the 38th general assembly as amended by chapter 20 of the laws of the 39th general assembly reads in part as follows:

"Said primary road fund shall be apportioned to the respective counties in the ratio that the area of the county bears to the total area of the state and shall be employed as herein provided, solely in the drainage, grading, surfacing and maintenance of the roads of the primary road system, the elimination or improvement of railroad crossings and the construction and maintenance of bridges and culverts located on such primary road system. The portion of said fund apportioned to each county as above provided, 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 improvements or the maintenance thereof."

Section 6 of chapter 237, acts of the 38th general assembly, as amended by chapter 20 of the acts of the 39th general assembly, provides with reference to the options each county may exercise through its board of supervisors in the expenditure of its allotment from the primary road fund as follows:

"First it may elect to complete the grading, construction of bridges and culverts and drainage of any part or all of the primary roads within the county before laying any hard surfacing, etc."

In our opinion these sections specifically authorize the county through its board of supervisors to pay for the construction of bridges wherever necessary to complete the primary road system proper and that therefore the board of supervisors of Hardin county can properly pay for the construction of the bridge referred to in your letter within the town of Alden.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

ALLOTMENT OF PRIMARY ROAD FUND

Highway commission cannot anticipate subsequent allotments. Highway commission can only appropriate 20 per cent of the annual allotment of a given application at a given time.

July 15, 1921.

Iowa State Highway Commission, A. J. ...: In a letter to this department dated July 9, 1921, you have submitted to this department for its opinion certain questions involving the authority of the commission under the provisions of chapter 230, acts of the 39th general assembly. Your request is at length and for the purposes of this opinion need not be

repeated herein. We quote only from your request the two questions submitted. They are as follows:

"First. Assuming that the allotment of the primary road fund to Wapello county for this year will be \$75,477.89, the same as last year, can the commission at this time legally make an appropriation from said allotment in the sum of \$25,483.41, all of said appropriation to be expended during this calendar year?

"Second. If the answer to the above question is in the negative, then assuming the allotment to said county to be the same as indicated above, can the commission at this time make an appropriation under said chapter in the sum of \$25,483.41 with the distinct provision that not to exceed 20 per cent of the total allotment for this year (approximately \$15,095.58) shall be actually expended this year, and that the remainder of the appropriation cannot be actually expended until after January 1 next."

Chapter 230, acts of the 39th general assembly is an act to authorize the payment of a portion of the cost of paving extensions of primary roads within cities. It is amendatory to sections 840-h to 840-r of the supplemental supplement to the code, 1915, as amended. The latter sections provide for the paving, graveling and hard surfacing of roadways within cities having a population of two thousand or more. These sections provide that such cities shall have power to establish paving districts to embrace such portions of the city as in the judgment of the city councils will receive special benefits from the construction, repair, improvement or reconstruction of such paved roadways.

They are given power to change the boundaries of such districts whenever in their judgment the same is necessary in order to be just and equitable to all the property specially benefited by such improvement. They are further authorized to assess so much of the cost of such paved roadway to the several lots or tracts of land contained in the paving districts where such improvements are made, as shall equal and be in proportion to the special benefits conferred upon the several properties and not in excess of such benefits and not in excess of 25 per cent of the actual value of said lots or tracts at the time of the levy of special assessments.

It is also provided that the city council, whenever it shall deem it advisable and necessary for the benefit of the city as a whole, to improve any roadway as stated, that it shall by resolution of necessity declare the advisability and necessity, state the streets, avenues or highways along which the improvement is to be made, the terminal points thereof, the one or more kinds of material proposed to be used, the width of the paved roadway, and further establish the paving district in which the lots and tracts of land, subject to special assessments are located, such tracts of land subject to special assessments to be determined in accordance with the provisions of chapter 7, title 5 of the code and acts amendatory thereto. In the resolution the council shall estimate the total cost of the improvement and shall state the proportion of such estimate to be assessed specially against each lot or tract of land in the district, the proportion to be assessed as against each separate lot or tract of land to be determined in accordance with the provisions of such act and also to be determined in proportion to the benefits, value, area, distance from the roadway and accessibility thereto. The law then provides for the plat and estimate which should precede the resolution of necessity, the pre-

liminary notes, the filing of objections and hearing thereon, the right to amend the resolution and the order to be entered providing for the construction of the improvement.

The law then provides that the city shall have power *after the completion of the improvement* to levy upon all taxable property, excepting moneys and credits, an annual tax for the purpose of paying that portion of the cost of such improvement not borne by the special assessments levied against the lots and tracts of land embraced in the paving district. It is provided, however, that all of the tax so levied shall not exceed in the aggregate ten mills in any one year and that in no event shall such cities be authorized or empowered to pay more than 50 per centum of the total cost of any such improvement out of such fund raised by the levy provided nor out of any other city fund. The city, however, is given power to anticipate the collection of the taxes in the manner provided by the law relating to bridge taxes. The law also makes so far as applicable the provisions of chapter 7, title 5 of the code and the supplements and acts amendatory thereto.

As stated, chapter 230 is amendatory to this law and provides that if in any city extensions of the primary roads are being improved or to be improved under the provisions of the law relating thereto that any or all of that portion of the improvement not specially assessable on the property within the assessment district and which would, under the law, have to be met by the city as a whole, may be paid from the primary road fund allotted to the county in which such city is located.

The same limitations, relative to the amount of the total cost of the improvement, applies with like force to cases in which such portion is to be borne by the tax alone and those in which all or a portion thereof is to be paid from the primary road fund.

The act sets out in detail the procedure to be followed. It provides what the resolution of application must contain, it provides for the filing of the plat and it further provides that the resolution and plat must show the primary road connecting with the improvement, the location of other streets and roads in the vicinity and the approximate boundaries of the assessment district which it is proposed to establish. After such procedure has been complied with, such city desiring to avail itself of the provisions of the chapter, submits the application provided for to the board of supervisors. The board may approve the application or may reject it. The right of appeal is given to the state highway commission which shall determine the matter on final review. *The commission may approve the application in whole or in part.* If so approved in whole or in part, the commission makes an appropriation or rather sets aside a certain part of the primary road fund, allotted the county in which such city is located, to meet the expenditure thus approved. In this connection, we call attention to the limitation hereinafter referred to. The commission immediately after its action notifies the city council and the board of supervisors of its determination. If approved as stated, the plans and specifications for the improvement must be submitted to the highway commission for its approval. This must be done before the contract is let, in fact, the contract itself must be so approved before becoming effective as a contract. The payment from the primary road fund is only

to be made when the work itself or a substantial portion thereof, at least, is completed to the satisfaction of the highway commission. Where only a substantial portion of the work is completed, the highway commission shall only pay a pro rata share to be determined by such commission. Such payments are to be made in the ordinary way in which payments are made under the primary road law.

We have made this brief statement of the law in order that the law as a whole may be considered in determining the very vital question presented by you. After so providing as stated, the law further provides that "not to exceed 20 per centum of the annual allotment of the primary road fund may be spent on projects within cities hereunder."

The allotment of the primary road fund is made by the highway commission and is in proportion to the area which a county bears to the area of the entire state. This allotment is made from time to time, based upon reports received from the federal government and on reports received from the state treasurer in accordance with the terms and provisions of the motor vehicle law of the state. The primary road fund consists of 94 per centum of the entire receipts from the motor vehicle law plus such amount as may be allotted to the state of Iowa under the provisions of the federal act providing for aid to states in the construction and improvement of post roads, the federal government in effect matching each dollar expended by the state for the improvement of the primary road system. The primary road fund in the possession of the state is a single fund, the highway commission carrying on its books the several allotments made in the manner stated to the several counties of the state.

The allotment to each county is carried in a separate account, all payments properly chargeable to the primary road fund as made in such county being charged against such account and all additional allotments made from time to time added thereto so that at all times there is a certain definite credit to the account of each county in the primary road fund. For example, Wapello county has an annual allotment of \$75,477.89. This allotment is credited on the books of the highway commission to Wapello county. In the ordinary course of events and if each county in the ordinary course of business could perform the work within its county, each county's annual allotment would be used during the year so that at the end of the year the books would be square. However, in practical working out, this is not true, some counties using more money in one given year than others and some counties not using more than a small portion of its allotment. However, for the purpose of this opinion the general rule may be assumed to be true and that in fact a county has a given amount of the fund to expend during a given year. Chapter 230 provides for the expenditure of 20 per cent of such allotment in the city providing the provisions of the chapter are complied with and the plan approved by the highway commission. The other 80 per cent of the allotment is to be expended in the ordinary way by the board of supervisors unless of course other cities and towns with like rights in the county should make similar improvements and be entitled to their proportionate share of the primary road fund. Chapter 230 contains no provision for the anticipation of subsequent allotments, in fact, the highway

commission is directed to make an appropriation from the allotment on hand at the time of the approval of the plan. Such allotment would be in the ordinary course of events the annual allotment less such payments as might have been made therefrom under the primary road law. These facts coupled with the express provision of the statute that the amount to be expended on a given application or project shall not exceed 20 per centum, leaves no doubt as to the intention of the legislature to, in effect, provide that 20 per cent of such annual allotment is available for the purposes provided in the chapter. It follows, therefore, that the amount which the highway commission can appropriate upon a given application at a given time, is 20 per cent of the annual allotment of a county. In the case of Wapello county, this will be \$15,095.58.

It has been contended that the commission has the right to anticipate under the provisions of the primary road law relative to anticipating one year's allotment in cases of improvements to the primary roads under section 24 of the primary road law. That this provision does not apply to the given situation is apparent when we consider that chapter 230 does not make available the provisions of the primary road law to such chapter. It only makes available for the purposes of the chapter a portion of the primary road fund, and further by reason of the fact that section 24 only applies to those projects approved by the board of supervisors in accordance with the primary road law and being made by such board of supervisors under the primary road law. The work under chapter 230 is under the control of the city councils. In fact, the board of supervisors has no interest in the matter at all after approving or rejecting the plan in the first instance. All bills are approved by the city council and forwarded to the highway commission direct without reference to the board of supervisors.

Without extending this opinion further, suffice it to say that we are unable by any reasonable construction to hold that the highway commission has any right or authority in the matter save and alone to set apart, under given circumstances, not to exceed 20 per centum of the annual allotment of a county. It follows therefore that both your questions must be answered in the negative. BEN J. GIBSON, *Attorney General.*

HIGHWAY COMMISSION CAN DESIGNATE PRIMARY ROADS

Highway commission can designate a road as a primary road without the consent of the board of supervisors of a county in which the road is located.

July 21, 1922.

Mr. Arthur Lund, County Attorney, Tipton, Iowa: You have requested an opinion from this department on the proposition of whether or not the highway commission can designate a road as a part of the primary system even though the board of supervisors of the county fails to approve, and objects to the designation of such road as a primary road.

Chapter 237 of the laws of the 38th general assembly provides for the establishment of the primary and secondary road systems. It is provided in section 3 of that chapter that:

"The primary road system shall embrace those main market 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 of chapter 249 of the laws of the 37th general assembly of the state of Iowa, accepting the provisions of the act of congress approved July 11, 1916, known as the federal aid road act; provided, that the said designation of the roads shall, for more efficient service or more economical construction of the system, and with the consent of the federal authorities, be subject to revision by the state highway commission. Any portion of said primary system so eliminated by any change shall revert to and become a part of the system from which originally taken. The state highway commission may, for the purpose of affording access to state parks and recreation centers within a county add such road or roads to the primary system of said county as the board of supervisors may specifically designate and request."

It will be noted that the fore part of the paragraph specifies the roads that shall constitute the primary road system, "provided that the said designation of the roads shall, for more efficient service or more economical construction of the system and with the consent of the federal authorities, be subject to revision by the state highway commission." This phrase specifically authorizes the highway commission, with the consent of the federal authorities, to change any portion of a road designated as a primary road, when, in its judgment it would be beneficial and more economical so to do. There is no provision anywhere which requires that the board of supervisors shall have a voice in determining the final location of a primary road. True, the last sentence of the paragraph quoted provides that the highway commission *may* add such road or roads to the primary system of the county as the board of supervisors may designate and request, in order to afford access to state parks and recreation centers within the county. This, however, does not require the highway commission to grant the request of the board of supervisors in such matters.

It is the opinion of this department that the highway commission can designate a road as a primary road without the consent and approval of the board of supervisors of a county in which such road is located.

BEN J. GIBSON, *Attorney General*,

By NEILL GARRETT, *Assistant Attorney General*.

INTEREST ON PRIMARY ROAD CONTRACT

Discussion of the question of the time when the balance due contractor for primary road work begins to draw interest.

May 23, 1922.

Iowa State Highway Commission, Ames, Iowa: Your letter of the 17th inst. addressed to Mr. Gibson has been referred to me for attention. Your letter is as follows:

"Will you please give us the opinion of your department upon the following question?

"Is a contractor who has completed the construction of a primary road improvement entitled to interest from the date his work is completed and accepted until the date of actual payment of his final estimate?

"In connection with the foregoing question, your attention is called to section 67 of pamphlet B, said pamphlet being a part of the standard specifications for federal aid and primary road work."

Section 67 of pamphlet B referred to in your letter is as follows:

"Final acceptance by the board and commission is stipulated to mean a written acceptance by the board and commission followed by final payment in accordance with the engineer's final estimates. It is expressly

stipulated that the board and commission shall make final acceptance and payment promptly after the contract has been completed and the road approved."

As we understand it there is no provision in the contract for the payment of interest and under the paragraph of the specifications above quoted payment would be required within a reasonable time after final acceptance and unless so made the contractor would ordinarily be entitled to interest by reason of default as damages. In other words, interest would be allowed as compensation to the contractor and as a penalty against the debtor for failure by the latter to pay the sum due at the time it is due. This is the general rule but there are of course exceptions thereto. If the failure to pay by the debtor is due to the fault of the contractor or if the amount due is not definitely known and time is required to ascertain the exact amount due default would not occur until the amount due is definitely ascertained from which time interest would be properly allowed.

Answering your question directly, if at the time of final acceptance there is a dispute between the contractor and the board or commission as to the amount due and the board and commission stand ready and willing to pay a definite sum which the contractor will not accept because of a claim on his part that it is not sufficient, and it finally develops that the amount tendered by the board and commission is the proper amount and the contractor agrees thereto, the contractor would not be entitled to interest until the time the amount was definitely agreed upon allowing a reasonable time to make the payment thereafter.

BEN J. GIBSON, Attorney General,

By B. J. FLICK, Assistant Attorney General.

AUTHORITY OF HIGHWAY COMMISSION OVER CONTRACTS OF SUPERVISORS

Roads and highways—Discussion as to whether or not Iowa state highway commission is vested with power to refuse approval of contract where contract has been let by board of supervisors and every requirement of the law has been complied with.

March 31, 1922.

Iowa State Highway Commission, Ames, Iowa: In your letter dated March 28, 1922, you request an opinion from this department relative to the interpretation to be given certain sections of the primary road law. Your request is in words as follows:

"Chapter 237, of the 38th general assembly (known as the primary road law) placed the letting of all contracts for primary road work in the hands of the county board of supervisors of the county in which the work is located. This law further provides that after such contracts have been awarded by the county board, they must receive the approval of the state highway commission before becoming effective as contracts.

"We wish to submit to you the following question with reference to the approval of such contracts:

"Assume that a contract has been awarded by the county board, for some paving work; that the plans and specifications for this work have been prepared by the commission or have been checked and approved by the commission, and hence are entirely satisfactory to the commission; that the type of paving to be used is satisfactory, and the price for the work is as low or lower than prevailing market conditions, so that so far as the price is concerned, the contract is entirely satisfactory, and

that all the requirements of the law have been fully complied with by the county board, so that there has been no violation of the statute in relation to the letting of the contract. Assume further, that there are objections among residents of the county to proceeding with this improvement, and that the owners of a majority of the acreage within the assessment district have expressed their objection to this improvement at this time, and have appealed to the commission to disapprove the contract. Has the commission legal power to disapprove this contract solely because of the objections by the property owners or is this a matter wholly within the jurisdiction of the county board? If the commission should disapprove a contract on such grounds, in your judgment, could the contractor, or the county, or other interested party, compel the commission by mandamus to make approval thereof?"

The manifest purpose of the legislature in enacting the primary road law was to create a system of highways of approximately a similar grade, designed on similar plans, state wide in continuity and yet within the limits provided by the law to leave the discretion as to policy with the several counties.

In order to attain the results sought the highway law provides that the board of supervisors of the county shall have certain powers and the highway commission of the state certain powers. In this dual relationship a careful reading of the entire law will convince that in matters of policy the counties acting through their boards of supervisors are supreme, while in matters of technique the highway commission is in control and supervises.

With this brief statement of the general purpose of the act we turn to a consideration of the very question submitted.

In the question submitted it appears that every requirement of the law has been complied with preliminary to the final approval of the contract by the highway commission. It appears that the resolution of the board of supervisors creating the assessment district was duly adopted and approved by the commission. It further appears that the plans, specifications and estimates were prepared by the commission in conformity to the law, approved by the United States government and duly filed; it further appears that advertisements for bids were made and bids received all in conformity to law; it further appears that the contract has been let by the board of supervisors all as provided by law. The sole act remaining to be done is the approval of the contract by the state highway commission.

There is no doubt but that under this section the highway commission is vested with certain discretionary powers. Undoubtedly the highway commission may refuse approval of a contract where the price is excessive or where the contract does not comply with the plans, specifications and estimates or where any provision of the law has not been complied with.

The serious question arises when a situation is presented such as that presented in your letter, namely, if all the requirements have been met, if the price is reasonable and if the board has in fact let the contract then can the highway commission arbitrarily and without any reason disapprove the contract?

It is a universal rule of law that a board or commission vested with discretion cannot arbitrarily abuse that discretion. It is also a uni-

versally recognized principle that courts will interfere to prevent an abuse of discretion. If it be assumed that there is a discretion in the commission still that discretion must be exercised within the limits prescribed by the legislature. To arbitrarily refuse approval of this contract would, in our opinion, be an abuse of any discretion which may be vested in the highway commission. The commission has ruled or found that there is no legal objection to the contract and no reason to disapprove it, certainly under such conditions the county would not be helpless but might properly compel an approval.

It is therefore the opinion of this department that the commission cannot arbitrarily refuse to approve a contract entered into in conformity to the law where every requirement of the law has been met and where the price is reasonable.

This opinion must not be construed as extending further than to answer the very question submitted. BEN J. GIBSON, *Attorney General.*

USE OF BRIDGE FUND

Board of supervisors cannot borrow from bridge fund and use same on the public highways.

February 27, 1922.

Mr. Earl W. Vincent, County Attorney, Guthrie Center, Iowa: You have submitted to this department for an opinion the following state of facts:

"The road fund of this county is overdrawn several thousand dollars. A bridge fund of the county has in it at the present time several thousand dollars which will not be needed for a year or more."

You then ask:

"The board of supervisors desire to borrow these funds from the bridge fund to be used in the road fund temporarily, or in other words, for a period of about one year if the same can be done without any violation of the law. If they can do this it will do away with the necessity of issuing bonds at this time with which to pay the present overdraft in the road fund."

It is a general rule of law that where the board of supervisors is authorized to levy a tax for a specific purpose and a limit is placed on the amount which may be levied, that such limitation is equivalent to a provision that no greater amount than is raised from such taxation shall be spent for that specific purpose. The reason for such a rule is apparent. If the board of supervisors, at its pleasure, could transfer from one fund to the other it would in effect break down the distinction existing between the different funds of the county, and would enable the board of supervisors to spend for one purpose practically all the money raised by taxation for the various county purposes.

To the foregoing rule, however, the legislature has provided a few exceptions. As bearing on the question at issue, the legislature has expressly provided, under section 429 of the code, the following:

"Whenever any county in the state is free from debt, and has a surplus in its bridge fund, after providing for the necessary repairs of bridges in said county, the board of supervisors may, out of such surplus, make improvements upon the highways, upon the petition of one-third of the resident freeholders of any township in said county; but in no case shall they be authorized to run the county in debt for such improvement of the highways; and whenever they shall make such im-

provements, they shall let the work by contract to the lowest responsible bidder, after having advertised for proposals, in some newspaper printed in the county, for not less than fourteen days previous to the letting of said contract."

Except as found in section 429 just quoted, I can find no statutory authority for using any part of the bridge fund upon the public highways except for bridge or culvert purposes.

It necessarily follows, therefore, that no part of the bridge fund may be legally diverted and used for road purposes, even though its use is of a temporary character and in the nature of a loan.

BEN J. GIBSON, *Attorney General*,

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

RIGHT TO REPLACE VIADUCT

No city council or board of supervisors can deny to a future council or board the right to build such viaducts as are necessary, or preclude contribution for expense of same from railroad company, contracts to the contrary notwithstanding.

January 17, 1922.

Mr. J. H. Ames, Bridge Engineer, State Highway Commission, Ames, Iowa: You have requested the opinion of this department on the proposition as to whether or not a contract entered into by and between the town of Fort Dodge, the board of supervisors of Webster county, and the Minneapolis and St. Louis railroad company in 1904 for the building of a viaduct over the railroad tracks which cross the primary road No. 16, extending north out of Fort Dodge, precludes the county and city from exacting any financial assistance from the railroad for the construction of a new viaduct at the same place. The section of the contract which is pertinent is as follows:

"Said viaduct shall be at all times the property of said city and county; the extent or proportion of such ownership to be determined between themselves, or their proper representatives; and they shall at all times be charged with and responsible for the maintenance thereof; it being understood and agreed that the said railroad company in consideration of the payment of said sum of two thousand seven hundred and fifty dollars, shall be and is hereby released from any and all liability to construct, replace, maintain or repair a viaduct at said crossing."

It will be observed by the terms of the section just quoted that in consideration of the payment by the railroad of the sum of \$2,750, the railroad company was released from any and all liability to construct, replace, maintain and repair a viaduct at that particular crossing.

Insofar as the old viaduct is concerned, it is our opinion that the provisions of the contract in the paragraph set out above are good, but we do not believe that a board of supervisors or a city council may so hamper and interfere with the authority and power of a later board or council by making a contract operative in the future, as is this one. No city council or board of supervisors can deny to a future council or board the right to build another viaduct under the statute, and preclude the statutory right to contribution for the expense of same, from the railroad company. Such action would be *ultra vires*, and against public policy.

It is therefore our opinion that a new viaduct under proper circumstances, may be erected in place of the old one, and that the railroad

company may be required to contribute to the expense incurred in the erection of such viaduct.

You also present the following proposition for our opinion:

"One further point in connection with this matter; in the event that it was proposed to go ahead with the construction of the new viaduct and we could not secure the consent of the railroad company to bear a fair portion of the cost would the board of railroad commissioners upon proper petition and proceedings, have jurisdiction to determine the necessity for the new construction and to determine upon a distribution of cost to be borne by the respective parties other than that set forth in the copy of the agreement attached?"

As we gather it from your letter, the proposed viaduct will be located partly within the city and partly outside the city. That situation presents a double proposition for consideration. Section 770 of the code, as amended by chapter 106 of the 38th general assembly, gives to cities having a population of five thousand or over the power to require any railroad company to erect, construct and maintain a viaduct along any street in the city, under certain conditions. It is also provided that no viaduct shall be required until the board of railroad commissioners shall after examination determine the same to be necessary for the public safety and convenience, and the plans of said viaduct approved by said board.

The part of the viaduct which is outside of the city limits would come under the jurisdiction of the county. It is provided in section 2017 of the supplemental supplement to the code, 1915, when there is a controversy between the board of supervisors and the railroad company as to the necessity for a viaduct and as to the division of the expense of erecting same, that the matter should be referred to the board of railroad commissioners of the state, upon the application of either, and that such board, after a full hearing, shall have authority to make such orders in respect thereto as are equitable and just. It is our opinion that the city and the county should get together and start the necessary machinery as prescribed in the section of the code indicated, and then file their application with the board of railroad commissioners for a hearing. The board will then hear the case of both the city and the county, either separately or jointly, and make its findings accordingly.

It is, therefore, our opinion that the board of railroad commissioners have jurisdiction to hear and pass upon the matters involved as prescribed in sections 770 of the code, and 2017 of the supplemental supplement to the code.

BEN J. GIBSON, *Attorney General*,
By NEILL GARRETT, *Assistant Attorney General*.

ACQUIRING OF RIGHT-OF-WAY OF HIGHWAY THROUGH ORCHARDS, ETC.

County cannot condemn right of way through orchard or ornamental grounds contiguous to dwelling at time shortly after fire destroying dwelling, when owner expects to rebuild—nor can railroad commission compel railway company to move tracks and acquire additional right of way to permit right of way acquisition by county.

January 20, 1922.

Iowa State Highway Commission, Ames, Iowa: We are in receipt of

a communication from Mr. J. H. Ames, Bridge Engineer, requesting an opinion from this department on certain questions submitted. His letter is as follows:

"Confirming our conversation of January 11th I am submitting to you for advice certain legal questions that have come up concerning the jurisdiction of the railroad commission and the rights of the board of supervisors of Polk county to procure right of way required to effect a road change known as crossing project 331, (West School House Crossing) in section 29, Delaware township, Polk county, Iowa.

"There are several questions involved and in order to present these matters to you for advice I am enclosing a blue print copy of a plat upon which I have indicated certain topographical features that may affect your decision. I have indicated in red on the attached plat the location of the railroad tracks as they exist at this time as well as the right of way limits of the railroad company as they exist at this time. I have indicated in yellow the proposed location of the railroad track as well as a possible extension of their right of way north of their present right of way limits. The questions upon which we would ask your advice are as follows:

"First: Can the board of supervisors of Polk county under existing statutes condemn a right of way for highway purposes through the orchard and ornamental grounds in approximately the location as indicated in brown on the attached print? It should be mentioned that the house, which for a number of years existed at approximately the location shown on the plat, is now nonexistent due to a fire which occurred a few months ago. Other barns and sheds are located on the small tract of ground adjacent to the orchard. It is our understanding that it is the intention of the property owner at some time in the near future to replace this house which burned down, in approximately its former location.

"Second: Can the board of railroad commissioners under existing statutes and upon proper petition and hearing require the railroad company to move their tracks to an approximate location as shown in yellow on the attached plan, which relocation of the track might involve the necessity of their securing additional right of way adjacent to right of way now owned by them. If the tracks were moved as contemplated the grade crossing marked A on the attached plat can be abandoned as a public crossing but the crossing marked B will need to be left open as an existing grade crossing for traffic originating north and west of the proposed improvement.

"The above implies a consideration of the general question of whether or not the railroad commission has jurisdiction in compelling the railroad company to change or alter their tracks and to compel them to participate in the expense necessary to eliminate a crossing from their lines as well as to improve a crossing which cannot be eliminated.

"It should be noted in connection with the above that the two present grade crossings are dangerous crossings and are located upon a part of the primary road system of Polk county which is likely to be improved by hard surfacing in the near future.

"We would not urge your department to give careful consideration to the points involved in question No. 2 were it not for the fact that it is a point which has come up before in connection with crossing improvements in other parts of the state and it is one which will come up in a number of crossing cases which will be before the railroad commission on appeal this year. If the railroad commission has no jurisdiction in cases of this kind it would until corrective legislation could be secured affect our plans for highway improvement in a number of instances.

"We would appreciate your early advice in these matters."

We note that Mr. Ames states that the owner of the land where the house was recently burned contemplates rebuilding on the same site. This would of course preclude establishing a right of way through his

orchard and ornamental grounds without an agreement on his part. The public certainly could not take advantage of the misfortune of the owner of this land in the loss of his house and establish a right of way across his ornamental grounds and through his orchard during the time between the destruction and rebuilding of his dwelling house.

The second question in our opinion should be answered in the negative. The statement in the letter of Mr. Ames, which is verified by an examination of the plat, is to the effect that the tracks of the interurban railway would have to be moved and a new right of way acquired by them for that purpose. This, in our opinion, the railroad commission is without authority to order.

BEN J. GIBSON, *Attorney General.*

By B. J. FLICK, *Assistant Attorney General.*

WHAT CONSTITUTES AN ORCHARD

What constitutes garden, orchard, ornamental ground question of fact in each case.

January 30, 1922.

Iowa State Highway Commission, Ames, Iowa: This department is in receipt of a letter from Mr. Coykendall, an engineer in the employ of your department, as follows:

"We are enclosing herewith a plat showing conditions in section 18, township 88 N., range 25 W., Hamilton county, Iowa, where a proposed relocation of the primary road necessitates acquiring new right of way.

"You will note from the plat that the right of way required on the proposed location will take three apple trees at one spot near the river bank, and two apple trees at a point near where the proposed right of way leaves the present right of way. The location of the apple trees in question has been shown by red dots on the blue print.

"Thus far the land owner has been unwilling to name a price for this additional right of way that the Hamilton county board of supervisors feel is fair, and the board is considering resorting to condemnation proceedings to acquire this necessary right of way.

"We would appreciate having you advise us whether, in the opinion of your department, the apple trees that must be sacrificed by the alignment which we are proposing, could be considered an orchard, thus preventing the securing of this right of way through condemnation proceedings. You will note that the property owner has quite a considerable orchard north and west of his buildings.

"We consider the proposed relocation very necessary, as it seems to be the only location available where it will be possible to secure right of way and get a good alignment on the approaches to the new bridge which we propose to construct."

Attached to the above letter is a plat, which we return herewith, and which shows that the proposed change in the highway when constructed will destroy five apple trees on the premises of the land owner in question. An examination of the plat will disclose that the orchard on these premises is located north and northeast of the dwelling house. The trees in question are located south and west of the dwelling house and do not appear to be a part of the orchard and if the plat presents the true situation it does not appear that the apple trees would be protected as a part of the orchard.

It may be that they constitute a part of the ornamental grounds con-

tiguous to the dwelling house and if this is true they would be protected against the establishment of a highway.

It is very difficult to pass judgment on the question as submitted because of the fact that the question of the existence or non-existence of an orchard is one in which the law depends so much upon the facts of each particular case.

The supreme court of Iowa in the case of Rubel vs. McAdon decided on January 11, 1921, and reported in 180 N. W., on page 394, said that:

"It cannot be said under the law or the facts of this case that a few small grape vines, four or five small ailanthus trees, a row of rhubarb and small blackberry bushes with cucumbers and melons planted in close proximity thereto, suffice to make either a garden, orchard or ornamental ground."

Of course, you are familiar with the provisions of section 1487 of the code of Iowa prohibiting the establishment of a road through any garden, orchard or ornamental ground contiguous to any dwelling house without the consent of the owner and that there is a similar provision with reference to the establishment of primary roads.

The question of what constitutes a garden, orchard or ornamental ground is of course one of fact although it would seem under the decision of the supreme court above cited that the court might determine the question of fact as a matter of law.

These matters are usually adjustable through an agreement with the owner and of course if the owner consents controversy is at an end.

BEN J. GIBSON, *Attorney General*.

By B. J. FLICK, *Assistant Attorney General*.

CONSTRUCTION OF BRIDGE OUTSIDE OF COUNTY

County not authorized to pay for construction of bridge outside territorial limits except in certain instances.

December 21, 1921.

Hon. Glenn C. Haynes, Auditor of State: This department is in receipt of the following letter signed by the auditors of Clinton and Scott counties under date of December 13th:

"Scott and Clinton counties have a county line problem on which we would like your opinion. We realize that this question should probably be submitted to the county attorneys of the respective counties, but inasmuch that the boards of supervisors desire your opinion and inasmuch as this matter is also a problem of the Iowa state highway commission, we feel that you will grant our request in the instance. The Wapsipinicon river is the boundary line between Scott and Clinton counties over a greater part of its course, various bridges have been constructed over this boundary line and, as in recent years it has changed its channels requiring new bridges within the respective counties, the old bridges, however, remaining. The primary roads leading north from Davenport will cross bridges over these new channels and inasmuch as the county line bridges over the old channels can now be reduced in size, it was felt that in bridging the various channels over the river the two counties should each bear one-half of the cost of constructing all these bridges.

"The boards desire to know whether an agreement on the part of these boards to pay one-half of the cost of the various bridges necessary to bridge the Wapsipinicon river would be legal, it being apparent that it is to the best interest of both counties that such agreement be made."

We are directing our reply to this letter to you because of the rule

which prohibits this department from advising any except officers of the state of Iowa, but we are forwarding a copy hereof to the auditors of Clinton and Scott counties.

The powers of boards of supervisors are specified in section 422 of the supplemental supplement to the code, 1915. Among the powers therein enumerated will be found the following:

"Par. 18. To provide for the erection of all bridges which may be necessary, and which the public convenience may require, within the respective counties, and to keep the same in repair, except as is otherwise provided by law."

Ordinarily money raised by the taxation of property within the county for the purpose of constructing and maintaining improvements can be spent only within the territorial limits of that county. Unless there is some express statutory authority for paying for bridge construction outside of the boundaries of the county the board of supervisors would not be authorized to contract for the expenditure of county funds on a construction of a bridge unless the same is located wholly within the county.

Section 424-a of the supplement to the code, 1913, makes an exception to this rule in authorizing the construction of bridges across streams of water which form the boundary lines of this state under the procedure set out in the sections immediately following section 424-a.

Chapter 107, acts of the 39th general assembly, provides as follows:

"The board of supervisors of any county may appropriate for the construction of any one bridge within the limits of such county a sum not to exceed fifty thousand (\$50,000.00) dollars 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 twenty-five thousand (\$25,000.00) dollars.

"The term 'bridge' as used in this section shall be held to include substructure, superstructure and approaches."

This act authorizes the board of supervisors to make an appropriation for the construction of a bridge on a county line.

Section 426 of the code of 1897 is as follows:

"Whenever a county line road intersects a stream of sufficient width to require a county bridge and the point of intersection does not afford a suitable site for the construction thereof, and there is a good site for its erection wholly within one or the other of said counties, at a reasonable distance from the county line, the boards of supervisors of the respective counties to be benefited by said bridge may make the necessary appropriations for the construction and maintenance thereof, as they might do if said bridge was located on the county line."

This section is the only provision for the construction of a bridge outside the limits of a county which authorizes the construction and maintenance thereof to be paid for by appropriations by the board of supervisors and a reading of the section will disclose that it applies only in cases where a county line road intersects a stream of such width to require a county bridge—that is to say, where a county line road constitutes the boundary between two counties.

There is no specific statutory authority for the board of supervisors of Scott county to pay for the construction of a bridge across the channel of a stream in Clinton county or to contribute to the cost of the construction thereof unless such stream constitutes the boundary between Scott and Clinton counties. Of course, the same limitation applies as to the power of the board of supervisors of Clinton county.

It is the opinion of this department, therefore, under the facts submitted in the above letter that the boards of supervisors of Scott and Clinton counties have not the authority to make the agreement contemplated because of lack of specific legislative authority.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

HARD SURFACING PRIMARY ROAD ON COUNTY LINE

Primary road on county line cannot be hard surfaced unless both counties have voted for hard surface.

October 18, 1921.

Mr. F. R. White, Chief Engineer, Highway Commission, Ames, Iowa: You request an opinion from this department upon the following statement of facts:

"In case a primary road is on a county line, one of the counties having authorized its board of supervisors to proceed with the hard surfacing of its primary road system, and the other county not having authorized its board to proceed with such work, can such county line primary road legally be hard surfaced and the necessary special assessments collected on the property in that portion of the assessment district within the county which has not authorized the hard surfacing of its primary road system?"

It has heretofore been the ruling of this department that no hard surfacing can be done on any highways in any county without a vote of the people. Section 36, chapter 237, acts of the 38th general assembly, merely provides for hard surfacing roads in the primary system which are located on or near the boundary line between two adjacent counties. Of course, this must be construed in connection with the rest of the statute, and if one of the counties has not voted for hard surfaced roads, then no roads can be hard surfaced in that county, and this regardless of the fact that it adjoins a county in which the people have voted for hard surfacing.

The only way I could see for the county which has voted for hard surface to hard surface a road on a county line, when the adjoining county has not voted for hard surface, is by adding a sufficient width to the present road so as to include all of the road along a boundary in the county which has authorized such improvement.

BEN J. GIBSON, *Attorney General*,

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

INTEREST ON WARRANTS ON PRIMARY ROAD FUND

Warrants drawn under the authority of latter part of section 13, chapter 237, 38th general assembly, draw interest from date of presentment to county treasurer for payment.

August 23, 1921.

Iowa State Highway Commission, Ames, Iowa: This department is in receipt of the letter of your auditor, Mr. C. R. Jones, under date of August 18, 1921. You state:

"The highway commission requests the opinion of your department as to the following points:

"1. Assuming that pursuant to the provisions of chapter 237, 38th gen-

eral assembly, and particularly section 13 thereof, duly approved voucher claims, payable at the office of the county treasurer, have been forwarded to the county auditor, that the county auditor has drawn warrants upon the primary road bond fund in payment thereof, but the county treasurer does not redeem such warrants upon presentation for the reason that neither bonds nor the proceeds of bonds have yet been made available.

"(a) Will such warrants draw interest?"

"(b) If so, at what rate, and from what fund should such interest be paid?"

"2. Assuming that claims are payable from special assessment fund, and that neither special assessment certificates nor proceeds thereof have as yet been made available.

"(a) Will such warrants draw interest?"

"(b) If so, at what rate, and from what fund should such interest be paid?"

"3. Assuming that claims are payable in road certificates in anticipation of future allotments and such certificates have not yet been issued under provisions of section 24, chapter 237, 38th general assembly.

"(a) Will such warrants draw interest?"

"(b) If so, at what rate, and from what fund should such interest be paid?"

An answer to your question will justify a discussion of the origin and history of interest. The custom of taking interest in return for the use of money has existed for so long a time that the earliest recorded history makes mention thereof. It is referred to in the Bible as "usury." In the early times it was looked upon with great disfavor, and was prohibited with severe penalties under the old Mosaic law, and also by statutes under the early English law. It was condemned by the church, but the lenders of money adhered to the custom so tenaciously that in the natural course of events their justification for demanding some compensation for the use of money became apparent, and was enacted into the English law in the form of a statute in 1545, by 37 Henry VIII, chapter 9.

After the enactment of this statute the feeling against the taking of interest for the use of money subsided, and the courts from time to time recognizing the justice of a compensation for the use of or withholding of money, allowed interest, not alone for the use of money, but for money due as a result of contract, and finally, on liquidated accounts.

In some jurisdictions it is still true that interest cannot be recovered except it be authorized by statute. In Iowa the supreme court has had occasion to pass on a question very similar to that presented by you. The earliest case is that of *Brown vs. Johnson county*, found in 1 Green, beginning on page 486. In that case it was decided that a county order payable on presentment to the treasurer is due, and draws interest from the date of such presentment. A dissenting opinion was written which has since been referred to in other decisions of the supreme court as containing better reasoning but a finding with respect to interest being collectible on orders or warrants presented for payment, is upheld in both the majority and the dissenting opinion.

In the case of *Campbell vs. County of Polk*, reported in the 3rd Iowa, beginning on page 467, the above case of *Brown vs. Johnson County* was reversed on one point, but not on the question of any warrant drawn on the county treasurer drawing interest after presentment for payment.

In fact, in the Campbell case the court adopts the reasoning of Justice Green in the dissenting opinion in the Brown case.

Under our statute section 3038, interest may be collected on money after the same becomes due, and on money due on the settlement of accounts on the day the balance is ascertained. Under a similar statute Justice Green in the Brown case above cited, states:

"The money is due—that is, liquidated, from the moment the allowance is made by the commissioners and the usual order of payment is entered upon their record. Without an order upon the treasurer, then, the creditor is entitled to interest, and without such order he may sue before any court of competent jurisdiction for the recovery of his demand and interest. Can the fact that he takes an order militate against his right to recover the interest? It is conceded that the order without payment is no satisfaction of the claim; and the decisions of this court show that a party may file such instrument for cancellation and recover on the original demand. It is clear, then, that the nature and merits of the indebtedness will justify a recovery of interest. What is there in the order itself that can preclude such recovery? It is an additional assurance—an acknowledgment of the indebtedness. The clear import of its language is, that the drawers have funds in the hands of the drawee from which payment is to be made to the payee. If these funds are not there, it is not the fault of the payee, or holder of the order; his claim still holds against the drawer; and I believe, upon every principle of justice and correct law, he is entitled to interest at the established rate until payment is made.

"If such an instrument cannot become due till particular funds are placed in the treasury for its particular payment, the drawers of the order, having the management and appropriation of those funds, have the power in their own hands to guard forever against the contingency upon which the payments would depend."

In the case of *Mills County National Bank vs. Mills County*, reported in the 67th Iowa, on page 697, the supreme court of Iowa decides that a warrant payable out of a particular fund may, when such fund does not exist, be placed in judgment against the county and payment enforced by the levy of a tax in obedience to the provisions of the statute. Other cases have been decided by our court, but none so directly in point as those above referred to.

It follows, then, that if there were no particular statute with reference to the payment of interest on warrants drawn by the county auditor upon the county treasurer, that the same would draw interest at the rate of six per cent, at least after presentment for payment, under the general interest statute, and quite likely would draw interest from date.

However, the whole question under discussion is settled, as we view it, by the provisions of section 483 of the 1913 supplement to the code. That section is as follows:

"As to warrants presented but not paid. When a warrant drawn by the auditor on the treasurer is presented for payment, and not paid for want of money, the treasurer shall indorse thereon a note of that fact and the date of presentation, and sign it, and thenceforth it shall draw interest at the rate of five per cent. He shall keep a record of the number and amount of the warrants presented and indorsed for non-payment, which shall be paid in the order of such presentation."

Prior to the amendment of the above quoted section, the rate of interest collectible on warrants after presentment for payment was six per cent. The section as amended, however, limits the rate to five per cent after presentment for payment. It is our view that the above section

applies to any warrant that is drawn by the county auditor on the county treasurer except drainage warrants which are governed by a specific statute. It would be the duty then of the county treasurer when warrants, like those under consideration, are presented to him for payment and none of the means for paying the same are at hand to indorse the fact on the warrant presented. Whether or not he does make such indorsement on warrants so presented would not affect the right of the holder to recover interest under the statute from the date the warrant is presented for payment, since under the decisions of our court the fact that the warrant is presented and payment refused is the material thing in fixing the right of the holder to recover interest and he would be permitted to prove such fact by evidence other than the indorsement of the treasurer.

In deciding this question, we believe we are not impertinent in making a few suggestions with regard to issuing warrants against funds which are not existent for their payment. In our opinion, there is no reasonable excuse for a failure to have at hand in the county treasury the means for the payment of the warrants under consideration at the time they are presented for that purpose. It may be that contracts have been let in the past and that some will be let in the future in connection with the improvement of the primary road system under such circumstances that the means for the payment of warrants presented, under the authority of the latter part of section 13 of chapter 237, acts of the 38th general assembly, will not be at hand in the county treasury for their payment on such presentment. However, it is our belief that the fault lies at some other stage of the proceeding in most instances than at the time of the letting of the contract. All officials concerned should see to it that bonds and certificates are issued and the means for paying such warrants in the county treasury so that the warrants under consideration in this opinion shall be paid when they are presented for that purpose. If, at the time a contract is let, there is any doubt about the ability of the officials to do this the question with respect to interest on warrants ought to be taken care of in the contract itself and the provisions of the statute allowing interest waived by the party in whose favor it would operate. There is no doubt this waiver could be made in such a way as to be binding, but in its absence, the warrants referred to in your questions above submitted will draw interest at five per cent from the time of their presentment to the treasurer, such interest to be considered as a part of the expense in connection with the improvement and to be taken care of and paid as follows:

1. On warrants drawn upon the primary road bond fund the interest shall be paid from such fund.
2. On warrants drawn against the special assessment fund interest is payable from such fund.
3. On warrants payable in road certificates in anticipation of future allotments interest shall be paid from the primary road fund.

We might suggest further that contracts should be let with the express

understanding that no warrants shall be drawn until the means for paying the same are present in the county treasury.

BEN J. GIBSON, *Attorney General*.

By B. J. FLICK, *Assistant Attorney General*.

EXPENSES OF BOARD OF APPORTIONMENT

If compensation of members of board of apportionment from same fund other expenses of improving district are paid from it.

June 26, 1922.

Hon. Glenn C. Haynes, Auditor of State: Your letter of May 17 addressed to Mr. Gibson has been referred to me for attention. You ask the opinion of this department on two questions as follows:

"First: Our county examiners find that in a great many counties the claims for abstracts of lands against which assessments have been made for primary road improvements, have been paid from the county general fund. Section 14 of chapter 237, acts of the 38th general assembly, provides for a board of apportionment, and while it does not require that an abstract of the lands be furnished, it does require the apportionment report to specify each tract of real estate by some intelligent description, the amount apportioned thereto, and the ownership thereof as the same appears on the transfer books in the auditor's office. In order to make this report and give an intelligent description of the land included in the assessment district, it is necessary in most instances to have an abstract of the land before the report can be made. The above mentioned section also provides for the compensation of the members of the board of apportionment, but is silent as to what fund the same should be paid from, although the state highway commission, in their pamphlet, of 'Primary and Secondary Road Laws of Iowa,' in a note following the above mentioned section, says that the compensation shall be paid from the county general fund. Should the compensation of the members of the board of apportionment and the claims for abstracts of the lands included in the assessment districts be paid from the county general fund, or from the funds of the assessment district?"

"Second: Our county examiners also find that claims for the publication of notices of assessments apportioned to each tract of land included in primary road assessment districts as provided for by section 14, chapter 237, acts of the 38th general assembly are being paid from the county general fund. Should bills for this publication be paid from the county general fund or from the funds of the assessment districts?"

First: It may be possible that an abstract of title would be necessary in some case to determine the proper description of land but such cases would certainly be very rare. In case it is absolutely necessary to have an abstract in order to determine the proper description then the expense for such abstract would be proper in our opinion. Although there is no specific provision for the payment of such expense or of the compensation of the members of the board of apportionment yet we are of the opinion that such expense and compensation cannot be paid from the general funds of the county but that the same are payable as a part of the expense of the improvement of the district from the same funds from which other expenses of such improvement are to be paid.

Second: What has been said with reference to the payment of compensation to the board of apportionment is true also with reference to the expense of publication of notices of assessments referred to in your second question above. Such expense should not be paid from the gen-

eral county fund but should be paid as a part of the expenses of the improvement of the district from the fund or funds from which all other expenses in connection with the improvement are paid.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

SERVICE OF NOTICE OF HEARING OF APPORTIONMENT REPORTS

Service of notice by publication is not sufficient as to persons named in the apportionment report and those in actual occupancy of the real estate affected, under the provisions of section 14, chapter 237, 38th general assembly.

May 6, 1921.

Iowa State Highway Commission, Ames, Iowa: In your letter of May 4, 1921, you ask for an opinion from this department upon the question as to whether or not, under section 14 of chapter 237, acts of the 38th general assembly, service of notice by publication is sufficient as to the persons named in the apportionment report and those in actual occupancy of the real estate affected by the apportionment.

Section 14 to which you refer, is that section of the present primary road law relating to the appointment of a board of apportionment, the report of such board, notice of hearing, and hearings on assessments. After providing for the appointment of the board and providing for the filing of the report of the board with the county auditor, the section then provides that the auditor shall fix a day for hearing before the board of supervisors and shall cause notice to be served upon each person whose name appears in the apportionment report or in any recommendation accompanying the same as owner, and also upon the person or persons in actual occupancy of the real estate affected. The succeeding paragraph provides for the publication of the notice of hearing on the report of the board of apportionment, and the next succeeding paragraph provides that there shall be no loss of jurisdiction for failure to serve any particular individual. In order to make the distinctions required we quote these three paragraphs of section 14 at length.

"Upon receipt of said apportionment, the county auditor shall fix a 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 recommendation accompanying the same as owner, and also upon the person or persons in actual occupancy of such real estate, which notice shall state the amount of special assessments apportioned to each tract, the day set for hearing before the board of supervisors, that at said hearing any apportionment may be increased without further notice, that (if such be the case) the board of apportionment has recommended that specified additional tracts of real estate should be included within said district, and that specified sums should be apportioned thereto to defray the cost of said improvement, and that all objections to said report, or any part thereof, by reason of any irregularity in prior proceedings, or by reason of any irregularity, illegality, or inequality in making such apportionment, must be specifically made in writing and filed with the county auditor on or before noon of the day set for such hearing, and that a failure to so make and file such objections will be deemed a conclusive waiver of all such objections.

"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, the last of which publications shall be not less than five

days prior to the day set for said hearing. Proof of such service shall be made by affidavit of the publisher and be filed with the county auditor.

"Omission to serve any party with notice herein provided shall work no loss of jurisdiction on the part of the board over such proceedings, 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 is discovered that service of such notice has not been had on any necessary person as herein provided, the board shall fix a time for hearing as to such omitted parties and shall cause service to be then made 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, and after such hearing shall proceed as to such person as though such service had been originally complete."

It will be observed that there is a provision for service of notice by publication in the paragraphs quoted by us. The question arising is as to whether or not this publication service is sufficient as to those individuals who are specifically entitled to notice under the first paragraph quoted. In our opinion it is not. This will be very clear when the three paragraphs are considered together. The last paragraph provides as stated that there shall be no loss of jurisdiction for failure to serve any individual, and that the omission shall only affect the persons upon whom service has not been had. The paragraph then provides that such individuals who are not given notice as prescribed in the two preceding paragraphs may be served either personally or by publication and directed to appear at a date set. This service may be by publication or by personal service.

In your letter you refer to the fact that there is oftentimes great difficulty in personally serving the individual property owners. Where there is difficulty the third paragraph provides a remedy. Authority is there given to publish the notice as to such omitted persons and require them to appear at a subsequent hearing. Under such circumstances the publication service is all that is necessary. From a consideration of the whole section we become convinced that the service required in the first instance on the property owner must be personal; that there must also be a publication service of notice. If personal service cannot be made upon the individual property owners the board, as to such property owners, may provide the method of service on such property owners whether personal or by publication. The whole purpose as will have been observed, is to give the individual property owner personal notice if it can be done, otherwise to provide a saving clause to the effect that the person or persons upon whom such service cannot be obtained may be served by publication to report at a subsequent and later date. Every right is thus preserved to the property owner and every contingency which might arise because of defective service, provided for.

It seems unnecessary to set out in this opinion the decisions of the court relative to statutes in which the method of service of a notice is not provided. That is where the statute is entirely silent on the question. It is the universal rule that where a statute is silent as to the method of service of a notice of a proceeding, that such notice must be personally served. Our own supreme court in the case of *Ellis vs. Carpenter*, 89 Iowa 521, so holds. The following cases in other jurisdictions

are to the same effect: *Chicago, etc. R. Co. vs. Smith*, 78 Illinois 96; *Meyer vs. Christian*, 64 Missouri App. 203; *Ryan vs. Kelly*, 9 Missouri App. 396; *Cerneli vs. Partridge*, 3 Missouri App. 575; *People vs. Lockport, etc., R. Co.*, 13 Hun (N. Y.) 211; *McDermott vs. Metropolitan Police Dist.*, 25 Barb (N. Y.) 635; *Rathbun vs. Acker*, 16 Barb. (N. Y.) 393. The statute being silent insofar as the method of service of the notice required by this section to be given to the individual property owner is concerned, it necessarily follows that personal service must be required. In order that there may be no confusion and no oversight on the part of any board or auditor, attention is also called to the publication of the notice required by this section. Both methods of service must be complied with in order to confer complete jurisdiction on the board to levy the assessment.

