State of Iowa

1944

TWENTY-FIFTH BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1944

JOHN M. RANKIN
Attorney General

Published by
THE STATE OF IOWA
Des Moines

ATTORNEY GENERAL'S DEPARTMENT

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ROBERT L. LARSON, Iowa City.....Assistant Attorney General
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—State Tax Commission
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GERTRUDE ZIGELER, Des Moines.....Secretary

ATTORNEYS GENERAL OF IOWA

1853-1945

NAME	HOME COUNTY	YEARS SERVED
David C. Cloud	Muscatine	1853-1856
Samuel A. Rice	Mahaska	1856-1861
Charles C. Nourse	Polk	1861-1865
Isaac L. Allen	Tama	1865-1866
Frederick E. Bissell	Dubuque	1866-1867
Henry O'Connor	Muscatine	1867-1872
Marsena E. Cutts	Mahaska	1872-1877
John F. McJunkin	Washington	1877-1881
Smith McPherson	Montgomery	1881-1885
A. J. Baker	Appanoose	1885-1889
John Y. Stone	Mills	1889-1895
Milton Remley	Johnson	1895-1901
Charles W. Mullan	Black Hawk	1901-1907
Howard W. Byers	Shelby	1907-1911
George Cosson	Audubon	1911-1916
Horace M. Havner	Iowa	1917-1921
Ben J. Gibson	Adams	1921-1926
John Fletcher	Polk	1927-1933
Edward L. O'Connor	Johnson	1933-1937
John H. Mitchell	Webster	1937-1939
Fred D. Everett	Monroe	1939-1940
John M. Rankin	Lee	1940-

Report of the Attorney General

December 31, 1944

HONORABLE BOURKE B. HICKENLOOPER
Governor of Iowa

My Dear Governor Hickenlooper:

Agreeably with Section 249 of the 1939 Code of Iowa, I have the honor to submit herewith the biennial report of the Attorney General, covering the period of his regular term beginning January 1, 1943, and ending December 31, 1944.

Chapter 12 of the 1939 Code of Iowa provides:

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

1. Prosecute and defend all causes in the supreme court in which the state is a party or interested.

2. Prosecute and defend in any other court or tribunal, all actions and proceedings, civil or criminal, in which the state may be a party or interested, when, in his judgment, the interest of the state requires such action, or when requested to do so by the governor, executive council, or general assembly.

3. Prosecute and defend all actions and proceedings brought by or against any state officer in his official capacity.

4. Give his opinion in writing, when requested, upon all questions of law submitted to him by the general assembly or by either house thereof, or by any state officer, elective or appointive. Questions submitted by state officers must be of a public nature and relate to the duties of such officer.

5. Prepare drafts for contracts, forms, and other writings which may be required for the use of the state.

6. Report to the governor, at the time provided by law, the condition of his office, opinions rendered, and business transacted of public interest.

7. Supervise county attorneys in all matters pertaining to the duties of their offices, and from time to time to require of

them reports as to the condition of public business intrusted to their charge.

8. Promptly account, to the treasurer of state, for all state funds received by him.

9. Keep in proper books a record of all official opinions, and a register of all actions prosecuted and defended by him, and of all proceedings had in relation thereto, which books shall be delivered to his successor.

10. Perform all other duties required by law."

It being the duty of the Attorney General to prosecute and defend all causes in the Supreme Court, in which the state is a party or interested, and prosecute and defend in any other court or tribunal all actions civil or criminal in which the state may be a party or interested, it is appropriate to review the activity of the department relative to criminal matters.

During the biennium, the department has handled seventy-four criminal cases in the Supreme Court where the defendant was appellant and two criminal cases where the state was appellant, with the following results: Defendant's appeal—46 affirmed, 4 reversed; State's appeal—2 reversed. Petitions for rehearing are now pending in three cases. Twenty-four other criminal cases are now pending. Submission to the court has been made in six of these cases, with final disposition therein awaiting the decision of the court. The other eighteen cases are in the process of preparation for submission to the court. Some of these pending cases will, as usual, be disposed of on clerk's transcripts, and it will not be necessary to file briefs and arguments in those cases. It is therefore impossible to state with exactness the number of cases wherein briefs and arguments will have to be filed. In only one case is there a brief and argument now due at this time, it being the policy of this department to file briefs and arguments as the same become due and thus keep the work up to date.

In addition to criminal cases in the Supreme Court, this department has participated in seventeen habeas corpus proceedings brought in the Federal courts by inmates of our several state penal institutions, and did successfully resist all efforts of the petitioners to obtain their discharge from custody therein.

During the two years covered by this report, the department has handled several cases where the legal questions involved were novel and the opinions therefore are of far-reaching importance in the administration of criminal law in this state. Of particular interest is the case of *State v. Kellison*. The case arose in Woodbury County, on a prosecution for manslaughter. The trial court held that death of another caused by drunken

driving in violation of Section 5022.02, Code, 1939, was not manslaughter in the absence of a showing of wantonness or recklessness, and discharged the defendant. The state appealed however, and obtained a reversal, the Supreme Court holding that the driving of an automobile on the public highway while the driver is intoxicated is a crime under the laws of this state, and that if such driver causes the death of another he is guilty of manslaughter. The court distinguished between a violation of the rules of the road which is *malum prohibitum* and a violation of a criminal statute which is *malum in se,* and ruled that while in the former situation, wantonness and recklessness must be shown to establish guilt of manslaughter, in the latter case it is not essential that they be shown. The case is of first impression in this state, and does much to clarify the law, and to bring our rule in line with that of nearly every other jurisdiction where the question has arisen.

This department has recovered for the State Conservation Commission from several individuals and from firms in other states the value of timber unlawfully cut and stolen from state parks along the Mississippi River, and such efforts were materially aided by the State Bureau of Criminal Investigation. Other collections have also been handled for the State Conservation Commission, including sale of ice, fish, furs and rentals. Several compensation claims against the State Conservation Commission were handled by this department, the principal one being known as the case of *Tecla Hutton v. The State Conservation Commission* involving the question of whether or not the director of the Conservation Commission was a state official or an employee. The matter was decided by the Iowa Supreme Court and in reversing the lower court the high court restated the plaintiff was such an officer delegated sovereign powers and duties, was a state official and not an employee, and refused compensation under the Iowa Workmen's Compensation Law.

Another important case involving the Conservation Commission handled by this department involves the right of the Conservation Commission to close the road through the state park at Clear Lake, Iowa, the case being known as *Schloemer v. State Conservation Commission, et al,* and is now ready for submission to the District Court of Cerro Gordo County.

Several cases on legal settlement were handled by this department on behalf of the State Board of Control, as well as three habeas corpus matters, the most important being that of *Ruth Madsen v. Stewart,* where the court found the inmate still insane and remanded her to the hospital for further care and treatment. This woman being an alleged killer, much attention was given the case.

Several collections were also made for the Board of Control, one of which resulted in a large sum being recovered from a

resident of Illinois. In another case an entire family was returned to the state of Tennessee.

The department has continued its policy of strict enforcement of the Practice Acts. One license to practice medicine was surrendered, and one to practice chiropractic was surrendered as the result of actions commenced by this department. One action was tried for an alleged violation of the embalming laws. Two injunction matters were successfully tried involving chiropractors, and one injunction action is now pending on appeal to the Supreme Court, the latter case being known as *State v. Robinson,* where the state is attempting to enjoin an alleged faith healer from such practice as an unlawful practice of medicine without a license.

One of the most important cases involving the Health Department was that of *State v. Otterholt,* in which the high court held that a license to practice a profession once granted was for life, unless said license was revoked or suspended by proper court action. An action to revoke the license did not present a moot question if the practitioner did not make application for a renewal of his license at the end of the year.

One action is also pending to enjoin the practice of barbering without a license where the barber did not apply for renewal within the time prescribed by statute, and did not follow the proper procedure to obtain a renewal.

Another important case handled for the Health Department was that of *E. E. Gilchrist v. W. L. Bierring,* which involved the renewal of the license of a cosmetology school and in which the Supreme Court held that a renewal license may not be refused when made in the proper time, without a notice and hearing, and that the right of renewal was inherent in the license when originally granted by the state.

In connection with licensing the department was called upon to handle an action to revoke the license to practice law, the result of which was the suspension of the licensee and the surrender of his license.

Probably the most important case handled by this department for the Department of Agriculture was the Jelke case, known as *Dahl v. Linn,* brought in Polk County, Iowa. Through the efforts of this department the Jelke company and various defendants consented to a decree holding the Jelke Good Luck Shortening and Jelke Vitalizer were subject to the Iowa oleomargarine tax, and has already resulted in a very sizeable tax being realized by the state.

Other cases handled by this department for the Department of Agriculture were the *Ostrander* case, an injunction action brought against the Secretary of Agriculture to prevent him from enforcing the Iowa Cream Grading law, in which it was decided that an injunction would not lie against the secretary to prevent him from enforcing the criminal law of the state, but as the lower court rendered a declaratory judgment in

favor of the plaintiff, the same is being appealed by this department to the Supreme Court, the department contending that same was not a proper subject for such a declaratory judgment; also a case of the *State v. Reickenbach,* which is being appealed to the Supreme Court by this department for a determination of the proper labeling requirements under the Iowa Chick Hatchery Act.

Several cases have been handled for the Motor Vehicle Department involving the reciprocity statute of this state, one of which is now pending as a result of a petition for rehearing in the Supreme Court of Iowa. The court in this case held that for one to be entitled to the benefits of reciprocity he must be properly licensed in the state of his residence. Another case pending involves the question of whether or not reciprocity in this state is self-enacting, or must be made active as a result of a written agreement executed by the proper state officials.

Other claims have been handled by this department, one of which resulted in the recovery of a $2,000 bequest for the State Curator of the Sherman Estate in Clayton County, Iowa.

During the biennium this department handled several important tax cases; the most important of these being *General Trading Company v. Tax Commission,* which was carried to the United States Supreme Court where by a "seven to two" decision the Iowa Supreme Court, which had ruled in favor of the Tax Commission, was upheld. This case established that foreign retailers, doing business in Iowa through agents who merely took orders subject to approval by the foreign retailer at its home office, were under duty to collect use taxes from their customers in Iowa; notwithstanding that such foreign retailers were not authorized to do business in this state and even though said agents were nonresidents of the state. The contention of the General Trading Company was that an attempt to require it to collect such taxes and remit same to the Tax Commission contravened the due process and commerce clauses of the United States Constitution. As indicated, the Supreme Court held this contention untenable.

Another important decision was handed down in the *Delashmutt* cases wherein the Supreme Court reversed the Monona County District Court and finally established, as the law of this state, that a remainderman, though a blood relative of the life tenant, is not entitled to homestead credit; notwithstanding that such remainderman is in full possession of the homestead. The court held that such possession was by contract with the life tenant and not by devise or by virtue of the operation of the inheritance laws.

In the *Horner* case, which also reached the Supreme Court, it was decided that the surviving joint tenant was liable for inheritance tax on the interest of the deceased life tenant in real estate. Upon the death of one life tenant the survivor's

interest in the real estate became enlarged and, hence, inheritance taxes became due thereon.

During the biennium eight cases, including the above, reached the appellate court; of these, five were won; in three, the Tax Commission was unsuccessful.

Several tax cases were tried in the district courts and not appealed. In practically all of these the Tax Commission was successful.

In addition to litigated matters, this department handed down numerous tax opinions, and in many other ways assisted the Tax Commission in properly discharging its duties.

The work of the Attorney General in looking after the interests of the State Department of Social Welfare has greatly increased during the last biennium. This department has charge of the state programs of old age assistance, blind assistance, child welfare, emergency relief and aid to dependent children. The latter was added by the 50th General Assembly.

The number of old age assistance recipients passing away has greatly increased during this period. This has greatly increased the work of the Attorney General. Many recipients leave an estate wherein real estate is sold to pay debts. In each such estate, an answer was filed, setting out the rights of the State Board, the amount of assistance granted and paid and asserting the Board's statutory lien and other rights in proper instances. A copy of each order authorizing sale of real estate was obtained and checked. This was done in about 500 estates each year. This was necessary in order that the State Board receive maximum reimbursement of old age assistance which has been paid.

Many troublesome questions arose in these estates which necessitated the appearance of the Attorney General, briefing of the questions involved and trial thereof.

A number of cases have been handled with reference to the election or failure to elect to take a life estate on the part of the surviving spouse of an old age assistance recipient. In almost all instances, these have been decided in favor of the State Board.

In each of the last two years, the Attorney General has appeared and filed answer in about 150 foreclosures, partition and quieting title actions wherein the lien or rights of the State Board were involved. Contested trials were had in a number. The decree was checked and approved in most instances.

About 50 promissory notes belonging to the State Board have been collected by correspondence. Suits were instituted on four notes and most of these have been settled.

Four actions for the foreclosure of the statutory lien for old age assistance have been commenced, two of which have gone to decree. Two more are ready to file and several are in process of preparation.

One blind assistance case was tried involving the question whether certain real estate constituted a homestead. A favorable decision for the State Board was obtained which resulted in the recovery of $1,000.

Another interesting case was tried involving the foreclosure of a note and mortgage which had been assigned to the State Board. The owner had lost the original note and mortgage and neither one had come into the possession of the State Board. The defendant appeared, pleaded payment and produced the note at the trial. Nevertheless, a decree of foreclosure was obtained on behalf of the State Board.

Considerable time has been devoted to the interests of the Child Welfare Department. Many perplexing problems have arisen which necessitated the giving of advice and the writing of a number of unofficial and official opinions. Two actions have been filed in equity for an injunction to restrain the illegal operation of a children's boarding home.

In the preceding biennium an important matter was undertaken which involves a hydro-electric project on the Cedar River in Muscatine County, Iowa, known as the Moscow Dam. It is claimed by the state, which is opposing the construction of this dam, that the construction would result in practically drying up the Cedar River from the point of the proposed dam to the point where the river flows into the Iowa River. The First Iowa Hydro Electric Cooperative, consisting of some 90 individuals, filed application with the Federal Power Commission for a license to construct this dam, hearing on which was held at Davenport in January, 1942, before the Trial Examiner of the Federal Power Commission, and the State of Iowa appeared in resistance to the granting of the license. This hearing consumed about three weeks and the state was represented by this department, after which briefs were filed. In October, 1943, a hearing on this matter was held before the Federal Power Commission at Washington, D. C., which hearing lasted several days, and the commission found that the Cedar River is not a navigable stream and that the commission has no jurisdiction over same. The Iowa Electric Cooperative appealed to the United States Court of Appeals for the District of Columbia and the State of Iowa intervened to sustain the order of the Federal Power Commission and to protect the interests of the state. Several printed briefs have been filed in the United States Court of Appeals, where the matter is still pending.

The case of *Lineberger v. W. G. C. Bagley,* which had its inception in 1939, is still pending. This case arose by reason of the assessment under the motor vehicle fuel tax law of a gasoline tax against Lineberger of some $2,400 and 100% penalty. A writ of certiorari was obtained and the district court annulled and set aside the action of the State Treasurer assessing this tax. This was appealed to the Supreme Court and submitted in 1941, and thereafter the Supreme Court re-

versed the action of the district court and sustained the action of the Treasurer of State. On the 27th day of August, 1942, Lineberger commenced an action to quiet title to certain real estate in Polk County, again attacking the assessment of the tax and penalty, as well as the constitutionality of the law under which they were imposed. This cause was dismissed for failure on the part of Lineberger to prosecute it, but in February, 1944, an order was entered in the district court vacating the dismissal of this cause, and reinstating the same. The case is still pending in the District Court of Polk County.

In March of 1943, the controversy arose involving the State, Socony-Vacuum Oil Company, Sollitt-Lancaster & White Corporation, contractors, and the Navy Department of the United States Government,—Sollitt-Lancaster & White, the contractors for the construction of the Naval Air Base at Ottumwa, Iowa, operating under a cost-plus fixed fee contract with the Navy Department. The Socony-Vacuum Oil Company furnished a very considerable amount of gasoline to Sollitt-Lancaster & White, used in the course of this construction. It was the contention of the State of Iowa that Socony-Vacuum Oil Company should pay the State of Iowa the gasoline tax on this and collect same from Sollitt-Lancaster & White. The Naval Officer in charge refused to allow Sollitt-Lancaster & White credit for this under their contract. This department, collaborating with the office of the Treasurer of State was finally able to obtain the agreement of the Navy Department to allow this tax item, and it is expected that within the course of the next few days the Treasurer of State will receive the amount of this tax from Socony-Vacuum Oil Company, which is an amount in excess of $13,000. This office was able to accomplish this without resorting to litigation, and the amount being received is the full amount of the tax on the gasoline furnished.

Another important case involves Radio Station WOI at Iowa State College of Agriculture at Ames. This arose upon application of Iowa State College of Agriculture and Fine Arts for special service authorization to operate the station from 6 o'clock a. m. C. W. T. until local sunset, in lieu of operation from sunrise to sunset at Ames. Hearings were held before the Federal Power Commission at Washington, D. C. and proposed findings were thereafter submitted by applicant and by petitioner, and the application was granted by the Commission on August 3, 1943. The authorization was cancelled on September 7, 1943, after protest against the grant was filed by Earle C. Anthony, Inc., the licensee of Station KFI at Los Angeles, California. The Commission held a hearing on October 26 and 27, 1943, in the office of the Commission at Washington. Effective December 9, 1944, a special service authorization was granted WOI with power reduced to one kilowatt from 6 o'clock

a. m. C. W. T. until 8 o'clock a. m. C. W. T. or until average local sunrise time at Ames, whichever is earlier.

Several estate matters have been handled by this department and several thousand dollars collected in fees due the state, both in escheat matters and in collection of gasoline taxes, $5,000 being collected for the State Sinking Fund from one estate alone.

A very important matter involving the Iowa Great Lakes Sewage Disposal System, has also been handled by this department during the past year. The towns of Spirit Lake and Arnolds Park for many years discharged treated sewage into East Okoboji Lake, both towns having constructed and operated sewage treatment plants, with the aid of state and federal funds. The last General Assembly passed a resolution for an investigation of this project after it was learned that an infestation of the lakes had occurred and was spreading to the other lakes in the district. Several biologists were employed by the Fish and Game Commission and the Conservation Commission to make a study of the situation and it was found that the profuse algae growth resulted from the discharge of treated sewage into the east chain of lakes and an extensive report of this investigation will be presented to the 51st General Assembly, for further action by the legislature.

The foregoing is only a small part of the civil litigation which has occupied this department. One further matter should be mentioned: During the session of the 50th General Assembly the services of this department were made available to the legislature and its members for counsel in connection with the legislative session.

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

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

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

Respectfully submitted,
JOHN M. RANKIN
Attorney General of Iowa

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

January 1, 1943 to December 31, 1944, inclusive

Appeals from Condemnation

Appeals pending January 1, 1943	10
Appeals instituted during above period	5
Old appeals tried or settled during above period	6
New appeals tried or settled during above period	1
Condemnation appeals pending December 31, 1944	8

Foreclosure Proceedings

Foreclosures pending January 1, 1943	7
Foreclosures instituted during above period	0
Old foreclosures disposed of during above period	3
Foreclosures pending December 31, 1944	4

Miscellaneous Cases

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

Misc. cases pending January 1, 1943	7
Misc. cases instituted during above period	17
Old misc. cases disposed of during above period	4
New misc. cases disposed of during above period	11
Miscellaneous cases pending December 31, 1944	9

Retained Percentage Cases

(On contractor's contracts.)

Percentage cases pending January 1, 1943	7
Instituted during above period	6
Old cases disposed of during above period	7
New cases disposed of during above period	6
Percentage cases pending December 31, 1944	0
Total number of all cases pending December 31, 1944	21

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Fred D. Everett	Monroe	1939-1940
John M. Rankin	Lee	1940-

SOME OF THE

IMPORTANT OPINIONS

OF THE

ATTORNEY GENERAL

FOR

Biennial Period

1943-1944

TEACHERS IN ARMED SERVICES: BENEFITS OF SECTION 467.25. Teachers who enter the armed services, including WAVES and WAACS, are entitled to the benefits provided in Section 467.25, providing the teaching contract is in force at such time.

December 21, 1942. *Mr. John F. Burrows, Deputy County Attorney, Keokuk, Iowa:*

In your letter of December 17, 1942, addressed to Judge Rankin, you request an opinion upon the problem outlined in that letter.

Because of the large number of inquiries which are now being made as to the status of Public School teachers under this statute, we are making this opinion somewhat more broad than would be required for the solution of the problem which you present.

Teachers in the Public Schools of your city are employed by your School Board under contracts for periods of one year. The services provided for in these contracts are performed by the teachers during a period lasting about nine and one-half (9½) months. However, the salaries provided for in the contracts are paid the teachers throughout the year in twelve (12) monthly payments. You inquire as to whether or not a teacher who either volunteers or is called into the Armed Forces after the period has expired during which the teacher's services are to be performed under his or her contract, but before the entire year during which payments are to be made to the teacher has expired, would be entitled to the benefits of Section 467.25, as amended, of the 1939 Code of Iowa.

In the first place, it is our opinion that teachers in Public Schools of this state are such "employees" as are entitled to the benefits of this statutory provision. It is immaterial, we believe, whether a teacher volunteers his or her services and is accepted by some branch of the Armed Forces, or whether a teacher is forced to enter the Armed Forces under the provisions of the Selective Service Act. In either of these cases it is our opinion that the teacher is entitled to the benefits of this statute, if that teacher is otherwise qualified.

It is our opinion that women who enter either the WAVES or the WAACS are entitled to the benefits of this section.

As to the particular problem about which you inquire, we do not believe that under those circumstances a teacher is entitled to the additional month's salary provided for in this section of the Code. After that teacher has performed all of the services required of him or her, under the terms of the contract entered into with the Board of Education, the employment of the teacher by the Board has ceased. The Board has no right to demand any further services from the teacher, and there is no duty upon the teacher to perform any additional services. The fact that there still remain some additional payments due the teacher from the School Board does not in our opinion alter the fact that the teacher is no longer an employee of the Board. In other words, it is our view that this feature of the contract is merely a form of paying the consideration due under the contract, but does not affect or change in any respect

the provisions and intent of the contract itself. Of course, the teacher involved is entitled to be paid all of the amount still due upon his contract after the completion of his work.

Should a teacher enter into a contract with a Board of Education agreeing to perform teaching services for that Board at some future time, and upon certain terms and for a stated period, and enter the Armed Forces before the period when under the contract the teacher has agreed to begin his or her work, it is our opinion that that teacher is not entitled to the benefits of this Act, for the reason that until the teacher has begun the performance of the services provided for in the contract, and has assumed the duties imposed upon the teacher by the contract, the teacher has not become an employee of the School District.

JUSTICE OF PEACE: CHANGE OF VENUE: TRANSCRIPT FEES IN ADVANCE. Where a change of venue is demanded the Justice of the Peace is authorized to demand fees in advance only for making and certifying the transcript.

January 6, 1943. *Mr. James S. Newman, Assistant County Attorney, First National Bank Bldg., Cedar Falls, Iowa:* We wish to acknowledge receipt of your recent letter in which you ask for our opinion on the following matter:

"In a civil action in Justice of the Peace Court, when a party requests a change in the place of trial, under Sections 10537 and 10538, as amended, of the Code, what fees are required to be paid to the Justice under the provisions of line two of Section 10538? Is the Justice entitled to all fees accrued up to the time of the filing of the motion to change, or merely to the transcript fee of Fifty Cents?"

Section 10537 of the 1939 Code of Iowa provides for the change of place of trial of a case in Justice Court when certain facts are shown to exist. The material portion of Section 10538 of the 1939 Code of Iowa, as amended, provides as follows:

10538 Next nearest justice. When a change is allowed and the fees for transcript are paid, said justice shall transmit all the original papers in the case, and a transcript of his proceedings, to the next nearest justice in the township, if there be any.

The case of Holmes vs. Butts, 87 Iowa 412, which was mentioned in your letter, does not specifically show just what fees were involved. We feel that the following language, which appears in the court's opinion, is certainly indicative that the fees involved were only for the making of the transcript, the court said that the question involved was "had the justice the right before granting the change to require that the costs occasioned thereby should be paid by the party making the application?***". The court in discussing this question continued "when the defendant appeared and demanded a change of venue the justice was authorized to demand his fees in advance for the making and certifying of the transcript;***".

Our position is further strengthened by the provisions of Code Section 10538, dealing with this subject, which commences "When a change is allowed and the fees for transcript are paid**". From this language we are clearly of the opinion that the Justice of the Peace is only entitled to demand payment of the transcript fee when a change of venue is asked and that there is no authority for the Justice of the Peace to demand that all fees that have accrued up to that time be paid.

COUNTY TREASURER: APPOINTMENT OF DEPUTIES: SALARIES DETERMINED. The County Treasurer may appoint a resident deputy collector at a salary to be determined by the provisions of Section 5223(3), but cannot appoint a deputy under terms of subsection 4 and have him serve as a resident deputy collector contemplated under subsection 3.

January 6, 1943. *Mr. Paul L. Kildee, County Attorney, 210 LaFayette Bldg., Waterloo, Iowa:* We wish to acknowledge receipt of your recent letter in which you ask for our opinion on the following matter:

"Paragraph 4 of Section 5223 of the 1939 Code of Iowa provides that the salary of each additional deputy over two appointed by the Treasurer shall receive one-half the amount of the salary of the Treasurer. One-half of the salary of our Treasurer is $1700.00. Paragraph 3 of the same Section 5223 of the Code provides that in a county with a population of 53,000, or over, in which there exists a city, not the county seat, having a population of 6,000, or over, the Treasurer may appoint a resident deputy collector of taxes for such city and vicinity, etc. Incidentally, Paragraph 3 of this Section was special legislation for this county insofar as Cedar Falls is a city of over 6,000 located in the county and not the county seat. Paragraph 3 provides for the appointment of a resident deputy. Is it possible for our Treasurer in January to appoint a third deputy at one-half of her salary, or $1700.00, this deputy to work in her office and in addition thereto, to go to Cedar Falls for approximately a five-week period each Spring and Fall and act as deputy collector of taxes for that city and vicinity during that short period of time, with the Treasurer preparing the necessary books and records for him to use each year, the thought being that he is not a resident collector, and if such is possible, how should the appointment read?"

In reply to your question we wish to set out the following portion of Section 5223 of the 1939 Code of Iowa:

5223 Deputy treasurer and clerks. Each deputy treasurer shall receive as his annual salary in counties having a population of:

1. Less than fifty thousand, one-half the amount of the salary of the treasurer, but if that amount is less than fifteen hundred dollars, the board of supervisors may allow an additional amount to make an aggregate not to exceed said sum.

***

3. Fifty-three thousand or over, in which there exists a city, not the county seat, having a population of six thousand or over, the treasurer may appoint a resident deputy collector of taxes for such city and vicinity under bond as provided for other deputies, and his compensation shall be the same as a deputy in a county with a population of less than fifty thousand. The treasurer in such case shall prepare the necssary books and records for such deputy each year.

4. In any county having within its limits a city with a population of thirty-six thousand or over, the salaries of the chief deputy and one to be designated by the treasurer as second deputy shall each be sixty-five per cent of the amount of the salary of the treasurer, and each additional deputy shall receive one-half the amount of the salary of the treasurer. If more than four deputies are required, or additional clerks, the board of supervisors shall fix the amount of their compensation.

It will be noted from Paragraph 3 of the above mentioned Code Section that the only authority that your Treasurer would have to appoint a deputy to maintain an office in Cedar Falls is to appoint a resident deputy collector as provided for in Paragraph 3. If it were not for Paragraph 3 there would not be any authority on the part of the Treasurer

to have a deputy maintain an office in Cedar Falls. It is noted that when a resident deputy collector is appointed that the salary is to be determined by the provisions of Section 5223 applicable to a deputy in a county with a population of less than fifty thousand.

The Treasurer may not appoint a third deputy under the provisions of Paragraph 4 of Section 5223 and pay such deputy the compensation therein provided, which in the instant case would be $1700.00, and at the same time have this deputy act as a resident deputy collector, at least, for a portion of the year.

If the Treasurer desires to have a deputy collector in Cedar Falls the compensation must be as provided for in Paragraph 3 of Section 5223 and the provisions of Paragraph 3 cannot be circumvented by appointing a third deputy to receive the compensation provided for in Paragraph 4 and assuming the duties of a resident deputy collector as provided for in Paragraph 3 of Section 5223 of the 1939 Code of Iowa. By no rule of statutory construction can we say that the more favorable provisions of Paragraph 3 and 4 may be united when it is clear that Paragraph 3 provides for the appointment of a resident deputy collector and the compensation to be paid.

COUNTY AUDITOR: AUTHORITY TO CORRECT ASSESSMENTS. The County Auditor has authority to correct any error in assessment or tax list any time before full payment of the tax involved. The Auditor does not have authority to correct assessment which is assessed either to high or to low. If the Auditor determines there is a duplicate assessment he would have authority to cancel the illegal assessment. The Auditor would have no authority relative to a cancellation of tax sale.

January 11, 1943. *Mr. Francis J. Kuble, County Attorney, Des Moines, Iowa:* We wish to acknowledge receipt of your recent letter in which you ask for our opinion on several questions that have been raised by your County Auditor.

The first question presented is:

"Does the County Auditor have authority to cancel tax already certified to the County Treasurer for collection without first having approval by the Board of Supervisors?"

Section 7149 of the 1939 Code of Iowa provides as follows:

7149 Corrections by auditor. The auditor may correct any error in the assessment or tax list, and may assess and list for taxation any omitted property.

It is our opinion that the authority of the auditor to correct any error in the assessment or tax list may be exercised at any time until there has been a full payment of the tax involved. We quote the following language from the case of Elliott vs. Rhoads, 203 Iowa 218, in which the court was discussing the question of whether the auditor could correct the tax list after it had been sent to the county treasurer and the first half of the taxes paid, the Court said:

"This question was discussed and decided in First Nat. Bank v. Hayes, 186 Iowa 892, in which this court held that the authority of the county auditor to correct errors made by the assessor in the assessment of property exists until there has been full payment of the amount exacted by the record."

Your second question is:

"Can the Auditor cancel or correct an assessment when petitioned for on the grounds that it was an arbitrary assessment and that the assessment roll was not signed by the party assessed?"

It should be pointed out that the provisions of Code Section 7149 do not give the auditor authority to correct an assessment by which a tax payer is assessed too much or too little on a particular piece of property. It is our position that before the auditor can correct an assessment he must be satisfied that an error has been made and a correction cannot be made by the auditor because of alleged excessive valuation. See Polk County vs. Sherman, 99 Iowa 60. It is our further opinion that the fact that the tax payer did not sign the assessment roll does not make the assessment illegal so that the auditor can correct or cancel the assessment as made.

Your third question is:

"Can the Auditor cancel a duplicate assessment without the approval of the Board of Supervisors?"

Code Section 7149 authorizing corrections by the Auditor makes no reference to approval by the Board of Supervisors and in case the auditor determines that a duplicate assessment has been made it is obvious that an illegal assessment exists and, therefore, the auditor would have authority to correct the assessment and to cancel the illegal assessment.

Your fourth question is:

"Can the Auditor cancel a tax sale on a property owned by a church, charitable organization, or other organizations of like nature, where the assessor erroneously assessed the property and the taxes were spread, became delinquent and were sold at tax sale, even though the property was not used for pecuniary profit?"

No where in the laws of the State of Iowa, dealing with tax matters, is there any provision authorizing the county auditor to cancel a tax sale and consequently our opinion must be that the auditor has no authority relative to the cancellation of tax sales. Section 7294 of the 1939 Code of Iowa provides as follows:

7294 Correcting wrongful sale. When it shall be made to appear to the treasurer, before the execution of a deed for real estate sold for taxes, or if the deed be returned by the purchaser, that any tract or lot was sold which was not subject to taxation, or upon which the taxes had been paid, he shall make an entry opposite such tract or lot on the sale book that the same was erroneously sold, and such entry shall be evidence of the fact therein stated, and the purchase money shall be refunded to the purchaser.

It is our position that the situation described in question four should be handled as provided in Section 7294 of the 1939 Code of Iowa.

OFFICIAL NEWSPAPERS: REQUIREMENTS. Newspapers must meet the requirements of Section 11099.1 before they can qualify under provisions of Chapter 274 relating to the selection of Official Newspapers.

January 13, 1943. *Mr. John D. Moon, County Attorney, Ottumwa, Iowa:* We wish to acknowledge receipt of your recent letter in which you ask for our opinion on several questions in connection with the appointment of official newspapers.

Your first question is:

"Does Section 11099.1 of the 1939 Code of Iowa apply to Chapter 274?"

As mentioned in your letter, our opinion of June 20, 1939, which appears at page 273 of the 1940 volume of the Attorney General's Opinions, holds that the above mentioned Section is applicable to Chapter 274 and we can see no reason why we should not adhere to the ruling therein made and our answer to your question must be in the affirmative.

You state next:

"In the event that you hold that the Section, above cited, does apply to Chapter 274, I would appreciate your opinion on the following question: On January 2, 1943, five newspapers filed applications to be official newspapers of this county. On that date, January 2, 1943, one of said papers had been in existence exactly two years; that is, its first issue appeared on January 2, 1941, although at the time the Board makes its selection several extra days will have elapsed and the two year period will have been exceeded.

Section 11099.1 of the 1939 Code of Iowa provides as follows:

11099.1 "Newspaper" defined. For the purpose of establishing and giving assured circulation to all notices and/or reports of proceedings required by statute to be published within the state, where newspapers are required to be used, newspapers of general circulation that have been established, published regularly and mailed through the post office of current entry for more than two years and which have a bona fide paid circulation recognized by the postal laws of the United States shall be designated for the publication of notices and/or reports of proceedings as required by law.

Section 5397 of the 1939 Code of Iowa specifies the time of selection of official newspapers and Section 5398 determines the source of selection. Section 5400 provides for the making of a written application by a publisher who desires that his newspaper be selected as an official newspaper. Section 5401 provides for verified statements to be deposited with the county auditor in case there is a contest relative to the selection of the newspaper.

It is our opinion that the question of whether a certain newspaper may qualify as an official newspaper within the statutory definition must be determined as of the time the selection of official newspapers is made. In other words, if the newspaper in question meets the requirements of Section 11099.1 at the time the selection is made such newspaper is entitled to be considered by the Board of Supervisors.

You further state that the newspaper in question was at first printed in a town outside of Wapello County, although purported to be a newspaper of Eldon, Wapello County, Iowa, and at a later date printing was actually done at Eldon. We do not believe that these facts have any bearing on the qualification of the paper in question. If the paper in question was actually a newspaper of Eldon, Wapello County, Iowa, having its principal place of business in Eldon, it would not be necessary that the actual printing be done at that place. The word "published" was not used in the Section in question in the narrow sense of printing and binding but we believe the word "published" was intended to make known publicly or to put into circulation.

Since receiving your letter we have talked to you on the question of just when the paper in question was first mailed through the post office

of Eldon, Iowa. If the facts are that the newspaper was first mailed through the post office of Eldon, Iowa, in March of 1941, the newspaper in question would not meet the statutory definition of a newspaper as provided in Section 11099.1. In this connection we note the following language from that Section:

"* * * newspapers of general circulation that have been established, published regularly and mailed through the post office of current entry for more than two years and which have a bona fide paid circulation recognized by the postal laws of the United States shall be designated for the publication of notices and/or reports of proceedings as required by law."

The language above noted requires that the newspaper be mailed through the post office of current entry, which in this case is Eldon, Iowa, for more than two years and if the paper has been mailed from Eldon only since March of 1941 it is obvious that the newspaper does not meet the statutory definition of a newspaper and cannot qualify under the provisions of Chapter 274 relating to the selection of official newspapers.

CHAIN STORES: FIFTEEN STORES OPERATED AT WHOLESALE AND RETAIL: SUBJECT TO ANNUAL OCCUPATIONAL TAX. The Beatrice Creamery Company maintains fifteen business establishments throughout the state where they sell at wholesale and retail, they are therefore determined to be conducting a business by a system of chain stores and are therefore liable for the annual occupational tax provided for in Section 6943.129.

January 15, 1943. *Honorable Fred W. Nelson, Chairman, Iowa State Tax Commission, Building:* This will acknowledge receipt of your letter of the 14th instant wherein you ask for an attorney general's opinion on the following legal question:

The facts are as follows:

The Beatrice Creamery Company maintains fifteen business establishments throughout the state. The places where these establishments are located and the amount of wholesale and retail business transacted by each for the first, second and third quarters of 1942 are shown by Exhibit "A" hereto attached and made a part hereof by reference.

We call attention specifically to the amount of business transacted by a few of the stores listed in Exhibit "A".

Dubuque, Iowa—Total Sales, First Quarter, 1942, $130,098.35, Wholesale Sales, $101,124.35, Retail Sales, $28,974.00, Retail Percent of Total, 22.27, Sales Tax Paid, $579.48. The second and third quarter sales from this store were in approximately the same amount, being Second Quarter, Retail Percent of Total, 21.56, Third Quarter 17.54;

Council Bluffs, Iowa—Total Sales, First Quarter, 1942, $74,101.91, Wholesale Sales, $65,489.91, Retail Sales, $8,612.00, Retail Percent of Total, 11.62, Sales Tax Paid, $172.24. The second and third quarter sales from this store were as follows: Retail Percent of Total 17.17 and 13.43, respectively;

Washington, Iowa—The Retail Percent of Total Sales was for the First Quarter of 1942, 10.98;

Griswold, Iowa—Retail Percent of Total Sales 86.79, for the First Quarter, 83.82 for the Second Quarter, 72.00 for the Third Quarter;

Oskaloosa, Iowa—This store did a retail business during the Third Quarter of $834.50 with Retail Percent of Total Sales of 3.05;

Grinnell, Iowa—This store made the following Retail Percent of Total Sales for the Second and Third Quarters for 1942, respectively: 3.19, 5.28.

As we have indicated, the amount of business done by each of the fifteen stores, operated by the Beatrice Creamery Company within this state, is shown in detail on Exhibit "A". Each of said stores has applied for and obtained a Retail Permit under and by virtue of the provisions of 6943.084 and as indicated by Exhibit "A" paid the Sales Tax on the retail sales.

The specific legal question is as to whether the Beatrice Creamery Company is engaged in conducting a business by a system of chain stores, as that term is used in Chapter 329.5, Code of Iowa, 1939. Several statutes have a bearing on the legal question involved herein, and these are hereinafter set out.

Sub-section 3 of Section 6943.127 provides:

" 'Sale' means any transfer, exchange or otherwise, in any manner or by any means whatsoever, for a consideration."

Sub-section 4 of Section 6943.127:

" 'Retail sale' or 'sale at retail' means the sale to a consumer or to any person for any purpose, other than for resale, of tangible personal property including goods, wares and merchandise."

Sub-section 6 of Section 6943.127:

" 'Store' means any store or stores, or any mercantile or other establishment in which tangible goods, wares or merchandise of any kind are sold or kept for sale at retail."

Sub-section 7 of Section 6943.127:

" 'Conducting a business by a system of chain stores' when used in this chapter shall be construed to mean and include every person, as defined in this chapter, in the business of owning, operating or maintaining, directly or indirectly, under the same general management, supervision, control or ownership in this state, and/or in this state and any other state, *two or more stores, where goods, wares, articles, commodities, or merchandise of any kind whatsoever are sold or offered for sale at retail and where the person operating such store or stores receives the retail profit from the commodities sold therein.* * * *"

Section 6943.129 provides:

"There is hereby imposed upon every person within the state of Iowa engaged in conducting a business by a system of chain stores from any of which stores are sold or otherwise disposed of at retail tangible personal property such as goods, wares, and merchandise an annual occupation tax for each taxable year during which year or any part thereof, such person is so engaged, as follows to wit:

1. A specific amount on each person engaged in conducting a business by a system of chain stores to be determined as follows:
   a. $5.00 for each store in excess of one and not in excess of ten if said business is conducted at not in excess of ten stores within this state under a single or common ownership supervision or management.
   b. $15.00 for each store in excess of ten and not in excess of twenty if said business is conducted at in excess of ten but not in excess of twenty stores within this state. * * *"

Other sections might be quoted which would throw further light on the legal question to be determined, but what we have set out, we believe to be sufficient.

A reading of these statutes leads us unhesitatingly to the conclusion that the Beatrice Creamery Company is conducting a business by a system of chain stores and, therefore, liable for the annual occupation tax provided for in Section 6943.129.

It seems to us that we cannot escape the conclusion that each of the business establishments of the Beatrice Creamery Company is a "store" in which tangible goods, wares or merchandise were sold or kept for sale at retail. It is shown without dispute that retail sales were made from all of said stores and that said sales in some instances aggregated 86.79 per cent of the total sales. We are referring now to the Griswold store. In at least three of the other stores it varied from approximately 10.98 per cent of the total up to 22.27 per cent. The three stores referred to are the ones at Washington, Council Bluffs and Dubuque.

As shown by Exhibit "A" in one of the stores, the retail percentage of the total sales was as low as .33 of one per cent. This, we believe, has no bearing on the legal question involved because as we construe the statute, there is nothing to indicate that the imposition of the occupation tax is conditioned upon the amount of business transacted. Under Section 6943.129, the occupation tax is imposed upon every person "conducting a business by a system of chain stores" and that phrase is defined in Sub-section 7 of Section 6943.127 as applying to every person who owns, operates or maintains directly or indirectly two or more stores where goods, wares, articles, commodities or merchandise of any kind whatsoever are sold or offered for sale at retail.

So it seems to us, it may not be said that the Beatrice Creamery Company in conducting these stores does not come squarely within the provisions of this sub-section.

We call, also, to your attention the recent case of Phillips Petroleum Company vs. Nelson, 5 N. W. (2d), page 1. That case involved specifically whether certain bulk plant operations of the Phillips Petroleum Company were subject to the application of the Iowa chain store tax. The Court held that such bulk plants were not "chain stores", but we cite the case because certain language therein used has, in our opinion, considerable bearing on the question herein presented. On page 4 of the N. W. citation, the Court said:

"As no merchandise was sold, offered for sale, or kept for sale on the premises, as plaintiff received no retail profit from commodities sold in the plant, because no sales were made therein, the bulk storage plants, or warehouses involved in this suit, are not stores within the statutory definition and are not subject to the chain store tax. Plaintiff, in operating its seventy-three bulk storage plants in the manner shown by the record, was not engaged in conducting a business by a system of chain stores from which merchandise was sold at retail within the meaning of Section 6943.129."

We set out also the following from said opinion which we think tends to support the conclusion herein reached:

"We are of the opinion the cited cases tend to sustain our construction of the act. The definition of a 'store' in the West Virginia Chain Store Tax Act is quite similar to its definition in the Iowa Act. In holding that the bulk plants and filling stations of defendant were, under the evidence, 'stores' as defined by the West Virginia Act, the court, in Fox v. Standard Oil Company, supra, said (294 U. S. 87, 55 S. Gt. 336, 79 L. Ed. 730): 'There is no doubt that goods, wares, and merchandise of a kind, i.e., gasoline and other petroleum products, and even tires and other

automobile accessories, *are sold by the complainant and its agencies at its plants and service stations.* This satisfies the test of the statute, and subjects the seller to the tax." (Italics supplied)

When we consider this language in light of the facts in the instant case, it becomes very clear, so it seems to us, that the Beatrice Creamery Company is liable for the occupation tax imposed by Chapter 329.5.

Here we have a number of stores operating under a retailer's permit, paying sales tax on their retail sales, which in some instances ran as high as 86.79 per cent of the gross sales, and which in all other respects come squarely within the provisions of Chapter 329.5. We cannot conceive upon what theory these stores may logically be said not to be "chain stores" as that term is used in Chapter 329.5.

We reach the conclusion, therefore, that the Beatrice Creamery Company is conducting a business by a system of chain stores and consequently is liable for the tax provided for in Section 6943.129.

TAXATION: SUPREME COURT DECLARING TAX UNCOLLECTIBLE: TREASURER NOT REQUIRED TO CARRY TAX FORWARD. Where the Supreme Court declared a tax uncollectible because of a change of valuation against the properties after the original tax had been paid the County Treasurer was not required to carry the tax forward.

January 18, 1943. *Mr. Frances J. Kuble, County Attorney, Polk County Court House, Des Moines, Iowa:* This will acknowledge receipt of your letter of the 11th instant wherein you ask the opinion of this department relative to the following legal question. For an understanding of the factual situation, we quote from your letter as follows:

"You will recall that as a result of the final enforcement of the board order additional taxes for the years of 1937 and 1938 were placed on a goodly number of properties after the 1937 and 1938 taxes were paid. The County Treasurer now inquires of us as to whether or not he should continue to carry these 1937 and 1938 taxes forward on the books * * *."

It is our opinion that in view of the decision of the Supreme Court in the case of Des Moines Elevator Company vs. Greenwalt, County Treasurer, 3 N. W. Reporter (2d) 150 (Iowa) that it would be futile to carry these taxes on the delinquent record. In this case, the Supreme Court of our state specifically held that taxes for the years 1937 and 1938, certified by the auditor by reason of change of valuation against properties after the original tax had been paid by the taxpayer, could not be collected.

It is very clear, therefore, that the taxes referred to in your letter are uncollectible and we can see no reason for carrying these taxes forward on the delinquent lists.

We call your attention to Section 7193, Code of Iowa, 1939 which provides as follows:

Sec. 7193:

"The Treasurer shall each year, upon receiving the tax list, enter upon the same in separate columns opposite each parcel of real estate on which the tax remains unpaid for any previous year, the amount of such unpaid tax, and unless such delinquent real estate tax is so brought forward and entered, it shall cease to be a lien upon the real estate upon

which the same was leveled and upon any other real estate of the owner * * *."

It will be noted that under Section 7193, the Treasurer is required, upon receiving the tax list, to enter upon the same the amount of unpaid taxes and unless such delinquent real estate tax is so brought forward and entered, it shall cease to be a lien. This statute places a specific and positive duty upon the treasurer with reference to delinquent taxes but in view of the decision in the Des Moines Elevator Company v. Greenwalt, we are constrained to hold that the treasurer is relieved of the duty of carrying forward such taxes as the Supreme Court has held to be uncollectible. That this was the effect of the holding of said case is clearly determined by the following language found on page 153 of the N. W. citation:

"It is, therefore, our holding that there can be no additional tax payment required because of the change in valuation by virtue of the order of the State Board of Assessment and Review (now State Tax Commission) for the reasons heretofore noted."

And the reasons are summed up in the following language from the opinion:

"In the present case, there is no pleading of any character to the effect that the original valuation made by the assessor was made fraudulently or by reason of any fraudulent acts of the taxpayer. That being true, we see no reason why the public through the tax authorities, should not be bound by the original valuation placed upon the property by the assessor. There is a statutory provision for an appeal on behalf of the public where the taxing authorities deem that an assessment is too low and which provides that any public officer of a county, city, town, township or school district may make complaint before the Board of Review. Section 7135, 1935 Code of Iowa.

"It is a statutory requirement that a taxpayer who objects to his assessment shall be required to appear and appeal to the Board of Review in order to obtain a reduction in the assessment and in turn to the district court if relief is not given. Inasmuch as a statutory provision has been provided for an appeal by taxing authorities where taxes are claimed to be too low, we see no reason why taxing bodies should not be required to make use of the statutory provisions which are provided in order to obtain an increased valuation and assessment."

We reach the conclusion, therefore, that inasmuch as our Supreme Court has specifically held that the additional taxes for the years 1937 and 1938, certified by the auditor to the county treasurer, as a result of the holding in State, ex rel, Iowa State Board of Assessment and Review, vs. Local Board, 225 Iowa 855, are not collectible, the treasurer is under no duty to carry forward on the delinquent list such additional taxes.

WAACS, WAVES AND SPARS: ENTITLED TO HOMESTEAD EXEMPTION. The members of the WAACS, WAVES and SPARS who are owners of homesteads must be considered as occupying or living on the same during such military service providing they were entitled to homestead credit for the year immediately preceding such service.

January 27, 1943. *Iowa State Tax Commission, Building:* This will acknowledge receipt of your communication of the 25th instant wherein you ask an Attorney General's opinion on the following legal question:

Are WAACS, WAVES, and SPARS entitled to the benefits provided for in Chapter 239, Laws of the 49th General Assembly, relating to homestead credit for persons in military service?

The answer to the above question involves the proper interpretation of Section 2 of Chapter 239, Laws of the 49th General Assembly, which provides as follows:

SEC. 2. "Section six thousand nine hundred forty-three and one hundred fifty-two thousandths (6943.152), Code, 1939, is amended by adding to paragraph a of subsection one (1) the following:", provided further, that when any person is inducted into active service under the Selective Training and Service Act of the United States of 1940 or whose voluntary entry into active service results in a credit on the quota of persons required for service under the Selective Training and Service Act, or who, being a member of any component part of the military, naval, or air forces or nurse corps of this state or nation, is called or ordered into active service, such person shall be considered as occupying or living on the homestead during such service, provided he was entitled to a homestead tax credit for the year immediately preceding such service.".

It will be noted, when the above amendment is analyzed, that a person in the military service is entitled to homestead exemption notwithstanding the fact that he does not occupy or live on the homestead, providing that he falls within one of the three following classifications:

1. When such person is inducted into active service under the Selective Training and Service Act of the United States of 1940.

2. When such person's voluntary entry into such active service results in credit on the quota of persons required for service under the Selective Training and Service Act.

3. When such person, being a member of any component part of the military, naval or air force or nurse corps of this state or nation is called or ordered into active service.

A perusal of the statutes creating the WAACS, SPARS and WAVES reveals that these organizations were created by special Act of Congress and are not amendments to the Selective Training and Service Act of the United States of 1940. It is clear, therefore, that when a person enlists in any of the three above mentioned women's organizations they are not inducted into active service under the Selective Training and Service Act of the United States of 1940 and hence, do not fall within the first of the three above enumerated classifications.

It is equally clear that the members of these organizations do not fall within classification two (2) above set out for their entry into active service does not result in a credit on the quota of persons required for service under the Selective Training and Service Act.

We now consider whether women who enter either of the three above mentioned organizations may be properly considered as coming within classification three (3) herein above set out.

While the question is not free from doubt, we are constrained to hold that it was the intention of the Legislature to afford the relief provided for in Chapter 239 to all persons who become members of the armed forces of our country. There is neither reason nor logic for an interpretation of this Chapter that would result in discrimination against women who become members of these military organizations. Particularly do we believe this conclusion justified when we consider the title of said Chapter 239, which reads as follows:

"AN ACT to amend sections six thousand nine hundred forty-three and one hundred forty-three thousandths (6943.143) and six thousand nine hundred forty-three and one hundred fifty-two thousandths (6943.152), Code, 1939, relating to rights and privileges granted to persons called, ordered, entering, or inducted into the military or naval forces or nurse corps of this state or the United States."

We reach the conclusion, therefore, that members of the WAACS, SPARS and WAVES, who are owners of homesteads, must be considered as occupying or living on the homestead during such service, provided they were entitled to a homestead credit for the year immediately preceding such service.

INSANITY: FIVE YEAR LIMITATION TO COLLECT CARE FROM RELATIVES. Charges for the care and support of an insane person constitute a continuous, open and current account and actions thereon are barred after a lapse of five years from the last item.

INSANITY: TWO YEAR LEGAL SETTLEMENT FOR INSANE PERSON. The liability of the county and state for support of insane persons is based upon a legal settlement of two years.

INSANITY: LIEN RELATES TO PROPERTY OF INSANE PERSON AND SPOUSE. The lien relates to the property of the insane person and spouse and does not extend to the property of other relatives.

BONDS: OFFICIAL BOND SHOULD BE RENEWED BY ISSUING NEW BOND. Where an official is elected to office for a definite period of time and a bond is required at the expiration of the bond a new bond should be issued and not by the filing of a renewal certificate.

February 2, 1943. *Robert E. Frush, County Attorney, Dallas County, Adel, Iowa:* This will acknowledge receipt of your letter dated February first wherein you ask our opinion on the following questions:

"1. Is there any limitation upon the time which the County can collect from relatives of persons who have been placed in State institutions?

2. Is an insane residence obtained in one or two years on liabilities of the county?

3. We have had this question arise several times concerning the lien records on insane persons. Our Auditor thinks that abstracters should show these liens against the father and mother who owned property when a son or daughter has been placed in an Institution for the Insane. My thought was that unless the lien record against the father and mother allowed the lien for the expenses of the son or daughter that the abstracter would not be bound to anticipate or note something that was not of record. Consequently the abstracter would have no record knowledge of the lien.

4. The state checkers have asked the Auditor for a new bond each year rather than a certificate renewing bonds that are continuous. Is a certificate renewing a continuous bond sufficient or should a new bond each year be given by the bonding companies?"

We shall answer your questions in the order in which they are put.

1. Section 3595, Code of Iowa 1939, reads as follows:

Personal liability. Insane persons and persons legally liable for their support shall remain liable for the support of such insane. Persons legally liable for the support of an insane or idiotic person shall include the spouse, father, mother, and adult children of such insane or idiotic person, and any person, firm or corporation bound by contract hereafter made for support. The county auditor, subject to the direction of the board of supervisors, shall enforce the obligation herein created as to all sums advanced by the county."

The case of Scott County vs. Townsley, 174 Iowa 192, 156 N. W. 291, held that an action by a county to recover for quarterly charges paid by a county for the support of an insane wife for which the husband is liable, constitute a continuous, open, current account against the husband, and an action to recover thereon is barred after the lapse of five years from the date of the last item of all the series of charges.

It is our opinion that the above named case is controlling and that the same principle should be applied in all recovery matters pertaining to all state institutions.

2. Section 3581, Code of Iowa 1939, reads as follows:

Liability of county and state. The necessary and legal costs and expenses attending the arrest, care, investigation, commitment, and support of an insane person committed to a state hospital shall be paid:

1. By the county in which such person has a legal settlement, or

2. By the state when such person has no legal settlement in this state, or when such settlement is unknown.

The residence of any person found insane who is an inmate of any state institution shall be that existing at the time of admission thereto."

Section 3828.088 reads in part as follows:

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

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

Under Section 3581, above quoted, it is obvious that the liability of the county and state for the support of the insane is dependent upon the legal settlement of the insane person. It is necessary to refer to Section 3828.088, 1939 Code of Iowa, as amended, to determine the legal settlement of any person. The 49th G. A., Section 3828.088 provided for a two year period of residence, and it is our opinion that in view of said fact the two year period should be controlling with reference to determining the legal settlement of an insane person.

3. Section 3604.1, Code of Iowa 1939, merely provides for a lien on any real estate owned by an insane person or his spouse. There is noth-

ing in the Code which provides for an automatic statutory lien against the real property of a son or daughter or mother or father of an insane person.

4. Section 1059, Code of Iowa 1939, provides for the form of an official bond of a public officer. Chapter 87, laws of the 49th G. A. amends said section by adding thereto the following: "The attachment of a renewal certificate to an existing bond shall not constitute compliance with this section."

We have previously held, and it is still our holding, that where an employee of the state is appointed for an indefinite length of time, that he may obtain a bond covering an indefinite length of time in such an amount as his superior deems necessary, and that there can be paid an annual premium on said bond. However, in the case of an elective official such as your Auditor, who is elected for a definite period of time, it is our opinion that he should obtain a bond covering the period of his term of office, and should not attach a renewal certificate thereto.

TAXATION: BOARD OF SOCIAL WELFARE TO NOTIFY BOARD OF SUPERVISORS AS TO PROPERTY OF OLD AGE RECIPIENTS. It is the duty of the State Board of Social Welfare to notify the Board of Supervisors as to the property holdings of old age recipients, but it is not necessary to notify each year the notice stands until there has been a change in the status of the old age recipient.

February 3, 1943. *Mr. Charles L. Johnston, County Attorney, Centerville, Iowa.* We wish to acknowledge receipt of your recent letter in which you ask for our opinion on the following matter:

"Is it necessary for the State Board of Social Welfare to notify the Board of Supervisors each year the names of the recipients of old age pension and also furnish it with a description of the property owned by such recipient; and also whether or not it is necessary for the Board of Supervisors each year to make an order suspending the taxes against such property?

"We have the situation in this county where the State Board of Social Welfare furnished to our Board of Supervisors a list of recipients of old age pensions, but in this case did not describe the real estate upon which the taxes should be suspended. The treasurer sold the real estate at tax sale, which was the recipient's homestead, and it was purchased by the county under the Public Bidder Act. Subsequent to this purchase by the county and before a tax deed was issued, the county assigned the tax sale certificate to an individual without knowledge that it was the sale of this recipient's homestead. The individual who purchased the certificate of sale from the county then proceeded to take a tax deed.

"I would appreciate your opinion as to whether or not the Board of Supervisors would have power to set aside this tax deed and refund the money to the purchaser?"

Section 6950.1 of the 1939 Code of Iowa provides as follows:

6950.1 Suspension of taxes. Whenever a person has been issued a certificate of old-age assistance and is receiving monthly or quarterly payments of assistance from the old-age assistance fund, such person shall be deemed to be unable to contribute to the public revenue. The state board of social welfare shall thereupon notify the board of supervisors, of the county in which such assisted person owns property, of the aforesaid fact, giving a statement of property, real and personal, owned,

possessed, or upon which said person is paying taxes as a purchaser under contract. It shall then be the duty of the board of supervisors so notified, without the filing of a petition and statement as specified in section 6950, to order the county treasurer to suspend the collection of all the taxes assessed against said property and remaining unpaid by such person or contractually payable by him, for such time as such person shall remain the owner or contractually prospective owner of such property, and during the period such person receives monthly or quarterly payments of assistance from the old-age assistance fund.

From an examination of this Section it is our opinion that it is not necessary for the State Board of Social Welfare every year to give the Board of Supervisors the information provided for in said Section. It is our opinion that once the information is given to the Board of Supervisors by the State Board of Social Welfare the taxes on the property in question shall remain suspended until there is a change of condition which again makes the property subject to taxation.

It will be noted from the facts stated in your letter that the State Board of Social Welfare has not complied with the provisions of Section 6950.1 of the 1939 Code of Iowa. You further state that the Treasurer sold real estate at tax sale which was an old age recipient's homestead and that it was purchased by the County and that the tax sale certificate was assigned to an individual and that said individual has taken a tax deed. In view of the fact that a tax deed has been issued it is our opinion that the Board of Supervisors has no authority to set aside the tax sale or the tax deed. It is our position that the situation presented does not fall within the provisions of either Section 7293 or Section 7294 of the 1939 Code of Iowa. It should be noted that we do not pass on the validity of the tax deed in question but merely hold that the Board of Supervisors does not have any authority to set aside the tax deed that has been issued.

SOLDIERS, SAILORS AND MARINES: ELECTED OFFICIAL ENTERING SERVICE: ENTITLED TO THIRTY DAYS PAY: OFFICE VACANCY FILLED. A Public officer entering military service is entitled to a leave of absence and also thirty days pay for the first thirty days of said leave under Section 467.25. The proper appointing officers may make a temporary appointment to fill the temporary vacancy.

February 3, 1943. *Mrs. Rosa Lee Snyder, County Attorney, Corydon, Iowa:* We wish to acknowledge receipt of your letter of February 1, 1943, in which you ask for our opinion on the following matter:

"Sometime in August 1942 Lloyd L. Fry, Clerk of District Court of Wayne County, Iowa, enlisted in the army. Before entering into active service he secured a leave of absence from the Board of Supervisors, also an agreement that all future warrants for salary of the Clerk be made to him and delivered to T. W. Miles together with a request that the Board approve A. T. Dotts as Deputy Clerk in his absence. Mr. Fry ran for re-election and was re-elected, and filed his bond as Clerk. All papers and acts performed in the office are done in his name as Clerk by A. T. Dotts, Deputy, or Margaret Bay Nessen, Deputy.

"Can Mr. Fry legally draw his warrants and have the affairs of his office conducted in his name although absent from the County and unable to return at his pleasure? Or must the Board grant him a leave of absence, one months pay, and appoint an acting Clerk to take charge, file a Clerk's bond during Fry's absence?"

Section 467.25 of the 1939 Code of Iowa, as amended by Chapter 73, Acts of the 49th General Assembly, provides as follows:

467.25 State and municipal officers and employees not to lose pay while on duty. All officers and employees of the state, or a subdivision thereof, or a municipality therein, who are members of the national guard, organized reserves or any component part of the military, naval, or air forces or nurse corps of this state or nation, or who are or may be otherwise inducted into the military service of this state or of the United States, shall, when ordered by proper authority to active service, be entitled to a leave of absence from such civil employment for the period of such active service, without loss of status or efficiency rating, and without loss of pay during the first thirty days of such leave of absence. The proper appointing authority may make a temporary appointment to fill any vacancy created by such leave of absence.

It is clear from reading the above quoted law that the Legislature intended that a public officer, such as mentioned in your letter, when entering the military service should be entitled to a leave of absence and entitled to pay for the first thirty days only of such leave of absence. There is no authority for the Board of Supervisors to authorize payment of salary beyond the first thirty days that the above mentioned public officer is in active military service and the Board of Supervisors cannot enter into any sort of an agreement contrary to the provisions of the law above mentioned.

It is significant that the Legislature, in amending Section 467.25 and providing for a leave of absence for persons entering the military service, refers to a "vacancy" and provided for the filling of such vacancy. It is true that the vacancy is a temporary one but it cannot be fairly said that a county officer entering the military service could continue to draw his salary where the Legislature has said that a vacancy exists which may be filled by the proper appointing authority. The true test, it seems to us, in determining whether a county officer may continue to draw his salary, even though he has entered the military service, is whether or not a situation exists which authorizes the Board to make a temporary appointment. It clearly appears in the instant case that such a situation is present and that a temporary vacancy has occurred and the Board of Supervisors no longer may legally pay a salary to the county officer who has departed for military service.

