State of Iowa
1948

TWENTY-SEVENTH BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1948

ROBERT L. LARSON
Attorney General

Published by
THE STATE OF IOWA
Des Moines, Iowa

ROBERT L. LARSON
Attorney General

PERSONNEL
DEPARTMENT OF JUSTICE

ROBERT L. LARSON.....Attorney General
DON HISE.....First Assistant Attorney General
OSCAR STRAUSS.....Assistant Attorney General
CLARENCE A. KADING.....Assistant Attorney General
KENT EMERY.....Assistant Attorney General
HENRY W. WORMLEY.....Special Assistant Attorney General
—State Tax Commission
FOLSOM EVEREST.....Special Assistant Attorney General
—State Highway Commission
CHARLES F. O'CONNOR.....Special Assistant Attorney General
—State Board of Social Welfare
EARL R. SHOSTROM..... Special Assistant Attorney General
—Claims
IRA A. BUCKLES.....Executive Secretary to Attorney General
BURDENA C. BRIM.....Secretary
DOTTIE M. CUMMINGS.....Secretary
WINIFRED FOLEY.....Secretary
ANNE B. PEARLMAN.....Secretary

ATTORNEYS GENERAL OF IOWA

1853-1949

NAME	HOME COUNTY	YEARS SERVED
David C. Cloud	Muscatine	1853-1856
Samuel A. Rice	Mahaska	1856-1861
Charles C. Nourse	Polk	1861-1865
Isaac L. Allen	Tama	1865-1866
Frederick E. Bissell	Dubuque	1866-1867
Henry O'Connor	Muscatine	1867-1872
Marsena E. Cutts	Mahaska	1872-1877
John F. McJunkin	Washington	1877-1881
Smith McPherson	Montgomery	1881-1885
A. J. Baker	Appanoose	1885-1889
John Y. Stone	Mills	1889-1895
Milton Remley	Johnson	1895-1901
Charles W. Mullan	Black Hawk	1901-1907
Howard W. Byers	Shelby	1907-1911
George Cosson	Audubon	1911-1917
Horace M. Havner	Iowa	1917-1921
Ben J. Gibson	Adams	1921-1927
John Fletcher	Polk	1927-1933
Edward L. O'Connor	Johnson	1933-1937
John H. Mitchell	Webster	1937-1939
Fred D. Everett	Monroe	1939-1940
John M. Rankin	Lee	1940-1947
Robert L. Larson	Johnson	1947-

REPORT OF THE ATTORNEY GENERAL

December 31, 1948

HONORABLE ROBERT D. BLUE
Governor of Iowa

Dear Governor:

In compliance with Section 17.6 of the 1946 Code of Iowa, I herewith submit the biennial report of the Attorney General covering the period of his regular term beginning January 1, 1947 and ending December 31, 1948.

Chapter 13 of the 1946 Code of Iowa provides:

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

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

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

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

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

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

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

7. Supervise county attorneys in all matters pertaining to the duties of their office, and from time to time to require of them reports as to the conditions of public business intrusted to their charge.

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

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

10. Perform all other duties required by law."

During the biennium, this department has participated in sixty criminal cases. Of this total amount the defendant-appellants were successful in only six cases. In three cases the State appealed and obtained a reversal in one case while the remaining two were affirmed. In addition to criminal cases in the Supreme Court there have been filed ten habeas corpus actions instituted in the various courts by inmates of the several state penal institutions, and in each instance the petitioner has been unsuccessful in his efforts to obtain his discharge from custody. In one of the habeas corpus cases the petitioner was unsuccessful in the United States Circuit Court of Appeals and the United States Supreme Court. In one other case a defendant in a criminal action appealed to the United States Supreme Court but was likewise unsuccessful.

In four instances this department has directly participated in the trial of criminal prosecutions in the lower courts.

There are at the present time nineteen cases in which an appeal has been perfected to the Supreme Court but which have not as yet been submitted.

Under the statutes by which this department is charged with the duty of supervising admissions to the Bar there have been conducted six bar examinations in Iowa City and two bar examinations in Des Moines. The examinations in Iowa City have been held during the months of February, June and October of each year, while the examinations in Des Moines have been held during the month of June.

The Department has also had the conduct of defenses to other cases questioning the power of the State and its agencies. In 1947 the Department successfully secured for the Board of Education adjudication of its power to employ its teaching staff at Iowa State College and in its sound discretion to prescribe the field in which they shall operate. This was the case of *Carl J. Drake vs. State Board of Education* which was tried in the Polk County District Court. Subsequently, the State Aid Transportation Act of the 51st General Assembly, restricting State aid to districts transporting children to public schools, was successfully litigated in the case of *Silver Lake Consolidated School District vs. Jessie Parker, et al.* This case required the Court to declare such aid was not available to districts transporting children who were attending private schools. During the biennium Celia Carson instituted an action in the District Court of Johnson County to quiet the title to certain property in Iowa City in the residence of Iowa City, as against the title of the State of Iowa, for the benefit of the

State University of Iowa. Defense to the case was successful in the District Court. The case is now pending upon appeal in the Supreme Court. In the District Court of Black Hawk County there is being litigated the case of *Blake vs. Price, President, et al.*, drawing in question the power of the Board of Education to serve meals to students of the Iowa State Teachers College, and the power of the Board of Education to require such students to take their meals in the dormitory restaurant. The Department has also successfully defended the constitutionality of the Agricultural Land Adjustment Act, enacted by the 51st General Assembly. This act was tested by the case of *Laura Dickinson vs. C. Fred Porter, Comptroller, et al.*, instituted in the Dubuque District Court. During the biennium such important enactments of the 52nd General Assembly among others, setting up the new County Board of Education, have had the continued attention of the Department.

During the biennium the Department instituted seven actions at the request of the State Department of Health. They consisted of proceedings to revoke licenses to practice one of the several healing arts or to restrain practice of those professions without the licenses required by law. Three of these actions resulted in the revocation of licenses to practice medicine. Three resulted in the entry of permanent injunctions against persons practicing chiropractic without the license required by law and the other was in the nature of a citation for contempt of court, due to the violation of one of these permanent injunction orders.

This Department instituted and disposed of two matters under direction of the Department of Agriculture during the biennium. They were both petitions against licensed practitioners of veterinary medicine and surgery. The charges were unprofessional and dishonorable conduct predicated upon falsification of health certifications on cattle with regard to their freedom from Bang's disease and tuberculosis. Upon hearing before the Secretary of Agriculture and the Examining Board suspension of licenses were obtained in each of the cases.

The Department during the period appeared on behalf of the Board of Pharmacy in a declaratory judgment action involving the question as to whether that board had any jurisdiction over hog cholera virus and serum or whether the Department of Agriculture had exclusive jurisdiction over the license, control and retail sale of these items. From an adverse ruling of the lower court an appeal was taken on behalf of the board of pharmacy and the matter has been submitted to the Supreme Court and is awaiting their decision.

Participation in actions for the Board of Control in disputed cases between counties on questions of legal settlement continued throughout the period. Disposition was made of all pending court actions prior to the close of the biennium.

The Department participated in several actions in the nature of habeas corpus proceedings on behalf of inmates at the various state institutions, one of which involved the transfer of a prisoner in the criminally insane ward at the Men's Reformatory at Anamosa, Iowa, to a state mental hospital upon the expiration of his criminal sentence. Upon hearing in the lower court the person was released. Appeal was taken in this matter which will bring before the Supreme Court the constitutionality of the statute authorizing the Board of Control to transfer prisoners from the penitentiary or reformatory upon the expiration of their sentence upon a finding of insanity.

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

The Department during the biennium defended the Department of Public Safety in ten actions. The plaintiffs were successful in two of the ten actions. These cases included an action to compel the Commissioner of Public Safety to issue a license under the detective license act, two actions resulting from revocation of automobile dealer licenses, and the remainder relating to revocation of motor vehicle and drivers' licenses and actions under the Financial and Safety Responsibility Act.

The Department represented the Conservation Commission, in addition to condemnation proceedings, in three cases in which the State of Iowa was plaintiff. Two of the cases sought damages resulting from automobile accidents in which state bridges were damaged. In each of the cases favorable settlement in favor of the State was obtained. The third case involves a question of title to real estate at Brown's Lake. The questions in this case are principally questions of law which were raised on defendant's motion to dismiss petition of the State. The motion has been overruled and after judgment is entered on the facts, an appeal is expected.

One case handled by the Department in the last biennium involved a question of escheat to the State of Iowa. The question was purely one of law which had never before arisen in this jurisdiction. It was necessary to secure a court determination for future guidance of the State in similar cases. On appeal the Supreme Court held that the property involved did not escheat to the state of Iowa.

In the case of *State of Iowa, ex rel Robert L. Larson, Attorney General et al, vs. Hugo S. Sierk,* an action was brought to remove from office a member of the board of supervisors of Scott County. The State was successful in this action.

Of the foregoing thirteen miscellaneous actions, eleven were terminated in favor of the State, and in three, the adverse parties were successful.

A member of the Department was detailed to investigate and marshal the evidence in the matter of the riot at the Rath Packing Plant at Waterloo.

Numerous opinions have been written for the Department of Public Safety, particularly with relation to the new Financial and Safety Responsibility Act, the Banking Department, the Conservation Commission, the Insurance Department, and the Secretary of State.

During the past two years the office has handled numerous cases for the State Tax Commission, and has been quite active in explaining the new County Assessor Law passed by the 52nd General Assembly.

The principal case involved the question of the definition of "readily obtainable in Iowa" and it was successfully litigated in *Peoples Gas and Electric Company vs. State Tax Commission,* so that the question of "readily obtainable in Iowa" has been definitely decided in favor of the state. This case afforded a collection of taxes in excess of one million three hundred thousand dollars, and since that date many old cases which were delayed pending a ruling by the Court have been finally disposed of and many thousands of dollars collected for the State of Iowa.

The freight car and equipment cases have been practically all settled and disposed of in favor of the Tax Commission.

The usual amount of questions relating to homestead exemptions and soldiers credit have been handled for the Tax Commission, as well as numerous cases involving appeals from inheritance tax assessments.

The 52nd General Assembly passed what was known as the "County Assessor Act" which was a new method of assessing in the state of Iowa, and which required much time from the Department in setting the Act in operation, interpreting its provisions, and providing assistance in an attempt to obtaining fair assessment of property in the State of Iowa.

The Department has given many opinions to the Tax Commission relative to its routine affairs and assisted in the preparation of findings, orders, and regulations required to be made by the Department.

In conjunction with the Tax Commission we have assisted the Iowa Liquor Control Commission in litigation concerning its leases and the cancellation thereof, which litigation was successfully terminated in favor of the State Tax Commission.

The Department successfully litigated matters involving the liability of a foreign contractor for Use Tax on equipment purchased outside the state of Iowa, and brought into the state of Iowa for use in the performance of contracts within the state of Iowa. The contractors challenged the right of the Tax Commission to collect a Use Tax based on the purchase price, especially when the machinery had been purchased and used previously in another state. The Court held the Act to be constitutional and the tax to be valid and nondiscriminatory.

The Special Assistant Attorney General for the State Department of Social Welfare handles legal problems arising by virtue of the state programs for old age assistance, blind assistance, child welfare and aid to dependent children.

The old age assistance program gives rise to the greatest amount of legal work for the Special Assistant Attorney General assigned to the welfare department. At all times, there are approximately 1,500 estates of deceased old age assistance recipients being probated or administered in which the State Department of Social Welfare has an interest. During the past biennium, claims to recover the amounts granted for old age assistance have been filed at the rate of eighty-five a month. In those estates in which real property was left, it was necessary that the Attorney General's office file answers to the applications of the administrators to sell the real property. Because additional claims were filed by other creditors of the estates of deceased recipients, a good deal of time of the Special Assistant Attorney General was devoted to establishing and defending the priority of claims of the State Department of Social Welfare. In order to properly do this, it has been necessary for the Attorney General to check the final reports of all administrators and executors in all of the estates of deceased old age assistance recipients. In those cases, where there was disagreement as to the priority of claims, the Attorney General appeared at the hearing on the final report to assert and defend the status of the State Department as a claimant in the estate.

In order to properly assert the statutory lien of the Department of Social Welfare, a copy of each Court Order authorizing sale of real estate had to be obtained and checked. In order to assist in the liquidation of these estates, the Attorney General has been called upon for advice and to take proper measures to establish whether an election or failure to elect to take a life estate had occurred.

In those instances where the lien could not be liquidated through administration of the estate, the Attorney General has had to foreclose the lien or obtain the necessary quit claim deeds. The existence of the lien has also made it necessary for the Attorney General to file an answer in a great many foreclosure, partition and quiet title actions. Contested trials have been had in a number of cases, and in all cases, the decree had to be checked and approved.

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

The participation of the Child Welfare Department as investigating agency in adoption proceedings has resulted in the need for legal advice from the Attorney General. The Board of Social Welfare from time to time, has had to call on the Attorney General for opinions relating to the jurisdiction of the Board.

The Department of Social Welfare felt it necessary to recommend certain changes in the laws applicable to the Department. These changes have been incorporated in more than thirty bills prepared by the Attorney General for consideration by the 53rd General Assembly.

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 52nd 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.

John M. Rankin of Keokuk, Iowa was appointed Attorney General on June 17, 1940 and served until his death, which occurred on June 20, 1947. On June 25, 1947 the undersigned was appointed to fill the unexpired term of Attorney General.

Having served as an Assistant Attorney General and being acquainted with the conduct of the office by the late Mr. Rankin, I wish to give expression of the sentiment of each and every member of this Department of the high regard in which he was held. He was an outstanding lawyer and upright gentleman and a conscientious and faithful public servant. The state of Iowa suffered a distinct loss at his passing.

In submitting this report, I want to express my appreciation to all public officials of the state for the splendid cooperation with this Department.

I appreciated the loyalty always shown by all members of this Department.

Respectfully submitted,

ROBERT L. LARSON

Attorney General of Iowa

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

January 1, 1947 to December 31, 1948, inclusive

Appeals from Condemnation

Appeals pending January 1, 1947	4
Appeals instituted during above period	27
Old appeals tried or settled during above period	1
New appeals tried or settled during above period	12
Condemnation appeals pending December 31, 1948	18

Miscellaneous Cases

(Injunctions, Mandamus, Damage, Workmen's Compensation, Drainage, Guardianships, Eviction and Prosecutions on Motor Vehicle Violations.)

Miscellaneous cases pending January 1, 1947	7
Miscellaneous cases instituted during above period	12
Old miscellaneous cases disposed of during above period	5
New miscellaneous cases disposed of during above period	6
Miscellaneous cases pending December 31, 1948	8

Retained Percentage Cases

(On contractor's contracts)

Percentage cases pending January 1, 1947	0
Instituted during above period	4
Disposed of during above period	3
Percentage cases pending December 31, 1948	1
Total number of all Cases Pending December 31, 1948	27

DEPARTMENTS AND OFFICERS REQUESTING OPINIONS

Departments

Officers

State of Iowa
1948

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1853-1949

NAME	HOME COUNTY	YEARS SERVED
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Samuel A. Rice	Mahaska	1856-1861
Charles C. Nourse	Polk	1861-1865
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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
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Milton Remley	Johnson	1895-1901
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George Cosson	Audubon	1911-1917
Horace M. Havner	Iowa	1917-1921
Ben J. Gibson	Adams	1921-1927
John Fletcher	Polk	1927-1933
Edward L. O'Connor	Johnson	1933-1937
John H. Mitchell	Webster	1937-1939
Fred D. Everett	Monroe	1939-1940
John M. Rankin	Lee	1940-1947
Robert L. Larson	Johnson	1947-

THE

OFFICIAL OPINIONS

OF THE

ATTORNEY GENERAL

FOR

Biennial Period

1947-1948

December 31, 1946

TAXATION: Allowing exemption to religious organization—communication to board before levy insufficient. Taxes on real estate become certain and definitely fixed when the levy is properly made by the board of supervisors and thereafter no exemption may be allowed under the provisions of section 427.1, Code 1946. Furthermore, any deed or lease under which the property may be exempt must be of record at the time the board makes the levy to entitle the holder to tax exemption.

Mr. Vernon R. Seeburger, County Attorney, Des Moines, Iowa: Pursuant to a request of the board of supervisors of Polk county you have submitted a question relative to the taxability of Lot 13 Langan Place for the tax of 1946 payable in 1947. The correspondence further discloses that the property in question was owned by Mr. John H. Cownie on January 1, 1946, was assessed in his name by the assessor for 1946 and thereafter a tax was levied against said property by the board of supervisors of Polk county, Iowa, on September 26, 1946, and thereafter a contract for the purchase of said property was recorded October 16, 1946 in Book 2032, page 305, records of Polk county, Iowa showing that the property had been purchased by a religious organization known as the Unity Truth Center. On October 21, 1946 a petition was filed with the board of supervisors asking that the taxes for the year 1946 payable in 1947 be cancelled and that the property be exempt from taxation because the same was hereafter to be used for church purposes. You have also submitted, herewith, several affidavits relating to the negotiations between Mr. Cownie and the Unity Truth Center and the fact that the county auditor of Polk county and the chairman of the board of supervisors was advised prior to the date of the tax levy September 26, 1946 that the Unity Truth Center was purchasing the property from Mr. Cownie. The writer summarizes the request for an opinion and the information in connection therewith by restating your proposition as follows:

1. Is property which is subject to taxation and is sold subsequent to the date of the levy by the board of supervisors entitled to an exemption where the purchaser of the property comes within the provisions for exemption as provided by section 427.1 of the Code?

2. Does the fact that the purchaser advised the board of supervisors and the county auditor prior to the levy of the taxes that the property was being purchased and would be held by a church and exempt from taxation have any bearing on the right of the church to claim such an exemption?

The pertinent statute is paragraph 9 of section 427.1 of the code. We quote,

"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 shall not be taxed. 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."

The property in question was subject to taxation on January 1, 1946 and was properly taxed to John H. Cownie at that time. The tax was properly levied September 26, 1946 by the board of supervisors of Polk county, Iowa. The property clearly was taxable and not exempt from taxation up to that date. The exemption from taxation was not intended to act retrospectively and exempt from prior taxes or prior liability for taxes. The provision was intended to operate prospectively and to exempt property from future liability. The property in question was subject to taxation for nine months of 1946 and certainly ought to pay taxes for that time. There are no provisions, however, of law under which a tax may be apportioned. The state must lose the whole tax or the owner of the property for the nine-month period must pay the tax.

The last expression of the Iowa supreme court is found in Iowa Wesleyan College vs. Knight, 207 Iowa, 1238 which is to the effect that if the property is acquired before the tax is levied by an organization in whose hands the property is not taxable, then no tax can be collected for the year in which the sale takes place. This opinion was recognized and followed by an attorney general's opinion dated October 6, 1942 and since that decision and the attorney general's opinion it has been the rule that once the levy was made the property was subject to tax even though after that date it passed into hands where under the law it would be free from taxation. There must be a time when taxes become certain and are definitely fixed and we believe that the opinion and the ruling of the attorney general is sound and should be followed. It is our opinion that the 1946 taxes payable in 1947 are valid and collectible against the property referred to in your letter. The exemption rights of the church organization will start with 1947 taxes payable in 1948.

In answer to the second proposition it is our opinion that the advice to the county auditor and the board of supervisors has no bearing on the case because of the express provisions of sub-section 9 of code section 427.1. We quote,

"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."

This language is clear and the facts as presented disclose that nothing was of record at the time the board of supervisors made the levy. The board is bound by the statute and their right to grant an exemption is delimited by the express language of the statute which requires that the deeds or leases on which the claimant bases his right must be filed for record.

January 6, 1947

SCHOOLS AND SCHOOL DISTRICTS: Borrowing money by issuing warrants or notes prohibited. A school district may not give promissory notes; neither may it issue warrants to borrow money for purchase of school busses or for current operating expenses in excess of the budget estimate.

Mr. J. H. Redman, Assistant to the Superintendent, Department of Banking, Des Moines, Iowa: Your letter of December 23, 1946, to Mr. Yoder, asking for opinion respecting the legality of assets found in Iowa banks, arising out of the following transactions, is at hand:

"Can a school district legally issue warrants payable to a bank for the purpose of borrowing money, the funds being used for the purchase of school busses or other equipment?

Or can the secretary of the school board legally issue warrants payable to the treasurer in round figures which he in turn endorses payable to a bank for the purpose of borrowing money to provide the school treasurer with funds for payment of current operating expenses?

Or can they borrow money from a bank giving a note as evidence of such indebtedness for either of the above purposes?

I would advise you

1. That financing the purchase of school busses or other equipment by the issuance of warrants to a bank for the purpose of borrowing to finance the purchase, is illegal. (See action 279.26 et seq. for the statutory directions for use and issuance of school warrants.)

2. Nor is there statutory authority, either express or implied, in a school board to borrow money for current operating expenses or the payment of purchase price of busses, and using school warrants in the manner described in your letter, for the purpose of such borrowing.

3. The issuance and use of notes by school boards for the purpose of borrowing, is unknown in the Iowa statutes and is illegal.

4. While there is no express statutory provision for financing the purchase of school busses, the approved legal practice plainly implied by the statute is to finance such purchase by the use of available money in the general fund, or by the issuance of bonds after authorization by the electors of the district, pursuant to the terms of section 298.21, subsection 3 in terms as follows:

"The board of directors of any school corporation when authorized by the voters at the regular election or at a special election called for that purpose, may issue the negotiable, interest-bearing school bonds of said corporation for borrowing money for any or all of the following purposes:

3. To acquire equipment for schools, sites, and buildings," or by the issuance of warrants against the general fund, stamped "not paid for want of funds" pursuant to the terms of chapter 74, Code of 1946, provided however, that the aggregate of such "no fund" warrants together with the amount of warrants against the existing general fund, do not exceed in amount, the budget estimate. Sections 24.3 and 24.14.

January 21, 1947

COUNTY ATTORNEY: Secret investigations—expense claims must be preaudited. The county attorney may bind the county for any reasonable expense of investigation but claims therefor must be preaudited by the board of supervisors and all warrants issued by the county must be made payable to the persons performing the services and state the purposes thereof. However such secret investigations may be made by the grand jury without preaudit of the claims by the board.

Mr. Carroll O. Switzer, County Attorney, Des Moines, Iowa: We are in receipt of your letter of January 10, 1947, in which you refer to certain recommendations made by the grand jury of Polk county, Iowa, at the conclusion of its investigation which terminated December 31, 1946, in which indictments were returned against two members of the board of supervisors, the director of welfare and overseer of the poor, and an operator of a garage.

You state that on January 3, 1947, the board of supervisors by resolution appropriated in the court expense fund for the county attorney's office the sum of $5,000.00 with which to proceed with such investigation.

You further state that it is your desire that such investigation be conducted in such a manner that it shall in no way interfere with the accomplishment and results of such investigation, and to do this will necessitate no disclosures and not make of public record the methods by which such investigation is being conducted, which included the disclosure of persons who will be assigned to assist in carrying out this investigation. You further state that it is your desire that such funds be paid in a manner so as not to disclose the services that are being rendered in this connection until such investigation is completed.

You further state:

"In view of the matters I have set forth herein I desire that the funds appropriated for special investigation by the county attorney's office be paid by the issuance of warrants by the county auditor payable to myself as county attorney, or in any other manner that may be practical wherein I would obtain receipts or vouchers from the persons to whom I shall pay the money for any service rendered, and upon the completion of the investigation that I file such receipts and vouchers with the county auditor, which would then disclose the persons, firms and companies to which such funds were disbursed. In that connection, during the process of this investigation, such receipts could at any time be examined by the court or state auditor's office so long as such information was not disclosed to the public until the completion of such investigation."

You further cite the attorney general's opinion of 1936 at page 521, which you claim holds that such procedure was lawful and not in violation of any statutes, and you ask our opinion if the plan of expenditure of the special investigation appropriation meets the requirements of the statutes.

Under the law, as you are aware, the county attorney is charged with the enforcement of the law in his county, and the proper expense of an investigation by the county attorney may be paid out of the court expense fund provided by section 444.10, Code of 1946, and he

may bind the county for these expenses. However, the fact that the board of supervisors appropriated $5,000.00 of this fund for the use of the county attorney adds nothing to the right of the county attorney to use said fund for the payment of a proper expense in the investigation of crime within his county. The court expense fund may be used in the manner provided by law, but any expense paid out of said fund must be in the regular manner as provided by law.

Section 332.3, Code of 1946, among other things, provides:

"332.3, General powers. The board of supervisors at any regular meeting shall have power:

* *

5. To examine and settle all acouunts of the receipts and expenditures of the county, and to examine, settle and allow all claims against the county unless otherwise provided by law."

This section presupposes that whenever services are performed for the county, or materials supplied for the county that claims must be filed and the board of supervisors shall examine, settle and allow such claims unless otherwise provided by law.

Section 333.2 provides as follows:

"333.2. Issuance of warrants. Except as otherwise provided an auditor shall not sign or issue any county warrant unless the board of supervisors by recorded vote or resolution shall have authorized the same, and every such warrant shall be numbered and the date, amount, and the number of the same, and the name of the person to whom issued, shall be entered in a book to be kept in his office for that purpose."

The exception to be noted which is mentioned in section 333.2 is found in section 333.3, Code of 1946, as follows:

"333.3. Issuance of warrants without audit. The county auditor is hereby authorized to issue warrants as follows before bills for same have been passed upon by the board of supervisors:

1. * *

5. For expense of the grand jury upon order of the judge of the district court."

If this is an investigation by the grand jury then the expenses of such investigation may be paid without preaudit upon order of the judge of the district court, and thereby the secrecy of your investigation may be preserved.

Section 333.4, Code of 1946, provides other exceptions to the issuance of warrants provided by section 333.2 by providing that the board of supervisors may by resolution authorize the county auditor to issue warrants when said board is not in session, to pay fixed charges such as freight, express, postage, water, light, telephone, salaries and payrolls, upon filing certified bills with the county auditor.

Section 333.6, Code of 1946, provides further as follows:

"Section 333.6. Form of warrants. Each warrant issued by the auditor shall be made payable to the person performing the service or furnishing the supplies for which said warrant makes payment, and shall state the purpose for which said warrant was issued."

It is apparent, therefore, according to the foregoing provisions of the code that there was a proper and orderly procedure contemplated by the legislature when it provided under the broad and general powers given to the board of supervisors that it should examine, settle and allow all claims against the county unless otherwise provided by law. The legislature made those certain exceptions which have been pointed out in sections 333.3 and 333.4, providing that the expenses of the grand jury might be paid upon order of the court without preaudit and for the payment of fixed charges and salaries and pay rolls. It was apparently the intent of the legislature that any other indebtedness owed by the county to anyone who had performed services or furnished material and supplies for the county, should only receive compensation therefor upon filing a claim to be examined, settled, and allowed by the board of supervisors, and warrants issued therefor, as provided by section 333.6, Code of 1946.

The opinion by the attorney general's office issued in 1936 and referred to in your letter is not applicable to the present situation for the reason that the question presented by your letter and the facts therein stated can be distinguished from the facts set out in the opinion.

We hold that the opinion above referred to is no authority for the issuance of warrants other than in the manner provided by the statute hereinabove referred to.

It is suggested that there is available for your purposes in making an investigation the county and state law enforcement agencies, and the state auditor's office. These facilities are not public, and are all available in the gathering of evidence upon which to base a prosecution or an action for removal. In addition thereto it is within your province to bind the county for any reasonable expense of investigation, including the appointment of any investigators you choose. You may prescribe their duties and approve any reasonable compensation for services actually performed. The provisions of section 333.6, however, are mandatory, and the method proposed by you is not included in the provisions of the statute and therefore is not proper.

February 8, 1947

CHATTEL MORTGAGES: Assignee not of record—release by agent of assignee—duty of county recorder. Sections 556.13, 556.17 and and 655.1, Code 1946, imposes upon the county recorder the duty of knowing that the marginal satisfaction of a chattel mortgage was made by the mortagee or his personal representative, or by the assignee or those legally acting for him. Where the record of his office does not reveal an assignee, the recorder is justified in refusing to record a mortgage release by one purporting to act for the assignee.

Mr. Frank R. Thompson, County Attorney, Guthrie Center, Iowa:

I acknowledge receipt of yours of the 23rd ult. with accompanying letter of George D. Bradley, director of the commodity credit corporation, both of which we exhibit as follows:

" The county recorder, Guthrie county, Iowa, has requested that I secure an opinion from you as to the requirement for releasing corn loans. The note and mortgage in most instances is given to a local bank and not assigned to the commodity credit corporation. It has

been the practice of our recorder's office to release the mortgage and return the papers to the chairman of the Guthrie county agriculture committee or a member thereof, when said chairman or member making a marginal release of the mortgage, without any assignment to said commodity credit corporation. Recently she received a letter from the commodity credit corporation (a copy of which is hereto attached) which seems to indicate that the commodity credit corporation should be the mortgagee or have an assignment of the mortgage before the chairman or its member is authorized to release said mortgage.

The question is, should the county recorder require that an assignment of both the note and mortgage be made by the bank or loan agency to the commodity credit corporation prior to allowing the chairman of the Guthrie county agricultural conservation committee or any member thereof to release said mortgage? Your prompt attention to this matter will be appreciated.

Signed: Frank R. Thompson"

"A great many chattel mortgages given to secure the payment of grain loans made by the commodity credit corporation, will from time to time be paid and will necessitate the filing of releases of such chattel mortgages; and for that reason the commodity credit corporation has determined that in all such instances where the commodity credit corporation is mortgagee or owner by assignment and the loan is paid or the security described in the mortgage has been delivered in accordance with the terms of the chattel mortgage, releases should be made on the margin of the county records by the county association or one of its members.

Therefore, the chairman of the Guthrie county agricultural conservation committee, or any member thereof, is hereby authorized to release on the margin of the county records such mortgage or mortgages as the commodity credit corporation shall in writing advise the said committee has been paid or satisfied. Upon receipt of such advice by the committee, this letter will constitute your authority to effect the release of the mortgage or mortgages described in the advice.

Signed: George D. Bradley"

1. We set forth herein, the following statutes having bearing upon the duties of the recorder, respecting assignment and release of chattel mortgages. Insofar as an assignment of a chattel mortgage is concerned, section 556.13 of the 1946 Code, provides as follows:

"A chattel mortgage filed or recorded by the mortgagee or the record holder thereof, by the execution of an appropriate written instrument, duly acknowledged, and filed in the same office where the mortgage is filed or recorded. If the mortgage is recorded, an assignment thereof may be made by the mortgagee or the record holder of the mortgage executing an assignment on the margin of the record of such mortgage, or, if the mortgage be filed but not recorded, such assignment may be indorsed upon the original instrument, but where the assignment is on the margin of the record or indorsed upon the instrument, the assignor shall be identified and his signature to such assignment witnessed and attested by the recorder or his deputy."

Insofar as release of the chattel mortgage is concerned, section 556.17, of the 1946 Code, provides as follows:

" Any mortgage, conditional sales contract, or pledge of personal property may be released of record by filing with the original instrument a duly executed satisfaction piece or release of mortgage or conditional sales contract; or by the mortgagee, vendor, or their authorized

agents indorsing a satisfaction of said mortgage or conditional sales contract on the index book under the head of "remarks" in the same manner as mortgages are now released by marginal satisfaction, and when so released on index book, the recorder shall enter a memorandum thereof on the original instrument or on the record thereof, if recorded."

And section 655.1, of the 1946 Code, provides as follows:

"When the amount due on a mortgage is paid off, the mortgagee, his personal representative or assignee, or those legally acting for him, and in case of payment of a school fund mortgage the county auditor, must acknowledge satisfaction thereof in the margin of the record of the mortgage, or by execution of an instrument in writing, referring to the mortgage, and duly acknowledged and recorded."

It will be noted that the release of the mortgage provided by section 556.17 concerns the method of release where a chattel mortgage is merely filed and not recorded, while section 655.1 is a statutory method prescribed for the release of the foregoing mortgage when it is duly recorded and not merely filed. This distinction is recognized by the language of section 556.17, which among other provisions, provides that the mortgage, etc., "when so released on the index book, the recorder shall enter a memorandum thereof on the original instrument or on the record thereof, if recorded. In either situation, the obligation of the recorder, when the satisfaction is upon the margin or upon the index, is identification of the person satisfying or releasing and the witnessing of his signature to such satisfaction or release. This obligation of the recorder to identify the person who has entered the marginal release and to witness his signature is the equivalent of the acknowledgment of the execution of the release by separate instrument, by the person so releasing before a notary public. This is explained by Volume II of the Iowa Law Bulletin, page 60 in words as follows:

" * * * * If the record were merely evidence of the contents of the deed and not of its execution also, the recording acts could hardly have brought the revolutionary change in the proof of land titles by the record itself rather than by the title deeds. But that the record should be proof of the execution of a deed it is necessary that the recording officer have adequate evidence of such execution. In some jurisdictions, especially the older ones, this is supplied by the execution or acknowledgment or attestation of the deed before the recorder. Such a practice has survived in Iowa as to the satisfaction of mortgages on the margin of the record. But this involves much inconvenience and in the newer jurisdictions has generally been superseded by the acknowledgment before a notary, magistrate or other official and the authentication of the notary's certificate by his seal. * * *."

In Matter of Coffin's Estate, 152 Misc. 619, 623, 273 NYS 974, 979, it is said:

"* * * * It has long been elementary throughout most of the states in the Union that one of the main conditions precedent to spreading on the public records, or the record of a court, a writing having to do with or underlying a preceeding or claim in rem, has been a statutory form of proof, before a public officer, both of the identity of the person purporting to have signed such writing, and also of this same person having expressly committed himself to it, by his signature, as and for his own act and deed. 'It is the decided weight of authority that the purpose of such a statute is to entitle the convey-

ance to be recorded. A compliance therewith is essential to a valid record.' 23 R. C. L. 184, citing Waskey v. Chambers, 224 U. S. 564, 32 S. Ct. 597, 56 L. Ed. 885, Ann. Cas. 1913D, 998. See, also, Keese v. Beardsley, 190 Cal. 465, 213 P. 500, 26 A. L. R. 1538."

Whether the release is effected by separate instrument or by marginal notice the methods prescribed for certifying to the due execution of the release are merely prerequisite to the eligibility of the recording of the instrument and the resultant constructive notice by such recording.

2. Whether the duty of the recorder extends to the point of not only identifying the person who releases and witnessing his signature, but also contemplates the obligation to embrace a determination that such person is a person recognized by statute as authorized to enter such release, presents a different question.

The terms of the statute under which the marginal release is directed is section 655.1 of the 1946 Code, heretofore previously set out. Under the terms of that section, when the mortgage is paid off the obligation is placed upon the mortgagee, his personal representative or assignee, or those legally acting for him, to acknowledge satisfaction thereof in the margin of the record of the mortgage. The language of the statute is "must acknowledge satisfaction thereof in the margin of the record thereof." While generally speaking, the county recorder is a ministerial officer performing ministerial duties, the mandatory character of the language of section 655.1 will reasonably impose upon the recorder the duty of knowing that the marginal satisfaction was made by the mortgagee, his personal representative, or assiinee, or those legally acting for him. This duty would not require of the recorder such knowledge of who is entitled to make the marginal release except as such knowledge may be gained from his own records.

The statute is binding not only upon the parties to the instrument of release, but upon the officer whose duties it is to record it. In other words, not only the parties to the release, but the keeper of the records must take note of the terms of this statute. It seems quite clear that if this were only a binding obligation upon the foregoing parties the result would be an incumbrance of the record with instruments which the recording officer is bound to know are not entitled to record. There is authority to sustain this conclusion in Low et al v. Fox, 56 Iowa 221, where was involved the question of a statutory penalty for failure of an assignee to enter a marginal release, the court said this:

" * * * The next inquiry is, did the court err in granting a new trial as to the verdict for the statutory penalty? The Code, section 3327, provides that 'whenever the amount due on any mortgage is paid off, the mortgagee, or those legally acting for him, must acknowledge satisfaction thereof in the margin of the record of the mortgage, or by execution of an instrument in writing referring to the mortgage, and duly acknowledged and recorded. If he fails to do so within sixty days after being requested, he shall forfeit to the mortgagor the sum of twenty-five dollars.' It will be observed that the liability for this penalty is against the mortgagee. E. H. Low was not the mortgagee. True, he was the assignee of the note secured by the mortgage, and

it is undoubtedly correct that the assignment of the note operated as an assignment of the mortgage, so that he could enforce the mortgage for his benefit. But there being no written and recorded assignment of the mortgage to him his entry of satisfaction would have been improper, as tending to confusion in the record title to the property, by showing a release by a stranger to the instrument. Whether under the statute the assignee under a recorded assignment of a mortgage incurs the penalty by refusing to enter satisfaction we need not determine. We think that under the facts of the case the court was correct in granting a new trial as to the verdict under consideration, because under the undisputed facts the defendant could not recover."

It would therefore follow that if there is no assignment of record from which identity of the assignee of the mortgage may be known, the recorder should in the execution of his duties, refuse to record the mortgage release. He is justified in relying only upon the record evidence found in his office.

March 21, 1947

DOMICILE AND RESIDENCE: Wife acquiring separate legal residence for soldiers' relief. A wife and minor children may acquire a separate legal residence from the husband for soldiers' relief purposes under certain circumstances. The term "residence" used in section 250.1, Code 1946, is interchangeable with the term "domicile".

Mr. Edwin H. Curtis, Executive Secretary, Iowa Bonus Board: We are in receipt of yours of the 18th, as follows:

"I am in receipt of a letter from Fremont county requesting an opinion on the eligibility for soldiers' relief of a wife and two children living in Fremont county, separated from the husband residing in Harrison county. The question is as follows:

A girl lived in Fremont county from birth until the time she was married. She married a man who was a resident of Harrison county and who later became a veteran of World War II and who was discharged from service on August 18, 1945, and returned home to Harrison county where he still lives and where he was born and raised. His wife joined him there on his return from service and has lived in Harrison county with him until recently when she left him for lack of support, claiming that he had furnished her very little support since 1946. After leaving him she returned to Fremont county with her two children of which the veteran in question is the father and is now making her home with her parents who are now furnishing her with necessaries. She feels that her parents should not be responsible for her 'keep' and that of the two children and has made application to the S & S commission of Fremont county for relief after having been denied same by Harrison county commission.

I am desirous of an official opinion on this as there are many other such cases in the state of Iowa."

In reply to the foregoing, we would advise you as follows: Section 250.1, Code of 1946 under which this relief is granted, provides as follows:

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

We are of the opinion that the term "residence" used in the foregoing statute is interchangeable with the term "Domicile". See 17 Am. Juris., par. 10, title "Domicile", 28 C.J.S., page 7, title "Domicile". In that view the rule with respect to separation of a husband and wife under the circumstances described in your letter, is set forth in 28 C.J.S., page 26, title "Domicile" as follows:

"The mere fact that a husband and wife are living apart does not prevent his domicile from fixing hers; but when he abandons her, or, by his conduct, justifies her leaving him, she may acquire a separate domicile.

The general rule that the wife's domicile follows that of her husband is not affected, in the absence of a valid separation as by a judicial decree of separation or divorce, by the mere fact that the husband and wife are living apart; and a wife who has left her husband and is living apart from him without just cause can acquire no separate domicile of her own, except, it has been held, in exceptional circumstances. Conversely, a married woman may acquire a separate domicile where there are grounds for separation, as where the wife has been abandoned or deserted, or forced by brutal treatment, misconduct, or other just cause to leave the husband."

and paragraph 48 of the title "Domicile" appearing in the 17 Am. Juris., states:

"Since desertion separates the spouses not only in law, but also in fact, the courts are practically unanimous in agreeing, in dicta and in decision, that where the husband has deserted the wife or where there has been a mutual abandonment of the marriage relation, so that every purpose of the marriage is destroyed, the reason for the rule that the husband fixes the family domicile ceases, and with it the rule itself ceases, and the wife is then at liberty to establish a separate domicile for all purposes; * * * * *."

Based upon the foregoing rule, we are of the opinion that the foregoing wife and minor children may acquire a separate legal residence for soldiers' relief purposes, from the husband. Whether such separate legal residence is acquired is to be determined by the soldiers' relief commission upon the facts of each case as presented to the commission under the foregoing applicable principles of law.

April 11, 1947

HOSPITALS: County memorial hospital—commissioners services gratuitious. There is no provision for payment or reimbursement to members of the memorial hall commission in chapter 37 of the Code for their expenses in performance of their duties.

Mr. B. K. Willoughby, County Attorney, Grundy Center, Iowa: This will acknowledge receipt of yours of the 9th inst. in which opinion in the following matter is requested:

"In working under chapter 37 of the Code the convention will be held on April 15th to select the commissioners who will have charge of the supervision, erection, management and control of the Grundy County memorial hospital. The question has been raised as to whether such commissioners are entitled to receive a reimbursement for the expenses such as transportation, secretarial help, meals and lodging while away from home on commission business and similar expenses in carrying out their duties as such commissioner.

The answer to this question will be quite important at the convention and have a great bearing on whether the commissioners selected will accept their appointments."

In reply thereto, we would advise that chapter 37 contains no express provision for payment or reimbursement to members of the memorial hall commission for their expenses in the performance of their official duties, whether such duties be performed at the place of the location of the building or incurred while performing official duties away from their homes, or the location of the memorial hall. Nor is there any statute of general application providing for the payment or reimbursement to public officials of their expenses incurred in performance of their official duties. Absent such legislative and statutory authority for the payment or reimbursement of such expenses, compensation therefore may not be recovered. The rule is stated thus in 46 C. J. 1018, title "Officers". "The right of an officer to compensation for expenses incurred by him in the performance of an official duty must be found in a provision of the constitution or a statute conferring it either directly or by necessary implication." In support of the foregoing rule, there is cited the case of MacKenzie vs. Douglas County, 81 Oregon 442; 159 Pac. 625, 1033.

While there is some authority to support a rule where a law requires an officer to do that which necessitates an expenditure of money for which no provision is made to supply him with cash in hand, he may make the expenditure out of his own funds and have reimbursement, therefore (Ticer vs. State, 35 Okla. 1; 128 Pac. 493), in our opinion even if applied, there are no duties expressly imposed upon such commissioners which would necessarily require the expenditure of money. Their power is prescribed in section 37.9 where provision is made for the appointment of a commission "consisting of five members, in the manner and with the qualifications hereinafter provided, which shall have charge and supervision of the erection of said building or monument and when erected, the management and control thereof." Presumptively in the performance of such duties no expense will be incurred, and if incurred, is not a subject of reimbursement. It is fairly and plainly evident that the legislature intended the position of commissioner, under chapter 37, to be honorary, the service to be performed gratuitous and expenses to be incurred not reimbursable.

April 30, 1947

COUNTY RECORDER: Unacknowledged bill of sale of partnership assets. Such instruments only are entitled to record as are authorized by statute. Acknowledgment or verification must appear thereon, where required by statute, before they may be recorded. A bill of sale of partnership assets should be acknowledged before recording (section 556.3, Code 1946).

Mr. John L. Dillon, County Attorney, Centerville, Iowa: I am in receipt of yours of the 16th inst. in which you state:

"The county recorder has requested an opinion as to whether or not an instrument has to be notarized before it can be recorded.

The instrument referred to does not affect the title of real estate, nor does it, as far as I can find, come under any of the statutes that require such an instrument to be acknowledged.

The specific instrument that brought up the question was one calling for the transfer of the personal assets of a general partnership to one of the partners as an individual. It was signed by both parties, but was not notarized. Under section 335.2, which merely requires that the instruments be in writing, I have instructed him to record this instrument, but for the benefit of the future I would like to have a ruling concerning such instruments."

In reply thereto I would advise you that the recorder's duty, with respect to the recording of instruments, is prescribed by section 335.2, Code of 1946 in terms as follows:

"The recorder shall keep his office at the county seat, and shall record at length, and as speedily as possible, all instruments in writing which may be delivered to him for record, in the manner directed by law."

Such instruments only are entitled to record as are authorized by statute. Acknowledgment or verification must appear thereon, where required by statute, before they may be recorded. It is the duty of the recorder to determine whether such acknowledgment or verification in fact appears upon the tendered instrument. However, he has no duty to perform in determining the legality of the form of the acknowledgment or verification.

The specific instrument referred to appears to be a bill of sale of partnership assets, and tested by the foregoing, should be acknowledged in order to entitle it to recording. See section 556.3, Code of 1946.

April 30, 1947

TAXATION: Exemption of agricultural institution. The American Polled Hereford Breeders' Association is entitled to tax exemption under section 427.1 (9, 10) Code 1946, as an "agricultural institution" provided it operates solely for their appropriate objects as such institution.

Mr. Carroll O. Switzer, County Attorney, Des Moines, Iowa: You have submitted to the attorney general a letter from Mr. Bert L. Zuver, city assessor, together with the articles of incorporation of the American Polled Hereford Breeders' Association and a request for an opinion on the following question:

1. Is the real property, tangible personal property and moneys and credits of the American Polled Hereford Breeders' Association entitled to an exemption from taxation by virtue of the Iowa law and especially sub-sections nine (9) and ten (10) of section 427.1, Code 1946?

Sub-section nine (9) of Code Section 427.1 provides,

"All grounds and buildings used by literary, scientific, charitable, benevolent, agricultural and religious institutions and societies solely for their appropriate objects shall not be taxed."

Sub-section ten (10) provides,

"Moneys and credits belonging exclusively to the institutions named in subsections seven (7), eight (8) and nine (9) and devoted solely to sustaining them, but not exceeding in amount or income the amount

prescribed by their charters or articles of incorporation; and the books, papers, pictures, works of art, apparatus, and other personal property belonging to such institutions and used solely for the purposes contemplated in said subsections."

At the outset one is confronted with the question of whether or not the American Polled Hereford Breeders' Association is an agricultural institution, and also with the question of whether or not their property and monies and credits are used solely for the purposes contemplated in the exemption statute and for their appropriate objects. The literal etymological meaning of agriculture is cultivating the soil. The legislature in enacting the exemption statute undoubtedly used the term "agricultural" in its broader and generally accepted sense, namely,

"Agriculture is the art or science of cultivating the ground and raising and harvesting the crops and in a broader sense, the science and art of production of plants and animals useful to man in which it includes farming, horticulture, forestry, dairying, sugar making, etc." St. Louis Rose Company vs. Conservation Commission, 159 So. Second 249. Hagenburger vs. the City of Los Angeles, 124 Pacific Second 345. Jordan vs. Stark Brothers 45 Federal Supplement 769.

In 51 American Jurisprudence, 510, it is stated, we quote,

"The grant of an exemption from taxation rests upon the theory that such exemption will benefit the body of the people and not upon any idea of lessening the burdens of the individual owners of property."

Further, it is the general rule of construction in Iowa that grants of immunity from taxation and tax exemption statutes are to be strictly construed. Hale vs. Iowa State Board of Assessment and Review, 223 Iowa 321, affirmed by United States Supreme Court, 102, 302 U. S. 95. Samuelson vs. Horn, 221 Iowa 208. It has also been stated that immunity from taxation by the state will not be recognized unless granted in terms too plain to be mistaken, Davenport National Bank vs. Mittelbuscher, 15 Federal 225; Morril vs. Bentley, 150 Iowa 677.

It is the judgment of the writer that the statute under which the American Polled Hereford Breeders' Association claims exemption is sufficiently definite and explicit, so that we can say that the property in question is exempt from taxation.

The writer of this opinion wishes to call attention to article three (3), we quote,

"The association shall have power to do all things consonant with the general nature of its business as set forth above; also, to acquire property, both real and personal, by purchase, donation, bequest and devise and to maintain, manage and dispose of the same, to loan money, upon both real estate and personal security, and to have and enjoy all rights and powers now and hereafter conferred by the statutes of Iowa upon corporations not for pecuniary profit and such as are properly and usually exercised by like organizations."

It is the opinion of the writer that in the promoting of good breeding that a benefit would flow to the body of the people of the state and entitle this association to an exemption. However, under the broad powers above quoted, if the association were to engage in loaning money

upon real estate and doing any and all things permitted under the power above referred to, then in that event they would be subject to taxation because they would not be operating solely for their appropriate objects as an agricultural institution.

May 1, 1947

TAXATION: Exemption statutes are to be strictly construed. The property of the Iowa Veterinary Medical Association is not exempt from taxation within the purview of section 427.1, Code of 1946.

Mr. Carroll O. Switzer, County Attorney, Des Moines, Iowa: This will acknowledge receipt of your letter together with a copy of a letter from Mr. Bert L. Zuver, the city assessor, in which you make inquiry as to whether any real and tangible personal property and moneys and credits of the Iowa Veterinary Medical Association is exempt from assessment and taxation under the provisions of subsections nine (9) and ten (10) of section 427.1, Code 1946. You have submitted for our consideration the constitution and by-laws of the Iowa Veterinary Medical Association. Article II of the Constitution provides as follows:

"Section 1. The general nature and purposes of this association and its business shall be social, educational, scientific and medical (veterinary). It shall promote mutual interest, social intercourse and good fellowship; elevate the standards of veterinary education; cultivate veterinary medical science and literature; protect and promote the professional interests of the veterinarian; direct and enlighten public opinion in regard to the duties, responsibilities and requirements of the veterinarian; contribute to the diffusion of the true scientific knowledge among its members and increase the efficiency of veterinary service to the livestock industry and public health."

The exemption statute in question is as follows:

"All grounds and buildings used by literary, scientific, charitable, benevolent, agricultural and religious institutions and societies solely for their appropriate objects shall not be taxed."

It is to be noted that immunity from taxation by the state will not be recognized unless granted in terms too plain to be mistaken. Davenport National Bank vs. Mittelbuscher, 15 Federal 225; Morril vs. Bentley, 150 Iowa 677; Boss vs. Polk County, 19 N.W. Second 225. Further, it is the general rule of construction in Iowa that grants of immunity from taxation and tax exemption statutes are to be strictly construed. Hale vs. Iowa State Board of Assessment and Review, 223 Iowa 321, affirmed by United States Supreme Court, 302 U. S. 95; Samuelson vs. Horn, 221 Iowa 208.

In 51 American Jurisprudence, 510, paragraph 504, it is stated,

"The grant of an exemption from taxation rests upon the theory that such exemption will benefit the body of the people and not upon any idea of lessening the burdens of the individual owners of property."

With the foregoing rules in mind the only question left for consideration is whether or not a strict construction of subsection nine (9) of section 427.1, Code 1946, would permit the conclusion that the Iowa Veterinary Medical Association was either a scientific or agricultural institution or society and if so, is the property in question

used solely for their appropriate objects as provided in the above quoted statute. Exemption statutes are to be strictly construed and an examination of article II herein above quoted discloses that the business of the association shall be social, promote good fellowship, promote and protect the professional interests of the veterinarian, diffuse true scientific knowledge among its members and increase the efficiency of veterinary service. Many of the objects of the association cannot be said to benefit the body of the people, but are rather for the purpose of benefitting the individuals as veterinarians. This society does not come within the terms of the statute unless it can be said that they are such scientific institution or society as is contemplated by the express terms of our statute. We find no definitions in a search of the Iowa cases and we quote, herewith, such as we have found in other jurisdictions, to-wit:

"Jockey club, maintaining experimental horse breeding station and breeding bureau, but organized mainly to protect and enjoy sport of horse racing, prevent dishonorable practices, and establish standards of gentlemen sportsmen, held not "scientific corporations" exempt from income tax. Revenue Act 1926, 231 (6), and Revenue Act 1928, 103 (6), 26 U.S.C.A., 103 note. Jockey Club v. Helvering, C.C.A.2, 76 F. 2d 597."

"A sanitarium for treatment of mental and nervous diseases which charged fees above cost for most of its service, and whose income exceeded expense, was not exempt from taxation by town as an "educational institution" or as a "scientific, literary, or benevolent association," notwithstanding that sanitarium was operated by nonstock, nonprofit corporation and that knowledge acquired by treatment was promulgated to the medical profession. St. 1937, 70.11 (4). Rogers Memorial Sanitarium v. Town of Summit, Wis., 279 N.W. 623."

" 'Scientific,' as used in Pub. St. c. 11, 5, cl. 3, as amended by St. 1889, c. 465, exempting from taxation corporations organized for literary, benevolent, charitable, and scientific purposes, means such an institution as is devoted either to the sciences generally, or to some department of science as a principal object, and not merely as an unimportant incident to its important objects. New England Theosophical Corp. v. Board of Assessors, 51 N.E. 456, 457, 172 Mass. 60, 42 L.R.A. 281."

"A corporation organized to provide and give to its members entertainment and lawful exhibition of feats of strength, agility, and activity, such as boxing, sparring, wrestling, basket ball, and any and all other indoor sports and harmless games, acceptable and beneficial to its members, was not organized for a fraternal beneficial, educational, or scientific purpose within Rev. St. 1909, 3432, Mo. St. Ann., 4996, p. 2288. State on Inf. of Wear v. Business Men's Athletic Club, 163 S.W. 901, 907, 178, Mo. App. 548."

"A corporation whose prime function was the maintenance, at high sportsmanlike level, of sport of dog shows and field trials and whose chief aim was to see that dog shows were staffed by proper judges and that a fair trial was given to all entrants was not a "scientific corporation" exempt from income tax. Revenue Act 1936, 101 (6), as amended, 26 U.S.C.A. Int. Rev. Code, 101 (6). American Kennel Club v. Hoey, C.C.A.N.Y., 148 F. 2d 920, 922."

"An organization, formed to inform and organize public sentiment respecting commonwealth's charitable and reformatory interests, but attempting to influence legislation as substantial part of its activities, was not a "scientific organization" within statute exempting such

organizations from social security taxes. Social Security Act 811 (b) (8), 9o7 (c), (7), 42 U.S.C.A. 1011 (b) (8), 1107 (c) (7); Federal Unemployment Tax Act 606, 26 U.S.C.A. Int. Rev. Code, 1426 (b) (8). Massachusetts Civic League v. U.S., D.C., Mass, 59 F. Supp. 346, 347."

"The social and recreational aspects of the Round Table Club of New Orleans are of too substantial a character to hold that it was organized and incorporated exclusively for "scientific, literary, or educational purposes", within Social Security Act. Round Table Club v. Fontenot, C.C.A. La., 143 F. 2d 196, 197."

From the foregoing authorities it is our conclusion that the society under consideration is not such as comes within the express terms of the statute. We do not believe that the statute under which the Iowa Veterinary Medical Association claims exemption is so definite and explicit that we can say that the property in question is exempt from taxation. Neither can we so construe the statute as to give to it the meaning that the Iowa Veterinary Medical Association now claims for it. If it is the desire of the legislature to exempt property under such a condition as is presented, we believe that it should so state the exemption in words that leave no question as to the intention of that body.

May 3, 1947

TAXATION: Homestead credit—two tracts which corner with each other. Two tracts of land having a common corner only are "contiguous" within the meaning of the homestead credit law. (Opinion June 12, 1937 withdrawn.)

Mr. John W. Barnes, State Tax Commission: You have submitted to this office the question as to whether or not two parcels of land which touch only at the corner are contiguous and may be considered as property entitled to a homestead tax credit under the statute granting such credit. Code, section 425.11, paragraph b of subsection one (1) is as follows:

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

In an attorney general's opinion under date of June 12, 1937, the term "contiguous" was considered and in that particular opinion the problem posed related to two pieces of land separated by a country highway, and the writer stated that the properties were contiguous inasmuch as the highway belonged to the land and the public had only a prescriptive right to use the same as a highway. In the foregoing opinion the writer referred to the case of Griffin vs. Denison Land Company 119 N.W. 1041 (N. Dak.) and quoted therefrom the following language:

" Two quarter sections of land which only touch at the corners, no part of the sides being common, do not constitute contiguous bodies of land."

According to Webster's Dictionary contiguous means,

"In actual contact; touching; also, near, though not in contact, neighboring; adjoining."

The Century Dictionary defines the word as:

"Touching; meeting or joining at the surface; hence, close together, neighboring, bordering or joining; adjacent, as to two certain objects, houses or estates."

The homestead tax credit Act is one providing for credits against certain property taxes and as its name indicates is a tax exemption act. Therefore, in its construction and interpretation one should follow the rules enunciated by the decisions in such cases. It is a well established principle that tax exemption statutes should be strictly construed and that those claiming exemptions must show themselves entitled thereto within the purview of the Act. Theta Xi Building Association vs. Board of Review 217 Iowa 1181; Samuelson vs. Horn 221 Iowa 208; Grand Lodge vs. Madigan 207 Iowa 24; Readlyn Hospital vs. Hoth 223 Iowa 341.

It may also be noted that in attempting to arrive at the correct interpretation of any particular provisions of the Act and the intention of the legislative body as expressed therein, one should consider the entire Act and, so far as possible, construe its various provisions in the light of their relation to the whole. The parts of the long title to the Act material hereto are as follows:

"An Act to encourage the acquiring and ownership of homesteads; to create the homestead credit fund; to provide for the allocation of such funds; and to define homesteads as well as provide for the making of claims for credit."

The Preamble states in part:

"Whereas it is the intention of the legislature and the purpose of this Act to encourage and foster home ownership and occupancy, and whereas this legislature feels that a proper method of encouraging home ownership and occupancy is by granting benefits to those within that class and * * * *"

The writer has found little, if any authority, to support a definition of "contiguous" in the Iowa cause and a search of the authorities presents the following:

"Contiguous," as used in Const. art. 15, 9, defining a homestead to be a person's dwelling place, with that part of his land and property which is about and contiguous to it, means touching sides, adjoining, adjacent. Linn County Bank v. Hopkins, 28 P. 606, 47 Kan. 580, 27 Am. St. Rep. 309."

" 'Contiguous' means near to, but not touching, not being synonymous with "adjoining." Northern Pacific Ry. Co. v. Douglas County, 130 N.W. 246, 248, 145 Wis. 288."

" 'Contiguous' means in actual contact, touching, or neighboring or adjoining. Smith v. Blairsburg Independent School Dist., 159 N.W. 1027, 1028, 179 Iowa, 500."

"Etymologically and generally, 'contiguous' meaning touching together, in contact with, and this meaning is generally applied by the courts, though a looser meaning has been given where legislative or contractual intent so requires. U. S. v. Hunter, C.C.A. Fla., 80 F. 2d 968, 969.'

" 'Contiguous' means in actual contact; touching; also, near, though not in contact; neighboring; adjoining; near in succession. Ehle v. Tenney Trading Co., 107 P. 2d 210, 212, 56 Ariz. 241; Brewer v. Heine, 106 P. 2d 495, 499, 56 Ariz. 160; Mitchell v. Melts, 18 S.E. 2d 406, 410, 220 N.C. 793."

"Two tracts having a common corner, making it possible to step from one to the other without crossing any other tract, are 'contiguous,' within the rule that adverse possession of one of several tracts contiguous to each other, conveyed by a deed, though separately described, extends to all. Parsons v. Dils, 189 S.W. 1158, 1159, 172 Ky. 774, Ann. Cas. 1918E, 796."

"Two tracts of land which cornered with each other were 'contiguous,' and when used as one farm could be selected as homestead; 'contiguous' being defined as touching or adjoining (Rev. Codes 1921, 6945, 6948, 6968; Const. art, 19 4). Oregon Mortg, Co. v. Dunbar, 289 P. 559, 560, 87 Mont. 603, 73 A.L.R. 113."

It is the opinion of the writer that two tracts of land which touch at the corner are contiguous within the meaning of the homestead tax credit law, and that any other conclusion would do violence to the language of the Act and would be contrary to the intent of the legislature as expressed and heretofore set out in this opinion. Any inference in the opinion dated June 12, 1937 that lands which touch at the corner are not contiguous is by virtue of this opinion withdrawn.

May 10, 1947

PAUPERS: Old-age assistance recipient living without the state—eligibility for poor relief. The presumption is that a person loses his legal settlement for poor relief if he is absent from the state for more than one year. This may be rebutted by evidence that he retained his domicile in Iowa and at all times intended to return. Receipt of old-age assistance from Iowa while without the state is a factor that may be considered.

Mr. Philip C. Lovrien, County Attorney, Humboldt, Iowa: Your letter of April 23, 1947, addressed to the Honorable John M. Rankin, Attorney General, has been referred to me for reply. In this letter, you ask the following questions:

"A party has been an old-age recipient for a number of years. About two or three years ago he moved out of the state to live with relatives. He has continued to receive the old-age pension in compliance with section 249.15 of the 1946 Code. The Director of the poor has been advised by the authorities of Los Angeles that he has incurred considerable medical expense and are asking reimbursement from this county. Apparently this illness is not of such a chronic nature as to bring it within the old-age pension assistance.

"Is this party entitled to poor relief from Humboldt County, Iowa, in view of the fact that he has been absent from the state more than one year?"

As I understand the case, this old-age assistance recipient had his residence, domicile and legal settlement in Humboldt County, Iowa, prior to his leaving the state to live in California.

Under the provisions of chapter 249 of the 1946 Code of Iowa, which is the chapter covering old-age assistance, it is not absolutely necessary

that the recipient have a legal settlement in the state of Iowa. Section 249.1 sets out some of the definitions for terms used in the chapter.

Subsection 5 of this section provides:

"The term 'domicile' shall mean the fixed permanent residence of the applicant or recipient of old-age assistance, to which, when absent, he has the intention of returning."

Subsection 6 of said section provides as follows:

"The term 'residence' shall mean the place of dwelling of the applicant or recipient of old-age assistance, whether permanent or temporary, and such dwelling place may or may not be the domicile of such person."

Section 252.16, 1946 Code of Iowa, provides in part 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, 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 person shall have filed with the board of supervisors of such county an affidavit stating that such person is no longer a pauper and intends to acquire a settlement in that county."

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

"* * *

Section 252.17 of the 1946 Code of Iowa provides as follows:

"A legal settlement once acquired shall so remain until such person has removed from this state for more than one year or has acquired a legal settlement in some other county or state."

It will be noted in reading the foregoing sections that requirements as to residence or domicile are different in the case of old-age assistance recipients under the provisions of chapter 249 of the 1946 Code of Iowa, and the requirements for persons to be eligible for general poor relief under the provisions of chapter 252 of the 1946 Code, in that all that is required in the case of an old-age assistance recipient is that he be a resident or have a domicile in the state of Iowa, while in the case of an applicant for general poor relief under the provisions of chapter 252 of the 1946 Code of Iowa, he must have a legal settlement which can only be acquired as provided by section 252.16 of the 1946 Code.

If an old-age assistance recipient was granted assistance at a time when he was eligible for such assistance, the mere fact that he may move out of the state to reside with relatives where he can be better taken care of, does not necessarily deprive him of old-age assistance, if his residence out of the state is temporary and if he retains his domicile in the state of Iowa, and intends to return thereto at some time in the future.

Under section 252.17 of the 1946 Code of Iowa, a person may lose his legal settlement for poor relief if he has removed from this state for more than one year, or if he has acquired a legal settlement in some other county or state. Apparently, the recipient in this case has not acquired a legal settlement in California even though he has resided in the state for more than one year.

It is our thought that there is a presumption that a person loses his legal settlement for poor relief if he is absent from the state for a period of more than one year. However, this is a rebuttable presumption, and if such a person is temporarily out of the state for the reason of ill health, business, or some other cause, and expects at all times to return to the state of Iowa, he should not loss his legal settlement. You are referred to an attorney general's opinion made on the 22nd day of April, 1943, which will be found in Report of Attorney General for the year 1944, on page 45, with reference to legal settlement, and this opinion really confirms the foregoing opinion as to the matter of legal settlement.

If the claimant can establish and satisfy the county board of supervisors that he did retain his legal settlement in the county, he should be assisted by general poor relief, but if it appears likely that there will have to be continued assistance from the general poor fund, he probably should be returned to the state of Iowa if he is physically able to be returned, so that relief could be furnished to him through the local overseer of the poor.

May 22, 1947

FIRE PROTECTION: Hotel inspection by department of agriculture three-fold enforcement. The responsibility of enforcement of fire protection laws is three-fold: The state fire marshal; local health officers and building inspectors; and the department of agriculture. The law on fire escapes is enforced by the fire marshal, the building code law by the health officers and municipal building inspectors; and the hotel law by the state department of agriculture.

Mr. Roy J. Sours, Chief Dairy and Food Division, Iowa Department of Agriculture: I acknowledge your request for a written opinion regarding the enforcement of the laws of fire protection in hotels as found in chapter 170, Code of 1946, stated as follows:

"Kindly point out in detail, the responsibilities and duties of the department in regard to this matter, and if the responsibility of the department is only to report the violation to the proper authorities as set out in section 170.48. If upon reinspection the violations still exist, what are our responsibilities?

Referring to section 170.48, who are the 'state and local authorities' to whom violations shall be reported, and also the specific violations to be reported to each?"

Section 170.38 to 170.51 inclusive, refers to fire protection in hotels and to the department of agriculture. Section 170.46, Code of 1946, provides as follows:

"The department shall cause to be inspected at least once each calendar year, every hotel, restaurant, and food establishment in the state, and

any inspector of said department may enter any such place at any reasonable hour to make such inspection. The management shall afford free access to every part of the premises and render all aid and assistance necessary to enable the inspector to make a thorough and complete examination."

Section 170.47, Code of 1946 provides as follows:

"Upon receipt of a verified complaint, signed by any patron of any hotel, restaurant, or food establishment, stating facts showing such places to be in an insanitary condition, or that the fire escapes and appliances are not kept in accordance with law, the department shall cause an examination to be made. If the complaint is found to be justifiable, the actual expenses necessarily incurred in making such inspection shall be charged and collected from the person conducting such place; but if such complaint is found to be without reasonable grounds, the actual expense necessarily incurred in making such inspection shall be collected from the person or persons making the complaint."

The "department" used in these sections, of course, refers to the department of agriculture. "Hotels" as defined in section 171.1, subsection 1, must be inspected at least once each year by a department inspector. They must also be inspected upon receipt of a verified complaint signed by a patron, stating facts showing such hotel does not provide fire escapes or appliances as required by law. Section 170.48, Code of 1946 provides as follows:

"After each inspection the department shall report all infringements of the fire protection law and regulations to the state fire marshal and local authorities, who shall take the necessary action to compel compliance with the same."

This section provides the trouble in this law for it fails to clearly designate the authority responsible for the enforcement of the fire protection laws in this state. It divides responsibility. That which seems to be everyone's business is no one's business, for there are at least three divisions mentioned in this section as parties responsible for the correction of infringements in fire protection laws. The department of agriculture, the state fire marshal, and the local authorities, meaning the health officers or councils of various city governments, building inspectors, etc.

We shall attempt to set forth the respective responsibilities as we see them.

From a careful review of the circumstances surrounding them, passage of this law in the 40th General Assembly, Extra Session and by foot notes in the 1924 Code, we came to the conclusion that the legislature intended to divide the responsibility of enforcement of fire protection laws between three divisions; the state fire marshal, as to fire escapes under the authority and under the provisions of Chapter 103, Code of 1946; the health officers or building inspectors in municipalities as to violations of the state and local building codes, and in all other matters of fire protection not elsewhere delegated, to the department of agriculture who enforces the provisions of chapter 170, an example of which is the necessity of providing fire extinguishers, as set out in section 170.44, Code of 1946.

It is my opinion that violations of the law relating to fire escapes should be referred by the department of agriculture to the state fire marshal, whose duty it is to compel compliance of the law under chapter 103, Code of 1946. Violations of the building code should be reported to the local boards of health or health officers, or under section 413.104, to building inspection departments, where so provided by ordinance, as these officers have the duty to compel compliance with the building code laws. All other violations and particularly those covered by the provisions of sections 170.38 to 170.45, inclusive, by the agriculture department as provided in section 170.49 and by section 170.50, which provides as follows:

"Any person conducting a hotel, restaurant, or food establishment, in violation of any provision of this chapter, may be restrained by injunction from operating such place of business. No injunction shall issue until after the defendant has had at least five days notice of the application therefor, and the time fixed for hearing thereon."

It is my further opinion that the legislature intended the department of agriculture use the above section on enforcement to correct violations of fire protection laws covered in chapter 170, and not specifically delegated elsewhere, and that the state fire marshal and the local health officers must resort to chapters 103 and 413 respectively for their authority and procedure to enforce compliance with fire protection laws under their jurisdiction. We also wish to point out that the department may call on the county attorney of each county to assist in the enforcement of these sections of the code.

May 22, 1947

MUNICIPAL CORPORATIONS: Garbage collection—fee system and tax levy provisions. The fee system for the collection of garbage does not rest on contract or agreement with the householder and may be exacted and collected at any time during the tax year, provided no levy has been made under subsection 16 of section 404.5, Code 1946. If levy has been made no fee may be collected until the expiration of the year for which such taxes have been levied, assessed and collected.

Mr. Chet B. Akers, Auditor of State; Attention Mr. T. E. DeHart: This will acknowledge receipt of yours of the 14th inst., in which you ask for opinion in the following situation:

"This office would like to have an opinion on House File 234, (Ch. 201) which was recently passed by the legislature, covering particularly, the following points:

1. Does the legislation authorize a city or town to establish a fee for the collection and disposal of garbage, rubbish and other waste material as may become dangerous to the public health or detrimental to the best interests of the community, to be collected from all persons who are the owners of and have under their control such materials, regardless of their consent, or must there be some sort of a contract, agreement or understanding between such persons and the city before such a fee is authorized.

2. At what period of time with regard to the levy, assessment and collection of the tax authorized by subsection 16, of section 404.5, Code 1946, may said fees be established and collected:

a. During the year in which no tax is levied, under subsection 16 of section 404.5, Code 1946, or

b. At any time when taxes collected under subsection 16 of section 404.5, Code 1946 have been exhausted by their proper use under said law allowing their levy, assessment and collection, regardless of whether the year in which the said taxes are to be collected has expired or not; or

c. Must the exercise of the rights conferred by said legislation be postponed until after the expiration of the year for which said taxes have been levied, assessed and collected, and/or also, until said time has expired and said funds have all been legally used?"

For an understanding of this problem, we exhibit here section 368.9, Code 1946, as amended by House File 234 (Ch. 201) of the 52nd General Assembly, where respecting cities and towns it is stated:

"They shall have power to establish and regulate:

1. SLAUGHTERHOUSES. Slaughterhouses, and in cities having five thousand or more inhabitants, to build and control the same.

2. SANITARY DISTRICTS. Sanitary districts for the collection and disposal of garbage and other such waste materials as may become dangerous to the public health or detrimental to the best interests of the community, and to adopt rules necessary for the administration thereof.

3. GARBAGE DISPOSAL PLANTS. Garbage disposal plants, and erect or purchase the same.

4. SWIMMING POOLS. Swimming pools and to build or to purchase the same."

And this section as amended by House File 234, (Ch. 201) 52nd General Assembly, provides:

"In lieu of the tax levy authorized by subsection sixteen (16) of section four hundred four point five (404.5), Code 1946, any city or town under any form of municipal government may within sanitary districts by ordinance establish rules for storage and rules and fees for the proper collection and disposal of garbage, rubbish and other waste material as may become dangerous to the public health or detrimental to the best interests of the community. Such fee shall be charged only where such collection service is rendered and shall be equitable and in proportion to the service rendered.

Sec. 2. This act shall also apply to special charter cities."

Section 404.5, subsection 16, Code of 1946, to which reference is made, is as follows:

"Garbage disposal and street cleaning fund. Within any sanitary district the following amounts which shall be used only to pay the cost of collection and disposal of garbage and such other material as may become dangerous to the public health, and for the oiling and sprinkling, flushing and cleaning of streets herein:

a. Cities with a population of less than five thousand not to exceed two mills;

b. Cities with a population of five thousand and less than twenty-five thousand not to exceed one mill;

c. Cities with a population in excess of twenty-five thousand not to exceed three-quarters mill."

Viewing these statutory provisions as a grant of police power by the state, to be exercised by the municipality by reasonable ordinance regulating the collection and disposal of garbage, accumulating within the limits of such municipality, it is unquestioned that necessary and reasonable regulations for such a collection and disposal of garbage may be adopted. The nature of garbage and kitchen refuse warrants the enactment of stringent police regulations, in regard to the care and disposition thereof. Section 37 American Jurisprudence, page 944, title "Municipal Corporation." Under that grant the power is sufficiently broad even without specific authorization, the municipality may exact a fee from householders for the collection and removal of garbage. See Walker v. Jamison, 37 N.E. 402; 39 N.E. 869; 28 LRA 679; also 15 ALR 292; 72 ALR 523; 135 ALR 1308; Clearly House File 234, 52nd General Assembly does not empower them imposition by a sanitary district of both a fee for collection of garbage and a tax for the same service. The statute prescribes them as mutually exclusive. Based upon the foregoing principles, we therefore answer your questions as follows:

1. A fee authorized to be collected from householders for the removal of garbage does not rest upon any contract, agreement or understanding between the city and such householders. It is an exaction by the city upon the householder, comparable in its imposition to an assessment.

2. a. If no tax has been levied under the power of subsection 16, of section 404.5, Code of 1946, such fees may be established, exacted and collected at any time during such tax year.

b. In view of the language of the foregoing subsection 16 of section 404.5, Code of 1946, if a levy has been made under that section, exhaustion of the taxes collected thereunder will not operate to authorize the exaction of a fee under the provisions of House File 234, (Ch. 201) 52nd General Assembly, during that tax year.

c. If the levy has been made under the foregoing section, then the power to exact a fee under House File 234, 52nd General Assembly may not be exercised until the expiration of the year for which such taxes have been levied, assessed and collected, and the funds legally used.

May 23, 1947

FISH AND GAME: Discrimination against Iowa residents in other states—exception to reciprocity. Chapter 84, Acts 52nd General Assembly prohibits the issuance of hunting or fishing licenses to nonresidents of Iowa of the type only in which discrimination, other than fees, appears against Iowa residents in the home state of the nonresident applicant.

Mr. G. L. Ziemer, Director, State Conservation Commission, Des Moines, Iowa.: I acknowledge receipt of your request for an opinion on the following problem stated by you:

"H. F. 482 (Ch. 84, 52nd G. A.) which became law upon publication, states in part:

"Sec. 2. If any state by law prohibits the issuance of a hunting or fishing license to residents of this state, or if any state by law permits

the issuance of a hunting or fishing license, but in so doing limits or restricts the privileges of residents of this state more than it limits or restricts the privileges of its own residents, no hunting or fishing license, or combined hunting and fishing license, shall be issued in this state to the residents of such state."

We believe this law is clear except upon the following point:

If a state discriminates against residents of Iowa in the issuance of hunting licenses, does this law prohibit us from selling both hunting or fishing licenses to residents of that state, or does it only prohibit us from selling the same type of license in which the discrimination exists?"

The above statute is clearly a restriction on the right of the conservation commission to issue hunting or fishing licenses to non-residents. It is in the nature of a reciprocity statute in reverse, or as an exceptiion to reciprocity. It provides in another way that Iowa will issue non-resident licenses to residents of other states when that other state does not restrict the privileges of residents of Iowa more than their own residents. It cannot be given any broader meaning as exceptions are always strictly construed.

It seems to us that the Legislature intended to provide that if another state limited or restricted the hunting privileges of Iowa residents more than it does its own under a hunting license of that state, then Iowa may not issue a hunting license to residents of that other state. If it restricts or limits a fishing privilege of an Iowa resident more than its own residents then Iowa will not issue a fishing license to residents of that state. In either case of course Iowa could not issue a combined hunting and fishing license to residents of that other state, but we believe a fishing license could be issued the nonresident if his state does not limit or restrict Iowa fishing privileges more than its own residents, although a hunting license could not be granted for the reason that it restricts or limits Iowa residents more than it does its own in hunting privileges.

It is our opinion that restricted privileges do not contemplate a mere difference in license fees, for Iowa, like other states, charges a non-resident a greater fee than residents of its own state for hunting or fishing licenses. This statute should be given no broader interpretation than to say that it prohibits the issuance of licenses only of the type in which a discrimination appears against Iowa residents in another state.

Therefore we believe and so hold that House File 482 (Ch. 84), Acts of the 52nd G. A. prohibits only the issuance of the type of licenses to residents of other states in which a discrimination, other than in fees, exists against residents of the state of Iowa.

May 26, 1947

ASSIGNMENTS: Wages to pay premium of group insurance—labor union not involved. If an employee as a part of the consideration of employment is required to enter into a group insurance plan which requires the employer to deduct the premium payment from his wages, then compliance with section 539.4, Code 1946, is unnecessary.

Nor is said deduction violative of chapter 296, Acts 52nd G. A. unless part of said premium comprises dues, charges, fees, contributions, fines, or assessments of any labor union.

Mr. Sam Orebaugh, Counsel, Insurance Department of Iowa: We have your letter of May 24, 1947, in which you make the following inquiry:

"1. Does an employee's revocable written request authorizing and directing his employer to make a monthly payroll deduction for the purpose of paying a group insurance premium come within the purview of 1946 Iowa Code section 539.4, relative to the assignment of wages?
2. Does such an authorization come within the purview of Senate File 109, (Ch. 296) Acts of the Fifty-second General Assembly of Iowa, relative to prohibited wage deductions by employers?"

In answering your first question your attention is directed to the case of Van Laningham v. Railway Company, 164 Iowa 161, in which a married man entered the employ of a Railway Company and as a condition of his employment was required to purchase a watch, the contract of employment being in writing. He agreed to an assignment of wages to meet the purchase. Later he and his wife joined in a written assignment complying with the provisions of the statute for the payment of other obligations. The question arose in regard to the priority of the assignments, the first assignment not having been signed by the wife.

At page 165 the court said:

"The object of the statute relied upon by the appellee is to protect the wife of the employee against the dissipation of his wages for purposes other than first for family support. But the right of the employee Smith, to earn wages as a servant of the railway company, in the first instance depended upon his agreement to comply with its rules, among which was that as to furnishing himself with a watch. The promise and obligation to procure the watch was a part of the consideration of his employment, and having assigned his wages to meet the indebtedness incurred in furnishing that consideration, other unaccepted claims against the pledged fund, even though based upon an assignment under the statute, had not the right to priority against it. The compliance with such rule may well be considered and treated as that which entered into the equipment of the company in the discharge of its service to the public, and we are of opinion that an order against wages to meet that particular purchase or indebtedness, accepted in payment of it by the employer so inhered in the contract of employment as to be a part of it; and to the extent that his earnings may be needed to meet it the exemption right cannot be claimed by the wife or by those claiming under assignment by her and her husband. The question is not unlike in principle to that arising under a claim for a purchase-money lien."

This is the latest case that we have been able to find dealing with the subject. The object of the statute, now section 539.4, Code 1946, is to protect the wife of the employee against dissipation of his wages for purposes other than first for family support. Based upon this decision it is our opinion that if an employee as a part of the consideration of his employment is required to enter into a group insurance plan which requires the employer to deduct from the wages of the employee a premium periodically for the payment of the insurance, then it is unnecessary to comply with the provisions of section 539.4.

"It will also be unnecessary to comply with Sec. 539.4 if the written request of the employee for the employer to deduct for group insurance premiums amounted to an order and not an assignment. Sec. 536.17, Code 1946 recognizes a difference between these directions, by referring to both classes, i. e. "valid assignments or orders". This direction in the case of group insurance premiums has been held to be revocable and not actionable. Therefore it must be classified as an order. Voluntary orders for deduction for group insurance directed to the employer and not to a labor union as prohibited in Chapter 296, Acts of the 52nd General Assembly, do not fall within the requirements of section 539.4, Code 1946."

In considering your second question we call your attention to the provisions of Senate File 109 (Ch. 296), and particularly sections 4 and 5 thereof, which are as follows:

"Sec. 4. It shall be unlawful for any person, firm, association, labor organization or corporation, or political subdivision, either directly or indirectly, or in any manner or by any means as a prerequisite to or a condition of employment to require any person to pay dues, charges, fees, contributions, fines or assessments to any labor union, labor association or labor organization.

Sec. 5. It shall be unlawful for any person, firm, association, labor organization or corporation to deduct labor organization dues, charges, fees, contributions, fines and assessments from an employee's earnings, wages or compensation, unless the employer has first been presented with an individual written order therefor signed by the employee, and by his or her spouse, if married, in the manner set forth in section five hundred thirty-nine point four (539.4), Code 1946, which written order shall be terminable at any time by the employee giving at least thirty days written notice of such termination to the employer."

It will be noted that in section 4 it is made unlawful for any person, firm, etc., to require any person to pay dues, charges, fees, contributions, fines or assessments to any labor union, labor association or labor organization as a prerequisite to a condition of employment.

Section 5 makes it unlawful for any person, firm, etc., to deduct labor organization dues from an employee's earnings, unless the employer has first been presented with a written order signed as provided by section 539.4, Code 1946.