In your letter you state that the framer of the law states that the original intention was to provide that publication notice should be sufficient. In interpreting a law the court must look not to what may have been the original intention of the legislature, but to a consideration of their intention as expressed in the law itself. Applying the rule of construction of legislative intent to the section in question, our conclusions with reference to this section have been reached.

BEN J. GIBSON, *Attorney General.*

FILING OF CONTRACTOR'S BOND

Time of filing in road improvement cases. Statutes as to time held to be directory and variance does not invalidate contract. Change in statute as to character of bond filed between time of letting contract and filing does not invalidate contract where bond complies with the law at the time it is filed.

May 20, 1921.

Mr. Tom Boynton, County Attorney, Forest City, Iowa: The department is in receipt of your letter of the 11th inst., in which you state the following facts and ask for our opinion on the same:

"In the late winter contract was let for graveling for what is known as 'Federal Aid Project No., etc.' The statute at that time provided that the successful bidder should secure the performance of his contract by a surety bond, with some properly authorized company, as surety thereon. Before the bond was filed and before the work was commenced, our legislature so amended this law that it became legal to accept bond with personal sureties instead of surety company. The successful bidder learning of this alteration of the law, presented a bond with personal sureties, who were properly qualified and to whom no objection could be made, unless it be that the fact that the 'letting' was held and the bid accepted; at a time when such a bond did not comply with the statute. I also believe that the successful bidder did not tender this bond until more than ten days after the letting, despite the fact that the notice to bidders specifically provided that contract must be entered into and bond filed within ten days from date of letting.

"I have learned that the State Highway Commission of the state has presented approximately the same state of facts to your department and have asked for your opinion thereon. For that reason I do not care to render any opinion until I know what your holding was in that matter."

You request to be advised as to whether the "letting" under the facts stated above was legal in view of the fact that the bond was not filed

within ten days from the date of letting the contract and was not such a bond as the law in force at the time contract was entered into provided should be filed.

It is our view of the law that the provision with reference to the filing of the bond is directory only and that a failure to comply within the time prescribed by statute does not invalidate the entire proceedings, provided such bond is filed within time to protect the county and those affected by the contract.

This is purely a question for the board to determine as to how much time might be allowed within which to file a bond and the failure to file within the statutory time would not be fatal, as we have above indicated, to the validity of the contract, nor do we believe that in this case where the law was changed with reference to the nature of the bond to be filed between the time of the letting and the filing of the bond affects the validity of the contract, if the bond provided for by the later enactment by the legislature is in fact filed.

BEN J. GIBSON, *Attorney General*,

By JOHN FLETCHER, *Assistant Attorney General*.

ESTABLISHMENT OF HIGHWAY BY USE

Establishment of a highway by use under claim of right is possible under our laws.

May 17, 1921.

Mr. E. L. Carroll, County Attorney, Creston, Iowa: Your letter of May 16th referring to a former letter written by you to this department on the question of the rights of certain land owners along the proposed primary road which is to take in a portion of the old right of way of the C. B. & Q. Railway Company which was abandoned by them about nineteen years ago has been referred to me for answer.

Because of the length of your letter we will not set it out in full but state the facts of the case concisely as we understand them.

The facts:

The C. B. & Q. Railway Company owned a right of way between Creston and Afton which was abandoned by it approximately nineteen years ago and deeded back to the owners of the land over which the right of way extended, the real estate included in said right of way and in some instances the consideration was expressed in the deed and actually passed. There has never been a dedication of the land by the owners to the public and no express permission authorizing the use of the old right of way as a highway by the public; however, the same has been used by the public for approximately nineteen years and parts thereof have been maintained, dragged, dressed, etc., at the public expense and the owners of the adjoining land have not asserted ownership except perhaps in one instance where signs were put up after abandonment notifying users of the road that the right of way was private property. This was perhaps eighteen or nineteen years ago and no signs have been in evidence in recent years.

The parties to whom this land was deeded by the railway company on its abandonment as a right of way have filed claims for the value of said land in case the primary road is established as proposed.

These as we understand them are the facts with relation to your first proposition.

The question as to whether or not the public has gained a right to use a highway must be decided upon the facts of each particular case. While the right cannot be supported by prescription, using that word in its technical sense, yet it may be established by proof of use and occupancy of the premises as a highway for a sufficient length of time under a claim of right by the public. This use, however, must be general, uninterrupted and continued for the period of the statute of limitations, which, of course, as you know, is ten years. The fact that public money has been expended for the maintenance and repair of a highway adds materially to the claim of the public to the right to use it and the fact that work has been done thereon is another factor which aids in establishing the right.

If the public with the knowledge of the owner has claimed and continuously exercised the right to use the land for a public highway for a period equal to that fixed by the statute for bringing action of ejectment its right to the highway is complete in the absence of proof that the road was so used by leave, favor or mistake. It is true that the right may not be established by the proof of use alone, but the use must be under the claim of right, which claim, of course, may be supported by circumstances aside from actual declarations.

Cases involving this question have been decided by the supreme court in great numbers and, as said at the beginning of this opinion, each case is decided upon its facts.

It is our opinion when we take into consideration our knowledge of the situation between Creston and Afton that the right of the public to use the abandoned right of way in question has been established and that the owners of the adjoining land would not be entitled to the value of such portion thereof as is now used as a highway.

BEN J. GIBSON, *Attorney General.*

By B. J. FLICK, *Assistant Attorney General.*

USE OF FUNDS OF SECONDARY ROAD SYSTEM

Secondary road system does not provide for grading and draining, but for graveling, oiling and other suitable surfacing.

May 11, 1921.

Hon. H. S. Van Alstine, Gilmore City, Iowa: During the session of the legislature you requested an opinion from this department as to the right to form districts for the purpose of grading roads of the secondary road system.

The secondary road system is provided in chapter 237 of the acts of the 38th General Assembly; it is a part of the primary road law of Iowa. This system is provided for in sections 46, et seq., of the act.

That part of section 47 of this act, which is applicable to a proper consideration of the question submitted by you, is in words as follows:

"In order to provide for the graveling, oiling or other suitable surfacing of roads of the secondary system, the board of supervisors shall have the power, on petition therefor, to establish road assessment districts, but such districts need not necessarily follow the zone limits provided herein for the improvement of primary roads."

As I understand, in your county some of the people are considering the

establishment of road improvement districts under this section. There is no doubt as to the right to establish the district; the question is as to the right to establish the district for the purposes desired by your citizens. As we take your question the purpose is to grade and drain the roads of the secondary system in the district to be established. There is no provision of the law which would authorize the establishment of the district, the collection of taxes and assessments under the law for this purpose. The law provides only for the formation of such districts for the purpose of graveling, oiling or other suitable surfacing.

The section to which reference has been made simply provides for the same benefits as to the secondary road system as is granted to the roads of the primary road system. The clear intent of the legislature is to the effect that the matter of grading and draining such roads is to be borne by the public at large, while the surfacing is to be done by the district.

It follows, therefore, that road districts as provided in sections 46, et seq., chapter 237 of the acts of the 38th general assembly, cannot be established for the purpose of grading and draining, but only for the purpose of graveling, oiling or other suitable surfacing of the roads.

BEN J. GIBSON, *Attorney General*.

FEDERAL AID ENGINEERING FUND

Statement of the law regulating the handling of federal aid engineering fund by treasurer of state and highway commission.

April 18, 1921.

Hon. Glenn C. Haynes, Auditor of State: In your letter of April 14, 1921, you ask for an opinion from this department submitting the following proposition:

"Can the state treasurer set aside under the provisions of chapter 249, section 6, acts of the 37th general assembly, and chapter 237, section 42, acts of the 38th general assembly, the sum of \$450,000 to the federal aid engineering fund, which represents the estimated cost for one year for preparing plans and specifications as certified by the highway commission? Said fund to be used in engineering work in connection with federal aid projects. In explanation of the federal aid engineering fund, I desire to state that the state of Iowa does not receive any aid from the federal government for any expenditure made from this fund, nor does the federal government set aside any money to be used by them in connection with the expense contracted by the state in this department."

The question submitted has relation to what is known as the federal aid engineering fund. This fund is a fund provided in section 6, chapter 249, acts of the 37th general assembly. This section, in so far as applicable, is as follows:

"The treasurer of state is also authorized and directed at the same time and in the same manner to transfer from said motor vehicle road fund, an amount equal to the estimated cost of plans and specifications for the current year, as certified by the state highway commission, which shall be known as the federal aid engineering fund."

This fund is also referred to and continued by section 42 of chapter 237 of the acts of the 38th general assembly. This section is 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 cost of plans and specifications for the current year, as certified by the state highway commission. Said fund shall be used for engineering work in connection with federal aid road projects and paid out only in properly itemized vouchers approved by the state highway commission and audited by the state board of audit."

These two provisions of law provide for a certain fund to be known as the federal aid engineering fund. This fund is for the purpose of payment of the cost of plans and specifications for the current year as certified by the state highway commission. Prior to the commencement of the current year the state highway commission estimates the amount which is necessary for this purpose. This amount is to be certified to the treasurer of state and the treasurer of state is directed to transfer such amount from the funds derived under the act regulatory of motor vehicles to the federal aid engineering fund.

The intent of the legislature is clear to the effect that this fund should be separate and distinct and that it should be devoted to a certain specified purpose which purpose is set out in the two statutes to which reference has been made. This purpose is to provide a fund for the payment of the cost of plans and specifications for federal aid projects.

It follows that this fund being separate and distinct from the primary road fund, and having no reference to such fund save in and so far as the same is incidental to a proper consideration of the uses to which the primary road fund may be devoted must be held to be an independent fund. The statute provides for the transfer of the amount certified. There is no discretion vested in the state treasurer, nor for that matter in the highway commission. The amount necessary to make up the fund must be transferred without regard to the provisions of senate file No. 271 of the 39th general assembly.

It might be pointed out in this connection that the state treasurer and the highway commission should not confuse the federal aid engineering fund with the primary road fund, and that such transfer should be carefully taken into consideration so as not to cause any error in the county's allotment of the primary road fund. We assume that this is done, but we call attention to the matter for the reason that there might easily be an error whereby there would be carried on the books of the highway commission in the primary road fund as allotted to the several counties the full amount collected under the act regulatory of motor vehicles without regard to the transfer made to the federal aid engineering fund.

BEN J. GIBSON, *Attorney General.*

PAYMENT FOR CONSTRUCTION OF BRIDGE ON PRIMARY ROAD

Board of supervisors cannot pay \$50,000 out of general bridge fund, and \$15,000 out of allotment of county from primary road fund, for construction of a bridge on a primary road.

April 14, 1921.

Iowa State Highway Commission, Ames, Iowa: In your letter of April 6, 1921, you ask for an opinion from this department as to the authority of a board of supervisors under the following statement of facts:

In Jackson county there is a bridge located on a portion of the primary road system, which is included within a federal aid project. The prelim-

inary estimate of the cost of this bridge is \$65,000. The question arises as to whether or not the board of supervisors can enter into a contract for the construction of this bridge, paying therefor \$50,000 out of the general bridge fund of the county, and \$15,000 out of the allotment of the county in the primary road fund.

It will be observed that the 39th general assembly enacted a law known as house file No. 337, which act in substance provides that the primary road fund may be used for the construction of bridges and culverts on the primary road system. The use of such funds for such purposes enlarged the purposes for which the primary road fund may be used.

The 39th general assembly also enacted a bill known as house file No. 660. This act is in words as follows:

"The board of supervisors of any county may appropriate for the construction of any one bridge within the limits of such county a sum not to exceed fifty thousand (\$50,000.00) dollars 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 twenty-five thousand (\$25,000.00) dollars."

In addition to these two laws, the consideration of this question involves chapter 237 of the acts of the 38th general assembly, commonly known as the primary road law. Under this chapter there is created the primary road fund and such fund is apportioned among the several counties of the state in the ratio that the area of the county bears to the total area of the state. Such allotment is known as the county's allotment of the primary road fund.

Under section 6 of the primary road law it is provided that the county, acting through its board of supervisors, shall have three options in the expenditure of its allotments from the primary road fund. This section is amended by house file No. 337 of the acts of the 39th general assembly, to which reference has been made to the end that the construction of bridges and culverts is included with other road construction.

The clear intent of the legislature as expressed in house file No. 660 of the acts of the 39th general assembly, is to limit the amount which may be appropriated by the board of supervisors for the construction of any one bridge; this limit is \$50,000. It will appear from a careful consideration of these statutes that there is no provision whereby the amount so specified can be increased by payments from other funds of the county, and this is so whether such fund be one of the ordinary county funds or whether it be the county allotment of the primary road fund. The limit of \$50,000 is applicable in any event. To permit the board of supervisors to authorize the expenditure of \$15,000 in addition to such limit would be violative of the clear intent of the legislature, and would be doing indirectly that which is impossible to do directly.

It will be observed that section 423 of the supplemental supplement to the code, 1915, provides that except as provided in section 424 of the code the board of supervisors shall not order the erection of a bridge the total cost of which exceeds a certain set sum without a vote of the people.

It must be held then that the sum of \$50,000 is a limit and can only be exceeded in the manner provided by section 423 of the supplemental supplement to the code, 1915, as amended.

BEN J. GIBSON, *Attorney General.*

OPINIONS RELATING TO DRAINAGE

INTEREST ON DRAINAGE WARRANTS

Interest on drainage warrants is compounded annually and holder of warrant need not present the same annually for additional endorsement showing interest not paid for want of funds.

June 26, 1922.

Hon. Glenn C. Haynes, Auditor of State: Your letter of May 28th addressed to Mr. Gibson has been referred to me for attention. You request the opinion of this department on the following questions:

"First: Should a county treasurer, in computing the interest due on drainage warrants under the provisions of section 1989-a9, S. 1913, as amended by chapter 264, 37th general assembly, and chapter 162, 38th general assembly, compute other than annual interest, or should it be computed at compound interest in case there was more than one year's interest due?"

"Second: If section 1989-a9 as amended by the 37th and 38th general assemblies does authorize the county treasurer to compute and pay compound interest on outstanding drainage warrants, is it necessary for the holder of the warrant to present the same to the county treasurer annually for an additional interest endorsement before compound interest can be paid?"

Section 1 of chapter 264 of the acts of the 37th general assembly contains the provision which is pertinent to the questions propounded by you. That section provides:

"All warrants drawn upon the funds of any drainage district, after the taking effect of this act, which cannot be paid for want of funds, shall bear interest at the rate of six per cent, payable annually, from and after the date of presentation thereof to the county treasurer."

Your questions then should be answered as follows:

(1) Since the interest on drainage warrants drawn under the provisions of section 1989-a9, supplement to the code, 1913, is payable annually the same should be compounded in case the warrant when paid is more than one year past due.

(2) Since the law provides that the interest on such drainage warrants shall be at the rate of six per cent payable annually it is not necessary that the holder of the warrant present the same to the county treasurer annually for an endorsement showing interest not paid for want of funds.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

INTEREST ON DRAINAGE WARRANTS

Interest will cease at the expiration of thirty days from the date of posting notice.

August 27, 1921.

Hon. Glenn C. Haynes, Auditor of State: Your letter of August 19th addressed to this department has been referred to me for answer. You request an opinion on the following proposition:

"When shall the interest cease on a drainage warrant which has been presented to the county treasurer and endorsed by him 'not paid for

want of funds? Shall the interest on such a warrant cease on the date the county treasurer mails a written notice of call to the then holder, as provided by section 3, chapter 162, acts of the 38th general assembly, or does the interest on the warrant continue until the expiration of thirty days from the date of the call or mailing of the notice as provided for by section 484 of the code of 1897?"

Section 484 of the code of 1897 referred to in your letter is 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 endorse upon it the date and the amount of interest allowed, and such warrant shall be cancelled and not reissued."

Section 3 of chapter 162, acts of the 38th general assembly is as follows:

"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."

It is difficult to tell just what the legislature intended to do with reference to stopping interest on drainage warrants by the language contained in the latter part of section 3 of chapter 162, above quoted. We must decide the question, however, on the language of the act as passed and the intention of the legislature as expressed in that language.

While the last clause of section 3 following the comma provides that interest on such warrants shall cease it does not say that such interest shall cease upon the mailing of the notice and the making of a memorandum showing the date of such mailing by the treasurer nor at any other time. The only definite provision of the law fixing a time when the interest on warrants shall cease is found in section 484.

Reading the two provisions together and giving effect to both sections it is our opinion that section 3 of chapter 162 of the acts of the 38th general assembly imposes an additional duty on county treasurers with reference to notice in the case of drainage warrants. That the notice to be posted as provided for in section 484 shall be given in case of drainage warrants and that interest will cease at the expiration of thirty days from the date of such posting.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

INTEREST ON DRAINAGE WARRANTS

Interest on drainage fund warrants drawn prior to April 21, 1917, drew five per cent simple interest from and after presentation to county treasurer. Since said date under section 1, chapter 264, 37th general assembly they draw six per cent annually.

May 13, 1921.

Mr. Roy U. Kinne, County Attorney, Storm Lake, Iowa: Your letter of May 9 addressed to this department has been referred to me for answer. You request an opinion on the following propositions:

"(1) What rate of interest should be allowed on drainage warrants issued prior to the change of the drainage law allowing six per cent annually?"

"(2) How should the interest be figured on drainage warrants issued since that date where it states 'warrants shall draw interest at the rate of six per cent annually.' Would this lawfully mean compound interest?"

Section 1 of chapter 264 of the acts of the 37th general assembly is as follows:

"All warrants drawn upon the funds of any drainage district, after the taking effect of this act, which cannot be paid for want of funds, shall bear interest at the rate of six per cent, payable annually, from and after the date of presentation thereof to the county treasurer."

This provision became the law on April 21, 1917. All warrants drawn on the drainage fund since this date draw interest at the rate of six per cent payable annually which means that the interest is due each year and consequently the interest draws interest after the same becomes due and this in effect is compound interest.

Before the enactment of the above provision of the statute section 483 of the 1913 supplement to the code governed, that section is as follows:

"When a warrant drawn by the auditor on the treasurer is presented for payment, and not paid for want of money, the treasurer shall indorse thereon a note of that fact and the date of presentation, and sign it; and thenceforth it shall draw interest at the rate of five per cent. He shall keep a record of the number and amount of the warrants presented and indorsed for nonpayment, which shall be paid in the order of such presentation."

A reading of the section just quoted will show that the interest on warrants presented for payment under the provisions of that section was fixed at five per cent and there being no provision for the payment of the interest annually five per cent simple interest would be all that such warrants would draw.

Section 483, above referred to, was passed by the 29th general assembly. Before the passage of that act the interest was six per cent simple interest.

It is the opinion of this department, therefore, that warrants drawn prior to the taking effect of section 1, chapter 264 of the 37th general assembly should draw interest at the rate of five per cent and that warrants drawn on the drainage fund since April 21, 1917, should draw six per cent annually from and after presentation thereof to the county treasurer.

BEN J. GIBSON, *Attorney General*.

By B. J. FLICK, *Assistant Attorney General*.

DRAINAGE WARRANTS MAY BE USED TO PAY DRAINAGE ASSESSMENTS

Drainage warrants shall be accepted in payment of drainage assessment where warrants are held by persons to whom they were issued.

February 18, 1921.

Hon. Glenn C. Haynes, Auditor of State: In your letter of February 2 you present the following questions:

"May the holder of a registered warrant, drainage, use that warrant to pay his assessment in the same drainage ditch that the warrant is drawn on, even though many other warrants have priority on the 'Register for Want of Funds'?"

"Has the party who owes the assessment on a ditch the privilege to

buy a registered warrant from another party and present it to pay his assessment, where other warrants are registered prior to it?"

In reply to your inquiry, will say that section 1989-a13, supplement to the code of Iowa, 1913, which bears upon the question presented reads in part as follows:

"Warrants drawn upon the funds of any drainage district shall be accepted by the county treasurer in payment of drainage assessments levied upon any lands in that district owned by the person to whom said warrants were issued."

We believe that the mere statement of the law as above set out answers the first part of your inquiry. As to the second part of your inquiry, will say that since the statute just quoted only requires the auditor to accept warrants drawn upon a drainage fund in payment of assessments levied upon lands in the district "owned by the person to whom the said warrants were issued," it is my opinion that the auditor would not be required to accept a warrant from any other than the person to whom it was issued in payment of his assessment in the drainage district.

BEN J. GIBSON, *Attorney General*,

By JOHN FLETCHER, *Assistant Attorney General*.

PENALTY ON DELINQUENT DRAINAGE ASSESSMENTS

When bonds are issued in the construction of drainage districts under section 1989-a27, supplement to the code, 1913, same rule as to interest and penalty applies as provided for in section 1989-a26.

October 23, 1922.

Mr. S. D. Quarton, County Attorney, Algona, Iowa: Your letter of the 5th inst. addressed to Attorney General Ben J. Gibson has been referred to me for attention.

You ask for the opinion of this department upon the following question:

"Where drainage bonds are issued pursuant to section 1989-a27 of the supplement to the code, 1913, and the land owner defaults in payment of his annual assessment, does the assessment carry interest plus penalty, or interest only?"

You will observe that the provisions of section 1989-a27 are silent as to the manner in which the land owner may pay the assessment levied against his land in drainage matters. That matter is taken care of in section 1989-a26 of the supplement to the code, 1913, wherein the land owner is given the privilege of paying his assessments in ten annual installments. Section 1989-a27 merely provides another method of raising the cash necessary to pay for the costs of establishing the drainage district and draining the land, namely, by issuing bonds. However, when the method provided for in section 1989-a27 is adopted, the land owner still has a right to pay his assessments in ten annual installments, or pay them all at once, provided, of course, such payment is made prior to the issuance of the bonds. Therefore, in case of default in the payment of assessments by the land owner, the same results would follow as though no bond issue was adopted, but certificates were issued as provided for in section 1989-a26, and the rule announced in the case of *Fitchpatrick vs. Fowler*, 157 Iowa, 215, would apply in either case. Namely, when the land owner has decided to pay his assessment in ten install-

ments and defaults in payment of any installment, then interest only is charged against him; on the other hand, if the land owner fails to take advantage of the ten annual installment provision and defaults in the payment of the assessment when due and payable, both interest and penalty attaches.

BEN J. GIBSON, *Attorney General*,

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

OPINIONS RELATING TO CORPORATIONS

RENEWAL OF CORPORATE EXISTENCE

Corporate life of corporations may be renewed at any time from three months before the termination, to and including three months after such termination, for the period of time provided in the articles, or for any shorter period of time.

October 14, 1921.

Hon. W. C. Ramsay, Secretary of State: You have requested an opinion from this department on the following question:

"Under section 1618 it is stated that the corporate existence of a company may be renewed 'within three months before or after the time for the termination thereof' by a majority vote at any regular or special election called for the purpose. In the event that the corporate existence of an Iowa corporation expires in July, 1922, and the stockholders desire to increase the capital stock of their company at the present time, is it possible in any way to take action at the present time to extend the period of corporate existence? In other words, is it possible for the stockholders in any way to take action to extend the company's charter prior to the three months' period before expiration of such charter?"

Section 1618 of the supplement to the code, 1913, has relation to the duration and renewal of corporate existence. It provides the time when such corporations may be renewed, and also the period of time for which they may be renewed. As the question submitted by you has relation only to the time when a corporation may renew its corporate existence, we shall only quote that part of this section directly applicable thereto. It 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."

This statute is plain and free from all ambiguity. It expressly directs that the corporate life may be renewed within three months before or after the time of the termination of the life thereof. That is to say, at any time from three months before the termination of the corporate life, to and including three months after such termination, the corporate existence may be renewed for the period of time provided in the articles, or for any shorter period of time. Of course, the method and procedure prescribed must be followed.

Corporations are merely artificial persons created by the law of the state, having only those powers provided by the law, which powers must be exercised in the manner and form prescribed by the law. The definition of a corporation as expressed by Mr. Chief Justice Marshall, speak-

ing for the supreme court of the United States, has been generally accepted as a perfect definition of a corporation. It is as follows:

"A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence."

The right of renewal is a right or power given by the statutes of the state to corporations. It is only by reason of the provisions of the statute that the right of renewal can be exercised. Under the statutes of this state the power of renewal must be exercised within a certain definite period of time and in a certain definite manner. The legislature having specifically spoken, and thus limited the right of renewal, its decision is final.

It follows, therefore, that the right of renewal of corporate existence within the state of Iowa can only be exercised in the manner and form prescribed by section 1618 of the supplement to the code of Iowa, 1913.

BEN J. GIBSON, *Attorney General*.

DUTY OF FOREIGN CORPORATIONS

All foreign corporations shall procure permit and pay fees prior to transacting or continuing business in this state.

October 18, 1921.

Hon. H. L. Van Alstine, Gilmore City, Iowa: I have your esteemed letter of August 3, 1921, in which you request an official construction of chapter 139, acts of the 39th general assembly, referred to in your letter as the Whitmore amendment, particularly with reference to its constitutionality and the authority of the secretary of state thereunder to require foreign corporations to procure a permit and pay certain fees in order to continue transacting business in this state.

Your letter reads:

"The more we see of that Whitmore amendment to the corporation laws, the more objectionable it appears to be. The Gilmore Portland Cement Corporation now has word from the secretary of state, advising us that the company is subject to the Iowa corporation tax fee, which in this case, will amount to somewhere near \$1500. Now, it would appear to us, grossly unjust and inequitable to require such fee from foreign corporations, who have complied with the law in the past, and have been doing business in the state for years.

"At the time this company was organized, we incorporated under the laws of West Virginia, for reasons which we deemed necessary under our plan of finances. We complied with the laws of Iowa, including the so-called blue sky law, and the corporation has been functioned, and the plant operating for years.

"Now, as above stated, it would be unjust and inequitable, and I question very much whether the state of Iowa can, constitutionally, make such a requirement upon existing corporations.

"I enclose herewith, a copy of letter from Senator Whitmore, and also a copy of letter which I am writing him. I suppose you will be governed by your opinion of a legal construction of this measure. However, it would seem highly desirable to endeavor to construe the law in such a manner as will entail the minimum of injustice to legitimate business."

Corporations, domestic as well as foreign, are, at all times, subject to the provisions of the constitution and statutes of Iowa.

Article 8, section 12, of the constitution of Iowa provides:

"Subject to the provisions of this article, the general assembly shall have power to amend or repeal all laws for the organization or creation of corporations, or granting of special or exclusive privileges or immunities, by a vote of two-thirds of each branch of the general assembly; and no exclusive privileges, except as in this article provided, shall ever be granted."

Pursuant to the foregoing constitutional provision the absolute right of control over corporations transacting business in Iowa is expressly lodged in the general assembly, and this applies to foreign as well as domestic corporations. In accordance with such constitutional authority the general assembly of Iowa has specifically reserved the power of regulation and control over all corporations.

Section 1619 of the code provides:

"The articles of incorporation, by-laws, rules and regulations of corporations hereafter organized under the provisions of this title, or whose organization may be adopted or amended hereunder, shall at all times be subject to legislative control, and may be at any time altered, abridged or set aside by law, and every franchise obtained, used or enjoyed by such corporation may be regulated, withheld, or be subject to conditions imposed upon the enjoyment thereof, whenever the general assembly shall deem necessary for the public good."

Construing section 1619 the supreme court of Iowa has repeatedly held that the general assembly possesses the sole power to create and regulate domestic corporations, and to impose upon foreign corporations, as a privilege of transacting business in this state, such conditions as it sees fit. *St. John vs. Building and Loan Association*, 136 Iowa, 448. As relating to foreign corporations, such power extends and continues throughout the entire period of their corporate activity in this state.

Prior to the so-called Whitmore amendment foreign corporations engaged exclusively in a mercantile and manufacturing business were exempted from the payment of certain fees and the procuring of a permit from the secretary of state prior to transacting business in Iowa. Under the Whitmore amendment this exemption is withdrawn.

As has been heretofore observed, the right to impose fees, penalties or taxes upon all corporations, foreign as well as domestic, if uniformly applied to all within the same class, is constitutional and clearly within the power of our legislature. It, therefore, follows that foreign corporations transacting business in Iowa shall comply with the provisions of section 1637 of the supplement to the code, 1913, as amended by chapter 139, acts of the 39th general assembly, referred to in your letter as the Whitmore amendment.

BEN J. GIBSON, *Attorney General*,

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

AMENDING ARTICLE OF FOREIGN CORPORATIONS

Foreign corporations not required to amend articles so as to comply in all parts with laws of Iowa, but only in and so far as the business to be transacted in this state is concerned. Secretary of state not required to issue general permit, but can prescribe the form of permit to be issued, taking care to authorize only such as is lawful under our laws.

August 8, 1921.

Hon. W. C. Ramsay, Secretary of State: As of date of July 25, 1921, and in response to your request, this department rendered an opinion in

which it was held that foreign banking institutions, trust companies and insurance companies seeking to do business in this state were required to comply with the provisions of section 1637 of the supplement to the code, 1913, as amended by chapter 139 of the acts of the 39th general assembly.

In connection with the section as so amended, and in connection with the opinion so rendered by this department, you have requested this department for a further ruling relative to the interpretation to be given this section as so amended in and so far as the same refers to such corporations. Your questions in substance are as follows:

First: You ask as to whether or not it is necessary for the articles of incorporation of such foreign corporations to be so amended prior to the granting of the permit required under the section, as to comply in all their parts with the provisions of our law.

Second: You ask as to whether or not a permit may be granted by your department to such corporations to transact certain classes of business in this state, without granting to such corporations the right to transact all the business provided by the articles of incorporation.

Third: You ask as to what is included within the term "doing business within this state" as used in this section as so amended.

In determining the first two propositions submitted by you we desire to call attention to the fact that the laws of the several states providing for the creation of corporations are different. Corporations are the creatures of legislatures. The several states, speaking through their legislatures, have conferred certain powers, rights and authorities upon corporations organized under the laws of such states. The laws of the several states relative thereto are not uniform. For example: In Iowa the life of a corporation is limited to a certain number of years. In other states the life of a corporation is different. In a few states perpetual grants are given. In some states corporations are authorized to transact many and varied classes of business. In Iowa the business to be transacted by corporations is limited to those classes of business which it is expressly authorized to transact by statute.

A corporation under the laws of Delaware may be authorized to transact business which such corporation would not be authorized to transact in Iowa. What is true as to these two states is likewise true as to practically all of the states. We may frankly say that no two states have exactly the same laws relating to corporations.

Corporations organize under the laws of a state because of the fact that under such laws they are authorized to transact particular classes of business. The articles of incorporation of such corporation provide at length the varied and different kinds of business which it is desired to transact, and which, under the laws of the state of its domicile, it is authorized to transact. Under the laws of the state of its domicile such corporation can transact all of the business provided in its articles; however, when it enters another state to transact business, it may discover that under the laws of such state part of the business which it is authorized to transact under the laws of the state of its domicile may be unlawful.

If it were to be held that the articles of incorporation of a corporation

desiring to transact business in this state must conform in all particulars to our laws, and that there must be eliminated therefrom all business which, however lawful in the state of its domicile, is unlawful under the laws of this state, the result would be that a corporation, in order to transact any business in Iowa, would be required to deprive itself of the right to transact business of a lawful character in the state of its domicile. If this were carried to its ultimate conclusion, and if a corporation desiring to transact business in all the states of the nation were required to amend its articles so as to conform to the laws of all the states, the result would be to deprive it of the right to transact almost every class of business.

We make these general observations relative to corporations in general to call attention to the effect which would necessarily result by the application of the rule that a foreign corporation, in order to secure a permit to do business in this state, must conform all of its articles to our law.

Calling attention to the particular corporations referred to in your request we desire to make the following observations:

You ask as to foreign banking corporations: A banking corporation is of a peculiar character. It is subject to restrictions which perhaps no other corporation is subject to. Under the rule in nearly every state in the nation a banking corporation is only authorized to conduct a general banking business at one particular place, and under one roof. It is not authorized to establish branch banks. Assuming that a bank is established under the laws of the state of Illinois to transact business in the city of Chicago, as a banking institution, it is not authorized to establish a branch bank. Assume that such bank desired to enter the state of Iowa for the purpose of loaning money to a bank in the state, and that its business of loaning money is of such a character as to be determined and as to fall within the meaning of the phrase "doing business in this state," such banking corporation could not amend its articles of incorporation so as to comply with the laws of this state. It could not, without surrendering its charter, qualify under the laws of this state as a banking institution authorized to conduct a general banking business in Iowa. If the rule mentioned in your first question were to be applied to banking institutions with full force the foreign banking institutions would be deprived of the right to transact business in this state.

What is true as to banking corporations applies with like force to insurance companies, trust companies and similar corporations.

Referring now to section 1637 as amended, we call attention to the fact that there is no provision in this entire section, nor are we able to discover any provision in the law, which requires the secretary of state to compel a foreign corporation to amend its articles so as to conform to the laws of this state in all particulars, nor are we able to discover any provision which requires the secretary of state to grant a permit to do all the business which such foreign corporation is authorized to do under the laws of its domicile. It will be observed under this section that where a corporation desires to transact business in this state, it must secure a permit to do such business. This does not mean that it must secure a

permit to do all the business which it is authorized to do, but only a permit to do such business as it desires to transact in Iowa.

The section as a whole provides just what a foreign corporation must do in order to be authorized to transact such business. It provides just what shall be filed in the office of the secretary of state. It authorizes him to make such further investigations of the corporation, its assets and manner of transacting business as he may desire to make. It gives him authority to refuse to grant a permit under certain conditions.

The law further provides that after the corporation has complied with all the provisions of the chapter relating to the authorization of foreign corporations to do business in Iowa, that the secretary of state "shall thereupon issue to such corporation a permit in such form as he may prescribe." That it was not the intention of the legislature that the secretary of state should be required to grant a general permit, or none at all, is apparent.

We are unable to conceive that it was the intention of the legislature to prohibit banking institutions, trust companies, insurance companies and mortgage companies from transacting business in this state which under the laws of Iowa would be lawful. We cannot conceive that it was their intention to prohibit transactions by such foreign corporations such as the purchase of negotiable papers, mortgages, notes and bonds. Such an intention would be inimical to the interests of the state at large.

On the contrary, the clear intent of the legislature was to prohibit such corporations from transacting business in Iowa save such business as under the laws of Iowa would be lawful. The fact that they transact other business in other states is immaterial.

It is therefore the opinion of this department that foreign corporations such as those referred to are not required to amend their articles of incorporation so that such articles comply in all parts with the laws of Iowa, but that the secretary of state is only required to know that such articles in and so far as the business to be transacted by such corporation in this state are lawful, and that all the other provisions of the chapter are complied with.

It is also the opinion of this department that you are not required to issue general permits, but that you may prescribe the form of permit to be issued. Your permit should under no circumstances authorize a corporation to transact any business in Iowa save such business as under our laws is lawful.

A corporation making application to you to transact business in this state should specify the business which it desires to transact. You should then make an investigation of the corporation in conformity with the law, and if, after such investigation, you are convinced of the stability of the corporation, that its manner of transacting business is free from fraud and is not against public policy, and if such corporation has complied with all the other provisions of the chapter, then you should grant your permit, limiting it as you may desire and believe best for the interests of the state.

Your third proposition, namely, as to what is included in the term "doing business within the state" is difficult of answer in a limited opinion. This phrase has been defined by the courts of the several states

in so many different cases that to refer to them all would be impossible in this opinion. In general, however, it may be observed that whether or not a particular transaction or transactions fall within the meaning of the term "doing business within the state" is a question of fact and law, dependent upon the particular facts and circumstances thereof.

However, it may be advisable to call your attention to some few general rules. It has been held that the doing of a single act of business in a state does not constitute doing business within the meaning of foreign corporation statutes. That is to say, isolated transactions as distinguished from a series of transactions does not fall within the meaning of the phrase. See: *Cooper Mfg. Co. vs. Ferguson*, 5 Supp. Ct. 739, 113 U. S. 727, 28 L. Ed. 1137; *Gilchrist vs. Helena*, H. S. & S. R. Co. (U. S.) 47 Fed. 593, 594; *Leasure vs. Union Mut. Life Ins. Co.*, 91 Pa. 491, 493; *Blakeslee Mfg. Co. vs. Hilton*, 118 Pa., Co. Ct. R. 553, 556; *Commonwealth vs. Standard Oil Co.*, 101 Pa. 119, 148; *National Knitting Co vs. Bronner*, 45 N. Y. Supp. 714, 715, 20 Misc. Rep. 125; *Florsheim Bros. Dry Goods Co. vs. Lester*, 29 S. W. 34, 35, 60, Ark 120 L. R. A. 505, 46 Am. St. Rep. 162.

This has been held in a case involving the taking of an isolated mortgage or bond.

It has also been held that where the entire transaction takes place without the state, such for example the making of a loan by a foreign bank, which loan is payable in a foreign state, the application accepted in a foreign state, and all other acts connected with the loan done in a foreign state, does not constitute doing business within the meaning of the phrase. See: *Scottish American Mortg. Co. vs. Ogden*, 21 South, 116, 118, 49 La. Ann. 8; *American Freehold Land Mortg. Co. vs. Pierce*, 21 South, 972, 49 La. Ann. 390; *Neal vs. New Orleans Loan, Building & Savings Assn*, 46 S. W. 755, 100 Tenn. 607; *Norton vs. Union Bank & Trust Co.* (Tenn.) 46 S. W. 544; *Scruggs vs. Scottish Mortg. Co.*, 16 S. W. 563, 54 Ark. 566; *State vs. Bristol Sav. Bank*, 18 South, 533, 534, 108 Ala., 54 Am. St. Rep. 141; *Ginn vs. New England Mortg. Sec. Co.*, 8 South 388, 92 Ala. 135.

It has been held, however, that where a foreign company maintains agencies within the state for the purpose of making loans, in fact, conducts a business within the state, that under such circumstances it is doing business within the meaning of the phrase.

In re *Montillo vs. Brick Company*, 163 Fed. 621.

However, the meaning of the phrase is so dependent upon the facts of each particular transaction as to render it necessary in each particular instance to consider and determine the proposition as to whether or not such particular transaction is within the statute.

You will observe that the section as amended, in that sentence which has relation to the right to bring actions by such foreign corporation, provides in substance that no action shall be maintained by the foreign corporation *doing business within this state* on a contract *executed in this state*, without first having secured the permit provided for. Both these contingencies must arise before the statute becomes applicable in and so far as this particular part thereof is concerned. On contracts ex-

cuted in another state, even though affecting property and rights in Iowa, the foreign corporation would be entitled to its rights without having complied with the statute.

On the other hand it would be entitled to its rights even though the contract were executed in Iowa, if in fact the corporation is not doing business within the state, however, these questions are of particular interest to the corporations and not of so great an interest to your department, and we shall not extend this opinion further.

Suffice it to say that if the question should arise in connection with your duties we would suggest that as to each particular set of facts and circumstances you submit a question to this department.

In connection with the foregoing and for your convenience, we call your attention to the reprints of the Corporation Trust Company, of New York, from the Corporation Journal to and including No. 98, issued in April, 1920, wherein is found a very complete analysis of the manner in which the courts have interpreted this phrase.

Your attention is also called to "Words and Phrases" under the head "Doing Business," found in volume 2 at page 108 to 127, inclusive. In this volume of "Words and Phrases" will be found a very complete digest of the decisions of the court involving an interpretation to be given this phrase.

BEN J. GIBSON, *Attorney General.*

ISSUANCE OF STOCK DIVIDENDS

Application to executive council must be made before declaring stock dividends from surplus.

March 1, 1921.

Hon. W. C. Ramsay, Secretary of State: Your letter of the 23d inst. addressed to Attorney General Ben J. Gibson has been referred to me for attention. You ask:

"Will you be kind enough to favor this department with an immediate opinion as to whether or not a company desiring to issue stock in their corporation against a surplus in their treasury, comes under the purview of the statute mentioned?"

The statute mentioned in your letter is section 1641-b of the 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. If it is purposed to pay for said capital stock in property or in any other thing than money, the corporation purposing 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. Pro-

vided that for the purpose of encouraging the construction of new steam or 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 effecting 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 that the statute above quoted contains the following provisions:

"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."

In the determination of your question we are excluding foreign corporations and corporations engaged in the insurance and banking business; for the reason that with reference to foreign corporations the laws of the state in which they are organized will govern, while with banking and insurance corporations we have specific statutes prescribing the use and distribution of its surplus. Therefore, this opinion is confined to the issuance of stock dividends by ordinary corporations organized for pecuniary profit in Iowa.

The surplus of a corporation is determined by deducting its liabilities from its assets. In estimating its assets all the property of the corporation is included; and in determining whether there is a surplus it is impossible to eliminate a consideration of the value of its assets. Therefore, whether there is a surplus depends upon the value of the property of the corporation.

If it is purposed to issue shares of stock in a corporation and pay for the same out of its surplus such surplus represents merely the value of its property in excess of its liabilities as fixed by the board of directors.

Section 1641-b, *supra*, provides that,

"When it is purposed to issue shares of stock and pay for the same in property, the executive council of Iowa shall determine the value of the property."

Therefore, if shares of stock are issued and paid for out of the surplus of the corporation, then the board of directors will be determining the value of the property from which the surplus is derived, and not the executive council.

For the foregoing reasons it is the opinion of this department that when it is purposed to issue shares of stock in a corporation and pay for the same out of its surplus, the corporation should apply to the executive council of Iowa and obtain its approval.

BEN J. GIBSON, *Attorney General*,

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

IOWA CORPORATION MUST HAVE PRINCIPAL PLACE OF BUSINESS HERE

A corporation organized under the laws of Iowa cannot have its principal place of business in another state.

December 5, 1921.

Hon. W. C. Ramsay, Secretary of State: You have requested an opinion from this department upon the three following questions:

"First: May an Iowa corporation under any condition legally hold a stockholders' meeting outside of the state, and, if so, when would it be permissible?"

"Second: May an Iowa corporation discontinue its principal place of business in this state and establish it in another?"

"Third: How are we to interpret the last sentence of that part of the law above quoted?"

The statute applicable to your questions will be found in section 1612 of the code, as amended, which reads as follows:

"Any corporation organized under the laws of this state shall fix upon and designate in its articles of incorporation its principal place of business which must be in this state, and if outside the limits of a city or town then its post office address must be given. The place of business so designated shall not be changed except through an amendment to its articles of incorporation. Its place of business shall be in charge of an agent of the corporation and shall be the place where it shall hold its meetings, keep a record of its proceedings and its stock and transfer books. Provided that any corporation organized under the laws of this state that does not maintain an office in the county of its organization, or transact business in this state, shall file with the secretary of state a written instrument duly signed and sealed, authorizing the secretary of state to acknowledge service of notice or process for and in behalf of such corporation in this state, and consenting that service of notice or process may be made upon the secretary of state, and when so made shall be taken and held as valid as if served according to the laws of this state, and waiving all claim or right of error by reason of such acknowledgment of service."

Under the provisions of this statute the principal place of business of a corporation organized under the laws of Iowa must be within the state. This statute also provides that the place of business of the corporation shall be the place where it shall hold its meetings. It is therefore the plain mandate of the statute that the place of holding of stockholders' meetings must be within the state, and must be at the place of business designated in the articles.

It is a general rule of law that a corporation organized under the laws of one state cannot perform strictly corporate acts at a stockholders' meeting held in another state unless expressly authorized by its governing law. *Harding vs. American Glucose Company*, 182 Ill. 551, 55 N. E. 577, 64 L. R. A. 738, 14 C. J. 886; *Hodgson vs. Duluth*, 46 Minn. 454; *Hilles vs. Parrish*, 14 N. J. Eq. 380; *Ormsby vs. Vermont Copper Mining Co.*, 56 N. Y. 623.

The reason for the rule is well set out in *Miller vs. Ewer*, 27 Me. 509, 46 Amd 619:

"That law by virtue of which a corporation exists is inoperative beyond the bounds of the legislative power, by which it is enacted. As the corporate faculty cannot accompany the natural persons beyond the bounds of the sovereignty, which confers it; and they cannot possess or exercise it there. Can have no more power there to make the artificial

being act, than other persons not named or associated as corporators. Any attempt to exercise such faculty there, is merely an usurpation of authority by persons destitute of it, and acting without any legal capacity to act in that manner."

It must therefore be held that an Iowa corporation must have its principal place of business within the state, and must hold its stockholders' meetings within the state, and that it cannot discontinue its place of business in Iowa and establish such principal place of business in another state. It might, however, by proper amendment, establish its principal place of business at another point within the state.

The third question submitted by you has relation to the filing of a written authority to acknowledge service of process with the secretary of state. The statute in this respect is that where the corporation does not maintain an office within the county of its organization, or where it does not transact business in the state of Iowa, then such authority is to be filed. Otherwise the corporation must be dissolved in accordance with the mandate of the statute. Where such authority is filed, then service of process may be made in the manner prescribed by this statute.

BEN J. GIBSON, *Attorney General*,

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

DUTY OF FOREIGN CORPORATIONS TRANSACTING BUSINESS IN IOWA

All corporations for pecuniary profit organized under the laws of Iowa or of the United States or any state or foreign country shall secure a permit before engaging in business in the state.

July 25, 1921.

Hon. W. C. Ramsay, Secretary of State: Your letter of July 20 addressed to the attorney general has been referred to me for answer. You state:

"I call your attention to section 5367 C. C. 1919, as amended by chapter 139 of the acts of the 39th general assembly, effective July 4, 1921, more particularly sections 3 and 4 of the chapter above referred to.

"In view of the changes above mentioned, I have had several inquiries as to whether foreign banking institutions, trust companies and insurance companies will now be permitted to make real estate loans in the state of Iowa, and conduct such other business as may be incident thereto.

I, therefore, submit the question to you and ask your opinion in the matter.

"You will find enclosed herewith copies of several of the letters which I have received, as these may be of some value to you in determining what is the real question."

Section 1637 of the code of 1913 as amended by the 39th general assembly reads as follows:

"Any corporation for pecuniary profit organized under the laws of another state, or of any territory of the United States, or of any foreign country, which has transacted business in the state of Iowa since the first day of September, eighteen hundred eighty-six, or desires hereafter to transact business in this state, and which has not a permit to do such business, shall file with the secretary of state a certified copy of its articles of incorporation, duly attested by the secretary of state or other state officer in whose office the original articles were filed, accompanied by a resolution of its board of directors or stockholders authorizing the filing thereof, and also authorizing service of process to be made upon

any of its officers or agents in this state engaged in transacting its business, and requesting the issuance to such corporation of a permit to transact business in this state; said application to contain a stipulation that such permit shall be subject to the provisions of this chapter. Said application shall also contain a statement subscribed and sworn to by at least two of the principal officers of the corporation, setting forth the following facts, to wit:

Paragraphs one, two, three, four and five of said section enumerate the facts which must be set forth in the statement referred to above.

The above section as amended now applies to any corporation for pecuniary profit organized under the laws of another state, etc., and no corporation so organized is now exempted from the provisions of this section, no matter for what purpose it was organized, except that corporations transacting business in this state prior to the first day of September, 1886, are exempt from the payment of the fees required under the above section. Prior to the amendment made by the 39th general assembly the section did not apply to foreign corporations buying, selling or otherwise dealing in notes, bonds, mortgages or other securities. The provisions of the act exempting such corporations were, however, repealed by the 39th general assembly so that the question submitted by you must be answered in the affirmative, that is to say it will be necessary for the Pearson-Taft Land Credit Company and all other corporations doing business in this state to comply with the foreign corporations act and secure a permit before doing business.

The 39th general assembly after striking from paragraph 5 of section 1637 of the 1913 supplement to the code, the following language:

"Nothing in this section shall be construed to prevent any foreign corporation from buying, selling or otherwise dealing in notes, bonds, mortgages and other securities,"

added the following in lieu thereof:

"No foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state unless prior to the making of such contract it shall have procured such permit. This prohibition shall also apply to any assignee of such foreign stock corporation and to any person claiming under such assignee of such foreign corporation or under either of them."

The intent and purpose of this provision and the effect of the law as it now is by virtue thereof is to make it a condition precedent to the right to maintain an action, that any foreign corporation doing business in this state shall comply with the provisions of the foreign corporations act, making possible the service of notice upon it so that the courts of this state will have jurisdiction and secure a permit from the secretary of state to transact business.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

OPINIONS RELATING TO BLUE SKY CONCERNS

BLUE SKY LAW RETROACTIVE

Provision of the law limiting promotion expense applicable to all sales of stock in the future, even though it may have effect of abrogating existing contracts.

May 10, 1921.

Hon. W. C. Ramsay, Secretary of State: The department is in receipt of your letter of the 4th inst. requesting an interpretation of section 1920-u23, being a part of the blue sky law, enacted by the 39th general assembly and additional to former enactments of the legislature on the same subject. The particular questions propounded by you are as follows:

"It is desired that you advise this department whether or not Iowa corporations who have been selling their stock and have entered into contracts to pay a greater commission and selling expense than that permitted under section 1920-u23 will be required to abrogate their contracts and in the future sell their stock on the basis as provided for in section 1920-u23,

"Will foreign corporations who have presented applications to this department in the past, which provided for a greater marketing expense than that provided for in section 1920-u23, and which have been granted a permit on such application be required to amend their application so as to comply with section 1920-u23?"

In answering your first question it is necessary for us to refer to certain laws with reference to the creation and organization of corporations to determine the authority that vests in the legislature with respect to their organization and control.

Section 12 of article 8 of the constitution reads as follows:

"Subject to the provisions of this article, the general assembly shall have power to amend or repeal all laws for the organization or creation of corporations, or granting of special or exclusive privileges or immunities, by a vote of two-thirds of each branch of the general assembly; and no exclusive privileges, except as in this article provided, shall ever be granted."

A reading of this section will disclose that the constitution gives to the general assembly full power to amend or repeal any law for the organization or creation of corporations, hence, full jurisdiction over such organizations was placed in the hands of the general assembly.

The legislature assuming the authority vested in it by the constitution enacted section 1619 of the code which reads as follows:

"The articles of incorporation, by-laws, rules and regulations of corporations hereafter organized under the provisions of this title, or whose organization may be adopted or amended hereunder, shall at all times be subject to legislative control, and may be at any time altered, abridged or set aside by law, and every franchise obtained, used or enjoyed by such corporation may be regulated, withheld, or be subject to conditions imposed upon the enjoyment thereof, whenever the general assembly shall deem necessary for the public good."

The section of the constitution, which we have above quoted, and the section of the code just referred to undoubtedly gave the legislature full

power to control the organization and operation of all corporations seeking to operate within the state of Iowa, and for that reason, the legislature would have the right to change the laws with reference to the organization of corporations even though such change might in effect abrogate or impair contracts existing between such corporation and other persons.

Corporations have no right to transact business within this state except as they are permitted to do so by legislative enactments and their articles of incorporation are at all times subject to amendment by that body.

The 39th general assembly by the enactment of the section of the blue sky law, which you have chosen to term section 1920-u23, placed a limitation upon the amount of money that might be expended in the sale of its stock and expended for other items which might be included under the term promotion expense.

The legislature under the laws hereinbefore referred to undoubtedly had the authority to require corporations to so limit their expense of promotion and they do not have the authority to make expenditure exceeding the amount therein set as the maximum expense and this section affects the expenditures of all corporations from and after the taking effect of the act of the 39th general assembly.