The provision of Chapter 73, Acts of the 49th General Assembly, relative to the appointment of a person to fill the temporary vacancy is as follows:

"The proper appointing authority may make a temporary appointment to fill any vacancy created by such leave of absence."

It will be observed that the use of the word "may" in this law denotes that it was the intention of the Legislature to make it possible for the proper appointing authority to make a temporary appointment to fill the temporary vacancy if it deems it advisable. It is our opinion that it is not mandatory that the Board of Supervisors, in the instant case, appoint a person as Clerk to fill the temporary vacancy.

SCHOOLS AND SCHOOL DISTRICTS: PART-TIME SCHOOLS: ATTENDANCE REQUIREMENTS: TRUANTS. In order to establish a part-time school there must reside in the district 15 or more children over 14 years of age, and under 16, who are not in regular attendance at full-time school. A child who is not regularly employed and who does not come under the exceptions provided may be punished as a truant.

February 5, 1943. *Mr. John F. Burrows, Deputy County Attorney, Keokuk, Iowa:* In your letter dated January 27, 1943, you state that a part-time school has been established in the City of Keokuk under the provisions of Chapter 218 of the 1939 Code of Iowa.

In connection with the operation of that part time school you submit the following questions for our opinion:

"To what extent does the local school board have authority and discretion to determine whether or not a child of the age of 15 may leave the full time school and enroll in the part time school. Our local board since the establishment of the part time school has exercised authority in this respect, and has only permitted such children to be enrolled in the part time school as are of proper age who have regular employment, and whose earnings are needed for the maintenance of the home. In a few cases students of proper age who are mentally unable to handle full time school work have also been placed in the part time school.

"Where a part time school has been established do the provisions for attendance at such school entirely supersede the attendance requirements of Sections 4410 and 4411.

"Where a part time school has been established and a child 15 no longer desires to attend full time school, must the school board and school authorities permit him to be enrolled in the part time school.

"May a child who is 15 years of age, and has not been enrolled in part time school and who refuses to attend full time school be punished as a truant if he refuses to attend full time school, or must the school authorities permit such a child under all circumstances to be enrolled in the part time school."

Section 4410 of the 1939 Code of Iowa provides in effect that any child over seven and under sixteen years of age in proper physical and mental condition to attend school, shall attend that school for at least twenty-four consecutive weeks in each school year. This provision has reference to full time schools.

Section 4411 provides that any child who falls within any of the following categories is not bound by the provisions of Code Section 4410, and need not attend full time school.

1. A child who is over the age of fourteen and is regularly employed.

2. A child whose educational qualifications are equal to those of pupils who have completed the eighth grade.

3. A child who is excused for sufficient reason by any court of record or judge.

4. A child who is attending religious services, or receiving religious instructions.

Section 4291 of the 1939 Code of Iowa, provides as follows:

4291 AUTHORIZATION. The board of directors in any independent school district situated in whole or in part in any city having a popula-

tion of twelve thousand or over, in which there shall reside or be employed, or both, fifteen or more children over fourteen years of age and under sixteen years of age, who are not in regular attendance in a full-time day school and who have not graduated from a four-year approved high school, shall establish and maintain part-time schools, departments, or classes for such children. In districts situated in whole or in part in cities having less than twelve thousand population, the board may establish and maintain such schools. When such part-time schools have been established, all persons having custody of such children shall cause them to attend the same.

As will be noted from reading the Code Section last quoted, no part-time school need be established unless there shall reside within the district containing that school "fifteen or more children over fourteen years of age and under sixteen years of age, *who are not in regular attendance at a full-time day school, and who have not graduated from a four-year approved high school.*" From this it appears that the part-time schools were provided for the exclusive benefit of those children over fourteen, and under sixteen years of age, not in regular attendance in a full-time day school, or who have not graduated from a four-year approved high school. The only manner in which a pupil in this age group might properly be not regularly attending the full-time day school, would be by that child falling within one of the various provisions contained in Section 4411 set out previously in this opinion.

A child who does not come within one of those exceptions is not entitled to attend part-time school, and must be required to attend full-time day school. A child, however, who does come within one of those exceptions is entitled to, and may properly demand to be enrolled in the part-time school.

It follows from this opinion that a child fifteen years of age, who has not been enrolled in part-time school, and who refuses to attend full-time school may be punished as a truant upon his refusal to attend full-time school, if he does not come within one of the exceptions set forth in Section 4411 of the 1939 Code.

As to those pupils who are mentally unable to assimilate subjects taught in the full time school, we believe it is proper to place them in the part-time school, and in connection with that holding refer you to the case of *State vs. Ghrist*, 222 Iowa 1069.

PENSION FUNDS: POLICEMEN AND FIREMEN: INJURY WHILE ON LEAVE IN MILITARY SERVICE: DISABILITY NOT CHARGEABLE TO PENSION FUND. A member of a police or firemen's pension fund who sustains an injury while in the armed services, while on leave of absence from the police or fire department is not entitled to disability benefits from the pension fund by reason of that injury.

February 9, 1943. *Hon. C. B. Akers, Auditor of State, Building:* In your letter of January 27, 1943, you submit the following problem for our opinion:

"Under Chapter 322, Code of 1939, which applies to disabled and retired firemen and policemen, and which is commonly known as the Old Pension Fund Law, Section 6316 says in effect that if a member has served five years or more, he shall be entitled, if disabled, to be retired and paid a pension under the provisions of this chapter. Assume, however, that a member of a police or fire department had served for more

than five years, and had obtained from the city council an authorized leave of absence for the duration of hostilities, and had enlisted in some branch of the service. Also assume that this member had been discharged from the armed service for medical reasons, or had been wounded in action and discharged. Could such a member then apply for a disability pension from the city when such disability could not be traced to his services with the city?"

The answer to the problem you present depends upon what interpretation is to be made of the provisions contained in Code Sections 6315, 6315.1, 6316 of the 1939 Code of Iowa.

These sections provide as follows:

6315 WHO ENTITLED TO PENSION—CONDITIONS. Any member of said departments who shall have served twenty-two years or more in such department, and shall have reached the age of fifty years; or who shall while a member of such department become mentally or physically permanently disabled from discharging his duties, shall be entitled to be retired, and upon retirement shall be paid out of the pension fund of such department a monthly pension equal to one-half the amount of salary received by him monthly at the date he actually retires from said department. If any member shall have served twenty-two years in said department, but shall not have reached the age of fifty years, he shall be entitled to retirement, but no pension shall be paid while he lives until he reaches the age of fifty years.

6315.1 SOLDIERS AND SAILORS. Any member of the fire or police department, who resigned therefrom to serve in the army, navy or marine reserve, or marine corps, of the United States, or as a member of the United States army and navy reserve, the Spanish-American war, or in the world war 1917-1918, and has returned with an honorable discharge from such service, to the fire or police department, shall have the period of such service included as part of his period of service in the department.

6316 DISABILITY—HOW CONTRACTED. No member who has not served five years or more in said department shall be entitled to be retired and paid a pension under the provisions of this chapter, unless such disability was contracted while engaged in the performance of his duties, or by reason of following such occupation. The question of disability shall be determined by the trustees upon the concurring report of at least two out of three physicians designated by the board of trustees to make a complete physical examination of the member. After any member shall become entitled to be retired, such right shall not be lost or forfeited by discharge or for any other reason except conviction for felony.

As will be noted Code Section 6315 provides that the pension and disability benefits referred to in that section, shall under the various terms of that section be paid to "any member of said departments."

It is our opinion that when a member of a fire or police department resigns from that department or secures an authorized leave of absence, and during that absence enters the military services, that person no longer is a member of the department which he left.

It is true that he is entitled to return to that department and under the provisions of Section 6315.1, he is entitled upon his reutrn to have the period of his military service added to the period of his service in the department which he left.

However, none of these Code Sections provide that he shall remain a member of the department which he left during the period of his leave,

and we do not see how any construction of these statutes could be made which would make such a man a member of the department during his absence from that department. Since his rights to pension or to disability payments depend upon his being a member of the municipal department at the time of his becoming disabled, or at the time he shall have served twenty-two (22) years in that department, it is our opinion that the member of a police or fire department who sustained an injury while in the armed service and while on leave of absence from that department, is not entitled to a disability pension by reason of that injury.

We refer you further to Code Section 6314, which provides as follows:

6314. MEMBERSHIP FEE—ASSESSMENTS. Every member of said departments shall be required to pay to the treasurer of said funds a membership fee to be fixed by the board of trustees, not exceeding five dollars, and shall also be assessed and required to pay annually an amount equal to one per cent per annum upon the amount of the annual salary paid to him, which assessment shall be deducted and retained in equal monthly installments out of such salary.

We believe that this provision tends to sustain our conclusion that the man referred to in your problem was not at the time of his injury a member of the department, because we understand that during his leave of absence he did not contribute to the pension fund as required in this Code Section, nor did he receive compensation as a member of this department, and every member, we believe, would be entitled to the regular compensation for services.

STATE OFFICERS, DEPARTMENT AND EMPLOYEES: MILITARY LEAVE ENTITLES EMPLOYEE TO 30 DAYS PAY: NO VACATION PAY. When a state employee enters military service he is entitled to 30 days pay as provided by section 467.25 but in the event he has vacation time accumulated he is not entitled to be paid for the vacation time.

Mrs. Mary Huncke, Chairman, State Board of Social Welfare, Des Moines, Iowa: This will acknowledge receipt of your letter of February 8, wherein you request an opinion upon the following questions, to-wit:

1. When a state employee is inducted into the military service, does his pay commence for the first thirty days of such absence under the provisions of Section 467.25, Code, 1939, as amended, (1) on the date he is ordered to report to Camp Dodge for induction, or (2) on the date he is ordered to report and leave for Camp after he has taken his seven day furlough, if one is taken.

2. If a state employee has any unused vacation due him when he is inducted into the "active service" of the military or naval forces of the United States, may he draw pay therefor in lieu of taking the vacation allowed him under Chapter 90, Acts of the Forty-ninth General Assembly? If he is permitted to draw such pay, when can it be paid to him?

In answer to question No. 1, Section 467.25, Code, 1939, as amended by Chapter 73, Acts of the Forty-ninth General Assembly, provides:

"All officers and employees of the state, or a subdivision thereof, or a municipality therein, who are members of the national guard, organized reserves or any component part of the military forces or nurse corps

of this state or nation, or who are or may be otherwise inducted into the military service of this state or of the United States, shall, when ordered by proper authority to active service, be entitled to a leave of absence from such civil employment, for the period of such active service, without loss of pay during *the first thirty days* of such leave of absence."

It will be noted that this provides that the state employee may receive his usual pay for *the first thirty days* of such a leave of absence commencing with the time he starts "active service". Therefore, the first question which confronts us is "when does he first commence 'active service'?"

The only definition of this term in the statutes of Iowa was first enacted by the Forty-fifth General Assembly in Extra Session, Chapter 10, Section 25, and now appearing as Section 467.02, Code, 1939:

"The term 'active service' shall be understood and construed to be service on behalf of the state in case of public disaster, riot, tumult, breach of the peace, resistance of process, or whenever the same is threatened, whenever called upon in aid of civil authorities, or under martial law, or at encampments whether ordered by state or federal authority, or upon any other duty requiring the entire time of the organization or person, *except when called or drafted into the federal service by the President of the United States.*

The last phrase of this section clearly excepts from "active service" a person called or drafted into the federal service by the President of the United States.

Since the men in this war are called into "active service" by the President, it would, therefore, at first blush, appear that these men are not entitled to the benefits of Section 467.26, as amended. However, on closer examination, we find that the Forty-ninth General Assembly amended this section to include additional classes of persons and also added, "or who are or may be otherwise inducted into the military service of this state or of the United States."

The writer of this opinion was a member of the Forty-ninth General Assembly and heard the discussion on the floor of the House of Representatives when this amendment was passed. Without question, it was the intention of the Legislature to make it possible for the employees enumerated in Section 467.26 to obtain the benefits thereof when called into "active service" in this war. Therefore, it would appear and we so hold, that the exception contained in Section 467.02 was repealed by implication by the amendment passed by the Forty-ninth General Assembly, at least so far as it applies to persons entering "active service" in this war,—the latter amendment being the last expression of intent by the Legislature.

The only part of the United States Selective Service Act of 1940, as amended, which gives us any help is Section 13 (b) (3), as follows:

"Sec. 13 (b) (3). The term 'period of military service,' when used in such Act of March 8, 1918, when applicable with respect to any such person, shall be deemed to mean the period beginning with the date of enactment of this Act, or the date on which such person is inducted into such forces under this Act for any period of training and service *or is ordered to such active duty*, whichever is the later, and ending sixty days after the date on which such period of training and service or active duty terminates;"

It is clear from the above that the induction of a person into the forces is separate and distinct from the time he is ordered to "active duty"

which is consonant with the term "active service." It would therefore, seem that the only reasonable interpretation which could be given "active duty" or "active service" would be that it means the time he reports back to Camp Dodge for transportation to a military camp for active training after his induction and after his seven day furlough.

Thus, we hold that the thirty day pay of a state employee under the provision of Section 467.25, as amended, when called into "active service" commences on the date he reports at Camp Dodge to be sent to Camp to commence active training.

In answer to question No. 2, Chapter 90, Acts of the Forty-ninth General Assembly, provides in part as follows: "All employees of the state * * are granted one week's vacation after one year's employment and two weeks' vacation per year after two or more years' employment, with pay."

When an employee takes a vacation, he is granted a leave of absence for rest and relaxation. His name remains on the payroll and on the list of employees. He is during that time actually an employee of the state and is expected to return at the end of a week or two weeks, as the case might be, to resume his duties.

However, when the employee leaves for active service, his name is removed from the payroll and the list of employees; he is no longer an employee of the state. He is then employed and paid by the United States government. It is fundamental that money cannot be paid to a person whose name is not on the payroll or on the list of employees. Chapter 90, Acts of the Forty-ninth General Assembly, permits vacation to be granted only to an employee of the state. Since this person is no longer a state employee, it is obvious that a vacation could not then be granted to him or money paid to him, whether for salary or in lieu of a vacation.

Looking at it from a practical standpoint, if an employee keeps in touch with his draft board, he can ascertain about when he will be called, a reasonable period in advance thereof, and would have ample opportunity to take his vacation.

Looking at it from a moral viewpoint, after he leaves his position, the State is kind enough to grant him pay for the first thirty days of active service, in addition to his military compensation, although few employees in industry receive this consideration. We feel that this is sufficiently benevolent. There is no sound reason morally or legally why he should then receive in addition, pay for a vacation which he did not, in fact, take.

We, therefore, hold that a state employee, when he leaves for active service, is not entitled to receive compensation for a vacation period which he did not take.

TAXATION: BUILDING USED FOR ARMORY EXEMPT FROM TAXATION: PART OF BUILDING USED FOR COMMERCIAL STORAGE TAXABLE. That portion of a privately owned building used by a local utility for storage is not exempt from taxation, while that portion used for armory purposes is exempt from taxation.

February 11, 1943. *Honorable Charles H. Grahl, Brig. Gen. AGD, Adjutant General of Iowa, Building:* This will acknowledge your letter

of the 5th instant wherein you ask the opinion of this department relative to the following legal question:

The pertinent facts, quoting from your letter, are as follows:

"The Armory at Boone, Iowa, is privately owned. A portion of this building is being used for armory purposes by the local unit of the Iowa State Guard. A part of the building is leased to a local utility, for storage purposes, and the rent received therefrom is paid to the owner of the building."

The legal question is:

Is all of said building exempt from taxation, or does such exemption apply only to that portion thereof used for armory purposes?

It is our opinion that that portion of the above described building which is leased to a local utility for storage purposes is not exempt from taxation. The remainder of the building, used for armory purposes, is exempt from taxation.

We reach this conclusion as a result of our interpretation of Section 467.50, Code of Iowa, 1939, which reads as follows:

"All personal and real property held and used for armory or military purposes shall be exempt from taxation; and it shall be lawful for any county or city or town which owns public utilities to grant to any organization or unit of the national guard, which is stationed in such place, the free use of such public utilities."

A reading of the above statute will at once make it apparent that in order to entitle the owner to exemption from taxation, under and by virtue of the provisions of the above section, his property, whether real or personal, must be held and used for armory or military purposes. We think it cannot be logically said that that portion of the above described building which has been leased to a local utility, for storage purposes, is "held and used for armory or military purposes", and consequently that portion of the building should be taxed. The remainder of the building is exempt from taxation for it is used for armory purposes.

It is our view that the assessor should place a reasonable valuation for assessment purposes upon the entire building and then deduct therefrom such sum as would reasonably represent the valuation of that portion of the property used for armory purposes. This method of assessment, however, is intended merely as a suggestion. Any method that will result in taxing that portion of the building used by the utility and exempting the portion used by the armory will, of course, be acceptable.

HOMESTEAD TAX CREDIT: TENANTS IN COMMON: ONLY ONE CREDIT ALLOWED. Where two different parties occupy a house and each party has his own living quarters and keeps up repairs on the portion occupied by him and where the property is assessed as a unit to the parties as tenants in common only one homestead tax credit may be allowed.

February 18, 1943. *Iowa State Tax Commission, Building:* This will acknowledge receipt of your letter of February 17 wherein you ask for an Attorney General's opinion on the following legal question:

"We are confronted with the following situation in regard to an application for Homestead Credit:

Mr. "A" and Mr. "B" own a lot and house together, half of the house being occupied by Mr. "A" and the other half by Mr. "B", each of whom keeps up the repairs on their one-half of the house. The assessment on

this property is made in the names of Mr. "A" and Mr. "B", with an assessed value of $4,400. Each has applied for and been granted a homestead credit on a valuation of $2,200.

The question is, should two homestead credits be granted on this property, or should there just be the one credit allowed?"

We are of the opinion that there should be allowed only one homestead credit on the above property. We base our conclusion on the definition of the word "homestead" as the same is found in Section 6943.152 which reads as follows:

"* * * The homestead must embrace the dwelling house in which the owner * * * lives.

It may contain one or more contiguous lots or tracts of land with the buildings or other appurtenances thereon habitually, and in good faith, used as a part of the homestead.

If within a city or town plat, it must not exceed one-half acre in extent; * * *

It must not embrace more than one dwelling house, but where a homestead outside of a city or town has more than one dwelling house situated thereon, the millage credit provided for in this chapter, shall apply to forty acres, the home and buildings used by the owner, but shall not apply to any other dwelling house and buildings appurtenant thereto situated upon said forty acres.

The words 'dwelling house' shall embrace any building occupied wholly or in part by the claimant as a home."

The general definition of homestead is found in Section 10135 and reads as follows:

"The homestead must embrace the house used as a home by the owner, and, if he has two or more houses thus used, he may select which he will retain. It may contain one or more contiguous lots or tracts of land, with the building and other appurtenances thereon, habitually and in good faith used as part of the same homestead."

We call also to your attention the definition of the word "owner" which we think supports the conclusion reached herein.

Section 6943.142 provides:

"The homestead credit fund (Sec. 6943.100, sub-section 2) shall be apportioned each year as hereinafter provided so as to give a credit against the tax on each eligible homestead in the state, as defined herein; the amount of such credit to be in the same proportion that the assessed valuation of each eligible homestead in the state in an amount not to exceed twenty-five hundred dollars bears to the total assessed valuation of all eligible homesteads in the state in an amount not to exceed twenty-five hundred dollars for each homestead.

The revenue distributable from the homestead credit fund, as provided for in subsection 2 of section 6943.100, shall be allocated every six months to the several counties of the state in the same proportion that the assessed valuation of all eligible homesteads in each county in an amount not to exceed twenty-five hundred dollars for each homestead, bears to the total assessed valuation of all eligible homesteads in the state in an amount not to exceed twenty-five hundred dollars for each homestead. On March 25, 1938, and every six months thereafter the commission shall certify and remit to the county treasurer of each county in the state the total amount of money which has been apportioned or is then apportionable to that county."

Other reasons supporting the conclusion reached by us herein might be given, but what we have herein stated, we deem sufficient. We think it is clear that it was not the legislative intent that persons who own property as tenants in common may each lawfully claim a homestead credit on said property by mere showing that they occupy the home separately as in the posited case.

SCHOOLS AND SCHOOL DISTRICTS: MILITARY LEAVE OF ABSENCE: COUNTY SUPERINTENDENTS VACANCY FILLED BY SPECIAL CONVENTION. Where a leave of absence is granted under Section 467.25 to a County Superintendent, for military service, the vacancy shall be filled by the "proper appointing authority" which in this case shall be by the special convention referred to in Section 4103.

February 23, 1943. *Mr. Don DeWaay, County Attorney, Rock Rapids, Iowa:* In a letter dated February 10, 1943, which we have received from your office you state that your County Superintendent expects soon to be inducted into the United States Military Service. You submit the following two questions for our opinion:

(1) Who grants the leave of absence, the County Board of Supervisors, or the County Convention which elects the County Superintendent as now provided by statute.

(2) Who is the proper appointing authority to make the temporary appointment to fill any vacancy in the office of the County Superintendent, created by a leave of absence, secured under the terms of Section 467.25, as amended, of the 1939 Code of Iowa.

In answer to your first question we refer you to an opinion issued by this office on April 8, 1941, and addressed to the County Attorney of Polk County, Iowa. In that opinion we held that a person coming within the terms of Code Section 467.25, as amended, need neither ask for nor receive a leave of absence to make the provisions of that section effective. We are enclosing a copy of that opinion.

As to your second question, we are setting out below the various provisions of the Code, which we believe are applicable to this problem.

Section 467.25, as amended, is as follows:

467.25 STATE AND MUNICIPAL OFFICERS AND EMPLOYEES NOT TO LOSE PAY WHILE ON DUTY. All officers and employees of the state, or a sub-division thereof, or a municipality therein, who are members of the national guard, organized reserves or any component part of the military, naval, or air forces or nurse corps of this state or nation, or who are or may be otherwise inducted into the military service of this state or of the United States, shall, when ordered by proper authority to active service, be entitled to a leave of absence from such civil employment for the period of such active service, without loss of status or efficiency rating, and without loss of pay during the first thirty days of such leave of absence. The proper appointing authority may make a temporary appointment to fill any vacancy created by such leave of absence.

Section 1152 (sub-section 4) is as follows:

1152 VACANCIES—HOW FILLED. Vacancies shall be filled by the officer or board named, and in the manner, and under the conditions, following:

* * * * *

4. County offices. In county offices, including justices of the peace and constables, by the board of supervisors.

Section 4103 provides as follows:

4103 VACANCIES. Vacancies in the office of county superintendent shall be filled at special conventions called and held in the same manner as regular conventions.

We believe that a vacancy arising such as this falls within the provisions of Code Section 4103, which is set forth above. Neither this section nor section 1152 applies specifically to vacancies in which provisions have been made by law for leaves of absence. The Legislature has provided for a very special way in which County Superintendents of Schools shall be elected. Such superintendents are elected to office by persons selected for that specific purpose, and whose abilities theoretically are especially suited to the proper management of our school systems.

It is our belief that as a matter of public policy Section 4103 should be held applicable to this question.

We hold that Section 1152 was meant to apply to those offices which are filled by general public elections, and we hold that in this instance the term, "the proper appointing authority" means the special convention referred to in Section 4103.

AGRICULTURE: MOTOR VEHICLES: OVERLOAD TOLERANCE: RAW FARM PRODUCTS. Since the legislature has not differentiated between raw farm products being transported by the farmer and by the processor, warehouseman, distributor or retailer, it is concluded that the additional tolerance is available to any and all such persons so long as the products remain in the raw or unprocessed state. Not all produce of the farm shall be allowed the 25% tolerance above the gross weight for which the vehicle hauling the same is registered. It is narrowed by the classification to "raw" farm and dairy products.

February 24, 1943. *Iowa State Highway Commission, Ames, Iowa:*

This will acknowledge receipt of your inquiry relative to whether or not the 25% overload tolerance allowed "raw farm" and other specified products applies to the following:

1. Fresh fish, boxed in ice while alive, and allowed to freeze.
2. Dressed fish shipped with or without freezing.
3. Fish shipped alive in tanks.

Section 5035.15, Code of 1939, provides in part as follows:

"5035.15. LOADING CAPACITY. * * * It shall be unlawful for any person to operate a motor truck, trailer, truck tractor, road tractor, semitrailer or combination thereof, on the public highways with a gross weight exceeding that for which it is registered by more than five per cent of the gross weight for which it is registered, provided, however, that any vehicle or vehicle combination referred to herein, while carrying a load of raw farm products, soil fertilizers, including ground limestone, raw dairy products or livestock, live poultry, eggs, may be operated with a gross weight of twenty-five per cent in excess of the gross weight for which it is registered."

In a previous unofficial opinion rendered under date of August 29, 1941, we sought, in a general way to apply the recognized definitions and rules of construction to the statute in question for the guidance of the officers whose duty it is to enforce the provisions of the statute. Portions of the opinion referred to are repeated here since they are applicable to your present inquiries.

It is first noted that neither "farm products" nor "raw farm products" is included among other definitions of words and phrases enumerated in Section 5000.01 of the Act. We must therefore, resort to such definitions and rules of construction as are recognized and applied by our courts.

"Farm product" has been variously defined as "a term applicable to an article which is produced by the soil, either under cultivation, or by nature, by labor or otherwise, and of spontaneous growth." It has also been held to apply "only to such products of the land as are subject to the process of becoming ripe and of being cut, gathered, made and laid up when ripe, as for instance wheat, standing crops of corn, pineapple plants, Indian corn, rye, barley, cotton, fruits, vegetables and the like. Under some circumstances the term will embrace animals, as for instance horses, swine, sheep, cattle, meat cattle, meat, dairy products, manure and cord wood." 25 C. J. 673 and cases cited.

We are not concerned here with soil fertilizer, livestock, live poultry and eggs within the definition above quoted because they are separately listed in the statute. It is probably safe to say that, generally speaking, farm products have been defined to include practically anything which may be grown or raised on a farm as the term is commonly used.

Apparently however, the legislature has not intended that the products of the farm shall all be allowed the twenty-five per cent tolerance above the gross weight for which the vehicle hauling the same is registered. This is evidenced by narrowing the classification to "raw" farm and dairy products.

Webster defines the word "raw" as "in, or nearly in the natural state;" "unprepared for use or enjoyment"; "crude"; "unprocessed". If we are to lend any significance to the use of the word "raw", and it seems clear that we should, the legislature must then have intended to limit a twenty-five per cent tolerance allowed in certain cases to farm products which are "unprocessed" and "in, or nearly in, their natural state."

It is necessary at this point to call attention to the fact that for purposes of enforcement of a penalty for the violaion of this statute it is clear that any reasonable doubt as to whether or not a dairy or farm product is "raw" must be resolved in favor of the accused. However, it is equally clear, that some limitation was intended by the use of the word "raw" and even a penal statute should not be unreasonably interpreted, or construed so as to render it ineffective, or to defeat the obvious intention of the legislature as found in the language actually used according to its true and obvious meaning; nor should such a statute be subjected to any strained or unnatural construction in order to work exemption from the penalty. 59 C. J. 1113-1117 and cases cited. By way of illustration, butter produced by the process of churning cream should not be classified as "raw" dairy or farm product. On the other hand, oats, barley and corn may well be said to be in their natural state as a raw farm product for purpose of enforcement of a penal statute, although they must first have been harvested and threshed. Fruits and vegetables would seem to come within the classification of raw farm products while in their natural state after being picked or harvested, but when canned or processed they would cease to be "raw" as we are disposed to believe that the statute should be interpreted.

Since the legislature has not differentiated between raw farm products being transported by the farmer and by the processor, warehouseman, distributor or retailer we conclude that the additional tolerance is available to any or all of such persons so long as the product remains in its raw or unprocessed state. The same is true with respect to raw farm products coming from outside the state.

An examination of the authorities fails to disclose any case wherein fish in any form, are construed to be a farm product. (See Words & Phrases, Perm. Ed. Vol. 16, pgs. 272 to 273; 25 C. J. 673). Neither are they included in any of the specific classifications set forth in the statute unless we conceive of the exceptional case where fish in a given state of decomposition may be utilized as a "soil fertilizer."

It is therefore our conclusion that in none of the cases referred to in your question should the 25% overload tolerance be allowed.

MOTOR VEHICLES: CAR STORED AND UNUSED FOR 3 YEARS: NO REGISTRATION REQUIRED: NO PENALTY. Where an automobile is "jacked up" and stored by the owner for a period of 3 consecutive years, no registration is required and no penalty accrues. Section 5009.02 is only applicable to motor vehicles which are operated upon the public highways in any given calendar year, making said vehicles subject to the annual registration for that year.

February 25, 1943. *Mr. Karl W. Fischer, Commissioner of Public Safety, Building:* We wish to acknowledge receipt of your letter in which you ask for our opinion on the following matter:

"A 1928 Hudson sedan was properly registered in the year 1938, and affidavit has been filed with the Department that the vehicle was placed on jacks in November of 1938, and has not been used since that time. Investigators of the Department find that to be true, but provisions of Section 5009.02 of the 1939 Code of Iowa were not adhered to in storing the vehicle. The vehicle has not been registered for the years 1939, 1940, 1941, or 1942, and has not been used since jacked up in November of 1938.

"We request your opinion as to whether the vehicle referred to must be charged registration fees for the years 1939, 1940, 1941, and 1942 with the monthly penalties on such fees for those years, or is the vehicle entitled to be re-registered the date it is placed in service by paying the full yearly registration fee for that year without penalty."

In order to answer your inquiry it is necessary to consider the following sections of the 1939 Code of Iowa.

Section 5001.02 provides as follows:

"VEHICLES SUBJECT TO REGISTRATION—EXCEPTION. Every motor vehicle, trailer and semitrailer *when driven or moved upon a highway, shall be* subject to the registration provisions of this chapter except: * * *".

Section 5001.04 provides as follows:

"APPLICATION FOR REGISTRATION. Every owner of a *vehicle subject to registration* hereunder shall make application to the county treasurer, of the county of his residence, for the registration thereof upon the appropriate form or forms furnished by the department and every such application shall bear the signature of the owner written with pen and ink and said signature shall be acknowledged by the owner before a person authorized to administer oaths and said application shall contain: * * *."

Section 5008.01 provides as follows:

"ANNUAL FEE REQUIRED. *An annual registration fee shall be paid for each motor vehicle or trailer operated upon the public highways of this state* unless said vehicle is specifically exempted under the provisions of this chapter. * * *."

(Italics supplied by writer)

From an examination of these code sections it is clear that all motor vehicles in the State of Iowa are not subject to registration. Section 5001.02, above quoted, provides, in substance, that every vehicle *when driven or moved* upon a highway is subject to registration. Section 5001.04 does not require every owner of a vehicle to apply for registration, but only every owner of a vehicle which is subject to registration. Again in Section 5008.01 we find that an annual registration fee shall

be paid for each motor vehicle or trailer *operated* upon the public highways of this state. So we find that it is not necessary for all vehicles in the State of Iowa to be registered under the provisions of Chapter 251.1 of the 1939 Code of Iowa.

Section 5009.01, and those immediately following provide the method of collecting registration fees, setting forth certain monthly penalties, providing for a list of delinquents to be turned over to the Sheriff, and defining the Sheriff's duties as to how he shall proceed to collect the fees:

Section 5009.02 provides as follows:

"MONTHLY PENALTY. On February 1 of each year, a penalty of five per cent of the annual registration fee shall be added to all fees not paid by that date, and five per cent of the annual registration fee shall be added to such fees on the first of each month thereafter that the same remains unpaid, until paid, provided that said penalty in no case shall be less than one dollar, *and provided that the owner of a motor vehicle who, on or before February 1 of any year, surrenders all registration plates for said vehicle to the county treasurer of the county in which said plates are of record, shall have the right to register said vehicle at any later period of said year by paying the full yearly registration fee without said penalty.* * * *."

(Italics supplied by writer)

At a first reading of this section it might seem that the registration fee could only be avoided by taking the affirmative action that is outlined in this section. However, we believe that it is a fair inference to draw from the provisions of Section 5009.02 that the section is only applicable to automobiles that have been operated during the calendar year, and which vehicles ordinarily would be subject to the usual annual registration fee. The section, in effect, permits a motor vehicle to be operated on the public highways of the State of Iowa during the month of January without the payment of the current registration fee, and provides that no registration fee need be paid for the current year if on or before February 1, the owner surrenders all registration plates for said vehicle to the County Treasurer of the County in which said plates are of record, provided the owner does not use the automobile on the public highways during the remainder of said year. If the owner desires to use said automobile after surrendering the registration plates, it is necessary for him to pay the full annual registration fee. So it is our conclusion that Section 5009.02 is only applicable to motor vehicles which are operated upon the public highways in any given calendar year, making said vehicles subject to the annual registration fee for that year. It is our opinion that Section 5009.01, and those immediately following dealing with the collection of fees and penalties are not applicable to the situation outlined in your letter.

It is our opinion that upon a satisfactory showing that the vehicle in question has not been operated upon the public highways during the years 1939, 1940, and 1941, that no registration fees or penalties could be charged for those years. If the owner seeks to register the automobile at the present time he would be required to pay a registration fee in accordance with the provisions of Section 5008.02, which provide as follows:

"FRACTIONAL PART OF YEAR. Where there is no delinquency and the registration is made in February or in succeeding months to and including November, the fees shall be computed on the basis of one-twelfth of the annual registration fee as provided herein multiplied by the number of the unexpired months of the year. Whenever any such fee so computed contains a fractional part of a dollar, it shall be computed as of the nearest fractional quarter dollar thereto, and the said amount shall be the fee which shall be collected.

"No fee shall be required for the month of December for a new car in good faith delivered during that month."

We have previously stated that Section 5009.02 is not applicable to the situation at hand, and therefore the provisions of that Section requiring the payment of the full annual registration fee are not applicable, and inasmuch as there is no delinquency, the registration fee would be governed by the provisions of Section 5008.02.

SOLDIERS, SAILORS AND MARINES: COUNTY RELIEF FUNDS: VETERAN'S WIDOW MARRYING AND AGAIN WIDOWED: NOT ENTITLED TO RELIEF FROM COUNTY SOLDIERS RELIEF FUND. Where a widow of a veteran of World War I marries and thereafter becomes a widow she is not entitled to the benefits of the County Soldiers Relief Fund.

March 3, 1943. *Mr. Edwin H. Curtis, Executive Secretary, Iowa Soldiers Bonus Board, Des Moines, Iowa:* In your letter of March 2, 1943, you submit the following question for an opinion from this office:

Can a world war veteran's widow who has been remarried, and then again been widowed, regain her status as a veteran's widow, and be entitled to aid from the County Soldiers' Relief Funds.

The statute upon which the payment of this type of relief is based is Code Section 3828.051 of the 1939 Code of Iowa, and provides as follows:

3828.051. TAX. A tax not exceeding one-fourth mill on the dollar may be levied by the board of supervisors upon all taxable property within the county, to be collected at the same time and in the same manner as other taxes, to create a fund for the relief of, and to pay the funeral expenses of honorably discharged, indigent United States soldiers, sailors, marines, and nurses who served in the military or naval forces of the United States in any war and their indigent wives, widows, and minor children, not over fourteen years of age if boys, nor sixteen if girls, having a legal residence in the county.

The problem which your question presents is as to how "their indigent widows", as it appears in this Section of the Code should be defined.

We can discover no Iowa cases defining the term "widow" as used in this statute, and we find that the cases upon this point in other jurisdictions are in substantial disagreement. Various of these cases are found in 45 Words and Phrases, page 144; in the footnotes to 48 Corpus Juris 788, Section 10, and the subject itself is generally covered in an annotation appearing in 72 ALR 1324.

The general approach to this question appears to be the determination of whether or not in the particular statute the term "widow" designates a person or a status.

If the statute designates a person, any substantial change in that person's status does not affect that person's right to the relief provided for in the statute.

If, on the other hand, the designation is of a status, a subsequent change in that status will defeat that person's right to the statutory relief.

In our opinion it is the better view, and the greater weight of authority would appear to sustain an interpretation of the phrase referred to in this opinion, as indicating a status and not a person. We further believe that such an interpretation would be most consistent with what we feel to have been the intention of the Legislature in passing this act, and we so hold.

It follows from this holding that the woman to whom you refer in your question is not entitled to aid from the County Soldiers' Relief Funds.

HIGHWAYS: COMMISSION ACQUIRING PROPERTY FOR HIGHWAY: NO LIABILITY FOR ASSESSMENT: CLAIMS SUBMITTED TO LEGISLATURE. Property acquired for highway purposes may not be specially assessed nor is the Highway Commission authorized to pay either current or delinquent assessments against the same. Such claims must be presented to the legislature for special appropriation for payment thereof.

March 9. 1943. *Iowa State Highway Commission, Ames, Iowa:* This will acknowledge receipt of your inquiry relative to the following questions:

1. May property acquired by the Highway Commission or State of Iowa for highway purposes be assessed by a municipality for the construction of sidewalks or sewer improvements along or in front of such property?

2. If such property itself is not assessable may the Highway Commission authorize the payment of same, including delinquent special assessments against such property existing prior to its acquisition by the State or Commission?

These questions, the reasons therefor, and authorities are referred to in an opinion appearing in the 1938 Report of the Attorney General, beginning on page 794 thereof.

We fully concur with the opinion and reasons given that property for highway purposes may not be specially assessed for the purposes set forth in your question, nor is the Highway Commission authorized to pay either current or delinquent assessments against the same. Such claims must be presented to the Legislature and a special appropriation made therefor.

WARRANTS: LOST WARRANT BETWEEN POLITICAL SUBDIVISIONS SECOND WARRANT ISSUED WITHOUT BOND. Where a warrant is issued from one political subdivision to another, and the warrant becomes lost, there is no sound reason for requiring an indemnifying bond before the issuance of a second warrant. The County Treasurer should stop payment upon the first warrant and issue a duplicate.

March 11, 1943. *Mr. Walter J. Willett, County Attorney, Tama County, Tama, Iowa:* I wish to acknowledge your request for an opinion upon the following facts:

In September, 1942, Tama County, Iowa, issued a warrant in the amount of $68.29 to the State of Iowa, being Tama County's share of aid to the blind. The warrant has not been cashed and appears to be lost. Can a duplicate warrant be issued by the County Treasurer without an indemnifying bond being filed?

I have carefully searched the Code of Iowa for statutes covering this situation but find none. If the warrant had been issued to a private person, your Treasurer would be justified in demanding an indemnifying bond before he issued a duplicate warrant in order that he might be properly protected. However, when the warrant is issued from one political subdivision to another, there is no sound reason for requiring such a bond. Political subdivisions are ordinarily solvent. If it should later appear that both warrants were cashed by the payee political subdivision, there would be no question but what restitution would be immediately made.

It is, therefore, our opinion that under the facts involved, your County Treasurer should not require an indemnifying bond, but should stop payment upon the first warrant and issue a duplicate.

SOLDIERS, SAILORS AND MARINES: WORLD WAR I OVER MILITARY AGE ENLISTING AND LEAVING STATE: ENTITLED TO EXEMPTIONS. A veteran of World War I, who is over military age and who enlists in the armed forces and then leaves the state is entitled to soldier's exemption for the reason that under Chap. 224, Laws of the 49th G. A., he is still a "resident of and domiciled in the State of Iowa."

April 10, 1943. *Iowa State Tax Commission, Building:* This will acknowledge receipt of your letter of the 8th instant wherein you ask the opinion of this department relative to the following legal question:

"Under the law providing for Soldier's exemption, it provides that all applicants for Soldier's Exemptions must be a resident of, and domiciled in, the state of Iowa, and now we are confronted with the following situation in regard to Soldier's Exemption:

Mr. A. a veteran of World War No. I, and being above the age so that he is not liable for the draft, but desiring to enter the service again, did so in February of 1943. Is Mr. A. entitled to the Soldier's Exemption for the year 1943, taxes payable in 1944?"

The answer to this question involves the interpretation of certain sections of our law, which we will hereinafter set out and discuss, and an Opinion rendered by this department on July 3, 1941.

Section 6946 provides:

"The following exemptions from taxation shall be allowed:
* * *

3. The property, not to exceed $500.00 in actual value, of any honorably discharged soldier, sailor, marine or nurse of the war with Germany."

Section 6947, Code of Iowa, 1939 provides:

"All persons named in Section 6946 shall receive a reduction equal to their exemption, to be made from any property owned by such persons and designated by them, such designation shall be made to and noted by the assessor at the time of making the assessment, or in lieu thereof, shall be made in writing and filed with the county auditor of the county in which such property is located. If no such designation is filed or

made as herein provided, then such exemption shall apply to the homestead, if any. Such exemption shall extend only for the period during which said persons remain the owners of such property."

By Chapter 242, Section 2, Laws of the 49th General Assembly, said Section 6947 was amended, revised and codified to read as follows:

"Any person named in Section Six Thousand Nine Hundred Forty-six (6946), provided *he is a resident of and domiciled in the state of Iowa,* shall receive a reduction equal to his exemption, to be made from any property owned by such person and designated by him by proceeding as hereinafter provided.

In order to be eligible to receive said exemption or reduction, the person claiming same shall have had recorded in the office of the county recorder of the county, in which he shall claim exemption or reduction, the military honorable discharge of the person claiming or through him is claimed said exemption; in the event said honorable discharge is lost, he may record in lieu of said discharge a certified copy of said discharge. Said person shall file with the county auditor his claim for exemption or reduction in taxes under oath, which claim shall set out the fact that *he is a resident of and domiciled in the state of Iowa,* and a person within the terms of Section Six Thousand Nine Hundred Forty-six (6946), and give the volume and page on which the honorable discharge or certified copy thereof is recorded in the office of the county recorder, and may include the designation of the property from which he desires said exemption or reduction to be made, and shall further state that he is the equitable and legal owner of the property designated therein. No person may claim a reduction or exemption in more than one county of the state of Iowa, and if no designation is made, the exemption shall apply to the homestead, if any." (Italic ours)

Section 3 of said Chapter 242 provides:

"Said claim for exemption, if filed on or before June 1 of any year and allowed by the Board of Supervisors, shall be effective to secure an exemption for the year in which such exemption is filed and when a claim has once been made and allowed, it shall be effective thereafter during the period of an ownership of the property designated or of the homestead, as the case may be, or until the death of all persons named in Section Six Thousand Nine Hundred Forty-six (6946) who remain equitable and legal owners of said property."

Our opinion of July 3, 1941 was with reference to the right of exemption of a World War veteran in the employ of the Postal Department of the United States and located at New Orleans. He maintained his voting residence in Iowa. In construing Section 2 of Chapter 242, Laws of the 49th General Assembly, we held that the person referred to was not "a resident of the state of Iowa" as that term was used in said Section 2. We said, in said Opinion, "residence and domicile are not necessarily the same. Residence is actually used to indicate a place or dwelling either of a permanent or temporary nature, while domicile denotes a fixed, permanent residence to which, when absent, one has the intention of returning * * *." We said further: "In construing this statute (Section 2 of Chapter 242, Laws of the 49th General Assembly) it is, therefore, apparent that the use of the word 'residence' restricted the class for soldiers' credit to those who actually live in the state of Iowa. Each of the above applicants might be said to have an Iowa domicile, but it cannot be said that they have an Iowa residence within the meaning of this statute. * * *"

The question now arises as to whether the statutes quoted, and our Opinion of July 3, 1941, require a conclusion that Mr. A., referred to in the posited case, is not entitled to soldier's exemption, it appearing that he is not now physically present within the state? We think not. We believe that the posited case may be distinguished from the World War veteran referred to in our Opinion of July 3, 1941.

In that case, Mr. A. voluntarily chose to enter the Postal Service and we may assume intended to make that his permanent vocation. At least, the assumption is justified that he entered the government service intending to remain therein for an indefinite period of time. When he entered the service, he knew that during the tenure of his employment he would be required to serve wherever directed by the government. At least, so we understand the rules of the Postal Service to require. Be that as it may, the facts revealed that Mr. A. was located at New Orleans and was not actually living in Iowa. He simply maintained a voting residence here. He was no doubt domiciled within the state, as it appears that he had not abandoned his intention to make Iowa his permanent home.

Now, it might be argued that when a person of non-military age elects to enter the military service, he is in the same situation as the Mr. A. referred to in our Opinion of July 3, 1941, for he leaves the state of his own volition. We are unwilling, however, to subscribe to this contention. We think that there is a wide difference between a person who, for the purpose of gaining a livelihood, leaves the state to enter employment, the character of which is such that he will probably not return for many years, and one who leaves the state for the purpose of making his or her contribution towards the defense of his country in time of emergency. Such absence from the state is intended to be only for a temporary period. The veteran retains his voting residence here and for the purpose of this Opinion, it is assumed that he intends to return to Iowa at the close of the war.

We are of the opinion that while he is absent from the state, he is, as some of the cases put it, "a mere sojourner" and is still a "resident of and domiciled in the state".

We reach the conclusion, therefore, that as to Mr. A. in the posited case, he is entitled to soldier's exemption for he is still "a resident of and domiciled in the state of Iowa" as we interpret Chapter 242.

What we have said, of course, applies only to a case where a veteran, who is above the military age, enters the armed forces and serves in a state other than Iowa, intending to return to this state to resume his actual residence here.

WARRANTS: INTEREST DUE WHEN "NOT PAID FOR WANT OF FUNDS." RATE APPLICABLE. Drainage warrants stamped "not paid for want of funds" draw interest at the rate prescribed by the Iowa law at the time the warrants were so stamped.

April 12, 1943. *Mr. Ed. J. Kelley, County Attorney, Ames, Iowa:* We wish to acknowledge receipt of your recent letter in which you ask for our opinion on the following matter:

"Do drainage warrants stamped for want of funds prior to the pass-

age of the law reducing the interest of such warrants, draw interest at the old rate or at the new rate from the date of the passage of the act reducing the interest?"

It is our opinion that the warrants stamped "not paid for want of funds" bear interest at the rate prescribed by the Iowa law at the time the warrants were so stamped. It is our position that the provisions of Chapter 263, Acts of the 49th General Assembly, are not subject to retrospective construction. In this connection we would like to call your attention to the following language which appears in *Volume 59 Corpus Juris, page 1159:*

"Retrospective or retroactive legislation is not favored. Hence, it is a well-settled and fundamental rule of statutory construction, variously stated, that all statutes are to be construed as having only a prospective operation, and not as operating retrospectively. It is equally well settled as a fundamental rule of statutory construction supported and established by numerous judicial decisions that statutes are not to be construed as having a retroactive effect. Both the above statements and rules are of course contingent upon the absence of any words expressing a contrary intention, or, more specifically, unless the purpose and intention of the legislature to give them a retrospective effect clearly, expressly, plainly, obviously, unequivocably, and unmistakably appears, or is clearly, or as it has sometimes been stated in instances where the subject matter was under consideration, distinctly, indisputably, manifestly, most positively, most explicitly, plainly, unambiguously, unequivocably, or unmistakably, or shown, by express declaration or command, or by a very clear, fair, necessary, unavoidable, or unequivocable implication. In every case of doubt, the doubt must be solved against the retrospective effect and in favor of prospective construction only."

The first six Sections of Chapter 263, Acts of the 49th General Assembly, amended various Sections of the Iowa law changing the rate of interest on bonds issued by drainage districts or public warrants not paid for want of funds or anticipatory warrants and drainage warrants from six per cent to four per cent. Section 7 of Chapter 263, Acts of the 49th General Assembly, provides as follows:

SEC. 7. Nothing in this act shall be construed as applying to any bonds issued and outstanding prior to its adoption.

It might be argued that from the provisions of Section 7 that it was the intention of the Legislature, because of the specific reference that the Act shall not be construed as applying to any bonds issued and outstanding prior to its adoption, that the Chapter was to be construed to be retroactive as to warrants. However, such a construction would throw considerable doubt on the constitutionality of this law and it is our duty to construe this law in accordance with the provisions of the Constitution. The statutes, relative to the rate of interest payable, in force and effect at the time the warrants in question were stamped "not paid for want of funds" became a part of the transaction. The agreement of the County is in no way affected by the change in the statutory rate of interest.

The statute stating the rate of interest to be paid on warrants stamped "not paid for want of funds" has the same effect, in the instant case, as though there has been an expressed agreement to pay interest at that rate. When the warrants were stamped, as above men-

tioned, the Drainage District, in effect, agreed that it would pay interest on said warrants at the rate then provided in the Iowa law. This interest rate is effective so long as the warrants, above mentioned, are outstanding and the lowering of the rate of interest on warrants stamped "not paid for want of funds" cannot be held applicable to warrants which were so stamped before the change in the law. In this connection we call your attention to an annotation and the cases cited therein appearing in *87 A. L. R. page 426*, and following, which is authority for our position in this matter.

SCHOOLS AND SCHOOL DISTRICTS: NO DIRECTOR FOR DISTRICT ELECTED AT REGULAR ELECTION: BOARD'S APPOINTMENT OF DIRECTOR IS LEGAL: FORMER DIRECTOR DOES NOT HOLD-OVER. Where at a regular school election no director is elected for a district, the Board at its organization meeting were within their rights in declaring a vacancy to exist and proceed to appoint a director. The former director does not hold-over.

April 14, 1943. *Mr. M. L. Mason, County Attorney, Mason City, Iowa:* In your letter of April 1, 1943, you request our opinion upon the problem arising from the following facts:

At the regular election held on March 8, 1943, no Director was elected or voted upon in Subdistrict No. 5 in Lincoln Township School District in this County, although the polls were open in the manner required by law. At the organization meeting of the Board held on the 15th day of March, the Board declared a vacancy existing and appointed John Purviance to fill the vacancy. He qualified immediately. Folgum, who was the Director for District No. 5 for the Term ending on March 15th, came in within ten days after the election, but after the 15th of March, and qualified and now claims to hold the office as a hold-over.

You inquire as to which of the two men is entitled to the office.

Section 4216.29 of the 1939 Code provides as follows:

VACANCIES. Failure to elect at the proper election or to appoint within the time fixed by law or the failure of the officer elected or appointed to qualify within the time prescribed by law; the incumbent ceasing to be a resident of the district or subdistrict; the resignation or death of incumbent or of the officer-elect; the removal of the incumbent from, or forfeiture of, his office, or the decision of a competent tribunal declaring his office vacant; the conviction of incumbent of an infamous crime or of any public offense involving the violation of his oath of office, shall constitute a vacancy.

Section 4223.2 provides as follows:

VACANCIES FILLED BY BOARD—QUALIFICATION—TENURE. Vacancies occurring among the officers or members of a school board shall be filled by the board by appointment. A person so appointed to fill a vacancy in an elective office shall hold until the organization of the board the third Monday in March immediately following the next regular election and until his successor is elected and qualified. A person appointed to fill a vacancy in an appointive office shall hold such office for the residue of the unexpired term and until his successor is appointed and qualified. Any person so appointed shall qualify within ten days thereafter in the manner required by section 4216.28.

Section 4216.24 provides as follows:

TERM OF OFFICE. Members of the board in all independent districts and undivided school townships shall be chosen at the regular election for a term of three years to succeed those whose terms expire at the organization of the board the third Monday in March immediately following and shall hold office for the term for which elected and until their successors are elected or appointed and qualified, except that in those independent districts which embrace a city and which have a population of one hundred and twenty-five thousand or more the term shall be six years. In school townships divided into subdistricts the subdirector and the director-at-large where one is required shall be elected at the regular election for a term of one year and until his successor is elected, or appointed, and qualified.

In all school corporations and subdistricts the term of office shall begin at the organization of the board on the third Monday of March.

A consideration of the statutory provisions set forth above leads us to the conclusion that a vacancy existed upon this School Board at the time the Board filled that vacancy by appointment, and that the action of the Board was authorized by law.

It is our opinion that Mr. Folgum's term of office expired at the time the vacancy was filled by appointment. We therefore hold that the man appointed by the Board to fill the vacancy is now entitled to the office.

COOPERATIVE ASSOCIATIONS: TRANSMISSION LINES ORGANIZED UNDER CHAP. 390.1 SUBJECT TO TAXATION: CANNOT QUALIFY AS NON-PROFIT ASSOCIATIONS ENTITLED TO EXCEPTIONS. A transmission line organized under Chapter 390.1 Code of Iowa cannot qualify as a non-profit cooperative association, so as to be exempt from taxation.

April 14, 1943. *Iowa State Tax Commission, Building:* This is in answer to your letter of the 12th instant wherein you ask the opinion of this department relative to the following legal questions:

1. Can an association organized after 1935 under Chapter 390.1, Code of Iowa, 1939, for the purpose of constructing and operating transmission lines, be considered as not organized and operated for profit and, therefore, entitled to the protection of the "exception" found in Section 7089 and be assessed under the provisions of Section 7102?
2. If the answer to the first question is in the negative, are such transmission lines to be assessed in the same manner as transmission lines that are owned and operated by other individuals or corporations?

It is our opinion that the answer to the first question is in the negative and we will hereinafter give our reasons for so holding.

Section 7089, Code of Iowa, 1939 provides:

"The word 'company' as used in this chapter and Section 6944, subsection 20, shall be deemed and considered to mean and include any person, co-partnership, association, corporation or syndicate (except cooperative corporations or associations which are not organized or operated for profit) that shall own or operate transmission line or lines for the conducting of electric energy located within the state and wholly or partly outside the cities and towns, whether formed or organized under the laws of this state or elsewhere."

Section 7090 provides:

"Every company owning or operating a transmission line or lines for the conduct of electric energy and which line or lines are located

within the state, and which said line or lines are also located wholly or partly outside cities and towns, shall, on or before the first day of May in each year, furnish to the State Tax Commission a verified statement as to its entire line or lines within this state. * * *."

In subsequent sections provision is made for the valuation and assessment of said lines for taxation purposes.

Section 7102 provides:

"The value of the interests of members in such cooperative corporations or associations which are not organized or operated for profit shall, for the purpose of taxation, be deemed real estate and be assessed as part of the real estate served by such transmission line or lines."

Chapter 389, Code of Iowa, 1939 pertains to the organization of cooperative associations.

Section 8459 of said chapter provides:

"Any number of persons, not less than five, may associate themselves as a cooperative association, society, company or exchange for the purpose of conducting any agricultural, dairy, mercantile, mining, manufacturing or mechanical business on the cooperative plan."

It is clear from the above section that the cooperative associations authorized by Chapter 389 are organized for pecuniary profit and such associations do not, therefore come within the exception of Section 7089. Furthermore, Chapter 389 is applicable only to associations originally chartered before July 4, 1935, and, therefore, could have no application to an association formed after 1935.

Chapter 390 provides for the organization of associations not for pecuniary profit.

Section 8485.1 (Chapter 390), Code of Iowa, 1939 provides:

"Associations organized under the provisions of this chapter are declared to be not for pecuniary profit."

Section 8486 (Chapter 390), Code of Iowa, 1939 provides:

"Any number of persons, not less than five, may associate, without capital stock, for the purpose of conducting any * * * or the constructing and operating of * * * high tension electric transmission lines on the cooperative plan and of acting as a cooperative selling agency.

It will be noted that this chapter specifically provides for the organization of nonprofit-sharing cooperative associations which, by Section 8486, above quoted, are given the right to construct and operate transmission lines. However, by specific provision in Chapter 390.1, Chapters 389 and 390 are declared inoperative as to corporations chartered from and after July 4, 1935, Section 8512.60 providing:

"The provisions of Chapters 389 and 390 are hereby declared inoperative as to corporations chartered from and after July 4, 1935, but said Chapters 389 and 390 shall continue in force and effect as to corporations organized or operating thereunder prior to July 4, 1933 so long as any such corporations elect to operate under or renew their charters under said chapters."

It will be noted, therefore, that cooperative associations organized

after July 4, 1935 must be formed under Chapter 390.1. There is no authority for the organization of such associations under any other chapter. It becomes pertinent, therefore, to inquire as to whether, if an association is formed under Chapter 390.1, it can be organized as an association not for pecuniary profit. We think not.

Section 8512.01 (Chapter 390.1) provides:

"This chapter applies only to cooperative associations as defined in Section 8812.02. All such associations hereafter formed must be organized under this chapter."

Section 8512.02 provides:

"A 'cooperative association' is one which, in serving some purpose enumerated in Section 8512.05, deals with or functions for its members * * * and which distributes its net earnings among its members in proportion to their dealings with it. * * *."

Section 8512.05 (Chapter 390.1) provides:

"Associations may be formed either:

1. To conduct a mercantile, manufacturing, mechanical or mining business, or to construct or operate telephone or electric transmission lines * * *."

A casual reading of Chapter 390.1 will make it at once apparent that the associations formed under said Chapter are for pecuniary profit. It is clear therefore, that such associations do not come within the exception of Section 7089. Hence, we reach the conclusion that if an association is formed under Chapter 390.1 to construct or operate an electric transmission line, such line must be assessed under the provisions of Chapter 340, excluding Section 7102, for as we view it, such an association is a "company" as that term is defined in Section 7089. (Chapter 340)

Summarizing, it is our view that the enactment of Chapter 390.1 resulted in the repeal of Chapters 389 and 390 except as to associations formed under said chapters prior to July 4, 1935. We say further that there is no provision in our law at the present time for organizing an association to construct and operate electric transmission lines on a non-pecuniary-profit basis. It follows, therefore, that the exception in Section 7089 has no application to newly organized associations. That exception specifically provides as follows:

"Except cooperative corporations or associations which are not organized or operated for profit."

As to your question number 2, it follows from what we have said above that associations organized for the purpose of constructing and operating transmission lines, under the provisions of Chapter 390.1, Code of Iowa, 1939, are "companies" as that term is defined in Section 7089, and such associations must, therefore, be valued and assessed under the provisions of Chapter 340, excluding, however, section 7102 in said chapter hereinabove set out.

LICENSES: CABIN CAMPS: HOTEL LICENSE REQUIRED. Hotels are defined as any place where sleeping accommodations are furnished transient guests for hire. Cabin Camps are such places and therefore a hotel license is required.

April 16, 1943. *Mr. Roy J. Sours, Chief, Dairy and Food Division, Department of Agriculture, Building:* In your letter of April 15, 1943, you request our opinion as to whether or not cabin camps within this state come within the definition of "hotels" under Section 2808 of the 1939 Code, so as to require the operators of such camps to procure hotel licenses.

Subsection 1 of Code Section 2808 provides as follows:

* * * *

1. "Hotel" shall mean any building or structure equipped, used, advertised as, or held out to the public to be an inn, hotel, or public lodging house or place where sleeping accommodations are furnished transient guests for hire, whether with or without meals.

* * * *

We understand that the term "cabin camps" in your letter refers to those establishments located in this state which offer sleeping accommodations to the general public, and which do in fact accept transient guests.

It is our opinion that this type of an establishment comes squarely within the definition of "hotel" as set forth in the Code provision contained in this letter.

We are not unmindful of other definitions of the word "hotel" contained in the Code, such as that in the State Housing Law, and in the Hotel Keepers Lien Act, the latter of which has been given judicial interpretation by our Supreme Court in the case of *Cedar Rapids Investment Company v. Commodore Hotel Company*, 205 Iowa 736.

Whatever the word "hotel" may mean by statute or by judicial interpretation as that word appears in other chapters of the Code, does not, we feel, permit our reaching a conclusion contrary to the one adopted here in interpreting the word "hotel" as that word may apply to situations arising under this particular chapter. The definition in this chapter, which is the definition to be used in determining whether or not a license is required for any particular establishment, is wholly unambiguous and does not lend itself to any artificial construction.

Our conclusion is that, as the statute states, "hotel" means any place where sleeping accommodations are furnished transient guests for hire, and that cabin camps are such places.

SOLDIERS, SAILORS AND MARINES: SOLDIER'S EXEMPTION: HOMESTEAD TAX CREDIT: METHOD OF COMPUTATION: REFUND TO STATE. In figuring a veteran's tax the homestead tax credit must be deducted from the assessed valuation before deducting the soldier's exemption and if under this method the homestead tax credit exceeds the amount of tax difference the county should remit the excess to the State Tax Commission.

April 21, 1943. *Iowa State Tax Commission, Building:* This is in answer to your letter of the 9th instant wherein you ask our opinion as to the following legal question:

The question involved is whether the county auditor of Carroll County, Iowa, has employed the proper procedure in computing soldier's and homestead exemption.

To illustrate the method employed by this officer, we set out the following hypothetical case:

Assessed valuation of World War veteran's property is $720.00. The assessed valuation multiplied by twenty-five mills (homestead millage) equals homestead credit of $18.00.

This veteran was entitled to soldier's exemption of $500.00, but the auditor only deducted $230.00, leaving a value of $490 on which to figure the taxes. The levy in this particular district was 36.77. $490.00 multiplied by 36.77 would equal $18.00.

It is our opinion that the procedure followed by the auditor was incorrect. He should have computed the homestead and soldier's exemption as follows:

$720 × .025 equals $18.00 homestead credit.
$720—$500 soldier's exemption equals $220 which is the amount upon which the millage should be computed.
$220×.03677 equals $8.09, which is the amount of tax.
$18.00, homestead credit, less $8.09, amount of tax, equals $9.91, amount owing by Carroll County to the State of Iowa.

We base our conclusion on the following sections of the Code of Iowa.