It will be noted that in both section 4 and section 5 the dues, charges, fees, etc., to be paid or exacted from the wages of an employee are only those dues, charges, fees, etc., payable to a labor union, labor association, or labor organization, and have nothing to do with the deduction of a premium from the employee's wages for group insurance.

It is therefore our opinion that such is not a deduction in behalf of a union as referred to in Senate File 109 unless said dues, charges, fees, contributions, fines or assessments of any labor union, labor association or labor organization are comprised partly of a premium in payment for group insurance. In any event, when a deduction is made under Senate File 109 (Ch. 296, 52 G. A.) for the ostensible purposes named therein, compliance must be had with section 539.4.

June 9, 1947

STATUTES: Effective date. An act of a regular session of the General Assembly cannot, by its own declaration, be made effective prior to July 4 in the absence of a publication clause. (Art. III. No. 26, Const. of Iowa)

Mr. Carroll O. Switzer, County Attorney, Des Moines, Iowa: We have yours of the 4th inst. in which opinion is requested in the following situation:

"Inasmuch as the present salary law under which Polk County is operating for the first six months of 1947 expires June 30, 1947, and the new salary law which was passed by the 52nd General Assembly does not take effect until July 4, 1947, this office would like the Attorney General's opinion as to what salary should be paid for the three-day period beginning July 1st and ending July 3rd.

Should the salaries for the various county officials and employees for this three-day period be figured on the basis of the salary paid during the first six months of 1947, or should this salary be figured on the basis of the salaries in effect prior to the time any increases were granted by the legislature, or would it be proper to pay for these three days the salaries which go into effect under Senate File 181 passed by the 52nd General Assembly?

We would appreciate an opinion from your department at your earliest possible convenience, so that the Auditor may correctly prepare his payrolls for the period beginning July 1, 1947."

Senate File 181 (Ch. 183) of the 52nd General Assembly fixes the salaries of county officers and their deputies. The effective date of that act is sought to be provided in section 12, which provides—"the provisions of this act shall be in full force and effect beginning July 1, 1947." Notwithstanding the foregoing provision, and bearing in mind that no publication clause was attached to Senate File 181, I am of the opinion that such provision, fixing July 1st as the effective date of the act, cannot survive as against the provisions of Article III, section 26, of the Constitution of Iowa, respecting the effective date of general legislative acts. Such section of the constitution provides as follows:

"No law of the General Assembly, passed at a regular session, of a public nature, shall take effect until the fourth day of July next after the passage thereof. Laws passed at a special session, shall take effect ninety days after the adjournment of the General Assembly by which they were passed. If the General Assembly shall deem any law of immediate importance, they may provide that the same shall take effect by publication in newspapers in the State."

The foregoing conclusion is not effected by the provisions of section 3.7 of the Code of 1946, which provides as follows:

"All acts and resolutions of a public nature passed at regular sessions of the general assembly shall take effect on the fourth day of July following their passage, unless some specified time is provided in the act, or they have sooner taken effect by publication."

The term "specified time" for the effective date, as "provided in the act", plainly imports a time subsequent to July 4th. If it be constitutional for the legislature to fix the effective date of its acts by specific provisions prior to July 4, there would be no necessity for the pro-

vision for publication thereof, to make the act effective prior to that date. It would follow from the foregoing, therefore, that the salary of all county officers, provided for by Senate File 181 (Ch. 183), shall begin on July 4, 1947 and between July 1, 1947 and the fourth day of July, 1947, their salaries are those fixed by law, excluding therefrom the increases granted such officers by chapter 168 of the 50th General Assembly, and chapter 151 of the 51st General Assembly.

June 9, 1947

RETIREMENT SYSTEM: Term "immediately preceding" construed. Under the public employer retirement system law, chapter 97, Code 1946 and chapter 76, Acts 52nd G. A. the term "calendar quarters immediately preceding" does not mean that they must be consecutive. The only requirement is that one must be covered in one-half the calendar quarters since first covered by the law and by a stated number in each case prior to retirement.

Mr. Claude M. Stanley, Commissioner, Iowa Employment Security Commission: We acknowledge your request for an opinion from this office as set forth in your letter of May 22, 1947, as follows:

"The Iowa employment security commission has received inquiries from individuals as to the proper interpretation of chapter 97, Code of 1946, and particularly that part of said chapter contained in sec. 97.45, subsection 6, which as amended by Senate File 174 (Ch. 76), Acts of the Fifty-Second General Assembly, reads as follows:

'The term "fully insured individual" means any individual with respect to whom it appears to the satisfaction of the commission that:

a. He had not less than one quarter of coverage for each two of the quarters elapsing after 1945 and after he was first covered under this chapter, and up to but excluding the quarter in which he retired, after he had attained the age of sixty-five, or died, whichever first occurred, and in no case less than six quarters of coverage, excepting that no employee who has passed his sixtieth birthday prior to January 1, 1946, shall be paid any benefits until he would have been covered for ten full quarters immediately preceding his retirement or death unless that employee has had ten years of employment in public service in Iowa prior to July 1, 1947, and in that event he shall be a fully insured individual when he has been covered by six calendar quarters immediately preceding the quarter in which he retired after reaching the age of sixty-five years, or died, whichever event first occurred, and pays by himself, his representative, or beneficiary, as the case may be, to the employer, the tax upon the wages he was being paid in the last quarter of 1946 for four additional calendar quarters, which sum shall also be matched by the employing political division or subdivision and paid to the commission at the time of the employee's retirement or death; or

He had at least forty quarters of coverage.'

"The question raised is whether or not the language used in the law which states that the individual 'has been covered for six calendar quarters immediately preceding the quarter in which he retired' means that the quarters must be consecutive.

As an example one employee states that he has had more than ten years service prior to July 1, 1947. That he was covered during the first calendar quarter of 1946. That during the second calendar quarter of 1946 he was on leave without pay and, therefore, had no wages. That he has been covered for the third and fourth quarters of 1946 and the first and second quarters of 1947 making five quarters at the end of June, 1947. Can this individual qualify to retire by being in

employment under the Act for the third quarter of 1947 ending September 30 in that year, or will it be necessary for this person to begin the accumulation of quarters after the quarter in which he had no service?

As a second proposition did the Legislature intend that only those persons who had been covered for six calender quarters ending June 30, 1947, would be eligible to retire under the provisions of Section 1 of Senate File 174?

In view of the fact that Senate File 174 was intended to modify the present law to take care of old people should it not be construed to permit retirement of those who come under Section 1 when they have had six quarters of coverage regardless of whether they are consecutive?

Proposition 3. The above quoted section of the law before amended provided that an individual who was sixty years old before January 1, 1946, must have been covered for ten full quarters immediately preceding his retirement. Does that mean that these quarters must be consecutive? There will be many cases of school teachers that will not be able to get consecutive quarters because they are paid on a monthly basis and while they might be fully employed during the school year yet because of the circumstances there could be a quarter in which they were paid no wages."

Senate File 174, Acts of the 52nd General Assembly provides as follows:

"Section 1. Section ninety-seven point forty-five (97.45), Code 1946, is amended by striking the semicolon (;) and the word 'or' in line fourteen (14) of subsection six (6), paragraph (a) of said section and adding the following: 'Unless that employee has had ten years of employment in public service in Iowa prior to July 1, 1947, and in that event he shall be a fully insured individual when he has been covered by six calender quarters immediately preceding the quarter in which he retired after reaching the age of sixty-five years, or died, whichever event first occurred, and pays by himself, his representative, or beneficiary, as the case may be, to the employer, the tax upon the wages he was being paid in the last quarter of 1946 for four additional calendar quarters, which sum shall also be matched by the employing political division or subdivision and paid to the commission at the time of the employee's retirement or death; or'

Sec. 2. Section ninety-seven point thirteen (97.13), Code 1946, is amended by adding the following: 'Every individual with a record of fifty (50) years or more employment by the State of Iowa or its political subdivisions, including public school district, in work now covered by this act and who has attained the age of sixty-five (65) years, and who shall pay into the Old Age and Survivor Insurance Trust Fund the tax upon the wages he was being paid in the last quarter of his employment for ten (10) quarters, which sum shall also be matched by the last employing political sub-division, shall be entitled to benefits of twenty-five (25) dollars per month during the remaining years of the life of such individual upon application to the Iowa Employment Security Commission and submission of proof of such employment."

We also desire to refer to section 97.45, Code 1946, on definitions, to determine what is meant by "coverage" under this law. In subsection 6 (a) we find that in order to qualify as a "fully insured individual" one must have not less than one quarter of coverage for each two of the quarters elapsing after 1945 and after one was first covered under this law, but in no case less than six quarters of coverage, meaning a quarter in which one receives more than fifty dollars in wages.

This we interpret as requiring coverage in but one-half of the total quarters elapsing after 1945 and after the employee first was covered under the law, and before he retired after reaching the age of sixty-five, or died, whichever first occurred, without reference to whether said quarters of coverage are consecutive or the order in which they occurred.

We also see in subsection 7 that the term "currently insured individual" means one who has been paid wages of not less than fifty dollars per quarter for not less than six of the twelve calendar quarters immediately preceding the quarter in which he died.

Careful study of these provisions lead us to but one conclusion, that a person who misses but one quarter out of two remains in good standing in the retirement system and needs not start over in accumulating quarters of coverage. After six quarters are so acquired he remains a currently insured individual.

Therefore, the answer to your first question, in our opinion, would be that the term "has been covered for six calendar quarters immediately preceding the quarter in which he retired" does not mean that the quarters must be consecutive, but that there must be coverage in six out of the last twelve calendar quarters, but not less than one out of two, since one was first covered under this law. In other words in accumulating the six quarters, at no time must one have less than one-half the quarters elapsing since he was first covered. Authorities upon this point are not numerous, but we find in the case of Eccleston vs. Roseberg, 199 Pac. 857, the court interpreting language similar to that used in our statute, and determined what is meant by the term "immediately preceding". The question arose there, as to whether or not that term meant continuous service, and the court held that the term meant only that there must be no interval elapse between the termination of service and retirement—interpreting "immediately" as being synonymous to "without any interval". The courts said that only the use of the word "continuous" itself would require ten consecutive years of service and that the term "ten years of service" merely designates the number of years of service necessary. "Continuous" was not used in our statute and the six quarters should be six quarters of service acquired by coverage in no less than one-half the quarters since first covered.

The answer to your second question, in our opinion, is that the legislature did not intend that only those persons who had been covered for six calendar quarters, ending June 30, 1947, would be eligible to retire under provisions of section 1 of Senate File 174. Rather, the law would seem to limit coverage to persons who, as employees, have had ten years employment in public service in Iowa, prior to July 1, 1947, and also gained the required coverage of six quarters. In other words, one who has had ten years service prior to July 1, 1947, would only need six calendar quarters within the last twelve calendar quarters

to be eligible for retirement under section 1 of Senate File 174, by being covered not less than one-half the quarters since the act became effective or he was first employed thereunder.

In answering your third question, to be consistent, we should hold, and we do, that the accumulated quarters need not be consecutive, but must be at least one-half of the quarters elapsing since one was first covered under this law until one has acquired ten full quarters on which a tax was paid, just prior to retirement, and had also reached sixty years of age prior to January 1, 1946.

We further hold that to preserve continuity of coverage under this law, one must be covered one-half of the calendar quarters since first covered, and should he fail to do that, the requirements as to being covered by a stated number of quarters immediately preceding the quarter of retirement, would not be met and the employee necessarily would need to start over in his accumulation of quarters to be currently insured, or one must have obtained the total quarters required to be fully insured, which is for those under sixty (60) years, forty (40) quarters and for those over (60), ten (10) quarters coverage.

June 10, 1947

SCHOOLS: Salary of county superintendent. The county board of education has the sole responsibility in fixing the salary of the county superintendent and its act is wholly binding upon the county.

Mr. John S. Redd, County Attorney, Sidney, Iowa: We have yours of the 6th inst. in which you state:

"Under the provisions of House File 228 (ch. 187) enacted by the legislature, the Fremont county board of education voted a very substantial increase in the salary of the county superintendent, and the record of their action was duly certified to the county auditor, the increase salary to become effective May 1, 1947. Under previous law the salary of the Superintendent was fixed by the board of supervisors.

It would seem under the provisions of House File 228, the board of supervisors has nothing to say about the fixing of the county superintendent's salary. I believe that the Cass county board has asked your department for a ruling on this question as a similar situation has arisen in that county.

The board of supervisors and the county superintendent would like a letter from your department as to what share, if any, the board of supervisors now has in fixing the salary of the county superintendent, and whether the act of the county board of education in fixing the salary of the county superintendent is wholly binding upon the county, the latter simply paying the salary fixed by the board of education."

In reply to the foregoing, in our opinion, the legislative intent respecting the foregoing problem is disclosed by the plain terms of House File 228 (ch. 187) of the 52nd General Assembly. House File 228 provides as follows:

"Section 1. Section three hundred forty point fifteen (340.15), Code 1946, is hereby amended by inserting after the word 'Each' in line one (1), the words 'county superintendent and'.

Sec. 2. Further amend section three hundred forty point fifteen (340.15), Code 1946, by changing the period (.) in line seven (7)

after the word 'law' to a semicolon (;) and adding the following sentence: 'provided, however, that in the fixing of such salaries, the county superintendent shall have no part in the proceedings of said board, but shall designate an acting chairman and shall absent himself from the meeting during the consideration of such salaries.'

Sec. 3. Section three hundred forty point thirteen (340.13), Code 1946, is hereby repealed.

Sec. 4. This Act being deemed of immediate importance shall be in full force and effect from and after its passage and publication in the Hampton Chronicle, a newspaper published at Hampton, Iowa, and the Sheffield Press, a newspaper published at Sheffield, Iowa."

Section 340.13, Code 1946, which is repealed by the foregoing act, provides as follows:

"Each county superintendent of schools shall receive an annual salary of not less than eighteen hundred dollars, and such additional compensation as may be allowed by the board of supervisors in each particular county, but in no case to exceed three thousand dollars."

The legislature, therefore, by the terms of that act, divested the board of supervisors of the power to fix the compensation of the county superintendent and bestowed that power upon the county board of education.

In our view, the legislature intended to divest the board of supervisors of all power and authority over the compensation to be paid the county superintendent and to invest the county board of education with uncontrolled discretion in the fixing of such compensation. When the compensation is so fixed, and subsequently certified by the board of education, it is entitled to approval by the board of supervisors as a matter of course, and warrant authorized to be issued accordingly.

June 25, 1947

COUNTIES: Compensation of assessor. The county auditor of each county became ex officio county assessor on July 4, 1947 and as such was entitled to additional compensation provided by law.

Mr. Chet B. Akers, Auditor of State, Attention Mr. L. I. Truax:

We have yours of the 9th inst. in which you request opinion in the following:

"Please advise me when the three hundred dollars ($300.00) additional salary for being county assessor begins for the county auditor."

In reply thereto, we advise you that Senate File 181 (ch. 183), 52nd General Assembly, section 2, subsection 14 thereof provides "in addition to the foregoing, as county auditor shall receive the sum of $300.00 per annum for discharging his duties as county assessor ex officio." This is the general appropriation act of the 52nd General Assembly and is in full force and effect from and after July 4, 1947.

Senate File 46 (ch. 240) 52nd General Assembly which created the office of county assessor as a duty of the county auditor, provides in section 1 thereof, the following:

"In every county in the state of Iowa the office of county assessor is hereby created within the office of the county auditor. The county

auditor shall be ex officio county assessor. On the effective date of this act the terms of office of all township, city and town assessors shall terminate, other than those of city assessors provided for by this act, and other than those of city assessors provided for by chapter 405, Code 1946."

According to section 53 of the foregoing Senate File 46 (ch. 240) it is provided that "the general provisions of this act shall not be in effect until the first day of January, 1948, except as otherwise specifically provided by this act." The act itself, subject to the foregoing, becomes effective on July 4, 1947.

While it may be indeterminate from the foregoing as to when the salary of the auditor and county assessor shall begin to be paid, the fact that the Auditor by the terms of the foregoing Senate File 46, is required to perform some duties before January 1, 1948, would indicate that he would become assessor on July 4, 1947. Section 3 of the foregoing Senate File 46 provides the following duties of the assessor prior to January 1, 1948. Such provision follows:

"* * * * On or before the first day of December, 1947, the board of supervisors in each county shall call a conference which shall include the mayors of all incorporated cities and towns in the county whose property is assessed by the county assessor, members of the county boards of education as now or hereafter constituted, and members of the board of supervisors. Such conference shall organize for the purpose of selecting a county board of review of not less than three (3) members or more than five (5) as may be deemed desirable by the conference. The members of the conference when organized shall constitute the appointive board. The board as selected shall include at least one farmer, one registered real estate broker and at least one person experienced in the building and construction field. The assessor shall be clerk of said board. * * * *"

It is obvious that the assessor has duties to perform under the foregoing provision, prior to January 1, 1948, as the clerk of the conference provided to be called by the board of supervisors of each county, before the first day of January 1948. As county auditor, he is the clerk of such board, performing duties prior to January 1, 1948.

We are of the opinion therefore, that the legislative intent was that the county auditor, as assessor, in performing such duties should be compensated from the effective date of the appropriation act, to-wit, July 4, 1947.

June 27, 1947

COUNTIES: Bonds of county assessors and deputies. The county auditor is required to provide two qualifying bonds, one as auditor and the other as ex officio county assessor (section 64.9, Code 1946 and section 9, chapter 240, Acts 52nd G. A.) The deputy county assessor shall give bond as required by sections 64.2 and 64.15, Code 1946.

Mr. Chet B. Akers, Auditor of State, Attention Mr. L. I. Truax:

We have yours of the 6th inst. in which you ask for opinion in the following:

"Is it the intent of the legislature for the county auditor as county assessor to have a bond, or for the deputy county assessor to have such?

If the county auditor is required to have a bond as county assessor, must he have two bonds, one which is required by 64.9, Code of Iowa, and the other by section 9, Senate File 46?"

In reply thereto, I would advise you

1. Whether the county auditor, as the county assessor, is required to furnish a bond to qualify for the performance of his duties as county assessor, is determined by section 9, of Senate File 46 (ch. 240), 52nd General Assembly, under which the office of county assessor is created and his duties prescribed. Such section provides "the county assessor shall be required to furnish such bond for the performance of his duties as the board of supervisors may require, and the county shall pay for such bonds." We are of the opinion that the foregoing provision contemplates that a bond is required of the county auditor, acting as the county assessor. The amount of the bond and such other attributes to its issuance are matters within the discretion of the board of supervisors.

2. Insofar as the deputy assessor is concerned, and the furnishing by him of a bond as a prerequisite to his qualification to the office of deputy county assessor, we would advise that Senate File 46 makes no specific provision for the providing of such bond by the deputy county assessor. However, section 64.2, Code of 1946 provides generally, for the giving of bond by public officers unless otherwise specially provided. According to section 64.15, Code of 1946, it is provided with respect to providing of bonds by deputies:

"Bonds required by law, of deputy state, county, city, and town officers shall, unless otherwise provided, be in such amounts as may be fixed by the governor, board of supervisors, or the council, as the case may be, with sureties as required for the bonds of the principal, and filed with the same officer. The giving of such bond shall not relieve the principal from liability for the official acts of the deputy."

In our view the foregoing general statutes supply the authority for requiring qualifying bonds to be provided by deputy assessors. We are of the opinion, therefore, that the deputy county assessor, in qualifying for his office, shall provide a bond in such amount as may be fixed by the board of supervisors, with surety to be approved and the bond filed as provided by law.

3. It is quite clear from the foregoing that the county auditor is required to provide two qualifying bonds, one as county auditor under the provisions of section 64.9, of the Code of 1946, and the other under section 9, of Senate File 46 (ch. 240), Acts of the 52nd General Assembly.

June 30, 1947

AERONAUTICS: Leasing municipal airport for private operation prohibited. A municipal airport acquired under chapter 330, Code 1946, is acquired for a public purpose. So long as used for the purpose for which acquired it is presumed that there is a public need for it, therefore the city is without power to lease the entire airport to a private person for operation by him. Section 330.12, Code 1946, would have no application.

Mr. Chet Akers, Auditor of State; Attention T. E. De Hart: We have yours with enclosure of letter of May 23rd and opinion of Bailey Webber, city solicitor of Ottumwa. The letter setting forth the facts of the situation, follows:

"A matter has arisen in Ottumwa upon which I have been called to express a legal opinion, copy of which is enclosed for your reference. In order that you may better understand the background, I submit the following brief sketch of the essential facts in reference to the acquisition of the Ottumwa airport:

On March 30, 1928, a group of Ottumwa citizens affiliated themselves as the Ottumwa Legion Airport Company, rented a major portion of the present field, constructed a hangar and other inconsequential outbuildings, graded runways, and in all, spent approximately $12,486.66. This money was largely private capital obtained by donations from interested parties. During the depression years, first under the Civil Works Administration, and later, the Emergency Relief Administration, approximately $50,000.00 fences, improving buildings, etc. I do not have all the data before me as to the exact amount spent but the above is a rough estimate thereof.

On September 19, 1936, the land which heretofore had been leased was transferred to the City of Ottumwa by proper deed, recorded in book 148, page 244, records of Wapello County, Iowa, subject to a purchase money mortgage of $15,000.00; and at or about that time, the city of Ottumwa entered into a contract with the Ottumwa Legion Airport Company to purchase the existing hangar for $5,425.00.

The matter rode along until 1939 at which time the National Youth Administration set up a training and construction project at the airport and as a result thereof, a second hangar was built, using NYA labor, and materials provided largely by monies raised by the Ottumwa Chamber of Commerce and interested citizens. This building was completed except for the cement floor about December 10, 1940.

At the regular November election, held November 5, 1940, the city voted a special one-fourth mill levy for airport property. Subsequent to that time, in January, 1941, a three-man airport commission was appointed. Apparently this was done without any enabling statute by the state legislature. About that time, the state legislature passed our present airport commission act, which airport commission plan for administration was duly approved by the voters in the election held March 31, 1941, and at that time our present five-man commission was appointed to act, as provided by state law. In the interim WPA funds in some small amount may have been spent at the airport but these figures are not available to me at this time.

Thereafter, as you know, during the war years, and when the Ottumwa Naval Air Station was established, the city of Ottumwa leased its municipal airport to the United States Navy for $1.00 and the field was used for training purposes as a 'satellite' field. During this time it is believed that the Navy spent some money on the runway and in the addition of a small control tower at the field. Fences were painted, a certain amount of grading was done, and the like. The field has since been released to the city of Ottumwa and in December, 1945, the city entered into the exclusive lease with the Neiderhauser Airways which is the subject of my opinion. The former airport manager, C. P. Oleson, has addressed a letter to the airport commission claiming that this exclusive lease is illegal for the reason that federal funds have been spent on the airport as outlined heretofore, and, therefore, such lease is in violation of the applicable federal statute which is set out in my submitted opinion.

I would appreciate it if you would take this letter and my opinion to the attorney general and attain his opinion thereon. This is an important matter to the city of Ottumwa and I am very desirous that the steps we take be absolutely correct from a legal standpoint and that they be made with the knowledge and approval of your office and that of the attorney general."

The city attorney, after consideration, concluded:

"1. If, in the exercise of the legislative discretion vested in it by statute, the commission determined that the public needs would not be injured by the lease of all or any portion of said property, the commission and the city of Ottumwa would be authorized to execute a lease affecting all or any portion of the municipal airport.

2. Since the city of Ottumwa, Iowa, and the airport commission have accepted federal aid for the construction and equipment of said airport, the power to lease is strictly limited by the laws of the United States applicable thereto, and as provided by Section 330.13.

3. Section 453, 49 U.S.C.A., specifically inhibits and prevents the city and its airport commission from making any exclusive lease in respect to the landing area upon which federal assistance has been expended.

4. The lease, dated November 29, 1945, executed by the airport commission with the Niederhauser Airways, is in violation of the provisions of the above quoted federal statute, and by the terms of the lease, the provisions contained therein, purporting to grant certain exclusive privileges, are without force and effect, and are beyond the power of the city and the airport commission to execute."

We reason the situation differently. While realizing the full import of the provision of section 330.12, as follows:

"* * * * When the public needs will not be injured thereby, any city or town may lease all or any portion of such property, for a period of years not exceeding twenty or sell any equipment no longer required."

we are of the opinion that such authorization is subject to the provisions of section 330.15 as follows:

"Any property acquired, owned, controlled, or occupied for the purposes enumerated in this chapter, shall be and is hereby declared to be acquired, owned, controlled and occupied for a public purpose and as a matter of public need, and the liability of any city or town in connection therewith shall be no greater than that imposed upon municipalities in the maintenance and operation of public parks."

This is an express declaration by the legislature that an airport acquired under chapter 330, or owned, controlled or occupied, is declared to be for a public purpose. And as a matter of public need, it is impliedly a prohibition upon a city or town owning, controlling or occupying such property for airport purposes from divesting itself of its obligation to devote such property to the public purpose for which it was acquired. In that view the power conferred by the provisions of section 330.12, upon a city or town to lease any portion of such property, is restricted and limited to the occasion when the public need will not be injured. The public purpose attaches to such property so long as there is public need. When it is no longer needed for the

public purpose for which it is created, established and acquired, then the terms of the statute, 330.12, become operative and the property, or any part thereof, may then be leased for a private purpose. Occupancy, by any other than a city or town, of the property for the purpose of operating an airport is a private purpose and not within the power of the city to exercise. The foregoing statute, 330.12, is no more than an expression of the following general rule set forth in 38 A.J., page 158, title Municipal Corporations" as follows:

"It has frequently been stated broadly that municipal corporations have no power to rent municipal property to private persons, in the absence of a charter provision or statutory enactment empowering them to do so either in express terms or by necessary intendment. Conversely, such a right may be exercised where given expressly or by necessary implication, and in some cases the existence of such right seems to have been assumed without question by the courts. It seems, however, to be generally conceded that a municipality having erected a building in good faith for municipal or public purposes has the right, when such building is no longer used by the municipality, when parts of it are not needed for public use. When at intervals the whole building is not so used, and when it does not interfere with its public use, to permit it to be used either gratuitously or for a compensation for private purposes. Likewise, a municipal corporation may realize an income from real estate held for public purposes but not needed for such purpose at the time. Temporary leases are often upheld on this ground. Where, however, the proper exercise of the power of a municipality to sell property is interfered with by a present leasing of it, it has been held in some cases that a lease thereof is invalid. There are some instances where the full and complete enjoyment of property by the public requires that certain leases of portions of the property be made to private persons. Such a temporary, casual, and incidental use of unused public property, for the purpose of public economy, does not amount to an unconstitutional invasion of the rights of citizens who are using their own property in the same line of business, so as to entitle the latter to an injunction. A municipality having an old unused building on its hands may spend a reasonable sum in repairing it and fitting it up for rental purposes, to prevent its lying idle. Moreover, a municipal corporation may lease property actually devoted to a public use, but which is held by the municipality in its private or proprietary capacity, such as gasworks used for supplying householders with light. On the other hand, it cannot without express legislative authority lease for private purposes or for compensation property held by it for public and governmental purposes and actually devoted to such uses. Thus, a municipal corporation cannot lease land dedicated as a public park, common, square, or playgrounds, nor can it lease part of a public wharf for private use. It has also been held that a memorial building may not be leased to private persons for private purposes. This rule does not necessarily forbid the renting of a portion of public grounds to private parties to carry on a private business incidental to the purpose for which the grounds were acquired, as where a portion of a park is leased for refreshment stands or for particular sports and amusements, or a portion of a public wharf is leased for a public elevator."

The foregoing view of the power of the municipality to lease ground acquired for airport purposes to a private party for operating by him, has the support of authority. In city of Daytona Beach vs. Dygert, 1 Sou. 2nd, 170; 233 ALR 2337, where there was a general statute authorizing municipalities to purchase, lease, acquire, real and personal

property, and to sell, alienate, convey, lease or otherwise dispose of the same for the benefit and advantage of the municipality, including its use and establishment for various municipal functions, including specifically an airport, to the same extent that natural persons might or could do, it was held that the foregoing statute would not grant power to the city to dispose of property impressed with a public trust, and "if the power or authority to lease this property exists, it must clearly appear by the terms of city charter or by statute applicable generally to the several municipalities of Florida," and concluded that the necessary charter power authority to enter into a lease or subletting of the airport owned by the city, to a private individual, would not exist. In State ex rel Mitchell vs. Coffeyville, 127 Kan. 663; Pac. 258; 63 ALR 610, it appeared that the city of Coffeyville owned an airport and sublet the same to a private individual;

"and the terms of the lease authorized the lessee to operate it for the convenience of all aviators who chose to use it, on reasonable terms named by the lessee, and was to have all the profits flowing from the operation of the airport; and he was required to pay the city for the use of the port the sum of $50 per month. The property was leased for a period of five years. See State ex rel. Mitchell v. Coffeyville, 127 Kan. 663; 274 P. 258, 260; 6 ALR 610. The question squarely presented there was whether or not the City of Coffeyville had the corporate power to sublet its municipally owned airport to a private individual. The court held that no such power existed, and in part said:

'This court, however, feels impelled to hold that neither the statute just quoted nor any other can by fair intendment be interpreted to confer upon the city of Coffeyville the corporate power to sublet its municipal airport, nor to confer upon a private individual, as lessee of the city, the exclusive privilege of managing the municipal airport for his private profit; and the fact that the lease contemplates that the lessee's charges must be reasonable, and that the aviation services which he undertakes to furnish must be open to all aviators alike, will not excuse the city's exercise of a corporate power for which there is no statutory authority.'"

and in 6 Amer. Juris. 14, 15, the rule is stated:

"A city which has acquired a municipal aviation field or airport under authority of statute has not, in the absence of express legislative authority, power to sublet such airport to a private individual, or to confer upon a private individual, as lessee of the city, the exclusive privilege of managing the municipal airport for his private profit."

This accords with the view of the Iowa Supreme Court respecting the power to use or lease a courthouse for a private purpose. In Hilgers vs. Woodbury County, 200 Iowa 1318, where was in question the right of the board of supervisors to lease the seventh floor of the courthouse to an American Legion Post, the court said:

"* * * * But the board of supervisors has no power to use or lease the courthouse or any portion thereof for a strictly private purpose, unless the legislature has seen fit by an enactment to grant such power; and no such power has been conferred in this state."

And in State vs. Board of Supervisors of Linn County, 232 Iowa 1092, 1096, the court said:

"The courthouse was built for a public purpose and the board of supervisors did not have the power to lease any part of it for private use in the absence of statutory authority. * * * *"

Rhyne on Airport and the Courts, in discussing the problem here presented, states:

"The one conclusion deducible from the cases discussed in this chapter is that draftsmen of airport legislation must specifically include in such legislation the power to lease municipal airports or the courts will probably find that no such lease can be entered into which would place the airport's entire facilities in private hands, but the leasing of parts of an airport to airlines or others, by concession agreements or rental leases, will be upheld as 'incidental to the main operation of the airport'."

It is our view, therefore, that the city of Ottumwa has no power to enter into a lease of the entire airport to a private person for operation by him.

June 30, 1947

HIGHWAYS: Establishment by county supervision—commissioners advisory report. In the establishment of a county highway the board of supervisors can accept the recommendation of the commissioner appointed pursuant to section 306.5, Code 1946, et seq. in full, in part, or can reject the entire proposed project. The report of the commissioner is merely advisory so long as it favors the proposed establishment, vacation, or alteration.

Mr. Joseph P. Hand, County Attorney, Emmetsburg, Iowa: This will acknowledge receipt of your letter of June 17th in which you state:

"The local board of supervisors, upon proper petition for the establishment of a county road appointed the county engineer as commissioner to make his recommendations for such road. The commissioner's recommendations were returned and subsequently the board of supervisors established a road not in conformity with the commissioner's recommendations, changing from such recommendations by establishing only one (1) mile of the road recommended and slight other deviations.

"The engineer (commissioner) stated that he of course would not have recommended the road as now established by the supervisors and the question has been submitted to this office whether or not such establishment is valid inasmuch as it did not follow the recommendations of the commissioner.

"I would appreciate an opinion from the attorney general's office as to whether the board can establish a road contrary to the recommendations of the commissioner."

Section 306.1, 1946 Code, confers upon the board of supervisors the power to establish secondary roads. It reads as follows:

"Jurisdiction. The board of supervisors has the general supervision of the secondary roads in the county, with power to establish, vacate, and change them as herein provided, and to see that the laws in relation to them are carried into effect."

Section 306.3 provides that any person desiring to have a road established, vacated, or altered, shall file a petition therefor in the auditor's office. The filing of such petition permits the board of supervisors to proceed with the establishment of a road. It is jurisdictional and

without it the board has no authority to act. Curtis vs. Pocahontas County, 72 Ia. 151, 33 N. W. 616; McCarl vs. Clarke County, 167 Ia. 14, 148 N. W. 1015.

Section 306.4 requires the petitioner to post a cost bond but this requirement has been held to be directory only and not jurisdictional.

Section 306.5 reads as follows:

"Commissioner. When the foregoing requirements have been complied with, the auditor shall appoint some suitable and disinterested elector of the county as commissioner, to examine into the expediency of the proposed establishment, alteration, or vacation, and report accordingly."

The commissioner's method of procedure is set out in Sections 306.8 to 306.12, inclusive. Sections 306.8 and 306.12 read as follows:

"306.8 Report. In forming his judgment, he must take into account the public and private convenience, and the expense of the proposed road, and, if he thinks the public convenience requires it, shall proceed at once to lay the same out, if the circumstances are such as to enable him to do so without having the same surveyed; but if, in his judgment, such road should not be established, or the alteration or vacation made, he shall proceed no further, and in either case shall, within thirty days after the day of his appointment, file his report in the auditor's office."

"306.12. Plat and field notes. A correct plat of the road or alteration, together with a copy of the field notes of the surveyor, if one has been employed, must be filed as a part of the commissioner's report."

The succeeding sections of the Code outline the procedure to be followed in assessing damages to the adjoining landowners, hearings on objections before the board, appeals and the final action of the board in establishing, vacating or altering the road in question.

Nowhere does there appear any section which confers authority for the establishing of a road on any other body than the board of supervisors. Such power is not given to the commissioner. The function of the commissioner then, is merely to make recommendations. The power to make the final decision rests in the board of supervisors. Such power is found in section 306.26, which reads as follows:

"306.26. Final action. When the time for final action arrives, the board may hear testimony, receive petitions for and remonstrances against the establishment, vacation, or alteration, as the case may be, of such road, and may establish, vacate, or alter, or refuse to do so, as in their judgment, founded on the testimony, the public good may require."

That the board is empowered to make changes in the plans as submitted by the commissioner can readily be inferred by a reading of section 306.43, which reads as follows:

"306.43. Lost field notes resurvey. When, by reason of the loss or destruction of the field notes of the original survey, or of defective surveys or record, or of numerous alterations since the original survey, the location of any road cannot be accurately determined, the board of the proper county may cause it to be resurveyed, platted, and recorded, as hereinafter provided."

It is true that if the commissioner returns a report recommending against the establishment of a road, the board of supervisors is without jurisdiction to proceed any further. But it has been held that in the absence of an adverse report the board of supervisors does have authority to proceed. And, this is true even where there has been no commissioner appointed, so that there could not be an adverse report.

In the case of Heery vs. Roberts, 186 Ia. 61, 170 N. W. 405, the court stated:

"We held in Lawrence v. Williams, 146 Iowa, 671, 125 N.W. 656, that if it be conceded the board is without jurisdiction to proceed after an adverse report by the commissioner, nevertheless it will not be without jurisdiction to entertain an entirely new proceeding by the filing of a new petition on the same line or route contemplated by the first petition. The board of supervisors is given express and exclusive jurisdiction to vacate highways. We should not by construction strain to oust it of that jurisdiction. As seen, the adverse report of the commissioner on the first petition did not effect the jurisdiction to act upon the second, and while it is settled that any proceedings wherein the commissioner does make an adverse report is abated and discontinued, it does not follow that the jurisdiction to entertain a new petition is terminated though no adverse report be filed, and merely because of failure to appoint a commissioner at all, thus making it impossible to have an adverse report. Nowhere does the statute prescribe in terms that jurisdiction ceases because no report of commissioner is filed. Nowhere is the jurisdiction in terms made to depend upon the appointment of a commissioner. That the action must stop when an authorized investigation finds that the proposal is inexpedient is one thing; that the action of the board of supervisors is void because the auditor appoints no commissioner, and the board uses its own judgment as to expediency, is quite a different thing. We are of the opinion that the appointment of the commissioner is largely for the purpose of determining whether what is proposed is justified in view of the expense that must be incurred. * * * * * We hold now that, whatever may be the effect of an adverse report, the proceedings are not void because through failure to appoint the commissioner there was no report either favorable or adverse."

It is true that the Heery case concerned the vacation of a road, while the instant case concerns the establishment of a road, but the reasoning of the court applies equally to both situations.

As we understand your statement of facts, your board of supervisors accepted the recommendation of the commissioner only in part, and rejected his recommendation that the proposed road be established for more than a mile in length. In our opinion, for the reasons stated above, your board has such power and can either accept the recommendation of the commissioner in full, in part, or can reject the entire proposed project. It is our further opinion that the report of the commissioner is merely advisory so long as it favors the proposed establishment, vacation or alteration.

July 3, 1947

SCHOOLS AND SCHOOL DISTRICTS: Preparation of budget in counties for 1948. It is incumbent on the county board of education existing upon the passage of chapter 147 Acts of the 52nd G. A., to prepare the budget for the year 1948.

Miss Jessie Parker, Superintendent of Public Instruction; Attention R. A. Griffin: We have your request for opinion arising out of Senate File 245, 52nd General Assembly, now exhibited in the laws of the 52nd General Assembly as chapter 147. The particular question is as to which body shall prepare the budget required to be filed between July 1 and July 15 to provide the new county board of education with funds for the year 1948.

In reply thereto, we are of the opinion that the preparation of the proposed county board of education budget for the year 1948, shall be the duty of the county board of education, existing now under the provisions of chapter 273, Code of 1946.

There is neither express nor implied implication in Senate File 245 that would deprive the existing county board of this duty, but on the other hand it appears clear this power and duty remains in the present board. Nor is there any implication therein that the local budget law, as far as the county board of education is concerned, is suspended in its operation, pending the effective date of the county school system created by the 52nd General Assembly.

Section 1 of the foregoing chapter provides for the creation in the several counties of the state, a county school system which shall become effective on the first Monday in April in 1948.

Section 4 thereof imposes upon the existing county board of education, on or before the first day of December, 1947, the duty of dividing the county into election areas, preparatory to setting up the new county board of education, that will operate from April, 1948. A subsequent section imposes upon the county board of education, duties with respect to the details of nomination for the office, in the board, and the election mechanics.

Section 5, fixing the terms of office of the board of education under the discussed act, provides such terms shall begin on the first Monday in April, 1948.

Section 14 provides for the appointment by the county board of education, of a county superintendent, whose term of office shall be for three years and specifically provides that his first regular term, under the act, shall begin the first secular day of August, 1948.

It seems to be the clear intent of the legislature that the present county board of education shall take all necessary steps to see that Senate File 245 can be successfully administered.

Subsection 10 of section 13 of chapter 147, provides, with respect to the budget, as follows:

"At the regular or a special meeting held between July 1 and July 15, consider the budget as submitted by the county superintendent, and certify to the board of supervisors the estimates of the amounts needed. Such estimates shall follow the budget procedure under chapter twenty-four (24), Code 1946. The board of supervisors shall then levy a tax

on all the taxable property in the county for the amount certified, and the money so raised shall go into a fund hereinafter called the county board of education fund."

To do this there must be a county board of education budget. There is no authority other than the present county board of education authorized even by implication, to make this budget. Necessarily, therefore, the existing board of education is the only board of education that could fulfill the obligation of the foregoing subsection 10 of section 13. Therefore, it seems clear that this authority though implied and accepted as of necessity must be exercised by the present county board of education in order to carry out the mandate of the legislature as expressed in this act.

Our thought is that by enacting section 13 of this act the legislature clearly intended for the county superintendent to prepare and submit a budget to the present county board of education at a regular or special meeting to be held between July 1 and 15; that the county board of education must consider said budget and certify the amount needed to carry out the provisions of the act, to the county board of supervisors; that the discretion vested in the county board of education to consider and approve said budget and certify it to the county board of supervisors is mandatory and uncontrolled; that it is incumbent upon the board of supervisors, as a matter of course, to authorize said levy as so certified.

July 8, 1947

BRIDGES: Flood damage—authority to exceed budget to repair—procedure. There is plenary authority under section 343.11 and chapter 346 of the Code to repair bridges destroyed by flood notwithstanding budget limitations.

Mr. Horace J. Melton, Assistant County Attorney, Fort Dodge, Iowa: We have yours of the 30th ult. in which you ask for opinion in the following situation:

"Recent floods have caused an unusual amount of damage to the bridges here in Webster County, Iowa, and a rather large expenditure will be required to repair them so that they are safe for public traffic. The necessary expenditure will far exceed this year's collectible revenue in the bridge fund. Can the county board of supervisors now go ahead with the work, issue warrants for the work done and then later issue bonds to take up these warrants that will be marked not paid for want of funds? It would appear to me that they could under the following statutory provisions: Section 343.10 of the Code confines expenditures within receipts. Section 343.11 however states that Section 343.10 does not apply to 'Expenditure for bridges or buildings destroyed by fire or flood or other extraordinary casualty.' The board therefore can in such a case as we have here issue warrants in excess of the receipts. Section 346.2 then provides that where the outstanding indebtedness incurred in repairing bridges equals or exceeds the sum of $5,000 bonds may be issued to refund such outstanding indebtedness. The procedure under that section would appear to be governed by the procedure outlined in Section 346.1 which provides that the bonds may be issued by a two-thirds vote of all the members of the board without the vote of the people. Section 346.4 of the Code then provides that the bonds shall be issued after competitive bidding. Are we correct therefore in assuming that warrants can be issued to repair bridges damaged by the recent floods and after the amount of unpaid warrants exceeds the sum of

$5,000 bridge bonds may be issued by the board of supervisors by a two-thirds vote pursuant to Chapter 346 of the Code. We would appreciate an early answer to this inquiry."

In reply to the foregoing, we submit to you the following accepted principles and procedure in the matter of repairing the damage and reconstruction of bridges and culverts damaged or destroyed by floods.

"Section 24.14, Code of 1946, among other things provides 'and thereafter no greater expenditure of public money shall be made for any specific purpose than the amount estimated and appropriated therefore, except as provided in section 24.6, 24.15 and sub-section 1 of section 343.11,' all of the Code of 1946. The exception noted as sub-section 1 of Section 343.11, provides as follows:

'Section 343.10 shall not apply to:

1. Expenditures for bridges or buildings destroyed by fire or flood or other extraordinary casualty.'

And it should be noted also, in consideration of this exception, that section 24.14 heretofore quoted, limits the expenditure for specific purposes. In the preparation of the budget, such specific purposes were designated as construction, and the specific operations thereunder, as well as maintenance. It would follow, therefore, that the destruction or damage of bridges by flood, were not within the original budget nor designated therein as an expenditure for any particular purpose. In that situation, subsection 1 of section 343.11, Code of 1946 is authority for the establishment of a specific emergency fund to provide for the reconstruction, caused by the flood emergency. In accomplishing the purpose of the exception and to provide for the funds with which destroyed or damaged bridges may be paid, the following procedure is pertinent:

1. The county engineer should make a survey of the flood damage and make an estimate of the damage or loss by each bridge designated separately and an estimate of the cost of restoration or reconstruction. The engineer should thereafter prepare an estimate of the cost of the damage and loss and submit the same to the board of supervisors.

2. The board of supervisors should then pass a proper resolution of necessity, which resolution should state the date and time of the flood and the particulars thereof, and should state the total amount of damage estimated by the engineer in terms of dollars, with a copy of his report, made to the board of supervisors, attached thereto and made a part thereof. The resolution should further state that the specific funds designated in the budget in 1946 and the tax levy made in 1946 for taxes to be collected and paid in 1947 for the purposes therein specified, are all allocated and obligated and that there remains no available fund from which to pay for the necessary restoration, reconstruction and repair to the bridges damaged by the flood.

3. The county auditor and county treasurer should then be instructed by proper action of the board, to set up ledger sheets showing the total amount of damage estimated and as claims for reconstruction or repairs are presented to the board, and approved, the county auditor should be authorized to issue warrants against this account, set up as a special bridge flood damage fund, and so designated on the warrant. The total amount of which warrants to be issued could not exceed the amount estimated by the engineer.

4. Upon presentation of these warrants to the county treasurer, they should be stamped 'not paid for want of funds' and when the aggregate of these stamped warrants equals or exceeds $5,000 the amount could be funded by the issuance of bonds and tax levy for their payment, all as provided by chapter 346, Code of 1946.

July 10, 1947

SOLDIERS, SAILORS, MARINES AND NURSES: Aid may be supplemented by aid to dependent children. Persons receiving soldier's relief under chapter 250, Code 1946, may receive additional aid for dependent children under chapter 239. However, persons applying first for aid for dependent children under chapter 239 are not entitled to additional relief under chapter 250.

SOLDIERS, SAILORS, MARINES, AND NURSES: Soldier's relief to persons already receiving old age assistance. Persons receiving old-age assistance under chapter 249, Code 1946, are not entitled to further aid under soldier's relief, chapter 250, except for fuel, dental, nursing, osteopathic, chiropractic, medical, and surgical assistance and hospitalization.

State Board of Social Welfare, Des Moines, Iowa: We have your communication enclosing a letter from Mr. Byrl D. Houck, director of social welfare for Webster county, Iowa, asking for an opinion on the following question:

"We have a few ADC cases where the children are eligible for and receiving soldiers' relief supplementing the ADC to help meet the deficiency, and we now have an application pending which would appear to have to be rejected since the county has to reimburse the state from the Poor Fund for their share of the expense in ADC cases. Please advise us as to what action we should take in this case and those cases now receiving ADC who are eligible for soldiers' relief.

"Also, please advise us as to what legal right we will have to reject an application for ADC when the eligibility requirements are not as outlined in section 2 of the Aid to Dependent Children law. It does not appear that the one mill levy provided under the soldiers' relief act will provide support sufficient to remove these families from a degree of need.

"We now have on file an application for old-age assistance from an honorably discharged veteran of World War I and we wonder if chapter 250 of the 1946 Code of Iowa intends to preclude the administration of this type of assistance through the county welfare office and if so, what legal right do we have to reject this application under the Old-Age Assistance Act."

In answer to paragraph 1 of your question, relative to ADC cases, where the children are eligible for soldiers' relief, we are of the opinion that they may be entitled to aid under both chapters at the same time under the circumstances hereinafter stated. If they are receiving help under chapter 239 of the 1946 Code of Iowa at the time they make application for aid under chapter 250 of the 1946 Code of Iowa, they are not also entitled to receive such additional aid under chapter 250 of the 1946 Code of Iowa, for it is presumed that the ADC relief as now provided for by law would care for all their needs. Section 239.5, Code 1946 as amended by chapter 134, 52nd G. A. The provisions of chapter 250 of the 1946 Code of Iowa apply to relief for children of soldiers, sailors and marines, and if the children are eligible under this chapter, they can ask for such relief, but the amount receivable is fixed by the soldiers' relief commission and may or may not be sufficient to meet all the applicant's needs. If they are getting relief under chapter 250 of the 1946 Code of Iowa at the time of application for ADC aid under chapter 239, we feel that they are also entitled to aid to dependent

children under the provisions of chapter 239 of the 1946 Code of Iowa, if it is shown that the amounts received from the Soldiers' Relief Commission is not adequate to meet their needs. The amounts received from the soldier's relief commission should be taken into consideration, however, in determining the need.

Your attention is called to paragraph 2 of section 239.5 of the 1946 Code of Iowa, as amended, which provides as follows:

"* * *

"The county board shall, on the basis of actual need, fix the amount of assistance necessary for any dependent child, subject to the approval of the state department, with due regard to the necessary expenditures of the family and the conditions existing in each case, taking into consideration any other income or resources of any child claiming assistance under this chapter and any private resources found to be available to such child. Such assistance when granted shall be sufficient, when added to all other income and support available to the child, to provide such child with a reasonable subsistence compatible with decency and health. Assistance, when granted, shall be paid monthly to an adult person within the specified degree of relationship and with whom the child is living, from the fund for aid to dependent children established by this chapter, upon the order of the state department."

Under the provisions of chapter 239 of the 1946 Code of Iowa, as amended, all necessary help and assistance can be given under this chapter.

The code provides for a great many different kinds of relief for poor persons and dependent persons and an applicant might be eligible under more than one chapter to receive relief. The legislature has in some instances provided that when one receives aid under one form of relief, he cannot participate in another form, but no such provision appears in chapter 239 or chapter 250, Code of 1946.

In answer to the second paragraph of your letter, if the board is satisfied that the applicant is not qualified under the law they should reject the application.

In answer to the last paragraph of your letter, as to whether or not an honorably discharged veteran of World War I is entitled to old-age assistance provided he is otherwise eligible, we can find nothing in chapter 249 of the 1946 Code of Iowa which would preclude an honorably discharged veteran from receiving old-age assistance if he qualified as provided by chapter 249 of the 1946 Code of Iowa, but we do not think that he would be entitled to assistance under the provisions of chapter 250 of the 1946 Code of Iowa if he was also receiving old-age assistance under the provisions of chapter 249 of the 1946 Code of Iowa, except as set out in Section 249.29 which provides in part as follows:

"No person receiving assistance under this chapter shall at the same time receive any other assistance from the state, or from any political subdivision thereof, except for fuel, dental, nursing, osteopathic, chiropractic, medical and surgical assistance and hospitalization."

It is, therefore, our opinion that a person receiving relief under chapter 250 of the 1946 Code of Iowa may also be eligible to receive relief

under the provisions of chapter 239 of the 1946 Code of Iowa, if the relief received from the soldiers' relief commission is not sufficient to meet the needs of such person. It is further our opinion that a person receiving old-age assistance under chapter 249, Code of 1946, may not receive any assistance under chapter 250 of the Code, except for fuel, dental, nursing, osteopathic, chiropractic, medical and surgical assistance and hospitalization.

July 16, 1947

TAXATION: Moneys and credits—deducting federal taxes as "debt". The federal courts in interpreting the federal income tax law classify the tax as a debt to the government. Therefore, the taxpayer's income tax owing to the federal government on January 1 is a deductible item in determining the assessable value of moneys and credits taxable in Iowa.

Mr. Carroll O. Switzer, County Attorney, Des Moines, Iowa: This will acknowledge receipt of your letter addressed to the attorney general in which you enclose a letter from Mr. Zuver, the city assessor, in which he makes the following inquiry.

"One of our Des Moines banks has recently presented its January 1, 1947, financial statement to this office and in this statement is found a liability under the item of 'Reserve for Federal Income Tax' of a rather sizeable amount. It reports that this is a 1946 liability that is to be paid in quarterly installments commencing March 15, 1947. This item was disallowed as a deduction in computing the value of shares of stock assessable to the stock owners of the bank, and for this reason a protest has been filed with the board of review taking exception to the method thus employed in arriving at the assessable value of moneys and credits chargeable to the stockholders."

As we understand this proposition this was an item of $79,764.49 which was exactly the amount of the income tax due and owing by the bank for 1946 and which they could pay quarterly in 1947 due to the fact that they are a corporation and not subject to the "pay as you go" plan. In answering your inquiry I am assuming that the amount of $79,764.49 is the exact amount of the liability of this bank for 1946 income tax due and payable on January 1, 1947. The city assessor is undoubtedly basing his objection to this deduction on the theory that taxes are not a debt and that is the rule as laid down in the state of Iowa relative to real estate and personal property taxes.

It is to be noted in this case we are dealing with federal income tax and, of course, the inquiry of necessity presents the question as to whether or not an income tax is a debt and is a different tax than a real estate or personal property tax. The federal income tax statute is a law enacted by Congress and subject to interpretation by the federal courts and we find from an examination of the authorities that the federal courts have held that "the liability of the taxpayer to the government is a debt and subject to collection the same as any other debt." See 47 Corpus Juris Secundum Section 93, 101 Federal Second 161; 50 Federal Second 102; 269 U. S. 492; 7 Federal Supp. 728.

The writer appreciates that a real estate tax is a tax against the property and not a personal liability and likewise a personal property tax has the same status and, therefore, neither one could properly be classified as a debt. Under the ruling of the federal court, however, income tax has been held to be a debt and it is our opinion that if the bank in question had a bona fide indebtedness for income tax on January 1, 1947, they are entitled to deduct the same as a valid liability of the bank.

July 17, 1947

STATE OFFICERS AND EMPLOYEES: Salaries at state institutions fixed by control board. Salaries of employees in institutions under the board of control may be fixed by the board without approval of the state comptroller or the executive council.

Mr. Herbert H. Hauge, member Board of Control of State Institutions, Des Moines, Iowa: Your letter of July 7, 1947, has been received and is as follows:

"The board of control desires an opinion as to whether or not it is subject to the jurisdiction of the executive council in the matter of salary and wage schedules.

We call your attention to S. F. 484 and H. F. 217 passed by the 52nd G. A. and we believe that we are not subject to the jurisdiction of the executive council. We believe that the construction of these two acts must follow the well known principle of law that where there is a conflict between general and special legislation that the special legislation prevails.

We have discussed this matter with Arthur T. Wallace, the new personnel assistant in the executive council and we believe that he has arrived at the same conclusion.

We ask for a favorable opinion if that is possible."

The 52nd General Assembly enacted House File 217. The same was signed and approved by the governor on March 27, 1947, as follows:

"AN ACT relating to the government and management of institutions under the board of control.

Be It Enacted By The General Assembly of the State of Iowa.

Section 1. Section two hundred eighteen point six (218.6), Code of 1946, is amended by striking from line one (1) the word, 'governor' and inserting in lieu thereof the words 'board of control'. Further amend said section by striking all after the word 'appointed' in line twelve (12) and insert in lieu thereof the following: 'He shall receive such compensation as ordered by the board of control and shall hold office at the pleasure of said board.'

Sec. 2. Section two hundred eighteen point eleven (218.11), Code 1946, is hereby repealed.

Sec. 3. Section two hundred eighteen point thirteen (218.13), Code 1946, is amended by striking from line two (2) the words, 'with the written approval of the governor'.

Sec. 4. Section two hundred eighteen point twenty-eight (218.28), Code 1946, is amended by striking from lines one and two (1 and 2) the words, 'or a committee thereof' and inserting in lieu thereof the words, 'or an employee thereof'.

Sec. 5. Section two hundred eighteen point twenty-nine (218.29), Code 1946, is amended by inserting in line one (1) after the word, 'board' the following, 'or such employee'.

Sec. 6. Section two hundred eighteen point sixty (218.60), Code 1946, is amended by striking from lines three and four (3 and 4) the words 'three hundred dollars' and inserting in lieu thereof the words, 'one thousand dollars'.

Sec. 7. Section two hundred eighteen point sixty-two (218.62), Code 1946, is amended by striking from lines two and three (2 and 3) the words 'three hundred dollars' and inserting in lieu thereof the words, 'one thousand dollars'. Further amend said section by adding at the end thereof the following: 'subject to the approval of the board'."

Among other things, House File 217 amended section 218.13, which appears in chapter 218, Code 1946, and which is entitled "Government of Institutions", by striking from said section the words "with the approval of the governor", and said section, as amended, is as follows:

"The board shall annually fix the annual or monthly salaries of all officers and employees for the year beginning July 1, of said year, except such salaries as are fixed by the general assembly. The board shall classify the officers and employees into grades and the salary and wages to be paid in each grade shall be uniform in similar institutions."

Subsequently thereto Senate File 484 was enacted by the 52nd General Assembly which was signed and approved by the governor on May 19, 1947, and is as follows:

AN ACT relating to the approval of compensation of employees of the state during the biennial fiscal period beginning July 1, 1947, and ending June 30, 1949.

Be It Enacted By The General Assembly of the State of Iowa:

Section 1. During the biennium beginning July 1, 1947, and ending June 30, 1949, the compensation paid employees of the state from appropriations made by the general assembly, except employees of elected state officials and of institutions under the state board of education, and except salaries specifically provided for by statute or appropriation act, shall be subject to the approval of the comptroller and the executive council."

The legislative history behind the enactment of Senate File 484 seems to be that the board of control was included in Senate File 484 by the House and passed. This action, if it had been finally adopted, would have specifically exempted the board of control from the approval of the comptroller and the executive council in fixing of salaries. However, when the bill went to the Senate, the board of control was stricken from the provisions of the bill because of the fact that House File 217 had already been enacted into law and specifically provided by its terms that salaries of officers and employees under the board of control should be fixed by the board. It is sell settled rule of statutory construction that the courts will always attempt to ascertain the intent of the legislature in construing its enactments. 219 Iowa 888; 219 Iowa 1066; 292 N. W. 73.

It is another well settled rule of statutory construction that repeal of a statute by implication is not favored. 221 Iowa 127; 218 Iowa 543.

The case of Fitzgerald v. State, 220 Iowa 547, and cases cited reaffirm the principles that are recognized in the construction of statutes as follows:

1. The province of construction lies wholly within the domain of ambiguity and that prior acts may be resorted to to solve, but not to create, an ambiguity.

2. A thing is within a statute if it is within the intention, though not within the law; a thing which is within the letter of a statute is not within the statute unless it is within the intention of the makers.

3. All statutes in pari materia should be construed irrespective of the time of their enactment.

4. Statutes should be so construed that the intent and purpose thereof cannot be eluded.

Statutes are in pari materia which relate to the same person or thing or the same class of persons or things. (Vol. 2, second series, Words & Phrases). It is a rule of interpretation that if divers statutes relate to the same thing they ought all to be taken into consideration in construing any one of them. (Vol. 2, second series, Words & Phrases).

The case of Workman v. District Court, 222 Iowa 364, recognized the principle that where a general statute, if standing alone, would include the same matters as a special statute and thus conflict with it, the special act will be deemed an exception to the general statute. The Court said:

"In the case of McKinney v. McClure, 206 Iowa 285, there was a general statutory declaration (Code 1924, section 6210) that agricultural lands within the limits of the city shall not be taxed for any city or town purpose.' There was also in existence contemporaneous specific statutes under the rule that a tax may be levied 'upon all taxable property in such city' (section 6043) for the purposes of paying the cost of paving arterial highways into and out of the city. We discussed this general question and it was there held that the specific statute modified the contemporaneous general statute. See also Great Western Accident Ins. Co. v. Martin, 183 Iowa 1009.

"That this is the general rule of construction, see 59 C.J. p. 1056, where the rule is announced that it is a fundamental rule that where the general statute, if standing alone, would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute, whether it was passed before or after such general enactment."

In the matter under discussion, when Senate File 484 was enacted and approved by the governor on May 19, 1947, House File 217 had already been enacted into law, and had prior thereto been signed and approved by the governor and was the law subject to take effect on July 4, 1947.

It is therefore our opinion that the board of control has the power and authority to fix the salaries of the officers and employees of the institutions under its control without the approval of the comptroller and executive council. However, since House File 217 merely refers to the salaries of the employees of institutions under the board of control, it is our opinion that the employees of the board of control itself are subject to the provisions of Senate File 484, except those employees named in chapter 116, Acts of the 52nd General Assembly and also those employees provided for by statute or appropriation.

July 17, 1947

COUNTIES: Salaries of officers increased by legislature—mandatory. A new statutory increase in salaries of county officers is mandatory and operates as authority to amend previously adopted operating budgets. Prior laws with limitations and prohibitions must yield to the later enactment.

Mr. Ray E. Johnson, State Comptroller: This will acknowledge receipt of yours of the 15th in which you set forth the following:

"Chapter 24 of the Code applies to budgets and expenditures of local boards including the county. Section 24.14 limits expenditures to the amount estimated and appropriated, with certain exceptions.

Counties are further limited by section 343.10 and chapter 344 of the Code.

Laws passed by the 52nd General Assembly increased salaries and expenses for county government to the extent that a number of counties cannot meet such increased expenditures without exceeding the general fund budget for the year 1947. In other words, when the county budget was proposed and adopted in August 1946 for 1947 no general increase in salaries and expenses was contemplated or provision made for payment.

This seems to be something entirely unforseen, and the question arises—how can counties meet the situation which is in the nature of an emergency? Some counties have the money but the budget is not high enough to permit expending the money. They are wondering if it is possible to amend the budget by publishing a ten day notice and holding a hearing on the proposed amendment.

This problem is confronting several counties and they are wondering how to pay those officers, deputies and clerks entitled to the extra salary:"

We advise you as follows:

The county budget law contained in chapters 344 and 24 and other statutes in pari materia is not a mere estimate of probable revenues and expenditures, but a statutory method of controlling and limiting the expenditures of municipal bodies. The statutory limitations and prohibitions exhibited by the following statutes are mandatory and not directory. The following statutes illustrate the foregoing limitations—

Section 24.14, Code of 1946, provides as follows:

"No greater tax than that so entered upon the record shall be levied or collected for the municipality proposing such tax for the purpose or purposes indicated; and thereafter no greater expenditure of public money shall be made for any specific purpose than the amount estimated and appropriated therefor, except as provided in sections 24.6, 24.15 and subsection 4 of section 343.11."

Section 24.15, Code of 1946, provides as follows:

"No tax shall be levied by any municipality in excess of the estimates published, except such taxes as are approved by a vote of the people, but in no case shall any tax levy be in excess of any limitation imposed thereon now or hereafter by the constitution and laws of the state."

Section 343.10, Code of 1946, provides as follows:

"It shall be unlawful for any county, or for any officer thereof, to allow any claim, or to issue any warrant, or to enter into any contract,

which will result, during said year, in an expenditure from any county fund in excess of an amount equal to the collectible revenues in said fund for said year, plus any unexpended balance in said fund for any previous years.

Any officer allowing a claim, issuing a warrant, or making a contract contrary to the provisions of this section, shall be held personally liable for the payment of the claim or warrant, or the performance of the contract."

Section 344.10, Code of 1946, provides as follows:

"It shall be unlawful for any county official, the expenditures of whose office comes under the provisions of this chapter, to authorize the expenditure of a sum for his department larger than the amount which has been appropriated by the county board of supervisors. Any county official in charge of any department or office who violates this law shall be guilty of a misdemeanor and punished accordingly."

The foregoing statutory limitations are applicable to the county budget of 1946, controlling the expenditure of the collectible revenue for the year 1947. However, the 52nd General Assembly, subsequent to the making of the foregoing budgets in the year 1946 and subsequent to the levies made thereunder, by chapter 183 thereof, imposed upon the several counties of the state the payment of increases of salaries of the several county officers and their deputies, which increases could not have been included in the budget of 1946, controlling the collectible revenues of 1947. The foregoing chapter 183, increasing the salaries of county officials cannot be ignored by the county government. The obligation to provide for and pay these increases is mandatory. The limitations and prohibitions in the local budget law, heretofore exhibited, therefore, must yield to the subsequent mandatory action of the legislature. In Kistler vs. Carbon County, 35 Atl. 2nd 733, this proposition is confirmed in the following language:

"County commissioners, however, cannot, by adopting a budget, limit or avoid liabilities imposed upon the county by the Constitution or by statutes. The call of the Constitution or of a statute is paramount, and they must respond to it by providing sufficient appropriations. In Bladen v. Philadelphia, 60 Pa. 464, the supreme court held that a clerk of the board of health whose salary had been fixed at $2,000 could recover only $1,400, the amount appropriated by city councils for that purpose. The opinion indicated that the clerk's compensation had been fixed by the board, under a statute which authorized it to determine the salary, but recovery was denied because the appropriation in force when he accepted his appointment was not sufficient to pay the salary. Sharswood, J., limiting the operation of the decision, commented (page 467 of 60 Pa.): 'Of course, we are not to be understood as holding that the city councils have any power to withhold payment from a state officer whose salary or perquisites are fixed by law, such as the officers of the courts, jurors, or indeed any of the necessary expenses of the administration of justice. The municipality has no more control over such matters in this city, than commissioners have in the several counties of the commonwealth. They can no more be reduced or denied than can the amounts ascertained in the fee bill when the city has occasion either to claim or defend in the courts, or transact other business in the offices. These claims stand on an entirely different ground.' It follows that the commissioners cannot defeat the auditors' claim upon the ground that the appropriation

is insufficient. County auditors are constitutional officers. Constitution, Art. XIV, Par. 1, P. S. Their compensation is fixed by statute. This is a statutory obligation, and courts, in adjudicating questions arising under such obligations, cannot be halted by a plea of an insufficient appropriation. 'Where it is mandatory duty of a board or an officer to make an appropriation for, or to provide in the budget for, the salary of a public officer or employee, and there is no other adequate legal remedy whereby such duty may be enforced, mandamus will lie.' 35 Am. Jur. 'Mandamus' Par. 246. The county commissioners are obliged to appropriate sufficient funds to meet constitutional and statutory obligations, and they can be compelled to do so by mandamus. Sinking Fund Commissioners v. Philadelphia, 320 Pa. 394, 182 A. 645; Com. ex rel. v. Pommer, 330 Pa. 421, 199 A 485."

We are of the opinion therefore, that the foregoing chapter 183 of the Acts of the 52nd General Assembly, operates as authority in the tax certifying and tax levying bodies to amend their 1946 budget to provide the necessary revenue required to pay the additional salaries directed by the foregoing chapter. The amendment of the budget is effectuated by the same statutory procedure as that provided for the making of the original budget.

July 24, 1947

INSANE PERSONS: Veterans committed by commission of insanity under chapter 130, Acts of the 52nd G. A. Insane veterans may be committed to a veteran's hospital by the county insanity commission under the provisions of chapter 130, Acts of the 52nd General Assembly, notwithstanding the ambiguous use of the word, "court" in said Act.

Mr. Leon N. Miller, County Attorney, Knoxville, Iowa: We have yours of the 14th inst. in which you state:

"The local insanity commission has asked me to write your department relative to chapter 130 of the 52nd General Assembly which is commonly known as Senate File 307.

I call your attention to the fact that in line 12 on Page 157 and in chapter 130 of the 52nd General Assembly it states 'the court, upon receipt of a certificate from the Veterans Administration', whereas prior hereto the local insanity commission made all the orders in reference to the commitment of individuals to the veterans hospital here at Knoxville, Iowa and further on down in line 16 said act provides 'The person whose commitment is sought shall be personally served with notice of the pending commitment proceeding in the manner as provided by the law of this state; and nothing in this act shall affect his right to appear and be heard in the proceedings.'

In other words the principal question here involved is whether or not the local insanity commission has jurisdiction over the commitment of individuals to the U. S. veterans hospital here at Knoxville, Iowa.

The legal member of the commission nor myself can find anything which definitely answers this question and in that the word 'court' is used we are wondering whether or not the local commission does have jurisdiction to commit patients to the U. S. veterans hospital here at Knoxville, Iowa.

This is rather important in that we have several of these matters pending for the last few days and would appreciate an opinion at your earliest convenience as to this proposition."

In reply thereto, we would advise you that if Chapter 130, to which reference is made, is read in its literal terms, there is an inference to be drawn that commitment of persons allegedly of unsound mind, is under the jurisdiction vested in the court, but the inference is rebutted when it is seen that no provision is made in the chapter, or otherwise, for the bestowing upon or the acquisition by the court, of such jurisdiction. The inference disappears when it is considered that original jurisdiction to commit persons of unsound mind to hospitals and other institutions, is vested in the county commission of insanity, under our statutes. Section 228.8 of the Code of 1946, provides as follows:

"Said commission shall, except as otherwise provided, have jurisdiction of all applications for the commitment to the state hospitals for the insane, or for the otherwise safekeeping, of insane persons within its county, unless the application is filed with the commission at a time when the alleged insane person is being held in custody under a trial information filed by the county attorney."

We are mindful that it is otherwise provided by section 229.17 and section 229.19, Code of 1946, vesting in the court the power of commitment on appeal from an order of the insanity commission, and also mindful of the power vested in the court where insanity is claimed in criminal trials. Chapter 783, Code of 1946.

We are of the opinion, therefore, that the legislative intent was to vest the powers and duties prescribed in chapter 130, Acts of the 52nd General Assembly, in the agency provided by law as the committing body. Therefore, in order to effectuate the intent of the legislature, we are of the opinion that such proceedings as are prescribed in chapter 130, respecting the commitment of a person who is eligible for care or treatment by the veterans administration or other agency of the United States government, is vested in the county insanity commission and not in the court.

July 25, 1947

COUNTIES: Salaries of justices of the peace—legislative act unworkable and void. Chapter 282, Acts of the 52nd General Assembly is in irreconcilable conflict between its several provisions; therefore, unworkable and void.

Mr. Clark O. Filseth, County Attorney, Davenport, Iowa: We have yours of the 11th inst. with respect to the compensation of justices of the peace of Davenport township as effected by chapter 282 of the Acts of the 52nd General Assembly, as follows:

"Enclosed herewith find copy of the letter received today from Phillip T. Steffen and John P. Dorgan, justices of the peace in the city of Davenport, Scott county, Iowa. The letter is self-explanatory, but I wish to add that it appears to me that there must have been some mistake in the preparation of the Act, perhaps by the enrollment clerk or someone having something to do with the Act, as in paragraph 3 of chap. 282 of the Acts of the 52nd General Assembly there appears to be an error in using the word 'under'.

This creates a very precarious situation. We have two local justices of the peace and constables, both justices being attorneys, who do not like to try cases in their courts and operate under a fee basis as compen-

sation therefor. The fees collected will not create enough revenue to pay the salaries that the legislature apparently intended they should receive.

The Act was intended to increase the salaries, but virtually it eliminates the salary for the office entirely, and indirectly eliminates the office. The office of justice of the peace is an office created by the Constitution of the state of Iowa and cannot be eliminated by the legislature. Consequently, any Act, whether intentional or unintentional, which is created by the legislature and purports to eliminate an office created by the Constitution, cannot be a valid act.

Our local representatives have informed us that the Act itself was intended to raise the salaries of the justices of the peace and constables throughout the state of Iowa, and not to put them on a fee basis.

I would like to have you give this your careful consideration and if there is anything you can do to correct the Act or if you can make a ruling which would give the justices of the peace and constables of the state of Iowa the salaries the legislature intended they should have, I shall appreciate it as a courtesy and favor to me, particularly as far as a ruling or correction might affect the local justices of the peace and constables.

I sincerely hope that something can be done about this and that you will give me your opinion and any discussion you might have with reference to this Act at your very earliest convenience, as this matter should be cleared before August 1, 1947, at which time the warrants are issued as compensation to the justices of the peace and constables."

For the purpose of presenting the legal situation we set forth chapter 282 of the 52nd General Assembly as follows:

AN ACT to amend section 601.131, code of 1946, relating to the compensation of justices of the peace and constables.

Be it Enacted by the General Assembly of the State of Iowa.:

Section 1. Section 601.131 Code of 1946, is hereby amended by striking therefrom subsections 2, 3 and 4 and inserting in lieu thereof the following:

2. Justices of the peace and constables in townships having a population of under 12,000 shall pay into the county treasury all fees collected each year in excess of the following sums:

a. In townships having a population of 4,000 and under 12,000, justices, $1,000; constables, $800.

b. In all townships having a population of under 4,000, justices, $750; constables, $625.

3. Justices of the peace and constables in townships having a population of under 10,000 shall pay into the county treasury all fees collected each year in excess of the following sums:

a. In townships having a population of 40,000 or more, justices, $2,250; constables, $1,875.

b. In townships have a population of 28,000 and under 40,000, justices, $1,875; constables, $1,500.

c. In townships having a population of 20,000 and under 28,000, justices, $1,500; constables $1,250.

d. In townships having a population of 10,000 and under 20,000, justices, $1,250; constables, $1,000.

4. Justices and constables in all townships having a population of 10,000 to 50,000 shall retain such civil and criminal fees as may be

allowed by the board of supervisors, not to exceed $500 per annum, and in townships having a population over 50,000, not to exceed $1,000 per annum for expenses of their offices actually incurred, and shall pay into the county treasury all the balance of the civil and criminal fees collected by them."

And, section 601.131 which the foregoing Act of the 52nd General Assembly amends, as amended, is exhibited as follows:

"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 (12,000) 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 (4,000) and under twelve thousand (12,000), justices, one thousand dollars ($1,000); constables, eight hundred dollars ($800).

b. In all townships having a population of under four thousand (4,000), justices, seven hundred fifty dollars ($750); constables, six hundred twenty-five dollars ($625).

3. Justices of the peace and constables in townships having a population of under ten thousand (10,000) shall pay into the county treasury all fees collected each year in excess of the following sums:

a. In townships having a population of forty thousand (40,000) or more, justices, twenty-two hundred fifty dollars ($2,250); constables, eighteen hundred seventy-five dollars ($1,875).

b. In townships having a population of twenty-eight thousand (28,000) and under forty thousand (40,000), justices, eighteen hundred seventy-five dollars ($1,875); constables, fifteen hundred dollars ($1,500).

c. In townships having a population of twenty thousand (20,000) and under twenty-eight thousand (28,000), justices, fifteen hundred dollars ($1,500); constables, twelve hundred fifty dollars ($1,250).

d. In townships having a population of ten thousand (10,000) and under twenty thousand (20,000), justices, twelve hundred fifty dollars ($1,250); constables, one thousand dollars ($1,000).

4. Justices and constables in all townships having a population of ten thousand (10,000) to fifty thousand (50,000) shall retain such civil and criminal fees as may be allowed by the board of supervisors, not to exceed five hundred dollars ($500) per annum and in townships having a population over fifty thousand (50,000) not to exceed one thousand dollars ($1,000) per annum for expenses of their offices actually incurred and shall pay into the county treasury all the balance of the civil and criminal fees collected by them."

We advise you as follows:

Compensation provided by the foregoing statute depends upon the intent of the legislature, and this intent in the first instance, is derived from the language used in the Act itself. Analysis of the foregoing statute, chapter 282, Acts of the 52nd General Assembly, to determine this intent, results in irreconcilable conflict between its several provisions, and a duplication of amount of compensation in respect to some justices. We call attention to some of the conflicts of Code section 601.131, as it now exists, after correlation of chapter 282, Acts of the 52nd General Assembly therein.

a. While justices of the peace and constables in townships having a population of more than 12,000 are required to pay into the county treasury all criminal fees collected in each year, section 4 thereof provides justices and constables in all townships having a population of 10,000 to 50,000 shall retain such civil and criminal fees as may be allowed by the board of supervisors, * * * * for expenses of their office actually incurred, and shall pay into the county treasury all of the balance of the civil and criminal fees collected by them.

b. Justices of the peace and constables in townships having a population of under 12,000 are, by section 2, all required to pay into the county treasury, all fees collected in excess of the following sums:

Townships having population of 4,000 and under 12,000, $1,000.00 by justices, $800.00 by constables.

Townships having population under 4,000, $750.00 by justices, $625.00 by constables.

While section 3 thereof requires justices of the peace and constables in townships having population of under 10,000 shall pay into the county treasury all fees in excess of the following sums, to wit:

Townships having population of 40,000 or more, $2,250.00 by justices, $1,875.00 by constables.

Townships having population of 28,000 and under 40,000 by justices, $1,875.00, by constables $1,500.00.

Townships having population of 20,000 and under 28,000, $1,500.00 by justices, $1,250.00 by constables.

Townships having a population of 10,000 and under 20,000, $1,250.00 by justices, $1,000.00 by constables.

Recitation of the conflicts between section 2 providing for compensation in townships under 12,000, and section 3 providing for compensation in townships under 10,000, is sufficient to show the unworkability and inoperativeness of these two sections. And even if the word "under" in section 3 thereof could be interpreted or converted into the word "over" 10,000, then the compensation of justices and constables in townships having population between 10,000 and 12,000 could be either $1,250.00 or $1,000.00 for justice, and either $800.00 or $1,000.00 for constables, which is likewise unworkable and inoperative.

c. Ambiguity and indefiniteness exist in requiring justices to retain such criminal and civil fees as may be allowed by the board of supervisors, for expenses, in all townships having a population of 10,000 to 50,000, when they are obligated already to pay their criminal fees into the treasury.

The foregoing conflicts and ambiguities, result in the foregoing Act of the 52nd General Assembly being unworkable, incapable of enforcement, and the intention of the legislature with respect to the amount of compensation to be paid to justices of the peace and constables, indeterminable.

While it is the duty of this department to ascertain the meaning of and give effect to legislative enactments, we are of the opinion that the same rule controls this department in the performance of such duty, as controls the courts. The duty of the court, insofar as it applies to statutes as are here under discussion, is prescribed by the supreme court in Davidson Building Company vs. Mulock, 212 Iowa 730, page 7 to 51, in these words:

"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 view of the foregoing pronouncement in the foregoing situation, we are with deference to the legislature, compelled to advise you that the foregoing Act, Chapter 282, of the Acts of the 52nd General Assembly, cannot be interpreted to effectuate the intention of the legislature and for the purpose of administration and the fixing of the compensation, the Act is unworkable. It is, therefore, our opinion that such compensation should be fixed and paid under and in accordance with the provisions of section 601.131, Code of 1946, without amendment. See 59 C.J., title "Statutes", Par. 554.

August 4, 1947

AERONAUTICS: Commission had authority to use both appropriation and fees collected. The aeronautics commission was authorized by chapter 148, Acts of the 51st General Assembly to use both the appropriation contained in said act and fees collected thereunder during the biennial period ending June 30, 1947. At that time any excess over $25,000 should then have been paid into the state general fund.

Mr. Ray E. Johnson, State Comptroller: In your letter of July 31, 1947, you have asked for an official opinion as to whether or not the Iowa aeronautics commission was authorized by chapter 148, Acts of the 51st General Assembly, to use both the appropriation and fees collected for the period of July 1, 1945 to June 30, 1947.

Your attention is directed to an opinion given by Mr. R. G. Yoder, First Assistant attorney general, to Mr. Lester G. Orcutt, Director Iowa aeronautics commission on January 19, 1946, in which he stated that the legislature intended that during the fiscal year there should be paid and received into the aviation fund created by section 36 of chapter 148, Acts of the 51st General Assembly, the annual appropriation made by section 37 thereof and the fees collected under other provisions of the act, the sum of which appropriation and fees diminished by proper expenditures of the commission should remain in said aviation fund until the end of the fiscal year, and any balance remaining to the credit of said fund on the last day of the fiscal year and in excess of $25,000 would then be paid into the general fund of the state.

The opinion hereinabove mentioned is hereby adopted as an official opinion, and acts of the Iowa aeronautics commission in using both the appropriation and fees collected for the period of July 1, 1945, to June

30, 1947, and the payment of the balance in excess of $25,000 remaining in said fund to the state at the end of the fiscal year were perfectly in accord with this opinion.

August 6, 1947

LOANS: Small loan law—other lending business in conjunction prescribed. One licensed under chapter 536, Code 1946, may not make loans in excess of $300, nor may such licensee conduct any other business in conjunction therewith unless authorized in writing by the superintendent of banking.

Mr. Newton P. Black, Superintendent, Department of Banking, Des Moines, Iowa: We have your letter dated July 14, 1947, which is as follows:

"For your convenience we enclose copy of the Iowa small loan law and Code Nos. 429.11, 429.12 and 535.6.

Here is our problem:

Some of our small loan licensees contend they can charge up to 2% per month on loans exceeding $300 under section 535.6 and be within the law if the loan is in no way connected with a small loan.

Our policy has been no small loan licensee operating under the small loan law can make loans in excess of $300. To get around this, some of the loan agencies file for another charter under 429.11, 429.12 and 535.6 and through that channel the same people handle their loans which exceed $300 on a 2% per month basis.

Section 535.6 is rather confusing to us. Would you please give us an opinion to guide our future policy?"

It seems from your letter that you have one question:

May small loan licensees which are licensed by the department of banking under chapter 536, Code 1946, engage in making loans exceeding $300.00 under the provisions of section 535.6, Code 1946, and by proceeding under section 429.11 to section 429.13, inclusive.

Let us first dispose of the question of whether or not any loan agency in the state of Iowa may charge 2% a month interest on any loan in excess of $300.00 under the provisions of section 535.6.

On July 20, 1937, an opinion was issued by the attorney general holding that a bank may not charge interest at the rate of 2% per month on its loans under this section, which was previously section 9408 of the code. The opinion goes on to state that the title of this section as originally enacted in chapter 341, Acts of the 46th General Assembly, provide as follows:

"An act to punish loan agents and others for receiving a greater rate than two per cent per month and to provide a penalty therefor."

As originally enacted it contains no $300.00 limitation, and it had the following paragraph as a part of the section:

"But the person or corporation making the loan shall be permitted to charge and include within the loan a reasonable amount for the inspection of investigation of the security, and also the cost of drawing the papers, not exceeding $1.00 and cost of recording same, which cost of inspection or investigation shall not exceed ten per cent of the amount loaned when the loan is under $50.00, nor more than $5.00 in any event, and no recording fee shall be included unless the instrument is actually recorded."