It follows from what we have above stated covering your first inquiry that your second inquiry must be answered in the affirmative and foreign corporations should be required to amend their application for a permit so as to comply with the provisions of section 1920-u23.

The interpretation that we have placed upon the power of the legislature to regulate and control corporations is supported by the case of *St. John vs. Building and Loan Association*, 136 Iowa, 448, in which the supreme court held that a corporation's right to do business is dependent upon legislative authority and its articles are always subject to amendment by the general assembly, which may impose conditions on the right of a going concern even though such conditions would in effect impair the obligations of existing contracts.

BEN J. GIBSON, *Attorney General*,

By JOHN FLETCHER, *Assistant Attorney General*.

WHEN SALE OF PROMISSORY NOTE IS NOT UNDER BLUE SKY LAW

Promissory notes issued in series by payor in a transaction the ultimate purpose of which is the sale of stock, do not come within the exemption provisions of either section 1920-u13 or paragraph d of section 1920u1.

May 10., 1921.

Hon. W. C. Ramsay, Secretary of State: This department is in receipt of your letter of the 3rd instant enclosing a series of promissory notes of the Continental Mortgage Loan Company of Omaha, Nebraska, attached to a receipt issued by said company entitling the holder on surrender thereof to one share of its common capital stock of the par value of \$100.

You quote a portion of section 1920-u13, as follows:

"Nothing in this act shall be construed as to prohibit a bona fide owner of any stocks, bonds or other securities from selling, exchanging or otherwise disposing of the same when not made in the course of continuing or repeated transactions of a similar nature, or when said securities, in-

cluding negotiable promissory notes, have been issued or given for goods, wares or merchandise purchased or dealt in by the issuer in the ordinary course of his business, or when sold, exchanged or otherwise disposed of to a bank subject to governmental supervision, trust company, insurance company, building and loan association, or to a person who has duly received a permit to transact business within this state pursuant to the provision of this act, provided that the same are sold by said owner in good faith and not for the purpose of evading the provisions of this act."

Also section 1920-u1, paragraph d, as follows:

"Evidences of indebtedness executed by a corporation and secured by a mortgage on real estate, which mortgage may also cover tangible property connected therewith, when the total amount of such indebtedness does not exceed the fair value of the property pledged; also evidences of indebtedness (not issued by a corporation) secured by bona fide mortgage on personal property in this state; also commercial paper or acceptances or negotiable promissory notes."

You then ask:

"Does the exemption in section 1920-u1 paragraph d exempt all promissory notes from the operation of the law, or can it be construed that only the promissory notes exempted in section 1920-u13 are the only ones to be exempted from the law?"

"This department has held in the past that promissory notes issued in series, and for the express purpose of financing a company did come under the provisions of the blue sky law.

"I attach hereto a copy of a promissory note being issued by the Continental Mortgage Loan Company of Omaha, Nebraska, which recently was held did come under the provisions of the present law. Will such a note be exempted under the amended law?"

Before answering your question specifically with reference to the proposal of the Continental Mortgage Loan Company, we will set out in full the receipt to which the series of promissory notes is attached. It is as follows:

"\$650.00

Omaha, Nebraska.

"Serial No.

"In consideration of an actual loan in the amount of five hundred dollars, the receipt of which is hereby acknowledged, Continental Mortgage Loan Company, a corporation, has executed in favor of and delivered to attached hereto, six coupon notes, viz: five coupon notes of one hundred dollars each, payable in one, two, three, four and five years, respectively, after the first of the month after the date hereof, and one coupon note of one hundred fifty dollars, payable six years after the first day of the month next following the date hereof.

"Said coupon notes represent repayments of both principal and interest of this loan and are payable in lawful money with New York Exchange at the office of Continental Mortgage Loan Company, Omaha, Nebraska.

"Continental Mortgage Loan Company agrees that upon surrender of this receipt on the due date of coupon note number 6, it will issue one share of its common capital stock; par value one hundred dollars, fully paid and nonassessable, and deliver same to the lawful holder hereof.

"Continental Mortgage Loan Company,
SecretaryPresident."

A reading of the above instrument will clearly demonstrate that the proposal of the Continental Mortgage Loan Company is in no sense for the sale in good faith of negotiable promissory notes. There is nothing therein contained that would indicate that the notes themselves are the subject of the sale but on the contrary, they merely represent the evidence of a debt created by the company for money borrowed from the payee and the so-called receipt shows clearly that the ultimate purpose

of the entire transaction is the sale of stock, the receipt itself providing that upon its surrender one share of stock shall be issued to the holder in consideration of the original loan made to the company. Such a transaction clearly demonstrates that it is governed by the provisions of the blue sky law and does not fall within the exceptions of either of the statutes above quoted. The conflict between section 1920-u13 and paragraph d of section 1920-u1 is more apparent than real and has no bearing at all upon the question under consideration because the exceptions therein provided do not apply to transactions of this character. It follows that before being authorized to do business in Iowa the Continental Mortgage Loan Company would be required to secure a permit from the secretary of state of the state of Iowa.

At the time of the publication of the act which included section 1920-u1, paragraph d, the law containing section 1920-u13 was already in force and has never been repealed. The legislature in enacting the amendment must be presumed to have had in mind all previous legislation upon the same subject and in construing a statute courts will consider the pre-existing law and any other acts relating to the same subject.

The prohibitions contained in the blue sky act relate to transactions involving the sale of securities, stocks, bonds, etc. The exemptions contained in the sections herein quoted also relate to transactions in which the ultimate purpose is the sale of the things exempted from the operation of the prohibitory portion of the statute. With this thought in mind a construction of the two sections quoted herein will naturally lead to the conclusion that there is no real conflict in their provisions since neither section in our opinion authorizes the negotiation of promissory notes by the issuer in a transaction the ultimate purpose of which is the sale of corporation stock.

Promissory notes may be signed and delivered as evidence of a debt without reference to the blue sky law so far as the payer and payee are concerned, but when a dealer in securities undertakes to dispose of them he cannot lawfully do so unless they are clearly within the exceptions named in the blue sky act. The issuer or payor is of course, not a dealer in promissory notes signed by him as security for a loan, and would not be permitted to exchange or otherwise dispose of the same in the course of continuing or repeated transactions of a similar nature. Especially would this be true when those transactions have for their ultimate purpose the sale of stock in a corporation as does the proposal of the Continental Mortgage Loan Company in question.

BEN J. GIBSON, *Attorney General.*

COMMON LAW ASSOCIATIONS UNDER BLUE SKY LAW

An association organized under the so-called common law statute of federal government is subject to blue sky law.

April 20, 1921.

Hon. W. C. Ramsay, Secretary of State: I have examined the so-called articles of incorporation of the Compressed Air, Heat and Power Company of Sioux City, submitted by you for an opinion as to whether said company is subject to the provisions of the blue sky law of this state in the sale of its so-called shares of stock.

The law governing your question will be found in chapter 13-B, title 9 of the supplemental supplement, 1915. Section 1920-u of said chapter provides:

"Every person, firm, association, company or corporation that shall either directly or through representatives or agents, sell, offer or negotiate for sale, within this state, any stocks, bonds or other securities, shall be subject to the provisions of this act, except as herein otherwise provided; and shall, before doing or offering to do any such business in this state, be required to secure a permit of the secretary of state of the state of Iowa."

It will be observed that every association, company or corporation selling or offering to sell its stocks, bonds or other securities in this state, comes within the provisions of the statute; unless the securities sold are the kind and character defined in section 1920-ul of the act.

Subdivision (e) of section 1920-ul exempts the following:

"The stock of any corporation organized under the laws of this or any state or territory of the United States, or of the federal government, provided that under the laws of such state or territory or federal government no capital stock of a corporation can be legally issued unless the par value of said stock is paid for in full in either cash or property at its actual value before the issuance of such stock and where all property and any other thing given in exchange for such stock other than cash must be valued at not more than its actual cash value by some duly appointed officer of commission of such state, territory or federal government under the laws of which such corporation is organized and where such stock has been issued in accordance with the provisions of such laws."

Referring to "articles of organization" as they are called of the Compressed Air, Heat and Power Company, it will be observed that said company is alleged to be organized under some common law and statutory provisions of the government of the United States. From an examination of the federal statutes I am unable to find any statute authorizing the creation of any such corporation. In the absence of any citation of any such statute we must assume there is none, or at least that it does not contain provisions entitling the company in question to exemption in the sale of its shares of stock.

Therefore I am of the opinion that the company in question shall be governed by the provisions of chapter 13-b supra.

BEN J. GIBSON, *Attorney General*,

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

ILLEGAL CONTRACTS UNDER BLUE SKY LAW

A contract is illegal which is executed with the express purpose of violating the blue sky law of Iowa.

April 1, 1921.

Hon. W. C. Ramsay, Secretary of State: We have your request for an opinion upon the following question:

"Does the transgression of the so-called blue sky law of this state, which provides for a penalty, render a contract by which the statute was transgressed, illegal?"

"Has the supreme court of Iowa passed upon this particular question?"

I am not familiar with any ruling of the supreme court directly on this question. However, the law is well established in this state that any promise, contract or undertaking, the performance of which would tend

to promote, advance, or carry into effect any object or purpose which is unlawful, is in itself void and will not sustain an action. *Reynolds vs. Nichols*, 12 Iowa, 398; *Dillon vs. Allen*, 46 Iowa 299.

Under the foregoing rules, it has been held that one who contracts to render services in violation of a statute, requiring a license to be procured by those performing such services, cannot recover compensation for services thus performed without a license. *Richardson vs. Brix*, 94 Iowa 626.

Therefore, I am of the opinion that a contract is illegal which is executed with the express purpose of violating the so-called blue sky law of this state.

BEN J. GIBSON, *Attorney General*,

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

WHEN BROKERS DO NOT NEED LICENSE

Brokers selling securities exempt under blue sky law, do not have to procure license.

June 28, 1922.

Hon. W. C. Ramsay, Secretary of State: You have submitted to this department for an opinion the two following questions:

"First: Does the fact that a broker deals exclusively in such securities as are excepted from the operations of the blue sky law by section 1920-u1 also exempt such broker from qualifying under section 1920-u16 of said laws?"

"Second: Where a financial institution purchases large bond issues from time to time and the bond carries with it the written guarantee of such purchaser as to the payment of both principal and interest, may it in turn offer such securities for sale in Iowa without qualifying either as owners or brokers, provided further that the bonds are or may be classed as exempt under sub-division K of section 1920-u1 of the blue sky law? In other words, would the guarantee of the original purchaser as to the payment alter the situation with respect to qualifying as above suggested?"

Chapter 149, acts of the 36th general assembly (chapter 13-B, title IX, supplemental supplement), as amended by chapter 189, acts of the 39th general assembly, and known as the "blue sky law," requires every person, firm, association, company or corporation to procure a permit from the secretary of state prior to selling or offering for sale any stocks, bonds, or other securities within this state.

Section 17 of chapter 149, requires every broker or dealer in stocks, bonds or other securities, to procure a permit from the secretary of state prior to selling or offering for sale such securities in the state of Iowa. However, section 2, chapter 149, as amended by chapter 189, acts of the 39th general assembly, expressly exempts the sale of a certain class of securities from the provisions of chapter 149, as amended. Under that exemption, a person, firm or corporation selling its own securities of the exempted class, is not required to procure a permit. Section 17 (section 1920-u16, supplemental supplement) requiring brokers to procure a permit, is one of the provisions of chapter 149. Since none of the provisions of chapter 149 apply to the sale of such exempted securities, and section 17 is one of the provisions of chapter 149, I am, therefore, of the opinion that a broker is not required to procure a broker's permit when selling or offering for sale such exempted securities only.

As to your second question, I do not believe that the fact a financial

institution guarantees the payment of both principal and interest in the re-sale of a large bond issue purchased by such institution, makes any difference, provided the bonds are of the exempted class.

BEN J. GIBSON, *Attorney General*,

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

INDUSTRIAL BUSINESS

The term "industrial business" as used in the blue sky law defined.

May 9, 1921.

Hon. W. C. Ramsay, Secretary of State: In your letter of May 3, 1921, you submit to this department a request for an opinion. For convenience we quote your letter:

"The 39th general assembly enacted an amendment to the Iowa blue sky law by adding thereto section 1920-u23 which reads:

"No person, firm, association, company or corporation shall offer for sale, sell, or otherwise dispose of within this state any securities coming within the provisions of this chapter upon which the total promotion expense, including all commissions, discounts on paper or other expense in marketing such securities exceed 10 per cent of the selling price thereof; provided, however, that any such company organized for the purpose of carrying on an *industrial business* within this state may expend for such purposes not to exceed 15 per cent of such selling price, and provided further that in addition thereto there may be paid all charter fees, franchise taxes, permit and certificate fees, attorney fees, and necessary expenditures for stationery and supplies. The agents' commission shall be paid to the agent only out of the purchase price of the stock and then only when and as such purchase price is paid by the purchaser."

"In connection with this paragraph it is desired that you define for the use of this department the words 'industrial business' as used in this section."

The term "industrial business" is a very broad term. The statute to which you refer places no limitations upon the term itself and simply provides that as to securities issued by companies carrying on an industrial business, the expense of marketing the securities shall not exceed 15 per cent of the selling price.

The terms "industrial," "industrial pursuit," "industrial enterprise," or "industrial business" have been given very broad interpretations by the courts. Worcester defines the term "industrial" as "relating to manufactures, or to the product of industry or labor." This definition is cited with approval in the case of *Louisville & N. R. Co. vs. Fulgham*, 91 Ala. 555, 8 So. Sep. 803, 804. In this case the term is held to include all kinds of manufacturing and hence, to include a mill for the manufacture of corn into flour.

In the case of *Wells, Fargo & Co. vs. Northern P. R. Co.* (U. S.) 23 Fed. 469, 474, 475, the court holds in construing the revised statutes of the United States, 1889, which permit persons to associate themselves together as bodies corporate for mining, manufacturing, and other industrial pursuits; that the term "industrial" is a large word and although it is associated with the words "mining" and "manufacturing" in the statute in question, it would be contrary to the manifest purpose of congress to so restrain it as that the pursuit must be literally, or almost literally, a mining one or a manufacturing one. In this case the court holds that an express business is an industrial pursuit within the meaning of the statute.

In *Bashford-Burmister Co. vs. Agus Fris Copper Co.*, 35 Pac. 983, the court holds that the term "industrial pursuits" as used in the revised statutes of the United States, 1889, includes a mercantile business for the sale of goods, mining supplies, etc. In this case the court says that the term "industrial pursuit" is a very broad expression. To the same effect see *Carver Mercantile Co. vs. Hulme*, 19 Pac. 213, 214, 7 Mont. 566.

The term "industrial" is defined in Cyc (22 Cyc, 493) as follows: "The term (industrial) is also often employed as referring to something relating to manufacturing or to the product of industry or labor."

The term "industrial business" as used in the act to which you refer must then be held to be inclusive of all manufacturing and mining industries, and in fact to include all business enterprises which may by a reasonable interpretation be included within the term "industrial." It might be said however, that in our opinion it would not include finance corporations, banking corporations, insurance corporations, or any other corporation the business of which may not properly be termed an industrial business.

Companies organized for the purpose of carrying on an industrial business must be held to be those companies or corporations engaged in manufacturing, mining or other industrial business. It does not include finance corporations, banking corporations, insurance corporations or any other similar corporations or companies. It will be observed that there is a distinction that cannot be with reasonable certainty defined, and yet which will be manifest in a consideration of the two classes of corporations to which you have referred. In this connection it may properly be said that wherever the distinction is not so marked, your department should submit the particular facts and circumstances so that the question may be considered with particularity.

BEN J. GIBSON, *Attorney General.*

OPINIONS RELATING TO SCHOOLS

JURISDICTION OF COUNTY SUPERINTENDENT

County superintendent has jurisdiction to hear question of revocation of teacher's certificate of all teachers employed in his county regardless of non-residence of teachers.

June 9, 1922.

Mr. W. H. Tedrow, County Attorney, Corydon, Iowa: At the request of Miss Ava Amenell, county superintendent of public instruction, I am writing you this letter.

The county superintendent requested an opinion from this department as to her jurisdiction to determine the question of the revocation of a teacher's certificate, the grounds for such revocation having occurred during the period the teacher was employed to teach in Wayne county, although at the time the charges were preferred against the teacher such teacher had removed from the county.

The statute covering this question will be found in section 2734-u of the supplement to the code, 1913, which reads as follows:

"When in the judgment of the county superintendent there is probable cause for the revocation of a certificate or diploma held by any teacher employed in this county, or when charges are preferred, supported by affidavits charging incompetency, immorality, intemperance, cruelty, or general neglect of the business of the school, the county superintendent shall within ten days transmit to such person a written statement of the charges preferred and set the time and place for the hearing of the same, at which trial the teacher shall be privileged to be present and make defense. If in the judgment of the county superintendent there is sufficient grounds for the revocation of the certificate or diploma, he shall at once issue in duplicate an order revoking the certificate or diploma, and the same shall become operative and of full force and effect ten days after the date of its issue, one copy of the order to be mailed to the holder of the certificate and the other to be mailed to the superintendent of public instruction. Provided that the person aggrieved by such order shall have the right to appeal to the superintendent of public instruction within ten days from the date of such mailing and in case of appeal the revocation shall not be effective until the same is affirmed, after full hearing, by the superintendent of public instruction. Provided further, that in the case of life dipomas or state certificates of whatever class, the revocation shall not be effective until affirmed by the educational board of examiners after full review by said board."

Pursuant to the provisions of the statute above quoted the county superintendent has jurisdiction to hear and determine charges preferred against a teacher who has been employed in the county under the jurisdiction of such superintendent, provided such teacher was so employed during the period in which he or she committed the acts which form the basis for revoking her certificate.

I am informed that in the case in question the acts were alleged to have been committed while the teacher was employed in Wayne county and therefore it is the opinion of this department that the county superintendent of Wayne county has jurisdiction to hear and determine the

matter even though the school term has closed and the teacher has gone to her home in another county.

BEN J. GIBSON, *Attorney General*,
By W. R. C. KENDRICK, *Assistant Attorney General*.

DISSOLUTION OF CONSOLIDATED SCHOOL DISTRICT

(1) When district lies partly in two counties, expense of county board of education sitting in joint session on appeal in case of dissolution should be paid by each county. (2) Expenses incident to dissolution and reorganization of new districts paid by each county.

April 14, 1922.

Mr. Hamilton Tobin, County Attorney, Vinton, Iowa: You have requested an opinion from this department upon the following facts:

"The Irving consolidated school district lies partly in Benton county and partly in Tama county. It is under the supervision of the county superintendent of Tama county. A petition for dissolution was filed with the county superintendent of Tama county, which petition was dismissed. Appeal was then taken to the county board of education and the county boards of the two counties met in joint session at Toledo."

You then ask:

First. "Which county pays the expense of the Benton county board to Toledo?"

Second. "Should the expense incident to the dissolution and organization of new districts be paid partly by Benton county?"

I am informed that the state superintendent of public instruction advised Miss Emma Crossley, county superintendent of Benton county, with reference to your first question, holding that Benton county should pay the expense of its board while attending the joint session at Toledo. This department concurs in that opinion.

As to your second question it is the opinion of this department that in as much as the supervision of the district is under the county superintendent of Tama county that the ordinary expenses incident to the dissolution should be paid by Tama county. In the re-organization of the former consolidated district, the expenses incident to the re-organization of that portion lying in Tama county should be paid by Tama county, and the expenses incident to the re-organization of the old district lying in Benton county should be paid by Benton county,

BEN J. GIBSON, *Attorney General*,
By W. R. C. KENDRICK, *Assistant Attorney General*.

USE OF FUNDS

The general appropriation under Sec. 2634-b8, Supp., 1913, may be used to pay expense of grading examination papers of normal training teachers in high schools.

February 13, 1922.

Hon. P. E. McClenahan, Superintendent of Public Instruction: You have submitted to this department the following question:

"May the state superintendent of public instruction legally pay the expenses incurred in grading the examination papers in the examinations held under the provisions of section 2634-b6 of the supplemental supplement, as amended by section 1, chapter 346, acts of the 37th general assembly, from the general appropriation provided for in section 2634-b8

of the supplement to the code, 1913, as amended by chapter 230, acts of the 38th general assembly?"

Section 2654-b6 is a part of the law governing the normal training of teachers in high schools and provides as follows:

"On the third Friday in January and the Wednesday and Thursday immediately preceding and on the third Friday in May and the Wednesday and Thursday immediately preceding, each year, in each high school approved under this act, an examination for graduation from the normal course shall be conducted under such rules as the state board of examiners shall prescribe, but the county superintendent of the county in which an approved high school may be located shall be designated as the conductor of said examination. Candidates for a certificate of graduation from the normal course failing in the examination in one or more subjects, may be permitted to enter the above examinations or the regular July teachers' examination under such regulations as the superintendent of public instruction shall prescribe.

"Each applicant for a certificate of graduation from the normal course in a county shall pay a fee of one dollar which shall entitle him to one examination in each subject required, provided, however, that applicants rewriting the examination in one or more subjects at the July teachers' examination as herein provided shall pay an additional fee of one dollar. One-half of the fees from the normal training examinations shall be paid into the state treasury on or before the first day of the succeeding month, and the remaining one-half shall be paid into the county institute fund of the county wherein the examination is held."

Section 2634-b8 of the supplement to the code, 1913, as amended by chapter 230, acts of the 38th general assembly, appropriates \$150,000.00 annually for the carrying out of the provisions of the law relating to the normal training of teachers in high schools. Section 2634-b8 as amended provides:

"For the purpose of carrying out the provisions of this chapter, there is hereby appropriated out of any moneys in the state treasury, not otherwise appropriated, the sum of \$150,000.00 annually hereafter."

The statute relating to the normal training of such teachers confers upon the state superintendent of public instruction the general supervision of the instruction of such teachers and section 2634-b4 of the supplement to the code, 1913, authorizes the use of the money appropriated by section 2634-b8 for the payment of such expenses as are incurred by the state superintendent in the exercise of such general supervision.

I am informed that a large number of students in the various high schools throughout the state are taking the instruction necessary to qualify them for normal teachers, and that this number is increasing each year. I am also informed that the questions used in each examination are either prepared or approved by the state superintendent of public instruction, and that in the examination of these papers it requires considerable time by a large force of examiners.

Inasmuch as the statute confers upon the state superintendent of public instruction the general supervision of such training and authorizes the use of the money appropriated by section 2634-b8, aforesaid, to pay the expenses incurred in such general supervision, it necessarily follows that the funds provided by said general appropriation may be legally used by the state superintendent of public instruction in payment of the expenses incurred in the examination of such papers.

BEN J. GIBSON, *Attorney General*,

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

PAYMENT OF TUITION IN PAROCHIAL SCHOOLS

School districts cannot pay tuition of pupil to parochial school.

February 8, 1922.

Mr. J. A. Nelson, County Attorney, Decorah, Iowa: I am in receipt of your letter dated February 6, 1922, in which you request an opinion from this department relative to the construction to be given section 2733-1a of the supplemental supplement to the code, 1915, as amended, in and so far as the same applies to the situation presented. You state:

"A pupil who has finished the eighth grade in the public schools of your county goes to Charles City, Iowa, and attends a parochial school which teaches the same branches as are taught in an approved public high school."

You ask as to whether or not the school district may lawfully pay the tuition of such pupil at such parochial school.

The code section to which you have referred has relation only to the public schools of the state. It expressly provides as follows:

"Any person 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 section further provides in substance that in such cases the school district of which the pupil is a resident shall pay the tuition of such pupil in the amount provided by statute.

From what has been said as well as from the other provisions of the section it will become apparent at once that this section applies only to the public schools of this state and that the authority of a school corporation to pay the tuition of a resident pupil of such corporation to a corporation maintaining a public high school applies only to public high schools or to county high schools which are public schools.

A school corporation can only pay from the funds collected for the maintenance of its public schools such sums and for such purposes as are provided by statute. There being no authority in the statute for the payment of tuition at parochial schools the directors of the district would be without authority to pay such tuition and the payment thereof would be unlawful.

BEN J. GIBSON, *Attorney General*.

PUBLISHING STATEMENTS OF CLAIMS PAID

The statement required under chapter 232, acts of the 39th general assembly, should be published in 1921, a few weeks delay immaterial.

October 21, 1921.

Hon. P. E. McClenahan, Superintendent of Public Instruction: Your letter of the 12th inst. addressed to Attorney General Ben J. Gibson has been referred to me for attention.

You ask for an official opinion from this department upon the two following questions:

- "1. Must school boards publish that statement for the present year?
- "2. If they did not publish it the first week in July must they publish it later?"

Senate File No. 393, referred to in your letter, is known as chapter 232,

acts of the 39th general assembly, and the portion thereof material to a determination of your questions provides:

"In each consolidated district and in each independent city or town school district, the board shall, during the first week of July of each year, publish, by one insertion in at least one newspaper of general circulation within the district, if there is a newspaper published within said district, a statement, verified by the affidavit of the secretary of the board, of all claims paid by said board during the preceding year, showing the amount paid, the name of the payee, and the purpose for which paid."

The better line of authorities hold that the term "first week" of any particular month means the first seven days of that month.

It is also a general rule of construction followed by practically all of the courts of last resort, including our own supreme court, that a statutory provision requiring public officials to perform some act within a specified time is directory, unless the contrary intention is clearly expressed in the statute.

We are, therefore, of the opinion that both questions submitted by you should be answered in the affirmative. However, we do not want to be understood as approving delay upon the part of such school boards in the publication of this statement. The statute provides that this statement shall be published during the first week of July each year, and that provision of the statute should be literally complied with if possible and should be ignored only when from some unavoidable cause the statement cannot be prepared in time to be published during the first week of July, and to merely neglect to comply with the statute would constitute gross inattention to duty on the part of the members of the school board.

BEN J. GIBSON, *Attorney General*,

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

ISSUANCE OF BONDS TO TAKE UP OUTSTANDING WARRANTS

District has right to vote bonds to take care of outstanding obligations represented by warrants which are unpaid, or bonds that have matured.

October 1, 1921.

Hon. P. E. McClenahan, Superintendent of Public Instruction: This department is in receipt of your communication of the 28th instant requesting our opinion as to the legality of an election in a school district where in voting for bonds, the following proposition was submitted to the voters:

"Shall the (naming the independent district) issue bonds in the sum of dollars (\$.....) for the purpose of constructing or equipping school houses?"

If, in voting for bonds, the proposition contains the following language:

"* * * for the purpose of erecting and constructing a new school house within said district and equipping and furnishing the same and for the purpose of purchasing a site upon which to erect such school building and additional land thereto, and certain of said funds to be used in taking care of certain outstanding bonds and obligations of said district now in existence, and also if necessary to provide for the housing of teachers."

You ask whether in our opinion the phrase "to be used in taking care of certain outstanding bonds and obligations of the district" contained in the proposition, would make the election illegal if the proposition

carried. The district would of course have a right to vote bonds to take care of outstanding obligations which were represented by warrants that were unpaid, or bonds that have matured.

We do not believe, therefore, that the phrase referred to would render an election illegal, but that such a proposition, if carried by the voters, would be binding upon the district, and bonds issued thereunder would be legally issued.

BEN J. GIBSON, *Attorney General*.

By JOHN FLETCHER, *Assistant Attorney General*.

CANNOT PAY SUPERINTENDENT TRAVELING EXPENSES OUT OF SCHOOL FUNDS, ETC.

Expense of superintendent and delegation of teachers incurred in attending the convention of the national association outside of the state cannot be paid from the funds of the county. Expense of physician who accompanies his football team cannot be paid out of the funds of the school district or county.

July 19, 1921.

Hon. Glenn C. Haynes, Auditor of State: Your written request of the 28th ult., for an opinion from this department has been referred to me for attention. You ask:

"First: Are the expense bills (R. R. fare, hotel bills, etc.) of the superintendent of schools and a delegation of teachers, for attendance at a convention of the National Association of Teachers, or at any similar meeting, held outside of the state, a legal charge to be paid from the funds of the school district?"

"Second: Is a physician's bill, for accompanying a school football team to various neighboring towns for football contests, under the guise of giving medical attendance if it should become necessary, a legal charge to be allowed and paid from the funds of the school district?"

With reference to your first question, this department has heretofore held that the traveling expenses of the county superintendent of schools and teachers in attendance at a convention of the National Association of Teachers held outside the state of Iowa, cannot be paid out of the funds of the county. We can find no authority for paying such expenses out of the funds of the school district.

In answer to your second question we are also unable to find any legal authority for paying such expenses.

Therefore, both your first and second questions should be answered in the negative.

BEN J. GIBSON, *Attorney General*.

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

SCHOOLS AT MINING CAMPS

Appropriation under chapter 373, 38th general assembly, may be used for improvement of school buildings, etc., in mining camps.

June 27, 1921.

Hon. P. E. McClenahan, Superintendent of Public Instruction: We have your request for an opinion on the following proposition submitted to this department on the 27th inst. by Mr. Heminger, your deputy.

His letter is as follows:

"We herewith hand you a blank form of an order for appropriation of state funds under chapter 373, of the acts of the 38th general assembly,

which act appropriated fifty thousand dollars (\$50,000) for mining camp schools during the biennium ending June 30, 1921.

"There is a small amount of money remaining in this fund and it is desired at this time to appropriate this money for use in various school corporations in which mining camps are located. If you find that this procedure is proper and legal we desire to complete this work at once and ask that you give us a written opinion on the question."

Attached to the letter is a blank form of appropriation for the purpose of relieving conditions existing in the mining camps at Zookspur and Highbridge in Dallas county, Iowa.

Chapter 373, acts of the 38th general assembly, to which you refer, is as follows:

"There is hereby appropriated from the state treasury out of funds not otherwise appropriated the sum of fifty thousand (\$50,000.00) dollars, or so much thereof as may be necessary to be used by the state superintendent of public instruction and under his direction during the next biennium for the purpose of relieving the conditions existing in the mining camps in the state of Iowa, so far as school facilities are concerned."

A reading of this section warrants the conclusion that the superintendent of public instruction may use the appropriation therein named for any lawful purpose in relieving the conditions existing in mining camps of the state, so far as school facilities are concerned and this, in our judgment, would include the purposes for which it is purposed to expend money in the instrument attached to your letter, which we return herewith.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

BORROWING MONEY—PAYMENT OF INTEREST

A school board has no authority to borrow money for any purpose, and has no authority to pay a higher rate of interest than six per cent on school obligations.

May 11, 1921.

Mr. G. I. Norman, County Attorney, Keokuk, Iowa: The department is in receipt of your letter of April 30, in which you request an opinion on certain questions with reference to the authority of the school board of the city of Keokuk.

You first request to be advised as to whether the school board has authority to borrow money from banks at the current rate of interest to pay current expenses of operating the schools when there is not sufficient money in the school treasury. There is no authority in the law permitting a school board to borrow money for any purpose, and there is no authority for the board to pay upon school obligations a higher rate of interest than six per cent. You will understand, of course, that a school board may anticipate a tax by issuing warrants which when presented for payment and not paid for want of funds, will draw six per cent interest, but there is nothing in the law authorizing a board to borrow money to meet operating expense. I might add that a school board has no authority in any matter except such authority as is specifically delegated to them by statute.

In conformity to your second request I am enclosing herewith a copy of senate file 298, enacted by the 39th general assembly permitting the

levying of school taxes and the issuance of warrants in anticipation of the tax for the purpose of paying any deficiency in the operating expense of a school district prior to July 1, 1921. This was purely an emergency measure designed to relieve certain districts which were short of funds to meet operating expenses, but the law required the certification of the tax to be made to the board of supervisors prior to April 15th, last.

BEN J. GIBSON, *Attorney General*,

By JOHN FLETCHER, *Assistant Attorney General*.

SALARY OF COUNTY SUPERINTENDENT

The term "additional compensation" as used in house file No. 421, 39th general assembly, does not include the expense of the county superintendent in visiting schools as provided by section 2734-b.

•April 18, 1921.

Hon. P. E. McClenahan, Superintendent of Public Instruction: In your letter of April 12, 1921, you ask for an opinion from this department, submitting the following proposition:

"House file No. 421, relating to the salary of the county superintendent of schools fixes the minimum at \$1800 and such other additional compensation as may be allowed by the board of supervisors not to exceed \$3000. We understand that this law became effective by publication April 7th.

"Does this law authorize the board of supervisors to fix the salary of the present county superintendents at \$3000 for the remainder of the current term? Does "additional compensation," as used in section 2, include the expense of the county superintendent in visiting schools within the county or does this refer only to additional salary?"

Section 1 of house file 421 provides that the salary of the county superintendent of schools shall be \$1800 per annum and such other and additional compensation as may be allowed by the board of supervisors. There is nothing in this act which limits its application to the salary of future county superintendents. The term "county superintendent of schools" must be held to include within itself the present county superintendent of schools or any future or subsequent superintendent. This act became effective upon publication and is now the law. Therefore, the board of supervisors of each county have the right to allow such additional compensation in addition to the \$1800 per year to and including \$3,000 as they may elect. It is entirely optional with the board of supervisors and unless they act the salary is \$1,800.

The second question submitted is as to whether or not the term "additional compensation" as so used includes the expenses of the county superintendent in visiting schools within the county. This question must be answered in the negative. It will be observed that section 2773-b of the supplemental supplement to the code, 1915, as amended provides especially for the expense of the county superintendent in visiting the schools of the county. This provision of the law is not repealed by house file 421 and is in force. It must therefore be held to be independent of house file 421 unless such act includes a provision which is inconsistent with such section. It will be observed that there is nothing inconsistent in the provisions of the law. It follows, therefore, that the term "additional compensation" as used in this act does not include the expense of the county superintendent in visiting schools as provided by section 2734-b.

BEN J. GIBSON, *Attorney General*.

FIVE YEARS EXPERIENCE

The term "five years' experience" as used in reference to qualifications of county superintendent defined.

April 15, 1921.

Hon. P. E. McClenahan, Superintendent of Public Instruction: You have requested an opinion from this department upon the question as to the meaning of the term "five years' experience" as used in section 2734-b, supplemental supplement to the code, 1915.

This section has relation to the qualifications of the county superintendent. It requires that the county superintendent shall have five years' experience in teaching. In determining what constitutes five years' experience in teaching it is necessary to determine first what is meant by the term "year" as used in this section.

Section 2773 of the code as amended is more or less applicable in determining this question. This section in so far as applicable is as follows:

"Every school shall be free of tuition to all actual residents between the ages of five and twenty-one years and each school regularly established shall continue for at least thirty-two weeks of five school days each in each school year commencing the first of July."

Under this section it will be observed that a school year commences on the first day of July and extends for twelve calendar months. Of such calendar year the law formerly provided that twenty-four weeks should be devoted to actual school work. By the acts of the 38th general assembly, chapter 143, this was amended so as to be thirty-two weeks.

With this brief statement of these two sections the question naturally arises as to the meaning to be given the word "year" in speaking of years' experience in teaching. It has been uniformly held in connection with cases involving contracts between teachers and districts, that the word "year" means the school year, or that portion of the calendar year devoted to actual school work. See: *Brookfield vs. Drury College*, 123 S. W., 86; *Williams vs. Bagnelle*, 138 Cal. 699; 72 Pac. 408; *Barthel vs. San Jose Bd. of Education*, 153 Cal. 376; *Golden vs. New Orleans Public School Directors*, 34 La. Ann. 354; *Dennison Tp. School Dist. vs. Padden*, 89 Pa. St. 395; *Burkhead vs. Ind. School Dist.*, 107 Ia. 29, 77 N. W. 491.

Under the laws of this state then the term "year" as used in speaking of teaching would mean under the law as it formerly stood, twenty-four weeks, and under the law as it now stands, thirty-two weeks of five days each. In speaking of five years' experience as used in connection with the section relating to the qualifications of county superintendent, it must be held that this rule applies. To hold otherwise would compel a teacher teaching in Iowa schools under ordinary circumstances to teach ten years of six months each in order to qualify. This certainly could not have been intended by the legislature and it certainly would not be in conformity to the decisions of the courts or the custom in connection with cases of this kind.

In your inquiry, however, you present the question as to whether or not a teacher can secure five years' experience in teaching short of five calendar years. You submit a state of facts in which a teacher has, so far as the requisite number of months' experience is concerned, fulfilled the requirements. That is to say if the number of months were spread

over five calendar years, there would be no question as to her qualifications. However, the same has been spread over less than five calendar years. The question is, does this meet the requirements of the statute relative to qualifications? Section 2773 of the code as amended provides that the school year commences on the first day of July and by implication extends to the first day of July of the succeeding year. Under this statute, as has been stated, a certain number of months must be devoted to actual school work. However, the school year remains the same. We have reached a conclusion that five years' experience in teaching as contemplated in the law cannot be acquired short of five calendar years. There are many reasons upon which we base this conclusion. In the first place, as stated, there can only be five school years in five calendar years under the laws of this state. It is true that the teacher is not required to teach the full school year in order to acquire a year's experience in teaching. Still the fact remains that there is but one school year in such calendar year. There is a further reason which seems to us to determine this matter and that is this. While a teacher is only required to teach a certain number of months in a school year, yet there are many other things which she is required to do. She is required to attend a certain number of teachers' institutes. She is required to devote a certain amount of time to study. In truth it is assumed that all that portion of the school year which is not devoted to teaching is by the teacher devoted to preparing herself for the profession in which she is engaged. That the legislature contemplated these things cannot be doubted when we remember the statute relative to qualification of teachers and when we remember the law relative to teachers' institutes. Can it be said that the teacher can gain this experience, devote this time to the performance of the duties she owes to her profession and which the statute requires in less than five school years. It occurs to us that this cannot be done. It follows, therefore, that under the law five years' experience within the contemplation of the law cannot be gained short of five calendar years.

You again submit the question as to whether or not the teacher can be given credit where she teaches less than the period required in one calendar year. That is to say, shall she be given credit for say three months' teaching in one calendar year when that is all that she teaches during that year. In our opinion she must be given credit for this and it must be considered in connection with the determination of her qualifications. It will be observed that there is a marked distinction between the cases in which she teaches less than the period required in a school year and those in which she teaches more. Where she teaches less than the required time she still secures the experience required in connection with teachers' institutes and in preparation. Whereas, where she teaches more she does not, as has been seen, secure this experience. We are firmly of the opinion that the teacher must not be deprived of the credit which she would thus gain. To so deprive her would be unfair and unjust.

In this opinion, then, we must hold as stated first, that there must be actually spent five calendar years in the profession of teaching. However, where the teacher has actually been in the profession more than five calendar years and has the required experience in number of months she must be held to be qualified. BEN J. GIBSON, *Attorney General*.

OPINIONS RELATING TO SALARIES AND FEES

COUNTY AUDITOR NOT ENTITLED TO EXTRA COMPENSATION FOR HANDLING SCHOOL BOOKS

County auditor is not entitled to extra compensation for handling text books and taking care of the accounts and distribution of the books where the board of education has appointed him to do this work.

June 30, 1922.

Hon. Glenn C. Haynes, Auditor of State: Your letter of June 24 addressed to Mr. Gibson has been referred to me for attention. You ask:

"Can a county auditor be allowed extra compensation for handling text books and taking care of the accounts and distribution of the books where the board of education has appointed him to do this work?"

We do not know of any statute nor has any statute been called to our attention which provides for the payment for the services above alluded to. There being no fund from which compensation for such services could be paid the county auditor would not be entitled to such compensation to be paid from the funds of the county.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

COMPENSATION OF SECRETARY AND TREASURER OF DENTAL BOARD

State cannot allow secretary and treasurer of dental board a per diem compensation in addition to his annual salary, as two compensations will not be paid to one person covering the same period of time. Section 5, chapter 309, 37th general assembly. 1289 of the code.

August 12, 1922.

Board of Audit, State House: You have requested the opinion of this department upon the question of whether the secretary and treasurer of the board of dental examiners is entitled to a per diem while acting as a member of the board of examiners in addition to his annual salary fixed by the board.

Section 5 of chapter 309, acts of the 37th general assembly, reads as follows:

"Each member of the board shall receive the sum of seven dollars and fifty cents for each day he is actually engaged in the duties of his office, with the actual expenses incurred by him in the discharge of such duties, and the treasurer shall receive a salary not exceeding six hundred dollars per annum for his services as secretary and treasurer, which amounts shall be paid out of the fund received by the board under the provision of this act, and from no other fund or source."

It will be noticed that the statute expressly limits the board in the amount of compensation it may allow the person selected by it to act as secretary and treasurer and denominates this compensation as an annual salary.

The term annual salary has been construed by the courts to mean the yearly compensation prescribed by law to be paid to a public officer for the personal discharge of all of the duties of his office enjoined

upon him by law. The payment of a salary is contingent upon the passing of time rather than upon the amount or character of the services rendered and it is therefore to be treated as full compensation for all services of a public officer in connection with the duties of his office within the period of time which it covers.

In addition to these general rules I call your attention to section 1289 of the code, which reads as follows:

"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."

Applying the provisions of this section to the situation at hand it at once becomes apparent that there is no express provision in the law under consideration such as would bring it within the exceptions stated in this general statute above quoted.

It is also the settled policy of this state that two compensations will not be paid to one person covering the same period of time and as the secretary and treasurer of this dental board receives compensation from the state for every secular day in the year it would, in my opinion, be a violation of this settled policy of the state in addition to being an express violation of section 1289, above quoted, and the general provisions of law above referred to for the state to allow him to draw a per diem compensation in addition to his annual salary.

For the reasons above given the board of audit should not follow the opinion given by this department to Mr. F. H. Paul, state accountant, under date of December 18, 1918, insofar as the matter herein referred to is concerned and as to such matter the opinion above referred to is overruled. (Report of attorney general 1917-1918 page 579)

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

SALARIES OF MEMBERS OF GENERAL ASSEMBLY

Salaries referred to in chapter 197, acts of 39th general assembly, should be held to be the total salary for one session of the general assembly, or \$1,000.

April 21, 1922.

Hon. J. B. Buser, Conesville, Iowa: In your letter dated April 19, 1922, you request an opinion from this department, which request is in substance as follows:

What interpretation is to be given chapter 197 of the acts of the 39th general assembly as the same affects candidates for the state senate or the house of representatives.

That part of chapter 197 of the acts of the 39th general assembly applicable to the proposition submitted is in words as follows:

"It shall be unlawful for any candidate to expend in connection with any primary election campaign more than fifty per centum of the annual salary applicable to the position for which he is a candidate and unlawful for him to expend in connection with his campaign for election to any office more than fifty per centum of the annual salary applicable to the position for which he is a candidate.

Section 12 of the supplement to the code, 1913, provides as follows:

"The compensation of the members of the general assembly shall be:

"To every member, for each regular session, one thousand dollars, and for each extra session the same compensation per day while in session, to be ascertained by the rate per day of the compensation of the members of the general assembly at the preceding regular session."

The constitution of the state of Iowa provides as follows:

"The sessions of the general assembly shall be biennial, and shall commence on the second Monday in January next ensuing the election of its members; unless the governor of the state shall, in the meantime, convene the general assembly by proclamation."

It would be ridiculous to assert that the 39th general assembly did not intend to cover by the terms and provisions of the act referred to, the office of representatives and senators in the general assembly. Candidates for the office of representative and senator are to be filed at the primary. Therefore, the act by its terms and by a reasonable construction of intent must be held to refer to these two officers.

The only question then remaining is what is the annual salary of the office? The annual salary of the office must be held to be the salary provided for each regular session.

It is true that there would be a special compensation in case of special sessions of the general assembly but such an amount is vague and uncertain and cannot be taken into consideration in determining the fixed definite amount referred to in this act.

It may be asserted that the annual salary should be one-half of this sum. This, however, does not appeal to this department as being sound. The question is not entirely free from doubt, but after giving the matter the most careful consideration we have come to the conclusion that the salary referred to should be held to be the total salary for one regular session of the general assembly, or one thousand dollars.

BEN J. GIBSON, *Attorney General.*

COUNTY AUDITOR NOT ENTITLED TO EXTRA COMPENSATION FOR HANDLING DRAINAGE WORK

The county auditor is not entitled to additional compensation for services in drainage matters. The salary he is to receive is fixed in the so-called salary act.

March 25, 1922.

Hon. Glenn C. Haynes, Auditor of State: We have your letter of recent date in which you request the opinion of this department upon the following proposition:

"Can the board of supervisors allow the county auditor compensation for his services in drainage matters in addition to the regular salary of the county auditor provided for in chapter 293, acts of the 38th, as amended by chapter 74, acts of the 39th general assembly? If so, would the county auditor be permitted to retain the compensation received for services in drainage matters or would he be required to turn the same in to the county treasury, under provisions of section 479a supplemental supplement, 1915?"

We think there is one provision in the statute that fully answers your inquiry, and that is section 479-a of the supplemental supplement to the code, 1915, which reads as follows:

"The auditor shall accept the salary herein provided in full compensation for all services performed by him under color of his office. All fees of every kind and nature which he receives for services performed in

his official capacity or on matters pertaining to the records in his office, shall belong to the county, and shall be paid into the county treasury quarterly."

This section is still a part of our law even though section 479 of the supplemental supplement to the code, 1915, has been repealed and a substitute enacted therefor by the 38th general assembly, and with a further modification by the 39th general assembly. We think that this absolutely precludes the county auditor from receiving any compensation other than the salary fixed by law for the performance of his official duties.

BEN J. GIBSON, *Attorney General*.

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

COMPENSATION OF TOWNSHIP OFFICERS

The 2 per cent commission allowed to a township clerk for handling township funds should be paid by the county.

The township trustees should be paid by the county for their services in looking after the roads of the township.

March 14, 1922.

Mr. Walter L. Eichendorf, County Attorney, McGregor, Iowa: We have your letter of February 24, 1922, in which you ask for the opinion of this department upon the following propositions, to-wit:

"Under section 591 of the 1913 supplement of the code, it is provided that the clerk shall receive 2 per cent of all money coming into his hands, by virtue of his office.

"Does his 2 per cent come out of the township funds, or should it be paid out of the county funds?"

"Under section 590 of the 1913 supplement of the code, it is provided that township trustees shall receive for each days' service, of 8 hours, necessarily engaged in official business, to be paid out of the county treasury, \$3.00.

"Under section 1538 of the 1913 supplement of the code, it is provided that trustees shall receive the same compensation per day for time necessarily spent in looking after the roads, as they do for other township business.

"Does this mean that trustees shall receive the regular compensation for overseeing and inspecting township roads and if it does, shall this money be paid out of the township funds or out of the county funds?"

In answering your inquiry we find that section 591 of the supplement, 1913, provides as follows:

"The township clerk shall receive:

"1. For each day of eight hours necessarily engaged in official business, where no other compensation or mode of payment is provided, to be paid from the county treasury, three dollars; provided, however, that in townships embraced entirely within the limits of special charter cities, the compensation of township clerks shall be four dollars per day.

"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, two per cent.

"3. For filing each application for a drain or ditch, fifty cents.

"4. For making out and certifying the papers in any appeal taken from an assessment by the trustees of damages done by trespassing animals, such additional compensation as the board of supervisors may allow."

You will note from the reading of the foregoing that the township clerk is to receive his compensation from the county "where no other compensation or mode of payment is provided * * *." There has been no other mode of payment provided in the statute for paying to the clerk

the percentage authorized in the above section. Hence, we believe that it was the intention of the legislature that the county should be required to pay the 2 per cent due the township clerk for the handling of the funds of the township.

Section 590 of the supplement, 1913, provides for the compensation of township trustees and states in part as follows:

"Township trustees shall receive:

"1. For each day's service of eight hours necessarily engaged in *official business*, to be paid out of the county treasury, \$3.00 each, provided, etc.
* * *"

Under the provisions of section 1538 of the supplement, 1913, it is the duty of the township trustees to inspect the roads of the township, and for so doing the section above referred to provides:

"The trustees shall receive the same compensation per day for time necessarily spent in looking after the roads as they do for other township business; * * *"

The matter of inspection of roads is just as much a part of the official business of the township trustees as any other work required of them, and the provisions of section 590 of the supplement, 1913, clearly indicates that they should be paid out of the county funds.

We note from your letter that you have advised the board of supervisors with reference to both of these questions and informed them that the clerk and the township trustees should be paid out of the county funds. We think that the advice you have given them is in exact accordance with the provisions of the statute.

BEN J. GIBSON, *Attorney General*.

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

SALARY OF DEPUTY SHERIFF—COUNTY OFFICERS

The provisions of chapter 260, acts of the 39th general assembly, governs in the matter of determining the compensation of deputy county officers beginning July 4, 1921. From June 1, 1921, to July 4, 1921, the provisions of chapter 97, acts of the 39th general assembly, governed the compensation of such officers.

March 14, 1922.

Mr. Albert J. Jorgenson, Sheriff, Sidney, Iowa: We have your letter of January 10, 1922, in which you ask for the opinion of this department upon the construction to be placed upon chapter 260 and chapter 97 of the acts of the 39th general assembly, with reference to the compensation to be paid a deputy sheriff. In order to answer your inquiry it is necessary for us to turn to the chapters above noted and to follow through the legislative history of each chapter.

The 38th general assembly by the passage of chapter 278 provided for the appointment and compensation of deputy county officers, and thereby fixed the compensation to be paid a deputy sheriff. Section 6 of the act provided as follows:

"The increases of salary granted by this act shall cease to terminate on June 1, 1921."

Chapter 97, acts of the 39th general assembly, repealed section 6 just above referred to and enacted a substitute therefor which reads:

"The increases of salary granted by the provisions of chapter 279, acts of the 38th general assembly, be and continue in full force and effect until the 1st day of June, 1923."

The act of the 39th general assembly just quoted had a publication clause attached to it and it was duly published in the Des Moines Capital and in the Iowa Forum and became effective on the 7th of April, 1921. This bill was introduced in the senate on the 26th of January, 1921. It passed the senate on February 23, and it passed the house on March 25. It was signed by the president of the senate and by the speaker of the house on April 1 and was transmitted to the governor on the same date. On the following day, to-wit: April 2, it was approved by the governor and duly signed. By the passage of chapter 97, it is clear that the legislature intended that the increased salary provided for by the 38th general assembly should continue in force until June 1, 1923, but the difficulty in determining the will of the legislature arises out of the fact that there was another act passed by the 39th general assembly which conflicts with chapter 97. We refer to chapter 260, acts of the 39th general assembly. The title of this act is as follows:

"An act to amend chapter 278, acts of the 38th general assembly, relating to the appointment and compensation of deputy county officers."

We shall not set forth this act at length, but for the purposes of this opinion it will suffice to state that it reduced the salary of the various deputy county officers, and so far as the deputy sheriff is concerned, the board of supervisors is clothed with limited discretion as to the salary which he shall receive.

Chapter 260 was designated during the 39th general assembly as house file No. 764. It was introduced in the house on March 8. On April 5 it passed the house and on April 8 it passed the senate, and on the same day it was sent to the governor for signature but it was not signed by him until the 14th of April. There was no publication clause attached to this act. Hence, it did not become effective until July 4, 1921.

We have traced in a brief way the legislative history of these two acts, and in determining the force and effect to be given them there are two principles of statutory construction that should be borne in mind.