Section 6943.152, sub-section 3, provides:

"The words 'assessed valuation' shall mean the valuation of the homestead as fixed by the assessor, or by the board of review, without deducting therefrom the exemptions authorized in Section 6946 (soldier's exemption)."

Section 6943.150 provides:

"If the amount of credit apportioned to any homestead under the provisions of this chapter in any year shall exceed the total tax, exclusive of any special assessments levied against said homestead, then such excess shall be remitted by the county treasurer to the state tax commission to be redeposited in the homestead credit fund and re-allocated the following year by the commission as provided hereunder."

Section 6943.142 provides:

"The homestead credit fund * * * shall be apportioned each year as hereinafter provided so as to give a credit against the tax on each eligible homestead in the state, as defined herein; the amount of such credit to be in the same proportion that the assessed valuation of each eligible homestead in the state, in an amount not to exceed $2500, bears to the total assessed valuation of all eligible homesteads in the state in an amount not to exceed $2500 for each homestead."

In view of the above sections, it is clear that on the homestead referred to in the posited case, the homestead credit must be figured on the assessed valuation of $720.00. This, at the rate of twenty-five mills, would amount to $18.00, and is the credit to be allowed on this homestead unless the tax thereon is less than the amount of the credit, in which event the difference must be refunded as provided by Section 6943.150.

It is clear that, inasmuch as the homestead in question was owned by a soldier of World War I, he was entitled to an exemption of $500.00. Therefore, in order to compute the tax, $500.00 must be deducted from the assessed valuation of $720.00. This leaves a balance of $220.00. $220.00 multiplied by 36.77 mills equals $8.09, which is the only tax this property is subject to. It will be noted that this is less than the homestead credit and, therefore, the state is entitled to a refund of the difference between the tax and the homestead credit. The refund, of course, is determined by subtracting $8.09 from $18.00, leaving $9.91, which is the amount of refund to which the state is entitled by virtue of the provisions of Section 6943.150.

OLD AGE ASSISTANCE: RECIPIENT MOVING TO ANOTHER COUNTY RESIDING IN INSTITUTION: NO NOTICE TO DEPART: NO LEGAL SETTLEMENT IN SECOND COUNTY AFTER 2 YEARS. Where a recipient of old age assistance moves from one county to another where he resides in an institution, he does not acquire a legal settlement in the second county even though he resides there over two years and no notice to depart is served upon him.

April 22, 1943. *Mr. E. J. Kean, County Attorney, Dubuque, Iowa:* In your recent letter, you state that your county is confronted with a serious question by reason of the following facts:

"In Dubuque, there are several institutions where elderly people are cared for and it has been customary for these institutions to accept as inmates, people from other counties in the state. Usually, the only compensation received for their care and keep is from old age pensions. Heretofore, the county officials relied on Section 3828.088, subsection 3, Code 1939, and did not serve the statutory notice to depart. Now, many of these persons are requiring medical aid and attention. The counties from which they moved and which are paying old age assistance to them, maintain that since these people have resided in Dubuque County for more than two years without the statutory notice having been served upon them, that Dubuque County is now liable for such medical aid and attention. This places a heavy burden on your county and you deem it unfair."

You ask an opinion on the following questions as applied to these facts:

(1) Can a person who is the recipient of old age assistance in one county in the state, move into another county, become an inmate of an institution, as described in Section 3828.088, subsection 3, Code 1939, reside there for two or more years without having the statutory notice to depart served upon him, acquire a legal settlement in the latter county?

(2) Would the same rule apply if the facts were the same except that the person in question did not reside in an institution?

Section 3828.088, Code 1939, provides as follows:

"A legal settlement in this state may be acquired as follows:

1. Any person continuously residing in any one county of this state for a period of two years, without being warned to depart as provided in this chapter acquires a settlement in that county * * *.

2. Any person having acquired a settlement in any county of this state shall not acquire a settlement in any other county until such per-

son shall have continuously resided in said county for a period of two years, without being warned to depart as provided in this chapter.

3. Any such person who is an inmate of or is supported by any institution whether organized for pecuniary profit or not or any institution supported by charitable or public funds in any county in this state or any person who is being supported by public funds shall not acquire a settlement in said county unless such person before becoming an inmate thereof or being supported thereby has a settlement in said county.

* * *."

On October 2, 1939, we issued an opinion wherein we held that a person receiving old age assistance is being supported by public funds under the provisions of subsection 3 of the above statute and thus cannot acquire a new legal settlement while he is continuing to receive old age assistance.

A recent decision of our Supreme Court strengthens this opinion. WOOD BROS. CONSTRUCTION CO. vs. BAGLEY, 6 N. W. 2d, 397, 400, quotes with approval from 42 Am. Jur., 718, as follows:

"Public funds are moneys belonging to the United States or a corporate agency of the Federal government, or state or subdivision thereof, or a municipal corporation. They represent moneys raised by the operation of law for the support of the government or for the discharge of its obligations. In other words, they constitute 'revenue', which, in turn, is defined as 'the income of the government arising from taxation, duties, and the like'."

At present, old age assistance is paid one-half from state funds and one-half from funds of the United States government. Therefore, such funds would without question be "public funds" under the definition of the Bagley case, supra.

However, the recent case of WARREN COUNTY vs. DECATUR COUNTY, 5 N. W. 2d, 847, has raised a number of doubts and has created considerable uncertainty regarding the law on this subject. We are not yet certain that we fully understand its holding. The evidence in the case showed that the family in question had accumulated some property, including a home, and had paid the taxes thereon. That although Mr. and Mrs. Hurst were both receiving old age assistance, the Court did not seem to think that these people were "poor persons" under the statute, being Section 3828.073, Code 1939 and that sufficient evidence had not been shown to prove that these people were *"being supported"* by public funds under Section 3828.088 (3). They might have received *"some assistance"* from public funds by way of old age assistance, but this would fall short of proving that they were *"being supported"* by public funds. To put it concretely, they might have been earning $25.00 per month and been receiving $15.00 a month from old age assistance. If this were true, they were not *"being supported"* by public funds but merely being *"assisted"*.

In answer to your first question, we are of the opinion that if a person who is a recipient of old age assistance, moves into Dubuque County, becomes an inmate of an institution as described in Section 3828.088 (3), resides there for two or more years without having the statutory notice to depart served upon him, he does not acquire a legal settlement in Dubuque County.

We would give the same answer to your second question but would suggest that if any cases of this nature arise, that you be very careful to prove that the person in question is *"being supported"* by public funds and not merely *"being assisted."* We are frank to say that the answer to this question is not free from doubt in view of the Warren County case, supra.

In the meantime, we would suggest that you serve the statutory notice to depart in all cases where there is any doubt.

STATE OFFICERS, DEPARTMENTS AND EMPLOYEES: AGRICULTURAL INSPECTION FEES TO BE PAID TO GENERAL FUND OF STATE. All funds collected by the Department of Agriculture for inspection fees must be paid over to the General Fund for the State or be placed in a trust fund. Such fees cannot be used by the department to employ inspectors, chemists and analysts for the purpose of carrying out the terms of Chapter 152 of the Code of Iowa.

May 26, 1943. *Mr. Clyde Spry, Assistant Secretary of Agriculture, Building:* In your recent letter you point out that Section 3118 of the 1939 Code of Iowa provides as follows:

INSPECTION FEE—REPORT UNDER OATH. For the purpose of defraying the expenses connected with the sampling, inspection and analysis of commercial feeds sold or offered for sale within this state and for other items incident to carrying out the provisions of this chapter, all corporations, firms or persons engaged in the manufacture of commercial feeds sold in this state shall on or before the fifteenth day of January and the fifteenth day of July of each year, make statement under oath, in due form of law, which shall be filed with the department and which shall set forth the number of net tons of such commercial feeds sold or distributed in this state during the six preceding calendar months; and upon such statement shall pay to the department the sum of ten cents per net ton of two thousand pounds. Each applicant for a certificate of registration shall include in such application a permit granting to the department permission to verify from applicant's records such applicant's statement of tonnage.

You request our opinion as to whether or not the provisions of this Code Section authorize the Secretary of Agriculture to use funds raised under the provisions of this section to employ inspectors, chemists and analysts for the purpose of carrying out the provisions of Chapter 152 of the 1939 Code of Iowa.

The provisions of the Code Section, quoted above, contain nothing which gives your Department direct authority for the management and expenditure of the funds collected by this inspection fee, and there is the definite provision of Code Section 3057 which provides for the payment of fees, such as these, to the general fund, said Section provides as follows:

3057 Fees paid into state treasury. All fees collected under the provisions of this title shall be paid into the state treasury.

We can find nothing in the law that would entitle you to use this fund directly, and we are forced to rule that whatever expenses are incurred by your Department for the administration of Chapter 152 of the 1939 Code of Iowa must be paid from your departmental appropria-

tion, which theoretically, at least, is designed to provide sufficient funds for carrying out all of the duties of your Department.

Your second question is as to whether or not the money raised under the provisions of Chapter 152 of the 1939 Code should be placed in a trust fund or surrendered to the State's General Fund.

It follows from our previous ruling in this opinion that these funds are payable to the State's General Fund.

INSANITY: LIABILITY OF PARENTS FOR SUPPORT OF ADULT DAUGHTER. Where an adult unmarried daughter was committed as insane on February 14, 1928, the parents were liable for support after June 2, 1939 in accordance with Chap. 98, section 1, Laws of the 48th G. A. This act is not retroactive. The five year statute of limitation is applicable, and this claim being in the nature of an open account, the statute does not run until five years after the last item of debit or credit.

June 10, 1943. *Weston E. Jones, County Attorney, Floyd County, Charles City, Iowa.* This will acknowledge receipt of your letter of June 8th wherein you ask our opinion on the following set of facts:

"On February 13, 1928, when 25 years of age, the unmarried daughter of a husband and wife, who are still living, was committed to the Iowa Hospital for the insane at Independence, Iowa. On July 31, 1929, said daughter was transferred to the Insane ward of the Floyd County, Iowa, Hospital (County Home) and she has been continuously there since said date.

1. Does the liability of the parents in this case start as of February 13, 1928, and continue on the theory of an open book account to present time?

2. Does the liability of the parents in this case start as of June 2, 1939, (effective date of act which apparently placed liability on parents for adult children) and continue to date on theory of open book account?

3. Does liability run as governed by 5-year statute of limitations or does liability run as provided for in poor law under 2-year statute of limitations?"

In answer to your first question it is our opinion that the parents were not liable to the County for the support of an insane adult child prior to June 2, 1939.

See: Monroe County vs. Teller, 51 Iowa 670.

In answer to your second question we quote from Chapter 98, Section 1, Acts of the Forty-eighth General Assembly, which was published June 1, 1939.

"Section 1. Section three thousand five hundred ninety-five (3595), Code, 1935, is hereby amended by inserting after the period following the word 'insane' in line three (3) thereof the following: 'Persons legally liable for the support of an insane or idiotic person shall include the spouse, father, mother, and adult children of such insane or idiotic person, and any person, firm, or corporation bound by contract hereafter made for support'."

It is our opinion that said above quoted section fixes the liability on the parents of an adult insane child as of June 2, 1939.

It is our further opinion that said section is not retroactive and does not fix liability on the parents of such child for any advancements made on behalf of such child before said date.

In answer to your third question we respectfully call your attention to *Harrison County vs. Dunn*, 84 Iowa 328, and *Jones County vs. Norton*, 91 Iowa 650, both of which cases hold that recovery may be had for care furnished an insane person only if action is brought on the account within five years from the date of the last item.

As we view it, you will not be barred by the statute of limitation since your cause of action against the parents arose less than five years ago.

OLD AGE ASSISTANCE: SENATE FILE 353 OF 50TH G. A. CONSTRUED: FUNERAL BENEFITS. On account of erroneous references to sections to be amended in Senate File 353 of the 50th G. A. a review of legislative intent is made for the purpose of giving full credence to the bill as intended by the legislature, relating to funeral benefits.

June 16, 1943. *Mrs. Mary Huncke, Chairman, State Board of Social Welfare, Des Moines, Iowa:* I wish to acknowledge receipt of your letter of June 8 requesting an opinion upon the following facts, to-wit:

"The 50th General Assembly passed Senate File 353 which was intended to make some changes in the old age assistance laws. The last paragraph of section 3 of the Act purports to transfer lines 13 to 20 inclusive of section 9, chapter 146, Acts of the 49th General Assembly from section 3828.018 to section 3828.021, Code, 1939, but some mistake seems to have been made so that it is not certain that this was accomplished. The code editor states that Senate File 353 was not enrolled as enacted and therefore, he does not have the authority to publish it in the Acts of the 50th General Assembly. If he fails to thus publish it, we are afraid this may injuriously effect these changes."

You ask an answer to the following questions:

"1. Was the change intended by the last paragraph of section 3 of S. F. 353 actually made?

"2. If not, what effect does this have on the remaining provisions of the bill?

"3. Do you have the authority to pay the funeral benefits of a person 'committed or admitted' to a tax supported institution in accordance with the provisions of lines 13 to 20 inclusive, of section 9, chapter 146, Acts of the 49th General Assembly, as amended by section 2 of S. F. 353, Acts of the 50th General Assembly?

"4. Should the code editor publish in the Acts of the 50th General Assembly, all of S. F. 353 in the exact form it was duly enrolled and signed by the presiding officers of the Senate and House and the Governor?"

In answer thereto, you are advised as follows:

1. Senate File 353, as originally written by Senate Judicial Committee No. 2 was as follows, to-wit:

"Section 1. Section three thousand eight hundred twenty-eight and twenty-one thousandths (3828.021), Code, 1939, is amended by striking from lines three (3) and four (4) commencing after the word "issued" in line three (3), the following: 'and has not been canceled'."

Later, Senator Goode offered the following amendment, to-wit:

"Amend Senate File 353 by adding as section two (2) the following:

'Sec. 2. Section three thousand eight hundred twenty-eight and eighteen thousandths (3828.018), Code, 1939, as amended by chapter one hundred forty-six (146), acts of the Forty-ninth General Assembly,

is hereby amended by striking the word 'committed' in line seventeen (17) of section nine (9) of chapter one hundred forty-six (146), acts of the Forty-ninth General Assembly, and inserting in lieu thereof the words 'committed or admitted'.'

"Also amend by adding as section three (3) the following:

'Sec. 3. Amend section three thousand eight hundred twenty-eight and twenty-nine thousandths (3828.029), Code, 1939, by adding after the word 'for' in line three (3) the words 'funeral expenses or'.'

"Also amend by striking the title and inserting in lieu thereof the following:

'An act to amend section three thousand eight hundred twenty-eight and twenty-one thousandths (3828.021), Code, 1939, and section three thousand eight hundred twenty- eight and twenty-nine thousandths (3828.029), Code, 1939 and section three thousand eight hundred twenty-eight and eighteen thousandths (3828.018), Code, 1939, as amended by chapter one hundred forty-six (146), acts of the Forty-ninth General Assembly, all relating to funeral expenses paid from the old age assistance fund'."

Later, he filed a second amendment, to-wit:

"Amend the amendment by Senator Goode by adding a new paragraph as follows:

'Also amend said section by striking from lines thirteen (13) and fourteen (14), the words and figures 'Section three thousand eight hundred twenty-eight and eighteen thousandths (3828.018)' and inserting in lieu thereof the words and figures 'Section three thousand eight hundred twenty-eight and twenty-one thousandths (3828.021)'".

When the Bill was enrolled, the second amendment was added as a new paragraph to Section 3 of the Bill. Therefore, under its provisions, it would amend Section 3828.029, Code, 1939, which has to do with a child's responsibility for the support of an old age assistance recipient. An examination of this section discloses that there are only twelve lines therein and that the words and figures 3828.018 do not appear at any place. Since it attempts to strike these words and figures from supposed lines 13 and 14, it is quite apparent that there must be some mistake.

It appears that it was the intention of Senator Goode that his second amendment should apply to Section 3828.018, as amended by Section 9 of Chapter 146, Acts of the 49th General Assembly. The context of section 9 would appear to bear this out as the words and figures "Sec. 3828.018" appear in lines 13 and 14 thereof. Also, this portion of section 9 pertains to Funeral Benefits. Sec. 3828.018 does not deal with Funeral Benefits and it very evidently was made a part of this section by mistake. Senator Goode, by his second amendment, evidently intended to correct this by changing it over to section 3828.021 where it belongs as the latter section deals with Funeral Benefits. However, it is questionable whether this was accomplished.

Since it is desirable that this change be made, the question arises as to whether the situation can be remedied by a construction of the Bill. We recognize the well established rule of statutory construction that the intent of the legislature should be ascertained and if possible, all parts of the act given effect in accordance with this intent. However, in order to accomplish this intent, we would be required to transpose the entire paragraph in question from its present position as a part of section 3 and make it a part of section 2. This would materially change the Bill

from the form in which it was enrolled in the Senate, signed by the President of the Senate, Speaker of the House and Governor of Iowa. We know of no statutes or decisions of any court of last resort which give us such power or authority. As was said in the case of *Davidson Bldg. Co. vs. Mulock*, 212 Iowa, 730, 751, 752:

"While it is the duty of the courts, if possible, to ascertain the meaning of, and give effect to legislative enactments, *yet, if a statute is so vague, incomplete, defective, indefinite, or so conflicting or inconsistent as to be unworkable or incapable of enforcement, it then becomes the duty of the courts to declare it inoperative and void, and the remedy lies in future legislative enactment and not by adding to, or filling up the gaps in the defective legislation, by judicial legislation.*

* * * * *

"In State v. West Side St. Ry. Co. (Mo.), 47 S. W. 959, the court said: 'The courts cannot venture upon the dangerous path of judicial legislation to supply omissions or remedy defects in matters committed to a co-ordinate branch of the government. It is far better to wait for necessary corrections by those authorized to make them, or, in fact, for them to remain unmade, however desirable they may be, than for judicial tribunals to transcend the just limits of their constitutional powers'."

Therefore, we are unable to escape the conclusion that said second amendment is defective, indefinite and so conflicting and inconsistent as to be unworkable and incapable of enforcement and therefore, invalid.

2. The next question with which we are met is, "After declaring said paragraph invalid, what effect, if any, does this have on the remaining provisions of S. F. 353?"

In the Mulock case, supra, on page 756, the Court also said:

"It is a rule of universal application that a statute may be valid in part, and invalid in another part, and if the invalid part is severable from the remainder, the portion which is valid may stand while that which is void may be stricken out and rejected, if after the elimination of the void portion, the remaining provisions are sufficient to be effective and accomplish their purpose in accordance with the legislative intent deducible from the act construed in the light of contemporary events."

Applying this rule, the second amendment by Senator Goode to Senate File 353 is easily severable from the remainder of the Bill and after the elimination of the invalid portion, the remaining portions are sufficient to be effective and accomplish their purpose and would therefor be valid.

3. Lines 9 to 20, inclusive, of Section 9, Chapter 146, Acts of the 49th General Assembly, as amended by section 2 of S. F. 353, Acts of the 50th General Assembly, provide as follows:

"Where a person has been receiving old age assistance under the provisions of this act and while receiving such assistance is committed or admitted to any tax supported institution for any cause and is not receiving old age assistance at the time of his death, he shall, notwithstanding such facts, be qualified to receive his burial expenses *as provided in this section.* (Italics is ours)

It will be observed this provides that such person as is therein described shall be qualified to receive his burial expense *"as provided in*

this section" (italics is ours). However, the remainder of this section has to do with the renewal of old age assistance certificates. Nothing is said about burial expense or how it can be obtained. Section 3828.021 contains the provisions of the Old Age Assistance Act as to the payment of funeral expenses.

It is very apparent that the Legislature intended that such a person should receive his burial expense. Since there are not other provisions of section 3828.018 with reference to such expenses, if we applied the language literally, we would have to hold that there was nothing to which those words could refer and therefore, the provisions would be invalid.

However, in *Peverill vs. Dept. of Agriculture*, 216 Iowa, 534, 535, the Court said, "It is a cardinal rule of statutory construction that legislative enactments shall be construed in such a manner that the ends of the enacting body may be accomplished."

In Sexton vs. Sexton, 129 Iowa, 487, 488, 489, the Court said, "But we are not always restricted to the precise words employed in getting at the meaning of a statute. And it is the real purpose and intent of the Legislature, *as meant to be expressed*, to which we are to give force of operation. Noble v. State, 1 G. Greene, 325; Dilger v. Palmer, 60 Iowa, 117. That which is clearly not within the intention of a statute, although within the letter thereof, is held not to be within the statute. Crabell v. Wapello C. Co., 68 Iowa, 751. *And a consruction is not to be put upon a statute which would manifestly effectuate injustice, if it is susceptible of a different construction.* Small v. Railway, 50 Iowa, 338." If we were to hold this paragraph to be invalid, it would unjustly affect some old people and prevent the State Board of Social Welfare from paying their burial expense when the Legislature manifestly intended that it should be thus paid.

Section 64, Code, 1939, provides in substance that the provisions of the code shall be liberally construed in order to effectuate justice.

In *McGray vs. Seigle*, 221 Iowa, 127, 132, the Court said:

"But we think the duty is imposed on courts to function, in the interpretation of statutes, in a manner more likely to ascertain the real intent of the legislature than would result from arbitrarily adopting the verbiage of a statute, without heeding other indications of legislative intent, and without considering the result of such arbitrary interpretation. In Oliphant v. Hawkinson, 192 Iowa 1259, 1263, 183 N. W. 805, 807, 33 A. L. R. 1433, this court quoted with approval the following: '*The intention of the lawmakers in the law.* This intention is to be gathered from the necessity or reason of the enactment and the meaning of the words, enlarged or restricted according to their real intent. *In construing a statute the courts are not confined to the literal meaning of the words. A thing within the intention is regarded within the statute, though not within the letter. A thing within the letter is not within the statute, if not also within the intention. When the intention can be collected from the statute, words may be modified or altered, so as to obviate all inconsistency with such intention.* (Hoyne v. Danisch, 264 Ill. 467, 106 N. E. 341.) When great inconvenience or absurd consequences will result from a particular construction, that construction should be avoided, unless the meaning of the legislature be so plain and manifest that avoidance is impossible. (People v. Wren, 4 Scam. (Ill.)

269.) The courts are bound to presume that absurd consequences leadnig to great injustice were not contemplated by the legislature, and a construction should be adopted that it may be reasonable to presume was contemplated'."

In *White vs. Rio Grande W. R. Co.*, 25 Utah, 346 71 Pac. 593, 2 Lewis' Sutherland on Statutory Construction (1st Ed.), section 260, 17 Am. & Eng. Eneye. of Law 19, 20, and Comfort vs. Kittle, 81 Ia. 179 (all cited in State vs. Claiborne, 185 Ia. 170, 176), it was held, "it is a rule of statutory construction that, where one word has been erroneously used, if another, or a word omitted, and the context afford the means of correction, the proper word will be deemed substituted or supplied."

In *State vs. Booth*, 169 Iowa, 142, in construing the following statute, "when it is proposed to include * a city town or *village*, the voters residing upon the territory outside the incorporated limits of such city, town, or *village* shall vote separately, etc.," (sec. 2794-a, Supp. Code, 1913), the court read into the statute the word "platted" in front of the word "village" wherever it appeared, in order to make all of the statute effective and to accomplish the obvious intent of the legislature.

In State vs. Claiborne, supra, a number of examples are given of changes by the court of a word in a statute in order to make effective the obvious intent of the Legislature.

An examination of the definitions of the word "section" as applied to statutes in Words & Phrases, discloses that this word has been construed by different courts to mean anything from a single sentence or subdivision of a statute to "sections" and even to "an entire act", in order to make effective the legislative intent.

In *Ellis vs. Whitlock*, 10 Mo. 781, the word "section" was construed as meaning "sections".

In *Rankin vs. Herod*, 130 Fed. 390, it was construed to refer to the entire act.

It is, therefore, our holding that the word "section" as used in the paragraph of the statute in question refers to and means "chapter". Accordingly, you would be required to pay the funeral expense of the persons therein described in accordance with the provisions of section 3828.021, Code, 1939, which is contained in the same chapter, to-wit: chapter 189.1, Code, 1939.

4. Chapter 13, Code, 1939, sets out the duties of the code editor. An examination thereof discloses that there are no provisions granting him any authority to publish the session laws of the Legislature. This duty is given to the State Superintendent of Printing in Section 215 (1) which provides that he shall prepare the manuscript copy of *all* laws, acts and joint resolutions passed at each session of the general assembly * * and cause the same to be printed. We believe this means exactly what it says. That it is his duty to have printed in the session laws *all* of the acts passed by the last General Assembly. Then it is up to the courts to determine their legality.

FEES: EXECUTORS, ADMINISTRATORS AND TRUSTEES FEES DEDUCTIBLE FOR INHERITANCE TAX PURPOSES EVEN THOUGH ESTATE OPENED PRIOR TO JULY 4, 1943, EFFECTIVE DATE OF HOUSE FILE 19, LAWS OF THE 50TH G. A. House File 19 of the laws of the 50th G. A. provides that Executors, Administrators and Trustees fees may be deducted for inheritance tax purposes and this act applies to estates which were probated prior to July 4, 1943, the effective date of House File 19.

June 17, 1943. *Mr. W. D. Daly, Counsel, Inheritance Tax Division, Iowa State Tax Commission, Building:* This will acknowledge receipt of your letter of June 10, 1943 wherein you ask the opinion of this department relative to the application and interpretation of House File 19, Laws of the 50th General Assembly.

The question is as to whether executors', administrators' or trustees' fees, which are allowed by order of court, can be deducted for inheritance tax purposes in estates that were opened prior to July 4, 1943, the date when said House File becomes effective.

It is our opinion that this law, when it becomes effective, applies to estates that were opened and unsettled prior to July 4, 1943 and in which no final order with reference to executors', administrators' or trustees' fees has been made.

Stating it another way: The question is as to whether the following amendment to our inheritance tax laws, to-wit:

"the fee of executors, administrators, or trustees as allowed by order of court."

authorizes the deduction for inheritance tax purposes on estates that were opened prior to July 4, 1943, or whether it applies only to the estates of decedents who die on or after July 4, 1943.

As we have indicated, we think it is clear that this amendment will authorize the deduction for inheritance tax purposes of such fees as are allowed by court in estates opened prior to July 4, 1943 and in which final allowance of such fees has not been made.

WARRANTS: COUNTY FUNDS INSUFFICIENT TO PAY WARRANTS: TREASURER CANNOT TAKE UP WARRANTS STAMPED "NOT PAID FOR WANT OF FUNDS" BY PAYING OUT OF CURRENT REVENUE BEING COLLECTED. Where the system of county financing has become outmoded the remedy is by legislative action and not by legal interpretation of laws relating to county funds.

June 23, 1943. *Mr. Francis J. Kuble, County Attorney, Des Moines, Iowa:* We wish to acknowledge receipt of your letter in which you ask for our opinion on the following matter:

"It has been necessary in the past in financing the County affairs of Polk County to issue warrants on such funds as Court Expense, Secondary Road and Pauper in excess of the anticipated income for such funds.

"As provided in Chapter 62.2 of the Code, such warrants would be stamped by the County Treasurer 'Not Paid for Want of Funds'. These warrants would then be cashed by a local bank and thereafter draw interest at 4% (Sec. 1171.12 as amended) until paid. Later when

enough warrants had issued to have a bond sale, the bank holding such warrants would take a judgment against the County, based on such warrants, in a friendly action. The County would then sell bonds to pay such judgment and in that way the Warrants would be paid.

"It will be necessary to continue issuing warrants on some funds which income in such funds will be inadequate to pay all expenses to be paid from such County funds.

"The County does now have and has always had in various funds an unused balance which has been on deposit in local banks, which have been approved by the Board of Supervisors as depositories. On April 30, 1943 the Treasurer had a balance in the County depositories of $4,018,515.06.

"It is the desire of the County to save for the taxpayers the interest accumulating on such warrants that must be stamped 'not paid for want of funds' from the time such warrants are issued up to the time the bonds are sold to pay such warrants. The interest on bonds which are sold to pay warrants, bears a very low rate of interest depending upon the competitive bids of various bidders.

"The County proposes to issue warrants on overdrawn funds whenever it becomes necessary and only on those funds as authorized by Sections 5258 and 5259 of the Code so that such expenditures may exceed the income for such fund plus the unexpended balance. The Warrants would then be presented by the payee to the County Treasurer and the County Treasurer would in turn pay such warrants from part of the proceeds of the current tax collections. The County Treasurer would then keep such warrants in his office holding them and listing them as cash on hands until the accumulated warrants were in a sufficient amount to warrant a bond sale to take up the warrants. The County Treasurer would then sell such warrants to a local bank. The proceeds of such sale would then be received by the County Treasurer and regarded as cash on hand which he would deposit as he would current tax receipts. Such warrants could also be paid by an approved transfer from the Emergency Fund. That way it would avoid a sale of the warrants and the issuance of bonds. This however, would be subject to the approval of the Comptroller. If, however, such warrants were sold to a local bank, the usual procedure would then be followed by a judgment being rendered against the County in a friendly action by the bank and bonds sold to pay such judgment.

"It is proposed that warrants which are paid by the County Treasurer from part of the current tax collections would be warrants drawn on funds as authorized by Section 5259 of the Code and would be warrants in payment of the general obligations of the County."

We have carefully considered the matter above mentioned and while there may be some merit in the plan we are of the opinion that the plan is not in accordance with the plain provisions of the Iowa law.

The Iowa law dealing with County finances provides for the establishment of certain funds and authorizes various expenditures from these funds. The law further provides that when a warrant is drawn on a particular fund and there is not enough money in the fund to pay the warrant the Treasurer shall endorse the fact thereon, and the warrant draws interest from that date until paid. See Section 1171.12 of the 1939 Code of Iowa as amended. To follow the plan above outlined would be to ignore the various statutory references to the distinct County funds, the disposal of these funds and to the handling of warrants drawn on such funds.

If the system of financing as outlined in the Iowa law is outmoded it should be changed by Legislative action and not by alleged legal in-

terpretation. Nothing in this opinion is intended to alter the practices of County officials in making transfers from one fund to another as may be authorized by law.

OLD AGE ASSISTANCE: RECIPIENTS TRUST FUND: REVOLVING FUND. Proceeds from sale and lease of recipients property should be placed in a "trust fund" and held until the death of the assignor or recipient.

June 24, 1943. *Mrs. Mary Huncke, Chairman, State Board of Social Welfare, Des Moines, Iowa:* I wish to acknowledge receipt of your letter of June 21 wherein you request an opinion upon the following facts:

Section 3828.042, Code, 1939, sets up a Revolving Fund to be used for certain purposes by the State Board of Social Welfare. Section 2 of Senate File 103 struck out a portion thereof and enacted a substitute as follows:

"At the end of each quarter of each fiscal year if the old age assistance revolving fund shall have a cash balance in excess of $200,000, the State Comptroller shall transfer such excess to the old age assistance fund and shall notify the State Board of such transfer. The amounts thus transferred shall supplement other allocations to the old age assistance fund and may be expended for the purposes and in the manner referred to in Section 3828.039."

There is now in the Revolving Fund in excess of $1,500,000 of which, in excess of $950,000 is carried on our books as "Recipients' Trust Account Credits". The latter consists of money received from real estate liens, claims in estates, sales of real estate, the liquidation of different kinds of property deeded or assigned to the State Board, etc. Part of this may be received before the death of the old age assistance recipient and may substantially exceed what has been paid by the State Board.

The Federal Social Security Board is entitled under the law to share equally with the State Board in recoveries of assistance paid after February 1, 1936, the date when federal participation commenced. However, the State Board makes advances for many things in which the Federal Board does not participate, such as funeral expenses, premiums on insurance policies assigned to the State Board, advancements to protect the lien of the State Board in real estate, viz: redemption of tax sale certificate, redemption of certificate of purchase at sheriff's sale, on foreclosure of mortgage, etc. The determination of how much of the money received belongs to the Federal Board and how much may be retained by the State Board cannot be made until the latter's liability is definitely fixed by the death of the recipient, payment of funeral expense, etc.

The State Board has drafted certain rules under the statute empowering it to do so, which govern the collection and application of trust fund account credits and which rules have been approved by the Federal Board.

One of these rules is in substance as follows:

"All moneys received by the State Board from whatever source shall not be applied to the assistance account of any recipient as a refund or

a recovery until the death of the recipient, if unmarried, or until the death of the surviving spouse, if married, and said surviving spouse was also a recipient, or until a cancellation of the certificate issued to the recipient, if unmarried, or to the recipient and spouse, if married."

Another is:

"The order of application to the individual assistance account of moneys received shall be as follows: First, to revolving fund advances and accrued interest thereon; second, to funeral claims and interest thereon; third, to monthly assistance payments paid prior to February 1, 1936, the date of federal participation, and interest thereon; fourth, to assistance payments made subsequent to February 1, 1936."

If the State Board is required under the above amendment by the 50th General Assembly to Section 3928.042 to transfer to the Old Age Assistance Fund for use as old age assistance, all money in excess of $200,000 at the end of each quarter, it would force the transfer and use for old age assistance of a large amount of funds which do not belong to the State Board and are being held in trust and would also require the State Board to apply proceeds of recipients' accounts and divide the money with the Federal Board before the accounts are matured, which in turn would mean a substantial loss to the State as full reimbursement could not be had.

Will you please advise us what we can do in this matter?

In answer thereto, you are advised as follows:

A part of Section 3828.012, Code, 1939, provides as follows:

"At the discretion of the state department, however, where such immediate sale, for cash, of such securities or investments necessitates an undue financial sacrifice, the applicant, when in immediate need of assistance, shall assign such securities and investments to the state *to be held in trust* by the state board *to reimburse the old age assistance revolving fund* for the amount paid from the old age assistance fund and the old age assistance revolving fund in assistance or other benefits in behalf of said applicant."

This, of course, contemplates the sale of these securities and investments by the State Board whenever it can be done advantageously. It takes place in most cases before the death of the assignor. This means that the State Board must hold the proceeds therefrom "in trust" until after the death of the assignor and until it is definitely ascertained what the complete amount of old age assistance and other benefits are which have to be advanced.

From the plain wording of this portion of the statute, it would seem to indicate that the legislature intended that the proceeds from the sale of such property should be placed in a "trust fund" and held until the contingency above set out happens and then that the revolving fund be reimbursed for all money advanced to the assignor before that time.

Chapter 189.1, Code, 1939, as amended, which contains all of the old age assistance laws, only specifically sets up two funds, the Revolving Fund and the Old Age Assistance fund. The statutory provisions with reference to these two funds do not make provision for their use as trust funds. Therefore, the legislature must have contemplated the setting up of some other fund to carry out its plain directions.

Further proof of this is found in the following provisions in Section 3828.023, Code, 1939, as amended:

"If the state board deems it necessary to protect the interest of the state, it may require, as a condition to the grant of assistance, the absolute conveyance or assignment of all, or any part, of the property of an applicant for assistance to the state board; * *

"The state board shall have power to *sell, lease, assign* or *convey* such property or defend and prosecute all suits concerning it and to pay all just claims against it and to do all other things necessary for the protection, preservation and management of the property. (Italics ours)

"Upon the death of the recipient, or * * * the property shall be disposed of and so much of the proceeds as is necessary for the repayment of the amount of assistance and other benefits paid to the grantor and/or his spouse and repayment of amount expended for the preservation of the property *shall be transferred to the old age assistance revolving fund.* The balance, if any, shall be paid through the old age assistance revolving fund to the heirs. (Italics ours)

When property is sold, leased, or conveyed prior to the death of the recipient and his spouse, if married, there would, of course, be income or proceeds therefrom. Yet, the Legislature provided that such proceeds should not be transferred to the Revolving Fund until the death of the recipient and his spouse, if married. Under the uses prescribed for the Old Age Assistance Fund, it is obvious that this money could not be placed therein during this interim. Therefore, the legislature must have contemplated that it be placed temporarily in some other fund such as a "trust fund."

On July 13, 1934, this department issued an opinion wherein it suggested the setting up of an Administration Fund for the payment of certain expenses of the Old Age Assistance Commission. This was later done. Such fund was also not specifically provided for by statute. Therefore, there is authority for doing the thing we are going to recommend.

It is our holding that a separate "trust fund" should be set up which can be called "Old Age Recipients' Trust Fund." All the funds which you have heretofore carried in the Revolving Fund under the subhead "Recipients' Trust Account Credits" can and should be placed therein. Then as the recipients' accounts mature in accordance with your rules covering collection and trust account credits, you should promptly disburse the same to the proper fund or to these entitled thereto.

LEGAL SETTLEMENT: MINORS TAKE SETTLEMENT OF DIVORCED MOTHER WHERE SHE IS GIVEN CUSTODY. It is ordinarily impossible for minors to obtain a legal settlement in their own right, but can only obtain a derivative settlement through some other person.

July 3, 1943. *Mr. Grant L. Hayes, County Attorney, Mount Ayr, Iowa:*

We wish to acknowledge receipt of your letter of June 16, supplemented at our request by your letter of June 29, asking for an opinion based upon the following facts:

"Mr. and Mrs. Raymond Mathis were parents of three children and had legal settlement in Ringgold County at the time they were divorced in 1937. The decree gave the mother custody of the children. In May, 1938, the father took the two oldest boys to Nebraska, and later deserted them in Omaha. Their identity was not known until July, 1941, when the Nebraska authorities appealed to Ringgold County to accept them,

which was done. Mrs. Mathis married Robert Sheets of Diagonal, Iowa, in the fall of 1938. They and their family were on WPA and direct relief and unable to support these two children. The mother voluntarily signed an authorization to permit the two boys to be taken to the Ottumwa Home Finding Association. This was done without any legal action or commitment on September 17, 1941. The boys had gotten so far behind in their schooling that the Ottumwa Home recommended that they be sent to the University Reading Clinic at Iowa City. The mother again voluntarily signed an authorization for this. She also signed a waiver of notice and consent that they be committed to the Iowa City Hospital for care and treatment, and this was done. The Reading Clinic is a part of this hospital. Robert Sheets obtained employment in Clearfield, Iowa, in Taylor County, and, together with his wife and children, except the two boys, moved there in April, 1941, established a residence and have since resided there. The family has been self-supporting and has received no assistance since moving to Taylor County. They have not been served with the statutory notice to depart by Taylor County. It acknowledges that Mr. and Mrs. Sheets have a legal settlement in that county, but refuses to acknowledge the legal settlement of the two boys in question, and particularly because of the aid given them in that Ringgold County had paid their expenses at Ottumwa and Iowa City. The authorities at Iowa City recommend that the boys stay there another year."

The question is:

"Where is the legal settlement of the two boys and which county is liable for their expenses at Iowa City during the coming year?"

Section 3828, Code, 1939, as amended, contains the law applicable hereto and provides as follows:

"A legal settlement in this state may be acquired as follows:

1. Any person continuously residing in any one county of this state for a period of two years without being warned to depart as provided in this chapter acquires a settlement in that county, * * *.

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

3. Any such person who is an inmate of or is supported by any institution whether organized for pecuniary profit or not or any institution supported by charitable or public funds in any county in this state or any person who is being supported by public funds shall not acquire a settlement in said county unless such person before becoming an inmate thereof or being supported thereby has a settlement in said county.

4. A married woman has the settlement of her husband, if he has one in this state; * * *.

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

* * *."

It will be noted that the only provision in the portions of the statute above quoted which specifically provides how a minor may obtain a legal settlement is found in subsection 5. This states that he takes the settlement of his father, if there be one, if not, that of the mother. Subsection 4 provides that the wife takes the legal settlement of the husband.

In this case, the wife had the legal settlement of the husband at the time of the divorce which was Ringgold County. In addition to this, she was given custody of the children by the decree. Since the father had departed to parts unknown, certainly, justice and the best interests of the child would demand that the settlement of the child be that of the

mother. Yet, the statutes make no provision therefor.

An examination of the Iowa cases discloses no decision in point.

It is said in 48 C. J., Paupers, Section 120:

"Where the parents of minor children are divorced, and the mother is given the exclusive custody and control of the children, they take the legal settlement of the mother. * * *"

On May 21, 1941, this Department handed down an opinion in harmoney with this citation. We reaffirm this holding.

Therefore, the two boys took the settlement of their mother at the time of the divorce which was Ringgold County. When she obtained a new settlement in Taylor County in April, 1943, this also became their settlement unless they came within the provisions of Subsection 3, Section 3828.088, Code, 1939, supra, because they were being supported by public funds from Ringgold County.

It is said in 48 C. J., Paupers, Section 48:

"Infants, not being sui juris, but under the control of their parents and deriving their settlement from them, have, as a general rule, and in the absence of any statute to the contrary, been held incapable of acquiring a settlement in their own right prior to emancipation, * * *."

Therefore, it will be seen that it is ordinarily impossible for minors to obtain a legal settlement in their own right but can only obtain a derivative settlement through some other person who in this case would be their mother. Therefore, subsection 3, Section 3828.088, Code, 1939, would have no application to minors.

It is our conclusion that the legal settlement of the two boys is now in Taylor County and that it is liable for their future support.

SCHOOLS AND SCHOOL DISTRICTS: STATE AID NOT SUBJECT TO ADMINISTRATIVE EXPENSES. No part of the appropriation made in section 17 of Senate File 350, laws of the 50th G. A. can be used for administrative expense.

July 7, 1943. *Hon. C. Fred Porter, State Comptroller, Building:*

We have your inquiry requesting an official opinion of this department as to whether or not an allocation for administrative expenses can be made from the appropriation for state aid to consolidated schools (which is $125,000 for each year of the present biennium) found in section 17 of Senate File 350, Acts of the 50th General Assembly.

We note that allocations from the appropriation for state aid to normal training schools have been made in the past for administrative expenses under the authority of an opinion written by Earl Wisdom on December 31, 1932. We have checked the opinion of Mr. Wisdom and find that the conclusion he arrives at is correct. The 34th General Assembly by what appears as Chapter 131 of the published acts of the 34th General Assembly provided for normal training of teachers in high schools, for state aid therefor, and made a general appropriation to carry out the provisions of the act. Section 5 of this act provided that the appropriation for instruction of pupils in normal training might be expended in part for inspection and supervision of such instruction by the superintendent of public instruction, and that the expense of such instruction by the superintendent of public instruction should be paid out of

such appropriation. This section 5 appears in the 1913 supplement as section 2634-b4. In the compiled code of 1919 it appeared as section 2312. The 1939 General Assembly by Chapter 209, section 52, amended section 2312 of the compiled code, but in no manner affecting the provision that the appropriation might be expended in part for inspection and supervision by the superintendent of public instruction, and that such inspection should be paid out of the appropriation. This was left unchanged. The section as it stood in the 1923 supplement to the compiled code was never repealed, so far as we have been able to ascertain from a searching examination of the Acts of the 40th General Assembly and the 40th Extra General Assembly, but nevertheless same was not brought forward and placed in the code of 1934. However, it is still in effect and by reason thereof there is authority to pay administrative expenses out of the appropriation for state aid to normal training schools. However, the same situation does not prevail with reference to state aid to consolidated schools. Provision for state aid to consolidated schools was made in Chapter 250, Acts of the 30th General Assembly, which appeared in the 1913 supplement as sections 2794-b to 2794-g, inclusive. In this enactment there was no provision for the payment of any administrative expense from the state aid nor, as this enactment was amended from time to time, was there any provision made for payment of any administrative expenses from the appropriation for state aid. The provision for state aid to consolidated schools now appears as section 1484, Code, 1939, and is in the same language as enacted by the 40th Extra General Assembly in section 44 of House File 100 (Chapter 16 of the published acts of the 40th Extra General Assembly).

As indicated above, nowhere is there any authority to use any part of the appropriation for state aid for consolidated schools for administrative expenses. It follows that no part of the appropriation made in section 17 of Senate File 350, Acts of the 50th General Assembly for state aid for consolidated schools can be used for administrative expense.

TAXATION: HOMESTEAD TAX CREDIT: SON-IN-LAW AND TENANT IN COMMON: NOT ENTITLED TO CREDIT. A person is not entitled to a homestead tax credit unless he be an "owner". A son-in-law is not a blood relative under the definition of owner and furthermore being a tenant in common is not entitled to homestead tax credit.

July 7, 1943. *Mr. Shirley A. Webster, County Attorney, Winterset, Iowa:* This will acknowledge receipt of your letter of recent date wherein you ask the opinion of this department relative to the following legal question:

"'A' and 'B' own a farm in Madison County, Iowa as tenants in common. 'A' is the son-in-law of 'B' and 'A' has made application for homestead credit on the undivided one-half interest in the forty acre tract which constitutes the homestead. 'A' occupies and farms the land."

The question is:

"Is 'A' entitled to the homestead tax credit to the extent of his undivided one-half interest in the homestead?"

In coming to a conclusion on this question it is, as we view it, necessary only to consider Section 6943.152, Code of Iowa, 1939, which provides:

"For the purpose of this chapter and wherever used in this chapter;

1. The word 'homestead' shall have the following meaning:

a. The homestead must embrace the dwelling house in which the *owner* claiming a millage credit or refund under this chapter actually lives six months or more in the year.

* * *

d. If outside of a city or town it must not contain more than forty acres.

* * *

2. The word 'owner' shall mean the person who holds the fee simple title to the homestead, and in addition shall mean the person occupying as a surviving spouse or the person occupying under a contract of purchase where it is shown that not less than one-tenth of the purchase price named in the contract actually has been paid and which contract has been recorded in the office of the county recorder of the county in which the property is located, or the person occupying the homestead under devise or by operation of the inheritance laws where the whole interest passes or where the divided interest is shared only by *blood relatives*, or by legally adopted children or where the person is occupying the homestead under a deed which conveys a divided interest where the other interests are owned by *blood relatives* or by legally adopted children." (Italics ours)

In view of the above definitions it is our opinion that "A" is not entitled to a homestead credit on his undivided one-half interest in said homestead. You will note that no provision is made in the law for a proportionate credit. As we interpret the law, applicant is entitled to either the whole credit or none.

In the comparatively recent case of W. J. Sandberg Company v. Iowa State Board of Assessment and Review, 225 Iowa 103, 278 N. W. 643, the Supreme Court of our state re-affirmed the doctrine that in construing statutes courts are bound by the definition of terms made use of by the Legislature. In the Sandberg case, the court said:

"In construing this statute (sales tax law) we are bound by the definition of terms made use of by the Legislature. As stated by this court in the case of State v. City of Des Moines, 221 Iowa 642, 266 N. W. 41, 42, 'the Legislature is its own lexieographer'."

In the posited case ,"A" clearly would not be entitled to homestead exemption unless he is an "owner" as that term is defined in Sub-section 2 of Section 6943.152. We have set out this section above and a careful reading of same will, in our opinion, clearly reveal that "A" is not an "owner" as that term is defined in said Sub-section. "A" and "B", the tenants in common, are not blood relatives and are not, therefore, included in the term "owner".

As sustaining our opinion, we call your attention to the case of Eysink v. Board, 229 Iowa 1240, 296 N. W. 376. In the Eysink case, the court said:

"It will be observed that in addition to a fee simple title holder, the term 'owner' also includes, according to the statute:

(1) Surviving spouse;

(2) purchaser under recorded contract, with ten per cent of the purchase price paid;

(3) devisee or heir of deceased owner;

(4) devisee or heir of an undivided interest where the remaining interest passes to blood relatives or adopted children; and

(5) grantee of a deed of a fractional interest where the other interests are owned by blood relatives or adopted children;
* * * * * *."

We reach the conclusion, therefore, that "A" is not entitled to homestead credit inasmuch as he is not an "owner" as that term is defined in the statute.

HEALTH: VENEREAL DISEASE HOSPITALS ESTABLISHED: COMMITMENT: STATE DEPARTMENT WITHOUT AUTHORITY TO ESTABLISH HOSPITAL. Detention hospitals for venereal diseases may be established by the county and local boards may provide places for isolation of persons infected. There is no authority for commitment of a person outside of board's jurisdiction. When person no longer has communicable disease he is entitled to freedom. The State Board of Health is not authorized to establish such hospital.

July 7, 1943. *Mr. Francis J. Kuble, County Attorney, Des Moines, Iowa:* In your letter of June 23rd you request the opinion of this office upon several questions arising out of the proposed establishment of a venereal disease hospital in Des Moines. We shall consider these questions as they are outlined in your letter. For the purpose of answering the questions under consideration we quote the following Sections of the 1939 Code of Iowa:

2258. FORCIBLE REMOVAL. The forcible removal and isolation of any infected person shall be accomplished by an application to any civil magistrate in the manner provided in section 2242 for the removal and abatement of nuisances; and such magistrate shall issue the warrant, as directed in such cases, to remove such person to the place designated by the local board, and to take possession of the infected house, lodging room, premises, or effects until the same have been properly fumigated or disinfected.

2260. REMOVAL TO ANOTHER JURISDICTION. No person known to be infected with any communicable disease dangerous to the public health shall move or be removed from the jurisdiction of one local board to the jurisdiction of another local board without the written permission of the local board from whose jurisdiction the infected person is to be removed, and if the removal is to another county, then the written permission of the local board into whose jurisdiction the infected person is to be removed shall also be secured.

1. Can the local board of health commit a person with a venereal disease to a hospital for treatment of this disease, the hospital being located in another county, that is, a county different from the residence of the committed person?

Whatever action may be taken by local authorities in this field is, in our opinion, governed by the provisions of Chapters 108 and 109 of the 1939 Code of Iowa. It seems to us that the various provisions contained in these Chapters contemplate the establishment of local facilities by local authorities for the benefit of local persons. Detention hospitals may be established by counties and local boards are authorized to provide places for the isolation of persons infected with communicable disease dangerous to public health. Nowhere is any provision found authorizing either a county or a local board of health to commit persons suffering from diseases described in this Chapter to hospitals outside the jurisdiction of these boards, except that under the provisions of Code

Section 2260 a removal may be made with the written permission of the local board into whose jurisdiction the person is to be taken.

2. Can such person committed under this procedure be refused his or her freedom upon the completion of the treatment in the venereal hospital located in another county and be compelled to return back to his or her home?

It is our opinion upon this question that as soon as a person is released from the hospital and it clearly appears that that person requires no further detention by reason of danger to the public health, that person may properly demand his complete freedom and may not be forced to return to the county from which he came.

3. If a patient is committed under the provisions of Section 2258 of the 1939 Code of Iowa, which empowers the local magistrate to issue a warrant for such commitment, can such warrant commit the patient to an institution outside the jurisdiction of the local courts of commitment and order his transmission and return under guard. By transmission and return I mean transmission to another county where the hospital is and return from said other county?

Our answer to the first question, we believe, is also an answer to the third, except that we do not believe Code Section 2258 would authorize local magistrates to issue a warrant committing a patient to an institution outside the jurisdiction of the local courts of commitment.

4. Does any statute empower the State Board or Department of Health to establish a state venereal hospital?

We can find no statutory authorization empowering the State Board of Health or the State Department of Health to establish such a hospital.

MILEAGE RATE: DISTRICT JUDGES. The maximum mileage rate which may be allowed to District Court Judges for the use of their automobiles in official traveling is four cents per mile as provided by sec. 308.5, Code 1939.

July 8, 1943. *Hon. C. Fred Porter, State Comptroller, Building:* We have your request for an official opinion on the question as to the mileage rate to which district judges are entitled in using their automobiles for travel on official business.

Prior to the 48th General Assembly the general provisions with reference to mileage which could have application was section 1225-d1, Code 1935, which provided as follows:

"When a public officer or employee is entitled to be paid his expenses in performing a public duty, no charge shall be made, allowed, or paid for the use of an automobile in excess of five cents per mile of actual and necessary travel."

The 48th General Assembly enacted what was known as the Car Dispatcher's Act, which appeared in the published acts of the 48th General Assembly as Chapter 131, and which appears in the 1939 Code as Chapter 18.1. The title of this act provides inter alia

"* * * to grant allowances to state officers and employees for the use of their own automobiles when operated on state business * * *."

Section 5 of this act, which appears in the 1939 code as section 308.5, provides:

"No state officer or employee shall use any state-owned car for his own personal private use, nor shall he be compensated for driving his own motor vehicle except if such is done on state business and in such case he shall not receive more than four cents per mile."

The 48th General Assembly which enacted the Car Dispatcher's Act, made no specific change or amendment to section 1225-d1 of the 1935 code, and in the 1939 code this section became 1225.01.

The 49th General Assembly, by what appears in the published acts of that assembly as Chapter 91, amended section 1225.01, Code, 1939, so that it now reads as follows, (the italicized portion being the amendment):

"When a public officer or employee *other than a state officer or employee, as provided in section three hundred eight and five tenths (308.5) section five thousand one hundred ninety-one (5191) and section two thousand six hundred eighty-two (6282), Code, 1939,* is entitled to be paid his expenses in performing a public duty, no charge shall be made, allowed, or paid for the use of an automobile in excess of five cents per mile of actual and necessary travel."

Section 308.5 referred to in this section is the section hereinbefore quoted from the State Car Dispatcher's Law limiting mileage rate in the case of state officers and employees for such travel; section 5191 is the section which provides for the fees which the sheriff shall charge and be entitled to collect including mileage; section 2682 provides the mileage to which an inspector under the Bovine Tuberculosis chapter shall be entitled to.

It will be noted that section 308.5, which limits the mileage rate to four cents per mile applies to *state* officers and employees, and section 1225.01 refers to *public* officers or employees. It will be conceded that a state officer or employee is also a public officer and employee. If the district judge is in the more limited class of a state officer, then the mileage which he may charge and collect is covered by section 308.5.

It would appear that a district judge is in fact a state officer. District judges receive their compensation and traveling expenses from the general fund of the state, appropriation therefor being made biennially in the general appropriation act which appropriates "for various departments and various divisions thereof, of the state of Iowa."

In view of the foregoing, it is the opinion of this department that the maximum mileage rate which may be allowed district judges for use of their automobiles in official travel is four cents per mile, as provided in section 308.5, Code, 1939.

CORPORATIONS: PERPETUAL EXISTENCE: PERIODICAL FEE REQUIRED. Corporations may have perpetual existence by so providing in their articles of incorporation and by paying the periodical fee required by statute.

July 14, 1943. *Hon. Wayne M. Ropes, Secretary of State, Building:*

We have your request for an official opinion as to the time of pay-

ment of the subsequent fees by corporations having the right of perpetuity, as provided for in section 8 of Chapter 225, Acts of the 50th General Assembly.

Chapter 225, Acts of the 50th General Assembly, provides for the first time for perpetual existence of corporations for pecuniary profit organized under the laws of the state of Iowa. An examination of this chapter discloses that this was accomplished in the act by amending certain sections of Chapter 384 (corporations for pecuniary profit), and by adding a new section to this chapter of the code. The determination of the question which you ask calls primarily for an interpretation of section 8 of Chapter 225, Acts of the 50th General Assembly, although consideration of the other sections is probably necessary to arrive at a conclusion.

Section 8360, Code, 1939, deals with amendments to articles of incorporation. Section 4 of Chapter 225, Acts of the 50th General Assembly, amends this section 8360 by striking the last sentence of the section and substituting other matter, which new matter is in the following language:

"Where capital stock is increased the certificate fee shall be omitted but there shall be paid a recording fee of twenty-five cents per page and in addition a filing fee which in case of corporations existing for a period of years shall be one dollar per thousand of such increase and in case of corporations empowered to exist perpetually shall be one dollar and ten cents per thousand of such increase. Corporations providing for perpetual existence by amendment to its articles shall, at the time of filing such amendment, pay to the secretary of state a fee of one hundred dollars together with a recording fee of twenty-five cents per page, and, for all authorized capital stock in excess of ten thousand dollars, an additional fee of one dollar ten cents per thousand."

Attention is called to the last sentence of the above quoted provision which provides for the fees that a corporation shall pay for perpetual existence *by amendment to its articles.*

Section 6 of Chapter 225, Acts of the 50th General Assembly, amends section 8365, Code, 1939, by striking the first sentence of the code section, and substituting the following:

"Corporations existing for a period of years may be renewed from time to time for the same or shorter periods, or may be renewed to exist perpetually, if a majority of the votes cast at any regular election, or special election called for that purpose, at any time during the corporate life or within three months after the termination thereof, 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."

Section 8365 deals with renewals of corporate existence. The preceding section of the code (8364) has to do with the duration or life of corporations, and this section was amended by section 5 of Chapter 225, Acts of the 50th General Assembly by adding the following provisions to the section:

"; provided however, that in addition to the power herein granted to incorporate for a period of years, corporations hereafter organized or now existing may have perpetual existence by so providing in the articles of incorporation or by amendment thereto pursuant to section 8360."

It would appear from the foregoing provisions of the statute that the 50th General Assembly in the enactment of Chapter 225 provided for an existing corporation to acquire perpetuity either by amendment to its existing articles of incorporation or by a renewal.

Section 8 of Chapter 225 provides for an additional and new section to be included in Chapter 384 of the code, and this has to do with periodical payment of fees by corporations having perpetual existence, and is in the following language:

"Corporations having the right of perpetual existence shall periodically pay the fees herein provided. Fifty years from the date of incorporation or last renewal of such 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, and each fifty years thereafter, and twenty years from the date of incorporation or last renewal of such corporations for other purposes, and each twenty years thereafter, there shall be paid to the secretary of state a fee of one hundred dollars and an additional fee of one dollar ten cents per thousand for all authorized stock in excess of ten thousand dollars; and upon such payment being made the secretary of state shall issue a certificate showing such payment. The period of existence of any such corporation failing to pay such fees at the time they are due shall thereupon terminate, provided, however, that any such corporation may be renewed at any time within three months thereafter."

This section has only to do with corporations having perpetual existence, and provides that fifty years or twenty years, as the case may be "from the date of incorporation or last renewal of such corporations", there shall be paid to the secretary of state a fee of one hundred dollars and an additional fee of one dollar ten cents per thousand for all authorized stock in excess of ten thousand dollars. The fees referred to here are not the fees which the corporation for perpetual existence paid when it first acquired its right to perpetual existence which are provided for in sections 2 and 4 of Chapter 225, but a periodical fee required to maintain the perpetual existence after the perpetual existence has been once acquired.

As indicated above, the language of the statute is that this shall be paid fifty or twenty years "from the date of incorporation or last renewal." If a corporation with perpetual existence is first incorporated subsequent to July 4, 1943 (the effective date of Chapter 225, Acts of the 50th General Assembly) the fee provided for in section 8 of Chapter 225, Acts of the 50th General Assembly would be due fifty or twenty years (as the case might be) from the date of its incorporation. If the corporation existed prior to July 4, 1943, and thereafter acquired perpetual existence by renewal of its articles of incorporation, as is provided for in section 6 of Chapter 225, Acts of the 50th General Assembly, its renewal, by reason of the provisions of section 7 of the chapter, would date from the expiration of the corporation period which it succeeds, and the additional fee would then be due fifty or twenty years from the date of its renewal, or in other words, the date its former corporate period would have expired. For illustration, if the corporation's corporate period would expire on December 1, 1943, and it renewed its ar-

ticles and provided in the renewal for perpetual existence on September 15, 1943, the fee provided for in section 8 would be due twenty or fifty years (as the case may be) from December 1, 1943.

If the corporation was in existence on July 4, 1943, and thereafter amended its articles of incorporation to provide for perpetual existence, as is provided for in section 4 of Chapter 225, Acts of the 50th General Assembly, the time when the fee provided for in section 8 would date from the date of its incorporation or renewal of incorporation immediately last preceding the date when it amended its articles of incorporation to provide for perpetual existence. For illustration, if the corporation had become incorporated or had renewed its corporation for a twenty year period as of September 1, 1933, and thereafter on September 1, 1944, acquired perpetual existence by amendment to its articles of incorporation, the fee provided for in section 8 would be due twenty years from September 1, 1933, or upon September 1, 1953.

We believe the foregoing interpretation gives effect to all of the language of the act without any strained or forced construction and that any other interpretation would have to assume the existence of an ambiguity which is not present.

HOMESTEAD TAX CREDIT: CHATTEL MORTGAGE WITH PHOTOSTATIC COPY OF REAL ESTATE CONTRACT NOT PROPER RECORDING: CHATTEL MORTGAGE FOR 10% PURCHASE PRICE NOT SUFFICIENT. The filing of a chattel mortgage to which is attached a photostatic copy of real estate contract is not sufficient recording to meet requirements of Homestead Tax Credit Law. The taking of a chattel mortgage to secure the 10% payment of purchase price does not meet requirements for homestead tax credit.

July 14, 1943. *Iowa State Tax Commission, Building:* This will acknowledge receipt of your letter of the 14th instant wherein you ask the opinion of this department relative to the following legal question: For a statement of the facts, we quote from your letter:

"During the audit of homestead credit applications in one of the counties in Iowa, it was found that homestead credit was being granted to parties who had filed a chattel mortgage and to this chattel mortgage was attached a photostatic copy of the contract.

"The question being, is this filing of a chattel mortgage, with photostatic copy of the contract attached, sufficient record for a homestead credit application to be granted, when our law requires that where property is being purchased on contract, the contract must be recorded? Furthermore, is the filing of a chattel mortgage sufficient to be considered as a ten per cent down payment?"

Answer to these questions involves the interpretation of sub-section 2 of Section 6943.152, Code of Iowa, 1939. This sub-section reads as follows:

"The word 'owner' shall mean the person who holds the fee simple title to the homestead, and in addition shall mean the person occupying as the surviving spouse or the person occupying under a contract of purchase where it is shown that not less than one-tenth of the purchase price named in the contract *actually has been paid* and which contract *has been recorded* in the office of the county recorder of the county in which the property is located * * *." (Italics ours)

It is our opinion as to question number one that the filing of a chattel mortgage with photostatic copy of the real estate contract attached is not a recording of the contract as that term is used in the above quoted sub-section 2. It will be noted that the Legislature has defined in plain and unambiguous language the term "owner".