That section was enacted to prohibit loan agents from exacting a commission for securing a loan in excess of 2 per cent.

The 39th General Assembly enacted the first "small loan act", now known as chapter 536, Code 1946, which was applicable to loans of $300.00 and under, and in an endeavor to co-ordinate section 535.6 and the small loan act they inserted the figures $300.00, and they also struck out the last paragraph above quoted. The section as originally written was aimed at the commission agents and brokers engaged in the business of procuring loans for parties and those whose business was to find borrowers or financial interests.

Section 535.6, Code 1946, as it now exists, provides as follows:

"Every person or persons, company, corporation, or firm, and every agent of any person, persons, company, corporation, or firm, who shall take or receive, or agree to take or receive, directly or indirectly, by means of commissions or brokerage charges, or otherwise, for the forbearance or use of money in the sum or amount of more than three hundred dollars a rate greater than two per cent per month, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not less than twenty-five dollars, nor more than five hundred dollars, or by imprisonment in the county jail for a period of not less than thirty days nor more than ninety days. Nothing herein contained shall be construed as authorizing a higher rate of interest than is now provided by law."

Section 535.2 provides as follows:

"The rate of interest shall be five cents on the hundred by the year in the following cases, unless the parties shall agree in writing for the payment of interest not exceeding seven cents on the hundred by the year:

1. Money due by express contract.
2. Money after the same becomes due.
3. Money loaned.
4. Money received to the use of another and retained beyond a reasonable time without the owner's consent, expressed or implied.
5. Money due on the settlement of accounting from the day the balance is ascertained.
6. Money due upon open accounts after six months from the date of the last item.
7. Money due, or to become due, where there is a contract to pay interest, and no rate is stipulated."

Section 535.4, Code 1946, provides as follows:

"No person shall, directly or indirectly, receive in money or in any other thing, or in any manner, any greater sum or value for the loan of money, or upon contract founded upon any sale or loan of real or personal property, than is in this chapter prescribed."

Section 535.5 provides a penalty for usury.

There is one exception provided by law for exacting a higher interest rate than that provided in section 535.2, and that is under chapter 536, Code 1946, known as the small loan Act. But unless one is licensed under that chapter and complies with its requirements he may not charge the rate allowed by its provisions.

The provisions of section 535.2 are, therefore, applicable to every loan agency in the state of Iowa, with the exception of those licensed under chapters 536 and 529. Section 535.2 is a grant of authority with a limitation therein fixed. A careful reading of section 535.6 will show that there is no grant contained in the section. There is nothing therein in conflict with the provisions of section 535.2. It is only a penal statute. The last sentence of section 535.6 says:

"Nothing herein contained shall be construed as authorizing a higher rate of interest than is now provided by law."

The language means that section 535.2 is still controlling, and that section 535.6 contains no grant of authority but only defines an offense and prescribes the penalty for the violation thereof, and that the only exception to charging a higher rate of interest than is provided by section 535.2 is under the provisions of chapter 536, Code 1946, and chapter 529.

You state further that some of the licensees under chapter 536, which is the small loan law, filed for another charter under the provisions of section 429.11 to section 429.13, inclusive, and section 535.6, and through that channel the same people handled their loans which exceeded $300.00 on a two per cent per month basis.

We have hereinbefore determined that the only exceptions to the rate of interest provided by law under the provisions of section 535.2 are small loan companies organized under chapter 536 and operations under chapter 529, Code 1946.

In answering a similar question, the attorney general on February 25, 1935, rendered an opinion on the question of whether or not a licensed small loan company could deal in automobile paper and similar lines in the same office in which their small loan business was conducted by creating a separate department, having a separate set of books, and keeping the two businesses separated, and, among other things, it was stated in that opinion as follows:

"Section 12 of the present small loan act provides in part:

"No licensee shall conduct the business of making loans under the provisions of this act within any office, room, suite, or place of business in which any other business is solicited or engaged in, or in association or conjunction therewith, except as may be authorized in writing by the superintendent upon his finding that the character of such business is such that the granting of such authority would not facilitate evasions of this act or of the rules and regulations lawfully made by him hereunder.'

"It is apparent then, that the conduct of any business in the same place of business as the small loan business is expressly prohibited except where authorized by you and based upon your finding that the character of such business is such that its operation would not facilitate evasions of this act or of rules and regulations lawfully made. You will note that the authorization to conduct other businesses is discretionary in you and like all public officers, such discretion must be legally exercised and not arbitrarily and capriciously. In determining this, you should look to the intent of the legislature in regulating the small loan business and the evils to be corrected.

"In the case of Commonwealth vs. Puder, 104 Atl., 505, the supreme court of Pennsylvania in passing upon the question of the constitutionality of their small loan act, said:

'The subject matter of the act has been before the public and under investigation and discussion for a number of years, not only in this jurisdiction, but in other states as well, and has resulted in the adopting of somewhat similar legislation in probably half the states of the Union. The attempt in recent years to eradicate the evils of the so-called "money loan sharks" by proceedings instituted in Philadelphia and Pittsburgh is a matter of general public knowledge, and those who have given the matter close investigation and thought concede that a prohibition of the business does not accomplish the desired result, and that the only practical method of dealing with the subject is by proper regulation.'

"Our own legislature had a similar thought in the enactment of this law and in inserting the above provision in the law, they wanted to be certain that no other business could be conducted in the same office with small loan business, for to allow such is getting right back to the loan shark evil that was attempted to be eradicated. In our opinion, the legislature did not intend to allow the operation of an insurance agency or other loaning agencies, or such similar business in the same office with the small loan company. The reason is apparent, for if such is allowed, the poor man whom the legislature attempted to protect, in making an application for a small loan, might be told that such application would not be granted unless the applicant also turned to the small loan company or another department of the company his insurance business or his automobile paper, or other similar businesses that could be easily twisted into the hands of the small loan company and if such is allowed, these borrowers of small amounts might as well be back in the hands of the loan sharks and it is apparent then to us, that the other businesses permitted by you to operate in conjunction with small loan companies must be ones under the express provisions of the act that will not facilitate evasions of the act and must be businesses that are wholly divorced from the small loan business and in exercising your discretion we would suggest that it is our opinion that the legislature did not intend to allow a small loan company to operate another type of loan business in its office even though it be done by separate department and a separate set of books and records kept."

The reasoning set out in this opinion seems to govern the question at issue.

It is, therefore, our opinion that one licensed to carry on a small loan business under chapter 536, Code 1946, may not make loans in excess of $300.00, nor may a licensee under chapter 536 conduct any other business or in association or conjunction therewith unless authorized in writing by the superintendent of banking, upon his finding that the character of such business is such that the granting of such authority would not facilitate evasions of the Act or of rules or regulations lawfully made by him thereunder. Nor may any other loan agency in the state of Iowa charge two per cent per month on loans in excess of $300.00, but are governed by the rate of interest as provided in section 535.2, Code 1946.

This opinion does not prohibit operations under chapter 529, Code 1946.

August 8, 1947

INSANE PERSONS: Counsel mandatory—appointment by judge—drug addicts and inebriates. Under the provisions of section 7, chapter 129, Acts 52nd General Assembly, a person informed against, appearing at an insanity hearing, must be represented by counsel. Said counsel may be appointed by a judge of the district court whether or not present at the hearing and he may appoint a resident attorney to represent each such party who may appear. Said section is likewise applicable to commitment of drug addicts and inebriates.

Mr. Chet B. Akers, Auditor of State, Attention L. I. Truax: Responding to your query with respect to the operation of chapter 129, Laws of the 52nd General Assembly, and particularly section 7 of the foregoing chapter, and these questions:

"1. May a court make an oral appointment in response to a telephone call requesting an appointment of counsel be made. Would such appointment be legal and would the court be required to confirm said appointment by written order, the next time he holds court in the county of the hearing.

2. Could the court appoint a resident attorney to appear and represent each party who is informed against and appears before the county insanity commission, when not otherwise represented by counsel?

3. If the person informed against appeared without counsel, and does not wish counsel, and so announces, is it necessary that counsel be assigned?

4. Do provisions of section 224.2, Code of 1946, make the foregoing provisions of section 7, chapter 129, Laws of the 52nd General Assembly apply also to the commitment of persons addicted to the excessive use of intoxicating liquor."

In reply to the foregoing, we exhibit the foregoing section 7, of chapter 129, Laws of the 52nd General Assembly in terms as follows:

"If at said hearing such person appears without counsel or appearance is made in his behalf without counsel, the commission, before proceeding further, shall inform such person or persons appearing for him of his right to legal counsel, then if no counsel is employed, the district court shall assign him counsel. An attorney so assigned shall receive such compensation as the district court shall fix to be paid in the first instance by the county."

We are of the opinion that the legislative intent in the enactment of the foregoing Act requires the foregoing duty to be performed by the judge of the district court and not by the court itself. This is concluded when it is considered that a court is a place where justice is administered by persons officially assembled under the authority of law at an appropriate time and place. That the foregoing duty, required by chapter 129 is not performed within the terms of the foregoing definition, is quite clear. In that situation, the rule with respect to effectuating the legislative intent by substituting the duty to be performed by the judge and not by the court, is stated in 14 Am. Juris, title "Courts", page 248, as follows:

"While there is a well-defined and generally recognized distinction between a judge and a judicial tribunal and while it takes more than a presiding officer to constitute a court, yet the judge of a court while

presiding over it is by common courtesy called 'the court' and the words 'court' and 'judge' are frequently used in the statutes of the various states as synonymous and the judge alone does not necessarily constitute a court, for while the judge is an indispensable part, he is only a part of the court. Whether an act is to be performed by the one or the other is generally to be determined by the character of the act, rather than by such designation. Whenever the power or duty imposed is found from a consideration of the object and purposes of the act to be one which is more properly the function of the court, it will be so construed; and whenever it is manifest that the legislature meant the judge, and not the court, that meaning will be applied to the words in order to carry out the legislative intent. 'Court' will always be construed to mean 'judge' and 'judge' to mean 'court', wherever either construction is necessary to carry into effect the obvious intent of the legislature."

In accordance therewith, we are of the opinion that the foregoing duty imposed upon the court is such an act as the legislature intended, and should be performed by the Judge.

Based upon the foregoing conclusion, we are of the opinion that

1. A judge may make an oral appointment in response to a telephone call requesting the assignment of counsel for a person informed against and who is without counsel in hearing before the insanity commission.

2. The judge could in furtherance of this duty, appoint, in writing, a resident attorney to appear and represent each party who is informed against and appears before the commission of insanity, if he appears without counsel, or if appearance is made in his behalf without counsel.

3. The obligation to assign an attorney to appear for a person informed against is mandatory and may not be waived by such person.

4. We exhibit the provisions of section 224.2, Code of 1946.

"All statutes governing the commitment, custody, treatment, and maintenance of the insane shall, so far as applicable, govern the commitment, custody, treatment, and maintenance of those addicted to the excessive use of such drugs and intoxicating liquors."

By the plain terms of the foregoing statute, the provisions of section 7 of chapter 129, as herein interpreted are applicable to commitments of persons addicted to excessive use of drugs and intoxicating liquor.

August 14, 1947

PARENT AND CHILD: Consent to marriage by divorced parents having custody. If both parents of a minor are living, one parent alone cannot legally consent to the minor's marriage even if divorced and legal custody of the minor has been bestowed on said parent.

Mr. H. Wayne Black, County Attorney, Audubon, Iowa: We have yours of the 31st ult. in which you state:

"A question has arisen recently in this county and in connection with some other counties in this district regarding the issuing of marriage licenses to minors whose parents are separated by divorce and the divorce decree awarding the custody and care of the minor to one of the parents.

Section 595.3 of the Code of Iowa 1946, provides as follows:

'Previous to the solemnization of any marriage a license for that purpose must be obtained from the clerk of the district court of the county wherein the marriage is to be solemnized. Such license must not be granted in any case: * * * *

2. Where the male is a minor, or the female is under eighteen years of age, unless a certificate of the consent of the parents is filed. If one of the parents is dead such certificate may be executed by the survivor. If both parents are dead the guardian of such minor may execute such certificate.'

The question which arises in connection with this section is where both parents are living, but separated by divorce and the mother having custody of the child, for example, suppose that the child being a son is age 19 and desires to get married and his mother who has his custody and care under the divorce decree is willing to consent to the issuing of a marriage license, but the father refuses to do so, can the clerk under the above section having a record of the divorce decree which shows that the mother has custody of the child issue a marriage license with the consent of the mother alone?

In this county the clerk of the district court has been issuing licenses in case the parent having custody of the child will sign the consent. In other counties in this district I understand that some of the clerks are refusing to issue licenses under such circumstances unless both parents consent due to the fact that the word 'parents' is used in the plural.

This section involved here is very similar to our adoption section. So far I have not found any cases construing this particular provision of this section and the nearest thing to it is the case under the adoption laws. One of our district court judges called this matter to my attention and said that he was of the opinion that if the same analogy was followed in this section that was being followed in the adoption laws then the clerk could issue a license under such circumstances.

The case under the adoption laws which shows that the parent having the custody of the child under the divorce decree could consent to the adoption without the consent of the other parent is Rubendall vs. Bisterfelt 291 N. W. 401, 227 Iowa 1388."

In addition to section 595.3, Code of 1946, which is set forth in your letter, we also exhibit section 595.8 which prescribes the duty of the parents or guardian of minor applicants for a marriage license, in terms as follows:

"If either applicant for a license is a minor, a certificate in writing of the parents or guardian, as the case may be, of consent, as provided in section 595.3, must be filed in the office of the clerk, and be acknowledged by them or proven to be genuine, and a memorandum thereof entered in the license book. The false making of such certificate shall be punishable as forgery."

And we direct your attention also to section 595.9 which prescribes the penalty imposed upon the clerk, if a license is issued in violation of the foregoing section 595.8. Section 595.9 provides as follows:

"If the clerk issues a license in violation of the provisions of section 595.8, or if a marriage is so solemnized without its being procured, the clerk so issuing the same, and the parties married, and all persons aiding them, are guilty of a misdemeanor."

In respect to the foregoing sections and the problem presented, it will be noted that section 595.3, while requiring a certificate of consent of the parents to be filed, excepts from the operation of the consent by the parents only these conditions: that if one of the parents be dead the certificate may be executed by the survivor; or if both be dead, then the guardian of such minor may execute such certificate. We apply to that statutory situation, the principles of "expressic unius est exclusio alterius" under which principle the fact that the statute provides for and recognizes only these two exceptions to the requirement of the consent of the parents, excludes any other exception from the operation of its terms. In other words, no exception being made by the statute for the consent of one parent, where the other is still living, even if divorced and legal custody bestowed upon her, such exception may not be recognized and therefore, such consent if given by one parent, is not a legal consent.

This view of the matter is confirmed by the mandatory character of the obligation placed upon the parents or the guardian in making the statutory consent certificate in writing in accordance with the requirements of section 595.8. Imposing such duty in terms of "must" is conclusive of the legislative intent to make this duty mandatory. And this view of the authority conferred by section 595.3 is further confirmed by the criminal penalty imposed upon the clerk if he issues a license contrary to the express terms of the foregoing section 595.3. The imposition of the penalty upon the clerk for neglect or omitting to perform statutory duties in connection with a marriage solemnization accords with established legislative policy generally; to penalize the persons charged with performing these duties. See 35 Am. Juris. 340, Title "Marriages". Based upon the foregoing, we are of the opinion that the clerk is not authorized to issue a marriage license to a minor whose father is living, upon the written consent of the divorced mother having legal custody of such minor.

August 18, 1947

SCHOOLS AND SCHOOL DISTRICTS: Changing independent district to consolidated district by mere change of name. The electors residing in an independent school district can not by merely voting to change the name convert such independent district to a consolidated school district, nor can a consolidated district be legally created in any other manner than as prescribed in chapter 276 of the Code.

Miss Jessie M. Parker, Superintendent of Public Instruction:

We have your request for opinion of the 22nd ult. in terms as follows:

"We have a question relative to the interpretation of the law governing the formation of consolidated schools for which we would like an official answer.

The situation is this:

On July 7, 1947, the Manhattan Independent School District of Coggon, Iowa, held a special election at which the following two propositions were submitted:

'Shall the board of school directors in and for the Independent School District of Manhattan, located in Linn County, State of Iowa, be author-

ized to sell the school buildings and sites located in territory recently annexed to the said independent school district and no longer needed for school use, and place the proceeds in the school house fund of said district?

Shall the name of the independent school district of Manhattan, located in Linn county, state of Iowa, be changed from Manhattan Independent School District to the Coggon Consolidated Independent School District, located in said county, the boundaries of proposed independent consolidated school district to be and remain the same as those established for the Manhattan Independent School District?'

We are particularly interested in the second proposition which carried by a vote of 73 to 14. Chapter 276 of the Code of Iowa provides a detailed plan for the formation of a consolidated school district, which involves petitions, hearings before the county board, approval of the proposed boundaries, etc. In the case in point, none of these procedures were followed. The proposition was merely submitted to change the name from the Manhattan Independent School District to the Coggon Consolidated Independent School District.

Our questions are as follows:

1. Is this a legal procedure for changing an independent school district name to that of a consolidated school district?

2. In the event that this was a legal election, does the school district become in fact a consolidated school district and thereafter does it have to operate under the laws governing consolidated school districts?

3. Under chapter 286, which is the chapter which provides for supplemental aid to school districts, it is provided in section 286.4 that the levy applicable to independent districts as a test as to whether or not they meet the conditions for being eligible for supplemental aid is seventeen mills. Is the department of public instruction justified in accepting this change of status of the Coggon district from independent to consolidated and thereby pay them a much greater amount of supplemental aid as a result of this reduction in the amount of the test levy, since in the case of consolidated districts the levy is only ten mills?

4. A further question arises as to whether or not, from the provisions of chapter 276, this district will be entitled to be the recipients of state reimbursement for transportation. Under an attorney general's opinion of October 15, 1937, page 568 in the 1938 volume of the published reports of the attorney general's office, if this district is in fact an independent district then a large number of elementary pupils who reside less than two and one-half miles from the school house but yet in the school district, cannot be transported to school at public expense and, therefore, cannot share in the distribution of state aid for transportation, nor can any high school pupils residing in the district be transported at public expense regardless of the distance from school. However, if by means of this election this district has become a consolidated district in fact, then the district is required by law to transport all of these pupils and will be entitled to share in state reimbursement from the transportation aid fund, under the provisions of chapter 285, Code 1946.

This proposition, if legal, will establish a precedent in regard to a new manner of changing school districts from one type to another and will have a considerable bearing on the payment of state aid. Therefore, it is important that we have an early ruling on this question."

In reply thereto we advise:

We are of the opinion that the foregoing procedure whereby by vote of the electors the Coggon Consolidated Independent School District

was created by changing the name of the Independent School District of Manhattan to the foregoing Coggon Consolidated Independent School District, is not a legal method for the creation of such a consolidated district. Section 276.2, which is a partial recodification of section 2794-a, 2915 Supplemental Supplement, provides as follows:

"Consolidated school corporations containing an area of not less than sixteen government sections of contiguous territory in one or more counties may be organized as independent districts for the purpose of maintaining a consolidated school, in the manner hereinafter provided."

Sections 276.2 and 276.3 et seq are accompanying sections providing the method and the mechanics of creating consolidated school districts. No other statutory method is prescribed whereby consolidated school corporations containing an area of not less than sixteen governmental sections of contiguous territory may be created. The rule in such situation is stated in 56 Corpus Juris 212, paragraph 65 title "Schools and School districts", to wit:

"The mode of and proceedings for the creation or alteration of a school district or other local school organization are ordinarily prescribed by statute, at least substantial compliance with which is requisite to effect a valid organization on alteration. Thus a new district is not formed out of two or more rotating districts merely by taking proper steps to disorganize the latter, without complying with the statutory provisions for the organization of the new district; and a district which ceased to exist upon the creation of a new district embracing its territory cannot be recreated or established in pro in proceedings to dissolve the latter district."

And the foregoing rule is the view of the supreme court of Iowa. In State of Iowa ex rel Stinman vs. Spellman, 191 Iowa 1181, was an action in quo warranto to test the validity of the organization of the Consolidated Independent School District of Richland, Adair County. The petition was denied. It appeared that a petition for the creation of a new school corporation to include all the township of Richland, was duly filed and question submitted to the electors and approved. The appeal presented the question whether such consolidated district could be created under section 2794-a, 1915 Supplemental Supplement, amended by chapter 149, Acts of the 38th General Assembly. This is the section of the code heretofore quoted, authorizing the establishment of a consolidated school district, and it was the claim that two independent districts could be united in only two ways. One by conformity of the procedure authorized by section 2793, Code of 1897, and the other in conformity with the procedure authorized by section 2899, Code of 1897. Holding that section 2794-a is also an included statutory method of uniting school districts, the court says:

"Whenever it is proposed to include an area of 16 sections, or more, section 2794-a as amended, is also applicable, and is the proper procedure if it is the purpose to organize and conduct a central school in rural territory and transport the pupils. Technically, this is not the union of two districts, but the organization of a new corporation for the purpose of conducting a central school as a consolidated district, which is required by law to furnish transportation for all rural pupils. This

section provides that a district of this kind must contain at least 16 sections of contiguous territory, and this territory may be only a part of one school corporation, as was the case when a part of Richland township was organized as a consolidated independent district. It may also be comprised of parts of several different corporations, or it may be parts of some and all of others, or it may be all of several corporations. In the case of Arnold v. Consolidated Ind. Sch. Dist., 173 Iowa 199, it is held that a consolidated independent school district may be included with other territory to organize a new district under the provisions of section 2794-a, Supplemental Supplement to the Code, 1915. The law has not been amended to change the rule in that case.

It is merely incidental if the territory described in the petition includes only the territory of two independent school corporations. The law in force at the time required that, in fixing the boundaries of the proposed districts, the boundary lines of existing corporations or subdistricts should be respected, and only by an appeal or review by the county board of education could any other boundary lines for a proposed district be established. To hold that section 2794-a, as amended by Chapter 149, Acts of the Thirty-eighth General Assembly, is not applicable in all cases where it is the purpose to organize a school corporation of 16 sections or more for the purpose of conducting a central school would, in effect, make nugatory this law for many localities."

In view of the foregoing, it is quite clear that the mere changing of the name of an independent school district to a consolidated school district does not legally convert such independent school district to a consolidated district, nor does it legally create such consolidated district. The foregoing chapter 276, Code of 1946 is the prescribed statutory method for the creation of such consolidated school corporation, and while there may be digressions made from all of its provisions, substantial compliance therewith is required to create a legal consolidation.

We answer your questions, therefore, as follows:

1 and 2. The legal procedure outlined in your letter for changing an independent school district name to that of a consolidated school district is not the legal creation of a consolidated school district and is not entitled to the benefits governing consolidated school districts.

3. The department of public instruction is not justified in accepting this change of status of the Coggon district from independent to consolidated, as a basis for the payment of supplemental aid.

4. The department would not be justified in reimbursement to the district from the transportation aid fund under the provisions of chapter 285, Code of 1946.

August 19, 1947

TAXATION: City assessor acting as deputy county assessor at same time prohibited. Cities having a population of 125,000 or more are assessed as provided in chapter 405, Code 1946, and the city assessor in such city cannot at the same time act as a deputy to the county assessor under the provisions of chapter 240, Acts 52nd General Assembly.

Mr. Carroll O. Switzer, County Attorney, Des Moines, Iowa: This will acknowledge receipt of your letter addressed to the attorney gen-

eral and which has been handed to me for attention. In your letter you submit the following proposition:

"Under the provisions of the Iowa statutes, is it lawful for one acting as city assessor in a city having a population of one hundred twenty-five thousand or more; to be appointed as first deputy assessor of the county in which such city is located by the county auditor (ex-officio county assessor) thereby lodging in the city assessor, under direction and supervision of the county assessor, authority to assess all nonexempt property in the county including that which is assessable in the city of which he is the assessor?" Would you kindly furnish me with an opinion on this question at your earliest possible convenience?"

In order to make proper answer to your inquiry it is necessary to consider the provisions of chapter 405 as they relate to cities over one hundred twenty-five thousand population. Chapter 405 is amended as it relates to cities of ten thousand to one hundred twenty-five thousand population and the provisions of the law contained in chapter 240, Acts of the 52nd General Assembly relate to county and city assessors.

It is to be noted that the county assessor law made provision for all cities, except cities over one hundred twenty-five thousand population for the reason that such cities had a special assessor law in operation, which law was modified to apply to all cities of ten thousand to one hundred twenty-five thousand. Under chapter 240 all cities of ten thousand to one hundred twenty-five thousand are automatically placed under the provisions of chapter 405 as amended unless such cities elect to be assessed by a county assessor as provided by chapter 240, Acts of the 52nd General Assembly.

The legislature in enacting chapter 240, Acts of the 52nd General Assembly, viewed the city assessor and the county assessor as two separate and distinct units operating under two separate and distinct provisions of law and their acts are reviewed by two separate and distinct boards of review, which boards of review are created under distinct provisions of the law. It was not the thought of the legislature that under the provisions of chapter 240 the city assessor and the county assessor should be the same person except that they did provide in section 23 as follows:

"Any county assessor shall be eligible for appointment as assessor in any city having a population of more than ten thousand and less than one hundred twenty-five thousand, but in such event the laws relating to the county assessor and a county board of review shall apply."

In other words, the effect of the statutory provisions is as follows: When a county assessor is appointed city assessor, then in truth and in fact the assessment of the city and the county is made by the county assessor and his work is reviewed by the county board of review, and the city board of review is eliminated. The result and effect is that the county assessor assesses the entire county under such an arrangement the same as any county assessor assesses any other complete county.

Under the provisions of the law, section 11 of chapter 240, the county assessor is to devote his entire time to the duties of his office and shall not engage in any operation or business interfering or inconsistent with such duties.

Section 12, chapter 240, Acts of the 52nd General Assembly, provides that a deputy assessor, or if more than one, the first deputy, in the absence or disability of the assessor shall perform all the duties of or pertaining to the office of the assessor. It is our construction of the law that the deputy county assessor is bound by the provisions of section 11 herein above quoted and which provide that he devote his entire time to the duties of his office and shall not engage in any operation or business interfering or inconsistent with such duties.

The city assessor in a city with a population of more than one hundred twenty-five thousand is a full time employee under the provisions of chapter 405 and the law provides that he shall be furnished with deputies to assist him in carrying out his duties. If his duties do not require his full time, then the necessity for deputies automatically vanishes, and if he is required to devote his full time to the city as such city assessor, which we believe to be the intent of the law, then he does not have any time to serve as deputy county assessor and if such city assessor were appointed deputy county assessor, he would not be in a position to comply with the provisions of section 11, paragraph one, chapter 240, which provides, "He shall devote his entire time to the duties of his office and shall not engage in any operation or business interfering or inconsistent with such duties." It is our judgment that no man can serve two masters and devote his entire time to each at the same time. The legislature did not intend that the city assessor under chapter 405, Code 1946, in cities with a population of over one hundred twenty-five thousand should be eligible to serve also as deputy assessor under the provisions of chapter 240, Acts of the 52nd General Assembly, or they would have so specifically provided in the law in the same manner they provided for such a combination in chapter 240, Acts of the 52nd General Assembly, and would have eliminated one of the boards of review and the expense thereof. In order for the city assessor under chapter 405 to be the first deputy county assessor under the provisions of chapter 240, it is necessary that the legislature amend the provisions of chapter 405, Code 1946. In fact, chapter 240 of the Acts of the 52nd General Assembly in section 23, indicates that the legislature intended that where one assessor was to assess the entire county, then in that event he should be a county assessor and subject to review by a county board of review.

It is, therefore, our opinion that the city assessor in cities over one hundred twenty-five thousand cannot serve as first deputy to the county assessor and that to hold otherwise would be contrary to the express intent of the legislature as gathered from the provisions of chapter 240, Acts of the 52nd General Assembly, and chapter 405, Code 1946.

August 21, 1947

STATE OFFICERS AND DEPARTMENTS: **Appropriations—paying for supplies purchased before end of biennium.** Supplies purchased before the end of a biennial fiscal term by a state department, but unused and unallocated in that term, are not obligations such as contemplated by section 8.33, Code 1946, and may be paid for out of appropriations for the succeeding biennium.

Mr. Ray E. Johnson, State Comptroller: We have yours of the 1st inst. in which you state:

"Several of the institutions under the supervision of the state board of control have unpaid claims, for supplies ordered prior to July 1, 1947, aggregating more than the balance in their respective appropriations as of June 30, 1947.

We respectfully ask for an official opinion as to whether or not appropriations, made by the 52nd General Assembly and available July 1, 1947, may be used to pay obligations incurred prior to July 1, 1947, after taking into consideration the provisions of sections 8.30 to 8.40 inclusive, of the 1946 Code."

We advise as follows:

The sections pertinent to the situation outlined are sections 8.30 and 8.33, each of which in terms follows:

"The appropriations made shall not be available for expenditure until allotted as provided for in section 8.31. All appropriations now or hereafter made are hereby declared to be maximum and proportionate appropriations; the purpose being to make the appropriations payable in full in the amounts named in the event that the estimated budget resources during each fiscal year of the biennium for which such appropriations are made, are sufficient to pay all of the appropriations in full. The governor shall restrict allotments only to prevent an overdraft or deficit in any fiscal year for which appropriations are made."

"No obligation of any kind whatsoever shall be incurred or created subsequent to the last day of the biennial fiscal term for which an appropriation for administration, operation, support and maintenance is made against any said appropriation, except when specific provision otherwise is made in the act making the appropriation. On the last day of the biennial fiscal term it shall be the duty of the head of each department, board, or commission, or officer receiving appropriations for administration, operation, support, and maintenance under any act, to file with the state comptroller a list of all obligations incurred, and for which warrants have not been drawn, up to and including that date. On September 30, following the close of each biennial fiscal term all unencumbered or unobligated balances of appropriations made for said biennial fiscal term shall revert to the state treasury and to credit of the fund from which the appropriation or appropriations were made, except that capital expenditures for the purchases of land or the erection of the buildings or new construction shall continue in force until the attainment of the object or the completion of the work for which such appropriations are made. This section shall not be construed to repeal the provisions of sections 19.11 to 19.14, inclusive."

Section 8.30 is legislative determination that the budget resouces during each fiscal year shall be sufficient to pay the appropriations made for that period of time. To effectuate that purpose, the legislature enacted section 8.33. Under the section it was provided that no obligation of any

kind shall be incurred or created subsequent to the last day of the biennial fiscal term, for which an appropriation has been made, and in order to make available any unexpended balance in the appropriation at the termination of the biennial fiscal period, provision is made requiring the heads of departments, boards or commissions, on the last day of the biennial fiscal term, to file with the comptroller a list of all obligations incurred and for which warrants have not been drawn up to and including that date. And on September 30, following the close of the biennial fiscal year the unencumbered unobligated balances of the associations shall revert to the state treasury and to the credit of the fund from which the appropriations were made. These provisions mean

a. The time within which an expenditure for an obligation incurred prior to the last day of the biennial fiscal term from an appropriation can be made is the last day of the biennial fiscal year and 90 days thereafter. The 90-day part thereof, being the time allowed by law for the filing of a claim against the State.

b. To preserve the appropriation to the biennial fiscal term, no obligation shall be incurred or created subsequent to the last day of such biennial fiscal term.

c. There is no requirement that such list of obligations shall be filed at the end of the fiscal year, but only at the end of the biennial fiscal term.

d. Unexpended appropriations of the first fiscal year of the biennium may be used during the second fiscal year of the biennium without filing the foregoing list of unpaid obligations.

The foregoing analysis has the support of opinion of this department issued March 26, 1937, appearing in the Report of the Attorney General for 1938, at page 130, wherein passing upon this statute in substantially the terms in which it now exists, the opinion concluded in these words:

"It is therefore our opinion that any funds on hand by the different departments, except only the state conservation commission, state fair board, those set out in the last part of section 84-e26, or any commissions that are provided in section 290 to 294, inclusive, during the biennium beginning July 1, 1935, and ending June 30, 1937, are not to be turned over to the state treasurer until six months after the expiration of the biennium which is at the close of the business of December 31, 1937. And further, that unexpended balances from the first fiscal year may be used during the second fiscal year of the biennium."

It being the intention of the legislature that the appropriations made by it shall be used in the maintenance of the institutions during the biennial term, we are of the opinion that a purchase of reasonable and necessary supplies made within the biennial period but unused and unallocated in that period is not an obligation within the provisions of section 8.33 and therefore such supplies may be paid for out of the appropriation for the succeeding biennial term.

September 2, 1947

CORPORATIONS: Bankruptcy and reorganization—dual methods—filing fees. A corporation thrown into bankruptcy may elect to reorganize either by amendment of its original and existing charter and articles or by the creation of a new corporation, without any discrimination so far as the amount of fees due the state of Iowa are concerned, the amount being the same in either case.

CORPORATIONS: Reorganization and increase of stock—additional filing fee due. A bankrupt corporation planning to reorganize and increase its capital stock must pay an additional filing fee to the extent of the proposed increase of capital stock.

Honorable Rollo H. Bergeson, Secretary of State: We are in receipt of your letter of August 9, 1947, which is as follows:

"The Chicago, Rock Island and Pacific Railway Company is a corporation organized co-ordinately under the laws of Iowa and Illinois. The original charter was issued in 1880 and necessary renewal was accomplished under the Iowa statute in 1930. In 1930 the corporation paid to the secretary of state the renewal filing fee of $170,015 based upon authorized capital stock of $170,000,000. The corporate period was thus extended to 1980.

"Since 1933 the corporation has been in bankruptcy. A plan of reorganization has been developed by the interstate commerce commission and approved by the federal court having jurisdiction. The plan contemplates tentatively abandonment of the Illinois corporation and consolidation of the corporate structure in the Iowa corporation.

"The change would be effected by amendment to the articles of incorporation of the Iowa corporation, which amendment would substantially increase the authorized capital stock.

"Two questions in this connection arise from the last sentence of Code section 491.11 which reads 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 organized.'

"Your written opinion is respectfully requested on these two questions, which follow:

(1) Will the Chicago, Rock Island and Pacific Railway Company (when its articles are thus amended, and the corporation selected by the reorganization managers as the reorganized corporation under the interstate commerce commission plan) be 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?'

(2) Will the corporation be required to pay, as a prerequisite to the filing of an amendment which increases its authorized capital stock, a filing fee at the rate of $1.00 per thousand of the increase?"

In order to accurately answer your first question we have been favored with a proposed copy of the amendment to the articles of incorporation of the Chicago, Rock Island and Pacific Railway Company.

The following are among some of the recitations contained in said proposed articles:

"Whereas, the plan of reorganization of the Chicago, Rock Island and Pacific Railway Company debtor, under the provisions of section 77 of the Act of Congress entitled 'An Act to establish a uniform system of bankruptcy throughout the United States as amended' (hereinafter sometimes referred to as the plan) has been duly approved and is approved pursuant to said act. And

"Whereas, the Chicago, Rock Island and Pacific Railway Company has been designated to become and be the reorganized corporation under the plan, and

"Whereas, the corporation has withdrawn from the State of Illinois as a corporation thereof and is no longer a consolidated corporation. * * *

"Now, therefore, in order to organize The Chicago Rock Island and Pacific Railway Company (hereinafter sometimes called the 'corporation') so as to be the reorganized company for the purpose of carrying into effect the plan, the following articles are made:"

The articles then proceed to state that the corporation shall henceforth be organized and exist solely under and by virtue of the laws of the state of Iowa, provide for increasing the capital stock to 4,305,000 shares and classify the same, provide for issuance of the stock, provide for voting powers of the stock, provide for the liquidation of the corporation, for the redemption of stock, for the conversion of stock, the voting rights, dividends, the election of directors, pre-emptive and other rights, quorum at stockholders meetings, scrip, for the number of directors, and the period of existence of the corporation, its principal place of business, amendment of the articles, and expunges certain articles and paragraphs of the original articles of incorporation.

Your attention is directed to the provisions of section 491.11, Code 1946, and particularly the last sentence which 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."

We have here a corporation which previously existed by virtue of having filed its articles both in the state of Illinois and the state of Iowa, which took advantage of the bankruptcy statutes of the United States, and which by its proposed amendment to articles relinquishes its corporate charter in the state of Illinois and becomes an Iowa corporation with distinctly different features provided for in its amendment to its articles of incorporation than appears in the original charter. All of the things which the corporation contemplates doing in changing its corporate structure are accomplished by an amendment to its articles.

In Corporation Law the word "organized" does not signify or refer to the creation of a corporation. In New Haven etc. RR Co. v. Chapman, 38 Conn. 46, the court said (p. 66):

"The word 'organize', as used in railroad and other charters, ordinarily signifies the choice and qualification of all necessary officers for the transaction of the business of the corporation."

The Kansas Supreme Court in Walston v. Oliver 30 Pac. 172, states:

" 'Organize' or 'organization,' as used in reference to corporations, has a well-understood meaning, which is the election of officers, providing for the subscription and payment of the capital stock, the adoption of by-laws, and such other steps as are necessary to endow the legal entity with the capacity to transact the legitimate business for which it was created."

In like manner, the word "organize", as used in section 491.11 might refer to the inception of mere incorporation of a corporation or the status resulting from some limitation in the corporate structure of an identical existing corporation. The word "organize" as used in the Iowa statute contemplates that the corporation shall have taken such steps as are necessary to comply with the provisions of section 77 of the bankruptcy act, and to carry out the requirements of the plan of reorganization.

In Whitman, et al. v. Northern Central Ry. Co., (Maryland) 127 Atl. 112, the court said:

"Giving the language its natural grammatical effect, the word 'organize' is used in that statute, to describe the present and existing status of the corporation, and not its status or condition at some past time."

So, here, the word "organized" in the Iowa statute describes the present and existing status of the corporation under the articles as tendered for filing and not the status or condition at some past time.

The change from a consolidated Illinois-Iowa corporation to a sole Iowa corporation, together with the other charter changes necessary to equip the corporation as a proper vehicle for executing and carrying out the plan add up to such a thorough revamping as to fit the statutory language "corporation organized for the purpose of carrying into effect the plan of reorganization."

These changes represent a fundamental change in the corporate structure. It is not the corporation as it existed in 1930 which is under discussion, but the corporation as it exists today by virtue of its amended articles.

It is, therefore, our opinion that the corporation here under consideration, with its articles as thus amended is 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". However, it is not such a corporation as is within the meaning of the last sentence of section 491.11. While a corporation may organize for carrying into effect a plan of reorganization approved in bankruptcy proceedings, either by amendment of its original and existing charter and articles, or by the creation of a new corporation credit for fees paid under section 491.11 applies only when the creation of a new corporation is the method utilized to carry the plan of reorganization into effect and operation. It is only when wholly new articles are filed, when a new

charter is applied for, and when a new legal entity is sought to be created that any credit as to incorporation fees is allowable by reason of section 491.11.

When an existing corporation amends its articles pursuant to a plan of reorganization, and under the amendment, the amount of authorized stock is increased, it is required to pay a fee only on the increase of capital stock authorized under the original, or previously amended articles, under the second sentence contained in section 491.11. It does not repay any fees on stock previously authorized, for the fees for that stock required by section 491.11 have already once been paid, and there is no statutory provision requiring repayment.

However, where a new corporation is formed to reorganize an existing corporation, such corporation would be required to pay incorporation fees based on the whole amount of stock authorized, even though some of the stock is clearly to be issued only in exchange for stock of the former corporation, in order to put the plan of reorganization in bankruptcy into effect, if no statutory provision to the contrary could be discovered. Such a situation would be burdensome to the corporation, and would be unjust in that one incorporation fee has already been paid to the state of Iowa on what, for practical purposes, is the same stock. Therefore, to meet that situation the legislature added the last sentence to section 491.11, thereby intending the same to be applicable only to the situation where the plan of reorganization is carried into effect by the creation and organization of a new corporation. Under this provision where a new corporation is organized, the new corporation is only liable to pay a fee for the amount of the capital stock which is over and above the amount of the capital stock authorized under the original articles of incorporation. To administer this provision you should compute the fees due from the reorganized corporation on the basis of the total amount of authorized stock, and from the fees so computed you are required to give a credit to the extent of the incorporation fees previously paid by the old corporation, such credit to be for the period of time that the old corporation's charter would have been in existence if it were not for the reorganization by the organization of the new corporation, which in this case would be in 1980, fifty years after the original incorporation.

Under this view, a corporation which is thrown into bankruptcy, may elect as to the method which it desires to effectuate a plan of reorganization without any discrimination so far as the amount of incorporation fees due the state of Iowa is concerned, the amount payable to this state being the same under either method.

At first glance, the answer to your second question does not seem so simple, but after a thorough study of section 491.11, Code 1946, the answer becomes apparent. At the time of the recodification by the 50th General Assembly of some of the laws affecting corporations, all the provisions of section 491.11, except the last sentence thereof, were contained in the bill.

The history of the course of the recodification bill discloses that the last sentence of section 491.11 came into the act by amendment and was not a part of the bill as it was originally filed and introduced.

It will be noted that the reorganized corporation proposes to increase its capital stock from $170,000,000, upon which amount the fee was originally paid in 1930, to $430,500,000 by the proposed amendment to its articles.

It has been contended that the last sentence of section 491.11, Code 1946, hereinabove set out, means that the fees required by the section to be paid shall not be collected from the reorganized corporation, and that the fees referred to mean those fees which the section requires the corporation to pay for increasing its capital stock. However, to reduce that sentence to its clear meaning, it must be read as follows:

"The fees, except the recording fees, required by this section to be paid, shall not be collected from a corporation * * * for the period until the termination of the time for which such fees were paid by the corporation so reorganized".

The phrase, "for which such fees were paid by the corporation so reorganized" clearly means that if a corporation which has been in bankruptcy, had, during its corporate existence paid a filing fee to the secretary of state upon its capitalized structure, then it would be entitled to credit for the amount which it had paid for the balance of the period of time that its corporate charter existed under the law. It could not have paid fees for an increase in its capital stock for the reason that there was no increase in its capital stock until that proposed by its amendment to its articles which it now tenders for filing.

It is, therefore, our opinion that the corporation will be required to pay a filing fee provided by law to the extent of the amount of its proposed increase of capital stock.

September 4, 1947

COUNTIES: Warrants not paid for want of funds—sale by treasurer or supervisors prohibited. Neither the county treasurer nor the board of supervisors has the power to contract for the sale of county warrants stamped "Presented but Not Paid for Want of Funds". However, the county treasurer may arrange with anyone for a lower rate of interest than the statutory rate to whom the holder may, if he chooses, present the warrant for cash.

Mr. Chet B. Akers, Auditor of State, Attention L. I. Truax:

We have yours of the 29th ult. in which you state the following for opinion:

"We are in receipt of a communication from the Polk county treasurer in which he submits this inquiry:

'At the present time we are stamping all warrants drawn on the court expense fund 'Presented But Not Paid for Want of Funds".

I have an offer from the Des Moines banks for an interest rate of two and one-half per cent (2½%) with no strings attached. In other words, they are willing to carry the warrants at the rate of two and one-half per cent and getting judgment against Polk county after

January 2nd, 1948, for the sale of bonds to take up outstanding warrants at that time.

I also have an offer from the Carleton D. Beh Company agreeing to take the warrants at one and one-half per cent interest rate, but the Carleton D. Beh Company wants a contract to this effect, and I am enclosing a copy of this contract which states that all warrants are to be delivered to their office or the Central National Bank. As county treasurer, after the stamp is placed on the back of the warrants, I do not think that I have any jurisdiction over the disposal of this warrant by the individual holding the same, and I am quite sure that legally I cannot cash the warrant and hold it as a cash item until a sizable amount of warrants are on hand to take to any bank or other party willing to buy the warrants.

I would appreciate it very much if you would get an opinion from the attorney general on the disposition of the warrants after they have been stamped, and the right of the county treasurer to enter into a contract which I am enclosing from the Carleton D. Beh Company."

"We are also enclosing herewith copy of an agreement between the board of supervisors of Polk county and the Carleton D. Beh Company, which is referred to in the above inquiry. An early reply on this matter will be appreciated."

In reply thereto, we advise you as follows:

For an understanding of this situation we set forth herein, the following applicable statutes, to wit: Section 74.1, Code of 1946, as follows:

"This chapter shall apply to all warrants which are legally drawn on a public treasury, including the treasury of a city acting under special charter, and which, when presented for payment, are not paid for want of funds."

And section 74.2, Code of 1946 as follows:

"When any such warrant is presented for payment, and not paid for want of funds, or only partially paid, the treasurer shall indorse the fact thereon, with the date of presentation, and sign said indorsement, and thereafter said warrant or the balance due thereon, shall draw interest at four per cent per annum on state and county warrants, and four per cent per annum on city, drainage, and school warrants, unless the treasurer arranges for the sale of said warrant at par at a lower rate of interest."

And section 74.3, Code of 1946, as follows:

"The treasury shall keep a record of all warrants so indorsed, which record shall show the number and amount, the date of presentation, and the name and post-office address of the holder, of each warrant."

The contract, form of which is attached, between the board of supervisors of Polk county and the Carleton D. Beh Company is void because it is obviously in excess of any powers vested in the board of supervisors. Clearly by section 74.2 any power to secure a lower rate of interest is vested in the treasurer and not in the board of supervisors. And the power of the treasurer does not extend to making a contract for the sale of such stamped warrants for these reasons, to wit:

1. The county does not own the warrant,—it is the property of the payee.

2. Public policy requires the treasurer to secure for the county the lowest obtainable rate of interest upon its obligations. A contract made by the treasurer requiring the county to pay a fixed rate of interest would restrict and restrain his power to secure a lower rate of interest for such stamped warrant. Obviously the word "arrange" in the foregoing statute imparts no such meaning and bestows no such power upon the treasurer.

The foregoing analysis of the power of the treasurer in arranging for the sale of a warrant at par at a lower rate of interest than that specified in the statute has support in the following opinion of the attorney general appearing in the Report of the Attorney General for 1938 at page 437, where it is said:

"* * * * When public warrants are presented to the treasurer for payment and not paid for want of funds such warrants shall be endorsed with the fact that they have been presented and not paid for want of funds with the date of presentation, which endorsement shall be signed by the treasurer after which the warrants shall draw interest as provided by statute unless the treasurer arranges for a sale of the warrants at par at a lower rate of interest than the warrant as originally written would draw under the statute, what procedure is necessary for the treasurer to go through in the sale of said warrant?

State and county warrants draw 5 per cent interest per annum, city, drainage and school warrants draw 6 per cent interest per annum. Under section 1171-f2 of the statute the treasurer must stamp such warrants 'unpaid for the want of funds,' if he is out of funds to pay them and endorse thereon the date of presentation and the rate of interest which the warrant will draw, unless the treasurer arranges for the sale of said warrant at par at a lower rate of interest. The statute is silent as to any particular formula to be pursued by the county treasurer. Inasmuch as the holder of the warrant should have the privilege of taking the interest bearing warrant if he chooses he should be given the first opportunity to take the warrant at an interest rate no greater than the offer of anybody else. There is no provision in the statute for advertising these warrants or for offering them to bidders."

In denying to the treasurer the power to contract away the right of the county to secure the lowest rate of interest obtainable upon its obligations, we adopt and confirm, as applicable here, the following, from an opinion of this department, appearing in the Report for 1944 at page 55, where, concerning a proposed arrangement for disposing of stamped warrants, it was said:

"* * * * 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 district 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 interpretation. 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."

It would be accepted practice within the principles of the foregoing opinion for the treasurer to arrange with a bank or banks, or other like agency, to cash warrants which he has stamped "not paid for want of funds" at a lower rate of interest than the statutory rate, and it would be within the foregoing principles for him to place upon such warrant, in addition to the foregoing stamp, a stamp to the effect that the warrant may be redeemed for cash at a named bank. In the event such an arrangement is made by the treasurer, the payee or holder of such stamped warrant should be advised of his right to cash the warrant at the named bank, or to hold the stamped warrant until such time as such warrant is called, in due course, for payment by the treasurer.

September 24, 1947

TAXATION: Refunds of sales and use taxes to governmental bodies. It was the intent of chapter 229, Acts of the 52nd General Assembly to refund to tax certifying and tax levying governmental bodies or subdivisions or branches thereof, any sales and use taxes paid for goods, wares, and merchandise including furnishing or service of gas, electricity, water, heat, and communication services used for public purposes.

Mr. Earle S. Smith, Director, Sales and Use Tax Division, Des Moines, Iowa: This will acknowledge your request for an opinion relating to the provisions of chapter 229, Acts of the 52nd General Assembly, inquiring if the terms "goods, wares and merchandise" as used in said Act include water, gas, heat and telephone services and other purchases made by tax certifying and tax levying bodies.

Code section 422.43 as amended by the 52nd General Assembly provides, "There is hereby imposed, beginning the first day of April, 1937, a tax of two percent upon the gross receipts from all sales of tangible personal property, consisting of goods, wares or merchandise, except as otherwise provided in this division, sold at retail in the state to consumer or users; a like rate of tax upon the gross receipts from the sales, furnishing or service of gas, electricity, water, heat and communication service including the gross receipts from such sales by any municipal corporation furnishing gas, electricity, water, heat and communication service to the public in its proprietary capacity, except as otherwise provided in this division, when sold at retail in the state to consumers or users."

The provision for refund, chapter 229, Acts of the 52nd General Assembly provides, "for refund of the amount of tax imposed hereunder and paid upon sales to it of any goods, wares or merchandise used for public purposes." The title to chapter 229 is as follows: "An Act relating to refunds of sales and use tax paid on purchases by tax certifying and tax levying governmental bodies of Iowa, or any subdivision or branch thereof."

The crux of the problem resolves itself into what is meant by "goods, wares and merchandise?" The phrase "goods, wares and merchandise" is of large significance both at common law and under various statutes; speaking generally, the words, taken together, are equivalent

to the term "personal property." They are constantly used in legal and common parlance to designate whatever species of property is not embraced by the phrase "lands, tenements and hereditaments," every species of property which is not real estate or freehold. Crowe v. Union Automobile Ins. Company, Tax. Civ. App. 79 S. W. 2d 168, 171.

Telegraphic messages are "subjects of commerce", and hence "goods" within provision of fair labor standards Act defining "goods" as including articles or subjects of commerce of any character. W. U. Tel. Co. v. Lenroot, N. Y., 65 S. Ct. 335, 341, 323 U. S. 490, 89 L. Ed. 414.

The term "goods and chattels" as generally used today is a term of broad and inclusive meaning. Rowe v. Colpoys, 137 F. 2d 249, 250, 148 A.L.R. 488.

Webster defines "ware" to be "article of merchandise especially in the plural; goods." Commonwealth vs. Keller 9 Pa. Co. Ct. R 253.

"Goods, wares and merchandise" means every species of property which is not real estate or freehold and is intended to include whatever is not embraced by the words "lands, tenements and hereditaments." Colp vs. Holbrook 129 N.E. 278; 76 Ind. App. 272.

Though, where question of application of statute of frauds is involved, phrase "goods, wares or merchandise" is equivalent to term "personal property," where phrase is employed in taxation laws it may be used in different senses, and in case of doubt its true meaning must be determined from context and purposes of act wherein it is used. Ex parte Gundelfinger, 262 P. 465, 466, 87 Cal. App. 636. The foregoing authorities while helpful to some degree are not decisive of the question.

The reference in chapter 229, Acts of the 52d General Assembly, is to "goods, wares or merchandise used for public purposes," which terms when used in a tax statute are generic and should not be construed in a strict sense so as to preclude the intent of the legislature as gathered from the sales and use tax Act, the Act and the title as expressed in chapter 229, Acts of the 52d General Assembly, relating to such refunds.

It is to be noted that section 422.43 imposes a tax upon the gross receipts from all sales of tangible personal property, consisting of goods, wares or merchandise except as otherwise provided in this division. The qualifying phrase "except as otherwise provided in this division" has particular significance in that it is also provided in this division that the tax is to be imposed upon the "gross receipts from the sales, furnishings or service of gas, electricity, water, heat and communication service, including the gross receipts from such sales by any municipal corporation furnishing gas, water, heat and communication service to the public in its proprietary capacity, except as otherwise provided in this division.

A reading of the foregoing statute discloses that the tax is imposed upon heat, water, electricity, gas and communication service and such

sales are not excluded by the express provisions of the sales tax Act so that in construing chapter 229, Acts of the 52d General Assembly, relating to refunds, one must keep in mind the obvious intent of the legislature which was to exempt tax certifying or tax levying bodies or any governmental subdivision thereof from the payment of any sales tax upon the items purchased by such tax certifying or tax levying bodies or any governmental subdivision thereof when used for public purposes. If we were to interpret this statute as excluding refunds on sales of gas, electricity, water, heat and communication service, such holding would defeat the purpose of the legislature in that it would require the payment of a tax without a right of refund in an instance when the legislature deemed it advisable to make such tax refundable.

An analysis of the use tax discloses that under the provisions of section 423.2, Code 1946, "An excise tax is imposed upon the use in this state of tangible personal property purchased on and after the effective date of this chapter for use in this state at the rate of two percent of the purchase price of said property."

Tangible personal property is defined in the use tax law in section 423.1, subsection 4, which provides, "Tangible personal property means tangible goods, wares and merchandise and gas, electricity and water when furnished or delivered to consumers or users within this state."

The legislature has specifically defined tangible personal property in the Use Tax Act as including the specific items referred to in this opinion, and in interpreting the sales tax Act and use tax Act our supreme court has stated that the use tax Law is complementary to the sales tax Law, and the two should be construed so as to harmonize their provisions. See State Tax Commission vs. General Trading Company, 233 Iowa 877; Nelson v. Sears, Roebuck and Company, (Iowa) 312 U.S. 359, 85 L. Ed. 888; Dain Mfg. Company v. Iowa State Tax Commission, 22 N.W. 2d 786; Peoples Gas and Electric Company v. State Tax Commission (decided September 16, 1947).

If the use tax Act is complementary to the sales tax Act and they are to be construed together, an interpretation of the refund statute should be made equally applicable to both sales tax and use tax.

Our legislature in the passage of chapter 229, Acts of the 52d General Assembly, must be presumed to be familiar with the language of the various statutes and likewise informed as to the interpretations placed on said Acts by the court. It was undoubtedly the intention of the legislature to grant a refund on all taxable purchases under the provisions of the sales tax and use tax Acts when such items were used for public purposes as provided in said law.

We, therefore, hold that the words "goods, wares and merchandise" as used in the sales and use tax refund Act are to be interpreted as having such a broad and general meaning as to cover sales of water, gas, heat and telephone services when such items are purchased by any tax certifying or tax levying body of Iowa or any governmental subdivision thereof and used for public purposes.

September 25, 1947

SOCIAL WELFARE: County board employees are state employees—schools of instruction. Employees of county boards of social welfare are state employees. Where any such employees are also appointed as overseers of the poor, they serve in a dual capacity and as such cannot be called by the state board for a school of instruction limited to matters pertaining solely to overseers of the poor. As state employees their vacations and sick leaves are governed by section 79.1, Code of 1946.

Mrs. Mary Huncke, Chairman, State Board of Social Welfare, Des Moines, Iowa: I have your communication of September 8, 1947, which poses the following questions:

"Are the employees of the county boards of social welfare, state employees, or are they county employees?

"Many of the county directors of social welfare have been appointed as overseers of the poor in what we term integrated counties. In their capacity as overseers of the poor, they and their employees will necessarily have to attend meetings which might be called schools of instruction, but have nothing to do with the categorical assistance programs. Your recent decision tends to make us believe that the expenses to attend such meetings would necessarily have to be from the categorical assistance funds and not from the poor fund as the topic being discussed.

"We should also like to have clearance to be able to determine how it is possible for county department of social welfare employees to operate under a different vacation and sick leave policy if they are deemed state employees."

In answer to question No. 1, as to whether employees of the county boards of social welfare are state employees or county employees, will say that we believe they are state employees. Section 234.6 of the 1946 Code of Iowa, which covers the powers and duties of the state board of social welfare, provides as follows:

"The state board shall be vested with the authority to administer old-age assistance, aid to the blind, aid to dependent children, child welfare, and emergency relief, and any other form of public welfare assistance that may hereafter be placed under its administration. It shall perform such duties, formulate and make such rules and regulations as may be necessary; shall outline such policies, dictate such procedure and delegate such powers as may be necessary for competent and efficient administration. It shall have power to abolish, alter, consolidate or establish divisions and may abolish or change offices created in connection therewith. It may employ necessary personnel and fix their compensation. It may allocate or reallocate functions and duties among any divisions now existing or hereafter established by the state board. It may promulgate rules and regulations relating to the employment of investigators and the allocation of their functions and duties among the various divisions as competent and efficient administration may require.

"The state board shall:

"1. Within ninety days after the close of each fiscal year, prepare and print for said year a report to the governor which shall include a full account of the operation of the acts under its control, adequate and complete statistical reports by counties and for the state as a whole concerning all payments made under its administration, and such other information as it may deem advisable, or which may be requested by the governor or by the general assembly.

"2. Co-operate with the federal social security board created by title VII of the social security act, 42 U.S.C. 901, enacted by the 74th Congress of the United States and approved August 14, 1935, or other agency of the federal government for public welfare assistance, in such reasonable manner as may be necessary to qualify for federal aid, including the making of such reports in such form and containing such information as the federal social security board, from time to time, may require, and to comply with such regulations as such federal social security board from time to time, may find necessary to assure the correctness and verification of such reports.

"3. Exercise general supervision over the county boards of social welfare and their employees.

"4. Furnish information to acquaint the public generally with the operation of the acts under the jurisdiction of the state board.

"5. With the approval of the governor and comptroller, set up from the funds under their control and management an administrative fund and from said administrative fund to pay the expenses of operating the state department."

Section 234.8, 1946 Code of Iowa, provides as follows:

"All employees of the state board shall have been residents of the state of Iowa for at least two years immediately preceding their employment and shall be selected from among those who have successfully qualified in an examination given by the state board or under its direction, covering character, general training, and experience. Such examinations shall be open to all persons, and persons taking such examinations, upon successfully qualifying, shall be classified according to the fields of work for which said persons are fitted, all in accordance with rules and regulations of the state board adopted and published by the state board."

Section 234.12, 1946 Code of Iowa, provides as follows:

"The county board shall employ a county director and such other personnel as is necessary for the performance of its duties. The number of employees shall be subject to the approval of the state board. The county director and all employees shall be selected solely on the basis of the fitness for the work to be performed, with due regard to experience and training, but graduation from college shall not be made a prerequisite of any such appointment. It shall be a prerequisite to obtaining an appointment that the applicant shall have been a legal resident of Iowa for at least two years prior to the time of making said application.

"Any appointment made by the county board other than clerical or stenographic help, shall be subject to review by the state board in this respect, that if any appointee is not properly carrying out the duties for which he is appointed, or if any appointee is not qualified or capable of handling the duties for which he is appointed, and the State Board so finds, it shall certify a copy of such finding to the county board and the county board shall then discharge the said employee and shall fill the vacancy."

Section 234.13, 1946 Code of Iowa, provides as follows:

"The compensation of county board employees shall be fixed by the county board of social welfare and shall be paid by the state board from funds made available for that purpose. However, the compensation of all employees shall be subject to the approval of the state board and the county board of supervisors."

Chapter 151 of the Acts of the 47th General Assembly enacted the foregoing section, and they are substantially in the same form as set out in the 1946 Code. Chapter 151 of the Acts of the 47th General Assembly was passed for the purpose of conforming to the federal act commonly known as the social security Act, which went into effect August 14, 1935 (42 U.S.C.A., section 301 et seq.). The federal act above prescribed the conditions to which the state plan for old-age assistance must comply, among which are: First, that the state plan shall provide that it shall be in effect in all political subdivisions of the state, and if administered by them, be mandatory upon them, second, provide for financial participation by the state; and third, either provide for the establishment or designation of a single state agency to administer the plans or provide for the establishment or designation of a single state agency to supervise the administration of the plan.

Following the enactment of the federal law, the legislature adopted the state social security Act known as chapter 151 of the Laws of the 47th General Asesmbly which created the state department of social welfare "which shall consist of a state board of social welfare, and such other officers and employees as may be hereafter provided."

It will be noted that section 234.6 above cited sets out the duties of the state board of social welfare and in reading this section, it is certainly apparent that the state board is vested with all of the executive power in connection with the state welfare program, including the county social welfare office, and it will be further noted that paragraph 2 of said section 234.7 authorizes the state board to co-operate with the federal social security board and to comply with the rules of the federal social security Act in order to qualify for federal aid, so that it is our opinion that the state board of social welfare does have authority and power to hire, discharge and to pay the so-called county employees of the state board of social welfare.

Section 234.12 above cited, provides that the county board shall employ a county director and such other personnel as is necessary for the performance of its duties. It will also be noted that this section provides that the number of employees shall be subject to the approval of the state board. It will further be noted that said section provides that the county directors and all employees shall be selected solely on the basis of the fitness for the work to be performed, with due regard to experience and training.

We are, therefore, of the opinion that all of the employees in the county office of social welfare do come under the merit system of the state of Iowa. This section further provides that any appointment made by the county board other than clerical or stenographic help, shall be subject to the review of the state board in this respect, and if any appointee is not properly carrying out the duties for which he is appointed, or if any appointee is not qualified or capable of handling the duties for which he is appointed, and the state board so finds, it shall certify a copy of such finding to the county board, and the county board shall then discharge said employee and shall fill the vacancy.

This provision in regard to employment of employees of the county board clearly shows that in all cases, except the appointment of clerical and stenographic help, the county board cannot employ any employees without the approval of the state board of social welfare. This further shows that even the stenographic and clerical help are also state employees for the reason that they are paid by the state board and they cannot be discharged except upon a finding by the state board that they are not performing the duties of their positions, as set out in said section 234.12, and that all of the employees, including the clerical and stenographic help are state employees, as the state board has the authority to direct and control the work done by the employee of the county board of social welfare.

On May 27, 1941, this office wrote an official opinion to Mr. Eugene J. Kean, county attorney of Dubuque county, Iowa, which finds that all the employees of the county board, including the clerical and stenographic help are in fact state employees, and must take the merit examination required for state employees of the state board of social welfare.

In the case of Hjerleid vs. State, 229 Iowa, 818 to 835 inclusive, it was held by the supreme court of the state of Iowa that for the purpose of workmen's compensation, in determining who the employer was, as to a county director of social welfare, the court held that such director was a state employee, and from the language of this case, which refers to chapter 151 of the Acts of the 47th General Assembly, which is now incorporated in the sections of the 1946 Code of Iowa above cited, it very definitely holds that employees of the county boards of social welfare are state employees and not county employees. For further cases, setting out the relationship of employer and employee, see Muscatine City Water Works, et al. vs. Blanche E. Duge, et al. 232 Iowa, 1076; Joe Heiliger vs. City of Sheldon, et al., 236 Iowa, 146.

In answer to your second question relative to overseers of the poor, we are of the opinion that the state board has no right to call any school of instruction, or meeting held strictly for overseers of the poor for the reason that overseers of the poor, even though they may be also county directors of social welfare, as provided for in the so-called integrated counties, are not state officers when acting in the capacity of overseers of the poor. We think possibly the auditor of state could call a school of instruction for overseers of the poor, as he calls schools of instruction for all of the other county employees except the county attorneys, county sheriffs and county superintendents of schools. He does in fact, call in the stewards of the county homes, and it would seem to us, if necessary, he could also call in the overseers of the poor, and if they were so called, the county should pay their necessary mileage and subsistence while attending such a meeting or school of instruction, and they would still draw their regular pay during the time they were attending the school of instruction.

In answer to your third question, we think this is answered by the answer to question No. 1 of this opinion. These employees, being state

employees, would be governed by the state law in regard to vacations, sick leave and working hours, as provided by section 79.1 of the 1946 Code of Iowa.

September 25, 1947

COUNTIES: Prisoners in jail—time-off credit for good behavior. County supervisors have no authority to give prisoners in the county jail credit for good behavior toward reduction in time of their incarceration.

Mr. Carroll O. Switzer, County Attorney, Des Moines, Iowa: Receipt is acknowledged of your inquiry of September 9, 1947, wherein reference is made to a letter which has been addressed to Mr. Mark L. Conkling, Chairman of the Polk county board of supervisors urging the adoption by said board of the following resolution:

"Be it resolved by the board of supervisors of Polk county, Iowa, as follows:

That each prisoner committed to the Polk county jail for either a term of imprisonment or for the nonpayment of fines assessment against him, and who has been made a trustee by the sheriff of Polk county, and does labor in the maintaining of county government property, or other labor, under the direction of the Polk county board of supervisors, or the sheriff of Polk county, Iowa, and who shall have no infraction of the rules against him, and who performs in the faithful manner the duties assigned to him, shall be entitled to the same reduction of sentence as provided by statute for prisoners or convicts serving time in state penal institutions."

Said letter presenting said resolution refers to section 789.17 of the Code of Iowa, which is as follows:

"A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine is satisfied, specifying the extent of the imprisonment, which shall not exceed one day for every three and one-third dollars of the fine."

to section 356.22 of the same Code which is as follows:

" For every day of labor performed by any convict under the provisions hereof, there shall be credited on any judgment for fine and costs against him the sum of one dollar and fifty cents."

to section 246.39 of the same Code, which is as follows:

"Each prisoner who shall have no infraction of the rules of discipline of the penitentiary or the men's or women's reformatory or laws of the state recorded against him, and who performs in a faithful manner the duties assigned to him, shall be entitled to a reduction of sentence as follows, and if the sentence be for less than a year, then the pro rata part thereof:

1. On the first year, one month.
2. On the second year, two months.
3. On the third year, three months.
4. On the fourth year, four months.
5. On the fifth year, five months.
6. On each subsequent year to the fifth year, six months."

to the following provisions of section 332.3, of the same Code:

"The board of supervisors at any regular meeting shall have power:

2. To make such rules not inconsistent with law, as it may deem necessary for its own government, the transaction of business, and the preservation of order.

4. To make such orders concerning the corporate property of the county as it may deem expedient, and not inconsistent with law.

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.

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.

15. To build, equip, and keep in repair the necessary buildings for use of the county and of the courts."

and finally to section 356.21, which provides:

"The officer having charge of any prisoner may use such means as are necessary to prevent his escape, and if the prisoner attempts to escape or if, being convicted, he refuses to labor, the officer having him in charge may, to secure his person or cause him to labor, deal with him as with other disorderly or refractory prisoners. Such punishment shall be inflicted within the jail or jail enclosure, and the time of such solitary confinement shall not be considered as any part of the time for which the prisoner is sentenced."

It is urged that under these statutes there is a clear discrimination between prisoners sentenced to county jails, and prisoners sentenced to state penal institutions for definite periods of imprisonment, in that the last mentioned class obtain time for good behavior and for labor performed outside the walls of the institutions and the first class none, and also that there is discrimination between prisoners who are confined in county jails for nonpayment of fines under section 789.17, and those who are in county jails serving out a sentence of imprisonment imposed by the committing court, in that the first class of county jail prisoners receive credit upon the fine for hard labor performed, at the rate of $4.83 1/3 per day, while the last class of county jail prisoners receive no time credit whatsoever for hard labor performed during his term of imprisonment. He urges that authority exists in your board of supervisors, under those provisions of section 332.3, which are set out above, to correct said discrimination.

Your specific inquiry is whether the board of supervisors has authority to adopt the proposed resolution.

Replying thereto, we call attention to the fact that if there is any discrimination as between prisoners committed to the state penal institutions and prisoners committed to county jails for definite terms of imprisonment, to the extent of credit for good behavior, and for labor performed outside the walls of said institutions, such discrimination rests upon statutory enactment which the board of supervisors is powerless to correct. The fact remains that the legislature has seen fit to allow credit in the one situation and none in the other, and

until the legislature changes the provisions of the applicable statutes, said discrimination, if it is discrimination, must remain, for the Constitution of this state (sec. 1, Article III) vests the legislative authority of this state solely in the general assembly and prohibits the exercise of powers belonging to the legislative department by any other department.

So far as the discrimination claimed to exist where inmates of county jails are concerned, there is no discrimination between those prisoners who are serving a fixed term of imprisonment in a jail under a judgment of a court, and those who are imprisoned therein by virtue of a judgment of court imposing a fine, and directing imprisonment for nonpayment of the fine pursuant to the provisions of section 789.17. The law is well established that imprisonment under such a judgment of conviction does not operate to satisfy the fine or release the defendant from liability to pay the fine itself. In Albertson v. Kriechbaum, 65 Iowa 11, at page 17, it is stated (referring to the provisions of judgment entered pursuant to Section 789.17):

"The provision in the judgment for his commitment is conditional and contingent. It can only be enforced in case of his refusal to perform the pecuniary judgment against him. Its office like that of the provision for execution in civil judgments, is to afford the means for the enforcement of the judgment. The imprisonment is not imposed in lieu of the fine. Neither does it operate to satisfy the judgment for the fine and costs, however long it may be continued.

Partial payment of a fine likewise does not release the defendant from liability to serve out the entire period of imprisonment provided in the judgment of conviction. Galles v. Wilcox, 68 Iowa 664, 27 N. W. 816. Therefore a prisoner imprisoned for nonpayment of a fine, at hard labor, receives no more credit for such hard labor, than the prisoner who is serving out a sentence of imprisonment for a fixed period of time. In each situation the prisoner received a credit of $1.50 only for each day of hard labor performed, to apply upon the judgment for costs and upon the fine, if a fine was imposed upon him, but the result so far as imprisonment is concerned, is that each prisoner serves out the entire period of imprisonment. Of course the prisoner who received only a term of imprisonment, and no fine, gets credit for his hard labor only to the extent of the costs, but that again is due to the specific provision made by the legislature in section 356.22 that the reward for hard labor shall be a credit only upon a "judgment for fine and costs."

The proposed resolution would have the effect of amending and modifying the provisions of sections 356.22 and 789.17, and of modifying and changing the provisions of the judgments entered against prisoners of your county jails, by the committing courts of your county. Under section 356.1, the Polk county sheriff is in charge of the jails of Polk county, and under section 356.2 it is his duty to receive those lawfully committed thereto, and "to keep them until discharged by law." The provisions of section 332.3, referred to above, neither specifically nor by implication, confer any power upon a board of supervisors, through

the adoption of such a resolution as is proposed, to amend or modify the laws of this state. This statute, conferring powers upon the board, clearly indicates that such powers shall be exercised in a manner not inconsistent with the law. To say that said provisions confer upon the board the power to adopt the proposed resolution would be putting an unconstitutional interpretation upon said statutory provisions, for the effect of such a construction would be to delegate to the board the power to legislate which, by section 1, Article III of our own Constitution, is vested in our general assembly, and would be an interference with the judicial power which by section 1, Article V of the same constitution is vested in the several courts of this state. The result here would be that the Board would be exercising powers properly belonging to the legislative and judicial departments of this state, contrary to the strict injunction contained in Article III of our Constitution, relating to distribution of powers.

For the reasons stated it is our opinion that the Polk county board of supervisors has no authority to adopt a resolution directing that credit be given prisoners in the Polk county jail toward reduction of terms of imprisonment imposed upon them by some court, for good behavior or hard labor performed by said prisoners, where such credit would be contrary to the provisions of the judgment of the committing court, and would have the effect of providing credit additional to those credits specified under the applicable statutes of this state.

September 25, 1947

MINORS: Conviction of crime involving maximum life imprisonment—commitment to training school. While a minor under 18 years of age, accused of rape, may not be tried in the juvenile court, yet upon conviction the district court may exercise his discretion and determine that punishment be for less than life imprisonment and transfer the cause to the juvenile court for further proceedings pursuant to section 232.30 of the Code. However, the district court may, under section 242.6, retain jurisdiction and impose commitment to the boys' training school, not for a term of years, but until the defendant attains the age of 21 years, even though this may result in detention for less than the minimum statutory punishment for the crime involved.

Mr. Lawrence B. Pedersen, County Attorney, Grinnell, Iowa: Receipt is acknowledged of your letter of September 19, 1947, supplementing our telephone conversation with reference to the situation which has arisen in your county in connection with the sentencing of five minor males upon their respective pleas of guilty to an indictment charging commission of the crime of rape.

You state that four of the defendants are 16 years old, and the other defendant 15 years old, that the court may desire to fix the term of imprisonment at the minimum term of five years in accordance with section 698.1 of the 1946 Code, and to avail itself of the following provisions of section 242.6 of said Code:

"When a boy or girl over ten and under eigtheen years of age,of sound mind, is found guilty in the district court of any crime except murder, the court may order the child sent to the state training school for boys, or for girls, as the case may be."

but that such judgment would conflict with section 232.30 requiring in effect that commitments to the state training school for boys shall be only until the child is twenty-one years of age, in that the defendants who are now sixteen years of age would reach their twenty-first birthdays before the lapse of five years.

You therefore request our opinion as to whether these defendants can be committed to the state training school for boys under section 242.6, and if so what the judgment entries should provide so as to allow imposition of the minimum punishment imposed by law, to-wit, five years.

In reply thereto it is apparent that these minor defendants could not be proceeded against originally as juveniles, because the crime of rape is "an offense which is punishable by life imprisonment" and is therefore within the prohibition contained in section 232.1 of the Code. However it does not follow that the procedure specified in section 232.20 cannot be followed in this situation. Where the crime involved is rape, the district court under section 698.1, has discretion as to the imposition of a sentence of imprisonment, either for life or for a term of years, and when the court exercises that discretion and elects to impose the lesser sentence of a term of years, the situation covered by section 232.20 then exists for under that statute provision is made for the transfer of the cause to the juvenile court "if the punishment be not for imprisonment for life or death." In other words, section 232.20, in our opinion, operates to defeat the jurisdiction of the juvenile court, by transfer, only where the imposition of life imprisonment is either a mandatory sentence or a minimum sentence. The commitment of these defendants to the Iowa training school for boys could be accomplished by entry of an order in the district court expressing an election by the Court to not impose judgment of conviction or a sentence of life imprisonment, and directing the transfer of the cases to the juvenile court for further proceedings, pursuant to section 232.20.

However if the district court elects to impose judgment of conviction, a commitment to the Iowa training school for boys still may be accomplished under section 242.6. However where the court acts pursuant to section 242.6 the court cannot impose imprisonment for a term of years, but must commit the minor to that institution for such period until said minor reaches the age of 21 years. In other words, where the district court proceeds to act under section 242.6 the punishment otherwise prescribed by statute for the commission of a criminal act (in this instance section 698.1), is not controlling. In the situation here involved the commitments would in each case be to the institution until the defendant reaches the age of 21 years, even though such date would in the case of the four minors who are now 16 years of age, occur prior to the expiration of the minimum five-year period of punishment provided in section 698.1.

This view of it is strengthened by reference to the manner in which sections 232.20, 232.30 and 242.6 were originally enacted. In the 1897 Code there was no provision for a juvenile court. The only provision for commitment in criminal cases to the state training school was con-

tained in section 2708 of said Code, which appeared in chapter 8, Title XIII, entitled "Industrial School." Said section in part provided:

"When a boy or girl over the age of 7 years and under 16, of sound mind, shall be found guilty in any court of record of any crime excepting that of murder, the court in its discretion may, instead of entering judgment of conviction, order and direct the party to be sent to the industrial school, if a boy to the school at Eldora, if a girl to that at Mitchellville, which order, certified by the clerk of the court under its seal, shall be sufficient authority for his or her transfer to and confinement in said school."

A further provision contained in this same section directed that all commitments made thereunder should be until the boy or girl arrives at majority. Under this statute there can be no doubt but that commitments made to the training schools could not be made for a term of years but were required to be made, in all cases, until such time as the minor involved reached the age of 21 years.

The first provisions for a juvenile court appeared in the Acts of the 30th G. A., as chapter 11 thereof. Said legislative act appeared in the 1913 supplement to the Code as chapter 5-B, sections 254-a13 to 254-a47 inclusive, the title of the chapter being "Juvenile Court." In the codification of 1924, chapter 5-B became chapter 180 of the 1924 Code, under the title: "Care of Neglected Dependent, and Delinquent Children." The first provision of section 2708, set out above was written and revised, and after being so rewritten and revised, appeared in part in section 3636 (now 232.20) as part of chapter 180, and in part in section 3690 (now section 242.6), as part of chapter 183, entitled "Training Schools." The provision for commitment until the child attains the age of 21 was placed in a third section of the Code, to-wit, section 3649, (now section 232.30), and was also in chapter 180. We believe this indicates a legislative intent to retain a method whereby minors convicted of certain crimes could be committed to the training schools rather than to penal institutions, and to indicate that such commitments should continue to be subject to the provisions of section 232.30, so that such commitments would be not for a term of years but rather until such time as the convicted minor reaches his or her majority, in the same manner as such commitments were required previously to be made under Section 2708. In other words, we believe that section 232.30 is intended to be a limitation on the exercise of the discretionary power which is conferred upon the district court by section 242.6, and where a commitment is made under said section, a commitment for a term of years cannot be made, nor can any provision be made for the transfer of a defendant to a penal institution at such time as he reaches his majority.

Therefore it is our opinion that if the district court proceeds by virtue of section 242.6, that the judgment should adjudicate the guilt of the defendants and sentence them to confinement in the state training school for boys until such time as they reach the age of 21, and no provision for confinement for a term of years should be made. It would also be proper to have the judgment entry recite that it is made pur-

suant to the provisions of section 242.6 and section 232.30 of the 1946 Code.

September 27, 1947

MOTOR VEHICLES: Financial responsibility act—public vehicles. The motor vehicle financial and safety responsibility act has no application to the authorized operator of a vehicle owned by the United States, the state of Iowa, or any political subdivision or municipality nor to the said owner thereof.

Mr. Alfred W. Kahl, Commissioner, Department of Public Safety: You have inquired as "to the application and effect of Chapter 172 of the Acts of the 52nd General Assembly titled 'Motor Vehicle Financial and Safety Responsibility Act' on owners and operators of public owned motor vehicles."

Section 33 of the Act appearing under the general provisions thereof is designated "Exceptions" and reads as follows:

"This act shall not apply with respect to any motor vehicle owned by the United States, this state or any political subdivision of this state or any municipality therein; nor, except for sections 4 and 26 of this act, with respect to any motor vehicle which is subject to the requirements of section three hundred twenty-five point twenty-six (325.26) and section three hundred twenty-seven point fifteen (327.15), Code 1946."

Before analyzing the provisions of this section, we wish to make the general observation that the motor vehicle financial and safety responsibility Act as passed by the 52nd General Assembly of Iowa in no way purports to change or affect the existing laws of Iowa as to the legal liability of any owner or operator of a motor vehicle operated within this state. The Act merely provides for a method of depriving certain operators and owners of the privilege of operating or using a motor vehicle within this state if there is a failure to file a report of accident as required by law, or inability to make a showing as to present financial responsibility when required by you under the authority granted to you in the Act. It also provides that in certain instances these privileges, which have been already suspended, shall not be reinstated unless and until certain conditions have been met and until proof is given as to future financial responsibility.

An examination of the entire act reveals that the method of depriving the operator of the privilege of driving is by suspension of the license to operate, and that of depriving the owner of the use of his motor vehicle is by the suspension of the registration certificate and registration plates issued under the laws of this state pertaining to his motor vehicle. The Act contains no provision for action against the motor vehicles themselves.

Turning now to the effect of the provision contained in section 33 of the Act, set out above, regarding publicly owned motor vehicles, we find the legislature has said "This act shall not apply with respect to any motor vehicle owned by the United States, this state, or any political subdivision of this state, or any municipality therein;" (underscoring ours). It is clear that this provision makes the law inapplicable

with respect to the suspension of the owners' registration or registrations on such motor vehicles. The question is whether the provision makes the law inapplicable with respect to the employee who is in actual physical control as an operator of such a motor vehicle at the time of the accident. In order to determine this we must take the Act as a whole and determine therefrom a construction consistent with the legislative intent as evidenced by the language used throughout the Act.