First. That if there are two acts of the legislature apparently in conflict, they should be so construed, if possible, so as to give both force and effect.

Second. That if two acts of the legislature are in conflict and it is impossible to give both of them force and effect, then the one last passed shall be deemed to express the intention and desire of the legislature.

Bearing these rules in mind, we desire to point out that there is a possible construction and we think an entirely legitimate one that will permit an interpretation that will give to some extent force to each act.

The increases of salary provided for by the act of the 38th general assembly extended only to June 1, 1921. By the passage of chapter 97, the 39th general assembly extended the life of this increase in salary until June 1, 1923. Hence, from June 1, 1921, until July 4, 1921, chapter 97, acts of the 39th general assembly, would govern the salary of the deputy county officers, but on July 4, 1921, chapter 260, acts of the 39th general assembly, became effective, and as it by its terms provided a different basis of compensation, and furthermore as it was the last expression of the will of the legislature, it is, therefore, the opinion of this department that beginning July 4, 1921, chapter 260, acts of the 39th

general assembly, superseded the former provisions with reference to the compensation of deputy county officers.

BEN J. GIBSON, *Attorney General*.

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

WHEN MARSHAL PAID SALARY IN LIEU OF FEES

Where marshal is paid a stated salary he is not entitled to fees earned in connection with his work. Fees earned by him in matters not connected with his duties may be retained.

December 15, 1921.

Hon. Glenn C. Haynes, Auditor of State: This department is in receipt of your letter of the 21st inst. in which you present the following inquiry:

"Can a city marshal whose salary has been fixed by ordinance as provided for by code section 675, retain fees collected by him, even though the ordinance fixing the salary did not provide that the salary should be in lieu of all other compensation? In other words, does the fixing of the salary by ordinance mean that the salary shall be in lieu of all fees even though the ordinance does not so state."

In response to your inquiry will say that where an ordinance fixes the salary of a marshal at a certain amount and is silent on the subject of fees that the salary so fixed should be construed as full compensation for all services rendered by him in his capacity as marshal of the municipality; and any fees earned or collected by him become the property of the municipality.

Section 946 of the code reads in part as follows:

"When such officers (marshals and police 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."

In the case of *City of Des Moines vs. Polk County*, 107 Iowa 528, the supreme court held that fees earned by a police judge and by a marshal in cases where the costs were properly taxed to the county should be paid to the city of Des Moines, since the police judge and marshal were paid a salary for their services.

The case above referred to is determinative on the question involved in your inquiry.

BEN J. GIBSON, *Attorney General*.

By JOHN FLETCHER, *Assistant Attorney General*.

APPOINTMENT AND SALARY OF DEPUTY SHERIFF

Under the provisions of section 5, chapter 260, 39th general assembly, board of supervisors must approve appointments and fix salary.

November 30, 1921.

Mr. E. L. Carroll, County Attorney, Creston, Iowa: I am in receipt of your letter dated November 29th in which you call attention to the dispute over the salary of the deputy sheriff of your county.

Your letter is in substance a request for an opinion from this department as to an interpretation to be given section 5 of chapter 260 of the acts of the 39th general assembly. This section is in words as follows:

"In all counties the sheriff 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 and from whom he shall

require a bond, which appointment and bond shall be approved by the board or officer which has the approval of the principal's bond. Such appointment may be revoked in writing, which appointment and revocation shall be filed and kept in the auditor's office. The person or persons, thus appointed, shall qualify by taking the same oath as his principal. In all cases the board of supervisors shall fix the number of deputies. The person or persons thus appointed shall receive a salary to be fixed by the board of supervisors but not to exceed fifteen hundred dollars (\$1,500) per year.

"Provided that in counties having a population of fifty thousand (50,000) or over the salary of the chief deputy shall be sixty-five (65) per cent of that of his principal, but not to exceed eighteen hundred dollars (\$1,800), the compensation of other deputies to be fixed by the board of supervisors.

"In counties in which district court is held in two places the first deputy shall receive sixty-five (65) per cent of the salary received by the sheriff, but the deputy in charge of the office other than at the county seat shall receive the same salary as that received by the first deputy at the county seat. All deputies shall be paid by the county."

This section was substituted for section 5 of the acts of the 38th general assembly.

It follows, therefore, that the limitations placed upon the salary of the deputy sheriff by section 5 of chapter 260 is a limitation on the amount which can be received by such officer. The opinion rendered by my predecessor construing the old statute is now inapplicable and of no effect.

BEN J. GIBSON, *Attorney General.*

WHEN COUNTY ATTORNEY MAY ACT AS ADMINISTRATOR AND RECEIVE FEES THEREFOR

May act as administrator and receive fees if not in connection with county work.

November 25, 1921.

Hon. Glenn C. Haynes, Auditor of State: I am in receipt of your letter dated November 23, 1921, in which you request an opinion from this department. It is perhaps advisable in order that your request may be clear and certain to quote your letter. It is in words as follows:

"The chairman of the board of supervisors submits a question which will undoubtedly call for an opinion from the attorney general's office before a conclusion can be reached. It has reference to the legality of certain fees charged and collected by the county attorney. The history of the case in short, is about as follows: In looking up the financial condition of a certain party, who was a county charge, it was found that he had some property. The county attorney was appointed administrator, and proceeded in the usual way in the settlement of the estate. On the completion of the work, he filed and collected the ordinary fee allowed in such cases to the administrator. He then filed with the board of supervisors the following items of fees in the case and collected same from the county: to legal advice, \$25.00; to attorney's fees, \$25.00; total, \$50.00.

"In view of the fact that he was then county attorney was he entitled to such fees?"

The county attorney of a county is not precluded from acting as an administrator or as an attorney for an estate in probate court, nor is he prohibited from receiving fees as such. Such work is personal and not work performed in the exercise of his duties as a public official. This statement is inserted in order that there may be no misunderstanding relative to this opinion.

With the explanation contained in the preceding paragraph we will now consider the specific proposition submitted by you upon the assumption that the services rendered by the county attorney and for which compensation is claimed were rendered for the benefit of the county.

It is unnecessary to set forth the statutes relating to the duties of a county attorney or to the provisions of the statute relative to his salary. Suffice it to say, that the duties of a county attorney include services of every kind for the benefit of the county or the several offices in the county government. Services for the collection of money due the county is clearly within the duties of the county attorney whatever may be the source from which the money is due. It is a well established rule of law that public officials are only entitled to such compensation for the performance of their prescribed duties as is fixed by statute, and that where a salary or other fixed compensation is provided for such official, and no other fees or compensation is provided by statute, then such salary or fixed compensation includes within itself all compensation to be paid for the performance of such duties.

See in this connection the following cases: *Moore vs. Independent District*, 55 Iowa 654; *McNider vs. Sirrien*, 84 Iowa 745; *Guanells vs. Pottawattamie County*, 84 Iowa, 36; *Ryce vs. Osage*, 88 Iowa 558; *Sprout vs. Kelly*, 37 Iowa 44; *State vs. Adams*. (No. App.) 72 S. W. 656; *Wood vs. Board of Commissioners*, 25 N. E. 188; *Tuall vs. County Commissioners*, 4 Ohio Dec. 318; *McGovern vs. Board of Commissioners*, (Volo) 131 Pac. 274; *Troup vs. Morgan County*, (Ala.) 19 So. 504; *DeBolt vs. Trustees of Cincinnati Twp.*, 7 Ohio S. R. 237. See also: *Burlingame vs. Hardin County*, 180 Iowa 919.

It follows, therefore, that the county attorney is not entitled to additional compensation for services rendered the county in connection with the collection of a debt due the county.

BEN J. GIBSON, *Attorney General*.

EMPLOYEES OF STATE LIMITED TO SALARY AS COMPENSATION FOR SERVICES

Persons in the employ of the state, working for a stated salary, are not entitled to other compensation from the state unless it is expressly provided by statute.

October 6, 1921.

Mr. Geo. L. McCaughan, Secretary of Railroad Commission: This department is in receipt of a letter from you dated August 30th, in which you state that one R. G. Nourse, who is in the employ of the State College of Agriculture and Mechanic Art at Ames, Iowa, who was a witness for the state before the interstate commerce commission at the hearing of the western grain and hay rate case, has filed his expense account for the trip to Washington, and has included a charge of \$25.00 per day for each day that he served as a witness.

You desire to be advised in this connection as to whether Mr. Nourse, whom you state is drawing a stated salary from the college at Ames, is entitled to pay for his time in addition to his traveling expenses.

Persons in the employ of the state, working for a stated salary, are

not entitled to other compensation from the state unless it is expressly provided for by statute.

As we understand the facts in the matter submitted to us, Mr. Nourse was drawing a salary from the state of Iowa for the time covered by his trip to Washington, and it would be against public policy for him to be allowed a per diem compensation for that same time for which he had once been paid by the state. It would be optional with him, however, in my judgment, to forego his stated salary and draw a per diem in case he desired to do so, but he cannot draw both the per diem and the salary for the same time, from the public treasury.

You would be justified, therefore, in denying him the per diem asked for in the event that he received a salary covering the period for which he now presents claim.

BEN J. GIBSON, *Attorney General*.

By JOHN FLETCHER, *Assistant Attorney General*.

COMPENSATION OF DEFACTO OFFICERS

Defacto officers are not entitled to salary of office.

February 25, 1921.

Hon. Arch McFarlane, State House: You have requested an opinion from this department upon the following state of facts:

"A city council of the city of Waterloo has appointed a person to the position of building commissioner for a term of two years. The foregoing appointment was illegal but the person appointed is now holding the position and performing the duties of building commissioner."

You then ask whether or not this person is entitled to draw the salary attached to that office.

It is a well recognized legal doctrine that a person holding an office illegally is not entitled to the compensation of that office. *McCue vs. The County of Wapello*, 56 Ia. 698; *Murphy vs. Lentz*, 131 Ia. 328.

I am, therefore, of the opinion that the person referred to in your inquiry is not entitled to draw the salary attached to the office in question.

BEN J. GIBSON, *Attorney General*,

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

COMPENSATION OF SUPERINTENDENT OF PUBLIC INSTRUCTION

The salary of the superintendent of public instruction includes all the compensation to which he is entitled for the performance of the regular duties of his office.

February 11, 1921.

Hon. N. E. Kendall, Governor: In your letter of February 8, 1921, you request an official opinion from this department upon this proposition:

"Has the superintendent of public instruction the legal right to demand and accept compensation for attendance upon and addresses delivered at county institutes?"

It is perhaps unnecessary, after the very full statement of the law contained in your letter, to again quote the sections of the code involved. However, in order to properly consider the matter I will quote these sections.

Section 2627-c of the supplement to the code of Iowa, 1913, relates to

the general duties of the superintendent of public instruction. In this section the duties of such official are set out in detail. Those portions thereof which are particularly applicable to the proper consideration of the question asked, are as follows:

"2. To suggest, through public addresses, pamphlets, bulletins, and by meetings and conferences with school officers, teachers, parents, and the public generally, such changes and improvements as he may think desirable, and may publish and distribute such views and information as he may deem important.

"3. To endeavor to promote among the people of the state a proper interest in the general subject of education, including industrial and commercial education, agriculture, manual and vocational training, domestic science and continuation work."

In the consideration of the proposition presented the first thing to determine is as to whether, or not the attendance upon and delivery of addresses at county institutes may properly be included within the official duties of such official. I am of the opinion that they may be so included. It will be observed from a consideration of section 2627-c, code supplement, 1913, that the duties imposed upon the superintendent of public instruction are many and that it was clearly the intent of the legislature to include within such duties lectures and addresses relating to the general subject of education and particularly to public addresses given at county institutes and other meetings for the benefit of the teachers of the state. The section is so broad in fact that it in effect precludes the superintendent of public instruction from demanding a compensation for any public address upon school matters or from receiving compensation for attendance at meetings and conferences relating to the general subject of education, which may be held with school officers, teachers, parents, or the general public. I am therefore of the opinion, as stated, that the matters referred to are properly included within the general duties of the state superintendent of public instruction, as referred to.

It necessarily follows that if such are properly included within the duties of this official, then can he, under the law, demand and accept compensation in addition to the salary prescribed?

Section 2627-h, supplement to the code, 1913, relating to the compensation of the state superintendent of public instruction is as follows:

"From and after the taking effect of this act the salary of the superintendent of public instruction shall be four thousand dollars per annum; the salary of his deputy shall be twenty-five hundred dollars per annum; the salary of the regular inspectors in the department of public instruction shall be two thousand dollars per annum each; the salary of the chief clerk shall be fifteen hundred dollars per annum, all such salaries to be paid monthly upon the warrant of the state auditor. The superintendent of public instruction and his deputy and the regular inspectors in his department shall also receive their actual necessary traveling expenses incurred in the performance of their official duties, to be allowed upon an itemized and verified account filed with and approved by the executive council and the state auditor who shall draw his warrant on the state treasurer for the amount allowed."

It is a well settled rule of law that public officials are entitled only to such compensation for the performance of their prescribed duties as is fixed by statute; that where a salary is provided for, and no additional compensation is allowed, such salary includes within itself all of the compensation to be paid for the performance of such duties. This has

been decided by the court in *Moore vs. Independent District*, 55 Ia. 654; *McNider vs. Sirrien*, 84 Ia. 745; *Guanella vs. Pottawattamie County*, 84 Ia. 36; *Ryce vs. Osage*, 88 Ia. 558; *Sprout vs. Kelly*, 37 Ia. 44.

It will be unnecessary to cite further cases but it may be said that this has been the universal holding of the courts of this state. It is also the universal holding of the courts of all the states. In fact, in the limited time at our disposal, we have been unable to find a single case to the contrary.

In order that you may have, for your information, the language of the courts in some of these cases we cite the following:

In *State vs. Adams* (Mo. App.) 72 S. W. 656, the court said:

"For it is well settled law that a right to compensation for the discharge of official duties is purely a creature of statute, and that the statute which is claimed to confer such right must be strictly construed."

In the case of *Wood vs. Board of Commissioners*, (Ind.) 25 N. W. 188, the court said:

"It is quite well settled by our decisions that an officer is entitled to such fees, and such fees only, as the statute provides. If he is unable to show a statute providing the fees he claims, or to show himself within the statute he will fail. * * *

"The compensation of public officers is fixed and regulated by statute and in the absence of a statute giving compensation, none can be recovered."

In this connection we cite: *Tull vs. County Commissioners*, 4 Ohio Dec. 318; *McGovern vs. Board of Commissioners*, (Colo.) 131 Pac. 274; *Troup vs. Morgan County*, (Ala.) 19 So. 504; *DeBolt vs. Trustees of Cincinnati Twp.*, 7 Ohio, S. R. 237.

It follows that the matters referred to in your question are properly within the duties of the superintendent of public instruction and that such official is only entitled to charge for the performance of his duties the salary and expenses as set out by section 2627-h, supplement, 1913.

BEN J. GIBSON, *Attorney General*.

SALARY OF COURT REPORTERS

Apportionment of salary among counties in district. Where all service is rendered in one county in a district it is liable for minimum salary for year.

January 14, 1921.

Hon. Glenn C. Haynes, Auditor of State: I am in receipt of your letter of the 11th inst. requesting an opinion from this department with reference to the payment of a deficit in the salary of S. S. Stackhouse, the official court reporter of Judge Theophilus.

You state in your communication that Judge Theophilus has been ill during the greater part of the year 1920 and unable to leave Davenport for the purpose of holding court at other places in his judicial district and as a consequence his reporter has served but eighty-seven days, all of which was paid for by Scott county in which the services were rendered.

You desire to be advised whether under the law Scott county is liable for the entire amount of the difference between the amount earned and the minimum amount to which he is entitled under the statute.

Section 254-a2 of the supplemental supplement to the code of Iowa, 1915, as amended by the 37th general assembly, reads in part as follows:

"Shorthand reporters of the district courts shall be paid ten dollars per day for each day's attendance upon said court, under the direction of the judge, out of the county treasury where such court is held, upon the certificate of the judge holding the court; and in case the total per diem of each reporter and his substitute shall not amount to the sum of twenty-four hundred dollars per year, the judge appointing him shall at the end of the year apportion the deficiency so remaining unpaid among the several counties of the district, if there be more than one county in such district, in proportion to the number of days of court actually held by said judge in such counties which apportionment shall be by him certified to the several county auditors, who shall issue warrants therefor to said reporter, which warrants shall be paid by the county treasurers out of any funds in the treasury not otherwise appropriated."

Since Judge Theophilus did not hold court in any of the counties of the district outside of Scott county and no service was rendered by his reporter in any of the counties, it is our view that under the language of the section above quoted no part of the services can be charged to the other counties and that any deficit in the reporter's salary must be made up by Scott county, the only county in which he rendered service.

BEN J. GIBSON, *Attorney General*.

By JOHN FLETCHER, *Assistant Attorney General*.

SHERIFF'S SALE—COLLECTION OF COMMISSION

Sheriff in making sale of real estate under an execution may collect the commission provided for by paragraph 7 of chapter 49, acts of the 37th general assembly in case the property is bid in by the judgment holder.

April 20, 1922.

Hon. Glenn C. Hayes, Auditor of State: This department is in receipt of your letter dated April 18, 1922, in which you request an official opinion upon the following question:

"Is a sheriff in making a sale of real estate under an execution required to collect the commission provided for by paragraph 7 of chapter 49, acts of the 37th general assembly, in case the property is bid in by the judgment holder?"

The question submitted by you must be answered in the affirmative. This very question has been determined by the supreme court of this state in the case of *Litchfield vs. Ashford*, 70 Iowa 393.

In the case referred to, the court holds in substance that where property is sold on execution and is bought by the execution plaintiff and the proceeds are credited on the judgment, the sheriff is entitled to the same percentage as compensation as if the purchase had been made by a stranger to the execution. It is true that this case was determined under a former statute of this state, but it is likewise true that such statute is identical in language with paragraph 7 of chapter 49 of the acts of the 37th general assembly.

The court in speaking of this matter says:

"It appears that by the previous legislation a sale of property to the plaintiff in execution was regarded as a collection made by the sale, and it is so in fact. The sale pays the debt. Now, when the 19th general assembly fixed the fees for collection, and omitted to except a collection made by a sale to the plaintiff in execution, we think the legislative in-

tent was to allow the percentage in all cases where the act of the sheriff amounted, in effect, to a collection."

The ruling of the court thus announced is confirmed in the case of *Nordyke-Marmon Co. vs. Jones Brothers*, 93 Iowa 705, and is quoted with approval in *Jurgens vs. Hauser*, 19 Mont. 184; 47 Pac. 809, and *Roberts vs. Ingolls*, (Nev.) 135 Pac. 927, and in *Sharvey vs. Central Vermillion Iron Co.*, 57 Minn. 216; 58 N. W. 864.

BEN J. GIBSON, *Attorney General*.

COMPENSATION OF JURORS

Jurors are not entitled to receive compensation for time during which they are excused from service and attendance.

May 7, 1921.

Mr. H. K. Lockwood, County Attorney, Cedar Rapids, Iowa: Confirming the opinion given to you over the telephone on the following proposition:

"On March 30, 1921, one of the judges of our district court excused the entire jury for a period of three days for the reason that the cases assigned for trial on those days were either dismissed or the lawyers were busy and unable to try them. Are the jurors legally entitled to receive compensation for those three days?"

This question has been before the supreme court but once according to our best information. In the case of *Venett et al vs. Jordan*, reported in the 111th Iowa, beginning on page 409, in which case the plaintiffs were members of the regular panel summoned for a regular term of the district court of Polk county where they appeared for service and during the term were excused for a period of fifteen days, the clerk refused to give them a certificate of service during those days. In determining the question on appeal, the supreme court said:

"We have to determine whether these jurors were entitled to compensation for the fifteen days during which they were excused from attendance upon the court. Section 3811, ccde 1873, is the only provision relating to the compensation of jurors, and it is as follows: 'Jurors shall receive the following fees: For each day's service or attendance in courts of record, two dollars. * * * They are to be paid when in actual service, or, if not called in a case, for the time they are in attendance awaiting call. When they are excused, as here, for a definite time, they cannot be said during such period to be in attendance on the court. Their time is their own, and they are not then subject to the orders of the court.'

"But something is claimed for section 233, the terms of which are: 'If, in the judgment of the court, the business of the term does not require the attendance of all or a portion of the trial jurors, they or such portion as the court deems proper may be discharged. Should it afterwards appear that a jury is required, the court may direct them to be resummoned, or impanel a jury from the bystanders.' We do not regard this section as exclusive, so as to forbid the court excusing the jury for a time when their services are not needed. But in any event, we do not see how its terms can avail these plaintiffs. If they were not excused, they were discharged, and their reassembling was as though they had been again summoned. They were not in attendance on the court during the fifteen days, and therefore can have no compensation for that time."

In the observation of the writer of this opinion the foregoing rule has been universally followed. There are instances which arise in the ordinary course of judicial procedure in which the jurors will be excused for

short periods and yet, in fact, devote their time to the service of the county. Such instances are within the peculiar knowledge of the trial court and in our opinion, where the trial court under such circumstances and conditions directs the clerk to allow such fees, that such act on the part of the trial court is within his discretion.

BEN J. GIBSON, *Attorney General.*

By B. J. FLICK, *Assistant Attorney General.*

FEES TO BE COLLECTED BY CLERK OF DISTRICT COURT IN NATURALIZATION MATTERS

Collection of naturalization fees. Only the fee of \$1.00 for filing declaration and \$4.00 for filing petition can be charged by the clerk of the district court.

July 5, 1921.

Hon. Glenn C. Haynes, Auditor of State: In your letter dated July 5, 1921, you ask for an opinion from this department on the following question:

"Does chapter 42, acts of the 39th general assembly mean that the clerk of the district court is required to collect two separate and distinct fees from an applicant for naturalization?"

The federal naturalization law requires the clerk to collect \$1.00 from any one making a declaration of intention and \$4.00 from any one making a petition for citizenship. Does chapter 42, acts of the 39th general assembly mean the clerk shall collect another fee of a like amount from every declarant and petitioner for naturalization?"

Senate file No. 368 of the 39th general assembly, commonly known as the Van Alstine bill, is amendatory of paragraphs 23 and 24 of section 296 of the supplement to the code of 1913.

The section to which reference has been made relates to the fees of clerks of the district courts. The particular paragraphs referred to relate to fees to be collected by the clerk of the district court in naturalization proceedings. Senate file No. 368, to which reference has been made, amends these two paragraphs. The federal naturalization act was adopted by congress June 29, 1906, and is found in chapter 3592, 34 Stat. 600, section 13.

It will be observed that the amendment as made by the 39th general assembly in effect conformed the state law with the national law. A careful reading of the two acts will show the exact similarity thereof

It will be observed further that the national law provides as follows:

"It shall be unlawful for any clerk of any court or his authorized deputy or assistant exercising jurisdiction in naturalization proceedings to demand, charge, collect or receive any other or additional fees or moneys in naturalization proceedings, save the fees and moneys herein specified; * * * *"

From a reading of the two sections to which reference has been made the intent of the legislature to conform the state law to the federal act will become apparent. The federal act provides as stated that the only fees to be charged are those fees specified in the act. The only effect of the state law would be to make the national law in and so far as applicable the law of the state and govern the fees to be charged in such cases.

It could not be held that double fees were to be charged under any reading of the law, especially is this true when viewed from the standpoint of the direct prohibition of the federal act.

BEN J. GIBSON, *Attorney General*.

WHEN LOCAL REGISTRARS ARE PAID

Local registrars can be paid only after state registrar makes his annual certification to the respective county treasurers.

July 30, 1921.

Mr. T. J. Edmonds, Secretary, Iowa Tuberculosis Association: You have requested the opinion of this department on the following proposition:

"Section 20 of house file 584, 39th general assembly, vital statistics, states that amounts payable to local registrars shall be paid by the treasurer of the county upon certification of the state registrar. Another sentence says that the state registrar shall annually certify the number of births and deaths properly registered. Since it may prove discouraging to the local registrars and harmful to the work to make them wait a whole year for their pay, is it not possible for the law to be so interpreted that the state registrar may certify monthly or at least quarterly so that the county treasurers may pay the fees at those intervals?"

Section 20 of chapter 222 of the laws of the 39th general assembly, insofar as applicable, reads as follows:

"All amounts payable to a registrar under the provisions of this section shall be paid by the treasurer of the county in which the registration district is located, upon certification by the state registrar. And the state registrar shall annually certify to the treasurers of the several counties the number of births and deaths properly registered, with the names of the local registrars and of the amounts due each at the rates fixed herein."

Section 20 is the only section of the chapter in which reference is made to the compensation to be paid local registrars, and the method and time when such payments shall be made. The above quotation from that section is clearly to the effect that no registrar shall be paid until the amount is certified by the state registrar, and it is then provided that this certification by the state registrar to the various county treasurers shall be made annually. We do not believe that any other construction can be placed on the terms of the section as quoted.

It is our opinion that the local registrars can be paid only after the state registrar makes his annual certification to the respective county treasurers.

BEN J. GIBSON, *Attorney General*,

By NEILL GARRETT, *Assistant Attorney General*.

MILEAGE ALLOWED SHERIFF

Sheriff can collect but one mileage on but one trip when more than one process is served on same person.

December 28, 1921.

Mr. R. H. Munro, County Attorney, Fairfield, Iowa: This department is in receipt of a letter from the sheriff of your county in which he asks for the opinion of this department with reference to mileage in serving notices. He states:

"We would like to know about the mileage received for serving notices. We have had an argument with the lawyers concerning two cases served

at Packwood, Iowa. One was *D. M. Lyon vs. J. H. Barron* and the other one was *Wm. Hintz vs. J. H. and E. C. Barron*. They were executions and garnishments in both cases. Some of the lawyers say we are entitled to mileage on both cases although served at the same time and others claim one mileage is all that is due us. On page 252, article XII, code of Iowa, 1897, says we are entitled to mileage for serving all cases and the above mentioned are entirely two separate cases."

We are directing our answer to you because of the rule of the department which prevents writing opinions to any officers except officers of the state and county attorneys. We will, however, furnish him with a copy of this opinion.

Paragraph twelve of section 511 of the code of 1897 referred to in the letter above quoted is as follows:

"Mileage in all cases required by law, going and returning, five cents per mile."

We assume that your sheriff in these two cases served notices of garnishment on the same person at the same time and he desires to know whether or not under the paragraph above quoted he is entitled to mileage in each case.

The case of *Redfield vs. Shelby County*, reported in 64 Iowa beginning on page 11 is decisive of the very question propounded by your sheriff, the only difference in the facts being that in the Shelby county case the mileage was claimed for serving subpoenas while in the case at bar notices of garnishment are involved. The same statute, however, applies to both cases.

In the Shelby county case the supreme court of Iowa said:

"Action for fees alleged to be due for the service of subpoenas in state cases. At the time of the service, there were seven state cases pending in Shelby county, in which the testimony of one Wyland was desired, who resided in Benton county. A subpoena in each case was put into the hands of the plaintiff, as sheriff of Shelby county, for service. He made such service by making one trip, which was a distance of one hundred and ninety-six miles, and charged for mileage on each subpoena, as fees, \$19.60, and the same was taxed as costs in each case, amounting in all to the sum of \$137.20. The plaintiff presented his bill for service, including the sum of \$137.20 for mileage, to the board of supervisors, which allowed mileage only for one trip, and disallowed the sum of \$117.60, for which this action is brought. The cause was tried without a jury, and judgment was rendered against the plaintiff for costs. He appeals.

"The statute relied upon is section 13, chapter 94, acts of the 19th general assembly, and is in the these words: 'Mileage in all cases required by law, going and returning, per mile, five cents.'

"Whether, if the plaintiff, with all the subpoenas in his hands at one time, had unnecessarily made a separate trip in each case, he could have charged full mileage for each trip, we need not determine. No officer probably would feel at liberty to make such unnecessary travel. The theory of the statute doubtless is that five cents per mile each way for actual travel is reasonable compensation, and we see nothing in the language of the statute which would justify the allowance of more in a case like the present."

There are other cases decided by our supreme court, for instance, *Barnes vs. Marion County*, 54 Iowa, 482, and *Bringolf vs. Polk County*, 41 Iowa, 554, but none of them so directly in point as the case above quoted.

It is our opinion therefore that your sheriff would be justified in charging and collecting but one mileage in cases where he makes but one trip

for the service of processes on one individual although he may make service of several processes in different cases at the same time.

BEN J. GIBSON, *Attorney General*.

By B. J. FLICK, *Assistant Attorney General*.

COLLECTION OF CORONER'S FEES

Coroner must first look to estate of deceased person for fees, and if estate is not able to pay, then county must pay. If county has advanced fees to coroner, the county may recover same from estate, if it is sufficient.

November 14, 1921.

Mr. James H. Wyllie, County Attorney, Sigourney, Iowa: Your request for the opinion of this department relative to the payment of fees to the county coroner has been referred to me for answer. As we gather it from your letter you present two propositions which we state as follows:

"1. Should the coroner first file his claim for fees and expenses with the auditor, to be allowed by the board of supervisors and paid to him from the county funds, and such expense then taxed by the clerk as part of the cost in the estate of the deceased over whom the inquest is held; or, should the coroner file a claim in the regular way against the estate for such fees and expenses and try to collect them the same as other claims against the estate before presenting same to the county.

"2. If the county has paid such fees and expenses upon the claim of the coroner, can it then file and collect a claim against the estate in lieu of that which should have been filed and collected by the coroner."

The question of fees and expenses allowed to the various officers of our state and county government has presented many difficult propositions. Section 3 of chapter 122, acts of the 38th general assembly, prescribes what fees shall be paid the county coroner for his services. It is also provided in paragraph 8 of that section that:

"Which fees shall be paid out of the county treasury when they cannot be obtained from the estate of the deceased."

The difficulty herein presented centers about the construction to be placed upon the phrase just quoted. In such cases it is always the rule that the statute should be strictly followed. It will be particularly noted that payment to the coroner by the county is contingent upon the fact of whether or not such fees can be obtained from the estate of the deceased. The county is not made liable nor responsible except upon the failure of the estate to pay such fees as are provided. In view of that situation the county is under no obligation to pay any fees to the coroner except on failure of the estate to pay them. It is manifest from the language used that the coroner should first look to the estate for the payment of his fees and expenses. Should the estate prove to be insufficient to pay such expense, then it is proper for the coroner to file his claim with the auditor and for the board of supervisors to then allow the prescribed fees out of the county funds.

In answer to your second proposition as to whether or not the county having paid the coroner such fees and expenses, can then file a claim against the estate in lieu of that which should have been filed by the coroner, will say that we believe such procedure would be proper. The estate is liable and cannot avoid payment because of the irregularity indicated. The county in such a case is subrogated to the rights of the coroner.

We trust that the foregoing will sufficiently answer the propositions submitted.

BEN J. GIBSON, *Attorney General*,

By NEILL GARRETT, *Assistant Attorney General*.

EXPENSES OF COUNTY ATTORNEY

A county attorney is not entitled to expenses incident to going from the theoretical county seat to the actual county seat.

March 10, 1922.

Mr. Harold Trewin, Assistant County Attorney, Cedar Rapids, Iowa:
We have your letter of March 7 in which you state:

"I have been employed as assistant county attorney of Linn county for some months last past. The county seat of Linn county is at Cedar Rapids and has been ever since I have been assistant county attorney. The court and county offices still remain at Marion, the former county seat, and have been there ever since I have acted as assistant county attorney. Section 3194, compiled code, after making certain provisions for the allowance of fees, etc., provides: '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.' I have incurred some expense in going to and from Marion in connection with various criminal matters and would like to know whether I can claim reimbursement for such expenses under this section. I have not as yet filed any claim with the board of supervisors.

"Some of the other county officers; namely, the clerk and the county auditor, are in practically the same situation that I am, in respect to the allowance of their expenses from Cedar Rapids to Marion, and they have expressed themselves to me as being interested in this matter and would like to know whether there is any provision authorizing similar allowances to them. My residence is, of course, at Cedar Rapids."

In answering this inquiry it is our understanding that the county seat of Linn county has been by vote of the people ordered removed from Marion to Cedar Rapids. The actual removal of the county seat has not been as yet accomplished. Theoretically the county seat may be said to be at Cedar Rapids but for all practical purposes the county seat is at Marion.

In the performance of your official duties your presence is required at Marion and, confronted with a situation of this character, it is the opinion of this department that you are not entitled to the expenses incurred in attending to your official business at Marion. This is the place where you are required to perform them. It is in fact the county seat. The theoretical existence of the county seat at Cedar Rapids is not in itself sufficient to overcome the practical existence of the county seat at Marion and to authorize the expenditure of public funds upon the theoretical existence of the county seat at Cedar Rapids.

BEN J. GIBSON, *Attorney General*.

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

OPINIONS RELATING TO BONDS

WHEN CONTRACT FOR SALE OF BONDS ILLEGAL

Contract by board of supervisors with regard to sale or exchange of county bonds made with a bank precluding competitive bidding for bonds illegal.

March 1, 1922.

Mr. H. C. Schulz, County Attorney, Newton, Iowa: You have submitted to this department for an opinion a proposition relating to the sale or exchange of funding bonds of your county. The facts are substantially as follows:

"Some time ago the board of supervisors of Jasper county together with the auditor of Jasper county and the treasurer of Jasper county entered into a contract with a certain banking institution, the name of which institution does not appear in the facts submitted.

"The substance of this contract is that the bank agreed to cash the warrants of Jasper county at par and Jasper county agreed to issue funding bonds in accordance with the provisions of the statute and to exchange them for par with accrued interest for the warrants accumulated by the bank in accordance with the provisions of the contract.

"The bank on its part cashed the warrants and the board of supervisors have directed the issuance of the funding bonds and, as we understand the matter, such bonds are now in the hands of the treasurer for disposition.

"The question arises as to what is the duty of the treasurer under such circumstances."

The attention of this department was called to this proposition during the spring and summer of 1921 by certain representatives of various bonding houses and by the auditor of state. At that time this department held that the board of supervisors or any other officer of a county was not authorized to enter into any such a contract as that to which reference has been made, the reason being that it would be against public policy and was unauthorized by the statute.

Funding bonds can only be issued and can only be disposed of in the manner provided by statute. They may or may not be issued. The question as to whether they shall be issued is one dependent upon the action of the board not in advance of the time but at the time they are authorized to issue such bonds under the provisions of the statute.

It was never contemplated by the statute that the board of supervisors could contract in advance and bind themselves to issue bonds, the issuance of which was discretionary not upon such board but upon the board or supervisors of the county at the very time of the issuance of such bonds. It was pointed out in such opinion that the board of supervisors might be entirely changed before the time came to carry out the provisions of the contract and certainly the old board would have no authority to bind the new board in such a matter.

In this opinion, therefore, we start with the assumption that all parties knew that the board of supervisors, the auditor and the treasurer had no authority to enter into the contract referred to, and that such authority did not exist was known to at least the state auditor and from him might have been obtained by any of the bond houses.

Section 403 of the supplement to the code, 1913, provides that the board of supervisors may whenever the indebtedness of the county exceeds the sum of five thousand dollars fund or refund such indebtedness. The matter is purely one within the discretion of the board of supervisors and they may or may not issue the bonds.

The section further provides that such action is only to be taken when the indebtedness of the county exceeds such sum on the first day of January, April, June or September.

Section 404 provides that when the bonds so issued have been executed and numbered that they shall be sealed and delivered to the county treasurer and his receipt taken therefor. The treasurer stands charged on his official bond for all bonds so delivered to him together with the proceeds thereof. The statute then provides that;

"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. When they are exchanged for warrants and other legal evidences of county indebtedness, the treasurer shall at once proceed to cancel such evidences of indebtedness by indorsing on the face thereof the amount for which they were received, the word 'canceled' and the date of cancellation. He shall also keep a record of bonds sold or exchanged by him by number, date of sale, amount, date of maturity, and the name and post office address of purchasers, and, if exchanged, what evidences of indebtedness were received therefor, which record shall be open at all times for inspection by the public. Whenever the holder of any bond shall sell or transfer it, the purchaser shall notify the treasurer of such purchase, giving at the same time the number of the bond transferred and his post office address, and every such transfer shall be noted on the records. The treasurer shall also report under oath to the board, at each regular session, a statement of all bonds sold or exchanged by him since the preceding report, and the date of such sale or exchange; and, when exchanged, a list or description of the county indebtedness exchanged therefor, and the amount of accrued interest received by him on such sale or exchange, which latter sum shall be charged to him as money received on bond fund, and so entered by him on his books; but such bonds shall not be exchanged for any indebtedness of the county except by the approval of the board of supervisors of said county."

There is no doubt as to there being a clear distinction between the words "sell" and "exchange." Our supreme court in *Reynolds vs. Lyon County*, 121 Iowa, 736, points out this distinction very clearly. *Doom vs. Cummins*, 35 U. S. (Law Ed. 1046) also has application to this distinction.

The courts hold that the word "exchange" when used in statutes relating to funding bonds has relation to the exchange of the bonds for outstanding warrants or other evidences of indebtedness, while the word "sell" refers to a cash transaction. The statute itself however clearly refers to the distinction in the latter part thereof wherein the legislature states that the bonds shall not be exchanged for outstanding indebtedness except by the approval of the board of supervisors of the county. This does not refer to the sale of the bonds.

The legislature in chapter 170 of the acts of the 39th general assembly provides that where bonds are issued and offered for sale in the sum of

\$25,000 or more the official or officials in charge of such bond issue shall advertise the same calling for bids. This chapter also provides for the rejection of bids and in such event for sale at private sale.

If the distinction between the exchange and sale of bonds is carried to its ultimate conclusion it naturally follows that it is not necessary to advertise where the bonds are simply exchanged. The statute, however, referring to the sale or exchange of bonds specifically provides that such bonds shall be sold or exchanged on the best available terms. The purpose and intent is manifest that the bonds shall be disposed of on the best available terms whether by sale or by exchange. If the best terms can be obtained through the sale of the bonds then it is the manifest duty of the treasurer to sell them. If on the other hand, the best available terms can be obtained by exchanging the bonds then it is his manifest duty to exchange them providing always that the board of supervisors in cases of exchange grants approval. In either event, the whole purpose and object should be and is to secure for the county the highest possible price for its bonds.

We find then the situation presented where the treasurer of the county has the discretion to sell or exchange the bonds but has no discretion as to the requirement of obtaining the best available price. The question then arises not as to whether or not it is necessary for him to advertise in cases of exchange but as to how he is to determine when and how he can receive the best available terms. The legislature has specifically provided that he cannot sell the bonds except upon advertisement. Before he can determine what are the best available terms which can be received from the sale of the bonds he must follow out the mandate of the statute and advertise. With the bids in hand he should then determine whether or not there is a possibility of receiving a higher bid at private sale and, if so, he has the discretion of rejecting all of the bids and selling at private sale. If none of the bids received by him are equal to the bids which he would receive if he exchanged the bonds then it would be his duty to exchange them. The whole purpose and object being to secure the highest price for the bonds.

This opinion must not be construed beyond the finding herein expressed and must not be construed as determining the validity of bonds which may have been issued and delivered without regard thereto, such questions not having been submitted and not being ruled upon.

This opinion only relates to the clear and manifest duty of the treasurer with reference to the sale or exchange of funding bonds.

It is therefore the ruling of this department that the duty of the treasurer of a county upon receiving funding bonds is to sell or exchange them on the best available terms and to use every method available in order to determine justly and fairly this proposition.

BEN J. GIBSON, *Attorney General.*

Note:—Foregoing opinion follows ruling made by prior administration. See Report of Attorney General 1919-1920, page 668. An opinion following same ruling given to Hon. Glenn C. Haynes, auditor of state on June 18, 1921.

TRANSFER OF BOND FUND

County cannot transfer funds from bond to bridge fund while bonds are outstanding and unpaid.

January 20, 1922.

Hon. Glenn C. Haynes, Auditor of State: We are in receipt of your letter of January 9, which is as follows:

"We are in receipt of the following letter from C. K. Swinney, county treasurer of Davis county:

"Regarding further telephone conversation of the 6th, in regard to the sale of Davis county bonds.

"I will again submit the proposition to you, and by request of our county attorney and board of supervisors, ask that your department and Mr. Gibson make us a ruling.

"The wealth of Davis county as shown by the assessors or auditors records is \$22,489,228.00 or \$5,622,307.00 and as we understand the law we would be allowed an indebtedness of \$250,000.00.

"On January 1, we had outstanding bonds of \$143,000.00 and registered warrants of about \$40,000.00. (The above wealth is first, actual; second, the taxable.)

"We have on hand in the bridge funding bond fund about \$41,000.00 to retire bonds as due, and have paid some that were not due but were able to get hold of and stop interest, but in the last year or so we have been unable to pay any that were not due on account of the holders not presenting for payment.

"Now, what we wish to do, is, the board to pass the resolution ordering the county bonded to take up the registered bridge warrants, have same printed and turned to the treasurer for sale. I will then advertise for bids, etc., with the provision that any or all of these bonds to be payable at any time at the county's option.

"I know that we can sell them for par and accrued interest on that contract. All right so far, now a Davis county bank bids par and interest, treasurer delivers bonds and receives a draft or deposit ticket. Immediately treasurer calls for bonds, pays bank 5 per cent interest for the one day, takes bonds cancels same and pays county 5 per cent interest for 20 years, at a cost of 2½ per cent interest for one day, as bank must pay county 2½ per cent on 90 per cent daily balance. Is this legal?

"It is our wish to do this as quickly as possible, yet we do not wish to, in any manner evade or disobey the law.

"If you will, please get in touch with Mr. Gibson and give us the ruling as soon as possible."

"This department requests the favor of an official opinion on the question submitted in the above letter, that is, whether or not it would be legal for the board of supervisors and county treasurer to make a transaction of this kind. In other words, whether or not bonds issued at this date can be paid out of the balance in the bond fund, said balance being the result of a tax already levied and collected for the purpose of paying bonds issued prior to this date."

Section 407 of the supplement to the code, 1913, relating to the bond fund of a county provides in part as follows:

"If after the payment of all bonds and interests provided for in section 403 of the supplement to the code, 1907, there remains any money in said bond fund, the board of supervisors may by resolution transfer said funds to the particular fund or funds on account of which the indebtedness arose for which said bonds were issued."

Assuming that the money in the bond fund of Davis county has been raised for the purpose of paying bonds issued for bridge purposes the board of supervisors would be authorized under this section after the payment of all such bonds outstanding and interests thereon to transfer the remainder of such fund, if any there be, to the bridge fund of Davis

county. So long, however, as there are bonds outstanding there is no method provided by which the board of supervisors can transfer money from the bond to the bridge fund.

The proposed bond issue in the letter above quoted is confessedly for no other purpose than to accomplish the transfer of funds from the bond to the bridge fund of Davis county and this in our opinion cannot be done, especially in view of the fact that bonds are still outstanding for the payment of which the money now in the bond fund was raised:

BEN J. GIBSON, *Attorney General*.

By B. J. FLICK, *Assistant Attorney General*.

AMOUNT OF BOND TO SECURE DEPOSIT OF PUBLIC FUNDS

Where personal bonds are given, the penalty must be for twice amount deposited in bank and surety must qualify for double the amount of the penalty of the bond.

February 17, 1921.

Mr. F. C. Bush, County Attorney, Osage, Iowa: Your letter of February 4 with the following question has been received:

"Where personal bond is given, must the bond be for twice the maximum amount of deposits, and then must the sureties on such bond, where personal bond is given, make oath to being worth twice the amount of the bond or twice the amount of the maximum deposit?"

Section 1457 of the 1913 supplement to the code provides that banks "shall file a bond with sureties to be approved by the treasurer and the board of supervisors in double the amount deposited."

This, without doubt, fixes the penalty of the bond at double the amount deposited in the bank.

Section 358 provides:

"The surety in every bond provided for or authorized by law must be a resident of this state, and worth double the sum to be secured beyond the amount of his debts, and have property liable to execution in this state equal to the sum to be secured, except as otherwise provided by law. Where there are two sureties in the same bond, they must in the aggregate have the qualifications described in this section."

From this provision it is evident that the surety on the personal bond, if there be but one surety, shall qualify for double the amount of the penalty of the bond, and have property liable to execution in this state equal to the sum represented by the penalty on the bond.

BEN J. GIBSON, *Attorney General*.

By B. J. FLICK, *Assistant Attorney General*.

ISSUANCE OF DEBENTURE BONDS

Corporations organized as both banks and trust companies cannot issue debentures or bonds.

October 31, 1921.

Hon. W. J. Murray, Superintendent of Banking: You have orally requested the opinion of this department regarding the legal right of a corporation, organized as both a trust company and savings bank, to issue debentures or bonds.

I can find no statute expressly authorizing state or savings banks to issue debentures or bonds. Section 1889-j of the supplement to the code,

1913, prescribes the purposes for which trust companies, state and savings banks may legally create indebtedness, and reads as follows:

"Trust companies, state or savings banks may contract indebtedness or liability for the following purposes:

"For necessary expenses in managing and transacting their business, for deposits, and to pay depositors, providing that in pursuance of an order of the board of directors previously adopted, other liabilities not in excess of an amount equal to the capital stock may be incurred."

Certainly, under the portion of the statute above quoted, no one could seriously contend that either a bank or trust company could legally issue debentures or bonds.

However, as relating to trust companies, section 1889-j, *supra*, further provides:

"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 first part of the section relates to indebtedness that may be legally created by banks and trust companies, while the final clause confers upon trust companies the additional power to issue debentures or bonds when secured by the actual transfer of real estate securities. It is evident that no such power was ever intended to be conferred upon banks; otherwise, the last clause of this section would have been made applicable to banks also.

We are, therefore, of the opinion that a corporation organized as both a bank and trust company cannot legally issue debentures or bonds.

BEN J. GIBSON, *Attorney General*,

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

OPINIONS RELATING TO CIGARETTES

LIFE OF CIGARETTE PERMIT

Permits remain in force for two years following the July 1 after their issuance unless sooner revoked for cause or cancelled with consent of permit holder.

May 31, 1922.

Hon. W. J. Burbank, Treasurer of State: You have requested the opinion of this department upon the following questions:

"1. Can a city or town council cancel a cigarette permit at any time and re-issue another in lieu thereof?

"2. When do cigarette permits expire under the provisions of section 3 of the cigarette law?"

Before entering into a discussion of the questions presented, we will first set out section 3 of chapter 203, acts of the 39th general assembly, commonly known as the Iowa cigarette law. That section reads as follows:

"No person, firm or corporation shall sell cigarettes or cigarette papers in the state of Iowa, without first having obtained a permit therefor, which said permit may be granted and issued by the council of any city or town, including cities under special charter and cities under the manager plan or commission form of government, *and said permit shall be in force and effect for two (2) years following the July 1 after its issue, unless sooner revoked*, and shall be granted only to a person, firm or corporation owning or operating the place from which said sale is to be made, and shall not be transferable, which permit shall have a number and show the residence and place of business of the permit holder. The council issuing such permit shall revoke the permit of any person who has violated any of the provisions of this act, *and no such permit can again be issued for a period of two years thereafter*. The clerk of said city or town shall, upon the issuance or revocation of any permit hereunder, immediately certify the same to the treasurer of state."

Section 3 of the cigarette law contains all of the provisions relative to the issuance and the revocation of permits. There is nothing contained in such section or in the law directly authorizing city or town councils to cancel permits which they have issued. It must be borne in mind that there is a distinction between the words "revoke" and "cancel." Under the provisions of section 3, it will be observed that it is mandatory upon the council issuing a permit to revoke the permit of any person who has violated any of the provisions of the act. It is further provided that no such permit can again be issued for a period of two years after such revocation. Hence, no permit should be revoked except for cause. On the other hand, it is reasonable, considering all of the provisions of the cigarette law, that permits might be cancelled in proper cases. Thus, should a permit holder decide to discontinue the sale of cigarettes and request that his permit be cancelled; or should a permit holder be obliged to move his place of business because of the expiration of his lease, a fire, or some other good reason, and would request the cancellation of his permit for that location, in such cases a council undoubtedly has power to cancel such permits. Before answering the first question propounded

directly, we will turn to a discussion of some of the provisions relating to the second question presented.

It is asked on what date cigarette permits expire under the provisions of section 3 as quoted above. It will be observed that the section provides that "said permit shall be in force and effect for two (2) years following the July 1 after its issue, unless sooner revoked." The question presented arises out of a situation, we are informed, where a city council desires to cancel permits issued prior to a certain date and re-issue new permits in lieu thereof. In such cases then, can a council cancel permits before the expiration of the period of time set out in section 3? It will be noted that the language of the provision is mandatory, but be that as it may, we are of the opinion that should the permit holder consent, a council may cancel such permit and re-issue another permit in lieu thereof; but should a permit holder object to the cancellation of his permit, we do not believe, under the language used, that a council could cancel same even though it would re-issue another permit in lieu thereof. The provision quoted specifically provides that the permit shall be in full force and effect for two years following the July 1 after its issue. Where there is objection to the cancellation of the permit, the only way it can be terminated would be by revocation for cause.

In view of the foregoing discussion, it is the opinion of this department that in answer to your first question a city or town council cannot cancel a permit without the consent of the permit holder before the expiration date provided in section 3. Also, we must answer the second question by holding that section 3 provides that a cigarette permit "shall be in force and effect for two years following the July 1 after its issue, unless sooner revoked."

BEN J. GIBSON, *Attorney General*,

By NEILL GARRETT, *Assistant Attorney General*.

GIVING AWAY OF CIGARETTES

Manufacturer may give away cigarettes to adults without securing permit. Must not, however, give to minors.

February 11, 1922.

Hon. W. J. Burbank, Treasurer of State: Your letter addressed to this department with request for an opinion has been referred to me. You state:

"Our attention has been called to the fact that certain manufacturers of cigarettes are distributing and desire to distribute free to adults, cigarettes, for advertising or promotion purposes.

"Those manufacturers who have carried on this advertising campaign, so far as we are aware, have had the packages properly covered with revenue stamps.

"We would kindly request that you furnish this department with your opinion as to whether or not free distribution of cigarettes can be made.

"Would you kindly give this your early consideration?"

As we interpret the provisions of chapter 203 of the acts of the 39th general assembly relating to the sale of cigarettes the gift of cigarettes to an adult is not prohibited, and in case a manufacturer desires to carry on an advertising campaign in this state by the gift of sample packages of cigarettes, we believe that he can do so without subjecting himself to liability for violation of the cigarette law so long as the gifts are strictly confined to adults.

Section 3 contains the regulatory provisions of the act relating to sales and is as follows:

"No person, firm or corporation shall sell cigarettes or cigarette papers in the state of Iowa, without first having obtained a permit therefor, which said permit may be granted and issued by the council of any city or town, including cities under special charter and cities under the manager plan or commission form of government, and said permit shall be in force and effect for two (2) years following the July 1 after its issue, unless sooner revoked, and shall be granted only to a person, firm or corporation owning or operating the place from which said sale is to be made, and shall not be transferable, which permit shall have a number and show the residence and place of business of the permit holder. The council issuing such permit shall revoke the permit of any person who has violated any of the provisions of this act and no such permit can again be issued for a period of two years thereafter. The clerk of said city or town shall, upon the issuance or revocation of any permit hereunder, immediately certify the same to the treasurer of state."

Nothing will be found in this section prohibiting the gift of cigarettes to adults.