As to a claimant who occupies a homestead by virtue of a contract of purchase, the Legislature provided that he was to be deemed the "owner" only under the two following conditions:

1. Where it is shown that not less than one-tenth of the purchase price named in the contract actually has been paid; and
2. Which contract has been recorded in the office of the county recorder of the county in which the property is located.

It becomes pertinent to inquire, therefore, as to whether the contract of the claimant in the posited case "has been recorded in the office of the county recorder." We think it has not. It is elementary that in construing a statute words and terms must be given their common, usual and generally accepted meaning. Applying this rule of construction, it will be readily seen that the contract of purchase in the posited case has not been recorded. We do not believe that merely attaching a photostatic copy of the contract to a chattel mortgage, which is filed in the office of the county recorder is a recording of the contract. In this connection, we must bear in mind that the index of the instrument filed would be the Chattel Mortgage index and not the one in which is indexed Real Estate Contracts. Clearly, attaching a photostatic copy of a real estate contract to a chattel mortgage would not be constructive notice of such contract and if this is so, then it certainly may not be said that the filing of the chattel mortgage with a photostatic copy of the real estate contract attached satisfies the requirements with reference to the recording of such contract.

The Legislature had the right to provide for the conditions under which homestead credit was to be allowed. What did it require with reference to purchasers of real estate under contract? It provided that one-tenth of the purchase price be actually paid and that the contract of purchase be recorded.

It is our conclusion, therefore, as to the applicant in the posited case that he has failed to comply with the second of the two above requirements, and is, therefore, not entitled to homestead credit.

As to your question number two, it is our opinion that the execution and delivery of a note secured by a chattel mortgage for one-tenth of the purchase price does not fulfill the requirements of the statute. What does the statute require? We quote:

"The word 'owner' shall mean the person who holds the fee simple title to the homestead, and in addition shall mean the person occupying as a surviving spouse *or the person occupying under a contract of purchase where it is shown that not less than one-tenth of the purchase price named in the contract actually has been paid.*" (Italics ours)

Now, can it be said that when a claimant merely executes to the grantor a note for one-tenth of the purchase price, secured by a chattel mortgage, that "one-tenth of the purchase price named in the contract

actually has been paid"? We think not. As sustaining our opinion, we call your attention to the case of Floyd v. State, 32 Arkansas, 200 in which it was said:

"Gantt, Dig., paragraph 2103, providing that no appeals shall be taken from a justice's judgment after it has been 'paid or collected,' does not include giving a mortgage for a fine adjudged to the state."

We must also bear in mind that the Legislature in defining the term "owner" provided:

"* * * or the person occupying under a contract of purchase where it is shown that not less than one-tenth of the purchase price named in the contract actually has been paid * * *." (Italics ours)

It is our opinion that when the Legislature employed the word "actually" that it meant to convey the idea of payment in cash or its equivalent. Certainly, the execution of a note secured by a chattel mortgage cannot be said to be "actual payment". It is a mere promise to pay and does not in our opinion satisfy the requirements of the statute. In this connection, it should also be borne in mind that the homestead credit law is really a tax exemption statute, and, therefore, in our opinion must be strictly construed against the exemption. Therefore, it is our view that unless the applicant comes squarely within the provisions of the chapter, he is not entitled to the credit.

It follows from what we have said that it is our view that the execution of the note secured by a chattel mortgage for one-tenth of the purchase price is not "actual payment" as that term is used in sub-section 2 of Section 6943.152.

CORPORATIONS: FOREIGN CORPORATIONS PAY FEE OF $25.00 ON $10,000 OR LESS RELATE TO PERIOD OF YEARS—NOT PERPETUAL EXISTENCE. The statute which provides that a foreign corporation shall pay a fee of $25.00 on first $10,000 of property in the state and $1.00 per $1,000 over $10,000 relates to corporations incorporated for a period of years and does not mean corporations with perpetual existence.

July 19, 1943. *Hon. Wayne M. Ropes, Secretary of State, Building:* We have your request for an official opinion as to whether or not since the going into effect of Chapter 227, Acts of the 50th General Assembly, a foreign corporation which has perpetual existence can secure a permit for twenty years by paying a fee of $25.00 plus one dollar per thousand or fraction thereof on money and property in the state in excess of ten thousand dollars.

Your inquiry must be answered in the negative.

Section 8423, Code, 1939, was amended by section 5, Chapter 227, Acts of the 50th General Assembly, and as so amended it now reads as follows:

"Before a permit is issued authorizing such corporation to transact business in the state, said corporation shall file with the secretary of state a certified copy of the articles of incorporation, with resolution and statement as previously set forth, and pay a filing fee of twenty-five dollars upon ten thousand dollars or less of money and property of such company actually within the state, and of one dollar for each one thous-

and dollars of such money or property within this state in excess of ten thousand dollars, if said corporation has existence for a period of years. If the corporation has perpetual existence under its articles or charter it shall make the filings as hereinbefore provided for and shall pay a filing fee of one hundred dollars and a further fee of one dollar and ten cents for each one thousand dollars of such money or property within this state in excess of ten thousand dollars, and thereafter shall periodically pay the said fee as follows: in the case of a corporation for the construction and operation, or the operation alone, of steam railways, interurban railways, and street railways, or for the establishment and conduct of savings banks, every fifty years from the date of qualification and in the case of all other corporations, every twenty years from the date of qualification, and upon the failure to make such payments within three months from the date same are due, the secretary of state shall cancel the permit of said corporation. The fees required by this section to be paid shall not be collected from a corporation organized for the purpose of carrying into effect a plan of reorganization approved in bankruptcy proceedings under the laws of the United States or in a general equity receivership in a Court of competent jurisdiction, until the period of time for which a permit to transact business within this state has previously been issued to the corporation so reorganized has elapsed."

From the foregoing it is evident that the provisions with reference to paying a fee of $25.00 upon ten thousand dollars or less of property within the state and one dollar for each one thousand dollars of property within the state in excess of ten thousand dollars applies only to corporations having existence for a period of years, and the section then goes on and provides as to what fee shall be paid by a corporation having perpetual existence under its articles or charter, and this fee is one hundred dollars and a fee of one dollar and ten cents for each one thousand dollars of property in excess of ten thousand dollars within this state.

CAFETERIAS: OPERATION BY INDUSTRIAL PLANTS FOR EMPLOYEES: LICENSE REQUIRED. Cafeterias or restaurants operated in industrial establishments serving food at cost to employees are "places where food is served for pay" and they come within the statutory definition of restaurants, and are required to procure a license before operation.

July 19, 1943. *Mr. Roy J. Sours, Chief, Dairy and Food Division, Department of Agriculture, Building:* In your letter of July 14, you request the opinion of this office upon the following question:

Various industrial establishments in Iowa are either operating or are permitting the operation of cafeterias within the plants, which serve food to the employees of the plants at cost.

You inquire as to whether or not such cafeterias are restaurants, as defined in sub-section 4 of Code Section 2808, and whether such establishments would be required to obtain a restaurant license from your department.

Sub-section 4 of Section 2808 of the 1939 Code of Iowa provides as follows:

* * *

4. "Restaurant" shall mean any building or structure equipped, used, advertised as, or held out to the public to be a restaurant, cafe, cafe-

teria, dining hall, lunch counter, lunch wagon, or other like place where food is served for pay, except hotels and such places as are used by churches, fraternal societies, and civic organizations which do not regularly engage in the serving of food as a business."

* * *

Section 2809 of the 1939 Code of Iowa, provides as follows:

LICENSE REQUIRED. No person shall maintain or conduct a hotel, restaurant, bakery, candy factory, ice cream factory, bottling works, canning factory, slaughterhouse, meat market, or place where fresh meats are sold at retail until he shall obtain a license from the department of agriculture. Each license shall expire one year from the date of issuance except a hotel or restaurant license which shall expire on the last day of December following the date of issuance. A hotel license shall be transferable upon the payment of a fee of one dollar to the department, but no other license shall be transferable.

While the establishments to which you refer are not held out to the public as being restaurants, that quality, nevertheless, is but one of the various methods of determining whether or not an establishment is a "restaurant" under the statutory definition of that word, which is set forth above.

These are "places where food is served for pay," and since they are, it is our opinion that they come within the statutory definition of restaurants, and are required to procure licenses before operation.

TAXATION: ASSIGNMENT OF TAX CERTIFICATE: STATE TAX COMMISSION EXECUTES ON BEHALF OF STATE OF IOWA. The State Tax Commission is the tax certifying body as far as the State of Iowa is concerned and in the assignment of a tax certificate the State Tax Commission is the proper authority to execute the same.

July 20, 1943. *Mr. Ben H. Hall, Director, Property Tax Division, State Tax Commission, Building:* This is in reply to your letter of June 21 in which you request an opinion from this department as to who gives the written approval for the State under the provisions of Section 7265.

Section 7265, Code of Iowa, 1939 provides, so far as material:

"The certificate of purchase shall be assignable by indorsement and entry in the register of tax sales in the office of county treasurer of the county from which said certificate issued, and when such assignment is so entered it shall vest in the assignee or his legal representatives all the right and title of the assignor. The statement in the treasurer's deed of the fact of the assignment shall be presumptive evidence thereof. When the county acquires a certificate of purchase and has the same in its possession for one year, or more, the board of supervisors may compromise and assign the said certificate of purchase, with the written approval of all tax-levying and tax-certifying bodies having any interest in said general taxes. * * *"

It is our opinion that the Tax Commission is the only proper body to execute the written approval referred to in the above quoted section and we shall hereinafter give our reason for so holding.

Section 7182, Code of Iowa, 1939, as amended, provides as follows:

"In each year the State Tax Commission shall fix the rate in percentage to be levied upon the assessed valuation of the taxable property

of the state necessary to raise such amount for general state purposes as shall be designated by the general assembly either by statute or joint resolution."

Section 7183, Code of Iowa, 1939 provides:

"The State Tax Commission shall certify the rate so fixed to the auditor of each county."

Sub-section 13-a of Section 84.06 provides:

"On August first, the State Comptroller shall, for each year of the biennium, certify to the State Tax Commission, the amount of money to be levied for general state taxes."

As we construe Sub-section 13-a, Section 84.06, the Comptroller becomes merely the source from which the Tax Commission receives information as to the amount designated by the General Assembly. In other words, the Comptroller is in no sense a tax-certifying body as that term is used in Section 7265.

It is our opinion that the term "tax-certifying body" as the same is used in Section 7265 refers to that body which has the duty of certifying to the County Auditor rates or valuations which will enable the Board of Supervisors to make the requisite levy as provided by Section 7171, Code of Iowa, 1939.

We reach the conclusion, therefore, that the Tax Commission is the certifying body which must give the written approval referred to in Section 7265.

CEMETERIES: SOLDIER'S AND SAILOR'S GRAVES: TAX LEVY. COUNTY TO PAY FROM GENERAL FUND. For the care and upkeep of Soldier's and Sailor's Graves the Board of Supervisors are authorized to pay such expense from the general fund of the county.

July 20, 1943. *Mr. Geo. F. Allen, County Attorney, Creston, Iowa:* We wish to acknowledge receipt of your recent letter in which you ask for our opinion on the following matter:

"The Superintendent of Graceland Cemetery of Creston, Union County, Iowa, has filed with the Auditor, a claim in the amount of $1993.00 for maintenance of the deceased Soldiers and Sailors graves, for a period covering approxmiately twenty-three years, under Sections 3828.065 and 3828.066 of the 1939 Code of Iowa.

"There is a quarter of a mill levy for cemetery purposes as per paragraph 14 of Section 6211 of the 1939 Code, and as I understand it, the money used from this levy is for the care and maintenance of the entire cemetery, and Soldiers and Sailors graves are given the same care and attention as any other.

"An opinion was rendered by the Attorney General's office on April 21, 1934, which I believe takes care of the part of this claim which goes back behind the current year. However, Section 3828.065 provides that this money shall be appropriated by the Board of Supervisors out of the general fund 'in any and all cases which provision for such care is not otherwise made.'

"In view of the fact that there is a quarter mill levy made for the purpose of maintenance and upkeep of the cemetery as a whole, is it mandatory that the Board in addition to said levy appropriate additional funds for the purpose of maintaining and caring for Soldiers and Sailors graves."

The pertinent part of Section 6211, 1939 Code of Iowa, provides as follows:

6211. TAXES FOR PARTICULAR PURPOSES. Any city or town shall have power to levy annually the following special taxes:
* * *

14. CEMETERY FUND. Any city, not to exceed one-fourth mill, and any town, not to exceed three-fourths mill, which shall be used only for the care, preservation, and adornment of any cemetery owned or controlled by the city or town, or owned and controlled by any private or incorporated cemetery association, township, or other municipality, even though situated in an adjoining county, if actually utilized for burial purposes by the people of the city or town. Said tax may be so expended for the support and maintenance of any such cemetery after it is no longer used for the purpose of interring the dead.

Section 3828.065, 1939 Code of Iowa, provides as follows:

3828.065. MAINTENANCE OF GRAVES. The board of supervisors of the several counties in this state shall each year, out of the general fund of their respective counties, appropriate and pay to the owners of, or to the public board of officers having control of cemeteries within the state in which any deceased soldier or sailor of the United States is buried, a sum sufficient to pay for the care and maintenance of the lots on which they are so buried, in any and all cases in which provision for such care is not otherwise made.

Section 3828.066, 1939 Code of Iowa, provides as follows:

3828.066. PAYMENT—HOW MADE. Such payment shall be made at the rate charged for like care and maintenance of other lots of similar size in the same cemetery, upon the affidavit of the superintendent or other person in charge of such cemetery, that the same has not been otherwise paid or provided for.

It will be noted that under the provisions of sub-section 14 of Section 6211, that the money raised by taxation for cemetery purposes shall be used only "* * * for the care, preservation, and adornment of any cemetery * * *." It is a matter of common knowledge that in maintaining a cemetery it is necessary to maintain considerable property that has not been divided into lots and sold. For example, there is a maintenance of driveways, care of shrubbery, trees, fences, and many other items. It is our opinion that the money raised by taxation under the provisions of subsection 14 of Section 6211 was intended, primarily, to meet the type of expense above mentioned.

Turning now to the provisions of Section 3828.065, it is our opinion that the language in said Section, "* * * *in any and all cases in which provision for such care is not otherwise made.*", does not contemplate that when a tax levy is made as provided in subsection 14 of Section 6211, that the use of the proceeds of such levy is "provision for such care" referred to in said Section 3828.065. Section 3828.066 recognizes that it is a common practice for a definite charge to be made for the care and maintenance of the burial lots in a cemetery. We believe that this is the charge contemplated when the Legislature enacted Section 3828.065 and such charge should be paid by the Board of Supervisors from the general fund when it is not otherwise paid.

It should be pointed out that the purchase price of many burial lots includes the cost of perpetual care and that many relatives of deceased soldiers and sailors do provide for the care of the service man's burial ground. A careful investigation along this line should be made before payment is made as authorized in Section 3828.065.

COUNTY ATTORNEY: APPOINTED REFEREE IN PROBATE: FEE TO BE ACCOUNTED FOR AS FEES OF COUNTY OFFICE. Where a county attorney is appointed referee in probate such fees as are paid to him as referee must be accounted for by him as fees of his office.

July 21, 1943. *Hon. C. B. Akers, Auditor of State, Building:* In your letter of July 19, 1943, you advise that a County Attorney of an Iowa County has been appointed referee in probate by the District Court, and that that County Attorney has collected various fees as such referee.

You request the opinion of this office as to whether this County Attorney may retain the fees he received as referee in probate, or whether he must report and remit them to his County.

Code Section 12041 provides as follows:

REFERENCE—EXAMINATION OF ACCOUNTS—FEES. In matters of accounts of executors and administrators, the court may appoint a referee, which referee, in all counties having a population of less than one hundred thousand shall, whenever in the opinion of the court it seems fit and proper, be the clerk of the district court of the county in which the estate is being probated, as referee, who shall have the powers and perform all the duties therein of referees appointed by the court in a civil action. All fees received by any county officer as such referee shall become a part of the fees of his office and shall be accounted for as such.

The last sentence in this Code Section appears to answer the problem which you submit, and provides that all fees received by referees in probate, who are also County Officers, shall become a part of the fees of that county office held and shall be so accounted for.

Obviously the County Attorney is a County Officer, and it follows that he may not retain these fees while he holds this county office.

This opinion will be found to be consistent with opinions previously issued by this office, and dated May 5, 1937, and January 10, 1939.

STATE OFFICERS AND DEPARTMENTS: DEPARTMENT OF HEALTH: ESTABLISHMENT OF VENEREAL DISEASE CENTER: LEGISLATIVE INTERIM COMMITTEE WITHOUT AUTHORITY TO FURNISH FUNDS. The legislative interim committee has no authority to allocate state funds in matters which "should have been presented to the General Assembly by way of a bill". An expenditure for venereal disease center would not fall within any of the categories set out in the act establishing interim committee funds but squarely within the prohibitory provisions of the act.

July 26, 1943. *Walter L. Bierring, M. D., Commissioner of Public Health, Building:* Reply is made to your letter of July 24, 1943.

In that letter you request the opinion of this office upon the question set forth in that part of your communication which is quoted below:

"In the proposed establishment of the Rapid Treatment Center for Venereal Diseases in the building formerly occupied by the Broadlawns General Polk County Hospital, 406 Center St., Des Moines, now listed as project Iowa 13-141, Federal Works Agency, it is requested by the Federal Works Agency that the State of Iowa through the State Department of Health contribute 25 per cent of the cost of renovation of

the old building and the equipment necessary for the use and operation of the same.

"The total cost for the above renovation and equipment is approximately $36,000, and the amount to be contributed by the State is $9000.

"Before submitting the request to the Interim Committee on Retrenchment and Reform, at a meeting on July 30, 1943, it is desired that an opinion be rendered by you whether such an appropriation can be legally made by said Interim Committee in accordance with Section 2, Chapter 45, page 63, Laws of the 50th General Assembly."

For the determination of the question you present, the pertinent part of Section 2, Chapter 45, of the Laws of the 50th General Assembly, is that which provides as follows:

"* * *

"Said fund shall be administered by the joint committee on retrenchment and reform and allocations therefrom may be made only for contingencies arising during the biennium which are legally payable from the funds of the state. No allocation from said fund shall be made for the administration of or carrying out the provisions of any act passed by the 50th General Assembly which does not contain an appropriation. Nor shall the committee on retrenchment and reform allocate any funds for any purpose or project which was or should have been presented to the General Assembly by way of a bill and which failed to become enacted into law."

"* * *."

The proposed expenditure of State Funds does not in our opinion fall within any of the categories set out in the provision quoted above, and in fact appears to fall squarely within the prohibitory provision of that Act, in that this is a matter which "should have been presented to the General Assembly by way of a bill."

Our conclusion is that the Interim Committee on Retrenchment and Reform has no authority to allocate State Funds for the purpose described in your letter.

TAXATION: PLATTED LAND WITHIN CITY OR TOWN USED FOR AGRICULTURAL PURPOSES. Agricultural lands situated within cities and towns irrespective of area is not exempt from taxation for city or town purposes if such land is laid out into lots of ten acres or less. If such land is laid out into lots of more than ten acres, then such land is exempt from taxation except for city or town road purposes and library purposes and cost of paving arterial highways into and out of the city or town.

August 9, 1943. *Iowa State Tax Commission, Building:* This is in answer to your letter of the 4th instant wherein you ask the opinion of this department relative to Section 6210, Code of Iowa, 1939, which provides for exemption from taxation of land used for agricultural or horticultural purposes when the same is included within the limits of any city or town and which land has not been laid off into lots of ten acres or less.

You ask our opinion on the two following specific questions:

1. In cases where, according to the records, the land has been divided into lots and blocks, but the facts show that the land is being farmed, would this area, if it were composed of ten acres or more, be entitled to the agricultural exemption?

2. In cases where a person may own a lot on which his home is located and this lot is contiguous to an area, which according to the records is divided into lots and blocks, but the facts show that the area is being used as a yard or garden and not divided by streets and alleys, would this owner be entitled to include this area in his homestead valuation?

We are of the opinion as to your question number one that the land therein referred to is not exempt from taxation for city or town purposes and we will hereinafter give our reasons for so holding.

Section 6210 provides:

"No land included within the limits of any city or town 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 said lands and all personal property necessary to the uses and cultivation of said agricultural or horticultural lands shall be liable to taxation for city and town road purposes, at not exceeding one and one-fourth mills, and for library purposes."

In answering your question number one in the negative, we assume that inasmuch as you use the phrase "in cases where * * * the land has been divided into lots and blocks" that you have reference to lots of less than ten acres. The statute very clearly provides that where agricultural lands are laid off into lots of ten acres or less such lots become subject to taxation for city or town purposes. As we interpret your question, you are in doubt as to what the law is when such lots in the aggregate exceed an area of more than ten acres.

It is our opinion that the size of the area embracing the lots is immaterial. For instance, if an eighty acre farm was situated within the boundaries of a city or town and said farm were laid off in lots of ten acres or less, such eighty acre farm would be clearly subject to taxation for city and town purposes. This, notwithstanding the fact that such eighty acre farm is used exclusively for agricultural or horticultural purposes. As sustaining this view, see Leicht, et al, vs. the City of Burlington, 73 Iowa 29; Brooks vs. Polk County, 52 Iowa 460.

We reach the conclusion, therefore, as to question number one that the land referred to, being divided into lots of ten acres or less, is not entitled to be exempted from taxation for city or town purposes.

In order to obviate any erroneous impression that might arise from what we have herein said, we wish to call to your attention that even though said land were divided into lots of more than ten acres and thus exempt from general city and town taxation, it would not be exempt from assessment for paving arterial highways into and out of the city. See McKinney vs. McClure, 206 Iowa 225, 220 N. W. 354. Taxation for the purpose of defraying the cost of such paving is expressly authorized by Chapter 308, Code of Iowa, 1939 and according to McKinney vs. McClure, supra, modifies Section 6210 to the extent indicated.

Recapitulating for the purpose of clarity, it is our opinion that agricultural lands situated within the boundaries of a city or town, irrespective of the area of such lands, are not exempt from taxation for any purpose if such lands are laid off into lots of ten acres or less.

If such lands, irrespective of area, are laid off into lots of more than ten acres, then the same are exempt from taxation except as follows:

1. City and town road purposes;
2. Library purposes;
3. Paving arterial highways into and out of the city.

As to your question number two, it is our opinion that the owner is entitled to include the area referred to in his homestead valuation, providing, however, that it does not exceed one-half acre in extent, and, providing further that the yard or garden referred to in your question is habitually and in good faith used as a part of the homestead.

Section 6943.152 provides:

"The word, 'homestead', shall have the following meaning:

a. The homestead must embrace the dwelling house in which the owner claiming a millage credit or refund under this chapter actually lives six months or more in the year * * *.

b. It may contain one or more contiguous lots or tracts of land with the buildings or other appurtenances thereon habitually, and in good faith, used as a part of the homestead.

c. If within a city or town plat, it must not exceed one-half acre in extent; if however, its assessed valuation is less than twenty-five hundred dollars, the land area may be enlarged until its assessed valuation reaches that amount.

* * * * *"

The above answer to your question number two is based on the assumption that the yard or garden referred to is contiguous to the lot upon which the home is located. In other words, as we interpret your question, there is no street or alley dividing the garden from the home. If there is such street or alley separating the lot upon which the home is located from the yard or garden referred to, then such latter tract would not be contiguous to the lot on which the home is situated and the owner in the posited case would not be entitled to include the yard or garden in his homestead valuation. This would be so irrespective of whether the street or alley is improved or not. In other words, if the plat shows a street or alley separating the garden or yard from the lot on which the home is located, the two tracts would not be contiguous as that term is used in the statute and consequently the owner would not be entitled to include the yard or garden in his homestead valuation.

AGRICULTURE: SALE BARNS: PREVENTION OF INFECTIOUS AND CONTAGIOUS DISEASES AMONG LIVESTOCK: QUARANTINE OF SALE BARNS. The Department of Agriculture may adopt rules and regulations in suppressing and preventing of infectious and contagious diseases among livestock in sale barns, and may quarantine any sale barn where the operator declines to comply with the rules and regulations.

August 10, 1943. *Dr. C. C. Franks, Chief, Division of Animal Industry, Department of Agriculture, Building:* In your recent letter you request the opinion of this office upon two questions.

The first of these is as to whether or not the Department of Agriculture is authorized under our law to adopt rules and regulations regarding the operation of sale barns within this State, which rules and regula-

tions are designed to prevent the spreading of infectious and contagious disease among livestock.

Your second question is as to whether or not you have the authority to quarantine and maintain as quarantined any sale barn within the State, if the operator of it refuses to comply with the rules and regulations referred to.

Section 2643 of the 1939 Code of Iowa, provides in part as follows:

"POWERS OF DEPARTMENT. In the enforcement of this chapter the department of agriculture shall have power to:

"1. Make all necessary rules for the suppression and prevention of infectious and contagious diseases among animals within the state.

"2. Provide for quarantining animals affected with infectious or contagious diseases, or that have been exposed to such diseases, whether within or without the state.

"3. Determine and employ the most efficient and practical means for the prevention, suppression, control, and eradication of contagious or infectious diseases among animals.

"4. Establish, maintain, enforce, and regulate quarantine and other measures relating to the movements and care of diseased animals.

"* * * * * *."

The question of whether or not an attempted legislative delegation of rule making power to an administrative body is valid, is in general dependent upon whether or not the statute delegating the power clearly outlines the objects intended to be attained by the rules, and properly limits the field within which rules might be made.

It appears to us that sub-section 1 of Code Section 2643, which is quoted above, adequately meets the requirements of this test, and it is our opinion that the Department of Agriculture may adopt rules regulating sale barns for the purpose of suppressing and preventing infectious and contagious disease among livestock.

In addition to this, sub-section 3 of the Code Section quoted herein appears to authorize the action inquired about.

As to your second question it is our opinion that if the operator of a sale barn declines to comply with rules adopted by your Department, and intended to suppress or prevent infectious or contagious diseases, your Department is authorized to quarantine the sale barn involved, and to maintain that quarantine so long as the operator of the barn declines to abide by your rules.

SOLDIERS, SAILORS AND MARINES: FEDERAL RELIEF ACT OF 1940: APPLICATION BY SERVICEMAN FOR BENEFITS NECESSARY. The benefits derived from the Federal Soldiers' and Sailors' Relief Act of 1940 are not automatic. It is necessary for the person serving in the Armed Services to make application to have the sale of his property deferred under the terms of the act. The applicability of this act is not limited to the home but extends to all property described in the act.

August 11, 1943. *Hon. C. B. Akers, Auditor of State, Building:* In your letter of August 5, you request an opinion regarding the application of the Federal Soldiers' and Sailors' Relief Act of 1940, with reference to the advertising and offering for sale of property upon which

taxes have become delinquent, and which is owned by a person serving in the Armed Forces of the United States, but which person has not made application to have the sale of his property deferred under the terms of this Act.

We shall take up your questions as they are set forth in your letter.

(1) Should penalty and interest be computed on the tax when the property is advertised and sold?
(2) Does the Act prevent the treasurer from selling the property for delinquent special tax such as paving and sewer?
(3) If the property is to be advertised should the interest be waived, or included with the tax?

Sub-section 2 of Section 560 of this Act provides as follows:

"* * * * * *

"(2) When any person in military service, or any person in his behalf, shall file with the collector of taxes, or other officer whose duty it is to enforce the collection of taxes or assessments, an affidavit showing (a) that a tax or assessment has been assessed upon property which is the subject of this section, (b) that such tax or assessment is unpaid, and (c) that by reason of such military service the ability of such person to pay such tax or assessment is materially affected, no sale of such property shall be made to enforce the collection of such tax or assessment, or any proceeding or action for such purpose commenced, except upon leave of court granted upon an application made therefor by such collector or other officer. The court thereupon may stay such proceedings or such sale, as provided in this Act, for a period extending not more than six months after the termination of the period of military service of such person.

"* * * * * *."

It is our opinion that the benefits obtainable under the provisions of this Act are not automatic, but depend upon the filing of an affidavit either by the person in military service, or, as the act provides, by any person in his behalf. We do not think it is the duty of County Officials to determine what property, within their jurisdiction and upon which taxes have become delinquent, is owned or occupied by a person in military service or his dependents, in such manner as to entitle that person or his dependents to the benefits of this Act.

The manner in which those benefits may be secured is outlined in the Act, and we believe it was the intent of the Act that such notice be given the officer whose duty it is to enforce the collection of taxes or assessments.

It is therefore our conclusion that, in the absence of the filing of such an affidavit, the Act has no application, and that the property involved should be advertised and sold in the regular manner as provided by our statutes.

Your fourth question is as follows:

(4) Does this act also apply to taxes upon property other than the home occupied by the person in military service, or his or her family?

Sub-section 1 of Section 560 of this Act provides as follows:

"(1) The provisions of this section shall apply when any taxes or assessments, whether general or special, falling due during the period of military service in respect of real property owned and occupied for dwelling, agricultural, or business purposes by a person in military service or his dependents at the commencement of his period of military service and still so occupied by his dependents or employees are not paid.

"* * * * * *."

It will be seen from reading this sub-section that the provisions of this Act are applicable to "real property owned and occupied for dwelling, agricultural, or business purposes."

It is our opinion that the applicability of this law is not limited to the home, but extends to all property coming within the description contained in the last quotation.

On September 21, 1942, we issued an opinion which dealt generally with the applicability of this act, and we are enclosing a copy of that opinion which will supplement the present one.

TAXATION: WAIVER OF INTEREST AND PENALTY FOR PERSONS IN ARMED FORCES: INCLUDES ALL TAXES PAYABLE TO COUNTY TREASURER: NOT APPLICABLE TO PROPERTY TAXES OF SPOUSE. The waiver of interest and penalty on taxes on property of persons in the Armed Forces applies to all taxes payable to the County Treasurer. The waiver does not extend to taxes on property of a spouse of one in the Armed Forces.

August 11, 1943. *Hon. C. B. Akers, Auditor of State, Building:* In your letter of August 5, you make several inquiries in reference to the application of Section 7214 of the 1939 Code, as amended by Chapter 221 of the Acts of the 50th General Assembly.

That Code Section as amended, provides as follows:

"INTEREST AS PENALTY. If the first installment of taxes shall not be paid by April 1, said installment shall become due and draw interest, as a penalty, of three-fourths of one per cent per month until paid, from the first day of April following the levy; and if the last half shall not be paid by October 1 following such levy, then a like interest shall be charged from the date such last half become delinquent. No interest and penalties shall be charged on any such taxes due and payable in the years 1943 and 1944 when the same are levied on the property of a person serving in the armed forces of the United States."

You first inquire as to whether or not the effect of this act is to waive penalty and interest on personal property, dog, road poll, sewage disposal, vault, paving and sewer taxes due in the years 1943 and 1944.

It is our opinion on this point that the word "taxes" refers to all taxes which are payable to or collectible by the County Treasurer, and would include all of the taxes to which you refer, and which are listed above.

Your next question is as to whether or not this statute as amended would waive the regular penalty and interest due upon taxes payable on property held in the name of the spouse of the person who is in the Armed Forces of the United States.

It is our opinion that this Code Section does not constitute a waiver of penalty and interest under these circumstances. The waiver is only directed to that property which is held by persons serving in the Armed Forces, and can only be so construed.

AGRICULTURE: "CATSUP": NECESSITY OF LABELING MIXTURE. Catsup is obviously a mixture and there being no exceptions to the requirements of Section 3039 or to the rules of the department this product must be labeled to conform to the above statute.

August 18, 1943. *Mr. Roy J. Sours, Chief, Dairy and Food Division, Department of Agriculture, Building:* In your letter of August 16, you advise that a food product containing various ingredients, and bearing the label "Catchup," is being marketed in Iowa, but that said product is not marked in accordance with the provisions of Section 3039 of the 1939 Code of Iowa.

Your Department has by rule, set up certain minimum standards for mixtures, and among these mixtures is one entitled "Catsup".

You wish the opinion of this office upon the question of whether or not the product being marketed as stated above, must be marked in accordance with the provisions of Section 3039, even though it meets the minimum requirements set up for "Catsup," under the rules of your Department.

Code Section 3039 provides as follows:

LABELING OF MIXTURES. In addition to the requirements of section 3037, unless otherwise provided, articles which are mixtures, compounds, combinations, blends, or imitations shall be marked as such and immediately followed, without any intervening matter and in the same size and style of type, by the names of all the ingredients contained therein, beginning with the one present in the largest proportion.

Since this article is obviously a mixture, and since we find no exception to the requirements of this Code Section, and are advised that your rules contain no such exception, it is our opinion that the product in question must be labeled to conform to the requirements of this Code Section.

TAXATION: CANCELLATION OR REMITTANCE OF TAXES OF AGED PERSON DOES NOT EXTEND TO HIS ADMINISTRATOR. Section 6951 does not grant the Board of Supervisors to cancel or remit taxes on the property of a deceased aged person on application of such aged person's administrator.

August 25, 1943. *Mr. E. K. Jones, County Attorney, Osceola, Iowa:* We wish to acknowledge receipt of your recent letter, in which you asked for our opinion on the following matter:

I would appreciate an opinion from your office as to whether or not the Board of Supervisors may under the authority vested in them by Section 6951 remit that part of taxes upon city property which are in excess of what the Board determines the market value to be, the taxes upon said real estate having been suspended over a period of years under Sections 6950 and 6950.1, the title owner of said real estate being deceased, leaving no spouse or minor child, the owner's estate being in the process of administration, said property having never been sold for delinquent taxes and the city council of the town where property is located having given their consent to the remittance of that portion of the taxes.

Section 6951 of the 1939 Code of Iowa, provides as follows:

ADDITIONAL ORDER. The board of supervisors may, if in their judgment it is for the best interests of the public and the petitioner referred to in section 6950, or the public and the aged person referred to in section 6950.1, cancel and remit the taxes assessed against the petitioner referred to in section 6950, or the aged person referred to in section 6950.1, his polls or estate or both, even though said taxes have previously been suspended as provided in sections 6950 and 6950.1.

From a consideration of this section, we are of the opinion that the Board of Supervisors does not have authority to cancel or remit the real estate taxes on the property mentioned, upon the application of the administrator.

The additional order mentioned in Section 6951 may be made when "it is for the best interests of the public and the aged person referred to in Section 6950.1." The person whose taxes were suspended is no longer living, and it is difficult to see how the additional order, as authorized in Section 6951, would be for the best interest of such "person".

Section 6952 provides for the payment of suspended taxes upon the death of the petitioner, except when the property passes to the surviving spouse, or minor child of such infirm person. This provision, we think, negatives any idea that the administrator may apply for the additional order mentioned in Section 6951.

It is our conclusion that the Board of Supervisors may not make the additional order cancelling and remitting suspended taxes upon the application of the administrator of the estate of the deceased petitioner.

FEES: DISTRICT COURT CLERK WITHOUT AUTHORITY TO CHARGE FEES WHERE NO PROVISION IS MADE FOR CHARGE. The Clerk of the District Court is only authorized to charge fees when there is an express provision for the charging of a fee.

September 9, 1943. *Mr. Thomas M. Healy, County Attorney, Fort Dodge, Iowa:* We wish to acknowledge receipt of your recent letter in which you present the following matter for our attention:

"An opinion is requested as to the fees which the Clerk of the District Court may charge where the persons entitled to inherit property proceed under Section 7328.

"Is the clerk authorized to proceed under Section 10837 paragraph 29 and charge $3.00 where the value is less than $3,000, and $5.00 where the value is between $3,000 and $5,000, and so on?"

Section 7328, 1939 Code of Iowa, provides as follows:

7328. ADMINISTRATION AVOIDED. When the heirs or persons entitled to inherit the property of an estate subject to the tax hereby imposed, desire to avoid the appointment of an administrator as provided in section 7327, they or one of them shall, before the expiration of four months from the death of the decedent file under oath the inventories and reports and perform all the duties required by this chapter, of administrators, including the filing of the lien. Proceedings for the collection of the tax when no administrator is appointed, shall conform as nearly as may be to the provisions of this chapter in other cases.

The pertinent part of Section 10837, 1939 Code of Iowa, provides as follows:

10837. FEES. The clerk of the district court shall charge and collect the following fees, all of which shall be paid into the county treasury:

* * *

29. For all services performed in the settlement of the estate of any decedent, minor, insane person, or other persons laboring under any legal disability, except where actions are brought by the administrator, guardian, trustee, or person acting in a representative capacity or against him, or as may be otherwise provided herein, where the value of the property of the estate does not exceed three thousand dollars, three dollars; where such value is between three thousand dollars and five thousand dollars, five dollars; * * *

* * *

Section 7328 merely outlines the procedure to be followed when a person entitled to inherit the property of an estate, subject to the inheritance tax, desires to avoid the appointment of an administrator but wishes to discharge the inheritance tax obligation. The only duties that the clerk performs in a situation of this kind are those duties imposed upon the clerk with reference to the collection of the inheritance tax by the State Tax Commission. It is our opinion that the fees provided for in subparagraph 29 of Section 10837 may be collected only when an estate is actually being administered or when a will has been admitted to probate.

When the heirs or persons entitled to inherit the property of an estate subject to the inheritance do not ask for the appointment of an administrator but merely file the inventories and reports required by Chapter 351, 1939 Code of Iowa, it is our opinion that such procedure is not the settlement of the estate for which the clerk would be entitled to charge the fees provided for in Section 10837. In the absence of any expressed provision authorizing the clerk to make a charge for the services rendered when the procedure provided for in Section 7328 is followed there is no authority for the clerk to make any charge.

SOLDIERS, SAILORS AND MARINES: VETERANS WIDOWS ADMISSION TO SOLDIERS' HOME. Widows of Veterans may be admitted to the Soldiers' Home regardless of the length of time married to a Veteran, if otherwise eligible.

September 11, 1943. *Board of Control, Building:* This will acknowledge receipt of your letter of September 10th wherein you ask our opinion on the following question:

"Can a widow of a veteran, who is eligible to enter the Soldiers' Home, apply and be admitted regardless of the length of time she has been married to said veteran husband?"

Sections 3384.04 and 3384.05, Code of Iowa 1939, read as follows:

"MARRIED COUPLES. When a married man is or becomes a member of the home, his wife, if she has been married to him for ten years and is otherwise eligible under this chapter, may be admitted as a member of the home subject to all the rules and regulations of said home. Husband and wife may be permitted to occupy, together, cottages or other quarters on the grounds of the home."

"WIDOWS OF VETERANS. If any deceased soldier, sailor or marine, who would be entitled to admission to the home if he were living, has

left a widow surviving him, such widow shall be entitled to admission to the home with the same rights, privileges and benefits as though her soldier, sailor or marine husband were living and a member of the home, provided, however, that such widow has reached the age of fifty years or is found by the commandant to be totally and permanently disabled and she does not have sufficient means or is unable to support and maintain herself, and provided further that she has been for the ten years preceding the date of her application, a resident of the state of Iowa, and that she has not married at any time since the death of her veteran husband except to a member of the home."

Under Section 3384.04 it is obvious that the veteran's wife must have been married to him for ten years before she is eligible for admission to the home.

It should be noted that Section 3384.05 definitely states:

"such widow shall be entitled to admission to the home."

The section then goes on to say:

"with the same rights, privileges and benefits as though her soldier, sailor or marine husband were living and a member of the home."

It is our opinion that by using the words: "rights, privileges and benefits", the Legislature was referring to the rights, privileges and benefits of the widow after she is admitted to the home.

It should be further noted that at no place in said section does the Legislature state that the widow shall be admitted "upon the same conditions" as though her husband were living. If the Legislature had used "upon the same conditions" then our answer to your inquiry would be in the negative.

In the absence of the use of such words, it is our opinion that under the provisions of the above quoted statutes, a widow, who is otherwise eligible for admission, may apply and be admitted to the home regardless of the length of time she has been married to her veteran husband.

TAXATION: MONIES AND CREDITS: TRUST FUNDS TURNED OVER TO CLERK OF COURT: TAXABLE. All monies and credits are subject to taxation unless there is a specific exemption. Money held by a Clerk of the District Court preceding the outcome of litigation is taxable.

September 29, 1943. *Mr. Walter J. Willett, County Attorney, Tama, Iowa:* We wish to acknowledge receipt of your letter of recent date in which you ask for our opinion on the following matter:

"On February 28, 1939 a trustee in an estate turned over to the Clerk of our District Court, $13,850.00 due to certain litigation pending, the court's order reads in part 'that said clerk is directed to hold said deposit in trust until the further orders of said Court or Judge thereof.'

"The Clerk of Court held this money in accordance with the court's order until March 29, 1943, when it was turned back to the trustee.

"The tax on this money for the years 1940-41-42-43 amount to the sum of $329.08, providing said fund is taxable.

"The question I would like to have answered is: Whether or not, if money in a trust estate is turned over to a Clerk of Court, pending the further orders of the Court, can the same be taxed, as monies and credits, against the trust estate, by the County?"

As stated in your letter, it is the contention of the trustee that the money, which was deposited with the Clerk of the Court until the further orders of the Court, should have been deposited by the Clerk with the County Treasurer in accordance with the provisions of Section 12784, 1939 Code of Iowa. This Section reads as follows:

12784. DEPOSIT WITH COUNTY TREASURER. If the funds, moneys, or securities so deposited with the clerk shall not be paid to the person or persons to whom the same are due, or to become due, within six months from the date of its deposit, the clerk shall then, *unless otherwise ordered by the court or judge,* deposit such funds, moneys, or securities with the county treasurer for the use of the county wherein such appointment was made, taking the treasurer's receipt therefor, countersigned by the county auditor, who shall thereupon charge upon the books of his office and against the treasurer the amount named in such receipts. (Italics ours)

We think that the italicized portion of the above statute prohibited the Clerk, in the instant case, from depositing the money with the County Treasurer. In view of this fact it is not necessary for us to consider the right to tax money that is turned over to the Treasurer in accordance with the provisions of Section 12784. The Court's order, in the instant case, directed the Clerk to hold said deposit in trust until the further orders of said court or judge thereof and because of this specific order the Clerk acted in accordance with the Court's order in retaining the trust fund.

All monies and credits are subject to taxation unless there is a specific exemption and in the absence of such exemption covering the present situation it is our opinion that the money held in trust by the Clerk of the District Court would be subject to the usual monies and credits tax.

MINORS: CHILDREN'S BOARDING HOME: SCHOOL TUITION PAID FROM STATE FUNDS. Children residing in a licensed boarding home are public charges and their school tuition should be paid from State funds.

October 6, 1943. *Mr. George O. Hurley, County Attorney, Harlan, Iowa:* Reply is made to your letter of September 30.

In that letter you state that there is in your county a children's home which is a charitable institution only to the extent that no charge is made for keeping any children there. It is, however, a boarding home, as defined by Section 3661.057 of the 1939 Code of Iowa, and I am advised by the Department of Social Welfare that it is now, or within a few days, will be licensed as a children's boarding home.

The children in the home who are of school age attend the Elkhorn school. The tuition of those children who attend high school is now being paid by the State Treasurer, but a controversy has arisen as to the manner in which tuition for children in the grade school should be paid.

The state checkers are taking the position that the county has no power to pay this tuition, and the State Department of Public Instruction is of the opinion that the tuition should be collected from the county of the children's residence.

You wish the opinion of this office, ruling as to the manner in which

this tuition should be paid, in the case of students in grade school who were domiciled in another school district than the one in which this boarding home is located.

Section 4283.01, provides as follows:

TUITION WHEN IN BOARDING HOME. When any child of school age has become a public charge and is being cared for in a children's boarding home licensed by the state, and the domicile of such child at the time it became a public charge was in another school district than the one wherein such boarding home is located, then, such child shall be entitled to attend public school in the school district in which such boarding home is located, or if such district does not maintain a school offering instruction in the grade in which such child is properly classified, then such child may attend upon such instruction in any approved public school in the state that will receive it. The tuition of such a child, at the rates established by law, shall be paid by the treasurer of state from any funds in the state treasury not otherwise appropriated, and upon warrants drawn by the state comptroller upon the requisition of the superintendent of public instruction. If such child was in the district at the time the regular biennial school census was taken, the semiannual apportionments shall be deducted from the tuition due the district under the provisions of this section. The superintendent of public instruction is hereby empowered to require such reports as are necessary properly to carry out the provisions of this section.

The problem first requires a definition of "public charge."

It is our opinion that any child who has no parents alive, or whose parents or relatives are unable to support him, should, for the purpose of this statute, be considered a public charge regardless of whether or not that child has actually received aid from public funds. This holding is in harmony with the statement made upon this subject in our opinion dated September 8, 1941. The part of this opinion to which we refer appears on page 97 of the 1942 report of the Attorney General.

Our conclusion on the problem is that this institution is a boarding home; that the provisions of Section 4283.01 apply to the children being cared for in this institution, and that those children attending grade school, who come from school districts other than the one in which the institution is situated, and who are being cared for by that institution without charge, are public charges, and are entitled to have their tuition paid from State Funds as provided by this Code Section.

DRUGS: GROCERY SOLICITOR SELLING ITEMS MENTIONED IN SECTION 3143: LICENSE REQUIRED. A solicitor for a grocery company who has items for sale such as liniment, mouthwash, skin cream, etc., defined as drugs in Section 3143, is required to secure a license for an itinerant vendor of drugs, but the company is not required to secure such a license.

October 6, 1943. *Mr. Francis J. Kuble, County Attorney, Polk County Court House, Des Moines, Iowa:* Receipt is acknowledged of your request for the opinion of this Department upon a question arising out of the following facts submitted by you:

"A grocery company has agents who solicit orders from individuals, by calling upon them at their homes. Among the items on the order list are a mouth wash, a liniment, and an antiseptic skin cream, which are within the definition of "drugs" defined in Section 3143 of the Code.

"The solicitor takes an order for merchandise subject to acceptance or rejection by the branch office. The order is then sent to the branch office, and if accepted is filled, and in about two weeks the merchandise is delivered to the purchaser by the solicitor or another representative of the company."

The two questions are as follows:

1. Is the solicitor of the orders an itinerant vender of drugs, and required to secure a license under the provision of Section 3148 and 3149 of the Code?

The articles listed in your question come under the substances and preparations listed in Section 3143 of the 1939 Code of Iowa, which is as follows:

DEFINED. For the purposes of this chapter "drug" shall include all substances and preparations for internal or external use recognized in the United States Pharmacopoeia or National Formulary and any substances or mixture of substances intended to be used for the cure, mitigation, or prevention of diseases of either man or animal.

Section 3148 of the 1939 Code of Iowa provides as follows:

"ITINERANT VENDOR OF DRUGS" DEFINED. "Itinerant vendor of drugs" shall mean any person who goes from place to place, or from house to house, and sells, offers or exposes for sale any drug as defined in this chapter.

Section 3149 of the 1939 Code of Iowa provides as follows:

LICENSE REQUIRED OF ITINERANT—FEE. Every itinerant vendor of drugs or medicines shall procure an annual license from the pharmacy examiners. The fee for such license shall be fifty dollars; such license may be transferred by the licensee upon the payment of a fee of one dollar to the pharmacy examiners. No license fee shall be required from any person who exclusively takes bona fide orders for transmission to the company and where such orders are shipped direct to the customer by or through a common carrier.

The next question, does the solicitor come within Section 3149, in view of the fact that he does not carry the drugs with him for immediate sale, but does return to deliver them himself, or by some other representative of the company.

If he sold and delivered at the same time, under the holding of the Supreme Court in *State vs. Logsdon*, 215 Iowa, 1298, where the Court states

"It is the opinion of this court that an agent of another, going about from place to place selling the drugs referred to in section 3148 of the Code, constitutes a person within the contemplation of section 3149 of the Code. He is the person who does the going about from house to house selling the drugs and it makes no difference whether he is selling such drugs for himself or for another."

there is no question but what he would be required to have a license. Taxing and licensing statutes should be strictly construed. Section 3149 refers to "every itinerant vendor" and excepts only those who "exclusively takes bona fide orders for transmission to the company, and where such orders are shipped direct to the customer by or through a common carrier."

If this is an exception, and we believe it is, then we cannot find that

the solicitor in the case stated comes thereunder. In order to come within an exception its terms must be strictly complied with. It is not stated that these solicitors act exclusively, and the drugs are not shipped direct by common carrier.

It is therefore our opinion that the solicitor must obtain a license provided for in Section 3149 of the 1939 Code of Iowa.

The next question as to whether the company must procure a license must be determined from Section 3148, above referred to, and under the above mentioned case of *State vs. Logsdon*, the vendor is the person who does the going about from house to house, and as an individual is the only one required to obtain the license.

We cannot read the principal into this action, especially since the change of this statute by the 45th General Assembly, Chapter 49. Prior to this change, the wording of Section 3148 was "any person who by himself, agent or employee," and the import of this change was to avoid taxing of both merchant and solicitor.

We therefore hold that the company need not obtain a license in the above stated case.

CORPORATIONS: REORGANIZATION IN BANKRUPTCY OR EQUITY RECEIVERSHIP: FEES WAIVED EXCEPT RECORDING FEE. Where a corporation is reorganized in bankruptcy or general equity receivership the fees shall not be collected as provided by Sections 8349 or 8423, except that the recording fee shall be paid.

October 7, 1943. *Hon. Wayne G. Ropes, Secretary of State, Building:* We have your request for an opinion as to whether a former domestic corporation which is being reorganized as a foreign corporation for the purpose of carrying into effect a plan of reorganization in bankruptcy proceedings under the laws of the United States or a general equity receivership must pay the regular fees required for the purpose of qualifying as a foreign corporation, or whether it would be entitled to the benefit of the provisions of either section 2 of Chapter 225 or section 5 of Chapter 227, Acts of the 50th General Assembly amending the corporation laws.

The 50th General Assembly enacted what appears in the published Acts of the 50th General Assembly as Chapter 225 which provided for corporations to have perpetual existence. In effecting this, section 2 of the act rewrote section 8349, Code 1939 relating to corporation fees for domestic corporations and the last sentence of the section as rewritten is as follows:

"The fees, except the recording fees, required by this section to be paid, shall not be collected from a corporation organized for the purpose of carrying into effect a plan of reorganization approved in bankruptcy proceedings under the laws of the United States or in a general equity receivership in a court of competent jurisdiction, for the period until the termination of the time for which such fees were paid by the corporation so reorganized."

The 50th General Assembly likewise enacted what appears in its published Acts as Chapter 227 relating to the issuance of permits to foreign corporations and particularly with reference to the fees for qualifying,

and in connection with this amendment by section 5 of the act amended section 8423 Code 1939, which relates to fees which a foreign corporation must pay in order to qualify and maintain its qualification. The last sentence of this act is as follows:

"The fees required by this section to be paid shall not be collected from a corporation organized for the purpose of carrying into effect a plan of reorganization approved in bankruptcy proceedings under the laws of the United States or in a general equity receivership in a Court of competent jurisdiction, until the period of time for which a permit to transact business within this state has previously been issued to the corporation so reorganized has elapsed."

An examination of the history of the course of these two acts through the medium of the House and Senate Journals discloses that both of the above quoted provisions of the respective acts came into the acts by amendments and were not a part of either of the bills as they originally were filed and introduced.

It is a matter of common knowledge that in recent years in a number of instances large corporations, particularly railway corporations, have been or are presently going through bankruptcy or receivership proceedings and reorganization, and with this knowledge the purpose of placing the above quoted provisions in the law is manifest, to-wit, that the reorganization corporation should not be required to pay additional fees if in the process of its reorganization it is deemed better for any reason to set it up as a new corporation rather than use the old corporate charter. If the old corporate charter was used of course no fees would be forthcoming. If a new corporate charter was obtained the law as it stood prior to the amendments above referred to would require the payment of original fees which would usually run into considerable sums of money. It was for the purpose of obviating this technicality and giving the corporations the benefit of their unexpired period when for all practical purposes it was the same corporation with the same properties, but with a new charter, that these enactments were made.

In the posited case we have the situation of a domestic corporation which has been in bankruptcy or receivership being reorganized as a foreign corporation. A foreign corporation coming into the state pays certain fees which permit it to transact business within the state for a given period. A domestic corporation being incorporated pays certain fees which permit it to transact business within the state for a certain period. The language of the last sentence of section 8423 as amended by section 5 of Chapter 227, Acts of the 50th General Assembly, is very broad. It says that the fees required by this section shall not be collected from "a corporation organized for the purpose of carrying into effect a plan of reorganization." It does not of necessity limit it to a corporation which was previously a foreign corporation. The sole qualification is that the corporation shall be one organized for the purpose of carrying into effect a plan of reorganization, and it of course indicates that the corporation must have had some qualification or permit to operate in the state of Iowa previously. We believe that in view of the intent indicated by the legislature, as hereinbefore reviewed, that it was the intent that a corporation, whether domestic or foreign, which is re-

organized as a foreign corporation as the result of bankruptcy proceedings or a general equity receivership, and which was originally qualified in the state either as a domestic or foreign corporation, is entitled to the benefit of the provisions of the last sentence of section 8423, Code 1939, as amended by section 5, Acts of the 50th General Assembly.

STATE INSTITUTIONS: SPECIAL LIQUOR PERMIT FOR COLLEGES ONLY REQUIREMENT: NO MANUFACTURER'S PERMIT REQUIRED. When the State College and University of Iowa obtain a special liquor permit for the purchase of alcohol, etc., that is all that is required. The provisions of the Iowa Liquor Control Act supersedes Chapter 103 of the Code requiring a manufacturer's permit and posting a bond.

October 13, 1943. *Mr. David A. Dancer, Secretary, Iowa State Board of Education, Building:* We wish to acknowledge receipt of your recent letter in which you ask for our opinion on the following matter:

"Attached is one of the special permits issued annually to Iowa State College by the Iowa Liquor Control Commission for the purchase of alcohol to be used for medicinal, laboratory and scientific purposes. In addition to the above permit, the College has also been securing a manufacturer's permit and furnishing a bond for $2000, as described in Chapter 103 of the Code. We would appreciate being advised as to whether it is necessary for us to continue to comply with the provisions of Chapter 103, 1939 Code of Iowa."

Chapter 103, 1939, Code of Iowa, was a part of the Iowa law prior to the present Iowa Liquor Control Act. Section 2164 of Chapter 103, 1939 Code of Iowa, provides as follows:

2164. PATENT AND PROPRIETARY MEDICINES. Patent and proprietary medicines, tinctures, extracts, toilet articles, and perfumes, and other like commodities, none of which are susceptible of use as a beverage but which require as one of their ingredients alcohol or vinous liquors, may be manufactured within this state, provided a permit so to manufacture is first obtained as hereinafter provided.

The balance of the Chapter provides that an application for the manufacturer's permit shall be made to a judge of the district court of the county in which the principal place of business is located; requires the filing of a bond upon the granting of a permit, and the making of reports by said manufacturer.

Section 1921.027, 1939 Code of Iowa, said Section being a part of the Iowa Liquor Control Act enacted by the 45th General Assembly, provides, in part, as follows:

1921.027. PERMITS.

1. There shall be two classes of permits under this chapter:
a. Individual permits.
b. Special permits.
2. Upon application being made, in the form and manner prescribed by the commission, to the commission, or to any agent authorized by the commission to issue permits accompanied by payment of the prescribed fee, and upon the commission or such authorized agent being satisfied that the applicant has complied with the rules and regulations established by the commission for the issuance of such a permit for the purchase, possession and/or transportation of alcoholic liquors under this chapter,

the commission or such authorized agent shall issue to the applicant a permit of the class applied for as follows:

* * *

b. A "special permit" in form as prescribed by the commission and subject to its issuance and/or use to such rules and regulations as the commission may adopt, may be issued as provided in this section, notwithstanding the other provisions of this chapter, as follows:

* * *

(2) To a soldiers home, sanitarium, hospital, college or home for the aged which will entitle the holder to purchase liquor from the state liquor stores or special distributors for use for medicinal, laboratory and scientific purposes only.

* * *

From this it will be noted that colleges may, when granted a special permit by the Liquor Control Commission, purchase liquor from the state liquor stores or special distributors for use for medicinal, laboratory and scientific purposes only. Section 1921.027 further provides for a special permit for persons engaged in the manufacture for sale of patent and proprietary medicines, tinctures, food products, extract, toilet articles and perfumes, and other like commodities, none of which are susceptible of use as a beverage, but which require as one of their ingredients alcohol or vinous liquors. The Section further requires that said manufacturer furnish a two thousand dollar bond, conditioned that the applicant will faithfully observe the provisions of this chapter and the rules and regulations of the Commission. It is clear that Section 1921.027 supersedes Chapter 103, 1939 Code of Iowa, and Chapter 103 continued in effect after the passage of the Iowa Liquor Control Act only to the extent mentioned in Section 1921.094, which provides as follows:

1921.094. SAVING CLAUSE AS TO PERMITS. No repeal declared in this chapter shall be deemed to affect the validity or continued operation of any existing permit issued under chapters 100 to 104, inclusive, of the code, until said permits are formally terminated by the commission and the power to terminate is hereby vested in the commission.

It is, therefore, our opinion that when Iowa State College and the State University of Iowa receive special permits from the Iowa Liquor Control Commission that such permits are the only permits required by the present Iowa law and it is no longer necessary for these institutions to comply with the provisions of Chapter 103, 1939 Code of Iowa.

POOR RELIEF: TUBERCULOSIS PATIENT: BOARD OF SUPERVISORS MAY CONTRACT FOR CARE WITH FOREIGN INSTITUTION. Under the provisions of Section 3828.125 a board of supervisors may contract with a foreign institution for care and treatment of an indigent tuberculosis patient within limitations imposed by Section 3828.125.

October 13, 1943. *Mr. H. Wayne Black, County Attorney, Audubon, Iowa:* We wish to acknowledge receipt of your recent letter in which you ask for our opinion on the question of whether the Board of Supervisors may properly contract with the State Sanitarium at Phoenix, Arizona, for the treatment of an indigent tuberculosis patient.

Section 3828.125, 1939 Code of Iowa, provides as follows:

3828.125. CARE AND TREATMENT. The board of supervisors of each county shall provide suitable care and treatment for indigent persons suffering from tuberculosis, and where no other suitable provision has been made, they may contract for such care and treatment with the board of trustees of any hospital, not maintained for pecuniary profit.

You advise us in your letter that the patient in question is now receiving treatment at the State Sanatorium at Oakdale. It is our opinion in the instant case that if the Board of Supervisors feel that the care and treatment of this patient at the Oakdale Sanatorium does not constitute suitable care and treatment for this particular patient that the Board of Supervisors could properly make a contract with the State Sanitarium of Arizona within the limitations of Section 3828.128, 1939 Code of Iowa.

SOLDIERS, SAILORS AND MARINES: RELIEF ACT OF 1940: PROPERTY JOINTLY OWNED BY CIVILIAN AND SERVICEMAN CANNOT BE SOLD FOR TAXES: DEPENDENTS OF SERVICEMAN MUST RESIDE ON PROPERTY: FALSE AFFIDAVIT REMEDY TO DISTRICT COURT. Where property is jointly owned by a civilian and serviceman, the Soldiers' Relief Act of 1940 will not permit a sale for taxes since there is no provision for selling an undivided interest. In order to receive the benefits of the Relief Act of 1940, the dependents of a serviceman must reside on the property. In the event of false affidavit as to occupancy by dependents, the remedy is by application to the District Court.

October 13, 1943. *Mr. John D. Moon, County Attorney, Ottumwa, Iowa:* This will acknowledge receipt of your letter of the 29th ultimo, wherein you ask the opinion of this office relative to the interpretation of Article V of the Soldiers' and Sailors' Relief Act of 1940.

In your letter there are set out three questions which we quote:

"1. Are these provisions applicable in the case of property jointly owned by a civilian and an individual in the armed forces where the property is occupied by dependents of the man in service and if so, to what extent do the provisions apply?

"2. Is it true, as the Treasurer believes, that the property must actually be occupied by the dependents of the man in service in order to qualify under this Section.

"3. If the Treasurer knows as a matter of fact that the property on which the affidavit is being filed is not occupied by the service man's dependents, but is rented for profit, is he under obligation to receive said affidavit? I assume the answer to this question is in the affirmative, and if so, is the only recourse of the County to apply to the court to allow sale for delinquent taxes, if facts justify?"

Article V of the above mentioned Act provides as follows:

"Art. V—Taxes and Public Lands

Sec. 500. REAL PROPERTY.

(1) Applicable to any taxes, general or special, falling due during period of service, on real property owned, at commencement of service, by person in service or his dependents, and occupied by them for dwelling, agricultural or business purposes.

(2) If a person in service, or one in his behalf, files with collector of taxes an affidavit showing (a) that a tax has been assessed on such property, (b) that such tax is unpaid and (c) that his ability to pay is materially affected by service, no tax sale shall be made, and no action for such purpose commenced, except by order of court upon application by collector. Court MAY stay sale or proceedings for not more than 6 months after termination of service."