We have made reference to the fact that the Act operates only as against licenses, registration certificates and plates, as distinguished from the motor vehicles themselves. To determine the intent of the legislature when they used the phrase "any motor vehicle" in the first portion of section 33, as quoted above, we must examine the last portion of that section. Section 325.26 of the 1946 Code of Iowa requires a motor carrier to file "an insurance policy, policies, surety bond or certificate of insurance" with the Iowa state commerce commission before they will be granted a certificate to operate. Section 327.15, 1946 Code of Iowa, contains a similar provision as to a truck operator before he shall be granted a permit to operate. Here the legislature used identical language in saying that the Act should not apply with respect to "any motor vehicle" which is subject to the requirements of the two sections just discussed. It will be noted, however, that they expressly provide that sections 4 and 26 of the Act should be applicable. Section 4 of the Act applies solely to the operator in that he shall have his license suspended for failure to make reports of traffic accidents. Section 26 has reference primarily to the operator in that it provides for the issuance of a restricted operator's license under certain circumstances. There are many other provisions in the Act which would be applicable to the operators of these carriers and trucks were it not for this limitation as expressed by the legislature. It is obvious then, that by excluding "any motor vehicle" subject to section 325.26 and section 327.15, 1946 Code of Iowa, they intended to exclude both the owner and operator from all provisions of the Act other than those contained in sections 4 and 26 which should remain effective as against the operator. In that part of section 33 dealing with public owned motor vehicles we find a complete exclusion of the "motor vehicle" with no provision whatever that any section or part of the Act shall remain applicable to anyone. Therefore, it must have been intended to exempt both the owner and operator of such a motor vehicle from all provisions of the Act.

The conclusion reached herein finds support in the decision of the supreme court of Minnesota in the case of City of St. Paul vs. Hoffman, 25 N. W. 661. In that case the court held that the provisions in the Minnesota safety responsibility Act exempting therefrom "any motor vehicle owned and operated by the United States, this state or any political subdivision thereon, or any municipality therein", excluded drivers of such vehicles from suspension of their drivers' license under the Act. In their discussion, the court stated that in their opinion the obvious purpose of the exemption was to relieve municipalities and others that were exempted from embarrassment in the performance

of their functions by finding the discharge of such functions hampered by the lack of licensed drivers.

It is, therefore, our opinion that the motor vehicle financial and safety responsibility Act has no application to either the owner or operators authorized to operate the motor vehicle at the time of the accident, if the owner be the United States, the state of Iowa, or any political subdivision thereof, or any municipality within the state of Iowa.

October 2, 1947

SCHOOLS AND SCHOOL DISTRICTS: Local school matters within jurisdiction of local board. The exclusive jurisdiction and powers vested in the local school board to administer affairs of the local school, including the rule for the admission of pupils is not superseded by the county board of education under chapter 147, Acts of the 52nd General Assembly.

SCHOOLS AND SCHOOL DISTRICTS: Local board's power to raise age of admission. The local school board has no power to raise the limit of the age of admission from five to six at a fixed date as a prerequisite for enrollment as beginners.

SCHOOLS AND SCHOOL DISTRICTS: Accepting beginners under five years at opening of school. A child who is five years old at the opening of school may be enrolled as a beginner, however, local boards may provide by reasonable rules that any child who is under five at the opening of school, but will attain such age within a reasonable time thereafter, is entitled to school privileges. Determination of a reasonable time is a legal discretion and limited school and teacher facilities may be considered.

SCHOOLS AND SCHOOL DISTRICTS: Pupils transferring to another school—what rules govern. Pupils transferring from one district to another are subject to the rules of admission of the district to which they transfer.

Miss Jessie M. Parker, Superintendent, Department of Public Instruction, Attention R. A. Griffin: We are in receipt of your letter of the 8th ult. requesting opinion in the following situation:

"Because of the many inquiries coming from school officials, the department of public instruction would appreciate an official interpretation of section 282.1 Code 1946 (4268) and those related thereto relative to age of children who enroll in the public schools as beginners.

1. May local school authorities, through their power to make rules and regulations, limit this enrollment to one beginning class each year and that when school opens in September?

2. May they raise the age from 5 to 6 years at a fixed date, as a requisite for the enrollment of beginners?

3. Must normal children who have reached their 5th birthday on or before school opens be enrolled as beginners?

4. What if any discretion would local school authorities have to enroll beginners who will be 5 years old within a reasonable time after school opens in the fall?

5. If so what would constitute a reasonable time?

6. If a board refuses to enroll the near 5 year olds living in the district, and the parents enroll them in a school that will accept them,

may the parents on the 5th birthday of these children, transfer them to their home school district and require the board thereof to enroll them as a transfer pupil, and not as a new enrollee?

7. What authority, if any, does the county board of education have in cases of this kind?

In other words, just how far may local school authorities go under the power to make rules and regulations to control the enrollment of normal beginners in the circumstances set out herein?

Since this is a matter of immediate concern to so many public schools, an early reply will be appreciated."

In reply to the foregoing, we would advise that we approach answer to the foregoing, knowing that both by constitution and statute, provision for the education of the youth of the state, is an imperative duty of the state and its subdivisions. Article IX, section 12 of the constitution provides as follows:

"The board of education shall provide for the education of all the youths of the state, through a system of common schools and such school shall be organized and kept in each school district at least three months in each year. Any district failing, for two consecutive years, to organize and keep up a school as aforesaid, may be deprived of their portion of the school fund."

And the right to attend public schools is fixed by the following rule, stated in Trusler's Essentials of School Law, as follows:

"The right to attend the public schools is not a private right held by an individual separately from the community at large, but is a political right held in common. It is not a privilege or immunity appertaining to a citizen of the United States as such; and therefore no person can lawfully demand admission as a pupil because of the mere status of citizenship. It is merely a privilege created by a state for its own citizens. The Fourteenth Amendment of the Constitution of the United States, however, forbids a state to 'deny to any person within its jurisdiction the equal protection of the laws,' and consequently no child residing within a state can be arbitrarily denied school privileges. But such privileges are to be enjoyed upon such reasonable conditions and restrictions as the lawmaking power, within constitutional limits, may see fit to impose; and, within these limits, the question, what terms and restrictions will best subserve the end sought in the establishment and maintenance of the public schools, is a question solely for the legislature, and not for the courts."

And to effectuate that purpose statutes have been enacted for the establishment and maintenance of schools for the appropriate education of such Iowa youths. And to further effectuate that purpose, certain powers have been bestowed upon school districts and their operating officials in their administrative discretion to make rules, with respect to the government of such pupils to the public schools so established. Illustrative of the provisions are sections 274.1, 274.2, 280.16, 282.1 and 282.3, Code of 1946, in terms as follows:

"Each school district now existing shall continue a body politic as a school corporation, unless hereafter changed as provided by law, and as such may sue and be sued, hold property, and exercise all the powers granted by law, and shall have exclusive jurisdiction in all school matters over the territory therein contained."

"The provisions of law relative to common schools shall apply alike to all districts, except when otherwise clearly stated, and the powers given to one form of corporation, or to a board in one kind of corporation, shall be exercised by the other in the same manner, as nearly as practicable. But school boards shall not incur original indebtedness by the issuance of bonds until authorized by the voters of the school corporation."

"The board of any independent school district upon the petition of the parents or guardians of twenty-five or more children of kindergarten age, may establish and maintain such a kindergarten in said district. No petition shall be effective unless the school in connection with which such kindergarten is desired is named in the petition and all persons who shall be qualified to sign such petitions shall be residents of the section or neighborhood served by that school. The board of education shall be the judge of the sufficiency of the petition. Any kindergarten teacher shall hold a certificate certifying that the holder thereof has been examined upon kindergarten principles and methods, and is qualified to teach in kindergartens."

"Persons between five and twenty-one years of age shall be of school age. A board may establish and maintain evening schools for all residents of the corporation regardless of age and for which no tuition need be charged. Nonresident children and those sojourning temporarily in any school corporation may attend school therein upon such terms as the board may determine."

"The board may exclude from school children under the age of six years when in its judgment such children are not sufficiently mature to be benefitted by attendance, or any incorrigible child or any child who in its judgment is so abnormal that his attendance at school will be of no substantial benefit to him, or any child whose presence in school may be injurious to the health or morals of other pupils or to the welfare of such school."

And respecting the power vested in the local school board to make rules concerning its own government and that of teachers and pupils, section 279.8, Code of 1946, provides as follows:

"The board shall make rules for its own government and that of the directors, officers, teachers, and pupils and for the care of the schoolhouse, grounds, and property of the school corporation, and aid in the enforcement of the same, and require the performance of duties by said persons imposed by law and the rules."

However, any rule adopted by the board in pursuance of the foregoing authority must be reasonable, and of course, this will include a rule with respect to admission of pupils. Such was the view of the appellate court of Illinois in the case of Board of Education vs. Bolton, 85 Ill. App. 92, where it appeared that Bolton in September had sent his daughter to school in the district, but she was sent home because she was not of school age. She did attain the required age of six years in October, and thereupon was again sent to school but acceptance of her as a pupil was denied, stating that she could not enter school until on or about April, 1898. It also appeared the school district had adopted the custom of permitting students who arrived at school age during the first month of the fall and spring terms, commencing on or about September first and April first, to enter school at that time. The court there said:

"In the exercise of these powers, the rules and orders made by the defendants must not be unreasonable, or such as to defeat the wise and beneficent purposes of the school law, and if reasonable, necessary, and such as will best afford to all the children in their district, entitled to attend public schools, an opportunity to receive the benefits of proper instruction, such reasonable and necessary rules and orders should be sustained by the courts."

And with respect to whether the rule that the board was putting into effect, was reasonable or unreasonable, the court said:

"* * * * The law makes it the duty of the proper board of each district 'to establish and keep in operation * *a sufficient number of free schools for the accommodation of all children in the district over the age of six and under twenty-one years, and shall secure for all such children the right and opportunity to an equal education in such free schools.' Rev. State., Chapt. 122, Art. 5, Sec. 26, Par. 5.

It was said by the Illinois supreme court, in the case of The People ex rel v. Board of Education, 127 Ill. 613, that by the statutes of this state, the duty of providing schools for the education of all children between the ages of six and twenty-one in their district, is imposed,' and in the case of Potts v. Breen, 167 Ill. 67, that 'the right or privilege of attending the public schools is given by law to every child of proper age in the state.'

In determining whether the rule in question was a reasonable one, under the circumstances, we must inquire whether it was calculated to promote the objects for which free schools were established. In Rulison v. Post, 70 Ill. 567, it is said:

'In the performance of their duty in carrying the law into effect, the directors may prescribe proper rules and regulations for the government of the schools of their district, and enforce them; * * * but all such rules and regulations must be reasonable and calculated to promote the objects of the law—the conferring of such an education upon all, free of charge. The law having conferred upon each child of proper age the right to be taught the enumerated branches, any rule or regulation, which, by its enforcement, would tend to hinder or deprive the child of this right, cannot be sustained. All rules must be adapted to the promotion and accomplishment of this great paramount object of the law.'

Appellant's child was of proper school age and there was no reason assigned for refusing her admission to the school, save the rule prohibiting children who had just arrived at school age from entering the schools at any time except during the first month of the fall and spring terms. The child had arrived at school age on October 9, only thirty-one days after the fall term of school commenced but she was refused admission until March 28, 1898, and thereby lost between five and six months schooling, during that school year; in the meantime the fall term had ended and the winter term had commenced, and also expired.

We are of opinion that the rule which caused appellee's child, who arrived at school age only thirty-one days after the fall term commenced, to lose the benefits of the free school, not only during the remaining months of that term, but also during the whole of the following winter term, was not a reasonable one or calculated to promote the objects of the law."

And as between the local school board and the county board of education in the field in which address is here made, their respective author-

ity generally, is set forth in 56 C.J., title "Schools and School Districts", as follows, insofar as the power of the local board is concerned, the text states:

"The board of education, or of directors, trustees, or the like, of a school district or other local school organization, being the governing body of the district, has general power, which in some states is expressly recognized by statute, not only to make such parliamentary rules for the convenient dispatch of its own business as it may deem proper, but also to make reasonable rules and regulations for the administration of the schools and the conduct of the affairs of the district, and to change such regulations from time to time, except, of course, that no such rule or regulation may conflict with or contravene any statute or constitutional provision, and subject to the rule that a board may not restrict or diminish its own powers. The attempted adoption of an existing statute as a rule or by-law of the board, is, however, a nullity. Any proper rule duly adopted or promulgated as the force of law within the board's field of action while it remains in effect; and it has been held that persons dealing with the board are chargeable with notice thereof. The enactment of a statute which conflicts with any rule or regulation repeals it."

And with respect to the power of the county board, the text states:

"A county board of education or of school trustees, although a creature of the law, may exercise any powers authorized by law, it however has in general only such powers as are expressly conferred upon it by constitutional or statutory provision or powers which are incidental to those expressly conferred. When acting within its authority its acts partake of a legislative character, and cannot be attacked collaterally. County school boards are ordinarily given broad discretion in the administration and supervision of schools, and an exercise of honest judgment, although erroneous, is not an abuse of such discretion, and is not subject to review, but it must not act arbitrarily, or unreasonably. There is no requirement that a board follow its past policy in matters within its discretion. A statute investing a county board of education with discretionary powers as to the establishment and discontinuance of high schools is not unconstitutional."

And the separation of the fields in which the local school board and the county board of education operate is specifically provided by section 3 of chapter 147, Laws of the 52nd General Assembly, (not operative until April 1, 1948) provide:

"The county board shall exercise such powers as are specifically assigned to it by law. In general their powers and duties shall relate to matters affecting the county school system as a whole rather than specified details relating to individual schools or districts. It shall be the duty of the county board after considering the recommendations of the county superintendent to exercise the following general powers:

1. The county board shall determine and adopt such policies as are deemed necessary by it for the efficient operation and general improvement of the county school system.

2. The county board shall adopt such rules and regulations as in its opinion will contribute to the more orderly and efficient operation of the county school system.

3. The county board shall have the power to perform those duties and exercise those responsibilities which are assigned to it by law and which are not in conflict with the powers and duties assigned to the local board by law, in order to improve the county school system and carry out the objectives and purposes of the school laws of Iowa."

In view of the foregoing established differentiation between the field of operations of the local board and the county board, we are not disposed to hold that section 18, subsection 11, chapter 147 of the Laws of the 52nd General Assembly has force and effect to supersede the exclusive jurisdiction and powers vested in the local board to administer the affairs of the local school, including the rule for the admission and government of its pupils. Section 8, of the foregoing section, is this—"The county superintendent shall, under the direction of the board, exercise the following powers and duties:" Subsection 11—"establish rules and regulations for admitting, classifying, promoting, and graduating pupils to or from the various rural schools in the county school system within the limits prescribed by law." To admit that such power to establish a rule for admission of children of the local school, is vested in the county superintendent, would in fact, be an implied repeal of the previous statutes herein cited, bestowing upon the local school district the very powers which would be exercised by the county superintendent. Implied repeals, of course, are not favored by the law, but it seems to us we are not limited to that reason because section 11, heretofore quoted, only prescribes authority in the county superintendent under the direction of the board, within the limits prescribed by law. The jurisdiction of the county board, does not extend to the supervision, control and administration of individual schools in the various schools making up the county school system. Unless we are to hold that the power vested in the county superintendent to fix rules for admission, implies such power exists also in the county board, then the exercise of the power by the county superintendent would be a contravention of the power specifically vested in the county board by the foregoing statute, to wit: that the powers and duties of the county board shall relate to the county school system as a whole, rather than specified details relating to individual schools or districts. We are not so disposed.

In State ex rel. Stoutmeyer vs. Duffy, 7 Nev. 342; 8 Am. Rep. 713, the implied power rests in the local school authorities to admit or to deny admission to the public school. There it was said:

"The power to admit to the public schools is not in words conferred upon trustees in this state, but it is so inseparably connected with their specified powers and so inevitable a conclusion therefrom, that no argument is needed to prove its necessary existence. Stats. 1864, 1865, p. 413; 1867, p. 89. The trustees have general control and supervision and while they may not see fit to require any applicant of school privileges to obtain from them an order of admission, they have the power to make such a regulation; and, upon the other hand, every person so qualified under the law to attend the public schools is entitled to such an order upon due demand."

Based upon the principles set forth in the foregoing, we are of the opinion

1. The local school board has no power to raise the limit of the age of admission from five years to six years at a fixed date, as a prerequisite for the enrollment of beginners. Such a rule is arbitrary and unreasonable.

2. When normal children have reached their fifth birthday before the opening of school they may be enrolled as beginners. No child, as a matter of right, is entitled to school privileges, who has not reached the age of five at the opening of school. If no rule as to admission has been adopted by a school district, a child attaining the age of five after the opening of the school year is entitled to admission at such time. However, the local school authorities may, under the principles and statutes hereinbefore set forth, provide by reasonable rules that any child who is under the age of five years at the time of the opening of school, but will attain such age within a reasonable time after the opening, is entitled to such privileges. Such rules may finally provide that admission after such reasonable time will be denied for that term. What would be a reasonable time, under the foregoing limitations, is to be determined in the legal discretion of the local authorities, based upon the factors set forth in section 282.3, Code of 1946, hereinbefore exhibited. Said board in exercising its legal discretion in adopting rules of admission may take into consideration, together with other circumstances, such factors as limited school and teacher facilities.

The rules of admission when they are such as come within the terms of the statutes are presumed to be reasonable. See

Smith vs. Dist. Twp., 42 Iowa 522
Burdick vs. Babcock, 31 Iowa 526
Kenzer vs. Ind. School Dist., 129 Iowa 441

3. Pupils, when transferring from one school district to another district, are subject to the rules of admission adopted by the district to which they transfer.

October 6, 1947

GAMBLING: Slot machines must be destroyed and not sold under execution. Slot machines, such as used for gambling, have no status as property, therefore, when seized and confiscated by legal process they may not be sold but must be destroyed as provided by law.

Mr. Robert M. Underhill, County Attorney, Onawa, Iowa.: We wish to acknowledge receipt of your recent letter in which you ask for our opinion on a matter which may be thusly stated:

May a judgment of forfeiture entered in a proceeding conducted under the provisions of chapter 751, Code of Iowa, 1946, direct the sale of the property seized, rather than destruction if the article involved is a slot machine?

Reference to section 751.25 contained in chapter 751 of the 1946 Code of Iowa, as follows:

"Judgment of forfeiture and destruction. If the magistrate finds that the property or any part thereof seized under the search warrant is of the illegal nature or character alleged in the information, he shall enter judgment of forfeiture to the state of said property, or of the part thereof, as the case may be, and shall, in addition to said judgment of forfeiture, enter an order directing the immediate destruction of all such property which does not have a legitimate use and the sale of all property other than money which may be used legitimately, unless said latter property is otherwise disposed of as in this chapter provided."

and to section 751.26, as follows:

"Execution—sale—destruction. Execution shall issue for the sale of all property except money, which may have a legitimate use, and for the destruction of all property having no legitimate use. Sales shall be made as provided by section 626.76. Due return of the execution shall be made thereon by the officer executing it."

reveals that the immediate destruction of all property "which does not have a legitimate use" shall be ordered, and that execution for the sale shall issue only of property "which may have a legitimate use."

In determining whether a slot machine is property and as such, susceptible of a legitimate use, we must be guided by the statutes of this state and the decisions of our courts interpretative thereof, rather than those of any other jurisdiction. The statutes cited above clearly refer to and contemplate a determination of the status of an article as property, and its legitimate use, according to the law of the state of Iowa. The court which enters the order of forfeiture and issues the execution, and the officers thereof conducting the sale or effecting the destruction of the subjects of forfeiture are part of the judicial system of this state; the article is at all times during the pendency of the proceedings situated in this state; and in case an order for sale is entered, the sale would be held and completed, and possession of and title to the article would be delivered to the purchaser, in this state. The entire proceeding is a remedy created by the law of this state, and under the principles of that field of law commonly referred to as "Conflicts of Law", would be governed entirely by the lex fori (the law of the forum).

Applying the law of the forum, it has been held by our Supreme Court in State v. Cowen, 231 Iowa 1117, 3 N. W. 2d 176, that slot machines have no status as property in this state.

Referring to section 726.5 of our 1946 Code (section 13210, Code of 1939), which is as follows:

"Possession of gambling devices prohibited. No one shall, in any manner, or for any purpose whatever, except under proceeding to destroy the same, have, keep, or hold in possession or control any roulette wheel, klondyke table, poker table, punchboard, faro, or keno layouts or any other machines used for gambling, or any slot machine or device with an element of chance attending such operation."

the court said (3 N. W. 2d 176, at 180) as to slot machines which are specifically mentioned in said statute, that:

"Some of the articles described in the indictment under section 13210 are unlawful under all circumstances, except in process of seizure. We are satisfied that in no case can there be any such property right unless there is a legal right to possession, and a right to transfer or to dispose of as one's own. Unless there is such legal right the law affords no protection, and it would naturally follow that there is no property right.

Slot machines are gambling devices—Rankin v. Mills Novelty Co., 186 Ark. 561, 32 S. W. 2d 161; State v. Doe, 227 Iowa 1215, 290 N. W. 518; State v. Ellis, 200 Iowa 1228, 206 N. W. 105; State ex rel Manchester v. Marvin, 211 Iowa 462, 233 N. W. 486; State v. Doe, 221 Iowa 1, 263 N. W. 529—and are made so by the statute; and the having,

keeping, or holding in possession or control of the machine, is outlawed." Since there is no property right in a slot machine in this state, and no legal right in this state to possess, transfer and dispose of the same, and if the having, keeping, or holding in possession or control of a slot machine is outlawed, then it follows that under no circumstances can there be a legitimate use of a slot machine in this state.

It is therefore our opinion that a court may not order a sale of a slot machine against which an order of forfeiture is entered under the provisions of chapter 751 of the 1946 Code, but must direct its immediate destruction under the mandatory language appearing in sections 751.25 and 751.26.

October 9, 1947

MILITIA: Wages from both federal and state governments. A member of the national guard, performing services for both federal and state governments, in time of peace, may be paid partially from federal funds and partially from state funds.

Charles H. Grahl, Adjutant General: We acknowledge receipt of yours of the 24th ult. as follows:

"It is requested that this office be furnished with an attorney general's opinion concerning the legality of an employee of this department being paid partially from state funds and partially from federal funds.

The point in question concerns an individual we wish to employ at Camp Dodge, Iowa. There are federal funds available to pay him a portion of his salary but in order that he might receive a living wage, it will be necessary to augment the federal funds available by state funds.

In view of the fact that the national guard is both a state and federal force, it is requested that this office be furnished with an opinion as to whether we may be authorized to pay an employee from both state and federal funds."

We are advised, in addition to the statement of your letter, that the individual to whom reference is made, would be employed to care for the material and other property, of the federal government in the hands of the national guard, and in addition thereto will perform clerical services as directed. In reply thereto, we advise that the status of the national guard as related to the federal government is pertinent in this situation. The national guard is the acting militia of the state, taken from the body of the militia. With respect to such militia, Article I, section 8 of the United States Constitution, invests the Congress with the power.

"To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the Militia according to the discipline prescribed by Congress: * * * *

The foregoing power, conferred by the constitution, according to 36 Am. Juris. page 221, title "Military"

"gives Congress power to provide for calling out the militia to execute the laws of the Union, suppress insurrection and repel invasions, and to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress. But these provisions do not give to Congress powers over the militia of the states beyond the specific objects enumerated. The power of Congress to organize, arm, and discipline the militia, being unlimited, except in the two particulars of officering or training them, may be exercised to any extent that may be deemed necessary by Congress."

Insofar as the power of the state over the militia, is concerned, that originates in the Constitution of the state, Article VI, section 1, providing as follows:

"The militia of this state shall be composed of all able bodied white male citizens, between the ages of eighteen and forty-five years, except such as are or may hereafter be exempt by the laws of the United States, or of this state, and shall be armed, equipped and trained, as the general assembly may provide by law."

And a textbook statement of the extent of this constitutional power is contained in 36 Am. Juris. 213 wherein it is stated:

"The Constitutions of the several states universally provide for the organization and maintenance of a well regulated militia, and grant to the legislature the necessary authority to carry that provision into effect. The power of state governments to legislate concerning the militia existed and was exercised before the adoption of the Constitution of the United States and its exercise was not prohibited by that instrument, it remains with the states, subject only to the paramount authority of acts of Congress enacted in pursuance of the Constitution of the United States. It seems to be indispensable that there should be concurrent control over the militia in both governments within the limitations imposed by the Constitution. Accordingly, it is laid down by text writers and courts that the power given to Congress to provide for organizing, arming, and disciplining the militia is not exclusive. It is defined to be merely an affirmative power, and not incompatible with the existence of a like power in the states; and hence the conclusion is that the power of concurrent legislation over the militia exists in the several states with the national government. When Congress has once acted within the limits of the power granted in the Constitution, its laws for organizing, arming, and disciplining the militia are supreme, and all interferring regulation adopted by the states are thenceforth suspended, and for the same reasons all repugnant legislation is unconstitutional. That principle applies, however, only where Congress has assumed control of the militia under granted powers, and does not militate against the construction uniformly given to the Constitution that a state may organize and discipline its own militia, in the absence of or subordinate to the regulations of Congress. It is only repugnant and interfering state legislation that must give way to the paramount laws of Congress constitutionally enacted."

Thus it will be seen by the foregoing that as between the federal government and the state government, the powers over the militia, in some respects are mutually exclusive, and in some respects concurrent. Under such coordinated powers, the Congress, as part of the national defense Act, provided by an Act of June 25, 1938 (1152 Stat. 1173), for

the compensation from monies appropriated under the provisions of the national defense Act, of help for the care of federal material, etc., in the hands of the national guard. Specifically, the Act provided as follows:

"That moneys hereafter appropriated under the provisions of the national defense Act, as amended, for compensation of help for care of material, animals, armament, and equipment in the hands of the national guard of the several states, territories, and the District of Columbia shall be available for the hire of caretakers who may also perform clerical duties incidental to their employment and such moneys may be used as supplemental to money appropriated by the several states, territories, and the District of Columbia for the support of the national guard: Provided, that nothing herein contained shall be construed to prevent the ultilization of the services of such caretakers on duties other than those indicated above, if such additional services do not interfere with the complete performance of the duties for which they are employed under the provisions of this Act: Provided further, That payments heretofore made for said help which now stand disallowed or would hereafter be disallowed but for this Act are hereby ratified and validated as to the disbursing officers making the same in such amounts only as are approved by the Secretary of War, whose determination shall be final and conclusive, and the comptroller general of the United States is hereby directed to allow credit in the accounts of said disbursing officers for and on account of such payments in said amounts: And provided further, That nothing herein shall be construed to prevent the collection from the personnel concerned of any amounts determined by the secretary of war to be due the United States."

And while the legality of a state employee being paid partially from state funds and partially from federal funds, cannot be doubted, under the foregoing authorities, his status as a state officer or state employee is not effected. In an opinion rendered January 31, 1939, the comptroller general of the United States, after due consideration of this question concluded in these words:

"While appointment of a national guard officer as property and disbursing officer of the United States by the governor of the state is subject to the approval of the secretary of war under the terms of section 67 of the National Defense Act, and his pay is derived from funds appropriated by the United States for the support of the national guard, it appears clear that creation of the position was primarily designed to more effectively assist the various states in the protection of federal property and equipment, etc., furnished to the states for the use of its national guard for which the governors or the state quartermaster officers previously had been responsible. The property and disbursing officer appointed under section 67 may be removed by the governor of the state who appointed him, without approval of the secretary of war, his status not differing materially from that of the state officer appointed under section 14 of the act of January 21, 1903, his title or designation under the provisions of said section 67 of the national defense Act having no significance.

In view of the history of the militia and the national guard, including the constitutional reservation in the states of the power of appointing the officers thereof and for training and disciplining as prescribed by the Congress, and the primary responsibility of the various states for the care and protection of the United States property and equipment furnished to the state national guard, it appears reasonable that the property and disbursing officers of the United States appointed by

the governors of such states are in fact state officers and not officers or employees of the United States within the meaning of section 1 of the Act of March 14, 1936, 49 Stat. 1161; consequently, they would not be entitled to annual leave as therein provided under the executive regulations issued pursuant thereto. Your question is answered accordingly."

We are, therefore, of the opinion that a member of the national guard, performing services of the character here stated for the federal government and the state of Iowa, in time of peace, may legally be paid partially from federal funds and partially from state funds.

October 9, 1947

STATE OFFICERS AND DEPARTMENTS: Accepting gifts not authorized. The state board of vocational education is not authorized by any legislative enactment to receive funds from the Iowa Restaurant Owner's Association.

Mr. Ray E. Johnson, Comptroller: We acknowledge receipt of yours of the 1st inst. in which opinion is requested in the following situation:

"The state board for vocational education have been receiving approximately $750.00 each quarter from the Iowa Restaurant Owner's Association. This money has been credited to their appropriation as received and is used to pay an itinerant teacher for restaurant work throughout the state.

I respectfully ask for an official opinion as to whether or not there is any legal authority for the acceptance of the contributions from the Iowa Restaurant Owner's Association to be used in connection with appropriations made to that department."

In reply thereto, we advise that the department of vocational education is a state agency created by the legislature, and its powers and duties are prescribed by chapter 258, Code of 1946. Examination of such chapter discloses that the only express authority vested in the vocational board of education, to accept moneys other than state funds is the provision therein made for the acceptance of federal aid, including therein the method of control and expenditure thereof. This express power, to accept federal funds, vested in the vocational education board excludes any inference to be drawn that the legislature intended that any other funds than those expressly provided for should be accepted or be under the control of that board. Insofar as the acquisition of property by the state or its agency is concerned, the legislature alone may exercise the power to acquire and enjoy such property. It is textbook law. In 59 C.J. 276, title "States" the rule is stated:

"A state has in general the same rights and powers in respect of property as an individual. It may acquire property, real or personal, by conveyance, will or otherwise, and hold or dispose of the same or apply it to any purpose, public or private, as it sees fit. The power of the state in respect of its property rights is vested in the legislature and the legislature alone can exercise the power necessary to the enjoyment and protection of those rights, by the enactment of statutes for that purpose; and, where the state has not given its consent to the acquisition of property in a particular way, it is not entitled thus to acquire it."

We are, therefore, of the opinion that the state board for vocational education is not authorized by legislative act, to accept the sum of $750.00 each quarter from the Iowa Restaurant Owner's Association, and is limited to such funds and the use thereof as are presently prescribed by statute. The state, however, is authorized, under the provisions outlined in section 565.3 and 565.4, Code of 1946, to accept gifts, but whether the state can accept the gift in question, under the provisions of chapter 565, is not involved in the posited question and is not here determined.

October 9, 1947

STATE OFFICERS AND DEPARTMENTS: Per diem compensation while attending convention. Members of the real estate commission, authorized by the executive council to attend a convention, are entitled to their statutory per diem.

Mr. Ray E. Johnson, Comptroller: We have yours of the 2nd inst. in which you request opinion in the following situation:

"The executive council of Iowa has authorized certain members of the Iowa real estate commission to attend a convention of the national association of license law officials to be held in San Francisco.

Section 117.12 of the Code, relating to the compensation of the Iowa real estate commissioners provides as follows:

'Compensation of commissioners. Each appointed member of the commission shall receive as full compensation for each day actually spent on the work of the commission the sum of ten dollars per diem and his actual and necessary expenses in the performance of duties pertaining to his office. The total per diem compensation of a single member of the commission shall not exceed five hundred dollars per annum.'

In connection with claims to be filed by members attending the convention an opinion is respectfully asked as to whether or not the ten dollars per diem can be claimed for the days going to, while attending, and days returning from the convention."

In reply thereto, we would advise you that this department has had occasion to consider a like situation insofar as members of the highway commission are concerned, and controlled by a statute in force in substantially like terms as the statute to which reference is here made, to-wit: section 117.12. Expression on the department's conclusion was announced on December 7, 1926 and the opinion there rendered, appearing now in the Report of the Attorney General for 1925-26 at page 479 in terms, is as follows:

"We wish to acknowledge receipt of your favor of the 29th in which you request our opinion as follows:

'Would a member of the highway commission, who has been authorized by the executive council to attend a meeting of the American Association of Highway officials, outside of the state, be entitled to a per diem of $10.00 for each day in traveling to and from and attending such convention?'

Section 4625, Code of Iowa, 1924, provides for the compensation of the state highway commission. This section reads as follows:

'4625. Compensation. Each appointive member shall receive ten dollars per day for each day actually employed in the work of the

commission, provided said compensation, for each commissioner, shall not exceed two thousand dollars per annum. Each member shall receive all actual necessary expenses incurred in the performance of his duties.'

Immediately following, section 4626 provides the duties of the commission. A reading of this section will disclose that the duties of the commission are broad and comprehensive. It is probably that the attendance of the members of the highway commission at certain gatherings or conventions outside of the state might not only be advisable but necessary for them to properly perform the duties imposed upon them by statute.

This matter was presented to the executive council of Iowa, who must have found that the attendance of the members of the highway commission at the meeting of the 'American Association of Highway Officials' was for the interest of the state, and therefore, within the duties to be performed by the commission.

In view of these facts, we cannot assume that the members of the highway commission were not in some manner employed in the work of the commission while attending the meeting referred to.

We are, therefore, of the opinion that the per diem claimed might properly be allowed and should be paid."

The foregoing controls the situation which you have presented and we confirm both the reasoning and the holding of the exhibited opinion. In our judgment, therefore, the members of the Iowa real estate commission, authorized to attend a convention of the national association of license law officials, to be held in San Francisco, are entitled to their statutory per diem.

October 16, 1947

INSANE PERSONS: Veterans—temporary custody by sanity commission—notice not necessary. The county insanity commission has plenary power to provide for the temporary custody of any person found to be insane, whether or not a veteran. Provision in chapter 130, Acts 52nd General Assembly as to notice to such person can be given no effect in view of section 229.2 of the Code.

Mr. Wm. W. Crissman, County Attorney, Cedar Rapids, Iowa: Receipt is acknowledged of your letter of October 2nd, 1947, which is as follows:

"The insanity commission for this county has requested that we obtain an opinion from your office concerning chapter 130, Laws of the 52nd G. A., with reference to mentally incompetent veterans. The language employed by the legislature in the first paragraph of said chapter 130 leaves the commission with considerable doubt as to whether they now have any authority to adjudicate and commit a veteran as being insane. Some of the questions arising out of the enactment of Chapter 130 may be stated as follows:

1. In view of the fact that said chapter 130 refers to the 'court' and nowhere mentions the commission of insanity, what authority does the commission now have relative to the adjudication of and commitment of a veteran?

2. If it is held that the term 'court' refers to the commission of insanity, what disposition can they make of a veteran that cannot be permitted to remain at large pending the commitment proceeding,

notice of which must be personally served on such veteran according to said chapter 130?

3. What notice of the commitment proceeding is to be served upon the veteran and by whom and within what time must the same be served?
4. If chapter 130 does refer to the commission of insanity, what disposition can the commission make of the veteran pending receipt of the certificate from the veterans administration or other agency as provided therein?"

Regarding your question as to what authority the commission of insanity now has relative to the commitment of a veteran alleged to be of unsound mind or otherwise in need of confinement, we refer you to an official opinion of this office dated July 24, 1947. The substance of that opinion was that original jurisdiction of committing persons of unsound mind to hospitals and other institutions is vested in the county commission of insanity by section 228.8 of the Code of 1946; that, although sections 229.17 and 229.19, Code of 1946, vest power of commitment on appeal in the court and chapter 783, Code of 1946 vests power in the court where insanity is claimed in criminal trials, the obvious legislative intent in enacting chapter 130, Acts of the 52nd General Assembly was to vest the powers and duties prescribed thereby in the committing body, which is the county commission of insanity.

Your question as to the power of the commission to provide for the custody of an alleged insane veteran pending the commitment proceedings, must be determined from an examination of the statutes existing prior to the enactment of chapter 130, Laws of the 52nd General Assembly, for the reason that this chapter does not purport to change the law in that respect. The commission's authority is contained in section 229.2, Code of 1946, which reads as follows:

"On the filing of such information, the commission, if satisfied that there is reasonable cause therefor, may require the alleged insane person to be brought before it and, to this end, may issue its warrant to any peace officer of the county. The commission may provide for the custody of such person until its investigation is concluded."

and section 229.16, Code of 1946, which is as follows:

"No person who shall be found to be insane shall, during investigation or after such finding, and pending commitment to the hospital, or when on the way there, be confined in any jail, prison, or place of solitary confinement, except in cases of extreme violence, when it may be necessary for the safety of such person or of the public, and if such person be so confined, there shall, at all times during its continuance, be some suitable person or persons in attendance in charge of such person; but at no time shall any female be placed in such confinement without at least one female attendant remaining in charge of her."

It is our opinion that under the sections just quoted they may provide for the custody of alleged insane persons until the investigation is concluded, regardless of veteran's status.

Your third question calls attention to that part of chapter 130, Acts of the 52nd General Assembly which provides: "The person whose commitment is sought shall be personally served with notice of the

pending commitment proceedings in the same manner as provided by the law of this state;" a consideration of this provision together with the provisions of chapter 228 and 229, Code of 1946, which embody the law of this state relative to the organization of the county commission of insanity and the procedure to be followed in the commitment of any alleged insane person leads to the ultimate conclusion that this part of chapter 130, Acts of the 52nd General Assembly, is not subject to being given any effect for the reason that there is no law in this state requiring service of a notice of the pending commitment proceedings before that commission.

It will be noted that under the provisions of section 229.2, as set out above, the commission "may require the alleged insane person to be brought before it and, to this end, may issue its warrant to any peace officer of the county."

It is our opinion, therefore, that the commission should disregard the provision as to notice and proceed under the provisions of section 229.2, Code of 1946.

In answer to your final question we think it only necessary to call attention to the fact that chapter 130, Acts of the 52nd General Assembly does not purport to vest in the commission any different power as to temporary custody after an adjudication of insanity than had theretofore existed under the law. This will be found in the following sections of the Code:

Section 229.24, Code of 1946; (as amended by section 5, Chap. 129, Acts of the 52nd G. A.)

"If any person found to be insane cannot at once be admitted to the hospital, or, in case of appeal from the finding of the commission, if such person cannot with safety be allowed to go at liberty, the commission of insanity shall require that such person shall be suitably provided for either in the county home or otherwise until such admission can be had, or until the occasion therefor no longer exists."

Section 229. 25, Code of 1946:

"Such patients may be cared for as private patients when relatives or friends will obligate themselves to provide such care without public charge. In such case the commission shall in writing appoint some suitable person special custodian who shall have authority and shall in all suitable ways restrain, protect, and care for such patient, in such manner as to best secure his safety and comfort, and to best protect the persons and property of others."

Section 229.26, Code of 1946:

"If care and custody of the patient is not provided as authorized in section 229.25 the commission shall require that he be restrained and cared for by the board of supervisors, at the expense of the county, at the county home or some other suitable place, and the commission of insanity shall issue its mandate to the board of supervisors, which shall forthwith comply therewith."

It is our opinion, therefore, in view of the sections just quoted that during the period pending receipt of the certificate from the veterans administration or other agency as provided in chapter 130, Acts of the

52nd General Assembly, the commission may resort to their general powers pertaining to temporary custody of any person found to be insane.

October 17, 1947

LABOR: Pay-roll deductions for labor organization purposes alone prohibited. Chapter 296, Acts 52nd General Assembly, has no application to pay-roll deductions for the Red Cross or Community Chest.

Mr. H. A. Grantham, Vice-Chairman, State Tax Commission, Des Moines, Iowa: You have made inquiry concerning an attorney general's opinion relative to pay-roll deductions authorized to cover Community Chest and Red Cross pledges and the effect of the provisions of chapter 296 of the Acts of the 52d General Assembly also known as Senate File 109. Please be advised that no attorney general's opinion has been issued relative to Community Chest or Red Cross pay-roll deductions.

The pertinent provision of chapter 296 is as follows:

"Sec. 5. It shall be unlawful for any person, firm, association, labor organization or corporation to deduct labor organization dues, charges, fees, contributions, fines or assessments from an employee's earnings, wages or compensation, unless the employer has first been presented with an individual written order therefor signed by the employee, and by his or her spouse, if married, in the manner set forth in section five hundred thirty-nine point four (539.4), Code 1946, which written order shall be terminable at any time by the employee giving at least thirty days written notice of such termination to the employer."

This section relates to labor organization dues, charges, fees, contributions, fines or assessments and each of the particular things specified in said provision must be read as if preceded by the word labor, namely, labor organization dues, labor charges, labor fees, etc. The provisions of this Act in no way relates to Community Chest and Red Cross pay-roll deductions and such items are not specifically set out in the Act nor within its express terms, and we hold that chapter 296 has no application to Community Chest or Red Cross pay-roll deduction authorizations.

The opinion of the attorney general's office dated May 26, 1947, written by James A. Lucas did not in any manner relate to the matters covered by this opinion, to-wit: Community Chest and Red Cross pay-roll deductions and this opinion is the only one of the attorney general relating thereto.

October 22, 1947

INSANE PERSONS: Warrant of commitment to "attending physician". The phrase "person's attending physician" for the purpose of effectuating chapter 129, Acts 52nd General Assembly is that physician designated by the commission under section 229.6 of the Code.

INSANE PERSONS: Executing warrant of commitment. The attending physician of one committed to an insane hospital may designate anyone capable to execute the warrant of commitment. Such persons are entitled to reimbursement for actual costs and expenses incurred but not in excess of five cents per mile for use of an automobile.

Mr. P. F. Hopkins, Chairman, Board of Control of State Institutions: Requests for interpretation of chapter 229, Code of 1946 as amended by chapter 129, Acts of the 52nd General Assembly, have been received by this office from numerous county attorneys and clerks of district courts throughout the state. The questions raised, although not identical, are of such a similar nature that we believe a general opinion is advisable.

Changes in the statute which have prompted the various questions were that by chapter 129, Acts of the 52nd General Assembly, the words: "person's attending physician or someone designated by said physician" were substituted for the word "sheriff" in section 229.11, Code of 1946, pertaining to the execution of the warrant of commitment isued by a county commission of insanity and the words: "said physician" for the word "sheriff" in that part providing for the making of the return on the original thereof to the clerk of said commission. Section 229.11, Code of 1946 as amended provided as follows:

"Said warrant and duplicate, with the certificate and finding of the physician, shall be delivered to the person's attending physician or some one designated by said physician, who shall execute the same by conveying such person to the hospital, and delivering him, with such duplicate and physician's certificate and finding, to the superintendent, who shall, over his official signature, acknowledge such delivery on the original warrant, which the said physician shall return to the clerk of the commission, with his costs and expenses indorsed thereon."

The inquiries on analysis resolve themselves into three basic questions which are:

1. What is meant by "person's attending physician" as that phrase was used by the legislature in this amendment and how should the commission of insanity proceed in their determination and designation of said "attending physician"?

2. Is there any limitation on the authority granted to the "attending physician" to designate someone to execute the warrant of commitment?

3. What compensation is provided for the attending physician as such and to what is he or his designee entitled to claim for the conveyance of the person to the hospital?

An examination of the provisions contained in chapter 129, Acts of the 52nd General Assembly reveals that the legislature did not define the phrase "person's attending physician" which, on first reading, would give rise to an inference that they intended to refer to the person's regular physician who had been in attendance and rendered professional service to the alleged insane person prior to the time a sworn information had been filed with the clerk of the commission, but this inference disappears when we find that in said amendment they did not provide for the designation or appointment of "an attending physician" in the instance where there had been no physician in attendance to the one against whom the sworn information was filed.

It is clear that in each hearing conducted by a county commission of insanity there must be an "attending physician" for the alleged insane person then before the commission as he would be the only one to receive or designate who should in his behalf receive the warrant of commitment preliminary to the execution thereof as provided for in section 229.11 as amended.

One of the definitions of "attending" given in Webster's New International Dictionary is: "to visit professionally, as a physician". An examination of a person in question on one occasion for the purpose of determining his mental and physical condition by a regular practicing physician would come within this defintion. In order to give effect to legislative enactments as heretofore contained in chapter 229, Code of 1946, and the amendments to said chapter now under discussion, we must arrive at the conclusion that it was the position of the legislature at the time of the enactment of chapter 129, Acts of the 52nd General Assembly, that the commission of insanity was already vested with power to determine and designate for each alleged insane person before them an "attending physician".

Section 229.6, Code of 1946, provides as follows:

"The commission shall, in all cases appoint, either from, or outside, its own membership, some regular practicing physician of the county to make a personal examination of the person in question for the purpose of determining his mental and physical condition. Said physician shall testify to the commission whether said person is sane or insane."

An examination of the historical reference following this section reveals that the requirement as to the appointment of some regular practicing physician of the county to make a personal examination of the alleged insane person for the purpose of the determining his mental and physical condition become part of the law of this state and first appeared in the Code of Iowa 1873 as section 1400. It is important to note that this section was not changed by the 52nd General Assembly. The requirement that the physician appointed under this section make a personal examination of the person in question would result in a professional visit or attendance to that patient so as to cause him to be the "person's attending physician" for the purpose of chapter 229, Code of 1946. Admittedly this conclusion recognizes a broad discretion vested in the commission insofar as determining and designating who the physician shall be, yet as a practical matter the legislature must have realized that if a person's family physician or one who had been in actual attendance prior to the filing of the information, did appear or make himself known and did qualify to be appointed under section 229.6, Code of 1946, he would be appointed for the purpose of making said examination and answering the interrogatories required.

It is our opinion, therefore, that the phrase "person's attending physician" for the purpose of effectuating the provisions of chapter 129, Acts of the 52nd General Assembly, is that physician designated and appointed by the commission under the provisions of section 229.6, Code of 1946.

Question No. 2 above arises primarily from the thought that by striking the word "sheriff" from the statutes in question the legislature is presumed to have intended that the sheriff or his deputy should have nothing to do with the commitment of any person under the provisions of section 229, Code of 1946. Obviously this was not the intention but rather the legislature intended that a physician interested in the welfare of the patient should determine how and by whom the patient was to be conveyed or transported to the hospital. They provided that the warrant was to be executed by the person's attending physician or "someone designated by said physician". The word "some" has been held to be a synonym of the word "any". See Webster's New International Dictionary, Unabridged (2nd Ed.), and Kayser vs. Occident Ins. Co. 234 Iowa 310, loc. cit. 318.

It is our opinion that the person's attending physician may designate "anyone" who in his opinion is capable of and has the necessary facilities for conveying the patient to the hospital. This might be another physician, a peace officer or any private individual. Clearly, it was intended that the physician would consider the element of violence and the question of the safety of such person as well as that of the public.

In answering the final question, we call attention to par. 3, section 228.9 Code of 1946, which provides that the physician appointed by the commission under section 229.6 Code of 1946, when not a member of the commission, shall be allowed a fee the same as a member and in addition thereto mileage of 5c per mile each way. By chapter 127, Acts of the 52nd General Assembly, the fee provided for the physician member of the commission is $7.50 for each commitment.

Regarding the compensation for the execution of the warrant of commitment which means the transportation or the conveying of the person to the hospital, it will be noted that section 229.11 as amended, provides that in making his return, the attending physician shall indorse on the original warrant the actual costs and expenses incurred by him or his designee in the performance of such duty. Clearly the imposition of this duty on the attending physician or on someone designated by him causes them to become employees of the county if they are not already regularly employed, as would be the case with the sheriff or his deputies, only for the purpose of performing this specific or limited duty.

It is our opinion that the attending physician or anyone designated other than the sheriff and his deputies would be entitled to reimbursement for actual costs and expenses incurred except that no allowance may be made for the use of an automobile for said transportation in excess of 5c per mile for actual and necessary travel. This limitation as to mileage allowance on these particular employees will be found in section 79.9, Code of 1946.

It is our further opinion that the sheriff or his deputies if designated can only act in their official capacity and by said designation it becomes their duty to act, as though specifically required by law, and

therefore under the provisions of section 337.11 (10) Code of 1946, would be entitled to reimbursement on the same items, except that they would be entitled to an allowance for the use of their own automobile in the amount of 7½c per mile for that portion of the trip within the county and 5c per mile for that portion of the trip outside of the county. If these county officials use a county-owned automobile, they would be entitled to reimbursement of actual costs except as in all such cases, there could be no allowance of expenses in the form of mileage.

October 28, 1947

TAXATION: Sales tax paid by city—no exemption but refund only. A city purchasing electrical energy must pay a sales tax and the vendor may not absorb the tax. Chapter 229, Acts 52nd General Assembly provides for refunds but does not relieve any purchaser from payment of the sales tax.

Mr. Earle S. Smith, Director of Sales Tax Division, Des Moines, Iowa: This will acknowledge receipt of your inquiry relating to the following matters:

1. Where a city purchases and consumes electricity is the sale to the city taxable under the provisions of the sales tax law?

2. May the vendor absorb the sales tax in such a case?

3. Does Senate File No. 280 (ch. 229) relieve any person from payment of the sales tax?

1. The sales tax law in Code section 422.42 sets out definitions of terms used in the Act. Subdivision 1 defines "persons" as, "including a municipal corporation." Subdivision 3 defines "a retail sale" as, "a sale to a customer or to any person for any purpose other than for processing or resale of tangible personal property and the sale of gas, electricity, water and communication service to retail consumers or users." The city, being a consumer of the electricity, the sale is taxable under the provisions of the sales tax Act, and must be collected from the city.

2. The vendor may not absorb the sales tax in any case because of the express provisions of Code section 422.49 which are as follows:

"It shall be unlawful for any retailer to advertise or hold out or state to the public or to any consumer, directly or indirectly, that the tax or any part thereof imposed by this division will be assumed or absorbed by the retailer or that it will not be considered as an element in the price to the consumer, or if added, that it or any part thereof will be refunded."

3. Senate File, to-wit: chapter 229, Acts of the 52d General Assembly, provides for sales tax refunds to governments under certain circumstances, and when proper application is made for such refund, does not by its terms relieve any person from payment of the sales tax.

October 28, 1947

TAXATION: Boards of review—county supervisors ineligible. A member of the county board of supervisors is not eligible for appointment to the county or city board of review under the county assessor law.

Mr. William W. Crissman, County Attorney, Cedar Rapids, Iowa:

Attention: *Don E. Smith, Assistant County Attorney*: Under date of October 21st you submitted the following questions:

1. Is one of the county board of supervisors eligible for appointment to the county board of review?

2. Is one of the county board of supervisors eligible for appointment to the local board of review under section 405.13 of the Iowa Code of 1946?

3. Would the fact that such county supervisor draws a salary as such rather than per diem, have any bearing upon your answers to question No. 1 and No. 2?

Questions 1 and 2 present an inquiry in each which is so related that one answer can serve as a reply to both inquiries. The answers to questions 1 and 2 are such that it obviates any necessity of answering your third question. There is nothing in the law which specifically provides as to qualifications of the members of the county board of review or the city board of review under chapter 405 as amended except a limitation as to the number from any town and certain requirements as to their occupation and they must be resident, qualified electors and freeholders. The county board of supervisors in both cases is one of the three bodies required by law to make the appointment of the board of review.

"An officer intrusted with the power of appointment should exercise it with disinterested skill and in a manner primarily for the benefit of the public, for it is the policy of the law to secure the utmost freedom from personal interest in such appointments. So, it is contrary to public policy to permit an officer having an appointing power to use such power as a means of conferring an office upon himself, or to permit an appointing body to appoint one of its own members." 42 American Jurisprudence 955; Hornung v. State, 116 Ind 458; 19 NE 157, 2 LRA 510; Meglemery v. Weissinger, 140 Ky 353; 131 SW 40; 31 LRA (NS) 575; Gaw v. Ashley, 195 Mass 172; 60 NE 790; 122 Am St Rep 229; 31 LRA (NS) 575.

In view of the foregoing it is our opinion that it would be against public policy and improper for the county board of supervisors to appoint one of their members to the county board of review or the city board of review under chapter 405 as amended.

November 6, 1947

SCHOOLS AND SCHOOL DISTRICTS: **Transportation of pupils—washout of bridge.** Where a bridge is washed out necessitating a longer route for school pupils the obligation of the district to transport is determined by measuring on "the most practicable route" which means the nearest and most direct route reasonably available, and maintained in a reasonably safe and proper condition for travel.

Mr. John S. Redd, County Attorney, Sidney, Iowa: We have yours of the 28th inst. in which you ask for opinion in the following situation:

"By reason of a wash-out of a county bridge, some rural school pupils now have to travel approximately 3½ miles to reach their local school. Before the bridge washed out, they were well within the 2-mile radius

of the school. The bridge was across a very deep gully in a hilly section of the county, and there is no practical way the children can cross where the bridge was located. The local school board has requested an opinion as to whether or not the district would be authorized to pay for the transportation of these children until the bridge is replaced, which appears to be very indefinite.

In view of the wording of section 282.15 of the Code of Iowa for 1946, which provides that the distance shall be measured on the public highway only and 'by the most practicable route' it appears to me that the board would be authorized and required to furnish the transportation. I would like your view of this question."

In reply thereto, we advise you that the obligation to transport students to public schools is a mandatory one.

Dermott vs. School District, 220 Iowa 345

Harwood vs. School District, 21 N.W. 2nd, 334

The power and authority to so transport is contained, insofar as consolidated school districts are concerned, in section 276.26, in terms as follows:

"The board of every consolidated school corporation shall provide suitable transportation to and from school for every child of school age living within said corporation and more than a mile from such school, but the board shall not be required to cause the vehicle of transportation to leave any public highway to receive or discharge pupils or to provide transportation for any pupil residing within the limits of any city, town, or village within which said school is situated."

And other than transportation in a consolidated district, provision is made therefor by section 279.19 of the Code of 1946, in terms as follows:

"When children enrolled in an elementary school other than in a consolidated district live two and one-half miles or more from the school in their district or subdistrict or when the school in their district or subdistrict has been closed and they are thereby placed more than two miles from the school designated for their attendance, the board shall arrange with any person outside the board for the transportation of such children to and from school and the cost of such transportation shall be paid from the general fund, but the board may provide transportation for a less distance. The board of any school district maintaining a public high school within a city having a population of seventy-five thousand or more may provide transportation for any pupil enrolled in said high school and residing more than three miles therefrom."

According to section 276.28, in a consolidated district, the terms of the statute, with reference to designation of the route to be traveled, are as follows:

"The board shall designate the routes to be traveled by each conveyance in transporting children to and from school. The board shall have the right on account of inclemency of the weather to suspend the transportation on any route upon any day or days when in its judgment it would be a hardship on the children, or when the roads to be traveled are unfit or impassable."

While the obligation to transport is mandatory, the legislature has provided standards by which the obligation of the school district in transporting pupils, shall be measured. Among such standards is the provision of section 279.20, Code of 1946, which defines how the distance of the transportation is measured in order to meet the requirements of the statute, which is stated as follows:

"Distance to school shall in all cases be measured on the public highway only and by the most practicable route, starting on the roadway opposite the private entrance to the residence of the pupil and ending on the roadway opposite the entrance to the school grounds."

While this provision is not a power vested in the school district to transport, this section, as construed with the preceding cited sections with respect to the obligation to transport children, plainly implies that transportation of school children to the public schools shall take place only over the public highway, and then by the "most practicable route." What is the "most practicable route" has not been the subject of opinion by the department, or decision by the supreme court. However, comparable statutory language has had the consideration of other courts. In Derich vs. Lake Creek School District, 234 N.W. 527, where the statutory provision is as follows:

"When pupils reside more than two and one-half miles from the nearest schoolhouse in the school district and not to exceed three miles, the parent, guardian, or pupil shall receive from his school district ten cents per day for each pupil; * * * the distance traveled by the most direct route, to be established by the district board, subject to an appeal * * * shall be the basis of computation."

And the words "most direct route" by which the distance was to be measured was said to mean:

"The most direct route by road, lawfully established as open to public travel and reasonably well and safely maintained for that purpose * * *. It seems to me almost a universal rule that when statutes require the computation of the 'most direct route' or 'the nearest route' they are necessarily held to mean the nearest or most direct route and upon and along public highways reasonably available as such. Any other interpretation makes for just exactly the confusion and difficulty that the instant case so well illustrates."

And the Supreme Court of Nebraska in Peterson vs. School District, 246 N.W. 723 had before it the meaning of the statute in these terms:

"Where a child lives more than three miles from a public school house which he or she is authorized to attend by the nearest practicable traveled road, where no free transportation is furnished such child, etc."

The question there for determination was what constitutes "the nearest practicable traveled road." The court there said:

"The ultimate purpose of the act here in question, of course, is to provide that every child of school age may have and enjoy the opportunity afforded by the public schools, and to provide that children living a long distance from school may avail themselves of the same privileges and the same opportunities that are afforded those living in close proximity thereto. And to equally distribute the burden of such educational opportunities among all the taxpayers, the legislature

has provided for the payment of transportation allowances to reimburse the parents of children who live more than 3 miles from the school in their own or another district.

The consequences that will result from construing the provisions of a statute should be taken into consideration in determining the intent of the legislature. Howard v. Jensen, 117 Neb. 102, 219, N.W., 811; Andrews v. School District No. 1, 183, Wis. 255, 197 N.W. 813; Pagel v. School District No. 1, 184 Wis. 251, 199 N.W. 67. Surely the beneficient purpose of the act is defeated if one of the parents of children living more than 3 miles from a school must, by reason of the dangers attendant on a route such as that in question, each day accompany his or her children. In the interpretation of a statute, the court will endeavor to ascertain the legislative intent and, if lawful, to give it effect.

The 6-mile road was apparently established by some individual for his own convenience and it has subsequently been used by others living in the community. There are none who are not more or less familiar with a 'short cut' route in any locality, but clearly the legislature did not have such a road in mind in the transportation of school children, whether they are accompanied or alone. In the use of the term 'practicable traveled road' the legislature must have contemplated a road that is not only conveniently accessible, but one that is recognized by the public and maintained in a reasonably safe and proper condition for travel. See Derichs v. Lake Creek School District, 57 S. D. 586, 234 N.W. 527, and Eastgate v. Osage School District 41 N.D. 518, 171 N.W. 96. A road that is not publicly maintained and which is located over private property, where it is necessary to open and close gates to prevent the escape of cattle and over which travel is precarious, cannot be said to be a practicable traveled road, within the meaning of the statute. Nor can a road be 'practicable' if it is necessary for a parent to daily leave his work and accompany his children to school merely because the road is unsafe for them to go over alone. Such was not the intent of the legislature."

We are of the view that the most practicable route is the nearest and most direct route reasonably available, and maintained in a reasonably safe and proper condition for travel. As applied to the stated situation, the foregoing definition is legal justification for the board to furnish transportation for the pupils to whom the route, formerly used, is not now available.

November 26, 1947

INSANE PERSONS: Support in County Home—liability of parent's estate. A claim filed in the estate of a deceased parent of an insane person confined in the County Home in the amount of the statutory liability of the parent must be paid from the general assets of the estate. Thereafter, the distributive share of such person is available for payment of his support without distinction of the period thereof.

Mr. Weston E. Jones, County Attorney, Charles City, Iowa: We have yours of the 3rd inst. in which you state:

"In 1931, Mr. A, an adult, was committed to the hospital for the insane at Independence, Iowa, from Floyd County, Iowa.

Subsequent to 1931, but prior to June 2, 1939, Mr. A was transferred to the insane ward of the Floyd County Home. The amount of his account for care and keep from the original commitment to June 2, 1939, was approximately $1,500.00.

That on January 7, 1947, Mr. A's father died, leaving a last will and testament and naming Mr. A to share in the estate equally with 6 other children. The amount of the account for the care and keep of Mr. A from June 2, 1939 to January 7, 1947 is in the approximate sum of $1,770.00.

Mr. A is still incarcerated in the Floyd County Home in the insane ward and the amount of the account for his care and keep from January 8 to date is in the approximate sum of $225.00.

Floyd County, Iowa filed claim in the estate of Mr. A's father for the period of June 2, 1939 to January 7, 1947 on the 1st day of February, 1947, which was within 6 months of the date of the death of Mr. A's father.

Questions:

1. Since A is an heir and is to receive a share of his father's estate can this share be first applied on A's account which was commenced in 1931 and then the balance, if any, be next applied on A's account subsequent to the death of the father on January 7, 1947?

2. Is the claim of Floyd County, Iowa for the period of June 2, 1939 to January 7, 1947, to be considered as a particular type of claim subject to payment from the assets of the estate regardless of any sum received by Mr. A as an heir? Assuming that Mr. A as an heir receives an amount sufficient to pay his account from 1931 to June 2 and then has a balance left over, must this balance be applied on the claim for the period of June 2, 1939 to January 7, 1947? Assuming that Mr. A receives a sufficient amount to pay his account from January 8, 1947 to date and that there is then a balance left over, must this balance be first applied on the claim against the estate which covers June 2, 1939 to January 7, 1947?

3. Is the claim against the estate for the period of June 2, 1939 to January 7, 1947 to be paid directly from the general assets of the estate before any determination is made of the various shares of the heirs?

4. Is there such a thing as primary or secondary liability in so far as the estate is concerned and Mr. A in the payment of the claim for any or all of the given periods?"

In reply thereto, we are of the opinion that determination of your fourth question, to wit: "Is there such a thing as primary or secondary liability insofar as the estate is concerned and Mr. A in the payment of the claim for any or all of the given periods?" will largely determine the problems you submit. The fourth question is a query as to whether there is such a thing as a primary or secondary liability insofar as the estate of A's father is concerned, and A, in payment of the claim for any or all of the given periods. Liability for insane support is grounded upon section 230.15, Code of 1946, in terms as follows:

"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."

That portion of the foregoing statute defining the persons who are legally liable for the support of insane or idiotic persons, was incor-

porated in the statute by chapter 98, 48th General Assembly. In so defining the several persons who are legally liable for such support it is fair to infer that the legislature realized the potential incapacity of insane and idiotic persons by reason of their disability to acquire money with which to pay for the support afforded by the county, and for that reason it is a fair inference to be drawn from the foregoing enactment that the legislature intended the persons defined to be liable for such support, to be liable primarily and equally with the insane or idiotic person to whom the support is accorded. In other words, they each and all are jointly and severally liable to the county for the payment of such support. Our statute, sections 613.1 and 613.2, Code of 1946, defines the extent of such liability in terms as follows:

"Where two or more persons are bound by contract or by judgment, decree, or statute, whether jointly only, or jointly and severally, or severally only, including the parties to negotiable paper, common orders, and checks, and sureties on the same or separate instruments, or by any liability growing out of the same, the action thereon may, at the plaintiff's option, be brought against any or all of them. When any of those so bound are dead, the action may be brought against any or all of the survivors with any or all of the representatives of the decedents, or against any or all such representatives.

An action or judgment against any one or more of several persons jointly bound shall not be a bar to proceedings against the others."

In other words, the creditors may pursue any or all of the persons liable for the payment of the support account until payment thereof is secured.

In the application therefore, of the foregoing principle, the support accruing from June 2, 1939 to the date hereof, is the liability of any or all of the foregoing named debtors. (Report of the Attorney General for 1944, page 48.) For support from 1931 to June 2, 1939 the insane person, A, alone is liable therefor. As to which one of the foregoing debtors the county shall pursue in order to affect collections, is a matter for determination by the board of supervisors. However, the claim of Floyd county, filed in the estate of A's deceased father must first be paid from the general assets of that estate. Thereafter, the share of A in the estate, when determined in a proper proceeding, is available for the payment of the support without distinction of the period thereof, until the amount thereof is paid or his share exhausted.

December 1, 1947

STATE OFFICERS: **Interim appointees filling vacancies—termination date.** Officers appointed under section 307.3, Code 1946, to fill vacancies continue to hold office until 30 days after convening of the next regular session of the General Assembly. Otherwise where no specific provision is made by statute to fill a vacancy the term of the appointee expires at the end of the next session of the General Assembly. (Const. Art. IV, section 10.)

Honorable Robert D. Blue, Governor of Iowa: Your request for our opinion as to whether or not it is necessary and proper to submit certain interim appointments to the special session of the General Assembly, has been received.

The provisions of the Iowa law upon this subject are found in Article IV, section 10, of the Constitution of Iowa, which provides as follows:

"When any office shall, from any cause, become vacant, and no mode is provided by the Constitution and laws for filling such vacancy, the governor shall have power to fill such vacancy, by granting a commission, which shall expire at the end of the next session of the general assembly, or at the next election by the people."

We also find in section 307.3, Code of Iowa, 1946, the following:

"Vacancies occurring while the general assembly is in session shall be filled for the unexpired portion of the term as full-term appointments are filled. Vacancies occurring while the general assembly is not in session shall be filled by the governor, but such appointments shall terminate at the end of thirty days after the convening of the next general assembly. Vacancies shall be filled from the same political party from which the vacancy occurs."

It is to be noted that in the constitutional provision that where no mode is provided by law for filling the vacancy, then and in that event the governor's appointment expires at the end of the next session of the General Assembly.

And it would seem that this provision contemplates a special session, as well as a regular session, in view of the use of the specific term "next session". See Plaka v. Walker, 124 Conn. 121, 198 Atl. 265; Woessner v. Bullock, 93 NE 1057.

However, section 307.3, being a specific law on the filling of vacancies in the membership of the highway commission, does not include the words "next session", but on the contrary, leaves out the word "session" and refers to the next General Assembly, and the next General Assembly will be the 53rd General Assembly, and it will not convene until January, 1949.

While there are no direct decisions on this point, we find in O.A.G. 1928, at page 49, an interpretation of this statute. Here we said that the holding of this office was that the interim appointments under said section will terminate at midnight on the 10th day of February, 1927, which was thirty days after the convening of the next General Assembly.

Other jurisdictions have considered the meaning of the term "next" in similar laws. In Woessner v. Bullock, supra, which cites an Iowa case, the court said:

"Had it been intended by the framers of the Constitution to limit the consideration of bills disapproved by the Governor to regular sessions, we should naturally expect such intention to be expressed by providing for such consideration by the next regular session, or by the next assembly, rather than the next session. People v. Rice, 135 N. Y. 473."

Therefore, in construing the provisions of section 307.3, Code 1946, it cannot be well doubted that the next General Assembly referred to meant the next regular or biennial session, and we so conclude.

It is our opinion that in the case of a vacancy in the position of a highway commission member, you should submit a proposed appointee only at the regular session, the next being the 53rd General Assembly convening in January, 1949.

In the case of a vacancy in the office of state comptroller, we find no statutory law providing for the filling of a vacancy in that office, and so conclude that such proposed appointee may be submitted to the senate in a special session of the General Assembly. As to whether or not it must be submitted, we advise that we find no provision in our law or in the Constitution under the heads of legislative or executive powers, which may be reasonably construed as charging the governor of the state with the mandatory power of sending to the senate the name of recess appointees for confirmation, at a special session. Our Constitution, Article IV, section 10, does not contain the provision found in many state constitutions, namely, "the failure of a governor to send to the senate the name of any person appointed to office, as herein provided, shall be equivalent to a rejection." However, if the governor does not send to the senate the name of the interim appointee for state comptroller, his commission expires at the end of the special session, and the governor must then make a new interim appointment until the next session of the General Assembly ends. In other words, such appointments remain temporary until some convened legislature confirms the governor's appointment.

We are, therefore, of the opinion that should you desire confirmation of your appointee for state comptroller, it will be proper to submit his name to the coming special session of the 52nd General Assembly. If you do not do so, then his present commission will expire at the end of the said session, and a new temporary commission will be required to fill that office until the next session of the General Assembly.

December 5, 1947

SCHOOL AND SCHOOL DISTRICTS: Election for county board. The independent district of the city of Des Moines must, under chapter 147, Acts 52nd General Assembly, hold an election in 1948 for county board of education and not under section 277.1 of the Code.

Mr. Carroll O. Switzer, County Attorney, Des Moines, Iowa: We have yours advising that you are in receipt of a letter from Ralph C. Norris, Polk County Superintendent of Schools, which states as follows:

"Chapter 147, S.F. 245 enacted by the 52nd General Assembly provides, among other things, that a new county board of education shall be elected on the second Monday in March, 1948, and

Section 277.1 regular election provides (Code 1946) 'The regular election shall be held annually on the second Monday in March in each school corporation and in each subdistrict for the purpose of submitting to the voters thereof any matter authorized by law, except that in all independent school districts which embrace a city and which have a population of one hundred twenty-five thousand or more such election shall be held biennially on the second Monday in March of odd-numbered years.'

It appears that since the first election to set up the new county board of education is an even-numbered year, and section 277.1 provides that Des Moines will not have a regular election until 1949 that either the Des Moines Independent School District board of directors will have to have a special election, the county board of education will have to hold one, or the Des Moines people will be deprived of an opportunity to vote in the election of the new county board of education.

Will you please give me an opinion as to the responsibility for holding an election in the Des Moines Independent School District? It is, of course, assumed that the people of Des Moines should have the privilege of participating in this election. Both the Des Moines board of education and the county board of education are interested in seeing that they have this privilege.

Does the county board of education have any authority at all in holding an election for the purpose of electing its own members? If the county board of education has the authority and the responsibility, will it be necessary that they observe the regular election precincts as set up by the Des Moines school board?"

and ask for opinion thereon.

In reply thereto, we would advise you that for an understanding of the situation, in addition to section 277.1 set forth in Mr. Norris' letter, chapter 147 of the Laws of the 52nd General Assembly, sections 4 and 5 thereof, provide as follows:

"Sec. 4. The territory of the entire county shall be divided into four election areas, as nearly as possible of equal size and contiguous territory, to be designated as the first, the second, the third and the fourth election areas. Where districts have territory in more than one county, the district will belong to the election area of the county where the school buildings are located. In the event of changes in the limits of school districts, the county board of education shall make any such adjustments as may be necessary to equalize the territorial size of the election areas, provided that no such change shall be made less than sixty days prior to the date of the annual school election.

On or before the first day of December 1947, in each county of the state, the county board of education then existing under the provisions of chapter two hundred seventy three (273), Code 1946, shall meet in special session and make the division provided for in this section."

"Sec. 5. The county board of education shall consist of five members, electors of the county, one member to be elected from each of the four election areas by the electors of the respective areas, one member to be elected at large from the area of the county school system by the electors thereof. Their terms of office shall commence on the first Monday in April following their election. All the members of the county board of education shall be first elected at the regular school election to be held on the second Monday in March 1948, and at the first regular meeting of the board on the following first Monday in April, the term of office of each of the five members shall be determined by lot, one member to serve for one year, two members to serve for three years and two members to serve for five years, and the result of such determination showing the name of each member, the area from which elected, and the term so determined shall be entered of record on the minutes of the board and shall be conclusive as to the term of the members. Thereafter, elections to the county board of education shall be held at the annual school elections in odd-numbered years for members whose terms expire on the first Monday in April following said elections and their term of office shall be for six years. Vacancies on said board shall be filled at the next regular meeting of the board by appointment by the remaining members of the board until the next odd-numbered year election at which election a member shall be elected to fill the vacancy for the balance of the unexpired term. A vacancy shall be defined as in section two hundred seventy-seven point twenty-nine (277.29), Code of 1946."

With respect to these several statutes it is to be observed that a statutory direction respecting the time for the holding of an election, is mandatory and a failure to hold the election at the time appointed results in the voiding of the election results. The rule thereof is stated in 18 Am. Juris., paragraph 112, title "Elections" in terms as follows:

"In most jurisdictions constitutional provisions, of which the courts may take judicial notice, fix the times of the election of various officers. Although such a provision should be adhered to, it does not preclude the legislature from fixing the time of elections not mentioned therein.

The prevailing view seems to be that where the date of an election is not left to the determination of officials, but is unequivocally fixed by statute, the provision is regarded as mandatory and the election officials have no authority to change the date. An election held at a time other than that prescribed will be declared void, although it has been indicated that officers elected at an unauthorized election who have performed their duties may be considered to have been at least de facto officers, whose acts are not subject to collateral attack. Statutes sometimes prohibit the holding of an election within a prescribed period after a prior election held under a similar law. Under a provision that a proposition once submitted and decided either way by a majority of the voters cannot be resubmitted within a period of two years, an election thereon held two days short of such period after the preceding election has been held to be void. The same result has been declared as to an election held under the provision of an act before such act goes into effect. This rule, however, is not inflexible, for a statutory provision as to the time for holding an election will be treated as directory where it appears from its general scope and policy that such was the legislative intent. Moreover, where an election clearly expresses the will of the voters, the courts are disinclined to set such election aside because of a departure from a statutory provision as to the time of holding it, even if such provision is regarded as mandatory. Thus, if the holding of an election on a day different from the day fixed by law was not induced by any corrupt or fraudulent motives but was the result purely of a mistake, and no one was prevented from voting thereby, the court may, in the exercise of its discretion, refuse to consider an attack upon its validity. On the other hand, if it appears that the noncompliance with the law was induced by any fraudulent motive or was prompted by any intent to disregard the law, the court should set it aside without hesitation."

Application of the foregoing rule to the situation presented would result in the voiding of an election held by an independent school district embracing a city having a population of 125,000 or more, on the second Monday in March, 1948, it being an even-numbered and not an odd-numbered year. We are, therefore, confronted with two statutes prescribing different times for holding elections in an independent district embracing a city of 125,000 population or more, the one prescribing it to be held in March, 1948 and the other March, 1949. These statutes are in direct conflict and both cannot be operative, The settled rule of statutory construction in that situation is that the provisions of chapter 147 of the 52nd General Assembly, must prevail over the provisions of section 277.1 and constitutes an implied repeal of the election provision respecting the biennial holding thereof, in odd-numbered years in a city of the class designated therein, insofar as the election required to be held in the year 1948 under the provisions

of chapter 147, 52nd General Assembly. The rule controlling the legislative intent interpreting conflicting statutory provisions is stated in 59 C.J., title "Statutes", pages 913, 914, 915, 916, 917 and 918, as follows:

"The rule that, in case of repugnancy or conflict between two legislative acts, the later one prevails and repeals the earlier one by implication applies where the conflict, repugnancy, or inconsistency is clear, plain, manifest, and irreconcilable, or, as sometimes states, where it is absolute, invincible, and material, and the two acts cannot be harmonized or both cannot stand, operate, or be given effect at the same time. Conversely, it is a general rule that an act is not impliedly repealed because of conflict, inconsistency, or repugnancy between it and a later act unless the conflict, inconsistency, or repugnancy is plain, unavoidable, and irreconcilable. Other statements of the rule are that the conflict, antagonism, incompatibility, inconsistency, or repugnancy must be: Clear, manifest; as well as being positive; direct, absolute; invincible; real or actual; such as to indicate, and demand a presumption, that the legislature intended the later act to repeal the former; such as to preclude any other reasonable construction, and any other conclusion, than that of a repeal by implication; or such that the two acts cannot be harmonized, and both cannot stand and have force, application, operation and effect. Where there is no inconsistency in language, the repugnancy necessary and sufficient to effect a repeal of the old statute by the new one is that which would exist between the continuance of the old in force in opposition to an obvious intent that the new should supplant it.

Where there is sufficient repugnancy or inconsistency between two statutes, or parts of two statutes, to effect a repeal by implication, the earlier statute is impliedly repealed to, and only to, the extent of the conflict, repugnancy, or inconsistency. A total repugnance between two statutes is sufficient, and, according to some authorities, is necessary, to cause a repeal of the earlier statute by implication.

If it is possible to do so, by any fair and reasonable construction, two seemingly repugnant acts should be harmonized or reconciled, so as to permit both to stand and be operative and effective, and thereby avoid a repeal of the earlier act by implication.

In a majority of jurisdictions there can be no implied repeal, of one act by another unless both acts deal with, or relate to, the same subject matter. However, a statute is not to be deemed repealed merely by the enactment of another statute on the same subject. The question is one of legislative intention. One of two affirmative statutes on the same subject matter does not repeal the other if both can stand. The court will, if possible, give effect to all statutes covering, in whole or in part, the same subject matter where they are not absolutely irreconcilable and no purpose of repeal is clearly shown or indicated."

Responsibility, therefore, for holding the election in the year 1948, in such an independent school district embracing a city of the class mentioned in section 277.1, falls upon the independent district of Des Moines whose duty and powers, with respect to such election, are set forth in the foregoing chapter 147 of the Acts of the 52nd General Assembly and chapter 277, Code of 1946.

December 11, 1947

MOTOR VEHICLES: Duplicate registration cards—for current registration only. The county treasurers are under no obligation to furnish a duplicate registration card where the registration has expired.

Department of Public Safety, Attention Mr. Hesse: Your letter of December 11, inquires whether, under the provisions of section 321.42,

Code of Iowa 1946, a county treasurer must, upon application, furnish a duplicate registration card for a motor vehicle registration which has expired. The afore-mentioned section provides:

"In the event any registration card or registration plate is lost, mutiliated, or becomes illegible the owner shall immediately make application for and obtain a duplicate upon the applicant furnishing information satisfactory to the department together with the payment of a fee of fifty cents for each such plate or registration card."

It is to be noted that the effect of the foregoing code section is to impose a duty upon the vehicle owner. The obvious purpose of the statute is to facilitate the administration and enforcement of the provisions of chapter 321 of the Code. The issuance of a duplicate registration card relating to registrations which have expired would in no manner accomplish or tend to accomplish the purpose of the provision. Therefore, it clearly was not the intent of the legislature to demand that a motor vehicle owner obtain a duplicate registration card for a registration which was not current.

You are, therefore, advised that it is the opinion of this office that the effect of section 321.42, Code of Iowa 1946, is to impose a duty upon a motor vehicle registrant to obtain a duplicate registration card whenever the current registration card issued to the registrant has become lost, mutiliated or illegible, and that the said code section is not to be construed as granting a right to registrants to require county treasurers to furnish duplicate registration cards on registrations that have expired.

December 11, 1947

COUNTIES: Bridges—restoration where damaged by flood. Expenses for construction, restoration, or repair of bridges destroyed or damaged by flood is an expense uncontrolled by the budget and may be paid from the emergency fund.

Mr. John E. Budd, County Attorney, Atlantic, Iowa: We have yours of the 26th ult. in which you submit the following:

"I have been requested by our county board of supervisors and our county engineer to obtain from your office an opinion on the following two questions in regards to bridge and culvert emergency funds:

1. If it would cost a certain sum to repair either a bridge or culvert which had been damaged by floods, and the board of supervisors and county engineer found that for the betterment of the road the bridge or culvert should be completely replaced with a new bridge or culvert, whether all of the cost could be paid out of our emergency fund or whether we could only pay out of the emergency fund the amount that our engineer estimated that it would have taken to repair the damage and any additional amounts must come from our construction fund, and

2. If we had a bridge completely washed away on account of the floods whether the new bridge would have to be a similar structure or whether it could be any type structure that we care to replace the damaged bridge with. In other words, if we had a wood bridge which could possibly be replaced with another wood bridge for a lesser amount than it would cost to replace it with a steel structure, whether we could replace the same with a steel structure and pay the full cost out of our emergency fund.

In other words, both of the above questions actually refer to whatever your interpretation of the word 'emergency' might be, and I would appreciate it if, in this opinion, you would attempt to explain the word 'emergency' ".

In reply thereto, for a better understanding of the situation that is presented, we set forth sections 343.10 and 343.11, sub-section 1 thereof, as follows:

Section 343.10

"It shall be unlawful for any county, or for any officer, thereof, to allow any claim, or to issue any warrant, or to enter into any contract, which will result, during said year, in an expenditure from any county fund in excess of an amount equal to the collectible revenues in said fund for said year, plus any unexpended balance in said fund for any previous years.

Any officer allowing a claim, issuing a warrant, or making a contract contrary to the provisions of this section, shall be held personally liable for the payment of the claim or warrant, or the performance of the contract."

And section 343.11

"Section 343.10 shall not apply to:

1. Expenditures for bridges or buildings destroyed by fire or flood or other extraordinary casualty."

Section 343.10 is known as the Tuck Law, and according to opinion of this department, issued in 1936, and appearing in the Report of the attorney general for 1936, page 532, "the above statute * * * * was passed, as its legislative history shows, for the purpose of putting the counties on a 'pay as you go' basis by requiring them to confine their expenditures to their income". However, clearly, according to section 343.11, the expenditures consequent to the damage or destruction to bridges or culverts by floods, are excluded from the terms, operation and purpose of the foregoing Tuck Law. And the reason for such exclusion is that the expenses and costs incident to such damage or destruction could, and may be, such as cannot be paid within the revenues of a tax year. In that aspect the exception is an expression of a legislative intent, that the county and its board of supervisors should not be hampered or impeded in the performance of its duties in that emergency and was not intended to deprive the county of its capacity to provide these essentials of highway use. The exception of the Tuck Law, 343.11, sub-section 1, is, therefore, not a limitation or restriction on the power of the county to construct, reconstruct, restore, or repair bridges or culverts damaged or destroyed by floods, under the statutory powers and directions provided therefor. The question of costs and expenses therefor, under the foregoing exception, is controlled by these statutory powers, and by constitutional limitations of the indebtedness. And whether a bridge or culvert should be repaired or completely replaced when destroyed or damaged by flood, is a matter to be determined by the board of supervisors within its usual statutory powers, and should be based upon a fair and reasonable exercise of discretion. Statutes and constitutions of other states re-

stricting the making of a contract in excess of the revenue for the fiscal year, and other constitutions and statutes of like intent, have been litigated and the subject of annotation. See 41 A.L.R. 790. In Kirk vs. High, 49 A.L.R. 782; 273 SW 389, in holding that construction of a courthouse not to exceed $150,000 to be paid for in twenty annual installments, was not within the following constitutional provisions:

"The fiscal affairs of counties, cities and incorporated towns shall be conducted on a sound financial basis, and no county court or levying board or agent of any county shall make or authorize any contract or make any allowance for any purpose whatsoever in excess of the revenue from all sources for the fiscal year in which said contract or allowance is made; nor shall any county judge, county clerk, or any other county officer, sign or issue any scrip, warrant or make any allowance in excess of the revenue from all sources for the current fiscal year; nor shall any city council, board of aldermen, board of public affairs, or commissioners, of any city of the first or second class, or any incorporated town, enter into any contract or make any allowance for any purpose whatsoever, or authorize the issuance of any contract or warrants, scrip or other evidence of indebtedness in excess of the revenue for such city or town for the current fiscal year; nor shall any mayor, city clerk, or recorder, or any other officer or officers, however designated, of any city of the first or second class or incorporated town, sign or issue any scrip, warrant or other certificate of indebtedness in excess of the revenue from all sources for the current fiscal year."