A manufacturer who carries on an advertising campaign of this sort however would be treading on rather dangerous ground because of the fact that some of his product might fall into the hands of minors.

Section 1 of the cigarette law so far as applicable to sale or gift to minors is as follows:

"Any person who shall furnish to any minor under twenty-one years of age, by gift, sale or otherwise, any cigarette or cigarette paper or wrapper, or any paper made or prepared for the purpose of making cigarettes, shall be guilty of a misdemeanor. Whoever is found guilty thereof, for the first offense shall be sentenced to pay a fine of not less than twenty-five dollars nor more than one hundred dollars and costs of prosecution, or imprisoned in the county jail for not more than thirty days; and for the second and each subsequent offense, upon conviction thereof, shall be sentenced to pay a fine of not less than one hundred dollars nor more than five hundred dollars and costs of prosecution, or be imprisoned in the county jail not less than one month nor more than six months, or both such fine and imprisonment."

As above indicated, it is our opinion that there is nothing in the cigarette law which would prohibit a manufacturer to advertise his product by a gift of cigarettes to adults. It would be his duty, however, to see to it that none of the cigarettes so given should fall into the hands of minors through his gift or distribution.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

WHEN PERMIT HOLDER CHANGES PLACE OF BUSINESS

When holder of cigarette permit changes place of business the city or town council may grant change of permit to cover new location.

October 13, 1921.

Hon. W. J. Burbank, Treasurer of State: You have requested an opinion from this department on the following question:

"May a merchant who was licensed to do business at a particular address and location remove to another address and location within the same city and still continue to sell cigarettes under the same license?"

There is no specific provision in chapter 203 of the laws of the 39th

general assembly, otherwise known as the cigarette law, authorizing the changing of a permit from one location to another.

Section 3 of the law relates to the issuance of permits and the conditions attached thereto. It provides that no cigarettes or cigarette papers shall be sold except under authority of a permit. It is provided that permits may be granted and issued by the city or town council. The permits run for a period of two years following the July 1 after their issue unless sooner revoked. It is required that the permit shall have a number and shall show the residence and place of business of the permit holder. Permits are not transferable. It is also required that before a permit can issue, a bond in the amount of not less than \$1,000, conditioned upon certain specified things must be furnished to the city or town. These are the important provisions of the law, so far as the question presented is concerned.

There is no provision for a refund or credit for an unused part of a year. Should a person who has taken out a permit decide to go out of business at any time before the expiration of his permit, there is no way by which he may receive a refund for that portion of the period not used. Neither can he transfer his permit to another person. The statute specifically prohibits such transfers.

Should a permit holder find it necessary to change his place of business because of the expiration of his lease, fire, or for some other good reason, it would be an extreme hardship on him to compel him to forfeit his permit and, if he establishes a business elsewhere in the same community, to compel him to take out another permit and pay another tax. The power to grant and issue permits is vested in the city or town council. If a permit holder applies to the council for a change of business location, makes a good faith showing, and files a proper bond for the new location, what then is there, to prevent the council from granting the request, if it so desires. There is nothing anywhere in the law which either directly or impliedly prohibits such action. We do not mean to infer that a permit holder may apply for and have his place of business changed at will, for by an abuse of such power by the council, a permit may become an itinerant or roving permit within the territorial jurisdiction of the council. The change of business locations, if granted, must be to another permanent place of business, and in good faith. If the council desires to grant a change of location to a permit holder, the better procedure would be to require the filing of a proper bond for the new location, cancel the old permit, and issue a new permit for the new place of business, without requiring the payment of another mulct tax. Whenever such action is taken, it is the duty of the city or town clerk to immediately notify the state treasurer of the action taken, the numbers of both the old and new permits, and the locations of both the old and new places of business.

For the reasons stated, we are of the opinion that the city or town council, or the board of supervisors of the county, as the case may be, may grant a change of business locations to permit holders in proper cases, and in the manner set out above.

BEN J. GIBSON, *Attorney General*,

By NEILL GARRETT, *Assistant Attorney General*.

EFFECT OF VETO OF CIGARETTE LICENSE

If the mayor refuse to sign an ordinance or resolution, he shall call meeting within 14 days thereafter and return the same, giving reasons. If he fails to call meeting or return ordinance, it becomes operative without his signature. Or it may be passed over his objections upon two-thirds vote. If the action is by motion duly recorded, the approval of mayor is unnecessary.

August 2, 1921.

Mr. Geo. A. Anderson, County Attorney, Clarinda, Iowa: You have requested the opinion of this department on the question as to "whether or not the mayor of Shenandoah has a right to veto a motion that has passed by three out of five councilmen to grant licenses to dealers to sell cigarettes."

The section of the cigarette law relative to the issuance of permits is section 3, and does not provide any method or procedure to be followed by the council of the city or town in such matters. The granting of cigarette permits by city or town councils has been accomplished by three methods, viz: By ordinance, by resolution, or by motion duly recorded. In the latter case it seems it is unnecessary to have the signature or approval of the mayor. See *Slocum vs. City of North Platte*, 192 Fed. Reporter, 252, at page 262; *Atchison Board of Education vs. Dekay*, 148 U. S. 691, 598; *Merchants Union Barb Wire Company vs. C., B. & Q. Railway Company*, 70 Iowa, 105, 107; *Martin vs. City of Oskaloosa*, 126 Iowa, 680, 685.

The rule is well settled in the Iowa case of *Merchants Union Barb Wire Co. vs. C., B. & Q. Railway*, supra, where the following language is used:

"The statute being silent upon this subject, the authority may be exercised by resolution duly passed or vote duly taken appearing in the proper record of the city."

It would appear then in the case before us, that if the action taken was by motion duly recorded, the approval of the mayor is not required. On the other hand, if the action taken by the council is in the nature of a formal resolution or ordinance, the situation is governed by the provisions of section 685 of the code of 1897, which is as follows:

"The mayor shall sign every ordinance or resolution passed by the council before the same shall be in force, and if he refuses to sign any such ordinance or resolution, he shall call a meeting of the council within fourteen days thereafter, and return the same, with his reasons therefor. If he fails to call the meeting within the time fixed above, or fails to return the ordinance or resolution, with his reasons, as herein required, such ordinance or resolution shall become operative without such signature, and the clerk shall record it in the ordinance book, with a minute of the facts making it operative.

"Upon the return of any such ordinance or resolution by the mayor to the council, it may pass the same over his objections, upon a call of the yeas and nays, by not less than a two-thirds vote of the council, and the clerk shall certify on said ordinance or resolution that the same was passed by a two-thirds vote of the council, and sign it officially as clerk."

It will be observed from a reading of the foregoing section that it is required that the mayor shall either sign or veto any ordinance or resolution passed by the city or town council, and if he refuses to sign any such ordinance or resolution, or vetoes same, he shall call a meeting of the council within fourteen (14) days thereafter and return the same with his reasons therefor.

This section also provides that if the mayor fails to call the meeting within that time, or fails to return the ordinance or resolution with his reasons as required, such ordinance or resolution will become operative without his signature, and the clerk shall record it in the ordinance book and make a record of such proceeding. If the mayor returns such ordinance or resolution as provided, the council may pass same over his objections by not less than a two-thirds ($\frac{2}{3}$) vote of the council, and the clerk shall make his record accordingly.

The rule then, is that in cases where the action taken is in the form of a resolution or ordinance, the provisions of section 685 of the code of 1897, as set out above, will apply: If the action is by motion duly recorded, the approval of the mayor is unnecessary.

BEN J. GIBSON, *Attorney General*,

By NEILL GARRETT, *Assistant Attorney General*.

PAYMENT OF EXPENSES OF CIGARETTE DEPARTMENT

Undoubtedly the legislative intent that all expense of enforcing this law incurred by the treasurer's office should be paid from the revenue derived under the act. Executive council should take this into consideration, by providing that actual traveling expenses be paid in addition to compensation fixed.

July 26, 1921.

Hon. Glenn C. Haynes, Auditor of State: You request to be advised as to whether persons employed by the treasurer of state to carry out the provisions of chapter 203, acts of the 39th general assembly relating to the sale of cigarettes are entitled to receive their actual and necessary traveling expenses while engaged in the performance of their duties.

Section 15 of the act reads as follows:

"The treasurer of state is hereby authorized to select and appoint an additional assistant to the treasurer of state, whose sole duties it shall be to administer and see that the provisions of this act are enforced, including the collection of all stamp taxes provided for herein. In the enforcement of this act he may call to his aid the attorney general, the special agents, any county attorney or any peace officer. The treasurer of state is further authorized to appoint such clerks and additional help as may be needed to carry out the provisions of this act. The compensation of all persons employed hereunder to be fixed by the executive council and to be paid from the revenues derived hereunder."

It will be observed that the treasurer of state is authorized to appoint such clerks and additional help as may be needed to carry out the provisions of the act, and that the compensation of all persons employed by the treasurer of state is to be fixed by the executive council.

In performing the duties enjoined upon the treasurer of state by the act, it is apparent that expense might be incurred by employes of the department in the performance of their duties, and it was undoubtedly the intention of the legislature that all expense of enforcing the law incurred by the treasurer of state's office should be paid from the revenue derived under the act.

These things being true, the council in fixing the compensation to be paid to persons employed in the department could take into consideration this fact and provide for it by fixing the compensation of the employes at a certain amount and their actual traveling expenses to be paid in addition to the compensation fixed.

It is our opinion that if the executive council has provided for the payment of the necessary traveling expenses of persons employed in the department, in addition to the compensation in the way of salary to be paid the employes, that the auditor's office would be justified in issuing warrants in payment of such traveling expenses, upon properly audited bills.

BEN J. GIBSON, *Attorney General*,

By JOHN FLETCHER, *Assistant Attorney General*.

GENERAL DISCUSSION OF CIGARETTE LAW

Statement with reference to right of traveling salesman to sell cigarettes; what resident wholesaler must do to legally sell cigarettes, etc.

May 19, 1921.

Hon. W. J. Burbank, Treasurer of State: In your letter of May 11, 1921, you ask for an opinion from this department as to the interpretation to be given committee substitute for house file No. 678 of the acts of the 39th general assembly insofar as is necessary to answer certain questions submitted by you. The law is commonly known as the cigarette law.

The questions submitted by you will be taken up in order.

The first of these questions is as follows:

"Are there any restrictions placed upon traveling salesmen and solicitors who represent a wholesale concern, and who do not sell to consumers?"

In answering this question we assume that the traveling salesmen and solicitors referred to in your question only take orders which are later filled by the wholesale concern represented by them. Under such circumstances there is no doubt as to the right of such traveling salesmen and solicitors to take orders for the sale of cigarettes, the sale in fact being made by the wholesale house at its principal place of business. However, if the traveling salesman or solicitor attempts to deliver the goods sold or makes a sale which may be construed as a sale at the place where the order is taken then such solicitor, unless acting under a permit legally issued, would be violating the law. The sole question involved is as to whether or not he makes a sale or whether he merely takes an order which is later to be filled at the principal place of business of the wholesale concern represented by him. In this connection it should not be forgotten that the wholesale house making the sale must comply with the law relative to the sale of cigarettes in Iowa.

The second question submitted by you is as follows:

"Can wholesale concerns solicit business in, and ship goods to, the counties of the state under the one operating permit?"

There is but one construction that can be placed upon this law and that is this: that if the sale is made by the wholesale concern from the point where sales are authorized under the permit such sales are legal. The fact that the goods were shipped to other counties and cities in the state would be immaterial, this being true your question must be answered in the affirmative.

The third question submitted is as follows:

"Is the resident wholesaler required to pay a mulct tax and the non-resident wholesaler allowed to solicit and deliver without a permit?"

In determining this question we shall first consider the proposition as to whether or not a wholesale dealer must have a permit. The law does not distinguish between a wholesale and retail dealer. That portion of

the law applicable is contained in section 3 of the act and is in words as follows:

"No person, firm or corporation shall sell cigarettes or cigarette papers in the state of Iowa without first having obtained a permit therefor."

The term "person, firm or corporation" as used in this section is not limited and therefore includes within itself any person, firm or corporation whether such person, firm or corporation sells cigarettes as a wholesaler, jobber or retailer. It must, therefore, be held that a wholesale house selling cigarettes in the state of Iowa must have a permit.

The question as to whether or not a non-resident wholesaler can sell cigarettes in the state of Iowa depends to no small degree upon the facts and circumstances connected with the sale. If the sale is made in the state of Iowa there is no doubt of illegality unless such wholesale house has a permit; however, if the sale is made outside of the state of Iowa and the goods shipped into the state of Iowa in interstate commerce such foreign wholesale house would not be required to have a permit. Each particular sale under these circumstances must depend upon its own facts and circumstances.

The next question submitted by you is as follows:

"Can wholesalers be required to sell to permit holders only?"

This question must be answered in the negative.

In answering the question, however, we desire to point out certain distinctions which must be borne in mind.

The wholesaler as will have been observed has the right to sell cigarettes provided such wholesaler has a permit. However, such wholesaler will not be required to place stamps on the packages of cigarettes, cigarette papers and tubes where the sale is made to a permit holder. The reason for this is contained in section 13 of the law which provides as follows:

"From and after the taking effect of this act there is hereby levied and assessed and shall be collected and paid upon all cigarettes and cigarette papers or wrappers and tubes sold in Iowa to consumers, the following taxes:

Class A. On cigarettes weighing not more than three pounds per thousand, one mill on each such cigarette;

Class B. On cigarettes weighing more than three pounds per thousand, two mills on each such cigarette;

Class C. On cigarette papers or wrappers or any papers made or prepared for the purpose of making cigarettes, made up in packages, books or sets; on each such package, book, or set containing not more than fifty papers, one-half cent; containing more than fifty papers and not more than one hundred papers, one cent; containing more than one hundred papers, one-half cent for each fifty papers or fractional part thereof.

Class D. On tubes, one cent for each fifty tubes or fractional part thereof."

This section, as will be noted, provides that stamps shall be attached only where the sale is made to a consumer. A sale by a wholesale concern to a dealer holding a permit could not by any reasonable construction be interpreted to mean a sale to a consumer. If the sale is made by the wholesale house to a consumer stamps must be attached in the same manner as sales to consumers by any permit holder.

This, we believe, answers your questions as fully as the same can be answered without particular facts upon which to base such answers.

BEN J. GIBSON, *Attorney General.*

OPINIONS RELATING TO MISCELLANEOUS MATTERS

REWARD OFFERED FOR CAPTURE OF PRISONERS VIOLATING PAROLE

Reward may be offered and paid for the apprehension of prisoners violating parole. (See sections 5681, code; 5718-a28, supplement 1913; 5718-a18, supplement 1913; 4897-a, supplement 1913.)

September 20, 1921.

Board of Parole: You have submitted to this department a request for an opinion as to whether rewards may be offered and paid for the apprehension of prisoners who have been paroled from the penitentiary or reformatory, and who have violated the terms of their parole and concealed themselves so that their whereabouts are unknown to the board or prison authorities.

Section 5681 of the code reads as follows:

"If a convict escapes from the penitentiary or men's reformatory, the warden shall take all proper measures for his apprehension; and for that purpose he may offer a reward, not exceeding fifty dollars, to be paid by the state, for the apprehension and delivery of such convict."

It will be noticed that under the provisions of the section above quoted, the warden of the institution from which a prisoner escapes may offer a reward for the apprehension and delivery of such person.

Section 5718-a28, code supplement of 1913, insofar as such section is applicable to the question under consideration reads as follows:

"Prisoners employed upon the highways of this state, or upon any public works, under the provisions of this chapter shall at all times be under the charge and jurisdiction of the warden of the institution to which the prisoner was sentenced."

It will be observed that this section, which covers the employment of convict labor upon the highways of this state, leaves the prisoners under the direct charge and jurisdiction of the warden of the institution to which they were sentenced, and the fact of their employment upon work elsewhere than about the prison does not take them out of the legal custody of the officers of the institution in which they belong.

Section 5718-a18, supplement to the code, 1913, in part reads as follows:

"The board of parole shall have power to establish rules and regulations under which it may allow prisoners within the penitentiary or men's reformatory other than prisoners serving life terms, to go upon parole outside of the penitentiary or men's reformatory building, inclosures and appurtenances, but remain while on parole in the legal custody of the warden of the penitentiary or men's reformatory, and under the control of the said board of parole and subject, at any time, to be taken back and confined within the penitentiary or men's reformatory."

Under the provisions of the above section, men who are out on parole are in the legal custody of the warden of the institution from which they are paroled.

Section 4897-a of the supplement to the code of Iowa, 1913, reads 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 condition of his parole or any rule or regulation 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."

You will observe that the latter part of the section last quoted makes it the same offense for a paroled prisoner to violate his parole as though he had made a physical escape from the penitentiary or reformatory.

It would be useless for the purposes of this opinion to enter into a lengthy discussion of the various sections which we have set out, because the legislature has clearly defined what shall be construed to constitute an escape from the penitentiary or reformatory. There is no doubt, therefore, but that a reward can be offered and paid for the apprehension of prisoners who have violated their parole and whose whereabouts are unknown to the officers of the board of parole or penitentiary or reformatory authorities, as is provided in the first section we have set out in this opinion.

BEN J. GIBSON, *Attorney General*,

By JOHN FLETCHER, *Assistant Attorney General*.

REWARDS

Rights of peace officers to receive rewards in this state. Citing *Maggi vs. Henderson*, 181 N. W. 27.

February 8, 1922.

Hon. Glenn C. Haynes, Auditor of State: You have requested an opinion from this department as to the rights of peace officers to receive rewards in this state. You call attention, first, to ordinary rewards such as rewards offered for the arrest and apprehension of criminals; second, to rewards offered by the state board of parole.

The law relative to the rights of peace officers to receive ordinary rewards, such as are offered for the arrest and apprehension for criminals, has been in doubt in this state for some years. It has been the rule, however, that officers are not to claim or to receive a reward offered in connection with crimes committed within the territorial jurisdiction of such officers. This rule has had repeated approvals from this department, beginning with Attorney General McPherson, including Attorney General Mullan, and Attorney General Byers. It has also been recently upheld in our supreme court in the case of *Maggi vs. Cassidy*, 181 N. W. 27.

The general right of peace officers to receive rewards is discussed at length in the case of *Maggi vs. Cassidy*, to which we have referred. In this case a crime has been committed in Madison county, Iowa, and a warrant placed in the hands of the sheriff of Madison county for the arrest of the

criminal. A reward was offered for the arrest and apprehension of the person accused of the commission of the crime. The reward having been earned, the question arose as to who was entitled to share therein. The sheriff of Madison county, Iowa, claimed the reward, as did also the sheriff of Black Hawk county, Iowa; George E. Bidwell, state agent of Iowa, and the city marshal of Winterset, Iowa.

The court held that the sheriff of Madison county, Iowa, was not entitled to share in the reward. The reason upon which the court bases its ruling is that it is contrary to sound public policy to permit a peace officer to demand or receive a reward for making an arrest which it is his duty to make. The court says:

"That any other rule would open the door to fraud and corruption."

What is said with reference to the sheriff of Madison county, Iowa, applies with like force to all peace officers in the state. They cannot accept a reward for the making of an arrest in connection with the investigation of a crime committed within the territorial jurisdiction of such officers.

The court held, however, that the sheriff of Black Hawk county, Iowa, was entitled to share in the reward. The reasons therefor are expressed by the court in the following language:

"The intervener Henderson held no warrant for the arrest of Clifton. He was under no official obligation to join in his pursuit or capture. Neither Black Hawk county nor Madison county was chargeable with fees or compensation for such volunteer service, and if he was influenced to action by the reward offered he wronged no one and neglected no duty he was otherwise bound to perform.

"This question, in various forms, and under various circumstances, has had the consideration of the courts and given rise to some conflict of opinion, but the trend of judicial opinion is quite in accord with the view that a reward for the arrest or arrest and conviction of an alleged criminal may be earned and properly received by an officer who is under no official duty to do the act without such reward. *Davis vs. Munson*, 43 Vt. 676, 5 Am. Rep. 315; *Russell vs. Stewart*, 44 Vt. 170; *Bronnenberg vs. Coburn*, 110 Ind. 169, 11 N. E. 29; *Kinn vs. First National Bank*, 118 Wis. 537, 95 N. W. 971, 99 Am. St. Rep. 1012; *Forsythe vs. Murnane*, 113 Minn. 181, 129 N. W. 134; *Smith vs. Vernon County*, 188 Mo. 501, 87 S. W. 949, 70 L. R. A. 59, 107 Am. St. Rep. 324; *Marsh vs. Wells Fargo Ex. Co.*, 88 Kan. 538, 129 Pac. 168, 43 L. R. A. (N.S.) 133, 11 L. R. A. 398; *Harris vs. More*, 70 Cal. 502, 11 Pac. 780; *Union P. Ry. Co. vs. Belek* (D.C.), 211 Fed. 699; *Chambers vs. Ogle*, 117 Ark. 242, 174 S. W. 532; *Bystrom vs. Rohlen*, 134 Minn. 67, 158 N. W. 796; *Gregg vs. Pierce*, 53 Barb. 387.

"We therefore hold that the record discloses no such duty on the part of the intervener Henderson as will preclude him from sharing in the reward."

This ruling must not be construed as holding that a peace officer in one county is not to assist the peace officer of another county in connection with the investigation of crimes, nor that such peace officers are not to make arrests for crimes committed in another county. It is apparent to all that it is the duty of all peace officers in the state to assist in the apprehension of criminals, whether such criminals be charged with the commission of crimes committed within the county or for crimes committed in other counties, cities and towns; or, for that matter, in other states. The control of crime is dependent upon the co-operative effort of all peace officers. The court only holds that where a

sheriff of a county other than that in which a crime is committed holds no warrant for the arrest of the criminal, he is entitled to share in a reward offered for the arrest and apprehension of such criminal.

The court further held that the city marshal of Winterset, a town within the county of Madison, was entitled to share in the reward. With reference thereto the court says:

"The same conclusion is quite inevitable in the case made by the intervention of Macomber. We find no precedent for denying the right of a town marshal, or local policeman or constable, to compete for a reward for making an arrest of one for whom he holds no warrant, where the scene of the crime and of the arrest are both outside of the officer's territorial jurisdiction."

What the court says in connection with the town marshal or local policeman or constable, is but a re-statement of the rule, applicable to sheriffs and is governed by the same general observations heretofore set out in this opinion.

There are so many different situations which will arise in connection with claims for rewards by peace officers that in every instance of doubt the peace officer should consult with the county attorney before taking definite action.

What has been said with reference to ordinary rewards applies with like force to rewards offered for parole violators and escaped convicts. Of course, the county having jurisdiction in such cases would fall within the same class as Madison county did in the case of *Maggi vs. Henderson*.

BEN J. GIBSON, *Attorney General*.

REWARD

Who entitled to reward offered by board of parole for person violating his parole—sheriff not entitled to reward for apprehending prisoner from his own county, but is entitled to reward for apprehending a prisoner from some other county.

March 3, 1922.

Hon. Glenn C. Haynes, Auditor of State: You have requested an opinion from this department as to whether or not Mr. W. H. Jones, sheriff of Woodbury county, and Mr. Merritt N. Hoffman, sheriff of Buena Vista county, are entitled to the reward offered by the state board of parole for the apprehension of certain parole violators.

The facts surrounding the apprehension of the parole violators are as follows:

"Melvin Carnes was paroled from the men's reformatory to Mr. Harry Burdick of Sioux City, Woodbury county. On October 15, 1920, Carnes absconded and was later on apprehended in Livingston county, Montana, by Sheriff W. H. Jones, of Woodbury county. A reward of \$50.00 was offered for the apprehension of Carnes.

"Harry Gaul was paroled from the men's reformatory to Mr. Arthur L. White in Clay county. Gaul absconded and was apprehended later on in Woodbury county by Sheriff W. H. Jones, of Woodbury county. A reward of \$25.00 was offered for the apprehension of Gaul.

"Hans Jacobson was paroled from the men's reformatory to Mr. Charles Rutherford in Buena Vista county. On October 16, 1921, Jacobson absconded and was later on apprehended by Mr. Merritt N. Hoffman, sheriff in Buena Vista county. A reward of \$25.00 was offered for the apprehension of Jacobson.

"Russell Vogel was paroled from the men's reformatory to Mr. James

S. Baldwin in Humboldt county. Vogel absconded and was later on apprehended by Mr. Merritt N. Hoffman, sheriff in Buena Vista county. A reward of \$25.00 was offered for the apprehension of Vogel."

Under the ruling of this department, as well as under a recent opinion of the supreme court of this state, the sheriff is not entitled to a reward offered for the apprehension of a person accused of committing a crime in his county, but a sheriff of a county in which the crime was not committed may legally receive a reward offered for the arrest of such a person, in the event he makes the arrest, provided a warrant for the arrest of such person has not been placed in the hands of said sheriff.

Section 5718-a18 of the supplement to the code, 1913, provides that all prisoners on parole shall be and remain in the legal custody of the warden of the penitentiary or the state reformatory as the case may be. This section further provides that in cases where a prisoner on parole absconds that the board of parole shall issue an order for the apprehension and arrest of such prisoner. This order properly certified should be placed in the hands of a peace officer for service.

Under the rule announced a peace officer having such order or warrant in his possession for service would not be entitled to share in a reward offered by the state for the apprehension of the prisoner.

It follows, therefore, that before you would be justified in permitting the payment of the rewards referred to it must be shown that the officer claiming such reward was not in possession either directly or indirectly of an order for the apprehension of the prisoner.

You have informed us that the reward offered is offered under the provisions of section 5681 of the code. This section provides that the warden may offer a reward not exceeding fifty dollars for the arrest or apprehension of an escaped convict. The warden cannot delegate the authority thus granted to him. The section provides for the payment of certain rewards from the public treasury, if in the exercise of the sound discretion of the warden it is deemed advisable. When a discretion is thus vested in a public officer such discretion cannot be delegated to another commission, board or officer but must be exercised by the very officer to whom the authority is delegated by the legislature.

It follows, therefore, that before you would be justified in permitting the reward offered to be paid from the public treasury it must be shown that the reward was offered by the warden, that it does not exceed the sum of fifty dollars, and that the prisoner for whose apprehension the reward is offered had absconded and his whereabouts unknown to the warden at the very time of the offer of the reward.

It must be further shown that the reward offered was in fact earned by the officer claiming the same. This of course is presumed upon the certification of the claim by the warden. However, it is the plain duty of the warden to satisfy himself in every case that the reward has been in truth earned.

In the cases submitted by you there is no doubt but that the sheriff of Woodbury county would be entitled to the rewards claimed by him providing the facts of each case comply with what has been stated herein. It would, of course, be unnecessary for you to require more than the

simple certification by the warden and by the board of parole as to the facts, in which event, the claim should be paid in the regular way.

A question, however, arises with reference to the reward claimed by the sheriff of Buena Vista county. In this case consideration must be given to chapter 10 of the acts of the 39th general assembly, which chapter provides in substance that the violation of a parole by a prisoner constitutes a felony. This chapter would be applicable if the arrest and apprehension of the prisoner was for the violation of his parole under the provisions of this section. However, if the sheriff, acting in good faith, apprehends the prisoner as an escaped convict for the purpose of recommitment to the penitentiary as distinguished from his arrest as a parole violator under the provisions of the chapter to which we have referred he would be entitled to the reward, otherwise not.

From what has been said it will be observed that each particular case involving the payment of a reward from the state treasury depends upon its own facts. However, if such facts are applied to the rules thus laid down there should be no doubt as to the decision in each instance. It is suggested that you take up the matter with the board of parole and with the warden in accordance with the provisions of this opinion and upon the record being clear so that there is no question about the correctness of the matter that payment be allowed or rejected as the case may be.

BEN J. GIBSON, *Attorney General*.

ARREST OF PAROLE VIOLATORS

The order of the Board of Parole, certified by its Secretary, is sufficient warrant for any Peace Officer to take into custody or return to the Penitentiary any Parole violator, for which service they shall receive same fees as sheriffs for like services.

July 17, 1922.

State Board of Parole: You have requested this department for an opinion as to the powers of the board of parole in connection with the execution of its orders for the return of prisoners who have violated the parole, or order of conditional release, and also as to the method and terms of payment to peace officers executing such orders.

Your attention is called to section 5718-a18 of the supplement to the code, 1913, wherein it is provided:

"and the board shall have full power to enforce such rules and regulations and to retake and reimprison any such paroled convict. The order of said board certified by its secretary shall be a sufficient warrant for any peace officer to arrest and take into actual custody or to return to the penitentiary specified in the order any prisoner conditionally released or paroled by said board; and it is hereby made the duty of all peace officers to execute such order the same as any other criminal process and they shall receive the same fees as sheriffs for like services, the same to be paid out of the appropriation made herein."

Under the provisions of this section the board of parole has a right to issue an order certified by its secretary, which order so certified has the full force and effect of a warrant issued by any court of competent jurisdiction, and which order is sufficient warrant for any peace officer in the state to arrest and take into actual custody any prisoner who has violated the terms of his parole or order of conditional release. Not

only does it vest him with power to take into actual custody such violator, but also to return to the penitentiary or reformatory, as the case may be, such prisoner, all in accordance with the order of the board of parole.

In such cases the peace officer is entitled to the same compensation and fees as he would be entitled to were the order a warrant of commitment issued by a court of competent jurisdiction. In such cases the sheriff should file with the state board of parole a duly verified claim setting out in detail the services performed, with the fees provided by law therefor, which claim when so certified is to be filed with the state board of parole for their approval, and forwarded to the state board of audit, in accordance with the provisions of law in such cases made and provided. Such claim shall be paid from the general appropriation of the state board of parole.

Under the statute vouchers should accompany claims of such a character, and therefore should accompany the claim filed with the state.

BEN J. GIBSON, *Attorney General*.

PARDONS

General discussion as to power of governor to grant pardons.

January 5, 1922.

Hon. N. E. Kendall, Governor of Iowa: Your letter of December 27, 1921, addressed to the attorney general has been referred to me for answer. Your letter is as follows:

"Several weeks ago Mr. Walter Rasmussen, a youth of sixteen years, was convicted of forgery, judgment entered committing him to the training school at Eldora and parole issued from the bench. His conduct since has been altogether exemplary and he now applies to me for a complete pardon. I entertain some doubt as to my authority to act in the matter and I shall be grateful if you will advise me at your early convenience."

Section 16 of article 4 of the constitution of the state of Iowa which fixes the power to grant pardons exclusively in the chief executive of the state provides:

"The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, subject to such regulations as may be provided by law. Upon conviction for treason, he shall have power to suspend the execution of the sentence until the case shall be reported to the general assembly at its next meeting, when the general assembly shall either grant a pardon, commute the sentence, direct the execution of the sentence, or grant a further reprieve. He shall have power to remit fines and forfeitures, under such regulations as may be prescribed by law; and shall report to the general assembly, at its next meeting, each case of reprieve, commutation, or pardon granted, and the reasons therefor; and also all persons in whose favor remission of fines and forfeitures shall have been made, and the several amounts remitted."

While the pardoning power in the governor is exclusive and absolute yet it will be observed that the constitution itself recognizes the right of the legislature to make regulations touching the exercise of that power and in the exercise of that right the legislature passed a bill prescribing certain rules for the government of the parole board which are now a part of the statutory law of this state.

Section 5718-a23 of the supplement to the code, 1913, provides:

"It shall be the duty of the board of parole under the direction of the governor, to take charge of all correspondence in reference to the pardon of persons convicted of crimes and to carefully investigate each application, and to file its recommendation with the governor with its reasons for the same."

Section 5718-a21 of the supplement to the code, 1913, provides:

"Nothing in this act contained shall be construed as impairing the power of the governor under the constitution, to grant a reprieve, pardons or commutations of sentence in any case."

The two sections just quoted were a part of chapter 192, acts of the 32d general assembly, and while section 5718-a23 would seem to place some limitation on the authority of the governor to act in case of pardons, yet it is our view that that section prescribed rather a rule for the action of the board of parole. The 39th general assembly, however, passed an act making it the duty of the governor before granting a pardon after conviction of a felony to present the matter to and obtain the advice of the board which has power to parole persons from the institution in which such person has been sentenced or committed. We refer to chapter 73, acts of the 39th general assembly. It is as follows:

"The governor shall have the power to remit fines and forfeitures upon such conditions and with such restrictions and limitations as he may think proper. After conviction of a felony, no pardon shall be granted by the governor until he shall have presented the matter to, and obtained the advice of the board which has power to parole persons from the institution to which such person has been sentenced or committed, but he may commute a death sentence to imprisonment in the penitentiary for life. Before presenting the matter to the proper board for its action, where the sentence is death or imprisonment for life, he shall cause a notice containing the reasons assigned for granting the pardon to be published in two newspapers of general circulation, one of which shall be published at the capital and the other in the county where the conviction was had, once each week, for four successive weeks, the last publication to be at least twenty days prior to the time of presenting such application to such board."

By our statute forgery is declared to be a felony. Mr. Rasmussen having been convicted of that crime has made application for a pardon with the hope no doubt of having restored to him all of the rights which were forfeited by such conviction. It is our opinion that if the procedure prescribed by the legislature as above set forth is followed by you in his case there is no doubt of your authority to grant a pardon to Mr. Rasmussen.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

TRADE-MARKS

The secretary of state has no discretion as to what is or is not a proper trade-mark to register in his office, the only exception being when one of a similar character has already been registered or where the one offered infringes upon one previously registered.

March 20, 1922.

Hon. W. C. Ramsey, Secretary of State: We have your letter in which you request the opinion of this department upon the following propositions:

"A certificate of registration was issued by this department to G. S. Johnson of Davenport registering the name 'Jersey Cream.' It appears

that the man Johnson is a broker in flour, and that this name had been used by certain milling companies for many years, the name 'Jersey Cream' being used on all brands of flour which were of an inferior grade or quality.

"I am requesting a written opinion as to whether or not this department under section 5049 and section 5050 is not required to accept for registration any label, trade-mark or form of advertising which may be filed here for such registration, provided such name, label, trade-mark or form of advertising has not been previously registered in the department."

In answering your inquiry it is necessary that we direct attention to the fact that the sections of the code quoted in your request for an opinion have been repealed by the provisions of chapter 29, acts of the 39th general assembly. The only discretion which seems to be lodged in the secretary of state in connection with trade-marks and the registration thereof is that when application has been made to you, and two copies of the trade-mark, counterparts or facsimiles have been left with you that:

"Said label, trade-mark or form of advertisement shall be of a distinctive character and not of the identical form or in any near resemblance to any label, trade-mark or form of advertisement previously filed for record in the office of the secretary of state.

"When the said secretary of state is satisfied that the facsimile copies or counterparts filed are true and correct, and that they are not in any manner an infringement or are calculated to deceive, he shall deliver to such person, firm, association or corporation so filing the same, a duly attested certificate of registration of the same for which he shall receive a fee of one dollar for filing and an additional fee of one dollar for a certificate of registration."

Under this section it is your duty to first determine whether or not any trade-mark of a similar character has been previously registered and whether or not the one tendered to you is an infringement of any such previously registered trade-mark, etc. If you find that it is an infringement, then you need not register it. But if you issue the certificate of registration, then you have no further authority in the matter, and whatever relief the rightful claimant has to the trade-mark must be obtained through the courts, as the statute makes no provision that you may cancel any trade-mark wrongfully issued.

BEN J. GIBSON, *Attorney General*,

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

MERGER OF STATE BANKS

State banks cannot be merged and retain their locations and operate.

July 15, 1922.

Hon. W. J. Murray, Superintendent of Banking: You have requested an opinion from this department upon the following questions:

"I desire your opinion as to whether or not I may validly approve the merger of three state banks in Des Moines which is legal in all respects and whether or not after such legal merger such bank may continue to operate its business in the banking rooms in that city now occupied by them."

The statutes of Iowa do not, in express terms, prohibit nor authorize banking institutions organized under the laws of this state to establish

branches; neither has the supreme court of Iowa had occasion to pass upon this question.

The writer has carefully examined the works of text writers and the judicial holdings in other states, and in practically every instance where banks are permitted to establish branch banks such authority is granted by statute in express terms.

As applying to national banks the rule is, and always has been, that a national banking institution has no authority to establish a branch bank, except by special provision or authority of congress. *Magee on Banks & Banking*, 2 Ed. p. 42, sec. 30, *Armstrong vs. Second Nat. Bank of Springfield*, 38 Fed. 883.

With reference to state banks the authorities are practically uniform in holding that there must be express legislative authority before a bank can establish a branch. Further, that even though the statute does not expressly prohibit the establishing of branch banks, yet the implication to that effect is clear, and that what is implied is as effective as that which is expressed. 7 *Corpus Juris*, 490, *Magee on Banks & Banking*, 2 Ed. p. 46, *Brunner vs. Citizens Bank*, 134 Ky. 283.

The principal reason for the rule that a state bank cannot establish branch banks in the absence of express legislative authority, but shall transact its usual business at one institution and under one roof is upon the principle that the bank shall have a location or place where all its business is to be transacted, and branches at a location other than the location of the mother bank would lead to conflict and confusion as to where notes and drafts should be presented for payment, protested and payments made, as well as to discourage the organization of other banking institutions, and would tend to invite and render possible direct evasions of the statutes governing the organization, operation and supervision of banks created by the laws of a state.

The case most frequently cited by the courts and text writers as sustaining the rule that state banks cannot establish branches, in the absence of express legislative authority, is the case of *Brunner, Secretary of State, vs. Citizens Bank of Shelbyville*, 134 Ky. 283. In that case the subject is exhaustively treated by the court, and is so germane to the question at issue that we feel constrained to quote a considerable portion thereof in this opinion. It is said on page 290:

"If the statute permits banks to have branches and the articles of incorporation so provide, no legal objection can be interposed to the establishment of such branches. But, if the statute does not by implication permit the creation of branch banks, or their creation does not follow as an incident to the powers granted by the charter under the law, the authority cannot be conferred by articles of incorporation.

"In this connection the argument is made that, as the statute does not forbid the establishment of branches or make any mention of the matter, it follows that banks should be allowed the same privileges as other business corporations created under the statute; and, as other business corporations have the authority by implication as a power incident to their business to set up as many branches as they like, so should banks enjoy this privilege. The statute does not in terms authorize commercial or manufacturing corporations to have branch places of business, nor does it deny them this right. The statute is silent upon this subject, both as to banks as well as all other corporations; but it is a matter of common knowledge that all large commercial and manufacturing corporations do have branch places of business, many of them in other

states than the home of the corporation, and that at these branches they carry on business in the same way as they do at their main or principal office or place of business. And the right to thus carry on a legitimate business by a corporation duly organized has never so far as we are aware been questioned. It would seem, therefore, that, if banks are to be denied privileges in this respect that are enjoyed by other corporations, some good reason should be advanced to support the discrimination. That there is sound reason for this discrimination we think can be demonstrated. Primarily it grows out of the peculiar nature of the banking business, and is supported by a fair construction of the statute and by a sound public policy. Banks are quasi public corporations. They may only be organized in such manner and do such things as the state in which they carry on business permits them to do; and in carrying out its policy the state has surrounded banking privileges with many wholesome restraints that are not applied to ordinary corporations. This is manifested in the various sections of the statute relating to corporations and banks. To illustrate: the statute provides in section 538, supra, that banks in addition to the provisions relating to corporations generally shall be governed by and subject to the provisions of the law relating exclusively to banks. Among these provisions that apply to banks, and not to corporations generally, we may notice the following: (1) Ordinary corporations may be organized by not less than three persons and with any amount of capital stock, while not less than five persons can associate to establish a bank, and the capital stock shall not be less than \$15,000, and in cities of 50,000 or more population not less than \$100,000. (2) At least 50 per cent of the capital stock in a bank must be paid in, in money, before it is authorized to commence business, and the remainder within one year; whereas, in other corporations the only requirement is that at least 50 per cent of the capital stock shall be in good faith subscribed before it shall be authorized to transact any business with persons other than its stockholders, and the capital stock may be paid at such times and in such amounts as the directors may require. (3) The money of banks cannot be employed directly or indirectly in any enterprise or business except the 'business of banking by discounting and negotiating notes, drafts, bills of exchange and other evidences of debt and purchase of bonds, receiving deposits and allowing interest thereon, buying and selling exchanges, coin and bullion, and lending money on personal or real security.' There is no such limitation in the statute respecting other corporations, and they may invest their money in any business or enterprise that is authorized by the charter. (4) The amount in which a person, firm or corporation may become indebted to a bank is fixed by statute, but in this particular other corporations are unrestrained. (5) Banks are required at all times to keep on hand a specified per cent of their deposits, and this reserve fund is carefully protected by restraining provisions, from which other corporations are exempt. (6) Banks are required to make reports of their condition to the secretary of state once in every three months, or oftener if required, and to publish these reports; but other corporations need not do this. (7) The stockholders in banks are liable for the debts in an amount equal to the extent of their stock at par value in addition to the amount of such stock, although stockholders in corporations generally are not subjected to this additional burden. In other words, the state through its legislative department has at all times exercised a careful and wholesome supervision over banking institutions for the purpose of protecting the general public from loss, while it has not, except in a general way, undertaken to control or interfere with the conduct of private corporations not invested with a public character or performing some public service. As further and forcibly illustrating the extent to which the state has gone in its control of banking interests, it may be noted that private banks are not allowed to be established and that all banking institutions must be incorporated. And this right of the state to deny to individuals the privilege of engaging in the banking business is generally sustained as a legitimate exercise of the police power, although the state would

not have the power to prevent persons from engaging in other legitimate business pursuits. *State of N. Dakota vs. Woodmansee*, 1 N. D. 246; 46 N. W. 970; 11 L. R. A. 420; *People vs. Utica Ins. Co.*, 15 Johns, (N. W.) 358, 8 Am. Dec. 243. From these general but important distinctions that the legislature has made between banks and corporations generally, it is apparent that banks cannot be allowed to exercise any functions that are not strictly authorized by law. What a mercantile corporation may do is not the standard by which to measure the powers of a banking institution. They occupy towards the public a very different relation. The number of branches or places of business that the mercantile corporation may establish, concerns no one except the stockholders and the creditors of the corporation. The public generally have no interest in its business nor any right to control or direct its affairs. But the whole body of the public is directly interested in the conduct and management of banking institutions because they are depositories in which is kept practically all the money of the country; and it is with the money so deposited that banks are enabled to successfully carry on a profitable business. The money employed by other corporations is usually confined to that paid in by the stockholders or borrowed; while the greater part of the money employed by banks is money that has been placed with them by depositors for safekeeping. It is therefore of the highest importance that the business of banking should be carefully supervised by the state in the interest of the public, and surrounded by such salutary safeguards as will maintain the solvency of these institutions. The loss occasioned by the failure of a private corporation is generally confined to the stockholders and creditors, while the failure of a bank brings ruin and disaster to the hundreds and often thousands of people who have placed with it on deposit their earnings, and it is to secure this depositing public from loss that the state through its agencies exercises a supervisory care over banking institutions. To extend by implication the powers of a bank by allowing it to exercise privileges not necessary to carry on the business would be to increase the probability of loss to the public by its mismanagement or failure. While we are not disposed in any wise to curtail the power essential to the proper conduct of the business, it does not seem to us that the establishment of branches is either prudent or necessary. Looking at the matter from a business standpoint, it is important that a bank should only have one place of business. The management and safe investment of money requires constant and painstaking care and attention, as well as sound and discriminating judgment on the part of the officers of a bank. These officers, or the majority of them usually live convenient to the place where the bank is located; and, although in many small institutions the routine of affairs is under the immediate control and direction of the cashier, the president and some of the directors are daily in and about the place of business, keeping a watchful eye on how it is conducted. But, if branches were established, they must in the necessity of things be left almost exclusively to the persons immediately in charge, free from the influence and presence of the officers and directors, and this practice would not in our judgment be conducive to safe and conservative banking methods. Upon this point it is well said in *Morse on Banks and Banking*, Sec. 46: 'A bank has its legal home in the state by which it is created, or, in case of a national bank, the state in which it is located or organized. Its domicile is there, and it is a citizen of that state in reference to suing in any state or federal court. It cannot transfer its franchise into any other sovereignty. 'It exists by force of the law creating it, and where that ceases to operate it can have no existence.' But such ordinary business as its organic law gives it power to do it may by its agents transact in any other state, unless prohibited by the charter, or by the laws or policy of such other state. Agencies for specific purposes, as for the redemption of bills or the dealing in bills of exchange, may be established in other places. In these cases it is for the convenience of the public that such should be the case. But there is no case which holds that an agency for the exercise of the more important and valuable

functions, such as issuing circulating paper or discounting notes, or an agency designed to carry on the general business of banking, would be regarded as legal; for such nominal establishment of agencies might easily result in the practical establishment of a network of branch banks throughout the home state or in other states. * * * Some business, as receiving deposits, certifying checks, and giving information of most kinds must be done at the banking house, or place set apart for those purposes by the bank, and cannot be done so as to bind the company by an officer away from the bank. Other business, as receiving information, and collecting debts, may be done by an officer away from the bank.

"If branches were necessary to enable banks to carry on their business, we would not be disposed to interfere with their establishment; but this feature of the case does not present any difficulty, because it cannot be said that branches are necessary to enable a banking institution to fulfill the purposes of its creation, although they might widen the field of its opportunities and increase its capacity to earn money for its stockholders. But neither the prospect of advantage to the stockholders nor the convenience to the community in which the branch is located should be allowed to have much weight in determining the wisdom or advisability of their existence. The important consideration is the security of the public, and that the public will be better protected by not allowing banks to establish branches we have little doubt. This matter of branch banks by implication or as an incident to the power to carry on a banking business is a comparatively new feature that has been introduced in some banking circles, and is a departure from the rule that has obtained in this state from the beginning. When banks were incorporated under special laws, it was not unusual for the legislature to give them by express authority the right to establish branches; and, under the authority so granted, several branches were in operation when the present general law upon the subject of banking was enacted, but, when the legislature came to enact this general law under which all state banks have their existence and from which they derive all their powers, it omitted all reference to branch banks, although it must have been within the knowledge of practically all the members of the general assembly that branch banks were being conducted under special acts.

"The fact that no provision was made in the general law for branch banks is significant as illustrating that it was not the purpose or policy of the state to further encourage or permit them. If the general assembly had deemed it wise to permit banks to establish branches, it would have so declared, and the failure to speak on so important a subject furnishes strong reason why this privilege not necessary to the enjoyment of the powers conferred by the statute and the charters obtained thereunder should not be conferred by implication. In addition to this, when the legislature fixed the amount of capital stock that a bank must have before commencing business, graded in some respects according to the population and needs of the community where the bank was to be located, it was certainly not contemplated or intended that upon this capital designed to be employed in one locality a bank might set up an unlimited number of branches and do a volume of business upon money received from depositors in widely separate communities entirely disproportionate to the capital invested. The capital stock of a bank and the double liability of the stockholders is the security to which depositors must look for the protection of their deposits and to permit a bank with a capital of say \$15,000 to have a number of branches doing a general banking business would greatly lessen the security of the depositors, and at the same time increase the probability of loss. It seems to us that, if branch banks are to be allowed, there should be set apart for the use and benefit of each branch not less than the amount of capital stock required in the organization of banks, and this was the policy pursued by the legislature in permitting banks incorporated under special acts to have branches at different places in the state. But the scheme under which it is insisted that the Citizens Bank of Shelbyville and other institutions may establish

branches does not contemplate or provide that there shall be any increase in the capital stock; the argument being that, when a bank is organized with the capital required by law for the conduct of the banking business in the place at which it is proposed to locate the bank, it may without any increase in its capital set up as many branches as it chooses, and where it pleases, and at these various places do a general banking business without any capital set apart for the purpose, although each of these branches is in itself virtually a distinct and complete banking institution, exercising and enjoying all the powers and privileges conferred upon chartered banks, and yet free from the duties and obligations imposed by law upon incorporated institutions. We cannot give our assent to a scheme like this.

"Other reasons might be advanced against granting the powers contended for, but we consider these sufficient to support the conclusion we have reached that, in the absence of express legislative authority, the power to establish branch banks does not follow by implication as a reasonable or necessary incident to the right to do a banking business. This construction does not mean that banks may not have agents. There is a wide difference between the appointment of agents to receive and collect money and forward it to the bank or to transact other business necessary or incidental to banking and the right to establish branch banks at which a general banking business is carried on. A bank may have as many duly appointed agents as its needs require, and these agents, among other things, may receive and forward to it at its place of business the money of persons who desire to deposit with it. We believe that safe and conservative banking methods, the protection of the public, the security of depositors, and the interests of the stockholders all demand that banks shall have only one place at which 'to carry on the business of banking and discounting and negotiating notes, drafts, bills of exchange, and other evidences of debt, and purchasing bonds, receiving deposits, and allowing interest thereon, buying and selling exchange, coin, and bullion, and lending money on personal or real security.' And that to legalize by judicial construction a departure from this course would soon result in failure that would do infinite harm to the banking interests of the state, and bring disaster to numbers of innocent people."

Therefore, in view of the fact that practically the uniform holding of the courts and text writers are against the power to establish branch banks, in the absence of express legislative authority, and from the further fact that such has been the universal holding of this department from the administration of Attorney General Stone down to the present, with the possible exception of Attorney General Havner, we believe, and it is our opinion, that your question should be answered in the negative.

BEN J. GIBSON, *Attorney General*,

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

PRIVATE BANKS

Private banks operating before state banking law enacted may be sold and interests therein sold and institution continued as private bank.

March 20, 1922.

Hon. W. J. Murray, Superintendent of Banking: Your letter of March 17th has just been called to my attention. You ask for the opinion of this department on the following proposition:

"At your convenience, I wish you would give me your opinion as to whether, under the law, a private bank, that was in operation before the present law came into effect, could sell the bank, or their interest in it, to other individuals and still operate as a private bank.

"Can an individual or a partner in a private bank dispose of their

interest to someone not already interested in the institution and bank still continue as a private bank?"

Section 2 of chapter 236, acts of the 38th general assembly, makes the use of the words "bank, banking," etc., unlawful after the taking effect of the act and is as follows:

"Henceforth it shall be unlawful for any individual, partnership, or unincorporated association, or corporation, other than national banking associations, not subject to the supervision or examination of the banking department, to make use of any office sign bearing thereon the word "bank," "banking," "banker," or any derivative, plural or compound of the word "banking," or word or words in a foreign language having the same or similar meaning, or to make use of any exterior or interior sign bearing thereon such word or words whatsoever to indicate to the general public, or to any individual, that such place or office is the place or office of a bank, nor shall such person or persons, partnership, unincorporated association, or corporation, make any use of or circulate any letterheads, billheads, bank notes, bank receipts, certificates, circulars, or any written or printed, or partly written or partly printed papers whatever having thereon any other word or words indicating that such business is the business of a bank. Any person or persons violating any of the provisions of this section, either individually or as an interested party in any such co-partnership or corporation, shall be guilty of a misdemeanor and on conviction thereof shall be fined in a sum not less than three hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail not less than sixty days nor more than one year, or by both such fine and imprisonment."

Section 3 of the same act provides:

"But nothing in this act shall be construed as affecting or in any wise interfering with any private bank or private banker that may be engaged in lawful business previous to the date on which the foregoing may be enacted."