As to your question No. 1, it is our opinion that where property is owned jointly by a soldier and a civilian, and the same is occupied by dependents of the soldier, the provisions of Article V of the Soldiers' and Sailors' Relief Act of 1940 are nevertheless applicable. There is no provision in our law for the sale of a divided interest in real estate. But for the Soldiers' and Sailors' Relief Act, it would be the duty of the County Treasurer under and by virtue of the provisions of Section 7189 to sell the real estate owned jointly by the soldier and the civilian. According to our interpretation of said act, the Treasurer would be without authority to sell the interest of the soldier, and inasmuch as there is no provision made for selling a divided interest, we reach the conclusion that said lands should not be included in the tax sale where an affidavit as provided by the Relief Act is filed, unless upon application of the Treasurer, the District Court otherwise orders.

As to your question No. 2, it is our opinion that the Soldiers' and Sailors' Relief Act applies only where the real estate upon which the tax is unpaid and which is subject to sale by the Treasurer, is actually occupied by the dependents of the person in service. In other words, as we interpret the statute, the act has no application to a case where the property is for example leased to a third person.

As to your question No. 3, we reach the conclusion that the Treasurer cannot include in the tax sale any property occupied by the dependents of a person in service when the affidavit provided for by the Act is filed with him. If he knows that the affidavit is false, the remedy is by application to the District Court under the provisions of subsection 2 of Article V of said Act.

MINORS: COMMITMENTS FOR NEGLECTED, DEPENDENT AND DELINQUENT CHILDREN LIMITED BY STATUTE: FATHER FLANNAGAN'S HOME NOT INCLUDED. Sections 3637 and 3646 provide for the commitment of neglected, dependent and delinquent children and where they are to be committed. Father Flannagan's Home at Omaha, Nebraska is not therein mentioned and a commitment to such home could not be made, furthermore it is also fundamental law that a court cannot commit a person outside the territorial limits of Iowa unless expressly authorized by statute to do so.

October 14, 1943. *Mr. M. L. Mason, County Attorney, Mason City, Iowa:* I wish to acknowledge receipt of your letter of October 9, requesting an opinion upon the following question, to-wit:

"Does the Judge of the District Court have authority to commit juveniles at county expense, to Father Flannagan's Home at Omaha, Nebraska?"

In answer thereto, you are advised as follows:

Chapter 180, Code 1939, as amended, sets out the Iowa law with ref-

erence to neglected, dependent and delinquent children. In the procedure therein set out, it states in Sections 3637 and 3646 certain places where such children may be committed.

Section 3637 reads as follows:

"ALTERNATIVE COMMITMENTS. The juvenile court, in the case of any neglected, dependent, or delinquent child, may:

1. Continue the proceedings from time to time and commit said child to the care and custody of a probation officer or other discreet person.
2. Commit said child to some suitable family home or allow it to remain in its own home.
3. Commit said child to any institution in the state, incorporated and maintained for the purpose of caring for such children.
4. Cause the child to be placed in a public or state hospital for treatment or special care, or in a private hospital which will receive it for such purpose, when such course seems necessary for the welfare of the child."

Section 3646 reads as follows:

"MANDATORY COMMITMENTS. If commitment of any child is not made under the foregoing provisions of this chapter, or if made thereunder and the results in the opinion of the court, are not conducive to the welfare of the child, the court shall proceed as follows:

1. If the child is neglected or dependent and not delinquent, it shall be committed either to the soldiers' orphans home or to the state juvenile home.
2. If the child is delinquent and under the age of ten years, it shall be committed to the state juvenile home.
3. If the child is over the age of ten years and, in the opinion of the court or judges is seriously delinquent or so disposed, it shall be committed to the state training school for boys or for girls, as the case may be; but married women, prostitutes, and girls who are pregnant shall not be committed to the training school.
4. If the child is over the age of ten years and, in the opinion of the court or judge, is not seriously delinquent nor so disposed, it shall be committed to the state juvenile home."

Since certain places are therein expressly described where such children may be committed, it thereby excludes all other places. Since Father Flannagan's Home at Omaha is not therein included, it would follow that no child can be committed at county expense to such Home.

It is also fundamental law that a court cannot commit a person outside the territorial limits of Iowa unless expressly authorized by statute so to do.

JUSTICE OF PEACE: SALARY INCREASE. A Justice of the Peace is a county officer and entitled to salary increase provided in Chapter 168, Acts of the 50th G. A., however there is no provision for increase for a justice of the peace who receives compensation solely on a fee basis as there is no provision for an increase of feees.

November 1, 1943. *Mr. Fred Cromwell, County Attorney, Burlington, Iowa:* We wish to acknowledge receipt of your recent letter in which you ask if a justice of the peace, as a county officer, is entitled to a salary increase as provided in Chapter 168, Acts of the 50th General Assembly.

Section 523, 1939 Code of Iowa, provides as follows:

523. JUSTICES AND CONSTABLES. In all townships, except such as are included in the territorial limits of municipal courts, there shall be elected, biennially, two justices of the peace and two constables, who shall hold office two years and be county officers.

This Section makes a justice of the peace a county officer and consequently he is to be included within the term "county officer" within the meaning of Chapter 168, Acts of the 50th General Assembly. However, it should be noted that justices of the peace in the State of Iowa are paid in some instances on a fee basis and in other instances upon a salary and fee basis. For the purpose of clarity we set out the provisions of Section 10639, 1939 Code of Iowa, as follows:

10639. ACCOUNTING FOR FEES—COMPENSATION.

1. Justices of the peace and constables in townships having a population of more than twelve thousand shall pay into the county treasury all criminal fees collected in each year.
2. Justices of the peace and constables in townships having a population of under twelve thousand shall pay into the county treasury all fees collected each year in excess of the following sums:
a. In townships having a population of four thousand and under twelve thousand, justices, eight hundred dollars; constables, six hundred dollars.
b. In all townships having a population of under four thousand, justices, six hundred dollars; constables, five hundred dollars.
3. In townships having a population of ten thousand or more, justices of the peace and constables shall receive in full compensation for their services performed in criminal cases during the year, the following sums which shall be paid monthly out of the county treasury:
a. In townships having a population of forty thousand or more, justices, eighteen hundred dollars; constables, fifteen hundred dollars.
b. In townships having a population of twenty-eight thousand or more, justices, fifteen hundred dollars; constables, twelve hundred dollars.
c. In townships having a population of twenty thousand and under twenty-eight thousand, justices, twelve hundred dollars; constables, one thousand dollars.
d. In townships having a population of ten thousand and under twenty thousand, justices, one thousand dollars; constables, eight hundred dollars.
4. Justices and constables in all townships having a population of ten thousand and over shall retain such civil fees as may be allowed by the board of supervisors, not to exceed five hundred dollars per annum, and in townships having a population over fifty thousand, not to exceed one thousand dollars per annum for expenses of their offices actually incurred, and shall pay into the county treasury all the balance of the civil fees collected by them.

Sections 4 and 5 of Chapter 168, Acts of the 50th General Assembly, provides as follows:

SEC. 4. Notwithstanding any provision of law to the contrary, from the effective date of this act to June 30, 1945, both inclusive, except as otherwise provided for herein, the compensation of all county officers and deputies whose compensation is fixed by law, including deputy assessors employed by cities but whose compensation is paid by the county, shall be increased by the board of supervisors as follows:
Salaries of one thousand two hundred dollars ($1200.00) or less, fif-

teen per cent (15%) increase; salaries over one thousand two hundred dollars ($1200.00) and not over two thousand two hundred dollars ($2200.00) ten per cent (10%) increase salaries over two thousand two hundred ($2200.00) and not in excess of two thousand five hundred dollars ($2500.00) five per cent (5%) increase, but such increase shall not bring the compensation of the officer or deputy above two thousand five hundred dollars ($2500.00), and any increases granted since January 1, 1943, shall be taken into consideration in carrying out the provisions of this act.

SEC. 5. During the period ending June 30, 1945, the compensation of any county officer, deputy or employee not otherwise covered by this act, whose compensation is now fixed by the board of supervisors or by order of court, may by action of the board of supervisors be increased over any maximum provided by law, but not in excess of the schedule contained in section four (4) of this act, and in any event any increase in salary granted to any such officer, deputy or employee since January 1, 1943, shall be taken into consideration in increasing salaries under the provision of this section.

From an examination of these two Sections we note that as far as justices of the peace are concerned, there is no provision for an increase in the salary of those justices whose compensation is paid on a fee basis. It is our opinion that those justices covered by subsections a, b, c, and d of subparagraph 3 of Section 10639, 1939 Code of Iowa, would be entitled to an increase in salary under the provisions of Section 4 of Chapter 168, Acts of the 50th General Assembly. However, there is no provision covering an increase where justices are authorized to retain fees that come into their possession, consequently there can be no increase granted as to the amount of fees that may be retained by the justices of the peace.

TAXATION: TAX SALE: NOTICE OF EXPIRATION OF RIGHT OF REDEMPTION: FEES FOR NOTICE SAME AS ORIGINAL NOTICE. In serving a notice of expiration of right of redemption of tax sale the fee for serving of such notice is limited to the charges made for the service of an original notice.

November 1, 1943. *Mr. Paul D. Turner, County Attorney, Storm Lake, Iowa:* We wish to acknowledge receipt of your recent letter in which you ask for our opinion relative to the service of notice of expiration of right of redemption from tax sale and the charges that may be made for such service. You state in your letter that the notice in question was served by the holder of the tax sale certificate, who is a resident of Rockwell City, said notice being served in Albert City, Buena Vista County, Iowa.

Our Supreme Court in the case of Galleger v. Duhigg, 218 Iowa 521, made the following statement when considering Section 7279, 1939 Code of Iowa: "It has been held by this court, however, that the word 'manner' in the statute in question is intended only to prescribe the mode in which the service should be made and not by whom it should be made and that the notice may be served by the holder of the certificate, his agent, or his attorney. Hodges v. Hodges, 6 Iowa 78, 71 Am. Dec. 388; Farris v. Powell, 10 Iowa 553; Ellsworth v. Van Ort, 67 Iowa 222, 25 N. W. 142; Hall v. Guthridge, 52 Iowa 408, 3 N. W. 475."

It is our opinion that the recent change in our rules of civil procedure, which specifically prohibits a party in interest from serving an original notice, is not applicable to the service of the notice of expiration of right of redemption from tax sale, consequently we believe that it was proper for the holder of the tax sale certificate to serve the notice in question.

As to the cost of serving the notice Section 7283, 1939 Code of Iowa, provides as follows:

7283. COST—FEE—REPORT. The cost of serving the notice and affidavit of publication shall be added to the amount necessary to redeem. The fee for serving the notice shall be the same as for service of an original notice, including copy fee and mileage. The treasurer shall, upon the filing of proof of service and statement of costs, forthwith report the same in writing to the auditor, who shall enter it on the sale book against the proper tract of real estate. The holder of the certificate of sale or his agent may report in writing to the county auditor the amount of costs incurred in giving such notice, and the auditor shall enter the same in the sale book. No redemption shall be complete until such costs are paid.

As stated above, we believe that the holder of the tax sale certificate can serve the notice and that he is entitled to the fees provided in Section 7283. In this connection we note the following language of said Section, "The fee for serving the notice shall be the same as for service of an original notice, including copy fee and mileage."

Section 5191, 1939 Code of Iowa, provides for a fee of fifty cents for the sheriff when serving a notice and making return thereof and mileage going and returning at seven and one-half cents a mile. There is no provision which would authorize a sheriff to charge mileage when serving an original notice beyond the county where he is holding office and we believe that the above quoted portion of Section 7283 would limit the mileage charge to the county in which the notice is served. We do not believe that the Legislature intended to permit the holder of a tax sale certificate to drive, for example, from Keokuk, Iowa, to Albert City, Iowa, to serve a notice of expiration of right of redemption and charge the seven and one-half cents mileage fee that is applicable to the service of original notices by the sheriff.

It is our conclusion that in the instant case mileage can only be charged for the miles travelled in Buena Vista County and that the charge for the service of the notice and the copy fee is limited to the charge that can be made in connection with the service of an original notice.

COUNTY OFFICERS AND EMPLOYEES: BOARD OF SUPERVISORS RIGHT TO FURNISH COUNTY BOARD OF SOCIAL WELFARE OFFICE, HEAT AND SUPPLIES. It is the duty of the County Board of Supervisors to furnish an office and necessary heat, light, stationery, etc., for its County Board of Social Welfare.

November 3, 1943. *Mr. Robert B. Pike, Counsel for Woodbury County Board of Supervisors, Sioux City, Iowa:* This will acknowledge receipt of your recent letter wherein you ask for an opinion on the following question:

"Should Woodbury County or the State Board of Social Welfare pay the office rent, janitor expense, light, heat, water, office supplies, postage, etc. for the Woodbury Department of Social Welfare?"

In answer thereto, you are advised as follows:

For many years, prior to 1934, the responsibility for all forms of poor relief reposed in the county. The original allowance of relief was made by the township trustees (Section 3828.097, Code 1939), but the bills were allowed and paid by the Board of Supervisors (Section 3828.106, Code 1939).

In the early 1930s, when the last depression was at its worst, the philosophy of the nation on this subject seemed to change. The majority came to feel that the responsibility for all relief was too great a load for the county and part of it should be shared by the state and nation. Therefore, the 45th General Assembly in Extraordinary Session, passed Chapter 19, known as the Old Age Assistance Act, which provided for the payment of old age assistance by the State to certain elderly people in need thereof and set up machinery to handle it.

Section 41 of the Act provided in part as follows:

"1. Nothing in this act shall be construed as repealing any other act or part of an act providing for the support of the poor except insofar as inconsistent therewith, and the provisions of this act shall be construed *as an additional method of supporting and providing for the aged poor.*"

Thus, it will be seen that the fundamental liability of the County for poor relief remained as it had been, but the State assumed the responsibility of furnishing *additional* and more adequate help for the aged poor. This relieved the counties from considerable of such burden.

In 1937, the 47th General Assembly passed Chapter 151 which provided for the formation of a State Department of Social Welfare, State Board of Social Welfare, defined their duties and made it possible for the Federal Government to participate in such relief and to assume part of the load. It provided for the appointment of county boards of social welfare, defined their duties and provided for the appointment and payment of their employees. This is found in a separate chapter from the Old Age Assistance Act and is known as Chapter 181.1, Code 1939, as amended. Chapter 137, Acts of the 47th General Assembly, repealed the former provisions with reference to the Old Age Assistance Commission and County Boards of Social Welfare. Examination of all of these acts and amendments to date discloses that no direct provision is made for the payment of the expenses about which you inquire.

Section 5133, Code 1939, provides that the Board of Supervisors shall provide offices for certain county officers therein named, but the County Board of Social Welfare is not mentioned.

Section 5134 provides that the Board of Supervisors shall furnish said county officers with fuel, lights, blanks, books and stationery, but again the County Board of Social Welfare is not named. Therefore, it will be necessary to determine whether it is in fact a "county board" and therefore, a county office.

The Legislature has the unquestioned power to make the local board a "County Board" or a "Branch Office of the State Board" whichever

it desires. Two different Legislatures have seen fit to designate it the "County Board of Social Welfare." Succeeding Legislatures have not changed it. If the Legislature had desired and so intended otherwise, it could just as easily have denominated it a "Branch Office of the State Board of Social Welfare." But it has not done so. The language used is plain and unambiguous. We think the Legislature meant exactly what it said, to-wit: that the local board is a "County Board" and therefore, a county office.

In further support of this view, on December 11, 1940, the office of Attorney General held that the expense of current office supplies for the County Board was payable from the County Poor Fund; that the expense of equipment of a permanent character was payable from the County General Fund. This holding could not have been made unless the County Board was a county office.

Also, Section 3661.010, Code 1939, provides that the County Board of Social Welfare shall be appointed by the Board of Supervisors. The State Board of Social Welfare is given no voice in these appointments and can neither recommend, approve or disapprove the same. Section 3661.011, Code 1939, as amended, provides: "The expense and compensation of County Board members shall be paid from the general fund of the County." The State is not charged with the payment of any part of such expense. Thus, it will be seen that the appointment of the members of the County Board and the payment of their compensation and expenses is entirely under the control of the Board of Supervisors and therefore, a county office.

This construction is also in harmony with our fundamental concept of local government which is, that in matters of this kind, local autonomy should be preserved.

Although Sections 5133 and 5134 fail to direct the Board of Supervisors to provide the County Board of Social Welfare with an office, heat, lights, supplies, etc., yet, certainly, it would be an unusual anomoly if the Legislature created a county office and did not intend that the Board of Supervisors should provide it with such necessities. These statutes also do not include the Overseer of the Poor and yet the Board of Supervisors furnishes him and his clerical force with an office, supplies, etc. Would anyone seriously contend that the Board did not have the duty and right to do so? We think not.

Section 5130, Code of 1939, provides in part as follows:

"The Board of Supervisors at any regular meeting shall have power:
"* * *
"6. To represent its county and have the care and management of the property and business thereof in all cases where no other provision is made."

In the case of *Wilhelm vs. Cedar County*, 50 Iowa, 254, the Supreme Court had occasion to interpret this section. On page 255, the Court said:

"No, because the statute does not expressly authorize the Board of Supervisors to employ a special agent or attorney to assist in the collection of taxes not collectible by the county treasurer in the discharge of

his duty, *it does not follow that they may not have the implied power to do so.* They have the power 'to represent their respective counties, business of the county in all cases where no other provision is made.' Revision, Sec. 312: Code, Sec. 303. It is the business of the county to collect taxes, and to use all reasonable means to do it. We think, therefore, the board of supervisors had the power to employ the plaintiff to render the service in question." (Italics are ours)

It made similar pronouncement in *Call vs. Hamilton County*, 62 Iowa, 448, and in *Allen vs. Cerro Gordo County*, 34 Iowa, 54. In the latter case, the Court said:

"But if the power were not thus in direct terms conferred, it would seem that it must be necessarily implied from the power to hold the property."

It is, therefore, our opinion that the County Board of Supervisors has implied power to furnish an office and the necessary heat, light, stationery, etc. for its County Board of Social Welfare.

We are aware that the case of Jones vs. Dunkelberg, 221 Iowa, 1031, 265 N. W., 157, might appear to contain statements which are not in harmony with this opinion. However, the Court said therein: "This opinion is only an authority confined to the facts and simply to and in accord with the facts set forth in the petition." It was handed down on January 29, 1936. At the next session of the Legislature, the statutes which furnished the basis for this opinion were materially changed. Thus, it would seem that this decision was not in conformity with the desire and intention of the Legislature. Such action on its part furnishes additional proof that the conclusion herein reached is correct.

You call our attention to the case of Hjerleid vs. State Board of Social Welfare, et al., 229 Iowa 818, which held that the Director-Investigator was a state employee, and therefore, the State was liable under the Workmen's Compensation Act for injuries received by such employee in the course of his employment. This decision is entirely in harmony with the conclusion herein reached. Sections 3661.012, 3661.013, 3661.014 and 3828.070, Code 1939, as amended, prescribe the method of appointment of the employees of the County Board and provide for the payment of their salaries. A careful examination of the same shows that the fundamental liability for administering what is known as poor relief yet lies with the Board of Supervisors, but it may be administered by the County Board of Social Welfare at the request of the Board of Supervisors and shall be thus administered when the County receives funds from the State Emergency Relief Fund. When the County Board pursuant to these provisions, administers ordinary poor relief, it does so on behalf of the County and as the agent of the Board of Supervisors, using county funds.

The mere fact that the statutes provide that the salary of the employees of the County Board shall be paid by the State Board does not indicate an intention on the part of the Legislature that the County Board is anything different than its name implies. On the contrary, it furnishes additional proof that the Legislature felt that the County should be relieved from a further portion of this burden and the State and Federal Government should assume part thereof. These statutes show

that it was the evident intention of the Legislature that the county, state and federal government should cooperate and work together in the furnishing of various kinds of poor relief and divide the responsibility therefor.

It is, therefore, our conclusion that it is the duty of Woodbury County to furnish an office and the necessary heat, light, stationery, etc. for its County Board of Social Welfare.

SOLDIERS, SAILORS AND MARINES: INTEREST AND PENALTY NOT TO BE CHARGED FOR 1943-1944. County Treasurers are not to enter interest or penalties on any tax due in 1943-1944 when sufficient showing has been made that the person is in the armed services, but when no evidence is supplied that person is in armed services it is proper for the treasurer to make such entries. No interest can be collected if satisfactory evidence is submitted at a later date showing such person was in the armed services.

November 17, 1943. *Hon. C. B. Akers, Auditor of State, Building:* This is in reply to your request for our opinion as to the application of Chapter 221, Acts of the 50th General Assembly, which reads as follows:

Section 1. Section seven thousand two hundred fourteen (7214), Code, 1939, is hereby amended by adding at the end thereof the following: "No interest and penalties shall be charged on any such taxes due and payable in the years 1943 and 1944 when the same are levied on the property of a person serving in the armed forces of the United States."

and as to whether said statute conflicts with the provisions of the United States Soldiers' and Sailors' Relief Act of 1940, which provision in part is as follows:

"If person in service or one in his behalf files with the collector of taxes an affidavit showing that a tax has been assessed on such property, that such tax is unpaid, that his ability to pay is materially affected by service, no tax sale shall be made, and no action for such purpose commenced, except by order of court upon application by collector. Court may stay sale or proceedings for not more than six months after termination of service. When tax is unpaid it shall draw interest at six per cent per annum and no other penalty or interest shall be incurred."

We are of the opinion that there is no conflict as far as the taxpayers of this state are concerned. You will note that Chapter 221 above referred to provides "no interest and penalties for the years 1943 and 1944" whereas the Soldiers' and Sailors' Act provides 6% per annum. Also under our statute the exemption is not dependent upon the service man's inability to pay. It is entirely within the rights of our Legislature to grant further exemptions in addition to the provisions of the Soldiers' and Sailors' Relief Act, and it is not necessary here to decide more.

While the Iowa Legislature did not provide any method of notice to the Treasurer, by the person in service, we do not feel that it intended to shoulder the respective County Treasurers with the impossible task of determining whether or not each piece of property taxed in the county belonged to a service man.

We believe that the treasurer may accept any satisfactory evidence of the person being in the armed services, including the affidavit, provided for in the Soldiers' and Sailors' Relief Act.

It is, therefore, our opinion that the County Treasurers should not enter interest or penalties on any taxes due and payable in the years 1943, and 1944, when a sufficient showing has been made to him that the person is in the armed services of the United States, but that where no evidence is supplied the County Treasurer that such person is in the armed services, that it would be proper for the County Treasurer to make proper entry on his books as to interest and penalties, where taxes remain unpaid. However, the interest and penalties cannot be collected, if at any later date satisfactory evidence is submitted, showing that the person in question was entitled to the benefits of Chapter 221, Acts of the 50th General Assembly.

OLD AGE ASSISTANCE: PROPERTY CONVEYED TO DAUGHTER WHO REFUSES TO PAY TAXES: TREASURER'S DUTY TO SELL AT TAX SALE. Where taxes have been suspended for an old age recipient and the property is later conveyed to a daughter who refuses to pay taxes the county treasurer has power and it is his duty to sell the real estate at the annual tax sale for suspended taxes without interest or penalty.

November 17, 1943. *Mr. George R. Blake, Acting County Attorney, Shell Rock, Iowa:* I wish to acknowledge receipt of your letter of November 10 requesting an opinion upon the following facts, to-wit:

"Real estate taxes of a person receiving old age assistance had been suspended for the year 1941 payable in 1942. Prior to his decease in May, 1943, he conveyed the real estate to his daughter who paid the 1942 taxes payable in 1943. She has refused to pay the suspended 1941 taxes.

QUESTION: Can this real estate be advertised and sold for the 1941 suspended taxes by the Treasurer at his regular annual tax sale in December?"

In answer thereto, you are advised as follows:

The first part of Section 6950.1, Code 1939, as amended, provides in substance that whenever a person is receiving old age assistance, that such person shall be deemed to be unable to contribute to the public revenue; that the State Board of Social Welfare shall notify the Board of Supervisors thereof, giving certain necessary information. The statute then states:

"It shall then be the duty of the Board of Supervisors * * * to order the County Treasurer to suspend the collection of all of the taxes assessed against said property and remaining unpaid by such person * * *for such time as such person shall remain the owner* * * of such property * * *." (Italics are ours)

Section 7244, Code 1939, as amended, provides 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, which sale shall be made for the total amount of taxes, interest and costs due and unpaid thereon, including all prior suspended taxes. * * * *No interest or penalty on suspended taxes shall be included in the sale price* * * *." (Italics are ours)

You will notice that Section 6950.1 provides for the suspension of taxes upon real estate of an old age assistance recipient "for such time as such person shall remain the owner." Section 7244 provides that it is the duty of the treasurer to advertise and sell all real estate on which the taxes for the preceding year or years are due and unpaid and no interest or penalty on such suspended taxes shall be included in the sale price.

It is, therefore, our judgment that your treasurer has the power and it is his duty under section 7244 to sell the real estate at his regular annual tax sale on the first Monday in December for the unpaid suspended taxes of 1941, without interest or penalty.

BANKS AND BANKING: COUNTY FUNDS ON DEPOSIT NOT SUBJECT TO BANK SERVICE CHARGES. There is no provision in the law for any service charge on public funds deposited in a bank.

November 18, 1943. *Mr. Lee W. Elwood, County Attorney Howard County, Cresco, Iowa:* We have your request for an opinion as to whether a bank designated as a depository bank under the provisions of Chapter 352.1, Code 1939, may charge the ordinary service charges pursuant to a uniform schedule of service charges adopted by the bank against county deposits.

This matter was the subject of an opinion rendered by this department on May 8, 1934, found on page 523 of the 1934 Report of the Attorney General. In that opinion it was held that such a service charge could not be made as to funds on deposit by the county. A considerable portion of the opinion was devoted to a discussion of the interest provisions that were at that time a part of the chapter as to the deposit of public funds and the chapter relating to the state sinking fund for public deposits. Since that time the legislature has repealed it, and it is now provided that no interest shall be paid to any public officer on any deposit of public funds, and the chapter provided for the state sinking fund for public deposits. Provision is made for making an assessment as the requirements of the sinking fund dictate against banks having public funds on deposit.

However, this change in the law with reference to payment of interest we do not deem to be controlling on the question presented by you. In the opinion above referred to attention is called to the statement that a deposit of public funds establishes a contractual relationship between the depositor and the depository bank in the nature of creditor and debtor and then referring to the above mentioned chapters states:

"The laws of this state with reference to the deposit of public funds and the state sinking fund for public deposits are parts and parcels of this contractual relationship."

As to the soundness of this proposition we do not believe there could be any question. No provision is made in Chapter 352.1 relating to the deposit of public funds for the making of any service charges by the depository, and in the absence of any such provision it is our opinion that no service charge can be made or claimed by the depository.

TAXATION: BURLINGTON RAILROAD VETERANS PROPERTY EXEMPT FROM TAXATION. The property of the Burlington Railroad Veterans is exempt from taxation under the provisions of Section 6944.

November 19, 1943. *Iowa State Tax Commission, Des Moines Building, Des Moines, Iowa:* This will acknowledge receipt of your communication of recent date wherein you ask our opinion relative to whether a certain building owned by an organization known as "Burlington Railroad Veterans" would be exempt from taxation under and by virtue of the provisions of Section 6944, Code of 1939.

It appears that this organization is national in scope, having so-called "chapters" situated in various parts of the country. We have before us the constitution and by-laws of the organization.

In a letter from Mr. Suman, Assessor, West Burlington, Iowa, with which the above-mentioned constitution and by-laws were transmitted, he states:

"Enclosed is a copy of our local by-laws and constitution. Also a copy of the national by-laws which were incorporated in December 1st, 1920.

"We use the national by-laws as far as possible and did use them exclusively until 1939 when we drew the local by-laws."

Perusal of the constitution and by-laws discloses the object of the organization. We quote from Article 2:

"Article 2. OBJECT. The object of this organization shall be, to bring together closer relationship of veterans employees of the Burlington Lines for the purpose of reviving old acquaintance, discussing topics of mutual interest and promoting every measure which shall be for the best interest of its members and remember them with flowers, Christmas baskets, greeting cards, etc., and help to bring sunshine into the declining years of their lives in every way possible. All money received or made by the chapter shall be used only for the upkeep, improvements and maintenance of property owned or leased by the chapter, as well as for social functions and charitable purpose."

It is our opinion that the property of this organization, subject to the limitations of subsection 9 of section 6944, Code of 1939, is exempt from taxation. Said section and subsection 9, so far as material to the legal question involved herein provides as follows:

"The following classes of property shall not be taxed:

1. * * *
2. * * *
3. * * *
4. * * *
5. * * *
6. * * *
7. * * *
8. * * *

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

From reading the above statute and subsection 9 thereof, we reach the conclusion that the property of "C. E. Perkins, Chapter No. 4 of the Veterans Association of Burlington Lines" is exempt from taxation for, as we view it, it is a charitable and benevolent society as those terms are used in subsection 9.

Therefore, if the deed to said organization conveying the building above referred to is filed for record, said real estate should be omitted from the 1944 assessment.

MINORS: INDIAN CHILDREN: ELIGIBLE TO PROVISIONS FOR AID TO DEPENDENT CHILDREN. Indian children residing on the Reservation in Tama County are eligible to receive aid under the provisions of the Aid to Dependent Children's Act.

November 23, 1943. *Mr. Walter J. Willett, County Attorney, Tama, Iowa:* I wish to acknowledge receipt of your recent letter asking for an opinion on the following question: "Are Indian children residing on the Sac and Fox reservation in Tama County, Iowa, entitled to the aid provided in the Aid to Dependent Children's Bill passed by the 50th General Assembly?"

With reference thereto, you submit the following information:

"Tama County has never furnished relief in the way of widow's allowance to the Indians on this Reservation for the reason that they are wards of the Federal Government and have been taken care of by it through its own personnel who had jurisdiction to handle such matters.

"On April 29, 1941, the Attorney General's office held that the Tama County Insane Commission did not have jurisdiction over insane Indians residing on the Reservation. As grounds therefor, it was stated that the State of Iowa under the provisions of Chapter 110, Acts of the 26th General Assembly, tendered jurisdiction of the Indians and their lands to the Federal Government, reserving the right to levy taxes on the lands for certain stated purposes. The Federal Government by an Act of Congress, approved June 10, 1896, accepted and assumed jurisdiction over these Indians and their lands.

"The Indians are anything but thrifty and if it is held that they are entitled to the provisions of this Act, it will probably cause a large number of Indian children to be eligible for aid.

"The Indian lands are not taxed for poor relief, while the money to support the Aid to Dependent Children's program is taken from this fund. Therefore, the entire burden will fall upon the white people of the county. It will probably prove to be quite heavy and burdensome and you feel this is manifestly unfair and unjust."

In answer thereto, you are advised as follows:

When a state adopts a plan which conforms to the Federal Social Security Act, the Federal Government contributes one-half the total cost thereof. However, the plan must first be approved by the Federal Social Security Board. It has now approved the Iowa plan. In arriving at a solution of your question, it will be necessary to construe the relevant portions of the Federal and Iowa Acts.

The pertinent parts of Section 402, Title IV of the Federal Act, as amended, are as follows:

"(a) A State plan for aid to dependent children must (1) provide

that it shall be in effect in all political subdivisions of the State, and if administered by them, be mandatory upon them; (2) provide for financial participation by the State; (3) either provide for the establishment or designation of a single State agency to administer the plan, or provide for the establishment or designation of a single State agency to supervise the administration of the plan; (4) provide for granting to any individual whose claim with respect to aid to a dependent child is denied, an opportunity for a fair hearing before such State Agency; * * * (7) provide that the State Agency shall, in determining need, take into consideration any other income and resources of any child claiming aid to dependent children; * * *

"(b) The Board shall approve any plan which fulfills the conditions specified in subsection (a), except that it shall not approve any plan which imposes as a condition of eligibility for aid to dependent children, a residence requirement which denies aid with respect to any child residing in the State (1) who has resided in the State for one year immediately preceding the application for such aid, or (2) who was born within the State within one year immediately preceding the application, if its mother has resided in the State for one year immediately preceding the birth."

A fair interpretation thereof reveals that a state plan must apply equally to all children within the political subdivisions of a state. Section 402 is practically identical with a similar porton of the Old Age Assistance and Aid to the Blind Acts with such changes as are necessary to adapt it to the particular subject. In interpreting these provisions in the administration of the other two programs, the Federal Social Security Board has consistently required that it must apply equally to all persons within the borders of the state. Failure to do so makes the state ineligible for federal aid.

Section 2, Chapter 130, Acts of the 50th General Assembly, known as "Aid to Dependent Children's Act" provides as follows:

"Assistance shall be granted under this act to *any needy dependent child* who:

1. Is living in a suitable family home maintained by one or more of the persons referred to in sub-section four (4) of section one (1) of this act.
2. Has resided in the state for one year immediately preceding the application for such assistance; or was born within the state within one year immediately preceding the application, if the mother has resided in the state for one year immediately preceding the birth of said child, without regard to the residence of the person or persons with whom said child is living.
3. Is not in a public institution and because of a physical or mental condition, in need of continued care therein."

This specifically states that *any* needy dependent child who comes within the provisions of the Act is eligible for assistance and no exception is made with reference to the Indians in Tama County.

On November 4, 1940, a Judge of the District Court of the 15th Judicial District of Minnesota in the case of "Beltrami County Welfare Board vs. Jennie Fairbanks" handed down a very able opinion on the question here involved. The case arose out of an order of the County Welfare Agency denying an application for aid to dependent children upon the ground that the Indian children with respect to whom the application was made, were wards of the Federal Government, living on

unallotted lands in a Reservation over which the County and State had no civil, criminal nor tax jurisdiction. The Court held that the applicant and her children were eligible for a grant of aid to dependent children. The case is exceptionally well reasoned. Because of its importance, we are enclosing a copy herewith.

It is, therefore, our opinion that the Indian children residing on the Reservation in Tama County are eligible to receive aid under the provisions of the aid to the Dependent Children's Act.

Tama County is only required to pay 25% of the total cost of the program in the county. Therefore, the burden may not be as heavy as you anticipate.

The last two paragraphs of the Minnesota opinion also very aptly answer this problem. They are as follows:

"It is doubtless true that the legislature when it enacted our child welfare act did not take into consideration the fact that in Beltrami county there was located this Red Lake Indian reservation, that the Indians, being wards of the government and having for years depended upon government assistance, have become less provident than many of the white people of today, and that the care of a large number of dependent Indian children would be cast upon the county of Beltrami, a county having a low valuation for taxation purposes.

"No provision was made in the law to relieve this county from that unusual burden, but that is a question for the legislature and not for the courts, and when this situation is presented to the legislature, Beltrami County will undoubtedly obtain that degree of relief which the legislature considers it is justly entitled to receive."

COUNTY OFFICERS AND EMPLOYEES: BOARD OF SUPERVISORS: MEMBER LOSING OFFICE BY ABSENCE FROM COUNTY: ELIGIBLE TO APPOINTMENT TO OFFICE. The fact that a member of the board of supervisors lost his office by absence as provided by section 5115 does not make him ineligible for reappointment to the office on account of Section 1153 which prohibits from appointment to office one who was removed from office within one year next preceding.

December 8, 1943. *Mr. Ralph H. Goeldner, County Attorney, Sigourney, Iowa:* We wish to acknowledge receipt of your recent letter in which you ask for our opinion on the following matter:

"A member of the Board of Supervisors has been absent from County A more than six months and in accordance with the provisions of Section 5115 the seat of said member of the Board of Supervisors has been declared vacant.

"Can said member be now reappointed to the same Board of Supervisors or is he barred from being so reappointed because of the provisions of Section 1153?"

Section 1153, 1939 Code of Iowa, provides as follows:

1153. PERSON REMOVED NOT ELIGIBLE. No person can be appointed to fill a vacancy who has been removed from office within one year next preceding.

In the instant case the member of the Board of Supervisors resigned from his position because of the provisions of Section 5115, 1939 Code of Iowa, which section provides as follows:

5115. ABSENCE FROM COUNTY—VACANCY. The absence of any supervisor from the county for six months in succession shall be treated as a resignation of his office, and the board shall, at its next meeting thereafter, by resolution regularly adopted and spread upon its records, declare his seat vacant.

It is our opinion that Section 1153 is not applicable to a resignation which takes effect because of the provisions of Section 5115. We believe that the words in Section 1153, "removed from office", refer to the specific procedure provided for in Chapter 56, 1939 Code of Iowa, entitled "Removal From Office". In other words, Section 1153 was intended to prohibit a person from regaining a public office within one year after he had been removed from office for any of the reasons mentioned in Section 1091.

It is, therefore, our conclusion that the member of the Board of Supervisors in question may be appointed to fill the vacancy on the Board of Supervisors.

TAXATION: AUDITOR'S POWER TO CANCEL TAX CERTIFICATE: BOARD OF SUPERVISORS TO CANCEL TAX SALE. The County Auditor has the power to cancel a tax certificate certified to the County Treasurer if he would have power to cancel such tax when the books were in his office if the tax was erroneously assessed or listed. Power to cancel a tax sale is vested solely in the Board of Supervisors.

December 8, 1943. *Iowa State Tax Commission, Des Moines Building, Des Moines, Iowa:* This will acknowledge receipt of your letter of the 3rd instant wherein you ask the opinion of this department relative to the following legal questions:

"1. Does the county auditor have authority to cancel a tax that has already been certified to the County Treasurer for collection, without first having such action approved by the Board of Supervisors?

"2. In cases where a property owned by a church, a charitable organization, or other organizations of like nature, has been listed for assessment by the assessor and the taxes were spread against this property, which became delinquent and the property was sold at tax sale, can the County Auditor cancel this tax sale or must the Board of Supervisors take the action under the provisions of law?

"3. If the County Auditor does not have the authority to make the corrections in the cases set out above, does the Board of Supervisors have the authority to make such corrections, and if they do so by resolution is it the duty of the auditor to carry out the action of the Board?

"4. Our law provides that certain classes of property are exempt from taxation, and now the question arises—just who has the authority to determine whether such property comes under those provisions? In the year when real property is assessed, is it the assessor who must determine whether the property is exempt, or is it the Board of Review? If it is the Board of Review, would they have the same authority in regard to real property in years in which real property is not assessed?

It is our opinion as to question No. 1, that if the tax in question is the result of an erroneous assessment or listing, the County Auditor has authority under and by virtue of Section 7149, to cancel such tax even after the tax list has been certified to the County Treasurer and the tax has not been fully paid. The following statutes and authorities, we believe, sustains our conclusion. Section 7149 provides:

"The auditor may correct any error *in the assessment or tax list*, and may assess and list for taxation any omitted property." (Italics ours)

Section 7152 provides:

"If such correction or assessment is made after the books or other records approved by the State Auditor, have passed into the hands of the treasurer he shall be charged or credited therefor as the case may be."

Many decisions of our Supreme Court have interpreted the two above code sections, but we find none that have specifically passed upon the question herein posed. We believe, however, that the factual situation in the decisions which we will hereinafter set out and quote from are sufficiently analogous to the instant case to constitute authority for our opinion.

The right of the Auditor to correct the assessment after the tax lists or books have been certified to the County Treasurer for collection has been passed upon several times by the Supreme Court. The following cases so hold:

Ridley vs. Doughty, 85 Iowa 420
Smith vs. McQuiston, 108 Iowa 363
First Nat. Bank vs. Hayes, 186 Iowa 892
First Nat. Bank vs. Anderson, 196 Iowa 587
(Reversed by Supreme Court of U. S. on other grounds) 70 L. Ed. 295
Parker vs. Van Steenburg, 68 Iowa 174

In Ridley vs. Doughty, Supra, the Court said:

"It is claimed in behalf of the appellant that at the time the demand was made upon the defendant to correct the tax book, said book was out of his possession and control, and in the hands of the county treasurer, and that it was not within the lawful power of the auditor to comply with the demand. *It appears to us that this question was determined in the former appeal.* It is true the point was not elaborated in the opinion, but it is there held that the authority to make the correction is given him by section 841 of the Code. It was necessary to so hold, for the very question involved in that appeal was whether, under the facts, the action of *mandamus* could be maintained. * * * the county treasurer cannot lawfully refuse to allow the proper corrections to be made, because authority to make the corrections is expressly conferred upon the county auditor * * *. The claim that the tax book is under the control of the treasurer is correct in the sense that the book is his warrant for the collection of the taxes, *but he has no right to interfere with the auditor in making lawful corrections of errors therein.* There can be no doubt that the auditor may correct any error in the assessment. Parker v. Van Steenburg, 68 Iowa, 174."

In Smith vs. McQuiston, Supra, the Court said:

"The undisputed facts are that the assessor fixed upon plaintiff's real estate a valuation of three hundred and ten dollars, but, by some error in copying the same, this assessment now appears upon the roll as three thousand one hundred and fifty dollars. * * * Is plaintiff precluded from questioning now in any manner the amount of this assessment, and, if not, has he adopted proper proceedings therefore? * * * Where the assessment is erroneous as being excessive, the only remedy of the property owner is by application to the board of equalization, and by appeal therefrom to the courts. Nugent v. Bates, 51 Iowa 77; Wilson v. Cass County, 69 Iowa 147; Harris v. Fremont County, 63 Iowa 639. But these cases presuppose an assessment of which complaint is made, and this suggests the question whether the entry here of three thousand one hundred and fifty dollars is in fact or in law an assessment. True, it appears upon the assessment roll, but not by the voluntary act of the assessor. An assessment would seem to require a decision or conclusion upon the assessor's part, as well as an entry of the amount by him. * * *

Section 841, Code 1873, provides: 'The county auditor may correct any clerical or other error in the assessment or tax books' * * * The power here given the auditor, we have held, includes the power to determine when a mistake has been made. Fuller v. Butler, 72 Iowa 729. *The word 'mistake' as used in this section, does not include, of course, errors of judgment on the part of the assessor, but is meant, perhaps, to cover all cases where the record does not disclose the true facts, and in which the matter of judgment or discretion is not involved.* Certainly it includes an error purely clerical, such as we have in the case at bar. WHEN THE DETERMINATION OF WHETHER THERE IS A MISTAKE DEPENDS UPON THE FACTS OUTSIDE OF THE RECORD, THOUGH IT IS NEVERTHELESS WITHIN THE POWER OF THE AUDITOR TO ACT, YET WE THINK IT IS WISE FOR HIM TO DECLINE DOING SO, AS HE DID IN THIS CASE, UNTIL THE MATTER HAS BEEN PASSED UPON BY THE COURT."

In First Nat. Bank vs. Hayes, Supra, the Court said:

"We think that, within the contemplation of Section 1385, and as applied to the current year, the errors that might be corrected thereunder were such as had relation to the name of the person against whom the assessment was made, the description of the property assessed, or the valuation thereof and the amount of the tax extended. * * * The error in the assessment or tax list is one relating to perfecting the tax list in the course of preparation or thereafter, at any time prior to the payment of taxes levied. * * *"

In First Nat. Bank vs. Anderson, Supra, the Court said:

"It would seem to be equally clear that the authority of the auditor to correct the tax lists of the preceding year continues until the taxes have been paid or otherwise legally discharged. * * * The purpose of the statute is to prevent property from escaping taxation. Provision is made therein for the assessment of omitted property, and also for the correction of errors in the tax lists. The authority of the auditor to correct the tax lists is not expressly or impliedly limited to the time within which he is required to deliver the same to the treasurer, *but continues until the tax has been paid, or otherwise legally discharged.*"

It will thus be seen that it is the settled law of this state that the Auditor has authority to correct any error in the assessment or tax lists after such lists have been certified to the County Treasurer and until the tax has been fully paid.

Your specific question, however, is as to whether the authority given to the Auditor by Section 7149 to correct errors is broad enough to authorize this officer to cancel the tax after the books have been delivered to the Treasurer. We are of the opinion that if the "error" is such as would justify the auditor in cancelling the tax while the tax lists or books were in his possession, then it would seem clear that he has the same power to cancel the tax after such tax lists or books have been certified to the County Treasurer. If an assessment has been made against a certain individual when his property is not in fact subject to assessment, as for example, because of certain exemptions provided by law, could it be logically contended that the Auditor would not have the authority under and by virtue of Section 7149 to cancel such assessment while the books were in his possession? We think not. Manifestly, therefore, in view of the fact that the above decisions specifically hold that the Auditor can correct an assessment after the books have been certified to the Treasurer, we are of the opinion that he would have the same power to cancel such assessment assuming, of course, that the assessment is an "error" as that term is used in Section 7149. The determina-

tion of what constitutes "error" in our opinion, is the most difficult problem inhering in your question. However, we are not without authority on this question. In First Nat. Bank vs. Hayes, Supra, our Supreme Court said:

"We think that, within the contemplation of Section 1385 (now 7149) and as applied to the current year, the errors that might be corrected thereunder were such as had relation to the name of the person against whom the assessment was made, the description of the property assessed, or the valuation thereof and the amount of the tax extended. * * *"

Here it should be parenthetically stated that the "valuation" above referred to does not authorize the Auditor to correct an error by which a taxpayer is assessed too much or too little on a particular piece of property. Such error is to be corrected by application to the Board of Review. The Supreme Court so expressly held in the case of Polk County vs. Sherman, 99 Iowa 60; 68 NW 562.

It is impossible to lay down any definite rule by which to determine what is and what is not an "error" which the Auditor is authorized to correct. The above quotation from First Nat. Bank vs. Hayes, however, we think fairly accurately describes the Auditor's authority. From this it would appear that such authority is limited indeed and should be exercised only when a manifest error or mistake has been made. As was aptly said in Smith vs. McQuiston, Supra:

"When the determination of whether there is a mistake depends upon the facts outside of the record, though it is nevertheless within the power of the auditor to act, yet we think it is wise for him to decline doing so, as he did in this case, until the matter has been passed upon by the court."

We reach the conclusion, therefore, as to question No. 1, that if the "error" is one that the Auditor would be authorized to correct under and by virtue of Section 7149 while the tax lists and books were in his possession, he would be authorized to cancel such erroneous tax after the certification of the books to the County Treasurer.

As to your question No. 2, it is our opinion that clearly the County Auditor would have no authority to cancel a tax sale. This authority, in our opinion, is vested in the Board of Supervisors under and by virtue of Section 7235 and 7236 which provides so far as material:

"7235. 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."

"7236. In case any real estate subject to taxation shall be sold for the payment of such erroneous tax * * * the error or irregularity in the tax may be corrected at any time provided in this chapter * * *"

Answering your question No. 3, it is our opinion that when the Board of Supervisors acts under the authority granted to it by Section 7235 and 7236, it is clearly the duty of the Auditor to comply with the Board's order.

Answering your question No. 4, it is our opinion that in the first instance it is the duty of the assessor to determine what property is exempt and what is not exempt from taxation. Therefore, in the year

when real property is assessed, it is clearly the assessor who must determine in the first instance whether the property is exempt. Of course, if the assessor classifies it as non-exempt and therefore places it upon the tax rolls, the aggrieved party may appear before the Board of Review which has authority to over-rule the assessor and find the property assessable. In years in which real property is not assessed, the duty of determining whether property is exempt or non-exempt is, in our opinion, upon the Board of Review.

While not specifically covering the subject, we think that Section 7129.1, Code of 1939, is authority for our opinion. Certainly some administrative body should have the authority to classify as exempt real estate which has become such since the original assessment. Under Section 7129.1, the Board of Review is charged with the mandatory duty of meeting each year after the year in which the assessment is made and where it finds the real estate has changed in value, to revalue and reassess any part of the real estate contained in the taxing district and in such case it shall determine the taxable value thereof. Any aggrieved taxpayer may petition for a revaluation of his property but no reduction or increase shall be made for prior years. Certainly it would seem logical that if an aggrieved taxpayer may petition for a reduction in the valuation of his property, he should have the right to petition for a removal from the tax lists of such property where it has acquired an exempt character.

We think that the authority of the Board of Review to classify property as exempt after the year of assessment inheres in Section 7129.1.

TAXATION: RAILROAD PROPERTY USED IN OPERATION OF RAILROAD TAXABLE BY STATE: LOTS NOT USED EXCLUSIVELY FOR RAILROAD PURPOSES TAXABLE BY LOCAL AUTHORITIES: LIENS. Property of a railway which is used exclusively in the operation of the road is taxable by the State, while property not used exclusively for railway purposes is taxable by local authorities. A lien for personal taxes attaches only to real estate owned by persons against whom the personal property taxes are assessed.

December 15, 1943. *State Tax Commission, Des Moines Building, Des Moines, Iowa:* This is in answer to your letter of the 13th instant wherein you ask our opinion relative to the three following legal questions:

"1. Railroad A owns a freight house in the City of Des Moines, which freight house is used and occupied in part by the railroad for the exclusive use of loading and unloading freight on said railroad's lines. Approximately one-third of the floor area of this freight house is occupied and used by the C Transportation Company, a separate and distinct corporate entity, although C is wholly owned subsidiary of the Railroad A. C, the transportation company, is engaged in the hauling of freight, by motor truck to and from the trains of A to other trains, to individuals from A's trains, to A's trains from other trains and individuals. C occupies and operates from the said one-third floor area of the freight house under leasehold with A. A and C have the same general officers, though no salary is paid the officers of A for serving as officers of C corporation. Such earnings and expenses as are derived from C by A, if reported to the State Tax Commission, are not taken into considera-

tion by said commission in determining the valuation of the railroad. A, since C and like companies pay taxes through motor vehicle assessments, are not within the jurisdiction of the Commission. Through error, in failure to report, such earnings have in the past been sometimes taken into consideration, and the State Tax Commission, through no fault of its own, has invalidly made an exclusive assessment. C's personal property has always been assessed locally. On the basis of the facts stated, the City of Des Moines claims that that part of A's freight house as used by C is property not exclusively used in the operation of the railroad and hence is subject to local assessment and taxation, rather than assessment by the State Tax Commission. On the premises, is this property subject to local jurisdiction as respects the valuation thereof for taxing purposes, or is it properly includable in the State Tax Commission's assessment?

"2. A leased three lots, which lots are adjacent to the railroad tracks of A, to the B concrete company. B uses said property for storage purposes, and for loading and unloading concrete products on A's trains. The concrete products, culverts, pipes, mortar, etc., are stored on the lots for purposes other than mere accessibility to the trains of A. Through error, while these lots have been leased to this company for several years and are admittedly not used for railroad purposes exclusively, they were not so reported and were included in the State Tax Commission's assessment for several past years. Polk County claims that in view of the lease and use of said lots for a period longer than five years, these lots should be taxed for five years back by the omitted tax collector, as provided by law. A claims that since the property was included in the state assessment, taxes thereon have been paid during these years, and that they are not therefore taxable locally for these past years. Was said assessment by the State Tax Commission null and void? May these lots be taxed by the omitted tax collector for the past five years with interest and penalties?

"3. A leased the South ¼ of Market Square to the T Gas Company for several years prior to 1938. Said property is admittedly not exclusively used for railroad purposes and is subject to local jurisdiction of assessment. For such years, the property was locally assessed, and the taxes thereon were paid by the T Gas Company, as provided in the lease between A and T. For the years 1938, 1939, and 1940, through error, no local assessment of the property was made, nor was such fact reported to the State Tax Commission by A. In 1941 and 1942 the property was locally assessed again and the taxes thereon were paid. The T Gas Company ceased business in 1943, owing taxes for the omitted years of local assessment, now put on by the omitted tax collector. A claim to be responsible for the taxes on the land only, and not the taxes against the improvements thereon, which were charged in the past to T as personal property. Inasmuch as the taxes, whether real or personal, become a lien on said real estate, interest and penalties are due thereon in addition to the omitted tax. T paid all taxes in the past. Is A responsible for the taxes on the improvements on said land placed thereon by T for the omitted years?"

As to your question No. 1, it is our opinion that the freight house in question is exclusively used in the operation of the railway and we hereinafter give our reasons for so holding. Section 7047 provides:

"Each railway or other corporation required by law to report to the state tax commission under the provisions of the law as it appears in section 7046 shall * * * make to the state tax commission a detailed statement showing the amount of real estate owned or used by it * * * for railway purposes, in each county in the state in which said real estate is situated, including the right-of-way, roadbed, bridges, culverts, depot grounds, station buildings, yards, section and tool houses, roundhouses,

machine and repair shops, water tanks, turntables, gravel beds and stone quarries, and for all other purposes, with the estimated actual value thereof, in such manner as may be required by the state tax commission."

Section 7060 provides:

"The said property shall be valued at its actual value, and the assessments shall be made upon the taxable value of the entire railway within the state, except as otherwise provided, * * * and shall include the right-of-way, roadbed, bridges, culverts, rolling stock, depots, station grounds, shops, buildings, gravel beds, and all other property, real and personal, *exclusively used in the operation of such railway.* (Italics ours.)

In a note, 80 A.L.R. 252, we find the following pertinent language supported by authorities:

"Property devoted principally to railroad uses and purposes is, according to the prevailing view, assessable by the state board or commission, and not by local authorities, under the kind of statutes now under consideration, although it is not used exclusively for such purposes, but is used incidentally or *in part* for other purposes. (Italics ours.) Osborn v. Hartford & N.H.R. Co. (1873) 40 Conn. 498; People ex rel. Anton v. Atchison, T. & S. F. R. Co. (1907) 225 Ill. 593, 80 N. E. 272. Milwaukee & St. P. R. Co. v. Milwaukee, 34 Wisc. 271."

In this note is found also the case which we rely on principally in sustaining the conclusion reached herein. We refer to Herter v. Chi. M. & St. P. Ry. Co., 114 Iowa 330. In the Herter case the facts were as follows:

The defendant railway owned grain elevators located at Portsmouth and Panama in Shelby county. These elevators were situated on the defendant's land contiguous to its railway tracks, and were leased to and operated by tenants, who paid nominal rent therefor, and bought grain for shipment over defendant's road. These elevators were taxed locally for the years 1893, 1894, 1895 and 1896. The suit involved the right to recover the taxes so levied. The statute then, similar to the one involved in the instant case, read as follows:

"Sec. 808. Lands, lots, and other real estate belonging to any railway company, not exclusively used in the operation of the several roads, * * * shall be subject to assessment and taxation on the same basis as the property of individuals in the several counties where situated."

Sec. 810 then read as follows:

"Sec. 810. All railway property not specified in section 808 of this chapter, shall be taxed upon the assessment made by the executive council. * * *"

While the Court held that it was bound by the finding of the lower court that the elevators were not exclusively used in the operation of defendant's road, we believe the following language employed in the decision definitely supports the conclusion herein reached. We quote:

"It is conceded by counsel on both sides that the controlling question here is as to the use of the elevators in question. It is not seriously contended by the appellee that an elevator used for the purpose of handling grain and other products for the purpose of shipment over a line of railroad may not be necessary and proper 'in the operation of the road'. Indeed, it could hardly be said that the operation of a railroad did not include facilities for handling grain and other articles presented for

shipment, and a grain elevator and *freight warehouse* are as essential for that purpose as are passenger stations and ticket and telegraph offices. * * * and in Chicago, St. P. M. & O. R. Co. v. Bayfield County, supra, it was held that it made no difference whether the property was operated by employees of the company or by tenants. Nor can we conceive how this should make any difference. If it is to the greater advantage of the railway company to partially operate its road by inducing third parties to buy and ship grain over its line, it certainly should be permitted to do so. We reach the conclusion, then, that, if the elevators in question were exclusively used in storing or taking in grain for shipment over the defendant's road, they were not subject to local assessment, but were for assessment by the executive council, under section 810. * * *"

In the Bayfield case, supra, it was held that a grain elevator owned by a railroad company at a small village at which there was no other elevator and where there would have been none had not the railroad company built it, used exclusively for the purpose of receiving grain shipped over the railroad company's lines and transferring it to lake carriers and not built or used to store grain for local consumption was held to be:

"necessarily used in operating the railroad so as to be exempt from local taxation under the Wisconsin statute."

In Minneapolis, St. P. & Ste. M. R. Co. v. Douglas County (159 Wis. 408) the Court said:

"Terminal facilities, such as freight houses, grain elevators, and warehouses, owned by the carrier, equipped with the proper appliances necessary to enable the railroad to perform its full duty of transportation and delivery of freight of all kinds, either to the consumer, the dealer, or a connecting carrier, constitute property necessarily used in the operation of a railroad, and hence become part of the entirety.

In the case of Re United New Jersey R. & Canal Co., 75 N. J. L. 334, it was held that:

"A dining room and restaurant operated by a railroad company in its ferry-house, used by it in connection with its railroad terminal, in transferring passengers between its trains and its ferry, were held to be reasonably necessary to the comfort and safety of passengers upon the railroad, and to be used for railroad purposes and hence assessable only by the state board of assessors, and not subject to local taxation."

We call also to your attention the case of Chi. R. I. & Pac. Ry. Co. v. Davenport, 51 Iowa 451. That case involved the assessment of the bridge across the Mississippi River at Davenport, owned exclusively by the government of the United States although the Rock Island Railroad paid one-half of the cost of its construction and was secured in its use. In holding that the bridge was not taxable, either wholly or in part to the company, our Supreme Court said:

"It will be discovered that all property of the railway exclusively used for its operation, is taxable upon assessment made by the executive council. We have seen that whatever property plaintiff has in its right connected with the bridge is used for no other purpose than the operation of its railroad, and that this property can be taxed only in the manner pointed out by law."

Many other cases could be cited tending to sustain the conclusion reached herein but to do so would unduly extend this opinion. We have no hesitancy, however, in holding that the freight house in the posited case is used "exclusively" in the operation of "A" railroad as that term is used in Section 7060.

Answering your question No. 2, it is our opinion that the lots in question were not used exclusively in the operation of the railroad and therefore the same is subject to local assessment and taxation. The omitted property tax collector has the right to assess these lots as provided by Chapter 344, Code of 1939.

Answering your question No. 3, we reach the conclusion that A is not liable for the taxes on the improvements in question and we hereinafter give our reasons for so holding.

Section 6959 provides:

"Property shall be taxed each year, and personal property shall be listed and assessed each year in the name of the owner thereof on the first day of January * * * and the auditor shall thereupon enter the taxable value of such buildings on the tax list as a part of the real estate to be taxed; but if such buildings are erected by another than the owner of the real estate, they shall be listed and assessed to the owner as personal property, but buildings and fixtures erected on real estate held under a lease of longer than three years duration shall be assessed as real estate."

The lease in the posited case was for less than three years. Hence, it follows that the buildings in question were to be assessed to T company as personal property. While it is true that personal property taxes become a lien on real estate, this has no application to the instant case and for the reason that the land was not owned by the person to whom the personal property referred to in your question, was assessed. Personal property taxes become a lien on the real estate only of the person against whom the personal property taxes are assessed. Therefore, in the instant case, the land being owned by A company and the improvements owned by T company, it follows from what we have said that the taxes on the improvements would not become a lien on the lots belonging to A company. Nor was there any lien in favor of the taxing authorities on the buildings. Such lien could be acquired only by the issuance of a distress warrant and levy made thereunder. We have been advised that no such warrant was ever issued. Hence, we reach the conclusion that even though the improvements may be owned by A company, there is no way whereby the delinquent taxes on such improvements may be enforced against said company.

MINORS: AID TO DEPENDENT CHILDREN: RESIDENCE REQUIREMENTS. Where a girl resided with her family in their home when the parents and daughter left home and the State with intentions of returning to the State and did so return, the absence was temporary and the daughter is eligible for aid under the Aid to Dependent Childrens' Act.

December 23, 1943. *Mr. H. C. Beard, Chairman, State Board of Social welfare, State of Iowa.* I wish to acknowledge receipt of your let-

ter of December 21 wherein you request an opinion upon the following facts, to wit:

"The family in question consists of husband, wife and daughter, aged 10. Prior to the matters hereinafter described the family owned a home and lived in Des Moines, Polk County, Iowa, for some time. The husband enlisted in the navy and was called to active duty January 12, 1942. He was stationed in St. Louis, Mo., and his wife and daughter joined him in May, 1942. In September, 1942, he suffered a heart attack and later was transferred to the naval hospital at Great Lakes, Ill. He was there released from active duty on April 9, 1943. The family returned to their home in Des Moines in May, 1943. Application has been made to receive the benefits under the recent Aid to Dependent Children's Act.

"Question: Does the daughter meet the residence requirement in order to be eligible for aid under this act."

In answer thereto you are advised as follows:

Section 2, Chapter 130, Acts of the 50th General Assembly, provides in part as follows:

"Sec. 2. Eligibility for aid to dependent children. Assistance shall be granted under this act to any needy dependent child who: * * * 2. Has resided in the state for one year immediately preceding the application for such assistance; or was born within the state within one year immediately preceding the application, if the mother has resided in the state for one year immediately preceding the birth of said child, without regard to the residence of the person or persons with whom said child is living."

The real question, therefore is:

"Has this child resided in the state of Iowa for one year immediately preceding the application, under the above facts."

Webster defines the word "reside" as meaning "to dwell permanently or continuously; to have one's residence or domicile."

54 C. J. 704 states that the term "resided" is interchangeable or synonymous with "residence."

In Hinds vs. Hinds, 1 Iowa 35, the court had up for consideration the question as to whether the plaintiff was, and had been a resident of the state for sufficient length of time to entitle her to obtain a divorce. The court in a very able opinion, which has been many time quoted, held that before the applicant for a divorce can claim to be within the jurisdiction of our courts, he must have a fixed habitation with no present intention of removing therefrom; that this means a legal residence and not an actual residence only; that it means such a residence as that when a man leaves it temporarily or on business, he has an intention of returning to, and which, when he has returned, becomes, and is de facto and de jure, his domicile, his residence. That the term "residence" as there used had reference to the fact that the citizen or person has a place that, to use an expressive word, is called "home", with no present intention of removing therefrom. Not that the person is to remain continuously there in order to retain his residence or domicile, and if absent for a long or short time with the intent to return the domicile still continues.