And the court there said:

"We think the amendment means just this: That, if a county, city, or town avails itself of the provision authorizing the taking up of its outstanding indebtedness, it shall not thereafter draw warrants upon the treasurer for an amount in excess of its annual revenues. It must stay out of debt. It means, further, that, if a city, county or town has any outstanding unpaid warrants which it does not take up by issuing bonds as authorized by the amendment, it must not add to its existing indebtedness by issuing more warrants than can be paid out of the revenues of the current year.

But it does not mean that the county without a courthouse or a jail must dispense with these essentials because they cannot be fully paid for in one year. Counties may contract for these buildings, and may apportion the cost over a number of years, but in doing so the other necessary expenses of government must be taken into account, and no authority be conferred upon the officers charged with the duty of issuing vouchers or warrants to issue them for a sum which will exceed the total revenues for any single year."

And a concurring opinion added this:

"Courthouses and jails are absolutely necessary in the administration of the state government, and I do not think that the amendment under consideration was designed to take away the powers, in respect to repairing and erecting courthouses and jails, which were possessed before its adoption. I think such an interpretation of the amendment would be too narrow and literal, and would tend to defeat the very purposes which it was designed to effectuate. Therefore, I think that the power to construct courthouses and jails is unchanged by the amendment."

We are of the opinion, therefore, that construction, reconstruction, restoration or repair of bridges or culverts destroyed or damaged by

flood, is an expense uncontrolled by the budget and may be paid from the emergency fund. For method of financing, if the emergency fund is insufficient, see opinion of the attorney general, issued July 8, 1947.

December 17, 1947

MOTOR VEHICLES: Suspended registration—transfer after sale of vehicle. Registration of a motor vehicle which has been transferred by bona fide sale, which vehicle is unregistered through suspension by operation of the financial and safety responsibility law may be accomplished on a form provided by the department complying with section 321.20 of the Code.

Mr. Alfred W. Kahl, Commissioner of Public Safety: In letter dated December 8, 1947, the motor vehicle registration division of the department of public safety requested an opinion of this office on the following question:

How may registration of a motor vehicle be accomplished after a bona fide sale when the registration of such vehicle is then suspended? Section 7, chapter 172, Acts of the 52nd General Assembly, provides:

"Duration of suspension. The license and registration and non-residents operating privilege suspended as provided in section 5 shall remain so suspended and shall not be renewed nor shall any such license or registration be issued to such person until:

1. Such person shall deposit or there shall be deposited on his behalf the security required under section 5; or

2. One year shall have elapsed following the date of such accident and evidence satisfactory to the commissioner has been filed with him that during such period no action for damages arising out of such accident has been instituted, or

3. Evidence satisfactory to the commissioner has been filed with him of a release from liability, or a final adjudication of non-liability, or a warrant for confession of judgment, or a duly acknowledged written agreement, in accordance with subdivision 4 of section 6; provided, however, in the event there shall be any default in the payment of any installment under any confession of judgment, then, upon notice of such default, the commissioner shall forthwith suspend the license and registration of nonresident's operating privilege of such person defaulting which shall not be restored unless and until the entire amount provided for in said confession of judgment has been paid; and provided, further, that in the event there shall be any default in the payment of any installment under any duly acknowledged written agreement, then, upon notice of such default, the commissioner shall forthwith suspend the license and registration or non resident's operating privilege of such person defaulting which shall not be restored unless and until (1) such person deposits and thereafter maintains security as required under section 5 in such amount as the commissioner may then determine, or (2) one year shall have elapsed following the date when such security was required and during such period no action upon such agreement has been instituted in a court in this state."

Section 14, chapter 172, Acts of the 52nd General Assembly provides:

"Suspension to continue until judgments paid and proof given. (a) Such license, registration, and nonresident's operating privilege shall remain so suspended and shall not be renewed, nor shall any such license or registration be thereafter issued in the name of such person, including any such person not previously licensed, unless and until

every such judgment is satisfied in full or to the extent hereinafter provided, and until the said person gives proof of financial responsibility subject to the exemptions stated in sections 13 and 16 of this Act."

Section 17 (b), chapter 172, Acts of the 52nd General Assembly, relating to proof required upon certain convictions, provides:

"Such license and registration shall remain suspended or revoked and shall not at any time thereafter be renewed nor shall any license be thereafter issued to such person, nor shall any motor vehicle be thereafter registered in the name of such person until permitted under the motor-vehicle laws of this state and not then unless and until he shall give and thereafter maintain proof of financial responsibility."

Section 321.20, Code of Iowa, 1946, provides:

"Every owner of a vehicle subject to registration hereunder shall make application to the county treasurer, of the county of his residence, or to the department, if a nonresident, 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:

1. The name, bona fide residence and mail address of the owner or business address of the owner if a firm, association or corporation.

2. A description of the vehicle including insofar as the hereinafter specified data may exist with respect to a given vehicle, the make, model, type of body, the number of cylinders, the serial number of the vehicle, the engine or other number of the vehicle and whether new or used and if a new vehicle the date of sale by the manufacturer or dealer to the person intending to operate such vehicle.

3. Such further information as may reasonably be required by the department."

Section 321.45, Code of Iowa, 1946, provides:

"Upon the transfer of ownership of any registered vehicle, the owner shall immediately give notice to the county treasurer, upon the form on the reverse side of the certificate of registration, stating the date of such transfer, the name and post-office address, with street number if in a city, of the person to whom transferred, the registration number, and such other information as the department may require."

Section 30, Chapter 172, Acts of the 52nd General Assembly, provides:

"Transfer of registration to defeat purpose of act prohibited. This act shall not prevent the owner of a motor vehicle, the registration of which has been suspended hereunder, from effecting a bona fide sale of such motor vehicle to another person whose rights or privileges are not suspended under this act nor prevent the registration of such motor vehicle by such transferee. This act shall not in any wise affect the rights of any conditional vendor, chattel mortgagee; or lessor of a motor vehicle registered in the name of another as owner who becomes subject to the provisions of this act."

The question presented indicates that it is presumed that if a vehicle has once been registered, registration thereafter can only be accomplished by giving notice to the county treasurer of the transfer of ownership of the vehicle upon the form on the reverse side of the certificate of registration, under the provisions of section 321.45 of the Code, supra.

The registration having been suspended, the vendor would not be in possession of a registration certificate, and would not gain possession of a registration certificate until the registration is renewed or a new registration is granted. The provisions of sections 7, 14, and 17 (b), chapter 172, Acts of the 52nd General Assembly, supra, prohibit renewal of registration or granting of a new registration until compliance with certain provisions of the Financial and Safety Responsibility Act.

Statutes are to be construed, so far as practicable, in a manner which gives effect to all its provisions and the provisions of other statutes. Relative to statutory construction it is stated in 59 C.J., section 595, page 995:

"Provided always that the interpretation is reasonable and not in conflict with the legislative intent, it is a cardinal rule of construction of statutes that effect must be given, if possible, to the whole statute and every part thereof. To this end it is the duty of the court, so far as practicable, to reconcile the different provisions so as to make them consistent, harmonious, and sensible. Just as an interpretation which gives effect to the statute will be chosen instead of one which defeats it, so an interpretation which gives effect to the entire language will be selected as against one which does not."

Continuing, it is said in section 596:

"It being the duty of the court to harmonize and reconcile all parts of the statute so that effect may be given to each and every part, conflicting intentions in the same statute are never to be supposed or so regarded, unless forced upon the court by unambiguous language."

The same principles prevail in determining the construction of related statutes.

It is pertinent to observe that section 321.45, Code of Iowa, 1946, relates to the transfer of "Registered" vehicles. The question is then presented whether vehicles upon which registration is suspended are "registered" vehicles within the contemplation of the said code section. In construing a statute relating to the suspension of police officers and policemen, the Supreme Court of Iowa in Markey v. Schunk, et al., 152 Iowa 508, said in pertinent part in defining the word "suspend":

"To suspend or discharge means to remove, either temporarily or permanently, from employment * * *".

In Taylor v. State, 38 South, 380, 49 Florida 69, the court said:

" 'Suspend' is to cause to cease for a time; * * *".

It appears that it was the intent of the legislature to use the term "suspend" in the sense of "to remove", and "to cease". Such construction gives practical effect to the various statutes involved. It then follows that a motor vehicle upon which registration has been suspended is not a registered vehicle and the provisions of section 321.45, Code of Iowa, 1946, are not applicable. In such a case no requirements apply other than the requirements contained in section 321.20, Code of Iowa, 1946, supra.

You are, therefore, advised that registration of a motor vehicle which has been transferred by bona fide sale, which vehicle is unregistered through suspension by operation of the Financial and Safety Responsibility Act may be accomplished upon a form provided by the department complying with the provisions of section 321.20, Code of Iowa, 1946.

You are further advised that under the provisions of paragraph 3 of the said section 321.20, the department may require such information as it may reasonably deem appropriate to indicate that a bona fide sale has been effected, as contemplated by Section 30, of the Financial and Safety Responsibility Act.

December 17, 1947

MOTOR VEHICLES: Registration—suspension and reregistration. The fee for registration of a vehicle upon which registration was suspended during some year prior to application should be on the basis of a full year without penalty as in the case of a vehicle in storage.

Mr. Alfred W. Kahl, Commissioner of Public Safety: The motor vehicle registration division of the department of public safety, in a letter dated December 8, 1947, requested an opinion of this office on the following question:

In the event that a motor vehicle registration has been suspended under the provisions of the Financial and Safety Responsibility Act, and thereafter, in a subsequent year, an owner of such vehicle becomes entitled to have such vehicle registered, should the vehicle be regarded as in storage during the period of the suspension.

Section 321.105, Code of Iowa, 1946, provides:

"321.105. 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.

Said registration fee shall be paid to the county treasurer at the same time the application is made for the registration or reregistration of said motor vehicle or trailer.

Section 321.130, Code of Iowa, 1946, provides:

"321.130. Fees in lieu of taxes. The registration fees imposed by this chapter upon private passenger motor vehicles shall be in lieu of all taxes, general or local, to which motor vehicles may be subject, and if a motor vehicle shall have been registered at any time under this chapter it shall not thereafter be subject to a personal property tax unless such motor vehicle shall have been in storage continuously as an unregistered motor vehicle during the preceding registration year."

It clearly appears that the intent of the foregoing provisions is to exact a registration fee for each motor vehicle or trailer operated upon the public highways of the state, and to tax as personal property certain vehicles not subject to registration. During the period of the suspension, it is to be presumed that the vehicle involved is not in operation upon the public highways of this state.

Section 321.134, Code of Iowa, 1946, provides:

321.134. 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 vehicle who, 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. Provided, however, that the annual registration fee for trucks, truck tractors, road tractors, trailers and semitrailers, as provided in sections 321.119 to 321.123, inclusive, when said annual registration fee is in excess of thirty dollars, may be payable in two equal semiannual installments.* * *"

Section 321.106, Code of Iowa, 1946, provides:

"321.106. 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 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."

Section 321.106 is not applicable to a vehicle upon which registration was suspended. Such a vehicle comes within the provisions of section 321.134, supra, either as a vehicle upon which there is a delinquency or as a vehicle in storage. It would be an anomalous result, indeed, to place a person whose registration has been suspended for failure to comply with the law in a more favored position than one whose vehicle was legally "in storage". Such would be the result if the provisions of section 321.106 were held to be applicable. On the other hand it would be equally illogical if the state were to impose a delinquent penalty for failure to register a vehicle when the state had refused to grant such registration.

The provisions of section 321.134, Code of Iowa, 1946, relating to vehicles in storage must be deemed to anticipate only one surrender of registration plates, regardless of the period of time the vehicle is in storage. It would be futile to require a surrender of plates prior to February 1 of each year, as obviously there are no plates to be surrendered for years subsequent to the original surrender.

As hereinbefore stated, the legislature intended to require a fee for the registration of vehicles operated on the public highways of this state, and to subject to personal property tax vehicles not so used and not registered.

For the foregoing reasons, it is the opinion of this office that the fee for the registration of a vehicle, upon which registration was suspended during some year prior to the application, should be on the basis of a full year without penalty under the provisions of section 321.134 of the code, relating to vehicles "in storage".

December 19, 1947

SOLDIERS, SAILORS, MARINES AND NURSES: Relief commission--sole control of employees. The board of supervisors has no control over the employees of the soldiers' relief commission. Salaries are fixed by the board consistent with the proper exercise of the functions within the legislative intent of the purposes of the law but such power is a discretion which may not be abused to the extent that the purpose of the law will be defeated.

Mr. Albert V. Hass, County Attorney, Chariton, Iowa: We acknowledge receipt of yours of the 24th ult. in which you submit for opinion, the following:

"As county attorney of Lucas County, Iowa, I would like to have your official opinion which will clarify for us certain aspects of chapter 250, Code of Iowa, 1946, relating to relief for soldiers, sailors and marines.

Section 250.2 provides as follows:

'Said fund shall be expended for the purposes aforesaid by the joint action and control of the board of supervisors and the relief commission hereinafter provided for.'

I would like to know just what joint action and control this section refers to inasmuch as the following sections speak of the county soldiers' relief commission but do not speak of the county board of supervisors in the administration of the fund. Does the statute contemplate that expenditures from said fund shall be passed upon jointly by the board of supervisors and the relief commission in the particular county involved?

Section 250.6, Code of Iowa, 1946 provides as follows:

'They shall qualify by taking the usual oath of office, and give bond in the sum of five hundred dollars each, conditioned for the faithful discharge of their duties with sureties to be approved by the county auditor. The commission shall organize by the selection of one of their number as chairman, and one as secretary. The commission shall have power to employ necessary administrative or clerical assistants when needed, the compensation of such employees to be fixed by the board of supervisors, but no member of the commission shall be so employed."

In Lucas County, Iowa, an office is maintained in the court house and a full time employee is paid compensation for duties performed in connection with said office under the direction and supervision of the county soldiers' relief commission. In our situation, I would like to have your opinion with respect to the following questions:

1. Under the foregoing section, is the commission given the exclusive power to determine when the need exists for administrative or clerical assistants?

2. After such need has been determined by the commission and an assistant named, who has received a salary fixed by the board of supervisors, is it within the power of said board to meet subsequently without the request or knowledge of the relief commission and reduce or terminate said salary, or must the board of supervisors fix or change the salary of said assistant only upon request of the relief commission?"

In reply thereto we advise

1. The legislative history of the several statutes providing for the joint action and the individual action of the relief commission follows. The Soldiers' Relief Act, as it appears in the Code of 1897, in sections 430, 431, and 432, as follows:

"Sec. 430. Dependent soldiers' and sailors' tax. A tax of one half mill upon the dollar, or such less sum as 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 Union soldiers, sailors, and marines, and their indigent wives, widows, and minor children not over fourteen years of age, if boys, nor over sixteen years, if girls, having a legal residence in the county."

"Sec. 431. Commission to disbursement duties. Said fund shall be disbursed by the soldiers' relief commission, which shall consist of three persons, two of whom shall be honorably discharged Union soldiers, sailors or marines, to be appointed by said board, subject to removal at any time by said board, for neglect of duty or maladministration, at the regular meeting in September, and who shall hold their office for three years and until their successors, shall be appointed and qualified; all vacancies to be filled by appointment by the board, one to be appointed each year. They shall qualify by taking the usual oath of office, and give bond in the sum of five hundred dollars each, conditioned for the faithful discharge of their duties, with sureties to be approved by the county auditor, and, when approved, shall be filed and recorded by him as other official bonds. The commission shall organize by the selection of one of their number as chairman, and one as secretary."

"Sec. 432. Meeting—report to supervisors—disbursements—how made. The commission shall meet annually at the county auditor's office, on the first Monday in September, and at such other times as may be necessary, at which annual meeting it shall determine who are entitled to relief, and the probable amount required to be expended therefor, which sum it shall certify to said board, together with a list of those found to be entitled to relief, and the sum to be paid in each case, the aggregate not to exceed the amount to be raised by the tax levy authorized; and it, at its regular September meeting, shall levy a sufficient tax to raise this amount. Upon the filing of the list with the board of supervisors, the county auditor shall, within twenty days thereafter, transmit to the township clerks in the county the names of those, if any, to whom relief has been awarded, and the amount. On the first Monday of each month after the fund is ready for distribution, the auditor shall issue his warrant upon the county treasurer to the commission for the sums thus awarded, and it shall proceed to disburse the same to the parties named in the list, taking receipts therefor, or distribution may be made in any other manner the commission may direct. Should it appear to the commission that any person entitled to assistance will not properly expend the same, then the payment may be made to some suitable person, who shall, as directed by it, make the disbursement thereof for the use and benefit of such person. The amount awarded to any party may be increased, decreased or discontinued by the commission at any regular meeting. New names may be added and certified thereat, and it shall, at the close of the year, make annual detailed reports of its work, which shall be accompanied with the proper voucher for all moneys received by it."

These statutes, in substantially like terms, now appear in the Code of 1939 as section 3828.051, 3828.052, and 3828.053, et seq., except for the addition made to section 430 of the Code of 1897 in 1915, now pertinent to this discussion, to wit:

"Said fund to be expended for the purpose aforesaid by the joint action and control of the board of supervisors and the relief commission provided for by section four hundred thirty-one of the code."

The method of the exercise of this joint control is nowhere prescribed.

It will be seen that the powers imposed upon the commission to disburse the funds, and prescribing in detail the method of disbursement and the several duties of the commission and the auditor in respect thereto, have remained constant during the many years since the enactment of the statutes providing these powers.

Within the rule stated in 59 C.J. 1000, title "Statutes" to wit:

"General and special provisions in a statute should stand together if possible, but where general terms or expressions in one statute are inconsistent with more specific or particular provisions in another part, the particular provisions must govern. See Story County v. Hanson, 178 Iowa 452."

We are of the opinion that notwithstanding the general provisions enacted in the supplement of 1915, heretofore exhibited, with respect to joint action and control by the board of supervisors and the commission, the disbursement of the funds is under the control of the commission, and no effect is given to the power of joint control. It is therefore unnecessary for the board of supervisors to meet and pass on allowances to needy veterans before the county auditor can draw a warrant for his relief, when all other provisions of the statute have been complied with by the soldiers' relief commission.

2. Section 250.6, Code of 1946, which you quote to the effect

"The commission shall have power to employ necessary administrative or clerical assistants when needed. The compensation of such employees to be fixed by the board of supervisors but no member of the commission shall be so employed."

clearly shows an intention upon the part of the legislature to bestow upon the commission the power to determine when the need for administrative or clerical assistants exists and the power to employ such administrative or clerical assistants to supply the need which the commission has determined. The foregoing interpretation accords with the maxim "expressio unius est exclusio alterius" i. e. where a statute directs the performance of certain things in a particular manner or by a particular person, it implies that it shall not be done otherwise or by a different person. See 59 C.J. title "Statutes" p. 94.

3. In answer to your question, to wit:

"After such need has been determined by the commission and an assistant named, who has received a salary fixed by the board of supervisors, is it within the power of said board to meet subsequently without the request or knowledge of the relief commission and reduce or terminate said salary, or must the board of supervisors fix or change the salary of said assistant only upon request of the relief commission?"

We are of the opinion that action of the board of supervisors to terminate the salary of employees, is in excess of its powers. If exercised, it would be a frustration of the powers bestowed upon the relief commission to administer its affairs. The intention of the legislature, in the foregoing statutes, was to exclude the board of supervisors from

the power to employ or the power to discharge employees. The power vested in the board to fix the salaries of employees does not embrace either expressly or impliedly, the power to control the administration of the relief commission. In fixing such salaries, the board of supervisors is presumed to act with reasonable discretion to the end that the legislative intent will be fulfilled and not frustrated. We have a comparable situation arising out of section 332.3, subsection 10, Code of 1946, which confers upon the board of supervisors the power

"to fix the compensation for all services, of county and township officers not otherwise provided by law and to provide for the payment of same."

Obviously such power does not confer upon the board, the power of control over the administration of the offices which such officers administer by statute.

We are of the opinion, therefore, that the board of supervisors having once fixed the salaries, or compensation, of employees and assistants of the relief commission, its power thereafter is limited to control of such salaries consistent with the proper exercise of the relief commission powers. Such power, however, does not embrace the power to vary such compensation or salary to the extent of abolishing the positions of administrators or employees of the commission.

January 29, 1948

SCHOOLS AND SCHOOL DISTRICTS: Funds—losses in permanent fund—reimbursement. Any losses suffered in the permanent school fund should be reimbursed from the county general fund.

Mr. Ray E. Johnson, State Comptroller: This will acknowledge receipt of your letter of January 24, 1948, wherein you ask in what manner and from what funds the permanent school fund should be reimbursed for losses suffered.

Section 302.3, 1946 Code, states that in part the temporary school fund shall consist of:

"2. The proceeds of all fines collected for violation of the penal laws, * * *"

Section 302.38 reads as follows:

"Excess—loss borne by county. Any excess over the amount of the unpaid portion of the principal, costs of foreclosure, and interest on the principal as above provided, shall inure to the county and be credited to the general county fund. If the lands shall be sold for a less amount than the unpaid portion of the principal, the loss shall be sustained by the county, and the board of supervisors shall at once order the amount of such loss transferred from the general fund or temporary school fund of the county to the permanent school fund account."

Section 4 of the second division of Article IX of the Iowa State Constitution reads as follows:

"Fines—how appropriated. Sec. 4. The money which may have been or shall be paid by persons as an equivalent for exemption from

military duty, and the clear proceeds of all fines collected in the several counties for any breach of the penal laws, shall be exclusively applied, in the several counties in which such money is paid, or fine collected, among the several school districts of said counties, in proportion to the number of youths subject to enumeration in such districts, to the support of common schools, or the establishment of libraries, as the board of education shall, from time to time, provide."

From a reading of section 302.38, above quoted, it appears that the permanent school fund could be reimbursed for any losses suffered from either the temporary school fund of the county, or the county general fund. However Section 4 of second division of Article IX of the state Constitution, is specific in its provision that the proceeds of all fines collected for any breach of the penal laws shall be exclusively applied to the school districts in the county in proportion to the number of youths.

Since the temporary school fund is made up in part of fines collected for the violation of penal laws, and the Constitution is specific on how such fines shall be distributed and does not authorize the use of such fines to reimburse the permanent school fund, it is our opinion that the permanent school fund should be reimbursed for any losses suffered from the county general fund.

January 29, 1948

SCHOOL AND SCHOOL DISTRICTS: **County board—eligibility for membership.** A resident elector of a school district maintaining a four-year high school, whether in an independent or consolidated district, is eligible to serve on the county board of education as a member from the area within which such district is located. The member at large of the county board may not be a resident of any such district which maintains a four-year high school.

Miss Jessie M. Parker, Superintendent, Dept. of Public Instruction: I have yours of the 22nd inst. in which you submit the following:

"We have had a question posed to us by one of the county boards of education regarding the election of the county board of education members as set forth in chapter 147, Acts of the 52nd General Assembly which because of its significance should have a ruling by your office.

The question is, 'Who is eligible for membership on the county board of education? Can a resident of a school district which maintains a four-year high school, either an independent or consolidated district, serve on the county board as the member from that area? Or in other words, is membership on the county board of education limited to residents of the school districts comprising the county school system thereby excluding from membership a resident of a school district which maintains a four-year high school?'

An early ruling on this matter would be appreciated because the filing of nomination petitions which may commence as early as January 23 under the provisions of the Act will be materially affected by this opinion."

In reply thereto, I am of the opinion that a resident elector of a school district, maintaining a four-year high school, whether in an independent or consolidated district, is eligible to serve on the county board of education, established by chapter 147, Acts of the 52nd General Assembly as a member from the area within which such school district is located.

Section 5 of the foregoing chapter provides as follows:

"The county board of education shall consist of five members, electors of the county, one member to be elected from each of the four election areas by the electors of the respective areas, one member to be elected at large from the area of the county school system by the electors thereof. Their terms of office shall commence on the first Monday in April following their election. All the members of the county board of education shall be first elected at the regular school election to be held on the second Monday in March 1948, and at the first regular meeting of the board on the following first Monday in April, the term of office of each of the five members shall be determined by lot, one member to serve for one year, two members to serve for three years and two members to serve for five years, and the result of such determination showing the name of each member, the area from which elected, and the term so determined shall be entered of record on the minutes of the board and shall be conclusive as to the term of the members. Thereafter, elections to the county board of education shall be held at the annual school elections in odd-numbered years for members whose terms expire on the first Monday in April following said elections and their term of office shall be for six years. Vacancies on said board shall be filled at the next regular meeting of the board by appointment by the remaining members of the board until the next odd-numbered year election at which election a member shall be elected to fill the vacancy for the balance of the unexpired term. A vacancy shall be defined as in section two hundred seventy-seven point twenty-nine (277.29) Code 1946."

Section 6 thereof provides as follows:

"Nomination papers in behalf of a candidate for member of the county board of education shall be filed with the county superintendent of schools not more than forty-five (45) days, nor less than twenty (20) days prior to the election at which a member is to be elected. Each candidate shall be nominated by a petition signed by not less than twenty-five (25) qualified electors of the area from which a member is to be elected, which petition shall state the name of the area from which a member is to be elected, the office to which he is to be elected, the name of the candidate and that he is a resident and elector in the named area. Signers of the petition shall, in addition to signing their names, show their residence, including street and number, if any, the school district in which they reside, and the date of signing, and each nomination paper shall have appended to it an affidavit of an elector other than the candidate in substantially the form provided in section six hundred seventy-four, (674), Code 1946, except as to the party affiliation."

It will be noted that according to section 5, the county board of education shall consist of five members,—electors of the county, one member to be elected from each of the four election areas by the electors of the respective areas. The area to which reference is there made, is the area provided to be defined in section 4 of the Act, which provides as follows:

"The territory of the entire county shall be divided into four election areas, as nearly as possible of equal size and contiguous territory, to be designated as the first, the second, the third and the fourth election areas. Where districts have territory in more than one county, the district will belong to the election area of the county where the school buildings are located. In the event of changes in the limits of school districts, the county board of education shall make any such adjust-

ments as may be necessary to equalize the territorial size of the election areas, provided that no such change shall be made less than sixty days prior to the date of the annual school election.

On or before the first day of December 1947, in each county of the state, the county board of education then existing under the provisions of chapter two hundred seventy-three (273), Code 1946, shall meet in special session and make the division provided for in this section."

It will be noted that neither of these foregoing sections excepts from the foregoing election areas from which the members of the county board of education shall be chosen, any part of the area in which a four-year high school is maintained. These provisions are unambiguous and plain in their terms. To incorporate by interpretation, such exceptions into the foregoing sections, would be legislation. As the court, in construing the statute, must ascertain and give effect to the legislative intent as expressed in the language of the statute, the court cannot, under its powers of construction, supply omissions in the statute, especially where it appears that the matter may have been intentionally omitted. And it may not read into a statute, exceptions not made by the legislature. See 59 C.J. 974, title "Statutes."

This conclusion is fortified by the provisions of section 6 of the foregoing Act, heretofore quoted. It requires that each candidate for the board shall be nominated by a petition, signed by not less than twenty-five qualified electors of the area from which a member is to be elected. Such section 6 does not except from its operation, the qualified electors of that part of an area in which a four-year high school is maintained. And this conclusion is not negatived by the provisions of section 2 of the foregoing Act, which defines the county school system as "embracing all the public schools of the county, except independent and consolidated school districts that maintain four-year high schools." The foregoing is merely a definition of what shall constitute the county school system and is not a qualification or limitation upon the constituent members of the county board of education.

In this connection, section 13, subsection 10 of the foregoing chapter 147, confers upon the board of supervisors the power and duty to "levy a tax on all the taxable property in the county for the amount certified, the money so raised shall go into a fund, hereinafter called the county board of education fund". It is beyond belief that the legislature intended that all of the taxable property in the county should be taxed for the purpose of maintaining and operating the county school system, and at the same time eliminate from participation in the administration of that fund a taxpayer of that part of the area which maintains a four-year high school. Such would be the result if that part of an area which maintains a four-year high school could not participate in the election of a member of the county board of education. "Taxation is merely a way of apportioning the cost of government among those who in some measures are privileged to enjoy its benefits and must bear its burdens."

However, insofar as the eligibility of the number of the county board of education to be elected at large, is concerned, the statute is equally

plain and unambiguous. Section 5 of the foregoing chapter 147, Acts of the 52nd General Assembly declares the eligibility of the member to be elected at large in these words—"one member to be elected at large from the area of the county school system by the electors thereof." The county school system is declared by the foregoing chapter 147, section 2 in the following terms—"the county school system shall embrace all the public schools of the county, except independent and consolidated school districts that maintain four-year high schools and shall be under the direction of the county board of education as provided in this Act." From the foregoing, it is clear that four members are elected from election areas as defined in the Act, and one member, the member at large, from the area of the county school system. The county school system consists of all the public school systems of the county except independent and consolidated districts that maintain four-year high schools. The member to be elected at large is chosen from among the electors of the school districts that do not maintain four-year high schools. Or otherwise stated, a member at large of the county board of education, under chapter 147, Acts of the 52nd General Assembly, may not be a resident of a school district within the county that maintains a four-year high school.

January 30, 1948

COUNTIES: Probation officers—compensation. Chapter 131, Acts 52nd General Assembly contains no express authority for the appointment of a probation officer to serve more than one county. The salary limitation in section 1 of the Act is applicable even if such appointment is implied by the Act.

Mr. Henry J. TePaske, County Attorney, Orange City, Iowa: This will acknowledge receipt of yours of the 25th ult. in which you state:

"We are writing to request an opinion on the effect of chapter 131 as a limitation on the salary of a probation officer where one officer is appointed by the judges to serve several counties under the provisions of section 6 of said chapter 131.

Sioux county and several of the adjoining counties are considering a plan of requesting the court to appoint one full-time juvenile probation officer to serve in several counties, say four or five. All of the counties have a population of less than 30,000 each and under subsection 1, none of the counties could pay more than $2,500 in salary for a full-time employee. But we do not feel that we can secure a competent officer to give his full time for several counties at a salary of $2,500.

Our question is whether the counties may together pay a substantial salary, say $3,500 or $4,000, which would be prorated among them so that the actual cost to each county would probably not be more than $1,000 or $1,500.

Subsection 3 provides that in counties having a population of more than 50,000 but less than 125,000, a chief probation officer may receive up to $3,600 per year. I assume that this could apply only to a single county with that population, and that it would have no effect on the combined total population of several counties in determining the maximum compensation for an officer employed by several of them acting together."

In reply thereto, I would advise that the Act treating of the foregoing matter is chapter 131, of the Acts of the 52nd General Assembly. I am not in agreement with you that section 6 thereof has any effect upon the limitation of the salary of a probation officer, where one officer is appointed by the judges to serve several counties. In my judgment, section 6, which provides as follows:

"If more than one county is served by a probation office the judges of the judicial district containing such counties may prorate the expense of said probation office among the several counties served."

is no more than authorization for prorating the clerical expenses of a probation office in the event that office serves more than one county. It is not authority for the appointment of a probation officer to serve more than one county. On the other hand, the Act itself is lacking either expressly or impliedly, in the power to appoint a probation officer to serve more than one county. Even if it could be argued that such power existed by implication, the prorating of the annual salaries, provided in sections 2, 3, and 4 of the Act could not be effected because such Act shows the payment of the salary to be for full time performance of the duties in a single county. The only method of compensation for officers who could, by implication, serve more than one county, would be on a per diem or hourly basis under the provisions of section 1 of the Act. Even then, the probation officer serving more than one county under an implied power contained in section 1 of the Act, could be paid for such services in the aggregate, only the sum of $2,500 annually.

February 3, 1948

TAXATION. Old-age assistance tax—lien on real estate. The tax provided by section 249.36 of the Code for old-age assistance for the years 1934, 1935 and 1936 is a lien on real estate and the statute of limitations does not apply to the collection thereof.

Mr. Donald E. Smith, Assistant County Attorney, Cedar Rapids, Iowa: We have your letter of December 30, 1947, in which you pose the following question in regard to the old-age assistance tax which was levied for the years of 1934, 1935 and 1936:

"It has been suggested that we obtain an opinion from your office with reference to the lien of old-age assistance taxes created by that part of the original act now set forth as section 249.36, Code of 1946. (Sec. 3828.039, 1939 Code), and a reconsideration of the opinion of your office dated August 17, 1944, found in Report of Attorney General, Vol. 1944, Page 169, wherein it is held, among other things, that such tax is not a poll tax or a personal property tax, and that the statute of limitations does not apply to the collection thereof, nor does it affect its lien upon property."

We believe, and hold that section 249.36 of the 1946 Code of Iowa, which was originally section 34 of chapter 19 of the Acts of the 45th General Assembly, Extraordinary Session, and which has by various amendments, been changed to its present form, as set out in section 249.36, does create a lien on real estate. Said section recites in part as follows:

"There is hereby created a fund to be known as the old-age assistance fund to be administered by the state board and state department, the proceeds of which shall be used to pay the expenditures incurred under this chapter. 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; or said county treasurer, when such delinquent person is not the owner of real estate, shall cause to be served a notice, which shall be served in the same manner as an original notice, upon the delinquent taxpayers' spouse or employer, if either, of the amount of the tax and penalties due and costs of collection and said spouse or employer shall pay the same, and thereupon the employer may subsequently withhold the amount thus paid in tax, penalty and cost of collection from any wages or salary then or in the future due said employee but costs of collection shall not be chargeable unless the tax and penalties are collected. * * *"

We would call your particular attention to the following language:

"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; or said county treasurer, when such delinquent person is not the owner of real estate, shall cause a notice, etc."

It would appear that in making out this list of persons who should pay the old-age assistance taxes as provided under section 249.36 of the 1946 Code of Iowa, that this did in fact, create a lien upon any real estate owned by the persons so listed. It further appears that there is no statute of limitations provided for in section 249.36 either as to the taxes, or as to the lien of said taxes on real estate, so that said taxes were and are a lien upon the real estate owned by the person against whom said taxes were levied.

It has, of course, long been the law that the statute of limitations does not run against the state except where there is a special statutory provision providing for a statute of limitations. See Des Moines County vs. Harker, 34 Iowa, 84; Kellogg vs. Decatur County, 38 Iowa 524. These cases, apparently, involved actions on school funds brought in the name of the county, but the real party in interest was the state.

We are, therefore, of the opinion that the old-age assistance taxes for the years of 1934, 1935 and 1936, were made a lien on real estate by what is now section 249.36 of the 1946 Code of Iowa, and the statute of limitations as to the lien and as to the taxes never runs against the State of Iowa.

February 5, 1948

COUNTIES. Board of supervisors—road maintenance—supervision by engineer. The board of supervisors shall establish policy for road construction and maintenance, allocate funds and in the end inspect the work generally leaving the immediate supervision and responsibility for the good-faith performance definitely in the hands of the county engineer.

Mr. A. Wayne Eckhardt, County Attorney, Muscatine, Iowa: We acknowledge receipt of your letter of January 29 requesting an official opinion from this office upon the interpretation of certain statutes of the state of Iowa relating to the construction and maintenance of secondary roads and more particularly to sections 309.1, 309.21 and 309.67, Code of 1946. You state that your special interest is in the interpretation of the particular sections insofar as they relate to the board of supervisors and the county engineer. Your questions are as follows:

"1. Is there any authority in any of the sections cited above or in related sections for individual members of the board to act as foreman of maintenance work in their assigned territory or in their district where the county is divided into supervisor districts?

2. Do these sections mean that the board shall establish policy as to construction and maintenance, allocate funds for maintenance and construction, and in the end inspect same generally, leaving the immediate supervision and responsibility for the good faith performance of the work definitely in the hands of the county engineer?"

Section 309.1 provides as follows:

"Construction, repair and maintenance. The duty to construct, repair, and maintain the secondary road and bridge systems of a county is hereby imposed on the board of supervisors."

Section 309.21 provides as follows:

"Supervision of construction and maintenance work. All construction and maintenance work shall be performed under the direct and immediate supervision of the county engineer who shall be deemed responsible for the efficient, economical and good-faith performance of said work."

Section 309.67 provides as follows:

"Repair and dragging. The county board of supervisors and the engineer are charged with the duty of causing the secondary road system to be so repaired and dragged as to keep same in proper condition, and shall adopt such methods as are necessary to maintain continuously, in the best condition practicable, the entire mileage of said system.

In addition to the above they shall specifically:

1. Keep all sluices, culverts, and bridges, and the openings thereof, and all side ditches of the road, free from obstructions.

2. Provide such side ditches with ample outlets.

3. Remove loose stones and other impediments from the traveled part of the highway.

4. Fill depressions and keep the road free from ruts, water pockets and mud holes.

5. Repair the approaches to bridges and culverts and keep such approaches smooth and free from obstruction."

In addition to said sections it is well to consider in connection therewith section 309.17 which provides as follows:

"Engineer—term. The board of supervisors shall employ one or more registered civil engineers who shall be known as county engineers. The board shall fix their term of employment which shall not exceed three years, but the tenure of office may be terminated at any time by the board."

Also section 309.19 which provides as follows:

"Duties—bonds. Said engineers shall, in the performance of their duties, work under the directions of said board and shall give bonds for the faithful performance of their duties in a sum not less than two thousand nor more than five thousand dollars, to be approved by the board."

It is well to note at the beginning of this discussion that the Supreme Court of Iowa in the case of McKinley vs. Clarke County, 228 Iowa 1185, holds that a county engineer is not merely an employee, but is an official and as a public official has certain defined powers and duties in reference to his work and those powers and duties are co-ordinated with other public officers in the county, namely: the county board of supervisors throughout chapter 309 of the 1946 Code of Iowa.

We, therefore, start with the premise that the board of supervisors and the county engineer are public officials and that the engineer is hired by the board of supervisors, and in the performance of his duties he shall work under the direction of the board of supervisors. He is a bonded official, as provided in section 309.19.

The primary duty to construct, repair and maintain the secondary roads of a county is imposed upon the board of supervisors. They should, with the advice of the engineer, determine programs relating to both construction and maintenance work. It is their duty to determine the advisability of certain projects. When the board acting as a board and not as individual members, carries out its duties as prescribed in the statutes, including duties prescribed in section 309.67, and determines a program relating to certain roads, bridges, parts of roads and approaches to bridges, it is their duty to turn such program over to the county engineer. The joint duty is several insofar as each has his part to perform.

It is the engineer's duty and he has the authority to direct said work and supervise the county employees in the authorized performance of construction and maintenance work. Because of his knowledge and training, the legislature has placed upon him the statutory responsibility as to how the work should be done.

The law therefore contemplates a joint responsibility in the construction and maintenance of secondary roads. It contemplates that the board of supervisors and the engineer will work together toward good secondary road construction and maintenance. There is no conflict of power, duty or authority. The supervisors have the power and the

duty, not only to pass upon the necessity and desirability of the construction and maintenance work on such roads in their county, but also have the authority to direct the county engineer to proceed with the job. The manner and method or procedure is within the responsibility of the engineer, subject to the final inspection of the board and the engineer is responsible to the board to the extent of his efficient, economical and good-faith performance of the work directed to be done by the board of supervisors.

It is, of course, elementary and we hold that the individual members of the board should not act as foremen of maintenance work even in their assigned territory or districts as individual members have no power or authority as individual members, but have only the duty to report to the board as a whole as to the conditions in their districts requiring board action. When the board members approve their recommendations, the work is to be supervised by the engineer.

From the discussion above set out, it is apparent and we hold that the board should establish the policy as to construction and maintenance, as well as the feasibility of certain projects, allocation of funds for the construction and maintenance of the projects and then direct the engineer to proceed with them and in the immediate supervision and responsibility for the good-faith performance of the work shall be left to the county engineer.

February 10, 1948

ELECTIONS: Residents on federal military reservation at Fort Des Moines. A resident of the veterans' village at Fort Des Moines acquires no right to vote by virtue of his residence on the military reservation.

Mr. Carroll O. Switzer, County Attorney, Des Moines, Iowa: We have your letter enclosing a copy of letter received from Roy L. Stephenson, mayor of Fort Des Moines veterans' village, requesting opinion as to whether residence in Fort Des Moines veterans' village constitute residence within the state and county under the election laws of the state of Iowa, and requesting an opinion on this matter. Mr. Stephenson's letter states as follows:

"We respectfully request your opinion as to whether residence in Fort Des Moines veterans' village constitutes residence within the state and county under the election laws of the state of Iowa.

In 1946 the Polk county board of supervisors created a rural voting precinct, known as Bloomfield township precinct No. 6, in the Fort Des Moines housing area and the residents of the area were permitted to vote.

During the past year your office has rendered opinions regarding other matters in connection with Fort Des Moines which make it appear that it is your opinion, since the Fort Des Moines housing area is located on what was formerly a federal army post that the county has no jurisdiction. This is somewhat a reversal of the position taken by your predecessor.

We respectfully request your early opinion with regard to this matter. Should it be your opinion that residents in the Fort Des Moines army post area do not constitute residents of the county and state for

purposes of voting in a general election, we would like to take steps to secure legislation to permit residents of Fort Des Moines to vote in county and state elections. The population of the veterans' village now exceeds 3,000, of which approximately 1,800 are of voting age.

Enclosed herewith is a copy of a portion of the lease entered into between the federal public housing authority and the city of Des Moines for the use of certain buildings in Fort Des Moines for veteran housing.

We will be glad to furnish you with any other information you might need in rendering an opinion in this matter."

Answer to this problem depends primarily upon the facts of the original transaction by which ownership of the Fort Des Moines area was acquired by the United States of America. Its power to acquire the property is contained in Article I, section 8 of the Constitution of the United States, which provides as follows:

"To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten miles square) as may, by Cession of particular states, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful Buildings;"

Pursuant to the foregoing power, the original reservation of Fort Des Moines, consisting of 400 acres, more or less, was acquired in 1901 by donations of citizens of the community and accepted under the provisions of the Act of April 4, 1931, Statutes, page 59, Military Reservation (Iowa) War Departments, December 14, 1940, page 2. The reservation was announced as a military reservation by general order No. 103, headquarters of the Army. Adjutant general's office, 1901, Ibid. In 1905, one acre was acquired by purchase for a roadway. Ibid. In 1908, additional land was acquired by purchase under authority of the Act of May 27, 1908, 35 Statutes, pages 317, 364. Ibid. In 1902, easements for a subsurface drain for sewer purposes in Polk and Warren counties were acquired by purchase. Ibid.

Exclusive jurisdiction over the original reservation was ceded by an Act approved April 4, 1900, Laws of Iowa, 1900, page 133, which provided:

"That whenever the title to any real property, situated within the state of Iowa, shall become vested in the United States of America, to be used as a barracks, drill-ground, or fort, or for other military purposes, the full, exclusive, and complete jurisdiction is hereby granted and ceded to the United States of America over such real property, and full consent to the acquisition of such real property is hereby given and granted by the state of Iowa to the United States, and all jurisdiction of the state of Iowa over such real property is hereby ceded and surrendered. All claims or right to levy taxes against said real property is also hereby fully released and surrendered."

While the acquisition of the original reservation, based on a gift, may not have been technically a "purchase" within Article I, section 8, Clause 17 of the Constitution (see Board of Commissioners of Valley County v. Bruce (1938) 106 Mont. 322, 77 p. (2d) 403, Aff'd, (1939)

305 U. S. 577), the state of Iowa nevertheless ceded and surrendered complete jurisdiction over the tract in question. In James v. Dravo Contracting Company (1937) 302 U. S. 134, 142, the Court declared:

"Clause 17 governs those cases where the United States acquires lands with the consent of the legislature of the state for the purposes there described. If lands are otherwise acquired, and jurisdiction is ceded by the state to the United States, the terms of the cession, to the extent that they may lawfully be prescribed, that is, consistently with the carrying out of the purpose of the acquisition, determine the extent of the federal jurisdiction."

To the same effect, see U. S. v. Unzeuta (1930) 281 U. S. 138. In Bailey v. Smith (S. D. Iowa 1928) 40 F. (2d) 958, 960, it was assumed that Fort Des Moines was "owned and controlled by the United States government."

Exclusive jurisdiction over those parts of the reservation acquired by actual purchase in 1905 and 1908 was ceded by the general act approved March 27, 1903, Laws of Iowa, 1902, page 165. This Act provided, in the part here pertinent:

"Section 1. Consent to acquisition of land. That the consent of the state of Iowa is hereby given, in accordance with the seventeenth clause, eighth section of the first article of the constitution of the United States, to the acquisition by the United States, by purchase, condemnation, or otherwise, of any land in this state required for sites for customhouses, courthouses, postoffices, arsenals, or other public buildings whatever, or for any other purposes of the government.

Section 2. Exclusive jurisdiction. That exclusive jurisdiction in and over any land so acquired by the United States shall be, and the same is hereby ceded to the United States, for all purposes except the service upon such sites of all civil and criminal process of the courts of this state: but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands."

This act of cession seems to settle any question as to the jurisdiction of the tracts in question.

The foregoing discloses, therefore, that a portion of the land constituting Fort Des Moines was ceded to the federal government by the state of Iowa without reservation of any kind and that the other portion of the Fort was ceded to the federal government for all purposes except the service thereon of all civil and criminal processes. The settled law of the right of residents upon such reservations as Fort Des Moines under cessions of the character herein exhibited, to vote, is set forth in Kennan on "Residence and Domicile" page 844, in these words:

"It was decided at a very early day that 'persons who reside on lands purchased by or ceded to the United States for navy yards, forts and arsenals where there is no other reservation of jurisdiction to the state than that of a right to serve civil and criminal process on such lands' are not liable to pay school or other taxes, nor do they obtain a settlement 'nor do they acquire, by residing on such lands, any elective franchise as inhabitants of such towns' ".

Cited in support thereof, the opinion of Justices, 42 Mass. 580, and Crook vs. Old Point Comfort, 54 Federal 604. The same rule is reiterated in Johnson vs. Morrill, 126 Pacific 2nd, 873, where it appeared that certain persons employed in national defense activities in the state of California and residing on various housing projects constructed outside the confines of the navy yard and in the said county, and where was presented the question whether the United States had acquired exclusive jurisdiction of the areas occupied by said housing projects and upon which the persons resided so as to preclude the exercise by such persons of the right of suffrage in the county and the state of California. On that proposition the court said:

"Seven projects, including 995 housing units are constructed or are to be constructed on military and naval reservations or bases. Unquestionably that would be subject to exclusive jurisdiction of the United States. Standard Oil Company vs. California, 291 U. S. 242; 54 S. Ct. 381; 78 Law Ed. 775."

It was also held in the foregoing case that exclusive legislation and exclusive jurisdiction have been held to be synonomous.

"The exercise of exclusive legislation and of exclusive jurisdiction have been held to be synonomous. Surplus Trading Co. v. Cook, 281 U. S. 647, 652, 50 S. Ct. 455, 74 L. Ed. 1091. If the projects here involved may be included in any of the purposes designated in the Constitution and the political code section, namely, if they can be said to be forts, magazines, arsenals, dockyards, or other needful buildings, then they have been acquired by the United States with the consent of the Legislature within the meaning of said section 8 of the federal Constitution and the United States has exclusive jurisdiction over the land, so acquired. Surplus Trading Co. v. Cook, supra, 281 U. S. page 652, 50 S. Ct. 455, 74 L. Ed. 1091; Standard Oil Co. vs. California, 291 U. S. 242, 54 S. Ct. 381, 78 L. Ed. 775; Consolidated Milk Producers v. Parker, 19 Cal. 2d 815, 123 P. 2d 440."

And it is likewise reiterated in the case of Herken vs. Glynn, 101 Pacific 2nd 946, where was involved a contested election between Herken and Glynn and the question whether residents at the soldiers' home were residents of Kansas and as such were entitled to the right of franchise, the court there said:

"The questions presented by this appeal find their basis in the force and effect which must be given to art. I, sec. 8, cl. 17 of the Constitution of the United States, wherein it is provided that the Congress shall have power: 'To exercise exclusive Legislation in all Cases whatsoever, over such District' (District of Columbia) 'and to exercise like Authority over all Places purchased by the consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful Buildings.' Without elaboration, it may be said it has been held that the term 'exclusive legislation' carries with it 'exclusive jurisdiction', and that a soldiers home is within the term 'other needful buildings'. The question of the extent of jurisdiction of the federal government, and the power of the state to legislate in a particular case, has been before the federal and state courts in many instances arising under a variety of circumstances. The briefs cite and our research discloses but a few cases dealing with the right to vote at a state election of a person residing on lands within the state which the state has ceded to the United States.

In authorities treating the matter generally, it is said that where a cession of a tract is made by a state to the United States for the purposes mentioned in the above constitutional provision, and there is no reservation of jurisdiction by the state other than the right to serve civil and criminal process on the ceded lands, persons who reside on such lands do not acquire any elective franchise as inhabitants of the ceding state. See McCrary on Election, 4th Ed. Par. 89, page 68; Paine on Elections, par. 63, page 44; Kennan on Residence and Domicile, par. 493, page 844; 20 C.J., Elections, par. 33, page 74; 18 Am. Jur., Elections, par. 66, page 224."

And after citing and considering a number of cases considering and deciding the question, concluded thus

"no case has been found where it has been held that residents on lands ceded by a state to the United States, retained or acquired a right to vote as residents of the ceding state."

And it is likewise confirmed in the later Kansas case of State v. Corcoran, 128 Pacific 999, in these words;

"It is well settled in this state, and generally elsewhere, that when the federal government, under authority of Congress, exercises exclusive legislation over a tract of land situated within the state for any of the purposes mentioned in the provision of the Federal Constitution above quoted, and such exercise of exclusive legislation by Congress is consented to by the state under a statute similar to ours above quoted, a resident of such a tract of land is not deemed a resident of the state with authority to vote at state elections. See Herken v. Glynn, 151 Kan. 855, 101 P. 2d, 946, where the authorities on the subject are collected."

In view of the foregoing rule, it is quite apparent that insofar as that part of Fort Des Moines as was acquired by the United States of America in 1905 and 1908 is concerned, the leasing by the housing authority to the city of Des Moines, of buildings situated thereon, does not vary the rule announced. Such purchase was made under the cession statute enacted March 27, 1902, and appearing in the Laws of Iowa for 1902 at page 165, which expressly provided that the exclusive jurisdiction ceded to the United States of America "shall continue no longer than the said United States shall own such land." The ownership of such land still resides in the United States. And even aside from the foregoing condition of ownership, the foregoing rule as applied to Fort Des Moines acquired and ceded by the legislative acts without distinction of time of acquisition, variance likewise does not appear. The lease between the national housing agency, designated therein as the federal public housing authority, and the city of Des Moines, is described as a lease for temporary housing, pursuant to Title V, as amended, of the Lanham Act, being Public Law 849 of the 76th Congress as amended. The lease specifically is a lease of the buildings situated on the ground of Fort Des Moines acquired under either grant by the state of Iowa. The buildings being described by numbers and including all the fixtures and personal property located in the said building and including equipment and personal property that may hereafter be furnished and the lease is for a period of from April 1, 1946 to March 1, 1947, renewable and terminable as provided in the lease.

While the instruments designated a lease to the local body, it is to be noted that the instrument recites the following:

"This Permit, made this 24th day of December, 1946, by the United States, acting by the Commissioner of the Federal Public Housing Authority, or any successor to its powers, functions and duties, hereinafter called the FPHA represented by the officer executing this instrument, and the city of Des Moines, a municipal corporation duly organized and existing by virtue of the laws of the state of Iowa, herein called the local body;

Witnesseth, That in consideration of the mutual promises and undertakings herein provided, and for the purpose of carrying out the provisions of Title V of the Lanham Act (Public Law 849, 76th Congress, as amended), the FPHA does hereby grant to the local body the right and privilege of entering upon, using and occupying the following property:"

From the foregoing, it is clear by the transaction between the housing authority and the city of Des Moines, that the United States still retains title to the premises and that the housing authority has, pursuant to the power vested in it by the Lanham Act, conferred upon the city of Des Moines the right to use, temporarily, certain buildings erected and maintained upon the land of the Fort. That it is terminable, in any event and without further notice, on a date two years after the termination of the emergency declared by the President, existing on September 8, 1939, subject to further extension after such termination, provided that the premises are still needed to provide housing for tenants in the interest of the orderly demobilization of the War effort. It seems clear, therefore, that the United States did not and did not intend by the foregoing lease or permit, to dilute in any respect, its exclusive jurisdiction over the area of Fort Des Moines or divest itself of any of the attributes of such jurisdiction. And as far as the city of Des Moines is concerned, the entering in of the foregoing lease or permit, it is to be stated that once a state has ceded to the United States its entire jurisdiction over a military reservation, as is the case here, and such jurisdiction has been accepted, it cannot be recaptured by the later action of the state alone. In re Ladd (C. C.D. Neb. 1896) 74 Fed. 31; U.S. v. Unzeuta (1930) 281 U.S. 138, 143. In the Ladd case, the court declared that a cession of this sort surrenders the "entire political jurisdiction, which includes judicial and legislative jurisdiction", except as to matters expressly reserved. It will be noted that the state of Iowa made no express reservation other than the one in section 2 of the Act of March 27, 1902 with respect to service of process. Nor was jurisdiction of the United States conditioned in that statute on the continued maintenance of a fort. The only condition was that stated in section 2 aforesaid, that the "United States shall own such lands." The earlier act of cession contained no express reservation or conditions of any kind, and even if the reference to use of the land "as a barracks, drillground, or fort, or for other military purposes" could be said to be an implied reservation that the land must continue to be used, it would seem that the activity in question would not result in a loss of jurisdiction over the area. See Arlington Hotel Co. v. Fant (1929) 278 U.S. 439; Benson v. U.S. (1892) 146, U.S. 325; U.S. v. Unzeuta (1930) 281 U.S. 138; Fort Leavenworth Railroad Co. v. Lowe (1885) 114 U.S. 525.

We hold herein, that a resident of Fort Des Moines veterans' village acquires no right to vote by virtue of his residence there. We suggest, without deciding, that the individual concerned may possess a right to vote at a former residence.

February 16, 1948

HIGHWAYS: Local road construction program. The statute (chapter 309, Code 1946) requires each county to have a program of local road construction and that 35 per cent of the secondary road construction fund be set aside each year for improvement of local roads which may include reconstruction as well as new construction.

Mr. Ralph Bastian, County Attorney, Fort Dodge, Iowa: In a recent letter you propounded the following questions:

"1. Is it necessary for the county to have a program of local road construction?

2. Is it necessary to have a yearly meeting of the board of approval, established by section 309.31, Code 1946?

3. Is it necessary to set aside 35% of the yearly secondary road construction fund for the improvement of local roads?

4. Does the requirement that a program be adopted by the board of approval include reconstruction, or is it limited to new construction?"

That it is necessary to have a program of local road construction which has been approved as to 35% of the yearly secondary road construction fund by the board of approval, as required by section 309.32, Code 1946, seems obvious from the collective consideration of sections 309.22 to 309.32, inclusive. All were part of the same act and should be read by taking the act by the four corners and reading the sections all together. Applying that process we conclude that the intent is primarily to insure, through the action of the board of approval on which the township trustees are given representation, that 35% of the funds are spent on local roads. To accomplish such an end it is necessary to have a program of local road construction.

That it is unnecessary to have a yearly meeting of the board of approval when there is an uncompleted program in existence with reference to the 35% is not quite so obvious, but this office so held in an opinion dated May 23, 1938. See '38 A.G. Ops. 759. That opinion is affirmed.

It follows from the foregoing that it is necessary to set aside 35% of the secondary road construction fund for the improvement of local roads every year. It may be applied either to an existing uncompleted program or to a new program, whichever situation is presented.

We are not inclined to limit the program which may be adopted by the board of approval to new construction to the exclusion of reconstruction. There is authority to the effect that "reconstruction is but a form of construction; a construction again of what had first been constructed, and hence a statute authorizing aid for the construction of a railroad will be construed to provide also for aid in the reconstruction of railroads." Bell vs. Maish, 137 Ind. 226, 36 N.E. 358, C L. 359. See

also The Ferax, 8 Fed. Cases, 1147; People v. Peoples High Line and Reservoir Co., 52 Col. 626, 123 Pac. 645; Town of Pelham vs. B. F. Woolsey, 16 Fed. 418, C. L. 419; and Bell County vs. Lightfoot, 104 Tex. 346, 138 S.W. 381.

We conclude that the trustees in their planning are not limited to new construction.

February 20, 1948

TAXATION: Sales tax refunds on goods used for public purposes: Refund of sales tax to tax certifying or tax levying bodies may be made on any goods purchased and used for public purposes. This may include athletic supplies purchased by public schools although such purchases are not for governmental purposes. (52nd G.A. Chapter 229)

Mr. Earle S. Smith, Director Sales Tax Division, Des Moines, Iowa:

This will acknowledge receipt of your letter in which you propose several questions relating to the refund of sales tax. I have restated your questions and believe that the following inquiries cover all of the propositions set out in your letter.

1. School districts have an athletic fund consisting of receipts from athletic events and other activities promoted by the students. These funds are collected and distributed under the direction of the school board and are used for purchasing such items as basketballs, athletic supplies, tickets, handbills and other articles in connection with school athletic activities and the question is, are claims for refund of sales tax in connection with such items allowable under the provisions of chapter 229, Acts of the 52nd G. A.?

2. Is Form ST 160 submitted with your letter a proper form under the provisions of chapter 229 and may the claimant delete parts of the certificate attached to the form to suit his own ideas and submit such deleted form in connection with his claims for a refund?

3. What is the duty and liability of the person making examination of the claim for refund with reference to deleting items which are not properly included in the claim and are items upon which no refund is allowable?

4. Under the provisions of section 4 is the thirty days within which an application for refund may be filed to be regarded as a limitation on the time of filing claims for a refund?

In response to inquiry number one, chapter 229, Acts of the 52nd G. A. provides that, "any tax certifying or tax levying body of Iowa or any governmental subdivision thereof may apply to the state tax commission for refund of the amount of tax imposed hereunder and paid upon sales to it of any goods, wares or merchandise used for public purposes. The Act further provides, "the governmental unit claiming a refund shall report to the commission the total amount or amounts valued in money expended directly or indirectly for goods, wares or merchandise used for public purposes by such tax certifying or tax levying body." The school boards supervise and control the athletic funds and their disbursement, and the question is, are the expenditures as made by such school boards for a "public purpose," and at the very outset the inquiry revolves around what is a "public purpose"? In Spalding vs. United States, D.C. Cal., 17 Federal Supplement, 957, the Court employed the following language: "As regards immunity from federal taxation existing in favor of instrumentalities of state as to property devoted to governmental purposes, there is a distinction be-

tween 'public purpose' and 'governmental purpose,' since a purpose may be 'public' and yet not be 'governmental.' "School boards are 'public corporations,' their functions are exclusively of a public character, their acts are performed solely for public benefit, funds which they possess, administer, and disburse are 'public funds,' dedicated to specific purpose, and their acts are purely administrative." Bank of Winnfield vs. Brumfield, 124 So. 628; 11 La. App. 647.

The legislature in chapter 229 employed the terms, "used for public purposes" and also, "money expended directly or indirectly for goods, wares or merchandise used for public purposes". We find nothing in the Act which would limit the expenditures strictly to a governmental purpose and as the writer views it the expenditures for athletic equipment, when expended by school boards out of their athletic funds, are expenditures for goods, wares or merchandise used for public purposes. The language is clear and we are very reluctant to deny this refund under the laws that exist, in view of the long standing practice of school boards in controlling and administering funds in connection with the schools they serve. It is our view that such claims are within the legislative intent as expressed in the statute.

In response to inquiry number two we have examined Form ST 160 and are of the opinion that such form is proper under the law, and the form having been prescribed and approved by the state tax commission should not be accepted where the language has been deleted in the certificate. To hold otherwise would permit the taxpayer in effect to prescribe the form, and disregard the right of the tax commission to do so.

In response to inquiry number three, you are advised that it is the duty of the person making examination of the claim for refund to audit the claim and approve only the portion thereof which is allowable under the provisions of chapter 229. It is the duty of such person and his responsibility to delete the items which are not properly included and on which the refund may not legally be claimed, and in no event can the claimant be allowed a refund in excess of the amount claimed.

In response to question number four, you are advised that section 4, chapter 229, Acts of the 52nd G. A. provides, "Application for refunds herein provided shall be certified to the state tax commission quarterly and within thirty days after the close of each quarter on March 31st, June 30th, September 30th and December 31st of each year." The thirty days therein provided is a statute of limitation and any claim not filed within thirty days after the close of each quarter should be denied as there is no provision for refund, except within the time and in the manner provided by chapter 229, Acts of the 52nd G. A. Any claim filed within the thirty-day period may be amended to correct errors therein, provided the amendment is not a new and substituted claim.

February 28, 1948

HIGHWAYS: Engineering services—payment in farm-to-market road project. A claim for engineering, inspection and administration arising under a contract negotiated by the board of supervisors in connection with a farm-to-market road project but never approved by the highway commission is subject to discretion of the commission as to payment from farm-to-market road funds.

Iowa State Highway Commission, Ames, Iowa: You have recently been confronted with a number of sworn claims for engineering services rendered in connection with farm-to-market roads. These claims are supported by contracts negotiated with private engineers or engineering firms by local boards of supervisors which contracts not only

have never been approved by the highway commission, but have never been submitted to the highway commission for approval. The contracts appear to be valid instruments so far as the board of supervisors is concerned, and in some instances call for a cash payment for preliminary engineering and for construction engineering, contemplate furnishing services "on the basis of all items of cost, except car mileage, plus 10% for general overhead, plus 20%. Car mileage shall be charged at the legal rate of .05 per mile * * *." It is not possible to tell how much the engineering will cost when this type of contract is entered into, and there have been occasions where that cost has run 15, 20 and to even a greater percentage of the total cost of the project to which it relates. This you are asked to pay out of farm-to-market funds even though you regard the charge as excessive. You ask what discretion you have as to the allowance of such a claim.

Nowhere in the farm-to-market road chapter is there to be found a specific requirement that contracts for engineering service must be approved by the highway commission. Section 310.9, Code of 1946, as amended by section 2 of chapter 162, Acts of the 52nd General Assembly is as follows:

"Before any project shall be approved by the state highway commission for farm-to-market road construction in any county under this chapter, the commission shall satisfy itself that said county is financially and suitably equipped and organized to properly maintain said road, and that the county engineer's office in said county is suitably organized, equipped and financed to discharge to the satisfaction of the commission, the duties herein required; and that before any county can receive any portion of the farm-to-market road fund allocated on a need basis, as provided in section 310.5, Code 1946, such county must have made every reasonable effort by the levy of local taxes and otherwise to provide funds for the improvement of its secondary road system, and said county, by and through its board of supervisors, is hereby required to recommend a system of farm-to-market roads not exceeding 35% of the total secondary road mileage of the county in which projects constructed under this chapter shall be located."

The word "project", according to the dictionary, and as construed by the courts, means "a planned undertaking or definitely formulated scheme or proposal". Creche vs. South Carolina, 200 S. C. 127, 20 S. E. 2nd 645, 651. In conformity with that idea that formulation of the project comes very early in the operation of the farm-to-market scheme. In practice the county engineer's organization is seldom equipped and staffed to accomplish even the preliminary engineering required in connection with the project and thus early in the undertaking the board of supervisors is frequently obliged to employ the services of an engineering firm to supplement the planning required to be done by the county engineer. At this point the highway commission is certainly in a position to inquire whether the county engineer's office is suitably organized and if it finds it inadequate approval of the project may be withheld until arrangements have been made satisfactory to the commission with reference to the supplementing of the county engineer's organization.

The necessity for the employment of additional engineering services may not always be apparent at the "project approval" stage of the proceedings. We have no difficulty in concluding that the board of supervisors is empowered to enter into a valid and binding contract for additional engineering services with reference to secondary roads, the definition of which includes farm-to-market roads (section 301.1 (1), Code 1946), and to pay for them out of the secondary road fund. Neither is there any difficulty with the proposition that the cost is permitted to be paid out of farm-to-market funds, for section 310.28, Code of 1946 says:

"Engineering, inspection and administration expense in connection with any farm-to-market road project may be paid from said county's allotment of the farm-to-market road fund. Any such expense incurred by the state highway commission may in the first instance be advanced out of the commission's support fund or out of the primary road fund, said amounts later being reimbursed to said funds out of the farm-to-market road fund.

Provided, that no part of the salary or expense of the county engineer, any member of the county board of supervisors, any member of the state highway commission, the chief engineer, or any department head or district engineer of the commission shall be paid out of the farm-to-market road fund."

The question then is whether payment in a given instance shall be made out of the farm-to-market road fund and who makes that determination. It has been urged that the discretion implied in the use of the permissive word "may" is the discretion of the board of supervisors rather than the highway commission. This would make the approval of the claim arising under the contract a purely ministerial function. That mandamus will lie to compel the performance of a purely ministerial duty is well established.

Appanoose County Farm Bureau v. Bd. of Sups. 218 Ia. 892, 256 N.W. 687;

Taylor County Farm Bureau v. Bd. of Sups. 218 Ia. 937, 252 N.W. 498;

Blume v. Crawford County, 217 Ia. 545, 250 N.W. 733;

First National Bank v. Hays, 186 Ia. 892, 171 N.W. 715.

In the Appanoose county case, first above cited, this rule was applied in an action to compel a board of supervisors to make an appropriation for the benefit of a county farm bureau corporation. The statute there interpreted was section 176.8, Code 1946, providing that:

"When articles of incorporation have been filed as provided by this chapter and the secretary and treasurer have certified to the board of supervisors of such county that the organization has at least two hundred bona fide members, whose aggregate yearly membership dues and pledges of such organization, amount to not less than one thousand dollars, the board of supervisors shall appropriate to such organization from the general fund of the county a sum double the amount of the aggregate of such dues and pledges * * * ."

In the opinion the court reviews the cases cited above and concerning the Taylor county case says:

"The court there held that no discretionary authority is conferred upon board of supervisors by the statute in such cases and that the act required to be performed is in sense judicial in character. The conclusion, therefore, reached in that case is decisive and disposes of the contention of the appellant that the certificate in question is prima facie only of the number of bona fide members. It is conclusive upon board of supervisors."

In the Taylor county case, supra, may be found the following, which is extracted in turn from the Hays case above:

"A ministerial act has been defined as 'one which a person or board performs upon a given state of facts, in a prescribed manner, in observance of the mandate of legal authority, and without regard to or the exercise of his own judgment upon the propriety of the act being done'. * * * The 'distinction between merely ministerial and judicial or other official acts seems to be that, where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial, but where the act to be done involves exercise of discretion, it is not to be deemed merely ministerial. Discretion may be defined, when applied to public functionaries, as the power or right conferred upon them by law of acting officially under certain circumstances, according to the dictates of their own judgment and conscience, and not controlled by the judgment or conscience of others.' "

Throughout the decisions dealing with this general problem of distinction between judicial and ministerial functions is reiterated the language: "Where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment * * * *."

What ground is there for believing that this discretion vests in the board of supervisors rather than the highway commission? Their expenditure is authorized, directed, restricted and controlled by the several provisions of chapter 310, Code 1946. The allotment of the fund among the several counties of the state is made by the highway commission under the provisions of section 310.5 and it keeps the accounts thereof, (section 310.6) and renders quarterly statements to the county, (section 310.8), which is a rather difficult thing to do when there are unknown contracts or uncertain amounts outstanding. Projects are initiated by counties, (section 310.11), but approved or modified by the highway commission, (sections 310.9 and 310.10). Construction contracts are let by the highway commission on concurrence of the board of supervisors, (section 310.14). Only when it comes to augmenting farm-to-market funds from other sources can the board of supervisors act alone (section 310.20). If right of way is to be paid for out of these funds the board has to request it of the commission which then does the work of acquiring and paying for the right of way (section 310.22). In every instance having to do with the expenditure of farm-to-market funds it is the express intent of the legislature that the highway commission shall act as a check upon the board of supervisors or vice versa. When we derive such an intent from an examination of the law as a whole, it would indeed be a strained and forced construction which leads to the conclusion that in the case of contracts

for engineering services only the use of the permissive "may" in the statute conferred discretion on the board of supervisors to the exclusion of the highway commission.

There is an obvious means by which the board of supervisors can avoid the embarrassment to which they may be exposed by having all or a part of the cost of "engineering, inspection and administration" thrust on the secondary road fund, and that is, to submit the proposed contract to the highway commission for approval before it is entered into. Once the contract is properly approved the payment of claims thereunder becomes a mere matter of audit, approval and payment by the comptroller, which is purely a ministerial function.

We conclude, that even where there is a valid contract for engineering services in connection with a farm-to-market project negotiated by a county board of supervisors, but never submitted for approval to the highway commission or approved by it, a claim for "engineering, inspection and administration" arising under such a contract is subject to the discretion of the highway commission as to whether it may be paid from farm-to-market funds. Obviously such disapproval may neither be arbitrary nor capricious.

All previous opinions of this office in conflict herewith are withdrawn.

March 3, 1948

SOLDIERS, SAILORS, MARINES, etc.: Treatment for tuberculosis at expense of county. A war veteran or a member of his family who has tuberculosis and whose financial situation falls within certain standards, is entitled to care and treatment under chapter 254 of the Code as amended or in a tuberculosis sanitarium maintained by the county under chapter 347. All other medical care and hospitalization for a veteran or his family must be furnished by the soldiers' relief commission under chapter 250 if the veteran is an indigent person.

Mr. Carroll O. Switzer, County Attorney, Des Moines, Iowa: We are in receipt of your request for an opinion on the following question:

Must care and treatment for indigent veterans or members of their family suffering from tuberculosis be given by the soldiers' relief commission or are such persons entitled to care and hospitalization under the provisions of chapter 254, Code of 1946, as amended by chapter 120 Acts of the 52nd G. A.?

Historically, chapter 254 Code of 1946 was predicated upon the same theory as relief granted to a poor person. The expenditure for care and treatment for indigent persons suffering from tuberculosis was from the poor fund of the county. By chapter 220, Acts of the 50th G. A., the legislature changed this and provided that the care and treatment of indigent persons suffering from the tuberculosis should be paid from the state institution fund of the county if no other suitable provision had been made such as the establishment of a county public hospital having a tuberculosis sanitarium as provided for under the provisions of chapter 347, Code of 1946.

By the provisions of chapter 120 Acts of the 52nd G. A., the legislature by amendment to chapter 254 Code of 1946 clearly evidenced

fering from tuberculosis by removing the word "indigent" from the provisions of this chapter. True, section 4 of chapter 120, Acts of the its intent to eliminate the humiliation and embarrassment to one suf- 52nd G. A. added to this chapter a new section which provides for free care and treatment under certain circumstances but an examination indicates that the adopted criteria for determining the financial ability to pay for said care and treatment is much more lenient than had theretofore existed as to support of the poor or even relief for soldiers, sailors and marines under chapter 250 Code of 1946. The financial status entitling a person to a certificate of free care is expressed in the following words:

"not possessed of sufficient income or estate to enable him to make payment of the costs of such treatment in whole or in part without affecting his reasonable economic security or support, in light of his resources, obligations and responsibilities to dependents;"

As additional evidence that the legislature intended to encourage care and treatment of tuberculosis patients without causing them to feel that they were "poor persons", "paupers" or even "indigent" persons, we find in section 4 of chapter 120 Acts of the 52nd G. A. the following expression of legislative intent:

"and expenditures of public funds for treatment of tuberculosis shall be considered expenditures for the protection of the public health and not as monies advanced in the nature of welfare or relief."

We are of the opinion that a veteran or a member of his family who has tuberculosis, and whose financial situation falls within the standards therein prescribed, is entitled to care and treatment for said disease under the provisions of chapter 254, Code of 1946, as amended by chapter 120, Acts of the 52nd G. A., or in the tuberculosis sanitarium of the county public hospital maintained under the provisions of chapter 347, Code of 1946, as the case may be in the particular county.

In reaching this conclusion, we are not unmindful of the official opinion issued by this department under date of May 3rd, 1939 which interpreted the word "relief" contained in the provision which is now section 250.1, Code of 1946, to include and embrace all needed care including medical care and hospitalization. The reasoning applied in that opinion no longer exists as to medical care and hospitalization for the particular disease of tuberculosis. It is a well-established rule of statutory construction that where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, and there is a conflict, the latter will prevail. See McKinney v. McClure, 206 Iowa 285; 220 N. W. 354. As we have pointed out herein, the enactment of chapter 120, Acts of the 52nd G. A. established provisions limited to the care and treatment of patients suffering from tuberculosis. As to all other medical care and hospitalization for a veteran or member of his family, the previous official opinion remains in effect and requires that these be furnished by the soldiers relief commission.

March 4, 1948

COUNTIES: **Budget director not permitted.** The county board of supervisors may not delegate its discretionary powers of making appropriations, determining the amount of taxes and the amount thereof to be expended for the maintenance of government to a county budget director or finance comptroller.

Mr. Carroll O. Switzer, County Attorney, Des Moines, Iowa: We have yours of the 21st ult. in which you submit the following communication:

"I am in receipt of a letter from Mark L. Conkling, chairman of the Polk County Board of Supervisors, which provides as follows:

'It has been recommended by the Des Moines Taxpayers Association and the secretary of the Bureau of Municipal Research that the board of supervisors appoint a budget director. In my mind it is questionable as to whether or not the statutes provide or grant the authority for the board to make such an appointment. Some legal minds interpret the law as giving the board broad and sufficient powers to appoint a budget director. Others seem to feel that there is no provision in the law providing for such powers.

It might be practical for the board in the matter of expediency and in the realm of conservation of the tax dollar to appoint a budget director which of course would have to have authority in working out and setting up a budget.

In the event such authority was granted by this board to a budget director to what extent would the board be responsible for his acts and in the event of some violation of the law on the part of the budget director would the board of supervisors still be held responsible?

I would appreciate it if you would please ascertain from the attorney general an opinion as to the board's authority for the appointment of such an officer and delegating authority to him as well as an opinion as to whether or not the board members would be relieved of the responsibility of his acts?'

Will you kindly favor this department with an opinion at your convenience?"

In reply to the foregoing, we would advise you as follows: The powers of the county board of supervisors are either express powers, conferred upon them by the legislature, or such implied powers as may be required to effectuate the intent and purpose of the express powers. The powers so conferred are either discretionary or ministerial. One distinction in the character of those separate powers is that the ministerial duties of the board of supervisors may be delegated, while their discretionary powers are not the subject of delegation. This distinction will, in our judgment, determine whether the board of supervisors has the legal power to create the office of budget director and make appointment to fill the office. The budgetary powers of the board of supervisors is conferred by chapter 24 of the Code of 1946. Such chapter, after defining the levying board to mean the board of supervisors of the county and any other public body or corporation that has the power to levy a tax, specifies the requirements of a local budget in section 24.3, in terms as follows:

"No municipality shall certify or levy in any year any tax on property subject to taxation unless and until the following estimates have been made, filed and considered, as hereinafter provided:

1. The amount of income thereof, for the several funds from sources other than taxation.

The estimate of such total income other than taxation, for cities over seventy-five thousand population, shall be computed as follows in each fund; the estimate of that portion of this income which is derived from licenses, fees, fines and other miscellaneous items of income other than taxes, shall be no larger than the actual collection of these different items of income, but not including transfers from other funds, during the preceding twelve months, ending June 30. Also, to such total estimate, may be added any new source of income other than taxes but only after it shall actually have been authorized by the city council and such estimate of this new source of income must be reasonable.

2. The amount proposed to be raised by taxation.

In cities over seventy-five thousand population, the amount proposed to be raised by taxation may be five and twenty-seven hundredths per cent larger than the amount proposed to be expended as provided in subsection three after deducting balances from the preceding year if any, and income from sources other than taxation. Nothing herein shall be construed as permitting a tax levy in excess of the millage rates elsewhere provided.

3. The amount proposed to be expended in each and every fund and for each and every general purpose during the fiscal year next ensuing.

4. A comparison of such amounts so proposed to be expended with the amounts expended for like purposes for the two preceding years."

According to section 24.8, the tax collections are estimated according to the following formula:

"The amount of the difference between the receipts estimated from all sources other than taxation and the estimated expenditures for all purposes, including the estimates for emergency expenditures, shall be the estimated amount to be raised by taxation upon the assessable property within the municipality for the next ensuing fiscal year. The estimate shall show the number of dollars of taxation for each thousand dollars of the assessed value of all property that is assessed."

And according to section 344.1, Code of 1946, to accomplish the purpose of the foregoing budgetary requirements and to control the expenditures of the money collected thereunder, the legislature has imposed upon each elective and appointive county officer, the obligation, on or before the 31st day of December of each year, to prepare and submit to the board of supervisors

"* * * * a detailed estimate itemized in the same manner that the various expenditures of such office or department are itemized on the records of the county auditor, showing the proposed expenditures of his office or department for the following calendar year. If the estimated expenditures show an increase over those for the current year, a statement in writing of the reason for such estimated increase must also be submitted."

And thereafter the obligation is imposed upon the board of supervisors on or before the 31st day of January each year. According to section 344.2, the duty of appropriating

"* * * * by resolution, such amounts as are deemed necessary for each of the different county officers and departments during the ensuing year, and shall specify from which of the different county funds created by law the appropriated sums shall be derived. The appropria-

tions to each separate county office or department shall be itemized in the same manner that the accounts are itemized on the records of the county auditor."

And according to section 344.7, that these several elective and appointive officers who have provided the board of supervisors with estimates of expenditures shall be advised that such expenditure shall be kept within the limit of the appropriation, the duty is imposed upon the county auditor on the 15th day of April, July and October of each year to

"* * * * furnish to each county office or department, a statement showing the various original appropriations to each office or department, expenditures of the office or department from its different appropriation accounts during the expired portion of the year, together with a statement of the balance of the appropriations for said office remaining unexpended."

That the making of the budgetary estimates, required by chapter 24, Code of 1946, and the appropriations to be made by the board of supervisors to each elective and appointive officer to meet the expenditures of his office or department, require the exercise of discretion, seems too clear to require case justification. Determining the amount of money that may be collected from the taxpayers and the amount thereof to be expended for the maintenance of government, cannot be otherwise. Such power as a discretionary power may not be delegated. It is to be noted quite consistent with the foregoing conclusions, that the legislature has made no provision for the creation of the office of a county budget director or finance comptroller, or for an appointment to such offices, or prescribed the qualifications of the person who might be so appointed to such offices, or his duties. On the other hand, comparably, the budget and finance control of state funds is provided by chapter 8 of the Code of 1946, in which the office of state comptroller is created and his powers and duties meticulously prescribed.

The rule of law on the essentials of this argument is set forth in 15 C.J., title "Counties" paragraph 116, which states the following:

"The right of a county board to delegate its authority depends on the nature of the duty to be performed. Powers involving the exercise of judgment and discretion are in the nature of public trusts and cannot be delegated to a committee or agent. Duties which are purely ministerial and executive and do not involve the exercise of discretion may be delegated by the board to a committee or to an agent, and employee, or a servant. In some cases the legislature has expressly authorized the board to delegate its power under certain circumstances, but the legislature is without constitutional warrant to clothe one or two supervisors with authority to name a tribunal to perform the duties devolving on the whole board. Where nothing further appears than the fact that a supervisor in doing certain acts was acting under a custom that prevailed in the county, it will be presumed that the board gave him the requisite authority."

And see the following other authorities:

Wilhelm vs. Cedar County, 50 Iowa 254;

Reconstruction Finance Corporation vs. Diehl, 296 N.W. 385, 391;

20 C.J.S., title "Counties" paragraph 89;

State vs. Manning, 220 Iowa 536.

This is not to be understood as denying to the county auditor, the power, with the approval of the board of supervisors, to employ assistance in the performance of his statutory duty as herein defined.