The last section clearly indicates that the legislature of the state recognizes the existence of a private bank as a distinct entity and an indisposition on the part of the legislature to interfere with the business of such an institution already operating under the laws of the state prior to the time of the enactment of chapter 236. This being true, it is our opinion that a private bank which is now being conducted under the authority of the laws of this state may be sold, or any interest therein may be transferred and the bank continue to operate as a private bank.

You will observe that by section 3 above quoted not only a "private banker" but also a "private bank" is excepted from the provisions of the entire act if the banker was engaged in lawful business or the bank existed previous to the date on which the act went into effect.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

BANKS MAY INVEST FUNDS IN FARM CREDIT CORPORATIONS

State banks and trust companies may invest in stock of farm credit corporations and carry same as assets at its market value.

January 10, 1922.

Hon. W. J. Murray, Superintendent of Banking: You have requested an opinion from this department as to the legal authority of state banks and trust companies to invest their funds in the capital stock of the Iowa Farm Credit Corporation and pay \$110.00 per share, the par value being \$100.00 per share, and to carry the stock as assets at \$110.00.

You state:

"It is the desire of this department to have your opinion concerning the purchase of stock or the investment of funds by state banks and trust companies in accordance with H. F. 763, acts of the 39th general assembly, in which such banks are permitted to invest an amount not exceeding ten per cent of their capital stock and surplus in the capital stock of corporations organized under the law for the extension of credit to those engaged in agriculture and agricultural organizations.

"You no doubt are aware that the Iowa Farm Credit Corporation, organized in Des Moines, Iowa, under this act, are selling stock to banks under this department at \$110.00 per share, par value \$100.00.

"It has been the ruling of this department that banks so investing shall carry this stock at par, \$100.00, among their assets, and that the \$10 above par value shall be charged to the profit and loss account of the purchasing bank, as this \$10 constitutes the overhead or promotion fee and does not represent the true value of the stock."

Section 1, chapter 157, acts of the 39th general assembly, being the statute referred to in your letter, provides:

"State banks and trust companies are hereby authorized, subject to the approval of the superintendent of banking, to invest an amount not exceeding ten per cent (10%) of their capital stock and surplus in the capital stock of corporations chartered or incorporated under the provisions of section twenty-five-a (25-a) of the federal reserve act, approved December 24, 1919, and a like amount in the capital stock of corporations organized under the laws of this state for the purpose of extending credit to those engaged in agriculture and to agricultural organizations; provided that the said investments by state banks and trust companies shall in no event exceed in the aggregate twenty per cent (20%) of the capital stock and surplus of said state bank or trust company."

Pursuant to the statute just quoted, state banks and trust companies are legally authorized to invest a fixed percentage of their capital and surplus in corporations such as the Iowa Farm Credit Corporation. In listing such stock as assets, the bank can carry it on its books only at its actual value. It will be observed, however, that no provision is made in the statute for ascertaining the actual value of such stock. It follows, therefore, that the actual value shall be ascertained by taking its market value.

The Iowa Farm Credit Corporation has just been organized and, therefore, in arriving at the market value of its stock, we must take the uniform price paid for the stock by the purchasers. If the par value of the stock is \$100.00, but every person who buys stock is actually paying \$110.00 per share, then its market value is \$110.00.

I am informed that the stock of the Iowa Farm Credit Corporation is actually selling to every purchaser at \$110.00 per share. Therefore, I am of the opinion that banks and trust companies organized under the laws of this state may legally purchase such stock at \$110.00 per share and carry it as assets in the same amount, until such time as the facts show that the actual value is less than \$110.00 per share, in which event the stock shall be carried at its then actual value, whatever that may be.

BEN J. GIBSON, *Attorney General*,

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

RIGHT OF DEPOSITOR IN INSOLVENT BANK WHO IS ALSO CREDITOR TO OFFSET INDEBTEDNESS

A depositor indebted to a bank that becomes insolvent is entitled to offset his indebtedness by any credit he may have in the bank.

November 16, 1921.

Banking Department, State House: In compliance with your oral request for an opinion as to whether the depositor in a bank may offset his indebtedness by credit which he may have as a depositor will say that it is a general rule established by the decisions of the courts of many states that a depositor who is indebted to the bank is entitled to set off the amount to his credit against his indebtedness even though the bank is insolvent.

There are many cases upon the proposition but it is sufficient for the purpose of this opinion to cite the following: *Steelman vs. Atchley*, 135 S. W. 902; *Jack vs. Clepser*, 196 Ia. 187; *Bernstein vs. Coburn N W.*, (Nebr.) 1021; *Building Company vs. New York Northern Bank*, 206 N. Y., 400.

The only state we find where it has been held otherwise is in California, where under a somewhat complicated state of facts the court took the contrary view.

Where, however, the paper is held by the bank at the time it becomes insolvent and goes into the hands of a receiver and the maker is a depositor in the bank he is entitled to offset his paper with the deposit to his credit in the bank. BEN J. GIBSON, *Attorney General*,

By JOHN FLETCHER, *Assistant Attorney General*.

WHAT CONSTITUTES STATE FUNDS

All funds collected by all officers of the state government become a part of the general fund of the state, unless expressly provided otherwise by statute, and cannot be converted to the use of the departments of state.

September 15, 1922.

Hon. W. J. Burbank, Treasurer of State: I am in receipt of your letter dated September 6, 1922, which letter is in words as follows:

"We desire an opinion from you stating to what fund money should be credited which is tendered to the treasurer of state by E. R. Harlan, secretary of conservation, in the following instances:

"In the first instance \$25.00 is tendered as monthly rental for July paid by A. D. Owenby for the privilege of conducting a small retail store in the Backbone State Park. To what fund should this be credited?

The second is in the sum of \$25.00, proceeds from the sale of hay cut from the Backbone Park, Delaware county, and sold by the custodian of the park for the benefit of the state. Should these sums be credited to the general revenue of the state of Iowa, or should they be credited to the park funds of the state, or should they be taken and held in trust subject to action of the legislature at its coming session?"

The funds referred to are collected by the state board of conservation for the use and benefit of the state of Iowa. There is no provision in the law whereby such funds become a part of the funds of the board of conservation, or of the secretary of the state board of conservation. Such collections are made by the officer or officers in question for the use and benefit of the state. A payment to the officer is a payment to

the state of Iowa, and the funds collected by the officer are paid as much to the state as though they were paid directly into the state treasury. In other words, the officer is the agent of the state for the collection of the fund, and he should at once remit such funds to the state treasurer in order that they may become a part of the funds of the state.

All funds collected by all officers of the state government become a part of the general fund of the state, unless there is an express provision of the statutes to the contrary. The several departments of the state government, in the absence of special statutory provisions, are maintained by the appropriations provided by the legislature and they cannot convert to the use of such departments, funds collected by reason of the provisions of the law.

BEN J. GIBSON, *Attorney General.*

CUSTODY OF INSANE PERSONS

Persons who are in fact insane may be taken into custody and restrained without any warrant of arrest or other judicial proceeding when such restraint is necessary to protect such insane person or the public from injury.

Nov. 19, 1921.

Mr. N. E. Head, District No. 9, U. S. Veterans Bureau, 6801 Delmar Blvd., St. Louis, Mo.: Dr. L. P. H. Bahrenburg of the United States Public Health Service has requested the opinion of this department upon the following matters:

"1. Is the holding of an insane person or the transfer of such person to another institution, against his will, a violation of the law?

"2. If so, what method of procedure should be adopted in order that we may legally hold or transfer such insane persons, the exigencies and peculiar phases of the government's work being duly considered?

It will, of course, be borne in mind that in the care and disposition of these patients the U. S. Public Health Service is dealing with wards of the government, i. e., beneficiaries of the United States Veterans' Bureau."

And in connection with the foregoing questions he has advised us of the following facts:

"The neuro-psychiatric section of this hospital is frequently called upon to hospitalize and transfer to other institutions within and without the state cases of insanity developing in ex-service men. These cases are thrust upon the hospital more or less precipitately, coming from various counties in the state and at times from other states. Few, if any, of these patients have been legally committed and yet the interests, both of society and the patient, demand that they be held in restraint. After a period of necessary observation for diagnostic purposes the patient is transferred to some other institution, sometimes to a Missouri state hospital, or, frequently, to one of the government institutions outside of the state. This is done with the consent of the patient's relatives but at times over the patient's protest. No commitment procedure is gone through, for the obvious reason that the patient may not be a resident of this county or state.

"Our attention has been invited to a possible violation of the lunacy laws of the state of Iowa in following out the above described method of procedure. The U. S. Public Health Service desires to act in conformity with the laws of the state in the performance of its duties and for that reason I would respectfully request your opinion on the following."

In answering these inquiries we desire to advise you that there are two methods of dealing with insane persons in this state. One is to have the person adjudged insane by the commissioners of insanity. An-

other method frequently pursued is to apply to the district court for the appointment of a guardian over the person alleged to be insane. This necessitates the determination of the question of the sanity of the person alleged to be of unsound mind. While these are the only two methods provided by statute for dealing with insane persons, yet our supreme court has recognized that an insane person may be restrained without any judicial proceedings whatever.

In a recent case our court announced this rule:

"We think the general rule is that where it is made to appear that one is not capable of rational self-control, and by reason thereof his own safety or the public safety is imperiled, one who, by relationship or otherwise, is the natural or proper custodian of an insane person, may lawfully restrain him in some proper place for treatment, for the good of the patient, or for the protection of the public, and this without warrant and without judicial proceedings. The right to restrain an insane person is not governed by the general law which provides that no one shall be deprived of life, liberty, or property without due process of law. Restraint under such conditions does not offend against the constitutional inhibition."

Again it has been said:

"I can see that the right to restrain these unfortunate persons for their own benefit, and for the protection of others, is as clear as the right to restrain one who, in the delirium of fever, would break away from his attendants, or one who, with a contagious disease upon him, should attempt to enter a public assembly. But the first thing to be determined is whether there is insanity in fact.

"This involves the necessity for restraint. One who arrests another and restrains him of his liberty, on the theory he is incapable of rational self-control, assumes the burden of showing that fact and the imminent necessity for the restraint. This, we think, is the true rule, and the safe and sane rule in matters of this kind."

Maxwell vs. Maxwell, Iowa, 177 N. W. 541, 10 A. L. R. 482; *Van Deusen vs. Newcomber*, 40 Mich. 90.

We think the foregoing quotations are so clear that further comment is unnecessary with reference to the right to restrain an insane person without judicial process.

We do not feel that we ought to attempt to determine the status of the ex-service men who are, as you say, under the custody of the United States Public Health Service and are wards of the government. The principles announced in the decisions herein cited we feel, however, fully authorize the restraint of any one who is in fact insane if such restraint is necessary to protect either the public or the person himself from injury.

BEN J. GIBSON, *Attorney General*,

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

EXAMINATION AS TO SANITY OF PRISONERS

The board of control and the warden of a penitentiary have authority to grant permission for the examination as to the sanity of persons confined at Fort Madison.

July 17, 1922.

Hon. N. E. Kendall, Governor of the State of Iowa: I am in receipt of your request for an opinion as to whether you could give permission to medical experts to examine Olander who is now in the penitentiary

at Fort Madison, this question having been submitted to you by Healy & Breen, of Fort Dodge.

In this connection your attention is called to section 2203 of the compiled code, it being as follows: (Sec. 5709-b supplemental supplement of 1915.)

"When it is by any person represented to the warden or to the board of control that any convict confined in the penitentiary at Fort Madison is insane, the matter shall be referred to the board of control, who shall cause a superintendent of one of the hospitals for the insane to make an examination of said convict and report to the board thereon, and if the report so warrants, said board shall order such convict transferred to the department for the insane at Anamosa and confined therein until he shall have served out his sentence, or shall be pronounced sane, in which latter event he shall be returned to the penitentiary or held in the men's reformatory to serve out his unexpired sentence."

Under the provisions of this section the board of control has authority to do the very thing requested by Messrs. Healy and Breen, and application should be made by them to such board.

You will observe also that section 9547 of the compiled code, it being section 4736 of the code of 1897, provides as follows:

"When the warden of the penitentiary is satisfied that there are reasonable grounds for believing that a defendant in his charge under sentence of death is insane or pregnant, he shall notify the commissioners of insanity of the county, wherein the penitentiary is located, who shall be sworn by the warden well and truly to inquire into the facts as to the insanity or pregnancy of the defendant, as the case may be, and return a true report of their findings."

Under this section you will observe that the warden likewise has power and authority to have an examination made of prisoners in his charge.

It occurs to the writer, however, that the advisable method is to proceed through the board of control. May we suggest, therefore, that you should wire Messrs. Healy and Breen to make application direct to the board of control in accordance with the provisions of section 2203 of the compiled code.

BEN J. GIBSON, *Attorney General*.

TRANSFER OF CRIMINAL INSANE

Transfer of criminal insane made from ward at Anamosa on order of governor without insane commission finding.

May 3, 1922.

Board of Control, State House: Your letter of the 5th of April, addressed to Mr. Gibson and requesting an opinion of this department has been referred to me for answer. Your letter is as follows:

"This department will be pleased to have your interpretation of section 5710 of the code of 1897, which section sets out the procedure with reference to transferring prisoners from the men's reformatory at Anamosa, who have been confined in the department for criminal insane, at the expiration of their sentence.

The question involved is, would a prisoner who had been serving time in the above department, and whose case had been passed on by a competent physician from one of our state hospitals for insane, have to be taken before the commissioners of insanity and adjudged insane before he could be received into our state hospital for insane for further care and treatment.

"With reference to transferring these prisoners, there is some question

as to whether or not the superintendent of the hospital would be authorized to receive and care for such patients when they had not been properly committed by the commissioners of insanity, as provided in section 2266, code of 1897."

Section 2266 of the code of 1897, to which you have referred, while it provides the authority for the commitment of an insane person when information is filed charging insanity before the commissioners of insanity of any county, is not exclusive. This section is a part of chapter 2 of title 12.

Section 2263 of the same title and chapter provides in part as follows:

"The commissioners shall have cognizance of all applications for admission to the hospital or for the safe keeping otherwise of insane persons within their respective counties *except in cases otherwise specially provided for.*"

That the district court of Iowa has authority to determine the question of the sanity or insanity of a defendant charged with crime after it has acquired jurisdiction of the person and subject matter, and this to the exclusion of the right of the commissioners of insanity to inquire into the question, is clearly decided in the case of *Stone vs. Conrad*, 105 Iowa, page 21. And while that case is not directly in point it is authority for our statement that there is an exception to the right of the commissioners of insanity to commit an insane person in cases "otherwise specially provided for."

Section 5710 of the code of 1897 to which you refer is as follows:

"No insane convict shall be discharged from the hospital apartment provided for the criminal insane until restored to reason, except as hereinafter provided. At the expiration of the term of sentence of such convict, an examination shall be made by competent physicians, and if it shall be found that he has not been restored to reason, such fact shall be certified to the governor, who shall investigate the matter, and if in his opinion such convict should be transferred to one of the hospitals for the insane, he may so order, or he may order that said convict shall be retained in the hospital apartment of the prison for criminal insane."

The above section provides for the procedure in cases "otherwise specially provided for." It must be borne in mind that the patients therein referred to are already confined in a state institution because of the fact that they are criminally insane and there could be no objection on the part of any hospital superintendent to receiving such patient by transfer to his institution on the ground that he had not been committed by the insanity commissioners.

However, we think it advisable to call to your attention section 5709-d of the 1915 supplement to the code of Iowa. That section provides as follows:

"No convict confined in the reformatory at Anamosa found to be insane shall be removed to any other institution, except upon order of the board of control and after an examination of such convict and report to said board warranting the same, made by a superintendent of one of the hospitals for the insane."

Section 5710 of the code of 1897 was a part of the acts of the 22d general assembly. Section 5709-d, above quoted, was a part of the acts of the 36th general assembly. While it would seem that these two sections are in conflict yet, in our opinion, section 5709-d is designed to cover cases of transfer when a convict is found to be insane, such finding and such

transfer being made during the time of the running of his sentence, while section 5710 of the code of 1897 prescribed the procedure for the transfer of an insane person after the expiration of his term of sentence.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

**COUNTY'S LIABILITY FOR RETURN OF INSANE TO COUNTY
BY SHERIFF**

Harrison county not liable for sheriff's fees and expenses in bringing insane patient from Chicago, Illinois, when patient was not in Harrison county at the time of issuance of warrant.

April 5, 1921.

Mr. Paul E. Roadifer, County Attorney, Logan, Iowa: In your letter of March 5, 1921, you ask for an opinion from this department upon a certain set of facts as applied to the law of this state relative to the care of the insane.

The facts in substance are these:

An information was filed with the board of insane commissioners of Harrison county alleging that one Roadifer was insane; that he had a legal settlement in Harrison county, and we assume, alleged that he was to be found in the county; a warrant was issued and placed in the hands of the sheriff for service; the sheriff went to the city of Chicago, Illinois, and brought the patient to Harrison county before the commissioners and he was found to be insane and committed to the hospital at Clarinda, Iowa.

The questions asked by you are these:

(1) As to the jurisdiction of the board of insane commissioners of Harrison county.

(2) As to their finding relative to the legal settlement of the insane person.

(3) As to the expenses incurred by the insane commissioners in bringing the patient from Chicago to Harrison county for the hearing.

In determining this matter it is necessary to take into consideration a great many sections of chapter 2, title XII, of the code, as amended. We do not desire to quote these statutes at length and will refer to them briefly in this opinion.

We desire to first call attention to section 2263 of the code which relates to the jurisdiction and power of the insane commissioners. This section provides:

"The commissioners shall have cognizance of all applications for admission to the hospital, or for the safe keeping otherwise of insane within their respective counties, except in cases otherwise specially provided for."

It will be observed from this section that the insane commissioners have jurisdiction over all insane persons within their respective counties, except in cases otherwise specially provided for.

In this connection, however, and in order that the matter may be clear we call attention also to section 2264 of the code relative to admission to the hospital.

We quote this section:

"Applications for admission to the hospital must be made in the form

of an information, verified by affidavit, alleging that the person in whose behalf the application is made is believed by the informant to be insane, and a fit subject for custody and treatment in the hospital, and that such person is found in the county, shall also state the place or residence of such person, or where it is believed to be, or that the same is not known, according to the facts."

It will be noted from this section that the information must be under oath and must allege: first, that the person in whose behalf the application is made is believed to be insane; second, that he is a fit subject for custody and treatment in the hospital; third, that the person is found in the county; and fourth, the residence of such person. In the case submitted we assume that the information contained all of these essentials. However, it will be observed that the person complained of was at the time in the city of Chicago, Illinois, and not in Harrison county.

The question of jurisdiction might well be a serious one but it is not necessary to determine this in order to answer the questions presented. In this connection it might be well to say that it appears at the very time the findings were made the patient was before the board, and that no objection has been made to the jurisdiction of the board, nor has an appeal been taken. This being true, all of the expenses of the sheriff in connection with the execution of the warrant of commitment to the hospital for the insane would be just charges against the county in the first instance.

However, it appears that the sheriff claims compensation and expenses in bringing the patient from Chicago, Illinois, to Harrison county, Iowa. We have been unable to find any statute which would justify the allowance of this expense by the county. There are perhaps, instances in which the sheriff would be entitled to expenses in serving a warrant outside the county but we are compelled to hold that this is not one of such cases. This is an original information. The patient has not escaped from the county but was in fact in Chicago at the very time the information was filed. There is no provision of the statute which would justify the bringing of this patient from Chicago at the expense of the county under a warrant issued by the board. The sheriff under ordinary circumstances, is entitled to his expenses in the service of the warrant but one of the essentials which must be alleged prior to the issuance of the warrant is that the patient is to be found in the county. The patient in this instance was not to be found in the county and the expenses incurred outside the borders of Harrison county would not be proper expense chargeable to the county.

As stated, it is impossible to enter into a discussion of the question of jurisdiction for the reason that it is not material in determining the real question presented. Now, as to the matter of settlement, we assume that the board made a finding as to the legal settlement of the patient. All that is necessary under such circumstances is to follow the provisions of the statute. It will be observed that if the legal settlement is found to be in Harrison county, then Harrison county must bear the expense. If it is found to be in another county of the state, then upon following the provisions of the statute such county can be made to bear the expense, and if the legal settlement is found to be in another state

or cannot be ascertained, then the state bears such expense, always providing that all of the requisites of the statute are complied with.

BEN J. GIBSON, *Attorney General*.

COUNTY TO PAY MEDICAL EXPENSES OF PERSON SHOT WHILE COMMITTING FELONY

Medical expense incurred attending criminal shot while committing a felony should be paid by the county.

November 1, 1922.

Mr. A. B. Hoover, County Attorney, Marshalltown, Iowa: You have requested an opinion from this department upon the following facts:

"Two men were found by the city police of the city of Marshalltown and the Northwestern detectives robbing box cars. A gun fight followed between the robbers and the officers in which the two robbers were shot, one of whom died instantly and the other some two or three hours later. They were taken to the hospital and doctors called in and an effort made to save the life of the man who was wounded."

You then ask:

"Should the county of Marshall or the city of Marshalltown pay the doctor bills incurred in furnishing medical aid to the wounded men, above mentioned."

Section 5643 of the code provides:

"The keeper of each jail must furnish necessary bedding, clothing, fuel and medical aid for all prisoners under his charge and keep an accurate account of the same."

Section 5651 of the code also provides:

"All charges and expenses for the safe keeping and maintaining of convicts and persons charged with public offenses, and committed to the jail for examination or trial, shall be allowed by the board of supervisors, except prisoners committed or detained by the authority of the courts of the United States, in which cases the United States must pay such expenses to the county."

The supreme court of Iowa had occasion to construe sections 5643 and 5651, supra, in the case of *Miller vs. Dickinson County*, 68 Iowa 102, wherein the marshal of the town of Spirit Lake was making the attempt to arrest a man by the name of Miller, who resisted such arrest. The marshal called on the sheriff to assist him, and in making the arrest Miller was shot and dangerously wounded. An information was filed charging that Miller had resisted an officer in the discharge of his duties. A warrant was issued and thereunder Miller was arrested by the sheriff, but he was so dangerously wounded that he could not be committed to jail or have his preliminary examination. Thereupon the sheriff employed the plaintiff in the case to board and take care of said Miller, and the action was brought against Dickinson county to recover for such services.

In holding that the county was liable under sections of the code similar to sections 5643 and 5651, supra, the court at page 104 says:

"From the time of the arrest under the preliminary information and warrant for resisting a public officer, the prisoner must be regarded, under the evidence in this case, as being in the custody of the sheriff. The preliminary examination did not take place, simply for the reason that the prisoner was unable, because of his condition, to plead to or admit or deny the accusation. The sheriff did what any humane man was bound to do, and that is, have him taken care of, and furnished

with such reasonable care and sustenance as his condition required. If this could be done in the jail, that was the proper place, but the evidence tends to show there was no jail. But if in fact there was, the sheriff was vested with a discretion in the premises, and there is no pretense that he acted in bad faith, or even injudiciously exercised the discretion reposed in him. The prisoner being in the custody of the sheriff, it was the duty of the latter to supply him with the necessaries of life suitable to his condition until the preliminary examination. It no doubt will be conceded that if the sheriff makes an arrest he may confine the prisoner in jail pending the preliminary examination, and that he may during such time provide him with the necessaries of life at the expense of the county. In legal contemplation that is what the sheriff did, and he from the time of the arrest was responsible for the appearance at the preliminary examination of the prisoner, which in fact took place subsequently. The sheriff had the power to contract for necessaries for the prisoner during the time he was in custody at the expense of the county. *Feldenheimer vs. Woodbury County*, 56 Iowa 379. This case is in point, except that the supplies were furnished to a prisoner in jail; but we think that this is not a controlling fact. If the prisoner cannot be confined in jail, he must be somewhere else, and the county is responsible for necessaries furnished him, if the circumstances were such that the prisoner could not be confined in jail."

Pursuant to the foregoing statutory provisions and holding of our supreme court, together with the fact that the person shot was committing a felony and subject to confinement in the county jail and prosecution in the district court, but owing to his condition it became imperative to rush him to a hospital for medical treatment and he died before he could be confined in the county jail or even an information filed against him, I am of the opinion that the county of Marshall is liable for the medical expense incurred in endeavoring to save this man's life.

BEN J. GIBSON, *Attorney General*.

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

LOCAL BOARD OF HEALTH—DELEGATION OF ITS POWERS TO ITS HEALTH OFFICERS

Section 8, chapter 290, acts of the 38th general assembly, provides for adoption of general rule whereby the local board of health may authorize the health officer of the board to act for and on behalf of the board, and to issue process in the name of the board in cases of suspected or known venereal diseases, without action being taken by the board on each particular case.

June 8, 1922.

Dr. William S. Conkling. You have forwarded to this office a letter written by Dr. J. F. Battin, of Marshalltown, dated May 6, and request our opinion on facts stated in that letter. The substance of the question propounded by Dr. Battin is as follows:

"To what extent can the local board of health delegate its powers to its health officer in the matter of the inspection, examination, isolation, internment or quarantine of persons afflicted with venereal diseases?"

Section 8 of chapter 299, acts of the 38th general assembly, reads as follows:

"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 when-

ever possible ascertain the sources of such infection. In such investigations the local board of health and its health officers 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, 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."

It is my opinion that under this section a general rule could be adopted by the local board, if one has not already been adopted, authorizing and directing the health officer of the board in any case where he is informed or discovers a disease of the character referred to, exists, to act for and on behalf of the board of health and to issue process in the name of the board, whenever necessary. The statute gives full power to the board and its health officers to enforce the law, and all that remains is for the board to prescribe how its work shall be done and by whom the different services shall be performed.

A general rule of this character would, we believe, enable the local board to function through its health officer without action being taken by the board on each particular case.

BEN J. GIBSON, *Attorney General*,

By JOHN FLETCHER, *Assistant Attorney General*.

CONTROL OF WATER SUPPLY FOR CITY

City of Des Moines has authority to control water in river for five miles above point where city plant is located.

Board of health has power to control and regulate pollution of streams from which water supply of cities is secured.

May 31, 1922.

Dr. Rodney P. Fagen, Secretary, State Board of Health: You call the attention of this department to the unsanitary condition existing in the vicinity of the source of the water supply for the city of Des Moines, and in connection therewith you have requested the opinion of this department as to the legal procedure available to abate such unsanitary conditions; also, the powers of the state board of health with reference thereto.

In this connection you have submitted a report made by Mr. H. V. Pedersen, civil and sanitary engineer of the state board of health, from which it appears that, in Bloomfield township along the south bank of the Raccoon river and west of Sixty-third street of the city of Des Moines, a large dumping ground exists, which dump is covered with all kinds of rubbish and garbage and other substances endangering the health and lives of the citizens of the state of Iowa, and contaminating the source of the water supply for the city of Des Moines.

From the said report it further appears that, in Walnut township, on the north side of Raccoon river and west of said Sixty-third street, another dumping ground exists, and that a short distance further west a dead animal lies putrifying on the ground, all of which is located within the water shed and contributory to the course of the water supply for the city of Des Moines.

It is further shown in said report that the sewage treatment plant of the city of Valley Junction is defective, and that effluent from the same passes directly into a creek which empties into the Raccoon river, contaminating the source of the water supply for the city of Des Moines.

The remedy for such condition is manifold. Under the law such conditions constitute a public nuisance, being injurious to the public health of the citizens of that locality. When such conditions exist it is the duty of the local Board of Health to abate the same, and if the local Board of Health refuses or neglects to do their duty in the premises, then the statutes of Iowa empower and authorize the state board of health to act.

With reference to the defective and dangerous condition of the sewage disposal plant of the city of Valley Junction, the statutes of Iowa clothe the state board of health with ample power and authority to compel the city of Valley Junction to place their disposal plant in a good condition within a reasonable length of time.

For the purpose of protecting the source of water supply from pollution for any city, the statutes provide that such city, by ordinance, may exercise jurisdiction over the territory extending five miles above the point from which the water is taken. The city of Des Moines, by ordinance No. 160, found in the bound volume of revised ordinances, 1916, has assumed jurisdiction over the said five mile territory, and under said ordinance the city of Des Moines has full power to protect its said water supply, and inasmuch as the city of Des Moines has taken jurisdiction over said territory, it is the duty of the city of Des Moines to thoroughly police such territory and protect its water supply from pollution.

Inasmuch as this is a matter of great public importance to not only the citizens of Des Moines and vicinity but also to visitors coming into the city, I might suggest that the state board of health, the city council of the city of Des Moines, the city council of the city of Valley Junction, and the local boards of health of Bloomfield and Walnut townships, should cooperate in removing the nuisance herein referred to, and in the future protect the public health of the citizens of this state against a similar menace.

ELEN J. GIBSON, *Attorney General*,

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

NURSES TRAINING SCHOOL

A nurses training school is authorized to credit students for college work, thereby shortening the time which such student is required to spend to complete a three-year course of study.

September 26, 1921.

Dr. Guilford H. Sumner, Secretary State Board of Health: Your letter of the 22nd instant addressed to the attorney general has been referred to me for answer. You ask an opinion of this department on the following question:

"The Iowa nurses law provides among other things that: 'After July first, nineteen hundred ten, no training school shall be accredited by the state board of health as a school of recognized standing which is not attached to a general hospital, and which does not have a course of study of at least three years,' etc.

"Will you therefore kindly give this office your written opinion as to whether or not a nurses training school may give credit for college work

or other degrees which a student may have obtained prior to entrance upon the nurses' training course, thereby shortening the course from three to nine months less than the required *three years*."

Section 2575a-29 of the supplement to the code, 1913, a portion of which you have quoted above, provides as follows:

"At the annual meeting of the state board of health it shall select two physicians from its own membership, and two registered nurses, residents of this state actively engaged in the practice of nursing, who, together with the secretary of the state board of health, shall constitute the examining committee for the year. The examinations provided for in this chapter shall be held in the city of Des Moines, in July of each year and at such other times and places as the board of health shall direct. All applicants for certificates to practice nursing shall have attained the age of twenty-one years and shall be of good moral character. They shall be graduates of training schools recognized as being in good standing by the state board of health of Iowa, and shall have received at least two years' instruction in general hospital practice. No training school shall be accredited by the state board of health as a school of recognized standing which is not attached to a general hospital, and which does not have a course of study of at least three years."

This and subsequent sections of the same chapter provide six requisites for a graduate nurse as follows:

1. They must be twenty-one years of age.
2. They must be of good moral character.
3. They shall be graduates of training schools recognized as being in good standing by the state board of health of Iowa.
4. They shall have received at least two years instruction in general hospital practice.
5. They shall pay the fees provided by law for examination.
6. They shall pass examination as provided by law before they are entitled to a certificate as a graduate nurse.

It will be observed that the training school in order to be accredited by the state board of health as a school of recognized standing shall be attached to a general hospital and have a course of study of at least three years. Nothing in the act, however, requires a student to spend the entire three years in completing the course of study, but two years instruction in general hospital practice is essential.

It is our opinion, therefore, that a nurses training school may give credit for work which a student may have done prior to entrance upon the nurses' training course, thereby shortening the time which the student shall spend in such school, provided that such student shall complete the entire three years' course and shall have at least two years instruction in general hospital practice and that your board would be warranted in recognizing the application for examination of a student so qualified.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

VITAL STATISTICS A PUBLIC RECORD

Copy of birth and death records kept by local registrar is public record.
State registrar to make certified copies for use as evidence.

May 10, 1922.

Mr. W. E. Jackson, County Attorney, Burlington, Iowa: Your letter of April 29 addressed to the attorney general has just been called to my

attention. You state that considerable confusion has resulted from chapter 22 of the 39th general assembly, being the law on vital statistics, and two questions are propounded.

(1) Is the record book provided for in section 19 a public record?

Our opinion is that this record is unquestionably of a public character and is subject to inspection by proper parties at all reasonable times.

(2) You ask whether or not a local registrar shall make a certified copy of the record of any birth or death or whether it is necessary that the state registrar furnish such certified copy under the provisions of section 21.

Section 21 was enacted for the benefit of persons who desire to obtain certified copies of the original record of births and deaths and it is made the duty of the state registrar to furnish such certified copy on payment of the fee therein provided. The copy which is in the record of the local registrar would not be the original record and I suppose that a certified copy thereof would not be admissible in evidence unless it could be shown that the original record had disappeared and was unobtainable.

Section 21 merely provides a means for parties interested to secure such copies as would be receivable in evidence and this, of course, under the general rule, would necessarily be a certified copy of the original record.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

REGISTRATION OF VITAL STATISTICS

Secretary of the state board is state registrar and should make order fixing the registration districts. Registrars in each district to be appointed by the board of supervisors.

July 13, 1921.

Dr. Guilford H. Sumner, State Board of Health: In your letter dated July 13, 1921, you ask in substance for an opinion from this department as to the power of the state board of health under the new vital statistics law and especially as to the power of the secretary of the board of health under the provisions of sections 1 and 3 of the act.

The sections to which reference has been made are in words and figures as follows:

"That the secretary of the state board of health shall be the state registrar of vital statistics and shall have charge of the registration of births and deaths; shall prepare the necessary instructions, forms and blanks for obtaining and preserving such records and shall procure the faithful registration of the same in each primary registration district as constituted in section three (3) of this act, and in the central bureau of vital statistics at the capital of the state. The state registrar shall be charged with the uniform and thorough enforcement of the law throughout the state, and shall from time to time recommend any additional legislation that may be necessary for this purpose."

"That for the purpose of this act the state shall be divided into registration districts as follows: each city, incorporated town, and township shall constitute a primary registration district; provided, that the state registrar may combine two or more primary registration districts when necessary to facilitate registration."

Under this act the secretary of the state board of health is created the state registrar of vital statistics. He is given charge of the work of the registration of births and deaths in this state. He is also charged as

a duty with the uniform and thorough enforcement of the law throughout the state. It will be observed, therefore, that the powers and duties of the state registrar are very clearly set forth and that no language of this department could add to or take from the provisions of the section to which reference has been made. In our opinion the section is very clear.

Section 3 provides that the state shall be divided into registration districts. The state registrar is given charge of this work of dividing the state into such districts. As long as the registrar works and acts in conformity to the provisions of this section he conforms to the law and his decisions are final.

In connection with the particular instance referred to, being Dubuque county, we simply submit that all that is necessary is for you to promulgate an order providing for the registration districts. Such order must then be acted upon and local registrars appointed in conformity to the law by the board of supervisors.

It is unnecessary to extend this opinion at length because of the fact that the law speaks for itself.

I would advise that you promulgate your order and if anything must be done in Dubuque that you take the matter up with the county attorney there who will render you every necessary assistance in the matter.

BEN J. GIBSON, *Attorney General.*

CLERK OF DISTRICT COURT MAY ACT AS REGISTRAR OF VITAL STATISTICS

Clerk of district court may accept an appointment as registrar of vital statistics, and retain personally the fees allowed to him by law as such registrar.

July 30, 1921.

Mr. T. J. Edmonds, Executive Secretary, Tuberculosis Association: You have requested the opinion of this department on the proposition as to whether or not the clerk of the court in any county may be appointed the registrar of vital statistics for that particular county seat and surrounding township, and also whether or not he may retain personally the fees paid for such service.

Section 2 of chapter 426 of the laws of the 37th general assembly provides as follows:

"The clerk of the district court shall accept the salary herein provided in full compensation of all services performed by him in his official capacity as such clerk of the district court."

Sections 299 and 300 of the code of 1897 provide that the clerk shall report to the board of supervisors and turn over to the county treasurer at certain set times, all funds and fees collected by his office, and not otherwise disposed of.

The question then arises—Does the office of registrar of vital statistics have any relation to the office of clerk of the district court in such a way as to be a part of such office, and to entitle the county to the fees collected by the registrar? The provisions of the law relative to the appointment of registrars of vital statistics in no manner places any of the duties of such office on the clerk of the district court. There is no connection whatever between the two offices. Any other person in the county

seat town, or the township in which it is located, might be appointed to such position as registrar, and such person would be entitled to the fees provided for the work done by the registrar.

It is our opinion that the office is so removed that the clerk of the district court, if he so desires, may accept an appointment as registrar of vital statistics within that district, and he may retain personally the fees allowed to him by law as such registrar.

The recent case of *Burlingame vs. Hardin County*, reported in 180 Iowa, page 919, sustains this contention. The proposition is also reaffirmed in the opinion in the recent case of *Plymouth County vs. Topper* (unreported), filed by the Iowa supreme court on June 25, 1921.

BEN J. GIBSON, *Attorney General*,

By NEILL GARRETT, *Assistant Attorney General*.

HOTELS

General discussion as to law regulating operation of hotels, namely, size of beds, number of guests occupying one room, rates, application of housing law, etc.

October 12, 1922.

George Barcklow, M. D., State Hotel Inspector: Your letter bearing date October 2, 1922, addressed to Attorney General Ben J. Gibson has been referred to me for attention.

You ask the opinion of this department upon the seven following questions:

"1. What is the minimum measurement or size of a bed that will accommodate two normal people with comfort and without crowding them in any way?

"2. Has any person or civic organization a right to make rulings with hotel manager to compel guest other than the convention guests to sleep in any overcrowded room?

"3. Has a hotel the authority to fill up every available space in a guest's sleeping room where the normal number of guests object?

"4. How many people are to occupy room for sleeping purposes before room shall be said to be overcrowded when the ordinary or normal capacity is two people? In connection with this question I will refer you to section 77, housing law of Iowa.

"5. Is it permissible for a hotel to charge \$50.00 a day for a guest room when said room will accommodate two people with the ordinary equipment when the rate filed in this office for said room is \$8.50 per person?

"6. Also shall a hotel be permitted to lease a guest room for demonstrating purposes or other uses when this room has sleeping equipment which is not removed from said room, particularly when a hotel is crowded and inconveniencing other guests by crowding?

"7. Has a hotel a right to make a lesser rate than the regular posted rate to a committee and then charge a rate greater than agreed upon? Also less than the maximum rate allowed or posted."

In answer to your first question, I can find no statute requiring hotel beds to be of any particular measurement or size.

Your second question is not entirely clear to us. However, the manager of hotels coming within the state housing laws has no right to require any guest to sleep in an overcrowded room, and, therefore, it is immaterial whether this is done pursuant to some private agreement with some individual or civic organization or not.

In answer to your third and fourth questions, the law prohibits the overcrowding of guest rooms in hotels coming within the provisions of the housing law and defines what would be overcrowding. Section 77, chapter 123, acts of the 38th general assembly. To overcrowd in violation of section 77, supra, would constitute a nuisance and authorize the local health officer to abate the same. Section 80, chapter 123, acts of the 38th general assembly. Such violations also authorize injunctive relief. Sections 96 and 105, chapter 123, acts of the 38th general assembly.

Whether or not a hotel could legally charge \$50.00 a day for a guest room, as referred to in your fifth question, when said room will accommodate two people with ordinary equipment and the rate filed with you is \$8.50 a person per day, will depend first upon whether or not the hotel is one coming under the provisions of the housing law; and second whether or not said room contains a sufficient number of cubic feet of air so as to permit six persons to occupy the same without being overcrowded as defined in section 77, chapter 123, acts of the 38th general assembly. In answer to this question, I am assuming that the hotel has placed in said room a sufficient number of persons at \$8.50 a day per person to amount to \$50.00 a day, which would be substantially six persons. There is nothing in the hotel law, except where the housing law is made applicable, that will prohibit overcrowding of hotel rooms and charging each occupant the maximum rate as filed in your office.

In answer to your sixth question, I can find no law which would prohibit the manager of a hotel doing the very thing referred to in your question.

In answer to your seventh question, the first half thereof is merely a matter of private contract, and if the manager violates the same, he is subject to the consequences usually following the breach of private executory contracts. Hotel managers may always charge less than the maximum rate filed with you.

BEN J. GIBSON, *Attorney General*,

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

AUTHORITY OF BOARD OF HEALTH—HOTEL INSPECTOR

The board of health has no authority to order the hotel inspector to cancel the license of any restaurant. The method of dealing with unsanitary eating places is that provided for by statute.

March 16, 1922.

Rodney F. Fagan, M. D., Secretary State Board of Health: We have your letter in which you request the written opinion of this department as to whether or not your board has authority to pass and enforce a certain resolution as follows:

"Whereas it is impossible for a restaurant to be kept sanitary when combined or in the same room with a billiard parlor, pool hall, card room or barber shop, be it resolved by the state board of health that the state hotel inspector be enjoined from licensing a restaurant as defined in house file 570, when combined or in the same room with a pool hall, card room, billiard parlor or barber shop, be it further resolved that it shall be necessary for the above mentioned places to build a partition of board or glass to extend from the floor to the ceiling with dust tight doors leading into the pool hall, card room, billiard parlor or barber shop in every such restaurant where cooking of any kind is done, if however,

no cooking is done in the above mentioned restaurant all food for sale shall be kept in glass cases or under glass bells until sold.

"Be it further resolved that those now licensed shall have their licenses revoked by the state hotel inspector unless they meet the above sanitary requirements."

In answering your inquiry, it is necessary that we direct your attention to the provisions of chapter 199, acts of the 39th general assembly, which relates to the regulation, licensing and sanitary inspection of restaurants, cafes, cafeterias, dining rooms, lunch wagons, lunch counters and all places where prepared food or meals are furnished to the public. An examination of this act discloses that every place where foods are prepared or meals are served is to be inspected by the inspector of hotels, and all approved places are then entitled to have a license issued to them permitting them to prepare foods or serve meals.

Section 9 of the act in question provides as follows:

"Every restaurant, except those temporary in location and character, situated in a city or town having a system of sewerage, shall be thoroughly drained, constructed and ventilated according to approved sanitary principles; *all restaurants shall be kept and maintained in a clean and sanitary condition and free from any effluvia, gas, or offensive odors arising from any sewer, drain, privy, or any other source whatsoever within the control of the owner, manager, agent or person, in charge thereof.* Restaurants, except those temporary in character and location, in cities or towns not provided with a sewerage system shall be drained constructed and ventilated in accordance with approved sanitary principles, and the drain shall be connected with an approved cesspool, which cesspool shall be properly cleaned and disinfected as often as necessary to keep and maintain it in an approved sanitary condition."

From a further reading of the act we find that where a place is found to be unsanitary, that notice is to be given the proprietor of such place in writing, advising him in what respects it fails to comply with the law and requiring such person, within a reasonable time to be fixed by the inspector, to do or cause to be done the things necessary to make it comply with the law. In event the proprietor fails or neglects to comply with the provisions of the act in question, he is deemed guilty of misdemeanor, and furthermore, an injunction may be obtained restraining the further use of such place as a restaurant until the provisions of the act have been complied with. There is nothing in the act that authorizes the state hotel inspector to revoke a license after it has been issued. The method of procedure after the issuance of the license seems to be that in case the place is not in a sanitary condition that the inspector give the proprietor written notice as aforesaid and proceed as above outlined. It is, therefore, the opinion of this department that the board of health has no authority to make or enforce a regulation such as proposed in your resolution.

There is nothing, however, in the statute that would prevent the hotel inspector from requiring pool halls operated in connection with restaurants to erect a partition between the pool hall and the restaurant as outlined in your resolution, and upon failure of the proprietor of such restaurant to comply with the demand made upon him for the erection of a partition, then you may proceed as provided by the act—by criminal prosecution or by the way of injunction.

BEN J. GIBSON, *Attorney General,*

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

WHO MUST HAVE LICENSE TO OPERATE EATING HOUSE

Hotel keepers with hotel license may operate cafe in same building without additional license. Temp bars and like serving meals must have license. One license will cover eating places in two locations in same building by same owner.

April 27, 1921.

Mr. J. B. Heefner, Inspector of Hotels: You have requested an opinion from this department upon the three following questions:

"1. Proprietor or manager operating both hotel and cafe, same building, and having paid a license on hotel, shall he be required to pay a license on cafe?"

"2. Section 1, third line, 'or place where food is served for pay to the public,' does this include temp bars, drug stores, ten cent stores, delicatessen and confectionery stores, who sell over counter and tables, sandwiches, salads, doughnuts, pies, coffee and luncheonettes?"

"3. Younker Brothers operate a place in basement, also on seventh floor same building. Does this require a license for each?"

Replying to your first question, it is my opinion that a person holding a license to operate a hotel where he operates both a hotel and a cafe in the same building is not required to secure an additional license to operate the cafe under house file No. 570.

In answer to your second question, I am of the opinion that such places of business, as you indicate, shall be required to obtain a license.

In answer to your third question, it is my opinion that one license will cover eating places in the different portions of the same building and conducted by the same person.

BEN J. GIBSON, *Attorney General*,

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

LICENSING OF EATING PLACES AT STATE AND COUNTY FAIRS

Eating places on state and county fair ground come under provisions of chapter 199 of the acts of the 39th general assembly and must pay a license fee and are subject to inspection.

June 29, 1921.

Mr. J. B. Heefner, Inspector of Hotels: You have requested the opinion of this department upon the following proposition:

According to house file 570, laws of the 39th general assembly, sanitary inspection and licensing of restaurants.

Do eating places on state and county fair grounds come under this department for inspection and license?

Section one of house file 570 which is chapter 199 of the laws of the 39th general assembly, provides as follows:

"Every building or structure kept, used, advertised as or held out to the public to be a restaurant, cafe, cafeteria, dining hall, lunch counter, lunch wagon or place where food is served for pay, to the public, except those used not more than one day in any week by churches, fraternal societies and civic organizations, shall for the purposes of this act be defined to be a restaurant and wherever the word 'restaurant' shall occur in this act it shall be construed to mean and cover every such place as is described in this section. Provided, however, that this act shall not apply to churches, lodges or like organizations, which do not regularly as a business, engage in the serving of food."

It will be observed from the foregoing that "every building or structure kept, used, advertised as or held out to the public to be a restaurant,

cafe, cafeteria, dining hall, lunch counter or place where food is served for pay, to the public" shall come under the provisions of this chapter. It is our opinion that eating places on state and county fair grounds are included within the provisions of the chapter and subject to inspection and must pay a license fee.

BEN J. GIBSON, *Attorney General*,

By NEILL GARRETT, *Assistant Attorney General*.

ISSUANCE OF LICENSE TO OSTEOPATHS

Board may issue new licenses to old practitioners, Applicants who took examination under old board and failed cannot take examination under new board if their qualifications are not up to new standard.

May 12, 1921.

Dr. C. J. Chrestensen, Keokuk, Iowa: I have your letters of the 30th ult. and the 10th inst. You ask for an opinion from this department upon the two following questions:

"The board feels that as we have the right to grant reciprocity to any applicant of any state whose requirements are the equal of ours before this went into effect, (section 12) we can issue a license to an old practitioner holding an old license, and too, since he has all the privileges now under the new law, we are not giving the old applicant anything he does not already possess. Indeed his status is not changed thereby. It is purely one of sentiment with the applicant's pride. We have up until the present only had a license from a source which has been entirely foreign to our belief and teaching."

"Another question which may come up for the board to settle is: can an applicant who has just taken the old medical board, take our examination (in case of failing to pass) although they have not the requirements under the new law? Or is the applicant still in the hands of the medical board which gives them another chance on the same fee and application? Although it no longer has any legal right to so function in matters relating to Osteopathy."

In answer to your first question, I can find no provision in the act which would prohibit the state board of osteopathy from issuing a license to those who have already obtained a license to practice osteopathy from the old medical board, and I am therefore of the opinion that your board would be authorized to issue a license upon the payment of the regular fee of five dollars.

As to your second question, I am of the opinion that such applicants cannot now take the examination before the new board created by the recent act. When the new law became effective the provisions of the former law were thereby repealed and made of no effect. If the new act fixes a higher qualification for applicants who desire to take the examination, then such applicants must have such qualifications before they will be eligible to take the examination.

In your letter of the 30th ult., you also ask for an interpretation of subdivision g of section 7 of the act creating the state board of osteopathy. Said subdivision provides:

"The executive council shall furnish the board suitable quarters wherein to perform its functions, and which shall be adequate to accommodate the clerical help employed by the board and the council shall equip such quarters with suitable furniture."

Under subdivision g, supra, the state board of osteopathy would be authorized in opening an office in the state house and place in charge

thereof a clerk or stenographer to receive the mail that might be addressed to the state board of osteopathy and answer such inquiries as might be made. For this purpose the executive council is given the power under said subdivision g to provide a room and equip it with furniture, typewriters, stationery and the like. Such rooms would be used as the headquarters of the state board of osteopathy.

BEN J. GIBSON, *Attorney General*,

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

OSTEOPATHS MAY PRACTICE OPTOMETRY

Duly registered osteopaths may practice optometry without further license.

August 31, 1922.

Dr. Rodney P. Fagan, Secretary State Board of Health: You have requested an opinion from this department as to whether or not osteopaths who are duly registered in accordance with the provisions of chapter 77, acts of the 39th general assembly, are authorized to practice optometry in this state as defined in chapter 167, acts of the 33rd general assembly, as amended by chapter 34, acts of the 37th general assembly, without further examination or license.

Section 10, chapter 77, acts of the 39th general assembly, prescribes the subjects and hours of study required prior to licensing a person to practice osteopathy in this state. Among the lists of subjects is found the subjects of "eye, ear, nose and throat," and a requirement that one hundred eighty hours shall be devoted to the study of those subjects. It is evident, therefore, that some knowledge of the eye, ear, nose and throat is required of osteopaths, and that duly licensed osteopaths are permitted to treat diseases of the eye, ear, nose and throat so long as in such treatment they do not prescribe or give internal curative medicine nor perform major or operative surgery.

Section 15, chapter 77, *supra*, practically confers upon duly licensed osteopaths in this state the same privilege, duty and obligation conferred, and imposed upon regular practicing physicians and surgeons with the exception, however, that osteopaths shall not prescribe or give internal curative medicine nor perform major or operative surgery.

Referring now to section 11, chapter 167, acts of the 33rd general assembly, as amended by chapter 213, acts of the 37th general assembly, we find that:

"Any person practicing optometry shall be prohibited from using the prefix doctor to his name, unless he is a duly registered and licensed physician and surgeon and his rights to such being allowed by the state board of medical examiners."

Pursuant to section 15, chapter 77, acts of the 39th general assembly, it is proper to interpret the portion of section 11, of chapter 167, just above quoted, to read as though the word "osteopathic" was inserted before the words "physician and surgeon."

In as much as the practice of optometry is defined to be the employment of any means other than the use of drugs for the measurement of the powers of vision and the adaptation of the lenses for the aid thereof and does not require the use of medicine or the practice of surgery, and in as much as regular practicing physicians and surgeons are permitted

to practice optometry without obtaining a license, and further in view of the fact that osteopaths are granted the same privilege, duty and obligation conferred and imposed upon regular physicians and surgeons, provided such osteopaths do not prescribe or give internal curative medicines nor perform major or operative surgery, I am of the opinion that a regular licensed osteopathic physician or surgeon may practice optometry without first obtaining a license under the optometry statute.

This opinion has been submitted to the attorney general and by him approved. The attorney general also directs that any and all outstanding opinions from this department conflicting with this opinion be recalled.

BEN J. GIBSON, *Attorney General*,

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

PRACTICE OF OPTOMETRY

Question whether or not mechanical device violates law is one of fact.

March 3, 1922.

Mr. Rodney P. Fagan, Secretary Board of Optometry Examiners: You have requested an opinion from this department upon the proposition of whether or not a person who owns or operates a mechanical device known as a "self-fitting optical machine" is violating the provisions of the Iowa law regulating the practice of optometry.