In the case of the United States v. Shanahan 232 Federal 169, 172, it was held that:

"The requirement of the naturalization laws that the applicant shall have 'resided continuously' in the United States for the prescribed time does not require his unbroken physical presence during that time, but

only that he maintain a bona fide residence and domicile here, and is a question of fact, into which intention enters as a controlling element."

Applying the above law to the case at bar, the facts show that the girl and her family resided in their home at Des Moines, Polk County, Iowa, for some time prior to January 12, 1942; that this was her home and her residence. When the family left this home, it intended to return and as soon as the father was released from the hospital at Great Lakes, Ill., did return. Therefore, such absence was only temporary and not with the intent or expectation of finding or making a new home at some other place. This did not affect their legal residence in Des Moines.

It is, therefore, our judgment that the daughter is eligible for aid under the Aid to Dependent Children's Act.

MOTOR VEHICLES: REGISTRATION DELINQUENCY. For the period of time from December 1 to January 31 inclusive, the registration fee is not delinquent and may be paid at any time during the two months without penalty.

December 23, 1943. *Mr. R. B. Laird, Acting Commissioner of Department of Public Safety, Building:* We have your letter requesting the ruling of this department as to the renewal registration of motor vehicles in 1944 which have been registered in 1943.

There appears to be some confusion as to the exact situation with reference to this matter and we believe it is desirable that this matter be clarified as much as it is possible to do so. With this in mind we have given the subject the most careful consideration.

The requirement for registration is for vehicles driven or moved upon the highway. Code sections 5001.01 and 5001.02. And the registration of a motor vehicle absolves it from the payment of all taxes to which motor vehicles might be subject. Section 5008.26. Under these provisions if a vehicle is not operated on the highway during the calendar year it is not subject to registration but is subject to the general property tax.

It is the ruling of this department that if a motor vehicle has been registered during the year 1943 a renewal registration for the year 1944 cannot be had without paying the full annual registration fee for the year 1944, regardless of when it is registered during the year 1944.

Section 5001.01 provides a criminal penalty for the operation of a motor vehicle upon the highways which is not registered, or for which the appropriate fee has not been paid when and as required. Section 5009.02 provides for a penalty beginning February 1 of each year on unpaid motor vehicle registration fees. Section 5001.24 provides that applications for renewal of registration shall be made on and after December 1 of the year for which it is registered. For the period from December 1 to January 31 inclusive, the registration fee is not delinquent, and it may be paid at any time during those two months. It follows that there can be no violation of the provisions of section 5001.01 during the period from December 1 to January 31, both inclusive.

It is, therefore, the ruling of this department that the provisions of section 5001.01 are not effective so as to create any criminal liability

with reference to the operation of a motor vehicle on the highways and registered in 1943, prior to February 1, 1944. There has been no legislative changes with reference to these particular provisions of the statute since their last enactment in 1937, and this department has never ruled contrary to the foregoing.

PROBATION OFFICER: COMPENSATION: CHAPTER 129, ACTS OF 50TH G. A. Any amount of time during any day that is devoted to actual rendition of services as a probation officer constitutes a day's time and entitles the officer to the compensation as provided by law.

January 4, 1944. *Mr. Paul E. Hellwege, County Attorney, Boone, Iowa:* Answering your query regarding the validity of an order made by Judge Fry fixing the compensation of the probation officer of Boone County at five dollars per day for services actually rendered and particularly what under that order constitutes a day's service, we advise: The question involves the interpretation of Chapter 129, Acts of the 50th General Assembly, fixing the compensation of probation officers. The statute is this:

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

Authorities support the view, which we entertain, that any amount of time during any day that is devoted to the actual rendition of services as probation officer constitutes a day's time and for which he is entitled to compensation at five dollars for the day. In *Smith vs. County of Jefferson*, 13 Pacific 917, where a superintendent of schools was compensated "for the time necessarily spent in the discharge of his duty he shall receive five dollars per day", the Court said, in answering the question as to what length of time will constitute a day's service, this:

"We answer, the law does not recognize fractions of days; when it provides a per diem compensation for the time necessarily devoted to the duties of an office, the officer is entitled to this daily compensation for each day on which it becomes necessary for him to perform any substantial official service, if he does perform the same, regardless of the time occupied in its performance."

In *State ex rel. Greb v. Hurn, Judge*, 172 Pacific 1147, the statute provided compensation for court reporters in these words: "each official reporter so appointed shall be paid a compensation at the rate of $10 per diem for every day he is actually in attendance upon said court pursuant to the direction of the court". The Court in answering the question if the official reporter is only in attendance a portion of the day should the per diem fixed by the statute be split or pro rated, said this:

"* * * In this state there is no statute which fixes the length of time that the court shall be in session each day. The session of the court may consist of any number of hours, within the limit of 24, between two successive midnights. In Smith v. Board of County Commissioners of Jef-

ferson Co., 10 Colo. 17, 13 Pac. 917, the Supreme Court of Colorado had before it a statute which provided for the compensation of the county superintendent of schools as follows:

" 'For the time necessarily spent in the discharge of his duty he shall receive five dollars per day. * * *'

"The question there was: 'Under this statute, what would constitute a day's service for the superintendent?' Answering this question it was said:

" 'We answer, the law does not recognize fractions of days; and, when it provides a per diem compensation for the time necessarily devoted to the duties of an office, the officer is entitled to this daily compensation for each day on which it becomes necessary for him to perform any substantial official service, if he does perform the same, regardless of the time occupied in its performance.'

"In White v. Dallas County, 87 Iowa, 563, 54 N. W. 368, the Supreme Court of the state of Iowa construed a statute which fixed the compensation of commissioners of insanity 'at the rate of three dollars per day, each, for all the time actually employed in the duties of their office.' It was there held that the commissioners, when employed in the duties of their office on a given day, were each entitled to $3 per diem fixed by the statute, regardless of the number of hours of such employment on a particular day. See, also, Board of Com'rs of McIntosh County v. Whitaker (Okl.) 158 Pac. 1136, and Robinson v. Dunn, 77 Cal. 473, 19 Pac. 878, 11 Am. St. Rep. 297.

"Other authorities might be cited, but it is useless to multiply citations where all of the authorities, so far as we are advised, support the view that, where the statute fixes an officer's compensation at a certain sum per day, such officer, performing any substantial service on a particular day, has a right to the per diem for that day.

"In the present case we think that under the statute the official court reporter is entitled to the per diem named in the statute for every day that he is directed by the presiding judge to be in attendance upon the court, and he is in fact in attendance, regardless of the period of time which such attendance for a particular day may cover. In fixing salaries and fees for the performance of public services at so much per day the law does not consider fractions of such day."

And the case of *White v. Dallas Co.*, 87 Iowa 563, previously referred to herein, reasons as follows:

"Ordinarily a 'day' is the space of time which elapses while the earth makes a complete revolution on its axis. Is the term used in that sense, or does it mean an artificial day, that is, to denote the time between the rising and the setting of the sun? Abbott's Law Dict.; Black's Law Dict. Or shall it be construed to mean a certain number of hours between sunrise and sunset, as eight hours or ten hours, or any definite number of hours less than twenty-four? Our statute does not, in terms, say how many hours shall constitute a day, as applied to the use of the word generally. In a few instances, and for certain specific purposes, the statute has defined eight hours as constituting a day. But we have no general law determining what number of hours shall constitute a day's labor. It is doubtless the general rule, and we have so held, that in the legal compulation of time the law will not take notice of fractions of a day, in the absence of a statute expressly providing therefor. True, there are exceptions to this rule, as where the enforcement would lead to manifest injury and wrong, in which case it has often been held that the truth in fact and point of time may be pleaded and proved. In re Richardson, 2 Story, 571; Ferris v. Ward, 9 Ill. 499; Murfree's Heirs v. Carmack, 4 Yerg. 270; Louisville v. Savings Bank, 104 U. S. 469; Neale v. Utz, 75 Va. 480. And it is said that, as the common law does not define what shall be regarded as a day's work, the parties are left 'to such regulations in that respect as are fixed by the custom of the trade or

business to which the contract relates, if there is any, or to be settled, as a matter of fact, as to what is in fact reasonable in a given case, in view of the business, the price paid, and the necessities of the occupation.' Wood on Master and Servant, section 86; Luske v. Hotchkiss, 37 Conn. 219'."

We conclude and it is our opinion that any amount of time during any day that is devoted to the actual rendition of services as a probation officer constitutes a day's time and entitles the officer to the compensation as provided by law.

WOVEN WIRE FENCING: GENERAL HARDWARE: SEC. 6943: Woven wire fencing is not included in the phrase "general hardware."

January 5, 1944. *State Tax Commission, Des Moines Building, Des Moines, Iowa:* This is in answer to your communication of recent date wherein you ask that I obtain an Attorney General's opinion with reference to the construction of a certain provision of Chapter 329.5 of the 1939 Code (Chain Store Tax Act).

Section 6943.128 provides:

"There are specifically exempted from the provisions of the chapter (Chap. 329.5) and from the computation of the tax imposed by it the following:

1. * * *
2. * * *
3. Persons selling at retail one or more of the following products: coal, ice, lumber, grain, feed, agricultural seeds as defined in Section Three Thousand, One hundred and Twenty-seven (3127), Code of 1939, fertilizer, twine, building materials (not including builders and general hardware, glass and paints) if the total retail sales of any such person or persons of such products within the state shall, during such taxable year, exceed ninety-five per cent of the total retail sales of all sources within the state of any such person or persons.
4. * * *
5. * * *

The specific question is whether woven wire fencing is included in the phrase "general hardware" as the same is used in subsection 3 above set out. We are of the opinion that woven wire fencing is not included in the phrase "general hardware" as the same is used in said subsection, and we hereinafter give our reasons for so holding.

"Hardware" is defined by Webster's New International Dictionary as "ware made of metal, as fittings, steel cutlery, tools, parts of machines and appliances, metal building equipment, utensils, etc."

The word "ware" is defined by the same dictionary as "articles of merchandise; the sum of articles of a particular kind or class; style or class of manufacturers; goods; commodities; merchandise;—orig. a collective sing. now usually in the plural, exc. in composition (as, hardware, tinware, etc.)"

The word "general" is defined by this work as "pertaining to, affecting or applicable to many or the greatest number of cases or questions; prevalent, usual, extensive."

The above definitions, we think, tend to support the conclusion herein reached. However, there is another and perhaps more compelling rea-

son for the construction which we have placed upon the phrase in question. We refer to where woven wire may be most generally obtained. It is a matter of common knowledge and therefore one of which we must take judicial notice that woven wire may be obtained from practically all, if not all, lumber dealers in the state, whereas many hardware stores, because of the bulk of this commodity, are not equipped to deal in woven wire in any considerable quantity.

It must be presumed, of course, that the lawmakers in enacting Section 6943.128, were cognizant of this fact and gave consideration thereto when employing the phrase "general hardware" in subsection 3.

Finally, we say that as we interpret this statute the term "general hardware" refers to that class of merchandise which hardware dealers generally, irrespective of the size of the store, customarily offer for sale to the public. When this test is applied, we think it cannot be logically said that woven wire fencing is "general hardware."

BANK VICE-PRESIDENTS: BOARD OF DIRECTORS: SEC. 9169: This provision of code requires at least one vice-president of bank to be a member of board of directors but does not prohibit the board from electing or appointing other officers with that title.

January 6, 1944. *Mr. Ralph Bunce, Deputy Superintendent of Banking, Des Moines, Iowa:* I have examined section 9169 of the Code as to whether it prevents a bank from having a vice-president who is not a member of the board of directors provided it does have one or more vice-presidents who are members of the board of directors.

On May 10, 1939, an opinion was rendered by this department in effect holding that under this statute all vice-presidents would have to be members of the board of directors.

After giving further consideration to the question we have reached the conclusion that the purport of this provision of the code was to require at least one vice-president to be a manner of the board of directors but that the statute does not prohibit the board of directors from electing or appointing other officers with that title. The opinion of May 10, 1939 is accordingly modified to this extent.

FARM-TO-MARKET ROAD FUND: BRIDGES: EXPENDITURES: SEC. 4669, 4670, 4670.1. Notwithstanding allotment of said fund is made to various counties, expenditure thereof is made under direction of State Highway Commission, the Farm-to-Market road fund remains a State Fund and warrants are drawn on said fund by State Highway Commission and no "appropriation" from such fund is made by the county board.

January 5, 1944. *Iowa State Highway Commission, Ames, Iowa:* This will acknowledge receipt of your request for an opinion as to whether or not the provisions of Sections 4669-4670.1, inclusive, Code of 1939, apply to proposed expenditures for bridges on Farm-to-Market projects paid for out of funds allotted to the counties from the Farm-to-Market road fund.

Sections 4669, 4670 and 4670.1 of the Code provide as follows:

"4669. INTRACOUNTY BRIDGE. The board of supervisors may, without authorization from the voters, appropriate, for the substructure, superstructure, and approaches of any one bridge within the county, a sum not exceeding fifty thousand dollars."

"4670. INTERCOUNTY AND STATE BRIDGE. The board of supervisors of any county may, without authorization from the voters, appropriate, for the substructure, superstructure, and approaches of any one bridge on a road between such county and another county of this state or on a road between such county and another state, a sum not exceeding twenty-five thousand dollars."

"4670.1. ELECTION REQUIRED. No appropriation for a bridge in excess of the authorization contained in sections 4669 and 4670 shall be made until the question of making such appropriation is first submitted to the electors. Such submission shall be made as provided in chapter 265."

The statutes quoted above remain unchanged since prior to enactment of the Farm-to-Market road law—Chapter 117 of the 48th G. A.,—and place a limitation only on the amounts which may be "appropriated" from county funds by the local board for bridge construction purposes without a vote of the electors.

Funds expendable on Farm-to-Market projects are limited to funds "allotted" to the counties from the Farm-to-Market road fund, and the "appropriation" therefor is made by the legislature. (Section 4686.04) Approval of projects, allotment of the fund to the counties, and expenditure thereof, are under the direction and control of the State Highway Commission. Notwithstanding allotment of said fund is made to the various counties, and although the county initiates Farm-to-Market projects with the approval of the State Highway Commission, the Farm-to-Market road fund nevertheless remains a State Fund, contracts are advertised and let by the State Highway Commission and warrants therefor are drawn on said fund by said Commission and no "appropriation" from such fund is made by the county board.

In the case of Conrad vs. Shearer, 197 Ia. 1078, 198 N. W. 633, mandamus was sought to compel the county to pay for primary road right of way acquired by the county, payment having been refused by the County Treasurer, for the reason that the aggregate expenditures therefor exceeded the $10,000 limitation imposed on the board, without a vote of the electors, in the purchase of real estate for county purposes (Sec. 423, Code of 1897, as amended by Chap. 332 of the 37th G. A., and Chap. 73 of the 38 G. A., now Sec. 5261, Code of 1939). In concluding that the limitation did not apply to such expenditures the court used this significant language.

"It is clear that the limitation in question must find application to a county purpose as such, and the statute must be construed to apply only to the specific limitations therein contained, and may not be extended by judicial construction beyond the clear legislative intent. The system of improvement by primary roads is not strictly limited to a purpose exercised by the county as a political entity, nor does the instant purpose fall within the classification as defined in section 423. The facts do not involve the issuance of bonds or the question of hard surfacing of roads within the county. A "county purpose" is one exercised by the county acting as a municipal corporation. It results in a use or control through

the county by its lawfully constituted agents such as the erection of a courthouse or county home, or other project sui generis. Our primary road system is essentially a state system. See chapter 237, Acts 38th G. A., as amended by chapter 84, Acts 40th G. A. In order that it may be carried on most advantageously to the state, improvements are made under plans approved by the state highway commission."

A substantial part of the Farm-to-Market road fund is composed of funds contributed by the Federal Government; the balance is raised from other sources than local taxation. Expenditure of county funds "appropriated" by the county, issuance of bonds, or a local tax levy, are not involved in the proposed expenditures for construction of bridges as Farm-to-Market projects and we therefore, conclude that the limitation provided by the sections first above quoted have no application to such proposed expenditures for bridge construction from the Farm-to-Market road fund.

TAX SALE: DISTRIBUTION: CERTIFICATE: SECTIONS 7255.1 AND 10260.4, 1939 CODE OF IOWA. Method of Distribution of proceeds of money received from Real Estate by the County Under Section 10260.4, 1939 Code of Iowa, directed in our opinion of July 30, 1940, is sound and same hereby confirmed.

January 11, 1944. *Mr. Paul E. Hellwege, County Attorney, Boone, Iowa:* This will acknowledge receipt of yours of the 17th ult., in relation to the interpretation of Section 10260.4, 1939 Code of Iowa, respecting the distribution of proceeds from the sale of property acquired at tax sale.

Your letter and the theories you have advanced have had our careful consideration. However, we disagree with your basic contention, to-wit: "That the taxes recited in the tax sale certificate are satisfied by reason of the County bidding the full amount and receiving the certificate." This disagreement and contrary view results for two reasons, first, the statute itself, Section 7255.1, does not appear to us to contemplate any such interpretation. It provides, "No money shall be paid by the county or other tax-levying and tax-certifying body for said purchase, but each of the tax-levying and tax-certifying bodies having any interest in said general taxes for which said real estate is sold shall be charged with the full amount of all the said delinquent general taxes due said levying and tax-certifying bodies, as its just share of the purchase price." In our view it is fairly inferable, if not plainly evident, that the statute does not contemplate a satisfaction of the tax by the purchase by the County.

Our second reason for the contrary conclusion is the authority and reason exhibited in the case of *Town of Iron River vs. Bayfield County*, 82 N. W. 559, 561, there under a mandatory statute, comparable to our own, addressing itself to the question of whether the purchase by the county is a collection or a satisfaction of the tax, the court said:

"The presumption, at its utmost, is that official duties have been performed; that lands have been offered for sale, and such as were not purchased and paid for by individuals have been, by statutory command, purchased by the county. We cannot presume how much have been treated in either manner. Unless, as appellant urges, the latter act is a collection, there is, therefore, no presumption that real estate taxes have been collected.

"In construing the various provisions of title 13, Rev. St. ('Taxation'), it must be continually borne in mind that the whole general purpose is the collection of revenue for the several sub-divisions of the government, —state, county, municipal, and school district. The formal acquisition of any lien or title in accordance with those provisions, whether by any municipal corporation or county or by any public officer, is primarily to continue or enforce the original right of the government against property, to the end that it may secure therefrom ultimately the money which such property or its owner ought to contribute towards governmental expenses, for with nothing but money can those expenses be paid. Such money, when received, by whichever of the collecting agencies, is then apportioned among the various governmental subdivisions according to their original rights. In the enforcement of such liens it may be unavoidable—it is always undesirable—that actual title to property should be taken. The purpose of the law, nevertheless, is collection of money, and not acquisition of property; and clear language is necessary to justify the inference of a legislative purpose that any step is to transpose the public body or officer from the position of a collecting agent into a proprietary, so as to substitute for the duty to account merely for the money ultimately received a duty to pay the ostensible price. In the light of such general purpose, it cannot be doubted that the purchase of lands at tax sale, enjoined upon the county treasurer by section 1138, 1d., is merely a step towards collection, and is not collection. Such view is emphasized by the fact that the county's control over the certificates is not that of an absolute owner. It cannot hold them to speculate, as could an individual, but must transfer them to any purchaser willing to pay the amount of the taxes which they represent. Section 1192, 1d. It has no option, but must, unlike an individual, purchase the property at all subsequent tax sales thereof.

"Other considerations readily suggest themselves, to render highly improbable a legislative purpose that, when the taxpayers of the several towns in a county neglect to pay their taxes, the county must supply the money, prominent among which is the practical impossibility of its doing so. The county has no means of obtaining money except from those very taxpayers. Another consideration was suggested in Town of Marinette v. Board of Sup'rs of Oconto Co., 47 Wis. 216, 225, 2 N. W. 319, in the following words: 'If the town treasurers do not collect money and town orders enough to pay the state and town taxes, the town will have a claim for the balance against the county when the same is collected under the provisions of section 1114; and, if they cannot be collected by the county, there would seem to be no injustice in saying that the loss should fall equally on the town and county, instead of on the county alone.' Surely the burden on counties of financiering is hard enough, which requires them to pay their own expenses out of proceeds of the bad debts owing the towns, without requiring that they supply money to purchase still other of such bad debts.

"So far as this court has approached the question, its utterances are opposed to the idea that the taking of tax certificates at command of the statutes is a collection of the tax. Finney v. City of Oshkosh, 18 Wis. 209, 211; Fletcher v. City of Oshkosh, 1d. 233; Jenks v. City of Racine, 50 Wis. 318, 6 N. W. 818; Hoyt v. Fass, 64 Wis. 273, 277, 25 N. W. 46; State v. Hobe (Wis.) 82 N. W. 336. The reasoning in Jenks vs. City of Racine seems entirely applicable, and well-night conclusive of the question now under consideration. The charter controlling the rights of the parties there provided for payment to the holder of a special assessment certificate 'after the amount thereof shall have been received into the city treasury.' The holding was that a taking by the city of tax certificates covering the amount of the assessment certificates was not a receiving into the treasury of that amount, in reaching which conclusion much stress was laid on the fact that taking the tax certificates was compulsory upon the city, which is equally true of the county under section 1114."

In view of the foregoing we are of the opinion that the method of distribution of proceeds of money received from real estate by the County under Section 10260.4, 1939 Code of Iowa, directed in our opinion of July 30, 1940, is sound and we hereby confirm the same.

TAX SALE: TAX CERTIFICATE: SECTION 7271, 1939 CODE OF IOWA: CHAPTER 222, ACTS OF 50TH GENERAL ASSEMBLY. Provisions of Chapter 222, Acts of 50th General Assembly are not retroactive.

January 11, 1944. *Mr. John B. Moon, County Attorney, Ottumwa, Iowa:* This will acknowledge receipt of yours of the 6th ult., asking for an opinion whether Chapter 222, Acts of the 50th General Assembly, amending Section 7271, 1939 Code of Iowa, is retroactive.

Section 7271, 1939 Code of Iowa, is this:

7271. FAILURE TO OBTAIN DEED—CANCELLATION OF SALE. After eight years have elapsed from the time of any tax sale, and no action has been taken by the holder of a certificate to obtain a deed, it shall be the duty of the county auditor and county treasurer to cancel such sales from their tax sale index and tax sale register.

Chapter 222, Acts of the 50th General Assembly, exhibits this amendment:

SECTION 1. Amend section seven thousand two hundred seventy-one (7271), Code, 1939, by striking the word "eight" in line one and substituting in lieu thereof the word "ten".

We are of the opinion that the amending Act is not retroactive. Such view is sustained, first, by the following rule of statutory construction, there being no express provision in the statute making the same retroactive. In the early case of *Bartruff v. Remey*, 15 Iowa 257, 258, it is stated:

"The object of this proceeding is to obtain a judicial construction of the Revenue Statute of 1862, above referred to, and to determine whether the same is retrospective so as to bring taxes delinquent prior to its enactments within its penalties.

"We remark first, that there is a class of cases or objects requiring legislative relief or assistance, in which it is not only competent, but where from considerations of a controlling public necessity it would seem to be the dictate of wisdom that the law-making body should give to their enactments a retrospective operation. Aside from this class of cases, within which the statute in question does not fall, the general tendency of the judicial mind has been, and that too with great steadiness of purpose both in England and this country, to hold that unless the retrospective intention of the Legislature is clearly expressed upon the face of the enactment, it shall be deemed to commence in futuro. Now there is nothing in the Revenue Act approved April 9th, 1862, from which it can be reasonably inferred that the General Assembly meant it to operate retrospectively, and we are not at liberty under the principle just stated to give it that construction. The treasurer, therefore, of Des Moines county, is not authorized to enforce the penalties of this statute against taxpayers who became delinquent anterior to the time of its taking effect as a law."

In *State v. Iowa Telephone Co.*, 175 Iowa 607, 623 it is stated:

"Another well-settled canon of construction is that statutes should be construed prospectively, and not retrospectively; and this is true although there be no constitutional impedient. State v. Hays, 52 Mo. 578; Amith v. Humphrey, 20 Mich. 398; Furney v. Ackerman, 21 Wis. 268; Forsyth v. Ripley, 2 G. Greene 181; City of Davenport v. D. & St. P. R. Co., 37 Iowa 624; Kennedy v. Des Moines, 84 Iowa 187; Farmers Co. v. Iowa State Ins. Co., 112 Iowa 608; Galusha v. Wendt, 114 Iowa 597; Davis v. O'Ferrall, 4 G. Greene 168; Rosier v. Hale, 10 Iowa 470; Bartruff v. Remey, 15 Iowa 257; Purezell v. Smidt, 21 Iowa 540; Payne v. Chicago, R. I. & P. R. Co., 44 Iowa 236.

"In the Davenport case, supra, it is said:

" 'It is also a well-established rule of the courts to construe all statutes as having only a prospective operation, unless the legislature expressly declare, or otherwise show a clear intent that it shall have a retroactive effect.'

"And in the Galusha case, it is said:

" 'There can be no controversy about the proposition that the court will construe a statute as prospective only, in the absence of language indicating an intention that it shall be retrospective.'

"In Cameron v. United States, 231 U. S. 710, it is said:

" 'A retrospective operation of statutes is not to be given except in clear cases, unequivocally evidencing the legislative intent to that effect. Union Pacific R. Co. v. Laramie Stock Yards Co., 231 U. S. 190, 199, and previous cases . . . Summers v. United States, 231 U. S. 92. In the absence of a clearly expressed legislative intent to the contrary, the court will presume that the lawmaking power is acting for the future, and does not intend to impair obligations incurred or rights relied upon in the past conduct of men when other legislation was in force. White v. United States, 191 U. S. 545, 552.'

"Turning again to Sections 775 and 776 of the Code of 1897, and considering the language used, in the light of these rules, it is apparent, we think, that the legislature did not intend to, nor did it in fact, forfeit the defendant's grant, or franchise, acquired under Section 1324 of the Code of 1873, as amended."

In *Azeltine v. Lutterman*, 218 Iowa 675, 685, where the rule is reaffirmed in the following words:

"This ruling was followed and re-announced in the case of Thomas v. Disbrow, 208 Iowa, 873, 224 N. W. 36, 37, in which we had before us the so-called 'Reckless Driver Statute.' In that case the trial court instructed the jury that the appellant's right of recovery must be under the amendment or amended statute. The amendment in question in that case became effective after the accident occurred and while the action for damages was pending, the same situation as in the case at bar. We reversed a judgment in that case by reason of such instruction of the court, and speaking through Justice Faville, we said:

" 'The question for our determination is whether or not the statute in question, which was adopted by the legislature after the injury and while the action was pending, is applicable to the instant case. Was the statute retrospective or prospective? It is a general rule of construction that statutes are to be construed as having a prospective operation only unless the purpose and intention of the legislature to give them a retrospective effect is clearly expressed in the act, or necessarily implied therefrom.'

"Citing Bartruff v. Remey, 15 Iowa 257; Knoulton v. Redenbaugh, 40 Iowa 114; State ex rel. v. Telephone Company, 175 Iowa 607, 154 N. W. 678, Ann. Cas. 1917E 539; Foster & Son v. Bellows, 204 Iowa 1052, 216 N. W. 956."

See 59 C. J. 1159, et seq. entitled "Statutes".

Second, it is sustained by these rules of tax sales: In *61 C. J. paragraph 1689*, the rule is stated: "The relative rights of the parties, having become fixed and vested at the time of the tax sale, cannot be affected by subsequent legislation", having the support of numerous authorities from different jurisdictions, including the cases of Myers vs. Copeland, 20 Iowa 22; Adams v. Beale, 19 Iowa 61. In *Fitzgerald v. Sioux City*, 125 Iowa 396, where plaintiff sought to quiet title to certain lots in Sioux City under tax deeds, to the proposition here asserted, the court said:

"Defendant's contention that plaintiff's tax deeds do not, on their face, cover more than State and county taxes, is without merit. This instrument follows the language of the statute, and its effect is to be found from the laws existing when the sale was made. These laws, it seems to us, relieved the property from the lien of all special taxes at that time delinquent which had been certified to the county auditor, and also of all delinquent taxes not carried forward as required by law."

In *61 C. J. paragraph 1799*, entitled "Taxation", the rule is stated: "Questions concerning the validity and effect of a tax sale as a transfer of title, or in so far as such sale affects the rights of the purchaser, are to be determined by the law in force at the time the sale was made, which law, indeed, constitutes a contract between the state and the purchaser, the terms of which cannot be impaired by subsequent legislation. Statutes affecting the title or rights of a tax-sale purchaser are not retroactive. The purchaser's rights, under the tax sale certificates, are to be determined specifically by the law in force at the time the certificate was acquired."

Third, nor is this within the class of statutes deemed remedial and when properly safe guarded they be retroactive in operation. In that aspect the case is like the case of *Logan v. Davis*, 190 Iowa 278, wherein a suit for recovery of rent for use and occupation of premises, and there appeared this statute, to-wit: Section 4198 of the Code of 1897, as follows: "The plaintiff cannot recover for the use and occupation of the premises for more than five years prior to the commencement of the action.", and there the court said:

"We are of opinion that Section 4198 is not to be dealt with as a statute of limitation. It is not found in the chapter that deals with such limitations, but in the one that deals with actions for the recovery of real property; no reference is made in this particular statute to any other statute provision; nor is any time of accrual or accrual itself mentioned. If what is involved here is a recovery 'for the used and occupation of the premises,' then it is flatly provided that recovery therefor cannot be for more than five years prior to the commencement of the action."

The distinction between a pure statute of limitation and a limitation attaching to a given right is set forth in 37 C. J., page 686, entitled "Limitations of Actions", as follows:

"A wide distinction exists between pure statutes of limitation and special statutory limitations qualifying a given right. In the latter instance time is made an essence of the right created and the limitation is an inherent part of the statute or agreement out of which the right in question arises, so that there is no right of action whatever independent of the limitation. A lapse of the statutory period operates, therefore, to extinguish the right altogether. To such limitations the rules of law governing pure statutes of limitation, applicable to all classes of

actions, have no application; they are to be determined by the law of the place under which the right of action arose or the contract was made, and are not to be treated as waived merely because they are not specially pleaded. They are not subject to the disabilities and excuses through which the effect of ordinary statutes of limitation may be avoided, nor, it seems, can they be evaded even by proof of fraud. Whether a particular limitation of time is to be regarded as a part of the general statute of limitations or as a qualification of a particular right must be determined from the language employed and from the connection in which it is used.

"Where time is of the essence of the right created, and the limitation is an inherent part of the statute or agreement under which the right in question arises, so that there is no right of action independent of the limitation, such special limitation extinguishes the right rather than affects the remedy."

For the foregoing reasons we are of the opinion that the amendment is not retroactive.

TAX SALE CERTIFICATE: COUNTY AUDITOR: COUNTY TREASURER: SEC. 7271, 1939 CODE: CHAPTER 222, ACTS OF 50TH GENERAL ASSEMBLY. Duty of County Auditor and County Treasurer to cancel tax sale under terms of Sec. 7271, when no action has been taken by holder of certificate to obtain deed, is limited to such action as appears of record in their respective offices.

January 13, 1944. *Mr. Hubert H. Schulz, County Attorney, Primghar, Iowa:* This will acknowledge receipt of yours of the 6th inst., reciting the following facts:

That your county treasurer on the 1st day of February, 1935, sold a tract of land for the real estate taxes for 1933, and on the same date tax sale certificate was issued to the purchaser; thereafter the purchaser went into possession of the premises and planted trees, etc.; in addition the purchaser and certificate holder paid the subsequent real estate taxes; the purchaser on December 2, 9, and 16, 1937, published notice of expiration of right of redemption, proof of this publication, however, was not filed with the County treasurer until June 26, 1943; at the time of such filing more than eight years had elapsed between the date of the sale and making of record the proof of publication.

Upon these facts you request an opinion, first, whether Section 7271, 1939 Code of Iowa, operates to cancel the tax sale; and second, whether Chapter 222, Acts of the 50th General Assembly, extending the time of cancellation of tax sale from eight years to ten years is retroactive.

In answer to your second question, we will advise that we have on January 11, 1944, rendered an opinion that Chapter 222, Acts of the 50th General Assembly, amending Section 7271, 1939 Code of Iowa, is not retroactive. For your information we are enclosing a copy of this opinion.

In answer to your first question, we are of the opinion that the facts set forth by you and recited herein are not actions within the contemplation of the statute, Section 7271. We take note of the case of *Ockendon vs. Barnes*, 43 Iowa 615, and opinions of the Attorney General of December 11, 1926, September 17, 1929, and September 4, 1935. We do not regard the case of Ockendon v. Barnes, 43 Iowa 615, as authority bearing upon the question. The statute, Section 7271, appears first in

the Code of 1897, long after the decision in the Ockendon case. That case determined only that the lapse of eleven years after deed could have been obtained constituted, as a matter of law, abandonmnt of the right to obtain the deed. We are disposed also to disagree with the conclusion of the opinions of December 11, 1926, and September 4, 1935, and are disposed, however, to confirm the conclusion of the opinion of September 17, 1929, in so far as it is applicable to the facts here under examination.

The statute, Section 7271, 1939 Code of Iowa, is as follows:

7271. FAILURE TO OBTAIN DEED—CANCELLATION OF SALE. After eight years have elapsed from the time of any tax sale, and no action has been taken by the holder of a certificate to obtain a deed, it shall be the duty of the county auditor and county treasurer to cancel such sales from their tax sale index and tax sale register.

You will note the phraseology that "no action has been taken by the holder of a certificate to obtain a deed." The duty imposed upon the county auditor and treasurer to cancel the sale is mandatory in event no such action is taken. The nature of the action taken will determine the toll of the statute. In our view the intent of the Legislature was to confine the duties of these offices under the statute to such action by the purchaser as appear upon their records. An obligation to examine the newspapers of the county at various and sundry times for the purpose of ascertaining whether the notice of expiration of time of redemption had been published, or to examine the tax books of the county treasurer to ascertain whether subsequent taxes had been paid and by whom, or to examine the premises for the purpose of seeing whether possession had been taken, presents practical burdensome difficulty. It seems quite apparent that such a duty imposed upon the county auditor and treasurer is not contemplated by the statute. *Holley v. Scott*, 148 N. W. 116, 123 Minn. 159, reasons likewise upon facts far less burdensome. There the county auditor by statute was required to prepare for the county treasurer a tax list of real property and to show upon the list opposite each description which shall be sold for taxes and from which redemption has not been made and which is subject to redemption the words "sold for taxes", and where any land has been sold for taxes and time for redemption has not expired to show upon the treasurer's receipt for said taxes the words "sold for taxes". The treasurer failed to stamp his receipt "sold for taxes", when, in fact, the land had been sold but the list furnished the treasurer by the auditor did not so recite it. In holding that the treasurer breached no statutory duty the court said:

"The tax list furnished by the auditor, with the certificate of the auditor as required by the statute, is the only authority the treasurer has to receive or collect taxes. R. L. 1905, No. 878. Nelson v. Becker, 63 Minn. 61, 65 N. W. 119. The treasurer does not keep books that show what land has been sold for taxes. The auditor does. It is urged that the treasurer has other means of information. It is true that he is required to attend the tax sale and "receive all moneys paid thereon.' R. L. 1905, No. 928. But he is required to keep no record of the lands sold, or of redemptions made, though he receives the moneys paid on redemption. It is also true that it might be possible for the treasurer to examine the books in the auditor's office each time a property owner paid his taxes.

But we fail to see any practical way in which the treasurer can acquire the information that a particular lot has been sold for taxes, and is subject to redemption, except from the list showing these facts that the law requires the auditor to furnish him annually. It is presumed that the auditor has done his duty. When the words 'sold for taxes' do not appear opposite a description on the list, it is presumed that the property has not been sold for taxes, or, if it has, that redemption has been made, or that the time for redemption has expired. We think the treasurer has the right to rely on this presumption. To hold otherwise would be to impose a burden on the treasurer that we do not think the law contemplates that he should bear."

In our view the duty of the county auditor and the county treasurer to cancel tax sales under the terms of Section 7271, when no action has been taken by the holder of the certificate to obtain a deed, is limited to such action as appears of record in their respective offices.

WOVEN WIRE FENCING: CHAIN STORE TAX: SEC. 6943.128: Dealers in products coal, ice, lumber, grain, feed, etc., may not include woven wire fencing in making up the 95% referred to in sub-section 3, and if the total sales of said products do not exceed 95%, exclusive of woven wire, such dealers become subject to the provisions of Iowa Chain Store Tax act.

January 13, 1944. *Iowa State Tax Commission, Des Moines Building, Des Moines, Iowa:* This will acknowledge receipt of your recent communication wherein you ask the opinion of this department relative to the following legal question.

Subsection 3 of Section 6943.128, of the Code of 1939, provides:

"There are specifically exempted from the provisions of the chapter (Chain Store Tax Act) and from the computation of the amount of tax imposed by it the following:

3. Persons selling at retail one or more of the following products: coal, ice, lumber, grain, feed, agricultural seeds, fertilizer, twine, building materials (not including builders and general hardware, glass, and paints) if the total retail sales of any such person or persons of such products within the state shall, during such taxable year, exceed ninety-five per cent of the total retail sales of all sources within the state of any such person or persons."

The specific question is as to whether woven wire fencing is included in any of the above enumerated products.

Our answer to this question is in the negative and we will hereinafter give our reasons for so holding. Manifestly, woven wire is not coal, nor ice, nor lumber, nor grain, nor feed, nor agricultural seeds, nor fertilizer, nor twine. The only claim that could be logically made is that it is included within the term "building materials" as that term is used in said subsection. We think, however, that it may not be logically said that woven wire fencing is "building material" as we construe the statute. The phrase "building materials" as therein used refers to a product which it is intended shall become a part of a building. It is a matter of common knowledge that woven wire fencing is not customarily used in the erection of a building. It might, perhaps, be occasionally used for the reinforcement of concrete or the building of corn cribs, and perhaps in the erection of other structures. However, such use is purely inci-

dental and certainly not the purpose for which it was intended. Thus we have no hesitancy in coming to the conclusion that woven wire fencing may not be properly classified as "building material."

It follows from what we have said that dealers in the products enumerated may not include woven wire fencing in making up the 95% referred to in said subsection, and that if the total retail sales of said products does not exceed 95%, exclusive of woven wire fencing sales, that such dealers become subject to the provisions of the Iowa Chain Store Tax Act.

CLAIMS: DOMESTIC ANIMAL FUND: SECTIONS 5130, 5124, 5452, 5453 AND 5454, 1939 CODE. Failure of claimant to have claim verified within ten days by affidavit of at least two disinterested persons not related to claimant is not mandatory or jurisdictional.

January 18, 1944. *Mr. John D. Moon, County Attorney, Ottumwa, Iowa:* This will acknowledge receipt of yours of the 13th inst., in which you ask for our opinion respecting the requirement of Section 5453, 1939 Code of Iowa, on claims against the domestic animal fund to be verified by affidavit of at least two disinterested persons not related to the claimant, and whether such provision is mandatory and jurisdictional.

Section 5130, 1939 Code of Iowa, confers upon the Board of Supervisors its powers, among which is subsection 5, which is as follows:

5130. GENERAL POWERS. The board of supervisors at any regular meeting shall have power:

* * *

5. To examine and settle all accounts of the receipts and expenditures of the county and to examine, settle, and allow all claims against the county, unless otherwise provided by law.

* * *

With respect to unliquidated claims generally, Section 5124, 1939 Code of Iowa, provides the manner in which all unliquidated claims shall be exhibited, and is as follows:

5124. UNLIQUIDATED CLAIMS. All unliquidated claims against counties and all claims for fees or compensation, except salaries fixed by statute, shall, before being audited or paid, be so itemized as to clearly show the basis of any such claim and whether for property sold or furnished the county, or for services rendered it, or upon some other account, and shall be duly verified by the affidavit of the claimant, filed with the county auditor for presentation to the board of supervisors; and no action shall be brought against any county upon any such claim until the same has been so filed and payment thereof refused or neglected.

Section 5452, 1939 Code of Iowa, is the specific statute providing the remedy for any person damaged by the killing or injury of any domestic animal or fowl by wolves, or by dogs not owned by said person, the terms of the statute being this:

5452. CLAIMS. Any person damaged by the killing or injury of any domestic animal or fowl by wolves, or by dogs not owned by said person, may, within ten days from the time he or his agent has knowledge of such killing or injury, file with the county auditor of the county in which such killing or injury occurred a claim for such damage.

Section 5453, 1939 Code of Iowa, prescribes the form in which the claim under Section 5452 shall be made, and is as follows:

5453. FORMS OF CLAIMS. Claims aforesaid shall state the amount of damages, a detailed statement of the facts attending the killing or injury and be verified by affidavit of at least two disinterested persons not related to claimant.

Section 5454, 1939 Code of Iowa, with respect to the allowance of the claims by the board, is this:

5454. ALLOWANCE OF CLAIMS. The board shall act on such claims within a reasonable time, and allow such part thereof as it may deem just. When a claim is allowed, the value of each animal or fowl killed or injured shall be entered of record.

The legal effect of these Sections, in our view, is this: Section 5130, subsection 5, confers upon the board the general grant of power to examine, settle and allow all claims against the county. However, Section 5124, with respect to unliquidated claims generally, regulates the form and the manner in which said claims shall be presented and provides specifically that the claims shall be duly verified by affidavit of the claimant, and no action shall be brought against any county on any such claim until the same has been so filed and payment thereof refused or neglected. Such presentation under that Section in the form prescribed is a condition precedent to an action against the county and is jurisdictional. *State ex rel Fletcher v. Naumann,* 213 Iowa 418. However, Section 5453, heretofor exhibited, regulating the form and manner in which claims under that Section shall be presented, contains no such condition to its allowance by the board. Section 5130, confers the power, Section 5453 exhibits the method of its exercise, that statute is regulatory and directory. We are of the view that the failure of a claimant to have his claim verified within the ten days prescribed for the filing of his claim by affidavit of at least two disinterested persons not related to the claimant is not mandatory or jurisdictional. Under a like statutory situation, as is exhibited by our statutes, the Supreme Court of Nebraska has held and adhered to a similar conclusion in *State ex rel Seth Thomas Clock Co. v. Commissioners of Cass County,* 83 N. W. 733. See also *Beadle v. Harmon,* 265 N. W. 18.

ARMED FORCES: LEAVE OF ABSENCE: MILITARY SERVICE: SECTION 467.25: STATE OFFICERS AND EMPLOYEES. When an officer or employee appointed for a term leaves for military service, he receives 30 days pay, and if he returns before term expires he is to be reinstated without loss of efficiency rating and status for balance of term only. The leave of absence expires with the term. Employees term expires with termination of time of office of his appointing officer.

January 26, 1944. *Iowa State Board of Control, Building:* In reply to your request for our opinion as to whether or not the term of an officer or employee in institutions under the Board of Control, is extended when the incumbent is or has been in the armed forces of the United States, I refer you to Section 467.25 of the 1939 Code of Iowa, which was amended in the 49th General Assembly, Chapter 73, so as to read as follows:

STATE AND MUNICIPAL OFFICERS AND EMPLOYEES NOT TO LOSE PAY WHILE ON DUTY. All officers and employees of the state, or a subdivision thereof, or a municipality therein, who are members of the national guard, organized reserves or any component part of the military, naval, or air forces or nurse corps of this state or nation, or who are or may be otherwise inducted into the military service of this state or of the United States, shall, when ordered by proper authority to active service, be entitled to a leave of absence from such civil employment for the period of such active service, without loss of status or efficiency rating, and without loss of pay during the first thirty days of such leave of absence.

The proper appointing authority may make a temporary appointment to fill any vacancy created by such leave of absence.

The object of the Legislature in the enactment of this law was to assure one who wished to enter the armed forces of our country, and who had regular employment with the state, subdivision or municipality of continuity of employment, as provided in the terms of their office or appointment, with no loss of status or efficiency rating due to his absence. This leave of absence could not extend beyond his term of office. Terms of most officers are provided by law and are definite. The vacancy ceases to exist when the term expires. This legislation being passed in peace time, no long leave of absence was contemplated. It is now clear that many officers' terms will expire before they return, but in order to extend their term, clear and definite legislation would be required.

When the term of an officer or employee expires, the incumbent retains no rights therein, unless specifically granted him by law.

Therefore, when an officer appointed for a term leaves for military service, as outlined in Section 467.25, and amendment thereto, he receives pay for the first thirty (30) days of his absence, and if he returns before his term expires, he is to be reinstated to his former position with the same efficiency rating and status for the balance of his term only. If he does not return before his term expires, the leave of absence expires with the term. Another appointment may be made for another definite term as by law provided, and former term cannot be extended to interfere with said appointment.

An employee's period of appointment expires with the termination of the term of office of his appointing officer, unless otherwise specifically provided by law.

CERTIFICATES OF DEPOSIT: PENSION MONEY: SECTION 6984: SECTION 11761: TAXATION: A certificate of deposit purchased with pension money is taxable as moneys and credits. Property purchased with pension money loses pension character and is not exempt from taxation. When tax is levied on certificate of deposit as moneys and credits no execution could be issued to collect said tax from the pension fund invested in certificate of deposit.

January 27, 1944. *Mr. M. L. Mason, County Attorney, Mason City, Iowa:* We wish to acknowledge your request for an opinion on the following question, to-wit:

Is pension money received from the Federal Government, and invested in certificates of deposit taxable as moneys and credits?

Section 6984 of the 1939 Code of Iowa is as follows:

"CREDITS" DEFINED. The term credit, as used in this chapter, includes every claim or demand due or to become due for money, labor, or other valuable thing, every annuity or sum of money receivable at stated periods, and all money or property of any kind secured by deed, title bond, mortgage, or otherwise; but pensions of the United States or any of them, or salaries, or payments expected for services to be rendered, are not included in the above term.

In *Beers v. Langenfeld, Treasurer*, 149 Iowa 581, we find the rule set out which must be followed in these matters.

The Court here says:

"It is the general rule that all property is subject to taxation, except such as has been specifically exempted therefrom by the Legislature."

In Chapter 330 of the 1939 Code of Iowa, we find said exemptions set out specifically in Section 6944. By careful examination of the listed exemptions we do not find certificates of deposit or other evidences of indebtedness purchased by pension funds included. The statutes of this State control as to what property is taxable and what property is exempt within its jurisdiction.

Unless certificates of deposit retain their status as pension, so as to be without the state's jurisdiction, they are taxable.

The United States Government exercises control over pensions as such. In order to determine what is meant by pensions or pension funds we must refer to Section 618 of Title 38, United States Code Annotated, which reads as follows:

BENEFITS EXEMPT FROM SEIZURES UNDER PROCESS AND TAXATION; NO DEDUCTIONS FOR INDEBTEDNESS TO UNITED STATES. No sum payable under this chapter to a veteran or his dependents, or to his estate, or to any beneficiary named under Subchapter V of this chapter, no adjusted-service certificate, and no proceeds of any loan made on such certificate shall be subject to attachment, levy, or seizure under any legal or equitable process, or to national or State taxation, and no deductions on account of any indebtedness of the veteran to the United States shall be made from the adjusted-service credit or from any amounts due under this chapter.

Under this section many cases are listed holding that said pension funds in order to come within this section must not be commingled with other funds or loaned out at interest. They further hold that when property is bought with pension money, such property loses pension character, and is not exempt from state taxation.

In our own courts, namely in *Smyth v. Hall*, 126 Iowa, 627, confirmed in *Bednar v. Carroll*, 138 Iowa 341, the Court held that interest and profits obtained from pension money was taxable. The Court did not pass on the question of whether or not said funds invested or loaned out were taxable. However, in Beers v. Langenfeld, supra, we find that the Court held that pension money invested in real estate did not escape taxation. It was further pointed out that the taxation statutes create a lien on the property which may be enforced against the property without judgment or execution. While our courts have not passed on the question of whether or not personal property purchased with pension

funds was taxable, we find in the case of *Martin v. Guilford County, 1931, N. C.* cited in 158 S. E. 847, the Court there made no difference between real and personal property. As a certificate of deposit must be considered personal property, as a loan to a bank, as an investment of the pensioner, and that the money provided by the United States Government has then changed its form, it no longer bears the exemption from taxation afforded pension funds by the Federal statute.

Therefore, we hold a certificate of deposit purchased with pension money is taxable as moneys and credits.

However, and again referring to Beers v. Langenfeld, supra, where the question of collection was disposed of in real property matters, and to Section 11761 of the 1939 Code of Iowa, we discover another problem regarding the collection of said tax when so assessed. Section 11761 of the 1939 Code of Iowa, provides as follows:

PENSION MONEY. All money received by any person, a resident of the state, as a pension from the United States government, whether the same shall be in the actual possession of such pensioner, or deposited, loaned, or invested by him, shall be exempt from execution, whether such pensioner shall be the head of a family or not.

From the reading of this section it appears clear that when a tax is levied upon a certificate of deposit as moneys and credits, no execution could be issued to collect said tax from the pension fund invested in a certificate of deposit.

STATE BOARD OF SOCIAL WELFARE: AID TO DEPENDENT CHILDREN: GUARDIAN: CHAP. 130, ACTS OF 50TH G. A. As County Board had nothing to do with appointment of guardian of property of children since his appointment was prior to application for assistance, assistance payments can and should be paid directly to mother and not to guardian.

February 4, 1944. *Mr. George O. Hurley, County Attorney, Harlan, Iowa:* I wish to acknowledge receipt of your letter of January 19 asking for an opinion based upon the following facts, to-wit:

A certain widow in Shelby County, Iowa, has two minor children within the ages prescribed by the Aid to Dependent Children's Act. They live with their mother in a home maintained by her. They inherited an interest in certain real estate from their grandfather's estate which brings in monthly income of $12.00 for each child. The children now have a guardian of their property who is their uncle and not a person with whom the children reside. The income is collected by the guardian and paid to them.

The Department of Social Welfare has set up certain eligibility requirements under the statute which require that the child must reside with its guardian in order to be eligible for aid under the statute. You feel that the reference to a guardian contained in the statute refers to a guardian of the person and not to a guardian of the property; that it would be unreasonable to require that the child must reside with the guardian of the property because in some cases, the guardian would be an institution such as a bank or person who is not related to the child.

Your question is: "Is said requirement of the State Department of Social Welfare correct?"

In answer thereto, you are advised as follows:

The Aid to Dependent Children's Act is known as Chapter 130, Acts of the 50th General Assembly. The pertinent portions of the sections in point are as follows:

"Sec. 5.
"* * * The County board may require as a condition of granting assistance, that a legal guardianship be established over any child or children and in such cases, the assistance payments shall be made to such guardian, when appointed, but no guardian shall be allowed to receive any assistance payments for any dependent child or children unless such guardian shall bear a relationship to the child or children embraced by paragraph 4, section 1 of this Act.
"* * *
Assistance, when granted, shall be paid monthly, to an adult person within the specified degrees of relationship and with whom the child is living, from the fund for aid to dependent children established by this Act, upon the order of the state department.
"Sec. 1.
"* * *
"4. A 'dependent child' means a needy child under the age of sixteen years, or under the age of eighteen years found to be regularly attending school, who has been deprived of parental support and care by reason of death, continued absence from home, or physical or mental incapacity or unfitness of either parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrothers, stepsisters, uncle or aunt, in a place of residence maintained by one or more of such relatives as his or their home."

It is our judgment that the quoted portions of Section 5, supra, only require the assistance payments to be paid to a guardian of the minor when the guardian has been appointed at the request of the county board of social welfare as a condition to granting assistance.

In your case, the guardian of the property had been appointed and qualified prior to the time that the application for assistance was made. The county board had nothing to do with such appointment and made no request for the appointment of a guardian as a condition of granting assistance. Therefore, the assistance payments can and should be paid directly to the mother and not to the guardian.

It would follow that the requirement of the State Department of Social Welfare which you have questioned should be modified to conform with this opinion.

CONTINUATION OF SPECIAL ASSESSMENT LIEN: TAX SALE. Where lands are sold for taxes, and special assessments are not included, lien continues when redemption is made by person who was owner at time of sale.

March 1, 1944. *Archie R. Nelson, County Attorney, Cherokee, Iowa:* This will acknowledge receipt of your letter of February 15th wherein you ask our opinion with reference to the following legal question:

"On May 24, 1939, to the then County Treasurer of Marshalltown, Iowa, you gave an opinion that, 'The amount due at the time of the sale included the special taxes, and redemption certificate should not have issued without the payment of delinquent special assessments'.
"The County Auditor of this county, without checking the law, allowed redemption following payment of only the general taxes, penalties, and

etc., without including the special assessment. I realize that was wrong but the question now is as to what steps should be taken. Has he the right to recall his action by tendering the person redeeming the amount paid him on the theory that his action was ultra vires and therefore void, or does he become personally liable under his bond for the amount of the unpaid special assessment?

"Another question, does the amount of the unpaid special assessment remain a lien upon the property, notwithstanding the fact that the auditor improperly allowed a proported redemption?"

It is our opinion that it is necessary only to answer the question continued in the third paragraph of your letter.

We think it is clear that where lands are sold for taxes, and special assessments are not included, that the special assessment lien continues against the premises when redemption is made by the person who was the record title owner at the time of the tax sale.

SCHOOL ELECTIONS: SALE OF PROPERTY: PERRY INDEPENDENT SCHOOL DISTRICT: Statutory authority to place the matter of sale of property before voters is a single and not a dual proposition.

March 4, 1944. *Mr. Robert Frush, County Attorney, Adel, Iowa:* We have at hand for opinion the letter of George H. Sackett of February 26, 1944, addressed to you.

It appears that it is the intention of the school board of Perry Independent School District of Perry, Iowa, to submit the following proposition to the voters at the coming school election, to-wit:

"Shall the Perry Independent School District of Perry, Iowa, sell the real estate owned by it, known as the Washington School Grounds, and described as the West One-Half of Block Fifty-three (W½ Block 53), otherwise described as Lots Seven to Twelve (7 to 12) inclusive in Block Fifty-three (53), of the original Town, now City of Perry, Dallas County, Iowa, for a cash consideration of Three Thousand Dollars ($3,000.00), and shall the proceeds of said sale be used for the improvement and betterment of the buildings and grounds of the Perry Independent School District of Perry, Iowa?"

The question for answer is whether the above proposition embraces two public measures, necessitating its separation into two propositions. The power under which the school district is submitting the proposition is Section 4217, sub-section 2, of the Code of Iowa, 1939, which provides as follows:

"4217. ENUMERATION. The voters at the regular election shall have power to:

* * *

"2. Direct the sale, lease, or other disposition of any schoolhouse or site or other property belonging to the corporation, and the application to be made of the proceeds thereof."

However, the manner in which the power shall be exercised in submitting to the voters, is defined by Section 766 of the Code of Iowa, 1939, which is as follows:

"766. DIFFERENT MEASURES ON SAME BALLOT. If more than one constitutional amendment or public measure is to be voted upon,

they shall be printed upon the same ballot, one below the other, with one inch space between the several constitutional amendments or public measures to be submitted."

In our view, the question whether the proposition submitted constitutes a single or dual proposition, is determined not only from the terms of the statute, but from the reason underlying its enactment. It is a fair inference that the Legislature intended to endow a school district with power to sell its capital assets, provided the voters to whom the proposition is submitted are advised of the purpose for which the proceeds of the sale of such assets shall be devoted. The property does not belong to the school district, nor to the directors or trustees thereof, but is owned by the public; and the public is entitled to know, when its property is sold by the school district, whose directors occupy a position of trust, what the money shall be used for. In that view, the statutory authority to place the matter of sale of property and disposition of the proceeds thereof before the voters is a single and not a dual proposition. While not a perfect parallel, there is support for this view in *Rock vs. Rinehart*, 88 Iowa 37.

FINAL REPORT OF FIDUCIARY UNDER SECTION 12781.1: ESTATES: TAXES. County Treasurer cannot certify that all taxes due or to become due have been paid if there are any personal taxes outstanding. Statute of limitations has no application to collection of taxes.

March 9, 1944. *Robert N. Johnson, Jr., County Attorney, Fort Madison, Iowa:* This will acknowledge receipt of your letter of the 2nd instant wherein you request an opinion from this department relative to the following legal question. The facts are these:

In a particular estate there are no personal taxes due except in the year 1937. The estate is about to be closed and the question is as to whether the County Treasurer, under Section 12781.1, can certify "that all personal taxes due and to become due the county in such estate matter have been fully paid and satisfied."

It is our opinion that the County Treasurer would have no legal authority to issue the certificate required by Section 12781.1 and for the reason that the 1937 taxes are manifestly due and unpaid. In this connection, we call to your attention that the statute of limitations does no apply to the collection of taxes. The Supreme Court of our state so held in the case of *Collins Oil Co. vs. Perrine*, 188 Iowa 295. The only prohibition with reference to the collection of taxes is the one that bars the collection of penalties and interest after four years. See Section 77194, Code of 1939.

BOARD OF TRUSTEES: CONSTRUCTION FUND: COUNTY PUBLIC HOSPITAL FUND: TAX LEVY FOR ERECTION AND EQUIPMENT OF HOSPITAL. Diversion of tax money acquired for the erection and equipment of hospital to self erected construction fund is illegal; fund arising from gifts and bequests cannot be used for any other purpose than stated in statute; transfer of the maintenance fund to self erected construction fund is also illegal; money for this purpose may not be disbursed legally by county treasurer from this questioned construction fund.

March 22, 1944. *Miss Martha Hoffman, County Attorney, Leo, Iowa:* We have yours of the 28th ult., with request for opinion of the validity of acts of the Board of Trustees of the Decatur County Hospital, recited as follows:

"That they have established a fund called a construction fund, to be used not only for construction, but for repairs and replacement of the equipment in the building on the grounds not covered by their yearly budget; that the fund is built up by bequests and the proceeds of the sale of used equipment, and by transfer from the maintenance fund."

The establishment of a county hospital and the powers of the statutory trustees of such hospital are defined in Chapter 269 of the Code of 1939. The Board of Trustees have such power, and only such power, as they have been endowed with under the provisions of this chapter. The funds at the disposal of said Board of Trustees arise, first, out of the operation of Section 5353, which is as follows:

TAX LEVY. If the hospital be established, the board of supervisors, at the time of levying ordinary taxes, shall levy a tax at the rate voted not to exceed one-half mill in any one year for the erection and equipment thereof, and also a tax not to exceed one mill for the improvement, maintenance, and replacements of the hospital, as certified by the board of hospital trustees; provided, however, in counties having a population of one hundred thirty-five thousand inhabitants or over, the levy for improvements and maintenance of the hospital shall not exceed two mills in any one year. The proceeds of such taxes shall constitute the county public hospital fund.

second, out of the provisions of sub-section 11 of Section 5359, which is as follows:

POWERS AND DUTIES. Said board of hospital trustees shall:
* * *

11. Accept property by gift, devise, bequest, or otherwise; and, if said board deems it advisable, may, at public sale, sell or exchange any property so accepted upon a concurring vote of a majority of all members of the board of hospital trustees, and apply the proceeds thereof, or property received in exchange therefor, to the purposes enumeratd in subsection 12 hereof or for equipment.

Funds arising out of Section 5353 are:

First: Those acquired by reason of the tax levy for the erection and equipment of the hospital.

Second: Those arising out of the tax levy for the improvement, maintenance and replacement of the hospital. These tax proceeds constitute the county public hospital fund.

The proceeds of gifts or bequests under the terms of Section 5359, subsection 11, may be devoted to two purposes only.

First: The retirement of bonds issued and outstanding in connection with purchase of the property of the hospital sold under the provisions of Section 5359, sub-section 11.

Second: For further permanent improvements as the Board of Trustees may determine.

The County Treasurer is made the custodian and disbursing officer of these funds. Section 5358 of the Code of 1939 provides as follows:

COUNTY TREASURER. The county treasurer shall receive and disburse all funds under the control of said board of trustees, the same to be paid out only upon warrants drawn by the county auditor by direction of the board of supervisors after the claim for which the same is drawn has been certified to be correct by the said board of trustees. He, thereafter is controlled by the provisions of Section 5165 of the 1939 Code, which is as follows:

FUNDS—SEPARATE ACCOUNT. The treasurer shall, for each term of his office, keep a separate account of the several taxes for state, county, school, highway, or other purposes, and of all other funds created by law, whether regular, temporary, or special, and no moneys in any such fund shall be paid out or used for any other purpose, except as specially authorized by law. The treasurer shall charge himself with the amount of the tax or other fund and credit himself with the amounts disbursed on each with the amount of delinquent taxes, when authorized to do so.

It seems clear to us upon well founded principles, that:

First: A diversion of the tax money acquired either for the erection and equipment of the hospital, or for its improvement, maintenance and replacement to a self erected construction fund is illegal.

Second: The fund arising out of bequests and gifts cannot be used for any other purpose than that stated in the statute, to-wit: The retirement of bonds issued for the purchase of property sold under the statute 5359, sub-section 11, or for further permanent improvement as the Board may determine, and a diversion thereof for repairs and replacement of equipment or construction not permanent is illegal.

Third: A transfer of any of the maintenance fund to a self erected construction fund for use in construction, either permanent or temporary, would likewise be an illegal diversion.

Fourth: The County treasurer could not legally disburse money from this questioned construction fund.