March 5, 1948

CRIMINAL LAW: Sentence—credit for hard labor. A prisoner in the county jail, although used at hard labor while confined therein, may not be given credit of $1.50 per day under section 356.22 of the Code unless he was originally sentenced to be confined at hard labor. A nunc pro tunc order will not lie to correct the oversight in the original sentence.

CRIMINAL LAW: Sentence—fine and imprisonment for default. One sentenced to pay a fine and in default thereof to serve a term in jail does not have the fine absolved by serving the term in jail.

Mr. Carroll O. Switzer, County Attorney, Des Moines, Iowa: This will acknowledge receipt of your letter of February 18th wherein you request an opinion of this department on the following facts:

On March 14, 1947, a prisoner was sentenced on one charge to serve six months in jail and to pay $1,000 fine, and in default of payment of said fine to serve 300 additional days. At the same time he was also sentenced on a second charge to serve one year in jail and to pay a $300 fine, and in default of the payment of said fine to serve ninety additional days. Said sentences to run concurrently. The sentences did not provide for hard labor, as provided in section 356.16, but as a matter of fact the prisoner has been used at hard labor for a total of 308 days. You ask:

1. Is the prisoner entitled to a credit of $1.50 per day as provided in section 356.22, 1946 Code, even though the original order did not state that he should be imprisoned at hard labor?

2. If said credit cannot be given, would it be possible for the court to make a nunc pro tunc order amending the original order to include hard labor from the date of the original order, even though there is no error involved as the question of whether or not the sentence should be at hard labor was never raised.

1. In answer to your first question, section 356.16, of the Code, reads as follows:

"**Hard labor.** Able-bodied male persons over the age of sixteen, confined in any jail under the judgment of any tribunal authorized to imprison for the violation of any law, ordinance, by-law or police regulation, may be required to labor during the whole or part of the time of his sentence, as hereinbefore provided, and such tribunal, when passing final judgment of imprisonment whether for nonpayment of fine or otherwise, shall have the power to and shall determine whether such imprisonment shall be at hard labor or not."

Immediately thereafter in the Code are five sections (356.18 to 356.21, inclusive) relating to hard labor on the part of prisoners. Section 356.22 reads as follows:

"**Credit for labor.** For every day of labor performed by any convict under the provisions hereof, there shall be credited on any judgment for fine and costs against him the sum of one dollar and fifty cents." It should be noted that under the provision of the section last above quoted, credit is given for labor performed by any convict "under the provisions hereof".

Historically sections 356.16 to 356.22, inclusive, were first enacted in 1870 and are found in chapter 69 Acts of the 13th G. A. in an Act entitled "An Act to authorize the working of persons confined in jails of the state and to protect prisoners." Section 1 of said Act authorized a court to order a prisoner confined at hard labor. Section 6 of said Act reads as follows:

"For every day's labor performed, by any convict under the provisions of this Act, there shall be credited on any judgment for fine and costs against him, the sum of $1.50, * * *"

In view of the historical developments of section 356.16 and 356.22, it is our opinion that said sections should be read together and that a credit of $1.50 per day may not be given a prisoner unless he was originally sentenced to be confined at hard labor.

2. A nunc pro tunc order is something different from an entry correcting an over-sight or mistake, such entry assumes that an act was done at a particular time which never got of record in the proper books, and the entry is finally made now for them. Hoface v. City of Monticello, 128 Iowa 239, 193 N. W. 488. A nunc pro tunc order can only be made to correct a mistake, it can never correct an oversight on the part of the court nor be used to correct judicial errors nor to render a judgment different than that actually rendered. Burnside v. Ward, 170 Mo. 531, 71 S. W. 337.

In your statement of facts you state that the question of whether the sentence should be at hard labor or not was never raised before the court at the time of the original judgment entry.

It is our opinion that a valid order cannot now be entered amending the original order to include confinement at hard labor.

3. Under the holding of our supreme court, if a defendant is sentenced to pay a fine or to serve a jail sentence in lieu thereof, "the judgment is in the alternative, and would be satisfied by either payment or by imprisonment." Wills v. Nielan, 88 Iowa 548. However, if a defendant is sentenced to pay fine and stands committed until such fine is paid, not exceeding a specified number of days, the sentence is not in the alternative and the fine imposed is still collectible, even though the defendant serves the specified number of days. In State v. Meier, 96 Iowa 375, our supreme court stated:

"It is true in this case that the imprisonment is the means provided by the statute for coercing payment of the fine, but it is settled by a long line of authorities that the undergoing of imprisonment in such a case by the defendant, would not release him from the payment of the fine. State v. Jordan, 39 Iowa 387; State v. Anwerda, 40 Iowa 151; City of Keokuk v. Dressell, 47 Iowa 597; Albertson v. Kreichbaum, 65 Iowa 18 (21 N. W. 178)."

See also State v. Crosser, 202 Iowa 725, and State v. Oliver, 203 Iowa 458.

It is therefore our opinion that the prisoner in the instant case should not be given credit on the $1,000 fine of $3.33 1/3 per day for the last six months he will have been in jail. The $1,000 fine which was in addition to his six months sentence, will still be due and payable when he is released from jail.

March 10, 1948

TAXATION: Moneys and credits—federal income tax as "debt". Federal income tax due and unpaid on January 1 of any year is not a "debt" within the provision of the statute taxing moneys and credits. However, such tax owed by a banking corporation may be deducted by the corporation as a liability of the corporation in fixing the value of its shares of stock for the purpose of taxation.

Mr. Carroll O. Switzer, County Attorney, Des Moines, Iowa: This will acknowledge your request which is expressed in the letter addressed to you by Bert L. Zuver, city assessor of Des Moines, Iowa. You pose the following question: "On March 28, 1945 an attorney general's opinion held that a federal income tax due the United States is not a debt and for this reason cannot be deducted as a debt from moneys and credits in making a return to a taxing jurisdiction for assessment purposes. Under July 29, 1947 an opinion by the attorney general stated that an unpaid federal income tax is a debt and, therefore, deductible by a banking institution in making a return for and in behalf of its stockholders for the purpose of arriving at the value of the shares of stock of the corporation." The letter makes inquiry as to whether the two opinions are inconsistent. You are advised that the two opinions are not inconsistent and relate to separate and distinct rules of law governing distinct situations under the laws relating to taxation. In order to clarify this matter you are advised that in listing moneys and credits under the provisions of chapter 429 of the Code, a person is entitled to deduct the gross amount of all debts in good faith owing by him. The opinion referred to in your inquiry calls attention to the fact that unpaid federal income tax or taxes are not a debt within the meaning of this statute and the opinion is based upon a holding of the Supreme Court of Iowa in the case of Bailies v. City of Des Moines, 127 Iowa 124, in which the Court stated:

"The general tenor of the authorities is to the effect that a tax in its essential characteristics is not a debt, but an impose levied by authority of government upon its citizens or subjects for the support of the state. It is not founded on contract or agreement, but operates in invitum. Where as a debt is a sum of money due by certain and express agreement, and originates in or is founded upon contracts express or implied. In Meriweather v. Garrett, 102 U. S. 472 (26 L. Ed. 197), it is said, 'a tax is a charge imposed by the legislature for the purpose of revenue. It is not founded upon contract, and does not establish the relation of debtor and creditor. It is an enforced proportional contribution levied by authority of the state.' See, also, the long collection of cases in volume 2, Words and Phrases, page 1883. It must be remembered that in the absence of statute there can be no deduction on account of debts, and he who would have such exemption

must be able to point out a statute which gives it to him. We are not justified in extending such a statute beyond its express terms. There is nothing in the spirit of the act which suggests a liberal interpretation thereof."

This decision is still the prevailing law in Iowa and to date has not been overruled.

The opinion of July 29, 1947 stated that the federal court had held that an income tax was a debt but this opinion did not hold and is not to be construed as being authority for the proposition that a federal income tax is such a debt as is contemplated by the provisions of section 429.4, Code 1946, relating to deduction of debts in determining the actual value of moneys and credits for taxation purposes. The opinion stated that if a bank had a bona fide indebtedness for income tax on January 1, 1947, they were entitled to deduct the same as a valid liability of the bank. Such deduction was permitted as a liability in the statement of assets and liabilities in order to arrive at the value of the shares of stock and the deduction in this instance is not a deduction of a debt from moneys and credits, but is a deduction allowable as a liability of the corporation in fixing the value of the shares of stock for the purpose of taxation.

As authority for the foregoing proposition we quote with approval the language contained in Equitable Life Insurance Company v. City of Des Moines, 207 Iowa 879, wherein the exact question was presented and the court employed the following language:

"Was the action of the trial court in making the deduction correct? The appellants rely on Bailies v. City of Des Moines, 127 Iowa 124, where we held that a tax is not a debt, to be deducted from the amount of moneys or credits to be assessed to a person under section 1311 of the Code of 1897 (now section 6988 of the Code). This case is not in point in the determination of the instant case. In the instant case, the amount sought to be deducted is not the tax of the individual shareholder, but the taxes due from the corporation. Under the provisions of sections 7026, 7013, and 7007-a1 to 7007-a4, Code of 1927, the corporation is liable for the payment of the taxes assessed to the stockholders, but the corporation may recover the same from the stockholders. It is not a tax on the moneys and credits of the corporation. It is a tax upon the shares of the stockholders, and is to be computed upon the value of the shares of stock. The mere fact that the tax is paid by the corporation does not alter the fact that it is the tax of the stockholders, and recoverable by the corporation against them. The question confronting the assessment officer is: What were the shares of stock worth on the 1st day of January, 1927. See section 7008 of the Code. Was the amount due and owing from the corporation for state, federal, and other taxes such a liability as would affect the value of the shares of stock? We answer in the affirmative. It is obvious that the net worth of the corporation determines the value of the shares of stock. The shares of stock represent the stockholders' interest in the property of the corporation. The interest of the stockholders must be measured by the value of the corporation's assets over and above its liabilities. In determining the net worth of the corporation, the taxes due must be considered a liability of the corporation."

We are of the opinion that the two opinions are not inconsistent and this opinion is issued for the purpose of clarifying the two former opinions and removing any doubt or confusion if such may be said to exist.

March 24, 1948

HIGHWAYS: Restricted use in certain seasons—remedy for abuse. Boards of supervisors have by resolution power to restrict traffic on certain roads because of climatic condition for the preservation thereof. If proceeding under section 321.471 of the Code the restriction should be by weight of vehicle; if under Section 321.473, the restriction may be by type of vehicle or by weight or both. A violation of such resolution may not, however, be punished as a misdemeanor as the remedy is limited to civil liability under section 321.475.

Mr. Carl Nystrom, County Attorney, Decorah, Iowa: In your letter of March 16th, 1948, you point out that from time to time in the spring of the year the board of supervisors of Winneshiek county has imposed a prohibition against trucks and busses traveling upon certain of the secondary roads of the county for one or more of the reasons enumerated in section 321.47, Code 1946, and you propound the following questions:

"1. Does the board of supervisors have authority under section 321.471 to prohibit the operation of school busses, and milk and cream trucks when, in the opinion of the board, the road or roads in question would be seriously damaged or destroyed by said trucks because of climatic conditions?

2. Is a violation of Code section 321.471 and Code section 321.473 punishable as a misdemeanor under Section 321.482, or is action limited to the civil liability provided in section 321.475?"

The section in question, 321.471, provides as follows:

"Local authorities with respect to highways under their jurisdiction may by ordinance or resolution prohibit the operation of vehicles upon any such highway or impose restrictions as to the weight of vehicles to be operated upon any such highway, for a total period of not to exceed ninety days in any one calendar year, whenever any said highway by reason of deterioration, rain, snow, or other climatic conditions will be seriously damaged or destroyed unless the use of vehicles thereon is prohibited or the permissible weights thereof reduced."

The following section, 321.472, prescribes the manner in which such determination shall become effective, and says:

"The local authority enacting any such ordinance or resolution shall erect or cause to be erected and maintained signs designating the provisions of the ordinance or resolution at each end of that portion of any highway affected thereby, and the ordinance or resolution shall not be effective unless and until such signs are erected and maintained."

The next succeeding section, 321.473, confers generally the right to prohibit the operation of trucks, or other commercial vehicles, and uses the following language:

"Local authorities with respect to highways under their jurisdiction may also, by ordinance or resolution, prohibit the operation of trucks or other commercial vehicles, or may impose limitations as to the weight thereof, on designated highways, which prohibitions and limitations shall be designated by appropriate signs placed on such highways."

The powers are conferred by the language of each of these sections upon "local authorities". From the same chapter of the statute, in section 321.1, sub-section 46, we find:

" 'Local authorities' mean every county, municipal, and other local board or body having authority to adopt local police regulations under the constitution and laws of this state."

That the board of supervisors is an agency clothed with power to adopt local police regulations should be clear from this section taken in conjunction with the general powers of the board of supervisors found in section 332.3, as amended. That the power attempted to be conferred upon boards of supervisors by sections 321.471, 321.472 and 321.473 amount to a valid delegation of legislative power is hardly debatable. In the case of Polk County vs. Cope, 176 Ia. 19, 157 N. W. 245, the court speaking through Justice Weaver, as long ago as 1916, used the following language:

"Still less merit is there in the objection that the statute delegates to the board power to make a law. The state is full of inferior bodies like a board of supervisors or a city council to whom is delegated some measure of legislative power, and it is too late in the day to question the constitutional soundness of such laws in aid of local autonomy for the management and control of local affairs."

It is difficult to define the basis of objection that the prohibition should not relate to school busses or to milk and cream trucks. That the board of supervisors would have the power under section 321.471 to completely prohibit the operation of vehicles on a highway for a period of ninety days cannot be doubted in view of the language of the section, nor can the right of the board to limit the weight of the vehicles to use the highway for such limited period be questioned. If it is sought to proceed under this section the prohibition should be on the basis of weight of vehicle rather than type of vehicle. If it is sought to proceed under section 321.473 then the prohibition may be on the basis of a distinction between truck and passenger vehicles or commercial vehicles, or it may be on the basis of weight, or both. With this limitation we answer question No. 1 in the affirmative.

Provision is made for the recovery of damages for injury to the roads in section 321.475, which so far as pertinent provides as follows:

"Any person driving any vehicle, object or contrivance upon any highway or highway structure shall be liable for all damages which said highway or structure may sustain as a result of any illegal operation, driving, or moving of such vehicle, object or contrivance, or as a result of operation, driving, or moving any vehicle, object, or contrivance, weighing in excess of the maximum weight in this chapter but authorized by a special permit issued as provided in this chapter.

* * * *

Such damage may be recovered in a civil action brought by the authorities in control of such highway or highway structure."

For violation of the provisions of chapter 321, which do not amount to felonies, section 321.482 provides as follows:

"It is a misdemeanor for any person to do any act forbidden or to fail to perform any act required by any of the provisions of this chapter unless any such violation is by this chapter or other law of this state declared to be a felony. Chapter 232 shall have no application in the prosecution of offenses committed in violation of this chapter.

Every person convicted of a misdemeanor for the violation of any of the provisions of this chapter for which another penalty is not provided shall be punished by fine of not more than one hundred dollars or by imprisonment for not more than thirty days."

There is nothing inconsistent in the provisions of the quoted sections; the latter is punitive in character and the former provides a means of reimbursing the owner of such a structure for the actual damage done. The statute with reference to damage is the more recently enacted and is cumulative in character.

We might, in a proper case, even go so far as to sustain the provisions of a catchall misdemeanor statute, such as section 321.482, but a recent pronouncement of the Iowa Supreme Court, in State v. Brighi, 232 Ia. 1087, 7 N. W. (2nd) 9, flashes a danger signal. That case applied the rule of strict construction to the very misdemeanor statute with which we are concerned, quoting the language of State v. Campbell, 217 Ia. 848, C.L. 853, 251 N. W. 717, C.L. 719, 92 A.L.R. 1176, as follows:

"It is a settled rule in this state that criminal statutes are to be strictly construed, and not extended to include an offense not clearly within the fair scope of the language employed. State vs. Bunn, 195 Ia. 9, 190 N.W. 155; State vs. Niehaus, 209 Ia. 533, 288 N.W. 308."

Where, as in the instant case, the language describing the offense is "act forbidden * * * * or required by any of the provisions of this chapter * * *." and the prohibition with which we are concerned is made effective not by "this chapter" but by "resolution" of a board of supervisors, we do not see how an offense can be charged within the fair scope of the language of section 321.482. It is the "restriction" imposed by the board of supervisors under powers validly delegated to it that is being transgressed rather than "any act forbidden" by a provision of "this chapter". Nothing may be taken by implication according to the language of many cases.

We conclude that such violations cannot be punished as a misdemeanor and that the remedy is limited to the civil liability provided by section 321.475.

March 25, 1948

COUNTIES: Airports—conversion of part of county farm—taxation. A county may convert part of the county farm, no longer needed for that purpose, to other county purposes such as an airport. County-owned equipment may be used for its construction and land may be leased to private individuals for hanger space and contracts may be made for concessions. However, the tax levy authorized by section 330.16 of the Code may not be made by counties without a vote of the people.

Mr. William B. Drake, County Attorney, Glenwood, Iowa: This will acknowledge receipt of your letter of February 21st wherein you ask the following questions:

"1. Does the board of supervisors have the authority and right to devote approximately 13½ acres of land located on the 200 acre Mills county farm to use as a county airport?

2. If the answer to question No. 1 is 'yes', does the Board have the authority and right to use county-owned equipment to do the necessary grading and smoothing to put an air strip in usable condition? In this connection, it should be pointed out that only a minimum amount of work will be necessary.

3. If a county airport is established in this manner, does the Board have the authority to lease land on said airport to private individuals for hanger space, and to contract for gasoline or other concessions at the airport?

4. If an airport is established in this manner by the county, and without a vote of the people, does the county have the right to make the tax levy authorized by section 330.16 Code of Iowa, 1946?"

In answer to your first question, section 332.3 reads as follows:

"General powers. The board of supervisors at any regular meeting shall have power: * * *

13. When any real estate, buildings, or other property are no longer needed for the purposes for which the same were acquired by the county, to convert the same to other county purposes or to sell or lease the same at a fair valuation."

If the board of supervisors, by proper resolution, finds that the 13½ acres of land located on the county farm are no longer needed for use by the county for purposes for which they were acquired, then under the provisions of the above quoted section your board may cause said 13½ acres to be converted to other county purposes.

In answer to your second question, we find no statute which would prohibit your board from authorizing the use of county-owned equipment to do the necessary grading and smoothing to put the air strip in question in usable condition.

In answer to your third question, under the subsection 13 of section 332.3, above quoted, it is our opinion that your board would have the authority to lease land on the airport to private individuals for hanger space and to contract for gasoline or other concessions.

In answer to your fourth question, it is necessary to examine the applicable law. In 1929 the 43rd G. A. granted authority to cities and towns to acquire, establish, improve, maintain and operate airports. Until 1945 no provision was made for the establishment of airports by any other political subdivision of the state. In 1945 under chapter 150 of the 51st G. A. the Legislature enacted the following statute which now appears as section 330.3 of the 1946 Code.

"Powers extended. All powers herein conferred upon and granted to cities and towns are hereby specifically extended and granted to and conferred upon all other political subdivisions within this state, including villages, townships, and counties."

Said Act was approved April 4, 1945. The 51st G. A. also enacted an Act entitled "An Act to amend chapter 303.1 of the 1939 Code of Iowa providing for the levy of a tax and the anticipation thereof by the issuance of bonds by municipalities for airport purposes." Said Act now appears as section 330.16 of the 1946 Code and reads as follows:

"Additional levy—bonds issued

1. Municipalities in which there have been established airports, pursuant to the provisions of this chapter, or by act of congress, or by any federal department or agency, and over which airport the municipality has control by ownership, grant, lease, or otherwise, may levy annually, when found necessary in addition to all other levies, a further tax within the limits hereinafter set out for the purposes of equipping, improving, maintaining, operating, or enlarging such airports.

The limits of such additional levies shall be as follows:

Under ten thousand population	1½ mills
From ten thousand to twenty thousand population	1 mill
From twenty thousand to fifty thousand population	¾ mill
Over fifty thousand population	½ mill

The provisions of section 330.7 shall not be operative with respect to the additional levies herein provided.

2. Such taxes, or a part thereof, may be anticipated by the issuance of bonds of such municipality maturing not later than twenty years from date of issue, pursuant to section 330.8".

This Act was approved March 22, 1945.

It should be noted that the last above quoted section was approved before chapter 150, Acts of the 51st G. A.

In order to answer your question it is necessary to determine what the legislature meant by the word "municipalities" as used in section 330.16 and to determine whether counties were meant to be included in the term "municipalities." At the time of the passage of section 330.16 by the legislature there had been no law enacted granting to counties, or any other political subdivision, the right to establish, operate or maintain airports. That right, under the law as it stood, could only be exercised by cities and towns. It should also be noted that section 330.16 makes provision for additional levies for municipalities under 10,000 population, and at the time of the passage of said Act there were no counties in the state having a population of less than 10,000 according to the United States census.

In addition to the above, the word "municipalities" ordinarily does not include counties. In Iowa a county is classified as a quasi corporation and not strictly as a municipality. Hilgers v. Woodbury County, 200 Iowa 1318, 206 N. W. 660; Brown v. Davis County, 196 Iowa 1341, 195 N. W. 363; 20 C. J. S. 758, and 14 Am. Juris. 186. Also in 37 Am. Juris. at page 623, the following quotation appears:

"While the term 'municipal corporation' is sometimes used, in its broader meaning, to include such public bodies as the state and each of the governmental subdivisions of the state,—such as counties, parishes, townships, hundreds, etc.,—it ordinarily applies only to cities, villages, and towns which are organized as full-fledged public corporations."

Further, if it is argued that the provisions of section 330.3 of the Code extend the powers of counties so as to enable them to levy the taxes provided for under section 330.16, there is a well defined line of authority which holds that such could not be done. In 51 Am. Juris. 361, the following language appears:

"Language of statute.—The intention of the legislature with respect to tax statute must, as in the case of statutes generally, be ascertained from the language of the act. As has been frequently pointed out, a tax cannot be imposed without clear and express language for that purpose. Unless the context shows that they are differently used, the words employed are to be given their ordinary meaning, and the effect of the statute is not to be extended by implication or forced construction beyond the clear meaning or import of the language used; nor is its operation to be enlarged to embrace matters not specifically pointed out."

See also 51 Am. Juris. 432 and In Re Kites Estate, 194 Iowa 129, 187 N. W. 585.

If the legislature had intended to empower counties to levy the tax provided in section 330.16, it is our opinion that counties would have been specifically named along with "municipalities"; to hold otherwise would be to place a forced construction on the meaning of the word "municipalities" and it would in effect create an authority to tax by implication.

It therefore follows that it is our opinion that counties are not included in the meaning of the word "municipalities" as used in section 330.16 of the Code and that counties do not have the power to levy the tax authorized therein.

April 1, 1948

TAXATION: Expert appraiser to assist county assessor. The county board of supervisors may employ an expert appraiser for the county assessor and pay the expense from the general levy for the assessor's office.

Mr. Carroll O. Switzer, County Attorney, Des Moines, Iowa: We have yours of the 25th ult. in which you submit the following:

"The board of supervisors of Polk county desire to employ, pursuant to section 20 of chapter 240 of the Laws of the 52nd General Assembly and such other permissive statutes as may bear upon the question, professional assistance to aid the county assessor in preparing and making the 1948 assessment upon all real estate in Polk county, Iowa, located outside the corporate limits of the city of Des Moines, Iowa.

A question has arisen as to whether payment therefor may be made by the board of supervisors out of the general fund, in which funds are now available, or whether your department interprets section 20 of chapter 240 of the Laws of the 52nd General Assembly to mean that the cost of these assessor's assistants must be borne out of a fund contributed to only by taxpayers living outside the corporate limits of the city of Des Moines and known as the 'County Assessor Fund', in which funds are not available and can only be made available by the transfer of funds from other county funds with approval of the comptroller.

The board of supervisors of Polk county, Iowa, and the representatives of all taxpayers' leagues and organizations within the city of Des Moines are anxious that payment for the Assessor's assistance be made out of the general fund, and the board has expressed an unofficial opinion that they cannot provide this assistance if the cost must be borne by the taxpayers outside of the city of Des Moines, only.

The cost of procuring the professional assistance herein referred to will be $77,800, which will result in virtually quadrupling the levy for

the county assessor fund as fixed by the 1948 budget, should your department decide that it must be paid from that fund.

Your attention is directed in passing, to the fact that at the time the 1941 assessment of properties within the corporate limits of Des Moines, Iowa, was made by Cleminshaw Company of Cleveland, Ohio, the cost thereof was borne in part by the taxpayers outside the corporate limits of Des Moines.

In view of the fact that the contract is about to be let for the professional assistance herein referred to and work must be gotten under way immediately in order to complete the 1949 assessment within the statutory time limitation, may I please urge such preferred attention to this request as is possible."

In reply thereto, and as pertinent to this question, I call your attention to the fact that in July of 1947 the state tax commission published its interpretation of the county assessors' law, being chapter 240 of the Acts of the 52nd General Assembly, and included in that interpretation was the following, appearing on page 11 thereof, the commission addressing itself to the subject of expert appraisal stated this:

"The county board of supervisors may employ an expert appraiser for the county assessor and the expense is paid from general levy for assessor's office."

The foregoing interpretation is approved. Justification thereof is clearly found in the provisions of the foregoing chapter 240. Section 6 thereof provides as follows:

"Any expenditures incurred under this act prior to January 1, 1948, shall be paid from the general fund of the county."

And Section 7 thereof provides the following:

" The county board of supervisors shall set up an annual budget for the office of county assessor covering expenditures for each year, during the year beginning January 1, 1948, as provided by chapter 344 of the Code. All provisions of chapter 344 shall apply to the office of county assessors. All expenditures made prior to January 1, 1948, under the provisions of this act, for the office of county assessor shall be paid from the county general fund and thereafter from the proceeds of the tax to be levied for the operation of the county assessor's office."

By rule of statutory construction the availability of the general fund for the payment of all expenditures incurred under chapter 240 prior to January 1, 1948, does, by plain implication, exclude the availability of that fund for such expenditures incurred after January 1, 1948. There after, by the terms of section 7, the expenditures of the office of county assessor, after January 1, 1948, are directed to be provided in the budget. Quite consistent with the foregoing is the provision of section 8 of chapter 240 which imposes upon the county board of supervisors the duty of creating the county assessor fund for the purpose of defraying the expenses of the county assessor and his office. Obviously, it refers to those incurred after January 1, 1948. The terms of that section are these:

"The county board of supervisors is hereby directed to levy a sufficient annual tax to defray expenses of the county assessor and his office. Such tax shall be levied upon taxing districts of the county which

are assessed by the county assessor. The amount of tax levied in 1947 for collection in 1948 and each year thereafter, shall be fixed by the board of supervisors."

It is true that the foregoing section 20 does not specifically prescribe the fund from which the appraisal assistants may be paid, but the omnibus character of sections 6 and 7 would, without question, include the expenditure necessary to pay for the assistance authorized by the foregoing section 20.

The fact that at the time the 1941 assessment of properties within the corporate limits of the city of Des Moines was made by the Cleminshaw Company, and the cost thereof paid from the general fund, contributed in part by the taxpayers outside the corporate limits of Des Moines, is not persuasive or contrary to the conclusion herein reached. If explanation is required, it is to be said that that contract was entered into in the year 1940, and by express provision of section 5669, Code of 1939, then in force, the compensation of the city assessor in a city of more than 125,000 population, and his deputies was ordered paid by the county from its general fund. There was no express statutory authorization for the employment by the county, for the assistance to the assessor of extra, technical or expert service. It is unfortunate that if doubt existed of the correctness of the tax commission ruling, heretofore referred to, that it could not have been resolved before the making of the 1948 budget and the levy made thereunder for the assessor's office.

In this opinion the state tax commission concurs.

April 15, 1948

INSANE PERSONS: Commitment of veterans—cost not chargeable to relief fund. Costs incurred in a hearing of commitment of a war veteran to a hospital for insane are properly paid from county funds and not from the soldiers' relief fund.

Mr. Edwin H. Curtis, Executive Secretary, Iowa Bonus Board: We have yours of the 26th ult. in which you state:

"I have at hand a letter of March 15, 1948, regarding the cost of commiting a veteran to the veterans hospital at Knoxville, Iowa.

This commitment was made by Marshall county who has billed Linn county for the cost stating that the veteran is a resident of Linn county. Linn county has billed the Linn county soldiers' relief commission for these costs.

In reading chapter 130 of the Acts of the 52nd General Assembly it appears to me that this is a county cost and not a cost from funds which were raised for soldiers' relief purposes. I desire an official opinion on this and will appreciate this opinion as early as possible."

In reply to the foregoing, we advise you as follows:

Whether the foregoing costs are legally payable from funds of the soldiers' relief commission, is determined by the statutory powers which are conferred upon the soldiers' relief commission. The fund and the purpose for which it shall be used is provided by section 250.1 Code of 1946, which is as follows:

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

It will be noted that the foregoing statute authorizes the creation of this fund for

"the relief of and to pay the funeral expenses of honorably discharged indigent men and women of the United States."

Therefore, if these costs are payable from this fund they must be embraced within the term "relief" used in the foregoing statute. It is true, according to authority, that there is considerable ambiguity in defining the term. However, in re. McMormick's Estate, 8 N.Y.S. 2nd 179 183, it is defined in these words:

" 'Relief' signifies the 'removal in whole or in part of any evil or hardship that afflicts body or mind; especially, the partial removal of pain, grief, want, care, anxiety, toil, or anything distressing or burdensome, so that some ease is obtained' ".

And in re. Matruski, 8 N.Y.S. 2nd 471, 476, states this

"What is relief anyway? Webster defines it as aid in the form of money or necessities for indigent persons. Succor, alleviation, sustenance, aid in time of danger, or extreme difficulties."

The term seems not to have been defined either by our statute or by our supreme court. This department, in an opinion appearing in the Report of the Attorney General for 1940 at page 207, said this:

"The next question that confronts us is, what is included in the term 'relief', as used in said Section 5385. It is our opinion that this contemplates relief of all types, including expenses incident to medical care and hospitalization. We do not believe that the statute should be construed as relating merely to furnishing of food, clothing and shelter. It was undoubtedly the purpose of the framers of this legislation to place the soldier and his dependents in a privileged class because of his service which such soldier has rendered to his country, and we can not believe that it was the intention of the legislature that a soldier suffering from a disease should seek relief from the overseer of the poor and thereby put him in the classification of a pauper.
* * * *

We reach the conclusion, therefore, that the soldiers' relief commission should furnish not only food, shelter and clothing to an indigent soldier, but also medical and hospital services * * * *."

The term "relief" does not include subscription to a newspaper for soldiers confined in soldiers' home. Report of the Attorney General for 1942, page 11. Nor may such funds be used for the purpose of contributing to the maintenance of a general service welfare center for soldiers. Opinion of the attorney general, June 4, 1945.

If, therefore, we are to include costs within the statutory term of relief, it must either expressly or by intendment, be included within the definitions hereinbefore stated. That this is not aid in the form

of money or necessities, provided for indigent soldiers, seems too plain for argument. It does not arise by reason of indigency nor does it arise by reason of the fact that the person under charge is a veteran. The costs in such proceedings are imposed without distinction of status or occupation. Jurisdiction of the insanity commission does not extend to the veteran because he is a veteran, but because he is a person allegedly of unsound mind or other disability, over which the commission may have jurisdiction.

We are, therefore, of the opinion that costs incurred in a hearing of commitment of a veteran, under the foregoing circumstances, are paid from the same county funds from which such costs are by statute paid. They are not a charge against the soldiers' relief commission fund.

April 22, 1948

TAXATION: Suspended taxes of old-age assistance recipient—when interest due. Interest on suspended taxes of an old-age assistance recipient is not chargeable while said taxes are suspended. However, when the pensioner dies the taxes become due and payable from that date and interest is properly charged.

Mr. Frank R. Thompson, County Attorney, Guthrie Center, Iowa: We have your letter of recent date in which you state:

"The Guthrie county treasurer has asked that I write you and secure your opinion on the following matter: Hanna Zeller died on January 1, 1947. She received old-age assistance and the taxes were suspended on her real estate since 1939. Her estate was opened, and the real estate sold for the purpose of paying the claims of the department of old-age assistance. The taxes were paid by the administrator February 5, 1948. The county treasurer charged interest on these suspended taxes from January 1, 1947, the date of the death of the old-age recipient. The real estate did not sell for enough to pay the claims of the department of old-age assistance, and the department has requested that they be allowed a refund of this interest, claiming that the collection of said interest was erroneous, and is not collectible in lieu of the provisions of section 427.11 of the 1946 Code of Iowa.

"It has been the custom of this county to so assess the interest. Will you please give us your opinion as to this matter?"

You ask, in other words, whether section 427.11 prohibits the collection of interest on taxes suspended under section 427.9, from the time the recipient dies until the taxes are actually paid.

Section 427.9 was adopted by section 1 of chapter 77 of the Acts of the 46th General Assembly, and provides that taxes on the real estate of old-age assistance recipients shall be suspended "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."

Section 427.11 reads as follows:

"In the event that the petitioner shall sell any real estate upon which the tax has been suspended in the manner above provided, or in case any property, or any part thereof, upon which said tax has been suspended, shall pass by devise, bequest, or inheritance, to any person

other than the surviving spouse or minor child of such infirm person, the taxes, without any accrued penalty, that have been thus suspended, shall all become due and payable, with six percent interest per annum from the date of such suspension, *except that no interest on taxes shall be charged against the property or estate of a person receiving or having received monthly or quarterly payments of old-age assistance,* and shall be enforceable against the property or part thereof which does not pass to such spouse or minor child. The petitioner, or any other person, shall have the right to pay the suspending taxes at any time." (the italics are ours)

The italicized portion of the above was adopted as an amendment to this section by section 3 of chapter 77 of the Acts of the 46th General Assembly. In interpreting this section, it is most readily understood by reading it with the italicized portion omitted until the very end of the section.

In Ahrweiles vs. Board of Supervisors of Mahaska County, 226 Iowa, on page 231, the court said:

"It is a well established principal that tax exemption statutes should be strictly construed, and that those claiming exemptions must show themselves entitled thereto within the provisions of the act."

217 Iowa 1181, 221 Iowa 208, 207 Iowa 24, 223 Iowa 341.

With this rule in mind, we conclude that "taxes" as used in the phrase "except that no interest on taxes shall be charged against the property or estate of a person receiving or having received monthly or quarterly payments of old-age assistance" is to be construed as meaning "suspended taxes." Such taxes, within the meaning of the above phrase, are no longer suspended when they become due and payable. Section 427.11 recites that when the property passes by devise, bequest or inheritance, the taxes shall all become due and payable. Consequently, as of January 1, 1947, the suspended taxes on the property of Hanna Seller became due and payable, and the prohibition against the collection of interest on those taxes, as contained in section 427.11 is no longer operative after that date.

This interpretation of this section is in line with the legislative intent as expressed in section 446.7. Section 446.7 reads in part, as follows:

"No interest or penalty on suspended taxes shall be included in the sale price, except that six per cent per annum from the date of suspension shall be included as to taxes suspended under the provisions of section 427.8."

The quoted portion of this section was adopted as an amendment to said section by section 1 of chapter 254 of the Acts of the 49th General Assembly.

Read in conjunction with section 427.11 and section 427.8, it is evident that interest on taxes accumulated during the period of suspension is collectible for taxes suspended under section 427.8, and is not collectible under section 427.9. However, the law applies only to interest accumulated on suspended taxes during the period of suspension.

Our conclusion is that the administrator in the estate of Hanna Zeller was correct in paying the interest on the suspended taxes from January 1, 1947 until February 5, 1948, and the county treasurer was correct in accepting such payment, and the department of old-age assistance should not be allowed a refund of this interest.

April 22, 1948

BEER: Delivery on Sunday or consumption on premises after closing hour prohibited. The statutes regulating the sale and consumption of beer prohibit one from taking delivery of beer on Sunday although the actual purchase may have been on a week-day. Likewise one may not consume beer on the premises of a Class B permittee after the closing hour regardless of when it was purchased and paid for.

Mr. Robert S. Bruner, County Attorney, Carroll, Iowa: This will acknowledge receipt of your letter of April 20th wherein you ask the following questions:

"Some questions have been submitted to me relative to the sale of beer under class B permits in connection with closing hours.

First, A purchases a case of beer or some other quantity on a Saturday and pays for it, and calls at the tavern on Sunday to take out the beer from the cooler. It would seem that this would be a violation of section 124.20 of the 1946 Code, which says in part, 'nor shall any such beer be sold or delivered to, or consumed by any person on the premises of any class B permit holder between the hours of 12 o'clock midnight on Saturday and 7 o'clock on the following Monday morning.' Am I correct that this is a violation?

Second, is it also a violation of the beer law for a customer to purchase and pay for beer shortly before the closing hour on another week day, as fixed by the city council or another authorized body, left in the cooler and served to him by the attendant to be consumed on the premises after the closing hour; this also includes the inquiry as to whether or not the beer can be ordered before the closing hour, paid for and placed on the table at which the customer sits, and consumed after the closing hour.

Would you be kind enough to give me your opinion on whether any or all of these instances are violations?"

The second paragraph of section 124.20, 1946 Code, reads as follows:

"Nor shall any such beer be sold or delivered to or consumed by any person on the premises of any class "B" permit holder, between the hours of twelve o'clock midnight on Saturday and seven o'clock of the following Monday morning."

Section 124.34 reads in part as follows:

"said city and town councils are further empowered to adopt ordinances, subject to the express provisions of section 124.20, for the fixing of the hours during which beer may be sold and consumed in the places of business of class B permittees, and further providing that subject to the express provisions of said section 124.20 no sale or consumption of beer shall be allowed on the premises of a class B permittee, as above provided, between the hours of one a. m. and six a. m., and for the location of the premises of Class B permittees; and are empowered to adopt ordinances not in conflict with the provisions of this chapter, governing any other activities or matters which may affect the sale and distribution of beer under Class B permits and the welfare and morals of the community involved."

In view of the above quoted provisions of the law it is our opinion that under no circumstances may beer be consumed by any person on the premises of a class B permit holder between the hours of twelve o'clock midnight on Saturday and seven o'clock a. m. on the following Monday morning, or be delivered during said hours.

With reference to week-day sale or consumption of beer the provisions of section 124.34 are controlling, and in said section it is specifically provided that no sale or consumption of beer shall be allowed on the premises of a class B permittee between the hours of 1:00 a. m. and 6:00 a. m. if a city ordinance or a resolution of the board of supervisors, as the case may be, provides for an earlier closing hour than 1:00 a. m. then such ordinance or resolution would be controlling.

It is therefore our opinion that it would be a plain violation of law for a person to purchase beer and pay for it, and then take delivery of said beer on Sunday.

In answer to your second question, it is our opinion that it would be a plain violation for a customer to purchase and pay for beer shortly before the closing hour in a week day and consume such beer on the premises of a class B permittee after the closing hour. Under our opinion it would make no difference whether or not the beer was actually delivered to the customer before or after the closing hour. The statute is plain in its provisions that consumption of beer after closing hours shall not be allowed.

May 6, 1948

BANKS AND BANKING: Limitation on liability to banks on chattel mortgages. Under section 528.14 of the Code chattel mortgages are not within the language "shipping documents, warehouse receipts or similar documents" but such mortgages are within the language "instruments securing title covering livestock."

Mr. Newton P. Black, Superintendent of Banking, Des Moines, Iowa:
Your recent letter requests an opinion as to whether the language "or similar documents transferring or securing title covering readily marketable staples", occurring in section 528.14, Code of Iowa, 1946, includes chattel mortgages.

Section 528.14, Code of Iowa, 1946, provides in pertinent part:

"Obligations of any person, copartnership, association, or corporation in the form of notes or drafts secured by shipping documents, warehouse receipts, or similar documents transferring or securing title covering readily marketable nonperishable staples when such property is fully covered by insurance shall be subject under this section to a limitation of twenty percent of such capital and surplus. Provided, that such obligations in amounts not to exceed forty percent of such capital and surplus may be permitted when the market value at any time is not less than one hundred twenty percent of the face amount of such obligation, provided further that if such obligations are secured by instruments securing title covering livestock or by a first lien on livestock with sufficient corn and rough feed to fatten said livestock during the term of the note and given for not more than the purchase price of said livestock, they shall be subject under this section to a limitation of forty percent of such capital and surplus."

Public Law No. 270 of the 64th Congress, approved September 7, 1916, amended section 13 of the federal reserve act of 1913 to read as follows in part:

"Any member bank may accept drafts or bills of exchange drawn upon it having not more than six months' sight to run, exclusive of days of grace, which grow out of transactions involving the importation or exportation of goods; or which grow out of transactions involving the domestic shipment of goods provided shipping documents conveying or securing title are attached at the time of acceptance; or which are secured at the time of acceptance by a warehouse receipt or other such document conveying or securing title covering readily marketable staples. No member bank shall accept, whether in a foreign or domestic transaction, for any one person, company, firm, or corporation, to an amount equal at any time in the aggregate to more than ten percent of its paid-up and unimpaired capital stock and surplus unless the bank is secured either by attached documents or by some other actual security growing out of the same transaction as the acceptance and no bank shall accept such bills to an amount equal at any time in the aggregate to more than one-half of its paid-up and unimpaired capital stock and surplus."

In an opinion dated March 25, 1918 (1918 Federal Reserve Bulletin 437) the federal reserve board in construing the federal law, ruled:

"Under the terms of section 13 of the federal reserve Act national banks are permitted to accept drafts in a domestic transaction only when shipping documents conveying title are attached at the time of acceptance, or when such drafts are secured at the time of acceptance by warehouse receipt or other such documents conveying or securing title covering readily marketable staples. In the case under consideration no shipping documents are attached, and in the opinion of this office a chattel mortgage on cattle is not a document similar to a warehouse receipt conveying or securing title to readily marketable staples. In the case of a chattel mortgage the borrower retains possession of the goods and merely vests the legal title as security for the debt."

By Public Law No. 62 of the 66th Congress, approved October 22, 1919, the federal reserve Act was further amended to read as follows in pertinent part:

"The total liabilities to any association of any person or of any company, corporation, or firm for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed 10 percentum of the amount of the capital stock of such association, actually paid in and unimpaired, and 10 percentum of its unimpaired surplus fund; provided, however, That * * * (3) the discount of notes (secured by shipping documents, warehouse receipts, or other such documents conveying or securing title covering readily marketable nonperishable staples, including livestock), when the actual market value of the property securing the obligation is not at any time less than 115 percentum of the face amount of the notes secured by such documents and when such property is fully covered by insurance, * * * shall not be considered as money borrowed within the meaning of this Section, * * * the total liabilities to any association, of any person or of any corporation, or firm, or company, or the several members thereof * * * * for money borrowed, including the liabilities upon notes secured in the manner described under (3) hereof * * * shall not at any time exceed unimpaired capital stock and surplus. The exceptions made under (3) hereof shall not

apply to the notes of any one person, corporation or firm or company, or the several members thereof for more than six months in any consecutive twelve months."

In an opinion dated December 1, 1919, the comptroller of the currency ruled that notes secured by "warehouse receipts or other such documents conveying or securing title covering readily marketable, nonperishable staples, including livestock", included notes secured by chattel mortgages on livestock.

We have been unable to find the opinion of the comptroller, although we believe that complete research has been made in all appropriate publications. Inquiry of the comptroller of the currency as to whether the opinion is in their files resulted in the following reply:

"Whereas we have been able to verify that the comptroller took the above position in construing the exceptions to section 5200 on December 1, 1919, we have been unable to locate any letter or memorandum in which the basis for that position is fully explained or supported."

The comptroller has further advised us that whether the position stated in the ruling of December 1, 1919, was maintained thereafter appears from their files as uncertain. However, the federal reserve Act was further amended by the Act of February 25, 1927, (44 Stat. 1229). The provisions pertinent to this discussion were restated and the exceptions to the 10 percent limit were reframed into eight exceptions. Exceptions (6) and (7) are relevant hereto. The Act in pertinent part provides:

"(6) Obligations of any person, copartnership, association or corporation, in the form of notes or drafts secured by shipping documents, warehouse receipts or other such documents transferring or securing title covering readily marketable nonperishable staples when such property is fully covered by insurance, if it is customary to insure such staples, shall be subject under this section to a limitation of 15 percentum of such capital and surplus in addition to such 10 percentum of such capital and surplus when the market value of such staples securing such obligation is not at any time less than 115 per centum of the face amount of such obligation, and to a further additional increase of limitation of 5 per centum of such capital and surplus when the market value of such staples securing such additional obligation is not at any time less than 125 per centum of the face amount of such additional obligation, and to a further additional increase of limitation of 5 per centum of such capital and surplus in addition to such 35 per centum of such capital and surplus when the market value of such staples securing such additional obligation is not at any time less than 130 per centum of the face amount of such additional obligation, and to a further additional increase of limitation of 5 per centum of such capital and surplus in addition to such 40 per centum of such capital and surplus when the market value of such staples securing such additional obligation is not at any time less than 135 per centum of the face amount of such additional obligation, and to a further additional increase of limitation of 5 per centum of such capital and surplus in addition to such 45 per centum of such capital and surplus when the market value of such staples securing such additional obligation is not at any time less than 140 per centum of the face amount of such additional obligation, but this exception shall not apply to obligations of any one person, copartnership, association or corporation arising from the same transaction and/or secured upon the identical staples for more than ten months.

"(7) Obligations of any person, copartnership, association, or corporation in the form of notes or drafts secured by shipping documents or instruments transferring or securing title covering livestock or giving a lien on livestock when the market value of the livestock securing the obligation is not at any time less than 115 per centum of the face amount of the notes covered by such documents shall be subject under this section to a limitation of 15 percentum of such capital and surplus in addition to such 10 percentum of such capital and surplus."

It is to be noted that exception (6), containing the language "obligations * * * in the form of notes or drafts secured by shipping documents, warehouse receipts or other such documents transferring or securing title covering readily marketable nonperishable staples * * *", sets forth exceptions as to limitations not contained in exception (7).

The comptroller's office has consistently held that chattel mortgages are not "other such documents transferring or securing title" under the provisions of exception (6). It is held by the comptroller that chattel mortgages are within the language "obligations * * * in the form of notes or drafts secured by shipping documents or instruments transferring or securing title * * *" under the provisions of exception (7).

The distinction drawn lies in the word "such" occurring in the phrase "other such documents" in section (6). The comptroller views this qualification to mean "similar" or "equivalent". No such qualification is found under exception (7). As the owner retains possession in the case of a chattel mortgage and loses possession under a warehouse receipt or shipping document chattel mortgages are not construed as "equivalent" or "similar" instruments. This construction is consistent with the opinion of the Federal Reserve Board of March 25, 1918.

It further appears that the distinction was in the mind of the Congress when a special provision was made relating to instruments transferring or securing title to livestock.

The language of section 528.14 Code of Iowa, 1946, "obligations * * * in the form of notes or drafts secured by shipping documents, warehouse receipts or similar documents transferring or securing title covering readily marketable staples * * *" is analogous to and almost identical with the language of section (6) of section 5200 of the federal reserve Act. The only distinction is that the federal reserve Act uses the phrase "or other such documents", whereas the Iowa statute uses the phrase "or similar documents". If anything, the word "similar" is more direct than the phrase "other such".

We are in agreement with the distinction drawn between chattel mortgages and warehouse receipts. We are further in agreement with the construction placed upon "other such" and "similar" as being "equivalent". Therefore, chattel mortgages covering "readily marketable staples" are not within the provisions of section 528.14.

It is to be noted, however, that the Iowa statute contains an additional exception as follows:

"Provided further that if such obligations are secured by instruments securing title covering livestock or by a first lien on livestock * * *".

To understand this exception it is necessary to analyze the phrase "such obligations". The word "obligations" refers to notes or drafts. It is the note or draft that is the obligation as is indicated by the language "obligations * * * in the form of notes or drafts * * *".

The code then provides that if obligations in the form of notes or drafts are secured by instruments securing title covering livestock they shall be subject to a limitation of 40 percent. This language is analogous to the language found in exception (7) of section 5200 of the federal reserve Act. Therefore, notes or drafts secured by chattel mortgages on livestock are within the specific exception of section 528.14, Code of Iowa, 1946, relating to livestock, as distinguished from the exception relating to readily marketable staples.

IN SUMMARY, you are advised that it is the opinion of this office that chattel mortgages are not within the language "shipping documents, warehouse receipts or similar documents", but such mortgages are within the language "instruments securing title covering livestock."

May 6, 1948

INSANE PERSONS: Costs of investigation—county obligation. The costs involved in the investigation resulting in the commitment of an alleged insane person are obligations of the county solely and are not reimbursable.

Honorable George Faul, Des Moines, Iowa: We have yours of the 29th ult., in which you submit the following:

There has arisen considerable controversy relative to the question of the payment of costs in proceedings involving the commitment of insane persons, especially in view of some enactment by the 52nd General Assembly, particularly chapter 129 of the session laws of the 52nd General Assembly. It would be logical, perhaps, to divide costs into three classifications, (1) those incurred in connection with the hearing before the commission, (2) those that arise by reason of the appeal authorized by Senate File 171 (chapter 129), and (3) those consisting of attorneys fees allowed by the court.

In connection with the first classification there has never been any question, it seems to me, but they are payable by the county. This is provided by section 228.10 of the Code. It also seems to me that this same rule applies to the costs involved in the second classification. However, with respect to the third classification, attorney fees, the legislature provided: "An attorney so assigned shall receive such compensation as the district court shall fix, to be paid in the first instance by the county". This is section 7 of chapter 130, Acts of the 52nd General Assembly.

This provision was added by an amendment from the floor and was not contained in the original report of the special committee which brought in a number of measures relating to the commitment, treatment and discharge of insane persons. The special question of what this language means was argued at some length on the floor of the Senate. There were those who contended that the phrase "shall be paid in the first instance" meant that the county had to pay these first just as if the words "in the first instance" were omitted. The ans-

wering argument to this was the claim that the county could require reimbursement from the person accused of being insane but from no other person. It was likened somewhat to a criminal case where a court appointed counsel and upon a showing that the defendant is destitute then such counsel is compensated out of the funds of the county.

In the argument it was contended that in no instance should the spouse be charged with the payment of attorney fees in these cases. The object of this measure was to prevent the miscarriage of justice in isolated cases where it was claimed persons were "railroaded to the asylum". It was recognized, however, that in perhaps the majority of the cases the spouse became the person filing the charges, or at least the one who was ordinarily required to take the initiative in this connection. It was also pointed out that usually this was done with great reluctance and only after it appears that there was no other alternative. The point made by these arguments was that the legislature should not compel a person to employ and pay for an attorney under circumstances such as these, and especially the spouse who usually waited long periods of time before permitting herself to be convinced that there remained no other way. In other words, it was not contended at any time when the bill was before the Senate that the county could go farther by way of reimbursement after it had paid these attorney fees in the first instance, than to the person accused of being insane or to his separate estate, and in no case under this language could the county require reimbursement from any other person, more particularly from the spouse of the insane person.

Several inquiries have come to me from different parts of the state asking my interpretation of these statutes, or at least requiring the views of members of the legislature expressed at the time of passage. It thus seems that this is a proper question for an opinion on the part of your office.

The particular question then would be "who is liable for the payment of costs and attorney fees in proceedings involving the commitment of insane persons, including fees incurred on the hearing before the commission, the appeal of the district court, and the attorney fees allowed by the court to an attorney who was appointed by the court? Assuming that all or a part of these fees are chargeable to the county in the first instance, who, if anyone, would be liable to reimburse the county?"

In reply thereto we are of the opinion that the foregoing costs, including attorney fees, are obligations of the county, payable out of the county treasury, with no power resting in the county to require reimbursement from anyone for such charges. The statutory authority so fixing the county's liability is section 228.10, Code 1946, which provides as follows:

"The compensation and expenses provided for above, and the fees of the sheriff provided for in such cases, shall be allowed and paid out of the county treasury in the usual manner."

The foregoing statute appears as a part of section 2309 of the Code of 1897, and the exact question was ruled on by the then attorney general in an opinion of March 15, 1902, and appearing in the Report of the Attorney General for 1904, at page 267 in the following form:

"Hon. A. J. Walsmith
Sheldon, Iowa:

Dear Sir—I beg to acknowledge the receipt of your favor of the 13th inst.

The provisions of section 2297 of the code only contemplate that the

cost of the support of an insane patient shall be chargeable to his estate.

Section 2309 provides that the cost of the investigation and of conveying the patient to a hospital shall be paid out of the county treasury, and no provision is anywhere made for charging such cost and expense to the estate of the insane person or for a recovery of the same by the county.

It seems to me clear that it was the intent of the legislature that all costs and expenses of investigating the condition of a person against whom an information is filed for insanity, shall be borne by the county, and that only the cost of his support is chargeable to his estate."

The foregoing interpretation appears to have remained unmodified since that period and is now confirmed. The amendment to section 229.5 of the Code of 1946, by the 52nd General Assembly, being section 7 of chapter 129 of the Acts thereof, does not, in our opinion, vary the terms of the foregoing section 228.10, or modify the foregoing interpretation thereof. Such section 7 of chapter 129 provides as follows:

"Sec. 7. Amend section two hundred twenty-nine point five (229.5), Code 1946, by adding thereto the following: 'If at said hearing said person appears without counsel or appearance is made in his behalf without counsel, the commission, before proceeding further, shall inform such person or persons appearing for him of his right to legal counsel, then if no counsel is employed, the district court shall assign him counsel. An attorney so assigned shall receive such compensation as the district court shall fix to be paid in the first instance by the county.' "

The expense there provided for paying the compensation allowed by law for an attorney assigned by the court is additional to the cost provided by chapter 228, Code 1946. If a claim of variance is to be made it is based upon the provision therein that the compensation as fixed by the district court shall "be paid in the first instance by the county". The only significance that we attach to such provision is that it shall be included in the costs reimbursable by the county of settlement to the county of commitment, as provided by section 230.10, as follows:

"All legal costs and expenses attending the arrest, care, investigation, and commitment of a person to a state hospital for the insane under a finding that such person has a legal settlement in another county of this state, shall, in the first instance be paid by the county of commitment. The county of such legal settlement shall reimburse the county so paying for all such payments, with interest."

In our opinion, as stated heretofore herein, the costs involved in the investigation resulting in the commitment of an alleged insane person are obligations of the county solely, and not reimbursable.

May 6, 1948

WEEDS: Waste banks of public drainage ditch—duty to destroy weeds. The owner of fee title to land occupied by the waste banks of an open drainage ditch has the beneficial use of such land and has the statutory duty to cut, burn, or otherwise destroy all noxious weeds growing thereon.

Mr. Clyde Spry, Assistant Secretary of Agriculture: We have your recent request for an opinion as to who is responsible for the destruc-

tion of noxious weeds and other weeds growing on the waste banks of an established, open, public drainage ditch.

Chapter 317, Code of 1946, as amended by chapter 168, Acts of the 52nd G. A., makes no specific reference to the matter of destroying noxious weeds or other weeds on the right-of-way for established public drainage ditches. Section 455.135, Code of 1946, in designating the duties of the board of supervisors or board of trustees of a drainage district speaks only of repair and the right to enlarge, reopen, deepen, widen, straighten and lengthen open drainage ditches. It imposes no duty or obligation upon the board of supervisors or board of trustees of the district as to maintaining the waste banks or cutting the weeds growing thereon.

Section 317.10, Code of 1946, however, does provide as follows:

"Each owner and each person in the possession or control of any lands shall cut, burn, or otherwise destroy, in whatever manner may be prescribed by the board of supervisors, all noxious weeds thereon, as defined in this chapter at such times in each year and in such manner as shall prevent said weeds from blooming or coming to maturity, and shall keep said lands free from such growth of any other weeds, as shall render the streets or highways adjoining said land unsafe for public travel."

The question then is whether or not the existence of an easement in the form of a right-of-way for the drainage ditch so divests the owner of the land as to exclude him from the application of the provisions of section 317.10 quoted above.

To determine the remaining rights of the holder of the fee title, we turn to section 455.163, Code 1946, which provides as follows:

"The landowner may have any beneficial use of the land to which he has fee title and which is occupied by the waste banks of an open ditch when such use does not interfere in any way with the easement or rights of the drainage district as contemplated by this chapter. For the purpose of gaining such use the landowner may smooth said waste banks, but in doing so he must preserve the berms of such open ditch without depositing any additional dirt upon them."

It is our opinion that the beneficial use of the land to which a person has fee title and which is occupied by the waste banks of an open drainage ditch carries with it the statutory duty to cut, burn, or otherwise destroy all noxious weeds growing on said waste banks as provided by the provisions of chapter 317, Code of 1946.

As to the owner's responsibility and duty to keep waste banks free from growth of any other weeds, it is our opinion that section 317.10, Code of 1946, imposes that duty only to the extent that the existence of such other weeds render highways adjoining said waste banks unsafe for public travel.

May 18, 1948

TAXATION: Refunds of sales tax to governmental bodies—materials used by contractor. Tax certifying and tax levying bodies are entitled by the express provision of chapter 229, Acts of the 52nd General Assembly to a refund of the sales or use taxes paid by a contractor in the erection or repairing of buildings for such bodies.

State Tax Commission, Des Moines, Iowa: This will acknowledge receipt of the application filed with your commission relating to the interpretation of chapter 229, Acts of the 52nd G. A., together with your request that we examine chapter 229, Acts of the 52d G. A., and advise you if the law contained in said chapter covers a refund of sales or use tax when such tax has been paid by a contractor for materials used in repairing or constructing buildings for tax certifying and tax levying bodies.

For convenience, we quote:

"Section 1. Any tax certifying or tax levying body of Iowa or any governmental subdivision thereof may apply to the state tax commission for refund of the amount of tax imposed hereunder and paid upon sales to it of any goods, wares or merchandise used for public purposes. Such refund may be obtained only in the following amounts and manner and only under the following conditions:

a. On forms furnished by the commission to be within such time as the commission may provide by regulation. The governmental unit claiming a refund shall report to the commission the total amount or amounts valued in money, expended directly or indirectly for goods, wares or merchandise used for public purposes by such tax certifying or tax levying body or governmental subdivision thereof.

b. On these forms the tax certifying or tax levying body or governmental subdivision thereof shall separately list the persons making the sales to it or to its order, together with the dates of the sales and the total amount so expended.

c. The tax certifying or tax levying body or governmental subdivision thereof must prove to the satisfaction of the commission that the person making the sales has included the amount thereof in the computation of the gross receipts of such person and that such person has paid the tax levied by this division based upon such computation of gross receipts."

The first paragraph of the section provides for a refund of the amount of tax imposed under the law and paid upon sales to any tax certifying or tax levying body of Iowa, of any goods, wares or merchandise used for public purposes. However, in division (a) of section one (1) we find the following language:

"The governmental unit claiming a refund shall report to the commission the total amount or amounts valued in money expended directly or indirectly for goods, wares or merchandise used for public purposes by such tax certifying or tax levying body or governmental subdivision thereof."

If the statute herein above quoted did not contain the language "expended directly or indirectly" it would not be difficult to interpret the statute and deny an exemption where the tax was not paid directly by the school district. The question of necessity revolves around what the legislature meant when they employed the words "expended directly or indirectly". The Act in question was passed by the 52d G. A. and approved April 28, 1947, and became effective as of that date. Since its enactment this statute has not been presented to the courts for an interpretation and hence we are without precedent or any aid in the construction thereof.

In the interpretation of a statute many times light can be gained from an examination of the history of the legislation. It is to be noted that the Honorable Robert D. Blue in his governor's biennial message in 1947 as disclosed on page 44 and 45 of the House Journal made the following suggestion to the 52d G. A., we quote:

"Two years ago I recommended that cities, counties and school districts be relieved of the burden of payment of sales and use tax to the state. These taxes are paid out of funds which units of local government have collected to carry on their functions. In effect, the state is imposing a tax upon its own sub-division. It is a tax upon a tax which cannot be justified. In view of the constantly increasing financial problems which must be faced by them, I believe they should be relieved of the payment of such taxes as a matter of justice and equity. It is estimated that their elimination will reduce the state income approximately three hundred and fifty thousand dollars, and the burden of local communities lightened a like amount. Such a proposal was favorably acted upon in one house last session, but failed to receive the consideration of the other body."

Subsequent to the message the senate introduced senate file 280 which Act as amended and passed by the legislature is the law under discussion.

Directly and indirectly is discussed in the case of Judd vs. Board of Education, 278 N.W. 200; 15 N.E. Second, 576. See 118 A.L.R. 795, we quote:

"The wording of the mandate is broad. Aid or support to the school "directly or indirectly" is prescribed. The two words must have been used with some definite intent and purpose; otherwise why were they used at all? Aid furnished "directly" would be that furnished in a direct line, both literally and figuratively, to the school itself, unmistakably earmarked, and without circumlocution or ambiguity. Aid furnished "indirectly" clearly embraces any contribution, to whomsoever made, circuitously, collaterally, disguised, or otherwise not in a straight, open and direct course for the open and avowed aid of the school, that may be to the benefit of the institution or promotional of its interests and purposes. How could the people have expressed their purpose in the fundamental law in more apt, simple and all-embracing language?"

It could be argued quite forcefully that our statute relates to the sale of goods, wares or merchandise, namely, personal property. Whereas, a contractor delivers a completed building to a school district and such building when completed is undoubtedly realty. It likewise could be urged that the consumer of the goods, wares or merchandise is the contractor and that the school district does not consume or pay for any goods used in the construction of the building, and that such school district is required to contract for the purchase of a completed unit at a fixed price and is not permitted to buy the materials, hire labor and construct the building under the Iowa law.

Regardless of the aforementioned propositions we cannot ignore the fact that the legislature passed the sales and use tax Act by virtue of their constitutional power and by an exercise of that same power they have seen fit to provide that where the tax is paid directly or indirectly the tax certifying and tax levying body is entitled to a refund. The

legislature has a perfect right to say who shall and who shall not pay a sales or use tax in Iowa and their last expression is contained in chapter 229, Acts of the 52d G. A. It is a reasonable presumption that the legislature followed the suggestion of the governor relative to the exemption of tax certifying and tax levying bodies from sales and use tax as set out in his message quoted heretofore in this opinion.

The legislative power of amendment is coextensive with its power of enactment. Hubbell vs. Higgins, 148 Iowa 36, 47; 126 N.W. 914.

To determine what the legislature meant we proceed to indulge in such aids as are deemed proper in the construction of statutes. Our first inquiry is, what did the legislature intend? In arriving at the intention of the legislature the subject matter, effect, consequence, and the reason and spirit of the statute must be considered as well as words in interpreting and construing it. Newgirg vs. Black, 174 Iowa 636.

It is always the duty in the construction of a statute to give force and effect in such manner as to best accomplish the evident intent of the legislature. Rauen vs. Prudential Insurance Company, 129 Iowa 725; Elks vs. Conn, 186 Iowa 48.

Legislative history should always be regarded in arriving at a proper interpretation of any given statute, Des Moines City Railway Company vs. Des Moines, 152 Iowa 18; and likewise the object to be attained must be considered, Parker vs. Parker, 102 Iowa 502.

A rule generally adopted by the courts in construing any statute is a consideration of what the rule was before its passage, the mischief and defect for which common law did not provide, what remedy legislature has provided and true reason for such remedy. Jones vs. Dunkelberg, 221 Iowa 1031.

The question in the instant case is, what was the intention of the legislature? Our court has said, "the intention of the legislature is the law" and 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. Oliphant vs. Hawkinson, 192 Iowa 1259.

The purpose and object the legislature had in mind sometimes throws light upon the meaning of the language used in a statute. Bookhart vs. The Greenlease-Lied Motor Company, 215 Iowa 8; 82 A.L.R. 1359.

Whenever it is possible legislative enactments must be construed in such a manner that the ends of the enacting body may be accomplished. Peverill vs. Department of Agriculture, 216 Iowa 534; Green vs. Brinegar, 228 Iowa 477.

With the foregoing rules in mind and in view of the message of the governor advising the legislature of the resultant loss of revenue if such a law were enacted, we assume that the legislature intended to grant a refund to tax certifying and tax levying bodies so as to relieve them from the unfair burden of a sales tax to be paid with tax

money, and that they purposely employed the language "directly or indirectly" in this particular statute so as to make certain that the tax was refunded in all cases, whether paid directly by the tax certifying and tax levying body, or indirectly through the contractor who was required to pay the tax under the law as it existed prior to the enactment of this statute. The language "directly and indirectly" as set out in this opinion is comprehensive and encompasses all instances wherein a sales or use tax is paid, and unless we construe the statute in the manner set out in this opinion the word "indirectly" must be ignored and the legislative intent frustrated. To say that a tax certifying and tax levying body would be entitled to a refund only where they had paid the tax on a direct purchase by them would be an absurd construction of the Act and do violence to the specific language of a statute which is plain, clear and unambiguous as we view it.

We conclude, therefore, that tax certifying and tax levying bodies of Iowa are entitled by the express provisions of Chapter 229, Acts of the 52d G. A., to a refund for the sales or use tax paid by a contractor in the erection or repairing of a building or buildings for such bodies upon the filing of a proper application for such refund and furnishing the proof required by the express provisions of chapter 229, Acts of the 52d G. A.

May 19, 1948

TAXATION: Exemption to charitable and religious organizations. The board of supervisors has no authority to pass on tax exemptions. Claim for such exemption should be made to the assessor the board of review, or the county auditor. If refused the exclusive remedy lies in appeal to the district court.

Mr. Carroll O. Switzer, County Attorney, Des Moines, Iowa: This will acknowledge receipt of your letter requesting an opinion on behalf of Bert L. Zuver, city assessor, in which you present the following matters:

1. An alleged charitable and religious organization, acting under chapter 234 of the Acts of the 52d G.A., in January 1948 filed with the assessor an application for exemption from taxes of certain real estate owned by it. The assessor proposes to deny the exemption. Subsequently, if the same applicant files a request with the board of supervisors to grant it an exemption from real estate taxes for this same real estate, may the board grant the exemption?

2. Does the board of supervisors have the power in any event to grant an exemption from real estate taxes upon an application based upon the provisions of subparagraph nine, section 427.1, Code of Iowa 1946?

3. Does the board of supervisors have any jurisdiction in any event relative to granting a tax exemption prior to July 1st of the year for which exemption is claimed?

In order to answer your three inquiries it is necessary to examine the statute in question. Prior to the passage of chapter 234, Acts of the 52d G. A., exemptions from taxation were set out in section 427.1 of the Code of Iowa. The 52nd G. A. passed an Act amending section 427.1, Code of 1946, and provided for the procedure to be followed in claiming of exemptions from taxation by certain societies and organizations.

The statute provides:

"That every society or organization claiming an exemption under the provisions of either subdivision six (6) or subdivision nine (9) of section 427.1, shall file with the assessor not later than February first (1st) of the year for which such exemption is requested, a statement upon forms to be prescribed by the state tax commission describing the nature of the property upon which such exemption is claimed, and setting out in detail any uses and income from such property derived from such rentals, leases or other uses of such property not solely for the appropriate objects for such society or organization."

Section two (2) of the Act provides,

"In any case where no such claim for exemption has been made to the assessor prior to the time his books are completed, such claims may be filed with the local board of review or with the county auditor not later than July first (1st) of the year for which such exemption from taxation is claimed, and a proper assessment shall be made either by the board of review or by the county auditor, if said property is all or in part subject to taxation."

Thus, chapter 234 provides for a claiming of the exemption in three distinct ways:

1. By filing with the assessor not later than February first (1st) of the year for which such exemption is requested.

2. Where no claim is made to the assessor prior to the time his books are completed, the claim may be filed with the local board of review, or

3. With the county auditor not later than July first (1st) of the year for which such exemption from taxation is claimed.

Section two (2) further provides:

"A proper assessment shall be made either by the board of review or by the county auditor, if said property is all or in part subject to taxation."

Section four (4) of the Act provides,

"1. That any taxpayer or taxing district may make application to the state tax commission for revocation for any exemption based upon alleged violation of the provisions of this Act.

2. The tax commission shall also have power on its own motion to set aside any exemption which has been granted upon property for which exemption is claimed under this Act."

A reading of the statute will disclose that the automatic granting of an exemption which existed under section 427.1 previous to the enactment of chapter 234 has been amended so that the claimant of an exemption under subsection six (6) or subsection nine (9) must make a claim with the proper parties and within the proper time as set out in the statute above quoted.

A taxpayer may make claim to the assessor or board of review or county auditor and in each instance it is contemplated that the party to whom the application is made shall pass upon the propriety of the exemption, and either allow or disallow the same. No where in this Act do we find any authority given to the board of supervisors to pass

upon said exemption or the granting or the refusal of the same. The only instance in which a board of supervisors has any right to pass upon an exemption is contained in section 427.8, Code 1946, where a person by reason of age or infirmity is unable to contribute to the public revenue and said section is not pertinent to the matter under discussion.

This question was presented to the attorney general's office and in effect was passed upon in an opinion found in 1944 O.A.G. 109, which reasoning therein contained is in our opinion sound and correctly expresses the law.

However, because of a change in the statute we are of the opinion that we should go further and explain the situation as it exists at the present time. The exemption under chapter 234 as it now stands is a part of the duty of the assessor in the assessment of property and if the claim is not filed with him, it is filed with the board of review, and the assessor in the first instance passes upon the exemption and if the taxpayer is not satisfied, he can appear before the board of review and make his complaint.

We quote with approval from Griswold vs. The County of Calhoun, 198 Iowa 1242:

"It thus appears that the authority of the board of review is plenary to correct errors in the classification and assessment of property and to increase or diminish the valuation fixed by the assessor. A tribunal having been created by the legislature and invested with power to hear certain complaints and grievances in the listing and assessment of property, its jurisdiction in all such matters is exclusive of all other remedies allowed by law, except as hereafter shown. Macklot v. City of Davenport, 17 Iowa 379; Lauman v. Des Moines County, 29 Iowa 310; Buell v. Schaale, 39 Iowa 293; Isbell v. Crawford County, 40 Iowa 102; Mayer v. Dubuque County, 43 Iowa 592; Richards v. Wapello County, 48 Iowa 507; Nugent v. Bates, 51 Iowa 77; Harris v. Fremont County, 63 Iowa 639; Wilson & Co. v. Cass County, 69 Iowa 147; Eyerly v. Jasper County, 72 Iowa 149; Missouri Valley & B. R. & B. Co. v. Harrison County, 74 Iowa 283; Van Wagenen v. Supervisors of Lyon County, 74 Iowa 716; Crawford v. Polk County, 112 Iowa 118; Wahkonsa Inv. Co., v. City of Fort Dodge, 125 Iowa 148.

The failure of a person aggrieved by the assessment of his property to appear before the board of review and make complaint waives his right to subsequently complain of any irregularity in the listing and assessment thereof. Dickey v. County of Polk, 58 Iowa 287; Richards v. Wapello County, supra; Harris v. Fremont County, supra; Van Wagenen v. Supervisors of Lyon County, supra."

Attention is further called to section 442.7 which provides,

"The court shall hear the appeal in equity and determine anew all questions arising before the board which relate to the liability of the property to assessment or the amount thereof, and its decision shall be certified by the clerk of the court to the county auditor, who shall correct the assessment books in his office accordingly."

The foregoing section indicates that an appeal from the action of the board of review is one of the purposes of determining the liability of the property to assessment. This is the sole question in case of

the granting of an exemption or the refusal thereof, and mistakes of assessors and boards of review are final in the absence of an appeal to the district court. See Langout vs. The First National Bank, 191 Iowa 957.

From a reading of chapter 234 we conclude that if the assessor fails to grant an exemption where one is due it is a case of error in the exercise of judgment or discretion and must be corrected on appeal. See Smith vs. McQuiston, 108 Iowa 663; First National Bank vs. Hayes, 186 Iowa 892.

The right to an exemption must be determined by the assessor and the board of review from the information contained in the application for such exemption and in passing on the same the assessor and the board of review are performing some act in the process of the assessment of the property for taxation.

We, therefore, conclude in answer to question number one (1) that there is no statutory authority which would permit an applicant to file a request with the board of supervisors to grant an exemption and that the board has no power to grant such an exemption.

In answer to question two (2) and three (3) it is our opinion that the board of supervisors does not have any power in any event to pass upon the exemption under the provisions of chapter 234 or any other statute, except section 427.8 hereinbefore referred to.

To summarize, a taxpayer may claim an exemption with the assessor, the board of review, or the county auditor. If such exemption is refused by the assessor, the taxpayer may complain to the board of review and if refused by them, his exclusive remedy lies in an appeal to the district court.

In addition to the foregoing the tax commission is given the power on its own motion to set aside any exemption which has been granted. Boards of supervisors do not have any authority to pass upon the allowance or disallowance of a claim for exemption under chapter 234, Acts of the 52d G. A.

May 19, 1948

STATE EMPLOYEES: Reimbursement for meals for public safety employees. Employees of the state are not entitled to reimbursement for money expended for meals which are taken at the place of domicile of such employees.

Mr. Ray E. Johnson, State Comptroller: This will acknowledge receipt of your letter of May 18, 1948, wherein you ask whether section 80.18, Code of 1946, authorizes the payment by the state of money expended by employees of the public safety department for meals when such employees are on duty at the place of their domicile. Section 80.18, Code of 1946, provides in part:

"It shall be the duty of the commissioner of public safety to provide subsistence to the members of the department when on duty."

This department has consistently ruled that employees of the state are not entitled to reimbursement for money expended for meals which are taken at the place of the domicile of such employees.

It is our opinion that section 80.18, above quoted, does not extend the general rule.

May 24, 1948

TAXATION: Merchandise removed from state before January first. A stock of merchandise in a store in Iowa having been removed from the state before January first is no longer taxable in Iowa. Merchandise held by a corporate entity is subject to the same taxation rules as property of an individual and it matters not if the corporation is a foreign corporation.

Mr. Carroll O. Switzer, County Attorney, Des Moines, Iowa: Attention Mr. Clyde E. Herring: We are in receipt of yours of the 12th inst., in which you submit the following:

I am in receipt of the following letter from Mr. Bert L. Zuver, city assessor, dated May 12, 1948:

"By direction of the local board of review I am instructed to request that you secure from the attorney general of this state an official legal opinion on the following question which now confronts this office and the board. It is a problem of state-wide importance and for this reason should be answered by the attorney general since there appears to be no supreme court decision by which we can be governed.

"The Great Atlantic & Pacific Tea Company, a foreign corporation, is now and has for the past several years been transacting a retail merchandising business in Des Moines. In the year 1947 it operated in Des Moines several grocery stores, a warehouse and a bakery. The warehouse and bakery supplied these Des Moines retail stores and others owned by the corporation over a widespread territory in Iowa and adjoining states with the merchandise sold to the retail trade.

"Although these establishments in Des Moines were in different locations, they were, nevertheless, owned by the one corporation and it was from the general superintendent's office in the warehouse at 316 S. E. 5th Street that the returns were made for all of the retail stores, its bakery, and warehouse as well.

"On or about September 1, 1947, it was decided by the corporation that it would be more advantageous to its organization that the warehouse merchandise and bakery establishment be moved to St. Louis, Missouri, and it proceeded to do so about October 1st.

"We are convinced that all of its machinery and equipment moved out of Des Moines before January 1, 1948, is nonassessable in this taxing jurisdiction, but since the law provides that the assessments on merchandise shall be based upon the averages for the year immediately preceding the year for which the assessment is being made, we have taken the position that all of the merchandise in Des Moines, whether in the retail stores, the warehouse, or at the bakery, must be included in arriving at the average even though a part of it were removed from Des Moines prior to January 1, 1948.

"Since this corporation is a single entity, even though operating in several locations, is it or is it not proper for us to make the assessment based upon the average of all inventories in Des Moines for the preceding year including that which was in the local warehouse and bakery for approximately the first 9 months of 1947?

"In view of the fact that a protest is being filed with the local board of review taking exception to the method employed by this office in making the assessment, I would suggest that you solicit a very early reply from the attorney general."

We would appreciate the opinion of your department on this matter, as requested by Mr. Zuver, at your earliest convenience.

In reply thereto we would advise you that if the foregoing situation existed involving the ownership of the foregoing described property by an individual, the fact that it was not subject to taxation on January 1, 1948, by reason of the fact that it had been removed from its tax situs in the state of Iowa, would in itself be controlling under sections 428.1 and 428.4, Code, 1946. However, we are presented with the question whether the fact that this property was owned by the Great Atlantic & Pacific Tea Company, a foreign corporation, results in a different rule. In so far as the taxation of merchandise possessed for the purpose of sale is concerned, the statute does not distinguish between the foregoing by reason of the fact that the merchandise may be owned by a person, a firm, or a corporation. Sec. 428.16, in defining the term "merchant" provides as follows:

"Any person, firm, or corporation owning or having in his possession or under his control within the state, with authority to sell the same, any personal property purchased with a view to its being sold, or which has been consigned to him from any place out of this state to be sold within the same, or to be delivered or shipped by him within or without this state, except a warehouseman as defined in section 542.58, shall be held to be a merchant for the purposes of this title."

It is clear from a reading of the foregoing statute that merchandise held by a corporate entity is subject to assessment and taxation in the same manner as if it were held or possessed by an individual, and the fact that the corporate entity so possessing the merchandise is a foreign corporation does not vary the rule.

See opinion of the attorney general appearing in the Report of Attorney General for 1942, at page 92, where it appears that a corporation organized under the laws of Delaware operated a store in Des Moines, and it was concluded that "in the immediate case the stock of merchandise of the foreign corporation is subject to taxation, and it is our conclusion that the capital stock of a foreign corporation which does business entirely within the confines of the State of Iowa, is exempt from taxation."

In that view, this merchandise having been moved out of the state on or before January 1, 1948, was no longer within the taxing jurisdiction of the state of Iowa.

Section 428.17 of the Code of 1946, to which reference is made as justifying taxation of this merchandise, does not vary the foregoing conclusion. That section is as follows:

"Stocks of merchandise. In assessing such stocks of merchandise, the assessor shall require the production of the last inventory and enter the date thereof in the assessment roll. If, in the judgment of the assessor, the inventory is not correct or if it was taken at such

time as to render it unreliable as to the amount or value of such merchandise, he shall assess the same by personal examination. The assessment shall be made at the same ratio of the average value of the stock during the year next preceding the time of assessment, as is provided by section 441.4, and if the merchant has not been engaged in business for one year, then at a like ratio of the average value during such time as he shall have been so engaged, and if commencing on January 1, then at the same ratio of the value at that time."

Clearly, the foregoing is not authority for the taxation of stocks of merchandise. It provides the taxing authorities with a standard or measure in accordance with which the property may be fairly assessed, generally.

A similar standard was set up in the state of Louisiana in the assessment of mercantile property, and the meaning and application of the formula was determined there in the case of Peden Iron & Steel Co., v. Louisiana Tax Commission, 111 So. 614. It appeared there that the Peden Company, a foreign corporation engaged in the mercantile business, its stock in trade consisting of oil well supplies, building hardware, automobile accessories, and sporting goods. On January 1, 1924, the company's stock on hand, consisting of various classes of goods and supplies, amounted to $204,200.00. On July 1, 1924, the stock amounted to $252,604.90, and on December 1, 1924, to $95,105.55, all as shown by the three inventories taken at the times stated. After the inventory of July 1, 1924, the company decided to discontinue the handling of automobile accessories, sporting goods, and building hardware, and to continue its business and stock in trade exclusively in oil well supplies. Thereupon all of the stock of the various classes other than oil well supplies was removed from the branch house in Shreveport, and this is why the goods on hand as shown by the inventory of December 1, 1924 amounted to only $95,105.55. Shortly before April 1, 1925, the company made a return of its property for assessment and taxing purposes for 1925, in which return was included the actual stock on hand as of date January 1, 1925, amounting to $95,105.55. The company exhibited the inventories which it had made during the year 1924 for assessment purposes. These were declined, but the assessor took as his basis for assessment for the year 1925 the average of the stock on hand during 1924, as shown by the three inventories made that year, and placed a valuation of $183,970.50. It was admitted that the company's stock on hand at no time during the year 1925 amounted to $95,105.55. The company asked for a reduction.

Two questions were submitted for answer, by the board: (1) Under the admitted facts was the plaintiff's assessment for 1925 properly made by the assessor? If the above question is answered in the affirmative, then is the steel company entitled to have its assessment reduced upon a proper and timely application?

The court, after citing the provisions of the Louisiana constitution that no property shall be assessed for more than its taxable cash value, and section 7 of Act 170 of 1898 placing upon the assessor the duty of making an assessment of all property subject to taxation, including

merchandise or stock in trade, on hand at the date of listing. It further provided that, in assessing mercantile firms, the true intent and purpose shall be held to mean the placing of such value upon the stock in trade, as will represent a fair average on the capital, both cash and credit, employed in the business of the party or parties to be assessed.