Section 2583-g of the supplement to the code, 1913, defines the practice of optometry. It provides as follows:

"The practice of optometry is defined to be the employment of any means other than the use of drugs for the measurement of the powers of vision and the adaptation of lenses for the aid thereof."

The question presented is one of fact only. The statute is plain and unambiguous. It would be impossible in such a statute to describe specifically all the means and devices which might be employed in the practice of optometry. The statute merely attempts to express in general terms what is to be considered as belonging to the practice of optometry.

The employment of any means, whether mechanical or otherwise, by or from which any person measures the powers of vision and adapts lenses for the aid thereof violates the provisions of the chapter regulating the practice of optometry and subjects such person to the penalties imposed therefor. This pronouncement does not apply in any manner to spectacles or glasses which are complete when offered for sale and are fitted by the purchaser himself by trying them on and subjecting them to any test he may desire. It is only the use of means or devices which are in truth and effect optometers similar to those employed and used by regularly licensed optometrists.

As has been stated, all such propositions are questions of fact and are not subjects on which we could properly render opinions. It is not for us to judicially determine whether or not any state of facts in such matters comes within or without the terms of the statute.

BEN J. GIBSON, *Attorney General*,

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

A CORPORATION CANNOT BE LICENSED TO PRACTICE DENTISTRY

A non-resident operating a dental office in Iowa must have license. Names of all dentists employed must be posted at entrance of office, and office must be advertised in name of owner.

October 31, 1922.

Dr. H. P. White, Secretary Iowa State Board of Dental Examiners: You have requested an opinion from this department upon the following state of facts:

A dentist by the name of G. D. Shipherd, residing at Omaha, Nebraska, owns and operates a dental office in Sioux City and Des Moines under the name of "The Bailey Dental Company." This company is incorporated. Dr. Shipherd does not hold a license to practice in this state, but operates the offices in Iowa through dentists employed by him and holding licenses to practice in Iowa. None of the dentists employed in such offices have their names appearing on either the office signs or office stationery. The only name appearing on either the office signs or stationery being "The Bailey Dental Company."

You then ask whether or not the manner of operating the dental offices above mentioned violate any of the statutes of Iowa.

Permit me to respectfully inform you that a license to practice dentistry in this state cannot be legally issued to a corporation. A corporation could not take the examination prescribed in section 2600-d, supplement to the code, 1913. Therefore, The Bailey Dental Company, in its corporate capacity, cannot be granted a license in Iowa.

Section 2600-o, supplement to the code, 1913, defining the practice of dentistry, provides in part as follows:

"The opening up of an office for the purpose of practicing dentistry shall be considered prima facie evidence that such person is engaged in the practice of dentistry."

Section 2600-o1, supplement to the code, 1913, further provides:

"Every person who shall practice dentistry * * * * as proprietor * * * shall keep his license in open view in his operating room; and if he owns, operates or controls a dental office, where anyone other than himself is practicing dentistry, he shall also cause to be displayed, and keep in a conspicuous place at the entrance of his place of business, the name of each and every person employed by him in the practice of dentistry at that place."

A violation of either of the foregoing sections constitutes a misdemeanor and subjects the person guilty to punishment by fine of not less than \$50.00 nor more than \$500.00, or by imprisonment in the county jail, not more than sixty days, or by both such fine and imprisonment. Section 2600-o4, supplement to the code, 1913.

Pursuant to section 2600-o and section 2600-o1, supra, the person referred to in your letter, to-wit: Dr. G. D. Shipherd of Omaha, Nebraska, has no authority to open up an office in Iowa for the purpose of practicing dentistry without being licensed in this state. To violate the foregoing provisions of the statute would subject him to the penalty prescribed in section 2600-o4, above referred to.

Under section 1, chapter 309, acts of the 37th general assembly, every licensed dentist operating or conducting a dental office in this state shall conduct it in his own name. In the event he employs dentists in his office, he shall post the name of each dentist so employed in a conspic-

uous place at the entrance of his place of business. Section 2600-01, supplement to the code, 1913.

It follows, therefore, that not only Dr. G. D. Shipherd of Omaha, Nebraska, is violating the law by operating a dental office in Iowa without a license, but also the dentists conducting the office in other than their own names are violating the statutes of this state.

BEN J. GIBSON, *Attorney General*,

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

WHO ENTITLED TO TAKE DENTAL EXAMINATION

Applicant to practice as dental hygienist who is a graduate of school requiring only one year high school, but who otherwise meets the requirements, may be licensed in the discretion of board. They have power to approve and reject schools, providing they exercise such discretion in *absolute good faith*. If this is abused, courts may interfere.

May 15, 1922.

Iowa State Board of Dental Examiners, Des Moines, Iowa: I am in receipt of your request dated May 8th in which you ask for an opinion from this department. Your request is in words as follows:

"I am addressing you, and would like your advice relative to our hygienists law. Section 3, chapter 309, 37th general assembly.

"We have an application from a girl, who, it would seem meets the requirements, but who will receive her hygienists degree from a school, the entrance requirements of which require only one year of high school.

"Our law says that she must have had the equivalent of two years high school, and have attended a school maintaining a course of at least nine months, and approved by our board. Question, how can we approve of the school requiring only one year of high school as an entrance requirement, and how can we accept an applicant graduating from such a school to our examination?

"We have considered that if the applicant has had the necessary two years or more of preliminary education, that we might permit the examination. But could we do this and not approve the school, or could we approve of the school even though they do not require a minimum of two years high school?"

You are informed that under the provisions of section 3 of chapter 309 of the acts of the 37th general assembly that:

"Any woman over eighteen years of age and of good moral character, whose preliminary education is equivalent to two years in the high school, and who is a graduate of a training school for dental hygiene, requiring a suitable course of not less than one academic year of at least nine months, and approved by the state board of dental examiners, may, upon the payment of ten dollars (\$10.00), be examined in the subjects taught in any such approved course for a license to practice as a dental hygienist, by the state board of dental examiners, and if her examination is satisfactory to said board, she shall be licensed as a dental hygienist."

Under the provision it is not a question as to whether or not the approved school requires only a preliminary education equivalent to one year in the high school. The test is does the woman when she appears and asks for the examination meet the several requirements specified in the section. There is nothing in the law to prohibit your board from approving this school. The statute does not require the school as a preliminary requisite to approve to require a preliminary education equivalent to two years in high school. The question of approval is one

lodged in the discretion of the board and if such discretion is properly exercised the determination by the board is final.

You could approve the school temporarily if you desired, in truth you can approve and reject schools in the exercise of your reasonable discretion. You should remember, however, at all times that you must exercise such discretion in absolute good faith. The law requires every board or officer vested with a discretion to exercise such discretion in good faith and not to abuse it. Where the discretion is not exercised in good faith or where it is abused the courts will interfere.

BEN J. GIBSON, *Attorney General*.

DISBURSEMENT OF DOMESTIC ANIMAL FUND

County treasurer should pay warrants presented between January 1 and January 10, 1923, from all funds collected for 1921 tax and 1922 license. Board may leave domestic fund intact during 1923 although same exceeds \$500.00.

August 10, 1922.

Hon. Glenn C. Haynes, Auditor of State: Your letter of August 4 addressed to Mr. Gibson has been referred to me for attention. You state:

"This department is in receipt of the following letter from V. R. Smith, county auditor of Taylor county:

"As you know we are this year collecting two years dog taxes, 1921 and 1922. Can any of the tax under the new law collected for the year 1922 be used with the 1921 tax collected to pay domestic animal claims filed during the year 1922?"

"We respectfully request an opinion on the question submitted in the above letter and an early reply will be very much appreciated.

"I wish to call your attention to the fact that if the 1922 claims are paid from the taxes received during the year 1922 and the claims should amount to enough to exhaust the fund before January 1, 1923, and the legislature should repeal the new dog law, that it might leave the county without any funds to take care of domestic animal claims for one year."

Section 458-b, supplement to the code, 1913, provides that all taxes collected upon the assessment of dogs shall be placed in a separate fund to be known as the domestic animal fund. The dog license law passed by the 39th general assembly provides that the money collected as license fees shall be paid into this domestic animal fund (Chapter 140, 39th general assembly).

Section 458-d, supplement to the code, 1913, as amended by chapter 15 of the 38th general assembly, provides as follows:

"The county auditor shall, on the first day of January of each year, furnish an itemized statement to the county treasurer of all warrants that have been issued for the twelve months preceding such date as provided herein, and the treasurer shall on or before the tenth day of said month pay said warrants issued by the auditor, as aforesaid, out of the domestic animal fund; but if such fund is then insufficient to pay said warrants in full he shall pay on each pro rata. When the balance in the domestic animal fund, after paying the warrants issued thereon, as hereinbefore provided, exceeds the sum of five hundred dollars the board of supervisors may transfer the excess to the general county fund."

We discover nothing that requires or authorizes the creation of more than one domestic animal fund or the separating of funds collected by way of taxes under the old law and by license under the recent dog license act.

We are of the opinion therefore that it would be the duty of the treasurer to pay warrants drawn for the payment of claims for injuries to domestic animals arising in the year 1922 from such funds as may be in the domestic animal fund between the first and tenth of January, 1923.

We note that you call our attention to the fact that if the next legislature should repeal the new dog license law there might be no money in the domestic animal fund for claims arising during the year 1923. If a repeal of the law is anticipated the board of supervisors of each county might in the exercise of its discretion leave all money in the domestic animal fund after the claims for 1922 have been paid. You will note that they may by the section above quoted transfer the excess of five hundred dollars after the warrants have been paid to the general county fund. This provision is not mandatory and, as above indicated, the board of supervisors in each county would have the power to leave the domestic animal fund intact after the payment of the warrants in January of 1923 although that fund would exceed five hundred dollars.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

COMMISSION OF ANIMAL HEALTH—EXPENDITURE OF APPROPRIATION

The expenditure of the appropriation for the eradication of tuberculosis in this state is vested in the commission of animal health. It is for that body to determine which applications shall be granted.

September 26, 1922.

Dr. Peter Malcolm, State Veterinarian: I am in receipt of your letter dated September 5, 1922, which letter is in words as follows:

"I would like to have an opinion upon a question that is being asked by different owners of cattle who have signed an agreement asking to have their cattle tuberculin tested with a view of detecting the presence of tuberculosis, and with a further view of freeing their herds from such a disease, as is set forth in chapter 287, acts of the 39th general assembly, section 10; and with a still further view of receiving indemnity on animals that are slaughtered on account of having tuberculosis.

"The question is: If owner A signs an agreement on a certain date and has his herd tested, and the tubercular animals slaughtered, and he has received state indemnity on same; and owner B signs the same kind of agreement (a copy of same is herewith attached) has the commission of animal health the power to make a ruling whereby owner B must wait until owner A's herd has been accredited, providing there are funds left in the state treasury from the annual appropriation of \$250,000.00 which was appropriated by the 39th general assembly, chapter 44?"

It is scarcely necessary to point out the fact that the expenditure of the appropriation for the eradication of tuberculosis in this state is vested in the commission of animal health. The appropriation granted by the legislature is limited in amount. It is insufficient to enable the board of animal health to test all cattle within the state, and it is insufficient to justify them in granting all applications, or in testing all animals for which applications are made. The commission must, of course, act fairly and reasonably in determining which applications should be granted, and what animals should be tested, all to the end that the very best interests of the state may be furthered.

In order to secure federal aid, it is necessary that the board of animal health proceed in conformity to the rules and regulations adopted by the United States government. Under such rules and regulations, before federal aid can be received there must be a certain well defined policy adopted for the accrediting of herds of cattle within the state. In order to accredit such herds, it is necessary that they not only be tested once, but that they be re-tested within the time and in the manner provided by such rules and regulations. The laws of the state of Iowa accept federal aid, and our statutes are to be construed giving consideration to the federal statutes, unless there be an express provision in our statutes to the contrary.

It follows, therefore, that in the determination of the question as to what animals should be tested, consideration should be given to the federal laws on the subject. Again, the laws of this state vest a certain discretion in the board of animal health, not only as to the animals which are to be tested, but also as to the number of times that such animals are to be tested, in order to conform with the federal law, and such discretion, where used within reason and in accordance with what is in the sound judgment of the board for the best interests of the state, will not be disturbed. The board of animal health should take this matter up and determine it honestly and fairly, and when it is so determined, whether one way or the other, it will be correct under the Iowa laws.

BEN J. GIBSON, *Attorney General.*

WHO MAY PRACTICE VETERINARY SURGERY

Person who has practiced for five years prior to enactment of act regulating veterinary practice, but who still continues to practice and has not taken out a certificate under the provisions of section 2538-b, does not violate the law by continuing such practice.

June 30, 1921.

Dr. Peter Malcolm, State Veterinarian: We are in receipt of your letter of June 24 requesting the opinion of this department upon the following proposition:

"Is a person who has practiced veterinary medicine, surgery or dentistry, guilty of violating the law by his failure to apply for and receive a certificate to practice, when such person has practiced that profession in this state for more than five years prior to the passage of the statutes regulating the practice and licensing of veterinarians?"

Section 2528-a of the supplement to the code, 1913, provides "that it shall be unlawful for any person to practice veterinary medicine, surgery or dentistry in this state, who shall not have complied with the provisions of this act."

Section 2538-1 provides "that any person violating any of the provisions of this act shall be guilty of a misdemeanor" and provides a penalty for the violation of any of the provisions of the chapter.

Secton 2538-b provides as follows:

"Any person of good moral character who has practiced the profession of veterinary medicine, surgery and dentistry in this state for a period of five years immediately preceding the passage of the act of which this is an amendment shall be deemed eligible to resigtration as an existing practitioner upon presenting to the board of veterinary medical examiners, created by the act of which this is an amendment, satisfactory evi-

dence that such person is of good moral character and that such person had actually practiced veterinary medicine, surgery and dentistry in the state of Iowa for a period of five years immediately preceding the passage of the act of which this is an amendment, application for such registration to be made before July 4, 1902."

The foregoing section is the only one which would have any bearing upon the state of facts set out in the proposition submitted. It will be observed from a careful reading of that section that there is nothing therein which prohibits anyone, having the qualifications specified, from continuing to practice after the taking effect of the act, the same as he had practiced before provided that he shall not append the title of veterinary to his name.

The state of facts is ruled by the case of *State vs. McCoy*, 149 Iowa, 500. We will quote the following from that case:

"True, if he had practiced five years and was of good moral character, he was 'eligible to registration as an existing practitioner,' and upon timely application might have received a certificate of qualification, and this would have been conclusive evidence of his right to practice. But suppose he concluded to continue his practice without procuring such certificate. Nothing in the act prohibited him from so doing. It is nowhere denounced as unlawful, and, not being in violation of 'any of the provisions of the act,' did not constitute a misdemeanor, within the meaning of the statute quoted."

It is our opinion, therefore, that in view of the language used in section 2538-b that any person who has practiced veterinary medicine, surgery or dentistry for five years prior to the enactment of the chapter regulating such practice, does not violate the law by continuing such practice, even though he has failed to apply for and receive a certificate from the board of veterinary medical examiners.

BEN J. GIBSON, *Attorney General*,

By NEILL GARRETT, *Assistant Attorney General*.

RECOVERY OF FISH AND GAME ESCAPING FROM STATE PROPERTY

When fish in a lake or pond adjacent to a stream can be traced to the original source—namely, the stream itself, such fish belong to the state. The state fish and game warden or deputies would have the right to recover same whether the lake or pond is surrounded by private grounds, or not.

July 19, 1922.

Hon. W. E. Albert, State Fish and Game Warden: You ask for an opinion from this department upon the following question:

"Would a deputy fish and game warden have the right to go on privately owned land to rescue fish in land locked ponds which had been left there by over-flow from one of the rivers of the state?"

You also call attention to the fact that there has in various parts of the state arisen a doubt as to the ownership of fish in land locked lakes and pools which are supplied by overflow from streams. In connection therewith you ask us for an opinion as to the ownership of such fish.

In connection with the two questions submitted we call your attention to the following sections of the code: Section 2545 of the supplement to the code, 1913, provides as follows:

"Persons who raise or propagate fish upon their own 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 of the supplement to the code is as follows:

"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 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, 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."

It will be observed that the statute relative to the ownership of the fish in private waters, and the statute relative to the ownership of fish in land locked ponds, sloughs and similar waters, which are stocked by overflow from public waters, to a certain extent conflict. However, such a conflict is more apparent than real. The purpose of section 2545 is to protect private owners in the ownership of fish propagated or raised privately. The purpose of section 2562-b is to protect the ownership of fish which belong to the public, whether such fish be in the rivers of the state or in land locked ponds, sloughs and bayous, by reason of overflow from such public waters or rivers.

It is difficult to render an opinion which is applicable in all instances. The facts as to each particular lake or pond to a certain extent will affect the correct determination of the matter. Suffice it to say however, that where the fish in a bayou, pond or similar water adjacent to a stream, can be traced to the original source, namely, the stream itself, whether by a direct inlet or outlet or by overflow of waters, such fish belong to the state. On the other hand, fish in private waters which are not so stocked belong to the individual. The state as a state undoubtedly has the right by reason of its sovereignty to recover its property wherever it may be in the state. This being true, the state fish and game warden would have the right to recover the fish which belong to the state for the benefit of the state, and this whether the lake, pond or similar water is surrounded by private grounds, or not. We might state, however, that in all instances the state fish and game department should under no circumstances damage the individual property of the individual, but should through mutual arrangement with the owner of the property recover such fish in a manner and method agreeable to the individual. In this manner difficulties will be avoided, and no question as to rights be involved. If there should be difficulty, we would advise that in each instance you take up the matter with this department prior to attempting the recovery of the fish, and be advised upon the particular facts of a particular case.

BEN J. GIBSON, *Attorney General.*

FISH AND GAME

Game fish cannot be taken from Iowa inland waters and transported or offered for transportation for the purpose of sale.

June 15, 1922.

Mr. W. E. Albert, Fish and Game Warden: You have requested an opinion from this department upon the question of whether or not game fish taken from the inland waters of the state may be offered for transportation or transported for the purpose of sale.

Section 2540 of the supplemental supplement to the code, 1915, contains the provisions of the Iowa law regulating fishing and the shipment of fish in Iowa. The first paragraph of that section reads as follows:

"Between the first day of October and April 15 no one shall take from the waters of the state any salmon or trout, nor between the first day of December and the fifteenth day of May any bass, pike, crappies, pickerel, or catfish, or other game fish, nor shall any one person take of said fish from the waters of the state in any one day more than forty of any or all of said kinds of fish, of which total number not more than twenty shall be bass, pike or pickerel. *It shall be unlawful for any person, firm or corporation to offer for transportation or to transport to any place within or without this state for purposes of sale, any game fish taken from the inland waters of the state.*"

It will be observed that the foregoing section makes specific provision that no game fish taken from the inland waters of the state of Iowa shall be transported or offered for transportation to any place within or without the state for the purposes of sale.

Section 2544 of the supplemental supplement to the code, 1915, provides a penalty for the violation of the provisions quoted above. That section reads as follows: •

"Any person, firm or corporation who shall violate any of the provisions of the five preceding sections 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."

We believe that the foregoing sufficiently answers your inquiry.

BEN J. GIBSON, *Attorney General*,

By NEILL GARRETT, *Assistant Attorney General*.

POSSESSION OF WILD DUCKS

A corporation or person having over fifty wild ducks in cold storage violates section 2552, supplemental supplement.

November 2, 1922.

Hon. W. E. Albert, State Fish and Game Warden: You have requested an opinion from this department upon the following question:

"Would sections 1127 and 1129 of the compiled code of 1919, giving the number of ducks which might lawfully be had in possession by any person, firm or corporation, as fifty at any time, include cold storage houses?"

Section 2552 of the supplemental supplement provides as follows:

"No person shall at any time or at any place within this state, trap, shoot or kill for traffic any of the birds, animals or game named in this chapter, nor shall any person shoot or kill more than eight prairie chickens, fifteen quails or twenty-five of the other birds or animals mentioned in this chapter in any one day, of any kind of said named animals,

birds or game, nor shall any one person, firm or corporation have more than sixteen prairie chickens or twenty-five of either kind of said named birds or game named in this chapter in his or their possession at any time unless lawfully received for transportation; provided, however, the limit of ducks in possession is hereby made fifty. Nor shall any person capture or take, or attempt to catch or take, with any trap, snare or net any of the birds or animals named in the preceding sections, or in any manner wilfully destroy the eggs or nest of any of the birds named in this chapter. Any person, firm or corporation violating any of the provisions of this section shall be held to be guilty of a misdemeanor and punished as provided for in section 2556 of the supplement to the code, 1907."

Section 2556 of the supplement to the code 1907, was repealed and the following enacted in lieu thereof, and appears as section 2556 of the supplemental supplement:

"If any person use any device, kill, trap, ensnare, buy, sell, ship, or have in his possession, or ship, take or carry out of the state, or ship within this state contrary to the provisions of this chapter, any of the birds or animals named or referred to herein, or shall wilfully destroy any eggs or nests of the birds named or referred to in the preceding sections, he shall be guilty of a misdemeanor, and be punished by a fine of ten dollars for each bird, beaver, mink, otter, or muskrat, or other animals named or referred to in this chapter, and ten dollars for each nest and the eggs therein, so killed, trapped, ensnared, bought, sold, shipped, had in possession, destroyed, taken or carried out of the state, or shipped within this state contrary to law, and shall stand committed to the county jail for thirty days unless such fine and costs of prosecuting are sooner paid."

Pursuant to the foregoing statutory provisions it is evident that the prohibition contained in section 2552 applies to cold storage houses; and if there is found more than fifty wild ducks in the possession of a person, firm or corporation operating a cold storage business, then such person, firm or corporation is guilty of a misdemeanor and punishable as provided for in section 2556, above quoted.

BEN J. GIBSON, *Attorney General*,

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

SEARCH WARRANT FOR FISH AND GAME

The fish and game warden has no authority to make a search for game and fish illegally possessed without a warrant.

Possession of a spear, trap, etc., within ten rods of public waters of state illegal; also the killing or attempting to take or kill fish within 300 feet of dam, etc., except by hook and line, illegal.

March 16, 1922.

Hon. W. E. Albert, State Fish and Game Warden: We have your letter of recent date in which you request this department to furnish you an opinion upon the following propositions:

"First, would a state deputy game warden have the right to search a hunter's coat, game bag, or automobile, for illegally taken game, providing he had good cause to believe that such person had illegally taken game in his possession?

"Secondly, refer your attention to section 2540, of the code of 1913. You will note that this section states:

"The possession of a spear, trap, net or seine in or upon any of the public waters of the state, or upon the ice of same, or on the shore within a limit of ten rods, or the taking or killing or attempting to take or kill any fish by any means other than by rod, line, hook and bait within 300 feet of a fishway or dam shall be unlawful."

"What we desire to know is, whether or not, such spear, net, trap or seine would necessarily have to be within 300 feet of a fishway or dam, before it could be seized and the person having same in possession fined."

In answering your first inquiry, permit me to state that I have made diligent search through all the statutes relating to the duties of the fish and game warden. There are a number of provisions made for the seizure of fish and game illegally possessed or being illegally shipped, and also for the seizure of nets, traps, etc., but there is not a word in the statute anywhere that I have been able to find that gives you authority to make a *search* for any such game, fish, nets, traps or spears without first having in your possession a warrant. It is, therefore, the opinion of this department that you cannot legally make a search in the absence of a warrant issued by a proper officer.

In your second inquiry we think it is clear that the possession of a spear, trap, net or seine within ten rods of the public waters of this state, or of the shores thereof, is unlawful. The 300 feet limitation mentioned in the latter portion of the section of the statute above quoted applies wholly to the taking or killing or attempting to take or kill any fish within 300 feet of a fishway or dam except by rod, line, hook and bait. We do not believe that the limitation of 300 feet has any application to any other provision of this statute than the taking of fish within the designated limit from a fishway or dam. Under the provisions of the statute just above quoted from, you would not be entitled to seize spears, nets, traps or seines unless they were within ten rods of some public waters of the state or of the shore thereof, but if within the prohibited district, then you may seize the same and deal with the same as provided by law.

BEN J. GIBSON, *Attorney General*,

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

LESSEE MUST HAVE HUNTER'S LICENSE

One who leases private lake must procure hunter's license.

November 23, 1921.

Hon. W. E. Albert, Fish and Game Warden: In response to your verbal request for the opinion of this department on the question whether or not a person leasing a privately owned lake within this state is required to procure a hunter's license in order that he may kill ducks on such lakes we have to say:

Section 2563-a8 of the supplement to the code of Iowa, 1913, provides in part as follows:

"Provided, however, that owners of farm lands, their children or tenants, shall have the right, without procuring a license, to hunt and kill wild animals, birds or game upon the lands owned or occupied by them."

It will be observed that the above exception to the general rule that a person in order to be authorized to hunt animals and game within this state shall secure a license therefor applies only to the owners of farm lands, their children or tenants and that such exception authorizes the owners of farm lands, their children or tenants to hunt and kill wild animals, birds or game upon the lands owned or occupied by them.

It was the intent of the legislature as clearly expressed in the provisions above quoted that tenants in order to come within the exception

to the hunter's license provision shall actually and in good faith occupy farm lands and that their hunting activities shall be confined to the lands actually and in good faith occupied by them.

If there is upon the farm lands so leased and occupied by them a lake or pond belonging to the premises they would of course be authorized by the above exception to shoot ducks thereon.

The leasing of a lake or pond alone for the purpose of shooting ducks thereon without procuring a license would in our opinion be a mere subterfuge and would violate not only the spirit but the letter of the law as well.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

EMPLOYMENT OF DEPUTY FISH AND GAME WARDEN

The state fish and game warden has no authority to employ a deputy exclusively for the purpose of lecturing to the children in the public schools on fish and game of Iowa. A deputy regularly employed may so lecture if doing so his duties are not interfered with.

March 8, 1922.

Mr. W. E. Albert, State Fish and Game Warden: We have your request of March 1 for an opinion upon the following proposition:

"Has the state fish and game warden a right under the law to employ deputies whose principle duties in addition to the enforcement of the fish and game laws is to lecture to the children in the public schools on the fish and game of Iowa, impressing upon them the need for conservation of the wild life of the state, and the importance of complying with all laws."

In answering your inquiry it is necessary to direct your attention to the provisions of section 2539 of the supplemental supplement, 1915, which defines the duties of the state fish and game warden. I think they may be summed up as follows:

- (1) He has charge and management of the fish hatcheries of the state.
- (2) He has charge of the distribution of the fry among the lakes and the streams of the state of Iowa.
- (3) He is to faithfully and impartially enforce the provisions of the chapter relating to fish and game.
- (4) He is required to give a biennial report to the governor of the work of his department.
- (5) He is to destroy nets, etc., seize game shipped in violation of law, make arrests, etc.

Section 2563 of the supplemental supplement, 1915, relates to the appointment of deputy fish and game wardens and fixes their salary and it in part states that such deputies "Shall act under the advice and direction of the fish and game warden, and perform such duties in relation to their offices as may be required of them * * *."

From a review of the foregoing it will be observed that there is no provision in the statute directing you to employ a deputy to lecture to the children in the public schools of the state on the subject of the fish and game of Iowa and if a deputy may be authorized to do so it must be by reason of the fact that you have authority to direct him to so act under the provisions of the section of the statute last above mentioned, but a careful reading of the section indicates that you are limited in your authority to direct such deputies to perform such duties "in relation to

their offices as may be required of them." There is nothing in the statute that in any way indicates that it was the intent of the legislature that you should designate any deputy to lecture to the school children of Iowa concerning the fish and game of the state.

However, there is nothing in the statute to prevent a deputy fish and game warden from delivering such lectures so long as such work does not interfere with the performance of the duties imposed by statute.

BEN J. GIBSON, *Attorney General*,

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

INCOMPATIBLE OFFICES

Justice of the peace and deputy game warden incompatible, and one person may not hold both offices at same time.

November 16, 1921.

Hon. W. E. Albert, State Fish and Game Warden: In your letter dated November 10, 1921, you ask for an opinion from this office as to the right of a deputy game warden while acting as such to also hold the office of justice of the peace. Your request is in words as follows:

"We find that one of our men holds a position as justice of the peace as well as being a deputy game warden. Kindly advise us as to the legality of such a condition."

The general rule with reference to questions of this nature is that where the two offices are incompatible that then it is improper for the officer to hold both offices.

Incompatibility has been fairly well defined by the courts. Our own court in *Bayou vs. Cattel*, 15 Iowa, 538, says:

"Incompatibility in office exists where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one incumbent to retain both. It does not necessarily arise when the incumbent places himself, for the time being, in a position where it is impossible to discharge the duties of both offices."

The supreme court of Missouri in *State ex rel Walker vs. Beis*, 135 Missouri, 325, says:

"At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two—some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him."

The supreme court of New York in *People vs. Green*, 58 New York, 295, says:

"Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of one is the vacation of the other. The force of the word, in its application to this matter, is, that from the nature and relation to each other of the two places, they ought not to be held by the same person, from contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate one to the other, and they must,

per se, have the right to interfere, one with the other, before they are incompatible at common law."

From what has been stated you will observe that incompatibility in public offices arises where the nature and duties of the two offices are such as to render it improper from consideration of public policy for one officer to hold both positions.

A deputy game warden is a peace officer charged with certain duties and responsibilities by the provisions of the fish and game laws of the state of Iowa. His duties as deputy game warden often times require his presence in justice court as a peace officer, as a prosecuting witness and otherwise as his duties may require. A justice of the peace on the other hand is a magistrate charged with the duty of determining questions of law and of fact from a judicial standpoint.

It would in our opinion be incompatible for a deputy game warden to hold the office of justice of the peace for the reasons stated and for the further reason that we are convinced that public policy forbids a peace officer while acting as such from also acting as a magistrate or judicial officer.

BEN J. GIBSON, *Attorney General.*

INCOMPATIBLE OFFICES

Office of mayor and member of general assembly incompatible. Cannot hold both offices at same time.

April 6, 1921.

Hon. William R. Blake, House Chamber: In your letter of April 5, 1921, you submit to this department a request for a written opinion upon the question as to whether or not a member of the general assembly can also act as mayor of a city or town under the constitution and laws of Iowa.

Section 22 of article 3, of the constitution is in words as follows:

"No person holding any lucrative office under the United States, or this state, or any other power, shall be eligible to hold a seat in the general assembly. But offices in the militia, to which there is attached no annual salary, or the office of justice of the peace or postmaster, whose compensation does not exceed one hundred dollars per annum, or notary public, shall not be deemed lucrative."

This section of the constitution has been discussed for years and has been construed in some former opinions given out by the department of justice. We refer to an opinion by the Honorable George Cosson, under date of January 25, 1913, found in volume 6 of the opinions of the department of justice at page 526. In this opinion Attorney General Cosson does not determine the question but refers to the matter of incompatibility. In a letter dated February 3, 1917, Attorney General H. M. Havner holds that the office of mayor is a lucrative office within the meaning of this section.

From a reading of the section of the constitution referred to it will be observed that a person holding a lucrative office under the federal government or under the state or any other power is ineligible to hold a seat in the general assembly. The exceptions are offices in the militia to which no annual salary is attached, the office of justice of the peace or postmaster where the compensation does not exceed \$100 per annum, and notary public. The office of mayor is not listed in those excepted. The sole question remaining to be determined then is as to whether or not the office of mayor is a lucrative office within the meaning of this section.

In *State vs. Kirk*, 44 Ind., 401, 15 Am. Rep. 239, the court says:

"Constitution, article 2, section 9, declares that no person holding a lucrative office or appointment under the United States or under this state shall be eligible to a seat in the general assembly, nor shall any person hold more than one lucrative office at the same time, except as in the constitution expressly provided, etc. Held, that the term "lucrative," as defined by Webster, means 'yielding lucre; gainful; profitable; making increase of money or goods; as a lucrative trade, lucrative business or office'—and that the test was whether the office yielded a pay supposed to be an adequate compensation for the services/or duties performed. The lucrateness of an office, which is its net profits, does not depend upon the amount of compensation affixed to it, but expenses incident to an office with a high salary may render it less lucrative in this latter sense than other offices having a much lower rate of compensation, but the office is nevertheless a lucrative one."

In *Crawford vs. Dunbar*, 52 Cal. 36, 39, the court said:

"'Lucrative office,' within constitution, article 4, section 21, prohibiting the holder of a lucrative office from holding any other office of profit under the state, means an office attached to which is a pecuniary salary. Thus an office to which is annexed a salary of \$1,000 per annum is a lucrative office, within the section."

In *State vs. Slagle*, 115 Penn., 336, the court said that a lucrative office is one whose pay is affixed to the performance of its duties and that the office of deputy sheriff, whether entitled to the compensation fixed by contract between the sheriff and the deputy or entitled to the fees allowed by law, is a lucrative office within constitution, article 2, section 26.

A lucrative office, as will be observed, is an office which yields compensation, is gainful or profitable. The office of mayor of a city or town is a gainful office and does yield compensation, and therefore must be held to be a lucrative office.

It follows that a member of the general assembly, under the constitution, cannot hold the office of mayor of a city or town for the reason that such office is a lucrative office within the meaning of section 22 of article 3, of the constitution. BEN J. GIBSON, Attorney General.

ESTABLISHING OF WARDS IN CITIES

An ordinance creating more wards than allowed by statute is void and should be repealed.

July 5, 1922.

Hon. Glenn C. Haynes, Auditor of State: You have submitted to this department the following statement of facts:

"The city of Fort Madison, being a city of the second class, is entitled under the statute not to exceed five wards. About three years ago the city council divided the fifth ward into two wards, making a total of six wards for said city."

You then ask:

"What procedure is necessary to remedy this error?"

Section 641 of the supplement to the code, 1913, authorizes city councils to divide the city into wards, the number in cities of the second class not to exceed five.

Section 641 reads as follows:

"Cities may be, by the council thereof, divided into wards, new ones created, or the boundaries changed, but in all cases, whether it be the

creation of wards or the changing of the boundaries thereof, the same shall be laid off, as nearly as may be, in a rectangular form, conforming the lines to the center of the streets or alleys, and giving to each ward, as far as practicable, an equal population; but in cities of the second class the number shall not be increased beyond five nor decreased to less than two."

Statutes conferring powers upon cities and towns are strictly construed against the city or town. Section 641, *supra*, limits the number of wards in a city of the second class to five. Prior to the adoption of the ordinance in question, the city of Fort Madison had reached its maximum limit in the number of wards. Therefore, the ordinance creating an additional ward is absolutely void. As bearing somewhat upon this question see: *Cascaden vs. City of Waterloo*, 106 Iowa, 673.

The proper procedure, in my opinion, for the city council of the city of Fort Madison to pursue is to adopt an ordinance repealing the ordinance in question, thereby leaving the old fifth ward intact, and then fill the vacancy as provided for in section 668, subdivision 9 of the supplement to the code, 1913.

BEN J. GIBSON, *Attorney General*.

TAKING SAND FROM MISSISSIPPI

There is no express statute prohibiting the taking of sand from the Mississippi river.

May 21, 1921.

Hon. W. C. Ramsay, Secretary of State: I am returning herewith a communication addressed to you and upon which you desire an opinion as to the legality of pumping sand and gravel from the Mississippi river and disposing of the same.

The act of congress in admitting into the union the state of Iowa fixed its boundaries so as to include all that part of the Mississippi river from the center of the channel thereof lying opposite the state of Iowa, and in section 3 of the act it defines the jurisdiction of the state of Iowa over that river as follows:

"And be it further enacted, that the said state of Iowa shall have concurrent jurisdiction on the river Mississippi, and every other river bordering on the said state of Iowa, so far as the said rivers shall form a common boundary to said state and any other state or states now or hereafter to be formed or bounded by the same: such rivers to be common to both; and that the said river Mississippi, and the navigable waters leading into the same, shall be common highways, and forever free, as well to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, impost or toll therefor, imposed by the said state of Iowa."

Insofar as this department is informed neither the federal courts nor the courts of this state have ever passed upon the question of whether the state acquired title by this act of congress to the bed of the river in the sense that it would have jurisdiction over the taking of sand or gravel therefrom and there is no statute in this state at this time expressly forbidding the taking of such sand or gravel except that such sand or gravel could not be taken if it interfered in any way with the use of the river as a river of navigation or as a highway of commerce.

BEN J. GIBSON, *Attorney General*,

By JOHN FLETCHER, *Assistant Attorney General*.

SUPERIOR COURT—VACANCY IN OFFICE

Appointment only until expiration of term for which predecessor was elected.

October 5, 1922.

Hon. N. E. Kendall, Governor of Iowa: I am in receipt of your communication of the 5th instant in which you propounded the following inquiry:

"Hon. Atherton B. Clark, superior judge in the city of Cedar Rapids, has resigned and I desire to elect his successor. He was elected at the November election, 1918, and entered upon the discharge of his duties at the opening of January, 1919. In view of existing law I wish you would advise me how the commission of Mr. Clark's successor should read as to time. In other words, when does the commission of Mr. Clark's successor as superior judge expire?"

In your proposition you state that Honorable Atherton B. Clark was elected superior judge in the city of Cedar Rapids at the November, 1918, election, and entered upon the discharge of his duties on the 1st day of January, 1919. I assume for the purpose of your inquiry that he was elected in 1918 for the full term of four years, and that his term of office would expire on the 1st day of January, 1923.

At the time Judge Clark was elected we had a statute providing for the election of superior judges at the regular November election, but subsequent to that time the 38th general assembly enacted chapter 63, section V of which reads as follows:

"In any city in which a superior court has been or may hereafter be established, the judge of said court shall be nominated and elected in the same manner now provided by law for the nomination and election of other elective officers in such city."

The above quoted section is supplemented by section 7 of the same act, and when these two sections are read together, it is apparent that in the election of superior judges the legislature contemplated that they should be elected, not only in the manner provided by law for the election of city officers, but also at the time that other city officers are elected.

Were it not for the enactment above referred to, the term of office of the person appointed by you as a successor to Judge Clark would expire upon the election and qualification of Judge Clark's successor at the general election this November. But because of the new enactment no successor can be elected by the people of Cedar Rapids during the remainder of the term for which Judge Clark was elected.

It is my opinion, therefore, that the commission of the person appointed by you as a successor to Judge Clark will expire on the 1st day of January, 1923. Of course, under our existing statutes there can be no one elected by the people to enter upon the duties of the office of superior judge on the 1st day of January, 1923, but in my opinion the commission issued by you cannot authorize the appointee to act beyond the term for which Judge Clark was elected.

BEN J. GIBSON, *Attorney General*,

By JOHN FLETCHER, *Assistant Attorney General*.

ADOPTION OF WARDS OF STATE

Child born in asylum may be transferred to orphans home on ground of abandonment. Orphans home with approval of board of control may execute adoption papers, consent to be given by mayor or clerk of court.

May 24, 1922.

Board of Control of State Institutions, State House: We have your letter in which you state:

"A woman was regularly committed to the Cherokee state hospital in March, 1914. In December of the same year she was paroled and again returned to the hospital, November 16, 1915.

"While on parole her mental symptoms became very prominent and her actions led her into liaison with various men; when she was returned to the hospital she was pregnant. The husband, although recognizing her mental condition and pitying her, would, of course, have nothing to do with the child, which was born in the institution.

"February 20, 1917, the child was admitted to the Iowa Soldiers' Orphans Home, Davenport, on the application of Dr. Donohoe, Cherokee state hospital, the application being approved by Hon. Wm. Hutchinson of the district court in and for Cherokee county. The child has been placed for two or more years with a family residing in Waterloo who are fully cognizant of its history. They are very much attached to the little girl and desire adoption papers.

"The question which now confronts this board is, whether or not the board is in position to execute adoption papers, or is it necessary for a guardian to be appointed to represent the mother in giving her consent."

We assume that this child was committed to the Iowa Soldiers' Orphans' Home at Davenport on the showing that it was abandoned. Under such circumstances the Iowa Soldiers' Orphans' Home is authorized by statute to execute papers of adoption as provided in section 254-a43 and section 2690-a of the supplement to the code, 1913. The consent to such adoption in case of an abandoned child may be made by the mayor of the city where the child resides or if the child is not living in the city then by the clerk of the district court of the county where the child is living as provided in section 3251 of the code of 1897.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

WHO SHOULD RETURN FUGITIVES

Who is primarily charged with duty of going to other counties and other states to apprehend and return criminals. General discussion.

May 9, 1922.

Mr. Herbert McCabe, County Attorney, Dubuque, Iowa: Your letter of March 13 addressed to Mr. Gibson has just been called to my attention and I have been requested to answer the questions propounded by you.

I will not quote your entire letter because of its length but will in a brief way set out the questions on which you desire our opinion as follows:

"1. Can the head of the police department of a city acting on his own initiative go to another state for the purpose of arresting and bringing back a suspect whom he justifiably has reason to believe was connected with a murder or other felony and afterwards secure pay from the county for his expense by presenting his bill to the board of supervisors?"

"2. Which officer, the sheriff or chief of police, is charged with the duty of proceeding to other counties and to other states for the purpose of apprehending and returning persons charged with crime?"

In answer to your first question. Ordinarily the jurisdiction of the police force is limited by the corporate limits of the city. Ordinarily a fugitive from justice from this state is returned by an agent appointed by the governor for that purpose. If the fugitive refuses to return he can, of course, be returned only upon requisition by the governor of this state, honored by the governor of the state from which he is returned. However, it frequently happens that one arrested in a foreign state on an order from an officer of this state charging him with a crime committed here signifies his willingness to return without the formality of requisition. Under such circumstances the board of supervisors of the county could authorize the sheriff or other peace officer to proceed to the foreign state and return the fugitive and pay the expense of such officer on claim properly filed therefor.

Second: The sheriff of the county is charged primarily with the duty of proceeding to other counties for the purpose of apprehending and returning persons charged with crime. The agent of the Governor is primarily charged with the duty of proceeding to other states for the purpose of apprehending and returning fugitives. However, under the provisions of section 5186 of the code of 1897 a warrant for arrest may be delivered to any peace officer for execution and served in any county in the state.

In cases of crime therefore when a warrant of arrest is issued the peace officer in whose hands such warrant is placed is charged primarily with the duty of executing the same.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

INCREASING INTEREST RATE OF BUILDING AND LOAN ASSOCIATIONS

Building and loan associations may by amendment of articles of incorporation increase rate of interest provided equitable plan is devised so that all borrowers entering at same time are placed upon an equality.

February 2, 1921.

Hon G. C. Haynes, Auditor of State: We are in receipt of your letter of January 31 in which you ask for an opinion relative to the correct interpretation of the interest rate provision of section 1893-a of the supplement to the code, 1913.

Section 1893-a of the supplement to the code, 1913, in so far as it applies to the question is as follows:

"No such associations shall be authorized or empowered to collect or receive premiums and interest from a borrower at a greater rate than eight per cent, and in case of an amendment to the articles of incorporation so that a *lower* rate of interest or charge for the use of money loaned to the borrowing member is authorized than the rate of interest charged upon loans to members who have theretofore borrowed, shall in like manner be reduced to the same rate as that permitted to borrowers after such amendments to the articles of incorporation, so that the interest charged under whatever name, whether charged as premium or interest to all members of the same association, shall be the same, all reductions

of the rate of interest or premium charged to new borrowers shall be made and apply equally to those who have theretofore borrowed."

The exact question presented is in words as follows:

"Will you kindly give me your opinion, under interpretation of the interest rate provisions of chapter 13 of the code, regulating building and loan associations, as to whether an association can by amending its articles of incorporation increase its rate of interest on loans without making the rate of increase retroactive to loans already made at a lower rate?"

Chapter 13 of title IX of the code is devoted to building and loan associations, their organization, articles of incorporation, and other provisions relative to such associations. Section 1893 provides just what the articles of incorporation shall show. Section 1894 provides that the same must be equitable in all respects. We quote this section:

"Such articles of incorporation with the by-laws of the association shall be presented to the executive council, and if it finds they are in conformity with the law, and based upon a plan equitable in all respects to its members, it shall attach thereto its certificate of approval, and thereupon such articles and by-laws shall be filed in the office of the auditor of state, who shall issue a certificate authorizing the association to transact business. Amendments to such articles may be made from time to time at any regular or special meeting of the stockholders, and shall in like manner be submitted to the executive council and approved by it. The council shall keep a record of its proceedings with reference to such associations."

It will be observed that in any event before the articles of incorporation are approved, or before amendments thereto are approved, there must be a finding by the executive council that such articles are in conformity with the law and based upon a plan equitable in all respects to the members of the association. The only question arising in this case is as to whether or not the plan presented is equitable. Of course it will be observed that the ultimate finding in this respect must be by the executive council as it is within the province of the council to determine this question. This department can only give an opinion as to the provisions of the law relative to the question submitted. In considering this matter we have gone over the prior records of the department and we find that on January 12, 1912, this identical question was presented to the department of justice and an opinion rendered thereon, which opinion is in words as follows:

"Yours of the 9th inst. in which you present the question as to whether or not, in view of the provisions of section 1893-a of the supplement to the code, a building and loan association which has once reduced its rate of interest to 6 per cent could, by amending its articles of incorporation, increase the rate of interest to 7 per cent, there being outstanding mortgages at the time drawing 6 per cent interest, has been received.

"The section of the statute to which you refer contemplates that the rate of interest may be as high as 8 per cent, and it is only where a reduction in the rate is made that a reduction to the same rate is required to be made on outstanding obligations drawing a higher rate. If a higher rate were established, it is clear that it could not be made to apply to outstanding obligations, unless at the time they gave their note and mortgage it was agreed that the rate might be increased. I am of the opinion, however, that new loans could be made at the higher rate without violating this section.

"I have taken the matter up with the secretary of the executive council, and he is of the opinion that the rate might be increased, but that if it were so increased, those paying a higher rate should be inclined to

a different series and the accounts kept separately from those paying the lower rate, and that by this means, there would be no discrimination among members of the same class or series, and that such an amendment to the articles of incorporation would meet the approval of the executive council."

It will be observed from what has been said heretofore that the original statute governing this matter was amended by the 28th general assembly, and in such amendment there was a provision governing the reduction in the rate of interest to be charged. This, however, does not apply to situations in which there is an increase rate provided for. The very use of the word "lower" is indicative of the legislative intent to have the section apply only to those instances in which there is a lower rate of interest charged.

I am convinced therefore, that so far as the law itself is concerned, there is nothing to prevent a building and loan association from amending its articles of incorporation to the end that a higher rate of interest may be charged. The question as to whether or not such an amendment is equitable in all respects will depend entirely upon the circumstances, upon the articles of incorporation themselves, and upon the plan provided for in the amendment. I am convinced, however, that before a higher rate of interest can be charged, the articles of incorporation must be amended and such amendment must be approved by the executive council. I am further convinced that there should be an equitable plan provided to the end that each and every borrower entering the association at any given time will be placed upon an absolute equality with all borrowers entering under the same conditions and the same provisions of the articles of incorporation.

In recapitulation we are of the opinion:

First: That the articles of incorporation may be amended so as to charge a higher rate.

Second: That such rate must be equitable to all concerned who are of the same class or status.

Third: That any such action will not be retroactive except upon consent of the parties.

We believe that this answers the questions submitted, and that nothing further need be said.

BEN J. GIBSON, *Attorney General.*

BOXING CONTESTS

Two things prohibiting: 1. Charging of admission. 2. Boxing for prize, reward or anything of value. In the absence of one or both of these essentials boxing contest not criminal.

March 23, 1922.

Mr. H. C. Horack, Iowa City, Iowa: Your letter of the 16th inst. addressed to Mr. Gibson has been referred to me for attention. You ask the opinion of this department on the following question:

"I have been requested by the department of physical education to get your opinion concerning a boxing tournament put on by the department of physical education at which admission fees will be charged. The contest is purely a student contest to encourage the sport of boxing and the participants receive no prize or reward. They might be given medals or something of that sort as a recognition of superiority but nothing which is given by way of compensation.

"The section of the code which is concerned is 8833 of the compiled code.

"We would very much appreciate your opinion on this subject as soon as you conveniently can get at it."

Section 8833 of the compiled code is identical with section 5038-a of the supplement to the code, 1913, and is as follows:

"Whoever engages in any boxing contest or sparring exhibition with or without gloves for a prize, reward, or anything of value, at which an admission fee is charged or received, either directly or indirectly, and whoever knowingly aids, abets, or assists in any such boxing contest or sparring exhibition, and any owner or lessee of any ground, lot, building, hall, or structure of any kind knowingly permitting the same to be used for such boxing contests or sparring exhibition, shall be fined not exceeding three hundred dollars, or imprisonment in the county jail not exceeding ninety days."

From your letter we assume that what the department of physical education proposes is a sparring exhibition. For such an exhibition to be criminal under the provisions of the section above quoted two things are essential.

1. The exhibition shall be for a prize, reward or anything of value.
2. An admission fee is charged or received directly or indirectly.

In the absence of either one of these two essentials the sparring exhibition is not prohibited in our opinion.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

MUNICIPAL BAND FUND

Cities and towns are authorized to levy a tax of not to exceed two mills for the purpose of rendering aid to municipal bands.

March 24, 1922.

Mr. Clarence R. Off, County Attorney, North English, Iowa: In your letter of March 22, 1922, you have requested an opinion from this department as to the interpretation to be given section 4 of chapter 37 of the acts of the 39th general assembly. Your request is in words as follows:

"There are several towns in Iowa county who are submitting the proposition in the coming election on Monday as to whether or not certain millage shall be levied each year for the purpose of furnishing a band fund. In several towns this proposition will carry. According to section 4 of chapter 37 of the acts of the 39th general assembly, the provision is made that the council or commission shall then levy a tax sufficient to support or employ such band, not to exceed two mills on the *assessed* valuation of such municipality.

"The auditor of Iowa county asked me yesterday for an opinion as to how he was going to make the levy on the assessed value and wondered whether that did not mean the taxable value. In your opinion would it not be proper for the auditor to use the taxable value as a basis for the levy?"

Section 1 of chapter 37 of the acts of the 39th general assembly provides that cities and towns within the limitations act are authorized to levy a tax of not to exceed two mills, for the purpose of rendering aid to municipal bands. This is the section authorizing the levy.

Section 4 of the chapter provides that when authorized by a vote of the people that it shall be the duty of the city or town council to make the levy. This section says in substance that the levy shall be two mills on the assessed valuation. The whole statute is to be read together and

in conjunction with all of the statutes relating to the assessment for taxation.

The statutes of this state provide that all property, except as otherwise specially provided, shall be assessed at its actual value, and that the taxable value thereof shall be 25 per cent. All levies are based upon the taxable value. We are clearly of the opinion that this chapter, taken as a whole with all the other sections relating to taxation of property, is to be construed as authorizing a levy of two mills on the taxable value. This certainly is true as to the section authorizing the levy; and the mere fact that the section relating to the duty of the council provides that the levy is to be on the assessed value, would not be sufficient authority to levy in excess of the levy provided by statute and authorized by section 1, as stated.

It is therefore the opinion of this department that the two mill levy authorized under the provisions of this chapter is to be based upon the taxable value and not upon the assessed value.

BEN J. GIBSON, *Attorney General.*

OWNERSHIP OF ICE

Ice on non-navigable and unmeandered streams belongs to riparian owners.