In view of the foregoing, we are of the opinion that the power exercised in establishing this fund is excessive, and without support in law.

CIGARETTES: GIFTS OF CIGARETTES: LICENSED CIGARETTE DEALERS: SAMPLE PACKAGES. Cigarettes cannot be made the subject of a gift by manufacturer's representatives in packages containing 20 cigarettes, and which packages are not marked sample, even though such cigarettes are purchased from a licensed Iowa distributor and bear the required Iowa revenue stamps.

March 29, 1944. *Iowa State Tax Commission, Des Moines Building, Des Moines, Iowa:* This will acknowledge receipt of your letter of the 17th instant wherein you ask the opinion of this department relative to the following legal question. For an understanding of the question, we set out the last two paragraphs of your letter.

"Is there any provision in the Code of Iowa prohibiting the giving away of cigarettes by Manufacturers' representatives in packages of 20 which are not marked sample, and which are purchased from a licensed Iowa distributor and bear the required Iowa revenue stamps?

"Will you kindly obtain an Attorney General's opinion on this legal question.

Yours very truly,
IOWA STATE TAX COMMISSION
By: H. A. Grantham, Chairman
Fred W. Nelson, Vice-Chairman
D. L. Murrow, Member."

It is our opinion that cigarettes cannot be made the subject of a gift by manufacturers' representatives in packages containing 20 cigarettes and which packages are not marked sample, notwithstanding the fact that such cigarettes are purchased from a licensed Iowa distributor and bear the required Iowa revenue stamps.

We base our opinion on Section 1556.34, Code of 1939, which reads as follows:

"The commission may, in its discretion, authorize a manufacturer to distribute in the state through his factory representative, free sample packages of cigarettes containing five cigarettes or less, when such individual packages bear a stamp equal to the tax herein imposed. Such packages shall bear the word 'Sample' in letters easily read. * * *"

The Supreme Court of our state has held that a statute directing the performance of certain things in a particular manner, by implication forbids every other manner of performance. See State for use of City of Estherville vs. Hanson, 210 Iowa 773; 231 NW 428.

ALTERATION OF STREAM OR WATERCOURSE: IMPROVEMENT OF PRIMARY ROAD SYSTEM: PRIMARY ROAD SYSTEM: STATE HIGHWAY COMMISSION: STREAMS: WATERCOURSES. The Commission may change or alter the course of a stream or watercourse, and acquire right of way necessary therefore, when the same is reasonably necessary and proper in the improvement of the primary road system.

March 29, 1944. *Iowa State Highway Commission, Ames, Iowa:* This will acknowledge receipt of your request for an opinion on your question stated in substance as follows:

Does the Highway Commission have authority to change or alter the course of a stream or watercourse where it deems it necessary in order to properly improve the primary road, and to acquire right of way therefor?

Section 4755.08, Code of 1939, provides in part as follows:

"4755.08. IMPROVEMENT OF PRIMARY SYSTEM. The state highway commission shall proceed with the improvement of the primary road system as rapidly as the funds become available therefor, until the entire mileage of the primary road system is graded, drained, bridged, and surfaced with gravel, pavement, or other surfacing approved by the commission as adequate for carrying the traffic thereon. * * * No road shall be surfaced until it has been brought to finished grade and drained. In proceeding with the improvement of primary roads hereunder, the highway commission shall give preference to grading and bridging projects. Such work shall be completed at the earliest practical date, and not more than thirty per cent of the primary road fund available for construction work in any year may be expended for paving until the entire mileage of the primary road system has been graded, drained and bridged. * * *"

The language of the above section rather clearly imparts authority to the Highway Commission to do and perform all acts necessary in the proper improvement of the primary road system. Exceptions are those only expressly withheld by statute, or by constitutional inhibition, for the protection of private property rights; however, among these excep-

tions we find no provision applicable to the Highway Commission forbidding the change or alteration of the course of a stream or watercourse, within the boundaries of the State, except the implication that such change must be necessary in the proper improvement of the primary road.

The word "improvement" has been variously defined by the courts, but it is a relative term and its meaning must be ascertained from the context or subject matter of the provision in which it is used. (Words and Phrases, Permanent Edition, Volume 20). By reference to its use in Sec. 4755.08 and other pertinent provisions of the statutes dealing with highway matters, it very plainly includes grading, draining, bridging and surfacing of the primary road system. If, therefore, it is necessary to alter the course of a stream in order to properly grade, drain, bridge and surface the primary road, the Highway Commission possesses the necessary authority so to do.

The latter part of your question involves the manner in which such authority may be exercised and requires a little more elucidation.

Section 4755.23, Code of 1939, provides as follows:

"4755.23. JURISDICTION TO ESTABLISH. In the maintenance, relocation, establishment or improvement of roads hereunder, including extensions of primary roads within cities and towns as provided in section 4755.21, the state highway commission shall have the authority to purchase or to institute and maintain proceedings for the condemnation of the necessary right-of-way therefor and for the condemnation of land, including a sufficient roadway to such land by the most reasonable route, for the purpose of obtaining gravel or other suitable material with which to improve such roads.

All the provisions of the law relating to the condemnation of lands for public state purposes, shall apply to the provisions hereof.

The provisions of chapter 237 shall not apply to the establishment, vacation, alteration or improvement of primary roads.

No such roads shall be established through any cemetery or burying ground without the consent of all of the parties affected by the same, nor shall any ground be taken for the rounding of a corner where the dwelling house, lawn and ornamental trees connected therewith are located at such corner, except by consent of the owner thereof."

This last quoted provision confers on the Highway Commission the powers of eminent domain in the purchase or condemnation of right of way. Here again the word "improvement" and "improve" is used in its broader sense to cover acquisitions as may be necessary in the "maintenance, relocation, establishment or *improvement*" of primary roads, and including the extensions in cities and towns.

It is inconceivable that, if in the proper relocation of a primary road it became necessary to cross a bend in a watercourse, a cut-off or channel change would be unauthorized when by so doing the cost of two expensive bridges could be saved, or that, if a stream were encroaching on an existing highway an alteration of its course could not be accomplished to reduce such hazard. In such cases we have no difficulty in arriving at the conclusion that the Commission may change or alter the course of a stream or watercourse, and acquire right of way necessary therefore, when the same is *reasonably necessary* and proper in the con-

struction, maintenance, relocation, establishment or, in other words in the "improvement" of the primary road system.

The words *"reasonably necessary"* are italicized where used last above, for the reason that in them lies the principal restriction on the Highway Commission in its determination of the nature of the improvement and the acquisition of right of way therefor. While the authority to determine such necessity has been conferred upon the Highway Commission by the legislature, giving it the privilege of exercising a wide discretion therein, such discretion may not be abused. Relative thereto we quote the following from 20 C. J. 626-628.

"While the Legislature may itself determine the necessity of exercising the power of eminent domain or of making the proposed improvement, it may, unless prohibited by the Constitution, delegate this power of determination to public officers or boards or to private corporations vested with the power of eminent domain, and their determination is conclusive in the absence of fraud, bad faith or clear abuse of discretion."

In stating the Iowa rule in *Scharnberg vs. Highway Commission*, 214 Ia. 1041, 243 N. W. 334, the court said:

"A very wide discretion is vested in the State Highway Commission in the construction of primary roads by the use of state primary road funds. A vast sum is at its disposal annually for said purpose. Every presumption must be indulged in that the State Highway Commission will proceed legally in all highway matters within its jurisdiction. The courts do not interfere with the legal exercise of discretion vested in such an administrative tribunal."

Numerous authorities both in Iowa and in other jurisdictions may be cited confirming the above proposition and from a careful review thereof, and of the statutes involved, within the limitation of reasonableness and necessity for the improvement, our answer to your question is in the affirmative.

EXEMPTION OF AUCTIONEER FROM PROVISIONS OF CHAPTER 91.2 OF CODE: AUCTIONEER'S AUTHORITY TO CLOSE SALE OF REAL ESTATE. Statute exempting auctioneer from provisions of Chapter 91.2 is limited by Sec. 1905.23 to sales for parties exempted therein. Whether auctioneer under particular circumstances set forth requires real estate license is question of fact. Auctioneer whose authority extends to closing of sale of real estate which he has sold at public auction is thereby converted into real estate broker or salesman.

March 30, 1944. *Hon Wayne M. Ropes, Secretary of State, State House, Des Moines, Iowa:* You propound to us the following with respect to the exception contained in Section 1905.23 of the 1939 Code of Iowa, to-wit:

"Nor shall it be held to include any auctioneer while selling real estate at public auction for any of the parties exempted under this section.", as applied to the following situations:

First. Where a public auction sale was advertised, giving the name of the owner, the name of the real estate broker, and also the name of the auctioneer, who is not a real estate broker or salesman, is the auc-

tioneer under these circumstances exempted from the provisions of Chapter 91.2 of the 1939 Code of Iowa?

Second. Whether an auctioneer can sell real estate at public auction for a real estate broker without having either a broker's license or a real estate salesman's license.

Third. Whether an auctioneer who has authority to close a sale of real estate which he has sold at public auction, becomes thereby a real estate broker or a real estate salesman.

The pertinent statutes involved in this situation are these:

"1905.20. LICENSE REQUIRED. It shall be unlawful for any person, copartnership, association or corporation, to act as a real estate broker or real estate salesman, or to advertise or assume to act as such real estate broker or real estate salesman, without a license issued by the Iowa real estate commissioner.

"1905.22. 'SALESMAN' DEFINED. A real estate salesman within the meaning of this chapter is any person who for a compensation or valuable consideration is employed either directly or indirectly by a real estate broker, to sell or offer to sell, or to buy or offer to buy, or to negotiate the purchase or sale or exchange of real estate, or to lease, to rent or offer for rent any real estate, or to negotiate leases thereof, or of the improvements thereon, as a whole or partial vocation.

"1905.23. NONAPPLICABILITY OF CHAPTER. The provisions of this chapter shall not apply to any person, copartnership, association or corporation, who as owner or lessor shall perform any of the acts aforesaid with reference to property owned or leased by them, or to the regular employees thereof, with respect to the property so owned or leased, where such acts are performed in the regular course of, or as an incident to, the management of such property and the investment therein, nor shall the provisions of this chapter apply to persons acting as attorney-in-fact under a duly executed power of attorney from the owner authorizing the final consummation by performance of any contract for the sale, leasing, or exchange of real estate, nor shall this chapter apply to an attorney admitted to practice in Iowa; nor shall it be held to include, while acting as such, a receiver, trustee in bankruptcy, administrator or executor, or any person selling real estate under order of any court, nor to include a trustee acting under a trust agreement, deed of trust, or will, or the regular salaried employees thereof; nor shall it be held to include any state or national bank, chartered to do business in the state, acting within the powers granted in its charter; nor shall it be held to include any auctioneer while selling real estate at public auction for any of the parties exempted under this section."

It will be noted by an examination of these statutes that the provisions of Section 1905.23 contain exceptions to the applicability of the general statute, Section 1905.20, among which is an auctioneer "while selling real estate at public auction for any of the parties exempted under this section."

The rule of statutory construction of exceptions in statutes is stated in 59 C. J., Paragraph 643, Title, "Statutes," as follows:

"EXCEPTIONS. An exception differs from a proviso in that the exception exempts something absolutely from the operation of the statute by express words in the enacting clause, while a proviso follows the enacting clause and operates to defeat its operation conditionally. But it has been said that there are many cases in which this dis-

tinction is wholly disregarded and the words used as if they were of the same significance. Moreover, it has been held not essential in all cases that an exception appear in the enacting clause; it may be in a separate section of the statute, or in a separate statute. But a statute, in order to be held an exception to the general provisions of another conferring power and limitation of power on an administrative board, must be couched in language so clear and unambiguous as to be free from doubt as to the legislative intent in declaring it to be an exception; and where a statute fixes its own exceptions to a general provision, no other statute can be looked to for exceptions. Where the terms of a statute are positive and unambiguous, exceptions not made by the legislature cannot be read into the act.

"CONSTRUCTION AND EFFECT. Exceptions, as a general rule, should be strictly, but reasonably, construed; they extend only so far as their language fairly warrants, and all doubts should be resolved in favor of the general provision rather than the exception. Where a general rule is established by statute with exceptions, the court will not curtail the former nor add to the latter by implication, and it is a general rule that an express exception excludes all others, although it is always proper in determining the applicability of this rule, to inquire whether, in the particular case, it accords with reason and justice. Another generally accepted rule of construction is that an exception of a particular thing from the general words shows that, in the opinion of the lawgiver, the thing excepted would be within the general provision had not the exception been made. On the other hand, it has been held that, while an exception may properly be considered in ascertaining the true meaning of a statute, it cannot put into a previous provision something which was not there before."

In *Eddington v. Northwestern Bell Telephone Company*, 201 Iowa 67, 72, the following rule is stated:

"It should always be borne in mind as the polestar of construction of any statute that the rule is broader than the *exception*; that the exception is specific, rather than general; and that, therefore, doubts and implications should be solved in favor of the rule, rather than of the exception."

In *Baker v. Clowser*, 158 Iowa 156, 161, it is stated:

"Of course, the exception goes no further than the language used in providing for it will fairly warrant, and it must be presumed that, beyond the scope of the exception thus provided for, the general statutory provision shall apply."

Applying these rules to the questions at hand, it is to be said, in considering questions 1 and 2, that the statute excepting an auctioneer is limited by the express terms of Section 1905.23, to sales by the auctioneer for any of the parties exempted under the said section. If it had been intended by the Legislature to exempt the auctioneer from the provisions of Chapter 91.2 in all transactions, the Legislature could easily have said:

"Nor shall it be held to include any auctioneer while selling real estate at public auction."

Not having so declared, it is a reasonable interpretation of this exception that the auctioneer, in selling real estate at public auction, is exempted from the securing of a license when he is selling for the persons named in Section 1905.23. A real estate broker, not being specifical-

ly included within the excepting statute as a party for whom an auctioneer may act without license, an auctioneer under the circumstances set forth in your letter, impliedly employed by a real estate broker, or an auctioneer expressly employed by such broker, is within the requirements of Chapter 91.2, and must procure a license either as a real estate broker or a real estate salesman, as the facts may require. Reason supports this conclusion. It appears that Section 1905.23 is concerned with sales by persons in both private and official capacity, not engaged generally in the business of buying and selling real estate. In contradistinction, the requirements of Section 1905.20, the general statute, are imposed upon those engaged in the buying and selling of real estate as a business or occupation. The crying of a sale by an auctioneer for the one is not in aid of one pursuing the sale as a business, while the crying of a sale for a broker is in aid of one in the business of selling real estate generally. Whether under the form of advertising set forth in question 1 of this opinion, the auctioneer is employed by the broker or the owner, is a fact question, and determination of the application of this statute may not be determined as a matter of law.

The question whether an auctioneer has authority to close a sale of real estate which he has sold at public auction, he having a license neither as a real estate broker nor a real estate salesman, is determined by the meaning attaching to the word "auctioneer," and to the legal extent of his duties. In *Kennell v. Boyer*, 144 Iowa 303, 304, it is said:

"The public sale of property to the highest bidder by a duly authorized auctioneer is a form of commercial transaction of great antiquity, and still in common use. The auctioneer acts in a *quasi* public capacity. He is usually required to have a public license, and has authority to represent and bind both parties. At the time and place appointed the auctioneer announces the terms and conditions under which the property is to be sold; that is, subject to which the proposed purchaser will become the owner of the property if he is declared the highest bidder.",

and in *Farr v. John*, 23 Iowa 286, 287, the court approved the following:

"The court refused to give the instructions as asked, but instructed the jury that if the plaintiff's auctioneer announced publicly and in the hearing of defendant, that no bid less than five cents would be received, and defendant only bid one cent, which was disregarded, and the hammer was not struck off to him, then defendant acquired no title to the hammer, and the plaintiff was entitled to their verdict; and this, notwithstanding the plaintiff advertised largely and stated that the bid of two dollars was by an absentee, and if any one bid more for it to let him have it."

In 7 C. J. S., Paragraph 1(b), Title, "Auctions and Auctioneers," it is said:

"An auctioneer is a person who conducts a public sale of property at auction.",

particularizing, among others, the following:

"SUBSTANCE OF DEFINITIONS

"'A number of definitions of "auctioneer" may be found in 1 Words and Phrases, First Series, 638, but the substance of all of them is that an auctioneer is a person who sells property at auction.'—State v. Balesh, 21 S. W. (2d) 163, 164, 180 Ark. 204.

"CRIER
"(1) The word 'auctioneer' is sometimes used to designate the crier who simply calls for bids and strikes the bargain at an auction sale; his connection with the sale may begin with calling for bids and end with striking the bargain.—White v. Dahlquist Mfg. Co., 60 N. E. 791, 179 Mass. 427."

There is statutory confirmation of the view expressed in the foregoing cases, that an auctioneer's duties terminate when he announces the completion of the sale by the fall of the hammer, or in other customary manner. Section 9950, subsection (2), provides as follows:

"9950 (Par. 21) SALE BY AUCTION. In the case of sale by auction:
* * *
"2. A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid, and the auctioneer may withdraw the goods from the sale unless the auction has been announced to be without reserve."

True, this section is contained in the chapter on "Sales Law," but we are disposed to the view that the definition of a sale by auction therein exhibited, controls a sale of real estate by auction as well as personal property.

In view of the foregoing, we are of the opinion, and so advise, that an auctioneer whose authority extends to closing a sale of real estate which he has cried and sold at public auction, is thereby converted into a real estate broker or a real estate salesman, as the facts may determine.

FOREIGN CORPORATIONS: FILING FEE FOR INCREASE OF PROPERTY IN IOWA: CORPORATIONS HAVING PERPETUAL OR LIMITED EXISTENCE. Filing fee for the increase of property of any foreign corporation, used in Iowa, is $1.00 per thousand or fraction thereof, without distinction between corporations limited for years or corporations unlimited in existence.

April 10, 1944. *Honorable Wayne M. Ropes, Secretary of State, Capitol Building, Des Moines, Iowa:* You request opinion of this department in respect to the construction of Senate File 306 of the Acts of the 50th General Assembly, now designated as Chapter 227 of the Acts of the 50th General Assembly and Section 8424 of the Code of 1939. The situation and question that presents itself to you is set forth by you as follows:

"Senate File 306 of the Acts of the 50th G. A. provides for fees in the case of foreign corporations having perpetual existence in the state of their incorporation and fixes the fee at one hundred dollars plus one dollar and ten cents per thousand on all money or property kept, used or invested in the State of Iowa in excess of ten thousand dollars.
"Section 8424 of the 1939 Code of Iowa provides among other things that when a foreign corporation, having a permit to transact business in the State of Iowa, increases the amount of money or other property kept, used or invested in the State of Iowa, it shall at the time of said increase or at the time of making annual report to the secretary of state in July of each year file with the secretary of state a sworn statement showing the amount of such increase and shall pay a filing fee thereon of one dollar for each one thousand dollars or fraction thereof of such increase.

"Section 8424 of the Code was not amended specifically by Senate File 306 of the Acts of the 50th G. A., and this office would like to know whether the fee on any increase reported should be one dollar per thousand or fraction thereof or one dollar and ten cents per thousand or fraction thereof in the case of corporations having perpetual existence."

Ascertainment of the intention of the Legislature is reached by examination and coordination of the statutes bearing on this situation. Section 2 of Chapter 227 of the Acts of the 50th General Assembly, being Senate File 306, provides as follows:

"Sec. 2. Amend section eight thousand four hundred twenty-four (8424), Code, 1939, by adding thereto as a separate paragraph the following:

" 'If said foreign corporation amends its articles of incorporation or files with the corporation official in the state of its incorporation any certificate of increase or decrease in its capital stock, or any instrument which affects its articles of incorporation, said corporation shall file with the secretary of state a copy of said amendment, certificate, or other instrument, certified by the official of the state of incorporation with whom it is filed. The fee for filing such copies shall be one dollar for each instrument separately certified by the official of the state of incorporation. The secretary of state shall issue to said corporation a certificate for each such instrument, stating that said instrument has been filed by him'."

Section 5 of the same chapter and bill provides as follows:

"Sec. 5. Amend section eight thousand four hundred twenty-three (8423), Code, 1939, by striking the period (.) at the end of said section and adding thereafter the following:

" 'if said corporation has existence for a period of years. If the corporation has perpetual existence under its articles or charter it shall make the filings as hereinbefore provided for and shall pay a filing fee of one hundred dollars and a further fee of one dollar and ten cents for each one thousand dollars of such money or property within this state in excess of ten thousand dollars, and thereafter shall periodically pay the said fee as follows: in the case of a corporation, for the construction and operation, or the operation alone, of steam railways, interurban railways, and street railways, or for the establishment and conduct of savings banks, every fifty years from the date of qualification and in the case of all other corporations, every twenty years from the date of qualification, and upon the failure to make such payments within three months from the date same are due, the secretary of state shall cancel the permit of said corporation. The fees required by this section to be paid shall not be collected from a corporation organized for the purpose of carrying into effect a plan of reorganization approved in bankruptcy proceedings under the laws of the United States or in a general equity receivership in a Court of competent jurisdiction, until the period of time for which a permit to transact business within this State has previously been issued to the corporation so reorganized has elapsed'."

It therefore appears that at the same time and in the same Act, the Legislature provided, first, for a filing fee for a foreign corporation having perpetual existence in the state of its organization; second, for a filing fee of a certificate of increase or decrease of the capital stock of any foreign corporation; and third, that at the time of the enactment of Chapter 227, Section 8424 of the Code existed, providing for a filing fee of $1.00 for each one thousand dollars or fraction thereof of any increase in the State of Iowa of money or property used therein, such fee being

imposed upon any foreign corporation without distinction of its being one for years or one existing in perpetuity. It appears, therefore, that the Legislature, with knowledge of this statutory situation, fixed a specific filing fee for a foreign corporation having perpetual existence, and at the same time, fixed a filing fee for a certificate of an increase of the property in Iowa of any foreign corporation, without reference to its duration. Under those circumstances, it is clear that the Legislature intended that foreign corporations, both those who existence is limited by years and those unlimited in duration, should pay for such increase the sum of $1.00 for each one thousand dollars or fraction thereof, for use in the State of Iowa, and not $1.10.

In view of the foregoing, we are of the opinion that the filing fee for the increase of property of any foreign corporation, used in Iowa, is the sum of $1.00 per thousand or fraction thereof, without distinction being made of corporations limited for years or corporations unlimited in existence.

DELINQUENT DOG LICENSE TAX: LIEN AGAINST REAL ESTATE. Collection of dog tax is controlled by the statutory provisions for the collection of personal property taxes in general, and the lien upon real estate for such unpaid tax does not commence until the 31st day of December following its entry as a tax against owner.

May 3, 1944. *Mr. Francis J. Kuble, County Attorney, Polk County Court House, Des Moines, Iowa:* You submit for opinion the following:

"Our office has been requested by the County Treasurer and Auditor to submit a matter to your office for an opinion, which might be stated thusly:

"When, if ever, does an unpaid dog tax become a lien upon the real estate owned by the person also owing said dog tax?

"It has been the opinion of this office in construing Chapter 276 of the 1939 Code of Iowa that up until the certification by the Auditor to the Treasurer of unpaid dog licenses the same were merely licenses, but upon said certification and entry of delinquent dog licenses, as provided by Sections 5435, 5440, and 5441 of said Chapter, the licenses become a tax.

"It is the procedure of our Treasurer's office to enter the tax upon the certification of the County Auditor directly in the delinquent personal tax list.

"Section 5441 provides:

" 'On receipt of said certificate, the treasurer shall at once enter as a tax, against each person the amount therein indicated as owing by him, and said tax shall be attended with the same consequences, and be collected in the same manner, as ordinary taxes.'

"It has been contended that construction of the Section above quoted makes Sections 7190 and 7203 applicable and that 7203 would not make a dog license imposed in April as a tax by the Treasurer a lien upon real estate until the subsequent December 31. Such contention is based upon the recognized rule of Iowa that a personal tax is not a lien upon real estate unless specifically made such by statute.

"We have examined the cases of Iowa and the opinions of your Office and have been unable to find where this matter has been decided, but we are of the opinion that Section 7203, which establishes personal taxes as a lien can be construed to establish the tax involved here as a lien upon real estate from the time it is imposed as a tax and continuing the same for one year from December 31 subsequent to the time it is imposed.

"Your early consideration of this matter and opinion hereon will be appreciated."

The statutes pertaining to this discussion are Sections 5441, 7190, and 7203, which are as follows:

"5441. ENTRY OF TAX. On receipt of said certificate, the treasurer shall at once enter, as a tax, against each person the amount therein indicated as owing by him, and said tax shall be attended with the same consequences, and be collected in the same manner, as ordinary taxes."

"7190. DELINQUENT PERSONAL TAX LIST. The treasurer shall, after October 1, and before December 31, of each year, enter in a book or other record to be kept in his office as a part of the records thereof, to be known as the delinquent personal tax list, all delinquent personal taxes and delinquent poll taxes of any preceding year which do not appear thereon. If the tax list maintained by said treasurer is such that all delinquent personal taxes and delinquent taxes of any preceding year are at all times therein recorded, then he shall not be required to keep in his office, as a part of the records thereof, a separate delinquent personal tax list."

"7203. LIEN OF PERSONAL TAXES. All poll taxes and taxes due from any person upon personal property shall, for a period of one year following December 31 of the year of levy, be a lien upon any and all real estate owned by such person or to which he may acquire title and situated in the county in which the tax is levied. From and after the expiration of said one year said taxes shall be a lien on all such real estate for an additional period of nine years provided said taxes are entered upon the delinquent personal tax list as provided by law. But in no instance shall said taxes be a lien after the expiration of ten years from December 31 of the year in which levied. This section shall apply to all poll taxes and to all taxes on personal property whether levied prior or subsequent to the time this section takes effect."

On March 24, 1926, this department rendered an opinion, holding the phraseology of Section 5441, to-wit, "* * * and said tax shall be attended with the same consequences, and be collected in the same manner, as ordinary taxes.", to be correlated to all statutes relating to taxes on personal property. Copy of such opniion is hereto attached and by reference made a part hereof.

It will be noted that Section 7203, as set forth in that opinion, has now been superseded, as appears by the exhibit thereof in this opinion. In accordance with its terms, taxes upon personal property become a lien on real estate for a period of one year following December 31st of the year in which it is levied, and shall exist as a lien for a period not exceeding ten years from that date. The lien of personal taxes on real estate is purely statutory. *In re Hagers Estate*, 235 N. W. 563, 570, 212 Iowa 851. It is the rule, also, that where the statute creating a tax lien provides when a lien shall attach, the time when the lien attaches must be determined by the terms thereof, and the lien attaches only at the time provided therein; and where definite time is fixed when the lien shall commence, it is equivalent to saying that it shall not commence before that time. 61 C. J., title "Taxation," Paragraph 1173.

Application of the foregoing principles to the situation outlined results in these conclusions:

(1) Under the plain language of Section 5441, the treasurer's au-

thority on receipt of the certificate from the auditor extends only to entering the unpaid license as a tax against the person. The statute neither expressly nor by inference makes it a lien. Nor is there anything therein justifying the conclusion that it becomes a delinquent personal tax. Pursuant to the terms of Section 5435:

"5435. DELINQUENCY. All license fees shall become delinquent on the first day of April of the year in which they are due and payable and a penalty of one dollar shall be added to each unpaid license on and after said date.",

the license becomes delinquent if unpaid on April 1st of the year in which it is due and payable. Converting this unpaid delinquent license into a tax is a method of collection. It would require clear precise language to impose a tax and concurrently make it delinquent. This conclusion is the more consistent in view of the fact that the statute, Chapter 276 (other than provision for payment at the time application is made), specifies no particular time when the license shall be paid.

(2) The collection of the dog tax being controlled by the statutory provision for the collection of personal property taxes in general, being Section 7203, the lien upon real estate for such unpaid tax therein provided for, does not commence until the 31st day of December following its entry as a tax against the person.

DRUGS: PHARMACISTS: PHENOTHIAZINE: P. T. Z. POWDER. A product which contains 98% phenothiazine and 2% inert matter is a drug, and must be sold only in drug or pharmacy stores under the supervision of a registered pharmacist.

May 19, 1944. *Mr. J. F. Rabe, Secretary, Pharmacy Examiners, State House:* In reply to your request for our opinion as to whether or not a submitted product labeled P. T. Z. powder, which is labeled 98% phenothiazine, and 2% inert, is a drug as defined in Chapter 155 of the 1939 Code of Iowa, and which must not be sold under the Iowa law in other than drug stores under the supervision of registered pharmacists, we state as follows:

Section 3143 of the 1939 Code of Iowa defines a drug as follows:

DEFINED. For the purposes of this chapter "drug" shall include all substances and preparations for internal or external use recognized in the United States Pharmacopoeia or National Formulary and any substances or mixture of substances intended to be used for the cure, mitigation, or prevention of diseases of either man or animal.

Phenothiazine is listed in the National Formulary, Seventh Edition, pages 322 and 323, where we find the description, solubility, identification, and other characteristics listed. A caution is announced therein that "Animals should be treated with Phenothiazine only under the advice of a veterinarian." Therefore, if this product is simply phenothiazine it must be classed as a drug.

This brings the question as to whether this product or any drug so mixed with a small amount of inert matter can be classed as proprietary medicine, or simply remain a drug. Phenothiazine by the National Formulary standard is not less than 95% pure.

Inert matter is defined in Webster's New International Dictionary as not having or manifesting active properties; not affecting other substances when in contact with them; powerless for an expected or desired effect, as a drug.

In Funk & Wagnalls New Standard Dictionary, we find the definition of inert matter as follows:

(1) Destitute of inherent power to move; inanimate; lifeless.
(2) Inactive.
(3) Devoid of active chemical properties; neutral.

Obviously then this product containing only 2% inert matter does not change the original drug in any way, and the product remains phenothiazine.

We next turn to Section 2578 of the 1939 Code of Iowa, which reads as follows:

PERSONS ENGAGED IN. For the purpose of this title the following classes of persons shall be deemed to be engaged in the practice of pharmacy:
1. Persons who engage in the business of selling, or offering or exposing for sale, drugs and medicines at retail.
2. Persons who compound or dispense drugs and medicines or fill the prescriptions of licensed physicians and surgeons, dentists, or veterinarians.

And Section 2579, paragraph 4 thereof, which reads as follows:

PERSONS NOT ENGAGED IN. Neither section 2578 nor section 2582 shall be construed to include the following classes:
* * * * *
4. Persons who sell, offer or expose for sale proprietory medicines or domestic remedies which are not in themselves poisonous or in violation of the law relative to intoxicating liquors.

Proprietary is defined in the Imperial Dictionary as,—belonging to, or ownership; as, proprietary rights. In Webster, as belonging to or pertaining to a proprietor, proprietor being defined as one who has the legal right or exclusive title to anything, whether in possession or not; an owner.

The requisites of proprietary medicine are not to be found in this powder, which is almost pure phenothiazine. There is nothing secret about phenothiazine, and the inert matter does not add or detract. There is no person who has the exclusive right to phenothiazine and it is a matter of common knowledge that phenothiazine is produced by more than one manufacturer.

Our conclusion must necessarily be that P. T. Z. powder consisting of 98% phenothiazine and 2% inert matter is a drug, and must be sold only in drug or pharmacy stores under the supervision of a registered pharmacist.

COMMISSION OF INSANITY: COMMITMENTS: EPILEPTICS: INSANE. The Commission of Insanity has the power to commit epileptics who cannot become voluntary patients to the state hospitals, and that in committing said epileptics, the same procedure is followed as in the commitment of insane in Chapter 177, Code of 1939.

May 31, 1944. *Mr. Francis J. Kuble, County Attorney, Court House, Des Moines, Iowa:* In reply to your letter of May 26, asking the opinion of this office as to the duty of the County Commission of Insanity in involuntary commitments of epileptics, and stating that it is the opinion of your office that it is the duty of the Commission of Insanity to commit epileptics to the State Hospital at Woodward, Iowa, who cannot become voluntary patients at said institution, we state as follows:

Section 3471 of the 1939 Code of Iowa, reads as follows:

STATUTES APPLICABLE. All laws relating to the commitment of insane persons to the hospitals for the insane, insofar as applicable, shall apply to commitments of epileptics to said hospital and school.

A careful examination of the history of this section reveals the intention of the Legislature. Originally said section was found in the Supplemental Supplement, 15, Section 2727-a96, and paragraph 6 thereof reads as follows:

COMMITMENTS—PROCEDURE. The commissioners of insanity in each county shall have the same power and authority to commit persons to the state hospital and colony for epileptics, except in cases of voluntary commitments to such hospital and colony, as is now conferred by law upon such commissioners in connection with the commitment of patients to the state hospital for the insane, and all laws relating to the admission of patients to the state hospital for the insane shall apply to admission of patients to the state hospital and colony for epileptics in all cases where such laws may be applicable. Application for the commitment of any person to the state hospital and colony for epileptics, other than voluntary commitments, must be in form of information verified by affidavit alleging that the person in whose behalf the application is made is believed by the informant to be afflicted with the disease known as epilepsy, and that such person is a fit subject for the care, custody, treatment and control of the state hospital and colony for epileptics, and that such person is found within the county where the information is filed, and shall also state the place of residence of such person if known, and if not known the best information or belief of the informant as to such residence according to the facts in each case.

Under this section of the Code we find an opinion of the Attorney General's Office, see AGO for 1919 and 1920, at page 813. Quoting from said opinion, we find the following statement:

If it is found that such person is a fit subject for the care, custody, treatment and control of the State Hospital and Colony for Epileptcis, then said commissioners will commit such person to said institution as provided for in paragraph 6 of section 2727-a96 of the supplemental supplement.

Further following the history of this section, we find in the 40th General Assembly, Extra Session, House File 84, the following:

Sec. 201. COMMITMENTS BY COMMISSIONERS OF INSANITY. All laws relating to the commitments of insane persons to the hospitals for the insane, in so far as applicable, shall apply to commitments of epileptics to said hospital and school.

It will be noted that this Section 201 of the Act is our present Section 3471, and that the Code Editor has dropped the first sentence, i. e.

Commitments by commissioners of insanity, from this section in our 1939 Code, as enacted by the Legislature. It is equally clear that the Legislature intended to place the duty to commit epileptics to the State Hospital on the Commission of Insanity of the respective counties, and not change the law as set out in Section 2727-a96 above referred, and that the procedure is the same as insanity matters.

It is therefore our opinion that the Commission of Insanity has the power to commit epileptics who cannot become voluntary patients, to the state hospitals, and that in committing said epileptics, the same procedure is followed as in the commitment of insane in Chapter 177, Code of 1939.

ILLEGITIMACY: ADOPTION: RELEASE OF CHILD: CHILD WELFARE: STATE BD. OF CONTROL: CHAP. 181.5, 473. A child born in lawful wedlock is presumed to be legitimate. A valid release for the purpose of adoption must be signed by the husband and wife even though the husband is not the father of the child and the husband may have been away from his wife for longer than 300 days. A decision as to the legitimacy of children should be left to courts. Neither State board should pass judgment thereon.

June 7, 1944. *State Board of Social Welfare, State of Iowa, State Board of Control, Des Moines, Iowa:* We wish to acknowledge receipt of your letter dated June 7, 1944, requesting an opinion upon the following facts, to-wit:

1. A certain married woman in this state had three legitimate children by her husband who is now in the armed forces and has been stationed overseas for a little less than a year. During his absence, she had a fourth child born to her and she claims that her husband is not the father of the latter child. She has signed a written release of the child to the American Home Finding Association which is a duly licensed child placing agency. The attorney for the agency has refused to accept this release without the husband joining therein. This question is whether the release of only the mother is sufficient?
2. A young woman has had a baby born to her which is claimed to be illegitimate. Her husband has been overseas in the armed forces for more than a year and has had no access to his wife. Is a release signed by only the mother sufficient?
3. If the answers to the above two questions are in the negative, what is the proper procedure to be followed in adopting the two babies?

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

1. Chapter 181.5, Code 1939, sets out the provisions of our Code with reference to child placing agencies and prescribes the conditions under which they can operate and children be released to them. After the release is properly executed, the agency can place the child in a home for the purpose of adoption.

Adoption is procured by commencing a regular action in court ending in the obtaining of a decree of adoption. Provisions with reference to the latter are found in Chapter 473, Code 1939.

The pertinent statutes in Chapter 181.5 are:

Section 3661.096. ASSUMPTION OF CARE AND CUSTODY. No person other than the parents or relatives of the child within the fourth

degree may assume the permanent care and custody of a child under fourteen years of age except in accordance with the provisions of this chapter.

Section 3661.097. RELINQUISHMENT OF RIGHTS AND DUTIES. No person may assign, relinquish, or otherwise transfer to another his rights, or duties with respect to the permanent care or custody of a child under fourteen years of age unless specifically authorized or required so to do by an order or decree of court, or unless the parent or parents sign a written release attested by two witnesses, of the permanent care and custody of the child to an agency licensed by the state board of social welfare.

Section 3661.098. RELINQUISHMENT BY ONE PARENT. Neither parent may sign such release without the written consent of the other unless the other is dead or hopelessly insane, or for one year immediately preceding has been under indictment for abandoning the family, or is imprisoned for crime, or is an inmate or keeper of a house of ill fame, or has been deprived of the custody of the child by judicial procedure because of unfitness to be its guardian, or unless the parents are not married to each other.

Thus, it will be seen that under the provisions of Section 3661.098, neither parent may sign a written release of a child without the written consent of the other, unless one or more stated exceptions exist, one of which is, "unless the parents are not married to each other."

Section 10501.3 which is a part of Chapter 473 on Adoption contains part of the provisions for adoption and contains substantially the same provisions as Section 3661.098 supra, including the last described exception.

Ordinarily, a child born in lawful wedlock is presumed to be the child of the persons thus married. This presumption is very strong and it takes very clear and convincing testimony to prove that a child thus born is illegitmiate. As was said in CRAVEN VS. SELWAY, 216 Iowa, 505, 508:

"This rule is founded on decency, morality and public policy. By that rule the child is protected in his inheritance and safeguarded against future humiliation and shame likewise, under the rule, the family relationship is kept sacred and the peace and harmony thereof preserved. No one, by incompetent evidence, can malign the virtue of the mother, and no one, by such evidence, can interrupt the harmony of the family relationship and undermine the sanctity of the home."

Also, until the fact of illegitimacy is established by clear, convincing and proper evidence, any declarations or statements of the mother or putative father or of said child cannot be received as evidence of the adultery of the mother or of the illegitimacy of the child and any such statements are incompetent. The legal propositions are well set out in the first two syllables of the Craven case, and we quote the same herewith:

"1. The presumption of legitimacy of a child born in lawful wedlock is so strong that it will yield only to CLEAR, SATISFACTORY AND PRACTICALLY CONCLUSIVE PROOF that the husband was:

1. Impotent, or
2. Entirely absent so as to have no access to the mother, or
3. Entirely absent from the mother at the period during which the child must have been begotten, or

4. Present with the mother under circumstances negativing sexual intercourse with her.

"2. The illegitimacy of a child born in lawful wedlock without proof that the husband was impotent or had no sexual access to the mother, cannot be established by the declaration of the mother, or of the putative father, or of said child, nor by proof of the mother's adultery.

"This does not imply that after illegitimacy has been made to appear, by competent proof, the declarations of the putative father and of the mother are not admissible to identify the actual father."

In this case, the husband has been overseas less than a year. As was also said by the Court in the Craven case:

"A period of gestation varies in different cases. Doctors testifying for the appellees asserted that the average period of gestation was approximately 273 days. These doctors said, however, that there is a wide variation in the period of gestation and according to this medical testimony:

'The child may be born anywhere from 230 to 240 days up to as long as over 300 days after the existence of the last menstrual period. A variation of a month on either side of 273 days would not arouse any great suspicion of trouble and would be considered normal.' "

Thus, it will be seen that if this mother had had an opportunity to be with her husband as far back as over 300 days after her last menstrual period, it would not have been physically impossible for her husband to be the father of the child. Our courts go a long way in holding children legitimate and will not place this terrible stain upon a child if any way can be found to avoid it.

A careful consideration of these principles as applied to the facts in this case will disclose that it is practically impossible to state with any degree of certainty whether the release of the mother is sufficient. This would also be true of most cases of this kind. Each case must stand upon its own facts and circumstances and each case is different. The final determination thereof must be made by a Court having jurisdiction of the parties.

If any State Board attempted to pass on such matters and did not reach the same conclusion as the Court, it would be in an embarrassing situation because of having given erroneous advice. Other persons who relied thereon, might have acted to their prejudice.

It is, therefore, our opinion that neither State Board should make any attempt to pass judgment upon such matters, but leave them to the Courts where they properly belong and whose judgment would be binding upon the parties concerned.

2. The answer to question 2 would be the same even though the husband of this mother might have been overseas in the armed forces for a period of two or three years and could not possibly have had any access to his wife. Nevertheless, there would be the same presumption, to-wit, that a child born in lawful wedlock is legitimate. This presumption would remain until the contrary is properly proved in a court having jurisdiction of the parties. Therefore, such cases must be left for determination by our courts.

3. The procedure to be followed in adopting the two babies in question is clearly set out in the statutes of Iowa. We suggest that you refer to these statutes.

We trust this answers your inquiry.

CLERK OF THE DISTRICT COURT: COPY FEES: FILING OF PLEADINGS: PLEADINGS. When a copy of the petition is attached to the original notice served upon the defendant it is not filed, within the terms of our statute, and the copy fee provided in Rule 84 of the Iowa Rules of Civil Procedure, to be taxed at costs, is not taxable, and such fee should not be charged.

June 27, 1944. *Mr. G. L. Gray, County Attorney, Rockwell City, Iowa:* You propound the following:

"Should the Clerk of the District Court charge a copy fee where the attorney filing the petition does not file a copy in the Clerk's office, but elects under the statute to attach a copy of the petition to the original notice and only one original copy is filed in his office."

Rule 84 of the Iowa Rules of Civil Procedure provides as follows:

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

It will be noted (1) that the fee is to be the property of the attorney filing the copy, and treating Rule 82 as in pari materia. (2) that the fee shall only be taxed when a copy of a motion or pleading is "filed." A pleading is deemed filed, according to Section 10833 of the Code of 1939, when

"PLEADINGS—WHEN DEEMED FILED—REMOVAL OF PAPERS. The clerk shall, immediately upon the filing thereof, make in the appearance docket a memorandum of the date of the filing of all petitions, demurrers, answers, motions, or papers of any other description in the cause; and no pleading of any description shall be considered as filed in the cause, or taken from the clerk's office, until the said memorandum is made."

And this statute in the case of *Nickson v. Blair*, 59 Iowa 531, was held to mean exactly what it says, and makes the meeting of the requirements thereof mandatory. The court there said:

"The motion to dismiss was based upon the fact that no memorandum of the date of filing the petition had been made in the appearance docket.

"The provision of statute upon which the defendant relies is in these words: "The clerk shall immediately upon the filing thereof make in the appearance docket a memorandum of the date of the filing of all petitions * * * or paper of any other description in the cause; and no pleading of any description shall be considered as filed in the cause * * * until the said memorandum is made. Code Par. 200."

"The plaintiff insists that this provision is merely directory, and that, where the petition has been lodged in the clerk's office and has been marked filed, as in this case, the plaintiff should not suffer by reason of the clerk's omission to make the required entry in the appearance docket.

"The provision may be divided into two parts. In the first part is a provision as to what the clerk shall do, and in the second is a provision as to what shall be the consequence of a failure. If we had only the first part, there would be much force in the plaintiff's position that the statute should be construed as merely directory. But the provision as to the consequences of a failure must be construed according to the plain meaning of the words, and so construing it, it forbids us to say that the effect is the same whether the entry is made or not. *Padden v. Moore*, 58 Iowa., 703."

Bearing in mind the foregoing, it seems clear that the privilege accorded to a litigant under Rule 82, to-wit

"All motions and pleadings, with copy, shall be filed with the clerk, except that no copy of the petition need be filed if a copy was attached to the original notice served upon each defendant. Sufficient additional copies of all motions and pleadings shall be filed to afford a copy for each adverse party appearing, but if more than one such party appear by the same counsel, only one copy need be filed for such parties. It shall be the duty of the pleader to file the required copies with the original if he then knows of the appearances; otherwise, immediately upon receipt of notice thereof to be given by the clerk. The copies shall be mailed or delivered forthwith by the clerk to the attorney of record for the adverse party or parties, if appearance is by attorney; otherwise to the parties."

of filing the copy with the clerk, or attaching the copy of the petition to the original notice served upon the defendant is self interpretative: Attaching a copy of the petition to the original notice served upon the defendant is not "filing" within the terms of our statute.

We are of the opinion, therefore, that where under the terms of Rule 82, the copy of the petition is attached to the original notice served upon the defendant, the copy fee provided in Rule 84 to be taxed as costs, is not taxable, and such fee should not be charged.

ARTICLES OF INCORPORATION: CAPITAL STOCK: CERTIFICATE OF RENEWAL: CORPORATIONS: FEES FOR RENEWAL. When renewal articles of incorporation include also an increase in capital stock, the required payment of the regular corporate fee for renewal should be collected, in addition to the fee for increase in capital stock.

June 27, 1944. *Hon. Wayne M. Ropes, Secretary of State, Building:* You query this office for opinion in the following situation:

"This office would like an official opinion from your office in regard to the fees which should be collected from corporations upon renewal of their corporate charter prior to the expiration date of their present corporate existence where the authorized capital stock is increased at the time of renewal.

"Should this office collect, in addition to the regular renewal fee, a fee for increase in capital stock as provided by Section 8360 of the 1939 Code of Iowa? We have a case of this kind coming up at the present time and would appreciate getting your official opinion as soon as is convenient."

Sections 8365 as amended, 8366 as amended, and 8368 as amended, all of the Code of 1939 are these:

8365. RENEWAL—CONDITIONS. Corporations existing for a period of years may be renewed from time to time for the same or shorter periods, or may be renewed to exist perpetually, if a majority of the votes cast at any regular election, or special election called for that purpose, at any time during the corporate life or within three months after the termination thereof, 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. Stockholders voting for renewal shall have three years from the date such action for renewal was taken in which to purchase the stock voted against such renewal, which purchase price shall bear interest at eight per cent per annum from the date of such renewal action until paid, and the provisions of this act (45 GA, ch. 143) shall not apply to any renewal voted before this act becomes operative.

8366. COMPUTATION AND DURATION. Such renewals shall date from the expiration of the corporate period which it succeeds.

8368. FILING WITH SECRETARY OF STATE—FEES—CERTIFICATE OF RENEWAL. Upon filing with the secretary of state the said certificate and articles of incorporation, and upon the payment to the secretary of state of a fee of twenty-five dollars, together with a recording fee of twenty-five cents per page, and an additional fee of one dollar per thousand for all authorized stock in excess of ten thousand dollars, the secretary of state shall issue a proper certificate for the renewal of the corporation.

1.

Renewal of the charter of a corporation is not a matter of right until compliance with statutory requirements for renewal.

"A corporation, having spent the life which the law gave it, can assert no inherent rights to further existence. Natural, not artificial, resuscitation is its relief, and this comes only through the law and as it decrees." State v. Roach, 190 S. W. 862. (Missouri)

The theory of renewal of a corporate charter is that in extending its corporate existence, the corporation is acquiring a renewal of its franchise "to be" a corporation. *Cobbs & Mitchell Inc., v. Corporation Tax Appeal Board,* 233 N. W. 386, (Michigan) and such franchise "to be" a corporation is distinct from a franchise to do business as a corporation. Otherwise phrased, one is the franchise "to be"; the other the franchise "to do". As a condition to the acquisition of the franchise to continue "to be" a corporation, the corporation must comply with the requirements of Section 8368, the terms of which are hereinbefore exhibited.

Therefore, among other requirements, such corporations must pay the fee of twenty-five dollars, and an additional fee of one dollar per thousand for all authorized stock in excess of ten thousand dollars.

2.

The statutory requirement for renewal does not include change of articles of incorporation by way of increase in its capital stock. Such increase is affected only by amendment. Section 8360, as follows, so provides:

8360. AMENDMENTS—FEES. Amendments to articles of incorporation making changes in any of the provisions of the articles may be made at any annual meeting of the stockholders or special meeting called for that purpose, and they shall be valid only when recorded, approved and published as the original articles are required to be. If no increase is made in the amount of capital stock, a certificate fee of one dollar and a recording fee of twenty-five cents per page must be paid. Where capital stock is increased the certificate fee shall be omitted but there shall be paid a recording fee of twenty-five cents per page and in addition a filing fee which in case of corporations existing for a period of years shall be one dollar per thousand of such increase and in case of corporations empowered to exist perpetually shall be one dollar and ten cents per thousand of such increase. Corporations providing for perpetual existence by amendment to its articles shall, at the time of filing such amendment, pay to the secretary of state a fee of one hundred dollars together with a recording fee of twenty-five cents per page, and, for all authorized capital stock in excess of ten thousand dollars, an additional fee of one dollar ten cents per thousand.

Its articles of incorporation to the contrary notwithstanding, if three-fourths of the voting stock of any corporation organized under the pro-

visions of chapter 384, with assets of the value of one million dollars or more, is owned by the individuals owning not more than one share each of the voting stock thereof, said articles may be amended at any regular or special meeting of stockholders, when a notice in writing of the substance of the proposed amendment has been mailed by ordinary mail to each voting stockholder of such corporation not more than ninety nor less than sixty days prior to said meeting, by the affirmative vote of two-thirds of the voting stock represented at said meeting when said amendment is approved by the affirmative vote of two-thirds of the members of the board of directors at a meeting prior to the mailing of said notice.

If such corporation is renewed under the provisions of section 8365, the voting stock of dissenting stockholders or any portion thereof may be purchased by the corporation at its option as provided in said section.

And the fact that such increase of capital stock appears in the renewal proceedings of a corporation, does not change the character of the procedure. It still remains an amendment to the articles. We think it was the legislative intent to require a renewal to be effected in accord with Sections 8365, 8366 and 8368, as amended, and 8367 of the Code of 1939, and that increase of capital stock to be effected by amendment under the terms of Section 8360, as amended. Stated otherwise, renewal cannot be effected by amendment, nor can increase of capital stock be effected by renewal.

3.

We are of the opinion, therefore, that where a renewal is effected prior to the expiration of the corporate period, and the renewal articles of incorporation include also an increase in capital stock, you should in addition to requiring the payment of the regular corporate fee for renewal, require and collect the fee for increase in capital stock, as provided in Section 8360, as amended, of the 1939 Code.

REAL ESTATE: SALE: LOTS LISTED SEPARATELY AND ASSESSED AS A UNIT: REDEMPTION: Redemption of two lots out of four when sold as one tract is unlawful.

July 7, 1944. *Mr. Archie R. Nelson, County Attorney, Cherokee, Iowa:* You present the following situation:

"We have a situation where four lots in one of the towns of the county were listed separately but assessed as a unit and sold at tax sale as a unit, and now the owner wishes to redeem two of the four lots only.

"Mason's Annotations to the Code of Iowa lists an opinion given by the Attorney General on April 17, 1937 which reads as follows.

" 'Although town lots shall be listed and assessed separately, County Auditor is without authority to accept redemption for a part only of property contained in tax sale certificates erroneously containing a number of town lots.' This is under Section 7272 of the 1937 Code.

"In turning to the printed volume of Attorney General's opinions I fail to find such an opinion. If you have a copy of such an opinion and it still meets your approval I would appreciate having you mail it to me, otherwise I would appreciate an opinion as of this date."

In addition we are advised that the lots are contiguous and under the same ownership.

I.

The opinion of this department dated April 17, 1937, to which you refer is hereby withdrawn.

II.

Section 7272 of the Code of 1939, provides as follows:

"REDEMPTION—TERMS. Real estate sold under the provisions of this chapter and chapter 347 may be redeemed at any time before the right of redemption is cut off, by the payment to the auditor, to be held by him subject to the order of the purchaser, of the amount for which the same was sold and four per cent of such amount added as a penalty, with six per cent interest per annum on the whole amount thus made from the day of sale, and the amount of all taxes, interest, and costs paid by the purchaser or his assignee for any subsequent year or years, with a similar penalty added as before on the amount of the payment for each subsequent year, and six per cent per annum on the whole of such amount or amounts from the day or days of payment."

There is no statutory authorization in Iowa for the partial redemption of parcels or lots sold en masse. The annotator in 145 A. L. R., page 1320 states:

"The cases assume that except as statutes otherwise provide, lands sold as a unit at tax sale can ordinarily be redeemed only as a unit. So it is apparent that, in general at least, any asserted right to make a partial or proportional redemption must be founded in the language of the statutes."

Where land is contiguous and owned by the same person, a sale thereof as a unit, although platted in separate parcels makes out a prima facie case of a valid sale. *Jones v. Mills County*, 224 Iowa 1375, 1389. And in addition where they are so situated, and used, and occupied as one parcel, the Court in *Jordan v. Beeson*, 225 Iowa 460, 464, said this:

"Appellees contend, under the authority of Weaver v. Grant, 39 Iowa 294, and Greer v. Wheeler, 41 Iowa 85, that on account of the fact that the lots in both blocks and intervening street have been so used and occupied for the past 37 years as one parcel and for one purpose, that the entire premises in fact constitute but one tract or parcel, and that therefore the sale of such property jointly is not in violation of section 7252.

"The two cited cases and the additoinal case of Martin v. Cole, 38 Iowa 141, are thoroughly discussed and analyzed in the specially concurring opinion in our recent case of Jones v. Mills County, 224 Iowa 1375, 279 N. W. 96. An analysis of those cases reveals that we are committed to the doctrine that whenever the real estate is contiguous and situated in the same section, that two or more tracts or lots thereof may be sold together where they are used and occupied as one parcel. Examination reveals, however, that in each of our cases approving this doctrine that the different tracts or lots have been contiguous and in the same section."

Based upon the foregoing, we are of the opinion that the sale is a valid sale.

III.

There being no statute authorizing a partial redemption from a valid sale, we agree with this dictum from the case of *Jones v. Mills County*, 224 Iowa 1375, 1382.

"If, as they contend, the sale is void, and they desire to redeem from only a portion of the land sold, since the property is properly assessed

and each tract valued separately, they could, without the consent of the tax sale certificate holder, ask the county auditor or treasurer to figure the tax on any separate tract and tender the amount of such tax with interest and penalty, and the county would be compelled to accept it. This would not be true if the sale were valid, for in such event the holder of the tax sale certificate would have to be consulted and give his consent to partial redemption."

In our view, therefore, redemption of two lots out of four when sold as one tract is unlawful.

We are not unmindful in reaching this conclusion of the case of *Penn v. Clemans,* 19 Iowa 372, where partial redemption was allowed. This involved a redemption of a homestead as part of the tract sold, and in respect to this opinion, the annotator in 145 A. L. R., 1332, said this:

"In Penn v. Clemans (1865) 19 Iowa 372, under a statute providing that 'the homestead is liable to be sold for no taxes save that which is due on itself exclusively,' it was held that where several distinct parcels of land, including a homestead, were sold in gross at a uniform sum per acre, the homesteader was entitled to redeem the homestead by paying a proportionate amount computed on its acreage. The court pointed out that the sale of the several distinct subdivisions in gross was irregular and that to permit the purchaser who was thus charged with knowledge of the irregularity to take advantage thereof so as to defeat the right of homestead redemption 'would be to override that well-settled rule of law and common justice that no man shall take advantage of his own wrong'."

DRUGS: PHARMACY, VITAMINS: VITAMIN PRODUCTS. The sale of vitamins in concentrated form intended to be used for the mitigation, prevention or cure of disease of man or animal, must be made in a licensed pharmacy under the supervision of a licensed pharmacist in the State of Iowa.

July 26, 1944. *Mr. J. F. Rabe, Secretary, Board of Pharmacy Examiners, Building:* We acknowledge your request for our opinion on the following questions:

1. Whether Vitamin Products in concentrated form as pills, capsules, tablets, or drops come under the classification of drugs in the meaning of the Iowa Pharmacy Law.
2. Is their sale restricted to pharmacies under the supervision of a registered pharmacist in the State of Iowa.

For the purpose of the State Pharmacy Act, "drug" means all medicinal substances and preparations for external and internal use recognized by the United States Pharmacopeia or National Formulary, AND any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of diseases of either man or animal. Section 2580, 1939 Code of Iowa.

We are concerned here only with vitamins in concentrated form, as distinguished from their natural state, and as found in vegetables, meat, and other articles of normal diet. It may be safely stated that a vitamin is not a proprietary medicine, so as to fall under the exception of Part IV of Section 2579 of the 1939 Code of Iowa.

What is known of vitamins is the result of research by many individuals over many years. No person has the exclusive rights to vitamins or their compound. This is clearly evident by the multitude of manufacturers offering the same type of vitamins for sale.

As per our conversation and examination of the United States Pharmacopeia and National Formulary, we find vitamins recognized officially in said Formulary and find monographs therein setting forth the standards for vitamins A, B-1, B-2, or G, C and D, and preparations containing these vitamins.

It is clear then that certain concentrated vitamins are recognized in the official United States Pharmacopeia and the official National Formulary as drugs.

Before drawing our final conclusion let us examine the second half of the definition of drugs as "any substance or mixture of substances intended to be used for the cure, mitigation or prevention of disease of either man or animal." Section 2580.

The question sometimes raised is: Are vitamins a food or a drug? We find many definitions of vitamins. We shall define it as a chemical compound or substance essential to the maintenance of health and growth, and to the prevention of certain diseases. Not all vitamins are recognized by the United States Pharmacopeia, or the National Formulary. Vitamins are sold to the consumer in either tablet, capsule or liquid form, or are in some foods in the natural state. In the former they are concentrated. In the latter they are, of course, not referred to as drugs.

All vitamins are intended for internal use. If prescribed by a physician, it will be only because they are intended for a cure, mitigation or prevention of disease. As to those who take vitamins without a physician's direction, it is claimed they do so to mitigate or prevent disease, being convinced by persuasive advertising of manufacturers, or by friends, that the vitamin concerned will either mitigate or cure their real or imaginary ailments.

In view of the apparent tremendous increase in recent years in the use by the public of concentrated vitamins, we deem it necessary to emphasize that in reaching our conclusions we have not treated the question of the effect, beneficial, harmful, or otherwise, of the use of vitamins. The only question before us is the interpretation of the regulatory provisions of the statute governing the sale of drugs, as defined therein, at retail.

We may point out, however, that the Courts have held categorically that the fact that the substance is harmless as a household medicine does not exempt it from the law. (184 Minnesota 51.)

Section 2578 of the 1939 Code sets out "Persons who engage in the business of selling, or offering, or exposing for sale, drugs and medicines at retail" are engaged in the practice of pharmacy, and must be licensed as per Section 2581.

In Section 2580, we find that a pharmacy is defined as a drug store in which drugs and medicines are exposed for sale, or sold at retail, or in which prescriptions of licensed physicians and surgeons, dentists or veterinarians are compounded, and sold by a registered pharmacist.

We are supported in our conclusion by like opinions of the office of the Attorney General of the State of New York, of the State of Minnesota, and of the State of South Dakota. These conclusions are as follows, and we hold:

1. That vitamins or vitamin products in concentrated form, whether sold in pills, capsules, tablets or drops come under the classification of drugs, within the meaning of the Iowa Pharmacy Law.
2. That the sale of vitamins in concentrated form intended to be used for the mitigation, prevention or cure of disease of man or animal, must be made in a licensed pharmacy, under the supervision of a licensed pharmacist in the State of Iowa.

ASSISTANTS TO ASSESSOR: AUTHORITY OF CITY COUNCIL: SECTION 5669. City council does not possess the authority to employ assistants to the assessor to perform extra or special services; the authority is vested solely in the board of supervisors.

August 9, 1944. *State Tax Commission, Des Moines Building, Des Moines, Iowa:* This will acknowledge receipt of your letter of the 22nd ultimo wherein you request an opinion on the following legal question:

Section 5669 provides for compensation of assessors and deputies and the last paragraph of said section contains the following provision:

"In cities where extra or special services are to be performed by the assessor, the board of supervisors may by special contract with the assessor, determine the compensation to be paid."

Question has arisen as to the power of the city council to employ assistants to the assessor to perform extra or special services and pay for such services out of city funds in the event that the board of supervisors refuses to employ such assistants to the assessor.

It is our opinion that the city council does not possess the authority to employ asistants to the assessors to perform extra or special services.

The last paragraph of Section 5669 set out above, we think, sustains our position. It is an elementary proposition of law that where a statute directs a thing to be done by a specified officer or board, an implication arises that it shall not be done by a different officer or board.

People vs. Gibson, 53 Colo. 231; 125 Pac. 531.
Taylor vs. Taylor, 66 W. Va. 238; 66 S. E. 690.

We therefore reach the conclusion that where extra or special services are to be performed by the assessor, the board of supervisors may by special contract with the assessor, authorize that officer to employ assistants for the performance of such extra or special services and determine the compensation to be paid. The fact that the board of supervisors refuses to enter into a special contract with the assessor for the performance of such services does not have the effect of conferring authority upon the city council to enter into a special contract with the assessor for the performance of such extra or special services. That authority is vested solely in the board of supervisors.

ANIMALS: BIRDS: FUR-BEARING ANIMALS: GAME BIRDS: SECTION 1794.097: SECTION 1794.001: SECTION 1794.011. The possession of not more than two game birds or fur-bearing animals as provided in Section 1974.097 is limited to legally acquired game, and such game taken out of season would be illegal possession. (FOR PETS.)