After discussing two prior cases before the Louisiana Supreme Court, the court quoted one as follows:

"That all the elements which constitute the capital of a mercantile firm or company shall be assessed at their average value during the preceding twelve months, and where the stock in trade varies in amount in that period, the average is obtained by calculating the mean of the several months."

To fix the rule for assessing merchandise or stock in trade on hand at the time of listing, and eliminate from the average the property previously removed, the court used the following language:

"We take the rule to be that, where it is not practicable to arrive at the amount of merchandise or stock in trade on hand at the time of listing the same for taxing purposes, then the assessing authorities are authorized to take as a basis for such purpose the average amount of stock on hand for the preceding year, and this method is fair both to the taxpayer and to the state.

"Where, however, the amount of stock on hand at the time of listing can be reasonably ascertained, then that amount should be accepted as the basis for the assessment.

"This method would be strictly in keeping with the cash value clause of the Constitution and the requirement of the statute that the valuation should be of the stock on hand at the date of listing.

"In the instant case the plaintiff did not have on hand on January 1, 1925, nor at any time during that year, a stock in trade and on hand exceeding $95,105.55, which consisted of its oil well supplies.

"It may be fairly assumed, therefore, that this amount represented the average oil well supplies carried during the previous year, and that the balance of the general average for 1924 represented the stock of the business which had been abandoned and removed long prior to January 1, 1925.

"To sustain the assessment made by the assessor in this case would clearly amount to double taxation, for it must be assumed that the portion of stock which had been removed was properly assessed at the place to which it had been removed.

"Suppose the plaintiff had confined its business during 1924 to that of handling oil well supplies, and its stock amounted to $95,105.55, but that on January 1st it had taken on the other business of automobile accessories, sporting goods, and building hardware, and the combined stock had amounted to $183,900, would it be contended for a moment that the stock of the single business carried on in 1924 should be taken as the proper basis for the assessment of 1925? Certainly not, for that would have been unfair to the state.

"Our answer to the first question is in the negative, and to the second in the affirmative."

By reason of the foregoing, we are of the opinion therefore that the merchandise in question is not subject to taxation.

This opinion is limited as authority to the facts submitted.

June 1, 1948

BANKS AND BANKING: Closing on Saturday. The superintendent of banking may promulgate such rules and regulations permitting or directing banking institutions to close and suspend banking activities during Saturday of each week throughout the year or certain designated periods of the year.

Honorable Newton P. Black, Superintendent of Banking, Des Moines, Iowa: As Iowa superintendent of banking you have requested an opinion from this office upon the following question:

"May the banking institutions of this state legally and voluntarily close and suspend their banking activities during Saturday of each week throughout the year or throughout certain designated periods of the year?"

Banking institutions, both state and national, are vested with power to adopt by-laws not inconsistent with law, regulating the manner in which their business is to be conducted and the privileges granted, exercised and enjoyed. (United States Revised Statutes, 5136; 42 Stat. 767; 24 U.S.C.A. Title XII, Sec. 24; Code of Iowa, 1946, Sec. 591.3, Par. 7).

In view of the fact that neither the federal government nor the state of Iowa by law, either statutory, administrative regulation, or judicial decision, fixes the hours and days during which institutions shall be open for banking business, it necessarily follows that such banking institutions may by by-law establish their own banking hours and days. Banking hours and days must be reasonable and adapted to the exigencies of the business, and the convenience of bank customers. (9 S.I.B. Sec. 56, 158; Marshall v. American Express Company, 7 Wisc. 1).

Section 524.14, Code of Iowa 1946, requires that banks must transact the business and perform the duties contemplated by their charters, which clearly contemplates that such banks establish reasonable days and hours for the transaction of bank business.

Business conditions can differ in the various communities of the state. In this opinion we make no attempt to lay down a yardstick by which banking hours and days should be fixed in any particular community.

As superintendent of banking, you may promulgate "such rules and regulations" as in your opinion may be necessary to the securement of uniform and reasonable banking hours and days for all banks under your jurisdiction. All banks should and no doubt will cooperate with your department to obtain this objective. If any such rule or regulation promulgated by you is not obeyed you may invoke the provisions of section 524.14, Code of Iowa, 1946.

This leaves the sole question as to whether the establishment of a five-day bank business week, from Monday to Friday, inclusive, will provide adequate banking facilities and will not be in conflict with law. In the determination of this question, consideration must be given to present day business and bank practices and customs both state and national, and to the negotiable instruments law of Iowa.

The Congress of the United States in 1938 enacted the Fair Labor Standards Act of 1938 (Act of June 25, 1938, 52 Stat. 1060). This Act, commonly known as the federal wage and hour law, establishes the forty-hour or five-day week for business and industry engaged in interstate commerce. The Act applies to state and national banks (Federal Reserve Bulletin, March 1933, pages 166-168; Federal wage and hour release R-1756 dated March 16, 1942). Under this Act industry and business have generally adopted the five-day business week of eight hours per day. In practice such five-day business week universally and customarily includes all of the business days of the week except Saturday. Since business and industry have adopted such five-day business week, and since the banking industry is an integral part of the business structure, it appears that the adoption by Iowa banking institutions of such business week would not constitute a "failure to provide adequate banking service" in our opinion.

Evidencing present day banking practice is the fact that the five-day bank business week, Saturday closing, is now being followed in twenty states and in the District of Columbia, as follows: California, Delaware, District of Columbia, Louisiana, Connecticut, Florida, Georgia, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Washington, and Wisconsin. The importance of this fact is emphasized by this information, namely: approximately forty-seven percent of all banking institutions of the nation are located in such states and such banks possess approximately seventy percent of all bank assets and bank deposits of all bank customers, and, it may be fairly stated, transact approximately seventy-five percent of the banking business in the nation.

We have stated that there is no law, either state or federal, regulating the hours or days during which Iowa banking institutions shall remain open for the transaction of bank business. It has been suggested that consideration be given to the Iowa negotiable instrument law. This we have done. The following sections are quoted:

"Section 541.86 Time of maturity. Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday, when that entire day is not a holiday.

"Section 541.147 Days of presentment. A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections 541.72 and 541.86. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock noon on that day."

We are of the opinion that there is nothing in the sections quoted nor elsewhere in the negotiable instruments law requiring banks to be open on Saturdays. On the contrary, such statutes indicate that banks may be closed on Saturdays.

In an opinion dated March 31, 1948 the attorney general of Michigan in construing the several provisions of the negotiable instruments law of Michigan (Sec. 87 and Sec. 148 of the negotiable instruments law, Michigan Stat. Ann.; 19.188 and 19.127 respectively) which so far as material are identical with the negotiable instruments law of Iowa (section 541.86 and section 541.147, Code of Iowa, 1946) squarely held that Michigan banks could close on Saturdays. The position which we take and which was taken by the attorney general of Michigan is sustained in the following cases:

Hitchcock v. Hogan, 99 Mich. 124;
Behrau v. Checker Service Corporation, 35 F. Supp. 531;
Long v. Alder, 169 Tenn. 422.

In further support of the conclusion that nothing in the Iowa negotiable instruments law requires banks to remain open six days a week, reference is made to section 541.190, Code of Iowa, 1946, which protects banks as to checks drawn on customers' accounts until such checks are accepted by the bank. We quote:

"Section 541.190 Check not an assignment—when bank liable. A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check."

Nothing in this opinion shall be construed as directing or requiring any bank to close during any hours of any business day or on Saturday.

June 16, 1948

WEEDS: Destruction on private property by publicly owned equipment. County-owned weed eradicating equipment and materials cannot legally be used upon private lands except by the weed commissioner in carrying out his duties prescribed by chapter 317 of the Code, the cost of such weed eradication can only be paid by assessment as provided in said chapter.

Mr. B. J. Maxwell, County Attorney, Tipton, Iowa: We have your recent request for an opinion on the following questions:

"1. Can the board of supervisors authorize the use of county weed eradicating equipment to destroy weeds on private property at the request of, or with the consent of the owner of said property, without first serving notice as required by statute?

2. Can the landowner pay the cost of the destruction of said weeds directly to the county without having an assessment made against his property as provided in section 317.20 of the 1946 Code of Iowa?"

In answer to your first question we find that section 740.20, Code of 1946, provides as follows:

"No public officer, deputy or employee of the state or any governmental subdivision, having charge or custody of any automobile, machinery, equipment, or other property, owned by the state or a governmental subdivision of this state, shall use or operate the same, or permit the same to be used or operated for any private purpose."

The provisions of this section standing alone would make it illegal to use county-owned weed eradicating equipment and materials on any privately owned land.

It becomes necessary, therefore, to determine whether any specific provision has been made for carrying out the objectives of the weed law appearing in chapter 317, Code of 1946. Section 9 of chapter 168, Acts of the 52nd General Assembly, amended that chapter as follows:

"Further amend said chapter by adding the following:

"An additional one-fourth (¼) mill may be levied by the county board of supervisors for the purpose of purchasing weed eradicating equipment and materials *to carry out the duties of the county weed commissioner* for use on all lands in the county, public or private. Such equipment and its use shall be subject to the authorization and direction of the county board of supervisors." (Italics ours)

The last sentence of this amendment would indicate an intent to vest complete discretion in the county board of supervisors to authorize the use of such weed eradicating equipment and materials on any land in the county, and at any time they deemed appropriate. We are of the opinion, however, that the underscored words "to carry out the duties of the county weed commissioner" are words of limitation, and restrict the use of said equipment and materials on private lands to those instances where, by the provisions of chapter 317, Code of 1946, as amended, the weed commissioner is obligated by statute to enter upon such lands and destroy weeds growing thereon.

An examination of chapter 317, Code of 1946, as amended, reveals many general duties imposed upon the weed commissioner, which are continuing duties. In order to outline a program of control for submission to the board of supervisors he must of necessity enter upon private lands and "spot" the infested areas. It is his duty to counsel, advise and participate in a program of weed destruction on roads or highways within the county as may be directed and authorized by the board of supervisors throughout the weed-growing season. However, by the provisions of section 117.16, Code of 1946, as amended by section 11, chapter 168, Laws of the 52nd General Assembly, the weed commissioner's duty to enter upon private lands and cause weeds to be destroyed comes into being only after a substantial failure by the owner or tenant to comply with the program of control adopted by the county board of supervisors. Even then the commissioner's power and authority to enter upon said privately owned lands for the purpose of destroying weeds exists by virtue of "due notice having been given to the landowners five days previous" under the provisions of section 317.6 Code of 1946 as amended. The required notice may be served in the regular manner or service therof may be accepted in writing.

For the weed commissioner to enter upon private lands at the request of, or with the consent of, the owner for the purpose of using county-owned weed eradicating equipment and materials prior to the expiration of the time set for destruction by the board of supervisors in their program of control, through necessity presupposes an agreement as to compensation for, or rental of, said equipment and materials. Clearly, there is no statutory provision to permit such action and it was not the intent of the legislature to provide for the levying of a tax to purchase equipment and materials to be used commercially.

It is our opinion, therefore, that county-owned weed eradicating equipment and materials cannot legally be used upon private lands except by the weed commissioner or persons employed and under his direction in carrying out his duty to enter and destroy weeds which the landowner and tenant failed to destroy within the time prescribed by the board of supervisors in their annual program of control resolution or any other order issued pursuant to the provisions of chapter 317, Code of 1946, as amended by chapter 168, Laws of the 52nd General Assembly.

In answer to your second question, we direct your attention to the provisions of section 317.20, Code of 1946, which sets out a definite procedure for the assessing and collecting of the cost of destruction of weeds on private land by the commissioner "after failure of the landowner responsible therefor to destroy such weeds pursuant to the order of the board of supervisors." It is apparent that it would be impossible for anyone to compute the amount due from any particular landowner prior to the actual assessment because of the provisions of section 317.20, paragraph 2, which provides as follows:

"Before making any such assessment, the board of supervisors shall prepare a plat or schedule showing the several lots, tracts of land or parcels of ground to be assessed and the amount proposed to be assessed against each of the same for destroying or controlling weeds during the calendar year."

By the provisions of this paragraph the members of the board of supervisors are vested with the sole authority to determine the amount to be charged to each tract or parcel of ground. Through necessity, even the board of supervisors could not determine the amount chargeable against any particular tract or parcel of ground until after all activities of the weed commissioner on private lands for the season in question had been laid before them, together with the costs thereof.

We are of the opinion that the only method for determining the charges for the destruction of weeds on a tract or parcel of private land, and the collection of said amount, is that prescribed by the legislature and designated a special tax to be levied and collected under the provisions of section 317.20, Code of 1946.

June 18, 1948

ELECTIONS: County supervisors—nomination. The rule as to which of several candidates to fill two terms for county supervisors have received the necessary thirty-five percent applied.

Mr. Clark O. Filseth, County Attorney, Davenport, Iowa: We have yours of the 11th inst., in which you state:

"Enclosed herewith you will find a request for opinion from our county auditor which I have received. Under date of June 8th your office forwarded me an opinion on this matter which was rendered in 1922. This opinion undoubtedly is still the law and covers the situation; at least, that is my interpretation and I have advised the auditor accordingly.

However, in order that the auditor may certify the winners of these two offices, I would appreciate very much an opinion from your office setting out the definite names of the winners according to the unofficial returns, with the understanding that in the event the official count should place another candidate in a No. 1 or 2 position, such candidate would be declared the winner rather than the one set out in the unofficial return."

And the letter of your county auditor follows:

"In reference to our recent primary election, and the close contest between the Republican candidates for the office of county supervisors, for the terms commencing, as set out below, the question has arisen as to the interpretation of section 43.52 of the 1946 Code of Iowa, relative to these contestants, and which, if any, are to be declared nominated.

(Nominate two) Term commencing Jan. 2, 1949	votes	(Nominate two) Term commencing Jan. 2, 1950	votes
A	1305	A	1878
B	1681	B	1690
C	1759	C	1982
D	950	D	1908
E	1360	E	1453
F	1705		

Will you kindly give us your interpretation of the law as to which of the contestants in each instance should be declared winners, realizing of course, that the figures set opposite their names are at this time still the unofficial count.

When receiving your opinion in this respect, we too shall consider its basis upon such figures and that any change in the count might of course disturb the persons declared nominated by you, although we do not expect to find any great difference, and give the above names and figures for an example in determining your interpretation of the above referred to section."

In addition to the foregoing information I am advised that the supervisors in Scott county are elected at large. The method of determining who is elected supervisor under the situations outlined is set forth in an opinion of this department appearing in the Report of Attorney General for 1922, at Page 62, in terms as follows:

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

I note that you have already advised that the manner in which to arrive at how many votes have been cast for each office is to take the total number of votes cast for two offices, divide in half, and each candidate would be required to receive 35 per cent of one-half of the total vote cast for the two offices.

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

Pursuant to the rule of the foregoing opinion and applying it to your situation, the results are these:

For the term commencing January 2, 1949

Total votes cast	8760 votes
One-half thereof	4380 votes
35% of one-half	1533 votes

Therefore the following candidates have exceeded the 35%

B	1681 votes
C	1759 votes
F	1705 votes

and the two highest, to-wit:

C
F

are the nominees.

For the term commencing January 2, 1950

Total votes cast	8911 votes
One-half thereof	4455 votes
35% of one-half	1559 votes

Therefore the following candidates have exceeded the 35% limitation, to-wit:

A	1878 votes
B	1690 votes
C	1982 votes
D	1908 votes

and the two highest, to-wit:

C
D

are the nominees.

June 19, 1948

ELECTIONS: Shortage of ballots at primary election. The board of supervisors acting as a canvassing board may determine the result of a primary election and in so doing, disregard the fact that many voters were turned away due to a shortage of official ballots. Having so acted their power is exhausted and such determination is not subject to review by the courts, a primary election not being an election within the meaning of the constitution.

Mr. John C. Owen, County Attorney, Washington, Iowa: We have yours of the 8th inst. in which you submit the following:

"I refer you to our telephone conversations about the primary election situation in Washington. What happened was, that although the county auditor had sufficient ballots printed according to the provisions of the statute, there were not enough of them, and a number of citizens were turned away from the polls because of lack of ballots. At one or two of the voting places, they used sample ballots or blank pieces of paper upon which the voter indicated their choice for certain offices. These ballots were returned with the other ballots, after being certified by the judges of election, and were returned to the auditor's office where they were counted.

I have examined the case of "State v. Carrington", 194 Iowa, 785, which states in general that the decision of the official canvassing board as to who has been nominated at a primary election, is not reviewable by the courts. It seems to me that this case covers the current situation.

Although I am county attorney, I was a candidate for re-election, and therefore hesitate to make any announcement as to the legality or illegality of the election. I would appreciate hearing from you with regard to whether this case which I have cited decides the question we have here in Washington county. In any event, we plan to proceed as if nothing had happened, and the board of supervisors will meet as the official canvassing board as usual and check the count."

We advise you as follows: From your letter it appears that the foregoing situation arises from a primary election already held; that pursuant to the terms of the statute, the succeeding step in the primary elective process is the canvass of the votes, the determination of the nominees, and the certification thereof. The canvassing body of the foregoing primary election is the board of supervisors, its power and duty as such is prescribed by section 43.49, Code of 1946, as follows:

"On the second Tuesday next following the primary election, the board of supervisors shall meet, open and canvass the returns from each voting precinct in the county, and make abstracts thereof, stating in words written at length:

1. The number of ballots cast in the county by each political party, separately, for each office.

2. The name of each person voted for and the number of votes given to each person for each different office."

The situation then is reduced to a determination of the character and extent of the foregoing power and duty of the canvassing board. We are not without precedent in that aspect. In the case of Davies v. Wilson, 229 Iowa 100,104, the Court fixed this power and duty in the following language:

"The purpose of a primary election is to permit the electors affiliated with the respective political parties to say by their votes who shall be the candidates of their parties for the various offices. In other words, the electors do the nominating. This is clearly manifest from the statutory provisions above set out, particularly sections 527 and 529, the latter section providing that 'candidates shall be nominated at a primary election . . . . .' The determinative factor in an election for public office, whether it be a primary or a general election, is the vote of the electors. It is true that the canvass by the state board of canvassers of the abstracts of the election returns filed by the county auditors is one of the statutory steps in an election for public office, but it cannot ordinarily alter the record made by the voters. Its duty is the ministerial or administrative one of ascertaining and verifying that record and declaring the result as it was shown upon the face of the abstracted returns. State ex rel Rise v. County Judge, 7 Iowa 186, 198; Jones v. Fisher, 156 Iowa 582, 586, 137 N. W. 940, 941; 9 C. J. Page 1275; 20 C. J. 200 section 255, it is stated:

'Where there is no question as to the genuineness of the returns or that all of the returns are before them, the powers and duties of canvassers are limited to the mechanical or mathematical function of ascertaining and declaring the apparent result of the election by adding or compiling the votes cast for each candidate as shown on the face of the returns before them, and then declaring or certifying the result so ascertained.'

Many cases are cited in support of the text: Wells v. Robertson, 277, Ill., 534, 539, 115 N. E. 654, 656 Campbell v. Hunt, 18 Ariz. 442, 452, 162 Pac. 882, 886; Lansdon v. State Board of Canvassers, 18 Ida,

596, 602, 111 P. 133, 134; State ex rel Fletcher v. Osburn, 24 Nev. 187, 51 P. 837; McCrary on Election (3rd Ed.) Section 226, and many other authorities announce this rule."

It therefore appears that if the returns are genuine and they include all the votes cast at the election, the power of the board of supervisors as a canvassing board is purely ministerial and limited to the mechanical function of ascertaining and declaring the result as shown on the face of those returns. In providing the canvassing board with the foregoing returns, it is to be noted that the duties of the judges of election are statutory, and contained in section 43.45, subsections 3, 4, 5, 6 and 7 which are as follows:

"3. Certify to the number of votes cast upon the ticket of each political party for each candidate for each office.

"4. Seal the ballots cast on behalf of each of the parties in separate envelopes, and on the outside of such envelope write or print the names of said party's candidates for all offices and opposite each name enter the number of votes cast for such candidate in said precinct.

"5. Seal all the envelopes of all political parties in one large envelope and on the outside thereof, or on a paper attached thereto, enter the number of votes cast by each party in said precinct.

"6. Seal the pollbooks containing the tally sheets and certificates of the election judges in an envelope, on the outside of which are written or printed in perpendicular columns the names of the several political parties with the names of the candidates for the different offices under their party name, and opposite each candidate's name enter the number of votes cast for such candidate in said precinct.

"7. Enter at the bottom of each party column on said envelope the total vote cast by said party in said precinct."

Where qualified persons were denied the privilege of voting, the effect of shortage of ballots, the voting by some persons of other than official ballots, are not matters within the area of the canvassing board's power.

When the board of supervisors as a canvassing board determines the results of the primary election in accordance with the provisions of section 43.9, as interpreted in the case of Davies v. Wilson, supra, the power of the canvassing board is exhausted.

It is to be noted further that having determined the election results, such determination is not the subject of question. It is a finality, and resort to the courts for review of this determination is denied. This is the ruling in State v. Carrington, 194 Iowa 785, wherein, in defining a primary election, it is said:

"A primary election is not an election, within the meaning of the Constitution; nor is it such within any meaning known to the common law. It is purely a legislative creation, that involves neither life, liberty, property, nor franchise. It is enacted solely for the benefit of orderly procedure in the administration of political parties respectively, whereby each may select candidates for office, to be submitted to the consideration of all the electors at the general election. In its creation, the legislature was subjected to no constitutional inhibition; nor are its imperfections, if any, subject to attack on constitutional grounds.

Prior to its legislative creation, the primary election never was or could be the subject of judicial cognizance; nor in its creation has the legislature conferred or taken away any right which has been heretofore, or can be hereafter, the subject of judicial cognizance except so far as such right may be later conferred by legislation. The power of the legislature extends both to the rights created by it and to the remedy for their protection. This is the general purport of our previous holdings. State v. Secretary of State, 141 Iowa 196; State v. Parker, 147 Iowa 69; Jones v. Fisher, 156 Iowa 582."

And excluding the courts from primary contests, stated this:

"When it is considered that tens of thousands of candidates are voted for at the primary within the state, and that irregularities of demarcation as to political affiliations must always be indefinite and uncertain, the impossibility of extending judicial cognizance to the contests which would probably be presented is quite apparent. The trial of the contests would be largely the trial of moot questions, in that many, if not most, of the contestants who might win their contests before the court would still lose at the general election. The question to be decided in such a contest would be almost necessarily political:

Had Democrats wrongfully called for and voted the Republican pimary ticket? Had Republicans wrongfully called for and voted the Democratic ticket? Was the voter a Democrat? Was he a Republican? Was he an Independent? What was he last year? Did he in good faith change his political affiliation? etc, etc. All these questions would be proper for the consideration of the judges of the election. For the judges of the district and supreme courts to take cognizance of them would be to contend with a flood."

We conclude, therefore, that if the returns are genuine and include the vote cast, the board of supervisors as a canvassing board is empowered to make the canvass, determine who has been nominated, and certify thereto, and their action thereunder is not subject to review by the court.

June 29, 1948

INSANE PERSONS: Parole by commissioners of person confined in hospital—compensation. The county commissioners of insanity may lawfully meet for the purpose of determining whether or not to give or withhold their consent to parole a patient confined in a hospital for the insane, but having met for that purpose, they are not entitled to compensation under the provisions of section 1, chapter 127, Laws of the 52nd General Assembly.

Mr. C. T. Cline, County Attorney, Burlington, Iowa: We have your letter dated May 18, 1948 in which you request our opinion on whether the compensation provided for in section 1 of chapter 127, Laws of the 52nd General Assembly for the physician and attorney members of the county commission of insanity is allowable when the commissioners determine whether to give their written consent to the board of control to parole an insane patient from a state hospital pursuant to the provisions of section 226.23 Code of 1946.

Section 3505 Code of 1939 provided as follows:

"The relatives of any patient not susceptible of cure by remedial treatment in the hospital, and not dangerous to be at large, shall have the right to take charge of and remove him with the consent of the board of control."

The above section was repealed by chapter 136, Laws of the 49th General Assembly and by section 1 of said chapter the following was enacted in lieu thereof:

"Upon the recommendations of the superintendent and the written consent of the commissioners of insanity of the county, which is the 'legal settlement of a patient, the *board of control may parole said patient for a period not to exceed one year under such conditions as are prescribed by said board.*" (Italics ours)

Section 3541(1), Code of 1939, provided as follows:

"Compensation and expenses shall be allowed as follows:

1. To each member of the commission, *$3.00 for each day actually employed in the duties of his office* as such member and necessary and actual expenses, not including charges for board." Italics ours)

In an opinion isued by this office under date of November 10, 1941, the above sections were quoted and it was observed that under the law as it then existed no patient confined in a state hospital for the insane, who had legal settlement in any county of this state, could be paroled by the board of control without the written consent of the commissioners of insanity of the county of legal settlement. The opinion held that the commissioners of insanity could lawfully convene for the purpose of considering whether they should consent to the parole of such patients in the hospitals for the insane and that they were entitled to three dollars per day for such services. The conclusion obviously was based upon the provisions of section 3541 subsection 1, Code of 1939 quoted above and appearing as section 228.9, subsection 1, Code of 1946. This is evident by the following quotation from that opinion:

"We are of the opinion that the law contemplates that said board may lawfully meet for the purpose of determining whether or not to give or withhold its consent to the parole of a patient confined in the hospital for the insane. It follows that for their services in attending said meeting they are each entitled to the compensation provided by law, to-wit: $3.00 for each day actually employed. The phrase, 'three dollars for each day actually employed', we construe to mean $3.00 for each day or fraction thereof. It will be noted that section 3541 provides, 'three dollars for each day actually employed in the duties of his office'. We believe that if the board meets for the purpose of determining whether or not it shall give or withhold consent of parole of a patient in the state hospital, this is a part of the duties of the commission of insanity and, consequently, they are entitled to be paid for their services in performing these duties.

We reach the conclusion, therefore, that the commissioners of insanity may convene for the purpose of considering whether it shall consent to the parole of patients in the hospitals for the insane and that they are entitled to $3.00 per day for such services."

Since the issuance of the opinion of this office just referred to, the legislature has amended the section relative to compensation for the members of the county commission of insanity. Section 1 of chapter 127, Laws of the 52nd General Assembly provides as follows:

"Section two hundred twenty-eight point nine (228.9), Code 1946, is amended by striking subsection one (1) and inserting in lieu thereof the following: '1. The compensation and expenses of the commissioners of insanity shall be as follows: To the member of the commission serving as physician, seven dollars and fifty ($7.50) for *each commitment or release of any person brought before said commission for each actual hearing*, and to the member of the commission serving as attorney, seven dollars and fifty cents ($7.50) for *each commitment or release of any person brought before said commission for each actual hearing.*" (Italics ours)

Section 1 of chapter 136, Laws of the 49th General Assembly quoted above relative to parole of patients from state hospitals for the insane has continued unchanged and now appears as section 226.23, Code of 1946.

Whether the conditions under which the physician and attorney members of the commission are entitled to compensation has been changed by the foregoing amendment is dependent upon the meaning of the words: "Each commitment or release of any person brought before said commission for each actual hearing." That they have a much narrower meaning than the words "actually employed in the duties of his office" is obvious. We must hold that the use of the more restrictive language establishes the legislative intent to provide compensation for the physician and attorney members of the county commission of insanity only in those instances where the services rendered by said commission culminates either in a "commitment" or a "release" of the person whose case is before it. Illustrative of such proceedings are the original hearings where the person whose case is before the commission is either committed or released by order of the commissioners and where one is brought before the commission pursuant to the provisions of section 229.30, Code of 1946, and it appears that cause no longer exists for the care within the county of said person as an insane patient. In this latter case the law requires prior approval of the board of control but it is the order of discharge by the county commission of insanity that constitutes the actual release.

Although it be conceded that the word "release" as used by our legislature in section 1 of chapter 127, Laws of the 52nd General Assembly is broad enough in its meaning to include "release on parole", the answer to your inquiry is still dependent upon the provisions of section 226.23, Code of 1946. Clearly, under this section the board of control of state institutions is vested with the final discretion as to whether or not a parole shall be granted to an insane patient from the state hospital. It is the order of parole by the board of control which effectuates a "release on parole" and not the written consent executed by the county commissioners of insanity.

It is our opinion, therefore, that the county commissioners of insanity may lawfully meet for the purpose of determining whether or not to give or withhold its consent to the parole of the patient confined in a hospital for the insane, but if they do meet for that purpose, they are not entitled to compensation under the provisions of section 1, chapter 127, Laws of the 52nd General Assembly.

July 2, 1948

PHYSICIANS AND SURGEONS: Osteopathic physician prescribing internal curative medicine. Osteopathic physician may prescribe simpler remedies commonly given for temporary relief and those antidotes, biologics and drugs generally recognized as necessary in case of minor surgery or obstetrics. However, he may not prescribe other drugs and medicines commonly known as internal curative medicines unless prescribed and given as preliminary to, preparatory to, or in conjunction with manipulative therapy.

W. S. Edmund, D. O., Secretary, Iowa Board of Osteopathic Examiners, Des Moines, Iowa: We have your letter of June 21, 1948 in which you state the following:

"From time to time, particularly with federal agencies, the question arises whether osteopathic physicians are permitted under their practice act to prescribe all internal curative medicines and drugs. Your opinion with reference thereto will be greatly appreciated."

All of the provisions contained in chapter 118 Code of 1931 entitled "Practice of Osteopathy and Surgery" were repealed and substitutions enacted therefor by chapter 23, Laws of the 46th General Assembly in 1935. The substituted provisions have remained unchanged and now appear in chapter 150 Code of 1946. The provisions of that chapter which are pertinent to your inquiry are sections 150.1(2), 150.7 and 150.8. The material portions of these sections, in the order named, read as follows:

Section 150.1(2)—

"Osteopathic practice is that method of rehabilitating, restoring and maintaining body functions by and through manual stimulation or inhibition of nerve mechanism controlling such body functions, or by the correction of anatomical maladjustment, *and/or by other therapeutic agents, methods and modalities used supplementary thereto; but such supplementary agents, methods or modalities shall be used only preliminary to, preparatory to and/or in conjunction with such manual treatment.* * * *"

Section 150.7—

"One licensed as an osteopathic physician may practice osteopathy as defined in section 150.1, including obstetrics and minor surgery. One specially licensed as an osteopathic physician and surgeon under section 150.5 may also practice major surgery."

Section 150.8—

"*A license to practice* osteopathy or osteopathy and surgery *shall not authorize the licensee to prescribe or give* internal curative medicines and a license to practice osteopathy shall not authorize the licensee to engage in major operative surgery. The words 'internal curative medicine', as used herein, shall be so construed as not to include antidotes, biologics, drugs *necessary to the practice of minor surgery and obstetrics, o simpler remedies commonly given for temporary relief.*" (Italics ours)

We are confronted with two well established and recognized principles of statutory construction; the first, being that no section or part thereof may be lifted from the context of the entire Act of the legislature for the purpose of determining the legislative intent as to

the meaning thereof but to the contrary the section or part thereof must be considered and interpreted as to its meaning in the light of all of the provisions contained in the entire Act; the second, being that all sections and parts thereof contained in an Act of the legislature must be given force and effect if at all possible. It is necessary, therefore, in order to determine the intent of the legislature with regard to the inquiry you make, to read and consider together the provisions of section 150.1(2) and 150.8.

Section 150.7 provides that one licensed as an osteopathic physician may practice osteopathy as defined in section 150.1. In reviewing that section, we find that subsection 2 set forth above, provides that osteopathic practitioners may, in addition to the correction of anatomical maladjustment use other therapeutic agents, methods and modalities in conjuncture with their basic concept of practice. Dorland's Medical Dictionary defines "therapeutic" as follows: "1. Pertaining to therapeutics or the art of healing. 2. Curative." The same medical dictionary defines "agents" in the following manner: "Any power, principle, or substance capable of acting upon the organism, whether curative, morbific, or other." The term "method" is defined by Dorland as: "The manner of performing any act or operation. For various methods of treatment, see Treatment." "Treatment" is then defined by Dorland as follows: "The management and care of a patient or the combating of his disorder." Under the definition of "method" and "treatment" we find set forth a total of eleven pages of types of care and methods of treatment which actually include and cover the use of the various medicines and drugs intended for internal curative purposes, and otherwise. By considering the phrase "A license to practice osteopathy or osteopathy and surgery shall not authorize the licensee to prescribe or give internal curative medicine", which appears in section 150.8 in light of the provisions of 150.1(2) and the definitions set forth above, it shows a definite legislative intent. In our opinion the quoted phrase was intended to mean that the mere possession of a license to practice osteopathy or osteopathy and surgery in itself does not authorize the licensee to prescribe or give internal curative medicines as is the case under the provisions of chapter 148, Code of 1946 which provides for the licensing of physicians and surgeons.

It would appear, therefore, that the holder of a license to practice osteopathy or osteopathy and surgery cannot legally limit his practice to that of diagnosis and the prescribing or giving of internal curative medicines but if he uses such drugs and medicines or any other therapeutic agent, method or modality supplementary to the manual stimulation or inhibition of nerve mechanism and as prescribed by the provisions of section 150.1(2) Code of 1946, he is vested with full power and authority to prescribe or give all known drugs and medicines.

We have yet to consider the meaning of the sentence contained in section 150.8 which provides "The words 'internal curative medicines' as used herein shall be so construed as not to include antidotes, biologics and drugs necessary to the practice of minor surgery and obstet-

rics and to the simple remedies commonly given for temporary relief". Having specifically provided in section 150.7 that one licensed as an osteopathic physician might legally practice obstetrics and minor surgery, it is apparent that the legislature was mindful of the fact that either of such type of case might require certain antidotes, biologics and drugs, yet not require stimulation or inhibition of the nerve mechanism or correction of anatomical maladjustments on the patient. It is obvious, therefore, that the concluding sentence in section 150.8 was intended to include two definite exceptions to the general prohibition as to a licensee prescribing and giving internal curative medicines as discussed in the forepart of this opinion. These exceptions are: (1) antidotes, biologics and drugs necessary to the practice of minor surgery and obstetrics and (2) the simpler remedies commonly given for temporary relief. Clearly, all drugs and medicines falling within the exceptions may legally be prescribed and given by a licensee under chapter 150 and need not be used as a supplementary agent so as to be subject to the limitations contained in section 150.1(2) above.

In determining the antidotes, biologics and drugs intended to be covered by exception No. (1) we must keep in mind the fact that exceptions to general rules of prohibition must be strictly construed. Webster's International Dictionary, Second Edition, defines the word "necessary" as: "essential to a desirable or projected end or condition; not to be dispensed without loss, damage, inefficiency, or the like". It further defines the word to mean: "a thing that is necessary or indispensable to some purpose; something that one cannot do without; a requisite; an essential." It is our opinion, therefore, that by identifying the antidotes, biologics and drugs which fall within the exception by designating them as those "necessary to the practice of minor surgery and obstetrics", the legislature intended to include only those which are found to be of a nature recognized generally by the professions to be essential in the actual performance of a case of minor surgery or obstetrics and even then only in case they are in fact prescribed or used by the osteopathic practitioner in such a case under his care and treatment.

It appears that the second exception needs no interpretation for the reason that authorities would readily agree on what constitutes the "simpler remedies commonly given for temporary relief".

In summary it is our opinion that an osteopathic practitioner may prescribe or give the simpler remedies commonly given for temporary relief and those antidotes, biologics and drugs generally recognized by the professions as necessary and essential in connection with any case of minor surgery or obstetrics actually under his care and treatment regardless of whether he is rendering to that patient osteopathic methods or rehabilitating, restoring and maintaining body functions as defined in 150.1(2), Code of 1946. As to other uses for those same antidotes, biologics and drugs than those just referred to and all other drugs and medicines not falling within either of the exceptions pointed out above, including those commonly known as internal curative med-

icines, he cannot legally prescribe or give them merely by virtue of his being a licensed osteopathic physician or surgeon. He has that authority, however, when they are prescribed or given under the conditions set forth in section 150.1(2), Code of 1946, namely, when used "preliminary to, preparatory to and/or in conjunction with" manipulative therapy which is the basic concept of the osteopathic profession.

In the preparation of this opinion we have not been unmindful of the existence of a previous opinion issued under date of August 27, 1935, but insofar as any part thereof is in conflict herewith, that part is hereby withdrawn.

July 5, 1948

TAXATION: County board of education as a certifying body—transfers. The county board of education is a certifying board for taxation purposes independent of the county board of supervisors within the meaning of section 24.2 of the Code and chapter 147, Laws of the 52nd G. A. There can be no transfer of funds either permanent or temporary between the county and the board of education.

Mr. Ray Johnson, State Comptroller: We have yours of the 25th ult. in which you submit the following:

"The time is near when all local boards will begin work on their budgets for the next ensuing fiscal year.

We are a little confused as to the exact interpretation of chapter 147, Laws of the 52nd General Assembly as it applies to the budget and tax levy for the county board of education. I am therefore asking your opinion as follows:

1. Is the county board of education a certifying board independent of the county board of supervisors within the meaning of section 24.2 Code of 1946?

2. In case the county board of education is not a certifying board except to file its askings with the board of supervisors will an appeal of taxpayers objecting to the board of education budget be before the supervisors or the board of education.

3. In any case can strictly county funds and board of education fund be transferred between the two boards?

Your early reply will be appreciated."

We answer the foregoing questions as follows:

(1) Section 24.2 of the Code of 1946, to which reference is made, defines certifying board as follows:

"As used in this chapter and unless otherwise required by the context:

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

2. The words "levying board" shall mean board of supervisors of the county and any other public body or corporation that has the power to levy a tax.

3. The words "certifying board" shall mean any public body which has the power or duty to certify any tax to be levied or sum of money to be collected by taxation.

4. The words "fiscal year" shall mean the year ending on the thirtieth day of June, and any other period of twelve months constituting a fiscal period, and ending at any other time.

5. The word "tax" shall mean any general or special tax levied against persons, property, or business, for public purposes as provided by law, but shall not include any special assessment nor any tax certified or levied by township trustees.

6. The words "state board" shall mean the state appeal board as created by section 24.25."

Whether the county board of education is a certifying board within the foregoing definition, is determined by the provisions of the statute bestowing budgetary powers upon it. Chapter 147, section 13, subsection 10 of the 52nd General Assembly which provides as follows:

"At the regular or a special meeting held between July 1 and July 15, consider the budget as submitted by the county superintendent, and certify to the board of supervisors the estimates of the amounts needed. Such estimates shall follow the budget procedure under chapter twenty-four (24), Code of 1946. The board of supervisors shall then levy a tax on all the taxable property in the county for the amount certified, and the money so raised shall go into a fund hereinafter called the county board of education fund."

and the members of the county board of education obtain the office of members thereof by election. This is the provision of section 5 of chapter 147, Acts of the 52nd General Assembly, which states:

"The county board of education shall consist of five members, electors of the county, one member to be elected from each of the four election areas by the electors of the respective areas, one member to be elected at large from the area of the county school system by the electors thereof."

Whether the foregoing statutory powers conferred upon the county board of education constitutes it, a certifying body within the terms of the statute, is determined by the case of State v. The Mayor, etc., Des Moines, 103 Iowa 76, where by vote of electors a free public library was established in the city of Des Moines, and in pursuance of law a board of library trustees was appointed. The board of trustees fixed and determined a rate of taxation on the taxable valuation on the property of the city for the purpose of maintaining a library and also fixed and determined a rate of taxation for the purpose of creating a sinking fund for the purpose of purchasing a lot and the erection of a library building, and caused the amount so fixed and determined to be certified to the city council of Des Moines. The city council refused to make the levy and to certify the levy certified to the council by the library trustees to the county auditor. But they did levy and certify a tax fixed by the city council for the purpose of the maintenance of a library. Mandamus was therefore sought to require the city council to levy and certify the rate of taxes fixed and determined by the board of library trustees. The contentions of the parties as stated by the court were these:

"On the one hand it is contended that the statute vests in the board of library trustees absolute power to fix and determine the amount of the levy to be made for the purpose of maintenance of the library, and of creating a sinking fund for the purchase of a lot and the erection

of a library building, subject only to the limitations in the statute; and that the duty devolves upon the city council to levy and certify the sums so certified to them by said board; that the city council is without any discretion in the matter. On the contrary, the appellees contend that the board of library trustees has no such power; that its power in the matter is advisory merely, and that the city council is invested with a discretion as to the amount or amounts which shall be levied for the purposes mentioned."

and with respect to the fundamental principle which controls the raising of taxes by the state and its agencies, the court said:

"The questions involved in this appeal are of great interest and importance. Irrespective of our duty to uphold the act of the legislature as constitutional, if it be possible to do so without doing violence to well-known legal principles and accepted canons of construction, our interest in the welfare of the people, which is so largely promoted by the establishment and maintenance of public libraries, would prompt us to give the questions presented most careful consideration. If it be conceded that a tax for the maintenance of a public library and for the erection of a library building is a tax for a public purpose, and hence one which, in furtherance of the general public policy of the state, may be compelled to be levied, may the legislature authorize its levy by the board of library trustees? Touching the power of the legislature to delegate the taxing power, Judge Cooley says: "It is a general rule of constitutional law that a sovereign power conferred by the people upon any one branch or department of the government is not to be delegated by that branch or department to any other. This is a principle which pervades our whole political system, and, when properly understood, permits of no exception, and it is applicable with peculiar force to the case of taxation. The power to tax is a legislative power. The people have created a legislative department for the exercise of the legislative power and within that power lies the authority to prescribe the rules of taxation, and to regulate the manner in which those rules shall be given effect. There is, nevertheless, one clearly defined exception to the rule that the legislature shall not delegate any portion of its authority. The exception, however, is strictly in harmony with the general features of our political system, and it rests upon an implication of popular assent, which is conclusive. These exceptions relate to the case of municipal corporations. Immemorial custom, which tacitly or expressly has been incorporated in the several state constitutions, has made these organizations a necessary part of the general machinery of state government, and they are allowed large authority in matters of local government, and to a considerable extent are permitted to make the local laws. This indulgence has been carried into matters of taxation; the state in very many cases doing little beyond prescribing rules of limitation within which, for local purposes, the local authorities may levy taxes. The legislature however, in thus making delegation of the power to tax, must make it to the corporation itself, and provide for its exercise by the proper legislative authority of the corporation. What is true of the state is equally true of the municipality, — that the power they possess to tax must be exercised by the corporation itself, and cannot be delegated to its officers or other agencies." Cooley, Taxation (2d ed.) pp. 61, 63, 65. The doctrine laid down by the learned author is that the delegation of the power to tax by the legislature must be made to the municipality itself, and that it cannot be delegated to other agencies."

and thereafter the court in considering the statute under which this power to levy by the board of trustees was based, concluded in these terms:

"We have treated this statute as, in effect, authorizing the library board to levy the tax. In fact, it in terms directs them to fix and determine the amount of the tax, which, upon being certified to the council, it must levy. The right to thus fix and determine is equivalent to the right to levy. Now, the uses to which this tax is to be put are local, and the benefits to be derived from such library must necessarily inure mostly to the people of the city of Des Moines. Such being the case, we think that the legislature had no power to vest the levying of this tax in a body not directly responsible to the people of the city. The levy and collection of a tax is a taking of the property of the taxpayer against his will, and such a necessary, arbitrary and far-reaching power ought not to be conferred upon a body of persons who are not the direct representatives of the people, who are not elected by them, and who, therefore, are not directly responsible to them, unless the people assent thereto."

And in Fevold v. Board of Supervisors, 202 Iowa, 1019, 1035, the holding in the foregoing case was stated to be:

"That a statute authorizing a library board, appointed by the mayor, to fix and determine the amount of a library tax which the city council was then required to levy, was invalid. It was said that the right to fix and determine was equivalent to the right to levy, and that the legislature had no power to vest the levying of the tax in a body not directly responsible to the people of the city.

Measured by the foregoing principles, it is clear that the county board of education is a "certifying board" within the statutory definition thereof heretofore quoted.

(2) In view of the conclusions reached with respect to the county board of education being a certifying board, no answer is required to question No. 2.

(3) Address is made to your third question as to whether strictly county funds and the board of education fund may be transferred between the two boards. The only authority for transfer of local funds is that provided by section 24.22 of the Code of 1946 which provides as follows:

"Upon the approval of the state board, it shall be lawful to make temporary or permanent transfers of money from one fund of the municipality to another fund thereof; but in no event shall there be transferred for any purpose any of the funds collected and received for the construction and maintenance of secondary roads. The certifying board or levying board, as the case may be shall provide that money temporarily transferred shall be returned to the fund from which it was transferred within such time and upon such conditions as the state board shall determine, provided that it shall not be necessary to return to the emergency fund, or to any other fund no longer required, any money transferred therefrom to any other fund. No transfer shall be made to a poor fund unless there is a shortage in said fund after the maximum permissible levy has been made for said fund."

Statutory analysis discloses that temporary or permanent transfers of money may be made from one fund of a municipality to another fund thereof. As has been shown, "Municipality" means, according to section 24.2, subsection 1, the following:

"1. The word "municipality" shall mean the county, city, town, school district and all other public bodies or corporations that have

power to levy or certify a tax or sum of money to be collected by taxation, but shall not include any drainage district, township, or road district."

The statute therefore means that a county or a city or a school district or any other certifying or levying body that has more than one public fund which it controls, may subject to the approval of the state board, transfer money from one fund to the other. The county hospital trustees possess one fund, the county hospital fund, and therefore that fund could not be the subject of transfer by the hospital trustees. And not being a fund of the county, within the terms of the statute, it could not, under the terms of the statute, be controlled by the board of supervisors. Unless the same certifying or levying board has control of both the lending and the borrowing funds, compliance with this provision of section 24.22 may not be effected, to-wit:

"The certifying board or levying board, as the case may be, shall provide that money temporarily transferred shall be returned to the fund from which it was transferred within such time and upon such conditions as the State Board shall determine."

Illustrative of the foregoing analysis, it can be seen that the county hospital fund could not be the subject of lending or borrowing. The county is without power to borrow from a city fund or vice versa because no enforcible provision within the terms of the statute could be made for the restoration of the borrowed fund. This principle is controlling whether the transfer of moneys be permanent or temporary.

The department has had occasion to consider the foregoing statute, 24.22, and has on these occasions reached a like conclusion. September 2, 1926 by opinion appearing in the Report of the Attorney General of 1925 and 1926 it was the holding that a board of supervisors may not transfer money from the general or county funds to the drainage funds, or vice versa. On November 22, 1926 by opinion appearing in the same volume of the Report of the Attorney General, it was held that township funds raised for taxation for road purposes may not be transferred for the township building fund and used for the purchase of the township hall without vote of the electors. It is there said:

"It is a well recognized rule that the transfer of funds raised by taxation or otherwise must be specifically provided by statute which shall be strictly construed in order to prevent taxing bodies from indiscriminately imposing taxes."

On May 20, 1927 by opinion appearing in the Report of the Attorney General for 1928 at Page 132, the power to transfer from the poor fund to the hospital fund was denied. It was stated therein:

"That there is no authority in the statute which would provide for such an action as the poor fund is governed under the sections found in Chapter 267 of the Code and are entirely separate and distinct from the provisions of chapter 269 referring to county public hospitals."

And by opinion issued August 4, 1927 appearing in the same volume at page 210, a like conclusion was reached with respect to the authority of transferring from the county poor fund to the county hospital fund.

And by opinion of April 5, 1928 appearing in the same volume at page 336, it was the opinion of the department:

"That in accordance with section 388 of the Code of 1927, temporary transfers from one fund to another may be made by a municipality, providing the levying or certifying board, as the case may be, makes provision for the return of said money and said transfer is approved by the budget director."

By opinion of the Attorney General for 1934, Page 142, it was determined no jurisdiction existed for the transfer of county funds to the funds of a drainage district for the purpose of taking care of the deficiency in that fund. It is stated there:

"That the funds of the particular drainage district are raised by taxation of the property in that district, while the county funds are made up of moneys collected from taxes levied upon all the property in the county".

And section 24.22 by opinion of the attorney general, appearing in the Report of 1934 at Page 708, was held not to be authority for the transfer of soldiers' relief fund to the county poor fund. The reason for such holding being:

"That the soldiers' relief was not created or provided for the purpose of relieving all indigent persons of the county, but was provided for the relief of a certain and particular class. The purpose was to prevent the necessity of veterans and their families being placed on the pauper list. For us to rule that the balance on hand at the end of a year should be paid over to the poor fund would be equivalent to ruling that the board of supervisors would have authority to transfer the particular fund at any time during the year and would be an absolute contradiction to the avowed purpose and intent of the legislature."

For the foregoing reasons there can be no transfer of funds either permanent or temporary between the county and the county board of education.

July 15, 1948

COUNTIES: Court expense fund—use for general county purposes prohibited. It was not the intention of the legislature to permit use of the court expense fund as an aid to, or a part of the general county fund, but it was to be used as an auxiliary fund and only when necessary to supplement the county general fund appropriated for court use.

Mr. Carroll O. Switzer, County Attorney, Des Moines, Iowa: Attention Mr. Clyde E. Herring, Assistant County Attorney: We have yours of the 2nd inst., in which you submit the following:

"I am in receipt of the following letter from Mr. Mark L. Conkling, Chairman of the board of supervisors of Polk county, dated June 24, 1948, and have been requested in addition, to obtain an opinion from your office:

'Our budget assistant, Denmar Miller, has advised the board of supervisors that we have been paying certain expenses of the operation of Polk county government improperly from the court expense fund. He has particularly questioned the authority of the board of supervisors to pay the expenses of the operation of the county attorney's office, sheriff's office, and any part of the court house payroll from that fund and has informed us that these expenses are properly payable from the general fund.

'Investigation reveals that these items, prior to 1944, were in fact budgeted in the county general fund, but in 1944 one-half of the salaries of the court house employees under the control of the building superintendent and one-half of the maintenance of the building and heating plant, were first paid from the court expense fund. In 1945 these items were again budgeted and paid from the court expense fund and in that year, the offices of the sheriff and the county attorney were budgeted in and paid from the court expense fund. The practice has been followed since that time.

'As you are no doubt aware, the general fund will not raise sufficient money to permit the transfer back to it of the questioned expenditures without a drastic reduction in the appropriations in each of the offices payable out of the county general fund.

'The board of supervisors requests an opinion from your office, therefore, on the following propositions:

1. May the board of supervisors legally and properly budget and appropriate from the court expense fund, sufficient sums to pay the cost of the operation of the sheriff's office, the county attorney's office and any portion of the maintenance of the court house building and heating plant, including salaries for that purpose?

2. If the items mentioned in question 1 may not be properly payable from the court expense fund, from what fund or funds may the same be payable?

3. What would be the legal consequences to the board of supervisors, as a board, or individually, should we, knowing that the payment of these expenses from the court expense fund has been questioned, budget and appropriate for those purposes from the court expense fund, in spite of such advice?

4. Is it permissible to budget in and pay from the court expense fund the cost of committing neglected, dependent, or delinquent children by the juvenile court to institutions incorporated and maintained for the purpose of caring for such children, and if not proper to budget in and pay these costs from the court expense fund, from what fund or funds may those costs be properly paid?

'It is absolutely imperative that these questions be answered with great promptness because the budget must be prepared and notices of the date of hearing on the budget must be served approximately the first day of August 1948, and until we have these questions answered, we will be unable to complete the preparation of the budget.'

"We would appreciate the opinion of your department on this matter as requested by Mr. Conkling, at your earliest convenience."

The questions submitted in your communication relates to section 444.10, Code of 1946, denominated "court expense" and hereinafter referred to as "the court expense fund". An examination of the history of this statute, the reason for its enactment, and the effect of the amendment by the 50th General Assembly, are aids in arriving at a correct interpretation thereof.

The court expense fund was first created by the provisions of H.F. 175, Acts of the 33rd General Assembly, reported as chapter 79, Acts of the 33rd General Assembly, and which law was approved April 6, 1909. We quote herewith:

"Section 1. Levy—purposes—amount. That division two (2) of section one thousand three hundred and three (1303) of the supplement to the code, 1907, be and the same is hereby amended by adding to said subdivision two (2), the following:

'Provided, however, that in any county where, by reason of extraordinary or unusual litigation the rates herein fixed for ordinary county revenue are found to be insufficient to pay the same, the board of supervisors may create an additional fund to be known as "court expense fund", and may levy for such fund, such rate of taxes, as shall be necessary to pay all court expenses chargeable to the county. Such fund shall be used for no other purpose, and the levy therefor shall be dispensed with, when the authorized levy for the ordinary county revenue is sufficient to meet the necessary county expenditures including such court expenses. Provided, further, that the levy for the purpose of providing an additional fund shall not exceed three mills on a dollar."

The provisions of this particular act provided for the additional levy of a court expense fund, "where, by reason of extraordinary or unusual litigation, the rates herein fixed for ordinary county revenue are found to be insufficient to pay the same, the board of supervisors may create an additional fund to be known as 'court expense fund' ".

It was recognized by the legislature that regardless of other bars and restrictions, courts must function under all circumstances. The millage levy for this special purpose has not been changed and is the same as the rate provided under the original act as passed in 1909.

This act provided only for the levying of a tax to create a court expense fund when there was extraordinary or unusual litigation. This pertinent, though troublesome, language remained in the statute until April 1, 1943. This language being difficult of interpretation created a doubt as to the permissable use of the funds and resulted in the amendment of the 50th General Assembly. Chapter 217, Acts of the 50th General Assembly provides as follows:

"Section 1. Section seven thousand one hundred seventy-two (7172), Code 1939, is amended by striking from line two (2) the following: 'by reason of extraordinary or unusual litigation', and by striking from line four (4) the following: 'the same,' and inserting in lieu thereof the following: 'all expenses incident to the maintenance and operation of the courts.' "

The amendment deleted the words "extraordinary or unusual litigation", and the following was inserted in lieu thereof: "all expenses incident to the maintenance and operation of the courts". Though this language, standing alone, would indicate that all court expense necessary to the maintenance and operation of the courts was to be paid out of this fund, it appears clear when reading the whole act and amended statute that no fundamental change in the law was intended or effected. Section 2 of the amendment provided for the legalization of the past use of the court expense fund, in order to remove any question as to its use predicated upon extraordinary or unusual litigation. This section clearly indicates that the legislature viewed the fund as one to be used only as supplementary to the funds provided by the general county levy.

Section 444.10, Code 1946, as amended, provides:

"Court expense. In any county where the rates herein fixed for ordinary county revenue are found to be insufficient to pay all expenses incident to the maintenance and operation of the courts, the board of supervisors may create an additional fund to be known as court expense fund, and may levy for such fund such rate of taxes as shall be necessary to pay all court expenses chargeable to the county. Such fund shall be used for no other purpose, and the levy therefore shall be dispensed with when the authorized levy for the ordinary county revenue is sufficient to meet the necessary county expenditures including such court expenses. Provided, further, that the levy for the purpose of providing an additional fund shall not exceed three-fourths mill on a dollar."

A careful examination of this section discloses that there are several distinct conditions provided in the section for the levy and use of the court expense fund, namely:

(1) In any county where the rates herein fixed for ordinary county revenue are found to be insufficient to pay all expenses incident to the maintenance and operation of the courts. This means that part ordinarily budgeted for the courts.

(2) Where the rates herein fixed for ordinary county revenue are found to be insufficient to pay all expenses incident to the maintenance and operation of the courts, the board of supervisors may create an additional fund to be known as the court expense fund.

(3) In any county where the rates herein fixed for ordinary county revenue are found to be insufficient, the board of supervisors may levy for such fund such rate of taxes as shall be necessary to pay all court expenses chargeable to the county.

(4) Such fund shall be used for no other purpose.

(5) The levy therefor shall be dispensed with when the authorized levy for the ordinary county revenue is sufficient to meet the necessary county expenditures, including such court expenses.

(6) The levy for the purpose of providing an additional fund shall not exceed three-fourths mill on a dollar.

The foregoing conditions disclose that section 444.10, court expense fund, is a supplemental or additional fund, to be used only when the county levy authorized under the provisions of section 444.9 is insufficient to pay all necessary court expenses properly chargeable to the county.

Chapter 444 relates to tax levies to be made in order to defray the cost of government. In construing any section contained in the chapter, it is a rule of statutory construction that all sections of the chapter be construed together in order that each may be given effect and the whole harmonized.

The county board of supervisors is required under section 444.9 to make a levy for the general county fund, and under the provisions of section 444.10, may make an additional levy only upon the express conditions, burdened with the limitations specifically provided in said sec-

tion and hereinbefore set out. The county general fund is created to pay the general expenses chargeable against the county in all cases where there is no specific levy authorized by statute to discharge the expenses relative to the operation of the county's business, including court expenses.

Chapter 340, Code 1946, and amendments thereto, specifically provide for payment of salaries of county officers. The salaries therein provided are for the county officers, their deputies and clerks. Section 340.16 specifically provides that the salaries fixed by the foregoing sections of this chapter shall be paid out of the general fund of the county. The only exception, however, is contained in section 340.17, which provides that the salaries of the clerk of the district court, and the deputy clerk may be paid from the court expense fund. This provision and the provisions of sections 231.12 and 231.13, which specifically provide for the payment of the salaries and expenses of probation officers of the juvenile court, are the only provisions which in any way modify the express language of section 444.10 relating to court expense fund.

When the salaries of the county officers were changed by chapter 183, Acts of the 52nd General Assembly, it is to be noted that in section 9 of the act, the legislature provided for increasing the rate of levy under section 444.9 of the code relating to general county levy, in order to discharge the obligation of the increased salaries for county officers, their clerks and deputies. The salaries of all county officers, their clerks and deputies, including the sheriff and county attorney, are paid under the provisions of the specific statute and are not a permissible expense to be paid out of the court expense fund.

It was the intention of the legislature that where funds are provided specifically by statute for the payment of the expenses of the county, those charged with the duty of defraying such expenses are required to keep within the provisions of the budget law, except as otherwise provided by statute. The officers of a county are required to limit their expenditures to the available funds provided by a levy made in accordance with their submitted budget. It was not the intention of the legislature to permit use of the court expense fund as an aid to, or a part of the general county fund, but it was to be used as an auxiliary fund, and only when necessary to supplement the county general fund appropriated for court use within the express limitations set out in this opinion.

Attention is called to the following attorney general's opinions relating to expenditures from the court expense fund:

O.A.G., 1924, page 134, holds that salaries of the sheriff and county attorney must be paid from the general fund.

O.A.G. 1926, page 207, holds that commissions on fines, and expense of boarding prisoners cannot be paid out of the court expense fund.

O.A.G. 1928, page 404, holds that where a transfer has been made of the county general fund to the court expense fund, it is not necessary to transfer it back, for the reason that court expenses are payable out of the ordinary revenues of the county.

O.A.G. 1938, page 166, holds that permanent improvements in the offices of the Clerk should be charged against the general fund, and not the court expense fund.

Using the foregoing history of the act and amendment as a guide, we proceed to answer the questions enumerated in your letter, and referring to inquiry number 1, which consists of two parts, you are advised as follows:

1 A. That in so far as the salaries of the sheriff and county attorney are concerned, including the deputies and assistants, the cost thereof is payable from the general fund of the county under the provisions of section 340.16, Code 1946, and cannot be paid out of the court expense fund.

1 B. As to the payment of a portion of the maintenance of the court house building and heating plant, including salaries in connection therewith, you are advised that this maintenance is an obligation of the board of supervisors, and payable from the general fund, for the reason that section 332.3, Code 1946, subsection 15, provides that the board of supervisors at any regular meeting shall have power "to build, equip and keep in repair the necessary buildings for use of the county and the courts."

1 C. You are further advised that Code sections 332.9 and 332.10, Code of 1946, provides "The board of supervisors shall also furnish each of said officers with fuel, lights, blanks, books and stationery necessary and proper to enable them to discharge the duties of their respective offices, but nothing herein shall be construed to require said board to furnish any county attorney with law books or library."

The foregoing supplies are furnished to the officers by the board of supervisors and paid for out of the county general fund, and cannot be paid from the court expense fund.

2. Your third inquiry relates to the legal consequences to the board of supervisors, as a board or individually, should they, knowing that the payment of these expenses from the court expense fund has been questioned, budget and appropriate for those purposes from the court expense fund, in spite of such advice?

You are advised that the local budget law, section 24.24, Code 1946, provides:

"Failure on the part of any public official to perform any of the duties prescribed in chapters 22, 23 and 24, and sections 8.39 and 11.1 to 11.5, inclusive, shall constitute a misdemeanor and shall be sufficient ground for removal from office."

You are further advised that a knowing and willful maladministration would subject the members of the board to removal from office, and make them personally liable for an improper expenditure of public funds. The power and causes of removal are stated in section 66.1 Code of 1946 as follows:

"Any appointive or elective officer, except such as may be removed only by impeachment, holding any public office in the state or in any division or municipality thereof, may be removed from office by the district court for any of the following reasons:

1. For willful or habitual neglect or refusal to perform the duties of his office.
2. For willful misconduct or maladministration in office.
3. For corruption.
4. For extortion.
5. Upon conviction of a felony.
6. For intoxication, or upon conviction of being intoxicated."

For a definition of willful misconduct you are referred to the case of State ex rel. Fletcher v. Naumann, 213 Iowa, 418.

3. Question number 4, as presented, relates to cost of committing neglected, dependent or delinquent children by the juvenile court, and as propounded we are not certain as to the particular cost to which you refer. Hence, to expedite this opinion, we are passing that question with the request that you please set out in detail the particular commitment costs referred to in your inquiry. Upon being provided with this information, further advice will be forthcoming.

July 29, 1948

HOSPITALS: County public hospital—Tuck law provisions. Expenditures of a county public hospital in excess of the budget for indigent patients are within the exceptions to sections 343.10 and 343.11 of the Code and can be paid. Expenditures for patients who are not indigent are within the prohibition of the statute and are limited to payment from the budgetary hospital maintenance fund.

Mr. C. B. Akers, Auditor of State, Attention: L. I. Truax, Supervisor: We have yours of the 14th inst. in which you state:

"We are in receipt of a communication from our examiner, Leonard Mogren, who has been making an audit and examination of the accounts of the Polk County Broadlawns Hospital. Mr. Mogren's letter is, in part, as follows:

'While making the examination of Broadlawns Polk County Hospital for the year 1947, Mr. T. P. Sharpnack, the Hospital Administrator, informed your examiner that he estimated the balance in the hospital maintenance fund, as of December 31, 1948, would be overdrawn approximately $20,000.00.

In discussing this anticipated condition he brought up the statute in the Code known as the Tuck Law, sections 343.10 and 343.11, Code of 1946, and wondered whether Polk County Hospital came under the provisions of this law, or whether the exceptions thereto included the hospital. He said he would appreciate it very much if we would secure a written opinion on this matter from the Attorney General.'

Your opinion on the above matter is requested. An early reply will be appreciated."

In reply to the foregoing, we advise:

Section 347.16 of the Code of 1946 expressly provides for free care and treatment in the county public hospitals for indigent persons who are both residents of the county and have established legal settlement

therein. Such section, as amended by chapter 120 and 191 of the 52nd G. A. provides as follows:

"Any resident of the county who is sick or injured shall be entitled to the benefits of such hospital and shall pay to the board of hospital trustees reasonable compensation for care and treatment according to the rules and regulations established by the board.

Free care and treatment in such county public hospitals to any indigent or tuberculous persons shall be furnished to such residents of the county as have established legal settlement in the county as defined in section 252.16 and have been found by the board of hospital trustees to be indigent and entitled to said care or be entitled to free care as provided in Chapter 254, provided however, such county public hospital may provide hospital benefits to indigent persons having a legal settlement outside the county and the county of such persons' legal settlement shall pay to such county public hospital for the fair and reasonable cost of such care, treatment and hospitalization.

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

Such county hospital when established, is maintained by a tax of not to exceed one mill, subject, however, in counties having a population of 135,000 or over, the levy therefor is limited to two mills in any one year, section 347.7, Code of 1946. The foregoing plainly is a recognition that expenditures for hospitalization for indigent patients in the county public hospital, is help from public funds. As such, whatever expenditures are made by reason of the hospitalization of such indigent patients, is within the exception of the Tuck Law expressed by sections 343.10 and 343.11, subsection 4 of the Code of 1946 in terms as follows:

343.10 "It shall be unlawful for any county, or for any officer thereof, to allow any claim or to issue any warrant, or to enter into any contract, which will result, during said year, in an expenditure from any county fund in excess of an amount equal to the collectible revenues in said fund for said year, plus any unexpended balance in said fund for any previous years.

Any officer allowing a claim, issuing a warrant, or making a contract contrary to the provisions of this section, shall be held personally liable for the payment of the claim or warrant, or the performance of the contract.

343.11 "Section 343.10 shall not apply to (4) Expenditures for the benefit of any person entitled to receive help from public funds."

It therefore follows that so much of the hospital maintenance fund as is expended in the free care and treatment of indigent persons, having residence and legal settlement in the same county, are expenditures for the benefit of persons entitled to receive help from public funds, and within the foregoing exceptions of the Tuck Law.

Such expenditures, including those in excess of the budgetary limitations and the Tuck Law, are payable from the county hospital maintenance fund. This being a self-producing and administered fund of a certifying body, is not the subject of transfer either to or from any other county funds. Opinion of the attorney general, July 5, 1948. And such is the rule laid down by the opinion of this department appearing in the Report of the Attorney General for 1928, Page 216. It is there said:

"We are, therefore, of the opinion that the provisions made for the establishment of a county public hospital and for a tax levy in support thereof was intended by the legislature to supply hospitalization service to indigent residents of the county without charge to them or to the poor or any other fund of the county, and that, therefore, the board of trustees of the county public hospital cannot collect from the county board of supervisors, or from any other county fund, any amount for the treatment of indigent patients."

We are of the opinion that expenditures in excess of the budget for indigent patients, are within the exceptions to the Tuck Law and can be paid. Expenditures for patients who are not indigent, are within the Tuck law and limited to payment from the budgetary hospital maintenance fund.

July 29, 1948

MINORS: Neglected, dependent, and delinquent children—monthly allowance for care. Monthly allowance for children committed to an institution under the provisions of section 240.5, Code 1946, may not properly be budgeted and paid from the juvenile fund authorized by section 232.36 of the Code, but such expenditures should be budgeted and paid from the poor fund in all counties maintaining such fund.

Mr. Carroll O. Switzer, County Attorney, Des Moines, Iowa: Attention Clyde E. Herring: We have yours of the 9th inst. in which you submit the following:

"I am in receipt of the following letter from Mr. Mark L. Conkling, Chairman of the board of supervisors of Polk county, dated July 8, 1948:

'We call your attention to certain sections of the 1946 Code of Iowa, together with amendments thereto, and in connection therewith desire to point out certain facts and request answers to questions as set out below:

There are two chapters of the Code in question: Chapter 232, entitled 'Care of Neglected, Dependent and Delinquent Children', and chapter 240, entitled 'Private Institutions for Neglected, Dependent and Delinquent Children'. Section 232.21, Par. 3, provides that:

'The juvenile court, in the case of any neglected dependent, or delinquent child, may: (3) Commit said child to any institution in the state, incorporated and maintained for the purpose of caring for such children.'

Section 240.5, as amended by chapter 137, section 1, Acts of the 52nd General Assembly, provides that 'the institution receiving and caring for a child under eighteen years of age and under commitment from the juvenile court, shall receive from the county of legal settlement of such child, a monthly allowance for the welfare of such child in such an amount as the board of supervisors in their judgment and discretion shall determine.

There is no indication in chapter 240 of where the funds for such payments are to be set up in the county's budget. Chapter 232, however, provides for the creation of a juvenile fund by the levy of a tax of ¼ mill, in sections 232.35 and 232.36, Polk county has for many years been budgeting and paying the cost of caring for these children from the juvenile fund, created by the tax levy provided for under section 232.36, supplemented by transfers from the emergency fund. The levy of ¼ mill will raise, roughly, $50,000.00, while the cost of operation of the juvenile home is about $85,000.00 and the additional costs requested under section 240.5 as amended, will require between $64,000.00 and $87,000.00.

We desire the following questions to be answered:

1. May the cost of monthly care of such children as provided by section 240.5 as amended, be properly budgeted in and paid by the juvenile fund as authorized by section 232.36?

2. If not, in what fund, or funds should these items be budgeted?

3. If so, may this expense be properly payable from any other fund, such as the general fund, or the court expense fund of the county, neither of which funds, as you know, are in any better position to stand this added amount than is the juvenile fund.

An early opinion on these questions is urgently requested.'

We would appreciate the opinion of your department on the questions propounded by Mr. Conkling."

We find neither express nor implied provision made in the statute for the payments required to be made under section 240.5 of the Code of 1946 as amended by chapter 137, section 1, Acts of the 52nd General Assembly. Section 232.35 and 232.36 of the Code of 1946 does provide for a juvenile fund but its use is limited plainly by the terms of those statutes. Those statutes provide as follows:

"In counties having a population of more than forty thousand, the board of supervisors shall, and in counties of over thirty thousand, said board may provide and maintain, separate, apart, and outside the inclosure of any jail or police station, a suitable detention home and school for dependent, neglected, and delinquent children."

"The board of supervisors may annually levy a tax of not to exceed one-fourth mill for the purpose of maintaining such home, and paying the salaries and expenses of all appointees authorized by this chapter." In that statutory situation it is the rule of financing that where there is no specific direction made with respect to the fund from which a directed expenditure will be paid, it is chargeable and payable out of the county general fund. If it were not for reasons following, this rule would fix the fund from which the expenditure required by section 240.5 is made. However, the Tuck Law, being section 343.10 Code of 1946, controls the county general fund. Requirement in excess of the juvenile fund limitation may not be paid therefrom without incurring the penalties therefor. The question then presents itself as to the fund from which the excess shall be paid. Dependents who receive the benefits of section 240.5 are, in fact, receiving help from public funds. Section 240.5 as amended by chapter 137, section 1, Acts of the 52nd General Assembly so provides:

"The institution receiving and caring for a child under eighteen years of age and under commitment from the juvenile court, shall receive, from the county of the legal settlement of such child, a monthly allowance for the welfare of said child in such an amount as the board of supervisors in their judgment and discretion may determine."

The expenditures for such purposes are, however, excepted from the provisions of the Tuck Law, section 343.10 and 343.11, subsection 4, Code of 1946, provides as follows:

343.10. "It shall be unlawful for any county, or for any officer thereof, to allow any claim, or to issue any warrant, or to enter into any contract, which will result, during said year, in an expenditure

from any county fund in excess of an amount equal to the collectible revenues in said fund for said year, plus any unexpended balance in said fund for any previous years.

Any officer allowing a claim, issuing a warrant, or making a contract contrary to the provisions of this section, shall be held personally liable for the payment of the claim or warrant, or the performance of the contract."

343.11. "Section 343.10 shall not apply to: (4) Expenditures for the benefit of any persons entitled to receive help from public funds."

While it has been generally understood that the foregoing provision is limited to relief from the poor fund, the language of the exception, however, is broad enough to include not only relief for the poor but others who by statute do receive help from public funds. In that aspect, it has been the holding of this department that the soldiers relief fund is exempt from the operation of the Tuck Law. See report of the Attorney General of 1940 at Page 362. And a like conclusion was reached by this department as appears by opinion appearing in the same volume at page 421. Plainly, therefore, the expenditure made under section 240.5 is likewise an expenditure for the benefit of those entitled to help from the public funds. However, if the county general fund were to be used for this purpose, it would bring such fund within the exception of the Tuck Law and destroy, therefore, the very purpose of the Tuck Law itself. This being a required expenditure, the use of a fund for such expenditure other than the general fund, may legally be tolerated.

Previously in this opinion we explained the use to which the juvenile fund, being sections 232.35 and 232.36, may be devoted, and therefore excluding that fund from use for the purpose of bearing this excess expenditure, there remains therefore, only the poor fund from which this excess may properly be paid. 240.5 ?

The relation between the county general fund and the poor fund is explained by opinion of this department appearing in the Report of Attorney General for 1936 at Page 84, where is stated:

"Section 5337 provided that the expense of supporting the poor shall be paid out of the county treasury in the same manner as other disbursements, for the law appears to make expenditures for relief a part of the general and ordinary expense of the county. Poor Fund Bonds then represent indebtedness of the county for its general and ordinary purposes and are subject to the limitations contained in section 6238, unless an emergency can clearly be shown to exist, resulting in an unequivocal demand for poor relief and making necessary an expenditure of money in such an amount as absolutely and necessarily to exceed the amount which can be raised for general and ordinary purposes. Certain relief must be furnished without making it impossible to carry on the other functions of the county government. The county government must function, and this requires certain revenue. The hungry also must be fed; this also requires the expenditure of money. If a situation arises where an emergency in the nature of an unprecedented demand for relief makes it imperative to exceed the limitations set by section 6238, with no alternative other than to require a large number of the population of the county to go hungry and to suffer otherwise

from lack of the necessities of life, then it might be said, and with considerable force, that indebtedness to relieve such persons in want in indebtedness for a special and extraordinary purpose.

We are confronted, however, with the terms of section 5337, which provides that:

"The expense of supporting the poor shall be paid out of the county treasury in the same manner as other disbursements for county purposes, and in case the ordinary revenue of the county proves insufficient for the support of the poor, the board may levy a poor tax not exceeding one and one-half mills on the dollar, to be entered on the tax list and collected as the ordinary county tax."

We quote again from Council Bluffs Savings Bank vs. Pottawattamie County, 216 Iowa, 1123:

"If the ordinary revenue is not sufficient for the support of the poor, the board may then levy a poor tax not exceeding three mills on the dollar."

The section last above quoted and the case just referred to seem to be legislative and judicial authority of a sufficiently persuasive character to require us to hold that indebtedness incurred for the support of those in need is indebtedness for general and ordinary purposes.

In case the ordinary revenue of the county proves insufficient for the support of the poor, the board may levy an additional poor tax not exceeding one and one-half mills on the dollar. In view of the authorities above quoted, it is the opinion of this department that indebtedness incurred for poor relief purposes and whether evidenced by poor fund bonds or otherwise, which indebtedness was brought about by the present emergency, is to be considered as indebtedness for "general and ordinary purposes" rather than for "special and extraordinary purposes" and is subject to the limitation contained in section 6238, namely that such indebtedness shall not exceed in the aggregate one and one-fourth per cent of the actual value of the taxable property within such corporation."

We answer, therefore, your questions as follows:

1. The expenditures directed to be made by section 240.5 as amended, Code of 1946, may not properly be budgeted and paid from the juvenile fund authorized by section 232.36, Code of 1946.

2 and 3. In the view that maintenance of a poor fund evidenced the county's conclusion that the general fund cannot be burdened with the foregoing expenditures, such expenditures required by section 240.5 should be budgeted and paid from the poor fund in all counties maintaining such fund.

August 12, 1948

CORPORATIONS: Value of corporate charter. The executive council may not assign capital value to a corporation's charter up to the amount of fees paid to the secretary of state for that charter in determining the value of property received in exchange for stock.

Honorable Rollo H. Bergeson, Secretary of State: We have yours of the 5th inst. in which you submit the following:

"Your official written opinion is requested on the following question: For the purpose of ascertaining the real value of the property or other things which a corporation proposes to receive for its capital stock under the provisions of Code chapter 492, may the executive council assign value to the corporate charter up to the amount of the fees paid to the secretary of state for that charter?"

Briefly stated, you inquire if the executive council may assign value to its corporate charter in determining value of property received in exchange for stock.

We find answer to the foregoing question in the terms of the foregoing numbered chapter. Section 492.6, Code of 1946 provides as follows:

"492.6. If it is proposed to pay for said capital stock in property or in any other thing than money, the corporation proposing the same must, before issuing capital stock in any form, apply to the executive council of the state for leave so to do. Such application shall state the amount of capital stock proposed to be issued for a consideration other than money, and set forth specifically the property or other thing to be received in payment for such stock."

The plain language of the foregoing statute concludes that it is an existent corporation which must apply to the executive council for leave to issue its capital stock, in property or any other thing than money. Until the corporation comes into existence, obviously the application cannot be made. The corporation does not exist until a proposed charter is filed with the secretary of state and authority to do business as a corporation issued by him. Until that authority is issued by the secretary of state, the articles are a mere proposal to the state of Iowa for authority to act as a corporation. It follows without argument therefore, that where a corporate charter is a prerequisite to the authority to act as a corporation, the corporation does not exist and cannot receive property or other thing of value until the articles of incorporation have been approved by the secretary of state and a certificate of corporate organization issued. Therefore, to hold that a corporation may receive its own charter is a legal contradiction. And value cannot be attached to property which the corporation has not received. The statutory duty of the council is to place value on property received. In Kirkup v. Anaconda Amusement Co., 59 Montana 469, 197 Pacific 1005, 17 American Law Report 441, the plaintiff sought to recover damages for breach of an agreement to pay him in stock of the corporation for services performed in promoting its organization under a constitutional and statutory provision that:

"No corporation shall issue stocks or bonds except for labor done, services performed or money and property actually received."

As pertinent to the point here under discussion, the court there said:

"It is obvious that, at the time the contract was made, no labor had been done, services performed, or money or property actually received by the corporation, as the corporation had no existence."

For the foregoing reasons we are of the opinion that the executive council may not assign capital value to its corporate charter up to the amount of fees paid to the secretary of state for that charter.

August 17, 1948

BANKS AND BANKING: Security business—state and savings banks precluded. A state or savings bank existing under and by virtue of the laws of the state of Iowa may not engage in business as a securities dealer.

Mr. Newton P. Black, Superintendent of Banking. Des Moines, Iowa: Your letter of July 3, 1948, presents the question whether state or savings banks may engage in the securities business.

The charter of a bank, and the statute under which the Charter is granted, determine the powers of a bank, such powers being limited to those which are expressly granted and such incidental powers as are essential to the exercise of those expressly granted, every power not clearly granted being withheld. 9 C.J.S. 334, section 157.

Section 532.1, Code of Iowa, 1946, provides in part:

"Trust companies, state and savings banks existing under the provisions of this title, in addition to the powers already granted to such corporations, shall have power, when so authorized by their articles of incorporation:

* * *

5. To issue drafts upon depositories, and to purchase, invest in, and sell promissory notes, bills of exchange, bonds, mortgages, and other securities."

Under the foregoing code provisions state and savings banks are granted the power to purchase, invest in, and sell securities, but the power to purchase is not the power "to deal in".

It is said in 7 American Jurisprudence, 130, section 169:

"As a general rule, a banking corporation has no power to carry on any business other than that of banking. The solvency of these institutions is generally guarded by special provisions and limitations in the statutes authorizing their incorporation and has always been the object of sedulous care, both on the part of the legislature and of the courts. The language employed in the statutes defines their power and duties and generally excludes, by necessary implication, a capacity to carry on any business other than that of banking and the adoption of any methods for the prosecution of such business other than those specifically pointed out by the statute."

Of course, in instances where a bank is forced to operate a business in order to realize on an obligation owing it, the bank would not be precluded from operation.

The Supreme Court of Iowa said in Henderson vs. Farmers Savings Bank, 199 Iowa 496:

"A savings (state) bank is a creature of law, the same as any other corporation, and can exercise no power not conferred by law. It derives its authority from the statutes creating and governing it; and an act done in an attempt to exercise power not given it by statute is a void act."

You are therefore advised that it is the opinion of this office that a state or savings bank existing under and by virtue of the laws of the state of Iowa may not engage in business as a securities dealer.

August 18, 1948

SCHOOLS AND SCHOOL DISTRICTS: Emergency fund not to augment schoolhouse levy. School districts may not use the one-mill emergency tax provided by section 24.6 of the Code to augment the two and one-half mill levy for construction of schoolhouses provided by subsection 7 or section 278.1.

Mr. Ray E. Johnson, State Comptroller: We have yours of the 11th inst. in which you submit the following:

"We have received a request from the independent school district of the city of Waterloo to approve the levy of a one mill emergency tax as provided by section 24.6, Code of 1946.

The request sets out the following as the reason for the levy:

'The schoolhouse fund will be benefited by this levy. The levy is necessary to provide funds to meet the increased cost of additions to present building to provide classrooms for increase school population. March 10, 1947 the voters approved a two and one-half mill levy to provide funds for additions to now existing buildings. The additions planned and intended to be financed from the 2½ mill levy could have been financed as planned had costs not gone up so sharply.'

I respectfully ask for an opinion as to whether or not we have the authority to authorize the levy of an emergency tax, the proceeds of which are to be used to augment funds levied under the provision of section 278.1, subsection 7, Code of 1946, providing for a school house tax."