November 28, 1921.

Hon. N. E. Kendall, Governor of Iowa: Your letter of the 22nd inst., addressed to Mr. Gibson, has been referred to me. Your letter contains the following request for an opinion from Mr. A. M. Troutner, of Nashua, Iowa:

"I beg to ask you, or if it is not your duty to answer, to have you refer me to state officer who will give me the legal answer as to who owns the ice in Cedar river either above or below dam at Nashua, Iowa.

"Please hand this to officer of state having legal answer for me.

"Thanking you very much for same."

The answer to this question will depend entirely upon whether or not Cedar river is a meandered stream. If a meandered stream the right to the ice that forms on the surface is in the public generally and one individual has as much right thereto as another providing he makes an appropriation by taking possession thereof at the time the ice field is ready for harvest.

The land office clerk informs us that the Cedar river is meandered from the point where it flows into the Iowa river to the east line of the city of Cedar Falls. Nashua is north of Cedar Falls and, if the information from the land office is accurate, is on a part of the stream which is not meandered and the bed of the stream at that point would belong to the riparian owners on either side thereof and the ice formed thereon appertains to the land and belongs to him who has the right to possess and use the land. That is to say, the owner of the land on one side of the stream would own to the middle of the bed of the stream, and whoever is in possession of such land either as owner or tenant of the owner is entitled to the ice that there forms.

There has been great controversy in different states over the character of such ice—whether it is real or personal property. Our supreme court,

though not determining the character of property which such ice takes, has settled the question of the right to its use in the case of *Marsh vs. McNider*, 88 Iowa, and on page 395 of that report will be found the following language:

"Whether the ice which forms in a running stream is to be regarded technically as a part of the land over which it is formed or to which it is attached is a question we do not find it necessary to determine. It is water congealed, and, although more readily secured and controlled for many purposes than water it is in most respects subject to the rules which govern the rights of the riparian proprietor to the water. Ice may be attached to his land, but it was not produced by the land, drew nothing from it, and will give nothing to it. It is transient by nature, and will soon disappear, unless prevented by the labor of man. It is a product of the changing seasons, which the occupier of the soil may use as he might have used the water from which it was formed. If he owns the land under it, he may use the ice as he might have used the water, to supply his natural wants, and for other purposes, so far as he can do so without affecting the rights of others, as of lower owners on the same stream. Such use appertains to the land, and belongs to him who has the right to possess and use it."

This quotation we believe answers the question propounded by Mr. Troutner.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

INTEREST TO BE PAID ON PUBLIC FUNDS

Section 113 of the supplement to code, 1913, as amended by section 1, chapter 114, acts of the 39th general assembly, refers only to state funds.

July 30, 1921.

Hon. W. J. Burbank, Treasurer of State: You have requested the opinion of this department on the following proposition:

"Chapter 114, 39th general assembly, which amends chapter 114, code 1913, provides for the rate of interest to be paid by depositories upon public funds.

"Does this act as changed apply to city and school funds?"

Section 113 of the supplement to the code, 1913, as amended by section 1 of chapter 114, acts of the 39th general assembly, refers only to state funds.

Section 1457 of the supplement to the code, 1913, as amended by section 2 of chapter 114, acts of the 39th general assembly, refers solely to county funds.

There is no reference made in either section to either city or school funds, and the only change worked in the law by the amendments in chapter 114 of the acts of the 39th general assembly is the change from two per cent interest to two and one-half per cent interest. Otherwise the sections are practically the same as before.

Section 2768 of the supplement to the code, 1913, as amended by paragraph 4 of chapter 386 of the laws of the 37th general assembly refers to the duties of school treasurers, and the depositing of school funds by such officers.

Section 660-a of the supplement to the code, 1913, refers to the depositing of city funds.

BEN J. GIBSON, *Attorney General*,

By NEILL GARRETT, *Assistant Attorney General*.

LENGTH OF INDETERMINATE SENTENCE

In cases where defendants are convicted of crime punishable by imprisonment in the penitentiary, with no alternative punishment by jail sentence or fine, the court is without power to fix the time of duration of imprisonment in any other way than the same is fixed by the indeterminate sentence law.

September 3, 1921.

Hon. N. E. Kendall, Governor of Iowa: Your letter of September 3 addressed to Mr. Gibson has been referred to me for answer. You state:

"Referring to my conversation this morning with Hon. Bruce J. Flick, assistant attorney general, I have to say that on September 6, 1919, Hon. N. J. Lee, judge of the 14th judicial district of Iowa, entered the following order upon a plea of guilty in the case of *State of Iowa vs. Jim Jackson*, indicted for rape:

"It is therefore ordered and adjudged by the undersigned judge that the said defendant is guilty of the crime of rape as set forth and charged in said indictment, and it is further ordered and adjudged that the defendant be imprisoned in the penitentiary at Fort Madison at hard labor, for a term of fifteen years, and that he pay the costs of this action taxed at \$74.43."

Section 4756 of the code provides as follows:

"If any person ravish and carnally know any female of the age of fifteen years or more by force and against her will, * * * he shall be imprisoned in the penitentiary for life or any term of years."

"The question immediately before me is as to the legality of Judge Lee's sentence. In punishment for rape, does the court have the power to fix a definite term or must he sentence for life?"

Chapter 192, section 9, of the acts of the 39th general assembly, which appears as section 5718-a13 of the supplement to the code, 1913, is as follows:

"After July fourth, nineteen hundred and seven, whenever any person over sixteen years of age is convicted of a felony, committed subsequent to July fourth, nineteen hundred and seven, except treason or murder, the court imposing a sentence of confinement in the penitentiary shall not fix the limit or duration of the same, but the term of such imprisonment shall not exceed the maximum term provided by law for the crime of which the prisoner was convicted; provided, that if a person be sentenced for two or more separate offenses and the second or further term is ordered to begin at the expiration of the first and such succeeding term of sentence is specified in the order of commitment, the several terms shall for the purpose of this act be construed as one continuous term of imprisonment; and, provided, that, where one is convicted of a felony that is punishable by imprisonment in the penitentiary, or by fine, or by imprisonment in the county jail, or both, the court may impose the lighter sentence if it shall so elect."

The above section constitutes what is known as our "indeterminate sentence" law. Its constitutionality has been questioned in numerous cases, and was first affirmed in the case of *State vs. Duff*, 144 Iowa, 142, and the opinion in that case has been followed by our court every time the question has been presented for determination. The constitutionality of the law being established, it is next in importance to determine the exact meaning of its provisions as interpreted by our court.

The section above quoted provides in itself that it shall apply only in cases where defendant is convicted of a felony committed subsequent to July 4, 1907. The record in the case submitted by you makes it unquestionable that the crime for which Jim Jackson was sentenced was com-

mitted subsequent to that date. The crime for which he was committed, to-wit: rape, being punishable by imprisonment in the penitentiary, no provision being made for fine or imprisonment in the county jail, the last provision of section 5718-a13 above quoted, following the semi-colon appearing after the word "imprisonment," has no application.

In the case of *State vs. Perkins*, reported in 143 Iowa, beginning on page 55, the supreme court uses the following language, which will be found on page 60:

"It is clear that the maximum imprisonment and punishment provided for by section 4932 of the code is three years in the penitentiary. Section 5718-a13 expressly provides that, except for treason or murder, the court imposing sentence of confinement in the penitentiary shall not fix the limit or duration of the same, but the term of such imprisonment shall not exceed the maximum term provided by law for the crime. While the district court has the power under the law to imprison in the penitentiary by the terms of this statute it is denied the power to fix the terms of such imprisonment, and the law itself says what the term shall be. It says, in effect, that it shall be the maximum term provided for in the law fixing the punishment or imprisonment."

As bearing on the same question, see the following authorities: *State vs. Loos*, 145 Iowa, 170; *State vs. Haines*, 152 Iowa, 394; *Adams vs. Barr*, 154 Iowa, 83.

In the case last above cited, one of the questions presented to the supreme court was whether or not the judgment was one within the power and authority of the district court to enter. Passing on this question, Mr. Justice Weaver speaking for the court, says:

"By its terms it is provided, as we have already noted, that in imposing judgment of imprisonment, in the penitentiary in cases of the kind therein described, the court 'shall not fix the limit or duration of the same.' In other words, in such cases a judgment or sentence that the defendant 'be imprisoned in the penitentiary according to law' is all that is required, and whatever is added thereto is unauthorized and may be ignored as void or mere surplusage. No reference whatever need be or should be made to a minimum or maximum period. When the record shows the offense of which he has been convicted, and that he is adjudged to suffer imprisonment in the penitentiary, the statute controls the period or term of his restraint, and it is to this statute, and not to the mitimum, to which the warden must look to ascertain the period of time for which he may keep him in custody."

An examination of the authorities above cited will lead unquestionably to the conclusion that your questions should be answered as follows:

1st. Defendant having been convicted of rape subsequent to July 4, 1907, Judge Lee's judgment of sentence is invalid.

2nd. In punishment for rape the court does not have the power to fix a definite term, but must sentence a defendant after conviction for an indeterminate term, not exceeding his natural life, and in case the court does fix a definite term, it is the duty of the warden to keep the prisoner in restraint for such maximum period, less good time earned, should he not be sooner paroled or pardoned, as provided by law.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

POWERS OF CUSTODIAN

Chapter 108, acts of the 39th general assembly makes it clear that the custodian appointed by executive council has the authority to assign the various men employed about the capitol to such work as he may desire.

September 29, 1921.

Honorable Executive Council: We are in receipt of your communication of September 6 in which you request an opinion of this department as to who is the custodian of the Iowa historical, memorial and art building.

Chapter 108, acts of the 39th general assembly, repealed section 147 of the supplemental supplement to the code of Iowa, 1915, which was enacted by the 36th general assembly. Section 147 S. S., 1915, made the adjutant general of the state of Iowa custodian of the Capitol building and all the grounds and premises appurtenant thereto, and all other state buildings erected upon the capitol grounds—"except the Iowa historical, memorial and art building and grounds." As above stated, this section was repealed by chapter 108 of the acts of the 39th general assembly, and section 1 of that act provides that the executive council shall appoint a custodian for the public buildings and grounds.

Section 2 of the act defines the duty of the custodian as follows:

"To have charge of, preserve and adequately protect the state capitol and grounds, and all other state grounds and buildings at the seat of government, and all property connected therewith or used therein or thereon.

"To see that all parts and apartments of said buildings are properly ventilated and kept clean and in order.

"To have, at all times, charge of and supervision over the police, janitors, and other employees of his department in and about the capitol and other state buildings at the seat of government."

There are, of course, other provisions in section 2, but they are not essential to a determination of the question involved in this opinion.

It will be noticed from a reading of section 2 that the custodian is given charge of not only the capitol building itself, but "all other state grounds and buildings at the seat of government, and all property connected therewith or used therein or thereon." So that in our opinion, as the law now stands, the person appointed by the executive council as custodian has charge of all of the buildings and property of the state of Iowa located on the capitol grounds, in the city of Des Moines.

You also request to be advised as to whether or not the executive council, acting through the custodian appointed by them, have the power to transfer janitors assigned to the historical building to such other work about the capitol grounds or buildings, as they may desire. Paragraph 4 of section 2 which we have above quoted, gives the custodian charge of and supervision over the janitors and other employees of his department, and paragraph 2 of the same section makes it a part of his duties to see that all parts and apartments of the buildings on the capitol grounds are properly ventilated, kept clean and in order.

It seems to us that the language of these paragraphs is clear, and that there can be little if any question but that the legislature placed all persons employed by the state in the matter of caring for the property of the state, located on the capitol grounds, by way of keeping the buildings

heated, clean and in repair, under the supervision of the custodian, and that being true, it necessarily follows that he has authority to assign the various men employed for these purposes to such work as he may desire to have them perform.

BEN J. GIBSON, *Attorney General*,

By JOHN FLETCHER, *Assistant Attorney General*.

LIMITATION OF AUTHORITY OF BOARD OF SUPERVISORS TO SECURE PLANS FOR COURT HOUSE

Board has no power to expend money for plans and specifications for court house or other building under section 423 of code, where the total cost will exceed \$10,000, unless first approved by a vote of the people.

May 13, 1921.

Mr. H. K. Lockwood, County Attorney, Cedar Rapids, Iowa: Receipt is hereby acknowledged of your letter of May 9 in which you request the opinion of this department on the following proposition:

"I would like your opinion as to whether or not the board of supervisors of Linn county, under section 423 of the code of Iowa as amended, or by virtue of any other provision of our law, have authority to pay an architect the sum of \$10,000.00 for preliminary plans and specifications of a proposed county court house before a bond issue for the erection of the court house has been authorized by a vote of the people as required by law.

"The situation here is that our board of supervisors, before the election to vote on the bond issue was held, entered into a written contract with one J. W. Royer, architect, whereby the said Royer was to furnish plans and specifications for a proposed court house, and, before the said election was held, the board of supervisors actually paid out \$7,500.00 on the contract. The bond issue failed to carry at the election, and the board of supervisors have now authorized the sum of \$2,500.00 more to be paid the architect. What are the rights of Linn county, the board of supervisors and Royer?"

The first question relates to the validity of the action of the board of supervisors in entering into the contract with the architect for the approving and furnishing of plans and specifications for the erection of a court house.

In considering this question it is necessary to determine what relation the plans and specifications bear to the construction or erection of a court house. Plans and specifications are a very important part of any major building enterprise. No one would attempt to build a court house without plans and specifications. The contract with the architect to draw plans and specifications for the erection of a court house is just as much a part of the building project as the contract with the contractor to build and erect a court house from those plans. Both contracts are in the same category. They are inseparable as being integral parts of the building operation.

Section 423 of the supplemental supplement to the code, 1915, as amended, provides:

"The board of supervisors shall not order the erection of a court house * * * when the probable cost will exceed ten thousand dollars * * * until a proposition therefor shall have been first submitted to the legal voters of the county and voted for by majority of all persons voting for and against such proposition at a general or special election * * *."

From the statute it is apparent that the board of supervisors has no authority to enter into any contract toward the erection of a court house

costing in excess of ten thousand dollars unless the same is approved by a vote of the people. It is the duty of the board of supervisors under this statute to first estimate the cost of the court house contemplated. If the estimated cost of the entire project exceeds ten thousand dollars, the board has no authority to enter into any contract for the erection of a court house unless the proposition is sanctioned by a vote of the people. The expenditure of ten thousand dollars without providing for the completion of a court house from that amount is clearly in excess of the board's power without first having secured the approval of the people by popular vote and is an *ultra vires* act. See *Harrison County vs. Ogden*, 145 N. W. 681.

You next ask—"What are the rights of Linn county, the board of supervisors and Royer, the architect?" It is the opinion of this department that the county auditor should be instructed not to issue a warrant for twenty-five hundred dollars for Royer, the architect, as authorized by the board of supervisors. For the further procedure to be followed, we would refer you to the procedure followed in the case of *Harrison County vs. Ogden*, *supra*.

BEN J. GIBSON, *Attorney General*,

By NEILL GARRETT, *Assistant Attorney General*.

RECORDING OF CHATTEL MORTGAGES

It is the duty of county recorder to record real estate mortgages with chattel mortgage clauses and index same in chattel mortgage index, when so requested.

July 27, 1921.

Mr. S. G. Bammer, County Attorney, Estherville, Iowa: Your letter of recent date addressed to the attorney general has been referred to me for attention.

You ask for a construction of chapter 246, acts of the 39th general assembly, relating to the indexing of real estate mortgages containing chattel mortgage clauses, particularly with respect to the following:

"Where real estate mortgages containing chattel mortgage clauses were received and filed by the county recorder prior to the taking effect of chapter 246, acts of the 38th general assembly, is it mandatory upon the county recorder to now record and index such mortgages? Also what fee should be charged for indexing the same?"

Chapter 246, acts of the 39th general assembly amends chapter 352, acts of the 38th general assembly by adding to the latter chapter the following:

"Where in a real estate mortgage there is any provision creating an encumbrance upon personal property or providing for a receivership in the event of foreclosure, the person, firm or corporation offering the same for record, may have the same recorded at length, and also indexed in the chattel mortgage index book provided for herein. In said index book the recorder shall show the book and page where said real estate mortgage is recorded and such recording shall have the same force and effect as though said real estate mortgages were retained by the county recorder in the manner provided for herein and such real estate mortgages shall not be required to be filed and kept in the office of the county recorder. When such real estate mortgage is released of record, the county recorder shall make entry thereof in the chattel mortgage index book."

Pursuant to the provisions of chapter 246, *supra*, it will be observed that any person, firm or corporation offering a real estate mortgage with

a chattel mortgage clause for record "may have the same recorded at length, and also indexed in the chattel mortgage index provided for" in chapter 352, acts of the 38th general assembly.

Evidently, it is not mandatory upon the county recorder to record and index such mortgages unless the person, offering the same for record, so requests, in which event it becomes the duty of the recorder to record the mortgage at length in the real estate mortgage record book and to index it in the chattel mortgage index book, reciting therein the book and page where the real estate mortgage is recorded. When all that is done, the original mortgage may then be returned to the person offering it for record.

In respect to real estate mortgages containing chattel mortgage clauses which have been received by the county recorder prior to the taking effect of chapter 246, supra, and which have been merely filed and indexed by the recorder, such mortgages may now be recorded at length in the real estate mortgage record book provided the person offering it for record now requests it, in which event it shall be either reindexed, or the recorder shall designate upon the chattel mortgage index book, if already indexed, the book and page of the real estate mortgage record where it can be found.

As to the fee for indexing such mortgages, the statute does not provide any, but for recording the mortgage, the recorder is allowed a fee of fifty cents for the first four hundred words and ten cents for each additional one hundred words or fraction thereof.

This opinion shall not be construed as holding that real estate mortgages with chattel mortgage clauses recorded or indexed prior to the taking effect of chapter 246, acts of the 39th general assembly shall be given any other effect from what they already had. As to that question we express no opinion.

BEN J. GIBSON, *Attorney General*,

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

INDEXING OF MORTGAGES

Real estate mortgages containing receivership or chattel mortgage clauses are to be indexed upon request of party offering them for record. The recorder not required to index in chattel mortgage index book without such request and no fee is required for such indexing.

September 30, 1921.

Hon. Glenn C. Haynes, Auditor of State: Your letter of September 24 addressed to this department by Mr. G. W. Kyte, chief clerk of your accounting department, has been referred to me for answer:

You request the official opinion of this department on the following questions:

"Under the provisions of chapter 246, acts of the 39th general assembly, do all real estate mortgages pledging rents, issues and profits or providing for a receivership in the event of foreclosure have to be indexed in the chattel mortgage index book after they have been recorded at length, or only when the party filing same asks to have them indexed in the chattel mortgage index?"

"Where a real estate mortgage containing a clause pledging the rents, issues and profits is recorded at length and also indexed in the chattel

mortgage index, shall the recorder charge a 25 cent fee for indexing the mortgage in the chattel index in addition to the regular recording fee?"

Chapter 246, acts of the 39th general assembly provides as follows:

"Where in a real estate mortgage there is any provision creating an encumbrance upon personal property or providing for a receivership in the event of foreclosure, the person, firm or corporation offering the same for record, may have the same recorded at length, and also indexed in the chattel mortgage index book provided for herein. In said index book the recorder shall show the book and page where said real estate mortgage is recorded and such recording shall have the same force and effect as though said real estate mortgages were retained by the county recorder in the manner provided for herein and such real estate mortgages shall not be required to be filed and kept in the office of the county recorder. When such real estate mortgage is released of record, the county recorder shall make entry thereof on the chattel mortgage index book."

In answer to your first question will say that chapter 246, above quoted, clearly indicates that it is the privilege of the person, firm or corporation offering the instrument therein referred to for record to have it indexed in the chattel mortgage index book and that no duty devolves upon the county recorder to so index such an instrument unless requested so to do by the party offering the same for record.

Your second question must be answered in the negative. There is no fee provided by statute for indexing a mortgage in the chattel mortgage index book and, therefore, the county recorder is without authority to charge or collect a 25 cent fee therefor.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

WHAT CONSTITUTES AN APPROPRIATION

Held that section 3, chapter 264, laws of the 39th general assembly is sufficient to constitute an appropriation, being the chapter providing for state aid to county and district fairs or agricultural societies.

July 6, 1921.

Hon. Glenn C. Haynes, Auditor of State: In your letter dated June 27, 1921, you ask for an opinion from this department, your request being in words as follows:

"It is requested that you furnish this department as soon as possible with an opinion as to whether or not the authority for withdrawals from the state treasury mentioned in section 3 of chapter 264, laws of the 39th general assembly is sufficient authority within the meaning of section 24, article 3 of the constitution of Iowa to authorize the auditor of state to draw warrants on the state treasurer.

"Your attention is invited to the fact that there is an appropriation clause in said act other than that appearing in section 3."

This request submits the simple proposition as to whether or not chapter 264 contains a provision which may be construed as an appropriation within the meaning of the constitution.

Section 24 of article 3 of the constitution is in words as follows:

"No money shall be drawn from the treasury but in consequence of appropriations made by law."

This provision of the constitution is mandatory and no money can be drawn from the state treasury save in consequence of appropriations made by the legislature. As to just what words are necessary to constitute an appropriation the courts are not in exact agreement. It has

been held in many instances that where there is sufficient language to show the clear intent of the legislature that certain funds be paid out of the state treasury that such constitutes an appropriation without the necessity for express words. It has always been the custom in this state, however, for legislative enactments calling for the expenditure of money to use the word "appropriate," "appropriated" or "appropriation." In such instances there is no question as to there being an express appropriation. In the chapter to which you refer, however, there are no express words of appropriation.

Section 3, to which you refer, is insofar as applicable to a consideration of the question submitted by you identical with the law as it was contained in section 1632 to 1644 inclusive of the code. Under such sections of the code there has been for years payments made on warrants drawn by the auditor. This fact must have been within the knowledge of the legislature at the time of the enactment of chapter 264 and it is presumed that the use of the language was made in consideration of the interpretation given such language by the officials of the state throughout a long period of years.

It will appear again that section 3 provides that:

"Any county or district fair or agricultural society upon filing with the secretary of the state board of agriculture a report as herein provided for, shall be entitled to receive from the state treasury a sum equal to eighty per cent of the first one thousand dollars, etc."

The language used is to the effect that the society or fair is entitled to receive from the state treasury a certain sum. With this in mind and turning to section 5 it will be noted that the auditor of state is directed to draw warrants on the state treasury for the funds herein above appropriated in favor of the several county or district fairs or agricultural societies.

The legislature in section 5 speaks and says that there has been an appropriation provided for in the preceding sections, this being true there can be no doubt as to the construction to be given this chapter as a whole, such construction being that there is an appropriation from the funds in the state treasury not otherwise appropriated, an amount equal to the amounts provided for in section 3 of the act.

It is therefore the opinion of this department that you are authorized to draw warrants on the state treasury in conformity to the provisions of this act upon compliance therewith as therein provided.

BEN J. GIBSON, *Attorney General.*

UNEXPENDED BALANCE OF APPROPRIATIONS

A contract entered into in good faith by a department prior to June 30, which contract cannot be completed prior to July 1, may be cared for out of the "unexpended balance" of the legislative appropriation for this particular department.

September 9, 1922.

Hon. Glenn C. Haynes, Auditor of State: On August 10, 1922, you referred to this department certain claims filed in your office August 7, 1922, by Mr. Guy Woods, and which claims have been approved by Mr. E. R. Harlan, curator of the historical department of the state of Iowa. In your

letter you requested an opinion as to whether or not these claims could be paid out of the appropriations provided for in section 14-c, of chapter 273 of the acts of the 38th general assembly. In order that the matter may be clear, we quote your letter:

"Enclosed herewith please find a claim recently filed with the board of audit by the historical department.

"The board of audit desires your opinion as to whether or not this claim can be paid from the appropriation made by section 14-c chapter 273, acts of the 38th general assembly.

"Your attention is invited to the fact that this appropriation evidently expired on June 30, 1921, and that Mr. Harlan notes on the claim that the work was contracted for on May 12, 1921. You will also note that two items for which credit is taken thereon were paid from the appropriation made by section 11-c, chapter 313, acts of the 39th general assembly.

"It is requested that the claim in duplicate be returned to this department with your opinion."

At once upon receiving your letter this department wrote you as of date August 16, 1922, suggesting that you call upon the curator for a copy of the contract referred to. We have received from you a copy of this contract, which is in words as follows:

"May 12, 1921.

"My dear Mr. Woods: You propose to furnish the camera, the airship and all necessary equipment for the making of a certain important historical motion picture film as follows:

"Provided I first go with you by automobile and arrange certain distinguishable markings along the Des Moines river showing the various streams entering into it, the different cities and towns, the abandoned towns from Des Moines down which were important in the navigation days, places of the dams and locks of the Des Moines river improvement, the established and proposed state parks and such other objects of interest historically as may be determined upon, you will navigate the air with a proper machine and camera, make runs of from seventy-five to two hundred feet as you progress the entire way from the Minnesota to the Missouri line.

"You propose that the expense of this enterprise shall not exceed \$1,500.00 of which amount there shall be paid to you in advance for film stock, etc., \$500.00, of which an itemized statement shall be filed by you before paying the balance due and for which balance due there shall be likewise filed an itemized statement. You further propose that you accept and assume all personal risk to yourself and property as also to the persons and property of anyone with or attending you, the state of Iowa to be held entirely free of all responsibility for the extra hazardous character of air navigation and photography.

"In consequence, I hereby accept your proposition and suggest the preliminary reconnaissance to begin Friday, May 13, 1921, and continue for that portion of the Des Moines river above to the city of Des Moines, my present familiarity with the stream below that point being sufficient for laying out the plan without time or expense on that account.

"The flight to be made, the photograph to be finished, except for titles, on or before July 1, 1921."

Since receiving this letter I have communicated with Mr. Woods orally. He informs me that this letter expresses approximately what the contract is, and that the claims filed are exactly what has been done to date.

Chapter 273 of the acts of the 38th general assembly is one of those acts enacted by each general assembly, and which is commonly called the "omnibus bill." This act relates to a large number of offices and departments of the state government, making certain specific appropriations

for certain specific purposes. The first section of this act is in words as follows:

"There is hereby appropriated from the state treasury for a term of two years, ending June 30, 1921, the following sums, or so much thereof as shall be necessary, provided that on the first day of July, succeeding the meeting of the regular session of the general assembly, all moneys appropriated in this act and remaining unexpended shall be and are hereby covered into the state treasury."

Paragraph c of section 14 to which you refer, is in words as follows:

"For making historic motion picture records of persons and events of value to the state of Iowa, twenty-five hundred dollars (\$2500.00)."

The sole question involved in the request submitted by you is as to whether or not the curator can enter into a contract in good faith prior to June 30, 1921, and thus provide for the expenditure of the appropriation so that such expenditure will be available for the purposes of the completion of the contract. This involves a determination of the question as to what is meant by the term "unexpended balance." The courts have passed on this matter in a number of cases, and we cite two. These cases deal largely with legislative appropriations, and are as follows:

"Unexpended, as used in general statute, chapter 73, 21, as amended by act March 20, 1876, 1, providing that commissioners of lunatic asylums shall report to the state auditor any 'unexpended balance' in their hands, means undisposed of. One of the meanings given by all lexicographers of 'expend' is 'to dispose of,' and where the board had exercised the power which they possessed, and had set apart the money then on hand for a specific purpose, it was no longer unexpended, within the fair meaning of the statute. *Norman vs. Central Kentucky Lunatic Asylum*, 17 S. W. 150, 152, 92 Ky. 16.

"Acts 1883, paragraph 4, providing that 'any unexpended balance' that may be in the state treasury to the credit of the military fund on the first day of July, 1883, shall be transferred, on the warrant of the auditor of public accounts, to the general revenue fund, should not be construed to include every part of the fund which has not been actually paid out of the treasury prior to the first day of July, without regard to existing claims against it, however just and well founded, but it means whatever may remain of the fund after the payment of all proper and just claims against it which accrued during the year ending on, and including the whole of the 30th day of June, and the fact that a part of these claims had not been actually paid on the first of July will make no difference in this respect. *People vs. Swigert*, 107 Ill. 494, 499."

In this connection may we further state that the purpose of the legislature with reference to the act referred to is plain and unambiguous. Such purpose is to provide the state with certain motion picture films. The duty of securing such films is imposed upon the historical department. The historical department in good faith makes the contract to secure the very thing sought by the legislature. A contract is entered into in good faith and under authority from the legislature. It cannot be maintained that it was the legislative intent to repudiate such contracts. Therefore, it necessarily follows that this contract must be maintained as a valid contract and one which can be carried out by the historical department.

The amount of the total expenditure is \$1,187.60; the balance remaining unpaid is \$458.91. The appropriation referred to is available for the purpose of the payment of this claim.

BEN J. GIBSON, *Attorney General.*

TRADE-MARKS

A trade-mark registered by the secretary of state, identical with one previously registered under the United States statutes, is invalid, but the secretary of state cannot cancel such certificate of registration without consent of the holder thereof.

April 5, 1922.

Hon. W. C. Ramsay, Secretary of State: We have your letter of March 30, 1922, in which you state:

"On July 27, 1921, the Replogle Company of Red Oak, Iowa, filed for registration in this office trade-mark of the words 'White Loaf' to be used in the sale and distribution of a certain grade of flour, and certificate of registration was duly issued to them.

"Now comes the representative of the Willis Norton and Company, manufacturers of high grade flour of Topeka, Kansas, and files for registration trade-mark using the identical words 'White Loaf,' who claim that this trade mark is registered and copyrighted by the federal government. "I am requesting of your office a written opinion covering the following questions:

"When such a certificate of registration is issued by this office, which subsequently proves to be in conflict with a registration issued by the federal government, was the original registration issued by this office erroneously granted, and if such registration is in conflict with the prior registration issued by the federal government, and is in conflict with the federal law, is the registration issued by this department invalid, and should the same be canceled and revoked?"

Chapter 29 of the acts of the 39th general assembly repealed the existing statutes with reference to the registration of trade-marks in the office of the secretary of state and enacted a substitute therefor. The act in part provides that:

"Said label, trade-mark or form of advertisement shall be of a distinctive character and not of the identical form or in any near resemblance to any label, trade-mark or form of advertisement previously filed for record in the office of the secretary of state.

"When the said secretary of state is satisfied that the facsimile copies or counterparts filed are true and correct, and that they are not in any manner an infringement or are calculated to deceive, * * *," he shall deliver to the person, firm, etc., on payment of the fee required by law, a certificate of registration.

The act further provides that such certificate of registration shall, in all actions and prosecutions, be sufficient proof of such label, trade-mark, etc.

The statutes of the United States governing trade-marks provides that the certificate of registration issued by the federal government is prima facie evidence of ownership of such trade-mark. Section 9501, U. S. Comp. Stat., 1916. The provisions of the federal statute unquestionably take precedence over our trade-mark statutes, and if a trade-mark has been registered under the federal provisions, the holder of such certificate is prima facie the owner thereof and he is entitled to protection of his trade-mark in this state. If a trade-mark was registered by you when a trade-mark of the same design had been previously registered in compliance with the federal statute, the one issued by you would be invalid. However, the statute gives you no right to revoke any trade-mark thus erroneously issued. The only time when you could revoke and cancel any trade-mark thus erroneously registered would be when the holder of the certificate

of registration consents thereto. If the holder refuses to consent to the revocation of his trade-mark, then the only relief available to the one whose rights are being infringed is through appropriate court action.

BEN J. GIBSON, *Attorney General*,

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

WHEN SECRETARY OF STATE MAY CORRECT CLERICAL ERRORS

Right of secretary of state to correct on records of his office discussed under facts of particular case.

May 17, 1921.

Hon. W. C. Ramsay, Secretary of State: We have your letter of May 17 requesting the opinion of this department on the following state of facts:

"April 26, 1850, one Edward Shelton made application to the board of public works, who had charge of the improvement of the Des Moines river and of the sale of lands received from the United States to aid in said improvement, to purchase the east half and northwest quarter of the northeast quarter of said section but certificate of final payment described the land as the east half and northwest quarter of the northwest quarter of said section 23 and by authority thereof patent was issued by the governor of the state with like description and said patent was duly recorded in records now in this office.

"We have been requested to change the description in the record of the patent so as to read east half and the northwest quarter of the northeast quarter of section 23-78-24."

Section 78 of the code of 1897 is as follows:

"The secretary (of state) is authorized and required to correct all clerical errors of his office in name of grantee and description of tract of land conveyed by the state, found upon the records of such office; he shall attach his official certificate to each conveyance so corrected, giving the reasons therefor; record the same with the record of the original conveyance, and make the necessary corrections in the tract and plat books of his office. Such corrections, when made in accordance with the foregoing provisions, shall have the force and effect of a deed originally correct, subject to prior rights accrued without notice."

It is our opinion that the provisions of the section just quoted do not apply to the facts presented in your question. As we understand you the record of the patent in your office contains a description identical with that in the patent issued by the governor to this land and also identical with the description in the certificate of final payment. If an error had been made in your office in copying the description of the land so as to make it different from that contained in the patent issued by the governor then in our opinion section 78 of the code would apply.

However, the facts in this case disclose that the error was made, if at all, when the certificate of final payment was issued and that thereafter there were no clerical errors in the records of your office.

BEN J. GIBSON, *Attorney General*,

By B. J. FLICK, *Assistant Attorney General*.

RE-OPENING OF COMPENSATION CASES ON NEWLY DISCOVERED EVIDENCE

Commissioner may resubmit claim to board of arbitration when board denies compensation, when newly discovered evidence will probably change award.

August 16, 1922.

Hon. A. B. Funk, Industrial Commissioner: You have requested the official opinion of this department upon the following question:

"Is it possible to reopen under any statutory form, a compensation case which has been arbitrated and for which no claim for review was filed within the statutory limit, when subsequent to such arbitration newly discovered evidence makes it probable that another arbitration or review proceeding would change the decision to an award from a refusal of the same on the original hearing?"

Before taking up the express statutory provisions governing the compensation of injured employes, it is well to consider some of the preliminary causes for the enactment of the workmen's compensation law, and the results sought to be obtained. Under the common and statutory laws, governing the rights of injured employes and prescribing remedies, which existed prior to the enactment of the Iowa workmen's compensation act, an injured employe seeking compensation was immediately confronted with the intricacies, uncertainties and delays involved in the established legal machinery. If the injured employe and his employer could not reach a voluntary settlement, then the only alternative for the employe was to institute a civil action for damages in the courts of the state. Such procedure bristled with technicalities, and often real justice was thwarted merely on account of some slight, legal, technical error. To avoid these unfair and unfortunate consequences the workmen's compensation law was enacted, providing for subsequent relief to that portion of our people sustaining personal injuries while earning a livelihood for themselves and their families by honest toil. When framing the workmen's compensation act adequate compensation was the polar star. Under its beneficent provisions a workman who sustained personal injuries in the course of and arising out of his employment, is absolutely entitled to compensation in accordance with a fixed schedule, unhampered and unrestricted by complex, impractical and technical legal procedure. Adequate and substantial compensation being the ultimate purpose of the act, let us now examine its express provisions.

Section 2477-m26 provides that:

"If the employer and the injured employe or representatives or dependents, fail to reach an agreement in regard to compensation under this act, either party may notify the industrial commissioner, who shall thereupon call for the formation of a committee of arbitration."

After the committee of arbitration has been fully organized, it shall then proceed to hear evidence introduced by both employer and employe relative to the injury, and in relation thereto section 2477-m29 provides:

"The committee of arbitration shall make such inquiries and investigations as it shall deem necessary * * *

"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. Unless a claim for review is filed by either party within five days from the date of filing the decision with said com-

missioner, such decision shall be enforceable under the provisions of this chapter."

The provisions of the chapter above referred to, relative to the enforcement of the award of the committee of arbitration, as found in section 2477-m33, are as follows:

"Any party in interest may present a certified copy of an order or decision of the commissioner, or an award of an arbitration committee, from which no claim for review has been filed within the time allowed therefor, or a memorandum or agreement approved by the commissioner and all papers in connection therewith, to the district court of the county in which the injury occurred, whereupon said court shall render a decree in accordance therewith and notify the parties. Such decree, in the absence of an appeal from the decision of the industrial commissioner, shall have the same effect and in all proceedings in relation thereto shall thereafter be the same as though rendered in a suit duly held and determined by said court."

It will be observed, therefore, that, in order to make the award of the committee of arbitration really effective, a certified copy of the award should be filed in the office of the clerk of the district court, and a decree of the court obtained thereon. In that event, the award becomes the decree of the court and the committee of arbitration has no further jurisdiction in the matter.

However, in the event the injured employe is not satisfied with the award of the committee of arbitration, the act in question makes specific provision for a review of the award by the industrial commissioner. In this connection, section 2477-m32 provides:

"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. No party shall as a matter of right be entitled to a second hearing upon any question of fact."

It will be observed that the section just quoted expressly provides:

"No party shall as a matter of right be entitled to a second hearing upon any question of fact."

It is clear, therefore, that upon review by the industrial commissioner, no party "as a matter of right shall be entitled to a second hearing." While ordinarily a case is closed as to any question of fact as soon as the industrial commissioner has rendered his decision upon review, yet it must be evident that the legislature had in mind cases the circumstances surrounding which justify a reopening of the same, and wisely left that matter to the sound discretion of the industrial commissioner.

A further examination of the act discloses the clear intention of the legislature to provide substantial compensation to an injured employe without his being circumscribed by technical rules of legal procedure. Section 2477-m24 specifically provides:

"The commissioner may make rules and regulations not inconsistent with this act for carrying out the provisions of the act. * * * Process and procedure under this act shall be as summary as reasonably may be. While sitting as an arbitration committee or when conducting a hearing upon review, or in the making of any investigation or inquiry, neither the commissioner nor the arbitration committee shall be bound by common law or statutory rules of evidence, or by technical or formal rules of procedure, but may hold such arbitrations or conduct such hearings and

make such investigations and inquiries in the manner best suited to ascertain the substantial rights of the parties."

Now, as to your question, to-wit:

"Is it possible to reopen under any statutory form, a compensation case which has been arbitrated and for which no claim for review was filed within the statutory limit?"

Except the provisions for filing a certified copy of the award in the office of the clerk of the district court, and procuring a decree thereon, there is no provision in the entire statute expressly prohibiting the reopening of the case before a committee of arbitration. If the legislature intended to foreclose all future consideration of the case, that intent must be inferred. But in this respect what is the fair and reasonable inference, taking the statute by its four corners and reading all of its provisions? Recalling the history of the birth of the act, it is found that the act was conceived in justice and fairness to the injured employe, and for the purpose of granting him substantial compensation for his loss sustained by the injury. Remembering also the provisions of the statute with reference to reviews, it will be observed that the statute clearly confers upon the industrial commissioner power to reopen a case and grant a second hearing when, in the exercise of his discretion, the commissioner believes that the ends of justice will be subserved thereby. And, finally, in expressing the manner in which the statute shall be construed, the legislature itself admonishes the officials selected to administer the act to refrain from applying thereto technical, formal and harsh rules of procedure incident to common and statutory law. The legislature specifically directs such administrators of the act to "hold such arbitrations or conduct such hearings and make such investigations and inquiries in the manner best suited to ascertain the substantial rights of the parties."

It necessarily follows, therefore, that in order to administer full and complete justice to an injured employe, the industrial commissioner is fully empowered under the statute to reopen a case and grant a second hearing before the committee of arbitration, when in his opinion the discovery of new evidence or facts will justify an award in favor of the injured employe.

BEN J. GIBSON, *Attorney General*,

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

WORKMEN'S COMPENSATION

Under rule adopted by commissioner, parent of deceased minor compensated upon basis of actual dependency after minor would have reached 21 years of age.

November 3, 1921.

Hon. A. B. Funk, Industrial Commissioner: You inform this department that, under the uniform holding of your department, the parents of a minor child, killed in the course of his employment, cease to be conclusively presumed to be wholly dependent upon such deceased child when the period of time has elapsed at which the child would have reached the age of twenty-one years had he lived, and that the parents then receive only such compensation as they can prove themselves entitled to as actual dependents.

You then ask this department whether, under your rule, such parents are entitled to compensation upon the basis of the full amount for which they can establish dependency, or upon only two-thirds of that amount.

Section 2477-m9, subdivision (f) of the supplement to the code, 1913, provides:

"Where injury causes death to an employe, a minor, whose earnings were received by the parent, the compensation to be paid the parent shall be two-thirds of the amount provided for payment in subdivision (d), section 10."

Under your holding the parent ceases to receive compensation under subdivision (f), supra, at the time the minor child would have reached the age of twenty-one years had he lived. Therefore, under such ruling, it is our opinion that the parent would thereafter receive compensation upon the basis of actual dependency and would be entitled to the full amount for which he can prove dependency, within the proper statutory limitations, and not upon the basis of two-thirds thereof.

It is expressly understood, however, that in this opinion we are not passing on the correctness of the foregoing rule adopted by your department.

BEN J. GIBSON, *Attorney General*,

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

PEDDLERS USING AUTOMOBILES

Tax to be imposed where peddler uses automobile as means of conveyance.

May 5, 1921.

Mr. E. F. Nefstead, County Attorney, Emmetsburg, Iowa: The department is in receipt of your letter of the 22d ultimo, in which you request an opinion as to whether persons peddling by means of an automobile can be required to pay a peddler's license under the provisions of sections 1347-a and 1348 of the supplement to the code of Iowa, 1913.

In reply will say that while the first part of section 1347-a seems to divide peddlers into three classes, namely those traveling on foot, those traveling in one-horse conveyances, and those traveling in two-horse conveyances, yet further along in the section, in defining the word "peddlers" the following language is used:

"The word 'peddlers' under the provisions of this act, and wherever found in the code, shall be held to include and apply to all transient merchants and itinerant vendors selling by sample or by taking orders, whether for immediate or future delivery."

The language which we have above quoted indicates that the legislature intended that every person following the trade of a peddler should be included in the provisions of the section and that without regard to the mode of delivery or kind of conveyance used. To hold that the section would apply only to those traveling on foot or by means of horse-drawn vehicles, and not apply to those using bicycles, motorcycles, automobiles, air craft, or other form of locomotion, would make the statute discriminatory and therefore, unconstitutional.

The courts will so interpret a statute as to preserve its validity and give it effect, if possible, without doing violence to its provisions, and we think that in construing this section, the courts would say that all peddlers who come within the definition of the word as given in the section.

must pay a license, and where their mode of conveyance does not come within one of the specific classifications designated by statute, they should pay such an amount as could be said would place them on an equal basis with the others who are specifically classified. That is to say, the officer issuing the license should determine in what classification the applicant should be placed with respect to the amount of license to be paid. It seems to us that such a construction is a reasonable one and that it would be upheld by the courts.

BEN J. GIBSON, *Attorney General*,
By JOHN FLETCHER, *Assistant Attorney General*.

CONTINGENT FUND DEFINED

The term contingent fund defined and use thereof stated. Use of contingent fund of attorney general especially considered.

November 20, 1922.

Hon. N. E. Kendall, Governor of Iowa: As you will recall, at the time of the adjournment of the 39th general assembly the committee on departmental affairs submitted to you and to the executive council three specific investigations for such further action as might be deemed right and proper and in accordance with the provisions of law.

In order that your records may be complete and likewise the present status of the matters definitely fixed may I submit to you the following report with recommendations with reference to the use of the contingent fund of Attorney General H. M. Havner.

As you will recall, during the Havner administration, Mr. F. C. Davidson was employed as special counsel by the department of justice and paid from the contingent fund. The amount paid Mr. Davidson, and which was questioned, was the sum of \$2,745.00 for seventy-seven days' service, commencing July 26, 1920. A number of oral communications have taken place relative to this matter, and I now take the privilege of reporting on it in full with the recommendations of the department.

In this connection, and before entering into a discussion of the facts or the law relative to this situation, may I state that shortly after the adjournment of the general assembly, and on April 16, 1921, I took this matter up with Mr. Havner to secure from him a complete statement of the facts. This I did by correspondence, a copy of the letters passing being on file in this department. This was carried on for some time due to the absence of Mr. Havner from the city. On December 2, 1921, however, the department received from Mr. Havner a complete statement of the situation, a copy of which letter is attached to this report.

After receiving this letter I caused still further investigation to be made by Mr. Powers of this department and by Mr. Kendrick of this department, to the end that all of the facts might be before me at the time of making this report.

The report could have been made to you during the summer but because of a large amount of litigation and other matters it has been delayed until the present date.

It appears that during the second term of Mr. Havner's administration as attorney general of the state that Mr. F. C. Davidson was assistant

attorney general. It further appears that Mr. Davidson as such assistant attorney general was placed in charge of the criminal appeals work of the department, both in the state court and in the federal courts. It further appears that practically all of the litigation of the department was handled by Mr. Davidson. Sometime in the spring of 1920 the daughter of Mr. Davidson took very ill and was taken to the state of Arizona where she was treated during the year 1920. Mr. Davidson at that time resigned as assistant attorney general and went to Arizona with the family. Mr. Havner then appointed Mr. Kendrick as first assistant attorney general in place of Mr. Davidson who had resigned. It appears further, that at the time considerable difficulty was encountered by Mr. Havner in securing assistants to work in the office. It further appears that at about that time, or perhaps a little later, the difficulties connected with the Associated Packing cases and the Midland Packing cases arose. These cases, as you will recall, were very important cases and involved the question of the fraudulent sale of stocks and bonds within the state. Mr. Havner himself devoted practically his entire time to these cases. According to Mr. Havner's statement, it appears that notwithstanding the fact that he had three assistants, Mr. Kendrick, Mr. Sandusky and Mr. Powers, that the work of the department accumulated to such a degree as to render it very doubtful indeed as to whether or not the department would be able to keep up with the work of the state. Mr. Havner says that with this realization of conditions he sought to have Mr. Davidson return, partly because of Mr. Davidson's ability as a lawyer, but more particularly because of the experience which Mr. Davidson had with the various cases and matters before the department. Mr. Davidson refused to return at the salary, which would have been a low salary inasmuch as the three higher positions in the department had been filled, and according to Mr. Havner's statement, he was unable to fill the position. With this as the situation Mr. Havner employed Mr. Davidson as a lawyer, not as an assistant attorney general, to come into the department and to work as a lawyer and as special counsel in order that the work of the department might be caught up and the accumulated business disposed of so that the department might be upon a smooth running basis.

These, in substance, are the facts that are submitted to this department by Mr. Havner, and from the investigation which I have made I am inclined to believe that in the main they are correct.

Mr. Havner again says that it was absolutely necessary to employ Mr. Davidson in order to meet the contingency which had arisen in the department, and that acting in good faith he did employ Mr. Davidson at the price fixed. Mr. Havner further states, in substance, that the contingency which arose was one which could not have been foreseen, and therefore, such a contingency as would require the caring for the same from the contingent fund provided for the department of justice.

The 38th general assembly provided in section 16 of chapter 273 of the acts of the 38th general assembly, a certain fund known as the contingent fund for the use of the attorney general. This section is in words as follows:

"For the office of the attorney general as contingent fund for the period ending June 30, 1921, the sum of twenty thousand dollars (\$20,000.00)."

It will be observed that in and so far as the statute quoted is concerned that there are apparently no limitations upon the use of the fund commonly known as the contingent fund of the attorney general's office.

We have examined the statutes of this state with care in order that there might be no misunderstanding with reference thereto, and the only other section of the law which we have been able to discover which might in any way relate to the question at hand is section 178 of the code of 1897. This section is in words as follows:

"Any contingent fund set apart to any office or officer to be expended for the state shall, as used, be entered in a proper book showing when, to whom and for what purpose it was devoted, and receipts shall be taken therefor, preserved and filed with the report hereinafter required. On or before the first day of November preceding each regular session of the general assembly, the officer or person having charge of the fund shall make report to the state auditor in writing, showing, in detail, each item of expenditure made, and he shall not be credited with any sum not paid out in the manner contemplated by the law making the appropriation, nor unless the report shall be accompanied with the proper vouchers and receipts. All funds not thus accounted for may be recovered by the state from the proper officer or person, with fifty per cent damages thereon, and the state auditor shall, in his report to the governor, make a detailed statement of the condition of each appropriation contemplated by this section."

This section, however, does not limit the uses to which the contingent fund may be put. It does require a report to be made in the manner and method provided by this statute. The legislature might have defined what is intended to be covered by the term "contingent fund," but in its wisdom it has not deemed it necessary to do so. The question naturally arises for what purposes can the contingent fund be used. That it is to be used for some purpose goes without further comment. For what purposes it may be used raises, however, a more difficult question.

A contingency has been defined as "an event which may or may not occur; that which is possible or probable; a fortuitous event; a chance." The term contingent has been defined as "something possible or liable but not certain to occur; incidental; casual; fortuitous."

It is a matter of common knowledge that in the operation of any department of the state government that conditions will arise from time to time which could not have been foreseen by the legislature, and yet which in the interests of the state must be met and met properly. Such conditions oftentimes require the expenditure of public funds in order to properly protect the interests of the state. It is for the purpose of meeting just such conditions that there has been from time immemorial provided for various departments of the state government a contingent fund. This fund is not given for the purpose of being expended for the ordinary purposes of a department, but is provided to meet conditions and contingencies which in the very nature of things could not be foreseen or anticipated by the legislature. That the provision for such a fund, at least for some of the departments of the state government, is the part of wisdom needs no comment. It follows that the contingent fund given to any department of the state government, and not otherwise limited, is to be used by the head of such department in the interests of the state to meet those conditions and contingencies which from time to time may arise during the biennium.

In this connection and before leaving the question as to what this fund can be used for, it must be remembered that the legislature, representing the people, has placed at the disposal of a certain public officer a certain definite sum of money to be used to meet those contingencies to which we have referred. It is not for some one other than such public officer to determine whether or not such contingencies have arisen, because the legislature has designated the officer who shall so determine. It follows that if the officer to whom the authority over a certain contingent fund is given acts in good faith and expends the contingent fund provided for his department for the benefit of the state, that his act cannot be questioned save by the legislature itself. That this was in the mind of the legislature is to be readily determined by a reference to section 178 to which we have referred. Note that this section provides for a report to the state auditor on or before November 1 immediately preceding the convening of the legislature.

It may be said that the salary act passed by the 38th general assembly provided salaries for the several assistants in the office of the attorney general. This is true. However, it will be observed from a reading of the letter of Mr. Havner, which is attached, and from his statements to the department that a contingency arose in the department of justice which could not be met by the regular assistants in the department.

It is of course true that the contingent fund given to each department of the state government must be used in the interests of the state and in order to fulfill the duties which are imposed upon the officer or department in question. There is no doubt but that in this instance the contingent fund was used for state purposes, and in order to accomplish the fulfillment of the duties imposed upon the department of justice.

The attorney general, Mr. Havner, and Mr. Davidson, who was the ultimate recipient of the money expended, both present this matter as one in which they exercised good faith and did that which they believed was for the best interests of the state, and that their action was necessary in order to meet a contingency which could not have been foreseen. This being true, and there being no evidence to the contrary, the conclusion is unavoidable that to engage in litigation over such fund would be to invite certain defeat.

It is, therefore, the recommendation of this department that as to this so-called Havner investigation the same be closed.

BEN J. GIBSON, *Attorney General.*

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