August 11, 1944. *Mr. Bruce F. Stiles, Chief, Division of Fish and Game, Iowa State Conservation Commission, Building:* We acknowledge

receipt of your letter of August 8 asking our opinion upon the following question:

"Is the possession of not more than two game birds or fur-bearing animals, as provided for in Section 1794.097, limited to legally acquired game; or may they be possessed regardless of how they are acquired?"

Let us first examine Section 1794.097 of the 1939 Code, which reads as follows:

GAME BIRDS OR ANIMALS AS PETS. Any person may *possess* not more than two game birds or fur-bearing animals confined as pets without being required to purchase a license as a game breeder, but he shall not be allowed to increase his stock beyond the original number nor shall he be allowed to kill or sell such stock. (Italics ours)

Let us next examine Section 1794.001 of the 1939 Code, which reads as follows:

PROHIBITED ACTS. It shall be unlawful for any person to *take* pursue, kill, trap or ensnare, buy, sell, *possess*, transport, or attempt to so take, pursue, kill, trap or ensnare, buy, sell, possess, or transport any game, protected non-game birds, fur-bearing animals or fur or skin of such animals, mussels, frogs, spawn or fish, or any part thereof, except upon the terms, conditions, limitations and restrictions set forth herein, and administrative orders necessary to carry out the purposes set out in section 1794.002, or as provided by the code. (Italics ours)

And also Section 1794.011, which reads as follows:

RESTRICTIONS. It shall be unlawful for any person except as otherwise provided, to wilfully disturb, pursue, shoot, kill, *take*, or attempt to take or have *in possession* any game bird or animal at any time except during the open season period embraced within the dates, both inclusive, specified for each variety and each locality, respectively, or in the open season take in any one day in excess of the number designated for each variety and/or each locality, respectively, or have in possession any variety of game bird or animal in excess of the number allowed in possession as indicated in the following table:
* * * * *. (Itaics ours)

A careful reading of the above set out sections makes it clear that were it not for Section 1794.079, possession of two game birds or fur-bearing animals, either for pets or for any other reason, out of season, would be illegal possession, possession being prohibited as well as taking in Section 1794.001 and Section 1794.011. There are no exceptions provided in the law for such taking, and it cannot be presumed.

Said exception contemplates a taking in a legal manner, since it does not extend to a taking. In view of the fact that there are several means of legally acquiring two such birds or animals, namely in an open season or from some licensed game breeder, we hold that such birds or animals cannot be possessed under Section 1794.097, unless acquired in a legal manner.

Under the laws of conservation persons cannot be permitted to take young animals from wild life out of season, with the excuse that the same are to be used as pets. If pets are so desired they may be obtained in season or from a licensed dealer, or in some other legal manner, and cannot be obtained from the wild life of the state. To permit

the same would be to destroy the purpose of our conservation laws, and open the door to hunting and trapping in seasons now closed for the protection of said birds and animals, or the protection of animals whose taking at any time is prohibited.

No person can, out of season, therefore, take such birds or animals legally, and should they do so it would be the duty of the conservation officer to seize and take possession of same, as provided in Section 1714, which reads as follows:

SEIZURE OF UNLAWFUL GAME. It shall be the duty of the director, conservation officers, and police officers of the state, to seize with or without warrant and take possession of any fish, furs, birds, or animals, or mussels, clams, and frogs, except for bait which have been caught, taken, or killed at a time, in a manner, or for a purpose, or had in possession or under control, or offered for shipment, or illegally transported in the state or to a point beyond the borders thereof, contrary to the provisions of this chapter.

It is therefore our opinion that the possession of not more than two game birds or fur-bearing animals as provided in Section 1794.097, is limited to legally acquired game.

OLD RECORDS: DESTRUCTION OF: TAX LISTS AND RECEIPTS: SEC. 10030: SEC. 5139. Board of Supervisors, after order to County Auditor rendering documents useless for purpose for which they were intended, could allocate such documents to the paper drive and be within the authority vested in them "to order to destroy."

August 15, 1944. *Mr. A. J. Hobson, County Attorney, Hampton, Iowa:* You submit for opinion the following:

"In connection with the drive for scrap paper, some of our County officers would like to know whether or not certain of their old records could be turned into the paper drive.

The Auditor would like to know if the assessor's books and assessor's rolls prior to the year 1920 could be turned in. He would also like to know how far back he should keep claims and cancelled warrants.

The Treasurer would like to know if the tax lists and duplicate tax receipts prior to the year 1920 could be turned in and if the motor vehicle records prior to 1942 could be turned in.

The Recorder would like to know if the old chattels, assignments and releases prior to the year 1930 could be turned in."

The foregoing officers are ministerial and possess such power and duties as are prescribed by statute. There is no specific statutory authority conferred upon any of these officers to turn in any useless or ancient records as "scrap" in the paper drive. There are two statutes, however, authorizing destruction of certain of such records. Under Section 10030, Code of 1939, as follows:

"In case such unrecorded instrument, with the extension or release thereof, if any, be not returned as hereinbefore provided, after the expiration of five years from the maturity thereof, or the maturity of any extension thereof, the recorder shall destroy such chattel mortgages with the extension or releases thereto attached, or other instruments or writing relating thereto, by burning the same in the presence of the board of county supervisors, or a committee appointed by the board of supervisors from their own number, to superintend the same, and when so destroyed the date of such destruction shall be entered on the index record under "remarks".

Specific authorization is conferred upon the Recorder to destroy, by burning, certain chattel mortgages and conditional sales agreements. The Department is committed to the rule that the destruction of such instruments is accomplished only in the manner stated in the statute, to-wit, by burning. Section 5139, Code of 1939, provides as follows:

"The board of supervisors is authorized to order the county auditor to destroy all duplicate tax receipts, poll tax receipts, and hunting license applications which have been on file in the office of the county treasurer or auditor for more than five years.
The board is also authorized to order the county auditor to destroy all assessors' books, assessment rolls, county vouchers and cancelled county warrants which have been on file in the office of the county auditor for more than ten years."

In accordance with this rule, stated in 59 C. J., page 984, entitled "Statutes":

"In accordance with the maxim, "expressio unius est exclusio alterius," where a statute enumerates the things upon which it is to operate, or forbids certain things, it is to be construed as excluding from its effect all those not expressly mentioned; and where it directs the performance of certain things in a particular manner, or by a particular person, it implies that it shall not be done otherwise nor by a different person." the Board of Supervisors is specifically the body authorized to order the destruction of the useless documents therein specified. Whether the destruction so authorized means the complete or total destruction of the specified documents or merely rendered useless for the purpose for which they were intended, is a question on which the Courts have rendered varying opinions according to the circumstances. However, we are of the view that, while the term "destruction" ordinarily implies complete destruction, in the connection used in the statute quoted it may be construed to describe an act which, while rendering the thing useless for the purpose for which it was intended, does not literally demolish or annihilate the document. (State vs. Johnson, 14 S. E. 2d., 24). In that view, your Board of Supervisors, after order to the Auditor rendering the documents useless for the purpose for which they were intended, could allocate such documents to the paper drive and be within the authority vested in them "to order to destroy".

OLD AGE ASSISTANCE HEAD TAX: SOLDIERS & SAILORS CIVIL RELIEF ACT: PROPERTY LIEN: SEC. 3828.039. The statute of limitations does not apply to the collection of the old age assistance head tax, nor does it affect its lien upon property.

August 17, 1944. *Mr. King R. Palmer, Chairman, State Board of Social Welfare, Des Moines, Iowa:* I wish to acknowledge receipt of your recent letter requesting an opinion upon the following facts, to-wit:

1. Does the Soldiers and Sailors Civil Relief Act of 1940 (as amended in 1942) apply to old age assistance head tax, provided for in Section 3828.039, Code 1939?
2. If answer to No. 1 is yes,
(a) Is the 1% per month penalty replaced by ½% per month interest?
(b) Does this apply only during time of active service?
(c) For what period does this apply if man was in service before

adoption of the 1940 act or if man remains in service after the end of the emergency?

(d) For what period does this apply if the service man is killed or dies while in service?

3. Does any statute of limitations apply to old age assistance tax, either as to its validity or as to its lien on property?

4. If answer to No. 3 is yes, is the date of expiration, for a service man extended for a period equal to the length of his service?

They will be answered in the order asked.

1. Section 560(1) of the Soldiers and Sailors Relief Act of 1940 as amended by the Act of 1942, provides as follows:

"The provisions of this section shall apply when any taxes or assessments, whether general or special (other than taxes on income), whether falling due prior to or during the period of military service, in respect of personal property, money, or credits, or real property owned and occupied for dwelling, professional, business, or agricultural purposes by a person in military service or his dependents at the commencement of his period of military service and still so occupied by his dependents or employees are not paid."

The first section of the Soldiers and Sailors Relief Act, being Section 510, provides in substance that provision is hereby made to suspend enforcement of civil liabilities of persons in military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the nation. It is our opinion that Section 560 was intended to cover all taxes and to suspend the collection thereof, while such person was in the military service of the United States. It is therefore our judgment that the Soldiers and Sailors Relief Act of 1940, as amended in 1942, applies to the collection of the Old Age Assistance head tax.

2. (a) Section 560(4) of the Soldiers and Sailors Relief Act, provides as follows:

"Whenever any tax or assessment shall not be paid when due, such tax or assessment due and unpaid shall bear interest until paid at the rate of 6 per centum per annum, and no other penalty or interest shall be incurred by reason of such non-payment. Any lien for such unpaid taxes or assessments shall also include interest thereon."

This provides that interest shall be paid upon a tax when it is not paid when due, at the rate of six per cent per annum, and no other penalty or interest shall be incurred by reason thereof. Where there is a conflict between state and federal law, the federal law will prevail. Kenkel v. State, 168 Wis. 335, 170 NW 715. Therefore, such provision would prevail over the penalty provision of Iowa. The interest would not be computed at the rate of one-half per cent per month, but would be computed as ordinary interest. The interest rate would change to six per cent per annum on the date that the person reported for induction and would continue for such time as the act was applicable as set out in 2(b), post.

(b) Section 510 of said act provides for the suspension of the enforcement of civil liabilities in certain cases of persons *in the military service* of the United States. (Italics ours).

Section 511(1) provides as follows:

"The term 'persons in Military Service' and the term 'persons in the Military Service of the United States', as used in this Act, shall include the following persons and no others: 'All members of the Army of the United States, the United States Navy, the Marine Corps, the Coast Guard, and all officers of the Public Health Service detailed by proper authority for duty either with the Army or Navy. The term 'military service', as used in this Act, shall signify Federal service on active duty with any branch of service heretofore referred to or mentioned as well as training or education under the supervision of the United States preliminary to induction into the military service. The term 'active service' or 'active duty' shall include the period during which a person in military service is absent from duty on account of sickness or wounds, leave or other lawful cause."

Section 511(2) provides as follows:

"The term 'period of military service', as used in this Act, shall include the time between the following dates: For persons in active service at the date of the approval of this Act it shall begin with the date of approval of this Act; for persons entering active service after the date of this Act, with the date of entering active service. It shall terminate with the date of discharge from active service or death while in active service, but in no case later than the date when this Act ceases to be in force."

Section 516 provides as follows:

"Any person who has been ordered to report for induction under the Selective Training and Service Act of 1940, as amended, shall be entitled to the relief and benefits accorded persons in military service under articles I, II, and III of this Act during the period beginning on the date of receipt of such order and ending on the date upon which such person reports for induction; and any member of the Enlisted Reserve Corps who is ordered to report for military service shall be entitled to such relief and benefits during the period beginning on the date of receipt of such order and ending on the date upon which he reports for such service."

Section 584 provides as follows:

"This Act shall remain in force until May 15, 1945: Provided, That should the United States be then engaged in a war, this Act shall remain in force until such war is terminated by a treaty of peace proclaimed by the President and for six months thereafter: Provided further, That wherever under any section or provision of this Act a proceeding, remedy, privilege, stay, limitation, accounting, or other transaction has been authorized or provided with respect to military service performed prior to the date herein fixed for the termination of this Act, such section or provision shall be deemed to continue in full force and effect so long as may be necessary to the exercise or enjoyment of such proceeding, remedy, privilege, stay, limitation, accounting or other transaction."

As stated, Section 511(1) and Section 511(2) provides that the provisions of the Act take effect on the date of the approval thereof, which was October 17, 1940. This applies to a person who had entered the service on that date or prior thereto.

Section 516, supra, states that it applies only to Articles I, II and III of said Act. The provisions with reference to taxes and interest thereon are contained in Article V. Therefore, this section would have no application. For a person entering service after the date of approval of

the Act, it would become applicable on the date he reported for induction and would continue until he was discharged from active service or until he died while in active service, but in no case, later than the date when the Act ceased to be in force as defined by Section 584.

(c)-(d) These two questions were answered in our answer to 2(b).

3. 61 CJ Taxation Section 1393. LIMITATIONS. 'In accordance with the maxim, Nullum Tempus Occurrit Regi, no statute of limitations runs against the right of the sovereign to collect its taxes, unless expressly made applicable; * * *"

There is no statute in Iowa placing any limitations upon the time in which the sovereign (the state) can collect taxes due. This principal enunciated in the above citation is based upon the proposition that the statute of limitations does not apply to the sovereign (the state).

Collins Oil Co. vs. Perrine, 188 Iowa 295, held that taxes may be collected by distress and sale even after the lapse of five years from their entry on the treasurer's books.

Section 3828.039, Code of 1939, provides in part as follows:

"To provide money for said fund, there is hereby levied on all persons residing in this state and who are citizens of the United States and of twenty-one years of age and upwards, except inmates of state and county institutions, an annual tax of two dollars, to and including December 31, 1936. From the list certified to the county treasurer under the provisions of section 5296-f35 (Code 1935), it shall be the duty of such county treasurer to place the names of all persons subject to said tax on a tax list as specified by the auditor of state, and the said annual tax levied by the provisions of this section and chapter shall be collected in 1935, and 1936, by the county treasurer as of January 1, with a delinquency date of July 1, after which latter date a penalty of one per cent for each month or fractional month of delinquency, and the county treasurer shall make remittance thereof to the treasurer of state who shall credit same to the old-age assistance fund. In any subsequent year to that in which any tax is due and payable, the county treasurer shall charge any unpaid tax and/or penalty against the property owned by the person by whom said tax is payable; * * *"

Obviously this is not a real estate tax. Section 7203, Code of 1939, provides in substance that poll taxes and taxes due from any person upon personal property, shall be a lien upon all real estate owned by such person for a period of ten years after December 31st, following the levy of such tax.

This is plainly not a poll tax nor a tax upon personal property. Therefore it is an entirely different kind of tax than any recognized by the Code, previous to the passage of Section 3828.039. A portion of Section 3828.039 above set out, provides that in any subsequent year to that in which any tax is due and payable, the county treasurer shall charge any unpaid tax and/or penalty against the property owned by the person by whom said tax is payable. The office of the attorney general ruled on June 5, 1934, that the head tax in question created a lien on real estate, and such holding has been affirmed in several other opinions.

It is, therefore, our judgment that the statute of limitations does not apply to the collection of the old age assistance head tax, nor does it affect its lien upon property.

4. Since our answer to number three was "no", there will be no need to answer question number four.

MILEAGE ALLOWANCE: SHERIFFS: SEC. 5191: Milage is allowed sheriff at 7½ cents per mile except where accumulated in transport by auto of persons to state institutions or other destinations he is allowed 5 cents per mile for that portion of trip outside the county.

August 21, 1944. *Mr. Leon N. Miller, County Attorney, Knoxville, Iowa:* This will acknowledge receipt of yours of the 14th inst. in which you set forth the following:

"Pursuance to our telephone conversation of last Saturday this office is asking for an opinion on the following question, "How many cents per mile is a sheriff entitled to for mileage outside of the County for which he is sheriff, where he owns his own car and excepting only in case of where he transports by auto one or more persons to a State institution or any other destination required by law?".

In other words, in the latter case I believe the law is well settled that he is entitled to five cents per mile.

I also understand that there is no question but what he is entitled to 7½ cents for mileage traveled within the county of which he is the sheriff, assuming of course, that he owns his own car.

I am inclosing herewith a copy of a letter written by the Sheriff's Association to our Board of Supervisors, dated August 9, 1944.

For your further information I have discussed the matter with several other County Attorneys and have come to the conclusion that the Counties are not uniform as to what the sheriffs charge per mile in the State of Iowa.

I trust your department may give me an opinion on this proposition at an early date."

On June 1, 1935, this Department issued an Official Opinion, appearing in the Attorney General's Report for 1936, page 165, the following portion of which pertinent to the question you submit is withdrawn:

"Answering the foregoing, it is the opinion of this department that salaries of the sheriff are fixed by Section 5226 of the 1931 Code of Iowa. Where the population is 15,000 or less than 20,000, the salary is $1,800.00. He shall receive 7½ cents mileage per mile for distance traveled inside the county in his official capacity and 5 cents mileage per mile for distance traveled outside of his county on official business. Sub-section 10 of Section 5191 of the 1931 Code of Iowa, as amended by the Acts of the 45th General Assembly in regular and extraordinary sessions."

Tracing the legislative intention by and through the statutes enacted respecting mileage expenses of Sheriff discloses that Section 511, paragraph 12, of the Code of 1897 provided as follows:

"Mileage in all cases required by law, going and returning, five cents per mile;"

Such statutory provision remained unchanged until the following appears in the Code of 1924, Section 5191, Subsection 10, as follows:

"Mileage in all cases required by law, going and returning, ten cents per mile, provided that this subsection shall not apply where provision is made for expenses, and in no case shall the law be construed to allow both mileage and expenses for the same services and for the same trip."

And such statute remained unchanged until the 45th and 45th Extra Session of the Legislature amended the same Act eventuating into the Section as it appeared in the Code of 1935, Section 5191, Subsection 10, as follows:

"Mileage in all cases required by law, going and returning, seven and one-half cents per mile, provided that this subsection shall not apply where provision is made for expenses, and in no case shall the law be construed to allow both mileage and expenses for the same services and for the same trip. In case the sheriff transports by auto, one or more persons to any state institution or any other destination required by law he shall receive five cents per mile for that portion of the trip outside of the county; or in case one or more legal papers are served on the same trip, he shall be entitled to but one mileage at the rate prescribed herein, the mileage cost thereof to be prorated to the respective persons transported and also in the case of separate papers served. Provided, however, that in the serving of original notices in civil cases the sheriff shall be allowed mileage at the rate of seven and one-half cents per mile in each action wherein such original notices are served, and, he may refuse to serve original notices in civil cases until the statutory fees and mileage for services have been paid."

The statute has remained unchanged since such time. Examination of these statutes discloses that the mileage allowance in all cases required by law varied from five cents per mile to ten cents per mile and reduced therefrom to seven and one-half cents. The change made by the 45th and 45th Extra General Assemblies embraced this:

"In case the Sheriff transports by auto one or more persons to any state institution or any other destination required by law, he shall receive five cents per mile for that portion of the trip outside of the County."

It will be noted that this amendment specifically provides mileage for travel *by auto,* and specifically provides the rate for the trip outside the County for mileage at the rate of five cents per mile. This modification constitutes a proviso. 59 C. J., paragraph 638, Title, "Statutes," states:

"A proviso is a clause engrafted on a preceding enactment for the purpose of restraining or modifying the enacting clause, or of excepting something from its operation which otherwise would have been within it, or of excluding some possible ground of misinterpretation of it, as by extending it to cases not intended by the legislature to be brought within its purview. The proviso is generally introduced by the word "provided," but its existence and effect are to be determined rather by its matter and substance than by its form; and such word may, if that be the sense gathered from the whole act, simply explain what had previously been stated in general terms, or direct the manner of doing what was allowed by the context to be done generally."

and such proviso is interpreted according to Paragraph 639, 59 C. J., Title, "Statutes", as follows:

"The cardinal rule that, in construing statutes, the court must ascertain and give effect to the legislative intent applies to the construction of provisos. A proviso should be construed together with the enacting clause, with a view to giving effect to each and to carrying out the intention of the legislature as manifested in the entire act and acts in pari materia; and where, by reason of omissions or of accidental mistakes in the use of words, the proviso can be given no sensible effect, it will be disregarded.

A proviso which follows and restricts an enacting clause general in its scope should be strictly construed, so as to take out of the enacting clause only those cases which are fairly within the terms of the proviso, and the burden of proof is on one claiming the benefit of the proviso."

Tested by these rules, it seems clear that we have a general enactment of mileage allowance of long standing, and thereafter a modification thereof. In other words, mileage is allowed the Sheriff in all cases required by law at 7½ cents per mile, except that where mileage is accumulated in transport by auto of person or persons to State Institutions or other destinations, he is allowed mileage at five cents per mile for that portion of the trip outside of the County.

CHICAGO & NORTHWESTERN RY. CO.: REORGANIZATION: EXEMPTION: FOREIGN CORPORATIONS: CHAP. 227 ACTS OF 50TH GENERAL ASSEMBLY: SEC. 8423: The Chicago & Northwestern Ry. Co. is entitled to the benefit of the exemption contained in Sec. 5, Chap. 227 Acts of the 50th G. A. provided it comes within the fact situation prescribed by the amendment.

August 21, 1944. *Hon. Wayne M. Ropes, Secretary of State, Building:* You propound for opinion the following:

"This office would like to have an official opinion in regard to the reorganization of CHICAGO & NORTHWESTERN RAILWAY COMPANY.

This corporation had a permit to transact business in the State of Iowa as a foreign corporation organized under the laws of the State of Illinois. The company has now submitted for filing a plan of reorganization and reincorporation of Chicago & Northwestern Railway Company under the laws of the State of Wisconsin. The reorganization has been made and approved by the District Court of the United States of America, Northern District of Illinois, Eastern Division and is a reorganization in bankruptcy. The company has tendered a fee of $1.00 for filing the new articles.

In a transaction of this kind where the new organization is incorporated in another state is the corporation entitled to exemption for the balance of the term of the original permit from fees on the property and money invested in the State of Iowa under the provisions of Section 8423 of the 1939 Code of Iowa as amended, or should the corporation pay on all of its property or money kept, used or invested in the State of Iowa the same as a new foreign corporation qualifying for a permit to transact business in the state? We would appreciate an early opinion from your office."

The 50th General Assembly amended Section 8423 of the 1939 Code by adding thereto the following as appears under Section 5 of Chapter 227 of the Acts of that Assembly. Such Chapter concerned foreign corporations.

"Amend section eight thousand four hundred twenty-three (8423), Code, 1939, by striking the period (.) at the end of said section and adding thereafter the following:

'if said corporation has existence for a period of years. If the corporation has perpetual existence under its articles or charter it shall make the filings as hereinbefore provided for and shall pay a filing fee of one hundred dollars and a further fee of one dollar and ten cents for each one thousand dollars of such money or property within this state in excess of ten thousand dollars, and thereafter shall periodically pay the said fee as follows: in the case of a corporation for the construction and operation, or the operation alone, of steam railways, interurban railways, and street railways, or for the establishment and conduct of savings banks, every fifty years from the date of qualification and in the case of all other corporations, every twenty years from the date of

qualification, and upon the failure to make such payments within three months from the date same are due, the secretary of state shall cancel the permit of said corporation. The fees required by this section to be paid shall not be collected from a corporation organized for the purpose of carrying into effect a plan of reorganization approved in bankruptcy proceedings under the laws of the United States or in a general equity receivership in a Court of competent jurisdiction, until the period of time for which a permit to transact business within this State has prevously been issued to the corporation so reorganized has elapsed'."

A substantially similar provision was enacted by the 50th General Assembly, having reference to domestic corporations. Such provision is exhibited in Section 2, Chapter 225, of the laws of the 50th General Assembly, as follows:

"Section eight thousand three hundred forty-nine (8349), Code 1939, is hereby amended and revised to read as follows:

'8349. INCORPORATION FEE. Corporations organized for a period of years shall pay the secretary of state, before a certificate of incorporation is issued, a fee of twenty-five dollars together with a recording fee of twenty-five cents per page, and, for all authorized stock in excess of ten thousand dollars, an additional fee of one dollar per thousand. Corporations organized to exist perpetually shall pay to the secretary of state, before a certificate of incorporation is issued, a fee of one hundred dollars together with a recording fee of twenty-five cents per page, and, for all authorized stock in excess of ten thousand dollars, an additional fee of one dollar ten cents per thousand. Should any corporation increase its capital stock, it shall pay to the secretary of state a recording fee of twenty-five cents per page and in addition a fee which in case of corporations existing for a period of years shall be one dollar per thousand of such increase and in case of corporations empowered to exist perpetually shall be one dollar and ten cents per thousand of such increase. The fees, except the recording fees, rquired by this section to be paid, shall not be collected from a corporation organized for the purpose of carrying into effect a plan of reorganization approved in bankruptcy proceedings under the laws of the United States or in a general equity receivership in a court of competent jurisdiction, for the period until the termination of the time for which such fees were paid by the corporation so reorganized'."

The foregoing legislative enactments providing the exemption are plain in language and unambiguous in meaning. Both domestic and foreign corporations are alike entitled to the benefit of the exemption. It is within the terms and operation of the rule that:

"in the absence of special legislation, a foreign corporation is generally at liberty under the rule of comity to enter a State for the purpose of its business on the same footing as a domestic corporation." (23 Amer. Juris., page 72, "Foreign Corporations.")

and the rule that:

"The power rests with the legislature, not with the courts, to say whether any, and if so, what, terms and conditions shall be imposed upon foreign corporations as a condition of granting them permission to do business in a state. The wisdom, expediency, or policy of statutes imposing such terms and conditions is purely a legislative question, with which the courts have nothing to do." (23 Amer. Juris., paragraph 236, "Foreign Corporations".)

We are of the opinion, therefore, that the Chicago & Northwestern Railway Company is entitled to the benefit of the exemption contained in Section 5, Chapter 227, of the Acts of the 50th General Assembly, provided it comes within the fact situation prescribed by the amendment.

SCHOOL FACILITIES: SUB-DISTRICTS: SEC. 4233.1, 4233.2 AND 4233.3, CODE 1939: The Home District being closed for lack of pupils, may make mutual agreement with other board furnishing facilities, with reference to tuition, but it shall not be in excess of $6.00 per month.

September 1, 1944. *Mr. Paul E. Hellwege, County Attorney, Boone, Iowa:* This will acknowledge receipt of yours of the 26th inst., in which you submit the following for an opinion:

"At the request of the County Superintendent of Schools of Boone County, Iowa, I write for your opinion regarding the following set of facts, to-wit:

We have in Boone County a number of sub-districts in school Districts where the school therein is closed. The Board of Directors of the School Township Corporation above mentioned, which we will hereinafter refer to as School Corporation A, has contracted for school facilities with another school corpration, which we will hereinafter refer to as School Corporation B. Under the particular system existing in School Corporation B the pupils in the Seventh and Eighth grades are considered to be Junior High School students. The Board and Superintendent in Corporation B state that the cost of operating the Junior High School is greater than that of operating the grade school and for that reason the tuition rates for pupils in Junior High School (Seventh and Eighth Grades) will be $8.00 or more monthly. The question resolves itself into two parts:

1. By virtue of Sections 4233.1 and 4233.3, Code of Iowa, 1939, has the Board of Directors of Corporation A, assuming the circumstances as being identical with the situation provided for in the first sentence of said Section 4233.1, authority to contract, under any circumstances, to pay more than $6.00 per month to School Corporation B. for facilities furnished pupils in the Seventh and Eighth grades?

2. Is it mandatory that School Corporation B. furnish facilities for pupils in the Seventh and Eighth grades from School Corporation A. in the event that School Corporation B. possesses adequate facilities for their instruction, or stated in other words may School Corporation B. arbitrarily refuse to take Seventh and Eighth grade pupils when Code Section 4233.3 seems to set a maximum rate of tuition?

Apparently some of this controversy has arisen because of the fact that the Board of Directors in corporations such as School Corporation B. above are attempting to take the position that their Junior High School is a part of their High School as distinguished from their grade school system and that they are entitled by virtue of Code Section 4277, as amended, to charge tuition fee not in excess of $12.00 per month."

1. Sections 4233.1, 4233.2 and 4233.3 of the Code of 1939 are exhibited as follows:

4233.1. "If a school is closed for lack of pupils, the board of such corporation shall provide for the instruction of the pupils of the corporation by sending them to other schools of the corporation or by contracting for such facilities in another school corporation if a school in such other corporation is nearer to them than any public school of the corporation of their residence and such pupils are over two miles from any public school in their resident corporation. Immediately upon the closing of any

school, the board shall notify the patrons of the school where their children are to attend; provided that when the school in a subdistrict of a school township has been closed, the residents of such subdistrict may, if they prefer, send their children to the public school of their choice outside the school township, provided the cost to the school township for each of such children will not exceed the pro rata cost in the entire school township during the school year immediately preceding."

4233.2. "Where a school has been closed and the board has failed to arrange for school facilities, as provided in section 4233.1, at least twenty days before the time the school would otherwise begin, it shall be the duty of the county superintendent to notify the president of the board of such corporation of such failure, and if the board does not arrange for school facilities within ten days thereafter, it shall then become the duty of the county superintendent to make such arrangements."

4233.3. "The tuition cost to be mutually agreed upon by the respective boards shall be paid by the home district except that the rate shall not be in excess of six dollars per months."

The rule of interpretation of these statutes is:

"that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them. If, the thing contained in the subsequent statute be within the reason of the former, it should be taken to be within the meaning thereof, and, if it can be gathered from the subsequent statute 'in pari materia' what meaning the Legislature intended to give the words of the former statute, it will amount to a legislative declaration of its meaning, and will govern the construction of the first statute. Galveston, H. & S. A. Ry. Co. v. Davidson (Tex.) 93 S. W. 436, 448." (Words and Phrases, Second Series, Vol. 2, Page 991.)

The word "duty" contained in Section 4233.2 is defined in *Bankers' Deposit Guaranty & Surety Co. v. Barnes*, 105 Pac. 697, 698, 81 Kan. 422 as:

"that which one is bound or under obligation to do."

Under the foregoing rule of construction of these statutes, the duty imposed upon the Superintendent is within the reason and meaning of Section 4233.1. Therefore, the obligation of School Corporation B is mandatory to furnish facilities for pupils in School Corporation A where the school has been closed for lack of pupils. And, in providing such school facilities, the provisions of 4233.3 respecting the tuition cost becomes operative. The rate should not be in excess of six dollars per month.

2. However, in the event the schools are closed by act of the Board and not by reason of lack of pupils, then the two Corporations may enter into a contract whereby Corporation B agrees to provide facilities for pupils of Corporation A and may charge therefor the average tuition per week for the school or room thereof in which such child attends. The maximum, as provided by Section 4233.3, of six dollars per month is not applicable. The situation, here outlined, is controlled by Section 4274, Code of 1939, as follows:

"A child residing in one corporation may attend school in another in the same or adjoining county if the two boards so agree. In case no such agreement is made, the county superintendent of the county in which the child resides and the board of such adjoining corporation may consent to such attendance, if the child resides nearer a schoolhouse in the adjoining corporation or nearer to a regularly established transportation route to a consolidated school and two miles or more from any public school in the corporation of his residence. Before granting such con-

sent the county superintendent shall give notice to the board where the child resides and hear objections, if any. In case such consent is given, the board of the district of the child's residence shall be notified thereof in writing, and shall pay to the other district the average tuition per week for the school or room thereof in which such child attends. If payment is refused or neglected, the board of the creditor corporation shall file an account thereof certified by its president with the auditor of the county of the child's residence, who shall transmit to the county treasurer an order directing him to transfer the amount of such account from the funds of the debtor corporation to the creditor corporation, who shall pay the same accordingly."

3. The foregoing includes a holding that pupils in the Seventh and Eighth Grades are Elementary pupils.

NURSES FUND: EXPENDITURES LIMITED TO PROVISIONS OF STATUTE. (2537.3) The expenditures to be made from the nurses fund provided by section 2537.3 of the 1939 Code of Iowa are limited to the purposes set forth in said statute and are not available for contributions to the State Nursing Council for War Service needs.

October 7th, 1944. *Miss Vera M. Sage, Executive Secretary, Iowa Board of Nurse Examiners, Building:* We have your letter of October 4th stating that the Board of Nurse Examiners desires an opinion on the following question:

"Will the Iowa law, as it pertains to nursing, permit the Board of Nurse Examiners to spend approximately two thousand dollars ($2000.00) from the "Nurses Fund" to carry on the activities of the State Nursing Council for War Service?"

You state in this letter as follows:

"The major purpose of the State Nursing Council for War Service is to coordinate any and all activities that relate to the meeting of nursing needs in wartime. Other purposes are as follows:

1. Procure nurses to meet the needs of the armed forces, and bring about equitable distribution of other nurses in order to maintain the best possible nursing service for civilians and in non-military governmental agencies.

2. Recruit student nurses.

3. Carry on an active public information program toward
(a) The nursing profession.
(b) Related professions and organizations.
(c) The general public.

4. Form local nursing councils for war service in county, district, city or town, depending upon logical divisions of the state and nurse population, and act as a link between the national services and these local councils.

5. Plan for post war needs.
Council work will inevitably affect post-war nursing whether or not a formal "post-war" plan is drawn up. For example, the number of students recruited now is one factor determining whether there will be a shortage or over supply of nurses after the war."

In order to determine whether or not the Board of Nurse Examiners for the State of Iowa can contribute funds to the State Nursing Council for War Service needs, we must examine section 2537.3 of the 1939 Code of Iowa which reads in part as follows:

"* * * All such fees collected and remitted shall be placed in a special fund by the treasurer of state and the state comptroller to be known as the "Nurses' fund", to be used by the board to administer and enforce the laws relating to the practice of nursing, to elevate the standards of schools of nursing, and to promote the educational and professional standards of nurses and nursing in this state, and no part of such expense shall be paid out of the state treasury. Any remainder in said fund at the end of each fiscal year, after all expense in carrying out the provisions of sections 2537.1 to 2537.6 inclusive, have been paid, or a sum sufficient for payment thereof set apart, shall be paid into the general fund of the state. Said fund shall be subject at all times to the warrant of the state comptroller, drawn upon written requisition of the chairman of the board and attested by the secretary, for the payment of all salaries and other expenses necessary to carry out the provisions of said sections, but in no event shall the total expenses therefor exceed the total fees collected and deposited to the credit of said fund."

You will notice in short that the Board is to use the "Nurses' fund" to administer and enforce the laws,

1. Relating to the practice of nursing.
2. To elevate the standards of schools of nursing.
3. To promote the educational and professional standards of nurses and nursing in this state.

You will also note that any remainder in said fund at the end of each fiscal year shall be paid into the general fund of the state. It is therefore clear that the use of the "Nurses' fund" is strictly limited to the uses provided in this and other sections, 2537.1 to 2537.6 inclusive, and for no other purposes.

We note from the objects and purposes of the State Nursing Council for War Service that its aims and ideals are laudable, and we also note that some of its functions are similar to the purposes for which this fund can be expended by the Board of Nurse Examiners.

Without considering the purposes not included in the powers listed above, such as recruiting nurses, in our opinion the Board of Nurse Examiners can not delegate to any other body the administration of part of the "Nurses' fund" even though that body has an identical purpose. The power and authority is vested in the Board of Nurse Examiners to administer the funds themselves and only for the purposes set out in the above referred sections. To hold otherwise would be to hold that they could delegate their authority, clearly unlawful without statutory provision.

It is therefore our opinion that the Board of Nurse Examiners is not permitted under the law to contribute any funds to the State Nursing Council for War Service although some of its objects coincide with the objects for which the Board may spend the "Nurses' fund".

CORPORATIONS: FEES CHARGEABLE FOR PERPETUAL EXISTENCE AND INCREASING AUTHORIZED CAPITAL STOCK. A corporation with a fixed period of existence is not subject to the $100.00 fee as provided by section 8360, 1939 Code of Iowa, when the only thing sought by the amendment is to increase the capital stock.

October 20th, 1944. *Mr. Wayne M. Ropes, Secretary of State, Building:* Your request of October 16th for an official opinion from this office on the following question, is acknowledged:

"This office would like an official opinion as to the fee to be charged to a corporation amending its articles of incorporation, providing for perpetual existence, and also increasing the authorized capital stock in the same amendment.

Should the corporation pay the fee of one hundred dollars plus one dollar ten cents per thousand on all authorized capital in excess of ten thousand dollars plus the recording fee, or should it pay the above fees and in addition thereto pay for the increase in authorized capital stock at the rate of one dollar ten cents per thousand of such increase? The regular fee for amendment providing for perpetual existence and the fee for increase of capital stock are both provided for in Section 8360 of the Code.

We have an opinion from your office to the effect that where a renewal is made prior to the expiration of the corporate period and where the authorized capital stock is increased that the corporation should pay the regular renewal fee and in addition thereto pay the fee on the increase in capital stock."

Section 8364 of the Code of Iowa 1939, provides as follows:

"8364. DURATION. 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; provided however, that in addition to the power herein granted to incorporate for a period of years, corporations hereafter organized or now existing may have perpetual existence by so providing in the articles of incorporation or by amendment thereto pursuant to section 8360."

It will be seen from the above section that it is possible under our law for a corporation with a fixed period of existence to acquire perpetual existence by providing for such perpetual existence by an amendment to its articles of incorporation, pursuant to Section 8360. Section 8360 of the Code of 1939 provides as follows:

"8360. AMENDMENTS—FEES. Amendments to articles of incorporation making changes in any of the provisions of the articles may be made at any annual meeting of the stockholders or special meeting called for that purpose, and they shall be valid only when recorded, approved and published as the original articles are required to be. If no increase is made in the amount of capital stock, a certificate fee of one dollar and a recording fee of twenty-five cents per page must be paid. Where capital stock is increased the certificate fee shall be omitted but there shall be paid a recording fee of twenty-five cents per page and in addition a filing fee which in case of corporations existing for a period of years shall be one dollar per thousand of such increase and in case of corporations empowered to exist perpetually shall be one dollar and ten cents per thousand of such increase. Corporations providing for perpetual existence by amendment to its articles shall, at the time of filing such amendment, pay to the secretary of state a fee of one hundred dollars together with a recording fee of twenty-five cents per page, and, for all authorized capital stock in excess of ten thousand dollars, an additional fee of one dollar ten cents per thousand. * * *"

The reference to section 8360 is, in our opinion, for the purpose of outlining the procedure by which an amendment to the articles of incorporation may be accomplished and become effective. If the amendment makes no increase in the capital stock merely the certificate fee and recording fee is required to be paid. This is what we would designate as the first provision of section 8360 having to do with an amendment

referring to capital stock. The second subdivision we quote as follows:

"Where capital stock is increased the certificate fee shall be omitted but there shall be paid a recording fee of twenty-five cents per page and in addition a filing fee which in case of corporations existing for a period of years shall be one dollar per thousand of such increase * * *."

This quotation is merely a part of the sentence but we feel it has a definite application merely to a corporation existing for a fixed period of years. The balance of the sentence is as follows:

"* * * and in case of corporations empowered to exist perpetually shall be one dollar and ten cents per thousand of such increase."

This portion of the sentence, in our opinion, has application only to corporations which prior to the adoption of the amendment were corporations empowered to exist perpetually so the whole sentence, which is as follows:

"Where capital stock is increased the certificate fee shall be omitted but there shall be paid a recording fee of twenty-five cents per page and in addition a filing fee which in case of corporations existing for a period of years shall be one dollar per thousand of such increase and in case of corporations empowered to exist perpetually shall be one dollar and ten cents per thousand of such increase."

refers to separate and distinct classes of corporations:

a. Those which at the time of filing the amendment were existing for a period years, and

b. Those which at the time of the adoption of the amendment were empowered to exist perpetually.

The last above quoted sentence, in our opinion, must be read distinct from the following:

"Corporations providing for perpetual existence by amendment to its articles shall, at the time of filing such amendment, pay to the secretary of state a fee of one hundred dollars together with a recording fee of twenty-five cents per page, and, for all authorized capital stock in excess of ten thousand dollars, an additional fee of one dollar ten cents per thousand."

In our opinion, this sentence can only refer and have application to corporations which prior to the adoption of the amendment providing for perpetual existence, were corporations with a fixed period of existence in their charter. It can not be said that a corporation with a fixed period of existence becomes immediately, for the purpose of fees chargeable, a corporation having perpetual existence upon the adoption of an amendment providing for perpetual existence. In other words, for the purpose of fees chargeable under section 8360 the corporation which has had a fixed period of existence must not be charged two fees. It must be charged only the fee set forth in the last sentence of that section 8360 first quoted in this opinion. It must not be charged a fee of one dollar and ten cents per thousand of increase of capital stock and also a fee of one hundred dollars plus one dollar and ten cents per thousand of all authorized capital stock in excess of ten thousand dollars, plus the recording fee.

You are therefor advised that it is the opinion of this office that the

corporation whose articles were submitted to you and gave rise to the question contained in your letter should be charged the following fees:

1. Recording fee of twenty-five cents per page.
2. Fee of one hundred dollars.

3. Additional fee of one dollar and ten cents per thousand for all authorized stock in excess of ten thousand dollars.

JUSTICE OF THE PEACE: FEES: COMPENSATION: SEC. 10639; 5733; 5734. Justice of the peace should account to county treasury not only for fees collected in civil and criminal state cases but also for fees collected while acting in the municipal court, and his compensation is determined by population of the township of his election.

November 20, 1944. *Mr. L. I. Truax, Supervisor of County Audits, Building:* We acknowledge receipt of your letter of the 16th asking our opinion and advice on the matter set out in a letter addressed to you by Mr. Nimrod, one of your examiners now making an examination of accounts in Pottawattamie County, and stating as follows:

"We have a situation out here that I think should be called to your special attention. As you perhaps already know, we have a Justice of the Peace, elected in Lake Township (outside of the city of Council Bluffs) who operates his court here in Council Bluffs in the Sheriff's office. As will be shown on pages 47-b and 47-c of our report for the year 1942 this Justice received $452.25 in excess fees for the year 1942 and my report for the year 1943 will show that the excess fees for 1943 is $479.70.

The Sheriff's office and the County Attorney seems to favor this set-up and have so informed the Board of Supervisors. They also seem to be of the opinion that the Justice should be permitted to retain all the fees that he collects.

The County Attorney's oral opinion is based on Code Section 5733 which permits a Justice to act when Municipal Judges are unavailable.

The Board of Supervisors have done nothing about this matter, but their desire is to have it settled one way or the other and have requested that I ask you to come out here and meet with them."

The jurisdiction of the justice of the peace is co-extensive with the county and is not limited by the divisions of the county for judicial purposes. See Coffman vs. Trimbal, 90 Iowa 737. Also the Opinion of the Attorney General in 1925 and 1926, page 205, wherein it is stated:

"The statutes do not require that a justice of the peace shall maintain an office or court in the township wherein he is elected, and in fact from a reading of the statutes hereinbefore referred to it is apparent that the legislature did not intend that his activities be restricted to a particular township, but rather that he might hold criminal court in any township of the county."

Therefore the justice of the peace may hold his court in the sheriff's office in the city of Council Bluffs.

As to the question regarding the compensation of this justice of the peace, section 10639, 2-b, reads as follows:

"Section 10639. Accounting for fees—compensation.

1. * * *

2. Justices of the peace and constables in townships having a population of under twelve thousand shall pay into the county treasury all fees collected each year in excess of the following sums:

a. * * *

b. In all townships having a population of under four thousand, justices, six hundred dollars; constables, five hundred dollars."

A careful reading of the above section indicates that the compensation of a justice of the peace in a township having a population under four thousand will not exceed $600 per year and that *all* fees collected in excess of that sum must be turned into the county treasury.

It is our understanding that Lake township is a township with a population of 778 which would indicate that the compensation of this justice, governed by the township of his election, would not be over $600 per year.

The justice may charge fees provided for services in prosecution for violations of the city ordinance in Council Bluffs, Iowa. Sections 5733 and 5734 read as follows:

"Section 5733. JURISDICTION OF JUSTICE OF PEACE. If the mayor or judge of the superior, municipal or police court is absent or unable to act, the nearest justice of the peace shall have jurisdiction and hold court in criminal cases, and receive the statutory fees, to be paid by the city or county as the case may be.

"Section 5734. TRANSFER OF CASE—FEES. When an information is filed before the mayor for the violation of an ordinance of the city or town, he may, upon his own motion only, at any time before trial, transfer the case for further proceedings to any justice of the peace court within such city or town, and such justice of the peace shall have jurisdiction thereof to the same extent and with the same power as the mayor. The fees taxable after the transfer of the case, fixed by ordinance, shall be paid by the city or town to such justice."

It must be perfectly clear that in matters of prosecution for offenses against the ordinances of the city the justice should keep a docket separate and distinct from the county docket. The titles of these cases are not the 'State of Iowa vs. John Doe', but the 'city of Council Bluffs vs. John Doe.' They are not state criminal cases. The section above provides that the fees shall be fixed by the city ordinance, and may or may not be the same as the state fees. They are paid by the city or town to the justice. It is our opinion that said fees must be considered as other fees received by the justice, for example the same as fees in civil cases, in an accounting by the justice of the peace to the county treasury as provided in code section 10639.

We find in Broyles v. Mahaska County, 213 Iowa, 345, the following statement by the court:

"A literal construction of this last paragraph (meaning section 10639-4) would therefore result in the constable's receiving a compensation of $800 from the county, he being compelled to turn in, not the excess over $600, but *all of the fees collected by him.*

We are disposed to think this last section of the statute controlling and the compensation of this constable must be figured on the basis of $800 a year, and *all fees collected by him* are chargeable against him and should be turned into the county treasury."

It is therefore our opinion that the justice of the peace in the case at hand should account to the county treasury not only for the fees collected in civil and criminal state cases but also the fees collected while acting in the municipal court and that his compensation, determined by the population of the township of his election which is Lake township, Pot-

tawattamie County, Iowa, may not exceed $600. This amount is in full compensation for all services rendered and he must account to the county for the balance.

INSTRUMENTS, FILING OF: CONDITIONAL SALES CONTRACTS: CHATTEL MORTGAGES: SEC. 10035: Copies of conditional sales contracts, chattel mortgages, etc., covering property owned by utility companies not accepted for filing in the office of Secretary of State under section 10035.

November 21, 1944. *Honorable Wayne M. Ropes, Secretary of State, Building:* This will acknowledge receipt of yours of the 18th inst., stating the following:

"This office would like an official opinion as to whether or not copies of conditional sales contracts, chattel mortgages, etc., covering property owned by utility companies, should be accepted for filing in this office under the provisions of Section 10035 or whether the original executed instrument should be filed.

You will note that there is no provision in Sections 10035 or 10036 for filing copies of these instruments, but the original instrument appears to be referred to. Section 10017 of the Code provides for filing instruments in the office of the County Recorder, and this section does permit the filing of the copy. However, there is nothing contained in Section 10035 with reference to the filing of copies."

Sections 10033, 10034 and 10035 of the Code of 1939 provide respectively as follows:

"Section 10033. In any contract for the sale of railroad or street railway equipment or rolling stock or power house, electric or other equipment of street or interurban railways or of electric light and power companies or of steam-heating companies, such equipment including engines, boilers, generators, switchboards, transformers, motors, and other machinery and appliances, it may be agreed that the title thereto, although possession thereof be delivered immediately or at any time or times subsequently, shall not vest in the purchaser until the purchase price shall be fully paid, or that the seller shall have and retain a lien thereon for the unpaid purchase money."

"Section 10034. In any contract for the leasing or hiring of such property, it may be stipulated for a conditional sale thereof at the termination of such contract, and that the rentals or amounts to be received under such contract may, as paid, be applied and treated as purchase money, and that the title to the property shall not vest in the lessee or bailee until the purchase price shall have been paid in full, and until the terms of the contract shall have been fully performed, notwithstanding delivery to and possession by such lessee or bailee."

"Section 10035. No such contract shall be valid as against any subsequent judgment creditor, or subsequent bona fide purchaser for value without notice, unless:

1. The same shall be evidenced by an instrument executed by the parties and acknowledged by the vendee, or lessee, or bailee, as the case may be, in the same manner as deeds are acknowledged or proved.
2. Such instrument shall be filed for record in the office of the secretary of state.
3. Each locomotive engine, stationary engine, boiler, switchboard, transformer, motor, other piece of machinery or appliance or car sold, leased, or hired as aforesaid shall have the name of the vendor, lessor or bailor plainly marked on each side thereof, followed by the word 'owner', 'lessor', or 'bailor', as the case may be."

1. It will be noted that Section 10035 provides constructive notice to be accorded to instruments described in 10033 and 10034. Authority supports the rule that constructive notice is not imparted unless the Statute providing for such notice is complied with. This has had the recent consideration of our Supreme Court in Fleck v. Iowa Employment Security Commission, 8 N. W. 2d, 703, 706, —— Iowa ——, where the Court says: (Page 706)

"(1) The matter of constructive notice has been before the courts many times. In 39 Am. Jur. § 7, in dealing with such notice it is stated that constructive notice is the law's substitute for actual notice and is intended to protect innocent persons who are about to engage in lawful transactions. Also that it has been said to be highly inexpedient to extend the doctrine of constructive notice, and the tendency is rather to restrict the doctrine, not as a general rule extending it to purely commercial transactions. It further goes on to say that this statement has been challenged, however, and it is said that the doctrine is founded upon the maturest wisdom. In Hibbard v. Zenor, 75 Iowa 471, 39 N. W. 714, 716, 9 Am. St. Rep. 497, a chattel mortgage was left at the office of the recorder late in the day. It was filed by the county recorder and not indexed until the following day. The court held that such filing was not constructive notice until all the entries required by section 1925 of the Code had been made. Code of 1873. Therein the court held that when the statute is complied with a person is charged with notice whether he makes the examination or not."

"(2, 3) In Thomas v. Desney, 57 Iowa 58, 10 N. W. 315, 317, the court said: 'It is said the plaintiff did not examine the index book and therefore was not in fact misled. This is immaterial. He was bound by whatever appeared in said book whether he examined it or not. He was not bound to examine it and in such case is only chargeable with notice of what it contains.' The case of Parry v. Reinertson, 208 Iowa 739, 224 N. W. 489, 63 A. L. R. 1051, quotes with approval the statement just quoted. This last cited case further states, 208 Iowa on page 746, 224 N. W. on page 492, 'It requires the filing, the recording, and proper indexing to afford constructive notice. Without proper indexing, there is no constructive notice of the rights of the mortgagee or grantee.' In that case the question was whether or not a party was held to have constructive notice. An instrument had been filed on behalf of one Grossman, a mortgagee. It was indexed with Grossman as grantor. The court held that inasmuch as the conveyance was from Reinertson to Grossman there was no constructive notice.

(4) In the case of James v. Newman, 147 Iowa 574, 126 N. W. 781, 783, the matter involved was that of constructive notice where a mortgage had been assigned on the margin of the record but had not been indexed. In that case speaking through Evans, Judge, the court said: 'Speaking, however, to the merits of the legal question here proposed, we may say that constructive notice as distinguished from actual notice is a creation of the statute, and is available to a party only in accord with the provisions of the statute. In order to impart constructive notice to third persons of any instrument of transfer by one person to another, the statute contemplates and requires that it be properly acknowledged by the parties, and that it be filed for record and spread upon the records by the county recorder, and that it be properly indexed. * * * We know of no rule of law that would justify us in dispensing with these prerequisites to constructive notice'."

Under the plain terms of Section 10035, the notice is imparted from the filing of the *contract* and *not* from the filing of a *copy* of the contract. Inference of the Legislative intent with respect to the notice imparted, by filing of the instrument itself or filing of a true copy thereof

is afforded when consideration is given to Section 10017 of the Code of 1939 contained in the same Chapter as Sections 10033, 10034 and 10035, in which provision is made for the filing for record of not only "any such instrument, but a true copy thereof". The omission of the provision for filing of copy in the statute here considered is significant in that the omission was intentional and accords with the rule that "the court in construing a statute must ascertain and give effect to the legislative intent as expressed in the language of the statute." And "the court cannot, under its powers of construction, supply omissions in a statute, especially where it appears that the matter may have been intentionally omitted." (59 C. J., Title "Statutes", page 974). Or, as stated in Rural Independent School District v. McCracken, 233 N. W., 147, 153, a "statute cannot be extended by construction to cover casus omissus." Based upon the foregoing, we are of the opinion that constructive notice is not afforded, under the Sections hereinbefore exhibited, by the filing of a *copy* of any instrument therein provided for.

2. Section 10036 of the Code of 1939 provides as follows:

"The contracts herein authorized shall be filed with the secretary of state who shall number consecutively all such contracts filed in his office and shall maintain a card index thereof alphabetically arranged, and shall preserve the same as permanent records of his office."

This imposes a duty upon you as Secretary of State. The duty here prescribed in the statute is the filing of the contracts herein authorized, being those contracts described in Sections 10033 and 10034. And further imposes upon you the duty of numbering consecutively such contracts so filed, to maintain a card index thereof, and to preserve the same as permanent records of your office. We think this duty, so imposed, is the duty of filing the *contracts* and *not* the copy of the contracts. We do not ascribe to the Legislature an intention to impose upon you, as Secretary of State, any duty that would serve no useful statutory purpose. The filing of a copy would not impart notice. Therefore, your duty is confined to filing of the instrument itself.

INSURANCE: REDUCED PREMIUM RATE FOR MEMBERS OF BAR ASSOCIATION: DISCRIMINATION UNDER SECTION 8666 OF THE CODE. A proposal for issuing health and accident insurance, without physical examination, at reduced premium rate to members of the State Bar Association is discriminatory under section 8666 of the 1939 Code of Iowa, since attorneys or the same class of persons who are not members of the association could not obtain such insurance on the same basis.

December 14, 1944. *Hon. Chas. R. Fischer, Commissioner of Insurance, Southern Surety Building, Des Moines, Iowa:* You ask this office for an opinion in connection with a plan of accident and health insurance which has been approved by the Iowa State Bar Association for sale to its members. In your letter you describe the plan and set forth your question as follows:

"The plan was represented by the Commercial Casualty Insurance Company and is briefly described in the letter of solicitation as follows:

'Briefly stated the proposal is that if 50% of the membership of the Association desire to be insured the insurance can be effected without

physical examination and at rates substantially lower than would be applicable if the insurance were taken independently by the individuals. The details of the plan and the options available to the members applying will be fully explained by the solicitors, whom it should be made plain represent the company and not the Association.'

Further detail of the plan is contained in the Iowa State Bar Association news bulletin of October 1944, a copy of which we enclose herewith. However, we are advised that reference to the plan as 'group insurance' has been deleted from the solicitation letter appearing in the bulletin and it is not contended that this is such a plan.

Our understanding is that substantial rate reductions will be given members of the State Bar Association who buy the Commercial Casualty Insurance Company policy on this volume basis, while attorneys who do not belong to the Bar Association and other professional men classified in the same category of risk will continue to be charged the full premium.

With special reference to Section 8666 of the code of Iowa and the cases and opinions cited thereunder will you kindly give us your opinion whether or not the plan herein outlined constitutes discrimination within the purview of the state statutes."

As we understand the plan, it is that the officers of the Iowa State Bar Association have informed the membership of that association that by virtue of such membership this accident and health insurance is available *only* providing 50% or more of the members of the association make application. Although the original publicity described the plan as a "group plan", such description has been eliminated for the reason that the insurance does not qualify as group insurance.

Section 8666 is the statute on discrimination in this state, and reads as follows:

"No life or casualty, health or accident insurance company or association shall make or permit any distinction or discrimination between persons insured of the same class and equal expectancy of life in the amount or payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms or conditions of the contract it makes; nor shall any such company or association or agent thereof make any contract of insurance agreement, other than as plainly expressed in the policy issued; nor shall any such company or association or agent pay or allow, directly or indirectly, as an inducement to insurance, any rebate of premium payable on the policy, or any specific favor or advantage in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement whatever, not specified in the policy or contract of insurance."

This office in an opinion dated January 5, 1934 definitely held that section 8666 applies to policies of health and accident insurance.

Since you state that substantial reductions will be given members of the Iowa State Bar Association who buy the Commercial Casualty Insurance Company policy on a volume basis while attorneys who do not belong to the Bar Association and other professional men classified in the same category of risk will continue to be charged the full premium, it is the opinion of this office that such a plan constitutes a distinction and discrimination "between persons insured of the same class and equal expectancy of life in the amount or payment of premiums or rates charged * * *" prohibited by section 8666 quoted above.

MINORS: WARD OF TRAINING SCHOOL: COMMITTING COURT MAY AUTHORIZE SUPERINTENDENT TO CONSENT TO SURGICAL OPERATION UPON THE MINOR. Where a minor, not being sui juris, is committed to a state institution the committing court may authorize the superintendent of the institution to consent to a surgical operation being performed upon such minor, since the institution becomes the guardian of such minor upon commitment.

December 15, 1944. *Mr. Robert E. Neff, Administrator, The State University of Iowa, Iowa City, Iowa* and *Mr. Arthur O. Leff, Counsel, Iowa City, Iowa:* This will acknowledge receipt of letter from Mr. R. E. Neff of date December 12, 1944, and letter of like date from Arthur O. Leff to this Department respecting the authority of the University Hospital to perform an operation upon James Tillman, colored, age 16, without the consent of his parents. It appears that Tillman was an inmate of the Iowa Training School for Boys at Eldora, Iowa, committed from Sioux City, Iowa, and who thereafter, pursuant to proper authority and procedure, was admitted to the University Hospital on November 14, 1944, for treatment and medical attention. A careful diagnostic study at the Hospital resulted in the conclusion by the attending physician that an operation is quite essential for his welfare. Emergency is not present.

Generally speaking, a minor, not being sui juris and, therefore, not a free agent, performance of an operation upon such minor cannot be had without the parents' consent. Where, as appears in the case under discussion, the minor, pursuant to order of Court under the provisions of Chapter 180 of the Code of 1939, has been committed to a State Institution, then, under the provisions of Section 3638, as follows:

"In case the court commits said child to the custody of some proper person or institution, such person or institution shall, by virtue of such custody, be the legal guardian of the person of such child and may be made a party to any proceeding for the legal adoption of such child, but any such adoption shall be approved by the court."

the person or institution becomes, by virtue of such commitment, the legal guardian of the person of such minor child, in this case it being the Iowa Training School for Boys at Eldora, Iowa, and it became such legal guardian of the person of Tillman, the minor. As such legal guardian, the Institution, generally speaking, would have the same authority as a guardian duly appointed by the court; in other words, this appointment by operation of law invests it with the same powers as may be invested in a guardian under due appointment by the Court. And ordinarily the relation of parent and child is not disrupted by the appointment of a guardian of the person of the minor. Nor does it relieve them of their natural obligations to each other or interfere with the continued performance thereof. A guardian acts under the authority of the committing court in respect to the care and welfare of the minor. Such guardian would have no inherent power without order of the committing court to consent to the performance of a surgical operation upon the minor. Proper procedure, therefore, in our view, would be a due application by the Superintendent of the Iowa Training School for Boys at Eldora, Iowa, guardian of the person of the minor, Tillman, to the com-

mitting court for authority to consent to such operation. And upon the assumption, as we do, that the committing court has found, under Chapter 180, Code of 1939, the parents unfit to control the care and welfare of the minor, upon proper notice and hearing, authority may thus be granted by the court to the Eldora Training School for Boys to consent to the performance of the surgical operation upon the minor without the parents' consent.

BONUS LAW: INDUCTEE RECEIVING CIVILIAN PAY: STATUS OF CLAIM FOR BONUS. Where persons are inducted into the armed services and are placed in a service where they receive the difference between army and civilian pay, such person is entitled to his statutory bonus allowance, except that it is reduced to the extent of the amount of civilian pay he received.

December 20, 1944. *Mr. Edwin H. Curtis, Executive Secretary, Iowa State Bonus Board, Building:* This will acknowledge receipt of yours of the 18th, as follows:

"Section 4 of the Iowa Bonus Law states that no person shall be entitled to such payment or allowance whose only service was in the Student Army Training Corp, 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.

There were several branches of civilian service, and we have had claims from the Russian Railway Relief and also from the Spruce Production Company. These men were inducted into service and placed in this service at the same rate of pay as civilians drew for like service. The army paid the regular army pay and the Russian Government of the Spruce Production Company the difference between army pay and civilian pay.

These men received honorable discharges.

My question is 'Does a person who has served in one of these services lose their rights to any portion of the Iowa Bonus or only for the time while in this service?' "

The portion of Section 4 of the Soldiers' Bonus Law drawn in question is this:

"No person shall be entitled to such payment or allowance, whose only service 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."

The legislative intention is the test of the meaning of legislative enactments. It is a rule that in discerning this intention it will be presumed that the Legislature did not intend to have its enactments work an unjust result. Application of these rules to the problem submitted seems conclusive that a person who is otherwise entitled to the bonus allowance forfeits that allowance only to the extent of civilian pay received by him for civilian work during the term of such service. In other words, his bonus allowance would be the statutory amount reduced by his civilian pay. Any other conclusion might result unjustly in that one entitled to the bonus and who had labored in civilian service might, for the remainder of his term of service, have been serving his country in combat. To forfeit his bonus under such circumstances is obviously an unjust penalty. We ascribe no such intention to the Legislature.

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Attorney General opinions usually quote or interpret Code sections or Acts of the General Assembly. Following in numerical order are indexed the chapters and sections of the 1939 Code where reference is made in the opinions and following this is an index of the chapters of the 49th and 50th General Assemblies with the page number.

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