In answer to the foregoing, we are of the opinion that the one mill emergency tax provided by section 24.6 of the Code of 1946, is not available to augment the two and one-half mill levy. Section 278.1, Sub-section 7, provides as follows:

278.1. "The voters at the regular election shall have power to: (7) Vote a schoolhouse tax, not exceeding two and one-half mills on the dollar in any one year, for the purchase of grounds, construction of schoolhouses, the payment of debts contracted for the erection of schoolhouses, not including interest on bonds, procuring libraries for and opening roads to schoolhouses."

This is specific legislative authority vested in the electors of the school district to determine for themselves by their vote, whether they will impose upon the property of the district the foregoing schoolhouse tax. It will be noted that even that power resting in the electors is specifically limited to the imposition upon the foregoing property of a levy of two and one-half mills on the dollar in any one year. This is in effect a limitation upon the amount which can be expended. Clearly, the use of the emergency fund, as provided by section 24.6, Code of 1946, in terms as follows:

"Each municipality as defined herein, may include in the estimate herein required, an estimate for an emergency fund. Each such municipality shall have power to assess and levy a tax for such emergency fund at a rate not to exceed one mill upon the taxable property of the municipality, provided that no such emergency tax levy shall be made until such municipality shall have first petitioned the state board to make such levy and received its approval thereof. Transfers of moneys may be made from the emergency fund to any other fund of the municipality for the purpose of meeting deficiencies in any such fund arising from any cause, provided, however, that no such transfer shall be made except upon the written approval of the state board, and then only when such approval is requested by a two-thirds vote of the governing body of said municipality."

would invest the school district with power to impose an additional tax upon the property of the school district without the consent of the

electors and without clear legislative sanction. We are of the opinion that, if the foregoing emergency fund could be used for the purpose of augmenting the funds derived from the specific authorization of the legislature, evidenced by section 278.1, Code of 1946, it would require specific legislative authoriziation. To hold otherwise would authorize to be done by indirection what is prohibited to be done directly. We are not, by the foregoing, conceding that the situation outlined has created an emergency within either the letter or the spirit of the foregoing section 24.6.

August 18, 1948

TAXATION: Expense of city assessor's office—city assessment expense fund. All expense of the city assessor's office and the local board of review in any city adopting an ordinance providing for a city assessor under the county assessor law shall, from January first following the date the act first becomes applicable to such city until funds are available in the city assessment expense fund provided in said law, be bourne by the general funds of the school district, the county, and the city.

Mr. Ray E. Johnson, State Comptroller: We have yours of the 4th inst. in which you submit the following:

"The 52nd G. A. enacted a law providing for county assessors, and is found under chapter 240 Acts of the 52nd G. A.

Section 15 of the act provides that a city, may, by ordinance, provide for the selection of a city assessor under the provisions of chapter 405, Code of 1946.

Section 18 of the act provides as follows:

'Until January first following the date this act first becomes applicable to any city, the expenses and compensation of the examining board and all expenses of the city assessor's office and local board of review, including salaries of all personnel, and compensation of the members of the board of review, shall be authorized by the board of supervisors and shall be paid by the county upon approval of the board of supervisors and the court costs and related expenses incident to any assessor shall be paid as now provided by law. Thereafter, all expenditures in cities selecting an assessor under this act shall be paid under the provisions of chapter 405, Code of 1946.'

I respectfully ask for an official opinion as to what fund should the expenses of the city assessor be paid from, after January 1st of the year following the adoption of an ordinance providing for a city assessor."

We advise you as follows:

It is clear by the terms of the foregoing statute the right to pay the expenses of the city assessor from the county fund, expires by limitation on January 1 following the date the act becomes applicable to the city electing to assess its property under the foregoing chapter 240 of the Acts of the 52nd General Assembly. By direction of the same statute, such expenditures, after the foregoing date of January 1st, are required to be paid pursuant to the provisions of chapter 405, Code of 1946. The fund there provided for is designated the city assessment expense fund, which fund is made up of contributions by the taxing bodies who will receive the benefits and avails of the taxes arising out of the assessment so made, to-wit: city, school district and county. Section 405.18 provides:

405.18. "All expenditures under this chapter shall be paid as hereinafter provided.

Not later than July 15 of each year the city assessor, the examining board and the local board of review shall each prepare a proposed budget of all expenses for the ensuing year. The city assessor shall include in his proposed budget the probable expenses for defending assessment appeals, and court costs taxed against the public bodies. Said budgets shall be combined by the city assessor and copies thereof forthwith filed by him with the board of supervisors, city council and school board.

Such combined budget shall contain an itemized list of the proposed salaries of the city assessor and each deputy, the amount required for field men and other personnel, their number and their compensation; the estimated amount needed for supplies, printing, mileage and other expenses necessary to operate the assessor's office, the estimated expenses of the examining board and the salary and expenses of the local board of review.

Not later than July 21 of each year, the mayor shall, by written notice, call a joint meeting of the city council, school board and county board of supervisors to consider such proposed budget and shall fix and adopt a consolidated budget for the ensuing year.

The mayor shall act as chairman and the city assessor as secretary of such meeting. The proposed budget or any item thereof may be increased or changed in any manner at this joint meeting. The majority vote of the members present of each taxing body shall count as one vote, and no action shall be valid except by the vote of not less than two out of three taxing bodies.

At the joint meeting the three taxing bodies shall authorize;

1. The number of deputies, field men, and other personnel of the assessor's office.

2. The salaries and compensation of members of the board of review, the assessor, chief deputy, other deputies, field men, and other personnel, and determine the time and manner of payment.

3. The miscellaneous expenses of the assessor's office, the board of review and the examining board, including office equipment, records, supplies, and other required items.

4. The estimated expense of assessment appeals.

All such expense items shall be included in the budget adopted for the ensuing year.

Each of the three taxing bodies shall contribute one-third of the amount required to make the final budget and shall, on the first day of January, April and July of each year remit one-third of its share to the county treasurer to be credited by him to a separate fund to be known as "The City Assessment Expense Fund", and from which fund all expenses incurred under this chapter shall be paid.

The county auditor shall keep a complete record of said fund and shall issue warrants thereon only on requisition of the city assessor.

The city assessor shall issue requisitions only in compliance with the annual budget. He shall issue requisitions for the examining board and for the board of review on order of the chairman of each board and for costs and expenses incident to assessment appeals, only on order of the city legal department.

Unexpended funds remaining in the city assessment expense fund at the end of a year shall be carried forward into the next year."

No provision, however, is made in the foregoing chapter 405 for the levying of taxes for the respective contributions to that fund or designating a fund from which they shall be drawn so in accordance with established rule it must be concluded that the contributions be made from the respective general fund of the city, the county and the school district. This must necessarily be so because, while chapter 240, section 31 authorizes and directs the foregoing taxing districts to levy a tax sufficient to meet the expenditures under chapter 240 required to be made by any city electing to assess its property under the foregoing chapter 405, this tax, of course, cannot be levied until September following January 1st when the expenses must be borne by the city assessment expense fund and the taxes so levied will not be available until after the succeeding January 1st. We therefore conclude that the general fund of the school district, the general fund of the county and the general fund of the city until the foregoing tax levies are available, shall bear this expense.

September 11, 1948

COUNTIES: Support of the poor—legal settlement of old-age assistance recipient. One receiving old-age assistance under the provisions of chapter 249 of the Code is not being supported by public funds within the meaning of subsection 3 of section 252.16, Code of 1946, relating to legal settlement, so as to make inoperative subsection 2 of said section.

Mr. Horace J. Melton, Assistant County Attorney, Fort Dodge, Iowa:
In your letter of August 6th, under the following facts:

"A resident of another county comes to this county for the first time, and resides for six years without being served a nonresident notice. However, before coming here, he was receiving old-age assistance, and continued to receive old-age assistance up until the time of his death."

you ask:

"Under those circumstances, did he acquire a legal settlement in this county?"

Under section 252.16, 1946 Iowa Code, the recipient of old-age maintenance to which you refer, would acquire a legal settlement in Webster county unless his circumstances placed him within the provisions of subsection 3 of section 252.16.

Subsection 3 of section 252.16 provides in part that "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 supported thereby, has such a settlement in said county." To properly answer your question, it becomes necessary to apply the quoted portion of the above mentioned section to those receiving old-age assistance under the provisions of chapter 249 of the 1946 Iowa Code.

In the 1936 volume of Attorney General's opinions, on page 670, and again in the 1940 Attorney General's opinions, on page 398, it was held that one receiving old-age assistance, was one "being supported by public funds" within the meaning of subsection 3, of section 252.16.

In Warren County vs. Decatur County, 232 Iowa, page 614, a contrary view was expressed by our supreme court. The court said: "But we hold that, while old-age assistance is an additional help to that provided by the poor laws, the statutes affording this assistance are not to be construed in the light of the laws with reference to the poor, which have been in force for many years. The statute with reference to old-age assistance makes no reference to legal settlement nor the methods by which the status may be obtained." In the Attorney General's opinions for the year 1944, on page 46, this office attempted to distinguish the Warren county case from previous Attorney General's opinions on the ground that "being assisted" did not necessarily mean "being supported." We do not see that the Warren county case made any such distinction, and it is our view that the Warren county case holds that receiving public assistance under the provisions of chapter 249 of the 1946 Iowa Code is not being supported by public funds within the meaning of subsection 3 of section 252.16 of the 1946 Iowa Code, so as to make inoperative, subsection 2 of section 252.16.

Your question, then, is answered in the affirmative.

September 16, 1948

WEEDS: Cost of destruction—Chapter 168, Acts 52nd G. A. Boards of supervisors in preparing assessments for destroying weeds should add an amount equal to 25 percent of the actual cost of such destruction on each given tract or parcel of land under the provisions of chapter 168, Acts of the 52nd G. A., the proceeds thereof to be placed in the general fund.

COUNTIES: Damage to crops from spraying weeds—liability. Counties, as municipal corporations, are not liable for damages to trees, shrubs, and growing crops on private property which results from destroying weeds by use of accepted solutions applied in the form of spray. Such destruction of weeds is a governmental function of the county.

Mr. Joseph H. Sams, County Attorney, Osage, Iowa: We have your letter dated August 20, 1948, in which you ask the following questions:

1. Section 317.16, Code of 1946, was amended by section 11 of chapter 168 of the Laws of the 52nd General Assembly by adding thereto the following: "such charges against the property owner shall include an additional charge of twenty-five (25) percent of actual weed eradication to cover costs of supervision and administration." Does the amendment require the board of supervisors to tax an additional 25% as a penalty over and above costs of special meetings, if any, as provided in section 317.16 and over and above the reasonable part of the compensation of the commissioner in charge as provided in section 317.20, subsection 1?

2. Is the county liable for damages due to injury to trees, shrubs and growing crops on property adjoining county roads which results from the county destroying weeds along said roads by means of the use of accepted and recommended solutions applied in the form of a spray?

In answer to your first question, section 317.20, Code of 1946, and subsection 1 thereof provides as follows:

"When the commissioner, or commissioners, destroy any weeds under the authority of section 317.16 or 317.17, after failure of the landowner responsible therefor to destroy such weeds pursuant to the order of the board of supervisors, the cost of such destruction shall be assessed against and collected from the landowner responsible in the following manner:

1. On or before December 31 of the year, the board of supervisors shall assess all of said costs for the calendar year, including a reasonable part of the compensation of the commissioner in charge, against the said land and the owner thereof by a special tax, which shall be certified to the county auditor and county treasurer by the clerk of the board of supervisors, and shall be placed upon the tax books, and collected, together with interest and penalty after due, in the same manner as other unpaid taxes. Such tax shall be due on March 1 after such assessment, and shall be delinquent after March 31. When collected, said funds shall be paid into the fund from which said costs were originally paid."

Section 317.16, Code of 1946, as amended by section 11 of chapter 168, Laws of the 52nd General Assembly, provides as follows:

"In case of a substantial failure to comply with such order, the weed commissioner, or commissioners, shall forthwith cause such weeds to be destroyed, and the expense of such destruction and the costs of any special meetings, if any, shall be paid from the county general fund, and recovered later by an assessment against the property owner, as provided in section 317.20. Such charges against the property owner shall include an additional charge of twenty-five (25) per cent of actual weed eradication to cover costs of supervision and administration."

More specifically your first question is whether the additional charge of twenty-five (25) per cent of actual weed eradication provided for in the last sentence of the section just quoted was intended to include the "reasonable part of the compensation of the commissioner in charge" provided for by a portion of section 317.20 above. There being no expressed repeal of that part of section 317.20, the question arises as to whether there is a repeal by implication. Under the well established rule in this state there is no repeal by implication except in a case where the more recent provision of a statute is repugnant to, and wholly inconsistent with, some provision of an existing statute. In our opinion there is no such situation in the provisions of the statute cited by you. In other words, that part of section 317.20, Code of 1946, which requires the assessment to include "a reasonable part of the compensation of the commissioner in charge" and the provision appearing in section 317.16, Code of 1946, with regard to the cost of any special meetings are not in any way affected by the amendment contained in section 11 of chapter 168, Laws of the 52nd General Assembly.

It is our opinion that the intent of the legislature was that the board of supervisors should now proceed in the same manner as originally provided to determine the amount of the special assessment except that in order to arrive at the final figure they should add an amount equal to 25 percent of the actual cost of destroying the weeds on the given tract or parcel of land. We hold that the phrase "to cover costs

of supervision and administration" as used in this amendment means no more than the proceeds shall go into the county general fund from which all costs and expenses of supervision and administration had been paid.

In answer to second question, we refer you to section 317.11, Code of 1946, which provides as follows:

"The board of supervisors shall destroy noxious weeds growing in county, trunk, and local county roads, and the highway commission shall destroy noxious weeds growing on primary roads. Nothing herein shall prevent the landowner from harvesting, in proper season, the grass grown on the road along his land."

This section imposes a legal duty upon the board of supervisors which it may not omit but must perform or subject its members to the penalty provided for under the provisions of section 317.23, Code of 1946. The imposition upon the county, acting through its board of supervisors, of this duty for the general public good and welfare brings it within the definition of a "governmental function" of the county so that the rule applied in the case of Abbott v. Des Moines, 230 Iowa 494, and cases therein cited, would be applicable and the county would not be liable for any damages resulting therefrom.

Section 317.18, Code of 1946, as amended by section 8, chapter 168, Laws of the 52nd General Assembly after prescribing a method by which the board of supervisors may order adjoining property owners to cut all weeds other than noxious weeds growing on county trunk and local county roads between the fence lines, contains the following provision:

"If the adjoining owner fails to cut said weeds as required in said order the county commissioner shall have same cut and the cost thereof shall be paid from the general county fund, and recovered later by an assessment against the adjoining property owners as provided in section 317.20."

The use of the word "shall" in this section again imposes a legal duty upon the county.

Section 317.19, Code of 1946, provides for the levy of a tax, the proceeds of which shall be designated as the "road clearing fund" and provides that said fund "shall be used for no purpose except to cut all weeds, second or undergrowth brush on said county trunk and local county roads between fence rows of such roads thereof in time to prevent reseeding." If there has been a levy under the provisions of this section, it must be admitted that in the use of said funds the county board of supervisors is performing a legal duty which is for the general public good and welfare, and one from which the county derives no profit or advantage as a municipal corporation as would be the case if it were a corporate or proprietary function.

It is our opinion that the above conclusion with regard to the destruction of noxious weeds is likewise applicable in those situations where the county is destroying other than noxious weeds and second or undergrowth brush on county trunk and local county roads. We answer

your second question, therefore, by saying that the county, as a municipal corporation, is not liable for damages resulting under the circumstances as set out by you in the question.

September 22, 1948

COUNTIES: Supervisors—reduction in number—statutes controlling. Section 331.3, Code 1946, controls the method of reducing the number of members on the board of supervisors in all counties except those in which a commission plan city of over 75,000 population is located. In such counties sections 331.4 and 331.5 apply . (Overruling O. A. G. of September 14, 1934 appearing on page 690 of the Report.)

Mr. Carl Nystrom, County Attorney, Decorah, Iowa: We have yours of the 14th inst. in which you state:

"The county auditor of this county has requested me to obtain an opinion from your department in regard to the proper construction of Code sections 331.4 and 331.5. He advises that it appears that the question of reducing the number of supervisors from 5 to 3 will be submitted November 2nd.

I find an attorney general's opinion dated September 14, 1934 which apparently holds that the proposition must pass by a majority vote outside of any city in the county and also by a majority vote in a city in the county. In reading Code sections 331.4 and 331.5 it strikes me that the interpretation in the opinion of 1934 seems contrary to the wording of the sections. The reference throughout 331.5 is to "the city", does it not appear that the legislature was referring only to a city operating under the commission form of government with a population of more than 75,000?

Will you please advise whether your department still adheres to the opinion of September 14, 1934. Will you also advise if your department interprets 331.4 to mean that the petition must be signed by 10 percent of the electors outside of any city in the county and also 10 percent of the electors residing in a city, or if you consider this section applies only to a city operating under the commission form of government with a population of more than 75,000. The auditor feels that he is in need of an up to date interpretation of these sections in order to know how to proceed with reference to the petitions and the election."

In reply thereto we advise you the opinion to which you refer, appearing in the Report of the Attorney General for 1934 at Page 690, is overruled and the following substituted therefor:

Provisions for reducing the number of members of a board of supervisors in all counties of the state first appeared in the Code of 1873, where was enacted section 299, Code of 1873, the following act providing the method for accomplishing such reduction, to-wit:

"In any county where the number of supervisors has been increased to "five" or "seven," the board of supervisors, on the petition of one-fourth of the legal voters of the county, shall submit to the qualified voters of the county at any regular election the question, "Shall the number of supervisors be reduced to five," or "three?" If a majority of the votes cast shall be for the decrease, then the board of supervisors shall be reduced to the number indicated by such vote, and thereafter there shall be annually elected the number requisite to keep the board full."

That provision, with slight amendment through the years, has appeared in the subsequent Codes and appeared as section 5108 of the Code of 1939, in terms as follows:

"5108. In any county where the number of supervisors has been increased to five or seven, the board of supervisors, on the petition of one-tenth of the qualified electors of the county, shall submit to the qualified voters of the county, at any regular election, one of the following propositions, as the same may be requested in such petition:

1. Shall the proposition to reduce the number of supervisors to five be adopted?

2. Shall the proposition to reduce the number of supervisors to three be adopted?

If a majority of the votes cast shall be for the decrease, then the number of supervisors shall be reduced to the number indicated by such vote."

It still appears in substantially the same form as section 331.3 of the Code of 1946. The only change between such section designated as 5108 of the 1939 Code and the same section designated as 331.3 of the 1946 Code is that provided by chapter 88 of the Acts of the 45th General Assembly. Insofar as section 5108 is concerned, the section was amended by the foregoing Act by striking the word "one-fourth" in line four thereof and inserting in lieu thereof the word "one-tenth". In addition, the foregoing chapter 88 contained sections 3 and 4 which are exhibited as follows:

"Sec. 3. In counties where there is a city operating under the commission form of government, with a population of more than 75,000 people, the petition shall contain ten (10) per cent of the qualified electors residing in the county and outside of the city, and then ten (10) per cent of the qualified electors residing in the city."

"Sec. 4. When the proposition is voted upon, the qualified electors residing in the county and outside of the city, shall vote separately upon the proposition, and there shall be cast a majority vote of such electors outside of the city, and a majority vote of the qualified electors of the city, before such change shall be effective."

These foregoing sections 3 and 4 are now designated in the Code of 1946 as sections 331.4 and 331.5. Clearly these two sections provide a statutory method of reducing the number of members of board of supervisors in counties where there is a city operating under the commission form of government with a population of more than 75,000 people. And equally clear is that it was the legislative intent that the qualified electors in counties within the foregoing description, should express their will with respect to the reduction of the number of members of board of supervisors in a different manner from that in all other counties. In that aspect, it is clear that the legislative intent was that for all counties other than counties containing cities operating under the commission form of government with a population of more than 75,000 people, the method for reducing the number of the board of supervisors is provided by section 331.3 Code of 1946; and that the legislative intent for reducing the number thereof in counties having cities operating under the commission form of government with a

population of over 75,000 people is prescribed by sections 331.4 and 331.5, Code of 1946, and so much of section 331.3 as provides for filing the petition and submission of the proposition to the voters. If section 331.5, being section 5108.2 of the Code of 1939, after being amended by section 4 of Chapter 88 of the 45th General Assembly, is held to control the method of reduction of the number of members of the board of supervisors in all counties in the state as is held in the opinion now overruled, then it must be held that there has been a repeal of section 331.3 Code of 1946 heretofore quoted because both methods affecting all counties cannot coexist. Plainly, chapter 88 of the 45th General Assembly, does not expressly repeal section 5108, Code of 1931, now section 331.3 of the Code of 1946. Nor may such a repeal be implied. The rule, with respect to such implied repeal, is set forth in Sutherland Statutory Construction, 3rd Edition, section 2012, where it is said:

"When a subsequent enactment covering a field of operation coterminous with a prior statute cannot by any reasonable construction be given effect while the prior law remains in operative existence because of irreconcilable conflict between the two acts, the latest legislative expression prevails, and the prior law yields to the extent of the conflict."

This statutory situation does not exist as between section 331.3 and section 331.5.

In our opinion, therefore, section 331.3 controls the method of reducing the number of members of the board of supervisors in all counties of the state except those in which a city with a population of more than 75,000 people operates under a commission form of government. In counties containing such cities, the method of reduction is prescribed by sections 331.4 and 331.5, Code of 1946.

September 30, 1948

HOSPITALS: County public hospital trustees—term of appointed members. Trustees appointed under section 347.9, Code 1946, for the management of a county public hospital hold office until the second secular day in January following the ensuing general election in November.

HOSPITALS: Trustees elected for county public hospitals—terms by lot. Persons elected to succeed trustees appointed for a county public hospital are the persons who shall determine by lot the terms each shall serve.

HOSPITALS: Trustees of county public hospitals—petitions of nominees. Candidates for trustees of county public hospitals should qualify for nomination by separate petitions. (Opinion of 1928 appearing on page 319 disapproved.)

Mr. Everette K. Jones, County Attorney, Osceola, Iowa: We have yours of the 18th inst. in which you submit the following questions regarding section 347.9, Code 1946:

"I would appreciate an opinion from your department relative to the following provisions of the above section as the same are applicable to the following situation:

'The board of supervisors of Clarke county, Iowa, following the special election which authorized the issue of $200,000 bonds for the erection of a county public hospital, appointed a board of trustees consisting of seven members who qualified and have continued to serve.

It was the opinion of the members of the board of trustees as well as others in the county who thought that it would be better to have the names of nominees placed upon the ballot for the general election by petition as nonpolitical matter. The time has now arrived at which it is necessary to take the necessary steps to place the names of these trustees upon the general election ballot and in that connection the following questions have arisen:

'1. Section 347.9 among other things provides that these appointed trustees "shall hold office until the following general election at which time their successors shall be elected, two for a term of two years, two for four years and three for six years.'

Question: When do the terms of those elected at the general election begin and when do they end? Do they begin as soon as they qualify after election or on the second secular day of January following? If their terms begin following the election, when do they end, that is are they elected for two, four and six years from and after the election.

2. Section 347.9 also provides: 'and they shall determine by lot their respective terms and thereafter their successors shall be elected for regular terms of six years each.

Question: When and who participates in this lottery? Is it not those who are elected at the general election and following the election?

3. In filing petitions for the nomination of these present trustees, may all of their names be included in one petition? An opinion found in 1928 O. A. G. Page 319 indicates the affirmative.'

Owing to the fact that these petitions must be filed not less than thirty days prior to the second day of November, I would appreciate a prompt reply to the foregoing."

In reply thereto we advise you:

1. With respect to your question No. 2 the pertinent portion of section 347.9 Code of 1946, recites:

"Such trustees shall hold office until the following general election, at which time their successors shall be elected, two for a term of two years, two for four years, and three for six years, and they shall determine by lot their respective terms, and thereafter their successors shall be elected for regular terms of six years each, none of whom shall be physicians or licensed practitioners."

We see no difficulty in concluding that the persons elected to succeed the appointed trustees are the persons who shall determine by lot the terms which each shall serve.

2. In answer to your question No. 3, we would advise you that, in our opinion the names of all nominees by petition for election, should qualify for such nominee each by separate petition. We are not disposed to approve of the opinion appearing in the Report of the Attorney General for 1928 at Page 319 as controlling the nomination by petition of candidates for the office of county hospital trustees.

3. With respect to question No. 1, as to when the terms of those persons elected to the office of trustee at the general election begin and when do they end, and as to whether the term begins as soon as they qualify or the second secular day of January following, we advise:

We repeat again the portion of section 347.9 which is pertinent to this problem:

"Such trustees shall hold office until the following general election, at which time their successors shall be elected, two for a term of two years, two for four years, and three for six years, and they shall determine by lot their respective terms, and thereafter their successors shall be elected for regular terms of six years each, none of whom shall be physicians or licensed practitioners."

Also pertinent to this problem is section 347.11 respecting the time for qualification of elected trustees. This section provides as follows:

"Said trustees shall, within ten days after their appointment or election, qualify by taking the usual oath of office, but no bond shall be required of them, and organize by the election of one of their number as chairman and one as secretary. Said board shall meet at least once each month. Four members of said board shall constitute a quorum for the transaction of business. The secretary shall keep a complete record of its proceedings."

The time for qualification of persons elected trustees of the county public hospital is an exception to the time required for qualifying of officers generally. Such general prescription is contained in sec. 63.1 fixing the time before noon of the second secular day in January of the first year of the term for which such officer was elected. Such section provides in terms as follows:

"Each officer, elective or appointive, before entering upon his duties as such, shall qualify by taking the prescribed oath and by giving, when required, a bond, which qualification shall be perfected, unless otherwise specified, before noon of the second secular day in January of the first year of the term for which such officer was elected."

However, the fact that the time for qualifying for the office of county hospital trustee is fixed within ten (10) days after the election, does not effect in any way the time when the term of that office begins. Section 39.8 fixes the term of office of all offices unless a different time is specified by statute. This section provides as follows:

"The term of office of all officers chosen at a general election for a full term shall commence on the second secular day of January next thereafter, except when otherwise provided by the constitution or by statute; that of an officer chosen to fill a vacancy shall commence as soon as he has qualified therefor."

That the time fixed for qualification does not by that requirement fix also the time for induction into office, is held and explained in the case of Ballantyne v. Bower, 99 Pac. 869, 873 in the following language:

"In several of the states one elected to an office is required to qualify before the time for his induction into the office, and generally within a stated period after his election or the issuance or delivery of a certificate of election, and that seems to have been the rule in those states where the death of one elected after qualifying is held to constitute a vacancy in the term thereafter to commence. And it seems, also, that in the cases so holding as to an office where such qualification had occurred the acts of qualifying were completed, so that nothing further was required to be done to entitle the one so qualifying to the office at the date of the commencement of his term should he have lived until that time."

It is to be noted in this connection that by section 69.2, subsection 4, the resignation or death of an officer elect before qualifying, creates a vacancy in the office.

As the date of qualification does not include the date of the assumption of the duties of the office or induction therein, the question arises as to whether this rule is changed or different by reason of the statutory provision of section 347.9 as follows:

"When it has been determined by the voters of a county to establish a county public hospital, the board shall appoint seven trustees chosen from among the resident citizens of the county with reference to their fitness for such office, three of whom may be women, and not more than four of such trustees shall be residents of the city, town, or village at which such hospital is located. Such trustees shall hold office until the following general election, at which time their successors shall be elected, two for a term of two years, two for four years, and three for six years, and they shall determine by lot their respective terms, and thereafter their successors shall be elected for regular terms of six years each, none of whom shall be physicians or licensed practitioners." If literal meaning is to be given to the foregoing language and thereby hold that the term of the appointed trustee expires immediately following the general election, at which the successors are elected, then there will be a vacancy in the office of these trustees until the second secular day of the following January. Concretely in this year of 1948, the offices would be vacant from November 3 to January 3, 1949. However, we are of the opinion, that the literal meaning of the foregoing section is controlled by the provisions of section 69.1, Code of 1946, which provides as follows:

"Except when otherwise provided, every officer elected or appointed for a fixed term shall hold office until his successor is elected and qualified, unless he resigns, or is removed or suspended, as provided by law." By such control, the existence of a vacancy for the period herein stated, is avoided with the result that the appointed trustees will hold office until the second secular day of January following the November election. Concretely, as far as the current situation is concerned, until the third day of January, 1949. The time for qualifying is fixed by the statute but the time for the commencement of the term is not fixed and to give the statute a practical and reasonable construction requires the application of Code section 39.8. Thus construed the term commences the second secular day of January.

October 7, 1948

RIVERS AND STREAMS: Permits to remove sand and gravel in commission cities. Sand and gravel may not be removed from the bed or banks of a meandered river inside a commission city without first securing permits from both the city and the state conservation commission. Such cities have control of said bed and banks but the state, however, is the owner in fee. Such cities have no rights or powers in relation to islands within the city.

Mr. Bruce F. Stiles, Director, State Conservation Commission: An opinion has been requested as to the right of the state conservation commission to grant a sand and gravel removal permit effective in that

part of the Cedar River lying within the corporate limits of the city of Cedar Rapids, Iowa. There is also presented the question whether the city of Cedar Rapids is the owner of islands in that part of the river within the corporate limits.

The city of Cedar Rapids became a river front improvement commission city under the provisions of the Code which now appear as section 372.6:

"When said commissioners have been so appointed and qualified, the fee simple title to the bed of the meandered stream, separating the corporate limits of the city for which they are appointed, shall immediately vest in the commission in trust for the public, and the same while held by the commission shall be exempt from taxation; but the fee title to the channel or bed of the stream to be located and preserved as hereinafter provided shall remain in the state; and the vested rights of riparian owners and owners of water powers shall not be injuriously affected by this chapter. Where the original boundary lines separating the land under the control of said commission for the land of the state or of any adjoining landowner, or the monuments marking the same have been lost, destroyed, or in dispute, said commissioners may proceed to have said boundary lines established as disputed corners and boundaries are established."

A fee simple title acquired by a public body for public uses is to be distinguished from a fee simple title acquired by an individual grantee for private use. Our supreme court in Waddell v. Board of Directors, 190 Iowa 400, has recognized the existence of the distinction. In the case of the individual grantee the grantee takes an absolute estate—the public grantee does not. It is also to be noted that title did not vest in the city of Cedar Rapids but rather in the commission. It was held in City of Cedar Rapids v. Marshall, 199 Iowa 1262, 203 NW 932, that the city of Cedar Rapids was not vested with any rights in, or control over the river bed of the Cedar River until the enactment of chapter 66, Acts of the 33rd General Assembly which became effective April 3, 1909. The provisions of the said chapter 66 are contained in chapter 416, Code of Iowa, 1946. Sections 416.124 and 416.125 of the Code provide:

"All cities which have heretofore been organized and acting under special charters and which have heretofore, or shall hereafter adopt the plan of government provided in this chapter, and which river front improvement commissions have been or shall hereafter be organized, under chapter 372, shall have and may exercise all the rights and powers conferred by said chapter on the said river front improvement commission, and all such rights and powers are hereby transferred to and vested in the city council of any such city or cities. Said council shall have the power to elect and shall elect a commission of three persons, to be known as the river front improvement commission, whose duties shall be to carry out the powers and duties with respect to the beds and banks of streams in such cities, herein conferred upon said city council, or such limited powers in respect thereto as the council may prescribe by ordinance. Said commission shall be elected biennially on the first Tuesday in May, and shall hold office for a term of six years and until their successors are elected and qualify. The members of the river front improvement commission shall be elected, one for two years, one for four years, and one for six years."

"Every city specified in section 416.124 shall have control of all the meandered streams within the boundaries thereof, and of the beds, banks, and waters of such streams. Said cities shall have power to prevent the placing or maintenance of nuisances and obstructions in such streams, or on or along the banks thereof and to abate and remove such nuisances or obstructions therefrom, and to recover the expense thereof from the person or persons causing, placing, or maintaining such nuisances therein or thereon; to deepen, widen, straighten, or change the channels of such streams; to improve and beautify the banks of such streams; to construct levees, embankments, and other works to protect the city and its property and its inhabitants and their property from floods; to acquire and take by purchase or condemnation any real property necessary for any such works and improvements; to assess upon property benefited by any such works or improvments, the cost thereof, to the extent of the special benefits conferred thereby, and not in excess of such special benefit and not in excess of twenty-five percent of the assessed value of the property benefited; to provide funds for any of the expenditures herein authorized, by levy upon all the taxable property in such city of a continued tax of not more than one-half mill on the dollar each year for not more than ten years, and to issue bonds in anticipation of such tax, and to pledge the proceeds of such tax to the payment of said bonds. The said special tax levy and the issuance of bonds in anticipation thereof, the general plans recommended by the river front improvement commission, and the estimated costs of said improvement based upon surveys, plans, and estimates made by the city engineer shall be provided for by ordinance."

The grant of rights contained in the foregoing sections 416.124 and 416.125 is not construed as a conveyance of title. There is no grant which can be construed as in any manner relating to islands.

It is the opinion of this office that cities governed by commission are granted unqualified control of the bed, banks and waters of meandered streams within their respective corporate limits, and that therefore it is not within the province of the state conservation commission to issue sand and gravel permits to remove sand or gravel from said beds, banks or waters without the approval of the city involved. As the state, however, is the owner in fee, the power and control granted to the cities does not include the power to sell or dispose of the property owned by the state. Neither the state nor the city having exclusive right to issue a permit, it necessarily follows that permits must be secured from each.

It is also the opinion of this office that such cities have not been granted any rights or powers with relation to islands, under the provisions herein examined.

October 15, 1948

INSANE PERSONS: Commitment and care of voluntary public patient at state psychopathic hospital. The cost of commitment of a voluntary public patient at the university psychopathic hospital falls upon the county where such person resides. The "legal settlement" of such persons has no application to care at such hospital and the expense of care and treatment of such public patients falls upon the state. The duty imposed by statute of investigation and report on such persons making application for care rests upon the county attorney of the county in which said person resides.

Mr. Harvey Uhlenhopp, County Attorney, Hampton, Iowa: We have your recent letter requesting an opinion regarding the following situation:

"An indigent person actually living in this county (Franklin county) has voluntarily applied for admission to the university psychopathic hospital as a public charge. She has a legal settlement in Hardin county, Iowa.

In view of the state of the statutes upon this subject, particularly sections 230.1, 225.38, and the other provisions of chapter 225 of the Iowa Code (1946), the following questions have arisen in connection with disposition of the case:

1. Upon whom does the cost of commitment of this voluntary public patient fall, since she lives here but has a legal settlement in Hardin county for support purposes?

2. Upon whom does the expense of maintaining and treating her at the university psychopathic hospital fall, under the circumstances related?

3. Which county is charged with the duty of actually processing the case—that of legal settlement or the one where the patient lives?

Your advice upon these questions, including the application of section 444.12 of the Code, is requested at an early date so that the case can be properly handled."

In answer to question one we first call your attention to the fact that an examination of the provisions of chapter 225, Code of 1946, reveals that "legal settlement" as defined by the provisions of section 252.16, Code of 1946, has no application to the procedure prescribed for the commitment and maintenance of a person at the psychopathic hospital at Iowa City, Iowa.

Section 225.10, Code of 1946, provides as follows:

"Persons suffering from mental diseases may be admitted as committed public patients as follows: Any physician authorized to practice his profession in the state of Iowa or any citizen of the state *may file information with any district or superior court of the state or with any judge thereof*, alleging that the person named therein is suffering from some abnormal mental condition that can probably be remedied by observation, treatment, and hospital care; and that he is, of himself or through those legally responsible for him, unable to provide the means for such observation and hospital care." (Italics supplied)

and section 225.13, Code of 1946, provides that:

"It shall be the duty of the said judge to have *a thorough investigation made by the county attorney* of the county in which the said person resides, regarding his financial condition and the financial condition of those legally responsible for him."

The provisions of these two sections require that the person on whose behalf the application is filed must be an actual resident of the state of Iowa, but the information may be filed with any district or superior court of the state or with any judge thereof. This grants jurisdiction to any of said courts within whose jurisdiction the person may be found at the time of the filing of the information. Sections 225.11, 225.12 and 225.13 provide for the procedure to be followed by the judge of the district or superior court with whom the information has been filed.

This procedure, including the court's power to appoint some person to accompany the patient to the state psychopathic hospital, creates the preliminary expenses and costs of commitment you inquire about. Section 225.21, Code of 1946, provides as follows:

"The person making claim to such compensation shall present to the court or judge an itemized sworn statement thereof, and when such claim for compensation has been approved by the court or judge, the same *shall be filed in the office of the county auditor and shall be allowed by the board of supervisors and paid from the state institution fund.*" (Italics supplied.)

In our opinion, these preliminary expenses and costs of commitment with regard to committed public patients and voluntary public patients are required to be paid from the state institution fund of the county in which the information is filed and the proceedings are had. In the case submitted by you this would be Franklin county, which by coincidence is the place of actual residence.

The answer to your second question is apparent from the provisions of section 225.8, Code of 1946, which provides as follows:

"All voluntary private patients and committed private patients shall be kept and maintained without expense to the state, and *the voluntary public patients and committed public patients shall be kept and maintained by the state.*" (Italics supplied.)

and section 225.28, Code of 1946, which provides that:

"The state shall pay to the state psychopathic hospital out of any money in the state treasury not otherwise appropriated, all expenses for the administration of said hospital, and *for the care, treatment, and maintenance of committed and voluntary public patients therein, including their clothing and all other expenses of said hospital for said public patients.* The bills for said expenses shall be rendered monthly in accordance with rules agreed upon by the state comptroller and the finance committee of the state board of education." (Italics supplied.)

By your third question we assume you make reference to the duty of investigating and reporting to the judge as to the financial condition of the person and of those legally responsible for him and the duty to appear in the matter for the purpose of conducting the trial. In our opinion section 225.13, Code of 1946, quoted above, imposes the duty of making the financial investigation and report to the judge upon the county attorney of the county in which said person actually resides regardless of where the information may have been filed. It is our further opinion that the provisions of section 225.14, Code of 1946, contemplate that the county attorney of the county in which the information has been filed with either the district or superior court, shall enter his appearance and conduct the trial, even though the financial report has been made by the county attorney of the county in which the person actually resides. In the vast majority of cases under the provisions of chapter 225, Code of 1946, the information will be filed in the district or superior court in the county in which the person actually resides, as is the situation in the case you submit, in which event the duties imposed upon the county attorney by section 225.13 and section 225.14 will fall upon the county attorney of the one county.

You inquire about the application of section 444.12, Code of 1946. This section, in substance, provides that the board of supervisors of each county shall establish a state institution fund and at the time of levying other taxes, estimate the amount necessary to meet the expenses in the coming year of maintaining county patients, including cost of commitment and transportation of patients at various state institutions and hospitals, including the state psychopathic hospital at Iowa City, Iowa, and shall levy a tax therefor. In our opinion the only requirement contained in this section is that the board of supervisors of each county, in estimating the amounts necessary to meet their obligations to be paid from their state institution fund for the coming year must include therein an estimate as to the preliminary expenses and cost of commitment of patients to the psychopathic hospital under provisions of chapter 225, Code of 1946, which they anticipate for the coming year.

October 21, 1948

ESCHEAT: Sale of real estate—conveyance by probate deed. The sale of real estate in cases where no heirs of a decedent appear, provided by section 636.53, Code 1946, relates to a sale by the administrator and conveyance is accomplished by probate deed. Section 302.5 of the code should be followed in conducting said proceedings and the proceeds thereof paid to the county treasurer as provided in section 302.2.

Mr. Don W. Barker, County Attorney, Iowa Falls, Iowa: Your letter of October 7, 1948 presents the following facts:

A died intestate on December 9, 1947 in Alden, Hardin county, Iowa. At the time of his death the decedent was seized and possessed of personal property and real estate. The personal property was sufficient in amount to pay all debts of the decedent and all costs of administration of the estate.

A was not married during his lifetime and no heirs have been found. Probate proceedings were opened on petition of a creditor and an administrator appointed. An application for order in escheat was filed on February 11, 1948. Due notice of death was given in accordance with order of court, and more than six months have elapsed since notice. On September 27, 1948, order was entered by the court declaring an escheat, and directing that the real estate be sold and the proceeds distributed as provided by statute pertaining to such cases.

On the foregoing facts you request an opinion on the question—What proceedings are appropriate in making a sale of the real estate?

Escheat, in the feudal sense, has not prevailed in this country since the Revolution. The state, in a just and proper exercise of its police power, may declare statutory grounds of escheat of lands within its territory. Various grounds of escheat have been prescribed by Constitution or by statute. The holding of property by a corporation in violation of constitutional or statutory provisions, as in the case of property held in excess of corporate needs, or longer than a prescribed time, may constitute a ground of escheat.

The power of the state rests upon the principle that when there is no proper claimant, property should fall to the state as the ultimate owner of all property within its jurisdiction for the benefit of all. It

is, therefore, seen that the theory of escheat sometimes advanced that the state is the last heir, is a perversion of language and of correct ideas. In our modern practice it would seem more accurate to say that an escheat results from the right of the state inherent in its sovereignty to take property to which there is no apparent claim of ownership under grounds declared by statute. In Iowa an escheat results upon the death intestate of a property owner when no person within the time prescribed by statute establishes heirship.

Sections 636.50 to 636.54, inclusive, Code of Iowa 1946, provides:

"636.50. Escheat. If there is property remaining uninherited, it shall escheat to the state."

"636.51. Proceedings for escheat. When the judge or clerk of the district court has reason to believe that any property of the estate of an intestate within the county should by law escheat, he must forthwith inform the state comptroller thereof, and appoint some suitable person administrator to take charge of such property, unless an executor or administrator has already been appointed for that purpose in some county in the state."

"636.52. Notice to persons interested. The administrator must give such notice of the death of the deceased and the amount and kind of property left by him within the state as in the opinion of the judge or clerk appointing him, will be best calculated to notify those interested, or supposed to be interested, in the property."

"636.53. Sale—proceeds. If within six months from the giving of such notice no claimant thereof appears, such property may be sold and the proceeds, under the direction of the state comptroller, paid over by the administrator for the benefit of the school fund. If real estate, the sale shall be conducted and the proceeds treated like those of school lands."

"636.54. Payment to person entitled. The money or any portion of it shall be paid at any time within ten years after the sale of the property or the appropriation of the money, but not afterwards, to anyone showing himself entitled thereto."

Sections 636.51 and 636.53 anticipate an escheat under sections 636.50 and 636.54.

In Klein v. Brodeck, 15 F. Supp. 473, U. S. District Court for the Eastern District of Pennsylvania, the court said:

"There is a distinction between 'escheatable' and 'escheated' * * * Evidence that money is escheatable is no evidence that it has been escheated and the state has no title until there has been an escheat."

The Supreme Court of Iowa said in McKeown v. Morrow, 183 Iowa 454:

"An estate does not become fully escheated until the expiration of ten years. Section 3387 of the Code of 1897 indicates that fact. It says:

'If there is property remaining uninherited (that is, at the end of ten years), it shall escheat to the state.'

It then becomes a permanent part of the school fund of the state, and as such remains inviolable, the interest only to be used as indicated in the statutes hereinbefore quoted. Until the end of ten years, the state holds the funds in trust for the rightful owner; holds them under the provisions of section 3390, for the benefit of the school fund. While it holds them as trustees, we think, clearly, under the provision of the

statute, the school fund alone receives the benefit that may arise from the funds. The benefit that comes must come through the way of accumulated interest. The right of the state to hold the funds continues in its officers until the expiration of ten years, or until the heirship is established. If no claimant appears at the end of ten years, and establishes a right to the fund, then, without any further action on the part of the court, the fund escheats to and becomes a part of the permanent school fund of the state."

The above quoted language of the supreme court clearly indicates that in Iowa there is no escheat of land under the code sections hereinbefore set forth. It is the proceeds received from the sale of the land that escheats, and that after the expiration of the ten year period. In the meantime, the state is a trustee of the funds derived from the sale.

As title to real estate does not escheat to the state of Iowa at the instant of death, the question of title to the real estate from the time of the death of the fee owner until sale is presented. The administrator does not take title nor does the state or any of its agents in the absence of a statute expressly so declaring. We have no statutory guidance and are confronted with the common law proposition that title to real estate is never in abeyance.

We conclude that the effect of the pertinent statutes is to presume heirs.

In People v. Roach 18 P. 408, the Supreme Court of California said:

"1. In State v. Smith, 70 Cal, 156, 12 Pac. Rep. 121, Mr. Justice McKinstry, in his opinion for the court said:

'All aliens take by succession. Civil Code, Sec. 671. The failure of a nonresident alien to 'appear and claim' within five years after descent cast operates a bar of his right to assert any title in the property as against the state. And this not on the idea that the property has escheated to the state, as of the date of the death of the ancestors, but because by the law the nonresident takes subject to the loss of his right by failure to make claim within the five years. * * * It would seem to follow that a nonresident alien would have no defense to an inquest to 'vest the title in the state, in the nature of office found, except a defense based on his appearance and claim within the five years, and it necessarily follows that a proceeding brought by the attorney general under title 8, pt. 3, is premature if commenced within the five years after the death of the ancestor.' That case is conclusive of this, unless, as claimed by appellant, the allegation that there are no heirs at all makes this a case of an absolute escheat, and the cause of action one which accrued the moment Blythe died. But was the court bound by this averment? Is it possible in law or in fact for a party to know that there are no heirs as soon after the death of the intestate? A fact impossible in law cannot be admitted by demurrer. Railroad Co. v. Palmes, 109 U. S. 253, 3 Sup. Ct. Rep. 193. Alien heirs have five years after descent cast to appear and claim their right by succession. Can any one affirm within that time that there are no heirs? Does not the affirmation of such a proposition presuppose acquaintance with every nonresident alien and his genealogy? The averment is clearly one of fact, impossible in law, and which cannot be admitted by demurrer."

* * * * * *

The Codes of this state, like all other laws proceed upon the theory that things have happened according to the ordinary course of nature and the ordinary habits of life; and it is a presumption of law that every intestate has left some one on earth entitled to claim as his heir, however remote. Code Civil Proc. Sec. 1963, subd. 28; Abb. Tr. Ev. 85, 86. In every provision of our Codes relating to the administration of estates and germane to the subject, this presumption is indulged."

In Wilbur v. Tobey, 16 Pick. 177, the Supreme Court of Massachusetts said:

"Upon the decease of an alien therefore, as he has no inheritable blood, he can have no legal heirs, and no one can hold or take the estate by descent; the law will not deem it to be in abeyance, unless in case of absolute necessity, and therefore the fee is deemed to vest in the Commonwealth presently. The Commonwealth therefore, upon the fact of the seisin, alienage, and death of the intestate being shown, have a complete title, without inquest of office.

But where a subject dies intestate, as the estate descends to collateral kindred indefinitely, the presumption of law is, that he had heirs, and this presumption will be good against the Commonwealth until they institute the regular proceedings by inquest of office, by which the fact whether the intestate did or did not die without heirs, can be ascertained, and if this fact is established in favor of the Commonwealth, it rebuts the contrary presumption and the Commonwealth by force of the judgment, and of the statute before cited, become seised in law and in fact."

In In Re French's Estate, 228 P. 194, the Supreme Court of Utah quoted with approval the statement of Mr. Chief Justice Shaw in Wilbur v. Tobey, supra, and said:

"While it is true that the chief justice does not place the necessity for a proceeding upon the ground of due process of law, he however, clearly states that some proceeding is necessary to overcome the presumption of an heir and to divest such heir of his property. Such, in the very nature of things, must be the law in this jurisdiction if for no other reason than that in this state the title or right to the property vests in the heir at the death of the ancestor, subject only to the payment of the debts of the decedent and the necessary costs of administering the estate. How, then, is the state going to transfer the title from an heir to itself without some legal process or proceeding?"

The Supreme Court of Nebraska recognized the presumption of heirs in In Re O'Connor's Estate, 222 N. W. 57, at page 60, saying:

"Another contention made by two or more of the groups of claimants is that the presumption obtains that every deceased person left heirs, and that the burden is on the state to prove the failure of kindred or surviving spouse, and it is insisted that this should be by proof of high degree. While the presumption obtains that the deceased person left surviving heirs, it does not follow that there is a presumption that any particular person or claimant is an heir. If such were the case, then, of more than 200 persons, who have appeared, claiming the O'Connor estate, there would be a presumption in favor of each one, although the various sets of claimants, more than a score in number, are unrelated to each other."

To effect an escheat of the proceeds derived from sale of property it is not necessary to establish that there are no heirs, as escheat becomes complete in the event of failure of any persons to appear and establish heirship within the prescribed period of time. In other words,

it appears proper to say that an escheat takes place by virtue of a bar, rather than upon a failure of heirs. It logically follows that the proper person to conduct the sale of real estate is the administrator in the estate proceedings. It is necessary, however, to examine the provisions of section 302.5 Code of Iowa 1946. In the event the last sentence in section 636.53 of the Code, "If real estate, the sale shall be conducted and the proceeds treated like those of school lands", were to be interpreted to direct a sale by the auditor, as prescribed in section 302.5, we would be at a loss to determine how title could become vested in a purchaser. Title to real estate sold under the provisions of section 302.5 eminates from the state, as provided in sections 10.5 and 10.6, Code of Iowa 1946, which state:

"10.5. Patents. Patents for lands shall issue from the land office, shall be signed by the governor and recorded by the secretary; and each patent shall contain therein a marginal certificate of the book and page on which it is recorded, which certificate shall be signed by the secretary, and all patents shall be delivered free of charge."

"10.6. When patents issued. No patents shall be issued for any lands belonging to the state, except upon the certificate of the person or officer specially charged with the custody of the same, setting forth the appraised value per acre, name of person to whom sold, date of sale, price per acre, amount paid, name of person making final payment, and of person who is entitled to the patent, and, if thus entitled by assignment from the original purchaser, setting forth fully such assignment, which certificate shall be filed and preserved in the land office."

As hereinbefore shown, the state is not vested with title. We, therefore, believe that the direction contained in the last sentence of section 636.53 is to the administrator and relates to the manner in which the administrator conducts the sale and makes disposition of the proceeds derived therefrom. In other words, as provided in section 302.5, there shall be given at least forty days' notice, by written or printed notices posted in five public places in the county, two of which shall be in the township in which the land to be sold is situated, and also notice of the sale shall be published once each week for two weeks preceding the sale, in a newspaper published in the county, describing the land to be sold, and the time and place of such sale.

You are, therefore, advised that it is the opinion of this office that the sale of real estate provided in section 636.53 Code of Iowa 1946, relates to a sale by the administrator in the estate proceedings, and consequently conveyance shall be accomplished by probate deed.

You are further advised that it is the opinion of this office that the administrator in conducting the sale proceedings should follow the provisions of section 302.5 of the Code relative to notice of sale and conduct of the same, and that the proceeds should be paid to the treasurer of the county, in accordance with the provisions of section 302.2, of the Code.

October 22, 1948

REAL ESTATE BROKERS: Dealing in real estate contracts—license required. A real estate contract being an estate in real property comes within the definition of "real estate" as used in section 117.4,

Code 1946. It follows that one who buys and sells such contracts for another must have a broker's license.

Mr. Earl A. Hart, Director, Iowa Real Estate Commission: We have yours of the 20th ult. in which you state:

"An opinion is respectfully requested on the following question:
'Section 117.4 of chapter 117, 1946 Code of Iowa reads as follows:
Real estate as used in this chapter shall mean real property wherever situated, and shall include any and all estate therein.'

Our question is: Must a person who buys and sells real estate contracts for another be required to have a real estate broker's license?"

In reply thereto, we would advise you that, in our opinion, a person otherwise qualified to become a real estate broker under chapter 117, Code of 1946, who buys and sells real estate contracts for another, is required to possess a real estate broker's license. Our conclusion is based upon the following legal situation. In addition to section 117.4 of the Code of 1946, which defines real estate as used in chapter 117 as follows:

"117.4. 'Real estate' as used in this chapter shall mean real property wherever situated, and shall include any and all estate therein."

the dictionary statute being section 4.1 subsection 8 of the Code of 1946, defines real estate as follows:

"The word 'land' and the phrases 'real estate' and 'real property' include lands, tenements, hereditaments, and all rights thereto and interests therein, equitable as well as legal."

According to the case of Shoemaker v. Coats, 10 S. E. 2d 810, 814, estates and interest in land are equivalent terms and used interchangeably, and such interest or estate in lands extends from absolute ownership to naked possession. The court there said:

"Black's Law Dictionary, 3rd Ed. p. 682, defines 'Estate': 'The interest which any one has in lands, or in any other subject of property * * * * * (citing authorities). An estate in lands, tenements and hereditaments signifies such interest as the tenant has therein. 2 Bl. Comm., 103.' The degree, quantity, nature and extent of interest which a person has in real property is usually referred to as an estate, and it varies from absolute ownership down to naked possession. Nicholson Corp. v. Ferguson, 114 Okl. 16, 243 P. 195, 200; Black supra."

And insofar as Iowa is concerned, the nature and quantity of the estate created by a real estate contract is set forth in the case of Cumming v. First National Bank, 199 Iowa 667, 668. There the rule defining the interest of the vendee in such contract is in terms as follows:

"The contract was in full force and effect on the date that Parkhill confessed judgment in the sum of $2,640.63 in favor of the defendant bank, to-wit, December 8, 1922. On this date, the agreement was not a mere option, but constituted a valid contract, and subject to specific performance. Here a landowner enters into a contract of sale, whereby the purchaser agrees to buy and the owner agrees to sell. The vendor retains the legal title until the purchase money is paid. No other condition is attached. Under such circumstances, the ownership of the real estate, as such, passes to the purchaser; and from that time forth the vendor holds legal title as security for his debt, and as trustee

for the purchaser: In re Estate of Miller, 142 Iowa 563. This is the recognized rule in Iowa. The title in equity passed to the vendee. It is not dependent upon a conveyance nor upon the payment of the purchase money; nor is possession or delivery of possession a necessary incident. O'Brien v. Paulsen, 192 Iowa 1351."

The business of selling, purchasing, exchanging or renting real estate for another for a fee, commission or other consideration, includes, within the foregoing operations, executory real estate contracts. Such contracts constitute an estate in real estate. Resultingly, the person so operating is required to possess a real estate broker's license. This is not to be construed as requiring a license of one who buys and sells such contracts for himself.

October 22, 1948

PAUPERS: Care in foreign county—rate higher than in home county. Although the charge for care of indigent patient in a county public hospital is more than the home county of such person's legal settlement would make under like circumstances, said charge must be paid by the county of legal settlement in the absence of any showing of discrimination or that said charge was more than usually charged for like services in the neighborhood where such services were rendered.

Mr. Robert M. Underhill, County Attorney, Onawa, Iowa: In your letter of September 17th, you ask whether the board of supervisors of Monona county must pay the $6.00 a day charge made by Broadlawn's Hospital in Des Moines for care furnished to an indigent person whose legal settlement is in Monona county, and you further state that the hospitalization charges locally and in Sioux City only amount to $4.00 per day.

Section 252.35 of the 1946 Code of Iowa provides as follows:

"All claims and bills for the care and support of the poor shall be certified to be correct by the proper trustees and presented to the board of supervisors, and, if they are satisfied that they are reasonable and proper, they shall be paid out of the county treasury."

Section 252.28 provides as follows:

"When medical services are rendered by order of the trustees or overseers of the poor, no more shall be charged or paid therefor than is usually charged for like services in the neighborhood where such services are rendered."

It is the opinion of this office that in the absence of any showing that the county is being discriminated against or that the $6.00 a day charge is more than is usually charged for like services in the neighborhood where such services are rendered, it is the duty of the board of supervisors of the county to authorize the payment of such claims.

October 25, 1948

TAXATION: Tax sale certificate assigned to mortgagee—lien for old-age assistance not extinguished. Where real estate of an old-age assistance recipient is sold for taxes, bid in by the county, and the tax sale certificate assigned to a mortgage of the property, the lien of the state for such old-age assistance is not extinguished and said

tax sale is a nullity. The mortgagee has no more than paid the taxes and having no title cannot make a clear conveyance to another.

Mr. Donald E. Smith, Assistant County Attorney, Cedar Rapids, Iowa:
In your letters of recent date, under the following facts:

"The record owner of real estate, 'A', was assessed with old-age pension taxes for 1934, 1935 and 1936, which are unpaid. The real estate was sold to Linn county, Iowa, at regular tax sale on January 6, 1936, for general taxes for 1932, 1933 and 1934, under section 7255, 7255-b1 and 7266, Code of Iowa, 1935. Notice of taking tax deed was filed by the certificate holder, Linn county, Iowa, on February 4, 1938. Thereafter, and on May 11, 1938, the certificate was assigned by Linn county, Iowa, to 'X'. Tax deed from the treasurer of Linn county, Iowa, issued March 21, 1945, was filed for record in the recorder's office the following day. (Inquiry reveals that said tax deed was issued in the name of 'X'.)

"'X' held a first mortgage on the property executed by 'A', April 16, 1934, filed for record, April 24, 1934, and the mortgage matured on April 16, 1935, as shown by the record. Tax deed affidavit under section 448.15 was filed by a subsequent grantee of 'X' and the 120-day period expired with no claims filed as provided therein."

you ask:

"1. Do the unpaid old-age assistance taxes assessed against 'A' constitute a lien against the real estate conveyed to 'X' by tax deed, in view of the stated interest of section 448.15 and section 448.16, and the construction thereof in the case of Swanson v. Pontralo, 27 N.W. 2d 21?

"2. Is it incumbent upon the assignee purchaser of a tax sale certificate from the county to look to the disposition by the county board of supervisors of the amount paid to the county for the assignment?

"3. Is it the duty of such assignee to ascertain the particular taxes to be satisfied by the amount he pays for the assignment?

"4. Would such duty, if any, on the assignee, vary as to general taxes, personal taxes, old-age assistance taxes, dog taxes, etc?"

There is an important exception to the general rule that a tax deed creates a new and indefeasible title in the one to whom the tax deed is issued. This exception receives exhaustive treatment in the opinion of Judge Bliss in Koch vs. Kiron Bank, 230 Iowa, 206. In this case the court quoted with approval, the language in Lane vs. Wright, 121 Iowa, 376:

"We regard it as a well settled proposition under the decision of this court that, where several persons hold claims which are liens upon the same land, equity will not permit one of the lienholders to absorb the common fund by purchasing the land at tax sale."

In 27 Iowa Law Review, on page 162, the following language is used in commenting on the Koch vs. Kiron Bank case:

"The question is simply whether protection against fraud in tax sale transactions necessitates incapacitating parties having an interest in the land from in any manner obtaining the tax title free of other claims existing at the time of the tax sale. Apparently, the Iowa court feels that in this situation, opportunities for fraud are so great and its detection so difficult, that a flat prohibition is necessary."

Thus, in Iowa, the courts hold that the purchase of a tax sale certificate by a mortgagee merely is a payment of the taxes, and the deed given on such certificate is a nullity. One of the assumptions that the courts rely upon in reaching this conclusion is that the mortgagee presumably is seeking to strengthen his interest as a mortgagee and is not endeavoring to destroy it. Thus, the tax deed issued by the treasurer of Linn county on March 21, 1945, conveyed nothing to "X". He in turn then was unable to convey a clear title to his grantee. The State of Iowa is not prohibited by section 448.7 from questioning the title of "X's" grantee, because of the ruling in Koch vs. Kiron State Bank and this section does not apply to an attack upon a void tax deed.

It is apparent, then, that the tax sale was invalid and it did not extinguish the lien of the state board of social welfare for old-age assistance head taxes due in 1934, 1935 and 1936, and that said taxes are still a lien upon the land in question.

Having answered your first question in the affirmative, it becomes unnecessary to answer questions 2, 3 and 4.

December 4, 1948

TAXATION: Property tax to pay soldiers' bonus—when levied. The terms of the Soldiers' Bonus Act of the 52nd General Assembly require that the property tax levy be made forthwith upon approval by the voters at the ensuing general election. (Chapter 59, Acts of the 52nd G. A.)

TAXATION: Delay in delivering tax list to treasurer. Necessary delay on the part of the county auditor in delivering the tax list to the county treasurer, occasioned by the task of spreading the soldiers' bonus levy, would not invalidate the tax or hamper its collection by the treasurer.

Honorable Robert D. Blue, Governor of Iowa: Reference is herein made to letter of Merrill R. Smith, as president of the Iowa County Auditors Association, of date of November 26th, addressed to you. The contents of which letter is by this reference made a part hereof. The import of this letter is, first, that a levy for the servicemen's compensation has been ordered at this time, and, second, that in most of the counties of the state the tax rates have been fixed and tax extensions made, and a large part of the tax lists completed, and that to make this levy now will require a recomputation of the tax extensions and levies of the tax lists, and that as a result some counties will not have their tax lists available until January or February, 1949.

The number of letters from the treasurers and county auditors of the state confirm the foregoing tax list situation in their respective counties to the effect that it is impossible now to revise their tax lists to conform with the statutory requirement, that these lists be in the hands of the county treasurers by December 31st. With respect to these questions, we advise you as follows:

(1) Insofar as question 1 is concerned, we call your attention to section 15 of the service compensation bill, otherwise known as the

Soldiers' Bonus Act, to this effect: "This act shall take effect immediately upon its adoption and approval at such election". Section 12 of the foregoing act confirms the legislative intent as set out by section 15 i. e., "To provide for the payment of the principal of said bonds so issued and sold * * *, there is hereby imposed and levied upon all of the taxable property within the State of Iowa in addition to all other taxes, a direct annual tax for each of the years said bonds are outstanding." Therefore, under the plain provisions of this act and the prior decisions of the supreme court it is mandatory that this levy be made forthwith.

(2) Respecting the situation arising out of the levying of this tax at this time under the facts set forth in the several letters referred to, resulting in the conclusion of the several county officials, that revision of the tax list cannot be effected to comply with the December 31st date for having this list in the hands of the treasurer, we call your attention to section 443.4, Code of 1946, which provides as follows:

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

It will be noted that while the obligation is placed upon the county auditor to deliver to the county treasurer on or before the 31st day of December, the tax list, the statute further dilutes this obligation by providing: "No informality therein, and no delay in delivering the same after the time above specified, shall affect the validity of any taxes, sales, or other proceedings for the collection of such taxes." The foregoing statute together with section 445.1 and so much of 445.10, Code of 1946, appeared as section 7193 of the Code of 1935, were considered in the case of Murphy vs. Smith, 222 Iowa 780, wherein action was brought to restrain the treasurer of Johnson county from selling certain real estate because delinquent taxes were not carried forward immediately within the time provided by statute.

The court, in taking notice that the law does not require the doing by public officials of official acts which are physically impossible within a fixed time, said this:

"The court must and does take judicial notice of the fact that the period of years for which the appellant now seeks relief was perhaps the most difficult of the years of depression; that every where there was a failure to meet tax obligations, and as a result thereof an unusual number of delinquencies took place, which imposed additional work upon the county treasurer. The county treasurer is charged by law with the all-important work of collecting taxes. The work in his office has not decreased, but, instead, the legislature has seen fit to place additional burdens upon the official holding this important position, and upon his worthy assistants. The statute that directs him to carry forward the delinquent real estate tax does not prescribe a definite time in which these duties should be completed. Were the contention of

appellant to prevail, that the county treasurer must perform these duties instantly, it would mean the doing of something physically impossible, and certainly, the law does not require the doing of any act which is physically impossible. This record shows that the county treasurer of Johnson county performed the duties imposed upon him by statute, carried forward the delinquent real estate taxes as rapidly as it was possible to do so within a reasonable time."

This accords with the rule announced in 61 C. J., Page 1020, entitled "Taxation" to the effect that "with respect to a tax list a delivery or commitment at a time other than that specified by statute is not fatal, in the absence of prejudice to anyone, the statutes being directory in this respect," citing the following cases:

"Colo.—Breeze v. Haley, 13 P. 913, 10 Colo. 5. Me.—Inhabitants of Sandy River Plantation v. Lewis, 84 A. 995, 109 Me. 472. N. Y.—Oswego County v. Betts, 6 N. Y. S. 934, 53 Hun 638. Pa.—Liberty Tp. v. Lingle, 33 Pa. Co. 335. S. D.—Henderson v. Hughes County, 83 N. W. 682, 13 S. D. 576. Ont.—Lewis v. Brady, 17 Ont. 377; Todd v. Perry, 20 U. C. Q. B. 649. 85. Breeze v. Haley, 13 P. 913, 10 Colo. 5. 86. Inhabitants of Sandy River Plantation v. Lewis, 84 A. 995, 109 Me. 472; Oswego County v. Betts, 6 N. Y. S. 934, 53 Hun 638; Lewis v. Brady, 17 Ont. 377. 87. Shaw v. Orr, 30 Iowa 355."

It would appear therefore, that by the plain terms of section 443.4, necessary delay on the part of the county auditor in delivering the tax list after the statutory time, December 31st, would not effect the validity of the tax or its collections by the county treasurer. It would follow, therefore, that if the delay is occasioned by impossible physical conditions arising in the performance of the listing by the auditor, the treasurer is not relieved of his statutory duties to make these tax collections upon receipt of such list. We might add in this connection and call your attention to the fact that the tax authorized under the previous bonus laws in 1922 was levied on December 6th of that year.

It is, therefore, the plain duty of the auditor to make the levy when certified to him by the state tax commission and to submit to the treasurer said list as soon as physically possible.

December 6, 1948

GUNS: **Carrying in trunk of automobile.** If the barrels and magazines of a gun are unloaded it may legally be carried in the trunk of an automobile.

Mr. E. W. Adams, County Attorney, Marshalltown, Iowa: In your letter dated November 16, 1948 you request an opinion as to whether section 110.23, Code of Iowa, 1946, is violated in the event a gun is carried in the trunk of an automobile, the barrels and magazines of which gun are unloaded.

Section 110.23, Code of Iowa, 1946, provides:

"No person, except as permitted by law, shall have or carry any gun in or on any vehicle on any public highway, unless such gun be taken down or contained in a case, and the barrels and magazines thereof unloaded."

By letter opinion of this office dated March 1, 1946 directed to the Iowa conservation commission, it was held that the intent of the foregoing section was the prevention of the possession of a gun available for instantaneous firing. The opinion noted that the legislature obviously had in mind that preparatory action would be required before a gun would be available and in a condition to be used as a fire arm. It was therefore required that the gun be taken down or contained in a case, either of which situations would necessitate acts preparatory to availability for use. An additional requirement was that in all instances the gun be unloaded.

If the statute were to be narrowly construed in determining the conditions which would satisfy the requirements, the statute would become purely technical rather than practical. A gun carried in a case especially provided therefor would be more readily available in the hands of a passenger in a motor vehicle than a gun carried in the trunk of such vehicle. We do not believe that the word "case" was intended to be construed in a technical sense but rather in a practical sense fulfilling the obvious intention of the act.

It is therefore the opinion of this office that section 110.23, Code of Iowa, 1946, is not violated by the carrying of a gun in the trunk of an automobile, the barrels and magazines of which gun are unloaded.

December 7, 1948

TAXATION: Soldiers' Bonus Act—levy in addition to all other taxes. The levy provided in the Soldiers' Bonus Act (section 12, Chapter 59, Acts 52nd G. A.) can only be made on the taxable property other than moneys and credits, bank stock, and stock of building and savings and loan associations. (See section 429.2, Code 1946)

State Tax Commission, George E. Gill, Chairman, Des Moines, Iowa: Replying to your inquiry of November 26th wherein you pose the following proposition:

"The state tax commission has received a notice from the treasurer of state requiring the certification of a state tax levy which indicates that the sum of $6,375,000, is required for retirement of soldiers' bonus bonds scheduled for maturity in 1949. Section 12, chapter 59, Laws of the 52nd General Assembly, provides 'that the tax necessary shall be levied upon all of the taxable property within the state of Iowa in addition to all other taxes.'"

"The commission desires an opinion as to whether or not the provision as quoted above supersedes existing laws which fix their rate of taxation of moneys and credits and certain other intangibles, such as bank stock, corporation stock, and building and loan shares. Construction is particularly desired of section 429.3 which reads: 'millage tax provided for in section 429.2 shall be in lieu of all other taxes upon moneys and credits."

"A construction is also required of section 430.6 relating to the assessment of bank stock and of section 431.16 relating to the taxation of shares of stock of building and loan associations."

"Generally, the state tax commission desires a ruling upon the whole subject of whether or not the millage levy to be made is to be levied against all forms of moneys and credits, corporation stock and other

intangible property subject to taxation in the state of Iowa, regardless of whether or not the laws now provide that they shall be taxed at specific rates and in no other manner."

Briefly stated you wish an interpretation of the language, "that the tax necessary shall be levied upon all the taxable property within the state of Iowa in addition to all other taxes." All property is taxable, unless specifically exempted under the provisions of section 427.13 of the Code, so that the inquiry is limited to the meaning of the words, "in addition to all other taxes", and whether or not the express limitations contained in sections 429.3, 430.7 and 431.16 are controlling and a limitation on the amount of taxes which may be assessed under the provisions of the foregoing sections.

Property cannot be taxed until authority therefor be conferred by the legislature, and the manner of imposing taxes prescribed by law must be followed; no other way of taxation can be lawfully pursued. Tallman vs. Butler Company, 12 Iowa 531; Faxton vs. McCosh, 12 Iowa 527; Iowa Homestead Company vs. Webster County, 21 Iowa 221; C. R. I. P. Railway vs. City of Davenport, 51 Iowa 454.

The legislature in enacting taxation laws adopted the scheme of taxing real and personal property on the basis of a millage levy limiting only the amount of millage levied for a specific purpose and placing no limitation on the aggregate number of mills.

Section 429.2 provides, "for a limit of five (5) mills on moneys and credits", and section 429.3 provides, "the millage tax provided for in 429.2 shall be in lieu of all other taxes upon moneys and credits." Section 430.7 provides, "bank stock shall be taxed as moneys and credits while section 431.16 relating to taxation of building, savings and loan associations provides, "taxes herein provided for shall be in lieu of *all other taxes* against building and loan, or savings and loan associations and against shares of stock of such associations." We deem it significant that the limitation employs the term *all other taxes.*

Rules relating to statutory construction contained in section 4.1, Code 1946, are as follows:

"Paragraph 2. Words and phrases. Words and phrases shall be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, shall be construed according to such meaning."

The words *all other taxes* have acquired a peculiar and appropriate meaning in law and should be construed in taxing statutes according to the meaning given such words by the legislature, because the legislature is its own lexicographer. Sandberg Company vs. Board, 225 Iowa 103; 278 N. W. 643.

As we view it the words *all other taxes* have been consistently used by the legislature in referring to taxes other than the taxes on moneys and credits, bank stock, and building, savings and loan associations.

An examination of sections 429.2, 430.7 and 431.16 will disclose that the legislature specifically provided that the taxes imposed on those particular classes of property should be in lieu of *all other taxes.* If the legislature has seen fit to give a peculiar meaning to the words *all other taxes* then when used in section 12 of chapter 59, Laws of the 52d G. A., they were used in that same sense by the legislature. If the term *all other taxes* relates only to taxes other than taxes on moneys and credits, bank stock, and building, savings and loan associations, then the moneys and credits, bank stock, and building, savings and loan associations cannot be subjected to the additional levy for the soldiers' bonus.

It is to be noted that the tax imposed under the provisions of chapter 59, Laws of the 52d G. A., is in addition to *all other taxes* and if the term *all other taxes* does not include taxes on moneys and credits, bank stock, building, savings and loan associations, then the levy for soldiers' bonus cannot be added as an additional tax because the statute expressly provides that it is to be in addition to *all other taxes.* Therefore, there is no provision in the soldiers' bonus law to levy a tax in addition to the tax imposed on moneys and credits, bank stock, building, savings and loan associations. We find no cases to support our view, but we deem the following quite significant.

The first bonus Act which was passed by the 39th G. A. and approved March 23, 1921 provided as follows:

"There is hereby imposed and levied upon all the taxable property within the State of Iowa in addition to *all other taxes.*"

The 40th Extra G. A., which was convened in 1924, passed an Act which appeared as Code section 6987 in the 1924 Code, which was as follows:

"Until the soldiers' bonus bonds are retired and paid, there shall be levied and collected upon all property taxed at five mills on the dollar of actual valuation as provided in the second preceding section an additional tax of one mill on the dollar of actual valuation. Said tax shall be remitted to the treasurer of state and applied to the payment of the principal and interest of the soldiers' bonus bonds."

It is deemed quite significant that under section 6986 of the 1924 Code relating to the division of moneys and credits tax, we find the following language:

"The millage tax provided for in the preceding section shall be in lieu of *all other taxes* upon moneys and credits and shall be levied by the board of supervisors, placed upon the tax list and collected by the county treasurer, and the amount collected in the various taxing districts of the state shall be divided between the various funds upon the same pro rata basis as *other taxes* collected in such taxing district are apportioned."

In addition to the foregoing, attention is called that section 4753-a12, Code 1931, provided, "that the board of supervisors shall, each year thereafter during the life of the bonds, levy on all the property of the county." In interpreting that section the attorney general's office, in

an opinion dated May 21, 1932, held that such tax was not applicable to moneys and credits. We quote, herewith, the opinion:

"May 21, 1932. County Attorney, Osage, Iowa: We acknowledge receipt of your letter under date of May 9, 1932, requesting an opinion of this department on the following question:

'This county proposes submitting to a vote of the people the question of issuing primary road bonds in accordance with the provisions of chapter 241, Code of Iowa 1931.

The question has arisen as to whether or not the tax levy which must be authorized is a tax on all of the property in the county including monies and credits, and whether it is based upon the assessed value or the taxable value.'

Under paragraph 10, section 63, chapter 4, Code of 1931, the word 'property', when used in the code includes both personal and real property.

Under section 6986, Code of 1931, the tax on monies and credits is in lieu of all other taxes on the same.

We are, therefore, of the opinion that the tax levy which must be provided for in connection with the road bond issue should be based only upon the personal and real property of your county exclusive of monies and credits.

We are also of the opinion that the millage should be based upon the taxable value of the property within the county and not upon the assessable value. Understand, of course, that the taxable value is one-fourth of the assessed value.

It is suggested, for your information, that for the purpose of determining the constitutional debt limitation and also of the limitation on indebtedness, as is contained in section 4753-a17, that the percentage is based upon the actual value of the taxable property within the county, and that for this purpose both personal and real property, including monies and credits, should be considered."

After careful consideration we are of the opinion that the levy provided for in section 12, Chapter 59, Acts of the 52nd G. A., can only be made on the taxable property other than moneys and credits, bank stock, and building, savings and loan associations. We do not believe that it was the intent of the legislature that the words *all other taxes* should be construed to include taxes on moneys and credits, bank stock, and building, savings and loan associations.

It is our opinion that the words *all other taxes* were employed by the legislature in the same sense in which they had been previously employed in other taxing statutes, and that the legislature having seen fit to give these words a peculiar and appropriate meaning in law, such meaning is binding and should be recognized in the interpretation of the foregoing statute.

The writer of this opinion is not unmindful of the fact that senate file 492 as presented to the House and the Senate contained the word "tangible" in lines 4 and 18 of Section 12, and that the word "tangible" was stricken on an amendment by Steinberg of Ames. This would indicate an intention on the part of the legislature to tax all property, because our court has held that the term "property" includes everything of value, tangible or intangible, capable of being the subject of indi-

vidual right or ownership. "Property" includes, in modern legal systems, practically all valuable rights, included various incorporeal rights, as patents, copyrights, rights of action; an estate, whether in lands, goods, money, or intangible rights, such as a copyright, patent rights, etc. (Webster's New International Dictionary); and second, "The term 'property' is said to be nomen generalissimum, and to include everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value, or which goes to make up one's wealth or estate." Wapsie P. & L. Company v. City of Tipton, 197 Iowa 996; Groenendyke v. Fowler, 204 Iowa 598; National Bank v. City Council, 136 Iowa 203.

However, if the legislature had wished to do so, under our opinion they should have amended the statute relating to moneys and credits, bank stock, and building, savings and loan associations, the same as it was amended to cover money and credits after the passage of the bonus Act in 1921. As we view these statutes which limit the amount of tax on moneys and credits, bank stock, and building, savings and loan associations, they are controlling unless specifically modified by legislative Act.

December 23, 1948

CONSTITUTIONAL LAW: Conviction of infamous crime—disqualified as public officer—Art. II, Sec. 5. One convicted of an "infamous crime", i.e. any crime punishable by imprisonment in the penitentiary, is not a qualified elector within the meaning of section 5 of Article II of the Constitution of Iowa and therefore is not qualified to hold a public office, e. g. constable, although infamous punishment may not actually be inflicted.

Mr. Allen Smith, County Attorney, Independence, Iowa: This will acknowledge receipt of your letter of December 10, wherein you state:

"Quite recently your office furnished to the Buchanan county board of supervisors, an opinion requested by them through my office respecting the right of one Mr. X to hold the office of constable of Washington twp., Buchanan county, Iowa; elected at the November, 1948 election by a write in vote.

Your opinion stated that if the bond was otherwise sufficient, and unless the electee was disqualified under the provisions of Article II, section 5 of the Iowa Constitution, the board would have to approve the bond.

The board requested me to make inquiry regarding this provision of the constitution, and in finding the facts, I have discovered that Mr. X was on the 8th day of December, 1938, convicted in federal court of a violation in two instances of section 1152-a, Title 26 of the United States Code, and fined the sum of $500.00 on each charge.

The board now wishes your office to give an opinion as to whether or not these convictions of 'infamous crime' are such as to disqualify the electee from holding office.

As I feel unable to look upon the matter objectively, I ask your office to pass upon this matter at your very early convenience, and with your opinion, kindly return the two certified copies herewith enclosed."

The question to be determined is whether or not Mr. X has been convicted of an "infamous crime".

In the case of Blodgett v. Clarke 177 Iowa 575, 159 SW 243, the following appears:

'To be eligible to an elective office created by the Constitution, a person must be a qualified elector. State v. Van Beek, 87 Iowa 569. Section 5 of Article 2 of the Constitution of Iowa declares:

'No . . . person convicted of any infamous crime shall be entitled to the privilege of an elector.'

Any crime punishable by imprisonment in the penitentiary is an 'infamous crime'. Flannagan v. Jepson, 177 Iowa 393. As the punishment prescribed by statute for forgery is confinement in the penitentiary not more than 10 years, the offense is infamous. Section 4853, Code."

The penalty for a violation of section 1152-a, Title 26, U. S. Code, (under which Mr. X was convicted) is found in section 1152-g, thereof and reads as follows:

"Any person who violates any of the provisions of 1152a * * * shall on conviction, be punished by a fine not exceeding $1,000.00, or by imprisonment at hard labor not exceeding five years or by both."

It is thus apparent that Mr. X could have been punished by imprisonment in the penitentiary for five years at hard labor even though in fact he only received a $500 fine.

The general rule is found in 21 *Words & Phrases* at page 253 and reads as follows:

"In some of the earlier decisions there was a tendency on the part of the courts to hold that the question of infamy was to be determined by the nature of the crime, and not at all by the character of the punishment, but the Supreme Court of the United States settled that the test to be applied in determining whether an offense is an infamous crime is the character of the punishment which may be inflicted. It is, however, held that the real criterion to be applied in such cases is whether the crime is one for which the statute authorizes the court to award an infamous punishment, and not whether the punishment ultimately awarded is an infamous one. If the accused is in danger of being subjected to an infamous punishment, the crime is deemed to be infamous, although infamous punishment may not actually be inflicted. State v. Clark, 56 P. 767, 768, 60 Kan. 450. See Ex Parte Wilson, 5 S. Ct. 935, 938, 114 U. S. 417, 29 L. Ed. 89; In re Mills, 10 S. Ct. 762, 763, 135 U. S. 263, 34 L. Ed. 107; United States vs. Johannesen, 35 F. 411, 412, Citing Mackin v. United States 6 S. Ct. 777, 117 U. S. 348, 29 L. Ed. 909; Ex parte McClusky, 40 F. 71, 72; In re Claasen, 11 S. Ct. 735, 737, 140 U. S. 200, 35 L. Ed. 409; Stokes v. United States, 60 F. 597, 598, 9 C. C. A. 152; United States v. Maxwell, 26 Fed. Cas. 1221, 1222. It is so used in Act Cong. March 3, 1891, providing that a writ of error may be taken from an existing Circuit Court direct to the Supreme Court of the United States in cases of conviction of a capital or other 'infamous crime'. In re Claasen, 11 S. Ct. 735, 737, 140 U. S. 200, 35 L. Ed. 409."

See also 24 A. L. R. 1002.

It is therefore our opinion that Mr. X has been convicted of an infamous crime, that he is not a qualified elector, and so therefore is not qualified to hold the office of constable of Washington township, Buchanan county, Iowa.

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